



Legal Trends & Updates for Ohio's
Judges, Prosecutors, and Defense
Attorneys

Ohio Supreme Court
Specialized Docket
Conference
November 21 – 22, 2019

Disclosure

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An Overview of Participants' rights and Constitutional Concerns

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Judicial Impartiality

Ohio Code of Judicial Conduct Canon 2.9(A)(6)

A judge may engage in ex parte communications when administering a specialized docket, provided the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage while in the specialized docket program as result of the ex parte communication

Judicial Impartiality, cont.

In re Yost, 155 Ohio St. 3d 1266, 2018-Ohio-5257, 121 N.E. 2d 382 (2018)

Drug participant was indicted on new felony charge; offense occurred prior to admission into program.

The new felony was assigned to the docket of the drug court judge.

Participant not terminated from drug court pending the outcome of proceedings in the new felony.

Prosecutor filed affidavit of disqualification in new felony alleging bias because Judge “unilaterally” allowed participant to remain in drug court wherein the Judge would see participant weekly.



Judicial impartiality, cont.

“The Code of Judicial Conduct contemplates that a judge who administers a specialized docket assumes a more interactive role with parties, treatment providers, probation officers, social workers, and others...Accordingly, the fact that a judge may have engaged in ex parte communications in a specialized docket program – even if those communications would not have been appropriate in a more traditional setting – does not automatically lead to the judge’s disqualification from other proceedings involving the same parties.” *Id.*

Judicial Impartiality, cont.



“Similarly, the fact that a judge may have been exposed to certain information about a participant in a specialized-docket program – information that the judge may not have learned in the more traditional judicial forum – does not automatically require the judge’s disqualification from other matters involving the participant.” *Id.*

Judicial impartiality

In re Disqualification of Giesler, 135 Ohio St. 3d 1201, 2011-Ohio-7083, 985 N.E. 2d 486

Mother filed for return of legal custody of children.

Mother had previously been terminated from juvenile dependency specialized docket court.

Mother asserted that specialized docket Judge engaged in improper ex parte communications with the parties and certain witnesses.

Disqualification denied, ex parte communication permitted by Jud.Cond.R. 2.9(A)(6)

Judicial Impartiality, cont.

In re Disqualification of Blanchard, 150 Ohio St. 3d 1260, 2017-Ohio-5543, 80 N.E.3d 504 (2017)

Mother's case plan included completion of Family Dependency Docket.

Both parents sought disqualification from the underlying dependency proceedings asserting the Judge is now a factual witness in regard to the mother's completion of the program.

Disqualification denied; the fact the same judge presides over a parent's dependency case and her family drug court hearings does not, without more, mandate disqualification.

Judicial Impartiality cont.

"...(t)he ability of a judge to preside fairly and impartially in a particular matter must be analyzed on a case by case basis. Hypothetically, a judge could be exposed to such highly prejudicial information in a parent's drug court hearings that the likelihood or appearance of bias in a parent's dependency case would be unacceptably high." *Id.*

In this case the parents' general and non-specific claim that the Judge heard prejudicial facts about them in drug court proceedings is insufficient to overcome the presumption of the Judge's impartiality.

Appendix I of the Rules of Superintendence for the Courts of Ohio

Established to guide courts in the planning and implementation of all specialized dockets.

“The standards set forth minimum requirements for the certification and operation of all specialized docket courts.”

Specialized
Docket
Standards

Standard 2. Non-Adversarial Approach

A specialized docket shall incorporate a non-adversarial approach while recognizing all of the following:

- (A) A prosecutor’s distinct role in pursuing justice and protecting public safety and victim’s rights;
- (B) A defense counsel’s distinct role in preserving the constitutional rights of the specialized docket participant;

Specialized
Docket
Standards,
cont.

- (C) The participant’s right to request the attendance of defense counsel during the portion of a specialized docket treatment team meeting concerning the participant;
- (D) A participant’s right to a detailed, written participation agreement and participant handbook outlining the requirements and process of the specialized docket.

Specialized
Docket
Standards,
cont.

Standard 3. Legal and Clinical Eligibility and Termination

A) Criteria

A specialized docket shall have written legal and clinical eligibility, completion, termination, and neutral discharge criteria that have been collaboratively developed, reviewed, and agreed upon by the relevant parties identified in Standard I(A).

Relevant parties include: the judge, the court, the prosecutor, defense counsel, licensed treatment providers, children services (for family dependency courts) and, probation, parole authority, law enforcement (for criminal and juvenile dockets).

Specialized
Docket
Standards,
cont.

B) Decision on admission or termination

A specialized docket judge shall have discretion to decide the admission into and termination from a specialized docket in accordance with the written criteria for the specialized docket.

C) No right to participate

The written legal and clinical eligibility and termination criteria do not create a right to participation in a specialized docket.

Specialized
Docket
Standards,
cont.

<http://www.sconet.state.oh.us/JCS/specDockets/guidanceConstitutionalStandards.pdf>

Specialized
Docket
Section
Guidance

Due Process

Reminder, Ohio's Specialized Docket Standard 2(A) requires that the court recognizes defense counsel's distinct role in preserving the constitutional rights of the participants.

A specialized docket court cannot require a participant to waive the right to a termination or jail sanction hearing, or the right to consult with an attorney, as a condition of participation in the program.

Program materials containing such waivers will not be approved for certification by the Ohio Supreme Court's Commission on Specialized Dockets.

Due Process, cont.

It does not matter that participation in the program is voluntary.

It does not matter that specialized docket programs are focused on treatment.

What does matter is that it is fundamental to our legal system that the State shall not deprive any person of life, liberty, or property without due process.

Due Process, cont.

State v. Rogers, 144 Idaho 738, 170 P.3d 881(2007),
“..the fact that no one is entitled to participate in the
drug court program is irrelevant; the Constitution
ensures that once a liberty interest is created due
process must be provided when the State seeks to
terminate that liberty interest.”

The Idaho Supreme Court rejected the State’s
argument that because participation in a drug court
program is a gift from the State and not an
entitlement, the State has the authority to determine
what program processes to which participants are
entitled.



Due Process, cont.

Termination Hearings

A specialized docket shall not terminate participants unless provided notice of intent to terminate, a hearing, and representation by counsel.

Said participants shall have a commensurate level of rights as those required for community control violations.

A participant may waive the right to a hearing, so long as the participant has had the right to consult with counsel, and the waiver is made knowingly, intelligently, and voluntarily.

Due Process, cont.

Jail Sanctions

Research in Drug Courts indicates that jail sanctions produce diminishing returns after approximately three to five days (Carey et al, 2012; Hawken & Kleiman, 2009) A multistate study found that Drug Courts that had a policy of applying jail sanctions of longer than one week were associated with increased recidivism and negative cost benefits. (Carey et al., 2012) Drug Courts that relied on jail sanctions longer than two weeks were two and a half times less effective at reducing crime and 45% less cost-effective than Drug Courts that tended to impose shorter jail sanctions.

Due Process, cont.

Jail Sanctions

A specialized docket shall not impose a jail sanction for non-compliance without providing notice, a hearing, and representation by counsel.

A participant may waive the right to a hearing, so long as the participant has had the right to consult with counsel, and the waiver is made knowingly, intelligently, and voluntarily.

Participants do not have the right to contest the imposition of sanctions that do not impact liberty interests.

Adjustments in treatment activities are not sanctions.

Due Process, cont.

Jail Sanctions

Given that many rule violations of specialized docket courts involve uncomplicated questions of fact, such as whether a drug test was positive or whether the participant missed treatment sessions, hearings can often be scheduled quickly and provide adequate procedural due process protections.

Sample Due Process Form

IN THE COURT OF COMMON PLEAS
ASHTABULA COUNTY, OHIO

State of Ohio,)
Plaintiff,) CASE NO. _____ CR _____
vs.)
Defendant.) **NOTICE OF VIOLATION**

You have violated the following conditions/requirements of drug court, to wit:

The proposed sanction for this violation is: _____

DATE: _____ Drug Court Probation Officer
I have reviewed the defendant's due process rights, including the right to a hearing, with the defendant.

DATE: _____ Attorney

STIPULATION AND WAIVER

I understand that I have: 1) the right to a hearing at which the State would have to prove the violation; 2) the right to hear, see, and cross-examine the witnesses against me; 3) the right to have an attorney represent me; 4) the right to testify, to call witnesses, and present evidence.

Understanding these rights, I hereby waive my right to consult with counsel and to have a hearing. I admit the violation and I accept the proposed sanction.

I request a hearing.

DATE: _____ Defendant

ORDER

The Court finds that the defendant has violated the conditions/requirements of drug court, as set forth above. The defendant is sanctioned as follows:

DATE: _____ JUDGE

Due Process, cont.

Jail Sanctions

O.R.C. 2981.08 does not grant authority to a specialized docket court probation officer to incarcerate a participant for up to 30 days without a hearing.

O.R.C. 2951.08(A) "...a probation officer may arrest the person under a community control sanction without a warrant **and** bring the person before the judge..."

O.R.C. 2951.08(B) "...**promptly shall** bring the person arrested before the judge..."

Due Process, cont.

Sample Notice of Violation

1. Provides a written notice of the claimed violations;
2. Provides the opportunity to consult with counsel;
3. Provides the opportunity to be heard in person and present evidence;
4. Provides the right to confront and cross examine witnesses.

Due Process, cont.

Mississippi Comm'n on Jud. Perf. v. Thompson,
169 So.3d 857 (2015)

Mississippi judge removed from office for:

- Jailing a participant for 24 days for unspecified violation.
- Keeping participants in treatment court indefinitely, some for over four years.
- Refusing to conduct jail sanction hearings.

“We agree that Judge Thompson’s lack of understanding and appreciation for basic legal principles...of due process safeguards cannot be overlooked.” – Mississippi Supreme Court

Abbott v. Columbus, 32 Ohio Misc. 152, 289 N.E.
2d 589 (1972)

“...preventive detention is in no case proper absent an emergency situation involving a clear and present danger to the community. It is incumbent upon this court regardless of its own predilections upon respect to the alleged conduct involved to support the constitutional rights of these petitioners, if for no reason than to encourage respect for and confidence in the judicial system of the citizenry.”

Preventive Detention

Detention requires Due Process.

Unlawful preventive detention exposes courts to class action lawsuits.

Hoffman v. Knoebel, 894 F.3d 836 (7th Cir. 2018)

“Unfortunately, the drug treatment court in Clark County was not one of the success stories. Under the stewardship of Judge Jerome Jacobi, the court ran roughshod over the rights of participants who frequently languished in jail for weeks and even months without justification. The jail stays imposed as sanctions for noncompliance (and awaiting placement in treatment facilities) were arbitrary and issued without due process.”

Preventive
Detention,
cont.

N.D.C.I. recommendations:

- Exhaust other less restrictive alternatives (e.g. house arrest, GPS monitoring, halfway house, etc.).
- Rely on treatment provider recommendations for alternatives.
- Hold a hearing with testimony by a treatment provider concerning the participant’s substance use or mental health needs.
- Provide consultation with counsel.
- Rely on other non-compliance issues to justify the sanction (e.g. missing appointments, curfew, etc.)

Preventive
Detention,
cont.

Recommendations:

- Make a probable cause determination.
- Set bail.
- Document the efforts taken to secure a treatment bed placement.
- Set review dates until treatment bed is available.
- Explore civil commitment.

Preventive
Detention,
cont.

Right Against
Self
Incrimination

A specialized docket court may require participants to waive their right to remain silent and to not incriminate themselves regarding violations of the rules of the specialized docket program.

However, a specialized docket court shall not require the waiver of these rights in regard to pending criminal charges, and statements made by participants cannot be used as evidence in any criminal prosecution.

Right Against Self Incrimination, cont.

In re Statements Made in Drug Court, 2010-MISC-0047, Union County local rule recognizing the need for participants to be honest and forthcoming, and prohibiting the use of statements as substantive evidence.

State v. Plouffe, 329 P.3d 1255 (Mont. 2014), the Montana Supreme Court held that a prosecutor cannot charge treatment court participant with a new crime based upon confidential information learned in staffing.

O.R.C. 2951.02(A) authorizes warrantless searches of participants as a condition of supervision *if* there are reasonable grounds to believe that the participant is not abiding by the law or complying with the terms of supervision.

Probation searches conducted pursuant to a condition of probation are constitutional provided that a reasonable suspicion exists that evidence of criminal activity can be found in probationer's home. *United States v. Knights*, 534 U.S. 112, 122, S.Ct. 587, 151 L.Ed.2d 497 (2001)

Those on community control supervision consent to warrantless searches. *State v. Benton*, 82 Ohio St.3d 316, 695 N.E.2d 757 (1998)

Searches

Medication Assisted Treatment (MAT)

A specialized docket court cannot prohibit Medication Assisted Treatment (MAT) because “it substitutes one addiction for another”.

Beginning in 2015, treatment courts receiving federal funding must attest in writing that they will not deny an otherwise eligible participant’s use of MAT and they will not require discontinuance of medications as a condition of graduation.

MAT, cont.

N.A.D.C.P. Best Practice Standard I(E):

“...numerous controlled studies have reported significantly better outcomes when addiction offenders received medically assisted treatments including opioid antagonist medications such as naltrexone, opioid agonist medications such as methadone, and a partial agonist medications such as buprenorphine.”

Ohio Standard 4(C): “Participants shall be placed as soon as possible in appropriate treatment services and program...”

MAT, cont.

MAT prohibitions are invalid under:
Americans with Disabilities Act (ADA)
Rehabilitation Act of 1973
Fourteenth Amendment
Eighth Amendment

MAT, cont.

When can a treatment court prohibit MAT and retain federal funding?

- The participant is not receiving the medications as part of treatment for a diagnosed substance use disorder; or
- A licensed prescriber, acting within the scope of their practice, has not examined the client and determined the medication is an appropriate treatment for their substance use disorder; or
- The medication was not appropriately authorized through prescription by a licensed prescriber.

Medical Marijuana



Marijuana is still a scheduled I substance under federal law.



FDA does not recognize marijuana as medication.

Brandon Coats v. Dish Network, LLC, 2015 CO 44, 350 P.3d 849 (2015)

- Employee who had state medical marijuana card fired for positive THC test.
- Employee challenged discharge pursuant to Colorado statute which prohibits employers from discharging an employee based upon engagement of “lawful activities”.
- Colorado Supreme Court ruled that a “lawful activity” must be lawful under both state and federal law.
- Federal law makes no exception for marijuana use for medicinal purposes.

Medical
Marijuana,
cont.

State ex. rel Polk v. Arizona, 237 Ariz. 125, 347 P.3d. 142 (2015)

- Arizona Medical Marijuana Act provides that a registered patient cannot be arrested, prosecuted, or penalized in any manner or denied any right or privilege for authorized medical marijuana use.
- Arizona Supreme Court ruled that this statute prohibits a trial court from conditioning *probation* on refraining from possessing or using medical marijuana.

Medical Marijuana, cont.

Restrictions on Participants

A specialized docket court may make restrictions as to:

1. The access or contact that participants have with certain geographical locations and certain persons or a class of persons, and
2. The consumption of various substances.

As long as said restrictions are reasonably related to the participants' rehabilitative needs.

Directives as to Drug Testing

A specialized docket may require participants to present themselves for drug testing at any time when requested by an authorized representative of the specialized docket treatment team.

The participant shall comply with such request, so long as requests are reasonably related to the participant's rehabilitative needs.



Reasonable relationship to rehabilitative needs

O.R.C. 2929.15(A) authorizes a court to impose financial sanctions, "as well as any other conditions of release under community control sanctions that the court considers appropriate."

O.R.C. 2951.041(D) requires the court to place an offender under the supervision of a probation department and further authorizes the court to include in the intervention treatment plan... "any other terms and conditions similar to community control sanctions..."



State v. Talty, 103 Ohio St. 3d 177, 2004-Ohio-4888, 814 N.E. 2d 1201.

Conditions must reasonably relate to rehabilitation, administering justice, and ensuring good behavior.

Conditions cannot be overly broad so as to unnecessarily impinge upon the participants' liberty.

Reasonable
Relationship
to
Rehabilitative
Needs, cont.

Pursuant to *Talty*, the conditions of a specialized docket should:

1. Be reasonably related to rehabilitation of the participant,
2. Have some relationship to the legal proceeding (crime, delinquency or dependency/neglect/abuse) for which the offender is participating in the program, and
3. Relate to the participants' conduct.

Reasonable
Relationship
to
Rehabilitative
Needs, cont.

Secular Alternatives to AA/NA



If a specialized docket program requires participation in a 12-step program, it shall permit participants to participate in a secular alternative and should refrain from requiring attendance at any non-secular 12-step program.



Specialized docket programs can refer participants to deity-based programs such as Alcoholics Anonymous, but courts cannot require participation without violating the First Amendment Establishment Clause.

The First Amendment Establishment Clause

It is not a violation of the Establishment Clause if a secular alternative is offered.

The participant must also properly raise any religious based concerns or objections to AA attendance to the court.

State v. Miller, 2014-Ohio-4348, 6th Dist. Nos WD-13-054, WD-14-006; *State v. Turner*, 2008-Ohio-3898, 11th Dist. No 2007-P-0090.

Other Constitutional Issues and Concerns

[National Drug Court Institute](#)

<https://www.ndci.org/resources/law/>



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State of Ohio,)
Plaintiff,)
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vs.) **NOTICE OF VIOLATION**
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_____,)
Defendant.)

You have violated the following conditions/requirements of drug court, to wit:

The proposed sanction for this violation is: _____

DATE: _____

Drug Court Probation Officer

I have reviewed the defendant's due process rights, including the right to a hearing, with the defendant.

DATE: _____

Attorney

STIPULATION AND WAIVER

I understand that I have: 1) the right to a hearing at which the State would have to prove the violation; 2) the right to hear, see, and cross-examine the witnesses against me; 3) the right to have an attorney represent me; 4) the right to testify, to call witnesses, and present evidence.

Understanding these rights, I hereby waive my right to consult with counsel and to have a hearing. I admit the violation and I accept the proposed sanction.

I request a hearing.

DATE: _____

Defendant

ORDER

The Court finds that the defendant has violated the conditions/requirements of drug court, as set forth above. The defendant is sanctioned as follows:

DATE: _____

JUDGE