Law, Ethics and Medication Assisted Treatment

Judge William Meyer (ret.)
Senior Judicial Fellow
National Drug Court Institute
Resources


Huddleston & Marlowe, Painting the Current Picture: A National Report on Drug Courts and Other Problem Solving Court Programs in the United States (NADCP: July 2011)

Lebowitz, D. “Proper Subjects for Medical Treatment?” Addiction, Prison-Based Drug Treatment and the Eighth Amendment University, DePaul Journal of Health Care, V.14, Issue 2 (Spring 2012)

Legal Action Center, “Legality of Denying Access to Medication Assisted Treatment In the Criminal Justice System” (LAC 12/1/11)


Marlowe, Hardin & Fox, , Painting the Current Picture: A National Report on Drug Courts and Other Problem Solving Court Programs in the United States (NADCP: June 2016)


National Association of Drug Court Professionals. (2010). Resolution of the Board of Directors on the availability of medically assisted treatment (M.A.T.) for addiction in Drug Courts.


Our court has seen an increase of Heroin as the drug of choice in the last 5 years

A. 0 to 5%
B. 6 to 15%
C. 16-25%
D. 26-40%
E. 41-60%
F. Greater than 60%
Our court has seen an increase of abuse of opiate pharmaceuticals as the drug of choice in the last 5 years

A. 0 to 5%
B. 6 to 15%
C. 16-25%
D. 26-40%
E. 41-60%
F. Greater than 60%
Drug Courts and Opioid Dependence

Following the national trend of increasing opioid misuse, the number of people in drug courts with opioid problems has increased over the past decade. This increase has been especially notable in rural drug courts, where opioids were the misused drug of choice for 19% of drug court participants in 2008, compared with 6% in 2005.

Growth of Opioid Use
Primary Drug of Choice - Drug Court Entrants

Our court uses Medication Assisted Treatment in appropriate cases

A. Yes
B. No
Prevalence of MAT Use in Drug Courts

Drug Court Use of MAT Compared with Other Criminal Justice Interventions

<table>
<thead>
<tr>
<th>Type of Program</th>
<th>Probation</th>
<th>Non-OTP community treatment</th>
<th>Drug Court</th>
</tr>
</thead>
<tbody>
<tr>
<td>17%</td>
<td></td>
<td>13%</td>
<td>56%</td>
</tr>
<tr>
<td>&lt;17%</td>
<td></td>
<td>&lt;13%</td>
<td></td>
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</table>

The graph shows the percentage of Drug Court use of MAT compared to Probation and Non-OTP community treatment.
The Unequivocal Position of NDCI

Inclusion of MAT as part of opioid abuse treatment in drug courts is recommended by the NDCI as well as the National Association of State Alcohol and Drug Abuse Directors.

The Unequivocal Position of NADCP

In 2010, NADCP issued a unanimous Board resolution directing Drug Courts to:

1. learn the facts about MAT,
2. obtain expert medical consultation,
3. make a fact-sensitive inquiry in each case to determine whether MAT is medically indicated or necessary for the participant, and
4. explain the court’s rationale for permitting or disallowing the use of MAT.

The resolution states explicitly that Drug Courts should not have blanket prohibitions against MAT.

National Association of Drug Court Professionals. (2010). Resolution of the Board of Directors on the availability of medically assisted treatment (M.A.T.) for addiction in Drug Courts.
NADCP Standards

**Standard I** (Target Population) provides that candidates for Drug Court should not be excluded from participation in the program because they have a legally valid prescription for an addiction or psychiatric medication.

**Standard V** (Substance Abuse Treatment) further directs Drug Courts to offer MAT when it is prescribed and monitored by a physician with expertise in addiction psychiatry, addiction medicine, or a related medical specialty.

**Standard VI** (Complementary Treatment and Social Services), Drug Courts should offer psychiatric medications for co-occurring mental health disorders when prescribed and monitored by a psychiatrist or other duly trained medical practitioner.


BJA/SAMHSA Drug Court Grant Applicants

Applicants must also demonstrate that the drug court grant applicants for which funds are being sought will not deny any eligible client for the treatment drug court access to the program because of their use of FDA-approved medications for the treatment of substance use disorders. (methadone, buprenorphine products including buprenorphine/naloxone combination formulations and buprenorphine mono-product formulations, naltrexone products including extended-release and oral formulations, disulfiram, and acamprosate calcium)
Methadone & Federal Drug Court Funding

Methadone treatment rendered in 7 BJA-2015-4087 accordance with current federal and state methadone dispensing regulations from an Opioid Treatment Program and ordered by a physician who has evaluated the client and determined that methadone is an appropriate medication treatment for the individual’s opioid use disorder must be permitted.
When, if ever, can the Drug Court say No & Still Keep Federal Funding

Medications available by prescription must be permitted, unless the judge determines the following conditions have not been met:

1. the client is receiving those medications as part of treatment for a diagnosed substance use disorder;
2. a licensed clinician, acting within their scope of practice, has examined the client and determined that the medication is an appropriate treatment for their substance use disorder
3. the medication was appropriately authorized through prescription by a licensed prescriber
As a condition of drug court graduation, we require MAT cessation

A. Yes
B. No
What about mandating cessation as a condition of Drug Court graduation?

• In all cases, MAT must be permitted to be continued for as long as the prescriber determines that the medication is clinically beneficial. Grantees must assure that a drug court client will not be compelled to no longer use MAT as part of the conditions of the drug court, if such a mandate is inconsistent with a licensed prescriber’s recommendation or valid prescription.
Under no circumstances may a drug court judge, other judicial official, correctional supervision officer, or any other staff connected to the identified drug court deny the use of these medications when made available to the client under the care of a properly authorized physician and pursuant to regulations within an Opioid Treatment Program or through a valid prescription.
Nancy McLorne

• Nancy is a 38 year old Caucasian female in Drug Court. Nancy is a single mother with two boys, Josh (8) and Jordan (10). Both boys are temporarily placed with Nancy’s parents. Nancy is employed at a local nursing home as a part-time nurse’s aide. Nancy started using alcohol and marijuana at age 15, Vicodin at age 28 and heroin at age 30. Nancy first started snorting heroin but progressed to intravenous use six years ago. Nancy has one prior offense for Possession of a Controlled Substance (heroin) five years ago. She received a suspended sentence, attended psycho-educational classes and completed minimal probation supervision.

• Probation has clinically assessed Nancy as drug-dependent. Her early onset of her drug use, coupled with constant and multiple-day binge patterns, coupled with cravings and withdrawal upon cessation confirms that she is drug-dependent. However, she has limited criminal history and no past treatment attempts.
Staffing Information

Nancy is 26 weeks in the program. During the first 60 days, Nancy was not responding to treatment and continued to test positive for heroin. The Court placed her in detox and since detox, Nancy has been fully compliant with treatment sessions and case management. She has been attending N.A meetings and she now has a sponsor.

- However beginning last week:
  - Nancy missed one of three treatment sessions last week;
  - Nancy failed to show for two U.A.s last week.
  - Yesterday Nancy’s UA was positive for opioids;
  - Nancy admitted to staff that she relapsed on heroin. (Nancy is clinically assessed as drug dependent)
• If Nancy was in an adult drug court that does not permit MAT when appropriately prescribed or authorized, the drug court would not be authorized for BJA or SAMHSA funding
The Science of MAT

Scientific research has firmly established that treatment of opiate dependence with medications reduces addiction and related criminal activity more effectively and at far less cost than incarceration. MAT uses medications, such as methadone or buprenorphine or naltrexone, to normalize brain chemistry, block the euphoric effects of opioids, relieve physiological cravings, and normalize body functions without the negative effects of short-acting drugs of abuse.
The Science of MAT

• The U.S. Department of Health and Human Services’ National Institutes of Health (“NIH”) Consensus Panel reported that MMT has “the highest probability of being effective” when combined with attention to medical, psychiatric and socio-economic issues, as well as drug counseling, and recommended that “[a]ll opiate-dependent persons under legal supervision ... have access to [MMT] ...” and Buprenorphine is at least as effective as methadone in a correctional setting.

Numerous studies also have shown that MAT reduces drug use, disease rates, and criminal activity among opiate addicted persons.
Medications for Opioid Addiction Treatment

- Methadone
- Buprenorphine (Subutex)
- Buprenorphine/Naloxone (Suboxone)
- Oral Naltrexone (Revia)
- Injectable extended release Naltrexone (Vivitrol)
For Opiate addiction, our Drug Court uses:

A. Methadone
B. Buprenorphine (includes Subutex and Suboxone)
C. Naltrexone (includes Revia and Vivitrol)
D. A & B
E. A & C
F. B & C
G. ALL
H. None
Medications for Alcohol Addiction Treatment

- Disulfiram (Antabuse)
- Oral naltrexone (Revia)
- Injectable extended release naltrexone (Vivitrol)
- Acamprosate (Campral)
For Alcohol addiction, our Drug Court uses:

A. Disulfiram (Antabuse)
B. Oral Naltrexone (Revia)
C. Injectable extended release naltrexone (Vivitrol)
D. Acamprosate (Campral)
E. All
F. None
Medications for Addiction Treatment: Highly Studied

<table>
<thead>
<tr>
<th>Name of Medication</th>
<th>Cochrane Reviews</th>
<th># Scientific Papers in Pub Med</th>
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<tbody>
<tr>
<td>Antabuse</td>
<td>no</td>
<td>3,640</td>
</tr>
<tr>
<td>Naltrexone</td>
<td>yes</td>
<td>7,215</td>
</tr>
<tr>
<td>Acamprosate</td>
<td>yes</td>
<td>552</td>
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<tr>
<td>Methadone</td>
<td>yes</td>
<td>11,784</td>
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<tr>
<td>Buprenorphine</td>
<td>yes</td>
<td>3,869</td>
</tr>
<tr>
<td>Naltrexone</td>
<td>yes</td>
<td>7,215</td>
</tr>
</tbody>
</table>

FDA-approved Medications for Opioid Addiction Treatment

Opioid Agonists
  1) Full agonist: Methadone (oral)
  2) Partial agonist: Buprenorphine (sublingual)

Opioid Antagonist
  1) Naltrexone (oral)
  2) Naltrexone (extended-release injection)

Opioid Agonist Treatment

- Block the euphoric effects of heroin
- Reduces heroin use, HIV risk and criminal behavior
- Can be provided for individuals in probation, parole, Drug Court, jail and prison
Opioid antagonists:

• Oral tablets effective when taken but have poor adherence
• Injectable naltrexone recently approved by the FDA for the prevention of relapse to opiate dependence
• Promising approach in CJ settings
Our Drug Court does not use MAT because:

A. Cost
B. Detox before D/C entry
C. Lack of providers
D. Court does not permit
E. Fear of diversion
So, Why Are Not Some Drug Courts not using MAT?
Reasons given for why buprenorphine was not available in a drug court

- Cost: 43%
- Detox before admission: 42%
- Lack of Providers: 41%
- Court not permit: 40%

Why Methadone is not used in Drug Courts

Court does not permit
- Urban Courts: 69%
- Suburban Courts: 67%
- Rural Courts: 50%
- Total: 52%

Tx provider not recommend or provide
- Urban Courts: 49%
- Suburban Courts: 45%
- Rural Courts: 36%
- Total: 45%

Detox before supervision
- Urban Courts: 49%
- Suburban Courts: 45%
- Rural Courts: 36%
- Total: 45%

Risk of diversion
- Urban Courts: 52%
- Suburban Courts: 47%
- Rural Courts: 40%
- Total: 45%

Challenging Blanket MAT Prohibitions

• Americans with Disabilities Act (ADA)
  Prohibits discrimination by state and local governments

• Rehabilitation Act of 1973 (RA)
  Prohibits discrimination by federally operated or assisted programs

*Discovery House, Inc. v. Consol. City of Indianapolis*, 319 F.3d 277, 279 (7th Cir. 2003) ("the ADA and the [Rehabilitation Act] . . . run along the same path and can be treated in the same way").

• Due Process protections of 14th Amendment

• 8th Amendment-cruel and unusual punishment
**ADA & RA**

To prevail on a claim for discrimination, an individual must prove that s/he:

1. has a “disability”;
2. is “otherwise qualified” to participate in or receive the public entities benefits including services, programs, or activities; and
3. was either excluded from participation in, or denied the benefits, or was otherwise discriminated against because of disability.

The presenter wants to acknowledge the seminal work or the Legal Action Center for its publication *Legality of denying access to medication assisted treatment in the criminal justice system*. New York, NY. (2011), which this ADA & RA legal analysis is based.
Drug Court are “Programs or Activities” Under the ADA & RA


• *People v. Brathwaite*, 11 Misc. 3d 918, 816 N.Y.S.2d 331 (Crim. Ct., Kings County 2006) (Brooklyn’s alternative sentencing program falls under Title II’s definition of “state service or program.”);

People using/needing MAT are “individuals with a disability”

MX Group, Inc. v. City of Covington, 293 F.3d 326, 336 (6th Cir. 2002)
• The court noted that it is well established that drug addiction constitutes an “impairment” under the ADA and that drug addiction necessarily substantially limited the major life activities of “employability, parenting, and functioning in everyday life.”

US v. City of Baltimore, 845 F. Supp. 2d 640 (D. Maryland 2012) Residents of substance abuse facility were individuals with a disability
Eligible Drug Court Participants who are disqualified because of blanket MAT policy would be “otherwise qualified” for the government services.

Thompson v. Davis, 295 F.3d 890, 896 (9th Cir. 2002). (Incarcerated individuals who charged the parole board with illegally denying them parole because of their disability (drug addiction) sufficiently alleged that they were “otherwise qualified” for parole because they were statutorily eligible.)
Actual or Eligible Drug Court Participants who take MAT are not a significant risk to the health or safety of others

- New Directions Treatment Serv. v. City of Reading, 490 F.3d 293, 305 (3d Cir. 2007) (NIMBY case)

➢ Generalities about the criminal behavior of heroin addicts is not enough to establish a substantial risk to the community

➢ Must establish the: “the nature, duration, and severity of the risk, and the probability that the potential injury will occur.” The inquiry must be based on “current medical knowledge” or “best available objective evidence,” not on “stereotypes or generalizations.”

- Start, Inc. v. Baltimore Cnty., Md., et al., 295 F. Supp. 2d 569, 577-78 (D. Md. 2003) (Diversion risks and concerns can be mitigated through a systematic protocol for administration)

• See also: THW Group, LLC v. Zoning Bd. of Adjustment, 86 A.3d 330, 337 (Pa.Commw.Ct.2014); In Re Howard Center, 99 A. 3d 1013 (Vt. 2014)
Blanket Denial of MAT Access is Discrimination because of a Disability

• Disparate Treatment
  
  *Thompson v. Davis*, 295 F.3d 890 (9th Cir. 2002) (Denying parole b/c of drug addiction subject to disparate treatment analysis of ADA)

• Reasonable Accommodation
  
  ADA requires governmental agencies to make reasonable accommodations to avoid discrimination unless such change would fundamentally alter the nature of services provided

• Disparate Impact
  
  Title II ADA prohibits eligibility requirements that “screen out or tend to screen out” individuals with a disability, unless the criteria are essential to the provision of the services
Watson v. Kentucky, ______F. Supp. 2d______, (E.D. Kentucky 7/7/15)

• Watson requested the state court take her off the conditional release terms or remove the "blanket prohibition on her taking Suboxone, Methadone or any other drugs that she needs" to treat her addiction. The state attorney clarified that there was not a blanket prohibition on MAT drug use, but that "it's generally the Court's practice to allow [MAT drug use] if the doctor will show [ ] medical need." The court agreed and instructed Watson to produce "medical proof and recommendations from a treating physician" that she needs to use MAT drugs as part of her treatment. Watson also asked the state court to declare Kentucky's policy with regards to MAT drugs in violation of the Americans with Disabilities Act ("ADA"), the Rehabilitation Act. The state court denied Watson's request. At the hearing, Watson did not raise any other claims, constitutional or otherwise. Watson filed a complaint in federal court challenging the medication condition.

• She claims that conditioning her use of narcotics on a court's review of a doctor's note violates the ADA, the Rehabilitation Act, the Equal Protection and Due Process Clauses of the United States Constitution, and § 2 of the Kentucky Constitution. Watson asks the Court to enjoin the Kentucky Administrative Office of the Courts from enforcing the medication condition. Held: Younger v. Harris, 401 U.S. 37 (1971) bars Watson’s claims because they can be adequately dealt with in state court.)
Summary of ADA & RA

Drug Court Blanket MAT Prohibitions offend the ADSA & RA because:

1. D/C is a program covered by the statutes
2. Drug Court Eligible Opiate Addicts have a disability
3. D/C eligible opiate addicts do not as a class constitute a substantial risk
4. Blanket denial of MAT is discrimination because of a disability
Due Process and Blanket Prohibitions of MAT

Constitutional due process requirements of reasonableness or rationality guide conditions of treatment and supervision for persons who are on probation or Drug Court.

1. Probation terms and conditions should be reasonably related to the crime and the rehabilitative needs of the individual and protection of the community. *People v. Beaty*, 181 Cal.App.4th 644, 105 Cal.Rptr.3d 76 (2010).

Blanket Denial of MAT is a Due Process Violation

All judges should:

(1) consider relevant information before making a factual decision,
(2) hear arguments from both sides of a controversy (typically from the defense and prosecution), and
(3) receive evidence from scientific experts, if the subject matter of the controversy is beyond the common knowledge of laypersons.

The jail policy of denying methadone to pretrial detainees, who were receiving treatment at a methadone program prior to incarceration, is in essence a state sanctioned measure of involuntary rehabilitation. It is fostered by governmental officials and constitutes state action under section 1983. The policy does not effectuate the state's narrow interests in pretrial confinement and causes a deprivation that is not suffered by bailed methadone addicts. The policy thus constitutes punishment imposed without a finding of criminal culpability and, as such, is violative of fundamental due process rights.
Thus

• Blanket prohibitions of medication assisted treatment are a due process violation because
  1. they are not rationally (scientifically) based
  2. they are not reasonable because they don’t account for the mandate of individualized sentencing
  3. Don’t give the parties a fair opportunity to present their case since one alternative is foreclosed
Contested Matters

• Federal Funding:

The matter is settled (Presumption) in most instances if: (1) the physician has legal authority to write the prescription, (2) the medication is indicated to treat the patient’s illness, (3) the prescription was not obtained fraudulently, and (4) the patient agrees to take the medication as prescribed.

If prescribed: Presumption in favor of MAT

Burden on objector to show MAT inappropriate
Contested Matters

• No Federal Funding:
• Same 4 elements: legal authority, medication indicated, no fraud and d/c participant agrees
• Burden on the Participant-Preponderance
  prosecution may offer counter evidence
  medically necessary vs medically indicated

_Hawaii Medical Service Assoc. v. Adams_, 120 Haw. 446 (App. 2009).

Prior Methadone abuse or deception in Tx
Eighth Amendment

• *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (The Eighth Amendment's prohibition against cruel and unusual punishment places on prison officials an "obligation to provide medical care for those whom [they are] punishing by incarceration")
Mellender v. Dane County, ___F. Supp___ (W. D. Wisc. 2006)

Allegations that defendants exhibited deliberate indifference to his serious medical needs by discontinuing his methadone prescription and enforcing a policy that restricts inmates from receiving prescription methadone pass summary judgment standard)
Norris v. Frame, 585 F.2d 1183, 1188 (3d Cir. 1978)

Pretrial detainees had no constitutional right to receive the drug methadone, unless it was prescribed before their detention.
Compulsory Medication


1. The Government Must have an Important Interest
2. The Medication Must Significantly Further the Governmental Interest – probability of success
3. The Medication Must be Necessary to Further the Governmental Interest – least intrusive
4. The Medication Must be Medically Appropriate—best interest of the defendant
Compelled Administration of MAT

• Before imposing such a condition, the district court must "support its decision on the record with record medical evidence that the condition of supervised release sought to be imposed is `necessary to accomplish goals of probation and `involves no greater deprivation of liberty than is reasonably necessary. United States v. Williams, 356 F.3d 1045, 1057 (9th Cir.2004) (Anti-Psychotics--probation)
Compelled Administration of MAT

• What needs to occur
• Nancy as an example
Summary

• MAT works

• NADCP/NDCI Monograph, Resolution and Standards

• Federal Funding—BJA & SAMHSA
  • Cannot condition participation on non-MAT
  • Cannot require cessation, if still prescribed

• No Blanket Prohibition
  • ADA & RA
  • Due Process
  • Eighth Amendment

• Make Individual Clinical Assessments with MAT as an Alternative using Evidence Based Practices
• The end