



**Superior Court of New Hampshire  
Drug Offender Program**

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**New Hampshire  
Adult Drug Court  
Policy Appendix A**

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## **Contested jail-sanction hearings & Right to Counsel**

Drug Court participants do not waive every right when they enter into the Drug Court program. One of those rights is the right to a contested hearing when a violation of the rules of Drug Court could result in a jail sanction. This means the participant can contest the evidence supporting the violation, if they deny they violated the rules of the program.

The hearing will be brief and will be held during or at the end of the regular Drug Court session. Prior to the hearing the participant will be notified (either verbally or in writing) of the conduct he/she engaged in that was a violation of the rules of Drug Court. The defense attorney team member (or designee) will represent the participant, and the prosecutor team member (or designee) will represent the state during the hearing.

The Drug Court violation hearing will generally proceed by offer of proof so, in most instances, witnesses will not be required to testify at the hearing. In addition, Lab Analysts will not be required to testify at the contested hearings regarding positive urine tests. If the Drug Court judge determines by a preponderance of the evidence that the participant violated the rules of the program, the participant may receive a lengthier sanction than if they had been honest about their conduct. If a jail sanction of more than 7 days is imposed, or if a participant is held pending further action of the team, the participant will be transported to each drug court session and the team will assess the participant's status.

### **When future clients are agreeing to drug court we must explain right to counsel to them**

I understand that if I wish to contest a violation and the violation could result in a jail sanction, I can request a hearing on whether I committed the violation. However, I agree that this hearing will be limited in nature. I agree that in most instances, the hearing will proceed by offer of proof, meaning in most instances witnesses will not be required to testify at the hearing. I agree that lab analysts will not be required to testify at contested hearings regarding positive urine tests. I understand that dishonesty will result in larger sanctions if I am found to have violated and denied the conduct.

## **New Hampshire Confidentiality Policy**

As a general proposition, no member of a drug court team shall reveal any information learned as a result of their participation in confidential drug court matters to anyone outside the drug court team. Prosecutors generally may not use information obtained in the confidential drug court setting to prosecute a participant for new crimes.

Drug Courts must address confidentiality on many different fronts. A participant's treatment records, progress and behavior in drug court are all subject to privacy laws. This policy attempts to outline some, but not all, of the circumstances under which a drug court and/or its team must turn over information to third parties. This policy also outlines the potential duty prosecutors have to disclose information regarding drug court participants to other criminal defendants.

### **I. Information to Law Enforcement / Third parties**

Many of these guidelines are derived from Federal law. Drug Courts must adhere to 42 USC 290dd-2 and the relevant CFRs promulgated thereunder.<sup>1</sup> Failure to follow these laws could result in criminal liability. These laws establish that Drug Court information is privileged and can only be disclosed to third parties, including law enforcement, under certain circumstances. The three main circumstances include:

- 1. Medical emergency**
- 2. Research/audits/evaluation but with no personal identifiers**
- 3. A court order**

42 USC 290dd-2(b)(2)(a)-(c). In addition, the drug court participant can always consent to disclosure.

It is most likely that problems will arise under the "court order" exception. If that is the case, the process depends on the purpose for which the information is needed. If the party seeking the order intends to use the information for non-criminal reasons (i.e. a civil case such as divorce, custody, etc.), the party must proceed under 42 CFR 2.64. Under this section, the party seeking the court order must:

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<sup>1</sup> These can be accessed at:

<https://www.law.cornell.edu/uscode/text/42/290dd-2> (Statute)

<https://www.law.cornell.edu/cfr/text/42/part-2> (CFRs)

- (1) Request the information from a court (not necessarily the drug court) using the name “John Doe” and not include any identifying information;
- (2) Give notice to the drug court participant AND the record holder;
- (3) A hearing should be scheduled by the court issuing the order (not necessarily the drug court) and the drug court participant and/or record holder should be allowed to participate.
- (4) The hearing should be sealed or off the record (the CFR mentions having it in the judge’s chambers).

The court may grant the order only after finding: (1) other ways of obtaining the information are not available or would not be effective; and (2) the public interest and need for the disclosure outweigh the potential injury to the patient, the physician-patient relationship and the treatment services. The court should tailor the order to limit disclosure to only what is necessary and to only those who need the information. The court may also impose other conditions to protect the participant’s privacy.

If the party seeking the information intends to use the information to prosecute and/or investigate the participant, then a different process applies. First, this type of court order can be requested by either the record holder OR law enforcement. (It is not clear why the record holder would want a court order, but there may be some circumstances under which it may be appropriate.) Under this section, only the record holder—not the patient—needs to be given notice of the request. At the hearing regarding the court order, the record holder should be afforded “[a]n opportunity to appear and be heard for the limited purpose of providing evidence on the statutory and regulatory criteria for the issuance of the court order.” The record holder may be represented by counsel. The hearing should be sealed or off the record.

The court may grant the order only after finding:

- (1) The crime involved is extremely serious, such as one which causes or directly threatens loss of life or serious bodily injury including homicide, rape, kidnapping, armed robbery, assault with a deadly weapon, and child abuse and neglect. See United States v. Hughes, 95 F. Supp. 2d 49, 58 (D. Mass. 2000) (discussing what is a serious crime).
- (2) There is a reasonable likelihood that the records will disclose information of substantial value in the investigation or prosecution.
- (3) Other ways of obtaining the information are not available or would not be effective.
- (4) The potential injury to the patient, to the physician-patient relationship and to the ability of the program to provide services to other patients is outweighed by the public interest and the need for the disclosure.
- (5) If the applicant is a person performing a law enforcement function that:
  - (i) The person holding the records has been afforded the opportunity to be represented by independent counsel; and

(ii) Any person holding the records which is an entity within Federal, State, or local government has in fact been represented by counsel independent of the applicant.

As with the court orders for civil cases, these orders must be narrowly tailored “to those parts of the patient’s record which are essential to fulfill the objective of the order” and only to the necessary law enforcement/prosecutorial individuals.

**NOTE:** It is very important that any court order be accompanied by a subpoena. The record holder should not comply with a request for information, absent consent, if: (1) there is only a subpoena, but no court order; (2) there is only a court order, but no subpoena; (3) there is neither a court order nor a subpoena; or (4) the record holder was not given notice or the opportunity to appear in front of the issuing court. In the event of number (4), the record holder should consult with counsel regarding legal options to quash the order.

No court order is necessary if the drug court participant consents. However, any consent should include the following:

(1) The specific name or general designation of the program or person permitted to make the disclosure.

(2) The name or title of the individual or the name of the organization to which disclosure is to be made.

(3) The name of the patient.

(4) The purpose of the disclosure.

(5) How much and what kind of information is to be disclosed.

(6) The signature of the patient and, when required for a patient who is a minor, the signature of a person authorized to give consent under § 2.14; or, when required for a patient who is incompetent or deceased, the signature of a person authorized to sign under § 2.15 in lieu of the patient.

(7) The date on which the consent is signed.

(8) A statement that the consent is subject to revocation at any time except to the extent that the program or person which is to make the disclosure has already acted in reliance on it. Acting in reliance includes the provision of treatment services in reliance on a valid consent to disclose information to a third party payer.

(9) The date, event, or condition upon which the consent will expire if not revoked before. This date, event, or condition must insure that the consent will last no longer than reasonably necessary to serve the purpose for which it is given.

If the participant has died, then the decedent’s personal representative can give the required consent. If there is no personal representative, consent can be given by a spouse, or if none, then by a “responsible” family member.

## II. Prosecutor's Duty to Disclose vs. Duty of Confidentiality

Brady obligations, could potentially conflict with federal law. For instance, 42 CFR 2.13 provides that: “The patient records to which these regulations apply may be disclosed or used only as permitted by these regulations and may not otherwise be disclosed or used in any civil, criminal, administrative, or legislative proceedings conducted by any Federal, State, or local authority.” (Emphasis added). There is no regulation permitting disclosure for Brady reasons. But see 42 CFR 2.12 (noting exceptions for crimes on program premises or against program personnel and reports of suspected child abuse and neglect). Therefore, it is quite possible that a prosecutor could have a constitutional duty to disclose certain information, but by doing so, would violate federal law and other ethical duties.<sup>2</sup> Moreover, there is little to no case law suggesting the proper course of action for a prosecutor to follow when faced with such a dilemma. While the Supreme Court has been willing to abdicate certain privileges in favor of a defendant's constitutional rights, see, e.g., United States v. Nixon, 418 U.S. 683, 707, 713 (1974) (holding that executive privilege must yield to specific need for evidence in criminal prosecution); Davis v. Alaska, 415 U.S. 308, 319 (1974) (state privilege in protecting secrecy of juvenile offender records must yield to defendant's Sixth Amendment right to confront witnesses); but see Swidler & Berlin v. United States, 524 U.S. 399, 403 (1998) (declining to rule on whether defendant's rights under Brady superseded the attorney-client privilege), it remains an open question if they would do so here. Thus, as things currently stand, the prosecutor is in an untenable position.

There are steps that can be taken to help minimize this concern.

1. Prosecutors should not share any information regarding drug court participants with non-drug court prosecutors.
2. The files should be kept separate in their offices and not be accessible to other prosecutors. This limits the pool of prosecutors who could face this issue to only drug court prosecutors.
3. Prosecutors should try to avoid taking on cases (or recuse him or herself) in which drug court participants may be involved as witnesses, or try to pursue the case without the use of the drug court participant. See Davis, 415 U.S. at 320 (“The State could have protected Green from exposure of his juvenile adjudication in these circumstances by refraining from using him to make out its case.”).
4. The surest way to resolve this issue would be by obtaining the drug court participant's consent. The participant should be made aware at the outset that a prosecutor may have certain constitutional obligations under limited circumstances to disclose information obtained in drug court to third parties. The participant would have to sign a consent form consistent with the nine requirements listed above in order to be admitted into drug court. The drug court participant's continuing consent would be a requirement to remain in the program. The consent cannot last indefinitely, so it is possible that even consent would not solve all Brady issues. Short of adopting this requirement, prosecutors must make their own Brady determinations, based on their training, experience, and own ethical guidelines, under the given circumstances.

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<sup>2</sup> The National Drug Court Institute takes the position that, based on “federal and state rules protecting information about recipients of AOD treatment and the drug court's rules and memorandum of understanding,” the prosecutor owes drug court participants a duty of confidentiality. National Drug Court Institute, Ethical Considerations for Attorneys and Judges in Drug Court 41–42 (2001).

## Team Members of an Adult Drug Court Team Memorandum

Drug Court teams have multiple agency representation, and in many cases, those agencies are not part of the core team, as defined by the National Association. Although interest and involvement of other criminal justice team members can enhance the performance of the team, and in some cases, should be encouraged, we need to be sure we are all consistent in our approach to effective team membership, and operating according to best practices. According to Best Practices in Drug Courts Vol VIII Issue I page 19-22, and Best Practices Vol. II, page 38, there are a number of practice / team members that should be present to ensure the program's success.

- Law Enforcement
- Judge
- Defense
- Prosecutor
- Treatment
- Case managers
- Coordinator
- Probation

The above listed agencies constitute the core team. Any other agency who seeks representation on the team may join by invitation and at the discretion of the team

If a team decides to permit a member in addition to those listed above to attend team meetings, the decision to allow that participation should be by consensus of the team members. Additional members may include representatives from Housing, HOC, Prison, Community Corrections, doctors, visiting interns, etc. All team members must sign a non-disclosure agreement. Because confidential information is discussed during team meetings, the treatment provider will determine how much information should be disclosed to assist in the recovery of the participant and to ensure that the team can operate according to best practices. Although participants sign releases before entering drug court, treatment providers are not required to reveal all confidential information during team meetings if such disclosure is not in the best interest of the participant.

Every member must fulfill the minimum training requirements contained in the training packet before they may participate in team meetings. (This applies if they are sitting on the team for staffing, this does

not apply if they are invited to give background information for a participant and then excused so the team can discuss other cases).

## **Drug Court Transfer of cases**

There has been an increased need to have a written policy to transfer Drug Court cases from one county to another due to a participant's change in residence, or some other reasonable hardship. Now that the majority of Superior Courts have a Drug Court this topic has been raised by a few jurisdictions. The Drug Offender program sees there are two ways to transfer a case; pre-plea and post-plea. The following steps should be taken in order to transfer a drug court case to another county.

### Pre plea

Before a defendant takes a plea we can transfer the case to another program if the following is agreed upon. The oversight of this process should be conducted by the local coordinator and the coordinator of the new court. The defendant cannot apply to multiple courts at the same time.

1. The County Attorney in both jurisdictions agrees to transfer the case.
2. The sending team agrees to transfer the case.
3. The new team agrees to receive the new case.
4. The new clinical team agrees to conduct an assessment.
5. If the new clinical team determines the participant is eligible for drug court, the Court file is transferred to the new jurisdiction.
6. The participant enters a plea in the new county and becomes a drug court participant of the new county. The participant is then subject to the policies and procedures of the new county, including policies on incentives and sanctions, community supervision, treatment, local resources, etc.

### Post plea

If a participant is in a drug court and circumstances arise that would support a transfer of the participant to a new drug court, the sending team should discuss the potential transfer and determine whether the participant would be better served by participating in the receiving county. If the sending team determines that transfer is appropriate, then the coordinator of the sending team should contact the receiving coordinator for discussion among the new team.

If the receiving team also agrees that the participant should be transferred, then the participant will review the new/receiving drug court handbook and protocols. The court will transfer the case file to the receiving county upon motion of the participant. The participant must sign releases to permit the sending team to share information regarding the participant's progress with the receiving team.

The motion to transfer must include a signed acknowledgement by the participant, in which the participant agrees to the transfer and agrees to be subject to the rules and requirements of the new drug court. The motion should also include a request to amend the sentence to include successful completion of the new drug court as a requirement of the suspended sentence.

#### Probation Supervision

NHDOC probation/parole supervision will be provided by the field office responsible for the county of residence unless there are extenuating circumstances. In the case of Hillsborough North (Manchester) and South (Nashua), supervision responsibility is designated by town within Hillsborough County.