

TREATMENT COURT
BEST PRACTICES AND
RECORDKEEPING



OCTOBER 2021

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This document is intended as an update and extension to the [Wisconsin Treatment Courts: Best Practices for Record-keeping, Confidentiality & Ex Parte Information](#) guide released in December 2011. Both documents are offered to help courts strike an appropriate balance between the need for confidentiality for treatment records and the need for public accountability and open records in the criminal justice system.

Acknowledgements

This report was prepared by a committee of circuit court judges, clerks of circuit court, and court administrators with experience in treatment courts. It has been approved and adopted by the Wisconsin Court System Planning and Policy Advisory Committee (PPAC) and by its Effective Justice Strategies Subcommittee.

Committee members included Judge Elliott Levine, La Crosse County, chair; Judge Cynthia Davis, Milwaukee County; Judge Gregory Gill, Jr., Outagamie County; Judge Michael Waterman, St. Croix County; Katie Schalley, Dunn County Clerk of Circuit Court; Kristina Secord, Walworth County Clerk of Circuit Court; Patrick Brummond, District 7 Court Administrator; and Amy Tauscher, La Crosse County Deputy Clerk of Circuit Court.

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Treatment Court Hearings

- Treatment court **hearings are generally open to the public¹ and on the record.²**
- If the underlying action is confidential, the treatment court proceedings will also be confidential. This will be most common in proceedings under Chapter 48 or Chapter 938.³
- Treatment court **team meetings should be confidential and not on the record.⁴**
 - See Section 2, *Victim Rights Law*
- When hearings are held using videoconferencing technology with some or all participants appearing from remote locations, real time access must be provided to the public.⁵

¹ Wis. Stat. § 757.14.

² There is no applicable exception under SCR 71.01.

³ See Wis. Stat. §§ 48.396 and 938.396.

⁴ See 42 CFR Part 2

⁵ See Wis. Stat. § 757.14. There are no exceptions for proceedings held remotely.

Victim Rights Law

This area of the law is developing and there is not always clear guidance for each situation. Be aware of the different factors involved and consider the intent of Marsy's Law.

- **VICTIM ATTENDANCE AT TREATMENT COURT HEARINGS**
 - Victims have the right to attend treatment court hearings, including graduation hearings.

- **VICTIM ATTENDANCE AT TREATMENT COURT TEAM MEETINGS/STAFFINGS**
 - Marsy's Law gives victims the right to request to attend all proceedings involving the case.⁶ However, the term "proceeding" is not defined.
 - Judges will have to determine whether treatment court team meetings are "proceedings" under Marsy's Law. Arguments against team meetings being "proceedings" include:
 - Defendant does not attend team meetings.
 - No final decisions are made by the court.
 - Anything relevant will subsequently be said in open court, where victim would have an opportunity to be heard.
 - Defendant's privacy interest should be considered.
 - Limit other off the record hearings that would be difficult for the victim to attend.
 - Celebratory events, such as a graduation reception, arguably are not considered "proceedings."

- **VICTIM NOTIFICATION OF PROCEEDINGS/HEARINGS**
 - Marsy's Law gives victims the right to request "reasonable and timely" notification of proceedings.⁷
 - It is the responsibility of the District Attorney's Office to notify victims of court proceedings.⁸
 - Due to the challenges for the victim witness office to keep up with providing notice of hearings with short notice, it is suggested that, if treatment court is always held at the same time each week, that information is provided to the

⁶ Wis. Const. Art. I, § 9m(2)(e).

⁷ Wis. Const. Art. I, § 9m(2)(g).

⁸ Wis. Stat. § 971.095(3).

victim(s). However, it is not known whether this general information would be considered sufficient notice.

- **VICTIM RIGHT TO BE HEARD**

- Marsy's Law gives victims the right to request to be heard at any proceedings during which a right of the victim is implicated.⁹
- Depending on what is discussed, victim rights may not be implicated at every treatment court hearing. However, it is suggested that victims be given the right to be heard at all review hearings to be safe.
- Judges may consider asking at every proceeding that implicates the victim's rights: "Is there a victim present who would like to be heard?"
- The judge may consider asking if the victim is willing to speak to the Victim-Witness Coordinator beforehand to get a sense of what the victim is going to say. The judge may also ask victim to put comments in writing if there are concerns as to what they might say.

⁹ Wis. Const. Art. I, § 9m(2)(i). This includes release, plea, sentencing, disposition, parole, revocation, expungement, or pardon.

Ex Parte Communication

The Wisconsin Supreme Court amended the Code of Judicial Conduct to address the judge's special role in treatment court. Supreme Court Rule 60.04(1)(g)6 was effective on July 1, 2012.

- SCR 60.04(1)(g)6 allows the treatment court judge to engage in ex parte communications with the other treatment court team members provided the participant knowingly waives such communications.
- A treatment court judge should obtain a waiver at the time of the participant's entry into the treatment court.¹⁰
- When a participant is represented by counsel, the treatment court judge should make every effort to include both the state's attorney and the defense attorney on all communications.

¹⁰ For a sample waiver regarding confidentiality and ex parte communications, see Wisconsin Treatment Courts: Best Practices for Record-Keeping, Confidentiality & Ex Parte Information 26–28 (Dec. 2011), <https://wicourts.gov/courts/programs/problemsolving/docs/bestpracticesreckeeping.pdf>.

Open Records, Work Product and Confidentiality

Judge's Notes

- Personal notes are not subject to disclosure under the open records law.¹¹
- Judge's notes need to be kept separately and are considered a work product of the judge.
- Notes are maintained only by the judge and can be both electronic and physical.
- It is recommended that *Status Reports* not be kept with the judge's notes.

Emails

- Any email received by a judge can be deleted when no longer needed
 - If a records request is received, emails, including deleted and archived emails, will have to be reviewed by the judge, who is the records custodian, to determine whether to release those records or whether an exception applies to the release.
 - If there is no statute or case law that creates a general exception to disclosure, the judge must decide whether the public policy favoring disclosure is overcome by a stronger public policy favoring nondisclosure.¹²

Status Reports

- Status reports, or team meeting reports, can be received by email.¹³
 - The system of email must be secure.
 - Reports should have a confidential identifier for the participants (e.g. participant ID number).
 - Personal identifying information should be excluded.
 - Status reports should be deleted by the judge once they are used. Judges should not possess a permanent file of status reports.
 - Status reports should be kept in the confidential treatment court file, not in the criminal court file.¹⁴

¹¹ *State v. Panknin*, 217 Wis. 2d 200, 209-216 (Ct. App. 1998).

¹² See, e.g., *Woznicki v. Erickson*, 202 Wis. 2d 178, 192-93 (1996).

¹³ Email is recommended as a best practice for team communications as it fosters communication; however, there are confidentiality concerns. See *Best Practices in Drug Courts, Drug Court Review*, Volume III, Issue 1, https://www.ndci.org/wp-content/uploads/DCR_best-practices-in-drug-courts.pdf.

¹⁴ <https://wicourts.gov/courts/programs/problemsolving/docs/witreatmentcourtstandards.pdf>

- Confidentiality Concerns
 - Record confidentiality rules are different for each agency involved in a treatment court team.
 - Confidentiality rules change depending on who creates and maintains the status reports and their authority for confidentiality.
- Generally, all Treatment Court records cannot be sealed.
 - Court should conduct the usual balancing test of whether the person's interest in keeping certain information confidential outweighs the public's general right to have information available.¹⁵

¹⁵ See *Newspapers, Inc. v. Breier*, 89 Wis. 2d 417, 436-37 (1979).

Due Process

Procedures for Due Process Hearing

- **PARTICIPANT RIGHTS**

- The participant who is alleged to have committed a violation(s) warranting a termination or sanction shall be entitled to:
 - Notice of the violation and/or allegations used as the basis for the termination/sanction.
 - Be present at the due process evidentiary hearing.
 - The right to call their own witnesses.
 - The right to cross-examine witnesses.
 - The right to factual findings.
 - The right to counsel (see below for additional information).
- If a participant wishes to knowingly, intelligently, and voluntarily waive their right to a due process hearing they:
 - Have a right to be present during a waiver of the due process hearing.
 - Must be informed of their right to a due process hearing.
 - Must not be under the influence of any substances which could impact their ability to understand the waiver of the due process hearing.

- **RIGHT TO COUNSEL**

- If the representative from the State Public Defender simply functions as a team member of the Treatment Court and does not individually represent each participant throughout all of the proceedings, this team member will not represent the participant in the due process hearing to avoid any conflicts of interest.
- The participant is entitled to counsel to assist them with an evidentiary hearing.
- Should the participant wish to have counsel for an evidentiary hearing, they may apply to the State Public Defender's office.
 - The State Public Defender will appoint counsel to the participant if they qualify.
 - If the participant does not qualify, they may apply for counsel through the Court.
 - The participant may choose to hire their own counsel.
- The Due Process hearing may be adjourned to a later date to give the participant and their defense counsel adequate time to prepare.

- If the participant wishes to waive their right to counsel and proceed pro-se, the court must ensure that the participant knowingly, intelligently, and voluntarily waives their right to an attorney.¹⁶
- A participant who has waived their right to counsel may nevertheless re-assert that right.¹⁷
- **DISCOVERY**
 - The participant and their attorney are entitled to the records related to the violations, which may include the test results, the reports of the testing lab, the procedures of the testing lab, etc.
 - If the violation(s) involve or include non-drug test violations (behavioral/other rules violations), the participant’s counsel may request such records from the appropriate reporting agency.
 - Waivers or releases may be required in order for participant’s counsel to receive certain protected or otherwise confidential information.
- **STANDARD OF PROOF**
 - The allegations of violations by the participant must be established by the State by preponderance of the evidence.¹⁸
- **EVIDENTIARY STANDARDS**
 - If the violation involves drug testing results, the standard of proof for the drug test results must have an indicia of “sufficiently reliable.”¹⁹
 - There must be a clear chain of custody for the samples and opportunity for timely confirmation testing.²⁰
 - Hearsay is permissible in a due process hearing.²¹

¹⁶ *Iowa v. Tovar*, 541 U.S. 77, 92 (2004).

¹⁷ *Robinson v. Ignacio*, 360 F.3d 1044 (9th Cir. 2004).

¹⁸ See, e.g., *State v. Workman*, 842 N.W. 2d 108 (Neb. App. 2013) (the minimal due process to which a parolee or probationer is entitled also applies to participants in the drug court program. The standard of proof for termination from drug court participation is preponderance of the evidence); *People v. Harrison*, 771 P.2d 23, 23 (Colo. Ct. App. 1989) (standard of proof is preponderance of the evidence). See also *State ex rel. Flowers v. Dept. of Health & Soc. Servs.*, 81 Wis. 2d 376 (1978) (establishing preponderance of evidence standard of proof is the proper standard to use in parole and probation revocation cases).

¹⁹ See, e.g., *People v. Dorcent*, 29 Misc. 3d 1165, 909 N.Y.S.2d 618 (2010) (SCRAM meets *Frye* test of scientific reliability for admission in court); *In re E.M.*, 728 N.W.2d 853 (Iowa App. 2007) (sweat patch reliable, unless evidence of environmental contamination). But see also, *Wilcox v. State*, 258 S.W.3d 785, 785 (Ark. Ct. App. 2007) (explaining that the test was not reliable because the pH level and temperature was not established).

²⁰ <https://wicourts.gov/courts/programs/problemsolving/docs/witreatmentcourtstandards.pdf>.

²¹ See *Taylor v. State*, CR-15-0354 (Ala. Crim. App. 9/9/16) (holding that a due process hearing is similar to a probation revocation hearing and therefore is not criminal in nature; thus formal rules of evidence not necessarily applicable).

- **HEARING PROCEDURES**

- The Due Process hearing must be held on the record.
- The hearing may be held at a time other than the usual prescribed treatment court hearings.
- The State shall present its witness(es) for each of the alleged violation(s) of the participant.
- The participant has a right to cross-examine the witnesses brought against them.
- After the close of the State's evidence, the participant and their counsel may present their own witnesses, subject to cross-examination by the State.
- At the end of the hearing, both the State and the participant's attorney may make closing statements to the presiding judge.

Special Considerations for Jail Sanctions

- Jail sanctions must be definite in duration and typically last no more than five days.
- Common procedures for imposing jail sanctions include:
 - Remand to custody (Bond Hearing)
 - Impose a stayed sentence (Judicial Review)
 - Probation hold
 - Additional conditional jail time related to probation (Judicial Review)
- The Court should not hold a participant for the sole purpose of awaiting a treatment placement.

Special Considerations for Termination

- **TEAM MEETING/STAFFING PROCEDURES**

- The participant retains the same due process rights during team termination hearing including:
 - Notice
 - Right to counsel
 - Right to be heard
 - This process is informal and not on the record.
 - The Treatment Court Judge should not be part of this meeting or decision.
 - The Team's decision and reason for termination shall be made part of the record during the due process hearing.
- See *Sentencing After Treatment Court Termination*

Sentencing After Treatment Court Termination

- Significant concerns regarding objective bias are raised when a treatment court judge presides over the sentencing after termination.²²
- These concerns are detailed in *State v. Marcotte*, 2020 WI App 28. (It is recommended that every treatment court judge reviews this case.)

Relevant Law

- A judge must be fair and impartial and must not be subjectively or objectively biased.²³
- Objective bias exists in two situations: (1) where there is an appearance of bias; and (2) where objective facts demonstrate that a judge treated a party unfairly.²⁴
- Objective bias must be analyzed on a case by case basis analyzing all of the circumstances.²⁵
- Subjective bias exists when a judge has personal doubts as to whether he or she can be impartial.²⁶

Recommendation

- The best practice is to have the treatment court judge recuse himself or herself.
- In the alternative, avoid the need for sentencing after termination altogether (in those cases where the program follows a post-adjudication probation model) by imposing but staying a sentence instead of withholding sentence before entry into the program.
- If the treatment court judge does proceed with the sentencing after termination, despite concerns of objective bias, a comprehensive waiver should be used.
 - Follow the waiver procedure for recusal outlined in Wisconsin Supreme Court Rule § 60.04(6).
 - The treatment court judge would disclose the basis for recusal: objective bias.
 - Subjective bias may not be waived.
 - If the treatment court judge believes that he or she lacks subjective bias toward either party (the State or the participant), then
 - The judge may ask the parties to consider, out of the presence of the judge, whether to waive recusal.

²² *Id.* ¶¶ 40, 42.

²³ *State v. Marcotte*, 2020 WI App 28, ¶ 16, 392 Wis. 2d 183, 943 N.W.2d 911.

²⁴ *Id.* ¶ 17.

²⁵ *Id.* ¶ 40.

²⁶ *State v. Gudgeon*, 2006 WI App 143, ¶20, 295 Wis. 2d 189, 720 N.W.2d 114.

- If the parties, without participation of the judge, agree to waive recusal, the judge may preside over the sentencing after termination.
- The judge must incorporate the waiver in the record and may require that such waiver be in writing and signed by both parties.

Sample Forms

Motion or Stipulation for Sanctions or Termination

STATE OF WISCONSIN, CIRCUIT COURT, _____ COUNTY

State of Wisconsin, Plaintiff

Motion **Stipulation**

For:

Sanctions

Termination

-VS-

Defendant's Name

Date of Birth

Motion:

1. I am the District Attorney.

2. On _____, the above named defendant was admitted to treatment court in the instant case and informed of the possibility of sanctions or termination for failure to comply with program conditions.

3. The defendant has violated the conditions of the program as follows:

A new criminal offense has been charged and probable cause has been found.

Continued use of an intoxicating substance.

Absconding.

Failure to comply with treatment.

Other: _____.

4. The defendant should be required to serve a sanction of incarceration of ___ days in the county jail or on in-home detention for the following reasons:
_____.

5. The defendant should be terminated from the treatment court program for the following reasons: _____.

Stipulation:

1. I am the defendant in this case.

2. I understand that the district attorney and team have requested that I:
- serve a sanction of incarceration of ___ days in the county jail or on in-home detention.
 - be terminated from the treatment court program.
3. I understand that I have a right to counsel and a hearing to contest the factual basis and/or requested action.
4. I understand that revocation from the treatment court program may result in sentence being imposed, revocation of my probation imposed in this case.
5. I waive my right to:
- counsel.
 - a hearing to contest the factual basis and stipulate to the court's reliance on these allegations for the requested action.
 - a hearing to contest the requested action and stipulate to its imposition by the court.
6. My decision to sign this document and enter into this stipulation is being made freely, voluntarily and intelligently.
7. Other: _____.

 Defendant's Signature

 Name printed or typed

 Date

 Attorney Signature

 Name printed or typed

 Date State bar number

 e-mail

 District Attorney Signature

 Name printed or typed

 Date State bar number

 e-mail phone

Order for Jail Sanction or Termination

STATE OF WISCONSIN, CIRCUIT COURT, _____ COUNTY

State of Wisconsin, Plaintiff

Order For:

- Jail sanction
- Termination

-VS-

Defendant's Name

Date of Birth

A hearing on the pending motion for sanctions termination was conducted on _____ which is the effective date of this order.

THE COURT FINDS:

1. On _____, the above named defendant was admitted to treatment court in the instant case and informed of the possibility of sanctions or termination for failure to comply with program conditions.

2. The above-named treatment court program was:

- Post-adjudication, pre-sentencing.
- Post-sentencing, probationary disposition.
- Post-sentencing, alternative to revocation.

3. The defendant has violated the conditions of the program as follows:

- A new criminal offense has been charged and probable cause has been found.
- Continued use of an intoxicating substance.
- Absconding.
- Failure to comply with treatment.
- Other: _____.

4. Other: _____.

THE COURT ORDERS:

1. The defendant shall serve a sanction of incarceration of ___ days in the county jail or on in-home detention beginning on _____ and ending on _____, with credit for ___ days time served.

The sanction is imposed pursuant to:

- Bail modification, § 969.08, 969.09 (Post-adjudication, pre-sentencing only)
- Imposition of jail imposed as a condition of probation, § 973.09(4)(a)
- Lift stay on imposed sentence, § 973.15(8)(a)
- Contempt finding, § 785.02
- Probation hold, as issued by the Department of Corrections, §§ 302.31, 302.335
- Probation sanction, as issued by the Department of Corrections, § 973.10(2s)

2. The defendant will be referred to the Department of Corrections to determine an appropriate response to the violation.

3. The defendant is hereby terminated from the treatment court program.

- a. bail is set at: \$ _____ cash personal recognizance bond
- b. remanded without bail pending sentencing (Post-adjudication, pre-sentencing only)
- c. defendant will be referred to the Department of Corrections to determine an appropriate response to termination.

4. Other: _____.

THIS IS A FINAL ORDER FOR PURPOSES OF APPEAL

Waiver and Consent to Allow Treatment Court Judge to Conduct Sentencing

STATE OF WISCONSIN, CIRCUIT COURT, _____ COUNTY

State of Wisconsin, Plaintiff

-vs-

**Waiver and Consent to Allow
Treatment Court Judge to
Conduct Sentencing**

Defendant's Name

Date of Birth

Motion:

1. I am the Defendant.

2. I understand that I have been terminated from participating in a treatment court program and will proceed to sentencing in the above captioned case.

3. I understand that Judge _____, having presided over my case as the treatment court judge:
 - a. has previously been provided with substantial information about my case and personal circumstances and that this information may have been provided at a time when I was not present in person or through counsel;
 - b. has greater familiarity with my case and personal circumstances than a different judge would and that this may impact the sentence I receive;
 - c. has indicated that the judge does not hold any personal bias or prejudice concerning myself or my case.

4. Knowing this, I am **not** asking that Judge _____ be recused. I consent to allow the judge to conduct the sentencing hearing and waive any objective bias posed for the reasons listed in para 3 above.

5. My decision is being made freely, voluntarily and intelligently after consulting with my attorney outside of the presence of the judge.

6. Other: _____.

Defendant's Signature

Name printed or typed

Date

District Attorney Signature

Name printed or typed

Date State bar number

e-mail phone

Attorney Signature

Name printed or typed

Date State bar number

e-mail phone