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Drug Courts: A Judicial Manual

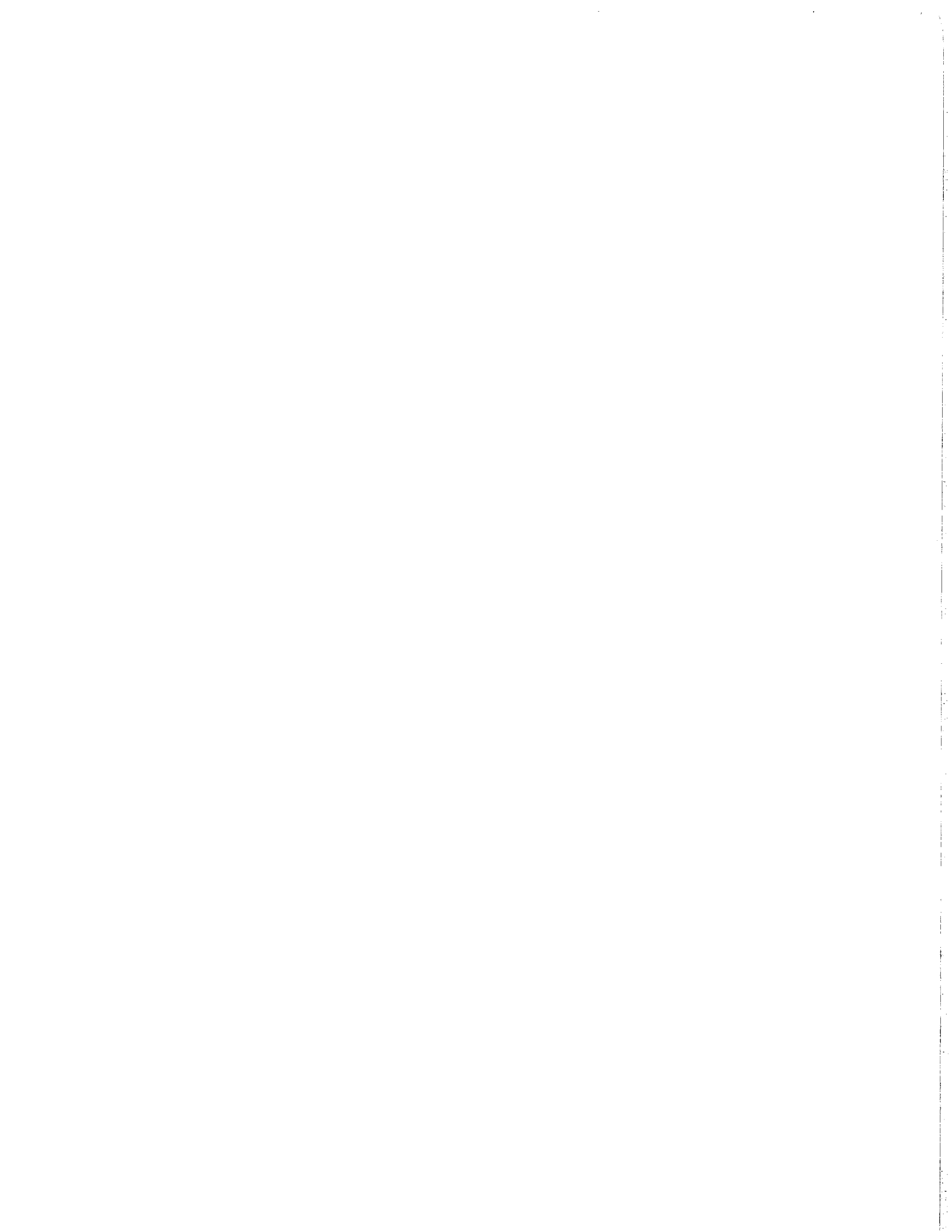
Judge Jeffrey S. Tauber



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Drug Courts: A Judicial Manual

Judge Jeffrey S. Tauber

Oakland-Piedmont-Emerlyville Municipal Court

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California Center for Judicial Education and Research (CJER) is the California judiciary's program for improving the administration of justice by furthering the education, stimulating the growth, and broadening the experience of California judges. Formed in 1973 as a joint enterprise of the Judicial Council of California and the California Judges Association, CJER conducts continuing education programs for the judiciary and orientation programs for new judges. It prepares judges' benchbooks and other educational materials. CJER also coordinates and assists other judicial organizations in arranging educational programs and conducts research to enhance judicial performance.

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Preface

The genesis of this Drug Courts manual began some five years ago when I was given the assignment of administering drug diversion cases in the Oakland court. I quickly learned that the existing system did little more than process the drug-using offender as quickly as possible. In looking for more effective ways to deal with the drug-using offender, I began a learning process that led to the initiation of Oakland's FIRST Drug Court and ultimately to the writing of this manual.

I am indebted to those criminal justice and drug treatment experts who have generously given of their time to my education and to this manual:

Dr. Douglas Anglin, Director of the UCLA Neuropsychiatric Institute; Dr. Steven Belenko, of the New York City Justice Agency; John A. Carver III, Director of the Washington, D.C. Pretrial Services Agency; Judy Green of the VERA Institute; Dr. Peter Greenwood, Director of the RAND Corporation Criminal Justice Program; Dr. Roger Peters, of the University of Florida; Dr. Michael Smith, Director of the Lincoln Hospital Drug Clinic; and Dr. Alex Stallcup, of Oakland.

I would like to acknowledge the special contributions of Judge Peggy Hora of the Hayward Municipal Court and Alameda County Deputy Probation Officer Frank Tapia, both of whom worked closely with me on this project over the past five years.

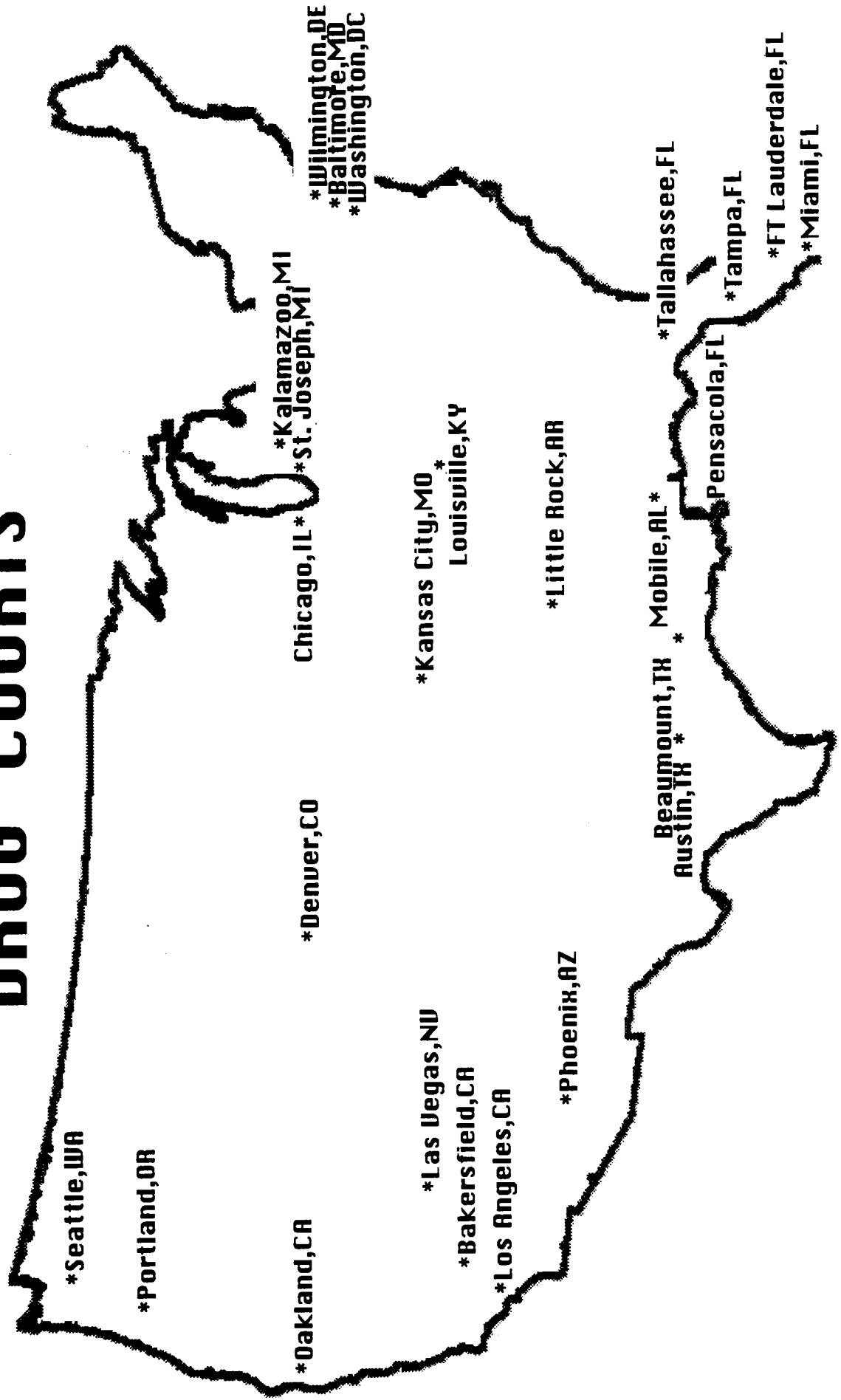
I would also like to thank the Board of Directors of the California Association of Drug Court Professionals for their support and encouragement: Judge Rudy Diaz, the newly elected President of the California Judges Association, Judge Tomar Mason of San Francisco, and Judge Barbara Beck of Santa Maria.

Lastly, this manual would not be possible without the extraordinary editorial and organizational gifts of Irene Hegarty and Ellen Matthews of the CJER staff.

Judge Jeffrey S. Tauber

The Drug Court symbol on the cover combines the gavel of the courts and the "medical snake" or "caduceus," the symbol of the healing professions. It is the logo of the National Association of Drug Court Professionals, and is used here with permission.

CURRENT DRUG COURTS



Drug Courts: A Judicial Manual

Viewed as a more effective approach to the drug abuse cases crowding the courts, Drug Courts have attracted interest from judges throughout the country. In this article, Judge Tauber shares his experience in setting up Oakland's FIRST program, explaining how Drug Courts work and the underlying principles that make them successful.

Hon. Jeffrey S. Tauber
Oakland-Piedmont-Emeryville Municipal Court
Chairman, The California Association of
Drug Court Professionals
President, The National Association of
Drug Court Professionals

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INTRODUCTION

Drug Courts have become a major focus for criminal justice system reform in the United States. They are an important component of the President's drug strategy, slated to receive major funding under the Crime Bill before Congress (1.4 billion dollars is currently designated within the "Drug Court Program" section; see Appendix C1). It is estimated that there are approximately 30 existing Drug Courts and that there will be over 100 Drug Courts nationwide by the end of 1994.

Drug Courts mark a turning back of the judicial clock to a time when judges ran their own calendars and were responsible for their court's operations; defendants had to answer directly and immediately to the judge for their conduct; and the judge monitored the defendant's progress as the case moved slowly and purposefully through the judicial system.

The courts have been forced to move away from that level of personal involvement because of an overwhelming workload, replacing it with an expedited case management model which relies on segmented case management, sentencing guidelines, negotiated pleas, and other strategies to speed up the process.

The results have been predictable and disastrous. Court, probation, prosecution, and defense personnel accept responsibility for only a small segment of an offender's case; often dozens of judicial, probation, prosecution, and defense personnel see an offender over the course of a single case. No one has or is expected to take a larger view of the offender (or the system) because everyone has been given piecemeal authority.

The drug-using offender quickly learns how to work within that framework and acts accordingly, manipulating and/or evading the court and program personnel. (Ironically, even when successful, the expedited management approach does little more than speed up the revolving door from our courts to our jails and prisons, and then back again.)

Some have criticized Drug Courts as a radical and unwarranted departure for the courts. However, there is nothing radical or even particularly new about how a Drug Court works. Court procedures are adapted to reflect the realities of the offender's substance abuse (see §§2-5). A cost-effective approach to the use of sanctions and incentives is applied (see §11). Applying a direct, immediate, and personal approach to the drug offender, a Drug Court handles all drug rehabilitation cases in a jurisdiction from start to finish (see §§2-19). Leadership and focus is provided by a single Drug Court judge and dedicated program staff (see §§20-24). Coordinated programs are created where all participants (not just the offender) are held accountable for their performance (see §§30-34).

Interest in Drug Courts is growing as a number of innovative Drug Courts have reportedly achieved remarkable success in reducing the levels of drug abuse, incarceration, and criminal recidivism among drug-using offenders (see Appendix A for a summary of Drug Court programs nationwide). That interest is heightened by the realization that these same offenders clog our court calendars, strain our treasuries, and fill our jails and prisons. (According to a recent American Bar Association report, imprisonment of drug offenders alone increased by 327% between 1986 and 1991).

While drug courts are often associated with diversion programs (e.g., Miami, Oakland), they are also the basis for pretrial supervision programs (e.g., Bakersfield, Washington D.C.), probation programs (e.g., Phoenix), and combined diversion and probation programs (e.g., Baltimore, Denver).

It is important to remember that program success is the result of the extraordinary efforts of a number of participating agencies working within a coordinated Drug Court System (see §36). However, even where no Drug Court exists (or is needed), the application of the principles of successful court-ordered drug rehabilitation, as described here, will achieve significantly better sentencing and supervisory outcomes.

I. [§1] DESIGNING A REALITY-BASED DRUG REHABILITATION PROGRAM

It takes more than increased funding and full judicial support (although extremely important) to create an effective program. Successful court-ordered drug rehabilitation programs are based on an understanding of the physiological, psychological, and behavioral realities of drug abuse and are designed and implemented with those realities in mind.

Most court-ordered drug rehabilitation programs suffer from the generally held belief that "nothing works" in the treatment of drug-using offenders. Unfortunately, that perception (although untrue) becomes a self-fulfilling prophecy when financially strapped communities inadequately fund court-ordered treatment programs and skeptical judges half-heartedly implement those same programs, often terminating an offender's participation upon the first sign of drug relapse.

Effective programs recognize that drug abuse is a serious, debilitating disorder; that relapse and intermittent progress are a part of most successful drug rehabilitations; that a drug addiction is not created overnight and cannot be cured overnight; that a drug user is most vulnerable to successful intervention when he or she is in crisis (i.e., immediately after initial arrest and incarceration); and that drug users are in denial and will do everything possible to avoid responsibility, make excuses for program failure, and evade the court and its programs.

C. [§8] Model Programs That Share Reality-Based Design Principles

Several jurisdictions across the country have developed successful court-ordered drug rehabilitation programs that recognize and work with (rather than against) the realities of drug usage. Although these programs often have substantially different program characteristics reflecting their individual circumstances (i.e., Miami, Fort Lauderdale, and Portland have replaced a Probation Department presence with direct court/treatment program linkages, while Oakland, Phoenix, and Kansas City use a court/probation partnership model), what is crucial is that they share the same underlying "reality-based" design principles.

The *Miami/Portland model* relies on the establishment of a special drug treatment provider that has sole responsibility for treatment and supervision, as well as drug testing. Both programs rely heavily on acupuncture as an adjunct to more traditional treatment modalities, and require daily drug testing and treatment during the first phase of the treatment program (which can last several weeks to several months). The judge makes final program decisions based on drug test results (in Miami, this is accessed through a computer screen at the bench), and other progress information supplied by the treatment provider. *Note:* Portland has a hybrid diversion program that requires participants to waive their right to a jury trial and stipulate to the physical evidence when entering the program (participants may withdraw from the program without sanctions within 15 days of entry).

The *Oakland/Phoenix model* relies on a combination of existing probation and community services to provide supervision and treatment to participants. The probation department provides drug education classes, drug testing, and weekly supervision groups, which fulfill some of the functions of treatment groups. Treatment services are delivered within the participant's local community. Contingency contracts offer structure for judicial decision-making, define success and failure, and inform all participants (including the court) as to what their responsibilities are during the program (see §§32-34 on contingency contracts).

The *Wilmington, Delaware model* relies on the structural framework provided by a TASC program. (TASC programs throughout the nation have established a methodology for the assessment and referral of offenders to appropriate treatment programs as well as providing case management, tracking, and coordination functions). The offender is referred to TASC for an immediate treatment assessment and is required to maintain frequent supervision contacts (including drug tests) with TASC personnel, while access to an appropriate treatment is facilitated. After treatment placement occurs, TASC works with treatment providers and others to ensure effective service delivery and continuity of services as offenders move through both the criminal justice and treatment systems.

A. [§2] What Is a Drug Court?

A Drug Court is a department to which defendants who are charged with drug offenses and who are eligible for court-ordered drug rehabilitation — through probation, diversion, or pretrial supervision — are referred. See §§12–19. A single judge handles these cases from the time they are referred for drug rehabilitation to the conclusion of the program. Defendants are placed in rehabilitation programs with frequent monitoring and treatment requirements, for report back to the court under diversion, O.R., or probation status. Various features of this type of court, such as immediate intervention and comprehensive supervision, are discussed in §§3–7. Sanctions are discussed in §§11 and 13, and the judge's role is discussed in §§20–24. Drug Courts are set up in a number of different ways. Procedures used in Oakland's FIRST Program are set out in Appendix B.

B. Features of a Reality-Based Drug Rehabilitation Program

The following program parameters are recommended to help ensure that acceptable design and implementation standards are achieved. They are based on a review of the literature in the field, interviews with Drug Court professionals nationwide, and site visits to existing Drug Courts.

1. [§3] A Unified Drug Court

Reality: *If no single court accepts responsibility for a program's effectiveness, there will be no one accountable when it fails.*

Recommendation:

A single Drug Court judge and staff provide leadership and focus to the program.

- a. A single Drug Court judge and court staff handle all cases in the jurisdiction *referred for drug rehabilitation purposes* (but not necessarily all drug cases).
- b. The Drug Court judge and court personnel are assigned for at least a one-year term (optimally, for two years).
- c. The program takes a minimum of six months from placement to completion (whether the program involves pretrial supervision, diversion, probation, or other court-ordered program).

Rationale:

The advantages of a single drug court concept are:

- (1) Accountability remains with a single judge;
- (2) Responsibility for program effectiveness resides in a single court;
- (3) A single program focus promotes systemwide coordination and cooperation;
- (4) Consistency in judicial decision-making and program implementation is maintained;
- (5) Sufficient numbers of defendants in the courtroom (by analogy a critical mass) encourage effective courtroom learning;
- (6) Specialization promotes staff expertise and personal commitment to program success; and
- (7) The direct participation, personal involvement, and long-term commitment and leadership of the judge are encouraged.

Note: Virtually all existing Drug Courts use a Unified Drug Court Structure with a single court assigned to handle all drug rehabilitation cases in the system. It is expected that there will be considerable pressure on large urban jurisdictions to set up multiple drug court departments. For the reasons described above it should be resisted. Where it cannot be avoided, the number of drug court departments should be minimized by limiting Drug Courts to *cases referred for drug rehabilitation purposes only*. (The need for a single, focussed drug court department is especially great during initial design and implementation phases.)

2. [§4] Immediate and Upfront Intervention

Reality: *A drug addict is most vulnerable to successful intervention when he or she is in crisis (i.e., immediately after initial arrest and incarceration).*

Recommendation:

Intervention should be immediate and front-loaded.

- a. The program places at least 75% of participants in a supervision and treatment program within one day of the offender's initial release from custody.
- b. The offender is placed in the program by the Drug Court judge and seen by that same judge at a progress report hearing within one month of placement.

- c. The program requires at least three contacts per week with supervision and/or treatment entities over the first three months of the program.

Rationale: Even the best-designed court-ordered drug rehabilitation program will be less than effective when intervention is delayed. Recognizing this, the Miami program transports the defendant by van directly from court to the treatment program to begin treatment. In Oakland, where offenders are typically placed in the program within one day of their release from custody, data shows that younger offenders so placed have substantially greater success (measured in recidivism rates and program completions) than those who are not. See Appendix B(5) for Oakland's three-year evaluation.

For the same reason, supervision and treatment should be front-loaded, to engage the participant early and often, giving the program and treatment the opportunity to take root. In Miami, offender contact with the program is required five times a week for the first three weeks, while in Oakland, an average of three contacts per week is required over the first ten weeks.

3. [§5] Coordinated, Comprehensive Supervision

Reality: *If there are gaps in program supervision, the drug-using offender will find and exploit them.*

Recommendation:

Supervision must be comprehensive and well-coordinated to ensure offender accountability.

- a. Drug testing is administered at least once a week over the first three months of the program.
- b. Supervision contacts are maintained on a weekly basis over the first three months of the program. (*Note:* Such contact may be accomplished by a treatment provider.)
- c. Progress reports before the same Drug Court judge and staff are scheduled, at a minimum, every month during the first three months of the program.

Rationale: Few offenders enter the court's programs with rehabilitation on their minds. They are in denial, and are there primarily to beat the system and avoid incarceration. The challenge is to keep them in the program until sobriety and attitudinal changes can occur. This may be difficult to accomplish, since

the drug-using offender is often an expert at avoiding responsibility, making excuses for his or her failures, and evading the court and its programs.

The drug offender must be held accountable for his or her conduct if rehabilitation is to be successful. Offender accountability depends on strong connections between participating agencies, vigilant court-monitoring procedures, frequent drug testing, and a coordinated, hands-on approach to supervision and treatment. A court-ordered program must build a chain-link fence around the drug-using offender, made up of frequent supervision contacts and drug testing, direct access to full information on the drug offender's progress, immediate responses to program failures, and frequent progress report hearings before a single Drug Court judge and permanent staff. (Oakland allows a maximum of 90 days, Miami no more than 60 days between progress report hearings.)

4. [§6] Long-Term Treatment and Aftercare

Reality: A drug addict is not created overnight, and therefore cannot be cured overnight.

Recommendation:

The drug-using offender needs intensive long term treatment and aftercare.

- a. Treatment must run for a minimum of six months.
- b. There must be at least one treatment session per week over the program's first six months (Note: Such treatment may also be accomplished by a supervisory agency.)
- c. Ongoing drug treatment and counseling, as well as educational opportunities, job training and placement, and health and housing assistance, are provided over the last three months of the program.

Rationale: Drug addiction is a serious, debilitating disease that demands intensive long-term treatment (Miami and Oakland participants average approximately one year to graduation). An initial treatment assessment is the first step in determining the appropriateness of a treatment plan. That assessment may take place at the time the offender enters the program or after placement in the program (when program performance itself is used as an assessment tool).

Treatment preferably begins in a medically supervised jail drug detoxification unit. For most, however, a community-based nonresidential treatment program is the initial treatment experience. More costly residential treatment

spaces are generally reserved for those who have not responded well to non-residential treatment.

Participating treatment programs should be selected and periodically evaluated for effectiveness. Depending on the availability and effectiveness of existing treatment programs (and financial feasibility), treatment programs can be created specifically to work with the drug-using offender. In Miami, treatment programs that were specially designed to provide acupuncture treatment (as well as more traditional treatment modalities) have shown excellent results when used in conjunction with a well-designed court-ordered rehabilitation program.

Without adequate aftercare, offenders' sobriety may be short-lived as they face the same problems that contributed to their drug usage in the first place. Aftercare should include ongoing drug treatment and counseling as well as educational opportunities, job training and placement, and health and housing assistance.

5. [§7] Progressive Sanctions and Incentives

Reality: *Relapse and intermittent progress are part of most successful drug rehabilitation.*

Recommendation:

The court must apply a patient, flexible approach to monitoring compliance.

- a. Less serious drug-using offenders are referred to a court-ordered supervision and treatment program, with dismissal of the drug charges (or other substantial program incentives) contingent on successful participation in the program.
- b. Drug usage while in the program and/or failure to participate should result in increased supervision, treatment, drug testing, and/or limited periods of incarceration (to detox the offender and deter him or her from further program failure).

Rationale: In most cases, progress toward rehabilitation will be slow-starting and fitful, with sobriety taking hold over a period of months. This requires patience and a consistent, yet flexible, hands-on approach to the monitoring of the offender's progress toward sobriety.

Progressive sanctions and incentives are appropriately applied in response to program failure and success, and should be applied incrementally to move the participant steadily toward sobriety. (See §§10–19.)

The *Washington D.C. model* is unique in the nation, as it handles drug treatment and rehabilitation through its pretrial services agency. Eligible offenders continue in pretrial status while they are provided with supervision, drug testing, and treatment through the pretrial services agency or through a specially created in-house treatment provider. The program is enhanced by state-of-the-art drug testing facilities and computerization, which can provide drug test results on the judge's computer screen within 10 minutes of the test. Judicial decision-making depends on a schedule of sanctions that flow from failed program participation and/or positive drug tests. Upon successful completion of this pretrial program, the offender is allowed to plead to a lesser offense and avoid prison.

D. [§9] Designing a Local Program

Communities are generally better served when they develop programs that reflect local financial and political circumstances, while incorporating "reality-based" design principles. Rather than attempting to replicate another jurisdiction's program, a jurisdiction should maximize local "ownership" and commitment by developing systems that reflect the strengths and resources (as well as the needs) of its local community.

Judges should look to existing Drug Court models for ideas but remember that all existing programs reflect their own circumstances (and compromises) and may not be easily or profitably adopted by other jurisdictions. A new Drug Court should be open to features and options existing programs may not have considered, since all Drug Court models are relatively new and continue to evolve and adapt.

II. [§10] SMART PUNISHMENT: A PRAGMATIC SENTENCING PHILOSOPHY

"Smart punishment" is the imposition of the minimum amount of punishment necessary to achieve the twin sentencing goals of reduced criminality and drug usage. It relies on the use of progressive sanctions, the measured application of a spectrum of sanctions, whose intensity increases incrementally with the number and seriousness of program failures.

A judge who uses extended incarceration as the only sanction for drug usage, like a carpenter who shows up at a jobsite with only a hammer, does not have the tools to get the job done. The Drug Court judge carries intensive supervision, counseling, educational services, residential treatment, acupuncture, medical interventions, drug testing, and program incentives, as well as incar-

ceration in his or her tool box.

The problem with the incarceration of drug-using offenders is not in its use but in our overdependence upon it. Incarceration works for drug-using offenders — by providing the offender with the opportunity to detox from drugs; as a deterrent, by presenting the offender with the stressful, anxiety-producing experience of incarceration; and by coercing drug-using offenders to enter and complete rehabilitation programs.

The use of extended periods of incarceration, however, does not appear to increase the value of incarceration and may, in fact, be counter-productive to sentencing goals. Because two aspirins relieve a headache, it does not follow that 10 aspirins will do a better job.

Extended incarceration may disrupt whatever stability exists in a drug-user's life (needed for successful drug rehabilitation), initiate the drug user into a criminal lifestyle, and reduce the deterrent effect of incarceration, thus limiting the effectiveness of court-ordered rehabilitation.

A. [§11] Progressive Sanctions

A judge who does not respond forcefully to the drug user's poor performance may be setting the offender up for failure. The message conveyed is that failure is neither serious nor important to the court, so why should the offender be concerned?

There must be immediate and direct consequences for all conduct. Sanctions follow violations and are applied as close to the time of failure as possible. This calls for frequent court hearings to monitor the offender and mete out sanctions. A patient, measured, and consistent, yet flexible approach to the different kinds of program failure moves the offender steadily toward sobriety:

Inadequate participation. Less serious violations, such as inadequate participation in a court-ordered program, call for sanctions that start with the intensification of supervision, treatment, and/or a single day's incarceration. Those sanctions increase incrementally (i.e., 1 day, 2 days, 4 days, etc.) with continued violations. *Note:* In the nomenclature of the Drug Court, the offender is *recycled* into the program after spending at least one day in custody.

Program failure. At the other end of the spectrum, complete program failure (represented by an offender's termination from diversion after a failure to appear (FTA) for a progress report hearing) calls for a substantial period of incarceration (at least one week) to detox the offender as well as to deter the offender from future program failure and/or drug usage. *Note:* In the nomenclature of the Drug Court, the offender is *reinstated* into the program after spending at least one week in custody. (The judge may wish to limit the number of reinstatements back into the program, i.e., one week for a first FTA, two weeks for a second, final termination for a third failure.)

Continued drug usage. The author's experience suggests that while it is appropriate to punish inadequate participation and/or program failure with incarceration, continued drug usage is effectively dealt with by increasing supervision, testing, and/or treatment requirements, ultimately culminating in residential treatment.

B. [§12] Diversion and Other Incentive Programs

Drug rehabilitation is at best a difficult, demanding, and lengthy process. In order to motivate defendants to complete that process it is necessary to offer them substantial incentives, as well as disincentives, to do so. Encouragement and appreciation, as well as tangible incentives (such as those listed below) should be given to participants for positive behaviors.

A diversion program (statutory or otherwise) provides a powerful motivational tool for drug rehabilitation, offering the defendant the opportunity to work toward a complete dismissal of a felony drug charge. In California, for example, drug diversion is statutorily mandated for eligible defendants, diverting less serious offenders from the criminal justice system into a supervision and treatment program administered by the county probation department.

1. [§13] Penal Code §1000 Diversion

Diversion under Pen C §§1000–1000.5 is available for defendants who have been charged with simple possession of certain controlled substances (see Health & S C §11350, 11357, 11377), planting and cultivation of marijuana for personal use (Health & S C §11358), and certain other drug offenses. Pen C §1000(a). The person who is diverted does not suffer a criminal conviction. Pen C §1000.5(a). The judge may require the payment of an administrative fee, as part of an enrollment fee in a diversion program, not to exceed \$500. Pen C §§1001.15, 1001.16. Reduction of the fee may provide the basis for an incentive. The court must consider ability to pay and no defendant may be denied diversion based on inability to pay. Pen C §§1001.15(a), 1001.16(a).

2. [§14] Eligibility

In order for a defendant to be eligible for diversion all of the following conditions must be met under Pen C §1000(a):

- (1) No prior controlled substance conviction;
- (2) Offense charged did not involve a crime of violence;

