



LEGAL CHALLENGES IN ADULT FELONY DRUG COURTS

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Alison M. Lerner
General Counsel
Council of Accountability Court Judges

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AGENDA

- Resources
- Hot Legal Issues
- Appellate Legal Authority

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RESOURCES



All Rise Judicial Benchbook

<https://allrise.org/wp-content/uploads/2022/07/Judicial-Benchbook-2017-Update.pdf>



Caselaw Resources

<https://allrise.org/laws/>



A Practitioner's Guide to Constitutional and Legal Issues in Adult Drug Courts

<https://allrise.org/publications/constitutional-and-legal-issues-in-adult-drug-courts/>



Critical Issues for Defense Attorneys

<https://allrise.org/publications/monograph-series-critical-issues-for-defense-attorneys/>



Your CACJ Resource

Alison.Lerner@georgiacourts.gov

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HOT LEGAL ISSUES

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HOT LEGAL ISSUE: TERMINATIONS

- Termination Best Practice Recommendation:
 - Treat a termination hearing like a VOP hearing as much as possible
 - Call witnesses, allow cross-examination, appoint counsel if needed
 - If there are other probation violations, it can be efficient to handle the termination and VOP together (but is not required)
- Burden of proof: **preponderance of the evidence**
 - Wilkinson v. State, 283 Ga.App. 213 (2006)

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HOT LEGAL ISSUE: TERMINATIONS

- Judicial Recusal at Termination
 - All Rise recommendation: “In the absence of case law, statute, or rule addressing this issue, the safest practice is to not require drug court participants to waive their right to request judicial recusal in termination/revocation hearings. Such waiver language should be eliminated from drug court contracts. **Additionally, drug courts should generally grant a motion for recusal of the drug court judge if one is filed by a participant.**”¹ (emphasis supplied)
 - Wilkinson v. State, 283 Ga.App. 213 (2006)
 - Approves of pre-entry waiver of right to recuse

¹ A PRACTITIONER'S GUIDE TO CONSTITUTIONAL AND LEGAL ISSUES IN ADULT DRUG COURTS, P7

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POLL

Sanctions

To the best of your knowledge, what appellate legal guidance is currently available regarding sanction procedures?

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To the best of your knowledge, what guidance is currently available regarding sanction procedures?

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HOT LEGAL ISSUE: SANCTIONS

- While there are a precious handful of quotes in dicta (many in footnotes) in appellate cases from other states, there is no appellate legal guidance on sanctioning anywhere in the nation.

RECOMMENDATION

When a participant denies allegations of noncompliance, a drug court should conduct a hearing at which the participant has the right to receive notice of the allegations, to be represented by counsel, to call witnesses, and to cross-examine the prosecution's witnesses.

A PRACTITIONER'S GUIDE TO CONSTITUTIONAL AND LEGAL ISSUES IN ADULT DRUG COURTS, P45

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HOT LEGAL ISSUE: SANCTIONS

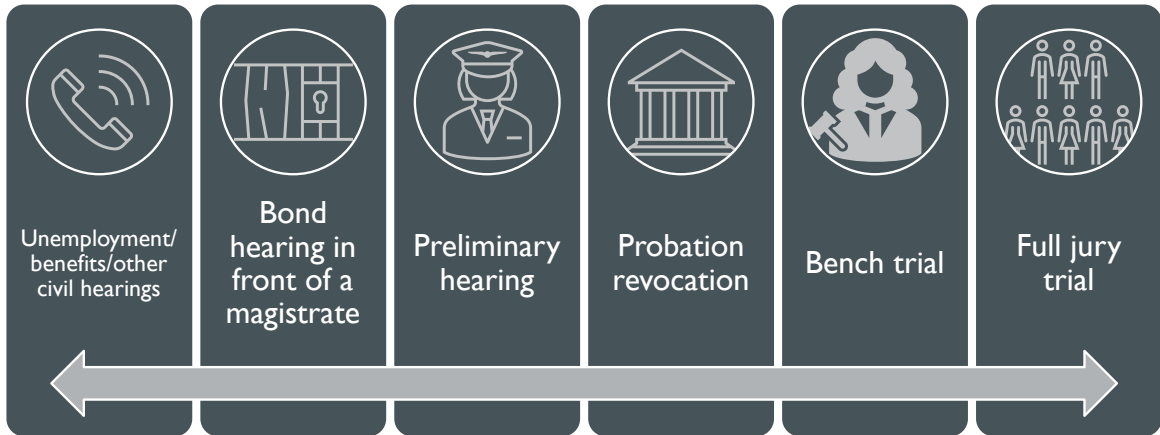
- However, **this does not mean** there must be a VOP-style hearing.
- **Something less than a probation violation-style hearing is acceptable in Georgia.**
- Be aware of the guidance from All Rise:

Nonetheless, the safer and fairer approach is to provide the full due process protections afforded at a probation revocation hearing when imposing sanctions, at least where a jail sanction is contemplated. The most recent case law on intermediate sanctions appears to be moving in the direction of requiring more due process. Consistent with this recommendation, the Treatment Court Institute's *Judicial Benchbook* advises that, "when a drug court participant contends that he or she did not engage in the conduct that is subject to a jail sanction, the court should give the participant a hearing with notice of allegations, the right to be represented by counsel, the right to testify, the right to cross-examine witnesses, and the right to call his or her own witnesses."²⁴⁶

A PRACTITIONER'S GUIDE TO CONSTITUTIONAL AND LEGAL ISSUES IN ADULT DRUG COURTS, P45

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HOT LEGAL ISSUE: SANCTIONS



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HOT LEGAL ISSUE: SANCTIONS

- Judge must ultimately decide how much due process will be afforded during a sanction
- Different procedures in different jurisdictions = okay and expected
- Local resources vary
- Remember sanctions should also be administered swiftly

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HOT LEGAL ISSUE: TRANSFERS

- CACJ Transfer Best Practices Guide:
<https://cacj.georgia.gov/standards-certification/participant-transfers>
- Philosophy: Funding for ACs is predominantly via a state appropriation. The legislature wants state funds to be used to serve all eligible Georgia citizens.
- CACJ's Vision: Making accountability courts work for all Georgians.
- Coordinating transfers across the states is progress toward this vision.

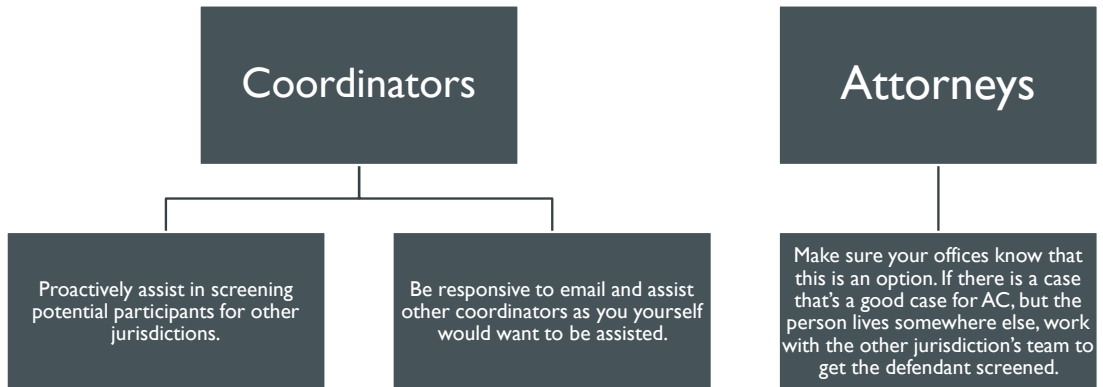
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It is not fair, equitable, or just that someone is considered ineligible for an accountability court just because they happen to get arrested in a county they don't reside in while their county of residence offers a state-funded AC.

HOT LEGAL ISSUE: TRANSFERS

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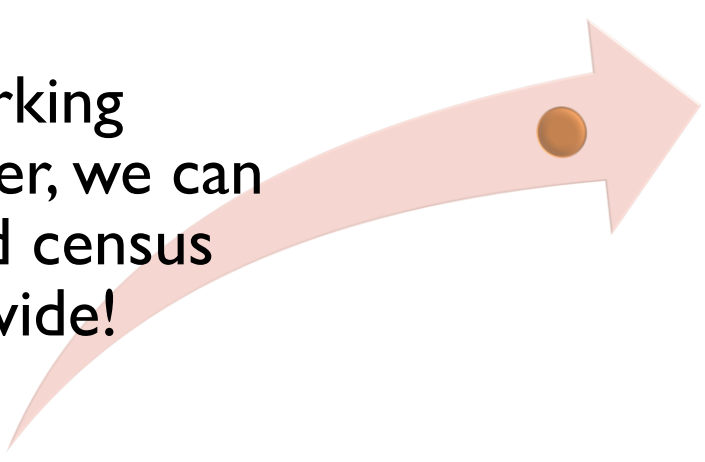
HOT LEGAL ISSUE: TRANSFERS



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HOT LEGAL ISSUE: TRANSFERS

By working together, we can expand census state-wide!



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HOT LEGAL ISSUE: HIPAA & CONFIDENTIALITY

- Make sure you know what's in your treatment provider's HIPAA and Part 2 waivers
- Ensure it covers release of information not just within the team and stakeholder offices, but to CACJ as part of data reporting and for research and evaluation purposes
- Internal/in-house treatment providers: the entire team may be considered a treatment provider
- External providers: team is protected because all info released by provider to team should be covered by the provider's waiver

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HOT LEGAL ISSUE: LGBTQIA+ ACCOMMODATION

- Standard 5.5: "All drug testing shall be directly observed by an authorized, same sex member of the drug court team, a licensed/certified medical professional, or other approved official of the same sex."
- Strict legal compliance: define sex as listed on driver's license and/or birth certificate
- However if a program wants to accommodate a transgender participant, they can do so, so long as screener is ok with it (get in writing)

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HOT LEGAL ISSUE: MAT AND THE ADA

- SUD and OUD are ADA-protected disabilities
- MAT cannot be prohibited per state standards
- MAT is the gold standard for treatment per American Medical Association.
- DOJ has initiated investigations into states that prohibit lawfully-prescribed MAT medication
 - DOJ sued PA and entered negotiations with MA over this

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POLL

Question:
Does your program offer MAT? Why or why not?

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Does your program offer MAT? Why or why not?

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APPELLATE LEGAL AUTHORITY

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GEORGIA CASE: TERMINATION

- Dave v. State, 365 Ga.App. 1 (2022):
 - Post-plea, pre-adjudication program
 - Defendant went AWOL from MHC
 - Program sent notice to defendant's last known address, not to counsel
 - Opt-out county, no public defender's office
 - Defendant did not appear for hearing
 - Court held hearing in defendant's absence and sentenced her to 2 years in prison

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GEORGIA CASES: TERMINATION

- Dave v. State, 876 S.E.2d 882 (2022):
 - Court of Appeals overturned the sentence
 - Must provide notice of termination hearing to defendant and counsel
 - In pre-adjudication cases, counsel at the time of the plea remains counsel of record unless withdrawn or substituted
 - Thus, defendant was not served because her counsel of record was not served

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GEORGIA CASES: TERMINATION

- Best practices from Dave
 - Clarify who is counsel of record
 - Pre-adjudication: plea counsel remains counsel of record unless withdrawn or substituted
 - Send notice of termination hearing to counsel and to defendant

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GEORGIA CASES: TERMINATION

- Best practices from Dave
 - Do not hold a termination hearing without defendant present
 - Remain in inactive-awol status until arrested
 - If you must do the termination hearing, do not sentence or revoke probation until defendant is picked up on the warrant
 - Hearing can be limited to a determination of whether the participant complied with the terms and conditions of the program
 - After hearing, participant would be terminated-noncompliance

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GEORGIA CASES: TERMINATION

- Best practices from Dave
 - If terminating in absentia, have a policy in the handbook outlining the period of time the person is AWOL before terminating
 - Policy re what constitutes AWOL status
 - Absconding must still be intentional to justify termination
 - Validity of waiver is an open question

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PRACTICE TIP: EXTENDING FELONY SENTENCES

OCGA § 42-8-34(g)

In addition, when the judge is considering revoking a probated sentence in order to require the defendant to enter a drug court division, mental health court division, family treatment court division, or veterans court division and the length of the original sentence is insufficient to authorize such revocation, the defendant may **voluntarily agree** to an extension of his or her original sentence **within the maximum sentence allowed by law**, notwithstanding subsection (f) of [Code Section 17-10-1](#). Such extension shall be for a period **not to exceed three years**, and upon completion of such specific court division program, the court may modify the terms of probation in accordance with subparagraph (a)(5)(A) of [Code Section 17-10-1](#).

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CASES FROM OTHER JURISDICTIONS: ELIGIBILITY

- State v. Second Judicial Dist. Court of Nev., 432 P.3d 154 (2018)
 - Nevada Supreme Court ruled that the drug court statute that allowed prosecutors a veto was unconstitutional in post-plea programs on separation of powers grounds
 - Prosecutor, as the state and a party to a case, cannot sentence, only the judge can
 - Careful: Pre-plea vs. post-plea programs are different

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CASES FROM OTHER JURISDICTIONS: DRUG TESTING NON-PARTICIPANTS

- Disciplinary Counsel v. Repp, 165 Ohio St. 3d 582 (2021)
 - Drug court judge ordered a guest in court (girlfriend of participant) to take a drug test
 - When she refused, he held her in contempt and incarcerated her for ten days
 - Judge was suspended for one year
 - All Rise recommends not testing non-participants

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QUESTIONS?



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CONTACT ME!



Helping Georgians Recover

Alison M. Lerner

General Counsel

Council of Accountability Court Judges

Mobile: (470)808-9110

alison.lerner@georgiacourts.gov

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