
RESPONSE TO THE NADCP

POSITION PAPER ON NORA (PROP. 5)

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OVERVIEW

The National Association of Drug Court Professionals (NADCP) has issued a political position paper opposing Proposition 5, the Nonviolent Offender Rehabilitation Act (NORA), a treatment expansion and prison reform initiative that will appear on the November 4, 2008, California ballot.

Despite the NADCP's vow to "disseminate accurate information" about NORA, the paper is riddled with errors and hobbled by ideology. At a time when many California practitioners are trying to put the old battles over Proposition 36 behind them, the NADCP tries to re-ignite tensions with an analysis that disregards any positive impacts of NORA and largely misinterprets the measure to present it in a distorted light.

There are at least 25 separate errors of fact in the NADCP paper, many quite substantial. But

for these errors, NADCP's paper could not achieve its dire tone. The drafters and sponsors of NORA invite readers of this response to examine the detailed rebuttal of these factual errors in Appendix A. (Begins on page 12.)

The bottom line is that the NADCP shows no recognition of the serious problems Californians face in the areas of public health and criminal justice. The paper is entirely silent about the state's prison overcrowding crisis, the dramatic and worsening shortfall in treatment funding and the lack of youth programs in the state. NORA addresses each of these problems. NADCP offers no plan for improving access to treatment and rehabilitation programs for the more than 100,000 youth and adults who would benefit each year from NORA. NADCP is telling Californians it is better to accept the rapidly deteriorating status quo.

Summary of NORA Campaign's Response to NADCP

The National Association of Drug Court Professionals (NADCP) has issued a political position paper attacking the Nonviolent Offender Rehabilitation Act (NORA), which will appear on the Nov. 4, 2008, ballot as Proposition 5. The problems with the NADCP position include:

- **NADCP ignores the good NORA does for drug courts.** The group's unbalanced paper neglects to mention that drug court funding would be doubled by Prop. 5. It does not mention that judges would have much-enhanced discretion to place defendants in treatment under NORA's Track III, along with discretion to impose jail sanctions or terminate defendants at any time. The measure would also proliferate re-entry drug courts for parolees. Finally, NORA would vastly improve studies on drug courts' operations and results, helping to demonstrate their value and improving their efficacy – a part of NORA that NADCP strangely portrays as a threat.
- **The NADCP paper is littered with mistakes, of which 25 are described in the campaign's response.** These include the claim that NORA would “eliminate” funding for several specialty courts (it doesn't) and the claim that the measure does not allow jail sanctions in Track II (it does).
- **NADCP simply fails to understand how NORA works.** Prop. 5 provides a system that mandates individualized care and supervision for nonviolent offenders. The similarities between NORA and drug courts far outweigh the differences. Treatment decisions and monitoring conditions under NORA are tied to individual assessments of addiction severity, criminal history and criminogenic risks. NORA provides incentives to reward progress and escalating sanctions for those who don't comply. Many of NADCP's objections fail to reflect the program's actual design.
- **NADCP reached its position without input from members.** The NADCP board voted to oppose NORA during a conference of 3,000 members, but the membership was not consulted. Members representing treatment and public defense, and members from California, were given no voice in the decision.
- **NADCP offers no solutions.** The NADCP paper ignores California's crushing problems in criminal justice and treatment. With NORA, California will address a prison overcrowding crisis that so far has defied solution, restore and expand treatment funding and create a system of publicly funded treatment for at-risk youth.

Brief Overview of Prop.5/NORA

Proposition 5, the Nonviolent Offender Rehabilitation Act (NORA), provides a full continuum of care for youth, nonviolent offenders in the courts and prisoners and parolees. As such, the measure is a comprehensive effort to fill acute shortfalls in treatment and rehabilitation. By making a greater commitment in these areas, NORA holds promise to reduce crime, recidivism and incarceration rates.

The measure's programs offering court-supervised treatment are the focus of this response because they are the primary target of the NADCP position paper.

Prop. 5 unifies three existing systems offering treatment through courts across California:

- PC 1000/deferred entry of judgment (DEJ) programs, which become **Track I** under NORA;
- Proposition 36 court-supervised treatment programs (authorized by the voters in November 2000), which become **Track II**; and
- Drug courts for adult felons, which become **Track III**.

Though all of these programs are available to some degree in many counties, only Prop. 36 is currently universally offered and funded for qualifying, nonviolent drug offenders.

NORA makes PC 1000-type diversion programs universal, also, for nonviolent drug offenders with a limited criminal history. NORA also pays for treatment programs in Track I – a major advancement because there is generally no funding for similar programs today.

Several evidence-based improvements are made to Prop. 36 as it becomes Track II, including the addition of a new process for handling “no-shows,” the addition of graduated sanctions and jail sanctions, and adequate resources for individualized treatment.

Finally, drug courts get enhanced funding and retain their current status as the high-end program for nonviolent offenders in court-supervised treatment.

Across the board, NORA encourages the adoption of collaborative court models in Tracks I-III, while guaranteeing due process for defendants. The combination of broader eligibility, enhanced judicial discretion, new accountability provisions and more robust treatment resources will strengthen California's court-supervised treatment systems and help many thousands more people each year to succeed in treatment.

The Good NORA Does for Drug Courts

Despite the attacks from NADCP, the truth about Prop. 5 (NORA) is that *the measure would greatly expand drug courts*, doubling the level of state funding that now goes to adult felon programs to about \$45 million per year, and making that funding permanent.

Put simply, NORA provides *more money for California drug courts than the federal government distributed to drug courts in all 50 states combined* last year.

Some of NORA's other benefits for drug courts include:

- **NORA leaves existing drug courts intact, while encouraging them to expand.** Drug court judges are given near-total discretion as to which nonviolent offenders to accept for placement in Track III treatment. Judges can take people who have failed out of Track II (*i.e.*, Prop. 36-type) programs or who are not eligible for any other program. On a case-by-case basis, judges may choose to place in Track III treatment persons who commit *non-drug offenses* that are nonviolent, and may require such offenders to first serve a part of their sentences and pay restitution before commencing treatment.
- **Under Track III, the court is given broad discretion to monitor defendants in any appropriate manner, including with drug testing paid for by NORA funds.** Judges are encouraged to use incentives and rewards to improve treatment retention and outcomes. The court may also impose jail sanctions in response to problems during Track III treatment. Probation and treatment under Track III may be terminated at any time, in the court's discretion.
- **NORA improves treatment matching, treatment quality and supervision.** Every person placed in treatment Tracks I, II and III will receive both a clinical assessment of their addiction severity and a criminal history evaluation. NORA requires people to be placed in a treatment program consistent with their assessed needs. Supervision by probation and the courts must be made consistent with the person's risks and needs identified in the criminal history evaluation.
- **NORA establishes and funds a single system of data collection for Tracks I-III.** Statewide, only two studies of drug courts have ever been published. They offer very limited data – failing to calculate annual rates of participation, dropout or treatment completion, for instance. By contrast, Proposition 36 – which mandated independent, academic studies – has generated a rich trove of offender and treatment data spanning several reports. These reports provide important insight into the program's successes, shortfalls and needs. By creating and funding a unitary system for data collection and analysis, NORA will help all of California's treatment courts, including its drug courts, to develop and implement evidence-based best practices and to demonstrate, county-by-county, their efficacy and identify areas for potential improvement.

(See Appendix B for more on NORA and Drug Courts.)

NORA relies heavily on drug court judges and team members not only to implement its programs, but to train and inspire new people to take on this work. Finally, as even the NADCP paper acknowledges, NORA incorporates several specific elements of drug courts in designing court-supervised treatment models for a wide range of nonviolent offenders, even for those that are not in Track III. NORA's similarities to drug courts far outweigh the differences.

NADCP Board Opposes NORA

The NADCP's political position against NORA was sealed May 30, 2008, at the group's national conference in St. Louis. Though more than 3,000 professionals attended the conference, the subject of NORA was never floated with the membership. California-based members were

not consulted, and treatment providers and public defenders were simply shut out until after the board of directors had made its decision. NADCP member Jeff Thoma, Public Defender of Solano County, was so offended by the board's lack of transparency and process, he wrote a letter to the group saying, in part:

NADCP purports to be an inclusive organization with partners from defense and treatment, but the reality is that it is not. The organization is run by judges and prosecutors... [I]t is apparent that the organization has no real respect for its partners in treatment and defense – not even enough respect to invite comment or consideration of differences of opinion before ramming this position through the board process. NADCP has now gone on record in the name of all its members opposing something that many of its members support, using heavy-handed tactics to avoid discussion and debate. It is very dispiriting.

(See Appendix C for the complete text of Mr. Thoma's letter.)

NADCP's position paper on NORA was issued via email on June 5, purporting to offer "accurate information" about NORA. However, the NADCP paper is far from "accurate." It is distorted by narrow views of drug court judges and NADCP's leadership, and contains many errors on the substance of NORA. The 25 errors documented in Appendix A tell a story in themselves of how NADCP failed to wrestle with the details of the ballot measure and state law.

History Repeats Itself

The NADCP's opposition to NORA bears a striking resemblance to drug court organizations' opposition to California's Proposition 36 in November 2000. Drug court leaders seem to believe their models are superior in every respect to Prop. 36 and NORA. Therefore, they would rather see *no legislation pass* in California than to see voters endorse a model they do not fully support, regardless of the lost opportunities.

In 2000, the choice drug court leaders saw was between drug courts, then serving about **3,000** people per year, or Prop. 36, which was projected (correctly) by the Legislative Analyst's Office (LAO) to serve **36,000** per year. The major argument advanced by drug court leaders throughout that campaign was that Prop. 36 would "cripple" or even "destroy" drug courts.

Of course, after Prop. 36 passed, drug courts did not disappear. Rather, they evolved. Upon passage of Prop. 36, the vast majority of drug court judges became champions of local implementation of the new law, while revamping their drug courts to serve somewhat more serious offenders who were not eligible for Prop. 36. A 2003 law required drug courts to serve only those offenders facing state prison time. Drug courts now serve people who don't qualify for Prop. 36 or who have failed out of the program and need more attention than the typical Prop. 36 program can offer.

In 2008, the choice again appears to be between California's drug courts as they are, which continue to serve about 3,000 adult felons per year, or a series of systemic reforms under NORA that would roughly *double* the number of people in court-supervised treatment programs, offer treatment for youth and transform our broken state prison and parole systems. Again, a few drug court leaders – this time largely from outside California – oppose further funding, expansion and

reforms in favor of a system that now provides treatment and rehabilitation to only a small portion of the people in need.

The argument, in 2000, that Prop. 36 would “destroy” drug courts was wrong then, and its analogue eight years later is wrong, too. Far from “threaten[ing] the survival and reputation” of drug courts, or “weaken[ing] California Drug Courts politically and economically,” as NADCP worries, NORA will give drug courts great opportunities to innovate, grow and prove their value with the best research possible.

The Big Issues

As we have noted, there are so many factual errors in the NADCP paper that it can be difficult to fairly rebut them. (Please see Appendix A – beginning on page 12 – for the detailed list, with explanations and citations to NORA.)

There are two central, but erroneous, themes that carry through the NADCP’s position paper:

- 1) Existing drug courts are threatened by NORA; and
- 2) NORA’s design does not allow appropriate placement of offenders or adequate monitoring and accountability.

NADCP offers little support for these arguments, but they nonetheless merit attention and rebuttal.

NORA Doubles Funding for Drug Courts

NORA doubles funding for adult felon drug courts through the measure’s Track III, and urges the use of collaborative court models for processing all nonviolent offenders in Tracks I-III. However, the NADCP paper doesn’t mention this – instead, the paper warns that funding for some specialty courts “is eliminated.” (The paper gives the examples of Juvenile Dependency Drug Courts, Juvenile Delinquency Drug Courts, Family Dependency Drug Treatment Courts and Reentry Drug Courts.) Simply put, the NADCP’s money scare is false.

As the many treatment advocates and professional organizations that endorse NORA already know, NORA does not “eliminate” any funding for the range of specialty courts mentioned here. Those funds currently come through year-by-year appropriations by the Legislature, and NORA does not change that.

In fact, NORA specifically says non-NORA programs should continue, and innovation with problem-solving courts should continue, in concert with the NORA system. (See H&S Code 11999.6(e)(1), which states that “no part” of this measure “shall be interpreted to preclude... the creation or maintenance of innovative programs providing court-supervised treatment to persons or defendants not eligible for treatment under the terms of this Act.”) The NADCP paper neglects to mention this fact.

As to “Re-entry Drug Courts,” a May 2008 paper published by the NADCP’s research affiliate, the National Drug Court Institute, says there were exactly 2 such courts in California at the end

of 2007.¹ NORA actually requires the California Department of Corrections and Rehabilitation (CDCR) to fund *five* separate pilot programs built from the “Parole Violations Intermediate Sanctions” legislation (SB 391, 2007) in *five* separate regions of the state for *five* years. That legislation calls for retired judges to apply the collaborative court model to parole violators. So, rather than eliminating Re-entry Drug Courts, NORA seeks to fund and proliferate them.

Support for the 10 Key Components

One of the state’s leading association of practitioners who work with drug courts in California, the County Alcohol and Drug Program Administrators’ Association of California (CADPAAC), believes that the NORA model requires little compromise of the founding purposes or principles of many drug courts – the 10 Key Components.

CADPAAC has compiled a list of the 10 Key Components and possible NORA impacts on each one. (See Appendix D.) According to CADPAAC, there would be no change from Prop. 5 with respect to at least eight components. There are “possible changes in procedure” to one component, “possible constraints” affecting one other.

CADPAAC notes that drug testing, one key component with no change, should be funded in Tracks I & II of NORA by existing grants, while Track III testing would be funded directly by NORA. CADPAAC also notes that, “A wider range of treatment options should become available,” due to NORA’s expansion of treatment funding, while “implementation of better data systems” would also make drug courts “better.”

Disposition and Monitoring

NORA provides that certain people are eligible for treatment within certain tracks based principally on their charged offense or offenses and criminal history, instead of making placement into treatment under Tracks I-III entirely subject to the discretion of judges and prosecutors. NORA then provides for treatment placement and monitoring consistent with each person’s background, risks and needs.

The system NORA proposes ensures appropriate monitoring for each offender based on individualized assessments, while, in a commonsense fashion, reserving the harshest consequences after termination for those with more serious criminal histories.

NADCP shows little understanding of this structure and raises several objections. The following points come from page 5 of the NADCP paper:

- “NORA bases eligibility determinations exclusively on offenders’ official criminal records and ignores their profiles of criminogenic risks and needs.”
- “drug-possession offenders must fail multiple times in low-intensity dispositions before becoming eligible for more intensive dispositions, including drug courts....”

¹ Huddleston, C. West; Marlowe, Douglas; et al, *Painting the Current Picture: A National Report Card on Drug Courts and Other Problem-Solving Court Programs in the United States*, National Drug Court Institute (May 2008), page 9 (Table 3).

- “[NORA] erects steadfast barriers against matching high-risk drug offenders to appropriate supervision.”

NADCP seriously misreads NORA in advancing these objections. The authors of the NADCP paper simply misunderstand the design and workings of Prop. 5.

There are no “steadfast barriers” to “appropriate supervision” in NORA, as NADCP claims. Quite to the contrary, a specific “criminal history evaluation” is mandated for each offender in Tracks I-III, whereby each person is evaluated for the “risk of recidivism.” Courts must use the resulting recommendations to arrange “appropriate monitoring” during court-supervised treatment. (See PC 1210 (h).)

The “criminal history evaluation” plainly does not “ignore[] their profiles of criminogenic risks and needs,” as NADCP claims – the NORA evaluation *develops such a profile* for each person and requires it to be used appropriately.

True, these evaluations do not dictate the “track” placement and cannot be used to declare an *eligible* person to be *ineligible* for a NORA treatment option. However, NADCP does not argue that people should be excluded whenever possible from a treatment option. Rather, NADCP suggests that some number of people won’t be supervised effectively.

This concern lacks merit. Consider that a person could enter NORA’s Track I, on paper the least-intensive level, but the “criminal history evaluation” might define that person as a “high-risk/high-needs” individual. The person is still eligible for Track I, but he or she could be put on a drug court supervision calendar, with all its rigors, right away, based on the criminal history evaluation. Problems during treatment and other probation violations could be monitored more closely and dealt with more swiftly than with a lower-needs offender. The defendant may be dropped from Track I more quickly than the typical Track I offender and moved up to higher-intensity dispositions. (Termination from Track I requires very minimal findings.)

This kind of flexibility in monitoring and movement through the tracks is built into NORA. Developing appropriate monitoring for each individual is the whole point of conducting a criminal history evaluation.

Put simply, NORA provides a different, but more than adequate, way of ensuring that nonviolent offenders are appropriately assessed and monitored during their treatment programs. (The process established by NORA also appears to closely track several specific recommendations for California made recently by Dr. Douglas Marlowe, NADCP’s Chief of Science, Law and Policy, and a frequent lecturer in California to drug court and Prop. 36 stakeholders. See Appendix E.)

NORA demands more sophisticated assessment tools – including tools for evaluating risk of recidivism and appropriate monitoring conditions – than are currently used in most jurisdictions, inside or outside California. If NORA becomes law, courts and counties will quickly recognize that “track” eligibility is not the primary defining factor dictating the level of supervision a person needs.

Accountability Issues

NORA holds offenders accountable with a straightforward sanctioning structure. Track I offenders can be transferred to Track II at the very first sign of trouble. In Track II, a jail sanction may be imposed for any “non-drug-related” probation violation, and “graduated sanctions” – not including jail – are to be used for the first few *drug-related* violations. This reserves the blunt instrument of jail time for the more serious cases.

Delaying jail sanctions is consistent with NADCP’s own position²:

The best available research evidence indicates that jail sanctions can be effective in improving outcomes when they are imposed quickly after an infraction has occurred, are brief in duration, do not interfere with the treatment process, and are *imposed after lesser sanctions have failed* to improve conduct. [Emphasis added.]

It is the official position of the NADCP that other kinds of sanctions should be tried before imposing jail time. NORA adopts this philosophy and limits courts’ use of jail during Track II treatment to respond to drug-related problems like missed meetings, relapse or other treatment issues. Other kinds of “graduated sanctions” are permitted for the first three drug-related violations, then jail becomes an option. For defendants in Track III, courts are free to impose jail sanctions at any time, though judges might wish to follow NADCP’s advice to hold back until “lesser sanctions have failed.”

The authors of the NADCP paper apparently missed the fact that NORA *permits* jail sanctions for drug-related violations of probation for defendants in Track II, the Prop. 36 equivalent.³ This is a major blunder that confuses every remark NADCP makes about NORA’s accountability provisions.

The truth is that jail sanctions *are* provided for in Track II for drug-related violations (see proposed PC 1210.1(j)(3)(C)(2)), starting with 48 hours, then 5 days, then 10 days per jail sanction. This is a sanctioning schedule drawn directly from legislation supported by California drug court leaders and passed in 2006. (The bill, SB 1137, which purported to amend voter-approved Proposition 36, was challenged and found invalid in court.) The same jail sanctions schedule applies for non-drug violations, though sanctions may begin upon the first violation.

The NADCP position is also undermined by another serious misrepresentation. NADCP says (p. 5) that jail sanctions may not be imposed if drugs are found to be present in the county jails. There is no such prohibition in NORA, although the presence of drugs in jails is a specific issue that the court must “consider,” along with several other required considerations drawn directly from SB 1137. [See PC 1210(m).]

² *Principles of Evidence-Based Sentencing and Other Court Dispositions for Substance Abusing Individuals* (no date), NADCP, p. 4.

³ The NADCP paper says, on page 5, that “Jail sanctions are not available in Track I and can only be imposed for *non-drug-related* violations in Track II.”

Parole Reform

Prop. 5 contains a major parole reform element that helps generate much of the measure's fiscal savings, while also providing the best hope for long-term recidivism reductions. By making rehabilitation a major priority during parole, NORA, more than any other proposal, could help reduce crime and the prison population in a lasting manner.

The prison-overcrowding crisis is reaching a boiling point in California, but the NADCP paper contains no mention of the issue. A trial is scheduled for mid-November, two weeks after the election, in which a panel of federal judges will consider whether to take over the California prison system and impose a population cap. Experts believe the cap would be set at 30,000-40,000 inmates lower than the current prison population.

As a measure of how severe the problem is, the Governor, in his January budget for FY 2008-09, proposed early release for some 22,000 prison inmates serving time for nonviolent offenses, along with no prison time in the future for any nonviolent offender sentenced to 20 months or less in state prison.

A major driver of the prison-overcrowding problem is the constant "churning" of parolees into and out of prison for minor violations of parole. Several high-level, expert commissions, including three that issued reports during the current Governor's term, have recommended major changes to California's parole system to end such "churning" for nonviolent parolees.

The Governor has promoted programs offering early discharge from parole – as soon as 6 months after release from prison – to parolees who complete rehabilitation programs. He has also proposed "summary parole" for large numbers of nonviolent parolees – a paper status with no real supervision contemplated. The state Senate, in June 2008, began work on a plan for "direct discharge" (i.e., no parole supervision at all) for essentially the same class of nonviolent former inmates. The terms of a tentative settlement in the prison-overcrowding litigation echoed all three proposals. (There was no final agreement on those terms.)

This is the context for NORA's parole reforms. Something must be done to reform California's parole system to help reduce overcrowding. NORA's parole provisions actually would be more rigorous for nonviolent parolees than the concepts offered this year by the Governor, state Senate and the parties to the prison litigation.

NADCP ignores the California context, and complains that NORA's changes to parole have no "empirical rationale." But the reality is that parole reform is imminent. NORA's proposed changes are the most conservative reforms in the mix, and the only ones that contemplate effective rehabilitation for parolees.

NADCP also worries that NORA would disrupt "Re-Entry Drug Courts." And yet, according to the National Drug Court Institute, there are now exactly two such courts in California, at a time when there are 130,000 people on parole. (There are five more "Reentry Courts.") Clearly, "Re-Entry Drug Courts" are not a cornerstone of the state's parole reform efforts. NORA, however, recognizes the potential value of the "reentry court" model, and specifically requires funding for five pilot projects using drug court judges to supervise parolees under a program authorized by the Legislature in 2007.

Turf Battles, Politics and Control

NADCP's paper does not simply advance a policy argument. The authors are preoccupied with turf battles and political tussles. Indeed, these issues may be the true root of the organization's objection to NORA.

For instance, the authors obsess on the potential harm to the "reputation" of drug courts if NORA requires judges to handle some of the most difficult offenders. They fear drug courts will be "weakened politically and economically" by NORA. And the NADCP paper complains that drug courts would fall under broader supervision by treatment stakeholders and experts.

NORA simply seeks to demand of drug courts the same research and reporting obligations required of Proposition 36 and other state-funded services. Failure to develop adequate analyses of drug courts at the national level has contributed to a dropoff in federal funding for such programs.⁴

NADCP complains that NORA "reduces the independence of drug courts," "buries drug courts within a complex administrative structure," and subjects them to control by "non-judicial personnel" through the NORA treatment oversight commission.

Specifically, NADCP worries that drug court allies don't have enough votes on the oversight commission, which NADCP fears would have "maximal representation from treatment providers and DPA's political and philosophical allies."

It would appear to be NADCP's position that the treatment providers, county administrators, defense counsel and researchers who would populate the commission – and who are wholly independent of the Drug Policy Alliance – are somehow *not* central to the workings of drug treatment courts.

Far from "weakening" drug courts, NORA would make drug courts more collaborative, more transparent and more accountable. It is curious that NADCP is evidently so fearful of this potential development.

⁴ The U.S. General Accounting Office (GAO) recently decried the lack of oversight, transparency and independent data collection and analysis of drug court programs funded by federal grants. (See United States General Accounting Office (GAO). *Drug Courts: Better DOJ Data Collection and Evaluation Efforts Needed to Measure Impact of Drug Court Programs*, April 18, 2002. Pages 18-19.) The GAO said, in part:

"Despite a significant increase in the number of drug court programs . . . that are required to collect and maintain performance and outcome data, DOJ continues to lack vital information on the overall impact of federally funded drug court programs. . . [The public] lacks sufficient information to (1) measure long-term program benefits, if any; (2) assess the impact of federally funded drug court programs on the criminal behavior of substance abuse offenders; or (3) assess whether drug court programs are an effective use of federal funds. . . As a result, DOJ cannot provide Congress, drug court stakeholders, and others with reliable information on the performance and impact of federally funded drug court programs."

Appendix A – Errors in the NADCP Position Paper

1. NORA doesn't touch funding for Juvenile, Family and Reentry Courts. NADCP claims (p. 3) that “existing funding” for a range of specialty courts that do not serve adult felons “is eliminated.” In fact, though NORA does not pay for those programs, it preserves the two grant programs that fund such programs now, and contains language specifically encouraging their continuation. (H&S Code 11999.6(e)(1).) NORA contains no provision that “eliminates” these specialty courts.

2. NORA provides jail sanctions in Track II. NADCP grossly misreads NORA on the often-central issue of jail sanctions. On p. 5, NADCP says, “Jail sanctions are not available in Track I and can only be imposed for *non-drug-related* violations in Track II.” [Italics in original; the error is repeated on p. 9.] Though jail sanctions are not, in fact, an option in Track I – from which termination is swift – NADCP is wrong about Track II. Jail sanctions for *drug-related* violations in Track II are provided at PC 1210.1(j)(3)(C)(2), several paragraphs after the provision for jail sanctions for *non-drug* violations that NADCP accurately reports. This was a major concession on the part of the drafters of NORA, but the NADCP's analysts did not see it, or simply ignored it.

3. NORA has no prohibition on jail sanctions if drugs are present in jails. NADCP misstates a “consideration” in NORA as a prohibition on jail sanctions. NADCP says flatly (p. 5) that “[j]ail sanctions may not be imposed if they would interfere with a medication regimen or if drugs are available within the jails (these exceptions are likely to be triggered frequently).” In fact, the court must “consider whether illicit drugs are available in the county's jail,” as one of several separate considerations enumerated in the definition of a “jail sanction.” [See PC 1210(m).] There is no prohibition, as NADCP states. Almost every word of the other mandatory considerations in this section comes from Senate Bill 1137, the Legislature's 2006 amendments to Prop. 36, supported by California drug court leaders, that were later ruled invalid.

4. NORA provides drug testing money. NADCP states (pp. 2, 5 and 6) that NORA prohibits “the use of funding from this initiative for drug testing.” In fact, NORA allows Track III funding to go to drug testing [see H&S Code 11999.6(a)].

5. NORA permits positive drug tests to lead to a probation violation. NADCP says (p. 5) that “[u]rine results may... not be used as the basis for a violation or entry of judgment.” This overstates the potential change in state law and the restrictions in NORA [see PC 1210.02(a)(5)]. Existing law (PC 1210.5), passed by the Legislature in 2001, requires all drug test results for probationers in treatment to be used as a “treatment tool” and stipulates that, “In evaluating a probationer's treatment program, results of any urinalysis shall be given no greater weight than other aspects of the probationer's individual treatment program.” NORA simply restates these existing restrictions, which call for drug test results to be evaluated *along with other factors* in the court's decision enter judgment or record a probation violation.

6. NORA incorporates legislative amendments to Prop. 36. The NADCP paper says (p. 3) that NORA “abrogates the (currently enjoined) amendments to Proposition 36 that would extend

court monitoring and accountability.” In fact, NADCP issued its position paper four weeks after a state Superior Court entered a final order in litigation challenging those amendments (on May 7, 2008), ruling them to be invalid under the state Constitution. NORA actually incorporates much of the voided language of the legislation (SB 1137), breathing life into an otherwise dead bill.

7. NORA is consistent with Little Hoover advice. NADCP claims (pp. 5-6) that NORA “ignores” the recommendations of the respected Little Hoover Commission regarding the need to “focus on the criminogenic risks and needs of drug offenders.” In fact, the final text of NORA was filed with state officials on Nov. 7, 2007, about *five months before* the Little Hoover Report in question (*Addressing Addiction*) was published – March 27, 2008. Little Hoover actually includes the text of NORA as an appendix, and many of its recommendations are reflected in the text and workings of Prop. 5.

8. NORA will cause little change in profiles of drug court clients. NADCP claims (p. 4) “[o]ffenders do not get to what might be defined as ‘Drug Court Proper’ until they have had *six* drug possession convictions or drug-related probation violations...” [Emphasis in original.] Here, new convictions and probation violations are conflated to create a worst-case scenario. In truth, a person could progress to Drug Court/Track III on a first offense with just one formal probation violation. An additional point: Under current California law, drug courts may only accept defendants facing state prison time. In almost all cases today, drug court clients have criminal records at least as substantial as NORA would prescribe before Track III entry.

9. NORA supports the 10 Key Components of drug courts. NADCP says that NORA “erects multiple barriers to applying the Ten Key Components of Drug Courts.” A group of leading practitioners who work with drug courts in California disagrees. The County Alcohol and Drug Program Administrators’ Association of California (CADPAAC) has compiled a list of the 10 Key Components and the possible NORA impacts on each one. (See Appendix D.) According to CADPAAC, there would be no change from Prop. 5 with respect to at least eight components. There are “possible changes in procedure” in one case, “possible constraints” on one other. CADPAAC notes that drug testing for Tracks I & II should be funded by existing grants and Track III testing funded by NORA, and that, “A wider range of treatment options should become available.”

10. NORA provides adequate funds for drug court operations. NADCP claims (p. 6) that it is “highly unlikely that sufficient funds” will be available, given the “new mandatory burdens being placed on Drug Courts by this initiative.” As this paper has noted previously, NORA’s Track III doubles the funding that drug courts currently receive for adult felon programs. There is, quite simply, *no limit* specified in NORA for Track III supervision costs. Any amount that can be shown to be necessary can be used for drug testing, probation and courts. Drug courts will have sufficient funds.

11. California drug courts not well studied. NADCP objects (p. 6) to “findings” language in NORA that says the measure would require California drug courts “for the first time to systematically report their budgets, expenditures, operations and treatment outcomes.” But NADCP does not rebut this point – in fact, the two statewide reports on drug courts so far failed to provide financial data on drug court budgets and operations, did not calculate rates of participation, dropouts or treatment completion for drug court clients, and did not even provide a

valid drug court program completion rate. NADCP's only response to this reality is to say "extensive research has been published," with absolutely no citations.

12. NORA does not limit sentencing after Track III failure. In the summary of Track III provided on p. 10, NADCP claims that the "consequences of termination" from Track III is a "Jail sentence of up to 1 year." Not true. According to NORA, in Track III: "If probation is terminated, the defendant may be sentenced without regard to any provision of this section." [See PC 1210.2(j).] A jail *or* prison sentence is available.

13. Independent analysis says Prop. 5 is a fiscal wash with long-term savings. The NADCP says several times that the "enormous taxpayer expenditures mandated by NORA are likely to far exceed any realized benefits." However, the nonpartisan Legislative Analyst, tasked by the state to determine the fiscal implications of the measure, says that NORA's annual costs would roughly equal annual savings generated in the prison and parole systems. An additional \$2.5 billion would be saved in capital outlay costs. NADCP has no basis for this claim.

14. NORA funds treatment for many different people. NADCP claims (p. 3) that NORA pays for "treatment and supervision for criminal defendants only." Not true. NORA pays for treatment for at-risk, nonviolent youth who need not be charged with any offense – they can be referred by family, school counselors or physicians. And NORA also provides treatment and rehabilitation to prisoners and parolees to reduce recidivism.

15. NORA recognizes harm reduction, but it is not on "equal footing." NADCP says that NORA provides an "endorsement, on equal footing with other treatment approaches, of harm reduction services... [which are] unproven and objectionable" (pp. 3, 8). Here NADCP is trying to scare readers into believing that abstinence-based treatment will be replaced by harm reduction services, which do not always demand abstinence.⁵ Not true. The defined range of treatment programs to which NORA offenders may be referred *does not* include harm reduction [see PC 1210(b)]. Instead, counties may provide harm-reduction services as ancillary support to clients. Harm reduction is not a required element of training for treatment providers or a substitute for substance abuse treatment. Such programs may prove to be valuable, but they are not placed on "equal footing" with "other treatment approaches," as NADCP falsely states.

16. NORA responds to the great need for parole reforms. The NADCP says there is no "empirical rationale" (p. 7) for limiting parole supervision for nonviolent offenders in the ways that NORA does. In fact, several nonpartisan, expert commissions have recommended zero or limited supervision for the same range of parolees – in part because there's little rationale for California's hybrid system of determinate sentencing with subsequent, long-term parole supervision. The "churning" of parolees in and out of prison for minor parole violations is widely seen as a driver of prison overcrowding. The Governor recently proposed "summary parole" for this group (virtually no supervision) and a state Senate committee recently approved, in concept, "direct discharge" (i.e., no parole supervision) for the same group. NORA calls for more parole supervision – with required rehabilitation – than is seen in these recent proposals.

⁵ A July 10, 2008, email of "Talking Points" from NADCP takes this argument to its logical, though fallacious, conclusion. The "Talking Points" say that NORA "requires treatment professionals and criminal justice professionals to tolerate continued drug usage by offenders if that's what the offenders set as their own personal goals." This is a preposterous interpretation of the measure's references to "harm reduction."

NADCP's assertion, in short, is refuted by experts and directly at odds with what will likely be imposed by the Legislature, the Governor or the federal court absent NORA.

17. NORA allows positive drug tests to be a parole violation. NADCP claims (p. 7) that NORA “[p]revents positive drug tests from serving as the basis for a parole violation....” This is false. Under NORA, positive drug tests would generally be treated as “technical violations” of parole, much as they are now. Under existing law (PC 3063.1), certain nonviolent parolees who violate parole with a positive drug test are to be diverted to treatment programs. NORA makes reference to that law in a new PC 3063.01 and speaks to how “further violations” of parole are to be processed, including local jail time.

18. NORA provides up to 12 months, not six months, of parole supervision for specified nonviolent offenders. The NADCP says (p. 2) that NORA would be “[c]apping the period of parole supervision for nonviolent drug and property offenses... to 6 months.” Not true. The actual limit is 12 months, as the NADCP paper later concedes, contradicting itself [see PC 3000 (c)(3) and (c)(3)(C)]. (See next item.)

19. NORA extends parole unless parolee completes treatment. NADCP claims (p. 7) that a parole can be supervised 12 months (“6 months, plus an additional 6 months”) if that parolee “refuses” treatment. Not true. The parolee will be subject to 12 months *unless* he or she *completes* rehabilitation. [See PC 3000 (c)(3)(C).]

20. NORA provides 14 days jail for technical violations. NADCP claims (p. 7) that NORA limits sanctions for “technical violations” of parole to 7 days in jail. In fact, the limit is twice that: 14 days. [See PC 3063.01(c).] Also, 30 days can be imposed for absconding.

21. NORA provides that parole can be revoked for misdemeanors. NADCP claims (p. 7) that NORA “[p]revents parole from being revoked for technical violations or new misdemeanors.” In fact, NORA states: “[W]here a misdemeanor violation has been found, parole may be revoked,” with up to 6 months in county jail as a punishment. [See PC 3063.01(d).] This period of time is equivalent to the amount of time now served in state prison facilities for similar parole violations.

22. NORA allows a range of consequences for “new offenses.” The NADCP claims (p. 7) that NORA prevents “meaningful consequences” for parolees who “commit new offenses.” Not true. NORA prescribes different sanctions depending on the severity of the offense, up to and including return to state prison. A “new offense” can also result in new charges and greater consequences in some cases. Several expert reports have argued against California’s current practice of prosecuting new crimes as parole violations, suggesting prosecution of new offenses instead.

23. Right to counsel for parolees predates NORA. As one way NORA “overhauls the parole system,” NADCP claims that NORA “[r]equires administrative due process hearings with the right to counsel for determinations of technical violations.” In fact, under the terms of a 2005 settlement in the *Valdivia* class action litigation, the state is already required to provide counsel for all parolees alleged to have violated parole; this is not new under NORA, nor could NORA lawfully change this, as the *Validivia* ruling is constitutionally compelled.

24. NORA enhances reentry drug courts. The NADCP complains (p. 8) that NORA would make “Reentry Drug Courts unworkable in California.” Such programs barely exist in

California. At this time there are two “reentry drug courts” in California, according to the National Drug Court Institute. There are about 130,000 people on parole. NORA actually requires funding of 5 pilot re-entry courts for 5 years [see PC 3063.02]. Far from making such courts unworkable, NORA could help make them a reality.

25. Jail sanctions not proved effective; NADCP has said “scant research” exists on the topic. The NADCP paper selectively quotes (p. 7) a statement from NORA’s “findings” section regarding jail sanctions, and suggests that two studies have proved jail sanctions to be effective.

NORA also states (wrongly) that the use of jail sanctions “has never been proved effective.”

The jail sanctions debate is tired in California, so we have saved this issue for last. But it is worth noting how carefully NADCP chose its words, because the paper’s authors do not actually claim there is any evidence for the efficacy of jail sanctions, even though they claim NORA’s text “wrongly” dismisses such evidence.

First, we would note that the text of NORA says in Section 3(j), in part: “The use of jail time to punish relapses and misbehavior during the treatment period has never been proved effective...” In other words, there’s no specific evidence that jail sanctions improve drug treatment outcomes.

The UCLA research team studying Prop. 36 recently wrote: “The benefits of flash incarceration are not well established.”⁶ In August 2007 testimony to the Little Hoover Commission, the NADCP’s Doug Marlowe said something similar: “scant research has addressed the utility of brief jail sanctions.”

The NADCP critique of NORA points to “two experimental studies in the District of Columbia and Hawaii [that] have demonstrated the efficacy of ‘coerced abstinence’ programs, which include jail sanctions.”

The DC and Hawaii programs covered by the studies are not drug courts, and “coerced abstinence” is not the same as treatment and recovery. In fact, not all “coerced abstinence” programs include a treatment component.

Put simply, NADCP is *changing the subject*. The fact remains: there are lots of studies of drug courts and other programs that use jail sanctions, but *no studies* that have isolated and proved the benefit of jail sanctions for improving treatment outcomes. The UCLA team and Marlowe spoke correctly, as does the language of NORA.

⁶ UCLA Integrated Substance Abuse Program, *SACPA Cost-Analysis Report (First and Second Years)*, March 13, 2006; p. 36, footnote 45.

Appendix E – Doug Marlowe and NORA

The foregoing discussion of placement, monitoring and accountability under NORA raises a larger issue. A principal author of the NADCP paper is Douglas Marlowe, NADCP’s Chief of Science, Law and Policy, and a frequent lecturer in California to drug court and Prop. 36 stakeholders.

In August 2007, in written testimony before the Little Hoover Commission, Dr. Marlowe wrote:

“[T]he rivalry between competing camps (e.g., Proposition 36 vs. drug courts) needs to stop – now. Most constituencies have a piece of the answer, but only a piece. The time has come for a *systemic* model...”

Dr. Marlowe then describes such a model as one featuring:

- Timely risk-and-needs assessments of drug offenders at the point of arrest, with results available swiftly to the court;
- “Targeting of individuals into appropriate and cost-efficient programs”;
- “Statutory provisions enabling seamless and rapid transfers of individuals from one program to another in light of demonstrative evidence of a need to alter the care plan”;
- “Careful and continuous measurement of performance and outcomes...”; and
- “Adequate funding... to support both the services and the research evaluations.”

NORA was written in the spirit Dr. Marlowe first describes, of ending the “rivalry” and creating a workable “systemic” model. The specific elements Dr. Marlowe suggests are all part of NORA. Though he now criticizes NORA, the reality is that nearly all of the NADCP’s objections could be, and would be, addressed through the implementation of NORA.

For instance, Dr. Marlowe suggests, in his testimony:

Regardless of the offense classification, evidence of high criminogenic risk should trigger additional authorizations for court-based supervision on a status calendar or noncompliance calendar, coupled with a standardized sequence of graduated sanctions and rewards.

As discussed in the body of this paper, this is achievable under NORA, regardless of the specific offense or which of the three “tracks” a drug offender is placed into. NORA requires a “criminal history evaluation” which must include an evaluation of the “risk of recidivism,” a factor closely matching Dr. Marlowe’s definition of “criminogenic risk.”⁷

⁷ According to Dr. Marlowe’s testimony to Little Hoover: “*Criminogenic risks* are those characteristics of offenders that make them more likely to relapse to drug misuse and less likely to succeed in rehabilitation, and thus more likely to recidivate. The most reliable and robust high-risk factors include an earlier onset of substance abuse (especially prior to age 14) or crime (especially prior to age 16), a younger age during rehabilitation (especially younger than 24 years old), a recidivist criminal record, previously unsuccessful attempts at rehabilitation, and a co-existing diagnosis of antisocial personality disorder.”

There are many other ways in which NORA incorporates Dr. Marlowe's specific recommendations. The reality is that no state comes close to NORA in fashioning a court-supervised treatment system that incorporates the fundamental tenets of drug courts, while rendering those courts more transparent and accountable than ever before.