

NATIONAL ASSOCIATION OF  
CRIMINAL DEFENSE LAWYERS

NACDL PROBLEM-SOLVING COURT TASK FORCE

TASK FORCE MEETING

DAY 1

THURSDAY,  
JANUARY 22, 2009

The Task Force convened at 9:30  
a.m., in offices of the National Association  
of Criminal Defense Lawyers, 1660 L Street,  
N.W., Washington, D.C., Rick Jones, Co-  
Chairman, presiding.

MEMBERS PRESENT:

RICK JONES, Co-Chairman

MARVIN SCHECHTER, Co-Chairman

ADELE BERNHARD, Member

JAY CLARK, Member

ELIZABETH KELLY, Member

JOEL SCHUMM, Member

GAIL SHIFMAN, Member

VICKI YOUNG, Member

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## P R O C E E D I N G S

(9:36 a.m.)

CO-CHAIRMAN JONES: So we're going  
to start.

Good morning, everyone and  
welcome. We are, as I'm sure you all know,  
NACDL's Problem-Solving Court Task Force and  
have been on a journey these last several  
months around the country, really sort of a  
listening tour to understand the good, the  
bad, and the ugly of problem-solving courts  
around the country.

We are pleased that the last leg  
of this portion of our journey brings us to  
Washington, D.C. at this wonderful time to be  
and exciting time to be in D.C., and also to  
be with all of you and actually to be at home  
here at the NACDL offices.

Before I go any further, let me  
just say that my name is Rick Jones. I'm the  
Executive Director of the Neighborhood  
Defenders Service of Harlem and on the faculty

1 of Columbia Law School in New York.

2 I'm joined by my colleagues here,  
3 members of the task force, and I will let them  
4 at this point introduce themselves.

5 MEMBER BERNHARD: Good morning.  
6 I'm Adele Bernhard, and I teach law at Case  
7 Law School.

8 MEMBER SCHUMM: Joel Schumm,  
9 Indiana University School of Law in  
10 Indianapolis.

11 CO-CHAIRMAN SCHECHTER: Marvin  
12 Schechter, an attorney in New York City.

13 MEMBER CLARK: Jay Clark in  
14 private practice in Cincinnati, Ohio.

15 MEMBER SHIFMAN: Gail Shifman,  
16 private practice in San Francisco.

17 MEMBER KELLY: I'm Elizabeth  
18 Kelly, and I have my own practice in  
19 Cleveland.

20 MEMBER YOUNG: Vicki Young,  
21 private practice, San Francisco and San Jose,  
22 California.

1 CO-CHAIRMAN JONES: Why don't we  
2 just go around the room quickly since we've  
3 got a crown and everybody introduce  
4 themselves?

5 MR. ROBINSON: Charles Robinson  
6 (speaking from an unmiked location).

7 MS. WILLIAMS: I'm Kashi Williams,  
8 and I'm (inaudible).

9 (Additional introduction provided  
10 from unmiked location.)

11 MR. MARLOWE: Doug Marlowe,  
12 National Association of Drug Courts  
13 Professionals and University of Pennsylvania.

14 (Additional introduction provided  
15 from unmiked location.)

16 CO-CHAIRMAN JONES: Great. Thank  
17 you all for being here.

18 The way that we have been  
19 operating and the way that we'll operate today  
20 is that we bring folks in to talk with us  
21 about problem-solving courts, and we do that  
22 by way of panel. Each panel is comprised of

1 a group of individuals who have some expertise  
2 or particular relevant experience to relate to  
3 the panel.

4 And the way that we run the panels  
5 is that one of our number usually leads the  
6 discussion. Unfortunately, we're missing one  
7 of our panel members this morning. Hopefully  
8 he will join us shortly, and then we can  
9 incorporate him into the discussion, but we  
10 are particularly excited this morning both to  
11 have Julia and Peter from the D.C. Public  
12 Defenders Service and from the Maryland public  
13 Defenders Service here to talk with us.

14 We've got a nice, long amount of  
15 time to spend with you. You are not only the  
16 last defense attorneys that we'll have an  
17 opportunity to speak to, but the last public  
18 defenders that we will have an opportunity to  
19 speak with before we actually begin to write  
20 what we hope will become a seminal document on  
21 problem-solving courts in America.

22 And so we have lots of stuff that

1 we want to talk to you about and a robust  
2 conversation ahead. I will tell everybody  
3 just because it's my responsibility to lead  
4 the questioning in this panel that what I  
5 thought we would do is sort of walk you  
6 through and divide the questioning up into  
7 segments, and during each segment I'll have  
8 questions certainly to ask, but I'm assuming  
9 that all of my colleagues will jump in and ask  
10 you whatever questions they might have about  
11 the particular topic.

12 There are six different topics  
13 that we want to discuss with you over the  
14 course of the next 90 minutes or so, but by  
15 way of starting, what we'd like to do is to  
16 have you all sort of tell us a little bit  
17 about yourselves, the work that you do, and  
18 the benefit, whatever thoughts you have about  
19 problem solving course generally and within  
20 your specific jurisdiction.

21 So the floor is yours, and I'll  
22 leave it to you to decide who wants to go

1 first.

2 MS. LEIGHTON: Well, since you've  
3 tossed the ball this way, my name is Julia  
4 Leighton. I've started in the Public  
5 Defenders Service in D.C. in, I think, '89.  
6 I was there but for a brief stint while I was  
7 in the Department of Justice as a federal  
8 prosecutor prosecuting environmental crimes.

9 I came back to PDS after eight  
10 years of litigation at PDS, three years of  
11 litigation with the Department of Justice, and  
12 came back to PDS and ultimately became a  
13 General Counsel, which is a position I've held  
14 now since, I think, about 2004.

15 So my days of being in a problem-  
16 solving court are over, and I don't profess to  
17 be an expert. I actually think there are very  
18 few experts, and certainly very few in our  
19 courthouse, despite everybody's best efforts.

20 But I sit on a number of  
21 committees that address the problem-solving  
22 courts and performance measures for the courts



1 and the development of the courts, and I  
2 certainly am involved in assigning other  
3 people at PDS to be involved as our court goes  
4 about developing courts.

5 We have a number of courts.  
6 There's a prostitution court. There's a John  
7 court. There's a mental health court.  
8 There's a community court. There's a drug  
9 court, and I'll bet I'm even missing one that  
10 are down in the traffic court. PDS does not  
11 by statute handle many, if any, misdemeanor  
12 cases, and we handle no DC cases, traffic  
13 offenses, except on sort of rare occasions  
14 where we're asked to step in.

15 What PDS does in the District of  
16 Columbia is handle the majority of the most  
17 serious cases. They handle about 80 percent  
18 of the felony ones, probably about 60 to 70  
19 percent of the life offenses, or what we call  
20 AFTC, accelerated felony trial calendar cases.

21 But we are the attorneys for drug  
22 court with a stand-in, and that was a creation

1           that happened while I was actually away from  
2           PDS, the negotiation between the court and PDS  
3           as to how was drug court going to be staffed  
4           when things had to happen on such a rapid pace  
5           and trying to find the individual lawyer, what  
6           we call CJ lawyer or panel attorney, to handle  
7           sanctions hearings would be difficult as  
8           opposed to having someone staffed every day  
9           the court meets to be available.

10                        So we don't really participate in  
11           the other problem solving courts except sort  
12           of in a policy perspective. I think in the  
13           District problem-solving courts sort of come  
14           from three forces: popular press, what people  
15           hear about as being good ideas; a desire to  
16           try and grab at a problem that's made its way  
17           to the criminal system, I think, in large part  
18           because we've failed somewhere else; and I  
19           speculate about this, but we've seen a steady  
20           decline in crime in the District of Columbia,  
21           but we've had no reduction in the number of  
22           judges or prosecutors. We have had a

1 reduction in the number of defense attorneys,  
2 and so maybe the resources are there and  
3 there's a certain cache to creating problem-  
4 solving courts.

5 But I'm not sure it comes out of  
6 any sort of systematic effort in the District  
7 to study who's coming into the system and what  
8 really does help keep them out of it once in.  
9 And I think there are just so many pressures.  
10 You know, who controls who's eligible for  
11 these courts? I think it's largely in the  
12 District the U.S. Attorney's Office, which of  
13 course answers to a different sovereign, and  
14 to a lesser extent in the regulatory offenses  
15 and offenses that are prosecuted by the Office  
16 of the Attorney General.

17 How it gets staffed is determined  
18 by the court, and our court rotates judges.  
19 And then sometimes we're called in after the  
20 plan is devised and asked to participate, and  
21 one of the struggles that we've had and the  
22 tensions that have existed is whether or not

1 we're in at the ground level or not, and our  
2 effort to suggest that while we may never buy  
3 into a court because we can't bind a future  
4 client, that it would be useful to have us  
5 there to sort of talk about what does the due  
6 process look like, what does the  
7 representation look like in this court.

8 And so in some of the courts that  
9 I've described we've been in it at the ground  
10 level. In others, it has been suggested we  
11 have no participatory role because we actually  
12 don't handle those kinds of cases, and instead  
13 the committees have been staffed by panel  
14 attorneys who are, of course, paid by the  
15 court.

16 So I think there are efforts in  
17 the District to study the courts. The  
18 performance measures, I think, are a real  
19 struggle. Data is a real struggle. I think  
20 the court is making genuine efforts to get at  
21 it, but I'm not sure that we have social  
22 scientists experts helping us decide what

1 really should be measured and what is a true  
2 control group.

3 Are we simply funneling the people  
4 into these courts that would actually do  
5 fairly well anyhow because of how risk adverse  
6 we are to who should be in the courts, or are  
7 we funneling the people into the courts that  
8 we actually could have the most impact on?

9 Are we really designing courts  
10 that address mental health issues, address  
11 what drives prostitution, what drives the  
12 consumption of prostitution, what drives drug  
13 addiction?

14 And is anybody figuring out what  
15 happens when you have a prostitute with mental  
16 health issues and a drug addiction?

17 MR. ROSE: Great. Thank you.

18 The thing that you just said that  
19 jumps out at me, first and foremost, is, gosh,  
20 what is an ethical control group, but those  
21 are issues that we sit around at the Public  
22 Defenders Office and talk about without any

1 expertise, as well, and yet the reaction I  
2 have to what Julia has just said is, my gosh,  
3 we're not alone.

4 By way of a brief background, I am  
5 but for a brief period in private practice a  
6 career public defender. I began as a trial  
7 lawyer for a couple of years. The bulk of my  
8 experience is as an appellate lawyer in the  
9 Maryland appellate courts.

10 I was aware of drug courts, but  
11 hadn't been a trial lawyer involved in drug  
12 courts as a trier, and my introduction or  
13 reintroduction to drug courts was when I came  
14 back as a public defender after my brief  
15 period in private practice, also to be in  
16 General Counsel's office. And one of the  
17 first things that I encountered when coming  
18 back to General Counsel's, Public Defenders  
19 office was this thing, drug court as it was  
20 called.

21 The larger umbrella of problem-  
22 solving courts in Maryland is directed through

1 the Office of Problem-Solving Courts, which is  
2 a branch of the Administrative Office of the  
3 Courts.

4 The whole push in Maryland began  
5 with a commission that was put together by the  
6 Chief Judge of the Court of Appeals to study  
7 the issue, and then problem-solving courts  
8 developed seemingly at the same time that the  
9 Office of Problem-Solving Courts, the  
10 overseeing entity, developed. Sort of the  
11 commission evolved into the Office of Problem-  
12 Solving Courts, that initial commission.

13 But at the same time, these courts  
14 were popping up, and in the beginning there  
15 was a lot of interest that came from the  
16 lawyers on the ground, the trial lawyers. I  
17 think there was this promise of drug treatment  
18 where there otherwise was next to nothing, at  
19 least next to nothing meaningful, and the lure  
20 of treatment, I think, allows the eyes of well  
21 meaning lawyers to glaze over a little bit as  
22 it regards basic due process, the fundamental

1           role of an advocate, among other things.

2                         And as we sort of allowed the  
3           local offices to drive the development of  
4           these what are really local courts in  
5           Maryland, and there are 23 counties in the  
6           city so a couple dozen jurisdictions, there  
7           were sort of drips and drabs of good things we  
8           would hear, but frustrations began to emerge  
9           and problems began to emerge. Difficulties  
10          began to emerge on micro levels.

11                        Ultimately though the question  
12          when it came really at us squarely a couple of  
13          years ago, what are these things and how are  
14          we to manage them, it came out of the fact  
15          that they began to really exponentially  
16          develop, seemingly without our participation  
17          at least from the top, and in Maryland we're  
18          a centralized Public Defender Office. We are  
19          based out of Baltimore. We're a large  
20          organization, 1,000 employees, 1,000-plus, and  
21          560-some lawyers across the state. And then  
22          there are actually 12 districts that we're



1 divided into.

2 But because they were locally  
3 developed and it seemed to be the important  
4 feature of them that the local personalities  
5 put together these courts, which again, there  
6 was the lure of drug treatment in what was an  
7 informal setting, I think it seemed innocuous  
8 enough.

9 When it began to really  
10 proliferate, there became an issue of  
11 resources. We have always been -- and I dare  
12 say never will be asked to do anything other  
13 than more with less, and in these fiscal times  
14 and in this climate, that's really hitting  
15 home, especially in the past six months with  
16 my agency.

17 But even before the financial sort  
18 of crisis trickled down on us all, the  
19 question of resources became the guiding force  
20 with the public defender Nancy Forster wanting  
21 to closely examine these courts, and the  
22 reason is obvious. They take up, they consume

1 a great deal of time. It isn't simply to  
2 complete somebody into one of these courts and  
3 off they go to drug treatment.

4 There is, as you all know, weekly,  
5 if not in some cases probably more than  
6 weekly, court hearings that stretch out over  
7 a long, long period of time, and that may have  
8 been the first sort of red flag indicator of  
9 what's going on here. These things seemed to  
10 stretch out beyond a normal period of  
11 probation and what may be otherwise a low  
12 level drug case, and where is this person?  
13 When do they finish this thing and when do  
14 they come out and demonstrate some success?

15 That may have been the first real  
16 sort of shot across the bow. What is the  
17 usefulness of this thing?

18 In any event, we began to examine  
19 the resource issue. How many lawyers do we  
20 have in these courts? What kind of time is  
21 this taking up? We've got lots of priorities,  
22 and we have to triage in many instances.

1                   That is to say in the larger  
2                   scheme of things what it is we're going to do  
3                   as an agency. What is the Public Defender  
4                   going to set her priorities on in terms of  
5                   representing clients the most effective way  
6                   and the best way and the most crucial places?

7                   That resource issue, it's  
8                   interesting. It came to a head over that two-  
9                   year period. I'm not really sure how many  
10                  courts popped up across our 23 or four  
11                  jurisdictions. We now have 40-plus courts.  
12                  It certainly wasn't 40 courts when we started.  
13                  Multiple courts in different jurisdictions,  
14                  including DUI courts, mental health courts;  
15                  there was at least one shot at a prostitution  
16                  court which I have to say anecdotally the  
17                  conversation about talking about sex  
18                  addiction, it seemed a little absurd at the  
19                  time. So we were being stretched in all  
20                  directions.

21                  And at this time when we were  
22                  gathering information about what these courts

1 looked like, the stacks of materials, we pored  
2 over them and actually in particular Nancy  
3 Forster herself read every page of these  
4 documents and was utterly appalled at just  
5 really the unbelievable suspending or  
6 disposing entirely of basic due process  
7 rights.

8           The requirements that were put on  
9 people, and that raised, of course, all the  
10 questions about who is going into these  
11 courts, and as I said, I think you're going to  
12 hear from me something familiar as I just  
13 heard, which is are they cherry picking. Are  
14 they sustaining these courts for their own  
15 reasons? Are we graduating people who don't  
16 have drug problems? Are we missing the people  
17 who do?

18           Then we set about visiting some of  
19 these courts, and I was stunned. My first  
20 visit into a drug court, it was a very  
21 interesting experience. There was a judge who  
22 seemed to me to be the epitome of the style of

1 judge you want in a drug court, a very  
2 approachable, amenable, folksy guy, with a  
3 real air of authority, but not an iota of a  
4 sense of abusing that authority, a father  
5 figure who, you know, as I watched this  
6 morning unfold in drug court, who was it  
7 seemed to me that the chemistry was all there  
8 until the supervisor on hand stepped away from  
9 the defense table and crossed the aisle to the  
10 state's table. Another attorney stepped up  
11 who was an underling to represent someone who  
12 had been talked about in a staffing meeting ex  
13 parte, and there was a decision about sending  
14 this man to jail, and I almost threw up right  
15 there. I mean, I just couldn't believe it.

16 The greatest possibility it seemed  
17 we had and right before my eyes it seemed to  
18 all turn upside down, anecdotal experience  
19 from others who went to look at other drug  
20 courts around the state, and we sort of  
21 sampled them. Maryland is a complicated  
22 place. We've got the inner city involved

1 more, clearly an urban area, and then we've  
2 got suburban districts that are largely  
3 populated, and a lot of rural districts around  
4 the edge of the state, and I can just offer  
5 that Ms. Forster's observations in the  
6 Baltimore City drug court where, in  
7 particular, a judge just out of control, super  
8 probation agent just couldn't be more opposite  
9 than the personality that I had encountered,  
10 notwithstanding the problems of drug court.

11 So there we were. What were we to  
12 do? We had to get some control over the  
13 enormity of this problem, resources, and that  
14 really became secondary. The entire resource  
15 question became secondary because really that  
16 was enormously distracted by the legal  
17 problems that we saw.

18 That struggle led us to corral all  
19 of our drug court folks and say, "Give over  
20 these agreements, everything you've got.  
21 We're going to write up a memo to indicate  
22 what is absolutely prohibited in these drug

1 court agreements so that they're at least  
2 legal in our view, and then we're going to  
3 have a real sit-down with our training folks  
4 and figure out how to make sure our advocates  
5 are advocates. They're effective advocates,  
6 and they maintain that role."

7 And we are now sort of in a bit of  
8 a lull. Just before the holidays things  
9 heated up with the folks who are running the  
10 office from some courts. They've been  
11 distracted by other things.

12 But I guess the main thrust of  
13 what I'm trying to say is that we very much  
14 felt like we couldn't get our hands around  
15 this thing. It took us really -- if there had  
16 been a time to do that these past two years,  
17 and there's a certain element of, gosh,  
18 embarrassment that the centralized office, the  
19 public defender somehow missed what was  
20 happening, and I think that that was the  
21 result of, as I said at the outset, this  
22 promise of drug treatment and the promise of

1 an informal setting which just seems to be not  
2 the promise to live it.

3 The last note I would make on this  
4 is that we are in the midst of litigation,  
5 appellant litigation now on the threshold  
6 question of whether our courts even have  
7 fundamental jurisdiction as regards drug  
8 courts.

9 I remember the first question that  
10 we bounced around when we had to get our hands  
11 around this thing. Is this an Article 4  
12 court? Article 4 is what -- our Constitution  
13 is what enables our court system. No, it's  
14 not. There's no Constitution provision for  
15 this court system, no statutory structure.  
16 There are no rules, and in fact, local rules  
17 in Maryland are illegal, and you either have  
18 illegal courts or legal courts operating  
19 illegally. So that's being litigated now, and  
20 that's where we stand.

21 CO-CHAIRMAN JONES: Thank you.

22 We've actually seen your brief,



1 and some of the questions that we've got flow  
2 from some of the issues that we think that you  
3 raised legitimately in that brief.

4 You both touched on a number of  
5 areas that we want to exposure with you in  
6 substantially more depth. The first area that  
7 we want to explore with you, and you both  
8 touched on it, is the creation of these  
9 courts. You talked a little bit about being  
10 surprised. There are 40 some odd courts in  
11 Maryland, and you talked about all of the  
12 various and sundry types of problem-solving  
13 courts that exist in the District.

14 These questions are directed to  
15 both of you, and if you could just sort of  
16 give us a sense, an overview maybe of the  
17 mechanisms by which problem-solving courts are  
18 created in your jurisdictions. Sort of what's  
19 the genesis, who's involved, who are the  
20 players, and what role, if any, does the  
21 defense Bar or the Public Defenders Office get  
22 involved? What input do you have?

1                   So we want to sort of explore  
2                   right off the bat how these things spring up,  
3                   how they're created and your thought about  
4                   that. So I guess we'll start, Julia.

5                   MS. LEIGHTON: I'm probably going  
6                   to get back to you on some of these because I  
7                   may have to actually find out. I have,  
8                   candidly, no idea where prostitution and John  
9                   court came from. I can speculate, but I  
10                  won't.

11                  The community court, it's not  
12                  clear to me what problem community court is  
13                  designed to solve, but I guess part of it is  
14                  the idea behind it is that these individuals  
15                  will pay back the community in which they  
16                  committed the offense, which of course assumes  
17                  that they committed the offense, and when  
18                  you're paying back the community before you  
19                  actually have your case resolved, it's not  
20                  clear to me how all of that works out.

21                  The community court, I believe,  
22                  was really an idea of the courts, and I think

1           that is where for the most part it starts in  
2           the District of Columbia, an idea of the  
3           courts, and again, with good intentions,  
4           right? It's like how often do you see the  
5           same problem come into your courtroom when you  
6           want to get your hands around a different way  
7           of addressing it.

8                         In the District I suppose there's  
9           some sense of how removed or not is the court  
10          system from the community. We have just one  
11          courthouse. It's not located anywhere near  
12          Southeast Washington, which is where most  
13          crime occurs or at least most arrests occur.

14                        So we're going to hear from them,  
15          and candidly, they should have been given more  
16          time than I do. PSA, Pretrial Services  
17          Administration, and specifically Spurgeon  
18          Kennedy who is an expert or as close to an  
19          expert as I've seen at any of the meetings I  
20          go to.

21                        The notion of sort of giving back,  
22          of trying to get intervention into folks with

1 low level crimes, you know, sort of nuisance,  
2 slightly above nuisance level crimes. So it  
3 was a brainchild, you know, of a judge, and  
4 the judge spearheaded it. The judge involved  
5 the defense lawyers that I believe the judge  
6 thought were appropriate to choose. That was  
7 no the Public Defender Service at the time.

8 A defense lawyer became involved  
9 in the training of folks what the programs  
10 were, what was available in community court.  
11 I took a look at it at one point, and it  
12 seemed to me for a year that I was looking at  
13 it that there were probably about ten to 12  
14 panel attorneys who, rough numbers because I  
15 don't have all the data, were probably making  
16 the better part of their year's living  
17 practicing in community court.

18 The judge made the appointments  
19 with coordination of an officer of our  
20 Superior Court Trial Lawyers Association,  
21 which is a voluntary organization of the panel  
22 lawyers; coordinated the appointments there,

1 and then also paid the vouchers. And that is  
2 not usually how it works in Superior Court.

3 There's usually an appointing  
4 judge assigned each week who handles the  
5 appointments with the administrative  
6 assistance of our office that coordinates  
7 who's available from the panel, from us, and  
8 what cases in the pro bono cases, and then it  
9 is the individual judges in the cases that  
10 then do the final work on the vouchers.

11 So there is at least a difference  
12 between who's appointing you, but it's a small  
13 court. You know, it's still a small court,  
14 and I think there is some tension there with  
15 that even on that system, but in this court it  
16 was very specific.

17 And there's that tension, right?  
18 I'm trying something new. This is a pilot.  
19 I need people that understand what the program  
20 is, what's available to people. I need to be  
21 able to process a number of cases, and at  
22 times that was the reason given for

1           disqualifying a PDS lawyer who was picking up  
2           a misdemeanor as a single representation and  
3           having other cases or the clinics, Georgetown  
4           Clinic.

5                        One of the other features we  
6           noticed in that is even when we made clear  
7           that we were actually going to stay in the  
8           case absent an absolute ruling putting off the  
9           case, our cases were always called at the end  
10          of the day I suspect because they took longer.

11                      One argument was because we were  
12          less familiar with the various programs and  
13          options and the way the court worked. Another  
14          might be that we were advocates.

15                      So that court changed a lot over  
16          time. I think it started very much where the  
17          argument could be made that you were in that  
18          court for a lot longer than if you had been  
19          assigned to another court. Yes, there are  
20          options and ways to resolve your case  
21          sometimes even short of a sentence, short of  
22          an adjudication, but it seemed to take, you

1 know, hours and hours and hours and hours and  
2 hours of community services and sort of almost  
3 insurmountable hurdles.

4 PSA was really, I think, a driving  
5 force at pushing that back. I think, again,  
6 some good expertise, a sense of, you know,  
7 what can people accomplish, and I'm not sure  
8 whether people did a lot of comparisons  
9 between, you know, what it meant for a  
10 defendant to go through that court as opposed  
11 to another court in a world of, you know, 50  
12 percent probability of a dismissal for want of  
13 prosecution because nobody shows up and you're  
14 out.

15 So in terms of which was more  
16 onerous, there were no options here. Certain  
17 charges, arrested in a certain jurisdiction,  
18 and you ended up in community court. If you  
19 weren't in that jurisdiction and if you  
20 weren't arrested on those charges, you  
21 couldn't get to it, and it's still being  
22 studied.

1 CO-CHAIRMAN JONES: Let me ask you  
2 a question. You guys are in drug court.

3 MS. LEIGHTON: Yes.

4 CO-CHAIRMAN JONES: With a caveat.  
5 Were you at all involved in any of the pre-  
6 planning, creation meetings around drug court?

7 MS. LEIGHTON: That was  
8 unfortunately the three years that I was away  
9 from the Public Defender Service and a  
10 Director earlier than, two Directors earlier  
11 than the Director I'm working for now. So I  
12 can't answer that.

13 It was created when I was actually  
14 trying cases. We had drug court, and in the  
15 '90s, drug court, I think, was one way of  
16 answering our mandatory minimums, and  
17 candidly, I had a number of clients who never  
18 tested positive who were distributing or  
19 accused of distributing that were in drug  
20 court and it avoided a four-year mandatory.

21 CO-CHAIRMAN SCHECHTER: Could you  
22 explain how that happened? How do you get



1 away from the mandatory if you went into the  
2 drug court?

3 MS. LEIGHTON: Drug court?

4 Because part of it is you'd get an attempt  
5 plea-off or an attempt plea-off and a  
6 successful completion of drug court.

7 CO-CHAIRMAN SCHECHTER: A U.S.  
8 Attorney would agree to that in advance?

9 MS. LEIGHTON: Yes, yes. You  
10 know, talking to people here that know what  
11 happens once you establish mandatory minimums,  
12 it just starts to drive so much, and I don't  
13 know who was involved in deciding. I just  
14 represent the people at that time. So who was  
15 doing the policy work and making the  
16 agreement, I can't answer except that it was  
17 a way to address this problem.

18 We no longer have mandatory  
19 minimums for drug offenses. Knock on wood it  
20 stays that way, but we still have drug court,  
21 and, no, I think our role primarily -- and if  
22 I learn differently I can keep writing down

1           these questions where I'm not absolutely  
2           positive of the answer so that I can get back  
3           to you -- our role is really the staffing  
4           issue, and how do you staff sanctions hearings  
5           if the idea behind it is the more immediate  
6           the better the impact?

7                       CO-CHAIRMAN JONES:   So your sense  
8           is the fact that this court was going to  
9           happen was a fait accompli --

10                      MS. LEIGHTON:   Yes.

11                      CO-CHAIRMAN JONES:   -- and you  
12           were brought in just to sort of work around  
13           the perimeter.

14                      MS. LEIGHTON:   And in terms of the  
15           contract, I mean, I think we had been involved  
16           in the contract, but again, I think PSA was  
17           really the expertise, and they have a fair  
18           amount of expertise in this, but this is what  
19           it looks like, and I just pull out one piece  
20           of a transcript for you.

21                      The Court:   "Sir, I don't want you  
22           here arguing with me about how I run the drug

1 court. You, respectfully, you made a request.  
2 I listened to it, and I ruled."

3 The lawyer: "Your Honor."

4 The Court: "Now, after that there  
5 really is nothing we can talk about."

6 The lawyer: "I'm here to advocate  
7 for my clients."

8 The Court: "But these are not  
9 your clients. You're here standing in."

10 The lawyer: "They're my--"

11 The Court: "Call the next case."

12 The lawyer: "May I be heard, Your  
13 Honor?"

14 The Court: "No."

15 CO-CHAIRMAN SCHECHTER: That's a  
16 federal judge?

17 MS. LEIGHTON: Well, no, that's  
18 our Superior Court.

19 CO-CHAIRMAN SCHECHTER: Superior  
20 Court judge.

21 MS. LEIGHTON: Presidentially  
22 appointed.

1                   I mean, there's a lot of tension  
2                   in these courtrooms about what really is our  
3                   role when they already signed a contract. We  
4                   want the lawyers that were engaged with them  
5                   when they signed the contract where they're  
6                   handling stand-ins, and it's personality  
7                   driven.

8                   Part of, I think, how these courts  
9                   get started, our mental health court right now  
10                  looks great. We've been involved since the  
11                  beginning. The judicial officer who took it  
12                  on has a real expertise in this area, drafted,  
13                  solicited our involvement from our Mental  
14                  Health Division, which has far more expertise  
15                  than trial lawyers and more than anyone in  
16                  this city about what does the mental health  
17                  system look like and what does it mean, the  
18                  various diagnoses, what can these people  
19                  accomplish or not in terms of the kinds of  
20                  hoops we make them jump through.

21                  Right now we have a judicial  
22                  officer that understand that, that understands

1           that, boy, 60 percent compliance from a  
2           paranoid schizophrenic is fabulous. Let's  
3           keep working our way towards it.

4                         They're sort of dealing with,  
5           again, the U.S. Attorney's Office controls  
6           what's eligible, and it's very low level right  
7           now. So nobody is going to look bad if it  
8           doesn't work, I suppose.

9                         But one of the things that we're  
10          working towards in that that I don't know  
11          exists in the others is how can we design this  
12          the way you would a lab, the way you would a  
13          scientific endeavor so that the personality  
14          that's there doesn't drive how these courts  
15          grow.

16                        And I don't know how you do that.  
17          I mean, I think hopefully there are other  
18          experts that can talk about that because I've  
19          seen studies that say personality matters, the  
20          interaction between the judicial officer and  
21          the person matters, but that's true of any  
22          treatment model, right? The better the

1 treatment people you get in there, the more  
2 successful the person is going to be, and yet  
3 everyone that's involved in this with the  
4 exception of some of the PSA folks, none of us  
5 are trained as clinical psychiatrists or  
6 psychologists to do this. Either we just have  
7 it from perhaps our experience as  
8 practitioners, but we're still not the  
9 experts.

10 So I think that it would be fair  
11 to say that the model in D.C. is that it  
12 starts with the judiciary. They engage with  
13 the prosecuting authorities because they need  
14 sign-off from them about who can participate.  
15 I suspect sometimes the reason we're not at  
16 the table there, for those of you who aren't  
17 familiar with D.C., I think we are described  
18 as a particularly adversarial criminal justice  
19 system, and maybe they feel that it's more  
20 likely to get buy-in from the prosecutors and  
21 law enforcement if PDS isn't at the table  
22 initially.

1                   And then I think there is a push-  
2 pull after that of are the cases that we're  
3 involved in and if we're not typically  
4 involved in, why not rely on the panel  
5 attorneys and their structure as opposed to  
6 PDS' particular expertise?

7                   CO-CHAIRMAN JONES: We have been  
8 joined by Paul DeWolfe, who is the District  
9 Public Defender from Montgomery County,  
10 Maryland.

11                   Welcome.

12                   MR. DeWOLFE: Thank you.

13                   CO-CHAIRMAN JONES: We're happy to  
14 have you here, and you haven't missed much.  
15 If you could just take five minutes or so and  
16 give us the benefit of sort of who you are and  
17 what you do and anything thoughts you might  
18 have just generally sort of about problem-  
19 solving courts in your home town.

20                   MR. DeWOLFE: Thank you, and  
21 welcome to Washington.

22                   I'm the District Public Defender

1 in Montgomery County. I'm also the president-  
2 elect of the Maryland Criminal Defense  
3 Attorneys Association and the current  
4 president of the Bar Association of Montgomery  
5 County, Maryland.

6 I'm testifying today though as a  
7 member of the ABA Diversion and Specialty  
8 Courts Task Force, and the task force is  
9 chaired by Irma Raker, who is a judge on the  
10 Court of Appeals in Maryland, retired.  
11 Included on the committee are academics,  
12 Walter Dickey, University of Maryland,  
13 Madison, University of Wisconsin, Madison Law  
14 School; Tamara Meekins, Howard University Law  
15 School; Michael Schrunk, elected District  
16 Attorney for Portland, Oregon; Michael Thomas,  
17 elected District Attorney for Saginaw County,  
18 Michigan; Richard Andreas, who is from the New  
19 York Court of Appeals; and Hal Hadden, a  
20 criminal defense attorney, Denver Colorado.

21 Ex officio members are Norm  
22 Reimer, Executive Director of NACEL; Tim



1 Murray, who is with the pretrial courts  
2 project in D.C.; as well as Spurgeon Kennedy  
3 from the same organization.

4 I wanted to talk just briefly  
5 about what the task force is designed to do,  
6 and the purpose is to propose Black letter  
7 standards and commentary to be presented to  
8 the ABA Standards Committee. The Standards  
9 Committee will either adopt or edit the  
10 standards to be presented by the Board of  
11 Governors.

12 I would like to address my  
13 comments, if I could, not to the standards as  
14 a whole, but to actually the role of the  
15 defense attorney.

16 CO-CHAIRMAN JONES: Absolutely.

17 MR. DeWOLFE: Rather than  
18 addressing the issue of whether or not these  
19 courts should exist, the task force took the  
20 position at the beginning that they do exist,  
21 that they're proliferating throughout the  
22 country, and that they are essentially

1 standardless.

2 And, again, rather than addressing  
3 the problems associated with the courts  
4 themselves, the task force set out to address  
5 the roles of the various participants.

6 Arguably, no participant in the specialty  
7 court team, not the judge, not the prosecutor,  
8 not the treatment provider, has struggled with  
9 his or her own identity other than the defense  
10 attorney.

11 Specialty courts are designed to  
12 reject the adversary model where an impartial  
13 judge resolves conflict between the parties.  
14 In specialty courts, the universally shared  
15 goal is successful treatment of a behavioral  
16 problem. The judge assumes the role not just  
17 of resolving disputes, but also actively  
18 directing, controlling, and supervising the  
19 defendant's rehabilitation.

20 The model is one of flexibility  
21 controlled by an ever increasing authority of  
22 the judge, one, to intervene, to impose

1 sanctions, and to remove the defendant from  
2 the programs, and in some cases impose severe  
3 punishment.

4 The defense attorney is required  
5 to strike a constant balance between  
6 acquiescing to informal procedures and  
7 practices that are not tolerated in criminal  
8 court, and trying to protect the client from  
9 the severe punishment that the court retains  
10 authority to impose.

11 The tension along with the defense  
12 attorneys in these specialty courts are the  
13 tensions between becoming a zealous partisan  
14 and advocate, maintaining the secrecy of all  
15 information learned about the client during  
16 the representation, and advising the client to  
17 protect himself or herself by withholding  
18 information damaging to the outcome of his  
19 case.

20 In a specialty court model, the  
21 role is at best ambiguous. There is  
22 institutional pressure to be a team player.

1 He or she must try to reconcile ethical rules  
2 of advocacy with the competing goals of the  
3 treatment team.

4 The defense counsel should  
5 individually evaluate each case for referral  
6 to specialized courts and fully advise the  
7 defendant of the advantages and the  
8 disadvantages of consenting to the  
9 jurisdiction in the specialty courts.

10 In doing so, we felt, the task  
11 force felt that the defense counsel should  
12 position the accused to make informed  
13 decisions about the pretrial motions  
14 available, the possible outcomes, the  
15 consequences of the waiver of pretrial  
16 motions, the likelihood of conviction, and the  
17 direct consequences of participating, and the  
18 rights that are waived.

19 The accused agrees to specialized  
20 court programs, and the defense counsel should  
21 advise the potential implications of waiving  
22 other rights, including the right to counsel.

1                   I'd like to sort of jump, if I  
2                   could, to some of the highlights of some of  
3                   the proposed standards that we're looking at.  
4                   The process hasn't yet completed, but in  
5                   discussing the role of the defense attorney,  
6                   the task force thought that the defense  
7                   attorney should advocate for due process  
8                   protections in the design and the  
9                   implementation of the specialty court. They  
10                  should advocate in the team meetings for the  
11                  stated interest of the client, despite  
12                  pressure to be a team player concerned with  
13                  the best interests of the client.

14                  They should demand hearings and  
15                  zealously advocate against arbitrary and  
16                  unfair sanctions against clients.

17                  Specialty courts should not be  
18                  created without sufficient funding -- this is  
19                  something that has been discussed -- for the  
20                  defense function. Resources should not come  
21                  at the expense of the other courts.

22                  Other considerations that have

1           been considered and proposed are that courts  
2           should monitor the qualifications and  
3           licensing the treatment programs, the cost to  
4           the defendants in treatment programs, and  
5           specialized courts should be periodically and  
6           independently evaluated.

7                        The consent of the defendant  
8           should be required for specialized court to  
9           assume jurisdiction over the defendant, and  
10          that's not the case in a lot of the programs  
11          that we have looked at, and there's a huge  
12          concern for the unrepresented defendants, and  
13          we have looked at programs throughout the  
14          country that don't seem to see the need for  
15          defense attorneys in certain aspects. So  
16          we're looking very closely at the concern of  
17          unrepresented defendants.

18                      The court should not have ex parte  
19          communications with the defendant, the defense  
20          counsel, the prosecutor, the treatment  
21          providers, or anyone else in the case. And  
22          that is not recognized in virtually any of the

1 programs that we have looked at. The ex parte  
2 communication is considered part of the  
3 program, and I think that is a major concern  
4 of the task force.

5 And all participants in the  
6 administration of specialty courts, including  
7 the judges, prosecutors, defense attorneys,  
8 pretrial services, corrections and treatment  
9 providers should participate in joint  
10 training, and with notice that there is  
11 virtually no training in some of the program  
12 that we've looked at.

13 One more thing I'd like to comment  
14 ion and that's sort of a personal observation.  
15 I think the major problem with these programs  
16 being standardless is that the rules change,  
17 and I heard Julia speak about the rules really  
18 being or the programs really being dependent  
19 on the personality of the judge, and we've  
20 noticed that in my jurisdiction and really  
21 throughout the country.

22 And when the rules change, our

1           experience is that generally the sanctions are  
2           ratcheted up. I have seen programs that begin  
3           as community treatment and really end as  
4           residential programs, where prison and where  
5           jail and where halfway houses and people are  
6           required to go to jail before they enter into  
7           these programs.

8                         And so as the failure level  
9           increases, the rules just change, and they  
10          changes generally in the way that the  
11          sanctions are ratcheted up right from the  
12          beginning of the program, where people are  
13          required instead of coming from the street to  
14          come to the program from jail, and then  
15          instead of living at home in the community,  
16          we've noticed that they have been required to  
17          live in halfway houses and then to be removed  
18          from halfway houses to sober treatment homes.

19                        And so the programs that we have  
20          looked at sort of morphed from community based  
21          programs to essentially residential programs  
22          as the failure rate increases.



1                   And one other point I'd like to  
2                   make if I have time.

3                   CO-CHAIRMAN JONES:    Sure,  
4                   absolutely.

5                   MR. DeWOLFE:    And that is what it  
6                   has been our experience to notice that the  
7                   judges, while almost universally caring and  
8                   treatment oriented, tend to take these  
9                   programs that are under their watch  
10                  personally, and they take the failure of these  
11                  programs very personally as well.

12                  And so when you have a judge that  
13                  is personally committed to the success of all  
14                  the participants and the same judge becomes  
15                  the person that deals with the criminal case  
16                  after the failure and the bouncing out of the  
17                  program of the defendant, that individual  
18                  tends to be treated much more harshly because  
19                  of the fact that he has failed this individual  
20                  judge.   That is at least one observation.

21                  CO-CHAIRMAN JONES:    Well, listen.  
22                  Thank you very much for those thoughtful

1           comments and also for the work that you and  
2           others are doing on that ABA Task Force.

3                        Let me just ask Peter very  
4           quickly, if you would, to just give us sort of  
5           the short-hand version of the creation of  
6           these courts in your jurisdiction and whether  
7           or not -- I mean, I know in your opening  
8           remarks you said that you sort of were  
9           surprised at how quickly they grew up and the  
10          task that it was to sort of get your arms  
11          around them.

12                       Are you at all involved in the  
13          formation of these things, the creation of  
14          these things? Does the Public Defenders  
15          Office have any opportunity for input?

16                       Just sort of give us the flavor of  
17          that.

18                       MR. ROSE: Well, let me just say  
19          this. On the administration side, we  
20          certainly are now. Early on, as I understand  
21          it, these were judge driven programs, clearly,  
22          and there was money coming from someplace. I

1           may be wrong about this, but it may have been  
2           originally that there was some federal money  
3           that was flowing from these courts, and that  
4           to get the grant money, you had to be certain  
5           that all of the stakeholders were  
6           participating, and that obviously included the  
7           judge, prosecutor, and really it seems to me  
8           in all cases the Public Defender or public  
9           defense organization, and then the treatment  
10          providers, and you could divide those between  
11          those treatment providers, juvenile service  
12          providers, education providers relevant, and  
13          of course, mental health.

14                        So they're all sitting around the  
15          table, and I think the noticeable feature of  
16          that group of stakeholders is that in the  
17          classical, traditional sense you've got one  
18          guy on one side of the power structure, and  
19          then you've got everybody else on the other  
20          side.

21                        But that's what happens, is they  
22          were judge driven. There was a desire to get

1 money, and maybe that's a little too cynical,  
2 although I think my job is to be skeptical and  
3 cynical, or it was really for a judge to say,  
4 "Hey, I want to make a difference or I can  
5 make a difference."

6 And I'm not going to cover all of  
7 the anecdotal bases because I'm certain that  
8 there are cases where prosecutors thought,  
9 "Hey, let's start a drug court," or maybe even  
10 our local offices would say, "Hey, I have an  
11 idea," but you've got to get the fire lit  
12 under the judge. The judge drives the  
13 process. You get these parties together.  
14 They generate a document that's an agreement,  
15 an interagency agreement that everybody  
16 subscribes to after some whittling and  
17 chiseling, and again, that process notably,  
18 our investigation of how that happened across  
19 the jurisdictions in Maryland was often the  
20 result of being overpowered by everybody on  
21 the other side of the table.

22 So you had some agreements that

1           were not favorable to the defense, and as I  
2           said, there was sort of a shock to us when we  
3           looked at them all how different they were and  
4           how in our perception wrong they were in many  
5           respects.

6                         That document, once assembled, and  
7           I'll sort of pick up where Paul left off,  
8           seems to be flexible and a moving target in  
9           some cases so that the rules do change.

10                        And then the question becomes,  
11          again, picking up on what Paul said, what is  
12          the defense lawyer going to make of his  
13          identity when you are faced with deciding how  
14          to litigate these rules, in the first  
15          instance, and perhaps how they change before  
16          your eyes in the second.

17                        Well, the judges and prosecutors,  
18          again, anecdotally, seem to me to have no  
19          trouble putting their hats on, but all the  
20          while encouraging defense counsel to not put  
21          a ripple in the water. So that's essentially,  
22          it seems to me, how most of the Maryland

1 courts pop up. There's the judge who gets an  
2 idea, and it's driven by the judge, and I  
3 think I said earlier, with the promise of it  
4 and with the right judges, there is this  
5 promise of treatment and, wow, this may be a  
6 great thing, and then the ground shifts  
7 beneath you.

8 CO-CHAIRMAN JONES: Thank you.

9 I want to move on to our next big  
10 area of discussion unless anybody here wants  
11 to ask any sort of follow-up questions about  
12 creating these courts.

13 MEMBER YOUNG: No. Peter, I just  
14 had a question because I'm not sure where in  
15 the process you are when you said we started  
16 gathering all of the information and looking  
17 at the agreements and we're going to go  
18 through and highlight what you thought were  
19 the worst practices.

20 Have you gotten to that point?

21 Are you still gathering?

22 I couldn't tell where you are.

1                   MR. ROSE: Yeah, I'm glad you  
2                   asked that because one of the other things I  
3                   was picking up on what Paul was saying is that  
4                   the effort from our end, sort of looking down  
5                   the wrong end of the telescope to be up in  
6                   administration and looking down at all of  
7                   these agreements that were made in all of the  
8                   jurisdictions and trying to decide what's  
9                   right and what's wrong, that was, in part, an  
10                  effort to standardize the way these courts are  
11                  going to function.

12                 Again, in the absence of any  
13                 statutory structure or any rules, we simply  
14                 had to say, "Look. We are the stakeholders.  
15                 We're not going to participate unless you do  
16                 the following things. Here's a list of what  
17                 you've got to remove. Here are the ways that  
18                 we see these courts are functioning  
19                 improperly, and unless the individual various  
20                 jurisdictions would modify and fix these  
21                 agreements, we're not going to participate."

22                 So we held that hammer over them

1 to try to standardize it ourselves or at least  
2 force sort of a standardization at least as  
3 best we could, you know, mindful, I think,  
4 putting aside the fact that we are litigating  
5 the professional question presently, but  
6 mindful, I think, of the fact that these  
7 courts are here and that they may very well be  
8 here to stay and if not in this current form,  
9 in some form.

10 But that's the process we were in.  
11 We had sort of collected these agreements,  
12 modified them, sent them back, and I think we  
13 have worked out all of the major problems,  
14 although we still have big problems.

15 So the courts are running. We've  
16 not allowed them to do the stand.

17 MEMBER SHIFMAN: I just want to  
18 clarify. So the 24 counties or court systems  
19 that you have in Maryland, they've modified  
20 the end user agreements basically with the  
21 defendants? Is that what's happening?

22 MR. ROSE: No, no. The agreements



1           between the stakeholders, in other words,  
2           there were provisions in some of the  
3           agreements that we felt was just basic  
4           violations of due process. So you've got to  
5           pick that out. We need to see a positive  
6           drug test. We can't just have an allegation  
7           of that, an in-court confession and summary  
8           punishment. Give the guy the drug results  
9           and let's give him a chance to challenge them.

10                       Basic things like that, they were  
11           retooled to satisfy us as between the  
12           stakeholders, not the individual contracts, if  
13           you will, that are entered into between the  
14           defendants.

15                       MEMBER SHIFMAN: But those are  
16           agreements between the stakeholders that  
17           you're talking about. Aren't those items that  
18           the defendants themselves have to sign onto?  
19           If I get a dirty test, I know that --

20                       MR. ROSE: Yes.

21                       MEMBER SHIFMAN: -- punishment is  
22           going to be X or Y.

1 MR. ROSE: Yes.

2 MEMBER SHIFMAN: And I'm waiving  
3 my right to a lawyer and I'm waiving the right  
4 to litigate, right?

5 MR. ROSE: Right. That's the  
6 front end of that case.

7 MEMBER SHIFMAN: So the front end  
8 is the stakeholder agreement between, you  
9 know, the power structures, the defense  
10 lawyer, the prosecutor, the treatment  
11 providers, the court, you know, et cetera.

12 MR. ROSE: Correct, correct.

13 MEMBER SHIFMAN: And the end user  
14 agreement is between, I guess, the court and  
15 the defendant would you call that?

16 MR. ROSE: Yeah, I'd say --

17 MEMBER SHIFMAN: Or the prosecutor  
18 and the defendant?

19 MR. DeWOLFE: It's a contract.  
20 You know, it's a contract. It's a treatment  
21 contract, almost like a probation contract  
22 that the defendant signs, and it includes

1 certain waivers and certain obligations.

2 And what the Maryland Public  
3 Defenders Office did was that they looked at  
4 all of the agreements, including the  
5 stakeholders and the individual agreements  
6 that the defendant signed, and they demanded  
7 that the courts themselves change those  
8 agreements in accordance with requirements  
9 that we asked them to take out, and if they  
10 didn't then we wouldn't participate.

11 And I don't know what the success  
12 rate is. In my court they simply agreed to  
13 all of the requests, for example, a due  
14 process hearing before liberty can be taken  
15 away. We are required that there at least be  
16 a due process hearing for an evidentiary  
17 hearing.

18 And some of the agreements  
19 honestly waive those rights.

20 CO-CHAIRMAN JONES: Let me push on  
21 to the next big area we want to discuss with  
22 you all, which is admission to these courts.

1 Who determines who gets in? Are we treating  
2 serious addicts in these courts or are we  
3 treating the most likely to succeed or for  
4 political reasons?

5 Do you find that there is  
6 individualized treatment or is it more sort of  
7 one size fits all?

8 If you could all sort of just talk  
9 to us a little bit about who are the folks  
10 that are getting into these courts and are  
11 they the folks that need to be getting into  
12 these courts and your sense of all that.

13 Julia, we'll start with you.

14 MS. LEIGHTON: I think we don't  
15 know the answer. I suspect we could be told  
16 answer. I think we don't know the answer  
17 because I don't think we've tested it and  
18 looked at it.

19 I think the leading force of who  
20 gets into the courts once the court has been  
21 established, the leading force of who gets  
22 into the court is determined by the

1 prosecuting authorities of which offenses are  
2 they going to -- for example, in D.C. domestic  
3 violence can't get into any court. It's just  
4 brought off the table.

5 And so I think that that's what  
6 drives who, what charges are available, what  
7 jurisdictions. I think that there's a way out  
8 of every court that I'm aware of, and we don't  
9 end up with the same judge, even in community  
10 court. We ultimately decide even though  
11 you're coming from a certain jurisdiction in  
12 a certain court; if you decide you want to go  
13 to trial, you got out into -- walk on the Leo  
14 (phonetic) as to where you end up.

15 The same with drug court. If you  
16 pop out, you go back to your county judge. So  
17 there is that, and you have counsel at all  
18 stages in the District. You have counsel from  
19 your first appearance in court throughout, and  
20 I'm aware of the sort of ex parte "no, no, I'm  
21 talking to your client," and that is handled  
22 by each advocate as they see it working to the

1 best advantage of their client, either to shut  
2 that down or to let that happen ,maybe not  
3 always enough time to communicate with your  
4 client to really prepare your client for what  
5 that means.

6 I think we see that in drug court  
7 because things happen so quickly, and the time  
8 to meet clients and time to talk to clients to  
9 prepare them for being questioned, and  
10 depending on the personality on the bench, a  
11 real effort to say, "I think your client is  
12 prepared. I discount the answer."

13 So I think you can --

14 CO-CHAIRMAN JONES: In drug court  
15 in D.C., is it just a misdemeanor court?

16 MS. LEIGHTON: No, it's felony.  
17 Drug court is felony court charges as well.  
18 Everything else is misdemeanor or less, but  
19 drug court does include felony offenses.

20 CO-CHAIRMAN JONES: And can you be  
21 charged with dealing as opposed to use and get  
22 in?

1 MS. LEIGHTON: Yes, yes.

2 CO-CHAIRMAN JONES: And are there  
3 folks do you think who will get into drug  
4 court who may not have a drug problem who are  
5 dealers, but who think that the drug court  
6 alley is a better avenue?

7 MS. LEIGHTON: My information is  
8 now dated. I know I said that I saw that when  
9 it initially started. I think drug use and  
10 drug dealing has changed since the mid-'90s  
11 till now, and I think you're seeing more use  
12 among an entire population. I think you're  
13 seeing more use among the population that's in  
14 drug court, and some of that may be that it's  
15 being targeted better. Some of that may be  
16 just the change in how things are happening.

17 I suspect we have more  
18 availability in the District of some level of  
19 individualized efforts, but the problem with  
20 all of this, right, is if we did all this  
21 stuff up front, we wouldn't be using courts to  
22 do it. I mean, that's the biggest absurdity

1 of it. If we really wanted to be good at  
2 this, we'd do it before it got to the courts  
3 because the courts are not the best, but for  
4 some reason they seem to have the resources  
5 that other departments are lacking.

6 So that it's exceptionally  
7 individualized? No, but we have a fair amount  
8 of services available in the District. We  
9 have a Pretrial Services Administration that  
10 really has worked to create options and to  
11 make them reasonable.

12 MR. DeWOLFE: Peter, who gets in  
13 in Maryland? It's all over the map really.

14 MR. ROSE: Yeah. As I mentioned  
15 at the outset, the Office of Problem-Solving  
16 Courts, which was the result of the commission  
17 that was earlier established, they hand out  
18 sort of guides on who will be eligible and who  
19 ought to be the gatekeepers, for example, and  
20 there may be a lot of options.

21 The problem with that body, and  
22 they do have sort of an oversight committee;



1 the problem with it is there's no teeth to the  
2 oversight committee and there's no  
3 requirements from the Office of Problem-  
4 Solving Courts in terms of whether you're  
5 going to get grant money, and it comes from  
6 them now. It's state grant money.

7 When someone wants to set up a  
8 court, and I guess I neglected to mention this  
9 part earlier, now they have to work with the  
10 Office of Problem-Solving Courts to ramp up  
11 their program. So there is some oversight  
12 there.

13 But as I mentioned, there is no  
14 requirement and there are no teeth to the  
15 oversight committee. They can't force anyone  
16 to do anything on the ground, and neither can  
17 the Office of Problem-Solving Courts, but the  
18 answer is there isn't a simple answer because  
19 it depends what the group decided when they  
20 established the court, and again, that was  
21 dependent upon the personality and not to  
22 mention the power structure.

1                   MR. DeWOLFE: Generally the  
2                   prosecutor is the gatekeeper in most of the  
3                   courts we've looked at, and the task force has  
4                   a real problem with that. When our court was  
5                   set up in Montgomery County, anybody could  
6                   recommend someone to the drug court. The team  
7                   would then vote or discuss it, and then the  
8                   judge would decide who gets in, and that's  
9                   changed.

10                   For the high end addicted people  
11                   who are violations of probation, who are  
12                   facing violation of probation and certain  
13                   jail, which is the way that the program  
14                   started, that system still exists, but because  
15                   their numbers weren't high enough to maintain  
16                   the court, they changed the rules. They  
17                   allowed the prosecutors to recommend people  
18                   who are facing indictment for drug cases, and  
19                   then the rules are that the prosecutor is the  
20                   gatekeeper.

21                   And I think that's an example of  
22                   how the rules just more depend upon

1           circumstances.

2                       MR. ROSE:  If I could just add  
3           briefly that the issue of addicts versus the  
4           cherry picking, it's something that we in the  
5           administration are very suspicious of, and I'm  
6           certain that you will hear later from Mr.  
7           Marlowe because I have attended a training,  
8           and I'm sorry.  It's probably Dr. Marlowe.  
9           Doug Marlowe gave to our folks, is that it  
10          really ought to be desperate measures for  
11          desperate folks, and as I say, we don't have  
12          any empirical information, but our suspicions  
13          are, and we have to be driven and guided by  
14          them to some extent, that there is a lot of  
15          cherry picking, and that's part of the  
16          difficulty getting our hands around the whole  
17          thing to decide what to do with it.

18                      CO-CHAIRMAN JONES:  Just in this  
19          area of who gets in, do any of you have any  
20          sort of hard data, anecdotal data or otherwise  
21          with respect to, in your various  
22          jurisdictions, racial and/or socioeconomic

1           disparities, trends with respect to who are  
2           the people who are passing through these  
3           courts or do you have any sense of that?

4                   MS. LEIGHTON:   Ninety-five percent  
5           of the individuals arrested in the District of  
6           Columbia are African American.

7                   CO-CHAIRMAN JONES:   And are 95  
8           percent of the people in drug court equally?

9                   MS. LEIGHTON:   At that point I  
10          suspect.  That's what populates that court.  
11          The issue starts at arrest.

12                   CO-CHAIRMAN JONES:   Right, right.

13                   MR. DeWOLFE:   I don't know that we  
14          have any data.

15                   CO-CHAIRMAN JONES:   Does anybody  
16          have any?

17                   Marvin.

18                   CO-CHAIRMAN SCHECHTER:   Mr.  
19          DeWolfe, I see the things that the task force  
20          is upset about.  We've run into the same  
21          thing.  Who's the gatekeeper?  What are the  
22          standards?  Do they change?  What are the

1 contracts?

2 But the battle is the drug courts  
3 are there. They exist, and the defense  
4 attorneys tell us that they want the drug  
5 courts because it helps their clients, but  
6 they want the due process stuff with it.

7 In order to get the due process  
8 stuff, my question to you is this: are we  
9 tweaking these courts? Is that where you're  
10 headed in the task force? Are we tweaking  
11 them the way Maryland is trying to tweak the  
12 original agreements?

13 Or is the recommendation that it's  
14 not worth it; that the prosecutors are the  
15 gatekeepers and we're getting the wrong people  
16 into their system? It's just not worth it in  
17 terms of due process. We don't get the  
18 discovery. We don't get drug testing.

19 So my question to you is that I  
20 hear you, but I'm not quite sure what you're  
21 really saying. Should we fight it? Should we  
22 recommend doing away with the drug courts, or

1 is your recommendation the opposite, that we  
2 have to change some things and if we change  
3 them, we can live with it?

4 MR. DeWOLFE: well, I think the  
5 overriding problem is that we're coming to  
6 this process 19 years after drug courts first  
7 came on the scene, and they're all over the  
8 country and they're in all different forms.

9 So ideally what I think should be  
10 done is that at the beginning, as I think  
11 perhaps the Office of Specialty Courts is  
12 trying to do in Maryland, at the beginning  
13 there should be some minimum standard set.  
14 We're hoping that the ABA can provide the  
15 black letter at least for some minimum  
16 standards, and then going from there,  
17 hopefully the due process concerns that we all  
18 have and the right to counsel concerns that we  
19 all have and the advocacy, the need for  
20 zealous advocacy on the part of the defense  
21 attorney that we all see should be built into  
22 the original document that creates the courts.

1           Having said that, what do you do  
2           with the courts that are already out there?  
3           And I think Maryland has started to take a  
4           look at them individually and to raise these  
5           concerns either through the Public Defender  
6           Office backing out of programs or threatening  
7           to back out of programs until and unless those  
8           due process concerns are built into the  
9           structure or perhaps in some cases to  
10          litigate.

11                   MR. ROSE: Yeah, can I just add  
12           onto that?

13                   CO-CHAIRMAN JONES: Sure.

14                   MR. ROSE: It seems to me that the  
15           philosophical barrier that the Public Defender  
16           has is the view that in drug courts due  
17           process itself is a barrier to treatment by  
18           way of speedy intervention.

19                   As soon as you get the guy in  
20           trouble and in court, get him into the  
21           program. And also this therapeutic  
22           intervention which I have seen variously

1 described in reported opinions as therapeutic  
2 incarceration, which you know, we've had many  
3 long debates, myself and the Public Defender  
4 and Deputy Public Defender about how we're  
5 going to accommodate this and what does this  
6 mean, not to mention the greater philosophical  
7 question about therapeutic incarceration is  
8 very Orwellian.

9 CO-CHAIRMAN JONES: Marvin sort of  
10 jumped us to the end of the conversation in  
11 the middle. I know, Julia, you wanted to  
12 comment on this, and then I want to sort of  
13 try to get back to working through some of  
14 these issues.

15 MS. LEIGHTON: As a practicing  
16 defense attorney -- I'll put that hat back on  
17 and remember those -- I want all options,  
18 right? I want all options because every  
19 client is different. Every set of  
20 circumstances is different. I've got one  
21 judge here, one judge here. It may depend on  
22 which judge where I go.



1           I can have two absolutely the same  
2 clients. If they're in front of two different  
3 calendar judges, I may make a different  
4 decision about whether I recommend to one  
5 going to drug court and not to the other.  
6 Maybe I have the same calendar and a different  
7 prosecutor. All defense attorneys want  
8 options, and the more the better, and then you  
9 work them for your client.

10           But part of the reason we're  
11 driven to want these options is because we  
12 don't have the ability to individualize a  
13 program for a client in other -- so we're  
14 popping from program sort of comes closest to  
15 works for my client, and I can figure him into  
16 that box as opposed to -- and I don't know how  
17 broadly you all see your trials. I hear this  
18 sort of it's there. They've built it, you  
19 know. We'll never shut it down.

20           And doing the voice that says,  
21 "Until we get it right, why are you spending  
22 all of these resources on this and why

1           wouldn't these resources be better spent if  
2           all of our attorneys could spend more time on  
3           each case putting together what is the best  
4           solution for that client and then trying to  
5           pitch it to a judge and a prosecutor?"

6                           CO-CHAIRMAN JONES:  Let me try to  
7           take you back 5,000 feet down to sort of some  
8           of the real stuff we're grappling with around  
9           these issues with respect to the defense bar,  
10          and the next sort of big area we want to talk  
11          to you guys about is the lawyer-client  
12          relationship, but specifically with respect to  
13          advising your clients.

14                           How comfortable do you lawyers  
15          feel in advising your clients to enter into  
16          drug programs?  How much time do you have with  
17          clients before they have to make that  
18          decision?

19                           What's the quantum of knowledge  
20          available to you before and as you're advising  
21          clients to make these decisions?  What's your  
22          sense of that going in with respect to the

1 quantum of knowledge and advice and counsel  
2 that the clients get before and as they're  
3 making the decision to enter into these  
4 various specialty court programs?

5 MS. LEIGHTON: PDS has a  
6 controlled case load, and as a result, I think  
7 we are in very good position to advise, to  
8 meet, to spend time. I think our lawyers are  
9 in a position to understand their programs and  
10 have the time to figure out the programs and  
11 figure out the options and figure out ways to  
12 actually take something that's happening in  
13 community court and convince a prosecutor in  
14 a whole other court to do the same thing.

15 I don't know that that necessarily  
16 can happen across the board, and I think that  
17 is one of the areas that I'd like to see  
18 courts getting more data in. I gave you the  
19 example of having looked briefly at the data  
20 that PDS has about who was getting the  
21 appointments, how many lawyers were getting  
22 appointments in a particular court, and how

1           many appointments they were getting over the  
2           course of a year.

3                           And while those appointment  
4           numbers didn't exceed the national standards,  
5           some of them came close, and there really  
6           isn't a good reason for that in the District  
7           of Columbia with the size of the panel that we  
8           have and the funding that we currently that we  
9           currently have for the CJ program.

10                          So I think there may be concerns  
11           about advice to perpetuate and whether people  
12           really have time to spend time on clients'  
13           individual circumstances and stated goals, I  
14           mean, not sort of what's best, but really have  
15           the time, and I think everybody has touched on  
16           this. You can as a human being buy into the  
17           idea of problem solving, but we're not problem  
18           solvers. Our role is to perpetuate our  
19           client's stated goals however irrational they  
20           may appear to someone or even to us. It is  
21           advancing the client's stated goal.

22                          And for many clients it would seem

1 to me that it is far better to role the dice  
2 on a 50 percent chance of a dismissal for one  
3 prosecution in an overcrowded court than to  
4 even take on, you know, 20, 40 hours of  
5 community service wearing a vest in our  
6 neighborhood that says I'm part of this  
7 program

8 CO-CHAIRMAN JONES: Let me just  
9 ask you one follow-up question because  
10 obviously we are all sort of familiar with the  
11 work that PDS does, but just systemically do  
12 lawyers generally have enough information at  
13 the time they've got to make that "do I advise  
14 my client I've got to enroll" decision? Do  
15 they know the Fourth and Fifth Amendment  
16 issue? Do they know about the stop, the  
17 quality of the service, the seizure, trying to  
18 think before they advise somebody about  
19 waiving all of these other rights we're  
20 talking about?

21 MS. LEIGHTON: What I would love  
22 to know is now you get your open discovery.

1 As you all know, we practice under the Federal  
2 Rules of Evidence and federal discovery rules,  
3 and we have paperwork, but really who knows a  
4 case until you've spent a lot of time, no  
5 matter how minor the case? Who knows a case?

6 In the District there's probably  
7 about a 20 percent no paper, no charge rate.  
8 So if the paperwork is that bad on its fix,  
9 what little you might get in the initial, is  
10 that bad on its face, it has already been done  
11 away with, and so it really is there's a lot  
12 more work involved. I mean, in that respect  
13 though for all positions at some point it's  
14 communicating with clients, but I'm not sure  
15 if people spend the kind of time you want even  
16 talking about what they can tell you about the  
17 stop or about the sort of conduct at least  
18 right at the time and to dig through and see  
19 whether or not something might be done.

20 CO-CHAIRMAN JONES: What about  
21 Maryland? What kind of time do you have to  
22 sit with clients and advise them about going

1           into these courts and what's the knowledge  
2           that you have as you get into that.

3                         MR. ROSE: I think that depends.  
4           Time is a luxury, I would guess, across the  
5           state, and the quality of information you get  
6           and the time you have is going to vary widely,  
7           I think.

8                         Paul, do you have a more specific  
9           answer?

10                        MR. DeWOLFE: Yeah, I mean, we're  
11           really talking about courts that have hundreds  
12           of people in them and some courts that have 15  
13           people in them, and so it's really hard to  
14           answer that question. You know, obviously one  
15           of the skills of the defense attorney is to be  
16           able to predict for your client what the  
17           consequences will be and, frankly, whether or  
18           not your client can make it through this  
19           rigorous program. We may be in a position to  
20           say, "Take your 30 days," or, "take your six  
21           months because you're not going to make it  
22           through this program. I guarantee you."

1                   And that takes knowing the client.

2                   That takes knowing the case, and that takes  
3                   time, and it's what we have done traditionally  
4                   with recommending whether to take a plea, to  
5                   go to trial, to be on probation rather than to  
6                   go to jail, and so that predictability depends  
7                   upon the case load of the attorney.

8                   I will say I think for private  
9                   attorneys it's probably more of a problem  
10                  because they're not familiar with the drug  
11                  courts or the specialty courts in terms of the  
12                  requirement.

13                  One of the requirements in our  
14                  drug court is in the first phase that you show  
15                  up every week, and the private attorney is  
16                  just not going to show up every week and be  
17                  there for the client, and so it is left to  
18                  sometimes the Public Defender who has to get  
19                  to know that client and make the predictions  
20                  and advice and take on the traditional role of  
21                  the defense attorney.

22                  So to answer your question it



1 really depends on the program. Discovery is  
2 good in Maryland. So we do have the  
3 opportunity to look at the case, to see if  
4 there are flaws in the case. So you may want  
5 to file a motion. You may want to go to trial  
6 instead of drug court, but the decision of  
7 whether or not to go into drug court depends  
8 upon the attorney-client relationship.

9 I think I would have to say at  
10 least with the Public Defenders we do have  
11 time to look at that.

12 CO-CHAIRMAN SCHECHTER: We run a  
13 little bit closer. We come down to  
14 jurisdictions, and we've actually got the time  
15 lines and I'm not hearing that here. So maybe  
16 we can just figure it out even with all of the  
17 diverse districts that you have.

18 If a person is arrested at 9:00  
19 a.m. this morning and they are a drug user,  
20 how soon after that time of arrest does the  
21 attorney have to make the decision to  
22 recommend the client to the drug court? Is it

1 five days? Is it 48 hours? Is it six months?

2 MR. DeWOLFE: I couldn't tell you.

3 CO-CHAIRMAN SCHECHTER: You

4 couldn't tell.

5 How soon after a 9:00 a.m. arrest

6 this morning --

7 MR. ROSE: Also I should say it's

8 not going to be consistent across the state.

9 CO-CHAIRMAN SCHECHTER: How soon

10 after 9:00 a.m. this morning at an arrest of

11 a drug user do you get discovery?

12 MR. DeWOLFE: Well, actually we

13 get it in my jurisdiction within 30 days.

14 CO-CHAIRMAN SCHECHTER: Montgomery

15 County?

16 MR. DeWOLFE: Yeah.

17 CO-CHAIRMAN SCHECHTER: Montgomery

18 County, you get it within 30 days, but that's

19 not standard throughout the state?

20 MR. DeWOLFE: That's not standard.

21 CO-CHAIRMAN SCHECHTER: Let's take

22 Montgomery County. You get discovery within

1           30 days. So theoretically as a defense  
2 attorney, you can hold off making the decision  
3 to send the client to drug court so that you  
4 could see what you've got, right?

5                   MR. DeWOLFE: Yes.

6                   CO-CHAIRMAN SCHECHTER: No one  
7 would say to you in Montgomery County you've  
8 waited too long. In other counties, Mr. Rose,  
9 would you not have that? Can you specifically  
10 say that in Maryland, that there are other  
11 counties where if you're arrested at 9:00 a.m.  
12 this morning you must make the decision? Tell  
13 us whether the person is going into drug court  
14 or not regardless of whether you've gotten the  
15 discovery?

16                   MR. ROSE: I just don't know.

17                   CO-CHAIRMAN SCHECHTER: Okay.

18                   MR. ROSE: I know we collect --  
19 well, we collect an enormous amount of  
20 information. It just simply escapes me as to  
21 whether there were any jurisdictions that said  
22 you've got a limited time.

1 CO-CHAIRMAN SCHECHTER: In those  
2 contracts that you were asked about before  
3 that you've gone over, is discovery  
4 specifically one of the things in the  
5 contract?

6 MR. ROSE: No, I don't recall  
7 discovery being mentioned ever.

8 CO-CHAIRMAN SCHECHTER: Really?

9 MEMBER SHIFMAN: Is that because  
10 you get discovery? It's routine now?

11 MR. DeWOLFE: It is routine in my  
12 jurisdiction.

13 MR. ROSE: I think it's probably  
14 fairly routine that you get it, but I,  
15 frankly, don't think it was a consideration  
16 for most folks. The question sort of involves  
17 whether you're going to do motions or what  
18 kind of a court it is, how you enter the  
19 court, and that just varies.

20 CO-CHAIRMAN SCHECHTER: Can you  
21 make motions in drug court?

22 MR. ROSE: You should be able to

1 now in Maryland, but it varied up until the  
2 time we go hold of the agreements and tried to  
3 make them uniform.

4 MR. DeWOLFE: I think typically  
5 the motion practice, if it's going to happen  
6 at all, would happen before entry to drug  
7 court. Drug court is sort of -- it's not a  
8 diversion, but it's a -- usually it takes one  
9 of two forms. It's either upon violation of  
10 probation or it's an agreement to set aside  
11 the prosecution of the case so that the person  
12 may by contract agree to enter this treatment  
13 program, and at that time they typically waive  
14 motions practice or typically waive -- by that  
15 time they have probably entered a plea of  
16 guilty.

17 CO-CHAIRMAN SCHECHTER: And just  
18 in Montgomery County, if you decide to go the  
19 motion route after 30 days and you lose the  
20 motion to suppress and you then decide you'd  
21 like to go to drug court, can you get into  
22 drug court?

1                   MR. DeWOLFE: Probably not, but  
2                   the way it is done in Montgomery County is  
3                   that the person is recommended for drug court,  
4                   and then an evaluation is done, and that's  
5                   where you get into the question of whether or  
6                   not the person is a dealer or a user. The  
7                   person doing the evaluation is supposed to be  
8                   able to read out that information.

9                   And then the court makes a  
10                  decision, and they could make a decision. The  
11                  prosecutor could recommend against it because  
12                  they have chosen to litigate motions or they  
13                  could recommend in favor of it, and they judge  
14                  ultimately makes the decision whether the  
15                  person gets in or not, but usually it  
16                  typically takes a guilty plea in order to.

17                 CO-CHAIRMAN JONES: Vicki, do you  
18                 have?

19                 MEMBER YOUNG: Well, in terms of  
20                 Maryland, maybe I'm hearing it wrong and in  
21                 part what Julia was hearing is that for the  
22                 people on the ground handling the individual

1 cases on the trial level, from both of you I  
2 wasn't hearing that they were having the due  
3 process concerns; that the concerns were  
4 coming from the top down because if you're at  
5 the trial level, that someone saying, you  
6 know, if I want someone to go into that  
7 program as one of the options, then that's  
8 just one of the things I consider in making  
9 the pool of recommendations.

10 But I was just trying to get a  
11 sense, you know, where is it that the concerns  
12 about the procedures we're using are coming  
13 from. Maybe I wasn't hearing you right  
14 because I thought PDS, you were saying you're  
15 not there at the decision and you're only  
16 there at the staffing end, and there's due  
17 process concerns there, but I'm getting --

18 MS. LEIGHTON: It depends on the  
19 court. It depends on the court. Mental  
20 health court we've been in from the ground  
21 level in terms of the design and talking and  
22 advising on the development of it. We

1           actually represent very, very few people in  
2           mental health court because of the nature of  
3           the charges that are available and because of  
4           the kinds of charges our staff lawyers handle.

5                        We don't even handle ten percent  
6           of the general filings, guns and drugs. So we  
7           handle a small fraction. I think you would  
8           find, and I wish I knew the answer to this one  
9           and I may try and figure it out, that our  
10          clients enter these problem-solving courts at  
11          a lower rate than we represent people. So if  
12          we represent ten percent of all the drug  
13          eligible cases, that we probably are send, you  
14          know, a lower percentage of that to the  
15          problem-solving courts than is seen throughout  
16          the system, but that is anecdotal. I don't  
17          actually have the hard data on it.

18                      What I think that I say it's not  
19          that they don't have due process concerns.

20                      MEMBER YOUNG: They are just  
21          willing to overlook them?

22                      MS. LEIGHTON: Well, no, I have a



1 lot of options, and so I can figure out where  
2 I want to go. It doesn't mean that they like  
3 a particular problem solving court or don't  
4 try and change the contract on behalf of their  
5 clients, and that has happened in some cases,  
6 or try to change the conditions or negotiate  
7 how the court will apply to their specific  
8 client.

9 And we had an instance recently  
10 where we got wind that a court was being  
11 created in a regional setting, and we thought  
12 we were seeing a pattern of how people were  
13 being sent to calendar, and everybody said --  
14 we took a constitutional challenge, and the  
15 court said it wasn't doing it, wasn't looking  
16 at it, wasn't really thinking about it, and  
17 the matter took the point away because this  
18 idea of a bull's (phonetic) court disappeared  
19 or has disappeared for now in terms of sending  
20 people.

21 So individual lawyers will see  
22 that pattern if they think someone is being

1 sent a particular way, and it's not  
2 advantageous to their client. Then they may  
3 raise a constitutional challenge at that  
4 point. If it had been advantageous to the  
5 client they would have not raised the  
6 challenge.

7 So, I mean, I think that our case  
8 loads do allow us to try to make -- what I'm  
9 trying to get at is it allows our individual  
10 lawyers to try to make the most out of every  
11 option out there and to try and push on those  
12 options that are out there.

13 But we don't have the discovery.  
14 So, again our case load sort of allows up some  
15 investigative abilities that may not be  
16 available. For example, we can start  
17 investigating the second we get a case. The  
18 panel attorneys have to get a voucher, and the  
19 time periods for that and how much is approved  
20 and whether it's approved in these kinds of  
21 cases for the kind of time, you know, the kind  
22 of investigation that you can do in, you know,

1 five days if you've got the resources to get  
2 out there, can allow you to make decisions.

3 But the flip side of it in D.C. is  
4 this is a resource save. The U.S. Attorney's  
5 Office and the prosecutors, they're saving  
6 resources if they don't have to complete  
7 discovery, if they don't have to make motions.

8 So there's a quid pro quo to  
9 getting into any of this, and I don't think we  
10 feel the same drive because I think we figure  
11 in our world we have to go out in the  
12 investigation ourselves anyhow. So we just  
13 get started, figure it out, and then advise.

14 But you still miss key pieces for  
15 some of your motions litigation. What would  
16 the radio runs have revealed in contradiction  
17 to the run reports for Fourth Amendment  
18 challenges? And that's always up in the air.

19 MEMBER SHIFMAN: I wanted to pick  
20 up the thread that came through at least from  
21 Julia and Paul, and I'm sure it's true for  
22 you, Peter, as well, but this idea that

1 sometimes you would advise a client just do  
2 the 30 days, just do the six months. You  
3 know, you get the sense that they're not going  
4 to be able to show up weekly. You know,  
5 they're just not ready to commit to the kind  
6 of activity level that these particularly drug  
7 treatment courts or community courts might  
8 require.

9 So my question to each of you, and  
10 if you could keep your answers concise, is  
11 whether or not you are finding that the  
12 sentences that are handed out in these courts  
13 for failure are significantly higher or just  
14 higher in general than the sentences they  
15 would have received had they just done the 30  
16 days or the six months on a routine plea for  
17 the offenses but the fact they went into the  
18 specialty courts.

19 MR. ROSE: I can reverse and say  
20 from my vantage point, I don't have any  
21 information on that, but as I think I said  
22 earlier, we're always suspicious.

1           MR. DeWOLFE: I think here is  
2           where the major problem lies, and that is when  
3           the judge that is the local judge or the  
4           specialty court judge, also has control of the  
5           criminal case because that's where I think you  
6           see you'll get a more serious -- that happened  
7           in our court.

8                     In our court, typically what would  
9           happen is another judge would send someone to  
10          drug court or agree that the case can go over  
11          to drug court, and then if the person busted  
12          out, then they would go back to the original  
13          judge.

14                    That has changed. That is another  
15          example of how the rule has changed, and now  
16          the drug court judge becomes the probation  
17          judge as well, and that's a very huge concern,  
18          and I think the ABA has looked at that as  
19          well. I think that there is a real concern  
20          that the judge takes it personally and that  
21          the sentence might be worse at the end.

22                    So when you're advising your

1 client whether to go into this court, you also  
2 have to advise them that that judge is going  
3 to hear the violation of probation case or  
4 that judge is ultimately going to sentence you  
5 on the case itself and you may do better, you  
6 may be better, you know, to keep the case out  
7 of drug court.

8 But you know, a lot of these  
9 people -- I'm sorry. I'm trying to keep it  
10 succinct -- but a lot of the people that we  
11 represent at least in our jurisdiction, this  
12 drug court really is the last chance before a  
13 long term incarceration, and so if they make  
14 it they avoid that, and so that's the weighing  
15 that the defense attorney has to do in every  
16 case.

17 Being in drug court is generally  
18 better than being in state prison, but if you  
19 can end up in state prison anyway, that's the  
20 way that the defense attorney has to think.

21 CO-CHAIRMAN JONES: Adele has got  
22 one quick question and then Jane, and then I

1 want to move on to a different --

2 MS. LEIGHTON: Could I response?

3 CO-CHAIRMAN JONES: Oh, I'm sorry.

4 I'm sorry.

5 MS. LEIGHTON: The answer is that

6 we don't have the data to really know that.

7 I think anecdotally the sense is in drug court

8 you've already been sentenced. You know it's

9 hanging over your head, and then the question

10 is I won't bore you with a transcript where a

11 lawyer tries to get back to the original judge

12 for a sentencing and to actually advocate for

13 a different sentence than the one that was

14 suspended based on his conduct, and the drug

15 court judge said, "I'm not having a sentencing

16 hearing. I'm not hearing you on sentencing.

17 All you're stepping back for a sanction and

18 you can set a sentencing data off or you can

19 accept my sentence, but I'm not having a

20 sentencing hearing."

21 And the lawyer said, "Okay. We'll

22 take the sanction. Give us the" -- but again,

1 know your forums, right, where your client is  
2 going, and as long as you have people that are  
3 paying attention to that, you can work your  
4 way through it, and I suspect there may be  
5 some change in the District to now to have  
6 voluntary sentencing guidelines that have, I  
7 think, made more uniform sentencing practices  
8 in the District so that we may see less of  
9 that individual, but it's a risk. It's always  
10 a risk.

11 In eight years of litigating  
12 cases, I had one client that ever decided to  
13 do the time. I think it's rare. It's a rare  
14 person. It's a rare set of circumstances.

15 CO-CHAIRMAN JONES: Adele and then  
16 Jay and then we're going to move on.

17 MEMBER BERNHARD: Okay. I was  
18 just wondering. A lot of what we're talking  
19 about or hearing about or thinking about seems  
20 like it's sort of overarching policy, and so  
21 what should the rules be? You know, what  
22 should the eligible criteria be.



1           But the individual lawyers aren't  
2           generally involved in those conversations. I  
3           mean, what kind of information is being  
4           communicated to the lawyers to help them  
5           handle the new situations? Are there  
6           trainings? What are we doing to give them the  
7           information so that they do have all of those  
8           options and can move from one court to the  
9           other, you know, and avail themselves of  
10          what's out there?

11           MS. LEIGHTON: We have ongoing  
12          training, either weeks of training before you  
13          even get a case.

14           MEMBER BERNHARD: Right, but what  
15          specific to this situation?

16           MS. LEIGHTON: Exactly. We have  
17          biweekly mandatory trainings at each practice  
18          level and a schedule of what you're learning  
19          and being trained on, and it includes the  
20          problem-solving courts. Again, we're not in  
21          those courts a lot.

22           MEMBER BERNHARD: Right.

1 MS. LEIGHTON: But we have a very  
2 low lawyer-to-supervisor ratio. It is the  
3 supervising lawyers in our Trial Division that  
4 sit on the drug --

5 MEMBER BERNHARD: Would it be  
6 difficult for us to see some of the training  
7 materials, to see what people are  
8 communicating to the lawyers?

9 CO-CHAIRMAN JONES: If you feel  
10 comfortable sharing that with us.

11 MEMBER BERNHARD: I mean if you  
12 do. I'm not saying that you have to,  
13 obviously. I'm just trying to get a sense  
14 because we are going to be talking to lawyers,  
15 not so much to the policy ends, and so I'm  
16 trying to focus on what we could be doing or  
17 saying that would be helpful to the lawyers.

18 CO-CHAIRMAN JONES: Paul and  
19 Peter.

20 MR. ROSE: Just briefly. The  
21 first question that was asked when we  
22 encountered this whole issue was is this

1 helping our clients. Do our attorneys on the  
2 ground like these things? That was question  
3 number one.

4 And I was the one who ventured out  
5 to convene all of us and perhaps to say, "Is  
6 this good for clients? You guys like this."  
7 And the rest of it followed and a lot of it  
8 policy driven, but that the end of that effort  
9 when we came to some sort of policy  
10 conclusions, we left it at we need -- and we  
11 have a training division -- we need to train  
12 our own lawyers. Office of Problem-Solving  
13 Courts in Maryland offers training. We don't  
14 like all of it, but many aspects of it, and we  
15 don't need to -- that's our plan and that's  
16 the endeavor, is to try to put together  
17 training specific to our view, to what our  
18 philosophy is with what we've done to  
19 restructure the course.

20 But we don't have any of that, and  
21 I couldn't hand over our training materials,  
22 but I --

1                   MEMBER BERNHARD:  But you're  
2                   thinking about it.

3                   MR. ROSE:  Yes.

4                   MEMBER BERNHARD:  Maybe we need to  
5                   have a way of continuing that kind of back-  
6                   and-forth in terms of getting that  
7                   information.

8                   MR. ROSE:  We'd love to do that.

9                   MS. LEIGHTON:  I'll talk to our  
10                  training director about it.  I mean, it  
11                  includes things like we had a specialty group  
12                  that does forensic practice work that had  
13                  looked at the tech labs, investigated the  
14                  labs, the testing, met with all of the staff  
15                  of the labs for drug testing, a lot of work  
16                  on, you know, what is new use, what is the  
17                  science behind new use test, what is the  
18                  science behind declining use test, you know.

19                  And my sense is that -- I don't  
20                  want to say this on tape, but I assume this  
21                  stays here -- my sense is that our lab is  
22                  pretty bullet proof right now, that we've

1 explored all of the challenges, but we have a  
2 specialty group, a forensic practice group  
3 that's to keep an eye on the lab practices.

4 Lawyers aren't expected to learn  
5 that.

6 MEMBER BERNHARD: Right.

7 MS. LEIGHTON: They're expected to  
8 come to --

9 MEMBER BERNHARD: But they have  
10 something can tap into.

11 MS. LEIGHTON: Yes.

12 CO-CHAIRMAN JONES: Just briefly I  
13 want to go through this just because we're  
14 interested, but not spend any significant  
15 amount of time on it, but the role of private  
16 counsel in these courts. Very, very quickly,  
17 do they appear in these courts? If so, how  
18 often?

19 And if not, what impact does that  
20 have on the Public Defenders Office both in  
21 terms of budget and in terms of case load? If  
22 you could just really sort of very succinctly

1 give us a sense of that.

2 MS. LEIGHTON: Very, very rarely  
3 do they appear, but typically if they appear  
4 they consult with us beforehand to get  
5 information about their employee in court.

6 CO-CHAIRMAN JONES: And how does  
7 that impact you in terms of resources, time,  
8 money, case load? Not a major position?

9 MS. LEIGHTON: No, but again, we  
10 don't handle the bulk of these cases. Our  
11 role in this area is to be support and to try  
12 to develop training. So one of the things I'm  
13 thinking about is whether we've done training  
14 for panel attorneys in this area.

15 MR. ROSE: As Paul mentioned  
16 earlier, we pick up where private counsel  
17 leave their clients, and it's not an enormous  
18 problem for us right now as far as I can tell,  
19 but every penny counts, and we're watching.  
20 We're paying attention to it because in the  
21 event there is going to be some rule making,  
22 we're going to have to address that problem.

1                   And I think the root of it is that  
2 private counsel don't really know what they're  
3 getting into .

4                   CO-CHAIRMAN JONES: Right, and I'm  
5 assuming that there's no additional  
6 remuneration for you when you pick up the case  
7 that the private Bar has left at your  
8 doorstep.

9                   MR. DeWOLFE: No. As a matter of  
10 fact, there's a grant in our jurisdiction, and  
11 it includes I have to have a prosecutor, but  
12 there is no money in the grant for the defense  
13 motion, and that's typical.

14                  CO-CHAIRMAN SCHECHTER: If I could  
15 ask one question.

16                  CO-CHAIRMAN JONES: Okay.

17                  CO-CHAIRMAN SCHECHTER: One of the  
18 things we've heard across the country and it's  
19 exactly the same, private attorneys don't show  
20 up, and concomitant with that, we also have  
21 heard that in many instances the public  
22 defenders are not showing up in these courts

1 after the initial acceptance. It's varied;  
2 it's spotty.

3 In Tucson, they show up. In  
4 Brooklyn, New York, they're not showing up.  
5 So my question is: if I'm a staff attorney  
6 and I pick up a case and it's assigned to drug  
7 court and the judge calls me back for 20  
8 conference over a two-year period, am I  
9 expected by my office to appear at each of  
10 those conferences?

11 MR. DeWOLFE: Yes.

12 MS. LEIGHTON: And yes in my  
13 office, but I guess to go back to the answer,  
14 we by agreement pick up all drug court cases  
15 for sanction hearings, even the panel.  
16 Ninety-five percent of those arrested in the  
17 District of Columbia quality for court  
18 appointed counsel. So the vast majority of  
19 the representation in the District is done by  
20 court appointed counsel.

21 But the cost to the system of  
22 bringing in on any given sanction day ten



1 different lawyers apparently troubled the  
2 court, which manages its suday (phonetic)  
3 budget and doesn't feel what happens to our  
4 budget.

5 So part of our decision to get  
6 involved and to staff that was a decision we  
7 made cognizant of our budget, cognizant of the  
8 court and trying to have a role in these  
9 problem-solving courts.

10 I will tell you we get pressure  
11 from our staff about the frustration they feel  
12 in these courts. We hie them to be scorched  
13 earth litigators, and these are frustrated  
14 courts, and likewise we hear from the judges  
15 who question, you know, how suited we are to  
16 this work.

17 CO-CHAIRMAN JONES: Inevitably  
18 what we've found as we've traveled around is  
19 that no matter how much time we allot to a  
20 panel, there's never enough of it to get to  
21 all of the things that we want.

22 One of the last two really issues

1           that we want to discuss with you all as we  
2           come up against the clock is sort of the  
3           overarching issue of ethics, and if you could  
4           just sort of give us a sense of what you think  
5           are the most frequent ethical dilemmas that  
6           your lawyers encounter as they operate in  
7           these courts and how the individual lawyer  
8           grapples and resolves these ethical dilemmas  
9           and whether or not there are office-wide  
10          conversations, thoughts, policies about some  
11          of the sort of myriad ethical dilemmas that  
12          the lawyers encounter as they work through  
13          these courts, we'd appreciate it.

14                        Julia, on the ethics question?

15                        MS. LEIGHTON: I don't think we  
16           do, and I think that may be sometimes why the  
17           court doesn't want us there. I think, yes,  
18           there's pressure on the issue of client  
19           confidences, but that's true in every court,  
20           in every setting whenever a client doesn't  
21           show up, whenever a client is late. How  
22           quickly do you answer? How do you answer?

1           How do you handle that situation?

2                       So I think it doesn't really  
3           change from the myriad of circumstances in  
4           which they typically find themselves. The  
5           concern I see for the District is when the  
6           universe of attorneys that appear in a  
7           particular court becomes very small and the  
8           court is controlling the budget and who helps  
9           them, supports them, monitors them for  
10          maintaining their independence. I think  
11          that's the biggest concern I see in the  
12          District.

13                      MR. DeWOLFE: Yeah, I think it's a  
14          huge problem, and I think the biggest problem  
15          is that institutional pressure to be a team  
16          player and to be concerned about the best  
17          interest of the client as opposed to being an  
18          advocate concerned with the expressed interest  
19          of the client on any given, and that's where  
20          the due process problems come in, when an  
21          attorney has to stand up to the judge and to  
22          the team and say that my client denies the

1 allegation or that my client does not want the  
2 sanction, and we want a hearing, and we want  
3 to litigate.

4 The pressure is enormous, and we  
5 generally have one or two attorneys that  
6 handle the drug court in our jurisdiction, and  
7 it's a constant battle, and as District Public  
8 Defender, we sort of have to back them up and  
9 bolster them on this issue of standing up to  
10 the judge and demanding hearings and demanding  
11 due process. It's a big problem.

12 CO-CHAIRMAN JONES: Do you ever  
13 encounter situations where the defense  
14 attorney and his client may not be in  
15 alignment, maybe in disagreement about what  
16 should happen where? And the defense attorney  
17 may think after coming from one of these  
18 private meetings in the back, ex parte  
19 meetings in the back, thinking that, well, if  
20 he takes the sanction, the judge is going to  
21 go softly on him, and I know this because I've  
22 been in the back and I know where, but the

1 client comes into court that morning and says,  
2 "I didn't do anything wrong. I don't want  
3 this sanction."

4 The defense attorney thinks the  
5 sanction might be the best thing. How do they  
6 -- and they're part of this team -- how do  
7 they resolve that dilemma?

8 MR. DeWOLFE: Well, you know,  
9 frankly, the real problem is that the  
10 sanctions can happen anyway. After that team  
11 meeting, the sanction is going to happen, and  
12 the attorney has to work with the client, tell  
13 the client what's likely to happen, like  
14 almost in any other case, and if the client  
15 says, "I want a hearing. I want to fight  
16 this," then the attorney has the obligation to  
17 fight it, but with the knowledge that that  
18 sanction is going to happen. That person is  
19 going to go to jail because it has been  
20 decided. It has been decided in the team  
21 meeting.

22 That's the reality of the

1 situation.

2 CO-CHAIRMAN JONES: How meaningful  
3 is that? If the defense attorney has been in  
4 the back and says, "I think sanction certainty  
5 is appropriate" --

6 MR. DeWOLFE: Well, see, I think  
7 the attorney should not say that without  
8 consulting the client. That's where the  
9 advocacy has to happen. Clearly, in this  
10 court the best advocacy is done in those team  
11 meetings and after consultation with the  
12 client and after a full understanding of what  
13 is, what might happen, and what will happen.

14 Then I think the attorney has to  
15 after the meeting take the client aside and  
16 discuss all of the options and then go with  
17 what the client expressed interest in. And  
18 that's the ethical obligation.

19 The team meetings are --

20 CO-CHAIRMAN JONES: you don't  
21 participate in the team meetings?

22 MR. DeWOLFE: But they're really

1 rampant in all of the drug courts, specialty  
2 courts that we've looked at.

3 CO-CHAIRMAN JONES: They exist for  
4 you.

5 MS. LEIGHTON: Not really.

6 CO-CHAIRMAN JONES: Let's let  
7 Peter get a chance.

8 MR. ROSE: Let me just say that  
9 hypothetical situation just articulated, it  
10 was my fear as I sat in court, the anecdote I  
11 gave you at the top of the discussion,  
12 watching the Public Defender move from the  
13 defense table to the state, and the guy comes  
14 in, the client, and there's a recommendation  
15 that's being advanced by the state and the  
16 Public Defender together, and then he's got  
17 another Public Defender lawyer.

18 It was just a nightmare to watch,  
19 but all of those things went through my head.  
20 How on earth can he do what he's doing? How  
21 on earth can he?

22 You know all of those

1           permutations, and that was the anecdote.

2           That's what I witness.

3                           CO-CHAIRMAN JONES:   How do you  
4           lawyers resolve those problems, if at all?

5                           MR. ROSE:   Well, I think across  
6           the state in large measure they are struggling  
7           with some of these identity issues, and that  
8           anecdote is a bit of an exception because  
9           there are a couple of places where we've seen  
10          this kind of participation, where the folks  
11          drink Koolaid, if you will, and we've  
12          corrected that.

13                          But that's one of the big fears,  
14          and the rest of it from my vantage point,  
15          again, it's philosophical or you read the  
16          literature and the debate back and forth  
17          between the scholars about the roles and the  
18          ethics and the dilemmas, but I think what Paul  
19          is describing is much more where the grounded  
20          problem is.  It's the institutional pressure  
21          and the dynamic that's created by the added  
22          ethical dilemmas.



1                   I mean, every lawyer has a  
2                   question about what am I going to do with this  
3                   situation, and you have a tough one. This  
4                   adds another dimension.

5                   But that description is wholly  
6                   different from sitting with a client and  
7                   saying, "Okay. Look. This judge is going to  
8                   knock you out of the park. I'm not going to  
9                   go in there and ask for nothing. We've got to  
10                  ask for something to make this realistic.:

11                  Getting your client's permission  
12                  and consent, really understands everything  
13                  that's going on, that's the fear, and part of  
14                  our training efforts are absolutely going to  
15                  be geared toward the role of counsel and not  
16                  having to encounter ethical dilemmas so that  
17                  we don't have to deal with it.

18                  CO-CHAIRMAN JONES: Can I just ask  
19                  Julia one quick question?

20                  How do you not participate in the  
21                  team meetings if the judge is there and the  
22                  prosecutor is there and the social worker is

1           there?  Are there team meetings that happen  
2           that --

3                       MS. LEIGHTON:  No.  Part of it is  
4           our court isn't designed quite that way.  They  
5           do their job.  We do our job.  They wonder why  
6           we -- I mean, the push-pull is how much time  
7           do we get to talk.  Can we push off the  
8           sanction?  Can we articulate something about  
9           the drug test that gets us -- I mean, that's  
10          what we do, and we start from the premise.

11                      We certainly convey to the  
12          clients, "Look.  We've investigated this lab.  
13          This is what we know about this lab.  This is  
14          what we know about the science of it.  This is  
15          the extent of what we know we can say."

16                      You can only go so far with the  
17          poppy seed muffin, right?  You can only go so  
18          far.  but we know what the options are, and we  
19          talk with our clients about what -- you know,  
20          what the arguments can be for the testing, and  
21          we try to convey all of that information in  
22          advance and say, you know, "This argument

1           doesn't pass the lab test. This gets us a  
2           little closer. This is the only thing we have  
3           any scientific evidence on."

4                       And we end up with that. I have a  
5           transcript where a judge says, "Well, give me  
6           a reason why your client could, this could  
7           be," and so where he starts to argue it, and  
8           the judge says, "Argue a scientific basis for  
9           the test results." And the judge says -- and  
10          then it sort of becomes clear that he hasn't  
11          consulted with his client. This isn't where  
12          this information is coming from.

13                      And he says, "How dare you put  
14          forward an argument that you aren't taking for  
15          your client."

16                      And he said, "Judge, you asked me  
17          how could it be, not how it was in this case.  
18          I'm telling you how it could be."

19                      And the judge went after him and  
20          said, "That's unethical. I asked you a  
21          question."

22                      And he said, "Let's pull the

1 transcript. You did not ask me that question.  
2 You asked me how it was possible. I'm  
3 articulating how it would be possible, and I  
4 still need more time to talk with my client.  
5 I am not answering that question."

6 CO-CHAIRMAN JONES: So let me just  
7 make sure that I'm clear. There are no team  
8 meetings at all in your staff.

9 MS. LEIGHTON: We don't have them.

10 CO-CHAIRMAN JONES: No staff  
11 meetings.

12 MS. LEIGHTON: No.

13 CO-CHAIRMAN JONES: So your drug  
14 court is actually much more adversarial than  
15 a lot that we --

16 MS. LEIGHTON: Not adversarial  
17 enough according to my lawyers, but yes, I  
18 have to say.

19 MEMBER CLARK: I just have a  
20 question for Mr. DeWolfe.

21 In terms of the ABA standards,  
22 what is the standard that you've talked about

1 in terms of the defense role participating in  
2 the staffings and in the meetings? What is  
3 the recommendation going to be? Should they  
4 not participate?

5 MR. DeWOLFE: Yeah. No, it is --

6 MEMBER CLARK: Or no staff? I  
7 mean, are they on the team?

8 MR. DeWOLFE: Yeah, they are.

9 It's a recognition that these exist and that  
10 the teams exist, and you can either  
11 participate or not participate. So the  
12 recommendation is that they participate and  
13 they advocate for the expressed interest of  
14 the clients within the team essentially.

15 MEMBER BERNHARD: And that's a key  
16 word, that expressed interest.

17 MR. DeWOLFE: I'm not sure that's  
18 going to end up in the standards, but that's  
19 the thought behind it.

20 MEMBER BERNHARD: All right.  
21 That's a key word though because that gets  
22 into the gist of the whole thing.

1           MR. DeWOLFE: It does. No, that's  
2 the ethical dilemma, was do you advocate for  
3 what the client wants or do you advocate for  
4 what the team feels, but that's different.

5           MS. LEIGHTON: That isn't -- that  
6 can't be -- I'm sorry. That can't be the  
7 ethical dilemma under the rules.

8           MEMBER BERNHARD: Not for the  
9 team, but suppose it is --

10          MR. DeWOLFE: Well, you know,  
11 that's the ethical dilemma of participating in  
12 these drug courts.

13          MS. LEIGHTON: It might be a rule  
14 dilemma, but it can't be a dilemma under the  
15 rules. The client sets the goals of  
16 representation.

17          MR. DeWOLFE: Oh, absolutely, and  
18 that's what we are intending to build into the  
19 standards, is that the role of the defense  
20 attorney is to follow the ethical standards,  
21 to advocate zealously within and without,  
22 within and outside of the team.

1 CO-CHAIRMAN SCHECHTER: Yeah.  
2 What we've seen in some of these, we've sat in  
3 on some of these drug meetings. In one I was  
4 invited to sit in by the judge in the team  
5 meeting unbeknownst to me. It was quite  
6 interesting. It was in Tucson.

7 And you talk about the ethical  
8 dilemma. It came about three-quarters of the  
9 way into the staffing meeting on a particular  
10 defendant who had violated, and this was the  
11 third violation. Probation wanted to continue  
12 the person. The prosecutor did not. The  
13 judge wanted to continue the person. The  
14 defense attorney said nothing, and I watched  
15 her. She was very experienced. She said  
16 nothing.

17 And I sat there, "Why is she  
18 saying nothing?" And about 30 seconds later  
19 it became obvious why, because the staffing  
20 person assigned to the court had found a new  
21 violation, and it was absolutely crystal clear  
22 because I asked the staff attorney afterwards.

1           The defense attorney knew about the new  
2           violation, but wasn't going to tell anybody.

3                         MR. DeWOLFE:   Right, right.

4                         CO-CHAIRMAN SCHECHTER:   That's the  
5           ethical dilemma, and you know, when you say as  
6           Adele said, you know, she picked up on the  
7           words "expressed interest."   This is where we  
8           keep running into on this elephant in the  
9           room.

10                        You know our attorneys are going  
11           into those rooms.   How far can they go, and so  
12           we had one attorney in Florida who told this  
13           committee that there should be new ethics  
14           rules to govern defense attorneys in drug  
15           courts.

16                        I don't know.   I think I'm right.  
17           You don't have guidelines yet in Maryland for  
18           your staff attorneys on what they can do at  
19           these meetings.   Would that be fair to say?

20                        MR. ROSE:   No, there are no rules  
21           or statutes or anything, but we told our  
22           attorneys it's an expression.   We don't do



1 best interest representation.

2 MS. LEIGHTON: And there are  
3 rules. There are the rules of professional  
4 conduct.

5 CO-CHAIRMAN SCHECHTER: Right,  
6 right.

7 MS. LEIGHTON: Who needs special  
8 rules?

9 CO-CHAIRMAN SCHECHTER: Right.  
10 Your position Julia would be that the ethics  
11 rules say we have a zealous representation  
12 obligation to the client and to protect  
13 privileged communications. End of story.

14 Therefore, if you're sitting in on  
15 a team meeting and you're advocating  
16 zealously, you cannot reveal to that team that  
17 your client just told you, "I had some coke  
18 last night."

19 MR. ROSE: Absolutely.

20 CO-CHAIRMAN SCHECHTER: Am I  
21 right?

22 MR. ROSE: Right.

1 MS. LEIGHTON: And in the juvenile  
2 context we do participate in these team  
3 meetings, and we participate as advocates. I  
4 mean, it's a rehabilitative model, but we're  
5 there, to be very clear, the voice of our  
6 client, our client's stated interest as judge  
7 after judge looks at us in these cases, or a  
8 few meetings look at us.

9 Judges will look at our clients  
10 and say, "Ignore what your lawyer just said,"  
11 and we fight back with that. You know, it's  
12 that rehabilitative mode.

13 I'm going to talk to your client.  
14 The client has already been adjudicated. Stop  
15 making excuses. It's time, young man, to step  
16 up. Ignore your lawyer.

17 And we push back and say, you  
18 know, one, you can't denigrate our role. You  
19 can articulate what you see as the interest,  
20 but do not denigrate the role of the lawyer in  
21 front of our client like that.

22 And the role in these team

1 meetings in the face of -- yes, I sometimes  
2 would. You know, a lot of experts are saying,  
3 "He's 13. This is what has happened to him.  
4 He needs to go to this special residential."

5 And our fight is absolutely not,  
6 absolutely not, absolutely not. If he has to  
7 stay at Oak Hill, he wants to stay in the  
8 community. That is his stated goal, and we  
9 will use every argument we have to try and  
10 persuade the experts that they're exceeding  
11 their expertise.

12 CO-CHAIRMAN JONES: We are  
13 unfortunately over on time, but before we let  
14 you go, and this has been a fascinating  
15 conversation, we appreciate you for having it  
16 with us.

17 What is your recommendation to us  
18 as a body who is about to publish a report on  
19 specialty courts, and assuming that we have no  
20 pre-conceptions or limitations whatsoever?  
21 Should these courts be abolished? Are they  
22 salvageable?

1           If each one of you could just take  
2 a minute or two and tell us what is your sense  
3 of that.

4           MS. LEIGHTON: When I hear what's  
5 happening elsewhere, I like a couple of our  
6 courts, but I really do think since you are  
7 looking nationally the challenge ought to be  
8 out there. Why do we have them all? How are  
9 they an effective use of resources?

10           I mean, intervention clearly helps  
11 people, but are we getting the intervention to  
12 the people who need it? Can we demonstrate  
13 that we're doing that? And can that be done  
14 in the court system?

15           We are making judges and the court  
16 system -- I think we're really getting close  
17 to twisting principles here and missing what's  
18 really needed, which is those resources spent  
19 before people get into the system and those  
20 resources equally available to everyone that's  
21 in the system, with the lawyers, with the time  
22 and the case load that allows them to try and

1 put together those packages for the clients  
2 whose expressed interest is served by those  
3 packages.

4 CO-CHAIRMAN JONES: Thank you.  
5 Thank you very much.

6 Paul.

7 MR. DeWOLFE: If they are to  
8 continue to exist, and I suspect that they  
9 will, then I think the recommendation of the  
10 Criminal Defense Lawyers Association should be  
11 that these courts should not be standardless,  
12 that there should be some overriding  
13 principles that guide these courts, that the  
14 role of the defense attorney should be  
15 strictly or at least should be spelled out in  
16 a way that is consistent with the ethical  
17 obligation of each attorney in any court in  
18 the country, and that the attorney should not  
19 abrogate his or her duty to the client.

20 I agree with the recommendation  
21 that the expressed interest of the client  
22 should be paramount in all of these courts,

1           and that attorneys participate in Public  
2           Defender Offices that participate should be  
3           concerned about the due process issues that  
4           have arisen throughout the country in so many  
5           of these courts and that the Defense Lawyers  
6           Association should be vigilant in making sure  
7           or assuring that drug process concerns are  
8           addressed in all of these courts.

9                        CO-CHAIRMAN JONES: Thank you.

10                      Peter.

11                     MR. ROSE: I think thus far the  
12           Maryland Office of Public Defenders is  
13           essentially managing what we see as a  
14           liability. As I mentioned, as you knew, we  
15           are currently litigating now the validity of  
16           these courts as they're set up in Maryland.  
17           I suppose my suspicion is that they will  
18           continue in some form or another. That form  
19           may dictate whether we view as management  
20           liability or embracing real option for  
21           clients.

22                      Overarching, I think, the

1 philosophical question for us is probably  
2 whether drug courts is an appropriate response  
3 to drug crime related problems, and I'm  
4 talking about drug courts specifically, or  
5 whether they're really an inappropriate  
6 response to a failed response to public health  
7 problems and socioeconomic problems. But  
8 that's a philosophical debate, but that's  
9 where our heads are.

10 CO-CHAIRMAN JONES: Well, thank  
11 you, and thank you all for a very, very  
12 productive conversation.

13 We have gone over, as you know.  
14 We are scheduled to take a 15 minute break.  
15 We're going to turn that into a five minute  
16 break because our next speaker is coming to us  
17 via videoconference, and we want to make sure  
18 that we are timely back for him. So let's  
19 have everybody back at 11:45.

20 Thank you.

21 (Whereupon, the foregoing matter  
22 went off the record at 11:41 a.m.)

1                   and went back on the record at  
2                   11:50 a.m.)

3                   CO-CHAIRMAN JONES: We just want  
4                   to start out by thanking you very much for  
5                   taking the time to do this. We're on the last  
6                   leg of a portion of our journey which has been  
7                   to travel around the country and meet with and  
8                   talk to stakeholders in problem-solving courts  
9                   around the country. We're very pleased to  
10                  have this time to speak with you.

11                  And the way that we operate is  
12                  that we would like for you -- and you should  
13                  know if you can't see completely and I'm  
14                  assuming that what we see in the lower left-  
15                  hand corner is what you see, and if that's the  
16                  case, you might not be able to tell that this  
17                  room goes a little deeper than your picture  
18                  and that there are other folks in the room as  
19                  well beyond our task force.

20                  But the way that we operate is  
21                  that we would like to give you five minutes or  
22                  so to just sort of tell us a little bit about



1           you, about yourself and the work that you're  
2           doing, and then we have some questions that  
3           we'd like to put to you.

4                       The way that we operate is that  
5           one of the members of the task force is  
6           principally responsible for the questioning,  
7           and for this conversation that's going to be  
8           the gentleman sitting next to me, Jay Clark.

9                       So at this point, I hope you heard  
10          everything that I said. The floor is yours,  
11          and we're interested in hearing about you and  
12          the court that you run.

13                      JUDGE BOZZA: Okay. Would you  
14          like to know a little bit about my background?  
15          Is that where you want to start?

16                      CO-CHAIRMAN JONES: Yes, sir.

17                      JUDGE BOZZA: Well, I've been on  
18          the bench almost 20 years. Before taking the  
19          bench in 1989, I was an associate professor of  
20          criminal justice at Gannon University. I had  
21          been both a defense attorney and a prosecutor,  
22          and I had taught at that time probably for

1            somewhere in the area of 16, 17 years at two  
2            or three different universities.

3                        My educational background is that  
4            I have, of course, my law degree from DePaul.  
5            I have a Master's degree in criminal justice  
6            from the School of Criminal Justice at the  
7            State University of New York at Albany.

8                        My very first foray into criminal  
9            justice was back in the early 1970s when I  
10          served as a probation officer in Monroe County  
11          in New York, New York State.

12                       So that's a thumbnail sketch of  
13          where I've been, and of course, my interest in  
14          this topic comes from both my academic  
15          interest as well as my experience here in the  
16          court, and I have been involved to one degree  
17          or another in criminal justice, criminal law,  
18          and related psychological and psychiatric  
19          issues for probably more than 35 years.

20                       So that's where I think I would  
21          let that stand unless there's something more  
22          that you think that you need to know about

1           that.

2                           CO-CHAIRMAN JONES:   That's  
3           wonderful and we appreciate that.  If you  
4           could give us a little bit of a sense of the  
5           court.

6                           JUDGE BOZZA:   The court that I  
7           serve in?

8                           CO-CHAIRMAN JONES:   Yes.

9                           JUDGE BOZZA:   Erie County is a  
10          moderate size community in northwestern  
11          Pennsylvania.  We are a court that's comprised  
12          of nine common pleas judges, and 15 -- I think  
13          it's now 15 district judges.  The common pleas  
14          judges are general jurisdiction judges that  
15          handle all manner of cases, civil and criminal  
16          up to the appellate level.

17                          And so my experience here has been  
18          in every area of the court.  Initially I  
19          served in both the Trial and Family Division  
20          for a couple of years.  Then I was assigned to  
21          the Family Division for a few years.  Then I  
22          served as the Administrative Judge in the

1 family court. I served as the president judge  
2 of the entire Court of Common Pleas for five  
3 years, and then Administrative Judge of the  
4 Trial Division of the court for about seven  
5 years or so.

6 Currently I'm assigned to doing  
7 mostly juvenile delinquency in dependency work  
8 where there are similar issues to the ones  
9 we're talkinga bout here, but in a slightly  
10 different context, and so I have a variety of  
11 experience.

12 Now, I also teach sentencing at  
13 the National Judicial College, which is a part  
14 of the University of Nevada, affiliated with  
15 the American Bar Association. I've been  
16 teaching sentencing and some other courses  
17 there since 1998. I teach for the  
18 Pennsylvania Supreme Court, New Judges School.  
19 I teach sentencing for them as well, and I  
20 also occasionally do seminars for the Supreme  
21 Court, the Administrative Office of  
22 Pennsylvania Courts for judges across the

1 state.

2 So that's a thumbnail sketch of my  
3 experience as far as the judging side of  
4 things goes.

5 Now, I would gather from my  
6 initial discussion that I had with Mr. Cutler?

7 CO-CHAIRMAN JONES: Right.

8 JUDGE BOZZA: That perhaps I'm  
9 somewhat of a lone voice in the woods on this  
10 issue of the role of judges in drug courts and  
11 the efficacy of drug courts, but I can tell  
12 you that I've been teaching about and involved  
13 with this whole drug court movement for a  
14 considerable period of time.

15 We do have a drug court here in  
16 Erie County. I am not directly involved in  
17 it. One of my colleagues was the initiator of  
18 it and has presided over it for a number of  
19 years.

20 We also have a mental health  
21 court, not so much as a separate undertaking,  
22 but it's a part of the entire drug court

1 approach, and together they're oftentimes  
2 referred to as treatment court.

3 We do not have a domestic  
4 relations court. We don't have a DUI drug  
5 court or actually another other specialty  
6 court. There is a juvenile court program that  
7 is affiliated with the adult program, and so  
8 that's the essence of what the lay of the land  
9 looks like here in Erie County with regard to  
10 drug courts I am involved in.

11 CO-CHAIRMAN JONES: Thank you.

12 At this point I'm going to turn  
13 the questioning over to Jay Clark, who you see  
14 sitting next to me.

15 MEMBER CLARK: Good morning,  
16 Judge.

17 JUDGE BOZZA: Good morning.

18 MEMBER CLARK: Judge, I've read  
19 your article about benevolent behavior  
20 modification that got published in the Widner  
21 Law Journal.

22 JUDGE BOZZA: Yes.

1                   MEMBER CLARK: And you make the  
2                   statement that the drugs courts and the  
3                   problem-solving courts have distorted the  
4                   traditional role of the judiciary that judges  
5                   participate in. My question is this. What do  
6                   you think the effect of the problem-solving  
7                   courts have been on the traditional role of  
8                   the defense attorney?

9                   JUDGE BOZZA: I think that it has  
10                  made life very difficult for defense attorneys  
11                  in many cases because the notion of drug court  
12                  has moved us away from the notion of advocacy  
13                  in an adversarial context to a collaborative  
14                  and cooperative model, and I do not believe  
15                  that ordinarily defense attorneys are either  
16                  well equipped or prepared and, quite candidly,  
17                  I don't believe it is their role to be  
18                  collaborators in treatment.

19                  I think they are advocates for  
20                  their clients. I think advocacy is a very  
21                  different thing than what is practiced in the  
22                  drug court setting.

1                   MEMBER CLARK: Do you think if  
2 drug courts were structured and they had  
3 guidelines or requirements that, in effect,  
4 restored the advocacy of the traditional role  
5 of the defense attorney and the judge and  
6 basically eliminated the team approach that  
7 they could exist or continue to exist, and  
8 would you be in favor of that?

9                   JUDGE BOZZA: I don't know because  
10 I would have to see what the restructuring is.  
11 You know, when you say take away the team  
12 approach, you know, that perhaps is one of the  
13 things that would need to be successfully  
14 altered in my view, significantly altered in  
15 my view to even get to the point where I  
16 believe we would be back to where we should  
17 be, but I'd have to see how that is  
18 structured.

19                   It's important to understand that  
20 the notion of specialty courts, but in  
21 particular drug courts and mental health  
22 courts, is that you are no longer talking



1           about whether or not somebody should be  
2           punished or, more broadly speaking, controlled  
3           by the state. You're now talking about, in  
4           effect, an agreement that the person should be  
5           either punished or, more broadly speaking,  
6           controlled by the state.

7                         And the only question becomes how  
8           effective you will be in accomplishing that,  
9           and I think that raises very significant  
10          jurisprudential issues, and I'm not sure that  
11          they can really be resolved by simply  
12          modifying the current approach, but I'd have  
13          to see what it looked like.

14                        MEMBER CLARK: You've done quite a  
15          bit of research, and a lot of thought went  
16          into your article. I want to talk to you  
17          about what you rated with effectiveness. Do  
18          you find or do you have a sense that some of  
19          these drug courts in terms of selection of who  
20          is admitted in the drug court, the criteria he  
21          admitted or taking people who are first time  
22          offenders, likely to succeed because the

1 court's numbers of success are higher? Are  
2 they taking a hard core drug user who truly  
3 needs the intensive treatment?

4 JUDGE BOZZA: Well, it's very  
5 difficult to generalize about that, and the  
6 reason is because there is no one standardized  
7 approach to drug courts in the country, and  
8 that's a very important thing to recognize.  
9 Every court essentially operates  
10 independently, even within states.

11 For example, in Pennsylvania there  
12 is no standard format to proceed in a drug  
13 court in Pennsylvania. The court that is here  
14 in Erie may be very different than the court  
15 that might be in your county or Philadelphia  
16 or Allegheny County. There is no one way to  
17 proceed, and with that said, the selection  
18 criteria are arbitrary either among the courts  
19 or perhaps even within the court.

20 And since it is a discretionary  
21 decision on the part of those people who are  
22 involved, I suspect very strongly that you

1 will find diversity, great diversity, from  
2 state to state, county to county throughout  
3 the country in the way in which they're  
4 chosen.

5 Now, parenthetically I'll say  
6 this. Originally, the original notion of drug  
7 courts was targeted towards those individuals  
8 who met certain criteria largely because the  
9 initial effort had to be sold as a program  
10 that would not endanger the community. And so  
11 very often in the beginning courts selected  
12 individuals who were nonviolent, who had  
13 relatively speaking more minor offenses and  
14 met certain other criteria.

15 Now, that has expanded, and there  
16 are some places in the country, I understand,  
17 who do, in fact, accept higher risk offenders.  
18 But I think that the important thing to  
19 recognize is in evaluating the concept is that  
20 you are not evaluating the same kind of  
21 program that's simply being replicated every  
22 place. There are tremendous differences.

1                   MEMBER CLARK: Your understanding  
2                   of the way the courts in Pennsylvania were,  
3                   statistically speaking is the demographic  
4                   breakdown of the people who were accepted in  
5                   the court along racial lines, along gender  
6                   lines; does it track the overall demographics  
7                   of people who are going into the system in  
8                   general?

9                   In other words, is it  
10                  disproportionate to one group that's getting  
11                  into the court as opposed to the general  
12                  arrests?

13                  JUDGE BOZZA: I cannot tell you  
14                  that because I have never seen any statewide  
15                  data. I can tell you that anecdotally --  
16                  actually, I'm losing your voice and your  
17                  picture got fuzzy there. Can you still hear  
18                  me?

19                  PARTICIPANTS: Yes.

20                  JUDGE BOZZA: I can tell you that  
21                  anecdotally in Erie County, it does seem that  
22                  there has been a consistent effort to avoid

1           those pitfalls. That is to say that they work  
2           hard at making sure that there is, shall we  
3           say, a representative group that gets the  
4           benefit, whatever those benefits are, of the  
5           drug court experience.

6                        I haven't seen that here, but I  
7           can't tell you for the rest of Pennsylvania.  
8           I don't know that.

9                        MEMBER CLARK: Do you know how do  
10          they do that in Erie County? Is there  
11          statistics that are kept? Is there a person  
12          who tracks that or how does that work?

13                       JUDGE BOZZA: There are statistics  
14          that are kept. There is an annual report that  
15          is prepared. It's prepared by the Civic  
16          Justice Institute or the Civic Institute,  
17          actually I think it's called, of Mercyhurst  
18          College, which also is responsible for doing  
19          the research that involved our program here at  
20          sanction certainty, and they do it. They do  
21          a report. They compile largely a descriptive  
22          report. It is not really an evaluative

1 report.

2 MEMBER CLARK: The program in Erie  
3 County, a person successfully completes it.  
4 What do they get out of that other than the  
5 obvious benefit of being drug free, we'll  
6 assume? Is the case dismissed? How is the  
7 case itself dealt with?

8 JUDGE BOZZA: Well, no, it's not  
9 dismissed, as far as I know. The case is  
10 actually simply brought to conclusion. They  
11 have to, I believe -- and I may not be  
12 completely up to date on this because this  
13 program has gone through, you know, revisions  
14 over time, and I'm not directly involved in  
15 it, but I believe what happens is that the  
16 individuals typically plead guilty to the  
17 events. They would normally be expected to go  
18 to jail. Instead of jail, they're placed on  
19 probation. They're placed on probation for  
20 varying lengths of time. If they complete the  
21 program, I believe then that they are released  
22 from their probation.

1                   MEMBER CLARK: With your article  
2 I'm clear that you think that the courts have  
3 basically undermined the role of the judge  
4 traditionally.

5                   JUDGE BOZZA: Yes.

6                   MEMBER CLARK: Do you think that  
7 there's a way that the courts can be salvaged  
8 to restore the judge's traditional role?

9                   JUDGE BOZZA: Do you mean in those  
10 places where there are drug courts?

11                  MEMBER CLARK: Correct.

12                  JUDGE BOZZA: Yes, yes.

13                  MEMBER CLARK: How? What would  
14 that look like?

15                  JUDGE BOZZA: Well, I think, first  
16 and foremost, what you do is you remove the  
17 judge as a therapist. The judge cannot be the  
18 treatment provider, cannot be the therapist  
19 and be the adjudicator. It's like saying what  
20 we really ought to do is we ought to have  
21 psychiatrists and then have them be the judge.  
22 Let's let them treat the patient and then when

1           they're finished treating the patient, they  
2           can determine what happens to them, what the  
3           government's role will continue to be.

4                        I mean, I think there's a  
5           fundamental problem, a fundamental  
6           inconsistency, and what we all need to  
7           understand, I believe, about the drug court  
8           notion, the specialty court notion is that we  
9           are talking about an effort to systematically  
10          use the court as a vehicle for changing  
11          behavior.

12                      Now, I would be the first to  
13          suggest that that enterprise has only modest  
14          success, but I would also be the first to  
15          argue that as the technology of changing  
16          behavior improves, and I believe it will,  
17          success will improve, and when success  
18          improves in that undertaking, the role of the  
19          judge in my view will be even more critically  
20          compromised.

21                      Now, I should tell you I have  
22          written about this as well in an article



1 published in 2002 with a bit of a different  
2 twist to it that has to do with the dangers of  
3 advocating treatment as the outcome in the  
4 judicial system. So they're related and  
5 importantly related topics.

6 MEMBER CLARK: I want to follow up  
7 with one of the conclusions in the article  
8 that I've got. We've heard some testimony in  
9 the other locations we've been to that there's  
10 some who feel that the financial resources,  
11 the money that is being used and devoted to  
12 the drug courts would be better spent if it  
13 was placed earlier in the system before the  
14 individuals came in contact with the criminal  
15 justice system.

16 What do you think?

17 JUDGE BOZZA: I doubt it because,  
18 first of all, I doubt that the government  
19 would spend that money wisely in that regard  
20 either, quite frankly. I mean, you know, it's  
21 common for us to say if we took the money from  
22 there and put it over there, it will work out

1 fine, but there's some assumptions about that  
2 which tend to be a little bit optimistic.

3 So I doubt just taking in a lot of  
4 money, which is actually in relative terms  
5 it's a fairly small amount of money, that it  
6 would really do much good at the front end.  
7 And the reason I tell you this, in fact, has  
8 to do with the fundamental notion of drug  
9 courts. That is to say that they are  
10 interested in presenting to defendants the  
11 opportunity to participate in treatment,  
12 something we call treatment.

13 The notion is that we must have  
14 some strategies that effectively change  
15 behavior, and if we apply those strategies,  
16 that behavior will, in fact, go away. We know  
17 that that is true only to a degree, and that  
18 degree is not nearly what we would like it to  
19 be.

20 And so if you move that to the  
21 front end, you still have the same limitations  
22 on the technology of behavioral change there

1           that you did at the other end. There's  
2           nothing different about that. Drug courts do  
3           nothing to improve the efficacy of treatment.  
4           Science is what we depend on to tell us about  
5           treatment.

6                         If the science doesn't improve,  
7           then our efficacy to use it can only improve  
8           to a certain degree.

9                         MEMBER CLARK: Do you think given  
10          the degree that drug courts are successful for  
11          a certain number of participants and that the  
12          number of course we have in place or would you  
13          advocate abolishing them?

14                        JUDGE BOZZA: I would advocate  
15          their adopting the approach that we adopted  
16          here in Erie County under the sanction  
17          certainty notion, with significant  
18          modifications.

19                        CO-CHAIRMAN JONES: Judge, let me  
20          ask you this. If the ability to successfully  
21          treat people with alcohol and chemical  
22          dependency improved, if the efficacy of those

1 programs and our ability to actually do  
2 treatment substantially improved such that we  
3 were to some degree of certainty able to  
4 scientifically know that we could treat  
5 people, where in society should that be  
6 housed, be placed?

7 Whose role is it? Whose job is  
8 it? I'm assuming that we don't think it  
9 should be judges in courts.

10 JUDGE BOZZA: No, I don't. I do  
11 believe it's the correctional system's role,  
12 and I mean, that's a whole other issue, but I  
13 believe that the justice system works well  
14 when it stays focused on what it really  
15 accomplishes or what it is intended to  
16 accomplish, I should say, and that I believe  
17 is this.

18 We feel very strongly that  
19 government control of human behavior --

20 (Pause in proceedings with  
21 videoconference technical interruption)

22 JUDGE BOZZA: -- roughly defined,

1 but at the very least it is a matter of the  
2 government controlling --

3 CO-CHAIRMAN JONES: Judge, can you  
4 hear me? Judge, can you hear me?

5 JUDGE BOZZA: Yes.

6 CO-CHAIRMAN JONES: I hate to tell  
7 you this, but we lost the last minute of what  
8 you were saying.

9 JUDGE BOZZA: Okay.

10 CO-CHAIRMAN JONES: So if you  
11 could just start that thought over we'd  
12 appreciate it.

13 JUDGE BOZZA: You probably didn't  
14 miss much.

15 (Laughter.)

16 JUDGE BOZZA: And many people here  
17 would agree with that.

18 What I was trying to get at it  
19 this. You know, the justice system itself is  
20 intended to bring responsibility to people who  
21 we believe are responsible for engaging in  
22 behavior that we don't like, and we punish

1           them. That's what we do. We punish them in  
2           all matters of way. We punish them by hurting  
3           them. We punish them by changing them. We  
4           punish them.

5                        So that's what the system is  
6           designed to do. It's accountability, and so  
7           I believe that really the fundamental issue  
8           here is how we should deviate from that.

9                        Let me give you an example. Any  
10          time I have somebody who appears in front of  
11          me who has some profound problem that we see  
12          as explaining criminal behavior, we try to  
13          come up with a solution for them, and we  
14          ordinarily say that we're going to do that by  
15          trying to rehabilitate you.

16                       Rehabilitation is a form of  
17          punishment because it's the government telling  
18          the person we're going to change you. That's  
19          sort of the bottom line of what we do.

20                       Now, we may not be good at it. We  
21          may do it in a very uneven sort of light, but  
22          that's what we do. That is what we do.

1                   Now, if there comes a time when,  
2                   in fact, science teaches us how to change  
3                   behavior predictably, efficiently, this raises  
4                   very large jurisprudential issues from our  
5                   point of view on how we proceed. Does that,  
6                   therefore, mean that when we put individuals  
7                   in the correction system one way, they will  
8                   come out another way, whether they want it or  
9                   not?

10                   In other words, if it doesn't even  
11                   require their cooperation, that would be  
12                   effective use of science, and if that's where  
13                   we want to go, if that's what society says we  
14                   want to do, then I believe that needs to be  
15                   done in the correctional system in the  
16                   executive branch of government so that -- and  
17                   then the critical point of this sort of long  
18                   speech -- so that judges can watch that  
19                   process closely and see what the government is  
20                   doing in making sure that, in fact, if we're  
21                   in the business of behavior change, we do it  
22                   in a way that meets our jurisprudential

1 requirements. I think that's critical.

2 MEMBER BERNHARD: Can I ask a  
3 question at some point?

4 MEMBER CLARK: Yes, go ahead.

5 MEMBER BERNHARD: Hi. I'm Adele  
6 Bernhard, and you're really thinking a lot  
7 about the role of the judge and the role of  
8 the court, and I tend to agree with everything  
9 that you've said, but I'm wondering why are  
10 these courts then so popular with judges.  
11 What's going on that makes this whole  
12 enterprise so very attractive?

13 JUDGE BOZZA: Well, you know, this  
14 is a question I've thought about quite a bit,  
15 and you know, the bottom line is this.  
16 Whether you as advocates for your clients can  
17 see this or not, the business of judging can  
18 be very difficult because we see very little  
19 success.

20 MEMBER BERNHARD: Right.

21 JUDGE BOZZA: Seldom do we  
22 experience significant changes in behavior of



1 the people that we are sentencing. I think  
2 there is a burning desire, a really very  
3 positive desire to see people change, to see  
4 success.

5 So when we come along and we offer  
6 to judges something that we feel is a success,  
7 we present it as a success, it's easily  
8 understood that we latch onto it, that we  
9 really want to give it a whirl. We want to  
10 see people change, and we want to have a role  
11 in that.

12 I think that is the general  
13 feeling that many, many judges have.

14 MEMBER BERNHARD: Well, and we  
15 don't want to really lose that positive  
16 engagement. At the same time there are  
17 definitely problems with the way the courts  
18 are structured.

19 JUDGE BOZZA: Yeah, I agree. I  
20 mean, I do think there are alternatives, but  
21 I don't see them on the horizon.

22 CO-CHAIRMAN JONES: Judge, as

1 we've found as we've gone around the country  
2 that there's never enough time to engage as  
3 thoroughly as we would like with people who  
4 come to us.

5 We've got one last set of  
6 questions from one of our members, and so I'm  
7 going to let him go ahead and ask that  
8 question.

9 MEMBER SCHUMM: Judge, under the  
10 sanction certainty model that you wrote about,  
11 that's part of probation. So there's still a  
12 conviction at the end. Would that be  
13 necessary or would it be possible that someone  
14 -- is there any reason someone would have to  
15 have a conviction still?

16 JUDGE BOZZA: No, no. In Erie  
17 County or in Pennsylvania, I should say, we  
18 have a program. It's called the accelerated  
19 rehabilitative disposition program. The  
20 shortened acronym is ARD, and that is the  
21 dominate pretrial diversion program in  
22 Pennsylvania, and so that is available to

1 first time offenders. They're placed on  
2 probation, and if they successfully complete  
3 it, they can, in fact, have their charges  
4 dismissed. In fact, they are dismissed. It  
5 isn't an option.

6 This model could be very easily  
7 used in that setting. Now, I would recommend,  
8 strongly recommend that if there's a sanction  
9 certainty approach going to be taken that it  
10 be a lot more sophisticated than the one we're  
11 using, and its chances of helping would be  
12 improved greatly, but it does not require a  
13 conviction. A conviction could be one of the  
14 incentives.

15 MEMBER SCHUMM: And when you  
16 mention success, is that no arrest for  
17 anything for a certain length of time? I  
18 mean, how do you define success? For a hard  
19 core drug user, isn't success maybe getting  
20 their life mostly back on track?

21 JUDGE BOZZA: From my point of  
22 view, within the court, not within the drug

1 and alcohol community, not within the broader  
2 community, within the court community, my  
3 belief is that success is that the person does  
4 not commit anymore crimes. The only reason  
5 that individual is here is because of criminal  
6 behavior. They're not here because he's a bad  
7 person. They're not here because they have  
8 mental health problems. They're here because  
9 they've committed crimes. We are a crime  
10 responding to entity. That's what the courts  
11 do because if you committed a crime, then you  
12 are convicted of that. We actually say you  
13 did it. You get punished. That's the notion  
14 of the justice system.

15 So I really do believe that we,  
16 the court, see our role as keeping people  
17 within the limited ability we have -- I have  
18 to say that -- limited ability we have to keep  
19 them from committing crimes.

20 CO-CHAIRMAN JONES: Last question,  
21 yes, last question.

22 MEMBER YOUNG: Okay. Do you think

1           that the way that your sanction certainty  
2           program has been implemented in Erie County is  
3           a viable alternative to drug court or what are  
4           your limitations?

5                         JUDGE BOZZA: I think it is I  
6           wouldn't say viable alternative because I  
7           believe what it is is drug court. It's drug  
8           court transposed. It's drug court without the  
9           judge. It's exactly the same theory being  
10          used without the judge's direct involvement  
11          and without compromising the role of the  
12          players.

13                        And so it's not so much it's an  
14          alternative. It's the concept in a different  
15          setting. They do exactly the same thing in  
16          sanction certainty as the drug court does with  
17          the judge, the same thing: use sanctions, use  
18          rewards. You use it in a way that is a part  
19          of whatever the science says it should be  
20          done.

21                        MEMBER YOUNG: Can it be more  
22          broadly applied beyond --

1                   JUDGE BOZZA: Absolutely. There's  
2                   no question it is a simple concept, and it is  
3                   almost without additional cost. I mean, one  
4                   of the phenomenal things about this whole  
5                   approach is it is so cheap to use this  
6                   approach. It requires so little in the way of  
7                   added bureaucracy that it should be broadly  
8                   attractive, but unfortunately, sometimes the  
9                   programs that are adopted and most attractive  
10                  are the ones that get, quote, funded. :They  
11                  need money.

12                  Once they need money, someone is  
13                  going to be giving it out, and therefore,  
14                  someone is there to receive it. And so I  
15                  believe that the sanction certainty model can  
16                  be sold as an approach to doing just what  
17                  you're doing in drug court with almost no  
18                  expense, very easily managed, but I think it's  
19                  something that could be done in most places.

20                  CO-CHAIRMAN JONES: Judge Bozza,  
21                  thank you so much for taking the time out of  
22                  your day to have this conversation, to bring

1           your voice and your ideas to this  
2           conversation. We greatly appreciate it.

3                         JUDGE BOZZA: You're very welcome.  
4           It's nice to meet all of you. We should get  
5           together like this more often.

6                         (Laughter.)

7                         JUDGE BOZZA: A wonderful  
8           technology. It's ideal.

9                         CO-CHAIRMAN JONES: Thank you.

10                        JUDGE BOZZA: Thank you. Good  
11           luck to you.

12                        CO-CHAIRMAN JONES: Thank you.

13                        (Whereupon, the foregoing matter  
14           went off the record at 12:22 p.m.  
15           and went back on the record at  
16           12:26 p.m.)

17                        CO-CHAIRMAN JONES: All right. We  
18           are inevitably slightly behind, but not  
19           hopelessly so. So if I can get everyone to be  
20           quiet, we will start the next panel.

21                        We have with us now Terrence  
22           Walton, who is the Director of Treatment at

1 the D.C. Pretrial Services Agency and Spurgeon  
2 Kennedy, who was the Director of Research,  
3 Analysis and Development at the same D.C.  
4 Pretrial Services Agency.

5 Welcome. We are pleased to have  
6 you and look forward to an engaging  
7 conversation. The way that we work is that  
8 one of us is responsible to lead the  
9 questioning of each panel, and for this  
10 particular panel that's going to be Marvin  
11 Schechter, but before we get to Marvin's  
12 questioning, I'd like to give each of you the  
13 opportunity to take five minutes or so and  
14 give us the benefit of your professional  
15 experience and the work that you're currently  
16 doing.

17 So having said that, the floor is  
18 yours. You can decide amongst yourself who  
19 will go first, but we're excited to have this  
20 conversation.

21 MR. KENNEDY: Well, first off,  
22 good afternoon and thank you for the chance to



1 present this information.

2 I've always been told as a speaker  
3 there are two places that you never want to  
4 be. One is before lunch; one is after lunch.  
5 So with that I'll try to be as brief and  
6 hopefully --

7 PARTICIPANT: You're doing at  
8 lunch.

9 (Laughter.)

10 MR. KENNEDY: We'll try to be as  
11 brief and as informative as we can.

12 As you mentioned, my name is  
13 Spurgeon Kennedy. I'm currently Director of  
14 Research, Analysis and Development with the  
15 D.C. Pretrial Services Agency. It is one of  
16 the largest pretrial programs in the country  
17 and one of the most comprehensive. D.C.  
18 Pretrial Services manages close to 24,000  
19 defendants on pretrial supervision, diversion,  
20 and a few actually sentenced in the District  
21 of Columbia. We serve both the D.C. Superior  
22 Court and the U.S. District Court for D.C.

1                   We have done a great many programs  
2                   in the 46 years or so that we've been in  
3                   existence. Three of those programs are  
4                   problem solving initiatives: our drug court,  
5                   which we began in 1993; our community court,  
6                   which I believe we started in 2003; and our  
7                   mental health diversion court, which started  
8                   back in 2008 -- 2007. I'm sorry. Time flies  
9                   when you're having fun.

10                   What we found is what I think a  
11                   lot of American communities have found who  
12                   have been forced to sort of become  
13                   laboratories for new and different approaches  
14                   as case loads have increased, as prisoners  
15                   have come back from prisons and resources have  
16                   become scarce.

17                   You've got to be smart, as smart  
18                   as you are tough when it comes to crime, and  
19                   for many defendants, the smarter approach  
20                   isn't the traditional let's arrest them, let's  
21                   prosecute them, let's throw them in jail or  
22                   put them on probation until they screw up, but

1           rather to address the root causes of crime.  
2           And for many defendants in our city and  
3           nationwide those causes are substance abuse,  
4           mental health related.

5                         We have in our specialty courts a  
6           population of defendants that traditionally  
7           have responded to these special programs.  
8           They have responded to treatment. They have  
9           done well. They have graduated. They have  
10          shown a reduction in drug use. They have  
11          shown better functioning in mental health.

12                        There are things about our  
13          programs that have really found over the years  
14          that these are alternatives that actually work  
15          to the extent that I don't believe that they  
16          should be alternatives anymore. I have always  
17          believed that if you really want something to  
18          fail, call it an alternative. Make it  
19          something that only gets used when it has to  
20          be used. We can't put more people in the  
21          jails. So we have to do pretrial services,  
22          and once the jail builds new beds or once it

1 becomes less filled, then we'll go back to  
2 business as usual.

3           You have to take alternatives and  
4 make them the thing that you do. One of the  
5 failures, I think, of this movement has been  
6 a reluctance to take the alternative and make  
7 it something that everyone in the system  
8 benefits from it. There's no reason after 20  
9 years that drug courts should still only  
10 handle the small number of people that they  
11 handle. The precepts of drug court, the  
12 benefits of drug court ought to be open to far  
13 more defendants.

14           In Washington, D.C., for example,  
15 our drug court managed about 369 people  
16 throughout the year. We have another  
17 treatment program that managed close to 900.  
18 It's a smaller number. Those defendants go  
19 through the same treatment. They go through  
20 the same sanction space scheme. They present  
21 themselves the same way that drug court  
22 defendants do. They don't have the luxury

1           though of the same benefits of drug court.

2                         Fortunately, in our city about a  
3           third of our criminal bench have served on the  
4           drug court. So they have created their own  
5           diversion programs. That doesn't happen in  
6           other jurisdictions. For the movement to  
7           really succeed and to sort of go into the next  
8           generation, I really think it has to stop  
9           thinking of itself as a movement, and that  
10          might be a little tough. It's get out of your  
11          comfort level and show what you've learned to  
12          the rest of the criminal justice system so  
13          that defendants who aren't lucky enough to  
14          qualify for drug court can still get the  
15          benefits that we've seen over the years at  
16          drug courts and that kind of thing.

17                         Thank you.

18                         CO-CHAIRMAN JONES: Thank you.

19                         MR. WALTON: Good afternoon.

20           Again, I'm Terrence Walton, Director of  
21           Treatment for the D.C. Pretrial Services  
22           Agency.

1 I'm delighted to be here. There's  
2 nothing I like more than talking about  
3 treatment and, in particular, I enjoy talking  
4 about drug court treatment, something I've  
5 done for almost the last ten years. I've been  
6 in the treatment field first as a practitioner  
7 and then as an administrator and things of  
8 that nature for the last 22 years. I guess  
9 that's right. As you can imagine, I must have  
10 started when I was very, very young to have  
11 been here so on.

12 But I'm in a good position because  
13 I began my field, my career working in the  
14 private sector, in the non-criminal justice  
15 setting, treatment settings that are much more  
16 traditional without the benefit of a judge, a  
17 sanction contract, and the like, and things  
18 went well there.

19 Then I transitioned to D.C.'s drug  
20 court in 1999 and this is my first exposure to  
21 a court involved, quasi-coercive treatment,  
22 and so I am happy to answer questions about

1 the differences, having worked as a  
2 practitioner and administrator in both  
3 environments.

4 At D.C. Pretrial, I am also in a  
5 fortunate position because, of course, we're  
6 a supervision agency, but we're also an agency  
7 that provides, that facilitates drug treatment  
8 for criminal defendants, but we don't just  
9 facilitate treatment. We also operate, as  
10 Spurgeon referenced, operate our own intensive  
11 out-patient treatment program where our case  
12 managers, our supervision officers are  
13 licensed and/or certified addiction  
14 specialists, and they provide a full fledged,  
15 intensive out-patient treatment program for  
16 both our drug court population and the other  
17 program that Spurgeon referenced.

18 And so it gives me an opportunity  
19 to really get an up close view of at least  
20 from a practitioner's point of view, and a  
21 sort of on the street point of view whether or  
22 not treatment works and whether or not drug

1 court treatment works as opposed to other  
2 models, and I'm happy to answer questions  
3 about my observations there.

4 One of the things that also has  
5 given me some additional insight is the fact  
6 that I am also on the faculty of the National  
7 Drug Court Institute, and so I've spent some  
8 time traveling the country helping to  
9 establish drug courts and helping to set them  
10 up. So I certainly have an opinion, and I am  
11 certainly an advocate, but I also understand  
12 that drug court isn't right for every person,  
13 for every defendant, and my expertise is  
14 treatment. And so my perspective is whether  
15 or not treatment works, and when it works, how  
16 it works, and if we establish that treatment  
17 does or doesn't work, and I think that it does  
18 a lot of the time but not always, then the  
19 question is does drug court treatment work.  
20 Is there anything about the drug court model  
21 which either makes treatment more likely to be  
22 successful or less likely?



1                   And the kinds of questions that  
2                   often come up is the coercive nature, the loss  
3                   of some confidentiality, the involvement of at  
4                   least external forces. Does that somehow  
5                   interfere with the kind of internal lasting  
6                   change we want? And I'm happy to talk about  
7                   my observations about those in response to  
8                   your questions.

9                   And so that's who I am. I do  
10                  treatment, but I work in a law enforcement  
11                  agency. So I'm certainly able to answer those  
12                  issues also, but I'm especially here to talk  
13                  about the treatment aspects and how drug  
14                  courts impact those.

15                  Thank you.

16                  CO-CHAIRMAN JONES: Great. Thank  
17                  you.

18                  Marvin.

19                  CO-CHAIRMAN SCHECHTER: Mr.  
20                  Walton, I guess we'll start with you. Our  
21                  last speaker made the following statement.  
22                  Let me quote it to you. "Drug courts do

1 nothing to improve the efficacy of treatment,"  
2 unquote.

3 Do you agree with that or disagree  
4 with it?

5 MR. WALTON: No, I disagree with  
6 it, and I'll do it from two perspectives.  
7 I'll do it first from my observation having  
8 been a practitioner, and I'll talk about just  
9 a little bit about what some of the research  
10 shows, and Spurgeon can talk about research  
11 from our agency perspective, but I can address  
12 sort of a larger perspective, I suppose.

13 As I mentioned, I began in the  
14 setting that wasn't a drug court model, and  
15 there were lots of people certainly who got  
16 better in that respect, but my observation in  
17 moving to the drug court treatment model is  
18 that there is in most cases nothing about the  
19 drug court model which really impedes the  
20 effectiveness of treatment.

21 Now, when treatment doesn't work,  
22 it doesn't work for the same reasons that it

1           doesn't work in any environment, either  
2           because of the readiness level of the  
3           participant or the program is not providing  
4           the kind of treatment that is needed to match  
5           the needs that come in the door.

6                         The biggest struggle I had before  
7           I switched to my current setting was getting  
8           individuals to show up and to keep showing up  
9           long enough for it to kick in, to stay engaged  
10          long enough for it to work.

11                        You know, treatment is designed  
12          for people who are dependent, for people who  
13          are addicts, and so, my goodness, those first  
14          few days and weeks can be awful trying not to  
15          use, and so many times people simply stop  
16          coming, and it's just too hard, and that's  
17          where drug court has been helpful. Because  
18          people have a real incentive, a carrot and a  
19          stick to help them stay engaged just long  
20          enough for it to work, and so that is the  
21          biggest difference that I've seen.

22                        Now, again, it's all about whether

1 the treatment is effective or not, whether or  
2 not the treatment is well structured, whether  
3 it's evidence based, whether it is designed  
4 properly. Those things being equal, then I  
5 far prefer the model where we have the  
6 involvement of the court, the involvement of  
7 defense attorneys sometimes encouraging people  
8 that this is a good deal for you, try and make  
9 this work, the involvement of other players to  
10 help make it happen.

11 The other part is I hope that  
12 someone has talked about the Georgia Law  
13 Review article. Has it been referenced yet in  
14 your hearings?

15 This is the Georgia Law Review,  
16 Spring 2008, Volume 42, Number 3. I'll have  
17 it here at the end to look at it. It has an  
18 excellent article called "Drug Treatment  
19 Courts in the 21st Century: The Evolution of  
20 the Revolution in Problem-Solving Courts," co-  
21 authored by retired Judge Peggy Hora or  
22 California and defense attorney Theodore

1           Stalcup, also from California.

2                       And there's lots of good stuff in  
3 here, but one thing in particular that I  
4 thought was interesting is that references,  
5 without going into detail, but it references  
6 a couple of pieces of research which address  
7 this issue, and I'm quoting now from page 752,  
8 where it describes that "evidence indicates  
9 that substance abusers mandated to receive  
10 treatment benefit as much and sometimes more  
11 than substance abusers who spontaneously elect  
12 to enter treatment."

13                      And that was based on a piece of  
14 research, a five-year outcome study done by  
15 John F. Kelly and his colleagues called  
16 "Substance Abuse Disorder Patients who Are  
17 Mandated to Treatment: Characteristics of the  
18 Treatment Process." They looked at one year  
19 and five year outcomes, looking at abstinence  
20 and, I believe, evidences of recidivism.

21                      The last thing that I will quote  
22 also from Judge Hora's article in the Georgia

1 Law Review is the issue about sort of  
2 recidivism rates following drug court  
3 treatment. Because at the end of the day,  
4 while I'm in this business because I believe  
5 it's good to help people get clean and sober,  
6 I'm in this business because I want to help  
7 people break free. I believe addiction is  
8 bondage, and I believe that I'm a liberator.  
9 That's why I'm in this business.

10 But I work for D.C. Pretrial, and  
11 our business is helping to protect public  
12 safety, and one way we do that is by  
13 addressing the kinds of issues that we believe  
14 contribute to defendants being unable to  
15 observe the conditions of their release,  
16 including the requirement to do all they can  
17 not to get rearrested.

18 And so the Urban Institute did a  
19 study looking at recidivism rates for drug  
20 court graduates that was published in 2003,  
21 and they found that in the first year  
22 following drug court treatment nationwide, 85

1           percent of offenders had no new arrest. Two  
2           years out, 73 percent of offenders who  
3           graduate, by the way, had no re-arrest, and I  
4           don't have in front of me the comparison data,  
5           but my observation in the field is that those  
6           are significantly better recidivism rates than  
7           we see in other environments.

8                         So, again, that's some of the  
9           research that I've seen, but frankly, my real  
10          observation is from my experience.

11                        CO-CHAIRMAN SCHECHTER: Let me  
12          ask. I assume that you've attended staffing  
13          sessions at drug courts in your experience.  
14          What do you think is the proper role of the  
15          defense attorney in those staffing sessions?

16                        MR. KENNEDY: Oh, boy, that's a  
17          good question. I hate those staffing  
18          sessions, and I'll tell you why. They're not  
19          staffing sessions in the usual sense of people  
20          getting together to figure out what is not  
21          appropriate for defendants' continued success  
22          in treatment. It's a group dynamic, and as

1 anyone who has been in the group will tell  
2 you, there's no such thing as a group of  
3 equals.

4           You don't get people together with  
5 equal stature, with equal interest, and with  
6 equal importance and go, "Tell me what you  
7 think." Usually what happens is that one  
8 voice, one dominant person can run a group,  
9 and persons either gravitate to that or they  
10 don't.

11           The tendency that I've seen, and  
12 the limited ones, and surely I've not gone to  
13 as many as Terrence has, to sort of go to the  
14 mean, and sometimes the mean is the voice of  
15 the judge, and that is not always the most  
16 articulate voice when it comes to treatment  
17 need and what that person, that defendant,  
18 should have in his or her protocol.

19           The defense attorney is really in  
20 a precarious position, I think, in these  
21 meetings. I don't think that you ever stop  
22 being an advocate, even when you're part of



1           this team. As a defense attorney, you cannot  
2           say to yourself, "I no longer represent this  
3           person."

4                           And when a group is telling you  
5           that, you know what, two days in jail is what  
6           this guy needs to stop using drugs, when you  
7           look at the research out there that shows that  
8           it's not the severity of the sanction but the  
9           certainty of the sanction that matters; that  
10          you could do something a little less stringent  
11          and get the same result, it's tough to be a  
12          team player and go, "No, I don't want to do  
13          that."

14                          But as a defense attorney, I think  
15          you have to. I know what the staffings are  
16          about. I know what they're trying to do, but  
17          I think they really put defense attorneys in  
18          an almost untenable position of wanting to be  
19          part of what you're trying to accomplish, but  
20          still being the voice of the defendant, the  
21          defendant, not the treatment person but the  
22          defendant in that room, and I'm not sure if

1           there's a real answer to that.

2                           CO-CHAIRMAN SCHECHTER:   Mr.  
3           Walton, do you agree?

4                           MR. WALTON:   Not entirely.  I  
5           certainly agree that there are staffings that  
6           go all kinds of ways, but I've also seen  
7           staffings where it was very difficult to tell  
8           until the end who exactly was the judge there  
9           and who was the defense attorney because there  
10          was a very open discussion about what's best  
11          in this case, and we did a little exercise  
12          trying to guess who was who and many of us  
13          were wrong.

14                          That's when it works like it  
15          should work because that's the intention.  But  
16          the role of the defense attorney, again,  
17          certainly it's advocated.  There's no question  
18          about that, but if the drug court model is  
19          properly designed, the defendant entered that  
20          program with full consent, full knowledge,  
21          able to consult with his attorney or an  
22          attorney who understands drug court, and a

1 decision has been made that this is a good  
2 deal for you.

3 I, first of all, do not believe  
4 that drug courts are good deals for people who  
5 don't need drug treatment. I just don't. I  
6 think that while certainly it might be a good  
7 legal deal, but I think it's abusing the  
8 model, and drug court isn't easy to do. So it  
9 really ought to be for individuals whose drug  
10 involvement is such that they need help to  
11 stop.

12 And so assuming that the person  
13 coming into drug court has had good counsel  
14 and the decision has been made, good advice  
15 has been given from the attorney about if this  
16 is the right option for you, and the defendant  
17 has consented and is able to consent that this  
18 is what I want to do, then the primary role,  
19 I believe, of the defense attorney during the  
20 staff meeting is to be sure that the terms of  
21 the, quote, almost like sort of a plea  
22 agreement really, but the terms of the deal

1           are being met; that my defendant, my client is  
2           being treated as per the agreement; that if,  
3           for instance, someone is pushing for this  
4           person to be removed from drug court, which is  
5           sometimes the case, to be put out of drug  
6           court and be put into regular case processing  
7           because they're taking too long to get it  
8           together, the attorney should be advocating.  
9           "Wait a minute. This is drug treatment court.  
10          This is why he's here. Look. He's done  
11          this," trying to see the sessions he's  
12          attended, not just the ones he didn't attend,  
13          advocating in much the same way that you do in  
14          other environments because the decision has  
15          been made that this is the right program for  
16          this individual.

17                   I don't think -- and while I  
18                   certainly understand the dilemma -- I don't  
19                   think it is that a defense attorney should  
20                   necessarily feel obligated to argue against a  
21                   couple day jail sanction. Now, if, in fact,  
22                   the jail sanction as in some programs is much

1 longer where it almost resembles a sentence,  
2 30 days or more, then certainly the attorney,  
3 you know, might want to argue that this is  
4 excessive. This person needs to be in  
5 treatment, not in jail, and this is contrary  
6 to the model is an appropriate discussion to  
7 have.

8 So, again, I believe the attorney  
9 is about being sure the deal is being kept,  
10 looking at all the facts and while not trying  
11 to shield the client from all of the sanctions  
12 because that's the model, and that's sort of  
13 how it all works, but to be sure that the  
14 sanctions are being distributed fairly and in  
15 proportion and based on the individual  
16 attorney's knowledge of what happens in that  
17 court.

18 CO-CHAIRMAN SCHECHTER: Let me ask  
19 both of you two related questions. In the  
20 drug courts you're familiar with or the  
21 problem-solving courts, who determines the  
22 eligibility requirements for people coming in?

1                   And the literature that we've  
2           looked at makes reference to a concept called  
3           "creaming," which the program are accused  
4           really of taking the people who really need  
5           the least help and putting them into the drug  
6           court system, and they turn out to be success  
7           stories as opposed to a hard core person.

8                   So I want to know have you seen  
9           evidence of that not only in the drug courts  
10          in your jurisdiction, but anywhere.

11                   MR. WALTON: What I have seen is  
12          that in most drug courts everywhere, perhaps  
13          except here in D.C., that most will not and  
14          cannot take violent offenders; that based on  
15          the terms of the grants that fund them, they  
16          can't take them.

17                   We don't have that problem in  
18          D.C., by the way, but we're very unique in  
19          that respect. So in the sense that if we  
20          believe that a lengthy criminal history or  
21          violent charges or arrest, if we believe that  
22          excluding those individuals is somehow

1           creaming them, that certainly happens. Many  
2           programs are either the community won't  
3           support allowing people with violent offenses  
4           or even violent charges to benefit from drug  
5           court or the grants don't allow it.

6                         Now, however, I don't think that's  
7           the issue. I don't think that there is -- at  
8           least I haven't seen evidence to suggest that  
9           a drug addict with a less extensive criminal  
10          history is any easier to treat than someone  
11          with a lower extensive criminal history. I  
12          mean, I think that it really is about the  
13          severity of addiction.

14                        If you have drug courts who are  
15          refusing to take people who have real  
16          substance dependence, then that's creaming,  
17          and to me that's contrary to the model. I  
18          haven't seen that as much.

19                        There's some jurisdictions that  
20          don't have enough treatment available. They  
21          don't have the liberal residential resources  
22          that we have available here and other places.

1           And so in that sense they can't take certain  
2           people because they can't treat them.

3                         But to the extent that they should  
4           be reaching out to the individual with the  
5           most serious substance dependence, most  
6           advanced substance dependence that they can  
7           treat, that they have the capacity to treat,  
8           and so, again, I think that most of the courts  
9           I have seen, they are treating severe  
10          dependent methamphetamine, cocaine, heroin,  
11          using DUI courts. Many of them are treating  
12          alcoholics of many years of dependence.

13                        And so I don't think that's a fair  
14          charge.

15                        MR. KENNEDY: One of the more  
16          interesting trips I ever took as a consultant  
17          was in the late 1990s. I had the chance to go  
18          to Birmingham, Alabama, to review two drug  
19          treatment programs. One was the drug court.  
20          The other one was one run by the TASC Program,  
21          the Treatment Alternative to Street Crimes.  
22          I think that's what TASC stands for.



1           The TASC Program population was  
2           predominantly male, predominantly black,  
3           charged with major misdemeanor and felony  
4           charges. The typical time in treatment was  
5           anywhere from one year to about 18 months.

6           The drug court was primarily  
7           female, primarily white, usually charged with  
8           theft and shoplifting crimes, and the average  
9           time in treatment was three months.

10           Now, I was told that this was a  
11           totally random assignment that got those  
12           persons into the various categories. I think  
13           that's one random calculator I'd love to get  
14           my hands on one day.

15           Are there programs that do this?  
16           Certainly, and I think it's not just drug  
17           courts that are guilty of that. Treatment  
18           programs in general sometimes do that,  
19           especially if your goal is to remain  
20           successful and to be funded. You sort of  
21           minimize the number of people that might make  
22           your reduction rates look worse than what you

1 want them to be.

2 The problem is, and I think  
3 Terrence has mentioned it, is that a lot of  
4 drug courts have not gone beyond the original  
5 restrictions that were outlined in the federal  
6 grants that started them. I believe back in  
7 November 2008, BJA, the Bureau of Justice  
8 Assistance, identified about -- I don't know  
9 -- close to 2000 drug courts in the 50 states  
10 here in D.C. and the American territories, and  
11 by their admission most of them still abided  
12 by the restrictions that were placed on them  
13 when they were federal grantees, which means  
14 no major felonies, no people with serious  
15 criminal histories. It's almost here's your  
16 population. Now, that's a great population to  
17 start a pilot program.

18 You know, if you're short of money  
19 and you want to start small and gradually work  
20 your way up, that's the good way of doing it.  
21 The problem is most drug courts have started  
22 small in mind and stayed that way. They're

1 very comfortable with the populations that  
2 they're using right now, and there's not a lot  
3 of inclination by these programs to expand.

4 Now, what we're finding in D.C.,  
5 and again, Terrence is correct, is that if you  
6 look at treatment results and what people do  
7 before and after treatment and doing treatment  
8 by charge, simply by what you're charged with  
9 and what your previous criminal history has  
10 been, there's absolutely no difference at all.  
11 A person who is addicted to heroin who gets  
12 treatment will do better in our sanctions  
13 based programs no matter what got them in the  
14 criminal justice system.

15 To have that as a restriction, as  
16 we still do, 14 years after being established  
17 is something that we should not be very proud  
18 of. Again, most drug courts have not moved  
19 beyond the initial populations, and that's one  
20 of the real sticking points and one of the  
21 issues that has to be addressed if these are  
22 going to stop being boutique courts and really

1 start being things that are very good and  
2 useful for the entire system.

3 MR. WALTON: Let me add I think  
4 that's exactly right, and I think that this is  
5 where advocacy is important here, even  
6 advocacy at the policy level, because even the  
7 most recent grants that have come out of BJA  
8 and SAMHSA for drug courts and other problem-  
9 solving courts, every one of them included the  
10 restrictions against violent offense and  
11 histories, every one of them, at least the  
12 ones that I was involved in reviewing.

13 So I think that Kenny is correct,  
14 that that is an area where if I were a part  
15 of a drug court team and helping to establish  
16 eligibility criteria, I'd be pushing to open  
17 that some, you know, unless the fund is  
18 prohibited.

19 To answer the first part of your  
20 question, that eligibility criteria is  
21 supposed to be set through a collaboration of  
22 the players on the team, the USAO. The

1 prosecutors always have a role there, of  
2 course, but the defense attorney should also  
3 be involved, the judge, and others involved,  
4 stakeholders, to figure out based on our  
5 community how wide can we spread this net.

6 If the intention is to have some  
7 impact on public safety, it certainly makes  
8 sense that you want to reach out to the drug  
9 addicted men and women who appear to be most  
10 involved in serious crimes if you can.

11 MR. KENNEDY: Domestic violence  
12 defendants, just to give you an example, have  
13 a prevalence of mental health issues and also  
14 alcohol and drug issues. That almost goes  
15 hand in hand with those particular kinds of  
16 crimes.

17 Bureau of Justice Assistance  
18 initially when it set up problem solving  
19 courts, particularly the mental health courts,  
20 openly discussed excluding domestic violence  
21 offenses because politically they didn't want  
22 this to be seen as a break, of someone who is

1 charged with these kinds of offenses and not  
2 going through the adjudicating process.

3 Again, you're taking a population  
4 that has a pronounced need that can be  
5 addressed by these courts and saying, "Nah,  
6 I'd rather not." And as long as that attitude  
7 is out there, as long as we are okay with  
8 saying that this person is a good candidate,  
9 but politically they just don't suit you very  
10 well. You're always going to have these  
11 specialty courts as specialty courts, and I  
12 think that's the shame of the movement so far.

13 MEMBER YOUNG: Judge Bozza had set  
14 up as I understand it in Erie County, is  
15 addressing treatment, but more from the  
16 probation officer perspective, that is, either  
17 after conviction, but obviously you could go  
18 back on a violation, and I'm trying to get a  
19 sense from you because you say that the fact  
20 that there is the coercion element to keep  
21 someone in a program exists for your pretrial  
22 and drug court.

1                   Would the same factors play in if  
2                   it were a probation type treatment? And  
3                   therefore, you know, our concerns on the  
4                   criminal justice end are sort of dealt with  
5                   before they get into the probation part.

6                   You only do pre-conviction work;  
7                   is that correct?

8                   MR. KENNEDY: Pretrial.

9                   MEMBER YOUNG: In the D.C.  
10                  Probation Department, do they have the same  
11                  kind of drug court type treatment programs and  
12                  what's their success or not?

13                  MR. WALTON: Well, they do. They  
14                  do. There is a probation court called Star  
15                  HITDA, and I don't know what the Star name is  
16                  for, Star HITDA, and then there is a sort of  
17                  reentry court called Saint HITDA. They have  
18                  a similar model. I unfortunately don't know  
19                  what their success rates are like.

20                  What I do know though is that  
21                  while they are similar models, in the Star  
22                  HITDA and Stain HITDA programs there really

1           isn't a single drug court judge. They use our  
2           drug court judge for sanctions, but there is  
3           no single judge who handles status hearings  
4           and those kind of things and to sort of  
5           develop that rapport.

6                           And so at least in D.C. and on the  
7           probation and reentry points --

8                           MEMBER YOUNG: Or maybe supervised  
9           release.

10                          MR. WALTON: That's right. Yeah,  
11           they don't have the benefit of the full model,  
12           and I think you may be hearing from Judge  
13           Rankin later on, who was our drug court judge  
14           for two years, and he has some real opinions  
15           about that and about how the lack of the  
16           regular judicial involvement he can tell the  
17           difference.

18                          I don't know the other model you  
19           referred to, but was the judge less involved  
20           in what you just referenced?

21                          MEMBER YOUNG: Correct. He's the  
22           judge that if there is a probation violation,



1           it goes forward, but he's saying he thought  
2           that most of that sanction and the imposition  
3           of sanctions, I guess, being delegated within  
4           the probation department, his opinion or, you  
5           know, what research they had seemed to  
6           indicate it was as effective as the other  
7           model.

8                         MR. WALTON: Well, that may be  
9           true. The part that concerns me though is not  
10          the judge's presence to sanction, but the  
11          incentive nature. You know, listen. At our  
12          drug court graduations, and every one I've  
13          seen around the country, and I do about 30 a  
14          year, that those who graduate they spend --

15                        MEMBER YOUNG: It's all about the  
16          change.

17                        MR. WALTON: They reference the  
18          judge, not the poor case manager who has  
19          struggled with them day after day. They talk  
20          about the judge, you know, how making -- you  
21          know, Judge, when you stepped me back and I  
22          really didn't care, it just -- and Kenny knows

1 the research better than I do, but it  
2 certainly seems like the judge appears to be  
3 a hugely important role. Maybe it's a  
4 fatherly or motherly figure. I don't know  
5 what it is, but a hugely important role to  
6 those who actually succeed.

7 CO-CHAIRMAN SCHECHTER: Going  
8 along the same lines about judges, can the  
9 judge who is so invested in the client, not  
10 only as a judge but as a therapist really, a  
11 father figure if you want, mother figure, can  
12 that person also be an adjudicator of that  
13 individual if they fail or should it be  
14 somebody different?

15 MR. KENNEDY: No, I think that  
16 it's very possible for judges to remain both  
17 the judicial figure and also a dominant person  
18 in the treatment. I think the truth is the  
19 fact that we've had 20 judges throughout the  
20 history of our drug court who seem to have  
21 done the trick here at least locally.

22 One of the things that I tell drug

1 court advocates, and I get varying responses  
2 about it, is that the problem-solving  
3 initiatives really aren't new. Pretrial  
4 diversion, for example, predates drug courts  
5 by a good 20 years. A lot of those diversion  
6 programs are almost split. Some were  
7 exclusively administrative, and some require  
8 you to go back to a judge before recommending  
9 a person's graduation or termination.

10 And what we found early on with  
11 those diversion programs was, as Terrence  
12 mentioned, there is a difference when the  
13 judge is involved, and what seems to be the  
14 difference is (a) you have someone who cares  
15 about you, but you also know that there's  
16 somebody in the room that can actually do  
17 something both bad to you if you don't comply  
18 with the rules.

19 If you listen to defendants at  
20 graduation, if you look at focus groups that  
21 have been conducted and the research that has  
22 come out of it, defendants are telling us that

1           there are some specific elements to drug  
2           courts and problem-solving courts that are  
3           effective with them. The judge, their  
4           relationship with other defendants in those  
5           groups, the relationship to the case managers,  
6           those persons who work with them day in and  
7           day out, those are the things that drive them.

8                        They have their own varying levels  
9           of readiness for treatment, but if you give  
10          them people who show that they care, if you  
11          give them a structure that they have to do, if  
12          you give them a person who will root for them,  
13          but at the same time lay the hammer down when  
14          it needs to be laid down, I think that's an  
15          effective thing.

16                      There is something about having a  
17          judge in the process. Does that judge have to  
18          be the central figure? I would argue that,  
19          but having a point of authority in treatment  
20          certainly goes a long way to making treatment  
21          better.

22                      CO-CHAIRMAN SCHECHTER: Two prior

1 speakers here today said the following: one,  
2 that they've looked at these courts from the  
3 eight American Bar Associations, and they find  
4 these courts to be standardless.

5 Two, we had Judge Bozza tell us  
6 that these courts varied from state to state  
7 and county to county.

8 You say they have to stop being an  
9 alternative court and stop being a movement  
10 and become part of the mainstream.

11 So here's my question. Would you  
12 support a recommendation that all problem-  
13 solving courts adhere to a set of general  
14 standards no matter where they're located in  
15 the United States and no matter what the type  
16 of problem is, with variation for a mental  
17 health court versus a drug court or DUI court,  
18 but that they must have set standards before  
19 they can be effective and used, as you would  
20 have it, part of the mainstream.

21 MR. KENNEDY: For full disclosure,  
22 I'm a liaison member with the American Bar

1 Association's Standards Committee on  
2 Diversion. So of course my answer is going to  
3 be yes to that.

4 (Laughter.)

5 MR. KENNEDY: If you look at --

6 CO-CHAIRMAN SCHECHTER: That's  
7 good.

8 MR. KENNEDY: If you look at every  
9 major segment of the criminal justice system,  
10 the attorneys, the prosecutors, judges,  
11 pretrial programs, probation programs, they  
12 have a set of written standards. It's not  
13 something that you fight over. It's not  
14 something that you debate. You have a set of  
15 standards that people read, agree on, and at  
16 least if you don't follow every single one,  
17 you at least know that we are all on the same  
18 page.

19 The fact that 20 years after the  
20 first drug court was implemented that the drug  
21 court movement itself has shied away from  
22 standards I think is inexcusable. The drug

1 courts have what I believe they call the ten  
2 key components, and if you ask a lot of  
3 advocates, ah, those are just a -- they're  
4 not.

5 You should have standards that say  
6 this is what a drug court is, this is what it  
7 should try to accomplish. These are the kinds  
8 of defendants that need to go into the courts,  
9 and this is the kind of data that you need to  
10 process and maintain to show whether or not  
11 you are effective.

12 I'll go you one better. Drug  
13 courts have got to start collecting evaluation  
14 and research oriented data. It's surprising  
15 how many drug courts cannot tell you the very  
16 simple things of how many people went through  
17 your program last year, how many people had a  
18 reduction in drug use, how many graduated and  
19 didn't recidivate within a year's time.

20 Again, they shied away from this.  
21 Every other part of the criminal justice  
22 system is moving towards performance measure

1 and tracking, research and evaluation. The  
2 drug court movement has got to come there as  
3 well. Any other problem solving courts, too.

4 Standards, performance measures,  
5 and data, research designs have got to be the  
6 three things that problem-solving courts have  
7 got to move to, I think.

8 MR. WALTON: I agree with that.  
9 That's a part of bringing drug courts to  
10 scale. It really is. That's sort of what the  
11 National Association of Drug Court  
12 Professionals, that's what they're pushing for  
13 one way or the other.

14 I would just offer perhaps one  
15 caveat, and that is that the standards ought  
16 to be broad enough to allow for certain  
17 differences based on cultural -- we have  
18 wellness courts that serve a different  
19 population, and there are certain -- there  
20 will be some differences between rural courts  
21 and urban courts.

22 So certainly standards, but that



1           are broad enough to allow for some uniqueness  
2           in individual stages.

3                       CO-CHAIRMAN SCHECHTER:   Have  
4           either of you had any requests, meetings or  
5           interest from the federal judiciary about  
6           setting up your model or what you do in  
7           federal district courts across the United  
8           States?

9                       MR. KENNEDY:   Years ago, the  
10          federal districts actually had two programs,  
11          one in the Clinton administration later on,  
12          but the latest was called Operation Drug Test  
13          where they actually set up drug testing and  
14          it's kind of a sanctions based treatment  
15          regime in some pilot ports.   I don't know what  
16          has gone on at them.   I do know that our  
17          agency because we're here in Washington, D.C.  
18          and the Administrative Office of the U.S.  
19          courts is here locally.   We have a lot of  
20          interaction here with them.   I don't know if  
21          Terrence has ever been asked to help out with  
22          it.   I haven't, and I don't know where the

1 federal system is with that.

2 CO-CHAIRMAN SCHECHTER: Are either  
3 of you familiar at all with the federal  
4 sentencing guidelines?

5 MR. KENNEDY: To the extent that  
6 we have to be. Our agency is a federal  
7 agency, though we don't handle sentenced  
8 defendants. It applies to us a little bit,  
9 but not a whole lot.

10 MEMBER KELLY: Back to the top of  
11 standards, why in both of your opinions has  
12 the drug court community been so reticent to  
13 promulgate standard?

14 MR. WALTON: Well, despite the  
15 fact that the drug courts have been around  
16 since 1989 and many more in the early part of  
17 the '90s, it's still a relatively young  
18 movement, I believe, and that its focus has  
19 been on spreading out as wide as possible, you  
20 know, allowing as many, establishing drug  
21 courts in as many places around the country  
22 and around the globe as possible.

1                   And part of the way you do that is  
2                   sort of opening the door pretty widely. You  
3                   know, I think the ten key components is a  
4                   great start in that direction and trying to  
5                   have some consistency. So I think it has been  
6                   part of the urgency to try and get this out  
7                   there and get people doing it.

8                   And quite frankly, I think that's  
9                   healthy. I think we have needed a period, you  
10                  know, maybe even a couple of decades to sort  
11                  of do it long enough to say, well, what are  
12                  the best set of standards to use. So I think  
13                  it's time for the transition now. I think  
14                  that in its infancy trying to come in too  
15                  early with the rigid standards would have  
16                  stunted the growth of drug courts, and I think  
17                  that whether they don't approve or not, I  
18                  think that is sort of the reason why we aren't  
19                  further along yet.

20                  MR. KENNEDY: I think the other  
21                  reason, frankly, is neat. The movement has  
22                  never really needed standards. I'll give you

1 a parallel. Pretrial Services Agencies began  
2 in the 1960s. We had our first set of  
3 standard in 1977. A lot of that as Terrence  
4 has mentioned was the maturation of the  
5 movement itself, but also back in 1977 you had  
6 a jail crisis. Jails were being overcrowded  
7 all over the place. The standards were a nice  
8 advertising tool that said to the rest of the  
9 field, this is well established, well thought  
10 of, real alternative to detention pretrial,  
11 and standards became almost a nice little  
12 advertisement for pretrial programs.

13 Drug courts have never really  
14 needed help to be sold. The old drug court  
15 program office pumped money to jurisdictions  
16 to start drug courts. You have judges who are  
17 on board in a lot of these that are effective  
18 salesmen to local funding agencies. You don't  
19 need that nice advertisement that we are real  
20 and we're legitimate because we have standards  
21 the way that other parts of the criminal  
22 justice system may have.

1                   I think now that those funding  
2 sources might be drying out a bit, that might  
3 prompt the movement a little bit to think  
4 about setting down standards that make sense  
5 and wide ranging enough to apply to all of the  
6 specialty courts going on.

7                   MR. WALTON: If I could just add  
8 one thing, while I don't know the details, I  
9 do know that the National Association of Drug  
10 Court Professionals is in at least the  
11 planning stages of setting up an accreditation  
12 program where drug courts can be accredited,  
13 and I suspect because of our close  
14 relationship with BJA and other funders that  
15 at some point that will become a requirement  
16 in order to receive grant funding, and that  
17 will greatly increase the incentive for  
18 establishing and adhering to some standards.

19                  MEMBER KELLY: I want to discuss  
20 high risk offenders again. A very cynical  
21 person might say that if all of a sudden drug  
22 courts started spreading their nets wider and

1 being willing -- strike that.

2 A cynical person would say that  
3 the reason why drug courts do not spread their  
4 nets so widely and bring in the high risk  
5 offenders is because they know that they would  
6 not treat them as successfully as they would  
7 the low risk offenders thereby basically  
8 indicting their own methodology and success.

9 How would you respond to that?

10 MR. KENNEDY: Boy, that is  
11 cynical.

12 (Laughter.)

13 MR. KENNEDY: I would say my  
14 answer to that would be our programs here  
15 locally that don't handle drug court  
16 defendants, our new directions program, our  
17 sanctions based program, our new direction  
18 program handles about two and a half times the  
19 numbers of people that go through drug court.  
20 They apply the same sanctions based treatment.

21 One of the things that's missing  
22 is the role of the judge, but even though you

1 have a defendant population that is more  
2 serious by charge, that usually grades out  
3 with our ASI results as more in need of  
4 treatment. At the end of the day, you have  
5 almost the same percentage of people  
6 successfully graduating that program and  
7 staying clean on that program as you have in  
8 drug court.

9 And I think the reason to that,  
10 again, is you figured out what treatment  
11 protocol works for that defendant population.  
12 Can drug courts expand to more serious  
13 defendants and still do what they're doing?  
14 In a lot of jurisdictions the answer is no.

15 If you want to take treatment that  
16 might work for the lower end defendants and  
17 try it with the seriously addicted defendant,  
18 you've got to fail. But if they're willing to  
19 open up the treatment regimen, if they're  
20 willing to really apply the kinds of services  
21 and the kinds of strategies that work for  
22 those kinds of defendants, I think they can

1 get the same rates of success. It really is  
2 up to what they want to do and what they're  
3 funded to do.

4 MR. WALTON: To piggy back on  
5 that, I agree with what Kenny has said there.  
6 In some ways D.C. is an excellent model to  
7 study. Because we are a federal agency that  
8 has a congressional allotment, we don't have  
9 some of the financial struggles that many  
10 courts do. So we are able to make residential  
11 treatment widely available.

12 We have hundreds of defendants in  
13 residential treatment right now. So that  
14 allows us to treat a more seriously dependent  
15 individual, but in looking at criminality and  
16 the more serious offenders, in order for drug  
17 courts across the board to open their  
18 population, we have to do a much better job at  
19 the clinical assessment piece because drug  
20 court is not designed to treat criminality.  
21 It's not designed to treat -- it really is  
22 designed to treat individuals who are drug



1           addicted and whose crimes no matter how  
2           serious they are, that there is a convincing  
3           nexus between the addiction and the criminal  
4           behavior.

5                         And so we have to become much more  
6           sophisticated at clinically assessing and  
7           looking for that nexus, and to the extent that  
8           we're able to do that, then I believe that  
9           drug courts would not harm themselves by  
10          treating the addicted individual who has very  
11          serious charges in criminal history, if indeed  
12          a nexus can be found between the criminal  
13          behavior and the addiction.

14                        There are some individuals, you  
15          know, and I understand I'm talking to defense  
16          lawyers, but there are some individuals who,  
17          you know, don't need to be in the community in  
18          drug court. They need to be, you know, locked  
19          up.

20                        PARTICIPANTS: No.

21                        MR. WALTON: Drug court is  
22          designed for people, despite how serious their

1 criminal matters are, for people who are in  
2 that situation as a direct or indirect result  
3 of their substance dependence.

4 MEMBER KELLY: And inasmuch as the  
5 prosecutors in so many of these drug courts  
6 effectively act as gatekeepers, do you think  
7 you could get them to buy into that?

8 MR. WALTON: Well, we've done it  
9 here in D.C., but you know, listen. We're 15  
10 years in, and we for many years could have  
11 opened up to anyone because we do not have any  
12 congressional or even community mandate not to  
13 treat violent offenses or charges in drug  
14 court, but we haven't. You know, we have used  
15 the same kind of restricters as other places  
16 until this past year when we have adjusted our  
17 criteria.

18 So this is 15 years in that we  
19 finally -- interestingly it was the USAO, the  
20 prosecutors, who suggested let's open this up  
21 some. Now, we still have certain limits, but  
22 we allow almost anyone with the agreement of

1 the U.S. Attorney and the drug court judge.  
2 So we haven't been doing it long enough to see  
3 how this is going to work out, but for the  
4 first time in 15 years, we're able to consider  
5 virtually, virtually any charge and any  
6 criminal history as long as the USAO agrees  
7 that it's an appropriate drug court candidate  
8 and the judge agrees.

9 So I think that at least in our  
10 jurisdiction, because we happen to have a USAO  
11 who really believes in the drug court model  
12 and is interested in being able to treat  
13 anyone who is truly addicted to the extent  
14 we're able to do that.

15 MR. KENNEDY: I think the lesson  
16 there is sometimes in order to change the  
17 minds of the people in charge you have to  
18 change the people in charge. Terrence  
19 mentioned now our current United States  
20 Attorney is very supportive. He's gone  
21 through the ranks, and he's seen the benefits  
22 of this.

1           He has also seen that judges, as I  
2 mentioned before -- about 65 calendar judges.  
3 Twenty of them are former drug court judges or  
4 community court judges or on the mental health  
5 side. They have pretty much established their  
6 own, you know, for lack of a better word,  
7 under the radar diversion programs.

8           If you go into New Directions and  
9 you look a lot like a defendant that goes in  
10 drug when accepting the charge, a lot of  
11 judges have been saying over the last two  
12 years, "Hey, how about dismissing this case or  
13 nulling this charge or reducing it down so  
14 that the person can get probation and continue  
15 treatment with our probation authority?"

16           And a lot of prosecutors have been  
17 saying, "Yes, that's a good idea."

18           I think if the court practice  
19 helped the prosecuting attorney realize that  
20 we were being a bit more restrictive with our  
21 drug court guidelines than we really needed to  
22 be and that helped to open it up, we're lucky

1 in that regard. In jurisdictions where one  
2 judge has done drug court forever, one  
3 prosecuting attorney has been there since day  
4 one, you don't have that mix of the drug court  
5 and other calendars so that other people know  
6 that there's a benefit there, and they'll keep  
7 being cloistered and keeping it as that  
8 boutique court really does a lot more harm  
9 than does good.

10 CO-CHAIRMAN JONES: My refrain is  
11 the same. We are sadly out of time. We're  
12 going to have one last question from Joel, and  
13 then we're going to wrap it up.

14 MEMBER SCHUMM: This is for you,  
15 Mr. Walton. It's about treatment and sort of  
16 the ten principles. How soon after arrest do  
17 you think treatment, drug court enrollment  
18 needs to occur?

19 MR. WALTON: Well, my answer is as  
20 soon as possible. What we look at is how soon  
21 is it happening now through normal court  
22 processing, and you want to make significant

1 improvements over that.

2 Frankly, if you can do it from the  
3 time the person enters the system through  
4 arrest, if the person can end up in treatment  
5 within a couple weeks or 30 days, that's  
6 excellent. The sooner the better, but again,  
7 what we're doing is look at what's happening  
8 now and trying to cut down that gap.

9 It's done for a couple of reasons.

10 I suppose the main one is that even for a  
11 population where some of whom are used to  
12 being arrested, an arrest is often a crisis  
13 moment. It's a moment where an individual is  
14 at a point where they are often ready to try  
15 and do something.

16 So if you can move a person, if  
17 you can get that person in front of a  
18 treatment person during that process, during  
19 the crisis essentially, the likelihood of  
20 getting them engaged and interested is  
21 greater.

22 So, you know, I think the short

1 answer is just as soon as possible. I want to  
2 add one thing to that. Kenny has referenced  
3 two programs, our drug court program and  
4 another program, New Directions, which is ripe  
5 for study, because one of the traditional drug  
6 courts, a single drug court judge, a full  
7 array of sanctions including a three-day jail  
8 sanction.

9 The other one is a court involved  
10 treatment program that does not have a single  
11 judge. It does not have a jail sanction, and  
12 the one on this side has never had any  
13 restrictions on criminal history, both  
14 treating. Both treat substance dependent  
15 folks, but the drug court treatment for those  
16 who are eligible for drug court and then for  
17 everybody else.

18 And Kenny has described we've had  
19 very similar results in terms of recidivism  
20 rates and rates of people getting clean, but  
21 what's under that, where the difference lies  
22 is that part of what I have to do is look at

1           how we're spending our treatment contract  
2           dollars, the residential treatment dollars.

3                         While both programs have similar  
4           success rates, both the New Directions and the  
5           drug court program, the New Directions program  
6           consumes by percentage a much higher  
7           percentage of our residential dollars than  
8           drug court. More drug court defendants being  
9           just as dependent as the New Directions folks  
10          are able to achieve sobriety while they're in  
11          intensive out-patient treatment, as opposed to  
12          having to be placed in residential, which  
13          happens with the New Directions program more  
14          frequently.

15                        I believe that's because in the  
16          drug court model we have the presence of the  
17          judge, the regular contact with the judge, and  
18          more stringent array of sanctions, and more  
19          immediacy with the sanctions. A person in  
20          drug court tests on one day. If they are  
21          positive or you don't show up, you're in court  
22          the next day.



1                   In New Directions, you're in court  
2                   when we get you in court, and the sanctions we  
3                   do are administrative sanctions that don't  
4                   have the immediacy or the weight of the  
5                   others.

6                   So two programs, similar outcomes,  
7                   but when you look at what went into that, it's  
8                   costing a lot more and requiring many more  
9                   defendants to be removed from their  
10                  environment and placed in necessary but  
11                  intrusive residential treatment.

12                  MR. KENNEDY: We actually have two  
13                  and a half programs. Part of the New  
14                  Directions program merges with our community  
15                  court. Our community court judge has the  
16                  option of placing people into treatment, and  
17                  he very much uses the New Directions program,  
18                  and he almost sits as a de facto drug court  
19                  judge for those programs.

20                  It will be very interesting to see  
21                  if there's a difference between the community  
22                  court/New Directions defendant and the New

1 Directions defendant without that judicial  
2 involvement.

3 So we are a laboratory, for better  
4 or for worse.

5 CO-CHAIRMAN JONES: Gentlemen,  
6 thank you. This has been highly informative,  
7 and we appreciate it.

8 PARTICIPANTS: Thank you.

9 CO-CHAIRMAN JONES: We're going to  
10 break for lunch. Lunch is out in the hall.  
11 Everyone is invited to join us for lunch, and  
12 we're going to resume taking testimony at two  
13 o'clock.

14 (Whereupon, at 1:26 p.m., the  
15 meeting was recessed for lunch, to reconvene  
16 at 2:00 p.m., the same day.)

17  
18  
19  
20  
21  
22



1 discussions are to give each of you five or so  
2 minutes to give us sort of an opening  
3 statement, tell us a little bit about  
4 yourselves and the work that you do, your  
5 connection to the issues, the benefit of your  
6 thoughts, and then we've got a number of  
7 questions that we'd like to pose and have sort  
8 of a general discussion.

9 And one of us always leads the  
10 questioning in each panel, for this panel that  
11 person will be Elizabeth Kelly.

12 So without me spending anymore  
13 time talking, let me turn the floor over to  
14 you. I guess ladies first, and Ms. Ekstrand,  
15 the floor is yours.

16 MS. EKSTRAND: Thank you.

17 As you said, I am the former  
18 Director for justice issues at GAO. I retired  
19 about a year ago. During my career there, we  
20 did several drug court studies, including one  
21 in 2005.

22 For that one, we reviewed 117

1 different evaluations of drug courts, and we  
2 found 27 that we thought were methodologically  
3 rigorous enough to hang our hat on.

4 The good news from all of that was  
5 that basically we found that in terms of  
6 recidivism, drug courts had a positive impact.  
7 Recidivism, the way it's measured in these  
8 studies, really is arrests, and we all know  
9 that lots of crimes go on that don't result in  
10 arrests, but it's a terrific surrogate, and  
11 when we get the same results over and over and  
12 over again, we can feel pretty positive that  
13 there is a relationship there.

14 That was the good news. The rest  
15 of the news is all about how complex it is to  
16 measure the impact of drug courts, and one of  
17 the things that makes it complex is that you  
18 can't really look at it by itself. You need  
19 to have some kind of comparison basis upon  
20 which to measure how well the drug court does  
21 compared to probation or compared to other  
22 potential programs.

1                   So this gets very complex, and you  
2                   might have an ability to collect data and  
3                   control the environment for those that are  
4                   actually in the drug court program, the  
5                   treatment group, but for whatever comparison  
6                   group you have, you have much less control and  
7                   much less ability to gather things like  
8                   whether they remain drug free or not, whether  
9                   they move out of the area or not. What  
10                  happens to them is much harder to capture.

11                  But because recidivism is such a  
12                  big, big issue in relation to drug courts, I  
13                  think that overall the message is good. We  
14                  really would like to be able to measure drug  
15                  relapse. We would like to be able to make  
16                  sure that we understand the impact of dropout  
17                  rates. We would like to know what it is about  
18                  drug courts, what factors are the ones that  
19                  have the greatest impact on the success of the  
20                  program. We'd certainly like to know cost  
21                  benefit and extend it out not just to the  
22                  court system, but to cost benefits for the

1 society as a whole.

2 And with that I'll be quiet.

3 CO-CHAIRMAN JONES: Thank you very  
4 much.

5 MR. JEFFRIES: Good afternoon.  
6 I'm Tim Jeffries with the Bureau of Justice  
7 Assistance, which is under the Office of  
8 Justice Programs, which is also under the  
9 Department of Justice.

10 How I came to be here -- I thank  
11 you for inviting me to speak on drug courts --  
12 is that initially I started working in  
13 detention homes at Virginia Beach, and I  
14 didn't even know the word "recidivism." I  
15 just knew that there were a lot of kids coming  
16 back into the system and couldn't figure out  
17 why is so-and-so right back here where he  
18 started when we tried to work with this client  
19 or this person or this individual or family.

20 So it prompted me to deal more  
21 with the societal issues and what's going out  
22 there that's encouraging these kids to

1 continue to do substance abuse and commit  
2 crimes while on substance abuse, which got me  
3 into going back to school for a Master's  
4 degree.

5 So I tell folks that I'm an MSW,  
6 hopefully so that you guys don't beat up on me  
7 because I'm a treatment guy.

8 (Laughter.)

9 MR. JEFFRIES: And also to let you  
10 know how I have a marriage of interventions  
11 for treatment and the judicial system back  
12 with working in detention. So somehow that  
13 landed me in what was called the Drug Courts  
14 Program Office in 1999 and 2000.

15 And from there the Drug Courts  
16 Program Office merged with the Bureau of  
17 Justice Assistance, which handles at least 17,  
18 18 other programs, of course, including one  
19 other specialty court, the mental health  
20 courts.

21 And from there I ended up in the  
22 policy sector. So that's kind of like my



1 history of how I got to be with the drug court  
2 discretionary grant program.

3 Over the last eight or nine years  
4 or so, I've had the luxury of seeing at least  
5 40 or 50 drug courts as a drug court grant  
6 manager. So I've heard a lot of different  
7 experiences from different roles within  
8 judges, prosecutors, treatment folks, even  
9 dealing with juvenile issues, with school  
10 liaisons and evaluation.

11 So I'm glad to have the knowledge  
12 and the background and also eight years of  
13 dealing with different drug courts to see how  
14 they have evolved over the last ten years  
15 since I've been working with them.

16 I was not quite sure how to  
17 prepare for this afternoon. So what I did do  
18 was present or bring some information about  
19 our Website. I don't know how familiar you  
20 guys are with our Bureau of Justice Assistance  
21 Website, but it has a whole host of resources  
22 and links that you can use to connect you to

1           some valuable tools.

2                       So I can run through that or I can  
3           wait for any questioning and try to plug in  
4           some information that we have on our Website,  
5           including some current announcements that are  
6           open for solicitations. It's up to you guys.

7                       CO-CHAIRMAN JONES: If you think  
8           that there's one or two sort of highlights,  
9           you can give us the headlines.

10                      MR. JEFFRIES: Well, I will say  
11           that once again, we have a current  
12           solicitation open. It's for our adult drug  
13           court program. Every year we run that  
14           solicitation, as you know, based on the  
15           appropriation from Congress.

16                      One thing I also wanted to correct  
17           the previous panel on is that we are  
18           collecting performance measures. I believe  
19           they said that the Bureau of Justice  
20           Assistance needs to get more involved in  
21           collecting performance measures. We are doing  
22           that as a result of the PART, the performance

1 assessment regularly that we undergo, which  
2 I'm sure GAO can speak more to that effect.

3 And one of the other suggestions  
4 that the PART said was make your results  
5 available to the public. So we do that.  
6 Every implementation enhancement and statewide  
7 grant that we have operational is available on  
8 our Website in terms of the number of re-  
9 arrests that you reported in the last six  
10 months, in addition to six or seven other  
11 performance measures.

12 So that is available at all times  
13 to the public. We also currently have the  
14 drug court planning initiative, which is a way  
15 that we engage teams in our planning phase,  
16 and it is a free training, and I do mean free.

17 So we have had to scale back  
18 because of cost on our end. Sometimes we've  
19 had to have the teams pay for their actual  
20 travel dollars to the training, but the actual  
21 training is free for up to this year it was 30  
22 teams, to learn the in and outs of drug court,

1 the policy and procedures, how to set up your  
2 eligibility and look at your population to see  
3 what you can serve and also how to evaluate  
4 your program and see the effectiveness of it.

5 It was also mentioned before that  
6 we serve nonviolent offenders. I do want to  
7 point that out.

8 Also on our Website we do have the  
9 ten key components, and those are our Bible  
10 components that have been, I believe, in  
11 existence since at least 1996, 1997. The Drug  
12 Courts Program Office began operation in 1994,  
13 when I believe there were 50 drug courts, and  
14 the ten key components came out in 1997, and  
15 currently we do have over 2,000, I believe,  
16 2,150-some drug courts in existence today, and  
17 those include adult, juvenile, family, and  
18 tribal.

19 So I think with that I'll turn it  
20 over.

21 CO-CHAIRMAN JONES: Great. Thank  
22 you.

1 MR. JEFFRIES: Thank you.

2 DR. MARLOWE: Hi. I'm Doug  
3 Marlowe. In addition to my role as the Chief  
4 of Research and Policy for NADCP, I have been  
5 a senior scientist at the University of  
6 Pennsylvania since 1998, at the Medical  
7 College of Pennsylvania before that working in  
8 substance abuse treatment research.

9 In 1998, I got a grant from the  
10 National Institute of Drug Abuse to ask a  
11 question in drug courts: do we really need  
12 the judge? That was the question.

13 So we set up a randomized  
14 experimental trial. It was a question about  
15 how do you set up a strong comparison group.  
16 The answer is you randomize. So we randomly  
17 assigned consenting drug court clients either  
18 to appear for status reviews in a court  
19 monitored intervention or to get all of the  
20 other services the same as the other clients,  
21 but to be monitored by the treatment program.

22 Now, they were still under court

1 jurisdiction and they still could be brought  
2 back for a termination, but they were not  
3 getting the judicial supervision.

4 We followed these people for two  
5 years looking at outcomes, and we found that  
6 when we compared people who saw the judge  
7 every two weeks throughout their enrollment in  
8 drug court versus those who basically did not  
9 see the judge at all, no differences in  
10 outcomes between the two groups.

11 So the assumption, therefore,  
12 could be as was suggested earlier that who  
13 needs the judge, if there's no difference  
14 whether they see the judge or not, but  
15 probation administered treatment and sanctions  
16 and sentence and the like.

17 There was one problem. There's  
18 something called risk needs responsivity  
19 theory. It's not a theory. It's a very well  
20 validated body of research in the criminal  
21 justice system that says intensive  
22 interventions get their best bang for the buck

1 with high risk offenders, and I want to talk  
2 about in a minute what I mean by high risk  
3 because I don't think you're using the term  
4 the way the research literature does like when  
5 you said that now.

6 High risk does not mean risk for  
7 violence. Okay? There is such thing as risk  
8 for violence. My wife had a high risk  
9 pregnancy. Okay? That did not mean that she  
10 was going to go out and kill somebody,  
11 although when she had some hormone surges I  
12 did worry about that.

13 (Laughter.)

14 DR. MARLOWE: It means when you're  
15 high risk that you're likely to have  
16 complications. You're likely not to do well  
17 in treatment. You need more intensive  
18 treatment. That is what the word "high risk"  
19 means.

20 The problem is when people assume  
21 high risk means risk for violence when  
22 somebody scores high on a risk assessment

1 tool, the prosecutor, who you all suggest is  
2 the gatekeeper, and that's the case in most  
3 places, might say, "I'm not taking the risk  
4 because that person will go out and kill  
5 somebody. They can't go in." And so they are  
6 screening out of drug courts exactly the core  
7 prognosis cases that need to be in drug court,  
8 and my research showed that.

9 What we did was called an  
10 interaction analysis where we compared  
11 outcomes for high risk and low risk people.  
12 We found that high risk people did better  
13 seeing the judge, much better off seeing the  
14 judge. Low risk people did as well and,  
15 frankly, better not seeing the judge.

16 We call that interaction effect.  
17 These people are doing better in this group  
18 and these people are doing better in this  
19 group, and we look at the groups as a whole.  
20 They cancel the effects out, and this way you  
21 get no differences. That's called interaction  
22 effect. It looks like this when you graph it.



1 It doesn't match.

2 It's not enough to do that once.

3 It could be something about that one judge.

4 You all talked about the personality of the

5 judge. It's all judge driven. Go to two

6 other drug courts in other counties, other

7 jurisdictions, different judges, different

8 populations, moving from misdemeanor to

9 felony, to probation cases; found the same

10 effect.

11 And in fact, when we did high risk

12 felony populations, the high risk offenders

13 who were not seeing the judge were doing so

14 badly that the ethics board that oversaw my

15 research study stopped our study. It was no

16 longer ethical to randomly assign high risk

17 drug offenders to a non-court supervised

18 intervention. They were failing out, and

19 guess what happens when they fail out. They

20 go to jail, and we don't want them to go to

21 jail. We want them in the community, and

22 therefore, not supervising them put them at

1 risk for incarceration, and they stopped our  
2 study. You can't do it anymore. It's  
3 unethical. Okay?

4 Now, we had set up safeguards for  
5 that. We knew that we were monitoring it, and  
6 we would stop if that happened.

7 We then developed a new study  
8 where we did a risk assessment and made the  
9 high risk people see the judge more often.  
10 Again, they are agreeing to be in the study,  
11 but we assigned high risk people. You see the  
12 judge every two weeks. Low risk people, you  
13 don't have to see the judge at all, and we'll  
14 compare you to treatment as usual.

15 No ethical problems because  
16 everybody is getting what the research says is  
17 better for them or they would have gotten  
18 anyway. The effects were extremely powerful  
19 for the high risk people and lasted out two  
20 years, and I think you have some of my  
21 articles. All of those data have been  
22 published, four grants funded by the National

1 Institute of Drug Abuse identifying the  
2 population that ought to be in drug court.

3 Now, let's talk about real world  
4 practice. When drug courts came into being in  
5 the late '80s and early '90s, we were still in  
6 the tough on crime, War on Drugs era, and if  
7 you wanted an alternative to that approach, a  
8 drug court was seen as an alternative. You  
9 had no choice but to take the low risk  
10 population because that's all the prosecutors  
11 were willing to accept for the risk of what  
12 would happen to their reputation if they  
13 showed themselves to be soft on crime.

14 And the results was that drug  
15 courts were what you used the word "creaming."  
16 I've heard "cherry picking." "Net widening"  
17 is another term. The problem with that is if  
18 you take low risk people into your drug court  
19 and you say, "Look at this. We've got a very  
20 high success rate in our program. Those same  
21 people would have done just as well on  
22 pretrial diversion, probation, and all you're

1           doing is capitalizing on people that would  
2           have gotten better anyway." It's a false  
3           positive.

4                       Also, if these people are not  
5           really jail bound, then you're not making much  
6           contribution to saving society money and  
7           diverting people from prison. They weren't  
8           going to prison anyway. So you're not doing  
9           what you said you were going to do.

10                      And worst of all, you're taking  
11           low risk people and you're net widening.  
12           You're bringing them deeper into the criminal  
13           justice system and exposing them to higher  
14           levels of supervision, higher levels of  
15           treatment, and the risk for higher level  
16           sanctions than they would have gotten if they  
17           had gone through adjudication as usual.

18                      So the goal then is for drug  
19           courts to move to their target population.  
20           The National Association of Drug Court  
21           Professionals' official position on this is  
22           that drug courts should be serving high risk,

1 meaning poor prognosis cases, not violence  
2 cases, although we don't have a position on  
3 whether or not you take violence cases, and  
4 high needs cases, i.e., people actually have  
5 to have a drug problem in order to be in drug  
6 court.

7 The problem is there are a lot of  
8 people getting into drug courts because they  
9 have picked up a drug charge. Just because  
10 you have a drug charge does not mean that you  
11 have a drug problem. It is the official  
12 position of NADCP; it's part of our training;  
13 it's part of our publications that you should  
14 be moving towards treating a high risk, high  
15 needs population, and that the low risk, low  
16 needs populations are suited to less intensive  
17 interventions, and the violence population,  
18 that's a policy issue for the state to decide  
19 whether they're going to be in drug courts or  
20 not.

21 Now, the gatekeeper as you have  
22 all suggested is not the drug court judge. It

1 is not the drug court program coordinator.  
2 The gatekeeper is the prosecution, and it is  
3 the prosecution that generally will allow,  
4 will sift off the lower risk cases for entry  
5 into drug court.

6 The problem is the prosecution  
7 often out foxes himself or herself because  
8 where does he or she think the high risk cases  
9 go? They think, oh, we're being tough on  
10 crime. The high risk cases wind up on  
11 probation getting less supervision and less  
12 services while the lower risk people are in  
13 it. It is, in fact, in some jurisdictions  
14 turned on its head.

15 But it's not turned on its head  
16 because the drug court model calls for it to  
17 be turned on its head. It is not, you know,  
18 a necessary implication of drug court practice  
19 and the ten key components to cream or net  
20 widen. It is just the political reality out  
21 there from the gatekeepers, prosecution and  
22 the like.

1           The other important thing to keep  
2           in mind is that as a result of these findings  
3           and a result of our training, the evidence is  
4           quite clear that drug courts are moving toward  
5           taking a higher risk, higher needs population.  
6           Most of the problems that people are quoting  
7           and citing, though legitimate, come from the  
8           late '90s into the early 2000s, maybe 2003,  
9           2004.

10           If you look at our painting the  
11           current picture, surveys of drug court  
12           programs nationally, the most rapidly growing  
13           drug courts take multiple probation violator  
14           cases. They are moving away even from the  
15           diversionary models because in the diversion  
16           programs all they can get are the first time  
17           offenders. That's the only people eligible  
18           for diversion.

19           We don't want the first time  
20           offenders unless they have other very serious,  
21           high risk characteristics. We want people who  
22           have failed multiple times with less intensive

1           interventions. We want the people who would  
2           be facing substantial time either in  
3           incarceration or some community correctional  
4           programming that restricts their freedom and  
5           that kind of thing. That's our target  
6           population.

7                            If you guys come out saying drug  
8           courts ought not to cream and net widen and  
9           the research suggests they ought to hit their  
10          appropriate target population, we will love  
11          you. We will cite you for that proposition.  
12          We will welcome that conclusion. It is not  
13          anathema to where we're coming from.

14                          CO-CHAIRMAN SCHECHTER: Will you  
15          pay us?

16                          DR. MARLOWE: No, we will not pay  
17          you.

18                          (Laughter.)

19                          CO-CHAIRMAN SCHECHTER: Just  
20          checking.

21                          DR. MARLOWE: It was a good  
22          question though.



1                   In fact, I'll shut up in just a  
2                   second, and those of you who know me know that  
3                   that's not true. It might surprise you to  
4                   know that most of what you guys have been  
5                   talking about here today, the concerns you've  
6                   been raising are our concerns as well.

7                   For example, should the same  
8                   judge, adjudicator, be sentencing a case who  
9                   was a drug court judge? Our official position  
10                  is no. The official position of the National  
11                  Association of Drug Court Professionals is if  
12                  somebody is facing termination and/or a  
13                  sanction that involves loss of liberties, in  
14                  other words, a jail sanction, they should have  
15                  a due process hearing akin to revocation, and  
16                  if they then have a termination and they're  
17                  going to sentencing, a different judge should  
18                  sentence that individual with the caveat that  
19                  there are some very rural jurisdictions and  
20                  the like where that's not feasible.

21                  And then we say that it's an  
22                  actual prejudice standard. And if there's

1           some evidence that the judge is being  
2           punitive, that's a question for appeal. That  
3           is our position. We train on it, publish on  
4           it. There were a lot of other things, ex  
5           parte communications. It is our official  
6           position that ex parte communications -- it's  
7           not our position. They are an ethical  
8           violation. They are subject to appellate  
9           review in overtime; that there should not be  
10          conversations between the judge and  
11          prosecution without defense counsel present.

12                        The problem is that there are  
13          jurisdictions where defense counsel says,  
14          "We're not going to be at staffing," sometimes  
15          for good reasons, sometimes for political  
16          reasons. Sometimes because they simple can't  
17          afford it. Whatever reason, "we're not going  
18          to staffings."

19                        The question then is does that  
20          mean there can't be a staffing because they're  
21          not present, it's ex parte; it essentially  
22          cripples the program, and programs that are

1 not having staffings, by the way, are not drug  
2 courts. They can call themselves drug courts.  
3 They can call themselves anything they want.  
4 If they don't have staffings, they're not drug  
5 courts. They're non-compliance with the ten  
6 key components.

7 Now, you probably already know  
8 this, that the supreme court, I believe, of  
9 Iowa -- I think it was Iowa -- or Idaho has  
10 just passed new procedures and a new  
11 interpretation of the ex parte rule saying  
12 that if defense counsel is aware of the  
13 staffings, has notice, knows what's going to  
14 be covered -- I'm not saying that you can  
15 agree. It's not our position. I'm just  
16 telling you what's going on -- and they elect  
17 not to go and they are told everything that's  
18 discussed and given an opportunity object, you  
19 know, it's not a violation of ex parte.

20 We don't have a position on that.  
21 It's a new rule. I'd like to hear what you  
22 guys have to say about it. Maybe we could

1           have a similar reaction to it, but the point  
2           is we need guidance from you guys about how to  
3           resolve these issues, but resolving them,  
4           guidance on how to resolve them is different  
5           than guidance on how to abolish something that  
6           you're not going to be able to abolish anyway.  
7           It's not practical as suggested, but we need  
8           improvement, and we need your input on it.

9                         And if a drug court does not have  
10           regular defense counsel involvement and  
11           independence, and if defense counsel are not  
12           operating in compliance with their own ethical  
13           guidelines, then it is not a drug court that  
14           complies with the drug court model. That is  
15           our position. It is not well espoused, and I  
16           agree with you.

17                        We recently hired a very seasoned  
18           Public Defender who is taking up a lot of that  
19           material for us. We are increasing our Public  
20           Defender representation on our board. We have  
21           the Public Defender of New Jersey who was  
22           previously on our board. We have two more

1 Public Defenders.

2 Any of you want to be on our  
3 board, we'd love to talk to you. No, we will  
4 not pay you for it. It's a voluntary.

5 CO-CHAIRMAN SCHECHTER: What about  
6 travel?

7 DR. MARLOWE: Yes, travel expenses  
8 are covered, and there's a very generous per  
9 diem.

10 Anyway, I will stop there simply  
11 to say that if you guys come out saying that  
12 we need better standards, real standards for  
13 drug court programs, that will strengthen our  
14 position because we are moving towards  
15 standards and credentialing, and we are  
16 getting push-back from the field that doesn't  
17 want to have those standards pushed on them.  
18 This is an innovative, ground up, grassroots  
19 program. Most state court systems, AOCs say  
20 we already credit courts. Drug courts are  
21 not a new court. They're not like family  
22 court. They're not like whatever, juvenile

1 court or family court. They're not separate  
2 courts. They're part of our criminal courts.  
3 Therefore, they don't get a separate  
4 accreditation. We accredit it.

5 We're coming in and saying no. As  
6 a professional organization, we accredit  
7 programs, and we want to develop accreditation  
8 criteria. We would love it if you came out  
9 saying that was critically important and that  
10 you would participate actively in the  
11 development and promulgation of those  
12 standards. You would actually be  
13 strengthening our position.

14 CO-CHAIRMAN JONES: Great. Thank  
15 you.

16 Elizabeth.

17 MEMBER KELLY: All right. First  
18 of all, I'll start with Ms. Ekstrand.

19 During your remarks you noted that  
20 as a result of your study, you found that  
21 approximately 27 I think was the number of  
22 drug courts across the country were, quote,

1 unquote, methodologically sound.

2 MS. EKSTRAND: No, ASME found 27  
3 drug court evaluation studies to be  
4 methodologically sound.

5 MEMBER KELLY: Okay.

6 MS. EKSTRAND: Out of 117.

7 MEMBER KELLY: Okay, and tell us  
8 what you mean by that term "methodologically  
9 sound."

10 MS. EKSTRAND: That they had a  
11 reasonable comparison group, that is, on basic  
12 characteristics, the drug court population we  
13 were looking at and the comparison group  
14 population they were looking at was very  
15 similar or else statistical means could be  
16 used to basically make them similar for the  
17 comparison.

18 Sometimes this population could be  
19 drug offenders who had gone through the system  
20 somewhat prior to the institutionalization of  
21 a drug court or, you know, as you mentioned,  
22 they could be randomly assigned to drug court

1 or not drug court. That's the premo way to do  
2 it, but often not possible.

3 Sometimes there are drug court  
4 offenders from another jurisdiction that  
5 doesn't have a drug court program that is  
6 basically very similar to the other  
7 jurisdiction because basically you're always  
8 wanting to make the comparison of how well the  
9 drug court did compared to what would have  
10 happened had there not been a drug court.

11 You know, so you can't run these  
12 people through twice, you know. So basically  
13 you have to come up with the best possible  
14 option to be able to make that kind of  
15 comparison, and these studies, these 27  
16 studies did this well.

17 So we felt -- and they measured  
18 their variables very well, and they had other  
19 qualities that made them methodologically  
20 sound. The sophistication of their analysis  
21 was strong. You know, again, as Doug said,  
22 they looked at subgroups to make sure that



1 subgroup findings were not masking total  
2 findings. They were able to use the  
3 appropriate controls to make sure that they  
4 were getting results that were reliable.

5 MEMBER KELLY: And who basically  
6 conducted these studies? Independent  
7 agencies, the courts themselves?

8 MS. EKSTRAND: It was a  
9 combination.

10 MEMBER KELLY: Okay.

11 MS. EKSTRAND: You know, many of  
12 them were conducted by academics, and many of  
13 them were under contract with NIJ, but there  
14 were a lot of studies that were funded by the  
15 states, various states, to look at their drug  
16 court programs. A lot of the state studies  
17 were particularly interested in cost benefit,  
18 of course, but they also, of course, measured  
19 the basics like recidivism and relapse to the  
20 extent possible.

21 So it was a wide variety of  
22 researchers, and in fact, in many ways that

1 makes it a stronger case that these were sound  
2 studies.

3 MEMBER KELLY: One of the  
4 criticisms we've heard today has been there  
5 just is not enough data out there about drug  
6 courts, and so what I would presume through  
7 your remarks, that there is data.

8 MS. EKSTRAND: As a researcher,  
9 I'd love more data, but --

10 MEMBER KELLY: But there is --

11 MS. EKSTRAND: -- but it depends  
12 on what it is. I mean, you know, we do have  
13 data on quite a few things, and you mentioned  
14 that BJA is collecting some drug court  
15 performance data. You know, that's all to the  
16 good.

17 But studies that really get to,  
18 you know, some of the nuances of drug courts,  
19 what really works, some of the things that  
20 Doug was saying about, you know, does the  
21 judge matter or not, you know, what kind of  
22 sanctions matter, we don't really know too

1 much about that yet.

2 You know, what kind of treatments  
3 are the best treatments? How many social  
4 workers need to be involved with somebody  
5 before it makes a difference? Would it be a  
6 good idea to have employment help and housing  
7 help and all kinds of social skills help for  
8 people in drug court programs?

9 Those are all the kinds of things  
10 that we just don't know enough about, and  
11 getting that kind of data, that's incredibly  
12 labor intensive and incredibly resource  
13 intensive. So that's what we don't have at  
14 this point.

15 MEMBER KELLY: And who -- I'm  
16 sorry. Yes?

17 DR. MARLOWE: I just want to  
18 follow up. There has been since the GAO  
19 report, there have been five what are called  
20 meta-analyses. Meta-analyses are where  
21 independent scientists that have nothing to do  
22 with the drug court field. They're from top

1 research institutions, gather all of the  
2 research that's been done, statewide studies,  
3 local evaluations, and they score them in  
4 terms of how good the studies were. Only the  
5 studies that meet high scientific credibility  
6 get kept.

7           They then average across all of  
8 those effects of what's called a meta-  
9 analysis. All five of these meta-analyses  
10 have found that drug court reduce recidivism.  
11 We don't know much about other outcomes  
12 because as said, following the cohort to get  
13 information after they leave is very  
14 expensive. We don't know a lot.

15           Here's the point. You could say,  
16 "I've read all of the meta-analyses. I've  
17 read the hundreds of studies. I don't think  
18 there's proof that drug courts reduce  
19 recidivism." You can reach that conclusion.

20           But if you reach that conclusion,  
21 then you must reach the same conclusion about  
22 every other criminal justice program in

1 existence and every other substance abuse  
2 treatment program in existence with the  
3 exception of methadone and maybe buprenorphine,  
4 which medications.

5 There is no other intervention.  
6 In fact, if any of you are taking, you know,  
7 hypertensive medications and other things,  
8 probably less scientific data on some of those  
9 medications than there is for drug courts'  
10 effects on recidivism.

11 So, again, do I know whether Judge  
12 Smith's drug court works? I have no idea  
13 unless I go in and study that particular drug  
14 court, but the drug court model across dozens  
15 and dozens of studies, if you don't accept the  
16 data, you can't accept the data for anything  
17 else because it's the highest level.

18 MEMBER SHIFMAN: Just a follow-up.  
19 Let me just ask you about that data and all  
20 those studies. I mean, that's taking studies  
21 of courts that include like marijuana courts  
22 or misdemeanor drug courts or that very narrow

1 net of offender that they're bringing in who  
2 probably would succeed at a variety of levels,  
3 right? Is that --

4 DR. MARLOWE: Well, let me address  
5 that. First of all, there's wide variation in  
6 the courts, which is one of the things you  
7 want in there now. So some of them were like  
8 you said, low risk courts. Some of them are  
9 probation violations. They're all mixed  
10 together, and the only way you get into the  
11 meta-analysis is if you had a suitable  
12 comparison condition so that you know how  
13 these people would have done if they weren't  
14 in drug -- you don't know that. You don't  
15 know how Bill would do, but you know how  
16 people like Bill would do. That's the only  
17 way they get into the meta-analysis, is if you  
18 have a comparison.

19 There's no comparison. So you  
20 couldn't answer that question. The  
21 researchers throw it out. It doesn't get to  
22 be used.

1                   MEMBER KELLY: One group that we  
2                   have been trying to understand more about  
3                   seems to be rather elusive. That is to say we  
4                   can't seem to find anyone to come in and  
5                   testify. No one has really kept track of  
6                   these folks or if they have, they're not  
7                   sharing, and that is people who were either  
8                   rejected for drug courts or who went through  
9                   them for a time and for whatever reason were  
10                  terminated.

11                  Have you as individuals looked  
12                  into that population? Do you know of other  
13                  people or other organizations who study them?

14                  DR. MARLOWE: The second group,  
15                  the dropouts, we do have data on. Once  
16                  somebody enters a drug court, they're in the  
17                  analysis whether they graduate or not. So  
18                  those people we know about.

19                  The people who don't get into drug  
20                  court either because they are determined not  
21                  to be eligible, they choose not to go, we very  
22                  often know very little about other than

1 numbers in some jurisdictions.

2 MEMBER KELLY: Okay. So no series  
3 of interviews have been conducted with this  
4 population or --

5 DR. MARLOWE: We'd love to do it.  
6 We have been unable to get funding. See,  
7 research is very expensive. That's the rate  
8 limiting factor. It's not that we're not  
9 interested in that. We're particularly  
10 interested in that for issues of racial and  
11 cultural and other biases, gender. Are groups  
12 getting in at different rates than their  
13 eligibility?

14 We'd love to study that, and we  
15 have sought foundation support. We have  
16 sought federal government support to study  
17 that.

18 MR. JEFFRIES: On the surface,  
19 just on that same topic, when I first came  
20 into the drug court program office in 1999 and  
21 2000, we had the data collection survey, and  
22 that's capturing a lot of information about



1 the demographics of each client that came in  
2 or at least was referred to the program.

3 One of the things that they  
4 noticed was that African American males were  
5 failing out of the program at an alarming  
6 rate. So to address that, the federal  
7 government created the cultural competency  
8 curriculum to look at African American  
9 retention, and it spread from that to look at  
10 other minority groups specific to whatever  
11 your population is not served. So if the  
12 particular client is in California, if it's an  
13 Asian population that are not continuing to  
14 sign up for the program or are failing out  
15 because of, let's say, there are language  
16 barriers, I know there are four or five  
17 different Mandarin and different cultures and  
18 languages in northern California. They won't  
19 address that so the people within the court  
20 could have some sort of understanding of how  
21 to look at each individual jurisdiction make-  
22 up and how to address those cultural issues.

1                   MEMBER KELLY: Do you have any  
2 response to that?

3                   MS. EKSTRAND: Well, just to make  
4 sure that when we're talking about drug court  
5 success, we're talking drug court success for  
6 those who are eligible, who are in drug  
7 courts. I mean, you know, the people who are  
8 screened out at the beginning may very well  
9 have been screened out for many other reasons  
10 that, in fact might have made them ineligible  
11 for many other programs. They could have co-  
12 occurring mental health conditions. They  
13 could have had all kinds of family situations  
14 that would make them not an eligible person.  
15 There would be a variety of reasons.

16                   So you know, it doesn't denigrate  
17 the validity of the data that we have on drug  
18 courts because we don't know about those  
19 people that didn't go in. I mean, it's  
20 definitely an interesting question and an  
21 interesting population, but it's just a  
22 different question.

1                   MEMBER KELLY: I understand.

2                   DR. MARLOWE: It will be a good  
3 question for you guys to say ought to be asked  
4 and funding.

5                   (Laughter.)

6                   DR. MARLOWE: I mean, it obviously  
7 speaks to due process and equal protection  
8 issues. It's very much your concern to find  
9 out what's happening in terms of entry into  
10 this program. It's of our concern, too, and  
11 the more groups that call for it, make a big  
12 deal about it and yell and scream about it,  
13 the more we get the feds. or, you know, other  
14 organizations to give money to study.

15                   I mean, we live on grants. We're  
16 a nonprofit organization, and as a researcher  
17 at the University of Pennsylvania, 100 percent  
18 soft money. If we don't get funding these  
19 questions don't get answered. So it's  
20 something to ask for.

21                   MEMBER KELLY: Mr. Jeffries, when  
22 you --

1                   MEMBER BERNHARD:  Let's get their  
2                   attention later.

3                   MEMBER KELLY:  When you introduced  
4                   yourself, you said unabashedly, "I am an MSW,"  
5                   and throughout the country as we've been  
6                   conducting these hearings, we've heard some  
7                   public defenders say, "Look.  I'm acting as a  
8                   social worker even more than I am acting as an  
9                   attorney."

10                   We have some judges who say, quite  
11                   frankly, they enjoy being more of a social  
12                   worker than a judge.

13                   How do you feel about all of these  
14                   people dabbling in your field?

15                   MR. JEFFRIES:  Well, more power to  
16                   them.

17                   MEMBER KELLY:  Okay.

18                   MR. JEFFRIES:  If they can help to  
19                   identify a client, I mean, I think that's the  
20                   approach of drug courts, to be a  
21                   nonadversarial team.  So whoever can jump in  
22                   there and advocate for the client under zero

1           sum means to do whatever the best interest of  
2           the client is, let's do it, and it doesn't  
3           matter to me if it's the judge, the Public  
4           Defender or the treatment provider.

5                        Ultimately usually it is the judge  
6           because people don't have a relationship with  
7           the judge that's effective. So if the judge  
8           wants to step out of his role to be a social  
9           worker, mediator, broker, all those other nine  
10          terms we learned at MSW school, then so be it.  
11          Let him do that as long as the ultimate  
12          benefit is an overall increased quality of  
13          life for these clients.

14                      MEMBER KELLY: Okay. Speaking of  
15          the role of the judge, Mr. -- Dr. Marlowe.  
16          Excuse me.

17                      DR. MARLOWE: Doug.

18                      MEMBER KELLY: Doug, you've  
19          written about the role of the judge and how  
20          arguably the fact that there is someone  
21          wearing a black robe on a podium is integrally  
22          important to the success of the program. You

1 heard Judge Bozza speak, and he is distinctly  
2 uncomfortable with that role. I was wondering  
3 if you have some reactions to his remarks.

4 DR. MARLOWE: Well, one point of  
5 contention. I've read his Law Review article.  
6 he cites me pretty extensively in that for the  
7 opposite proposition that my research stands  
8 for. I don't mean that as a -- you know, I'm  
9 sure he didn't mean to, but my position is  
10 that the -- and I don't know that it's the  
11 black robe. I don't think anyone knows what  
12 it is.

13 I do know a scientific fact that  
14 high risk offenders appearing in status  
15 hearings have better outcomes than high risk  
16 offenders who don't. I know that replicated  
17 an experimental study.

18 Now, the issue of a social worker,  
19 I actually share some of the concerns about  
20 judges and social workers. If the judge says,  
21 "I really prefer the social worker than a  
22 judge," then go to graduate school and be a

1 social worker.

2 In other words, you know, the  
3 reason why we believe drug courts work is  
4 because everybody does their job. They just  
5 do it in a team integrated way. The judge  
6 should be the judge. The public defender  
7 should be the public defender or private  
8 defense counsel. The prosecutor should be the  
9 prosecutor. Treatment should do the  
10 treatment, and people are not supposed to  
11 cross those roles. They're supposed to  
12 integrate or coordinate those roles.

13 So I think that that is a concern,  
14 but for example, there are judges that take  
15 drug court clients out on field trips. Okay?  
16 We consider that a problem, you know, and I  
17 think we'll be coming out with position papers  
18 on that.

19 MEMBER KELLY: A lot of them.

20 DR. MARLOWE: I understand, and we  
21 agree with you that we need standards. The  
22 question I would point to that I'd ask you, do

1       you think that these same problems don't  
2       plague every kind of criminal justice program,  
3       every kind of treatment program where people  
4       overstep their roles, don't have the right  
5       competencies.

6                   I think that those problems,  
7       you'll see them in probation. You'll see them  
8       in pretrial services. The idea is to fix the  
9       program so that they don't do those kinds of  
10      things. There would need to be a statement  
11      that a drug court judge should not be outside  
12      the courtroom interacting with the clients in  
13      a planned way except under certain  
14      circumstances, and I guess we'd have to figure  
15      out what that is. Maybe if there were  
16      chaperons and both counsel were present or  
17      something, but we haven't spoken to that, and  
18      so judges do -- don't quote me on this -- but  
19      some judges do dumb things. I mean, you know,  
20      they do things that are embarrassing, and they  
21      are problematic.

22                   But that's not the drug court



1 model. That's judges not engaged in their  
2 appropriate role.

3 CO-CHAIRMAN JONES: Do you have  
4 more?

5 MEMBER KELLY: I just have one  
6 more question. Admittedly the focus of  
7 today's hearing has been drug courts, but  
8 nonetheless, virtually everyone who has  
9 testified today has mentioned at some point  
10 mental illness or mental health courts, and if  
11 you have an individual who has a mental  
12 illness and who may probably be medicating him  
13 or herself with illegal drug usage, how do you  
14 treat that person?

15 Do you put that person in a mental  
16 health court if your jurisdiction has one? Do  
17 you have mental health courts that are also  
18 equipped to deal with these issues?

19 Then, Ms. Ekstrand, you referred  
20 to some other drug courts that will  
21 automatically exclude you if you have a mental  
22 illness. So how do we grapple with these co-

1 occurring issues?

2 MR. JEFFRIES: That question is  
3 for me or --

4 MEMBER KELLY: For any and all.

5 DR. MARLOWE: One concern I have  
6 is the artificial lines drawn. You know,  
7 people say we have five courts. We have a  
8 drug court. We have a DUI court. We have  
9 this court, and they have 23 clients in each  
10 of those courts, and they're holding status  
11 reviews during different times of the day.  
12 There may be distinctions without a  
13 difference.

14 The overlap between substance use  
15 and mental illness is quite substantial. So  
16 if you think you're going to treat one or the  
17 other with a co-occurring case, you're making  
18 a mistake because all of the research says you  
19 don't treat one or the other. You treat them  
20 both concurrently.

21 So if you're going to take  
22 mentally ill clients into your drug court

1 program, then you need to have the right  
2 services, evidence based services for that  
3 population. You also need to know that  
4 sanctions or rewards need to be applied I  
5 don't want to say differently. There are  
6 differences in how they -- the basic rules are  
7 not different, but some of the art of the  
8 application and what you're focusing on  
9 changes.

10 So if you're going to take that  
11 population, you had better know what you're  
12 doing. So you need to be trained on it, and  
13 you need to take it. The alternative is to  
14 say we're not equipped for it, which I have  
15 personal problems with, but I'd rather see a  
16 program say we can't do it than to say we now  
17 have a mental health court because we said we  
18 have a mental health court, and in fact, it's  
19 no different than the drug court. That's a  
20 big problem.

21 MS. EKSTRAND: And the treatment  
22 really needs to include the mental health

1 treatment or else, you know, success seems to  
2 me to be pretty limited.

3 You know, if you're going to take  
4 their drug of choice away, then there needs to  
5 be the kinds of therapy and the kinds of other  
6 medication that can help them with their  
7 chemical imbalances that are causing them  
8 mental health problems.

9 MEMBER KELLY: Mr. Jeffries.

10 MR. JEFFRIES: I agree with what  
11 they both said. I think that the treatment  
12 definitely needs to address co-occurring  
13 disorders and those with those specific  
14 issues. I heard earlier, you know, about the  
15 eligibility requirements and certain  
16 populations being excluded, and I think you  
17 have to go back to what we do in our drug  
18 court printing initiative training. We ask  
19 the individual teams, the drug court teams to  
20 identify their needs and their availability of  
21 resources.

22 If they don't have the resources

1 to deal with co-occurring populations, then  
2 they probably can't include them in their  
3 eligibility. So it's about the need to meet  
4 the community because we're seeing a large  
5 number of co-occurring disorders within our  
6 existing drug court populations.

7 CO-CHAIRMAN JONES: Adele.

8 MEMBER BERNHARD: One thing, I got  
9 a little bit lost when you were talking about  
10 the studies. Okay? When you're talking about  
11 finding out that we're reducing recidivism,  
12 we're talking about people who have graduated  
13 from --

14 DR. MARLOWE: No, everybody who  
15 entered.

16 MEMBER BERNHARD: Everybody who  
17 entered --

18 DR. MARLOWE: Including failures.

19 MEMBER BERNHARD: -- is doing  
20 better.

21 MS. EKSTRAND: The dropouts,  
22 including dropouts. Even the dropouts.

1                   MEMBER BERNHARD: Even the  
2 dropouts. Now, do we have sort of separate  
3 studies looking at both separate things that  
4 I assume --

5                   DR. MARLOWE: Well, graduates  
6 always do better than dropouts.

7                   MEMBER BERNHARD: Because they got  
8 all the way through.

9                   MS. EKSTRAND: Always, right.

10                  MEMBER BERNHARD: But even people  
11 who just start and are there for a little  
12 while are still --

13                  MS. EKSTRAND: They're generally  
14 doing better than those were never in the drug  
15 court, were never in another program or in  
16 another -- in the comparison group.

17                  MEMBER BERNHARD: Okay. So that's  
18 one answer. Then the second thing you said  
19 that I also got a little bit lost with was you  
20 said, well, you can look at all of this and  
21 you can say that this isn't working, but if  
22 you do say that, then you also must say that

1 nothing else is working, right?

2 DR. MARLOWE: Correct.

3 MEMBER BERNHARD: So another way  
4 of saying what you've just said is that  
5 nothing really is working terribly well or  
6 we're all working a little bit well or we're  
7 all doing the best we can or --

8 DR. MARLOWE: Well --

9 MEMBER BERNHARD: I mean, to some  
10 extent, yeah, we're out, you know -- it's  
11 relative.

12 DR. MARLOWE: I think that we have  
13 a long way to go to improve outcomes for  
14 addicted individual in general, and especially  
15 addicted individuals involved in the justice  
16 system.

17 For a long time we have nothing.  
18 We really had nothing. We now have some  
19 programs, not just drug court; some programs  
20 that are showing reliable, statistically  
21 significant and clinically meaningful and find  
22 it better than the alternative.

1                   What we need to do is build on  
2                   those programs, not say we're done, but build  
3                   on them.

4                   MEMBER BERNHARD: And that's part  
5                   of why we should be looking at the various  
6                   different components.

7                   DR. MARLOWE: Absolutely.

8                   MEMBER BERNHARD: So that we can  
9                   figure out what it is that's making a  
10                  difference and why.

11                  DR. MARLOWE: Tomorrow you'll be  
12                  hearing from Mike Finigan, right? He is one  
13                  of the researchers who has looked at the  
14                  compliance with the various ten key  
15                  components, like ranking programs on how  
16                  compliant they are with the key components and  
17                  looking at outcomes, not the only person to  
18                  have done that. Faye Taxman through the NIDA  
19                  CJ-DATS have looked at it, which is the basis  
20                  of our accreditation standards going forward.

21                  Legal said, "Well, how do you know  
22                  what a drug court ought to be doing?"



1                   Well, the answer is we're starting  
2                   to get evidence of which drug courts are more  
3                   effective than others and why, and that's  
4                   going to be the basis of credentialing, but we  
5                   have a long way to go.

6                   MEMBER BERNHARD: Yeah, yeah,  
7                   yeah. We're trying to kind of focus a little  
8                   bit also on the role of the defense attorney  
9                   in these drug courts. Is there anything that  
10                  you know of that looks at the role or the  
11                  activities or the intervention, the support of  
12                  defense attorneys that looks like it makes any  
13                  difference one way or the other?

14                  DR. MARLOWE: The only thing I can  
15                  tell you with the scientific strength is that  
16                  the presence of defense counsel at status  
17                  hearings and staffings is predictive of better  
18                  outcomes. Defense counsel is disengaged. The  
19                  program has worse outcomes. That I can tell  
20                  you, and Mike Finigan can tell you in greater  
21                  detail, which is why we're saying to you we  
22                  can't have defense counsel pulling out of drug

1 courts. We need them investing more in drug  
2 courts, and we understand that that is a  
3 negotiating process.

4 There are reasons why defense  
5 counsel have pulled out. Some of it is  
6 because of judges who did say -- I know a  
7 judge who said, "We don't really need your  
8 buy-in, you know. If you don't want to refer  
9 your clients, don't. We're doing this  
10 anyway."

11 And we always say to those judges,  
12 "Are you crazy? I mean, of course you need  
13 defense counsel buy-in. You know, they're  
14 part of the team."

15 So I can tell you that if defense  
16 counsel is disengaged the outcomes are worse.

17 CO-CHAIRMAN JONES: Vicki.

18 MEMBER YOUNG: One -- one --

19 MEMBER BERNHARD: Do you know why?

20 DR. MARLOWE: The short answer is

21 no.

22 MEMBER YOUNG: Well, part of my

1 question was when you first started and you  
2 said, "I was supposed to determine, you know,  
3 does the judge matter," and then you were  
4 saying, you know, you did these studies, but  
5 then as I was listening, what I thought I  
6 heard you were comparing is whether somebody  
7 was, you know, going through the drug court  
8 process and going to the -- you know, showing  
9 up every two weeks to drug court and they're  
10 staffing or not.

11 But if you look at that process,  
12 they have, assuming that the defense counsel  
13 is engaged as well; the defense attorney is  
14 present at those same times, as well as the  
15 judge, as well as, I guess, the treatment  
16 provider, and there's contact every two weeks  
17 or whatever you want to call it.

18 So how did you separate out it's  
19 the fact that the judge matters or is it the  
20 fact that they're showing up every two weeks  
21 or who's there matters?

22 DR. MARLOWE: No, what I'm saying

1 is they're not having court hearings. We took  
2 the court hearings out of the equation.

3 MEMBER YOUNG: Right.

4 DR. MARLOWE: Oh, I see what  
5 you're saying. So it could be -- okay.  
6 That's fair.

7 MEMBER YOUNG: So which player in  
8 the court hearing?

9 DR. MARLOWE: You're right.  
10 That's fair, and in fact, no, we don't know.  
11 That's actually a very valid point, and you  
12 know, we've sometimes equated the judge with  
13 the court because the judge controls the court  
14 proceedings, but you're correct. It was the  
15 court milieu that was taken out of the  
16 equation. Everything else was the same.  
17 You're not monitoring treatment, case  
18 management. It was the court. The better  
19 word is the court rather than that.

20 MEMBER YOUNG: And I don't know  
21 how you separate. You start taking out the  
22 different players, but I --

1 DR. MARLOWE: That's what Mike  
2 Finigan has tried to do, but he didn't do it  
3 in the way I did where we randomly assign  
4 people. What he has done is he's gone to  
5 dozens and dozens of drug courts and rated  
6 them on how much defense counsel is involved  
7 and then looked at their outcomes. It's  
8 correlational. It's not as strong. He's  
9 trying to get at that question.

10 MEMBER YOUNG: I had a question  
11 for Mr. -- is it Jeffries or Jeffrey?

12 MR. JEFFRIES: Jeffries.

13 MEMBER YOUNG: Jeffries.

14 Because since you're with BJA and  
15 as far as I understand it, BJA has been a  
16 large funder of drug court programs, and  
17 remember, you know, just the topic before.  
18 People were saying, well, the original fund  
19 said we could only use this little population;  
20 you know, that we were constrained by the  
21 terms of our grant.

22 So if BJA is the grantor, is BJA

1           putting those limits, or is it because the  
2           prosecutors won't buy into the process and,  
3           therefore, you won't give the grant or now  
4           you'll give grants to a bigger population?

5                       MR. JEFFRIES: Our limits are  
6           generic, but we also have to look at the  
7           population within the community and what they  
8           can house and how many clients they can house  
9           based on their resources. Back to resources  
10          again.

11                      We mandate that there are no  
12          violent offenders within the court system.

13                      MEMBER YOUNG: That's just a  
14          rule.

15                      MR. JEFFRIES: That was just a  
16          generic rule. A statute came from Congress  
17          that said that there would be no violent  
18          offenders set forth by X, Y and Z definitions.  
19          Those are the parameters that we put on the  
20          actual grantees.

21                      MEMBER YOUNG: And there has been  
22          no effort to try to modify the terms of that

1 original legislation or anything?

2 MR. JEFFRIES: This past year they  
3 have modified the violent offender definition  
4 to make it state that no violent offenders  
5 with jail term punishable by one year,  
6 exceeding one year, but this is the first year  
7 that is being grandfathered in.

8 MEMBER YOUNG: Okay. So it is  
9 starting to broaden a bit.

10 DR. MARLOWE: And they made it  
11 clear it has to be a conviction, that arrest  
12 history is not sufficient. So it has been  
13 narrowed, the definition of a violent  
14 offender.

15 CO-CHAIRMAN SCHECHTER: I want to  
16 go back to that issue of defense attorneys not  
17 part of the staffing. It's clear that it  
18 doesn't work out as well, and we don't know  
19 exactly why, but what it suggests -- and your  
20 opinion is what I'm really looking for -- what  
21 it suggests is just as in a regular case, a  
22 non-drug case, that the amount of time spent

1 by the defense attorney with the client  
2 enhances the defense attorney's credibility  
3 and professionalism even with the most ardent  
4 client.

5 And so when you get to the  
6 staffing meeting what we've seen, at least  
7 what I have seen, is those attorneys who go to  
8 the staffing meeting who have already met with  
9 their clients and are way ahead of the curve  
10 and know more than anyone else in the room,  
11 they're not going to sell the client out.  
12 They're in a position to really make a  
13 difference in that staffing meeting because  
14 they know more than anyone else in the room.

15 Is that what we're really talking  
16 about? Is it a function of the defense  
17 attorney personally? Do you think that's  
18 what's going on?

19 DR. MARLOWE: You're asking an  
20 opinion now.

21 CO-CHAIRMAN SCHECHTER: Yeah.

22 DR. MARLOWE: Not data. My



1 opinion would be I think you are probably  
2 accurate. Part of it is that it's an  
3 indication of a defense attorney doing his or  
4 her job better, and that more better will lead  
5 to more better outcomes.

6 So one of the problems that  
7 happens sometimes, and this is anecdotal, but  
8 sometimes the Public Defenders Office assigns  
9 their most junior Public Defenders to drug  
10 court because they see it as a less important  
11 program. In fact, it would be better if your  
12 most seasoned Public Defenders were at least  
13 there occasionally.

14 I understand there are resource  
15 issues. I get that, but one of the problems  
16 is you can set a program up for failure if you  
17 pick the most junior judge to run the docket,  
18 if the Public Defender sends their most junior  
19 -- you know, their 1Ls or whatever, their  
20 first year; the Attorney General has some, you  
21 know, disengaged D.A. That's an invitation to  
22 disaster.

1 CO-CHAIRMAN SCHECHTER: Just to  
2 follow up on that, would it be your position  
3 that a Public Defender Office, that the better  
4 model is to have a dedicated group or a unit  
5 of drug court attorneys with specialized  
6 training as opposed to a general group of  
7 attorneys in the office who go in and just  
8 take cases on an ad hoc basis?

9 DR. MARLOWE: Again, this is all  
10 speculation.

11 CO-CHAIRMAN SCHECHTER: Right.

12 DR. MARLOWE: And my feeling is  
13 like all other specialized cases and dockets,  
14 having a team that's well trained and focused  
15 on those issues and then letting other  
16 attorneys in the office perhaps rotate through  
17 to get a taste of it, to witness it, but yeah,  
18 I mean, drug cases are among your most  
19 populous cases and the most complex cases, and  
20 so, yes, you need specialized units just like  
21 you have specialized units for capital cases  
22 and rate cases and all of that.

1                   CO-CHAIRMAN SCHECHTER:  And so as  
2                   a standard for drug court where participation  
3                   by a Public Defenders Office is necessarily  
4                   required, would it be a sine qua non of such  
5                   a model or a standard that the Public  
6                   Defenders Office has to have not only  
7                   dedicated personnel but specially trained  
8                   personnel?

9                   DR. MARLOWE:  I mean, I think the  
10                  answer to that is yes.  I mean, I'm not  
11                  speaking NADCP policy.

12                  CO-CHAIRMAN SCHECHTER:  Just a  
13                  general --

14                  DR. MARLOWE:  My personal view is  
15                  having done research and looked at countless  
16                  drug court programs, you know, it's not a big  
17                  shock that when the Public Defender knows what  
18                  he or she is doing, they get better outcomes  
19                  than when the Public Defender doesn't know  
20                  what he or she is doing.

21                  CO-CHAIRMAN SCHECHTER:  And  
22                  finally, on the other side that rule is going

1 to be true for the prosecutor.

2 DR. MARLOWE: Yes, it would.

3 CO-CHAIRMAN SCHECHTER: Right?

4 DR. MARLOWE: Yes, it would.

5 CO-CHAIRMAN SCHECHTER: The more  
6 the prosecutor has a specialized unit and  
7 trained personnel the better will be the buy-  
8 in and better will be the result. Would that  
9 be a fair statement?

10 DR. MARLOWE: I guess my sense is  
11 that, again, this is pure speculation. I  
12 think the answer is yes. I can be more clear  
13 about that if you want to take it to the judge  
14 level where judges are specially trained and  
15 dedicated to the docket. Those judges do  
16 better than when judges are rotating through,  
17 where they're assigned sort of willy-nilly or  
18 they have one year assignments. Those  
19 outcomes are poorer.

20 So I can say that about judges.  
21 It would make perfect sense to me that the  
22 same thing would apply to all of the other

1 actors in the drug court.

2 CO-CHAIRMAN SCHECHTER: And if we  
3 made a recommendation that those are  
4 requirements for a standard of the drug court  
5 for prosecutors and defense attorneys and  
6 staff lawyers and even members of the private  
7 Bar in certain jurisdictions, that that is not  
8 only a standard to be aspired to, but one  
9 which will be required after studies are  
10 urged. Would that be something along the  
11 lines of what your organization is look for?

12 DR. MARLOWE: If you were to say  
13 that you would think it's very important to  
14 study --

15 CO-CHAIRMAN SCHECHTER: That  
16 issue.

17 DR. MARLOWE: -- that issue, we  
18 would -- I think we would endorse it. If you  
19 were to say we think that should be the  
20 standard, we would say we don't know. We  
21 couldn't stand behind something that there's  
22 no data on.

1                   But if you say it should be  
2                   studied, we would definitely sign onto it.

3                   CO-CHAIRMAN SCHECHTER: Ms.  
4                   Ekstrand, in all of those reports that you  
5                   looked at?

6                   MS. EKSTRAND: Well, in all of the  
7                   reports we looked at, there wasn't much in it,  
8                   but it seems like a basic management tenet is  
9                   that, you know, people who are experienced and  
10                  well trained do better.

11                  So, you know, from a common sense  
12                  perspective and from my current position at  
13                  the National Academy of Public Administration,  
14                  I would say that, you know, it's almost a no-  
15                  brainer that they're training. If they're  
16                  dedicated to that particular area, you know,  
17                  I can't imagine that it would be --

18                  CO-CHAIRMAN SCHECHTER: But  
19                  nonetheless, that is a no-brainer, and it  
20                  makes perfect sense from a managerial point of  
21                  view. We know that is not the case in many  
22                  jurisdictions.

1 DR. MARLOWE: We don't know it.  
2 We're very concerned. I suspect it's probably  
3 not the case. We haven't studied that  
4 question, although you should ask Mike Finigan  
5 tomorrow at least for the programs that he's  
6 studied, and he might be able to tell you  
7 about 50 programs that we looked at how they  
8 scored on those things. It's not 2,000  
9 programs, but it's 50 programs.

10 CO-CHAIRMAN JONES: Elizabeth and  
11 then Gail.

12 I'm sorry. Ms. Ekstrand.

13 MS. EKSTRAND: If I could just add  
14 one more thing.

15 CO-CHAIRMAN JONES: Sure.

16 MS. EKSTRAND: You know, this is  
17 pure speculation on my part, but you know, I  
18 would think that there are probably not a lot  
19 of prosecutors and Public Defenders or maybe  
20 judges that are spending their life aspiring  
21 to have a seat in the drug courts. I would  
22 think they're thinking that something else is

1           probably much more interesting and prestigious  
2           and something that will further their career.

3                        So, you know, I think you have to  
4           have a carrot out there to get people to be  
5           willing to take training, to specialize in  
6           that area to make that something where they  
7           aspire to have some of their best work.

8                        You know, I really don't know the  
9           judges' attitudes toward their courts, but you  
10          know, in the case of a lot of juvenile courts  
11          or family courts, that's not where judges want  
12          to spend their time, and so you're not getting  
13          people who are willing to put in the extra  
14          effort to become super experts on this area.

15                       So there has to be something in it  
16          for them.

17                       CO-CHAIRMAN JONES: I'm sorry.

18                       MR. JEFFRIES: And from our  
19          federal perspective, we would look at how we  
20          would train those folks because we have role  
21          specific training now. Each district judge or  
22          the District Attorney are evaluated and



1           trained. The National Drug Court Institute  
2           does that, and we only have funding for up to  
3           80 participants for each year for those  
4           disciplines, and we've exceeded that.

5                        I know National Drug Court  
6           Institute has called us and said, "Look.  
7           We've got 90-some people registered. We're  
8           going to try to take 90," but they only have  
9           accommodations for so many people. So how do  
10          we fund those slots for those training  
11          availabilities?

12                      CO-CHAIRMAN SCHECHTER: Would you  
13          do funding with other organizations if you ran  
14          a program like that?

15                      MR. JEFFRIES: I can't speak on  
16          behalf of our director, but an MOU with  
17          another organization, but --

18                      CO-CHAIRMAN SCHECHTER: Let's say  
19          you are looking at NADC. I said we know 20  
20          defense attorneys around the country in big  
21          drug programs. We have a foundation. We  
22          might want to go to them and ask them for some

1 money for specialized drug training in  
2 conjunction with a program that you're  
3 running.

4 Would there be a problem with  
5 that?

6 MR. JEFFRIES: I'm certain that we  
7 would be amenable to that. The funding that  
8 we get for the specific training comes from  
9 the Office of National Drug Control Policy,  
10 and without that funding, we wouldn't be able  
11 to do the role specific trainings that we do  
12 in that arena. Because our budgets have been  
13 cut annually, as you probably are aware. So  
14 any other assistance we get would add more  
15 slots to the available trainings that we have  
16 scheduled.

17 CO-CHAIRMAN JONES: Elizabeth.

18 MEMBER KELLY: As you may know,  
19 NACDL represents not only Public Defenders but  
20 private defense attorneys, and there is  
21 somewhat of a recognition that many of these  
22 drug courts effectively exclude private

1 defense attorneys namely at the staffing  
2 meetings for a couple of reasons.

3 Number one, those staffing teams  
4 are basically perceived as closed clubs where  
5 a Public Defender might be welcome, but a  
6 private attorney is not necessarily welcome.

7 And, secondly, as a practical  
8 matter, there are not a lot of clients out  
9 there who would probably be willing to retain  
10 an attorney not only for the court appearance,  
11 but for 20, 30, 40 staffing meetings.

12 So do you have any suggestions  
13 about how to be more inclusive of the private  
14 Bar?

15 DR. MARLOWE: Can I just tell you  
16 how they do it in Delaware? Most of my  
17 research is in the Delaware drug court. They  
18 have the Delaware Association criminal defense  
19 lawyers, which is their private Bar  
20 essentially, and they have -- actually the  
21 head of that organization is the private bar  
22 representative to the drug courts. He is at

1 all of the staffings, and anybody can go with  
2 him for cases or whatever. His name is Andy  
3 Ahern. It's a good model.

4 Now, of course, Delaware is a  
5 small state. They can pull stuff off that  
6 other places can't. The biggest problem, of  
7 course, they'll tell you is there may be so  
8 many private defense counsel that that's the  
9 problem and the judge can't work the status  
10 here. They've got to fit them all in when  
11 they're available, and it becomes difficult to  
12 get them into the staffings, magnifies that.

13 So my sense of that is there are  
14 some jurisdictions where they basically  
15 interact with the Public Defender and the  
16 Public Defender's presence there. Somehow  
17 they have some interaction with the private  
18 counsel, and I don't know if there's any  
19 literal legal status there. I don't know how  
20 that works.

21 But I just know that's how people  
22 are trying to get around it. I don't know if

1           it's working well. I don't have any research  
2           on it. It's a big issue, needless to say.

3                       A lot of the courts I work in none  
4           of the clients can afford private counsel. So  
5           it's not their most -- they're 85, 90 percent  
6           are Public Defenders.

7                       CO-CHAIRMAN JONES: Gail.

8                       MEMBER SHIFMAN: I wanted to  
9           follow up on the specialized training. I  
10          mean, we all know that the more experience you  
11          have, the better you are in all fields like  
12          the pilot who landed that plane. Remarkable,  
13          and a junior pilot might not have been able to  
14          do.

15                      But for you guys, what does the  
16          specialized training for defense lawyers mean?  
17          Does it mean, for instance, being trained in  
18          the various aspects of substance abuse and  
19          treatment and co-concurring diagnoses and  
20          problems? Is that the kind of specialized  
21          training?

22                      Does it include being a member of

1 a team in a cooperative environment as opposed  
2 to the traditional adversarial role?

3 I mean, so when you refer to the  
4 specialized training, you know, with detail  
5 I'd be interested in knowing -- I think all of  
6 us would -- what does that mean for a defense  
7 lawyer.

8 MS. EKSTRAND: I'm looking at you,  
9 Tim.

10 (Laughter.)

11 DR. MARLOWE: I don't believe a  
12 defense -- we have defense counsel that  
13 deliver that training, but maybe you could  
14 answer it better than I could, but none of  
15 these curricula are engraved in stone. So if  
16 you guys wanted to work with us to improve our  
17 curricula and you tell us that these issues  
18 are legal ethics.

19 We have a judge who delivers a lot  
20 of this stuff on legal ethics. Maybe we need  
21 to have --

22 MEMBER YOUNG: He's the guy from

1 Colorado.

2 DR. MARLOWE: Bill Meyers.

3 MEMBER YOUNG: We've already heard  
4 from him.

5 DR. MARLOWE: You what?

6 MEMBER YOUNG: He spoke to us in  
7 Arizona.

8 DR. MARLOWE: Yeah, and he's not  
9 the only one, but as I said to you before,  
10 what our position is on some of these issues  
11 he's been sort of our judicial fellow.

12 But you know, if what came out of  
13 this was you guys worked with us to change  
14 those curricula -- of course I'm saying this  
15 with a funder sitting right here as if it's  
16 totally up to us to do that -- but I think  
17 that, you know, they're not engraved in stone

18 MEMBER YOUNG: So is it the same  
19 program or different?

20 MEMBER SHIFMAN: And for you, Mr.  
21 Jeffries, what?

22 MR. JEFFRIES: I'm not a defense

1 attorney. So I wouldn't know the parameters  
2 or what the curricula should reflect, but in  
3 hearing what you just said, it should include  
4 what the common issues are in drug court. It  
5 should include what the top priorities are  
6 that we have if it's addressing co-occurring  
7 or what new issues that are going on just  
8 generically in the courts.

9 I believe those are generic  
10 components that are included in the  
11 curriculum. I'm sad to say that I have not  
12 seen one of those trainings. So I couldn't  
13 tell you exactly what's included, but  
14 definitely we would be amenable basically to  
15 understand what should be included in that.

16 MEMBER SHIFMAN: And from your  
17 organization, who's training the defense  
18 lawyers?

19 MR. JEFFRIES: It's the National  
20 Drug Court --

21 (Simultaneous conversation.)

22 DR. MARLOWE: Yeah, we get BJA



1 monies to provide training to drug court  
2 programs, and they don't have to pay to come  
3 to the trainings. We get the money from the  
4 feds. and we go out and do X number of  
5 trainings a year, and we have different  
6 training faculty depending on who's being  
7 trained.

8 So I do sanctions and incentives,  
9 but we have pharmacologists do whatever, and  
10 then there are defense counsel. We have  
11 defense counsel trainers who deliver the  
12 defense curricula. So the reason I don't know  
13 about it is not because it's unimportant.  
14 It's just I don't deliver that curricula.  
15 Other people do.

16 MEMBER YOUNG: Well, I wasn't sure  
17 because I knew that the National Association  
18 of Drug Court Professionals did training and  
19 then you were talking about training as well,  
20 but really you're talking about the same  
21 training.

22 DR. MARLOWE: We are.

1                   MEMBER YOUNG:  It's not two  
2                   separate sets of programs.

3                   DR. MARLOWE:  That's correct.

4                   MEMBER YOUNG:  You are funding  
5                   their organization to do that training.

6                   DR. MARLOWE:  That's correct.

7                   MEMBER YOUNG:  So let's say other  
8                   than the 80 or 90 defense counsel per year  
9                   that can be trained, are you aware of other  
10                  training in the drug court area other than  
11                  through --

12                  DR. MARLOWE:  We have our Public  
13                  Defender.

14                  MS. LONG:  We have our conference  
15                  every year, but what we also do is we have a  
16                  technical assistance project that he goes  
17                  around and trades teams and the public  
18                  officials --

19                  MEMBER YOUNG:  So you go on site.

20                  MS. LONG:  -- part of their  
21                  training, and we require that every team  
22                  member be there in order to conduct that

1 training. So we would go in at any time, in  
2 front of the team or we do a lot of regional  
3 trainings, and we also appear and do trainings  
4 for public conferences. We did one for Alaska  
5 where the PD had their conference and they  
6 asked for one of our senior Public Defenders.  
7 Actually she's on our board and she went there  
8 and did a training of ethical and  
9 confidentiality issues, and they asked for  
10 that, for their drug court defense counsel in  
11 Alaska.

12 So we're open and we're able to do  
13 all kinds of things.

14 CO-CHAIRMAN JONES: Carmen.

15 MS. HERNANDEZ: I wondered what  
16 goes in to constitute your training.

17 PARTICIPANT: I'm having a hard  
18 time hearing you, the folks in the back of the  
19 room.

20 CO-CHAIRMAN JONES: You'll have to  
21 speak up please.

22 MS. HERNANDEZ: I just wanted to

1 know your part of the training topics that you  
2 would be taught as a defense attorney trainee.  
3 Is it, you know, legal issues or is it MSW  
4 issues or --

5 DR. MARLOWE: All of the above.

6 MS. LONG: It's a combination of  
7 everything. Terrence Walton, he's actually  
8 one of our trainers. He trains at our defense  
9 counsel, specific training during the week.  
10 They teach pharmacology, treatment, relapse.

11 We have someone to come in and  
12 talk about cultural competency. We also talk  
13 about ethical confidentiality issues. We talk  
14 about community service, probation issues. We  
15 talk about every role in the drug court teams  
16 to give them an overview of what they're going  
17 to deal with in drug court.

18 CO-CHAIRMAN JONES: Can you two  
19 just put your names and titles on the record  
20 for the reporter, please?

21 MS. LONG: I'm Austine Long,  
22 Project Director for National Drug Court

1 Institute, Technical Assistance.

2 MS. HERNANDEZ: I'm Carmen  
3 Hernandez, promote defense attorneys.

4 MS. LONG: Yes, I'm also -- the  
5 panel may know that, but I'm also a Public  
6 Defender from Durham County, North Carolina,  
7 and I also was in private practice for several  
8 years as well.

9 CO-CHAIRMAN JONES: Thank you.

10 I just have a couple of thought  
11 and questions for you guys before we wrap up.  
12 In listening to the process the process and  
13 this conversation, one of the things I think  
14 that you said about the NADCP's position is  
15 that you were an advocate of multiple judges,  
16 the judge for the day-to-day stuff, a  
17 different, separate and distinct judge for  
18 hearings and then a separate and distinct  
19 judge for sentencing.

20 DR. MARLOWE: A separate judge for  
21 sentencing.

22 CO-CHAIRMAN JONES: So if we just

1 go to the day-to-day and the hearings, you're  
2 comfortable that that's the same judge?

3 DR. MARLOWE: Just make sure I  
4 understand. So there's the judge who's  
5 overseeing the proceedings. If there's going  
6 to be a termination hearing, that should not  
7 be done in a status review. There should be  
8 a due process hearing with notice, counsel,  
9 all of that stuff.

10 But we allow the drug court judge  
11 to make the determination or termination or we  
12 think it's appropriate. But once termination  
13 is made, that judge should not be the person  
14 who then says, "Okay. Now I'm sentencing on  
15 the original charge." It should be a separate  
16 judge, again, with exigency exceptions for  
17 when that's not feasible.

18 CO-CHAIRMAN JONES: And my sense  
19 is -- and people can tell me if they think I'm  
20 wrong -- my sense is that that's not only not  
21 going to be feasible and small jurisdictions  
22 and locales where there's one judge, but I

1 suspect that's not going to go over big in New  
2 York City where they're going to think it's  
3 ineffective and doesn't, you know, sort of  
4 assist in the smooth administration of justice  
5 bouncing these things around to different  
6 judges.

7 DR. MARLOWE: I don't know how to  
8 answer that.

9 CO-CHAIRMAN JONES: And my sense,  
10 it's more common than --

11 DR. MARLOWE: Yeah. In the courts  
12 where I work, that's what was done. In  
13 Philadelphia and Delaware the sentencing is  
14 done separate.

15 CO-CHAIRMAN JONES: Another thing  
16 I just wanted to make sure that I was clear  
17 about is when you said that the studies look  
18 at recidivism and you said that what  
19 constitutes recidivism is arrests, that's  
20 surprising to me because I would think that  
21 from the drug court's perspective, they'd want  
22 a recidivist to be someone who has actually

1           been convicted because then you're going to  
2           have a likely higher percentage of folks who  
3           are not recidivists.

4                        If you just look at arrests, their  
5           percent of recidivism is going to be higher.  
6           No?

7                        MS. EKSTRAND: Well, certainly if  
8           you just look at arrests your percentage of  
9           recidivism will be higher.

10                      CO-CHAIRMAN JONES: Right.

11                      MS. EKSTRAND: But, you know,  
12           maybe you could make the assumption that  
13           people that are arrested are innocent, and so  
14           they should stay in the drug court program,  
15           but to my knowledge that has not been the case  
16           that that assumption has been made. If an  
17           arrest occurs, then your drug court data is  
18           over.

19                      DR. MARLOWE: That actually  
20           varies. I'm sorry. The reason we settled on  
21           arrest, frankly, is a practical matter.  
22           Commission data are not reliable. That's the



1 reason. They don't mean what you think they  
2 mean.

3 Arrest data mean we know that  
4 arrest says this person was arrested. Chances  
5 are they were arrested, but conviction, we  
6 don't know if what's in the database is  
7 accurate.

8 CO-CHAIRMAN JONES: So then you  
9 have to sort of almost put an asterisk by  
10 recidivism because you may get arrested, but  
11 that doesn't mean you did anything at all.

12 DR. MARLOWE: That's correct.

13 MS. EKSTRAND: Well, and by the  
14 same token you have done ten crimes and not  
15 get arrested for it.

16 DR. MARLOWE: So then in that  
17 you'd hope --

18 MS. EKSTRAND: We're hoping that  
19 this is a good surrogate, but you know, in the  
20 social science world this is probably as good  
21 as it gets.

22 DR. MARLOWE: That's right.

1 That's correct.

2 CO-CHAIRMAN JONES: Carmen.

3 MS. HERNANDEZ: I was going to say  
4 my understand was in most recidivism studies  
5 that what they used.

6 MS. EKSTRAND: Exactly.

7 MS. HERNANDEZ: I know in the  
8 General District studies there was a whole  
9 dispute over why should you say that someone  
10 who has been arrested unlawfully, you know,  
11 selective --

12 DR. MARLOWE: Correct.

13 MS. HERNANDEZ: -- analysis.

14 MS. EKSTRAND: Well, I mean,  
15 you're hoping that, in fact, you're going to  
16 have enough cases that the falsely arrested  
17 and those who should have been arrested but  
18 weren't, you know, I mean, that's quite an  
19 assumption.

20 CO-CHAIRMAN JONES: It is.

21 DR. MARLOWE: All the more reason  
22 why studies don't get included unless there's

1 a comparison study.

2 MS. EKSTRAND: Exactly.

3 DR. MARLOWE: But those errors  
4 should be equivalent in both groups.

5 MS. EKSTRAND: Exactly.

6 DR. MARLOWE: So even though when  
7 I say there's a 25 percent recidivism rate  
8 here and 50 percent here, it may not really be  
9 25 and 50, but that difference is probably  
10 real. So this is higher than this. It's  
11 probably right.

12 MEMBER SCHUMM: I guess, Mr.  
13 Marlowe, you were here this morning when the  
14 Public Defenders from Maryland talked about  
15 the things that have happened in staffing and  
16 then sort of what the client saw in court. It  
17 seems to me that the key component is kind of  
18 the second and third are probably the ones  
19 that cause defense lawyers the most concern.

20 You said staffing is essential.  
21 If there weren't staffing, it's not a drug  
22 court. What's so important about the staffing

1 at which the person isn't there? And are  
2 there models where that's not used?

3 DR. MARLOWE: Well, first of all,  
4 I was saying that was based on the research  
5 study that showed that when defense counsel  
6 was engaged and attendant at staff meetings  
7 and court hearings regularly, they could sort  
8 of look at how often they were there.

9 Programs where defense counsel is  
10 there and engaged and have their outcomes, I  
11 was just stating an empirical fact. Now, one  
12 of the issues about this whole issue of  
13 nonadversarial approach has been somewhat  
14 misinterpreted. Our interpretation of that is  
15 that most of the zealous advocacy takes place  
16 in the staffing. That is where defense  
17 counsel is supposed to be saying, "Judge,  
18 you're wrong and we don't think it's a fair,"  
19 whatever. It's supposed to take place out of  
20 the client's milieu, earshot.

21 And then defense counsel goes and  
22 tells their client what happened. That's

1           what's supposed to happen. It's not supposed  
2           to be a yelling match, but so there is  
3           advocacy. It's just not in their head. Like  
4           they don't stand there in court and defense  
5           counsel is saying, "Judge, you're wrong," and  
6           getting in between the judge's interaction  
7           with the client. It's supposed to take place  
8           in the staff.

9                         MEMBER SCHUMM: And is that what  
10           happens in Delaware and Penn, in the courts  
11           you're familiar with?

12                        DR. MARLOWE: In the good courts,  
13           that's what happens. In the bad courts,  
14           defense counsel keeps their mouth shut,  
15           doesn't say anything, sometimes doesn't know  
16           whether the urine was dirty. He's hearing for  
17           the first time the urine was dirty. That's  
18           not a competent --

19                        MEMBER SCHUMM: And are those on  
20           the record in any way?

21                        DR. MARLOWE: No.

22                        MEMBER SCHUMM: No?

1                   MEMBER KELLY: Can an attorney  
2                   have the option of bringing his or her own  
3                   court reporter if they know that the staff  
4                   meeting is going to be particularly  
5                   contentious?

6                   CO-CHAIRMAN SCHECHTER: It would  
7                   destroy the whole model, wouldn't it?

8                   DR. MARLOWE: No. I think what  
9                   would happen is you then -- if there is no  
10                  resolution, then the resolution is, then the  
11                  discussion is add in the court, and you've  
12                  have a synopsis.

13                  I'm not saying you couldn't do it,  
14                  you know. I've never heard of that happening,  
15                  but what happened is defense counsel's  
16                  judgement, letting you when I got out there  
17                  I'm going to stay on the record, but I think  
18                  you're wrong.

19                  And then the judge says, "Do what  
20                  you want," or says something else, whatever  
21                  judges say, and you go out there and defense  
22                  counsel should not be intimidated. That's

1           their job, is to say, "We talked about this,  
2           Your Honor. As I said, my client denies that  
3           the urine was dirty. We think it was a faulty  
4           test. We're challenging and want a hearing."

5                       CO-CHAIRMAN SCHECHTER: It's  
6           actually a little more subtle than that. In  
7           good courts where the judge at a staffing  
8           hearing knows that the defense attorney will  
9           advocate and will push back against the other  
10          forces around the table, if the defense  
11          attorney says, "Okay. I don't agree with  
12          everyone around this table. We're going to a  
13          hearing," what I've seen is the judge says,  
14          "Hold on," and that's when the deal strikes.

15                      DR. MARLOWE: And keeps the  
16          conversation going.

17                      CO-CHAIRMAN SCHECHTER: Yes.

18                      DR. MARLOWE: That's what's  
19          supposed to happen.

20                      CO-CHAIRMAN SCHECHTER: That's  
21          what happens. The smart judge pulls everyone  
22          back and says, "Wait a minute before we go to

1 loggerheads."

2 What then happens is they strike a  
3 deal, which is a compromise between an all out  
4 fight and putting a guy back in jail with a  
5 sanction, and then at 2:00 p.m. when everybody  
6 comes out on the record, what I have found is  
7 it's almost like an assembly line because the  
8 deals have already been struck.

9 So your case takes 30 seconds.

10 Ms. Ekstrand's case takes a minute and a half.

11 You know, Adele's case might take three  
12 minutes because they had a wrinkle. The in-  
13 court stuff is a byproduct. It's extra. The  
14 battle is within the hearing itself.

15 DR. MARLOWE: That's right.

16 CO-CHAIRMAN SCHECHTER: The other  
17 thing, and do correct me if I'm wrong because  
18 this is important from what I've seen the way  
19 you do, the staffing depends upon trust. Is  
20 that pretty much how the model works?

21 DR. MARLOWE: It's supposed to.

22 Trust meaning you should be able to fill your



1           role, say what you want to say without  
2           retaliation.

3                       CO-CHAIRMAN SCHECHTER: Right, and  
4           that's what the problem is for the defense  
5           attorney. Because everybody says we all trust  
6           one another, except the defense attorney says  
7           trust but verify.

8                       DR. MARLOWE: Everybody is  
9           supposed to say trust but verify, but you  
10          know, that's what's supposed to happen.

11                      CO-CHAIRMAN JONES: Ms. Ekstrand,  
12          when you say that the NADCP's position is no  
13          ex parte conversations, do you think of  
14          staffing as ex parte conversations?

15                      DR. MARLOWE: Our statement is  
16          that defense counsel should be present at the  
17          staffings so that the prosecution, for  
18          example, is not having conversations with the  
19          judge without defense counsel present. That's  
20          our point.

21                      So if by ex parte you mean the  
22          client should be present, that's not our

1 position.

2 CO-CHAIRMAN JONES: So you're  
3 comfortable with the client not being present.

4 DR. MARLOWE: Right.

5 MEMBER BERNHARD: So in a way  
6 isn't this like an old fashioned plea  
7 bargaining session --

8 DR. MARLOWE: Yes, it is.

9 MEMBER BERNHARD: -- which no  
10 longer happens at least where I practice  
11 anymore, but used to be that everybody would  
12 go up to the bench and everything would get  
13 worked out and we'd go back and we'd either  
14 put it on the record or we'd have our  
15 argument, right?

16 DR. MARLOWE: That is the way it's  
17 supposed to work. When they are pro forma or  
18 when the people in the room don't feel they  
19 can speak up, then it's dysfunctional, but the  
20 question is would it have been dysfunctional  
21 if it was a regular court proceeding and the  
22 same actors are involved. You know, that I

1 can't answer.

2 MEMBER BERNHARD: And the only  
3 real difference, it seems to me, is that we  
4 have a few additional players who have  
5 additional information.

6 DR. MARLOWE: That's right.

7 CO-CHAIRMAN JONES: I have got two  
8 last questions unless others. Go ahead.

9 MEMBER CLARK: Mr. Marlowe, I'm  
10 looking on your Website for your training for  
11 this last year, and you did in April drug  
12 court defense counsel training.

13 DR. MARLOWE: I did? I didn't see  
14 that.

15 MEMBER CLARK: Well, not you.

16 DR. MARLOWE: Okay.

17 MEMBER CLARK: Do you guys keep  
18 copies of materials that are used?

19 DR. MARLOWE: Oh, sure.

20 MEMBER CLARK: Could you get us a  
21 copy of what you sent to them?

22 DR. MARLOWE: Yes, absolutely.

1 We'll send you the books and whatever.

2 MEMBER CLARK: Yeah, whatever. If  
3 an attorney went, what they would be given.

4 DR. MARLOWE: Absolutely.

5 CO-CHAIRMAN JONES: Just second to  
6 last question is for your section, Mr.  
7 Marlowe. I believe -- correct me if I'm wrong  
8 -- you said in your opening statement or at  
9 some point during this conversation that the  
10 drug court model works. At least it works as  
11 good as anything else that we know and have  
12 been able to study based upon the 27 clean  
13 studies and the five or whatever it is meta-  
14 studies, that the drug court model works.

15 DR. MARLOWE: They reduce  
16 recidivism.

17 CO-CHAIRMAN JONES: Reduce  
18 recidivism, and you know, this morning if  
19 there was a theory or theme to the morning it  
20 certainly was that drug courts are  
21 standardless, and I think that to a greater or  
22 lesser degree you all subscribe to that notion

1 and that there should be standards.

2 I'm wondering, and maybe I should  
3 know this, is there any place that you can  
4 point us to? When you say the drug court  
5 model works, I'm wondering what is the drug  
6 court model if they're all different and  
7 they're standardless.

8 Is there some place we can go to  
9 get a good assessment of what is the drug  
10 court model?

11 DR. MARLOWE: Well, that's what I  
12 was sort of getting at. I think you've got  
13 the right person coming tomorrow. I think you  
14 should definitely save a lot of these  
15 questions for Mike Finigan because what he's  
16 done and what Faye Taxman and a few other  
17 researchers have done is say the ten key  
18 components which are rather broad and  
19 aspirational, there is a way to measure the  
20 developed ways of looking at how close a court  
21 follows these.

22 And so what they're saying is the

1 closer courts are to following these  
2 principles, the better the outcome. So it's  
3 adherence to these.

4 That's not good enough. Their  
5 assessment is would you look at adherence now  
6 and you can become the standards. So when we  
7 say adversarial hearing, we mean X needs to  
8 happen, Y needs to happen, Z needs to happen,  
9 A should not happen, B shouldn't. You know,  
10 we need to operationalize these based on that  
11 research.

12 So it's true there is no one  
13 model, but I think there's more similarities  
14 between drug courts than there are between  
15 drug courts and other courts. So, you know,  
16 that's sort of we're not done. We have a long  
17 way to go on them.

18 CO-CHAIRMAN JONES: My last  
19 question, and it's as much a statement of  
20 aspiration as much as anything else, and I  
21 guess it goes to you, Mr. Jeffries, and also  
22 to you, Mr. Marlowe, particular BJA, is the

1 deep pockets that are where they go for  
2 funding.

3           You know, I understand that  
4 research is expensive and there's lack of  
5 funding and all of your money is soft and all  
6 the things that you sort of said, but we have  
7 been literally all over the country, and  
8 everywhere we go, and if you were here this  
9 morning you heard it this morning, we've asked  
10 about what do you know about racial disparity.  
11 What do you know about social disparities?

12           And everywhere we go and it will  
13 frustratingly be in our report that the answer  
14 is always, "I don't know. The research hasn't  
15 been done. The studies haven't been done."

16           That's, I think, unacceptable.

17           DR. MARLOWE: I agree with you.

18           CO-CHAIRMAN JONES: And so I think  
19 that to the extent that this conversation goes  
20 beyond this room, and I'm glad to see you're  
21 writing, Mr. Jeffries --

22           (Laughter.)

1 DR. MARLOWE: He's a friend. So  
2 we're on track.

3 CO-CHAIRMAN JONES: I understand.  
4 You know, I think that we would like to know  
5 the answer to the racial disparity questions  
6 in this field and in this area, and so to the  
7 extent that we can leave you with that we  
8 would, and thank you very much for your time  
9 and for this conversation.

10 MR. JEFFRIES: Can I give you two  
11 cents worth?

12 CO-CHAIRMAN JONES: Yes, please  
13 do.

14 MR. JEFFRIES: One of our  
15 solicitations that's coming out February 2nd  
16 is called "Translating a Research Enterprise"  
17 (phonetic), basically to look at the research  
18 out there and develop curriculum around what  
19 works, what's going as Doug Marlowe can attest  
20 to.

21 I would love someone to grab that  
22 and say there are racial disparities within



1 courts, and we would like to take the research  
2 and translate that into a curriculum. I'm  
3 putting that out there in case anybody wants  
4 to.

5 CO-CHAIRMAN JONES: Great. What  
6 we know is that we don't know that there are  
7 because of the studies, but we certainly  
8 believe we can say it.

9 MR. JEFFRIES: Well, we'll make it  
10 come out.

11 CO-CHAIRMAN JONES: right.

12 MR. JEFFRIES: And we're also  
13 taking money for additional slots for our  
14 defense attorneys.

15 (Laughter.)

16 CO-CHAIRMAN JONES: Thank you so  
17 much.

18 MR. JEFFRIES: Thank you.

19 MS. EKSTRAND: Thank you.

20 (Whereupon, at 2:29 p.m., the  
21 meeting was adjourned.)

22

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**Doug Marlowe**  
**Transcript Edits**  
**DC Hearing**  
**Thursday January 22, 2009**

p. 241, lines 9 to 20: The NADCP Board has not (yet) issued a resolution re. whether, and under what circumstances, the drug court judge should also be the sentencing judge. Therefore, it is inaccurate to say that our "official" position is against this practice. The paragraph should read as follows:

"Our position is no if it feasible to do otherwise. In our trainings by the National Association of Drug Court Professionals, we recommend that if somebody is facing termination and/or a sanction that involves loss of liberties . . ."

p. 264, lines 10-14: Should read as follows:

"There would need to be a statement that a drug court judge should not be outside the courtroom interacting with the clients in an unstructured way, without defense counsel and the prosecution present, except under certain well-defined circumstances . . ."

p. 264, line 19: Please change the word "dumb" to "questionable."

p. 264, line 20: Please change the word "embarrassing" to "subject to reasonable objections"

p. 302, line 10: NADCP has no enforcement authority over judges, therefore it is incorrect to say that we "allow" them to do any particular act. The sentence should read as follows:

"But we have no objection if the drug court judge makes the determination of termination . . ."

p. 302, lines 12 to 14: Should read as follows:

"But once termination is made, that judge should ideally not be the person who . . ."

p. 302, line 15: "It should ideally be a separate judge . . ."

p. 303, line 13: Please omit "Philadelphia". The drug court is undergoing major changes with a new president judge and I don't know if this is still true.

