led by Anita Kennedy and the Hon. Glade Roper, giving special attention to the Inouye decision. At the national conference a month later, retired judge William G. Meyer led off a presentation on constitutional issues with a summary of the Inouye case, recommending that drug court judges survey the community for secular programs and provide secular alternatives when requested (Meyer, 2008). Similarly, the 2008 conference of CAADAC, the California association of addiction counselors, hosted a well-attended panel on the Inouye case, which I had the honor to present.[4]

Those examples apart, the profession has largely remained silent. None of the national counselors' organizations has mentioned the case in its publications to date, and even the CAADAC newsletter has not mentioned it, despite this being very much a news development in the home court. The silence has been so pronounced that some critics of the profession have labeled Inouye as "the case they don't want you to know about" (Parks, 2009).

On the surface, the court's holding that 12-step programs are "religious" obviously causes discomfort for many members of 12-step groups, including those who are active in the addiction treatment profession. One observer reported that an AA meeting in Texas, a report on the Inouye case led to pandemonium.[5] It has been 12-step teaching for decades that the groups are "spiritual not religious." The fact that virtually every court that has considered the issue in the light of Establishment Clause jurisprudence[6] has decided otherwise places these believers in the uncomfortable position of wanting to have life on their terms rather than on life's terms.

However, the professional discomfort goes deeper than this largely semantic issue. To the extent that they are aware of it at all, many professionals feel that the Inouye line of cases puts them in an impossible position. They are supposed to offer clients a choice between 12-step and secular groups, but where are the secular options? The practical reality is that the 12-step organizations, with their origins in the 1930s, are readily available almost everywhere, while the secular options are much newer and less well developed. The secular organization with which I am affiliated, LifeRing, has about 50 meetings in the Northern California area, the largest concentration of non-step meetings anywhere in the US today, and perhaps in the past 75 years, but this is still tiny by comparison with the 12-step groups. Many professionals do not have secular groups on their radar screen, even where the secular groups exist.[7] Many secular groups, including the one with which I am affiliated, are happy to provide literature, speakers, and other support to treatment professionals who wish to initiate new meetings, but many professionals are unprepared to make the effort that is required on their part to provide clients with a secular option. Lists of treatment programs that run

a secular program or offer secular options exist,[8] but many professionals are unaware of them. Instead, a number of professionals wish that the Inouye line of cases would just go away, and there are those who pretend that it doesn't exist. After all, most clients of the state don't know their rights, can't find a lawyer, and would rather fake their way through the system than rock the boat, especially if bucking the system means more jail time.[9] These professionals find themselves in the ethical quandary of knowingly continuing an unlawful practice.

The Inouye case also stirs deeper emotions. There are those who feel that persons who become addicted thereby forfeit their constitutional rights. Deep and sometimes subliminal currents of stigma against the addicted person surface here. Addicted persons, especially once they get caught up in the criminal justice system, are thought to deserve whatever punishment they get, including the deprivation of legal rights and the violation of their belief systems. Some argue that the addicted person's professions of religious belief or disbelief are nothing but a smokescreen to evade treatment. The addict's only real belief, in this view, is "I believe I'll have another." The idea that the addicted person always remains a whole person — conflicted and troublesome as he or she may be — and remains a citizen and a member of the community, entitled to its basic rights and privileges, still faces vocal as well as silent opposition, not only in the larger society but within the treatment profession and in the communities of recovery.

However, there is also a growing realization within the profession that what the courts have been saying is not only good law, it's good therapy. In a comprehensive study of treatment approaches, Reid K. Hester and William R. Miller wrote that client choice is a key to successful outcomes:

"A strong and consistent finding in research on motivation is that people are most likely to undertake and persist in an action when they perceive that they have personally chosen to do so" (Hester, R.K. & Miller, W.R., 1995).

In other words, giving the client a choice between 12-step and secular options is likely to motivate the client to invest personal effort in whichever approach the client chooses. For court-ordered participants, whose inner motivation is frequently around zero, adding the element of choice is not only likely to foster more active engagement; it also removes one of the common excuses for program resistance.

Providing clients with choices also recognizes the reality that, as AA co-founder Bill Wilson put it, "The roads to recovery are many" (AA, 1944). In the words of historians William White and Ernest Kurtz, this basic understanding is still insufficiently developed in the practice of most treatment providers. They write:

"It is time that the recognition of multiple pathways and styles of recovery fully permeated the philosophies and clinical protocols of all organizations providing addiction treatment and recovery support services" (White, W. & Kurtz, E., 2005).

In short, what the courts require — the provision of choices — leading professionals have long recognized as a necessary and beneficial therapeutic practice. The Inouye court and its predecessors are only telling the profession that it must do as a matter of law what it should be doing in any event as a matter of quality treatment.

Ricky Inouye didn't live to see the outcome of his case. While the matter was pending on appeal, his desires and the unhappiness they brought him both terminated with his premature death. His son Zenn took over the case. Buddhists, of course, don't believe in heaven; but if Ricky's soul had some present consciousness, he might consider that, despite his many self-inflicted sufferings, his life was not wasted.

Martin Nicolaus, MA, JD, *an attorney, and a founder and current CEO of LifeRing Secular Recovery. He is the author of several books including Empowering Your Sober Self: The LifeRing Approach to Addiction Recovery.*

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[1] A review of the cases appears in Kerr v. Farrey, 95 F.3d 472 (7th Cir. 1996), discussed in more detail later in this article.

[2] The Supreme Court's refusal to hear a case must not be confused with affirmance of the case. Affirmance means that the law of the case becomes the law throughout the United States.

[3] "The confidential nature of AA/NA treatment makes testing efficacy difficult. There is, however, some data to suggest that the programs, as part of a larger treatment strategy, have helped many people maintain their sobriety, at least for a period of time."

[4] A copy of my PowerPoint and an amateur video are available at www.LifeRing.org

[5] Ibid.

[6] In the separate area of zoning law, far removed from the Establishment Clause, an appeals court in Pennsylvania recently ruled that AA is not "religious" for zoning purposes. Neighbors of an Alano-type club house complained of meeting attendees littering, urinating, and making noise. The owner of the club tried to argue that the meetings were religious and therefore exempt from zoning restrictions. Glenside Center Inc. v. Abington Township, March 17 2009; see http://www.aopc.org/OpPosting/Cwealth /out/886CD08_3-17-09.pdf June 29, 2009.

[7] Among the secular alternatives are:
- LifeRing Secular Recovery (www.lifering.org)
- SMART Recovery (www.smartrecovery.org)
- Women for Sobriety (http://www.womenforsobriety.org/)
- SOS (http://www. secularsobriety.org/)

[8] One such list is at http://lifering.org/treatment/index.htm

[9] See, e.g. "Court-ordered 12-step Attendance is Illegal," by Tom Horvath, Ph.D. , June 29, 2009, online at: http://www.isnare.com/?aid=338758&ca=Legal

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CHOICE OF SUPPORT GROUPS

IT'S THE LAW!

By Martin Nicolaus, MA, JD

Ricky Inouye was a conflicted young man. He was a Buddhist, a belief system that indicts desire as the root of all unhappiness. He also suffered from addiction to methamphetamine. As if to illustrate the Buddhist principle, his desire for the drug led him from one unhappiness to another.

First, police in his native Honolulu arrested him for possession and related crimes, and he was convicted. Then, prison authorities sent him to a drug treatment program based on the 12 steps. To Inouye, this meant more unhappiness. He objected that the program was "religion-based" and in conflict with his Buddhist faith. He filed suit against prison authorities, and that suit was still pending when he became eligible for parole and was released into the custody of his parole officer, Mark Nanamori. More unhappiness followed.

Nanamori knew that Inouye's first suit was pending, and he knew that Inouye was a Buddhist. Inouye's lawyer, the veteran constitutional law practitioner Walter Schoettele, wrote a letter to Nanamori, as follows:

- "Mr. Inouye is a Buddhist. As such, he objects on grounds of the Establishment and Free Exercise Clauses of the First Amendment of the United States Constitution to any state-imposed religious practice as a condition of his parole.
- Enclosed is a copy of the decision in Kerr v. Farrey, 95 F.3d 472 (7th Cir. 1996), which holds that the Alcoholics Anonymous 12-step program cannot be imposed by the state as a requirement for eligibility for parole.
- Mr. Inouye does not object to participating in a substance abuse treatment program. However, he does object to any program that has explicit religious content. This includes,but is not limited to, the recitation of prayers at meetings, whether or not Mr. Inouye is required to participate in the prayer.
- Please assure that there is no religious content in any substance abuse program that is imposed as a requirement of Mr. Inouye's parole.

Given this background, Nanamori assigned Inouye, as a condition of his parole, to participate in a treatment program run by the Salvation Army (SA). When I recounted this history to a gathering of addiction counselors in California, there was a collective gasp. The SA program not only requires attendance at meetings of Alcoholics Anonymous (AA) and/or Narcotics Anonymous (NA), but it also has a reputation as one of the more explicitly religious varieties of the 12-step gamut, encouraging each client to develop "a personal relationship with God as provided by Jesus Christ" (Salvation Army, 2009).

Inouye did as he was told, but the program clearly was not a fit. He complained that the program's focus on personal helplessness and on surrender to a deity clashed with his Buddhist beliefs, which stress personal responsibility and choice. After a couple of months, Inouye stopped attending.

Informed that Inouye was not attending the SA program, Nanamori moved to suspend Inouye's parole, and he was sent back to prison. He served almost two more years in prison, and upon his release, filed a second lawsuit (the first having meanwhile settled). He named Nanamori, county parole officials and the officer who had arrested him (Kemna) for violating his constitutional rights. His suit was based on Section 1983, a federal law that provides for monetary damages and other relief to a plaintiff who proves a violation of his or her constitutional rights.

The specific constitutional right which Inouye claimed was violated was the Establishment Clause of the First Amendment to the U.S. Constitution, which says: "Congress shall make no law respecting an establishment of religion ..." In a long and complex string of cases, the U.S. Supreme Court and lower courts have generally construed government compulsion to participate in religious exercises as a violation of the Establishment Clause.[1]

Inouye filed his suit in the federal district court in Honolulu. The defendants in the case elected not to challenge Inouye's contention that the SA program and the AA/NA support groups were "religious" in nature. They also did not contest Inouye's claim that referring him to 12-step groups as a condition of his freedom violated his constitutional rights. They rested their defense, rather, on the doctrine of "qualified immunity."

The qualified immunity defense is available to government officials acting in their official capacity in situations where the law is unclear and unsettled. Here, Nanamori and the other defendants argued that the law regarding the religious nature of the AA/NA program at the time Nanamori moved to revoke Inouye's parole (2001) was fuzzy, so that Nanamori's mistake was reasonable under the circumstances, and he should be excused.

The trial judge agreed with the defendants, and Inouye lost. However, he appealed the case to the next higher level, the Ninth Circuit Court of Appeals in San Francisco. On Sept. 7, 2007, the Ninth Circuit overruled the Honolulu court and ruled in Inouye's favor. Judge Marsha Berzon wrote the decision for a unanimous three-judge panel; the official citation is Inouye v. Kemna, 504 F.3d 705 (9th Cir. 2007).

Inouye v. Kemna

Because Nanamori and the other defendants admitted that "reverence for 'a higher power' is a substantial component of the AA/NA program," the court spent very little time on the issue of whether the AA/NA program was substantially "religious" in nature. Both sides agreed that it was.

Because Nanamori also admitted that "requiring a parolee to attend religion-based treatment programs violates the First Amendment," the court also spent little time reviewing the constitutional issue in detail. In a summary fashion, it applied a standard three-part test to determine whether Inouye's constitutional rights had been violated:

1. Has the state acted?
2. Was there coercion?
3. Was the object of the coercion religious rather than secular?

As to point one, the answer was clearly affirmative. Nanamori was a state employee acting in his official capacity. It doesn't matter that the government didn't run either the treatment program or the 12-step support groups; it is enough that it sent him there.

Coercion — point two — also was clearly present. Inouye had to participate in the 12-step groups as a condition of his parole, and was jailed when he refused.

As to point three, there was no disagreement. Both sides in the case agreed that the AA/NA program "is based in a higher power" and is "substantially based on religion."

In sum, the court wrote, Nanamori "required Inouye to attend a program rooted in religious faith and then recommended revoking his parole because he refused to participate"—and this is clearly unconstitutional. "For the government to coerce someone to participate in religious activities strikes at the core of the Establishment Clause of the First Amendment . . ."

"While we in no way denigrate the fine work of AA/NA, atten-dance in their programs may not be coerced by the state. The Hobson's choice Nanamori offered Inouye — to be imprisoned or to renounce his own religious beliefs — offends the core of Establishment Clause jurisprudence."

With those preliminaries out of the way, the court then got down to the central issue, whether the law on this point was fuzzy at the time Nanamori acted, or whether it was clear and settled, so that Nanamori reasonably should have known at the time that sending Inouye to AA/NA offended his constitutional rights. To this end, the court reviewed all the published prior decisions on this issue, and concluded:

"The vastly overwhelming weight of authority on the precise question in this case held at the time of Nanamori's actions that coercing participation in programs of this kind is uncon-stitutional."

The court's review of the prior law highlighted the following earlier opinions:

Kerr v. Farrey, 95 F.3d 472 (7th Cir. 1996). In this case, the federal Court of Appeals in Chicago held that requiring James Kerr, a prisoner in the state of Wisconsin, to attend a 12-step substance abuse counseling program on pain of being rated a higher security risk and losing eligibility for parole, violates the Establishment Clause.

In Kerr, unlike in Inouye's case, the defendants (led by Catherine Farrey, warden of the prison) denied that the NA program was religious. The court spent considerable time weighing the issue, and considered but rejected the argument that the program was "spiritual not religious," concluded:

"A straightforward reading of the twelve steps shows clearly that the steps are based on the monotheistic idea of a single God or Supreme Being. True, that God might be known as Allah to some, or YHWH to others, or the Holy Trinity to still others, but the twelve steps consistently refer to 'God, as we understood Him.' Even if we expanded the steps to include polytheistic ideals, or animistic philosophies, they are still fundamentally based on a religious concept of a Higher Power. Kerr alleged, furthermore, that the meetings were permeated with explicit religious content."

The court's reference to "polytheistic ideals" was a response to the defendants' argument that participants in 12-step programs were free to worship any God they chose, so that the group's belief system, viewed as a whole, is polytheistic. Polytheism, however, is still religion. The court's reference to "animistic philosophies" responds to the argument that 12-step participants could choose as their God an inanimate object such as a light bulb or a doorknob. The belief that inanimate objects harbor supernatural powers is central to the religion of animism, common in many indigenous and early societies (Wikipedia, 2009). Animism is another form of religion. The court, accordingly, held that compelling the prisoner to attend 12-step meetings violated his constitutional rights under the Establishment Clause.

Another leading case on the issue, on which the Inouye court relied, is Warner v. Orange Cty Dept of Probation, 115 F.3d 1068 (2nd Cir. 1997). Robert Warner, the plaintiff here, did not believe in God and objected to the prayers and other religious aspects of the AA meetings he was required to attend. Here, too, as in Kerr v. Farrey, the defendants denied that the AA program was religious in nature, and both sides introduced considerable evidence on the issue at trial. The case came up on appeal to the federal Court of Appeals for the Second Circuit in New York City.

This court, like its Chicago counterpart, had little difficulty deciding that the 12-step program was religious in nature for purposes of the Establishment Clause. It wrote:

"[T]he program Warner was required to attend involved a substantial religious component. For example, the 'Twelve Steps' included instruction that participants should 'believe that a Power greater than ourselves could restore us'; '[make] a decision to turn our will and our lives over to the care of God as we [understand] Him'; '[a]dmit[ ] to God . . . the exact nature of our wrongs'; be 'entirely ready to have God remove all these defects . . . [and] ask Him to remove our shortcomings'; and '[seek] through prayer and meditation to improve our conscious contact with God, as we [understand] Him.'"

The court found that the AA meetings Warner attended: "had a substantial religious component"; contained "religious exercises"; were "religion-infused"; were "intensely religious events"; "repeatedly turned to religion as the basis of motivation."

Moreover, the court found that Warner had no choice in the matter.

"Neither the probation recommendation, nor the court's sentence, offered Warner any choice among therapy programs. The probation department's policy, its recommendation, and its printed form all directly recommended A.A. therapy to the sentencing judge, without suggesting that the probationer might have any option to select another therapy program, free of religious content."

On this record, the court found that the county had violated Warner's constitutional rights.

The county then chose to invest its resources in an appeal to the U.S. Supreme Court. The Supreme Court, however, declined to hear the case. The Supreme Court's action, technically known as denial of the writ of certiorari, means that the Warner decision remains the law in its jurisdiction, and the law in all other jurisdictions is unaffected.[2]

In addition to the two federal circuit court cases, the Inouye panel cited a string of cases in lower federal courts and in state courts, all decided and published before Nanamori sent Inouye to the 12-step programs, and all with the same result. Moreover, the court found that "this march of unanimity has continued well past March 2001, when Nanamori acted." It cited a series of newer cases, also with the same result. Bottom line: a reasonable person in Nanamori's position should have known already in 2001 that coercing a parolee to attend AA/NA meetings was a violation of the constitution. The law on this issue was not fuzzy. It was clear and settled. Accordingly, Nanamori did not have "qualified immunity."

In the relatively short period since the publication of the Inouye v. Kemna decision, there have been further court rulings on the issue. Most noteworthy is Hanas v. Inter-City Christian Outreach, in which the manager of a Drug Court was found liable for coercing a Catholic client to attend a faith-based program run by Pentecostal Protestants, and Americans United v. Prison Fellowship, in which the federal Eighth Circuit Court of Appeals in St. Louis, Missouri, found that state funding of a faith-based prison treatment program violates the Establishment Clause.

To date, there are many states where the religious nature of AA/NA has been settled, and states where the issue has not (yet) been decided.

The Ninth Circuit Court of Appeals in San Francisco has a reputation as an innovator, particularly in civil liberties issues. But in Inouye v. Kemna, the Ninth Circuit's decision in merely fell in step behind the moderate Second Circuit in New York — whose decision has been left untouched by the Supreme Court for more than ten years — and the traditionally conservative Seventh Circuit in Chicago.

The Inouye decision did not break new legal ground on the issue of whether 12-step programs are religious for purposes of the Establishment Clause. Its power flows precisely from its "me, too" quality — by adding its voice to those of others, the decision adds momentum to the "march of unanimity" on this issue.

Implications for referrals

Before discussing what these decisions mean, it's useful to understand what they don't mean.

Neither the Inouye court nor the prior cases say that AA is a "religion." The Inouye decision specifically observes:

"We do not hold that AA/NA is itself a religion. We hold only that … the AA/NA program involved here has such substantial religious components that governmentally compelled participation in it violated the Establishment Clause."

In other words, "religiousness" for purposes of the Establishment Clause is a matter of degrees. Merely token religious expression (akin to the phrase "In God We Trust" on the currency) may be too trivial to trigger the prohibition. Defining where the bar lies is a matter for case-by-case deliberation. In any event, the courts have consistently found that the number of "religious components" in the AA/NA approach is not merely token or trivial, but is substantial; and that is enough to offend the Constitution.

This line of decisions also does not mean that referral to AA/NA is forbidden. On the contrary, the court cites AA/NA for "fine work," and nothing suggests that referral to these organizations should cease[3].

The Inouye decision also does not mean that professionals should wait until a suit is filed before complying with the constitutional mandate. On the contrary, the thrust of the decision is that Nanamori — as a reasonable professional — should have known that compelled referral to 12-step groups was unconstitutional before Inouye filed his suit.

It's also important to understand that this line of cases does not apply to all treatment professionals. The rule of Inouye and its precedents applies only to persons who are "state actors," a legal term with parameters that are still evolving. Clearly, criminal justice officials at all levels are state actors. Counselors in government agencies other than the criminal justice system, but where governmental coercion of some kind is involved, appear highly vulnerable to the rule of these cases. One thinks of institutions like state bar associations, state medical review boards, state nursing boards, and similar agencies that can and frequently do condition retention of state-issued licenses on participation in 12-step treatment programs and support groups. Employees of private programs operated with substantial government funding and with government oversight, as in the Americans United v. Prison Fellowship case, are also liable to fall within the "state actor" definition. By contrast, professionals in private practice without government funding are not affected; but, of course, these professionals may have little coercive power in any event.

The essence of the Inouye line of cases is that the referring professional must offer the client a choice. What the Establishment Clause forbids is referral combined with coercion. As the court put it:

"The Hobson's choice Nanamori offered Inouye — to be imprisoned or to renounce his own religious beliefs — offends the core of Establishment Clause jurisprudence."

In other words, it isn't religion that offends, it's coerced religion. Similarly, in the Warner case, the court wrote:

"Neither the probation recommendation, nor the court's sentence, offered Warner any choice among therapy programs … Had Warner been offered a reasonable choice of therapy providers, so that he was not compelled by the state's judicial power to enter a religious program, the considerations would be altogether different."

Similarly, the Kerr decision hinged on the fact that "[t]he only choice available to Kerr was the NA program." In one widely cited case, where a secular support group option was available, no constitutional violation was found. O'Connor v. California, 855 F.Supp. 303 (C.D.Cal.1994).

The bottom line message from the courts is this: If you are a state actor, and if you require clients to attend treatment or support groups (or else!), then you must offer not only 12-step but also a secular alternative. Or you and your agency may be sued for monetary damages and attorney fees.

Reaction to Inouye

Among drug treatment professionals who work within the target area of the Inouye line of cases, the Drug Court professionals stand out for their recognition of the Inouye decision and its implications. At their annual California conference in April 2008, participants had a panel discussion