

Treatment Court Legal Issues: We Don't Have All the Answers



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Goals for Today's Session:

- Review of key legal topics impacting treatment courts
- Engage in open discussion with attendees around pressing legal issues



Key Legal Topics for Today's Session

- Target Population and Eligibility Criteria
- Minnesota Court of Appeals *Cleary* Opinion
- Due Process/Liberty Issues
- Medication Assisted Treatment/Treatment
- Medical Marijuana



Are you taking the right
people?

Target Population and Eligibility Criteria

- Treatment courts should make admission decisions based on objective eligibility criteria.
- Treatment courts should be targeting individuals at high risk ***to reoffend*** and in high need ***of clinical services*** as determined by the use of validated risk and need assessment tools.

RISK PRINCIPLE

- “*High Risk*” refers to the likelihood that an offender will not succeed adequately on standard supervision, and will continue to engage in the same behavior that got him or her into trouble in the first place.
- NOT necessarily a risk for violence or dangerousness.
- Risk essentially means a difficult prognosis or lesser amenability to treatment.

NEED PRINCIPLE

- Clinical syndromes or disorders (substance use disorder; mental illness diagnosis)
- Major psychiatric disorders
- Functional impairments (e.g. homelessness, diminished ability to to feel pleasure, etc.)

Validated Risk & Need Assessments for Use in Treatment Courts

Adult Drug Court Assessments	DWI Court Assessments
RANT (screen)*	CARS
LS/CMI	RIASI
LSI-R	IDA
COMPAS	DWI-RANT (screen)*
TCU	SBiRT (screen)

* RANT & DWI-RANT are required under Minnesota Treatment Court Standards and provided to treatment courts through the State Court Administrator's Office.

Treating Multiple Risk and Need Levels in Treatment Court

- Participants should be separated into different tracks within a treatment court
- Tracks provide appropriate levels of supervision, treatment, & testing based on an individual's assessed level of risk and need.

ALTERNATIVE TRACKS

	High Risk	Low Risk
High Need (mod to severe MH/SUD)	<u>Standard Track</u> Accountability, Treatment & Habilitation	<u>Treatment Track</u> Treatment & Habilitation
Low Need (no or mild MH/SUD)	<u>Supervision Track</u> Accountability & Habilitation	<u>Diversion Track</u> Secondary Prevention

PRACTICAL IMPLICATIONS

High Risk

Low Risk

High
Need
(mod to severe
MH/SUD)

- ✓ Status calendar
- ✓ Treatment
- ✓ Pro-social & adaptive habilit.
- ✓ Abstinence is distal
- ✓ Positive reinforcement
- ✓ Community Support Groups
- ✓ ~ 18-24 mos. (~200 hrs.)

- ✓ Noncompliance calendar
- ✓ Treatment (separate milieu)
- ✓ Adaptive habilitation
- ✓ Abstinence is distal
- ✓ Positive reinforcement
- ✓ Community Support Groups
- ✓ ~ 12-18 mos. (~150 hrs.)

Low
Need
(no or mild
MH/SUD)

- ✓ Status calendar
- ✓ Pro-social habilitation
- ✓ Abstinence is proximal
- ✓ Negative reinforcement
- ✓ ~ 12-18 mos. (~100 hrs.)
- ✓ NO support groups

- ✓ Noncompliance calendar
- ✓ Psycho-education
- ✓ Abstinence is proximal
- ✓ Individual/stratified groups
- ✓ ~ 3-6 mos. (~ 12-26 hrs.)
- ✓ NO support groups

DUE PROCESS: What Process is Due?

Drug Court Termination

and

Due Process

*State v. Cleary**

- Key Issue: When the sole basis for revoking a participant's probation is termination from treatment court, is the participant entitled to have a different judge preside over the probation revocation hearing?
- Decision: Yes. A treatment court participant whose probation is being revoked solely as the result of termination from a treatment court is entitled to have a different judge preside over the probation revocation hearing.

*882 N.W.2d 899 (Minn. Ct. App. 2016)

State v. Cleary

- The right to an independent magistrate is essential in providing the procedural due process rights guaranteed to treatment court participants who will suffer the loss of a property right (i.e. the benefits of treatment court).
- In *Cleary*, the Court found that a judge presiding over treatment court has a “unique” and “personal” relationship with participants, unlike that of a typical judge-litigant. This could lead to bias.
- The mere appearance of a lack of impartiality was sufficient to merit a different judge in the probation revocation hearing.

State v. Cleary : in practice

- Judicial impartiality is an essential procedural protection, but removal is not automatic. A participant may choose to have the drug court judge preside over the probation revocation hearing.
 - The National Drug Court Institute notes “the safest position is to offer the offender the option to be sentenced by the drug court judge or by another neutral magistrate, and to entertain petitions for recusal if they are proffered by either the the defense or prosecution.” (National Drug Court Institute, *The Drug Court Judicial Benchbook* at 41 (Douglas Marlowe & Judge William G. Meyer eds., 2011))
- Bias is not assumed – the inquiry is whether an “objective observer would reasonably question whether the presiding drug court judge was able to maintain an open mind at the probation revocation hearing.” 882 N.W.2d at 904-05.

State v. Cleary : in practice

- The importance of judicial impartiality is rooted not only in due process, but the Code of Judicial Conduct. Minn. Code of Judicial Conduct, R. 2.3 and 2.3.
- *Cleary's* applicability is also most likely limited to the probation revocation hearing *after* a participant is terminated from the treatment court. The decision whether to terminate a participant from treatment court is not implicated by *Cleary*.

Procedural Due Process -- State v. Cleary Fact Pattern

- Elizabeth Johnson* is a participant in AnyCounty's DWI Court. She was screened for and admitted to the court in January 2015 after her fourth DWI offense. Between 2004 and 2013, she was convicted of three DWIs. She was ultimately referred to AnyCounty's treatment court after her fourth DWI, a felony, in November 2014.
- Elizabeth pled guilty to the felony DWI, was adjudicated, and received a sentence of five years in prison, suspended with seven years of supervised probation. Additionally, she was required to comply with all terms of the DWI court.
- *name and other details are fictional

Procedural Due Process -- State v. Cleary Fact Pattern

- One term of participation in AnyCounty's DWI court is that all participants must sign an acknowledgement and waiver at the outset of their admission into the program. The waiver, which was provided to Elizabeth at her sentencing and with an attorney present, provided in part that "any violation of terms and conditions of the court shall result in imposition of sanctions, without hearing ... termination of participation in the court shall result in imposition of the remainder of the suspended prison sentence and fines without hearing. Participant waives all rights to any hearing."
- Elizabeth started drinking when she was still in high school and although treatment was a condition of her probation in each of her DWIs prior to admission in AnyCounty's court, she had never maintained sobriety longer than one month. Elizabeth struggles with serious depression and anxiety. Since starting in the problem-solving court, Elizabeth was able to receive consistent treatment, initially was sober for three months, and adhered to all required policies in place in the court.

Procedural Due Process – State v. Cleary Fact Pattern

- Unfortunately, Elizabeth failed a UA after the three month mark. In accordance with the terms of the DWI court, Elizabeth was sanctioned. However, the pattern of several months of sobriety followed by a failed or missed UA, or failure to comply with other terms, continued for over a year. Elizabeth received a total of eight sanctions of varying severity over a year and a half.
- Finally, the AnyCounty DWI court team determined that Elizabeth was not a good fit for the treatment court and Elizabeth was terminated from the court. In accordance with the policy manual and waiver, Elizabeth was not provided a formal hearing on the termination.
- After termination, the State moved to impose Elizabeth's suspended sentence as she had violated her probation's terms upon termination from DWI court.
- The State argued that Elizabeth should not have the opportunity to contest the imposition of her jail sentence and fines due to the waiver she'd signed upon entry to the DWI court, over a year and a half ago. The district court agreed and imposed her sentence. The same judge who terminated her from DWI court also imposed her sentence.

Procedural Due Process— State v. Cleary Fact Pattern

- What are the issues here, if any?
- If the termination from DWI court AND the subsequent probation revocation were heard before the same judge, are there any problems?
- If the termination and probation revocation are to be heard before the same judge and Elizabeth asserted a right to a different judge, what should be done? What if she waives the option of having a different judge for each hearing?

Procedural Due Process— State v. Cleary Fact Pattern

- If the waiver were limited to a waiver of hearings for minor violations and imposition of smaller sanctions, but guaranteed the right to formal hearings for probation revocations, would there be issues?
- If Elizabeth had not been required to waive her right to revocation hearing before the fact, but did so after termination, would there be any issue?
- What about the right to a hearing for both probation revocations and terminations? Or is a participant guaranteed the right to formal hearing for all violations, no matter how minor?

Due Process & Liberty Issues

- Procedural protections are due under the due process clause when the defendant will potentially suffer a loss to a recognized liberty or property right under the 14th Amendment.
- Where does this apply in treatment court?



Due Process & Liberty Issues

- How do teams appropriately manage fraternization policies and freedom of association?
- What is the difference between ordering attendance at AA/NA etc. and ordering participation in pro-social activities?
- Does your team have clear eligibility and termination criteria? Does the participant know what those are?
- Are your participants informed of the right to an attorney in matters related to liberty and property?



Due Process & Liberty Issues

Procedural protections should be in place for these specific components of treatment court:

- Termination
- Probation Revocation
- Judicial Recusal at Termination
- Sanctions
- Place and Area Restrictions



Medically Assisted Treatment and Treatment Courts

- What is your court's policy and practice regarding MAT?
- Do participants have MAT integrated into their treatment plans with any frequency in your courts?



The Cost of Blanket Denials of MAT

Father Blames New York Judge for Son's Heroin Overdose

In Northern Kentucky in 2013, a majority of opioid addicts who died from overdoses lost their lives shortly after leaving jail or after having at least some experience with an abstinence-based program.

Tasha Riley of Ohio overdoses and dies two weeks after release from prison into drug court

Kentucky Sued in Federal Court Over Drug Treatment Practices:

Judge Karen Thomas says “I don’t give them a choice” on allowing MAT for addicts

Dying to be Free

Drug Court Fatally Misunderstands Addict Psychology

MAT and legal issues: NADCP and the Resolution of the Board of Directors

- In 2010, the NADCP's Board of Directors published a resolution directing treatment courts to:
 - Learn the facts about MAT
 - Obtain expert medical consultation
 - Make a fact-sensitive inquiry in each case to determine whether MAT is indicated for the participant
 - Explain the court's rationale each time it permits or disallows use of MAT
- NADCP does *not* permit blanket prohibitions against MAT. MAT must be allowed to continue for as long as the prescriber determines it is clinically beneficial to the participant.
- No Treatment Court judge or any staff connected to the Court may deny the use of MAT when made available to the participant from a duly licensed physician, per regulations within an Opioid Treatment Program, or through a valid prescription.

MAT and legal issues: ADA and RA

- The Americans with Disabilities Act (ADA) prohibits discrimination against people with disabilities by state and local governments
- The Rehabilitation Act of 1973 (RA) prohibits discrimination by federally operated or assisted programs
- An individual has a claim for discrimination under these statutes when she proves she
 - Has a disability
 - Is qualified to participate in or receive the benefits of a given program, activity, or service (such as a Treatment Court)
 - Was excluded from participation or denied benefits because of her disability
- Courts nationwide have found that Treatment Courts are programs or activities under the ADA/RA (*see, e.g., Evans v. State*, 667 S.E.2d 183 (Ga. App. 2008)); that people who avail themselves of MAT are individuals with a disability, i.e. addiction (*see, e.g., U.S. v. City of Baltimore*, 845 F. Supp. 2d 640 (D. Maryland 2012)); and that blanket denial of MAT access to otherwise qualified participants is discrimination due to disability (*see, e.g., Thompson v. Davis*, 295 F.3d 890 (9th Cir. 2002))

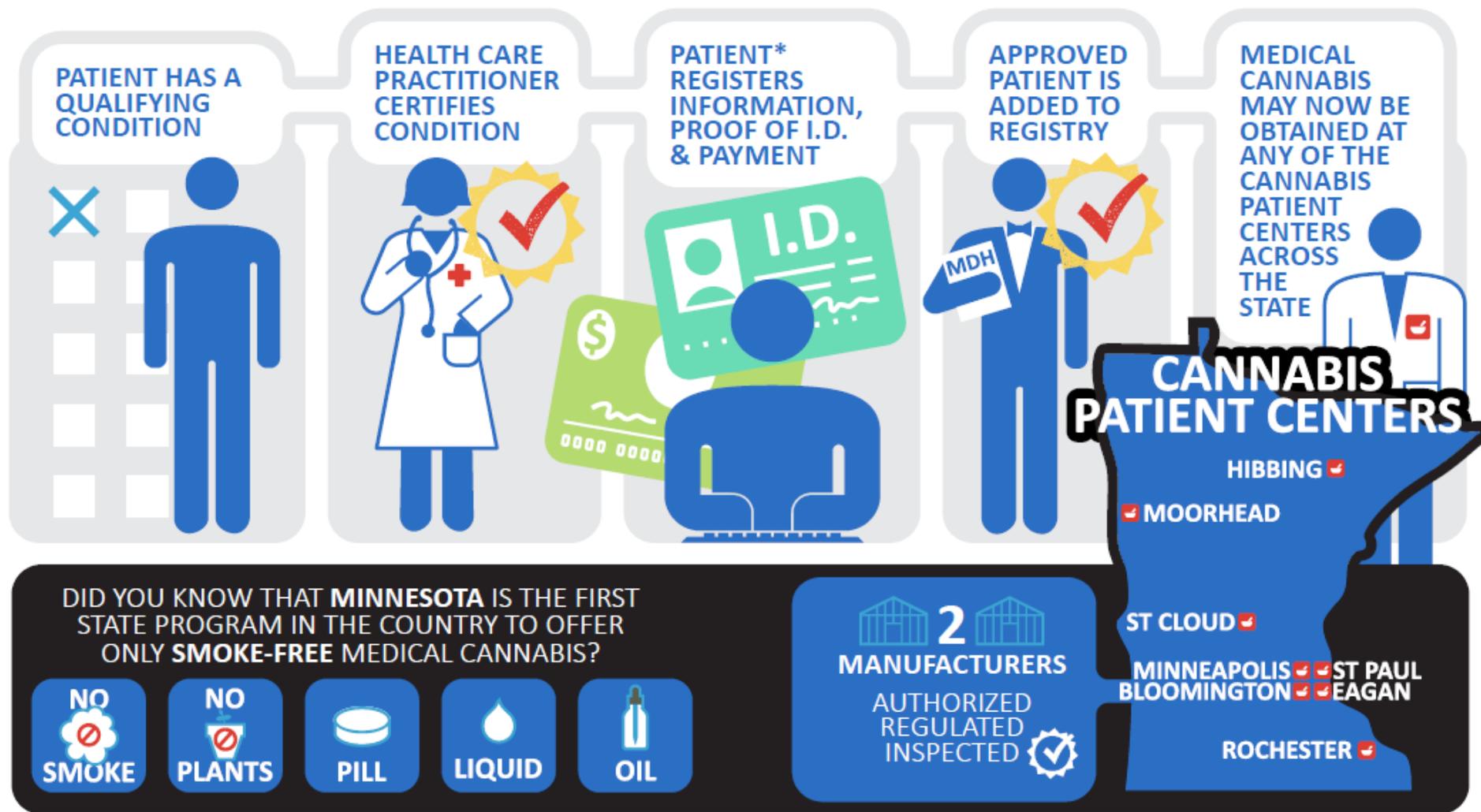
MAT and legal issues: Due Process & 8th Amendment

- Treatment Court participants are afforded constitutional due process protection of reasonableness and rationality.
- Individualized inquiries into each participant's situation must be made to meet individual needs: consider all facts, all arguments from both sides of issue, and analyze available evidence from medical and scientific experts
- Blanket denial of MAT is in opposition to the due process protections afforded to participants.
- Denial of MAT to an individual experiencing withdrawal may constitute deliberate indifference to serious medical need in violation of the Eighth Amendment's prohibition on cruel and unusual punishment.

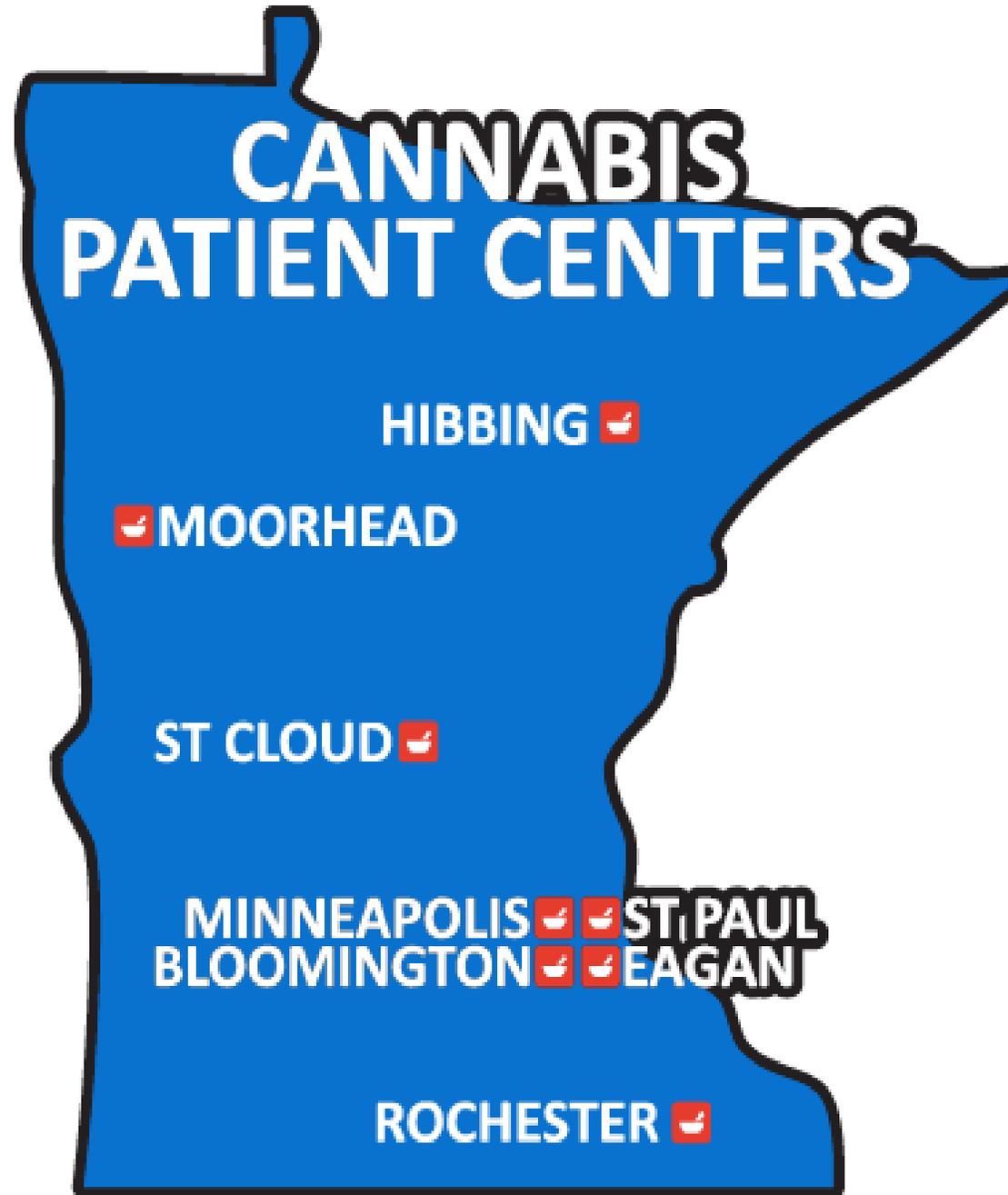
Medical Marijuana

- Legislation passed by the Minnesota State Legislature in 2014 created a process to allow seriously ill Minnesotans the ability to use medical cannabis to treat certain medical conditions.
- Beginning in July 2015, eligible patients enrolled on the patient registry became eligible to purchase medical cannabis from one of the state identified dispensaries

Overview of MN Medical Cannabis Program



*Care-giver may represent a patient by applying and meeting conditions including a background check.



Source: Minnesota Department of Public Health, <http://www.health.state.mn.us/topics/cannabis/patients/locations.html>

Medical Marijuana

- Limited & sometimes conflicting case law on this topic
 - Cases prohibiting a trial court from making refraining from or using medical marijuana a condition of probation
 - [Reed-Kaliher v. Hoggatt, Ariz. , P.3d \(2015\),](#)
 - [Polk v. Hancock, Ariz. , P.3d \(2015\)](#)
 - Case where authorized use of medical marijuana did not trump condition of probation prohibiting commission of new crime including federal crimes
 - [People v. Watkins, No. 10CA0579, Court of Appeals of Colorado, February 2, 2012](#)

Medical Marijuana

- What experience have Minnesota's treatment courts had with participants receiving a certification from a medical practitioner and enrolling in the registry?

St. Louis County DWI Court Prescription Drug Policy

If during the course of participation it becomes necessary for a participant to take prescription medication, the participant must have a blue card signed by their provider, stating that the medication is absolutely necessary. Probation must be notified immediately. The following are the procedures that must be followed for all participants who are placed on prescription medications.

DWI Court participants will be required to provide a blue card signed by their provider if a prescription drug is required. Participants will be required to identify one primary health care provider (PHCP) to coordinate all healthcare needs and sign the appropriate releases for the DWI Court Team. The PHCP will be responsible for managing all the prescription medications with the exception of those participants who do see a psychiatrist.

Participants will be asked to notify the DWI Court team if he/she is prescribed or administered a mood altering or controlled substance. He/she will also be required to provide a copy of the prescription by his/her next scheduled court date and keep the medication in its original prescription container.

St. Louis County DWI Court Prescription Drug Policy

In addition, the participant should expect pill counts to be completed by probation, if the team feels it is necessary, or by random. Participants will be required to fill all of his/her prescriptions at one pharmacy. A quarterly printout documenting new prescriptions and/or refills from that pharmacy must be provided to the DWI Court Team.

The South St. Louis County DWI Court prohibits the illegal use of smoked or raw marijuana by participants, and requires convincing and demonstrable evidence of medical necessity presented by a competent physician with expertise in addiction psychiatry or addiction medicine before permitting the use of smoked or raw marijuana by participants for ostensibly medicinal purposes.

Failure to comply with the prescription drug policy may result in a sanction or termination from the program.

Additional Resources

Constitutional and Other Legal Issues in Drug Court

Hon. William G. Meyer (ret.)
Senior Judicial Fellow
National Drug Court Institute
Updated March 8, 2017

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

The Drug Court Judicial Benchbook

<https://www.ndci.org/publications/more-publications/drug-court-judicial-benchbook/>