

The Legal Stuff: What We Know and What We Don't about the New Laws regarding Cannabis, THC, and CBD, and How Treatment Courts Can Respond

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Adapting to new laws and emerging issues

******* This section is generalized and *does not constitute legal advice* regarding New York State treatment court policy or mandates regarding cannabinoids.

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Brief reminder:

- Don't practice medicine without a license, ask questions, inform, and adopt the doctor's orders as part of the case plan and Court orders.
- IF there is a question about use of any mind- or mood-altering substance, request a second opinion and one primary reviewing physician for ALL medications being used.
- Identical procedures as a Court would use for persons who are misusing prescription medications or having challenges due to the impact of medication use.
- Team attorneys should be familiar with the procedures used for MAT laws, including procedure for challenging MAT for prior diversion or sales of MAT externally.

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Issues:

- The reality of cannabinoids-you must know in order to shape argument. *Brian Meyer knows stuff!*
 - Route of administration and types make a huge difference in treatment.
- The pervasive nature of cannabinoids in over-the-counter commerce which can disrupt treatment, and drug testing. * *This is recreational at best, and should be banned in treatment courts, like energy drinks, alcohol, cold medications etc.*
- The medical legal issues: extremely thorny issues. State vs. Fed rules
- The recreational legal issues. Appears you can bar recreational cannabis in a treatment court, but not on regular probation unless related to the specifics of the **underlying crime**.
- Differing impacts across family, criminal, generic probation, and treatment courts, including impaired driving courts.

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Terminology in the law is both clear and vague

- People v Stanton 2018 NY Slip Op 28221 Decided on July 16, 2018
- The discussion from this case appears to be adopted by the Legislature.
- The Legislature appears to have not heard, or discarded the notion of treatment courts (NB: MM for SUD in text of law).

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OPEN QUESTIONS:

- Does the New York statute create cannabis as non-FDA MAT?
 - Do you follow the MAT rules?
- Does the New York statute allow felony probationers and treatment court participants to work in marijuana stores, or be caregivers?
(*appears yes*)
- Does the New York statute create a local ADA issue

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Always distinguish between the requested use(s)

- Recreational?
- Medical?
- Both? OTC combined with medical?

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What are we talking about?

- **Recreational use?** Get a waiver for use during treatment court period.
 - Lay a good record for appeal, if no waiver of appeal.
 - Have a uniform pleading with relevant science and citations, providing a broad and accurate factual basis for the parties' position and adequate factual grounds for the lower Court's decision.
 - Be certain to tie a ruling to reasonable relationship of facts of the case, challenges raised by assessment(s), and success on probation.
- **Medical?** Tread carefully, and watch your record.
 - Follow the law as it relates to any other substance used by participants.
 - Follow the law as it relates to legally prescribed FDA approved substances
 - Follow the law as it relates to legally prescribed MAT.
 - *Each MAY be different.*

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Medical: Definition of “condition”

18. "Condition" means having one of the following conditions: cancer, positive status for human immunodeficiency virus or acquired immune deficiency syndrome, amyotrophic lateral sclerosis, Parkinson's disease, multiple sclerosis, damage to the nervous tissue of the spinal cord with objective neurological indication of intractable spasticity, epilepsy, inflammatory bowel disease, neuropathies, Huntington's disease, post-traumatic stress disorder, pain that degrades health and functional capability where the use of medical cannabis is an alternative to opioid use, **substance use disorder**, Alzheimer's, muscular dystrophy, dystonia, rheumatoid arthritis, autism or **any other condition certified by the practitioner.**

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Section 854-A

- 6. A person currently under parole, probation or other state supervision, or released on recognizance, non-monetary conditions, or bail prior to being convicted, shall not be punished or otherwise penalized for conduct allowed under this chapter unless the terms and conditions of said parole, probation, or state supervision explicitly prohibit a person's cannabis use or any other conduct otherwise allowed under this chapter. A person's use of cannabis or conduct under this chapter shall not be prohibited unless it has been shown by clear and convincing evidence that the prohibition is reasonably related to the underlying crime. Nothing in this provision shall restrict the rights of a certified medical patient.
- **Does not seem to allow for SUD treatment restrictions.**

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Consider:

- Ban recreational, and CBD products which are NOT FDA approved.
- Medical, create a separate track for those persons who are unwilling to forego cannabis while in a treatment court.
- See them independently, treat them independently, and develop the expertise in motivational interviewing to let them explore the relationship with cannabis and if it is impacting their SUD, or their lives.
- Persons who have an acute need for specific medications in treatment courts should be treated similarly. Temporary accommodations are made for surgery, etc. Thus, a second opinion would be in order.

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Due Process and Blanket prohibitions of MAT

Constitutional due process requires reasonableness or a rational basis for conditions of treatment and supervision of persons on probation or in drug court.

- Probation terms and conditions should be reasonably related to the crime and the rehabilitative needs of the individual and protection of the community People v. Beaty, 181 Cal.App.4th 644, 105 Cal.Rptr.3d 76 (2010)
- Judge must impose individualized conditions to meet community and individual needs. Commonwealth v. Wilson, 11 A.3d 519 (Pa. Super. 2010).

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Medical may consider conditional approval or use

- You may consider monitoring treatment personal capabilities. If persons can engage, can remember lessons, and are not disengaged or distracting others in group, revisit approval at regular intervals.
- Generally, over time, as other withdrawal and treatment issues clarify, the impact of cannabinoids may require adjustments, and some motivational interviewing may assist with considering voluntary termination.
- Re-consult a physician, or a specialist via Telehealth.

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Other considerations regarding cannabinoids

What is requested or currently being used?

- Determine what cannabinoids are being requested or used! It makes a difference legally and for treatment!
 - **Cannabis?**
 - Route of ingestion?
 - Plant material? Smoked, vaped, vaporizer? (harm reduction)
 - Nugs? Bud...soaked in honey oil...rolled in powdered hash.
 - Refined or concentrated cannabis?
 - Type(s) being used? Hashish?
 - Concentrates? Honey oil? Dabs? Wax? Shatter? Tinctures? Edibles?
 - Dosage and frequency as to each?

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What is requested or currently being used?

- Cannabinoids?
 - CBD?
 - Over the counter?
 - Route of ingestion?
 - Type(s) being used?
 - Dosage and frequency?
 - FDA approved via prescription? Use standard protocol for meds.
 - “Recommendation” with OTC access.

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FDA approved cannabinoids:

- If prescribed pursuant to FDA approval, by a physician, I suggest the legal procedure is exactly the same as Courts should be using for any prescription medication.
 - 42 USC waiver, and HIPAA waiver execution and communication with physician to be certain the medical professional is aware of the SUD diagnosis.
 - Communication between team and provider about changes, observations, etc.
 - Continued consultation between the team and the physician, as needed, examination of medical records. (rare)

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Non-FDA approved uses

- “Wild Wild West” meets the law.
- Challenges with overlapping formulas, inconsistent concentrations, consumer fraud, and cumulative uses on a brain and body suffering from distressed neurotransmitters and moderate to severe substance use disorders.

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Over the counter items are pervasive and disrupt drug testing

CBD maple nitro coffee



Energy drink with super creatine



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Things to consider:

- Legal waiver and agreement of non-use during treatment as a condition of plea bargain in all non-medical cases.
- Courts commonly ban legal items which interfere with
 - Drug testing (poppy seeds, kratom, over the counter energy products, decongestants, any products containing CBD or creatine sold over the Counter, etc.
 - Treatment: alcohol, including ETOH based cooking materials and kombucha.
- ***In consultation with physicians***, Courts currently limit access to benzodiazepines, opioid and synthetic opioid substances, etc.

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Legal issues abound!

**My
advice!**



Always start from here:

1. **Are you a medical doctor?**
2. **Do you have a license to practice medicine?**
3. **Do you specialize in addiction medicine?**

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Blanket denial of MAT is a due process violation-what about objections?

- All Judges should:
 - Consider relevant information before making a factual decision.
 - Hear arguments from all sides of the controversy and receive evidence from scientific experts, if the subject matter is beyond that of lay person knowledge.

There is a **federal presumption** tied to funding.

- The matter is settled (Presumption) in most instances if: (1) the physician has legal authority to write the prescription, (2) the medication is indicated to treat the patient's illness, (3) the prescription was not obtained fraudulently, and (4) the patient agrees to take the medication as prescribed. If prescribed: Presumption in favor of MAT **Burden of proof is on the objector to show it is inappropriate by preponderance.**

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If not, hold a hearing when medical cannabis is the issue.

- Follow due process
- Hold a hearing with expert testimony
- Preserve the transcript for frequent use.

- NDCI legal updates at the "law" section of their website.

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Medically Assisted Treatment

BONUS primer on the law.

How to object depends on a variety of issues, notably federal funding.

It is not clear if federal MAT law applies to non-FDA approved "MAT".

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No federal funding:

- (1) the physician has legal authority to write the prescription, (2) the medication is indicated to treat the patient's illness, (3) the prescription was not obtained fraudulently, and (4) the patient agrees to take the medication as prescribed.
- But the burden is different. The moving party makes a prima facie case, then opposition may introduce evidence of prior abuse of MAT, or MAT deception in treatment.

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Much of the litigation around MAT involves criminal cases not family treatment courts-but they are instructive

- But there are lessons to be learned and things to watch out for!
- Beisel v. Espinosa, Florida, 2017, United States District Court Tampa Division, case No.8:17-cv-51-T-33TBM, pro per misfires, but has instructive language. **[Adult Drug Court allows MAT but local FDC does not-equal protection and discrimination]**
- ADA, RA, and some of 42 USC Section 1983 applies to FTC. Some tort claims may also lie.
- Monitor the Legal Action Center, NY NY for updates

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Can we mandate cessation as a condition of Drug Court graduation?

NO- In all cases, MAT must be permitted to be continued for as long as the prescriber determines that the medication is clinically beneficial. Grantees must assure that a drug court client will not be compelled to no longer use MAT as part of the conditions of the drug court, if such a mandate is inconsistent with a licensed prescriber's recommendation or valid prescription.

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The Bottom Line

Under no circumstances may a drug court judge, other judicial official, correctional supervision officer, or any other staff connected to the identified drug court deny the use of these medications when made available to the client under the care of a properly authorized physician and pursuant to regulations within an Opioid Treatment Program or through a valid prescription.

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Challenging Blanket MAT prohibitions:

- The Americans with Disabilities Act (ADA)
 - Prohibits discrimination by state and local governments
- Rehabilitation Act of 1973 (RA)
 - Prohibits discrimination by federally operated or assisted programs.
 - See: *Discovery House, Inc. v. Consol. City of Indianapolis*, 319 F.3d 277, 279 (7th Circuit. 2003) (“the ADA and The RA...fun along the same path, and can be treated in the same way”).
- Due Process protections of the 14th Amendment
 - 1983 Civil Rights violations....
- 8th Amendment-cruel and unusual punishment.

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“This drug court isn’t a program under the ADA and RA”

Wrong.

- Pennsylvania Dep’t of Corrections v. Yesky, 524 U.S. 206, 210 (1999) (ADA applies to correctional programs)
- People v. Brathwaite, 11 Misc. 3d 918, 816 N.Y.S. 2nd 331 (Crim. Ct., Kings County 2006) (Brooklyn’s alternative sentencing program falls under Title II’s definition of “state service or program.”)
- Evans v. State, 667 S.E. 2d 183, 186 (Ga. App. 2008) (A drug court is a “public entity” under the ADA).

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But they aren’t disabled simply because they need MAT!

Addiction is a disability.

MX Group, Inc. v. City of Covington, 293 F.3d 326, 336 (6th Circuit 2002)

*It is well established that drug addiction constitutes and “impairment” under the ADA and that drug addiction necessarily substantially limits major life activities of “employability, **parenting**, and functioning in everyday life”. (emphasis added)*

US v. City of Baltimore, 845 F. Supp. 2nd 640 (D. Maryland 2012)

Residents of substance abuse facility were individuals with a disability.

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Eligible Participants disqualified due to blanket MAT policy but would be otherwise qualified?

- Thompson v. Davis, 295 F.3d 890, 896 (9th Circuit, 2002)
Incarcerated individuals who were illegally denied parole because of their disability (drug addiction) sufficiently alleged that there were otherwise qualified for parole.

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MAT users are not a significant risk to health or safety

- New Directions Treatment Services v. City of Reading, 490 F.3d 293, 305 (3rd Cir. 2007) (NIMBY case) General statements about heroin users does not establish substantial risk to community. Must establish nature, severity and duration of risk, based on current medical knowledge and best evidence.
- Start, Inc. v Baltimore County, Md. Et alia, 295 F. Supp.2d 569, 577-78 (D.Md. 2003) Risks of diversion and concerns can be mitigated by protocols and administration.
- There are several cases in this area.

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Blanket Denial of MAT access is discrimination because of a disability.

- Disparate treatment
 - Thompson v. Davis, 295 F.3d 890 (9th Circuit 2002) denial of parole because of addiction is subject to disparate treatment analysis of ADA.
- Reasonable Accommodation
 - ADA requires reasonable accommodation to avoid discrimination.
- Disparate Impact
 - Title II ADA prohibits eligibility requirements that screen out or tend to screen out individuals with a disability, unless the criteria are essential to the provision of services.

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Watson v. Kentucky, E.D Kentucky, 7/7/15 (F. Supp.2d)

- Watson requires the state court take her off the conditional release terms or remove the “blanket prohibition on her taking suboxone, methadone or any other drugs that she needs to treat her addiction. The state attorney clarified that there was not a Blanket prohibition on MAT, but agreed that “it’s generally the Court’s practice to allow MAT if the doctor will show medical need.”
- Relief denied. Her challenge on federal grounds was denied stating the claim could be handled on the state level.

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GENERAL RULE:

- blanket prohibitions of MAT are a due process violation because they are not rationally (scientifically based).
- They are not reasonable because they are not consistent with individualized sentencing and treatment
- They do not give parties a fair opportunity to present their case, since one alternative is foreclosed.