

# Legal and Adversarial Roles in Collaborative Courts

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Wisconsin Association of Treatment Court Professionals  
2017 Conference – May 11, 2017

Charlene D. Jackson, NADCP Consultant

# Why Drug Courts?

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- War on Drugs
  - Dockets overwhelmed
  - Drug related cases unresolved
  - High recidivism rates = “frequent fliers”
- Science – connection between behavior and offense
- Provide tools to get well and stay well
- Research

# Differences – Silos vs. Circles

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## Traditional Court

- Focus: Offense
- Punishment determined by sentencing range
- Judicial interaction limited
- Minimal post sentence interaction
- Remove offender from community

## Drug Court

- Focus: Behavior behind Offense
- Individualized treatment plan
- Increased judicial interaction
- High post sentence interaction
- Offender remains in community

# Judges



# Lessons Learned

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- People don't always do what the Judge orders
  - Defective robe?
  - Banging the gavel harder?
  - Work on your mean face or voice?
- There are individuals who are not afraid of going to jail

# Judicial Core Competencies

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- Fully participates as team member; committed to program, mission and goals
- Participates in staffing; advocates for effective incentives and/or sanctions
- Preside over hearings – implement responses to participant behavior
- Knowledgeable of gender, age and cultural issues that may impact participant success
- Brings stakeholders together; evaluate current processes and collaborates to coordinate innovative solutions

# Judicial Core Competencies

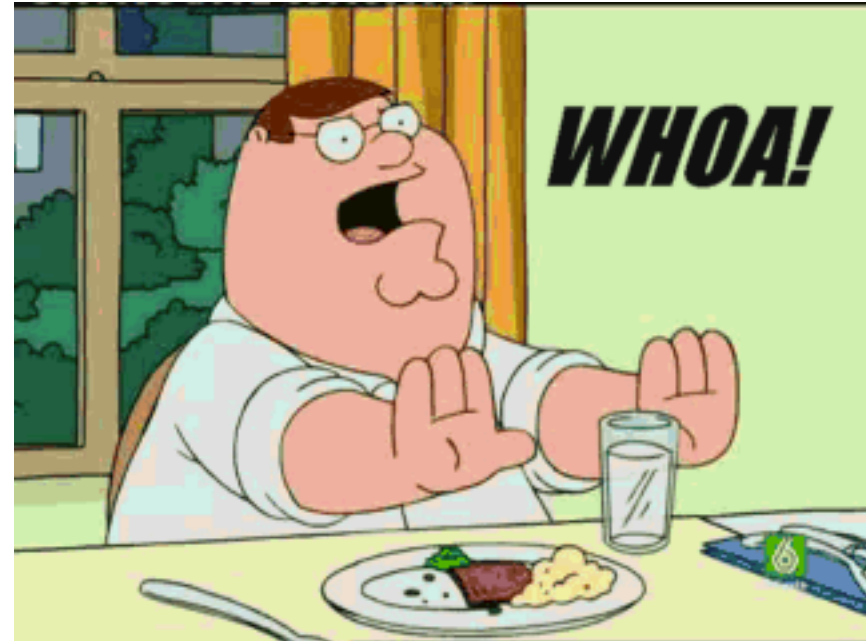
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- Program advocate by utilizing community leadership role to create interest and develop support
- Leads the team to develop protocols and procedures
- Aware of impact substance abuse has on the court system, the lives of offenders, their families and community
- Encourages the education of peers, colleagues, judiciary in the efficacy of Drug Courts

# But Wait .... Judicial Ethics

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- Ex Parte Communications
- Independent decision
- Neutrality
- Due Process
- Judicial Cannons





# Ex Parte Communication – Case Staffing

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- Therapeutic court exception
- A judge may initiate, permit, engage in or consider ex parte communications knowingly waived by a participant when the judge is assigned to a therapeutic, treatment or problem-solving docket in which the judge must assume a more interactive role....
  - Wisconsin SCR 60.04, Comment (g)(6)

# Independent Decision – Coordinated Response

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- Staffing – discuss participant progress and reach consensus regarding incentive or sanction
- Judge has ability to reject or modify recommendation based upon facts presented by the participant in court
- Final decision must always remain with the judge

# Neutrality

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- Impartial does not mean indifferent
- Be aware of transference and countertransference potential
- Different focus
  - Drug Court – compliance with treatment – behavior modification
  - Traditional Court – Dispute between parties

# Due Process

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- Still applies: Notice and meaningful opportunity to respond
- Process for responding to recommendations for sanctions/incentives
- Process termination from drug court

# Judges and Behavioral Change - Research

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- Judges staying on the drug court bench longer than 2 years → **3x greater cost savings**
- 3+ minutes of interaction/participant → **153% reduction in recidivism**

# Why?

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- Comfort and skill development
- Consistency for program and participant
  - Program continuity
  - Consistent application of policies and procedures
  - Procedural Fairness
  - Consistent response to behavior
- Get to know your participants
- Message that someone in authority cares

# Importance of Leadership

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# Leadership Expectations

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- Empower others to modify behavior
- Set the tone and expectations for team and participants
- Conduct on the bench and off the bench



# Best Practice Standards – Training

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- Outcomes better when judge is knowledgeable about substance abuse treatment and willing to learn about addiction
- Professional obligation to be aware of current legal, ethical and constitutional practices
- Annual training recommended

# Best Practice Standards - Active Participation in Team Meetings

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- Better outcomes when judges regularly attend staffing sessions
- Facilitates opportunity for each team member to be heard and considered
- If do not attend; less likely to be informed/prepared and may only receive information through the perspective of the person sharing the information

# Best Practice Standards – Interaction with Participants

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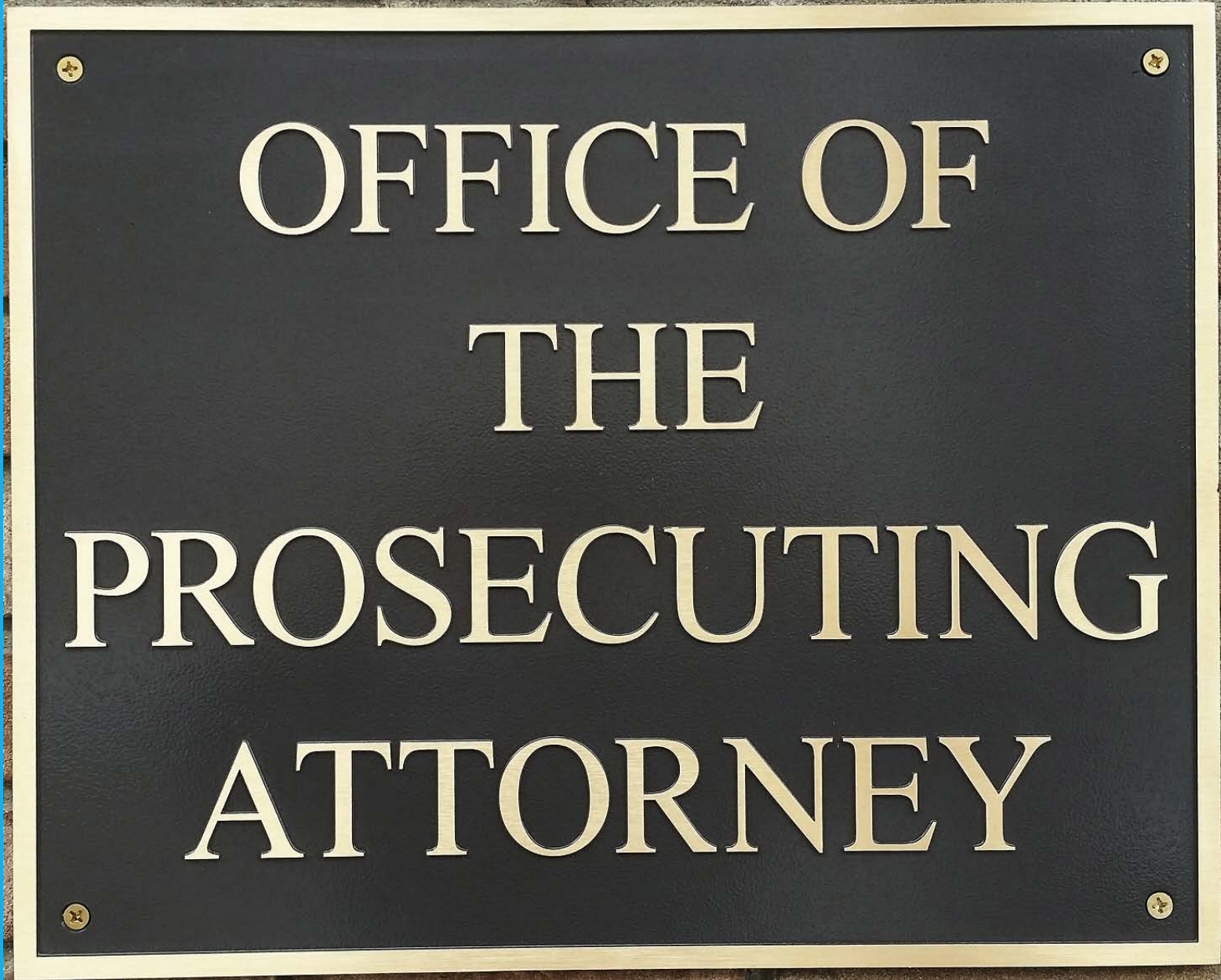
- 3+ minutes per participant leads to better outcomes
- Set the tone with participant
- Procedural fairness: individuals are more likely to accept negative outcome if they perceive they were treated fairly
  - Treated with respect
  - Opportunity to be heard
  - Rules/Procedures followed - available
  - Basis for decision

# Best Practice Standards – Judicial Demeanor

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- Not every judge can be a drug court judge and that's OK!
- Judicial style
  - Talker or listener
  - Supportive
  - Motivational enhancements
  - Avoids confrontation
  - Empathetic or sympathetic
  - Knowledgeable
  - Patient

Prosecutors



# Prosecutor Core Competencies

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- Fully participates as team member; committed to program, mission and goals
- Participates as a team member, operating in a non-adversarial manner, promoting a sense of unified team presence
- As part of the team, in appropriate non-court settings, advocates for effective incentives and sanctions
- “Gate keeper” – maintains eligibility standards while participating in a non-adversarial environment which **focuses on the benefits of therapeutic outcomes**

# Prosecutor Core Competencies

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- Monitor participant progress within pre-established boundaries that allow continued program participation, including suggestions for appropriate sanctions/incentives
- Knowledgeable about addiction, alcoholism, pharmacology (generally) and applies knowledge to respond to participant behavior in a therapeutically appropriate manner
- Knowledgeable of gender, age and cultural issues that may impact participants
- Participates with team in community education
- Educates peers, colleagues and judiciary of efficacy of Drug Court

# Prosecutor Duties

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- Advocate
  - Public safety
  - Victim interest
  - Participant accountability to program requirements
- Resolution of participant's other legal matters that may impact program participation
- Still responsible for representing the community concerns focused on public safety and compliance with the law but also on participant's recovery and successful reintegration

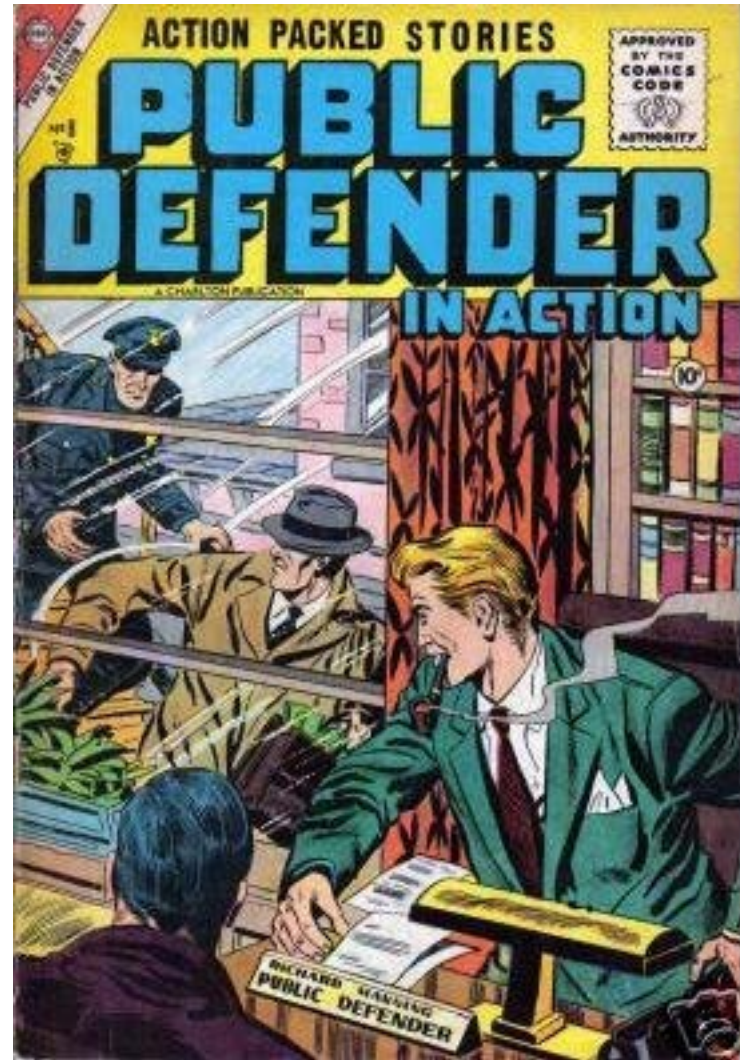


# Public Safety

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- Gate keeper
  - Legal screening of offender
  - Identify certain cases – eligible for Drug Court
  - Recommend sanctions and/or incentives as may be appropriate
  - Determination which offenses will be charged (as opposed to sanctioned) if committed while participant is in Drug Court
- Increased monitoring of participant activity as opposed to jail or probation
- Cost savings

# Defense Counsel



# Defense Counsel Core Competencies

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- Fully participates as team member; committed to program, mission and goals
- Evaluates defendant's legal situation and ensures protection of defendant's legal rights
- While in Drug Court, participates as a team member, operating in a non-adversarial manner while in court, promoting a sense of unified team presence
- Effectively advises defendants of their legal rights, options, treatment options, program conditions and sentencing outcomes while developing a relationship with the defendant that promotes the defendant's long term best interest

# Defense Counsel Core Competencies

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- Monitors participant progress to support full participation and ensure the participant is receiving appropriate treatment and rehabilitation services
- As part of the team, in appropriate non-court settings, advocates for effective incentives and sanctions
- Knowledgeable of gender, age and cultural issues that may impact participants
- Participates with team in community education
- Educates peers, colleagues and judiciary of efficacy of Drug Court

# Typical Defense Counsel Duties

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- Protection of constitutional and due process rights
- Advocates for participant's legal interests
- Handle day to day general issues relating to participant in drug court but also protect legal interests if participant may face jail as a sanction or termination

# Participant Perception

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- Defense counsel on team provides increased perception of procedural fairness to participant – greater perception of fairness leads to greater outcomes

Non-Adversarial ..  
I can't .....I'm the  
PROSECUTOR or  
I'm DEFENSE  
COUNSEL!

I have a duty of  
zealous advocacy!



# Remember the Why?

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- War on Drugs
  - Dockets overwhelmed
  - Drug related cases unresolved
  - High recidivism rates = “frequent fliers”
  - Jail alone doesn’t work – particularly for those with dependence and/or co-occurring issues
  - Not effective and it is cost prohibitive to put everyone who commits a crime in jail
- Science – connection between behavior and offense
- Provide tools to get well and stay well
- Research



# Shift in Focus

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- Once a participant is accepted into Drug Court the focus is on participant recovery, compliance with the law and reintegration into the community not the merits of the case
- Still maintain distinct roles but have shared goal of addressing dependence and reduction/elimination of defendant's engagement in criminal justice system
  - Prosecutor – Public safety by ensuring eligibility and program compliance
  - Defense – Due Process protection and encouraging full participation

# ABA Model Rules - Commentary

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- Competence

- Understanding of the Drug Court model to provide proper advice
- Interdisciplinary training to understand nature of substance abuse and treatment options
- Experienced practitioners should be assigned

- Scope of Representation

- Decision to enter Drug Court – defense counsel should ensure the option of Drug Court is extended to all eligible defendants and provide adequate basis for exercising that option; competent informed decision
- Decision to enter Drug Court is that of the defendant so long as decision is made knowingly

# ABA Model Rules - Commentary

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- Defense Counsel - Proper advisement on Drug Court
  - Overall nature
  - Effect of participation on expectations of confidentiality
  - Structure of legal representation
  - Attorney still has duties of competent, diligent and loyal representation – primary function shifts to staffing
  - Does not mean every sanction is challenged – sanctions should continue to serve participant's recovery and consistent with sanctions imposed on others for similar violations.

# ABA Model Rules - Commentary

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- Prosecutor - Entry into Drug Court – Prosecutorial Discretion
  - Consider foregoing charges that might be appropriate in absence of Drug Court – negatively impacting eligibility
  - Not a promise not to charge
- Prosecutor – Communication – Victim’s Rights
  - Victims deserve the same considerations as traditional court
  - However, confidentiality laws prohibit sharing of information learned in Drug Court

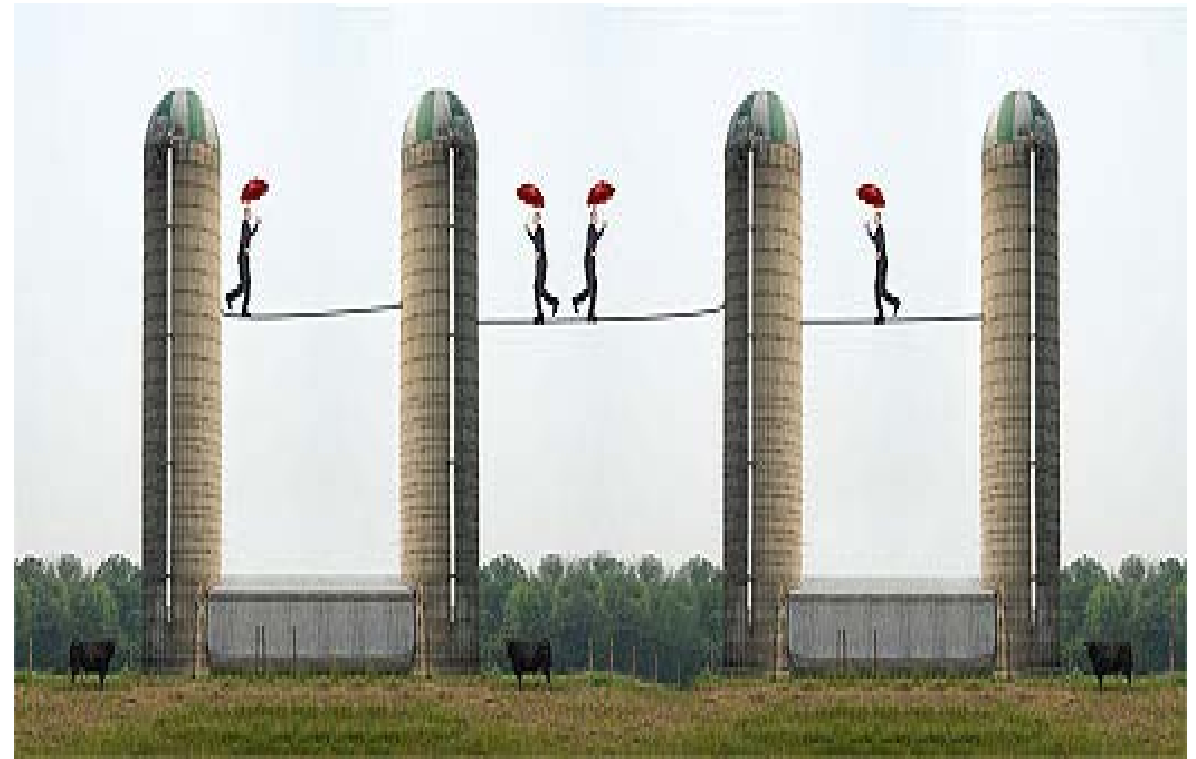
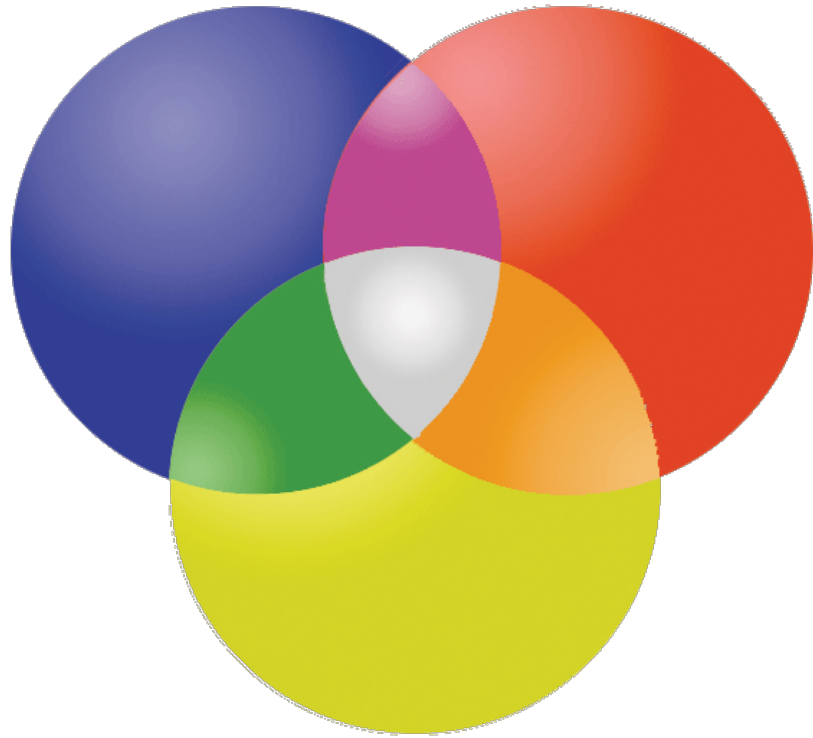
# Back to the Why ... Looking at Research

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- Drug Courts where the Prosecutor attended all team meetings experienced:
  - More than two times greater cost savings
  - Higher graduation rates
- Drug Courts where the Public Defender attended all team meetings experienced:
  - Eight times greater savings
  - 41% improvement in lowering outcome costs

# Remember Circles ... Not Silos

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## For More Information

- [www.ndcrc.org](http://www.ndcrc.org)
- Marlowe, Douglas B and William Meyer, 2011, *The Drug Court Judicial BenchBook*, [www.ndci.org](http://www.ndci.org)
- National Association of Drug Court Professionals (2013). *Adult Drug Court Best Practice Standards, Volume I*. Alexandria, VA. National Association of Drug Court Professionals
- Bureau of Justice Assistance, Core Competencies Guide Adult DCPI Trainings, [www.dcpi.ncjrs.gov/dcpi/pdf/ndci-core-competencies.doc](http://www.dcpi.ncjrs.gov/dcpi/pdf/ndci-core-competencies.doc)

# Thank you

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Please remember to complete your evaluations!

Speaker Evaluation Form

Link: <http://bit.ly/2mxKUFM>