

June 2005

Witness for the Client: A Judge's Role in Increasing Awareness in the Defendant

Joyce Wheeler

Follow this and additional works at: <https://digitalcommons.maineraw.maine.edu/mlr>



Part of the [Courts Commons](#), [Judges Commons](#), and the [Jurisprudence Commons](#)

Recommended Citation

Joyce Wheeler, *Witness for the Client: A Judge's Role in Increasing Awareness in the Defendant*, 57 Me. L. Rev. 463 (2005).

Available at: <https://digitalcommons.maineraw.maine.edu/mlr/vol57/iss2/6>

This Article is brought to you for free and open access by the Journals at University of Maine School of Law Digital Commons. It has been accepted for inclusion in Maine Law Review by an authorized editor of University of Maine School of Law Digital Commons. For more information, please contact mdecrow@maine.edu.

WITNESS FOR THE CLIENT: A JUDGE'S ROLE IN INCREASING AWARENESS IN THE DEFENDANT

Honorable Joyce Wheeler

- I. INTRODUCTION
- II. ADULT DRUG TREATMENT COURT
 - A. *Overview*
 - B. *The Role of the Judge*
- III. THE STANCE OF WITNESS FOR THE CLIENT
- IV. A DRUG COURT SESSION
 - A. *Overview*
 - B. *Contact with Sam*
 - C. *Contact with John*
 - D. *Steve and Sandy: The Beginning of the Stance of Witness for the Client*
 - E. *Successes and Failures*
- V. FINAL THOUGHTS ABOUT THE ATMOSPHERE IN THE COURTROOM

WITNESS FOR THE CLIENT: A JUDGE'S ROLE IN INCREASING AWARENESS IN THE DEFENDANT*

*Honorable Joyce Wheeler***

"Justice does not depend upon legal dialectics so much as upon the atmosphere of the court room, and that in the end depends primarily upon the judge."

-Judge Learned Hand¹

I. INTRODUCTION

My participation in a new drug treatment court over the last few years signifies a transformation of this judge's application of herself in the courtroom. I have moved from the traditional role of judge to a more fluid role in which I begin from the stance as witness for the client and, when necessary, move to the more traditional decision-making responsibility of a judge. Awareness of the change occurred over time,² but became most apparent in the context of an adult drug treatment court that integrates drug and alcohol treatment into the criminal justice system.

A number of factors support the change in my judicial stance. First, this is a treatment court that requires new and different skills to be brought to bear on criminal behavior related to substance abuse. Second, the colleague with whom I share the responsibility for this drug court has taught me that it is all right to make contact with criminal defendants, and in so doing, relate to the defendants as clients. I use the term "contact" here in the Gestalt sense of being "open in a broad and deep way to the other's experience."³ Third, my training in Gestalt therapy over the last eleven years has provided me with the necessary tools to organize my experience in drug court.⁴ Fourth, working collaboratively with the drug court team has expanded my awareness about what the client needs, provided more creative ap-

* The original version of this Article appeared in 9 *GESTALT REV.* 2 (2005). It is reprinted here with their permission.

** Joyce Wheeler is a judge in the Maine District Court where she presides in the Adult Drug Treatment Court and Domestic Violence Case Coordination Project. She received her J.D., cum laude, from Boston College Law School and served as a law clerk to Chief Judge Andrew A. Caffrey of the United States District Court, District of Massachusetts before practicing law at Owens & Associates, Boston, Massachusetts, and Bernstein, Shur, Sawyer & Nelson, Portland, Maine, and serving as Counsel for the University of Maine System. Many thanks for comments on earlier drafts to Justice Jen Levy of the Maine Supreme Court and to Edwin Novis and Joe Melnick of the International Gestalt Study Center, Wellfleet, Massachusetts.

1. *Brown v. Walter*, 62 F.2d 798, 800 (2d Cir. 1933).

2. The change began when, at the conclusion of trials of separating and divorcing parents, I summarized for the parties what I heard them say during the trial, acknowledged their accomplishments as parents, and identified areas to develop for their more effective parenting after the trial and the custody decision. At that time, I did not perceive my role as witness, but rather I was experimenting with some tools for developing awareness that I acquired from my Gestalt therapy training.

3. Joseph Melnick, *Welcome to Gestalt Review: An Editorial*, 1 *GESTALT REV.* 5 (1997).

4. I completed trainings in the Organizational and System Development Program at the Gestalt Institute of Cleveland and the Couples and Family Program at the Gestalt International Study Center on Cape Cod.

proaches for addressing crime and addiction within the judicial system, and supported a greater likelihood for rehabilitation. And finally, the fact that the defendants have already accepted responsibility for their crime by pleading guilty and know the best and worse deals depending on the outcome of their participation in drug court means that the punishment aspect of criminal justice has been met and we can focus on rehabilitation.

A drug court session describing my experience—and, maybe, the clients' experience—illuminates this expanded structure for judging. But first, descriptions of the drug court, the role of the judge, and the concept of judge as witness, provide a context for the drug court session that follows.

II. ADULT DRUG TREATMENT COURT

A. Overview

Drug courts first appeared in the late 1980s to stop abuse of alcohol and other drugs and related criminal activity. By May 2003, there were 1042 drug courts nationwide, including adult, juvenile, family, and tribal drug courts.⁵ Drug courts use the coercive power of the court through judicial supervision and oversight to encourage offenders to stay in treatment and out of trouble.

Maine initiated the Adult Drug Treatment Court (ADTC) with six locations throughout Maine in 2001.⁶ The ADTC is based on a post-conviction model that focuses on offenders that demonstrate a high risk of criminal recidivism and a moderate to substantial substance abuse problem. Upon entering drug court, the offender enters a plea of guilty to a crime or probation violation, receives a “best deal” and a “worse deal” depending on the outcome of drug court, agrees to delay sentencing until he or she either successfully completes the program or is terminated from drug court, and enters into a contract agreeing to the certain conditions contained therein. These conditions include abstinence, daily telephone check-ins and weekly meetings with the adherence case manager, meetings with probation, random drug testing, substance abuse treatment,⁷ and attendance in weekly drug court sessions presided over by a judge. There may also be other conditions, such as individual counseling, maintaining a stable residence, concurrent participation in a certified batterer's program, maintaining employment, paying child support, compensating the victim, and performing community service.

5. PAMELA M. CASEY & DAVID B. ROTTMAN, *PROBLEM-SOLVING COURTS: MODELS AND TRENDS* 6 (2003).

6. In ME. REV. STAT. ANN. tit. 4 §§ 421-423 (Supp. 2003), the Maine Legislature authorized the Judicial Branch to establish an Adult Drug Treatment Court.

7. The Office of Substance Abuse and the Department of Corrections of the State of Maine cooperatively researched and developed a Differential Substance Abuse Treatment System (DSAT) for Maine's adult substance abusing offender population. DSAT provides for standardized substance abuse screening and follow-up comprehensive assessments for adult offenders and then primary treatment for the adult drug court client. The treatment component consists of Motivational Enhancement Treatment, and Intensive Treatment Phase, including Intensive Cognitive/Behavioral Groups, a Maintenance Phase, and a Re-evaluation prior to discharge. DSAT is researched based, utilizes best treatment practices for adult substance abusing offenders, and is designed to produce positive treatment outcomes. Initially, there was great resistance in the treatment community to the DSAT model. After working with this model for the last few years, many treatment providers find that it works and have integrated the tools from this model into their work with other clients.

Drug courts combine judicial supervision and community-based treatment to change offender behavior. Before each weekly court session, the judge meets with the drug court team, which includes treatment providers, the adherence case manager, probation officers, and prosecutor to assess the status of each client. Sometimes, in order to better understand where the client is, the team invites the client and his or her counsel to join the team in the pre-court session. The team develops a coordinated strategy for keeping the client in treatment.

The weekly drug court sessions occur in the open courtroom at the conclusion of the pre-court team meeting. The judge wears a robe and sits on the bench. Each client comes before the court to speak with the judge and to report on the outcomes of drug and alcohol testing, how many Alcoholics Anonymous or Narcotics Anonymous (AA/NA) meetings were attended, and other activities of the last week.⁸ Members of the team may also speak, adding relevant information concerning each client.

Drug court uses a system of graduated rewards and sanctions over at least a one-year period. In the court sessions, the client's progress is acknowledged with verbal praise from the judge, the team, and other clients. Praise may be received for a range of behaviors, including negative urine tests, resisting an overture from a friend to use drugs or alcohol, obtaining a job, finding housing, or positive participation in a treatment session. A client's failure to comply with the conditions of his or her drug court contract is sanctioned. Violations that result in the imposition of sanctions range from having a positive urine test, missing a treatment session, failing to make daily call-ins to the case manager, missing a weekly drug court session, to new criminal conduct. Sanctions for violations range from warnings and admonishment from the bench in open court, writing assignments, demotion to earlier program phases, increased monitoring, escalating periods of jail confinement, and ultimately termination from the program and reinstatement of the regular criminal court process.

In drug court, "[a] cornerstone principle is that each court event and process, including the application of rewards and sanctions, has a therapeutic purpose and value. The purpose of drug court is to motivate the adult substance abusing offender to change addictive and criminal behaviors."⁹ Relapses are expected and, like other violations, are addressed through a series of graduated sanctions: "Becoming sober and drug free is a learning experience, and each relapse [of alcohol and other drug] use may teach something about the recovery process."¹⁰ Furthermore, "[t]here is a growing body of evidence indicating that drug treatment—especially intensive, long-term treatment—can successfully reduce drug use and criminality, even when treatment is involuntary."¹¹ Although there is limited research

8. Clients report that they find it difficult to speak with the judge in drug court. Because their prior experience involves communicating with the court through their attorney, clients are not use to relating to a judge in this manner. It is not necessarily any easier for the clients to sit with the judge, prosecutor, probation officer in the circle format that is described later in this Article, but the clients appear more open in this less formal courtroom environment. See State of Maine Adult Treatment Court Policy and Procedure Manual, 2004 at 12, 26.

9. *Id.* at 24.

10. NAT'L ASS'N OF DRUG COURT PROF'LS, DRUG COURT STANDARDS COMM., DEFINING DRUG COURTS: THE KEY COMPONENTS 23 (1997) [hereinafter DRUG COURT PROF'LS].

11. Shelley Johnson et al., *Drug Courts and Treatment: Lessons to be Learned from the "What Works" Literature*, 4 CORRECTIONS MGMT. Q. 70, 71 (2000).

to support the widespread effectiveness of drug courts, outcome findings for some drug court models suggest lower incarceration rates, longer times to rearrest, and less frequent rearrest among participants.¹² Other studies disclose that some drug court programs have failed to show evidence of effectiveness. It is difficult to evaluate drug courts, in part, because there are different drug court models and variations in the style of the particular judge. Johnson points out that “[a]lthough it is difficult to determine why some programs are failing to show evidence of effectiveness, the correctional treatment literature provides a strong case that the quality and content of the treatment programs may have an effect.”¹³

B. The Role of the Judge

Key components of a successful drug court include judicial oversight, immediate treatment intervention, and frequent alcohol and other drug testing.¹⁴ Recognizing that “[o]ngoing judicial interaction with each drug court participant is essential,” best practices have been recommended for that judicial interaction.¹⁵ Best practices include: frequent status hearings; encouraging appropriate behavior and discouraging inappropriate behavior; communicating through ongoing supervision that someone with authority cares about them and is closely watching them; conducting frequent status hearings so the participant is aware of how he or she is doing in relation to others; and having a significant number of participants in the courtroom providing an opportunity to educate both the client speaking with the judge and the other waiting clients on the benefits of compliance and the consequences for noncompliance.¹⁶

The relationship between the judge and the participant in drug court is innovative. The relationship “challenges the time-honored role of judicial impartiality.”¹⁷ Traditionally, a judge remains objective and detached enough to carry out the responsibility of making decisions that are objective and reasonable and based on the evidence presented and the applicable law. This occurs in a single event in the courtroom that involves the judge listening to the evidence and arguments of prosecutor and defense counsel, sometimes hearing from the defendant and the victim, and then, imposing the sentence. In contrast, the drug court judge actively and continuously supervises the client’s progress in treatment and engages the client directly, not only about successes and failures in treatment, but in all aspects of the client’s life.¹⁸

Judicial self-assessment reflects that judges value “the relationship between themselves and the participant.”¹⁹ Satel warns, however, that the unconventional nature of the relationship with the participants can engender complex reactions in the judge: there is the possibility of “judicial” counter transference.²⁰ “Classi-

12. *Id.* (internal citations omitted).

13. Johnson, *supra* note 11, at 72.

14. DRUG COURT PROF’LS, *supra* note 10, at 4.

15. *Id.* at 27.

16. *Id.*

17. Sally L. Satel, *Observational Study of Courtroom Dynamics in Selected Drug Courts*, 1998 NAT’L DRUG COURT INST. REV., 43, 47.

18. *Id.*

19. *Id.* at 52.

20. *Id.* at 54.

cally, these reactions are unconscious—that is, outside the awareness of the judge (or therapist)—but are manifested in ideas, feelings, or behaviors that are inappropriately intense (in the positive or negative direction) or somehow not fully rational.”²¹

In this Article, I will add to the discussion of the relationship between the drug court judge and the participant by exploring the space between the judge and the client that contributes to the change in my judicial stance. It is in that space that the concept of witness for the client arises.

III. THE STANCE OF WITNESS FOR THE CLIENT

A drug treatment court offers an opportunity to move the criminal justice system from a dualistic view, in which the judge stands here and the defendant over there, to a unified field view,²² in which the defendant is not the crime or addiction but the crime or addiction form part of a whole person who exists within systems of relationships—individual, family, community, and other groups, including drug court. The use of the term “defendant” allows the judge to stand separate from the defendant, and this position is often necessary to carry out some of the traditional and important judicial responsibilities, such as sentencing. In contrast, the use of the term “client” creates a different relationship between judge and defendant, one in which the two, and the larger community, work together to create change and support for the client. From the vantage point of the unified field view, the judge, the team, the clients, and the drug court are all part of the field: “Adopting the unified field perspective wholeheartedly entails individuals recognizing that they are not just *in* a group but *are* the group. They constitute the systems they are in; they are part of their system’s existence as the system is of theirs.”²³ As such, we co-create the community of which we are a part and we share responsibility for how the community and the individuals within the community operate.

The concept of judge as witness for the client can support the judge in this new role in the community and also support the client in changing habitual patterns and risking living life differently, free of addictive substances. I intentionally use the term witness because it both challenges the traditionally defined neutral role of a judge and describes my experience in drug court.

The Gestalt therapy concept of awareness informs my use of the term witness. From a Gestalt therapy perspective, awareness is part of phenomenology, a method for “bracket[ing] off our biases and assumptions as much as possible”²⁴ and depending instead on our ability to observe and describe “the phenomena of the self, the other(s), and the interpersonal dynamics that occur.”²⁵ “Gestalt therapy . . . emphasizes that you can only know that which you experience . . . and considers all experience as legitimate phenomena.”²⁶

21. *Id.*

22. For a discussion on the “unified field” view, see Malcolm Parlett, *The Unified Field in Practice*, 1 *GESTALT REV.* 16 (1997).

23. *Id.* at 30 (emphasis in original).

24. *Id.*

25. *Id.*

26. *Id.*

As a witness, I can contribute to increasing a client's awareness of "what is," as a precursor for change. In Gestalt therapy, this is the paradoxical theory of change that postures that "'change occurs when one becomes what he is, not when he tries to be what he is not.'"²⁷ Like the therapist who "enables the client to amplify *what* [he or] she does and *how* [he or] she does it in the *here and now*,"²⁸ a judge can similarly make it possible for the drug court client to see what he does and how he does it in his daily life. The judge can do this by carefully listening and watching and by paying attention to the "interaction of [her] senses and the external or internal world as simply a way of learning"²⁹ about the client so that he or she can find out what is needed. Then, the judge, to paraphrase Beisser, can use the client's own words to make more prominent what the client has said so that he or she might see that he or she has choices that he or she may not have seen before.³⁰

I am also increasing my awareness. Edwin Nevis describes the process of awareness as "[w]andering around in our environment without a particular direction or goal enabl[ing] us to maintain an unjudgmental posture," allowing "one or more of our senses to become aroused and for our interest to grow in response," and because of this, encountering "unforeseen or serendipitous learning."³¹ As witness, I wander around and remain fully open to what the client has to say about what happened when the client, for example, relapsed, where the client is now, and what the client thinks he or she needs to maintain sobriety or comply with the drug court requirements. By listening to the client, I increase my own awareness and learn something new that did not come up during the pre-court team meeting and contributes to a greater understanding of what is needed for the client and from the team.

The stance of witness allows me to suspend judgment and wander for a while with the client, to meet the client where the client is, and to try to understand the client's experience. Expanding my understanding of where the client is enables me to assist the client in gaining greater awareness of where the client is and what the client needs and to support the client in making new and different choices. This stance then supports my moving more fully into the role of judge where I will make a decision that is informed by the client and the drug court team, will support the client's recovery, and will hold the client accountable for his or her behavior.³²

27. Helga M. Gennant Matzko, *A Gestalt Therapy Treatment Approach for Addictions: "Multiple Transformation Process,"* 1 GESTALT REV. 34, 42 (1997) (internal citation omitted).

28. *Id.* (emphasis in original).

29. EDWIN C. NEVIS, ORGANIZATIONAL CONSULTING: A GESTALT APPROACH 7 (3rd prtg. 2001).

30. Arnold Beisser, M.D., *Teacher, Collaborator, Friend: Fritz*, 1 GESTALT REV. 9, 11 (1997).

31. NEVIS, *supra* note 29, at 7.

32. An interesting tension has developed in the work of the drug court team. The team in its pre-court session tries to reach a consensus of how to deal with a client based on the information available to the team in the pre-court session. Because of other professional demands on the team members, some are not able to stay for the drug court session. The outcome is sometimes dramatically impacted by what occurs in the drug court session. Those team members who are not present for the session often find it difficult to understand the decision actually made and often feel like their views were not taken into consideration in making the decision. As a team we have struggled to gain greater awareness of this experience and to develop greater understanding when this happens.

IV. A DRUG COURT SESSION

A. Overview

Out of nineteen clients in drug court today, there are four clients who are in jail, having been arrested for violations of the drug treatment court contract. Two will have to be addressed today in a sanction hearing; the other two will be put off until defense counsel and additional information are available. But today, in addition to the fifteen who have been towing the line, there are these two: One whose transgressions are minor, really, when compared to where he has come from: failing to check in weekly in person and failing to call in daily. Also there is the nonpayment of fees that he agreed to reimburse the shelter³³ where he lived during another sanction. The other client's problems are more serious: he tested positive for cocaine for the third time in the last seven months. Each has compelling stories that will get developed and filled in during today's drug court session.

But, for technical reasons (no clerk available to record the sanction hearings until later in the day), we address first those clients who have had a successful week. Each week with no use of drugs or alcohol and compliance with the other drug court requirements is a success that merits acknowledgment by the court and sometimes an expansion of privileges. Each is in drug court because he or she committed a crime and has a serious drug or alcohol problem. Drug court offers them, over the course of a year, an opportunity through a system of graduated sanctions and rewards to become clean and sober and to meet their responsibilities to their family and community. If they succeed, their criminal cases come to completion generally without any jail; but, if they fail, they will serve a period of incarceration, which could be substantial depending on the nature of their crime.

Each client's story is quite remarkable. Today I am able to learn a bit more about each of them. Two of the clients have been clean and sober and in compliance since they began drug court. One has completed nine months and one week; the other has completed ten months. Both are contemplating graduation in a couple of months; the average length of a stay in drug court is one year. Another, who should have graduated last month if time in drug court alone mattered, seems to have let go of his struggle about whether his positive tests for cocaine are reliable, turned his attitude around and is showing his vulnerability and desire to succeed. Another is honest about not feeling great and we discuss the health issues that interfere with her ability to read or do ordinary things to get through the day. Others relate stories of their success in strengthening their connections with their family and children and how those connections support them in remaining free of drugs. When asked whether they used alcohol or drugs this past week, each responded no and that they had attended two, three, or even five AA sessions this past week, attended their group DSAT session, and reported as required. Some recount stories of what keeps him or her sober. One who is a full-time college student and taxi cab driver sees the drunks who ride in his cab: Their condition reminds him of why he wants to stay sober. Another has buried a second friend

33. We have been very fortunate to have the ability to house some clients at the local shelter that provides a safe, structured residential environment for those in early stages of recovery until they experience some success and learn to take care of themselves.

who died a drug-related death. The consequences of using drugs and the impact on their children's lives are powerful motivations for staying away from drugs and alcohol. These are the lucky ones this week. They may have slipped in the past, but this week they can claim as a success. Each has found support, within and without, to make healthy choices, including for one client the choice not to take an apartment on her own because it is not time yet in her recovery. She is developing the ability to manage her impulsivity. As each tells his or her story of this past week, I listen, point out the new skills he or she is developing and then congratulate each client on his or her successes this week. The District Attorney, the case manager, the treatment provider, all part of the drug court team, alternately offer words of encouragement and respect for the choices these clients have made. Two of the clients are offered the most improved journal award this week because of the honesty and frankness their journals reflect. They are using their journals in a way that supports their recovery.

It has been a long morning. It is now noon—two hours since we began the weekly in-court sessions at 10:00 a.m., during which each client came before the court and shared with the judge, and the rest of the team members and clients, his or her experiences over the last week. And it has been three and one-half hours since 8:30 a.m. when we began the drug court team pre-court meetings, during which the team meets and discusses the progress of each client and whether a reward or sanction is merited.

These pre-court team sessions are a departure from the typical handling of criminal cases. In the team meetings, the judge, prosecutor, probation officer, treatment provider, and case manager talk about each client, usually without the client or his attorney present. Each of the team members stands on equal footing as we struggle over those clients who are not in compliance. When a client encounters serious problems, the defense attorney and the client meet with the team or members of the team. During the pre-court session, the team weighs all of the information, trying to reach consensus. These discussions are not always easy; sometimes there is great disagreement about what should be done. Each team member comes with his or her own professional and personal experiences and perspectives. With nineteen clients to review, prospective clients to screen, and rewards and sanctions to be discussed, there is a lot of ground to cover at each pre-court session. In the end, however, the ultimate decision about the sanction to be imposed is left to the judge, who after pre-court team discussions and after hearing in open court from the prosecutor and the client and his attorney, makes the decision.

B. Contact with Sam

The two clients today who are not in compliance disclose the difficulty of these discussions. Sam³⁴ is only twenty-four years old and has spent much of his adolescence and the first three years of his adulthood in prison. Altogether, Sam has been in drug court for 379 days and is still in an early phase of treatment because of violations of his contract. He experienced serious problems in the early

34. Although drug court sessions are open to the public, the names and details have been altered to protect the clients.

part of drug court. He sustained one of the longest sanctions of 120 days for packing an adulterated urine sample. He just missed being terminated from drug court at a time when one of his good friends was terminated from drug court and sent to prison. Sam was given another chance, a chance well worth the gamble because he has been sober and out of trouble with the law for the last five months. Yet, he is not meeting all of the requirements of drug court that expects so much more of its clients in addition to sobriety. He has been late for appointments, failed to show up to check in with his case manager, failed to make payments, and in general, just failed to pay attention to the details. These details are important because compliance with them demonstrates, to some degree, the client's stage of recovery. Sam was warned in August that he was on thin ice because of his failure to pay attention to these details and that he needed to come up with a backup plan for how he would ensure his reporting to the case manager when work interfered with his ability to get to the appointment. He failed to submit the backup plan and now he has missed the last two weeks of meetings with the case manager, failed to check in daily by telephone, and failed to start making the payments he agreed to make to the shelter. In the pre-court session, the team was unanimous that Sam was getting away with too much and that some jail time was necessary to impose upon Sam the importance of compliance.

It is noon before we reach the two cases requiring a sanction hearing. I see Sam's attorney in the courtroom in connection with another client whose sanction hearing is put off until another day because of the lack of information on the extent of that client's violation—that is, the possible commission of a new crime. I advise Sam and his attorney that Sam is facing a jail sanction and ask them to speak with each other and some of the team members before the sanction hearing. I release the clients who reported to the court earlier in the morning and adjourn the drug court session for a few minutes. Most clients leave, but one, Alan, remains for the next stage of today's proceedings.

Sam's sanction hearing begins. The prosecutor asks for seven days in jail and outlines all of Sam's failures. Sam's attorney pleads for an alternative to jail. He points out that this is the longest period in Sam's that he has stayed out of jail. Sam's attorney outlines Sam's successes. He argues that Sam is handicapped because he spent so much time in jail:³⁵ Sam does not have the skills to make choices that for many of us seem so simple, such as remembering in the midst of a busy work day schedule to call and to say that he will be late or to tell his ride or his employer that he needs to check in by 6:00 p.m. Many of the drug court clients have lost their right to operate a motor vehicle and Sam fits within this category. For these clients, it is difficult to get rides to work and for meeting the drug court requirements. It takes some skill and perseverance to manage it all. After the attorney speaks, some of the team members speak, clarifying what Sam did or did

35. There is a basis for this argument. "Many addiction specialists believe that emotional development ceases at the beginning of chronic drug abuse." Matzko, *supra* note 27, at 49. This certainly seems to be true for many of our drug court clients, such as Sam, who find it difficult to perform tasks that are easy for many of us because we learned them early in our lives. Matzko postures that emotional development of those who abuse substances "is greatly diminished much earlier, namely, when emotional abuse begins." *Id.* at 50. Regardless, in drug court, we focus on the client's experience in the present, and the history of the client is part of the ground out of which the work that we do arises.

not do, and offering further insight into what might support Sam in drug court.

Gina, Sam's girlfriend and the mother of Sam's two young girls, comes into the courtroom. She has missed most of the proceedings, but quickly understands that there is a risk that Sam will go back to jail. She has been a strong support for Sam; yet, she has held him accountable, not letting him move in with her and the girls until he stopped using drugs. And now she is upset that he may go to jail, because as she explains to me, she has known Sam for ten years, this is the best he has ever done, he is trying so hard and jail is not the way to change his behavior. She points out how hard it is for them because they both work, they have two little girls, Sam does not have his driver's license and has so many commitments for drug court. She is right. It is very hard. They are very young and doing all of this alone.

It is Sam's turn to speak. He is very emotional. His eyes fill with tears. He is frustrated and is not sure where to begin. He does not understand because he thought he was doing well in drug court. He does not want to admit that he is overwhelmed, but then he does. He describes what happens to him when he is at work and his employer moves him from one job site to another in one day and how difficult that makes it for him to first remember about his drug court obligation and then to follow through on that obligation. I begin to see what happens to him, how he gets lost in setting limits, how he is unable to ask his employer for assistance. I see that he is, in his mind, trying harder than he ever has at anything. I see that he is lost and how he does not know how to maintain the awareness that is essential to meeting the drug court requirements. He is overwhelmed at meeting all of his responsibilities.

As Sam and I speak, a solution becomes evident.³⁶ I need to stand to talk to him—to make the points that I want to make with him. Standing in the courtroom is not something that I normally do, but this is where my energy is at the moment and I am moved to stand.³⁷ I tell Sam that he has gone along now for five months maintaining sobriety—that this is great success, that he has also reached a plateau, and now it is time for him to learn to do more. We expect him to do more and we believe he can. But the question, I tell him, is: how can we support him?

I describe for Sam that it is like teaching a child to walk. I ask him if he remembers when his daughters were learning to walk, and then I remember that he

36. From a Gestalt therapy perspective, a figure is formed, or stands out, and all else is ground, or context for the figure.

37. My increased awareness has mobilized my energy so that I am ready to take some action. I am unsure about where Sam is in his awareness. However, the Gestalt Cycle of Experience is a useful model for understanding:

[T]he process by which people—individually or collectively—become *aware* of what is going on at any moment, and how to mobilize *energy* to take some *action* that allows them to deal constructively with possibilities suggested by the new awareness It assumes that when a disequilibrium in the state of being or functioning of a person(s) comes into awareness, the natural human tendency is to want to do something to achieve a new state of equilibrium. The model also assumes that there is an inherent desire in people to function at the most effective, satisfying level possible, and that learning to utilize this process is a key to the achievement of optimum functioning.

Nevis, *supra* note 29, at 1-2 (emphasis in original). Thus, in the dialogue, both Sam and I are increasing our awareness so that we may optimize our functioning.

had served three years in jail just before entering drug court, and I ask him if he missed seeing his daughters learn to walk. He bows his head; he did miss seeing his daughters learn to walk. So I demonstrate with my hands and body movement and describe for him the experience: first, we leave a short space between us and the child for the child to walk to us, and as the child gets better at walking, we step back further and further, encouraging her to walk further to us. I tell Sam that this is what we expect of him.

I decide to impose seven days of house arrest to emphasize the seriousness of the matter and to limit the number of activities on which he will have to focus. I also instruct Sam that he is to keep a notebook for thirty days, and he is required to write each day all of the drug court responsibilities as he accomplishes each. I explain that this means, for example, that he is responsible to call in every day, and he will write in his notebook the date and time that he called in. I describe each of the responsibilities that he has and tell him that these are all to be recorded in his notebook. I am not adding any new responsibilities, but rather reminding him of all of his responsibilities and telling him that he must record each as soon as he has done it. I ask him if he knows why I am imposing this requirement. Sam responds, "so that it becomes habit." He understands this much.

C. Contact with John

And now it is time to address John. John is dressed in the orange-colored county jail garb, having been arrested and jailed since he tested positive for cocaine. His attorney and he come forward to sit at the table with the prosecutor. At the pre-court session, the team struggled over John's needs, the need for a sanction to protect the integrity of the process, and the need for consistency in the sanctions imposed. Everyone concurred that a strong sanction was needed, but the views ranged from house arrest to six months in jail. The treatment provider expressed concern for John's mental health and the need for a psychological evaluation to help us better understand what is going on with him. Those who advocated for a lengthy jail sanction did so because, after all, he had been convicted of trafficking and came to drug court when the State moved to revoke his probation after his first positive test for cocaine. Since coming into drug court, he admitted to using alcohol in the first month, and then tested positive for cocaine three more times, each use occurring a couple of months apart. By the time of the sanction hearing, everyone understands that John is facing a cap of ninety days in jail if he admits his use this last time, that the prosecutor will argue for ninety days, and John and his attorney will advocate for something less. John does not deny that he used cocaine.

I do not know what I will do. I am more informed than I am for most criminal defendants in the regular court process. This is one of the benefits of drug court: I have a fuller picture of this defendant that I gain not only from the pre-court session, but also from the conversation that will occur between the defendant and me during the sanction hearing. I will talk to John, first to see how honest he will be about his use and then to see how much insight he has about his use. And so the hearing begins. I ask first whether he admits to using cocaine. He responds that he does. I ask him to describe how he came to use cocaine that day. John describes his world closing in on him, problems with work, problems with his relationship

and his girlfriend's younger sister who lives with them, money problems, and depression. He describes sitting on the couch for hours, not eating or sleeping. Friday night he goes to an AA meeting looking for something that he does not usually seek or expect from AA—that is, some answers to his problems. No answers come, even though he speaks with his sponsor. He returns to the couch and returns to not eating and not sleeping. Finally, by Sunday, he decides to go someplace to get some cocaine, hoping to feel better, to feel normal again. He thinks about bringing some cocaine home, but states that he had the good sense not to do this. When I ask him about how he felt on Monday, he describes the guilt he felt and the certainty that he would go to jail for his use. When I ask him how the cocaine affected his depression, he responds that the depression was still there. He describes telling the drug court case manager during the drug test that he had used cocaine.

I ask John whether this use differs from the first two times. The prior use involved peer pressure and caving into that. This time he sought out the drug because he was feeling so bad. I ask him about his self-medication. He supposes that is what he is doing, although he seems surprised to admit this to himself.

I ask John questions about his depression. He has never been diagnosed or prescribed medication. His depression did not show up when we screened him for admission into drug court. He is not the first client to enter drug court without our having sufficient information about a mental health diagnosis. John talks to me about a family member's mental health issues, how that individual has taken many medications, and, in his view, is still not right. He describes his fear of being like this person and how he has resisted facing his depression. We talk about when he first experienced depression, and how the depression that he felt just before his last use has not changed. The drug court case manager raises concerns about the depth of John's depression and whether he has had any suicidal thoughts. He asks John some questions to assess the risk for suicide. John and I then discuss whether he was at the time of the use, or now, having any suicidal thoughts. John responds that he is not suicidal. We continue our conversation as I try to understand where John is. John speaks slowly, openly, and honestly.

The prosecutor then makes his recommendation of ninety days. He argues that John has been in the program seven months and that he should by now have the tools to not use. He should be further along than he is and this is his third positive test since entering drug court. He reminds the court of the crimes that brought John into drug court.

John's attorney asks for no more than thirty days. He knows John's family, and he talks about the struggle of facing mental health issues and how drug abuse complicates the struggle. The attorney is clearly very moved as he advocates for John.

The treatment provider points out how well John has done in the DSAT program. She says she can hold a space in John's current group for thirty days and help him with making up missed sessions, but incarceration beyond thirty days will mean that John would have to start over with a different group. She advocates for the need to address John's mental health issues. She suggests that house arrest would allow him to get the services that he needs.

I convey my decision to John. I explain that on the simple facts of his case, without regard to the mental health issues, that ninety days would be an appropri-

ate sanction, particularly if I believed that at seven months he should know better. However, I explain that I have a different view. After speaking with him, I conclude that as he has sobered up, his depression has been uncovered. Until we deal with his depression, we cannot know if he can succeed in drug court. So, I sentence him to thirty days; with credit for the time he has been detained thus far, he will stay in jail another twenty days or so. I also order him to house arrest for ninety days. I order a psychological evaluation and that he comply with any recommended follow-up treatment. There is a brief conversation about how long a psychological evaluation might take. Someone suggests that it may not occur for quite a while. I order the parties to explore advancing the evaluation because of the apparent seriousness of the depression. In the meantime, I order him to begin counseling right away. I drop him back to an earlier phase of drug court. I also order him, during his house arrest, to research and write a five-page paper on depression and the relationship to drug abuse.

John takes this all in. He seems relieved. I encourage him to see that today he is taking responsibility for his depression and he is beginning to face it.³⁸

When I look up after speaking with John, I see that Alan is still in the courtroom. It is now 1:30. This has been an unusually long day in drug court. Alan has been in the courtroom since 10:00 a.m. Alan is one of the clients who had a successful week, who has had many successful weeks. He decided to stay after I told the other clients that they could leave at noon. He has remained attentive throughout the proceedings. At this moment, I wonder what he is thinking and how Sam and John's stories may have impacted him. Normally, the sanctions occur during the regular drug court session so that all of the clients witness each other's progress throughout and learn about the benefits of program compliance and the consequences for noncompliance. When I see Alan still there, I wish that the other drug court clients had been there to witness Sam's and John's experiences because we learn so much from each other. I know that the others will hear soon enough about the outcomes because the rumor mill works so well in drug court. The clients keep careful tabs on each other. I only hope that the stories are conveyed to the other clients without any distortion.

I leave to go to another courthouse where I have kept the parties to a post-divorce trial waiting. I struggle to settle down and get engaged in their story; it pales in comparison to the stories of Sam and John that are now so much a part of me. I think about how the awareness of serving as a witness to the client's progress through drug court affected how I presided in court this morning. I wonder whether I can bring this expanded awareness to the divorce that I am about to hear.

D. Steve and Sandy: The Beginning of the Stance of Witness for the Client

Several months earlier I presided over a sanction hearing for Steve, another drug court client. He had tested positive for cocaine, but he insisted that the test was not accurate and he had not used. We sent the test for more sophisticated testing and learned that the test sample was not urine but an adulterated sample

38. As soon as the drug court session is over, I telephone the jail and report my concerns about John's mental health and the discussion about suicide. I am assured that a nurse will examine him and that he will be watched carefully.

that Steve was passing off as his urine. Steve continued to deny and claimed that the drug court manager had it out for him. However, at the sanction hearing, Steve decided that he would not put the State to the burden of proving that he manipulated the test, and that he would admit that the State could prove this, and that the court could go ahead and sanction him.

This was not the first time that Steve had come before me for a sanction hearing. The other times were not as serious, but they evidenced, from my perspective, a power struggle. By the time of this sanction hearing, however, I saw the futility in arguing with him about his behavior and approached the sanction hearing as one in which I would simply acknowledge where Steve was and impose a sanction, appropriate to where he was in his recovery, based on what the evidence demonstrated; that is, that he had submitted a false test. I understood that, for whatever reason, he could not admit to this violation. I did not need him to admit to the manipulation of the test: it was enough for me that he was willing to accept responsibility at some level and that he wanted to stay in drug court. My stance broke up the power struggle that had existed between Steve and me.

Eventually, long after the sanction hearing, Steve came to accept full responsibility for his behavior with respect to that test and he was in the first group to graduate from drug court. By accepting where Steve was at that time, I was able to proceed to apply a sanction that incorporated his experience, and not one based solely on my judgment of him. While the time that he spent in jail may not have differed significantly, this experience with Steve represented for me a subtle shift in my work as a drug court judge.

It took another client's experience to make this shift clearer to me. I recommended Sandy to drug court when she came before me on a driving under the influence charge during a regular criminal docket. She faced a mandatory jail term because this was not her first driving under the influence violation. Sandy came into drug court and appeared to be one of our stars. Her drug tests were negative. She continued working full time and was successful in her job. She went through a divorce and seemed to handle the divorce very well despite all of the uncertainties about the financial outcome. She was a mother with teenage children.

As Sandy's year in drug court was coming to completion, we heard rumors about her use of alcohol. She denied. None of the tests were able to confirm the rumors. She was very distraught over our doubting her sobriety. After one drug court session, the treatment provider asked me to sit down with Sandy and listen to her. During this conversation, Sandy continued to deny. I observed how much her hands trembled and, in my need to make meaning out of this experience, I attributed this to the extreme anxiety she must have been experiencing with our doubts about her use. Stuck on solutions and not paying enough attention to the doubts about her sobriety that I continued to have, I encouraged her to ignore the rumors and stick to the program.

Then, a surprise visit to her home one night by probation officers turned up overwhelming evidence that she was using alcohol and may have driven her car that night after having consumed alcohol. I worried about how I had failed to simply pay attention to the phenomena and instead rushed to make meaning out of her story and to find solutions. While worrying about how I had interacted with Sandy, I became aware that I could better serve in drug court if I saw my role as

witness to the experiences of Sandy and the other clients. How much more supportive my role would be if I could observe her experience, and not rush to explain or interpret her experience, but simply observe the phenomena and bring them into her awareness. Just maybe, she would have walked away from our interaction with a greater awareness of where she was, and maybe her denial would not have lasted as long as it did.

E. Successes and Failures

At the end of the day, Steve and Sandy graduated from drug court.³⁹ Alan was terminated shortly after the sanction hearing that he observed because of new criminal activity and our discovery of his ongoing substance abuse.⁴⁰ Sam and John did not graduate. Sam was terminated, not because of continued drug use or crime, neither of which existed at the time, but because we concluded that he simply was not able to meet all of the conditions of drug court sufficient for graduation from it. Because of the length of time that he was in drug court and his successes there, Sam was moved from drug court to probation where the conditions were fewer and easier for him to follow. John violated again and agreed to do a lengthy in-patient program. Shortly, after his return to the drug court program, he again used cocaine. Termination from drug court became the only alternative. I presided over that hearing as well. In the end, John seemed relieved to no longer have to keep up the pretense of succeeding in drug court. He went to jail for a period of time, and is now out.

From time to time, former drug court clients stop by to reconnect. I am always curious to see how they are making their way. Very occasionally, we hear from clients who were terminated from drug court, but who are excited about new programs in jail in which they are participating. These former clients still hold hope for their recovery and rehabilitative process. Periodically, we run into clients who have graduated from drug court, but have relapsed or run into new legal problems.⁴¹ These experiences challenge how I measure success, both that of the clients and my own. However, if I hold to my experience as witness, the need to measure success recedes. I know that the clients—even those who have “failed”—have gained a greater awareness of their self-destructive behaviors and have experienced some positive, reinforcing success. They have these experiences to both motivate them and to fall back on when their old patterns and behaviors begin to resurface.

V. FINAL THOUGHTS ABOUT THE ATMOSPHERE IN THE COURTROOM

The drug court session discussed in this Article occurred when we still adhered to the traditional structure of the courtroom of the judge sitting behind the

39. Both have since been arrested for new crimes, one for an offense related to alcohol use.

40. After this termination and serving his sentence, Alan again came back into drug court for violating his probation. Alan is the only client to have restarted the drug court program after having been terminated.

41. One former graduate of drug court appeared before me in court recently. When I said to him how sorry I was to see him again in court, he responded, “But, judge, I did not use any alcohol or drugs.” Indeed, the police report did not allege that he was under the influence or in possession of any alcohol or drugs at the time of the alleged offense.

bench and elevated above the defendant. As we became more comfortable with the new roles that were possible in drug court, we began moving the courtroom furniture and sitting in a circle for the weekly in-court sessions with the clients. Clients who were arrested for violating the contract over the last week join us in the circle, even though they may be wearing orange prison-issued clothing and chains. This change in structure really changed the field conditions so that we were able to interact “other than in usual ways.”⁴² We engage in a more fluid and open discussion that ranges from client check-ins, to supportive story-telling, to teaching moments. We return to the traditional courtroom structure when certain events occur such as induction into drug court, imposition of a possible jail sanction, and sentencing. As we “risk doing something differently,”⁴³ we support our clients in taking healthy risks.

Although Judge Learned Hand ascribes to the judge responsibility for the atmosphere in the courtroom,⁴⁴ it is each of the drug court participants—the judge, the other team members, the clients, their attorneys, and family members—who share responsibility for the atmosphere in the courtroom and supporting the client as he or she changes his or her life circumstances. The judge, because of the power inherent in the position, can provide leadership in taking the risks that will support healthy change, but it is the shared responsibility of the entire community that is necessary for real change to occur.

42. Parlett, *supra* note 22, at 25.

43. *Id.*

44. *See* Brown v. Walter, 62 F.2d 798, 800 (2d Cir. 1933) (stating that justice depends on the atmosphere in the court, which “depends primarily on the judge”).