

SUFFOLK ACADEMY OF LAW

The Educational Arm of the Suffolk County Bar Association 560 Wheeler Road, Hauppauge, NY 11788 (631) 234-5588



JUDICIAL DIVERSION PROGRAM IN SUFFOLK COUNTY: Handling Felony Cases in Suffolk County Courts

FACULTY Marth M. Rogers, Esq. Principal Law Clerk to Hon. Martin I. Efman, J.S.C.

Thank you to Patrick McCormick, Esq., Campolo, Middleton & McCormick, LLP as Benefactor of this program.

October 24, 2017 Suffolk County Bar Center, NY

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Ms. Rogers has served as principal law clerk to Suffolk County Supreme Court Justice Martin I. Efman since 2008. Prior to that, she served as Deputy Chief Clerk of the Suffolk County Court as well as Deputy Chief Clerk of the Suffolk County Supreme Court. In these positions, she was the second highest-ranking nonjudicial employee in each of these 2 courts, responsible for administration of court operations, budget preparation, personnel issues and day to day administrative issues. Between 1994 and 2001, she was elected to two terms of office as a Town Councilwoman for the Town of Southampton. She has also served as an Assistant Suffolk County Attorney and as an attorney for the Legal Aid Society of Suffolk County.

Since 2003, Ms. Rogers has been an active member of the Suffolk County Judicial Committee on Women in the Courts and has past service as a co-chair appointed by the District Administrative Judge of Suffolk County. She is past president of the Suffolk County Brehon Society. She is actively involved in breast health awareness issues as a founding member of the South Fork Breast Health Coalition and as a Congressionally appointed member of the Federal Breast Cancer Advisory Board focusing on the Long Island Breast Cancer Study.

Suffolk County Judicial Diversion Program

(Felony indictments and Superior Court Informations)
Hon. Martin I. Efman, J.S.C.
Arthur M. Cromarty Court Complex
210 Center Drive
Riverhead, NY 11901
(631) 852-2166

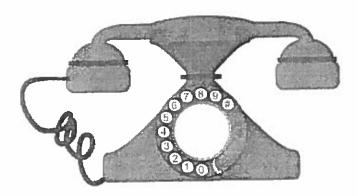
Principal Law Clerk Martha M. Rogers, Esq. (631) 852-2166 JDP Case Managers Harold Bush (631) 852-3412 and Elaine Annese (631) 852-3545

Treatment Courts - Supervisor and Project Director Ed Gialella (631) 853-5435

East End Drug Court and East End VET Charlene Mascia (631) 852-3553

Family Treatment Court Ivonne Garay (631) 853-4482

Mental Health Court Victoria McDonaugh (631) 853-3290



NON-JDP Alternatives - Early release programs from State Facilities

http://www.doccs.ny.gov/ProgramServices

The "Substance Abuse Treatment Services" website maintained by the NYS Department of Corrections (DOCS) offers comprehensive information and links to the following programs:

Alcohol and Substance Abuse Treatment Programs (ASAT)

Assessment and Program Preparation Unit (APPU) MICA/ASAT Program

Behavioral Health Unit (BHU) Mentally III/Chemically Addicted (MICA) ASAT

Chemical Dependency/Domestic Violence Program (CD/DV)

Clean Start (ASAT)

Comprehensive Alcohol and Substance Abuse Treatment Program (CASAT)

Driving While Intoxicated (DWI) Treatment Program

Female Trauma Recovery (FTR) Program

Intermediate Care Program Mentally Ill/Chemically Addicted (MICA) ASAT Prog.

Mentally III/Chemically Addicted (MICA) Residential ASAT (General Confinement)

Nursery Mothers Alcohol and Substance Abuse Treatment Program

Regional Medical Unit (RMU) ASAT Program

Returned Parole Violators (RPV) ASAT Program

Relapse Treatment Program

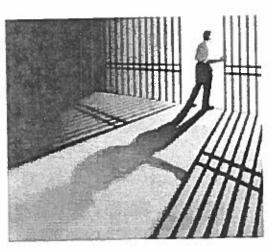
Residential Substance Abuse Treatment Program (RSAT)

Sensorially Disabled Unit (SDU) ASAT Program

Special Housing Unit (SHU) Pre-Treatment Workbook Program

Special Needs Unit (SNU)

Specialized Treatment Program (STP) Mentally III/Chemically Addicted (MICA)
Pre-Treatment Program





Important JDP Considerations:

- 1. JDP offers a positive and life changing opportunity to defendants who are committed to living a sober life
- 2. JDP is not a "quick fix" it requires a serious and long term to commitment to treatment. For a defendant who is simply looking to avoid plea options available in a non-JDP situation, it may not be the right program. The consequences of failing to comply with JDP requirements can be quite severe.



- 3. The required commitment includes treatment as directed, regular urinalysis, regular court appearances and consent to unscheduled home visits by the Probation Department. For a client who has no driver's license, is enrolled in school or has employment commitments, it is a very difficult commitment.
- 4. There is no set time period or "average" JDP sentence. It depends on the facts and circumstances of each individual case. Termination of the contract is within the discretion of the Court.
- 5. The contract is limited only to cases defined in the contract. If a defendant has other cases pending (e.g. misdemeanor dockets in another court), they are not covered by the agreement unless specified in the contract.

Visit the Suffolk County JDP website - it includes copies of statutes and other useful information:

http://www.nycourts.gov/courts/10jd/suffolk/treatment

CPL Article 216 Judicial Diversion Program (JDP) for Certain Felony Offenders

Is the defendant statutorily eligible to be considered for JDP?

- Defendant is charged in indictment or SCI with Class B, C, D or E felony offenses under Penal Law Article 220 (controlled substances offenses) and Article 221 (offenses involving marihuana)
- Defendant is charged in indictment or SCI with a "specified offense", CPL §410.91

•	Defendant is charged	in indictment or SCI with a "specified offense", CFL 9410.71
	140.20	Burglary 3
	145.05	Criminal Mischief 2
	145.05	Criminal Mischief 3
	155.30 favelue	ding firearms or meth components] Grand Larceny 2
	155.35 [exclu	ding property of one or more firearms] Grand Larceny 3
	165.06	I Inputhorized Use of a Vehicle 2
	165.45 [exclu	ding firearms or meth components] Crim Poss Stolen Prop 3
	165.45 [exclu	ding firearms] Crim Poss Stolen Property 4
	170.10	Forgery 2
	170.25	Criminal Possession of a Forged Instrument 2
	170.60	Unlawfully Using Slugs 1
	Also includes	a felony "attempt" to commit any of these felony offenses
	11130 (1101111100	

When is a defendant not statutorily eligible for JDP? Consider defendant's criminal history

A defendant may be charged with a qualifying JDP offense but is not eligible if, within the preceding 10 years (excluding any time spent incarcerated), was convicted of:

- A violent felony offense, PL §70.02 1.
- Any other offense where merit time is not allowed pursuant to Correction Law 2. §803(1)(d)(ii). This includes Manslaughter 2, §125.15; Vehicular Manslaughter 1 and 2, §§125.12, 125.13; Criminally Negligent Homicide, §125.10 and any offenses defined in Article 130 of the Penal Law (sex offenses).
- A Class A felony offense as defined in PL Article 220. This includes Criminal 3. Sale of a Controlled Substance in the First and Second Degrees, PL §§220.41, 43; and Criminal Possession of a Controlled Substance in the First and Second Degrees, PL §§ 220.18, 21.
- Defendant has been adjudicated a second violent felony offender or a persistent 4. violent selony offender.
- A violent felony offense, for which incarceration is mandatory upon conviction, 5. is pending.

Can an otherwise "ineligible" defendant" be deemed eligible?

Yes, if the prosecutor consents.

Suffolk County's Non-Statutory Factors Which Impact Eligibility

- Must be a Suffolk County resident
- Prior participation in a treatment court or successful completion of a non-judicial treatment program
- Dual Diagnosis (e.g. mental health issues as well as substance abuse disorder)
- Prescription medications opiates, even if legitimately prescribed, are prohibited
- Whether defendant's prior history impacts ability of JDP staff to secure placement in a residential treatment facility (any history of violence, particularly any history of sexual assault or arson)
- A prior criminal history which demonstrates an unwillingness to comply with Court mandates (e.g. criminal contempt convictions)
- Ability to travel and commit to regular court appearances
- Defendant's behavior and actions during the JDP application process

Application & Assessment for JDP in Suffolk County Court

At any time <u>between arraignment and guilty plea or commencement of trial</u>, an eligible defendant may request to be considered for the JDP Program. This application is made before the assigned judge presiding over each defendant's case.

If a plea of guilty has already been entered, a defendant is not eligible to apply for JDP.

A defendant charged with a Violation of Probation is therefore not eligible for JDP.



The JDP Referral

With respect to the determination as to whether or not a defendant should be referred for an evaluation, CPL Article 216 does not require that every "eligible" defendant be guaranteed an evaluation to determine if he/she should be offered diversion for treatment. CPL §216.05(1) leaves this decision to the discretion of the assigned judge. There is no "inherent right to be granted judicial diversion", People v. Homback, 31 Misc.3d 789 (Rockland Co. 2010), cited by People v. Williams, 105 A.D.3d 1428 (4th Dept. 2013), lv. den. 21 N.Y.3d 1021 (2013). Thus, a defendant could be statutorily eligible to apply for JDP but the assigned trial court judge could find that person to be an unsuitable candidate for the program.

Statutorily, the courts are given great deference in evaluating each of the 5 eligibility factors and making determinations relating to JDP. CPL 216.05(1) specifically provides that, "the court at the request of the eligible defendant, <u>may</u> order an alcohol and substance abuse evaluation" (emphasis added).

When challenging the denial of a JDP referral by the assigned trial court judge, the issue on appeal is whether the trial court acted within its legislatively prescribed discretion in denying defendant's application.

The JDP Application

If the trial court permits the application, defendant signs a written consent authorizing disclosure of the results of the evaluation for the purpose of determining whether the defendant can participate in the JDP Program. The process of applying for JDP is done in open court. Defendant is given two dates - one for the JDP screening and one for the next court date.

ALL DEFENDANTS - INCLUDING APPLICANTS - ARE TESTED ON JDP DATES!

Prior to the court date, defendant meets with a caseworker. Such interviews usually take between 1 ½ to 2 hours. Most interviews are in Central Islip or Riverhead. In very rare situations (e.g. snow storm), video interviews can be done. Incarcerated defendants are interviewed by video.

By law, assessments include the following information:

- A. History of substance abuse or dependence as defined in the diagnostic and statistical manual of mental disorders;
- B. History of mental disorder or mental illness;
- C. Ability of JDP to effectively address defendant's abuse or dependence;
- D. Treatment recommendations

Unlike traditional "pre-plea" or "pre-sentence" reports, which tend to focus on the specific crime and those impacted by it, the assessment provides a comprehensive analysis of a defendant's psychological, social, family and substance abuse history. Most significantly, the assessment recommends to the Court whether or not a person should be accepted into JDP.

What happens after the assessment is completed?

- 1. Upon receipt of the assessment, the Court provides a copy to prosecution & defense. In Suffolk County, the practice is to provide copies by e-mail.
- 2. Either party may request a hearing to determine whether JDP should be offered. The shall hold a hearing and may consider oral and written arguments, testimony of witnesses, victim statements and other evidence, including prior incarceration (within past 10 years) or youthful offender adjudication for violent felony offense or for any other offense that would not be eligible for merit time.

DETERMINING JDP ELIGIBILITY

- 3. Upon completion of the hearing or after reviewing the application (without hearing), the Court is statutorily required to make eligibility findings.
- 4. If the parties agree OR if the Court determines that treatment should be offered, defendant is permitted to participate in JDP.

THE 5 ELIGIBILTY FACTORS THAT THE COURT MUST CONSIDER

- A. Whether defendant is eligible as defined in CPL §216.00(1)
- B. Whether defendant has a history of alcohol of substance abuse dependence
- C. Whether substance abuse dependence is a contributing factor to the defendant's criminal behavior
- D. Whether the defendant's participation in JDP could effectively address such substance abuse dependence
- E. Whether or not institutional confinement may be required for protection of the public



Guilty Plea - A Requirement to Participating in JDP

An eligible defendant is required to enter a guilty plea in order to participate in JDP. The only exceptions to this rule are (1) DA and Court consent to not requiring a plea; or (2) Court determination of exceptional circumstances where entering a plea is likely to result in severe collateral consequences.

Signing of the Contract and Custody Status

It is a common misconception that signing a JDP contract triggers immediate release from custody. In Suffolk County, incarcerated JDP participants are not automatically released on the day that the JDP contract is signed. JDP staff does not set up treatment programs until after a contract is signed and after insurance coverage is in place. If treatment involves an inpatient facility, there is quite often a waiting list until a bed becomes available. Generally speaking, and subject to the circumstances of each defendant's case, the bail status of incarcerated defendants remains the same until a treatment slot is secured. In Suffolk County, it is a common practice that, when a bed date is available, the incarcerated defendant is released to the custody of the Suffolk County Department of Probation and transported by probation officers to the treatment facility.



JDP and SUPERIOR COURT INFORMATIONS

In Suffolk County, there are specific rules issued by Hon. Martin I. Efman, J.S.C., relating to the filing of Superior Court Informations ("SCI") that contemplate a JDP disposition. Copies of these rules are provided in the attached appendix.

There are two important rules to remember when structuring a non-JDP disposition:

- 1. DA consent to JDP participation is not an eligibility determination
- 2. Be thoroughly familiar with lesser included offenses



It is critical that, in structuring the charges in the SCI, that the parties plan for a non-JDP disposition. If the DA is consenting to a JDP disposition via SCI, the SCI should be structured in such a way that, if defendant is found "not eligible" for JDP by the Court, there is still an opportunity for the defendant to obtain that same disposition on the non-JDP calendar.

The Court can only grant favorable dispositions on charges listed in the indictment/SCI or on charges that are lesser included offenses. Serious legal issues arise when the parties seek a "favorable" JDP sentence for a charge that is either not listed in the SCI or is not a legal lesser included offense.

In SCI's, the most frequent missteps relate to the lesser included offenses for these charges:

1. Petit Larceny, a Class A misdemeanor, is not a lesser included offense of a burglary. It can be charged as a separate offense but it is not a statutory element of a burglary. Depending on the nature of the burglary charge, reduction to a Class "A" misdemeanor, may not be available. In such cases, the SCI should charge a separate Class "A" misdemeanor.

> PL 140.25 Burglary 2 - lesser included is Criminal Trespass 2, Class A misdemeanor PL §140.15 ("A" misdemeanor - must be a dwelling)

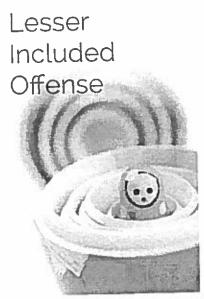
> PL §140.20 Burglary 3 - lesser included is Criminal Trespass 3, Class B misdemeanor PL §140.10 ("B" misdemeanor - a building or real property)

2. Generally speaking, there are no PL Article 220 "possession" charges that are lesser included offenses of a "sale" of a controlled substance, PL §§220.31 - 220.44. There is no misdemeanor level "sale" charge in the Penal Law.

People v. Davis, 14 N.Y.3d 20 (2009) - In observing that it was possible to sell drugs without, concomitantly, by the same conduct, possessing them, the Court of Appeals ruled that the Class A misdemeanor of Criminal Possession of a Controlled Substance in the Seventh Degree, PL §220.03, was not a lesser included offense of Criminal Sale of a Controlled Substance in the Third Degree, PL §220.39.

See also People v. Teixeira, 101 A.D.2d 818 (2nd Dept. 1984), lv. den. 63 N.Y.2d 680 (1984).

For purposes of a guilty plea, CPL §220.20(1)(h) provides an exception to the legal restrictions on plea bargains to lesser included offenses. It permits a "possession" charge to be considered a lesser included offense of any offense of criminal sale or possession of a controlled substance, in any degree. In Suffolk County, it is the Court's practice to require that the plea be to a recognized lesser included offense and to only rely on CPL §220.20(1)(h) in extremely rare circumstances.



IMMIGRATION CONSEQUENCES

In <u>Padilla v. Kentucky</u>, 559 U.S. 356 (2010), the United States Supreme Court ruled that, under the Sixth Amendment, an attorney's failure to correctly advise a client of immigration consequences constitutes Constitutionally deficient assistance of counsel. All noncitizens (including lawful permanent residents, i.e., "green card holders," as well as refugees/asylees, visa holders and undocumented immigrants) potentially face negative immigration consequences as a result of a guilty plea in the Judicial Diversion Program.

Some of the consequences facing a noncitizen defendant who pleads guilty to a crime as part of JDP might include:

Inability to obtain an official I.D. card

Inability to work

Inability to get housing

Inability to get health insurance

Inability to go to college

Inability to travel outside of the U.S.

Inability to renew permanent resident card ("green card")

Ineligibility for lawful permanent residence (green card status)

Ineligibility for citizenship

Initiation of deportation proceedings

Immediate or imminent placement in immigration detention anywhere in the U.S.

Ineligibility for waivers and other forms of relief from deportation

Ineligibility for asylum even if faced with persecution abroad

Lengthy or permanent exile from the U.S.

Enhanced sentences upon reentry into the U.S.

Inability to live or work safely in the country of deportation

When contemplating a JDP disposition, in addition to relying upon information provided by the defendant, it is a good practice to review the rap sheet, which indicates place of birth. It is also a good practice for defense counsel to place a statement on the record indicating that defendant has been advised concerning immigration consequences.

In New York, there is a statutory requirement that, prior to accepting a defendant's plea of guilty, there must be judicial advisement concerning potential immigration consequences, CPL §220.50(7).

The American Bar Association (ABA) also has professional guidelines relating to ethical obligations and judicial advisals on immigration consequences.

ABA Criminal Justice Section Standard 6-1.1 states that trial judges have general responsibility for "safeguarding both the rights of the accused and the interests of the public in the administration of criminal justice".

ABA Standards for Criminal Justice Pleas of Guilty Standard 14-1.4[c] indicates that courts should advise defendants as to immigration consequences, but avoid inquiring about or requiring disclosure of citizenship or immigration status.

ABA Standards for Criminal Justice: Collateral Sanctions and Discretionary Disqualification of Convicted Person recommend that judges inform defendants of "collateral sanctions" such as change in immigration status that could result from a guilty plea or conviction.

Immigration Assistance

SCBA Immigration Committee: Maurice K. Williams, Esq., co-chair (631) 213-1567 Aniella Russo, Esq., co-chair (631) 582-5753

In Suffolk County, criminal immigration resources are available, free of charge, to defendants represented by 18-B attorneys and by the Legal Aid Society. These Regional Immigration Assistance Centers are funded by the NYS Office of Indigent Legal Services.

Michelle Calera-Kopf, Esq., Legal Aid Society of Suffolk County (631) 853-7807 mcalderakopf@sclas.org

Christina M. Gaudio, Esq., Legal Aid Society of Suffolk County (631) 853-5216 cgaudio@sclas.org

These attorneys provide timely and confidential consultations about the immigration consequences of any plea or offer. It is their objective to meet <u>Padilla</u> obligations and provide accurate and detailed information to non-citizen clients about the impact of the criminal charges they face.

Additional Immigration/Criminal Website Resources:

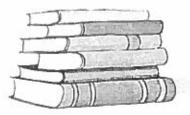
New York State Defender's Association - www.nysda.org
This organization administers the Immigrant Defense Project in New York City, which makes services available to public defenders

Immigrant Defense Project - www.immigrantdefenseproject.org
Provides training, a helpline and written materials
On the main web page provides links to information for Judges and prosecution

Defending Immigrants Parnership - www.defendingimmigrants.org

NLG National Immigration Project - www.nationalimmigrationproject.org

Immigrant Legal Resource Center - www.ilrc.org





- 1. The contract must be in writing. In Suffolk County, it is prepared by the Court.
- 2. Contract includes requirement that defendant participate in treatment, appear before the Court on a periodic basis, submit to urinalysis and refrain from criminal behavior.
- 3. Throughout the JDP process, the Court has discretion to reward or reprimand a defendant as they progress through treatment.
- 4. During JDP participation, the JDP Court retains jurisdiction over the defendant. This includes jurisdiction over custody status.

What happens after the contract is signed and defendant is accepted into JDP?

After signing the contract, each defendant is directed to regularly appear on scheduled JDP dates (absent a holiday. Suffolk County JDP cases are scheduled every Monday). Initially, defendants appear on a weekly basis. If a defendant positively progresses in treatment, the Court dates are extended over time. If a defendant relapses, is rearrested or is non-compliant, time in the program will be recalculated (similar to VOP "bad time") and the completion date, if defendant remains in JDP, is extended. The type and duration of treatment required is determined by the JDP staff.

At all stages of the pendency of a JDP case, each defendant is tested for drug and alcohol use. Testing occurs in the courthouse, at treatment and on unannounced home visits. If it is suspected that a defendant is non-compliant or manipulating test results, additional measures are taken, e.g. increased testing, imposition of GPS conditions, imposition of SCRAM conditions.



ETHICAL CONSIDERATIONS



Client Confidentiality

What are counsel's ethical obligations concerning the disclosure of confidential information pertaining to a client applying for or participating in the JDP program?

A JDP application necessitates disclosure to the prosecution and to the Court that a defendant has a substance abuse problem. During the application process, the defendant authorizes the disclosure of the results of a pyscho-social evaluation (detailing medical, psychiatric, social and substance abuse history) to counsel, the local probation department, the Court and authorized Court personnel. JDP court cases are in a public courtroom. The contract includes an acknowledgment by the defendant that the case will be discussed in open court in the presence of others, including members of the public that may be in attendance. Unless specifically sealed by statute, the contract is part of a public record in the Court file. During the entire pendency of a JDP case, medical, psychiatric, treatment and monitoring information is routinely discussed.

NY Rules of Professional Conduct Rule 1.6(a)(1) generally bars counsel from knowingly revealing "confidential information" unless the client gives "informed consent". When representing a client applying for JDP, defense counsel must provide the client with full disclosure and obtain informed consent before requesting that client to execute any release authorizing disclosure of confidential information.

In addition, participation in JDP requires that all participants sign a "criminal justice release" consenting to release of information from treatment providers to the Court. If hospitalization or other health records are involved, participants are required to authorize information pursuant to the Health Insurance Portability and Accountability Act of 1997 ("HIPAA"). Copies of both of these forms are attached in the appendix.

Legal Advice vs. Medical Advice

May a defense attorney ethically counsel the client regarding the client's drug addiction? In particular, may the defense attorney suggest that the client enter a drug rehabilitation program, even if such participation is not required to resolve the client's criminal case?

A lawyer is not required to give advice on medical or other non-legal matters. However, Rule 2.1 of the NY Rules of Professional Conduct provides that, in addition to legal matters, a lawyer "may refer not only to law but to other considerations such as moral, economic, social, psychological, and political factors that may be relevant to the client's situation". The NYSBA Committee on Professional Ethics has rendered an opinion that an attorney ethically may counsel a client regarding the client's drug addiction, including recommending that the client enter a drug rehabilitation program, Op. 1106 (10/14/2016).



Is There a Duty to Advise the Client About Diversion Programs?

Yes. If the client has been charged with a drug-related crime and is eligible for a court-sponsored diversion program, then the lawyer must advise the client about the pros and cons of entering such a program. Rule 1.4(1)(2) and Rule 1.4(b) of the NY Rules of Professional Conduct require an attorney to counsel a client to the extent reasonably necessary for the client to make an informed decision and to accomplish the client's objectives.

Negative/Severe Consequences of JDP Failure

The penalty for failure to successfully complete JDP is often greater than the plea bargain sentence offered for conviction without diversion. May defense counsel advise a client to request a substance abuse evaluation and enter a rehabilitation program in connection with a court-sponsored diversion program, even if there are negative consequences if the client is not successfully discharged?

As the objective of most individuals charged with a drug offense may be to avoid a criminal conviction or to minimize penalties, a JDP disposition would be consistent with these client objectives. However, the sanctions for violating JDP can be more severe than those associated with a non-JDP disposition. The ethical obligation of defense counsel is to advise the client of the right to go to trial as well as the different plea options available. This includes the nature of the diversion program, including the consequences of failing to abide by JDP rules. This is consistent with Rule 1.1 of the NY Rules of Professional Conduct, requiring competent representation encompassing "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation".

Judicial Participation on Narcotics Advisory Committee

A full time judge who presides over a drug treatment court may serve on a legislator's community advisory board dedicating to improving the law and the administration of justice concerning individuals suffering from drug addiction provided: (1) the board membership does not cast doubt on the judge's fairness and impartiality; (2) the judge abides by all applicable limitations on judicial speech and conduct; and (3) the judge advises the legislator not to use the judge's name or the fact of the judge's participation for partisan political purposes.

Opinion 15-203 (12/3/2015), NYS Advisory Committee on Judicial Ethics

Judicial Participation on Organization's Advisory Board

A full time judge who presides over a treatment court and judicial diversion program may serve as an advisory board member of a not-for-profit organization that addresses substance abuse issues provided: (1) no legal advice; (2) no personal participation in fund-raising activities; (3) no referrals to the organization; and (4) disqualification in cases in which the organization appears.

Opinion 15-201 (12/3/2015), NYS Advisory Committee on Judicial Ethics

Judicial Assistance to Lawyers Assistance Committee

A part-time judge may volunteer to serve as a mentor/monitor for an attorney struggling with addiction and may also volunteer to work with a bar association's lawyer assistance committee to encourage attorneys to participate in a 12-step recovery program or seek substance abuse counseling subject to recusal if either requested by the attorney or if the judge doubts his/her ability to be fair and impartial. In rendering this opinion, the Committee determined that there was no purely private interest and that the proposed activities "are clearly intended to help improve the legal system and the administration of justice by encouraging attorneys to seek help with drug or alcohol problems that may interfere with their ability to practice law".

Opinion 16-177 (5/4/2017), NYS Advisory Committee on Judicial Ethics



APPEALS

There are 3 areas of judicial determinations which can potentially be the subject of a JDP appeal: (1) referral for an evaluation by the assigned trial court judge; (2) the eligibility determination by the JDP judge; and (3) the final sentence imposed in the case.

In cases where defendant, either after a mere determination or after a full hearing, appeals the denial of the application to participate in JDP, the appellate court will typically examine the particular evidence presented by each individual case and analyze it under the five eligibility factors set forth in CPL §216.05(3)(b)[statutory eligibility, personal history, contributing factor, benefits of JDP and public safety]. Many of the decisions addressing the issue of whether the lower court should have granted the defendant's application for judicial diversion pursuant to CPL Article 216 will turn on the unique facts of each case and whether the trial court, in the exercise of discretion, should have granted defendant's application. Appeals relating to the final sentence imposed in a JDP case generally tend to challenge the terms of the JDP contract or raise Due Process issues.

The appeal of JDP determinations in criminal proceedings is limited. JDP orders relating to referrals and eligibility determinations cannot be the subject of interlocutory appeals. Thus, they would potentially be included as part of an appeal following conviction. However, it is the Suffolk County practice to require waiver of the right to appeal as a condition of the JDP plea. This waiver is secured by both the District Attorney (executed waiver form - sample attached in appendix) and by the Court (as a specific term of the contract). In addition, the waiver of appeal is the subject of an inquiry on the record when the guilty plea is entered. Absent a reviewable issue which survives the waiver (e.g. involuntariness of the guilty plea, the validity of the waiver of the right to appeal and the legality of the sentence), the opportunities for appellate review are limited, McKinney's Practice Commentaries to CPL §450.10 by William C. Donnino.

Sealing of Records in JDP Cases

- 1. The Court has the power to seal the cases of eligible defendants who successfully complete JDP.
- 2. The Court may also conditionally seal the arrest, prosecution and conviction records for no more than three of the defendant's prior eligible misdemeanors (limited to Article 220 and 221).
- 3. Sealing applications require notice and the opportunity to be heard at hearing.

Determination of Violation of Terms of JDP Contract

- The Court may conduct a summary hearing consistent with due process.
- 2. If the Court determines that a violation has occurred, the Court, may modify the conditions, reconsider custody status or terminate defendant's participation in JDP; and, when applicable, either proceed with the sentence authorized by the contract OR any lesser sentence authorized to be imposed for the crime of conviction, taking into account the length of time defendant spent in residential treatment and the need for treatment while defendant is incarcerated.
- 3. In determining how to respond to a violation, the Court shall consider all relevant circumstances, including the views of the parties and the reality of relapse prior to successful completion of treatment. The Court should consider using graduated responses designed to facilitate the successful completion of the program.
- 4. The Court is not prohibited from taking the harshest steps when a defendant violates terms, in the interest of public safety.
- 5. Defendant can terminate participation in JDP and be subject to the authorized sentence, and Court can take into consideration time spent in treatment.

CASE LAW RELATING TO JDP ISSUES

Separate and apart from the Court's eligibility determination, is the preliminary issue of whether the inclusion of certain non-specified ("neutral") offenses in the indictment renders a defendant statutorily ineligible to apply for JDP.

JDP Applications with a Mix of Specified and "Neutral" Offenses

CPL Article 216 is silent as to whether the presence on an indictment of nonviolent, non-specified crimes as well as the presence of specified eligible charges precludes eligibility. Courts across the State have reached different conclusions on this issue. Some have held that, as long as there is an eligible offense and a defendant is not otherwise disqualified by §CPL 216.00(1), the inclusion of a neutral charge will not preclude participation, People v. Jordan, 29 Misc.3d 619 (Westchester Co. 2010); People v. Iverson, 32 Misc.3d 1246 (A)(Kings Co. 2011). Others, however, have determined that the list is exhaustive and that, in the absence of statutory authorization, the Court cannot expand the list of eligible offenses, People v. Sheffield, (2/4/10), N.Y. Co. Supreme Court, Hon. Patricia Nunez, Case No. 04365-2009; People v. Jaen, (3/19/10), N.Y. Co. Supreme Court, Hon. Ellen M. Coin, Case No. 05704-2008.

In Suffolk County, the JDP Court does consider indictments which charge both specified and neutral offenses, <u>People v. Langhorne</u>, (12/4/2014), Suffolk Co. Supreme Court, Hon. Martin I. Efman, Case No. 02934K-2013. However, this does not include "Leandra's Law" cases or crimes involving operation of a motor vehicle while impaired by the use of alcohol or drugs on the basis that such crimes cannot be considered equivalent in degree of risk to public safety as those non-violent crimes specified in CPL Article 216.

JDP Applications with Only "Neutral" Offenses In re Doorley v. DeMarco, et al., 106 A.D.3d 27 (4th Dept. 2013)

By way of a hybrid CPLR Article 78 proceeding and declaratory judgment action, the District Attorney of Monroe County challenged the determination of the criminal trial court to accept certain participants and to go forward with certain JDP contracts that were opposed by the prosecution. The basis of the DA's argument was that the Court exceeded its statutory authority because the particular charges that were the subject of these contracts were not offenses specified under Penal Law Articles 220 or 221 or CPL §410.91. The appellate court agreed, concluding that, by refusing to comply with the "plain language" of CPL 216.00(1), the trial judge had "acted in excess of his authority in matters over which he has jurisdiction". The appellate court's decision went far beyond granting a writ prohibiting the trial court from taking any further action on the cases that were the subject of this appeal. It also granted a declaratory judgment that the trial court judges admit only those defendants meeting the criteria set forth in CPL §216.00(1) into the judicial diversion program.

People v. Pittman, 140 A.D.3d 989 (2nd Dept. 2016)

Defendant appealed the denial of his application to participate in JDP. The Second Department recognized that "Courts are afforded great deference in making judicial diversion determinations". Applying the five statutory factors set forth in CPL 216.05(3)(b), the appellate court concluded that the Court has providently exercised its discretion.

People v Corbett, 135 A.D.3d 872 (2nd Dept. 2016), lv. den. 27 N.Y.3d 1130 (2016)

Defendant, a JDP participant who was rearrested in violation of the JDP plea agreement and consequently received the contractual breakout, argued on appeal that the JDP plea was not made knowingly, voluntarily and intelligently. Defendant claimed that, at the time he entered into the contract, he did not understand the severity of the enhanced sentence to be imposed if unsuccessful in JDP. After noting that the issue was unpreserved for appellate review since there was no motion to withdraw the plea, the Court addressed the merits of the argument. Based upon the record of the plea proceedings, the Court found that the enhanced sentence was properly imposed.

People v. Fiammegta, 14 N.Y.3d 90 (2010)

Addressing a non-JDP issue, this Court of Appeals decision, in dicta, recognizes that the legislative intent of CPL 216.05(9)(b) is one that endorses "judicial flexibility" when determining whether a defendant has violated the terms of the JDP contract. The sentencing court must be assured that the information upon which the violation is based is reliable and accurate and that the requirements of the Due Process Clause are satisfied. However, there is no "right" to a summary hearing challenging the alleged violation. <u>Id</u>. at 96.

People v. Travers, 95 A.D.3d 1239 (2nd Dept. 2012)

This was a Suffolk County case in which defendant argued that, by relying upon unsworn testimony, the sentencing court, which had imposed the breakout, violated his right to Due Process. The appellate court focused upon whether the evidence was reliable and accurate and found that the trial court "properly relied" upon such testimony in determining that he had violated the conditions of his plea.

People v. Keller, 139 A.D.3d 755 (2nd Dept. 2016), lv. den. 27 N.Y.3d 1152 (2016)

In this Suffolk County case, defendant argued that the sentencing court's reliance on a presentence report which contained hearsay information violated his right to Due Process. The Second Department determined that the contents of the pre-sentence report were reliable and accurate evidence. The decision also noted that the JDP contract signed by defendant specifically provided that hearsay evidence was admissible to establish a violation of the contract.

People v. Deprosperis, 132 A.D.3d 692 (2nd Dept. 2015), lv. den. 26 N.Y.3d 1108 (2016)

In a JDP case from Westchester County, defendant challenged the waiver of his right to appeal on the basis that "no valid consideration" was given in exchange for his guilty plea. The Court upheld the plea of guilty and waiver of the right to appeal, finding that the specific sentencing promises relating to successful/unsuccessful participation were sufficient consideration.

SAMPLE CONTRACT

PART_JDI)
CONTRAC Judicial Dive HON. MAR	T ersion Program TIN I. EFMAN
Date:	XXXXX
Case No.	XXXXX
	CONTRAC Judicial Dive HON. MAR

The Court, having found that the defendant should be offered alcohol or substance abuse treatment pursuant to CPL Article 216, the Office of the Suffolk County District Attorney (where applicable) and the above-named defendant, agree that the defendant shall plead guilty to the following charge(s), pursuant to the provisions of this Contract.

COUNT(S)

PLEA OF GUILTY TO:

COUNT(S)	
Example #1 - D is a violent-PFO	charged with a new felony offense - DA consents to JDP
Count 1	PL §220.16(1) Criminal Poss Cont Substance 3 Class "B" non-violent felony
Count 2	PL §220.03 Criminal Poss Cont Substance 7 Class "A" misdemeanor
Example #2 - D has no prior felon	y convictions, DA is opposed to JDP but Court grants
Count 1	PL §140.20 Burglary in the Third Degree Class "D" non-violent felony

- Defendant hereby agrees to enter the Judicial Diversion Program, as authorized by Article 216
 of the Criminal Procedure Law, as an alternative to being sentenced under the above plea(s)
 of guilty and under conditions summarized below and in the Treatment Plan, which will be
 developed upon completion of defendant's evaluation.
- 2. Defendant agrees to report to treatment provider(s) as required and to follow their recommendations.

If the Court determines that the defendant has complied with the provisions of this contract 3. and the requirements of the JDP treatment plan, including modifications approved by the Court, the conviction(s) herein listed will be disposed of as follows:

Sample provisions for a successful JDP participant

Interim probation is a required part of this contract. Upon a determination by the Court that the defendant has complied with the provisions of this Contract and successfully completed the JDP treatment plan, the defendant will then be required to complete 1 year of interim probation unless deemed unnecessary by the Court at the time of completion.

Example #1

Upon completion of interim probation, Count 1 will be dismissed. The guilty plea to the A misdemeanor of Criminal Possession of a Controlled Substance in the Seventh Degree [Penal Law § 220.03], as to Count 2, will stand and defendant will be sentenced to a Conditional Discharge.

Example #2

Upon completion of interim probation, the defendant will be permitted to withdraw the guilty plea and enter a guilty plea to the "B" misdemeanor of Criminal Trespass in the Third Degree [Penal Law §140.10(a)], a lesser included offense of Count 1, and will be sentenced to time served.



Unless specified by the Court, this plea does not encompass any cases other than the indictment that is the subject of this contract. There is no agreement with the Court or the People to dismiss any other cases upon entry of a plea of guilty in Suffolk County Court.

If the Court determines that the defendant has NOT complied with the provisions of this 4. contract and the requirements of the JDP treatment plan, including modifications approved by the Court, the conviction(s) herein listed will stand and will be disposed of as follows:

Sample provisions for a non-successful JDP participant



Example #1

In the event the Court determines that the defendant has not complied with the provisions of this Contract and the JDP treatment plan, the defendant will be sentenced, as a prior violent felony offender, as follows:

Count 1, [PL §220.16(1) Criminal Possession of a Controlled Substance in the Third Degree], seven (7) years of incarceration followed by three (3) years of post release supervision. Count 2, [PL §220.03 Criminal Possession of a Controlled Substance in the Seventh Degree], one year incarceration.

Example #2

In the event the Court determines that the defendant has not complied with the provisions of this Contract and the JDP treatment plan, the felony plea will on Count 1 will stand and defendant will be sentenced on Count 1 to an indeterminate term of incarceration with a minimum of one year and a maximum of three years.

- Pursuant to the terms of this negotiated plea bargain and contract, defendant expressly agrees 5. to waive the right to appeal.
- Defendant agrees that the sentence set forth in this contract may be in addition to Court-6. imposed mandatory fines and surcharges, suspension and revocation of driving privileges and other administrative penalties prescribed by law.
- Defendant agrees to random and observed testing for drug or alcohol use and understands that 7. failure to provide a urine sample or breathalyzer test may be considered by the Court to be the equivalent of a positive test result.
- Defendant agrees to appear in County Court periodically, and understands that the Court may 8. require periodic reports from substance abuse treatment and other designated service providers for the duration of the defendant's participation in the Judicial Diversion Program.
- Defendant hereby waives his/her attorney's appearance at court appearances and treatment 9. conferences while the defendant is participating in the Judicial Diversion Program. However, this waiver shall in no way affect defense counsel's obligation to represent the defendant at defendant's sentencing proceeding.
- Defendant understands that missed court dates may result in a bench warrant, termination 10. from the program, and reinstatement for sentencing.
- Defendant understands that any violation of terms of parole or probation will also be deemed 11. a violation of this contract and subject defendant to sanctions and/or termination from the program.

- 12. Defendant must reside in an approved halfway house or inpatient facility, as designated by the Court, whenever required.
- 13. Defendant understands that he or she must inform the Court and treatment provider(s) immediately of any change in address and phone number.
- 14. Defendant understands that any new arrest may be grounds for immediate termination from the program. Failure to report a new arrest within 10 days may also be grounds for immediate termination from the program.
- 15. Defendant understands that the Court will require defendants to discuss drug use with treatment providers and the Court and that any statement defendant makes regarding drug use while in the treatment program or for the purpose of treatment will not be admissible against the defendant as evidence in any current or future criminal prosecution. Nothing in this provision shall prevent a prosecutor from offering such statements for the purpose of impeachment of defendant's testimony in any future proceedings. Further, such statements will be admissible at a termination proceeding.
- 16. Defendant understands that the County Court is an open court and that defendant's case, including matters related to substance abuse treatment, may be discussed in open court and in the presence of other defendants, court staff, lawyer's treatment provider staff and members of the public.
- 17. Defendant understands that violation of any terms of this contract and/or failure to work diligently toward the goals of this program, may result in defendant's case being returned for sentencing to the County Court or before the local Criminal Court. Further, defendant waives his/her right to appeal a sentence in the instant case.
- 18. Defendant agrees to sign written consents to release information protected by 42 U.S.C. Section 290dd-2 and 45 C.F.R. Parts 160 and 164. The consent to release "protected" information shall be drafted in accordance with applicable federal and state laws.
- 19. Defendant shall permit a probation officer and/or his/her agent to search defendant, defendant's vehicle, and defendant's place of abode. Probation may seize any illegal drugs, drug paraphernalia or implements, or any illegal or illicit items found during a search. Any such search and seizure could result in additional criminal charges filed against the defendant.
- 20. Defendant agrees to keep all required appointments and to participate in programs that may include, but are not limited to:
 - Substance abuse treatment programs;
 - b. Counseling programs;
 - Education programs or a specified school;
 - d. Vocational programs; and
 - e. Day reporting programs

- 21. Defendant agrees that any one of the following occurrences may cause the Court to change the requirements of the program, impose sanctions (including jail time), and/or terminate the defendant from the program:
 - a. Failure to keep any program appointments
 - b. Failure to comply with any reasonable request or requirement,
 - c. Failure to comply with the rules of the treatment provider(s),
 - d. Positive toxicology tests for any non-prescribed drug including alcohol, or any drug not permitted by the Court,
 - e. Frequenting unlawful or disreputable places or consorting with disreputable persons, and
 - f. Failure to comply with any other provisions set forth in this contract

The imposition of a sanction or termination is solely at the discretion of the Court.

- 22. Defendant agrees that any pre-existing medical condition shall in no way excuse non-compliance with the terms of this contract, and the defendant's obligations thereunder.
- 23. Should the Court determine that the defendant is unable to continue in the Judicial Diversion Program due to medical, psychological, or other disqualifying conditions that were unknown when the defendant entered this agreement, the defendant will be allowed to withdraw his/her guilty plea and have the case transferred to a regular trial part for disposition.
- 24. Defendant agrees that in the event a termination hearing is held,
 - a. Hearsay evidence is admissible for the purpose of establishing a violation of the contract;
 - b. The standard of proof shall be a preponderance of the evidence; and
 - c. Rules applicable to violation of probation hearings pursuant to CPL § 410.70 (3) and/or suppression hearings pursuant to CPL § 710.60 are applicable.
- 25. Determinations relating to placement in treatment programs are made by the Court and not by the defendant. By entering into this contract, defendant understands and agrees that the Judicial Diversion Program does not recognize or place JDP applicants or participants with non-approved treatment providers. JDP requires that all patient treatment services be operated by the New York State Office of Alcohol and Substance Abuse Services ("OASAS"); hold a valid Operating Certificate or Certificate of Approval to provide substance abuse or alcoholism services from the OASAS issued pursuant to Article 19 or 32 of the Mental Hygiene Law, or a similar license or approval from any other state's chemical dependence authority for the other state in which the agency, facility or program is located; is a program that includes alcoholism and/or substance abuse treatment consistent with OASAS standards and is licensed and/or operated by another New York State agency; is organized and operated

Department of Veterans Affairs, as a	ude the Indian Health Service and the United States program providing chemical dependence services that s; or is a non-certified setting that involves the legal rvices and that affords on-site supervision that meets the OASAS.
Defendant's Signature	Defense Attorney's Signature
	THOM OF A TORNEY
CERTIFICA	TION OF ATTORNEY
attorn	, hereby certify that I am attorney of record (or ey of record) for the above-named defendant and that I defendant has freely and knowingly entered in this
Attorney	Date
District Attorney	Date
HON. MARTIN I. EFMAN	Date

I Non- Compliance

The following are some examples of non-compliance that may result in court ordered sanctions or termination from the program:

- 1. Failure of defendant to keep mandated treatment appointment dates with service provider;
- Failure of defendant to keep all scheduled court appearances;
- 3. Failure of defendant to consistently remain drug free as evidenced by repeated positive lab results demonstrating drug usage;
- 4. Failure of defendant to lead a law-abiding life as a result of re-arrest and/or conviction;
- 5. Failure of defendant to avoid frequenting unlawful or disreputable places and/or consorting with disreputable persons;
- 6. Failure of defendant to follow instructions of the judge and/or treatment provider.

II Sanctions

The following is a list of some court-ordered sanctions that the Court may impose as a result of defendant's non-compliance:

- In-Court verbal admonishment;
- 2. Essays;
- Increased toxicology frequency;
- Increased court reporting schedule;
- Extension of defendant's court-mandated program;
- Weekend work program;
- 7. Financial penalties;
- 8. Community service;
- 9. Period of incarceration.

III Termination

Termination from the Judicial Diversion Program is subject to the discretion of the Court.

I have read, understood and received a copy of conditions of non-compliance and resulting sanctions.

Defendant	Date
HON. MARTIN I. EFMAN	Date

-				
				Case No.
COLDITY	COURT OF SUFFOLK CO	MINITY		Charges
STATE OF	NEW YORK			NYSID
	3 (2) (4) (4) (4) (4) (4) (4) (4) (4) (4) (4	220000777	X	DOB
THE PEOP	LE OF THE STATE OF N	EW YORK	•	PFO Status
				Holds
	- against -		į	
		·,		
	Defendant		Applie	cation for Judicial Diversion Program
			X Ca	nse #
			D	.O.B.
Criminal Pro	cedure Law. <u>I understand, as</u> <u>my case being called.</u> I also r legal matters that impact my	a JDP Appli understand to custody state	<i>icant and/or cl</i> that a positive us, including c	resuant to Article 216 of the New York Statilient, that I will be drug tested on each count test may affect my bail status. I understand other pending court cases, parole, scofflaws P. It is my responsibility to clear such holds
Date	Phone			Signature of Defendant
Application	Determination		Referral/IA	S Judge
	Evaluation Denied		Defendant i	in Custody
۵	Evaluation Ordered	۵	Defendant (Out of Custody
You will be onot receive a	contacted by JDP staff within phone call within 48 hours, y	the next 48 l ou are instru	hours to sched	dule an out of custody evaluation. If you don't (631) 852-3412.
Defense Atty	Name/Phone #	Next	Court Date _	- Hon. Martin I. Efman - JDP
				gned ADA
	1000 100 A 1000 12	20 1	*	ulad avaluation Failure to do so may resul

For JDP Caseworker Use

TO THE DEFENDANT: You must appear 30 minutes prior to scheduled evaluation. Failure to do so may result in the case going back to the original Judge.

EVALUATION DATE: Evaluation location is determined by JDP staff. Evaluations are conducted at 400 Carleton Avenue, Central Islip, New York 11722 or 210 Center Drive, Riverhead, New York 11901. Following evaluation, you must return to the JDP courtroom at 9:30 a.m. on the next scheduled court date. Failure to appear may result in the issuance of a warrant.

COUNTY OF		PARTJDP
	E OF THE STATE OF NEW YORK	
		Judicial Diversion Program Case No. XXXXXX
	-against-	
XXXXXXX	XXXXXXX,	
	Defendant.	
1.0 1.00	Court having received a completed alcohol and request to enter the Judicial Diversion Progradered any relevant evidence in accordance wildings:	im, as codified in CPL Afficie 210, and
(1)	The defendant is "eligible" as defined in starticle;	abdivision one of section 216.00 of this
(2)	The defendant has a history of alcohol or s	substance abuse dependence;
(3)	Such alcohol or substance abuse depender defendant's criminal behavior;	ice is a contributing factor to the
(4)	The defendant's participation in judicial dabuse or dependence, and	iversion could effectively address such
(5)	Institutional confinement of the defendant of the public.	may not be necessary for the protection
Upo opportunity	n these findings the Court hereby determines to enter the Judicial Diversion Program.	that the defendant shall be offered the
		XXXXXXX
Dated:		HON. MARTIN I. EFMAN

NEW YORK STATE

NEW YORK STATE DFFICE OF ALCOHOLISM AND SUBSTANCE ABUSE SEF CONSENT TO RELEASE OF INFORMATION	RVICES	Client's Last Name	First		[VII
CONCERNING CHEMICAL DEPENDENCE TREATMENT	Ì				
FOR CRIMINAL JUSTICE CLIENT	rs	Referring Entity's Staff N	lember's Name:	:	Į
Client's New York State Identification Number (NYS)					
	1 }	Referring Entity's Nam	e and Address		
	•	Suffolk County Fel			
Referring Entry Type [] Parol - General [] Parol - Release Shock	-				
[] District Attorney [] Parol - Release Shock [] Court [] Parol - Release Willard		210 Center Drive			
[] Probation [] Parol - Release Resente	nce	Riverhead, NY, 11			
1) SEND A COPY OF THIS INSTRUCTIONS: 2) ADD A COPY OF THIS 3) PROVIDE A COPY OF T	COMPLETED	ETED FORM TO THE CLIENTS	ENT / DEFEND	ANT	,
I, the undersigned, Client/Defendant, hereby CON	NSENT and a	uthorize communication be	tween the above	named Re	eferring
Entity, my Chemical Dependence Treatment Provider:				<u> </u>	
and the following:					
			<u></u>		
I CONSENT to DISCLOSURE OF INFORMATIO)N concerning	g my current and past indivi	dual assessment	or evaluation	on, intake
treatment recommendation, date of	f admission, at	nd status as a patient inclui	altig course and i	ICACI CI II CO.	attente form
I was a second individual or group) my	progress and	compliance including but no	ot limiten to: thy	Affendance	. 01 1001 01
attendance at treatment, dates and results of toxicology	/ urinalysis,	cooperation with my treatile	sent program, p	1091103107	
completion or reason(s) for termination, date of discharg Such disclosure is for the PURPOSE of enabling the	 antitioe liete 	id above to communicate as	to my treatmen	it needs, ac	ctivities,
Such disclosure is for the PURPUSE or enabling the history and attitude towards my evaluation and treatmen	it for purposes	s of monitoring the terms a	nd conditions of t	treatment, i	release,
I see management purposes and for carrying out other o	imoal dudes;	ANU			
	hehveen and	among the above named	Referring Ent	ity and the	New York
Charles Office of Atenhalism and Substance Abuse Services	(OASAS);	and Casas to Discro	SE THLOKLINI	1011 10 010	
State Division of Criminal Justice Services (DCJS), coprogram evaluation activities. I understand that any repo	incerning adm orts or studies	nission and discharge data i s compiled from my records	disclosed pursua	ant to this re	elease will
not include personally identifiable information which will r	remain confid	ential and protected from fu	irther re-disclosu	ire.	
I, the undersigned, have read the above and authorize	the shoff of t	he shows named disclosing	entities to disclo	se, obtain a	ind share
to the service as bosola, capcified. I understand that	at. unless ou	jerwise specified, idilis collis	CHE MILL CHOOK II	16	
and effective	ive termination	n or revocation of my releas	e italii commissi	ICHIC IIICCIIII	t brosser.
supervision, probation, parole, post-release supervision,	, or local cond	ditional release or other pro	ceeding or deten	mination by	a releasing
and a stranger which I was referred to or otherwise 300	reed to treatm	ient.			
I also understand that any disclosure of any identifying in	nformation is	bound by Title 42 of the Co	ige of receion Ke neurance Portah	itity and Acc	ountability
2, governing the confidentiality of alcohol and drug abus Act of 1996 (HIPAA) 45 C.F.R. Pts. 160 164; and that n	e patient rect	ords, as well as the neath i	other than thos	e designate	d above is
Act of 1996 (HIPAA) 45 C.F.R. Pts. 160 164; and that in forbidden without additional written authorization on my	edisclosure or nart.	Sud intolligation to a party			
		T be accompanied by t	he form Proh	ibition or	1
NOTE: Any information released through this Redisclosure of Information Co	oncerning	Chemical Dependence	≘ Treatment l	Patient (rrs-1)
I understand that generally the program may not condit	ion my treatm	nent on whether I sign a co	nsent form, but	that in certa	in limited
I understand that generally the program may not condition circumstances I may be denied treatment if I do not significant.	on a consent f	form. I have received a co	ppy of this form,	as recogniz	ed by my
signature below.	grown decomposition of				
Signature neither					
(Print Name of Client)	(Signati	ure of Client)		(Date)	
V. III. C.					
(Print Name of Witness or Parent/Guardian,		re of Witness or Parent/Gu	ardian,	(Date)	
if Client under 18)	if Client	under 18)			11 2
TRS-49 (09/23/09)				Append	lix - 5 ent Releas

Appendix - 3
Treatment Release to Court

OCA Official Form No.: 960



Patient Name	Date of Birth	Social Security Number
Patient Address		
or my authorized representative, request that health information rega	ording my care and treatme	nt be released as set forth on this form:
accordance with New York State Law and the Privacy Rule of the I	lealth Insurance Portability	and Accountability Act of 1996
IIPAA), I understand that: This authorization may include disclosure of information relative REATMENT, except psychotherapy notes, and CONFIDENTIAL the appropriate line in Item 9(a). In the event the health information initial the line on the box in Item 9(a), I specifically authorize release. If I am authorizing the release of HIV-related, alcohol or drug to rohibited from redisclosing such information without my authorized attention that I have the right to request a list of people who may reexperience discrimination because of the release or disclosure of III for Human Rights at (212) 480-2493 or the New York City Common exponsible for protecting my rights. I have the right to revoke this authorization at any time by writing evoke this authorization except to the extent that action has already be a light of the conditioned upon my authorization of this disclosure. Information disclosed under this authorization might be redisclosed.	ng to ALCOHOL and D HIV* RELATED INFOR described below includes a of such information to the p reatment, or mental health zation unless permitted to ceive or use my HIV-relate V-related information, I m ission of Human Rights a g to the health care provide seen taken based on this au- cetment, payment, enrolling re.	RUG ABUSE, MENTAL HEALTH AMATION only if I place my initials on any of these types of information, and I person(s) indicated in Item 8. treatment information, the recipient is do so under federal or state law. I ad information without authorization. If any contact the New York State Division t (212) 306-7450. These agencies are are listed below. I understand that I may thorization. ment in a health plan, or eligibility for any that a noted above in Item 2), and this
edisclosure may no longer be protected by federal or state law. THIS AUTHORIZATION DOES NOT AUTHORIZE YOU TAKE WITH ANYONE OTHER THAN THE ATTORNEY OR	TO DISCUSS MY HEAL COVERNMENTAL AGE	INCY SPECIFIED IN ITEM 9 (b).
CARE WITH ANYONE OTHER THAN THE ATTORNET OR	OO A PIGHTISIALISE	
Name and address of health provider or entity to release this infor	nation:	
. Name and address of health provider or entity to release this infor	nation:	
. Name and address of health provider or entity to release this infor	nation:	
Name and address of health provider or entity to release this information. Name and address of person(s) or category of person to whom this	information will be sent:	
Name and address of health provider or entity to release this information. Name and address of person(s) or category of person to whom this (a). Specific information to be released: Description of the language of the person	information will be sent: (insert date) es (except psychotherapy no	otes), test results, radiology studies, film
 Name and address of health provider or entity to release this information. Name and address of person(s) or category of person to whom this (a). Specific information to be released: ☐ Medical Record from (insert date) ☐ Entire Medical Record, including patient histories, office note referrals, consults, billing records, insurance records, and records. 	information will be sent: (insert date) es (except psychotherapy nords sent to you by other h	otes), test results, radiology studies, film ealth care providers. (Indicate by Initialing)
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Name and address of health provider or entity to release this information. Name and address of person(s) or category of person to whom this. (a). Specific information to be released: Medical Record from (insert date)	information will be sent: (insert date) es (except psychotherapy nords sent to you by other h	otes), test results, radiology studies, film ealth care providers. (Indicate by Initialing) Alcohol/Drug Treatment
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Name and address of health provider or entity to release this information. Name and address of person(s) or category of person to whom this (a). Specific information to be released: Medical Record from (insert date) Entire Medical Record, including patient histories, office note referrals, consults, billing records, insurance records, and record Other: Other: Authorization to Discuss Health Information (b) By initialing here Initials	information will be sent: (insert date) es (except psychotherapy nords sent to you by other h Include:	otes), test results, radiology studies, film ealth care providers. (Indicate by Initialing) — Alcohol/Drug Treatment — Mental Health Information — HIV-Related Information
Name and address of health provider or entity to release this information. Name and address of person(s) or category of person to whom this. (a). Specific information to be released: Medical Record from (insert date)	information will be sent: (insert date) es (except psychotherapy nords sent to you by other h Include:	otes), test results, radiology studies, film ealth care providers. (Indicate by Initialing) — Alcohol/Drug Treatment — Mental Health Information — HIV-Related Information
Name and address of health provider or entity to release this information. Name and address of person(s) or category of person to whom this least specific information to be released: Medical Record from (insert date)	information will be sent: (insert date) es (except psychotherapy neords sent to you by other h Include: Name of individual heatmental agency, listed here:	otes), test results, radiology studies, film ealth care providers. (Indicate by Initialing) Alcohol/Drug Treatment Mental Health Information HIV-Related Information
Name and address of health provider or entity to release this informs. Name and address of person(s) or category of person to whom this D(a). Specific information to be released: Medical Record from (insert date)	information will be sent: (insert date) es (except psychotherapy neords sent to you by other h Include: Name of individual heatmental agency, listed here:	otes), test results, radiology studies, film ealth care providers. (Indicate by Initialing) — Alcohol/Drug Treatment — Mental Health Information — HIV-Related Information
7. Name and address of health provider or entity to release this informs. 8. Name and address of person(s) or category of person to whom this of the person of person to whom this of the person of the person of person to whom this of the person of the person of person to whom this of the person	information will be sent: (insert date) es (except psychotherapy neords sent to you by other h Include: Name of individual heatmental agency, listed here:	otes), test results, radiology studies, film ealth care providers. (Indicate by Initialing) Alcohol/Drug Treatment Mental Health Information HIV-Related Information

All items on this form have been completed and my questions about this form have been answered. In addition, I have been provided a copy of the form.

Signature of patient or representative authorized by law.

^{*} Human Immunodeficiency Virus that causes AIDS. The New York State Public Health Law protects information which reasonably could identify someone as having HIV symptoms or infection and information regarding a person's contacts.



STATE OF NEW YORK UNIFIED COURT SYSTEM HON. MARTIN I. EFMAN, J.S.C.

210 Center Drive Riverhead, NY 11901 Tel. (631) 852-2166 Fax (631) 852-2729

Principal Law Clerk Martha M. Rogers, Esq. Secretary
Arlene Keeffe

COURT RULES FOR THE FILING OF SUPERIOR COURT INFORMATIONS

PART 3 AND JUDICIAL DIVERSION PROGRAM

Permission from chambers is required prior to the filing of any Superior Court Information. This is done by calling chambers and coordinating the scheduling with judicial staff. The Clerk of the Court will not schedule any SCI's unless they are pre-approved by chambers.

The Suffolk County District Attorney's Office is required to provide chambers with written notice of the proposed SCI. In addition to case information, the notice must include the names of counsel for both sides as well as the applicable DA Bureau. The Court accepts such information by telefax to (631) 852-2729.

Prior to the scheduled SCI date, the Court requires that a copy of the felony complaint and defendant's criminal history be delivered to chambers.

SCI's which contemplate participation in the Judicial Diversion Program are NOT automatically calendared on either the Part 3 or felony JDP calendar. Unless directed by the Court (e.g. defendant has other cases pending before a particular Judge), potential JDP cases are filed and handled in the same way as all other SCI's in the County Court. They are randomly assigned by the Clerk of the Court and the JDP application is processed in the same manner as all other JDP applications. Parties are reminded that participation in JDP is governed by the statutory requirements of CPL Article 216 and DA consent to JDP in an SCI is not a guarantee that such a disposition will be available from the Court.

Due to the regularly scheduled calendar for the Judicial Diversion Program, SCI's are not scheduled before the Court on Mondays. Any exceptions require express permission from the Court on a case by case basis.

SCI's which appear on the court calendar that have not complied with this procedure will be removed from the calendar.



STATE OF NEW YORK UNIFIED COURT SYSTEM HON. MARTIN I. EFMAN, J.S.C.

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Principal Law Clerk Martha M. Rogers, Esq. Arlene Keeffe Secretary

COURT RULES FOR THE FILING OF SUPERIOR COURT INFORMATIONS

JUDICIAL DIVERSION PROGRAM

The Court does not accept Superior Court Information ("SCI") applications for participation in the Judicial Diversion Program ("JDP") unless the prosecution fully consents in advance to JDP participation upon a Court determination of eligibility. SCI applications for JDP conditioned upon limited prosecutorial consent to merely a JDP screening or evaluation are not accepted by the Court.

In the event that a JDP application is denied or withdrawn, the parties are reminded that the SCI should be drafted in a manner that allows for the original disposition contemplated by the parties to be achieved without participation in JDP. This includes cases in which a violent felony is the subject of the SCI or the defendant's criminal history includes prior felony conviction(s).

This rule shall apply to all Superior Court Informations filed on or after June 1, 2017.

HON. MARTIN I. EFMAN, J.S.C.

Date: May 25, 2017

STRATEGIES Avresearch, training, and Center for Commu

EARLY RELEASE CHECKLIST: DETERMINATE SENTENCES

(
Program	Eligibility	Exclusions	Impact	Impact on Client
Willard	CPL § 410 91; specified 2d D & E property offenses; 2d C, D, & E drug offenses; 1st B drug offense (except CSCS to a Child)	Not currently convicted of non-specified offense; no prior VFO, class A or B non-drug felony conviction; not under jurisdiction of or currently awaiting delivery to DOCS	Sentenced to parole supervision, with first 90 days spent at Willard	
Shock	Correction Law §§ 865-867; b/w 16 and 50 years old; within 3 years conditional release	Not currently convicted of A-I felony, VFO, sex, homicide, escape, or absconding. No prior VFO w/ state prison sentence. Must be screened by Shock screening committee (which look for indications of violence, predatory behavior, or crimes of sophistication; medical or mental health problems)	Graduates of 6 month program earn Earned Eligibility Certificate (see Correction Law § 805) and are immediately parole eligible	
Judicial Shock	PL§ 60.04(7): same as above, but must also be convicted drug offense	Same as above, but screened only for medical/mental health problems; if exist, alternative-to-Shock program must be made available.	same as above	
Temporary Release (includes CASAT)	Correction Law §§ 851-861; within 24 months of earliest release (30 months for drug offenses) and requisite time in (generally 6 months; 9 months for second B felony drug offense)	Not currently convicted of VFO, sex offense, homicide, escape, absconding, or aggravated harassment of DOCS employee. Violent felony override may be avail (see www.communityalternatives.org/pdf/temporaryrelease.pdf	Release to community for extended periods of time for work, education, etc.	
Judicial CASAT	PL § 60.04(6); conviction for drug offense	For CASAT annex and work release, must not have any of above exclusions. If above exclusions apply, will only get CASAT annex 6-9 months prior to earliest release.	If TR eligible, will enter CASAT annex for 6 months and then work release.	
Presumptive Release	Correction Law § 806; have achieved an EEC (§ 805)	Not currently convicted of A-I felony. VFO, specified homicide, sex offense, incest, sex performance of child, hate erime, terrorism, or aggravated harassment of employee; no serious disciplinary infraction or frivolous lawsuit	Released at earliest release opportunity	
Merit Release	Correction Law § 803; achieve EEC one of 4 program objectives.	Not currently convicted of A-I non-drug felony, VFO, specified homicide, sex offense, incest, sex performance of child, or aggravated harassment DOCS employee; no serious disciplinary infraction or frivolous lawsuit	1/7 off minimum in addition to the 1/7 off for conditional release.	
Conditional Release	all determinate sentences	poor institutional record	1/7 off determinate	

Post Release Supervision: 1-5 for non sex felonies (PL § 70.45(2)); 3 to 25 years for felony sex offenses (PL § 70.80).

New York State Bar Association Committee on Professional Ethics Opinion 1106 (10/14/16)

Topic: Advice on non-legal issues; allocation of authority

Digest: An attorney may render advice that includes considerations such as the benefits and risks of entering a drug treatment program. The attorney must act competently and must adequately explain to the client the material risks of the proposed course of conduct and reasonably available alternatives. However, once the client decides to take a certain course of action, the attorney must follow the directives of the client even if the client's directive conflicts with what the lawyer believes to be in the best interest of the client. If the client is eligible for a diversion program, the attorney must be mindful of confidentiality concerns since treatment records may be provided to judges, prosecutors and program staff. The attorney must provide the client with full disclosure and obtain informed consent before asking the client to execute any release authorizing disclosure of confidential information to the judge or prosecutors.

Rules: 1.1(a), 1.2(a), 1.4(a) & (b), 1.6, 2.1

FACTS

- 1. The inquirer is a criminal defense attorney whose clients sometimes have underlying substance abuse issues. The inquirer is concerned that a failure to address the client's substance abuse issues could result in recidivism, or even the client's death.
- 2. The client may be eligible to participate in a court-sponsored diversion program. In an effort to break the cycle of addiction, criminal activity and recidivism, New York State has instituted judicial diversion programs and has set up drug courts to address the issues emanating from drug abuse. The mission of drug courts is to end the abuse of alcohol and other drugs and related criminal activity. See Problem Solving Courts Drug Treatment Courts Overview, available at http://www.nycourts.gov/courts/problem_solving/drugcourts/overview.shtml. Specifically, pursuant to Criminal Procedure Law Article 216, courts are authorized to divert eligible felony offenders into substance abuse treatment programs. The defense lawyer's traditional role as zealous advocate for the client may be at odds with the focus of drug courts and diversion programs, which utilize a "nonadversarial, collaborative approach" among the prosecutor, defense attorney, judge and others. See National Association of Criminal Defense Lawyers, America's Problem-Solving Courts: The Criminal Costs of Treatment and the Case for Reform, September 2009 p.30.
- 3. Often, the defendant may receive two plea offers from the prosecution. One involves diversion to a treatment program, and the other does not involve diversion. The penalty for failure to complete the treatment program successfully may be greater than the sentence offered for conviction without diversion.
- 4. For purposes of this opinion, we will assume that the procedures detailed in CPL Article 216 regarding the judicial diversion program apply:

- At any time before the entry of a guilty plea or commencement of trial, the court, at the defendant's request, may order an alcohol and substance abuse evaluation.
- The defendant must, in writing, authorize disclosure of the results of such evaluation to the defense attorney, the prosecutor, the local probation department, the court, and authorized court personnel.
- After receipt of the evaluation, the court may hold a hearing on the issue of whether
 the defendant should be offered treatment pursuant to Article 216, and, upon
 completion of such a hearing, will make findings about whether the defendant's
 participation in judicial diversion could effectively address the defendant's substance
 abuse or dependence.
- Before the court issues an order granting judicial diversion and releasing the defendant into the diversion program, unless an exception applies, the eligible defendant must plead guilty to the charge or charges.
- The defendant must agree on the record or in writing to abide by the release conditions set by the court, which will include participation in a specified period of treatment, and may include periodic court appearances and urinalysis, to enable the court to monitor the defendant's progress in treatment.
- If the court determines that the defendant has violated a condition of his or her release under the judicial diversion program, the court may impose any sentence authorized for the crime for which the defendant has been convicted in accordance with the plea agreement, although the court will consider the extent to which persons who ultimately successfully complete a treatment regimen sometimes relapse by not abstaining from alcohol or substance abuse or by failing to comply fully with all requirements imposed by a treatment program and may use graduated and appropriate responses or sanctions designed to address inappropriate behaviors. See CPL Article 216.

QUESTIONS

- 5. Under this backdrop, the inquirer raises several questions:
- a. May a defense attorney ethically counsel the client regarding the client's drug addiction? In particular, may the defense attorney suggest that the client enter a drug rehabilitation program, even if such participation is not required to resolve the client's criminal case?
- b. May defense counsel advise a client to request a substance abuse evaluation and enter a rehabilitation program in connection with a court-sponsored diversion program, even if there are negative consequences if the client is not successfully discharged?
- c. May a defense attorney permit a client to sign a release authorizing a courtsupervised program to receive information regarding the client's performance in treatment?

OPINION

Rendering advice on non-legal matters, such as drug addiction

6. The initial question is addressed by Rule 2.1 of the New York Rules of Professional Conduct (the "Rules"). Rule 2.1 ("Advisor") reads:

In representing a client, a lawyer *shall* exercise independent professional judgment and render candid advice. In rendering advice, a lawyer *may* refer not only to law but to other considerations such as moral, economic, social, psychological, and political factors that may be relevant to the client's situation. [Emphasis added.]

- 7. The Comments to Rule 2.1 provide further guidance. Comment [2] to Rule 2.1 specifically states that "[it] is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice."
- 8. Comment [5] to Rule 2.1 states: "In general, a lawyer is not expected to give advice until asked by the client. However, ... it may be advisable under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation."
- 9. A lawyer is not required to give advice on medical or other non-legal matters. However, when rendering "candid advice" as required by Rule 2.1, the lawyer "may" refer to considerations beyond the law. Thus, a lawyer may discuss with the client the client's substance abuse/addiction and provide advice regarding the pros and cons of entering a treatment program. If the lawyer believes that continued substance abuse may lead to adverse legal consequences for the client, such as subsequent charges or arrest, the lawyer should discuss the consequences with the client. See Rule 2.1, Cmt. [5]; Rule 1.4. As advisor, the lawyer may point out the potential consequences of the client's actions or inaction related to the treatment of the underlying substance abuse, including recidivism and death.
- 10. This Committee has previously addressed the lawyer's role as advisor and has said that a lawyer's advice need not be confined to purely legal considerations. In N.Y. State 769 (2003), quoting EC 7-8, the Committee said:

A lawyer should exert best efforts to ensure that decisions of the client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so. Advice of a lawyer to the client need not be confined to purely legal considerations. A lawyer should advise the client of the possible effect of each legal alternative. A lawyer should bring to bear upon this decision-making process the fullness of his or her experience as well as the lawyer's objective viewpoint.

11. N.Y. City 2011-2 (2011) also discussed the lawyer's role as advisor, saying: "In providing candid advice, a lawyer should advise the client to consider the costs and benefits [of a course of action], as well as possible alternatives." Opinion 2011-2 added that "lawyers must be cognizant of the various ethical issues... and should advise clients accordingly. The issues may include the compromise of confidentiality and waiver of

attorney-client privilege, and the potential impact on a lawyer's exercise of independent judgment."

12. In sum, the inquirer ethically may counsel the client regarding the client's drug addiction, including recommending that the client enter a drug rehabilitation program.

The Duty to Advise the Client About Diversion Programs

- 13. If the client has been charged with a drug-related crime and is eligible for a court-sponsored diversion program, then the lawyer must advise the client about the pros and cons of entering such a program. See Rule 1.4(a)(2) ("A lawyer shall ... reasonably consult with the client about the means by which the client's objectives are to be accomplished."); Rule 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation").
- 14. This mandated consultation requires that the lawyer be familiar with the procedures of the diversion program or drug court, the sanctions that may apply for failure to complete the program, as well as the options and alternatives available to the client, so that the lawyer can explain to the client the options, alternatives, and possible consequences. See Rule 1.1(a) ("[t]he lawyer should provide the client with competent representation," which "requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation"; see also Rule 1.1, Cmt. [5] ("Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem"); Cf. Padilla v. Kentucky, 559 U.S. 356 (2010) (lawyer advising a non-U.S. citizen whether to plead guilty to a felony must advise that felony conviction would make client subject to deportation).
- 15. The objective of most individuals charged with a drug offense may be to avoid a criminal conviction or to minimize or avoid incarceration or other penalties. A diversion program may achieve those objectives. However, one risk of a diversion program (which may include progressive sanctions or incarceration) is that sanctions for violating the terms of the program may be more severe than the penalty offered by the prosecutor for conviction without participation in a diversion program. Thus, entering into a diversion program may conflict with the client's stated objective of minimizing penalties. The attorney must therefore advise the client of the nature of the drug court or diversion program, the consequences of abiding or failing to abide by the rules, and how participation in a diversion program will affect the client's interests. In addition, the lawyer should provide information and advice on alternative courses of action, including legal and treatment alternatives available outside of the drug court program, the opportunity to plea bargain, and the right to go to trial. The lawyer should then discuss these options with the client.
- 16. The inquirer asks if it is ethical to recommend a diversion program that would include the imposition of sanctions against the lawyer's client. If the lawyer believes there is a reasonable possibility that the client will succeed in the rehabilitation program, the lawyer may not only explain but may actually recommend a rehabilitation program even though the program could result in the imposition of harsh sanctions against the

client if the client fails in the program.

Determining Client's Best Interest

- 17. The ultimate decision whether to enter a program with sanctions, to which the client will be subject if the client violates the terms of the program, rests with the client. Rule 1.2(a) states:
 - (a) Subject to the provisions herein, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are pursued. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
- 18. Comment [1] to Rule 1.2 states: "Paragraph (a) confers upon the client the ultimate authority to determine the purpose to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations." Once the lawyer presents the relevant considerations and alternatives pursuant to Rule 1.4 and the client makes a decision as to the desired course of action, Rule 1.2 compels the lawyer to pursue the client's stated objective.
- 19. As this Committee stated in N.Y. State 1037 (2014), "Rule 1.2(a) requires a lawyer to abide by a client's decisions concerning the 'objectives' of a representation, and to consult with the client as to the 'means' by which those objectives are to be pursued. Rule 1.4(a)(2) reinforces that provision by providing that a lawyer shall reasonably consult with the client about the means by which the client's objectives are to be accomplished." Thus, the lawyer must sufficiently explain a matter to a client so that the client can make informed decisions.
- 20. Where the sanctions for failing the rehabilitation program may be more severe than the criminal penalties offered to the client for pleading guilty to a drug charge, the client may prefer a criminal penalty rather than being monitored for upwards of a year in a drug treatment program. Even if the lawyer believes it would be in the 'best interests of the client' to obtain treatment for addiction, the decision is not the lawyer's to make. Under Rule 1.2(a), a lawyer must abide by the client's decision concerning the objectives of representation, and, in a criminal case, must abide by the client's decision (after consultation with the lawyer) as to the "plea to be entered, whether to waive jury trial and whether the client will testify." Once the client makes his or her choice, whether it be to attend a treatment program or to go through the traditional criminal justice system, the lawyer must abide by that decision.

Confidentiality

21. Typically, as a condition of entry into a diversion program, the client is required to consent to the release of health and treatment information to the judge, attorneys and other personnel of the court.² This treatment and monitoring information raises confidentiality concerns.

- 22. Rule 1.6 generally bars a lawyer from knowingly revealing "confidential information" unless the client gives "informed consent." See Rule 1.6(a)(1). The Rule defines "confidential information" as "information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or information that the client has requested be kept confidential." The client's treatment information would be "confidential information," as it is likely to be embarrassing or detrimental to the client if disclosed. Although it would not be the lawyer who discloses it, by recommending that the client agree to be diverted to a drug program, the lawyer is in effect asking the client's consent to the disclosure of confidential information. Thus, the defense lawyer must counsel the client on how those disclosures could undermine the attorney client privilege or otherwise be detrimental to the client, and must ensure that the client has enough information to give informed consent before executing confidentiality waiver forms.³
- 23. The lawyer, where possible, should also seek to limit the scope of the release, such as specifying the persons to whom information will be provided, the uses to which such disclosures may be put, the nature of the information that will be disclosed and the time period in which disclosures may be made. See also N.Y. State 1059 (2015) (lawyers for clients in immigration proceedings may disclose the names and certain procedural information regarding the clients' cases where the clients give voluntary, informed consent to the disclosure). Whether the lawyer should recommend the client to sign a release for the court/attorneys to receive the client's treatment information depends on the client's stated objectives.

Other Considerations

24. Finally, whether, the plea agreement signed by the client as a condition for diversion may be used as evidence against the client in future criminal or civil proceedings is an evidentiary question that is beyond the jurisdiction of this committee.

CONCLUSION

25. An attorney may render advice that includes considerations such as the benefits and risks of entering a drug treatment program. The attorney must act competently and must adequately explain to the client the material risks of the proposed course of conduct and reasonably available alternatives. However, once the client decides to take a certain course of action, the attorney must follow the directives of the client even if the client's directive conflicts with what the lawyer believes to be in the best interest of the client. If the client is eligible for a diversion program, the attorney must be mindful of confidentiality concerns since treatment records may be provided to judges, prosecutors and program staff. The attorney must provide the client with full disclosure and obtain informed consent before requesting the client to execute any release authorizing disclosure of confidential information to the judge or prosecutors.

(28-16)

¹Drug courts combine drug treatment with ongoing judicial supervision. In this way, drug

courts seek to break the cycle of addiction, crime, and repeat incarceration. While practice varies widely from state to state (and county to county), the outlines of the drug court model are that: addicted offenders are linked to treatment; their progress is monitored by a drug court team composed of the judge, attorneys, and program staff; participants interact directly with the judge, who responds to progress and setbacks by providing a range of rewards and sanctions; and successful participants generally have the charges against them dismissed or reduced, while unsuccessful participants are generally convicted and incarcerated. See The New York State Drug Court Evaluation – Center for Court Innovation 2003 page ix.

²Whether the contract or release signed by the client complies with the Health Insurance Portability and Accountability Act of 1997 ("HIPAA"), which prohibits release of health information by certain agencies, and whether the contract or release complies with 42 CFR Part 2, which prohibits the release of alcohol or drug use information, is a matter outside the jurisdiction of this committee – but pursuant to Rule 1.4, a lawyer advising a client about a drug rehabilitation program, whether in response to criminal charges or otherwise, should counsel the client about the client's rights under those laws.

³See Richard C. Boldt, Rehabilitative Punishment and the Drug Treatment Court Movement, 76 WASH U.L.Q. 1205, 1289-1290 (1998) ("[l]f the choice to enter treatment is to be genuine, defendants must be helped to understand the potential costs and benefits involved, including the potentially harmful consequences that can result from the disclosure to judges or prosecutors of personal and sometimes incriminating information gained in the course of substance abuse treatment. Defendants must be informed of the considerable benefits in terms of confidentiality to which defendants are entitled if they enter treatment on their own without mandate from the criminal justice system. In other words, a genuine choice with respect to the waiver of confidentiality requires that defendants be informed of the unusually generous privacy protections already in place, which their consent will extinguish.")

Court of the State of New York County	
THE PEOPLE OF THE STATE OF NEW YORK	-X
V.	WAIVER OF RIGHT TO APPEAL/ RENUNCIA DE DERECHO APELAR Indictment/ Case/Dkt. No.
Defendant.	-Y
I, the undersigned	defendant, as part of the plea agreement being entered, hereby waive my right to appeal from the judgment and
Yo, el demandado de culpabilidad, entro en este acuerdo con el conocim mi derecho de apelar de la sentencia y condena de es	abajo firmante, como parte del acuerdo de declaración niento y consentimiento de todas las partes, renuncio a ste Tribunal.
I understand that the right to appeal is separate of entering a plea of guilty.	and distinct from those rights forfeited by law as a result
Entiendo que el derecho a apelar es distinto y resultado de la declaración de culpabilidad.	separado de los derechos confiscados por la ley como
I waive my right to appeal voluntarily and kno	wingly after being informed of this right.
Renuncio a mi derecho a apelar voluntariame de este derecho.	nte y con conocimiento después de haber sido informado
I have had an adequate opportunity to discuss and all questions I may have had concerning this waiv	these matters with my attorney and am satisfied that any er have been sufficiently answered.
He tenido una oportunidad adecuada para dis que todas y cada una de las preguntas que pueda hab suficientemente contestadas.	cutir estos asuntos con mi abogado y estoy satisfecho de per tenido con respecto a esta renuncia han sido

También entiendo que la renuncia incluye perder mi derecho a impugnar cualquier sentencia aumentada que entiendo que pueda ser impuesta si fallo, por mi conducta o de otra manera, antes o después de que se imponga la pena, a cumplir con las condiciones que me impone esta corte.

I understand may be imposed should I fail, by my conduct or otherwise, before or after sentence is imposed, to

abide by the conditions imposed upon me by this court.

I further understand that the waiver includes forfeiting my right to challenge any increased sentence that

In consideration and as part of my plea agreement, I hereby waive my right to contest extradition to this state, concerning this case, should I voluntarily leave the jurisdiction prior to the commencement or throughout the duration of my sentence, if prohibited.

En consideración y como parte de mi acuerdo de culpabilidad, por la presente renuncio a mi derecho a impugnar la extradición a este estado, en relación con este caso, si salgo voluntariamente la jurisdicción antes del comienzo o durante toda la duración de mi sentencia, si está prohibido.

I have been advised and understand that [che	eck where appropriate]:
Me han aconsejado y entiendo que [marque	e donde sea apropiado]:
My sentence will include a period of post-relea	ase supervision for years.
Mi sentencia incluirá un período de supervisió	on posterior por años.
I understand that I must register as a convicted subject to a Risk Assessment Hearing under the Sex	sex offender and that the terms of that registration are Offender Registration Act.
Yo entiendo que debo registrarme como delir registro están sujetos a una Audiencia de Evaluació Sexuales.	ncuente sexual condenado y que los términos de ese n de Riesgos bajo la Ley de Registro de Delincuentes
I have been advised and understand that, if I a upon my immigration status, including a likelihood by my attorney, and that I am secure in this knowled	m not a U.S. citizen, my plea of guilty may have an effect or certainty of deportation, which has been explained to me dge at the time of my guilty plea.
culpabilidad puede afectar mi estado migratorio, in	ciudadano de los Estados Unidos, mi declaración de icluyendo una probabilidad o certeza de deportación, que n este conocimiento en el momento de mi declaración de
Dated: , New York	
, 20	
	Defendant
	Witnessed By Attorney for Defendant

SAMPLE

CONFIDENTIAL-NOT FOR PUBLIC INSPECTION PSYCHO SOCIAL SUMMARY REPORT SUFFOLK COUNTY JUDICIAL DIVERSION TREATMENT COURT

Judge: Case #

Report Date:

Name:

Soc. Sec #: xxx-xx-xxxx Date of Birth: 0/0/0000

Address:

Phone Number: 631-xxx-xxxx, Cell- 516-xxx-xxxx

Mr. Doe was assessed on 2/11/2013 in a 90 minute face-to-face interview at the John P. Cohalan Court Complex, Central Islip, NY, for the Suffolk County Judicial Treatment Court. Mr. Doe was positive for cocaine on the day of his assessment.

Mr. Doe is a 20 year old, single male, living with his parents. Mr. Doe reported that he has a valid driver's license, but does not have a car.

MEDICAL HISTORY

Mr. Doe reported that he was in a car accident on 12/28/12, in which he sustained a head injury. Mr. Doe received no follow up treatment.

VOCATIONAL/EDUCATIONAL HISTORY

Mr. Doe reported that he graduated (NAME) High School in 2010. Prior to (NAME) High School, Mr. Doe attend St. John's and was expelled after two incidents. On the first offense, Mr. Doe reported that he had put "clams in a bunch of lockers and stunk up the school". On the second one, Mr. Doe was caught "selling weed". Mr. Doe also reported attending Catholic Memorial High School, but stopped going because it was "too far". Upon graduating high school, Mr. Doe attended Suffolk Community College, but dropped out before he completed his first semester. In Mr. Doe's earlier years, he attended O.L.P.H where he had many behavior problems, stating "getting into trouble was fun, I enjoyed the teacher's reaction".

Mr. Doe reported that he currently works at Radio Shack in Farmingdale and DJ's on the side. Prior to this, Mr.Doe worked at Subway and a pizzeria.

DRUG/ALCOHOL HISTORY

Mr. Doe reported that at age 17, he tried his first drug, which he labeled as "speed". Mr. Doe referred to the "speed" as "Yellow Jackets", which is a brand name for an herbal stimulant. Mr. Doe reported only using this drug 1 time. Mr. Doe then reported that he began stealing his father's pills, which were Xanax and Vicodin. Mr. Doe began taking 3 Vicodin 750's, and 3, 5 mlg. Xanax pills, until he could not steal anymore from his father. It was at this point that Mr. Doe began buying illicit Xanax 8 mlg's daily on and off until he was 19.

Alcohol: Mr. Doe reported that he began drinking alcohol at age 17, drinking a

bottle of Vodka on the weekends. This progressed to daily drinking until May, 2012.

Other Substances: Mr. Doe reported a history of using Ecstacy, Molly's, Ketamine, Acid, Mushrooms, Mescaline, and cough medicine.

Cocaine: Mr. Doe reported that at age 17, he began using cocaine intranasally, 2 grams daily. This progressed to 5 to 6 grams daily and sometimes up to 1/8 of an ounce. Mr. Doe stated "my nose hurt so much". This continued to age 19. From 5/8/12 to New Years Eve, Mr. Doe reported that he stopped using cocaine. Mr. Doe resumed using and then was arrested. Mr. Doe identified stress as trigger for his relapse.

Mr. Doe reported no history of substance abuse treatment. Currently, Mr.Doe is receiving treatment at South Oaks.

CRIMINAL HISTORY

Mr. Doe did report a history with the criminal justice system (see NYSID).

FAMILY DRUGIALCOHOL HISTORY

Mr. Doe reported no family history with drugs or alcohol.

FAMILY SOCIAL HISTORY

Mr. Doe reported that he is the oldest of 2. Mr. Doe lives at home with his mother, father, and sister, age 17. Mr. Doe reported a loving family environment. Mr. Doe described his mother as "paranoid" and the source of some of his stress. Mr. Doe described his father as supportive and a "people person". Mr. Doe described his relationship with his sister as "distant".

PSYCHIATRIC HISTORY

Mr. Doe reported that in 2009 he was diagnosed with Attention Deficit Disorder and prescribed Ritalin, Adderall, and Concerta. Mr. Doe reported that he is not currently taking any medication.

COUNSELOR ASSESSMENT

Mr. Doe reported that his primary drug of choice is **Cocaine.** According to his reporting, he does meet the criteria to substantiate a poly-substance dependance diagnosis according to the diagnostic manual, DSM IV-TR.

During Mr. Doe's evaluation, he discussed times in which he had responded well to a well structured, strict environment. Mr. Doe described situations when positive attention was given, he had responded well. He also described "enjoying" his teachers reactions when he behaved poorly. Mr. Doe presented as a immature, attention seeking, young man who is in need of a highly structured substance abuse treatment program. Mr. Doe's current level of treatment may not be appropriate as evidenced by his continued use of substances (testing positive). If accepted into JDP, Mr. Doe should be considered for probation's Criminal Thinking group at DRC to address negative patterns of thinking, and encouraged to attended self help.

Victoria McDonaugh, L.M.S.W

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People » Criminal History » Criminal Repository Search [+] Feedback

Criminal Repository

Repository Inquiry

New York State Division of Criminal Justice Services
Alfred E. Smith Building, 80 South Swan St.
Albany, New York 12210. Tel:1-800-262-DCJS
Michael C.Green, Executive Deputy Commissioner of the NYS Division of Criminal Justice Services

Identification Summary Criminal History Joh/License Wanted Missing NCIC/III

Attention - Important Information

* See Additional Information at the bottom of this response for more banners pertaining to the criminal history

DEPORTED ALIEN

Further information is available regarding this subject from U.S. Immigration and Customs Enforcement. To verify immigration status, submit a query via the Integrated Justice Ponal using the PEOPLE>IMMIGRATION tab.

Violent Felony offense(s) on file

DNA SAMPLE OWED Required to provide a DNA sample for inclusion in the State DNA Databank. If more information is required call DCJS Office of Forensic Services at 1-800-262-3257 "DNA specimen collection guide"

Missing Person Information is included with this record

Identification Information **



Cycle 5 Arrest Date September 13, 2012

Name:

SAM SAMPLE Test
Relief Relief Cert C Relief JR

Sammy S Sample JR
MICHAEL SAMPLE
JOHNNIE DOE

MICHAEL SAMPLE sammy Testing

sammy Testing sample Test
Sammy Test DUMMY CLIENT
DMVPOLICY DMVTEST CARL PUBLIC

JOHNNIE DILLENGER

CARL PUBLIC
SAMMY E HOSTNAME

JOE SCHMO

Date of Birth:

February 06, 1966 May 24, 1956 October 11, 1952 June 01, 1994 January 27, 1960 May 25, 1956

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Place of Birth:

New York New Jersey USA Bangladesh Massachusetts

Address:

7 Main Street, Albany, NY 12203

5 MAIN STREET, ALBANY, NY 12205

123 Main street, Kingston, NY 12401

1515 MOCKINGBIRD LANE, ALBANY, NY 12203

5 MAIN STREET, ALBANY, NY

BLACK ROCK RD, KING FERRY, NY 12345 1312 MOCKINGBIRD LANE, ALBANY, NY 12203 BLACK ROCK RD, KING FERRY, NY BLACK ROCK RD, KINGS FERRY, NY 16 KARNER RD, COLONIE, NY 534 MAXWELL ST, DEWITT, NY 6 EMPIRE STATE PLAZA, ALBANY, NY 12228

Sex: Male / Unknown / Female Race: White

Ethnicity: Skin Tone:

Not Hispanic Height:

5' 07"

Light Weight:

150

SSN:

099-99-9992 091-82-9031 199-99-9782

569-36-1221

Eye Color:

NYSID#: FBI#: Probation Client ID#:

Hair Color:

Black

NCIC Classification#:

9003300 1690020 05870633R III Status: Status in other states unknown

Alien Number: A99999999

Country of Deportation:

Guyana

Country of Citizenship:

Deportation Date: July 01, 1999

US Citizen:

Yes

Summary Information

Total Arrests: 7

Date of Earliest Arrest: October 17, 1998 Latest Prior Arrest Date: January 01, 2014

Total Arrests:	
Felony:	4
Violent Felony:	2
Firearm:	
Misdemeanor:	3
Other:	0

Total Arraigned Arrests:	4
Felony:	0
Violent Felony:	0
Firearm:	0
Misdemeanor:	1
Other:	0

Total Open Cases:	5	Cycles (max 5)
Felony:	2	16,13
Violent Felony:	0	
Misdemeanor:	2	7,2
Other:	0	
Open ACD:	1	3
Non Docketed Cases:	3	16,13,7

		-
Total Convictions:	2	Cycles (max 5)
Felony:	[1]	5
Violent Felony:	11	5
Firearm:	0	
Misdemeanor:	i	4
Other;	0	
YO Adjud.:	0	

Varrant Information:		Cycles (max 5)
Failure to Appear Counts:	1	4
Total Open:	ī	4
Activ NYC:	1	4

DOC Classification:		Cycles (max 5)
Escape Charges:	0	
Sex Offender Convictions:	1	5
Probation Revoc:	0.	
Parole Revoc:	0	

NYS Criminal His Information

Cycle 17

No Arrest Reported

Court Case Information

-- Court: Albany City Court | Case Number: 123

August 14, 2014

Initial Report Of Docket Number

Appendix - 20 Criminal History (cont'd)

Certificate of Relief New York County Supreme Court Agency: June 10, 1987 Date: December 10, 1990 Permanency Date: Issue Type: Relieves holder of all forfeitures, all disabilities and bars to employment, Relief Description: excluding right to retain or be eligible for public office; certificate issued at time of sentence. Other History Related Information There is no Other History Related Information associated with this history Job/License Information **Civil Information Pistol** Type of Application: **DMVPOLICY DMVTEST** Name: Date of Birth: August 05, 1988 Ethnicity: Hispanic SSN: 569-36-1221 6 EMPIRE STATE PLAZA, ALBANY, NY 12228 Address: Date of Application: June 14, 1994 Albany City Police Department Application Agency: Application Number: Wanted Information There is no NYS Wanted Information associated with this history. Missing Person Information Missing: 1 of 1 Missing Person Other For: Reported By: NYS Div of Criminal Justice Services- Bureau Information Systems (NY001185Y) 80 South Swan Street, Albany, NY, 12210 Missing Data: Name: SAM SAMPLE Alias: TEST A TESTER Date of Birth: May 24, 1956 Supplemental Date(s) of Birth: March 18, 1950 June 08, 1952 October 11, 1952 May 25, 1956 January 27, 1960 January 28, 1960 February 06, 1966 May 24, 1957 New-York Birth Place: Mother's MaidenName: Father's Name: Race: Skin Tone: Sex: White Light Male Eye Color: Hair Color: Height: Weight: 150 Brown Black

Certificate of Relief

Sears, Marks, Tattoos:

There is no Other History Related Information associated with this history.

Job/License Information

Civil Information

Type of Application:

Mortgage Loan Originator

Name:

Date of Birth:

Country of Citizenship:

USA

Ethnicity: SSN: Address: Agency ID:

Date of Application:

Application Agency:

NYS Banking Department - Mortgage Division

Application Number:

Driver's License:

Type of Application:

Mortgage Loan Originator

Name:

Date of Birth:

Country of Citizenship:

USA

Ethnicity: SSN: Address:

Date of Application:

Application Agency:

NYS Banking Department - Mortgage Division

Application Number: Driver's License:

Wanted Information **

There is no NYS Wanted Information associated with this history.

Missing Person Information

You did not request possible Missing Information, so it is not included in this history.

Additional Information