



Michigan Supreme Court

State Court Administrative Office

Court Services Division

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MEMORANDUM

DATE: June 23, 2020

TO: Problem-Solving Courts Judges
Problem-Solving Courts Project Directors

FROM: Andrew Smith
Problem-Solving Courts Manager

RE: Conducting Remote Problem-Solving Court Hearings

Problem-solving courts (PSC) provide critical services to a very vulnerable population. Consequently, it is important to maintain structure when there is not physical access to the court. Regular review hearings and staffing meetings are key to maintaining that structure. Technology enables courts to conduct both remotely, while ensuring public access to the appropriate components of a PSC. To help our PSCs and the population they serve, this memo compiles recommendations regarding remote technology and PSC hearings.

With a few exceptions, [MCL 600.1420](#) requires court proceedings to be open to the public. PSCs are not exempt from this requirement¹, even when the PSC proceedings are conducted remotely. Providing public access to PSCs is essential to provide transparency for these programs. In *Florida v. Noelle L. Bush*, the 9th Circuit Court of Appeals denied the defendant's request to close the courtroom, "...public access to the courts is an important part of the criminal justice system, as it promotes free discussion of governmental affairs by imparting a more complete understanding to the public of the judicial system [and] the people have a right to know what occurs in the court."

The court also stated that "open access is critical so that the public can see that drug court is working to reduce the recidivism rate and to return individuals to a productive state. Open access is necessary in order to demonstrate that the program is worthy of public support. It is vital that the community realize that drug court works so that its graduates can become

¹ *State of Florida v. Noelle L. Bush* (Case No. 48-02-CF-6371-0) - BJA summary at <http://www.supremecourt.ohio.gov/JCS/specDockets/resources/newsletter/info/BJAJune2015.pdf>

productive members of society, that jobs will be available to them, and that other community support will be forthcoming.” (BJA Drug Court Clearinghouse and Technical Assistance Project, 2014)

Unlike court proceedings, staffing meetings may be closed to the public, without the requirement of providing a public record. This allows the team to discuss participant progress with full disclosure of confidential information (within the parameters of a signed consent to release confidential information). Staffing meetings can be held using virtual meeting technology, without face to face contact.

Due to the nature of PSC review hearings, courts have expressed concerns about sharing confidential information in the courtroom. When it is necessary to share confidential information in court, the information disclosed should be limited to the minimum information necessary for the hearing as determined by the presiding judge. Additional information is referenced in a memo from Judge Patrick Bowler, which is attached as Appendix A.

There is one exception to the open hearing requirement that PSCs are likely to encounter at some point. The Michigan Court of Appeals recently reaffirmed² that all hearings held pursuant to Holmes Youth Trainee Act (HYTA)³ should be closed to the public, with its published opinion in [People v GR, Mich App \(2020\)\(Docket No. 346418\)](#)⁴. See [MCR 8.116\(D\)\(1\)](#) and this Michigan Judicial Institute ([MJI](#)) [benchcard](#) for more information about limiting access to court proceedings.

To accommodate the open court requirement courts are encouraged to establish a live stream of the court proceedings to facilitate access to public court proceedings pursuant to the [Michigan Trial Courts Virtual Courtroom Standards and Guidelines](#) and Administrative Order 2020-06, which requires that the public have access to court proceedings either during the proceeding, or immediately after through access to a video recording of the proceeding. This recording is not the official court record and does not need to be retained through the live stream service once the hearing is concluded.

The [Michigan Trial Courts Virtual Courtroom Standards and Guidelines](#) not only establishes guidelines and standards on ways for courts to comply with Administrative Orders 2020-02 and 2020-06, it also provides examples from courts with active remote hearings for each guideline. Additionally, the MJI has developed resources to assist courts in setting up and conducting a remote proceeding including a [checklist](#) and a [bench card](#) for judges.

Additional resources

- [Michigan Trial Court Standards for Courtroom Technology](#)

² *People v. Bobek*, 217 Mich App 524 (1996)

³ [MCL 762.11 et seq](#)

⁴ There does not appear to be any specific authority to allow or prohibit a defendant from waiving his or her right to a nonpublic or closed proceeding, so it would be a matter of judicial discretion whether to allow it for HYTA cases, as well as the proper procedure necessary to constitute a valid waiver of the defendant’s statutory right. If a defendant did waive his or her right to a nonpublic or closed proceeding, it may negate the benefit the deferral offers by publicizing the charged offense(s) and assignment to youthful trainee status.

- [Using Zoom and Virtual Courtroom Resource Center](#)
- [SCAO - Frequently Asked Questions Regarding Expansion of Remote Proceedings](#)
- [Preparing for a Pandemic: An Emergency Response Benchbook and Operational Guidebook for State Court Judges and Administrators](#)

Appendix A

MEMORANDUM

DATE: June 8, 2020

TO: Andrew Smith, Problem-Solving Courts Manager, Michigan Supreme Court, State Court Administrative Office, Court Services

FROM: Honorable Patrick C. Bowler, ret

RE: Protecting Confidentiality in Problem-Solving Court Proceedings

Question Presented

How does a problem-solving court (PSC) abide by the law of confidentiality, 42 CFR, Part 2, when live streaming review hearings?

Brief Answer

Pursuant to the tenets of the law of confidentiality: Avoid all discussion of protected health information (PHI) in review hearings. Discussion of PHI should be restricted to staffings. However, based on ‘*official duties*,’ there are limited exceptions to the law. (See below ‘Exceptions to 42 CFR, part 2 restrictions’)

Discussion

Problem-Solving Courts Must Conduct Review Hearings

Although the restrictions mandated by the COVID-19 epidemic have made PSC procedures difficult; their importance to the recovery community and the criminal justice system are as important during the epidemic, if not more important, than they were pre-pandemic. A necessary component of the PSC is the review hearing. Review hearings must be continued as a required best practice.

A review hearing is a court proceeding. (See additional references included)

Basic legal and constitutional principles require that all court proceedings be open to the public.

- Article 1, § 20 of the 1963 Michigan Constitution. (Accused’s right to public trial)
- MCL 600.1420. The sittings of every court within this state **shall be public**.
- Caselaw: *"[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure."* (Michigan

Supreme Court: *People v Vaughn*, 821 NW2d 288 (2012), citing United States Supreme Court: *Presley v Georgia*, 558 US 209 (2010); quoting United States Supreme Court: *Waller v Georgia*, 467 US 39 (1984)). (Note: Public has a right to public trial under 1st Amendment).

A staffing is not considered a court proceeding and is not required to be open to the public.

See Washington Supreme Court: *State v Sykes*, 339 P3d 972 (2014). The Washington Supreme Court held that the Washington constitution (like Michigan's requirement of open courts) does not require adult drug court "staffings" to be presumptively open. Participants may consent to have PHI discussed in staffings.

Confidentiality Law, 42 CFR, part 2: The Standard of Minimization

Despite the high level of protection afforded to information regarding substance abuse treatment by the Confidentiality Law:

The PSC team can obtain the level of information they need to determine if participants are complying with program criteria and that is done in staffings. The case of *State v Sykes*, cited above, explains the PSC process for using staffings as the time for discussing confidential information. Washington's statutes and constitution are like Michigan's. The issue in the case was whether a staffing was a 'court proceeding' and thus must be conducted in open court. The Washington Supreme Court ruled that a staffing is NOT a court proceeding. In the case of *Florida v Noelle L. Bush*⁵, the court required open proceedings in the PSC with an explanation that PSC personnel are trained on how to conduct proceedings in open court while minimizing PHI.

In providing guidance for PSC's, the U.S. Department of Justice indicates:

"However, there may be instances in which compliance with these provisions (42 CFR, part 2) will require limiting the extent of information disclosed as well as the forum in which it is presented." See Drug Court Resource Series, Practical Guide for Applying Confidentiality Laws to Drug Court Operations, OJP, U.S. Department of Justice.

The 'limiting' of information is known as the 'Rule of Minimization.' The challenge presented for PSC proceedings that utilize live streaming is how to avoid discussion of PHI in review hearings. Courts across the country have been creative in avoiding unnecessary reference to PHI. For instance, references to treatment courts can be resolved by NOT referring to the court proceedings as 'Drug Treatment Court' or other PSC proceedings. Use of regular court terminology, such as probation or 'Intensive Probation' or other alternative names may be used. Minimization for proceedings involving sanction/termination exceptions are discussed below.

Exceptions to 42 CFR, part 2 restrictions:

There are occasions when violations have occurred, and sanctions are deemed appropriate. If the participant chooses to admit a violation, which, hopefully, is the common resolution for violations (engendered by the positive relationship of the court and participant. [See below]), the

⁵ Circuit Court of the Ninth Judicial Circuit for Orange County, Florida: *State of Florida v. Noelle L. Bush*, 48-02-CF-6371-0 (2002)

violation can be admitted in general terms without reference to PHI. The defense attorney on the team should be practiced in how to proceed with an admission of violation without discussion of confidential information.

However, there may be instances where PHI must be revealed. These are the 'rare' occasions when it is essential to have a 'record' of required rights and findings for the proceedings. An example might be an actual violation hearing or termination hearing where the participant violated PSC requirements, such as missed tests or failure to attend treatment. Again, the 'Rule of Minimization' should be utilized, however 42 CFR, part 2, does recognize that there are occasions where courts must comply with traditional court rule requirements.

Non-Legal Reasons for not discussing PHI in public proceedings.

Review hearings in open court are not the proper forum for a discussion of a participant's addiction or other PHI for reasons that go beyond legal requirements:

- A. Discussions of addiction and treatment are the mainstay of treatment professionals and the participant. Occasionally, the participant's progress in the PSC might require that the probation officer or caseworker or other trained professional on the PSC team discuss treatment issues and/or compliance of treatment issues with the participant. If team discussions are appropriate for determining the participants' plan for recovery, then the 'staffing' is the proper forum for discussing PHI. In a staffing PHI information is still limited to what is necessary to work the plan of recovery. A judge in the courtroom can emphasize compliance, if needed, by referencing general requirements, or the advice of the probation officer or other team member without reiterating PHI.
- B. Research clearly shows that the relationship between the judge and the participant is a key factor in the success of PSC's. Although the time that a judge has available to interact with each participant is limited, studies and post-graduate interviews with participants establish that judges trained in the techniques of motivational interviewing, who effectively build relationships and trust with participants, significantly promote participant recovery. Engaging the participant is a critical step; approaching a participant's interests, concerns and values with curiosity and actively listening to the participant responses improves outcomes. All change is self-change, motivational interviewing techniques facilitate the necessary change. Importantly, motivational interviewing does not necessitate a discussion of PHI. Judges and all members of the PSC team should be trained in basic motivational interviewing techniques.

Summary

The requirement of 'open proceedings' for review hearings in PSCs has served a valid purpose; closure of court proceedings creates the opportunity for actual or perceived violations of due process. Unfortunately, there is a history of such violations in PSCs. Violations of due process are not in conformance with the key components of PSCs as mandated by Michigan law, and counter-productive to procedural justice and recovery.

The Confidentiality Law, 42 CFR, part 2, is complicated; PSCs must be creative in adapting to its requirements. The spirit of the law is important; its purpose is to protect health information so that those in need will seek the help necessary to change their lives. The law seeks to avoid the stigma that presents with the disease of addiction. Live stream listeners may surmise that addiction prevails in PSC proceedings. Some things cannot be avoided. But the listeners' opinions do not negate the court's responsibility to do what is necessary to institutionalize compliance with confidentiality requirements. PSC's must seek whatever means available to protect participants as they travel the difficult path to long term recovery from the disease of addiction.

Additional References

A PSC is a court of law.

- Adult Drug Court Standards, Best Practices, and Promising Practices⁶.

Chapter 1: Roles and Responsibilities of the Drug Court Judge.

1. General a. Standards. i. A drug treatment court shall comply with the 10 key components promulgated by the national association of drug court professionals, which include all of the following essential characteristics: • Ongoing close judicial interaction with each participant and supervision of progress for each participant.(MCL 600.1060(c)(vii))2 ii.

- A drug court “is a court function, clearly laid out as an alternative sentencing program under the applicable statutes.” Kentucky Supreme Court, *Commonwealth v Nicely*, 326 SW3d 441, (Ky 2010)
- The federal and state guarantees of due process apply to sentencing proceedings. See *Morrissey v. Brewer*, 408 U.S. 471, (1972)
- **PSC Statute:**

- **Drug Court Statute:**

MCL 600.1060(c) "Drug treatment court" means a court supervised treatment program for individuals who abuse or are dependent upon any controlled substance or alcohol. A drug treatment court shall comply with the 10 key components promulgated by the national association of drug court professionals . . .⁷

- **Mental Health Court Statute:**

MCL 600.1090 (e) "Mental health court" means any of the following:

⁶ For efficient use of space only the Drug Court manual was referenced. However, the [Veterans Treatment Court Standards, Best Practices, and Promising Practices](#) manual is similar in content.

⁷ Emphasis added

- (i) A court-supervised treatment program for individuals who are diagnosed by a mental health professional with having a serious mental illness, serious emotional disturbance, co-occurring disorder, or developmental disability.
- (ii) Programs designed to adhere to the 10 essential elements of a mental health court promulgated by the bureau of justice assistance . . . ⁸

- **Veterans Court Statute:**

MCL 600.1200(j) "Veterans treatment court" or "veterans court" means a court adopted or instituted under section 1201 that provides a supervised treatment program for individuals who are veterans and who abuse or are dependent upon any controlled substance or alcohol or suffer from a mental illness⁷

MCL 600.1201(1) A veterans court shall comply with the modified version of the 10 key components of drug treatment courts as promulgated by the Buffalo veterans treatment court which include all of the following essential characteristics: . . .

(g) Ongoing judicial interaction with each veteran.⁷

- **42 CFR § 2.35 Disclosures to elements of the criminal justice system which have referred patients.**

(d) *Restrictions on re-disclosure and use.* An individual within the criminal justice system who receives patient information under this section may re-disclose and use it only to carry out that individual's official duties with regard to the patient's conditional release or other action in connection with which the consent was given.

⁸ Emphasis added