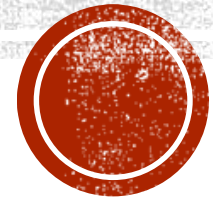


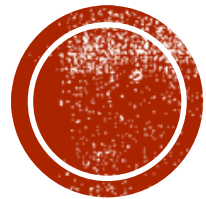
PARTICIPANTS' RIGHTS IN HEALING TO WELLNESS COURTS

NADCP Annual Training Conference

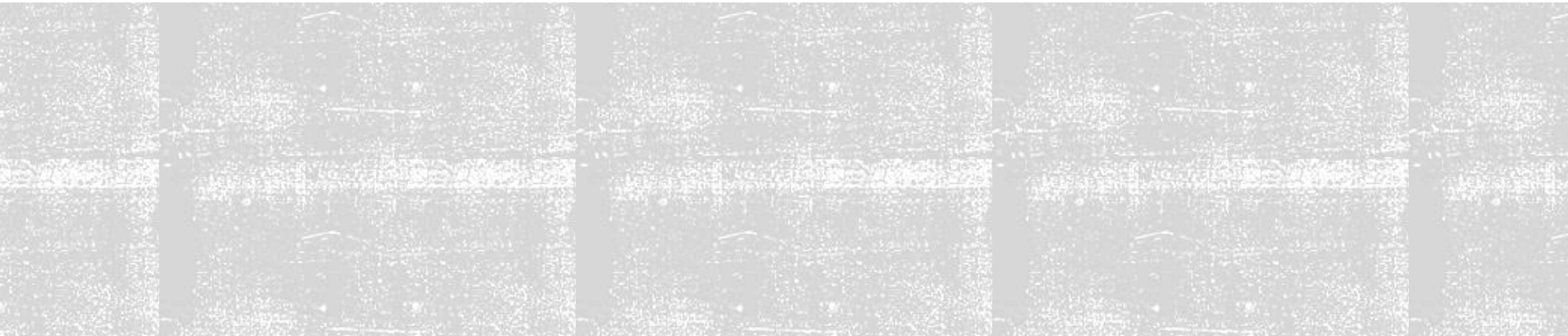
July 9-12, 2017



Carrie Garrow
Charlene Jackson
Lauren van Schilfgaarde
Tribal Law & Policy Institute

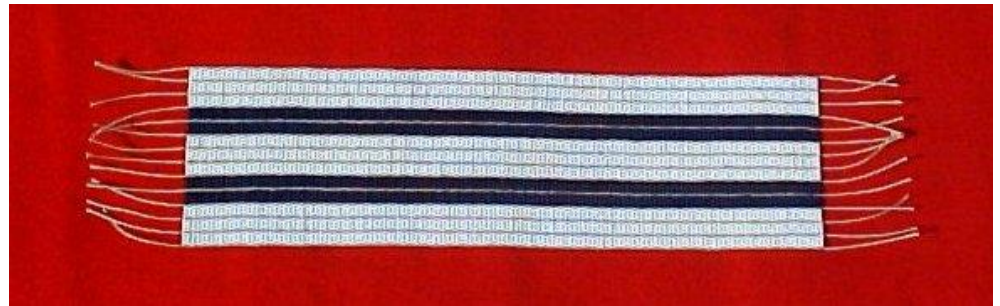


SOVEREIGNTY AND ICRA



SOVEREIGNTY

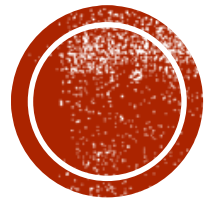
- Indian Nations are sovereign nations outside U.S. Constitution
- Prior to colonization Indian Nations exercised full criminal jurisdiction
- Indian Nations are governed by tribal constitutions, codes, case law, customs and traditions
- U.S. interference in Indian nations' criminal jurisdiction
 - Federal jurisdiction
 - State jurisdiction
 - Non-Indians
 - Limitations on sentencing



INDIAN CIVIL RIGHTS ACT (ICRA)

- Prohibition against unreasonable search and seizures
- Right against self-incrimination
- Right to an attorney
- Right to liberty
- TLOA issues – sentenced to up to three years
 - Right to effective counsel
 - Indigent right to counsel
 - Judges training requirement
 - Maintain a record of the proceeding





COMMON ISSUES



ENTRY INTO HEALING TO WELLNESS COURT

- Do I have a right to enter into HWC?
- Should I enter a plea prior to entering into HWC?
- Do I have a right to talk to my attorney prior to entry into HWC?
- What am I consenting to?
- Court capacity: what if the Wellness Court does not have enough spots?



SANCTIONS



- Right to a hearing for sanctions
 - If there is *potentially* a loss of liberty – due process rights attach.
 - Good Rule of Thumb: If sanction will amount to loss of liberty – due process rights attach.
- What process is owed?
- Will sanctions be greater than no Wellness Court participation?
- The importance of feeling due process



MORE ON JAIL



- Be cautious about using jail as a sanction in a pre-plea situations.
- What about contempt?
 - Direct contempt - Conduct must occur in the “immediate view and presence of judge” and actually disrupt court for immediate sanction
 - Indirect contempt – Hearing required



ASIDE FROM JAIL/DETENTION

- Intermediate sanctions do not implicate the same due process concerns but some type of hearing is necessary.

(State v. Rogers, Idaho, 2007)

- Defendant who voluntarily agreed to drug court cannot opt-out to avoid jail-based drug treatment.

(Walker v. Lamberti, Florida, 2010)



“TIME SERVED”

- Argument: Time served as a sanction should be credited towards un-imposed jail sentence in underlying criminal matter.
- Held: No consensus
 - Denial – Waived credit when signed participation agreement – if it’s specific
 - Credit for time served waiting to be admitted and/or following termination but denied credit for time served as participant
 - Credit granted
 - Credit not granted when serving for contempt of court



OTHER LEGAL CONSEQUENCES

- Arrests while in Wellness Court
- Restitution, Wellness Court fees, and other financial obligations
- Reunification and other dependency case outcomes



TERMINATION

- Termination \cong Probation Revocation – same rules apply.

(People v. Anderson, Illinois, 2005, State v. Cassill-Skilton, Washington, 2004, Hagar v. State, Oklahoma, 1999, In re Miguel, Arizona, 2003, State v. Rogers, Idaho 2007)

- What about right to counsel?
 - Not required for US Constitution, may be required by state law
 - Tribal? Not required by ICRA, may be required by tribal constitution or law



CAN I WAIVE A TERMINATION HEARING?

- Cannot prospectively waive due process right.

(State v. LaPlaca, New Hampshire 2011, Staley v. State, Florida, 2003)

- Failure to provide pre-termination hearing was a violation of due process when removal from Drug Court would result in imposition of suspended sentence.

(Gross v. Maine, 2013).

- Under Tribal law?



THE BASICS OF TERMINATION

- Generally – notice, hearing, a fair procedure
 - All required by ICRA
- Create an adequate record of termination hearings
- Think – Due Process

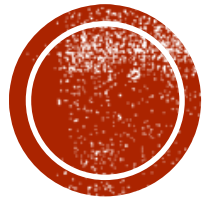


THE BASICS OF TERMINATION

- What does this mean for you?
 - Need a separate judge? - Not necessarily
 - Creating a record is good process

**NOTICE OF
TERMINATION**





SIDE BAR: RIGHTS IN THE CIVIL CONTEXT

Termination of Parental Rights and
Other Legal Considerations in
Family Healing to Wellness Court

RIGHT TO COUNSEL IN FAMILY COURT

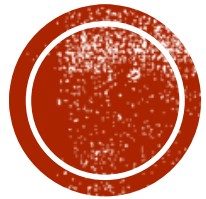
- No right to counsel (under U.S. Constitution) in child protective proceedings, including termination of parental rights cases, except on a case-by-case basis.
 - *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981)
 - Consider representation of children
- Still, most state courts provide counsel for indigent parents in termination of parental rights proceedings
- Counsel for other stages of the case is far more spotty



VISITATION AND REMOVALS

- How linked should supervised visitation and length of visitation be with compliance of treatment plan?
 - Child safety and best interest vs. sanction for non-compliance
- Should the removal of a child from the home and/or visitation be separately litigated, or waived as part of Wellness Court?





SEARCH AND SEIZURE



SEARCH AND SEIZURE



- Post plea and on probation
 - Typically upheld
- Pre plea and not on probation
 - Split in jurisdictions as to whether these are upheld



LIMITATIONS/PROHIBITIONS ON PLACES AND HOUSING

- Court has discretion and must be exercised in a reasonable manner
 - Cannot be overly broad when viewed in light of desired goals
 - Is restriction related to nature of offense or rehabilitation of probationer?



OTHER RESTRICTIONS ON PARTICIPANT'S FAMILY

- For juveniles
 - What if parents have drugs and/or alcohol in the home?
 - What if participant is truant?
- For adults
 - What if children reside in the home?
 - Can community supervision search a non-participant's room during a home visit?

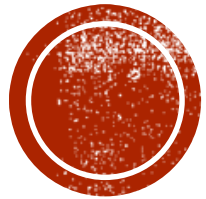


DRUG TESTING



- Must be related to Probationer's rehabilitation, protection of the public, or assuring appearance in Court
- When can a participant dispute a drug test result?





CONFIDENTIALITY



HIPAA



"According to your HIPAA release form
I can't share anything with you."

- Drug Court may not be a covered entity but providers are
- Rule/Order allows for transmission of information in court proceedings.
(45 CFR 164.512 (a) and (e))
- Consent forms include notice of release of information as part of participation.
(45 CFR 164.508(b)(4))
- Consent must be revocable.



FEDERAL CONFIDENTIALITY

- General Rule: Patient Identifying Information cannot be disclosed
- Consent requirements must be met
- Right to revoke:
 - Criminal: No revocation
 - Juvenile & Family: May revoke



CONFIDENTIALITY AND COURT

- Closed proceedings
 - 42 CFR 2.35 and the need for open courtrooms required denial of motion to close proceedings.
(Florida v. Noelle Bush, Florida, 2002)
- Staffing
 - Based upon uniqueness of Drug Court, Adult Drug Court staff meetings are not subject to open courts provision of Washington Constitution.
(State v. Sykes, Washington 2014)



CONFIDENTIALITY AND PROVIDERS

- Reluctant to Share Information
- What do you need to know?
 - Appropriateness for Program
 - Moderate to Severe Substance Use Disorder
 - Co-Occurring Disorders
 - Treatment Recommendations
 - Progress in Treatment
 - Changes in Treatment recommendations
 - No need for details



CONFIDENTIALITY AND THEIR ATTORNEY

- Participant retains an attorney-client privilege relationship with their defense counselor.
... So long as communications are made in private.



SOCIAL MEDIA

- Participant's availability or use of social media
- Admissibility issues
- Reliability issues
- Authentication issues
 - Messages should be authenticated on a case-by-case basis
 - State v. Fleck, 23 A.3d 818 (Conn. App. Ct. 2011)



ACCESS TO SERVICES

- Who pays for treatment and services while in Wellness Court? Who pays after graduation?
- What if some participants receive housing/transportation subsidies, and others do not?
- What if a participant wants to see a different provider?
- Can arrestee access services without participating in Wellness Court?



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TRIBAL LAW AND POLICY INSTITUTE RESOURCES

- www.WellnessCourts.org
- Tribal Healing to Wellness Court Publication Series
 - Tribal 10 Key Components
 - Preliminary Overview
 - Judicial Bench Book
 - Program Development
- Webinars
- Training Calendar
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