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BEST PRACTICES

Breaking with Tradition

Introducing Problem Solving in Conventional Courts

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Introducing Problem Solving in Conventional Courts

Introduction

With more than 2,000 problem-solving courts in the United States, the problem-solving movement has been described in the first book on the subject as being on “the brink of achieving real and lasting change within the judiciary.”

Although their influence is growing, problem-solving courts—such as drug courts, community courts, and domestic violence courts—still impact only a portion of the millions of cases that pass through state court systems each year. As a result, some advocates have begun to explore other ways—apart from establishing more problem-solving courts—to apply the lessons learned since the first models emerged in the 1980s.

This paper, which is geared toward practitioners, describes how this might work. The paper discusses why problem solving is desirable, which practices and principles appear to be easiest to transfer to conventional courtrooms, and strategies for changing the culture of a conventional courtroom gradually, maybe even one case at a time.

Problem-Solving Principles and Practices

Problem-solving courts seek to address the problems—like drug addiction and family violence—that bring people to court. In doing so, problem-solving courts do more than simply process cases but try to improve conditions for victims, offenders and society at large.

Studies have shown that problem-solving models reduce recidivism, improve neighborhood quality of life and lower system-wide costs. Some researchers have now begun exploring exactly which components of problem solving are the most important. Is it regular judicial monitoring? Is it treatment as an alternative to incarceration? By identifying key ingredients, researchers are opening the door to the dissemination of principles and practices broadly throughout conventional courts.

Based on focus group discussions with judges in 2003 who had worked in problem-solving courts, researchers at the Center for Court Innovation—working in partnership with the Judicial Council of California—identified five principles that could be most easily transferred to conventional courtroom settings:

- proactive, problem-solving orientation of the judge;
- integration of social services;
- team-based, non-adversarial approach;
- interaction with the defendant/litigant; and
- ongoing judicial supervision.

Many focus group participants acknowledged the benefits of problem solving, noting that since problem-solving courts “have proven themselves effective, the integration of their methods into other court settings should be regarded simply as the dissemination of best practices.”

In addition, participants in later focus groups involving attorneys, other court staff and social service providers identified particular stages of the criminal justice process when problem solving might be most appropriate—specifically during bail hearings, plea bargaining and sentencing. (The two studies based on the focus group research are hereafter referred to collectively as the “transferability study.”)

All focus group participants agreed that problem solving had no place during trial, when adversarialism—not collaboration—drives the action. Participants also said problem solving is appropriate only “when defendants have underlying problems that contribute to the criminal behavior and can be addressed by court intervention.”

Not every element of problem solving receives consistent support, either among focus group participants or those interviewed for this report. The idea of engaging the community—to identify neighborhood problems, set goals, create work service programs, educate stakeholders and build public confidence—makes some judges nervous. They worry, among other things, that interacting with the community might make them appear biased. Some prosecutors are wary of social services that appeared to be “soft” on crime. And some defense attorneys don’t want judges speaking directly to offenders. “There are those judges who ‘get it’ and can be incredibly effective when speaking with certain clients. But then there are those judges who can be disastrous,” said Robin Steinberg, executive director of The Bronx Defenders, which represents indigent clients.

For some supporters of problem solving, resistance by other courtroom players can be frustrating. Uriel Neto, a community prosecutor with the State Attorney’s Office in Palm Beach County, Fla., once negotiated with a defense attorney a creative plea agreement for a drug-addicted prostitute with a long criminal record. The sentence involved short-term jail followed by drug rehabilitation. But the judge said, “Why are you wasting my time? Time served!” Neto recalled. The public defender “had found a [rehabilitation] program that was acceptable to me that served the needs of the community [and the client]... but the judge felt, ‘Oh. It’s just another number.’... A lot of the traditional judges think of it as a process, ... a numbers game,” Neto said.

Judges

Judicial attitudes toward problem solving are mixed. Some, especially those who have worked in problem-solving courts, embrace the concept. For instance, 96 percent of 217 judges surveyed who presided over problem-solving courts reported being “very satisfied (70 percent) or “satisfied” (26 percent) with their experiences.

Others, however, think differently. Some, for example, think of the judge as someone who decides cases, not solves problems. “Generally, a judge will say ‘I’m not a social worker,’ or ‘I’m not a psychologist,” said Fred Bonner, presiding judge of the Seattle Municipal Court and a supporter of problem solving. A related issue—reflect-

ed in the transferability study—is a philosophical preference many judges have for punishment over rehabilitation. A further concern is that even judges receptive to problem solving “are discouraged from attempting to practice it by their lack of experience in a specialized court that would teach them the necessary skills,” according to the authors of the transferability study.

In the transferability study, judges “repeatedly invoked their experience in a specialized problem-solving court as critical in helping them find productive ways to apply problem solving elsewhere. This in turn raises the question of how to ensure that more judges receive such court experience and how the relevant skills might be imparted to judges who are without experience in problem-solving courts.”

In order for a judge to agree to a non-traditional sentence, prosecutors, defenders and court administrators must address the judge’s key concerns, including issues like public safety and proportionate punishment. In other words, a sentence should minimize risks to the public and be proportionate to the crime. In addition, if there’s an individual victim involved, the judge may want to be assured that the victim is comfortable with the sentence.

Cost is a further concern—one that can often support a prosecutor or defense attorney who is advocating an alternative sentence. That’s because alternative sanctions often cost less than jail. In addition, procedures that speed up decision-making also enhance savings. Staff at the Alternative Sentencing and Mitigation Institute in Fulton County, Ga., sometimes draw up a cost-benefit analysis to persuade a judge that an alternative sentence is a practical choice. Factors in the analysis often include the cost of jail versus the cost of drug treatment, plus the savings to the community that accrues when a rehabilitated offender gets a job, pays taxes, supports his or her children and makes other financial contributions to society.

“You can say it [an alternative sentence] is the right thing to do, but no one cares,” said the institute’s executive director, Susan Wardell. “What they care about is that jails are overcrowded, taxes are too high, and they want to save resources.”

Judges are also understandably concerned about efficiency. Typically overburdened, they are more likely to accept a non-traditional alternative if it doesn’t increase the workload or lengthen case-processing time. “The biggest obstacle from the perspective of a judge or court administrator is time. They have ridiculously huge dockets and people say, ‘Just bring someone back to see how they’re doing,’ but there isn’t always time to do that,” said Pam Casey, principal court research consultant at the National Center for State Courts.

Anne Swern, counsel to Brooklyn District Attorney Charles J. Hynes, said judges have an easier time buying into a non-traditional approach when you “let them know you have the tools to do it” yourself. D.A. Hynes, for instance, established Treatment Alternatives for Dually Diagnosed Defendants, which works with offenders with serious mental illness, many of whom also have substance-abuse problems. Defendants who meet program criteria plead guilty and are placed in treatment—16-24 months for predicate felons, less time for those facing misdemeanor charges. Because a non-profit partner agency handles the clinical assessment, placement, and monitoring,

the program doesn't place additional burdens on Brooklyn's already overburdened judges.

When the Probation Department in Indianapolis developed its new comprehensive community work service program, it made the program more appealing to judges by allowing them to schedule offenders via computer from the bench. "We knew it wouldn't be enough to say [to judges], 'We're going to add three more work crews and the community had bought into the program,'" said Mark D. Stoner, supervising judge for the county's Adult Probation Services. "We had to use our existing computer resources so that each individual judge could sentence someone to community work service right from their courtroom and be able to tell them exactly when and where they'll do it."

Defense Attorneys

It's not just judges who need to be convinced of the merits of problem solving. Like judges, traditional prosecutors and defense attorneys are also often skeptical of or unfamiliar with the concept.

Many public defenders feel that exploring alternative sentences—like drug treatment—falls outside their responsibilities. As a group of defense attorneys wrote for the Executive Session on Public Defense at Harvard University's School of Government at Harvard:

The ordinary assumption is that the wish of the client will be to maximize his liberty. It naturally turns out, then, that most public defenders think of their work as being devoted to maximizing the liberty interests of their clients. And that is what they most comfortably do.

A general aversion to problem solving was echoed by a defense attorney who participated in the transferability study: "This is not what [defense attorneys'] got into it for. They are there to protect the client's rights. They run the motions and try cases. The head of my office is very supportive of collaborative [problem-solving] courts, but in their place. The rest of the office... [believes in] fighting the fight."

Some public defenders' lack of interest in problem solving is compounded by the fact that most are overwhelmed. Indigent defense is often under-funded, caseloads are usually extremely high and training is often minimal.

"Public defenders are ... focused on legal defense," said Cait Clarke, a former public defender who previously served as director of the National Defender Leadership Institute at the National Legal Aid and Defender Association. "Their role definition is narrowed by the sheer volume of cases. It's wonderful to say 'You should look into this program for your client,' ... [but] a lot of times they're just saying 'Should I plead this or take it to trial?' and they can't get beyond traditional lawyering skills."

Added David J. Carroll, director of research and evaluations at the National Legal Aid and Defender Association: "Indigent defense in this country is in total crisis. Because of that it's very difficult for defenders to get the county or state to give them the resources they need to do what they're supposed to be doing in terms of defender

services let alone be innovative. When we talk about places that have been innovative it's almost exclusively those places that are well funded and administered."

When public defenders do have the time to listen, however, they often realize that obtaining the least restrictive sentence is not always their client's priority. "Client voices often go unheard in the criminal justice system. The court system is built to process the criminal case at hand, and not to respond to the broader needs and concerns of clients or even of their communities," said Robin Steinberg, of The Bronx Defenders. "But if a defender or even a judge really sits down and listens to the stories of clients—listens to how an arrest affects their grandmother's right to live in public housing or affects their ability to remain in this country—then they would have no choice but to opt for resolutions that are outside the traditional."

Offices that have been able to innovate often pursue problem solving under the banner of "community" or "holistic" defense. Clarke describes holistic defense as "the notion that we look at all the problems facing our clients, not just the Fourth Amendment search," Clarke said.

Bennett Brummer, the Miami-Dade public defender, for example, has created the Anti-Violence Initiative, which includes among its goals:

- case disposition that will benefit clients and their families rather than simply processing clients through the juvenile and criminal justice systems;
- creation of sentencing alternatives to incarceration that would, because of their effectiveness, be attractive to judges and prosecutors.

Clarke says offices like Brummer's are "supporting the legal role not replacing it." Defenders in such offices remain vigorous advocates for their clients, but they also have the support of social workers and investigators who help them gather more information about their clients that will give attorneys "more leverage at trial, plea and sentencing," Clarke said.

Clarke suggested different strategies for encouraging defenders to become more problem solving, including training both supervisors and front-line staff in problem-solving principles, developing law school curricula and legal clinics that teach problem solving, and encouraging defense lawyers with experience in problem-solving settings to be the "storytellers"—educating their peers at trainings, in articles and through informal word-of-mouth.

Clarke and other advocates of community defense say that public defenders are uniquely situated to be problem solvers. "Defense lawyers know their clients and their communities. We're talking to family members and witnesses. We can identify resources in the community," Clarke said.

Ultimately, however, for problem solving to appeal to defense attorneys, it must produce a result that is fair to the defendant. "It won't work if they [defendants] are going to get slammed harder. That's where a lot of defense lawyers are upset over problem solving," Clarke said.

Prosecutors

Prosecutors, like judges, have been known to object to what they see as “social work” in problem solving. Said a prosecutor in one of the transferability focus groups: “A prosecutor’s job has more to do with the security and safety of society... [than] the well-being of the client... When we’re looking at a problem, we’re not looking at, ‘Hey, what’s good for this guy?’ We’re looking at, ‘Hey, what’s good for the safety of the community?’”

Most prosecutors’ attitudes toward problem solving are shaped by their bosses’ attitudes. “Prosecutors believe that they are paid to put forth the state’s position, and if the state’s position is dictated by an office that sees itself as very traditional, then it will be left to the defense attorney to pitch the new ideas,” said Wayne Pearson, a prosecutor in Multnomah County, Oregon.

Still some prosecutors are adherents of problem solving, especially those in offices that have launched “community prosecution” programs over the last 15 years. Community prosecution encourages prosecutors to build collaborative relationships with stakeholders and apply problem-solving strategies toward safety issues.

In Marion County, Indiana, for example, the Prosecutor’s Office created the Red Zone Program, which offers those facing a first-time charge of soliciting a prostitute a chance to avoid a conviction by participating in a full Saturday of activities, including a syphilis test, listening to a Health Department presentation about sexually transmitted diseases, participating in a neighborhood impact panel during which area residents talk about the effects prostitution has on their community, and performing community service.

The program is in some ways ideal because it appeals to both defense attorneys (because it allows offenders to avoid a conviction) and prosecutors (because it requires that offenders “pay back” the neighborhood). The program also creates an incentive to reduce recidivism by requiring offenders to stay out of trouble for two years or risk having the original charge reinstated.

Deputy Prosecutor Michelle Waymire, chief of the Marion County Community Prosecution Unit, said prosecutors who focus exclusively on punishment risk missing a larger problem: repeat offending. “When the Red Zone Program was created it was because we wanted to change these defendants’ behavior. That’s what you really want to instill in a traditional prosecutor; you want them to start thinking about impacting this person’s behavior in low-level cases so that they’re not back in front of us again,” she said.

Pearson said that for him to adopt a problem-solving outlook, he needed to focus on the big picture. “I had to shift my focus. It was no longer “the” case and “the” sentence; it was a bigger picture of a problem that had to be solved... Part of my brain was saying, ‘Let’s get this guy deported’ and the other side saying ‘That’s not going to solve the problem for the community. You can’t seek traditional punishment and also solve the problem, but unfortunately, most prosecutors have this generic cookie-cutter idea of a sanction and don’t take into consideration problem solving.’”

Court Administrators

Nationally, court administrators have expressed support for problem solving. The Conference of State Court Administrators has called upon court administrators to “encourage, where appropriate, the broad integration over the next decade of the principles and methods employed in the problem-solving courts into the administration of justice to improve court processes and outcomes.”

On a local level, however, support for problem-solving practices among court managers and clerks varies. “Sometimes local court managers can pose a hurdle,” said Utah’s State Court Administrator Dan Becker.

Administrators’ concerns often focus on resources. Problem solving—especially in the form of full-fledged courts—is often perceived as a significant drain on overburdened court staffs’ time and energy. In order to earn the support of clerks and court managers, therefore, advocates of problem solving need to demonstrate either that new resources are available to support programming or that current resources can, without undue hardship, be re-directed.

One way to get administrators on board is to invite them into the planning process from the get go. “Court managers have to be involved at the outset. The problems arise when discussion take place among the judges and others and it’s presented to the court managers as a *fait accompli*. That’s when you get resistance,” Becker said. “Court managers need to understand what collaboration means and to be part of the process from the beginning. That way, they’re more likely to buy in and understand it.”

Utah’s Judicial Council has tried to institutionalize court managers’ roles in the planning process by promulgating a new rule of judicial administration governing the creation of problem-solving courts. The new rule spells out clearly who needs to be involved in the planning process of any new court and who needs to sign off on it. Under the rule, court managers are key players.

It’s impossible to imagine applying problem-solving practices without the support of court managers. “Only the court manager and presiding judge have a system-wide view. But where the presiding judge may have the vision and leadership for moving the system forward, the court manager is the implementer and has his or her hands on all the infrastructure components that will be affected. They can help make sure the infrastructure is provided for any new effort,” said Pam Casey, of the National Center for State Courts.

Added Brian Wynne, chief court clerk in Brooklyn, N.Y.: “You need court administrators involved because they generally have the best perspective on how the court operates and the devil is often in the details.”

Several participants in the transferability study felt strongly that having case management and treatment resources available in the courthouse would be invaluable. In most cases, the responsibility for finding the resources to hire, train and house new staff to perform these services would inevitably fall largely to court managers.

In Seattle, court administrators played an essential role in the development of the new criminal courthouse, which includes as a centerpiece a comprehensive resource center for offenders. “The resource center provides help from food stamps to drug

referrals, housing and social services,” said Robert Hood, chief of the Public and Community Safety Division in the Seattle City Attorney’s Office. “The vision was ‘Let’s figure out a way to get the services in the court itself so that defendants could take advantage of it in a one-stop shop.’”

As with prosecutors, defense attorneys and judges, it helps to get buy in from the top. Statewide administrators can influence thinking locally by developing trainings on problem solving and using their bully pulpit to encourage change. When the message comes from the top, it helps court managers begin to see problem solving not merely as a discreet project but as a fundamental shift in how business is to be done.

“I think that over time, we want to get court managers to understand that this is really the way we want to do business,” Becker said. “For a long time, these were regarded as individual projects. But ‘project’ suggests a beginning and an end. We need to think about not just individual projects but also how to improve the way we handle all cases driven by underlying problems like drug addiction or mental illness.”

Fostering a Problem-Solving Environment

Once explained, the advantages of problem solving are often self evident. Collecting more information about offenders, for example, is a principle of problem solving that appeals to everyone: judges, defense attorneys and prosecutors. More information allows the court to craft a more appropriate response.

And problem solving doesn’t necessarily require tremendous effort. A few extra questions on a pre-trial questionnaire can help determine whether a defendant needs drug treatment or mental health services. Even a small tweak can make a community service sentence more problem solving, Waymire pointed out. For instance, she said, a traditional prosecutor might readily accept community service as a sentence for a graffiti offense but could make the punishment more problem-solving—and restorative—simply by requiring that the service be done in the neighborhood where the offense was committed.

There are numerous ways to foster a courtroom environment conducive to problem solving. Here are some possible strategies:

Provide training in problem solving

Court systems, defenders’ offices and prosecutors’ offices interested in promoting problem solving can use trainings to spread the word.

The New York State Unified Court System, for example, offered in 2005 a continuing education program on problem solving to 22 judges from around the state. The training, “Applying Problem-Solving Techniques Outside Problem-Solving Courts,” explored problem solving through panels, lectures and small-group discussions of hypothetical cases.

The U.S. Attorney’s Office in Washington D.C. coordinated a program for Superior Court judges to educate them about crime problems in the community. According to Assistant U.S. Attorney Andy Lopez, one of the messages to the judges was: “You’re not going to get a lot of [impact statements from the community], but when you do get them, they’re going to be about spots that are chronic problems.”

State courts in Utah have sponsored two-to-three hour workshops for clerks and court managers on the topic of problem solving. Although voluntary, the workshops have been “well attended,” according to State Court Administrator Dan Becker. In addition, the state court system encourages the inclusion of clerks and managers in teams that participate in statewide problem-solving court trainings.

There are also informal training opportunities, including:

Brown bag lunches, at which practitioners hear from speakers on specialized topics. Judges, prosecutors or defense attorneys interested in problem solving can arrange for an expert—such as a staff member of a problem-solving court—to speak to colleagues at such a gathering. For example, given the prevalence of drug use, many criminal justice officials might be interested to hear from a drug court practitioner about pharmacology and how different drugs affect functioning.

Experts in the courtroom, who can educate judges and other courtroom players about particular issues or services. For instance, Lea Fields, a prosecutor in San Diego, brought a police officer who works in the Serial Inebriate Program before a judge to explain how the program works. “The judge didn’t know about the program, and it was really... helpful,” Fields said. “Plus [the officer] was in uniform so it really gave a lot of credence to the program.” Defense attorneys sometimes bring social workers into the courtroom to provide non-legal information about an offender’s situation. Fulton County Conflict Defender (a state- and county-funded non-profit agency that provides indigent defense in Fulton County, Ga.) started the Alternative Sentencing and Mitigation Institute. The institute sends social workers to make oral presentations in court or chambers. In this way, the social workers not only supply background information on individual cases but, over time, educate judges, prosecutors and defense attorneys about social services, drug addiction, mental health, domestic violence and a host of issues that can have an impact on alternative sentencing.

Program names, which can educate on an almost unconscious level. Assistant State Attorney Uriel Neto said his community prosecution unit in Delray Beach, Fla., uses the acronym COMBAT (Community-based Anti-Crime Task Force) to indicate to anyone in the courtroom that the unit is special and to train the judge to associate with the name COMBAT a non-traditional approach. “When I announce my name on the record, ‘Uriel Neto from the community-based COMBAT unit,’ it gets the judge’s attention. It makes the judge think for a second, ‘Oh, this is not one of the normal prosecutors in my division.’”

Let the community speak for itself

Problem-solving strategies often focus on low-level non-violent offending, which overburdened court systems have a tendency to de-emphasize in favor of felonies and violent crime.

A good strategy for educating judges, defense attorneys and prosecutors about the impact of misdemeanors on the community is to let the community speak for itself.

“Nothing is more effective ... than having the judges learn directly from the community,” said Judge Ann O’Regan Keary, the presiding judge at Washington D.C.’s East of the River Community Court. The Criminal Division of the D.C. Superior Court, in fact, invited community representatives from different constituencies to address judges about the issues that concerned them. Among the things the judges in Washington D.C. learned was the extent to which the public held judges responsible for problems.

“One of the comments ... was that when they [members of the public] go to community meetings and judges aren’t there, then ... the blame gets shifted to [the judges]. It was an eye-opener for us, that we ought to be a little bit more responsive and out there,” Keary said. “You get really compelling pictures of what quality-of-life offenses are doing to the neighborhoods when you listen to these law-abiding citizens, many of whom are elderly or raising children themselves and are telling you about the day-to-day impact on their lives.”

Diana Burleson, director of the Marion County (Ind.) Justice Agency, said that as a traditional prosecutor she was persuaded to adopt problem-solving principles after hearing from ordinary citizens. “I was always too busy and had too much to do, but once I started going to community meetings and hearing about the impact of low-level crime, and the more I saw the same offenders again and again, I realized that something had to be done differently. If you got prosecutors out to the community more, it would change their focus a bit,” she said.

Community prosecutors in St. Paul, Minn., received approval from the chief judge to organize two judicial forums. The idea came from community members who expressed an interest in meeting judges, and the forums were structured so that the invitation to participate came from the community. “We partnered with community-based organizations because we ... wanted the community to drive the concept,” according to Laura Pietan, a deputy city attorney. The forums were held “in the most hardcore heavy-duty crime-ridden neighborhoods” and included bus tours of neighborhood hot spots and a discussion, moderated by a community member, at which stakeholders were able to ask the judges questions, Pietan said. A total of 17 judges participated in the two forums.

Some judges feel uncomfortable interacting directly with the community. In such cases, court administrators can serve as a liaison between the courthouse and the larger community. “Even judges sympathetic to problem solving sometimes feel that they are ethically constrained from interacting with service providers or other stakeholders. That’s where court manager can be a big help; they can reach out to commu-

nity members and service providers,” said Pam Casey, of the National Center for State Courts.

Some prosecutors have organized “Courtroom Watch” programs to bring stakeholder voices into the courthouse. “Some judges don’t like them at all; some judges love them,” said Neto, the community prosecutor from Delray Beach. Neto has invited people from Northwood Neighborhood Watch to court to emphasize to the judge the community’s interest in particular cases. Watch members wear buttons that glow in the dark. “It’s yellow and you can’t miss it,” Neto said.

At sentencing, prosecutors have been known to invite community members to address the bench, although in such situations it is best if only a representative sample speak, according to prosecutors who have tried this strategy. Also, stakeholders should not level unsubstantiated accusations about the defendant (for instance, about other crimes he is rumored to have committed) but rather speak about the case at hand or about general crime problems in the community. Judge Keary advised that prosecutors should also alert judges in advance if they’re going to invite the community to speak. Lengthy statements that clog a judge’s schedule can backfire. “You end up shooting yourself in the foot accidentally because the judge hasn’t been able to plan for it,” Keary said.

Stakeholders who attend court are not always looking for harsh sentences. Rather, they seek the most effective one, said Libby Milliken, a deputy prosecutor in Indianapolis. Milliken said in non-violent cases, stakeholders in court aren’t pressing for jail but rather a sentence that will get the offender to stop his or her behavior. She has heard stakeholders say things to the judge like, “ ‘We want you to do whatever it’s going to take to make them stop. If treatment will make them stop, we want them to get treatment.’ ... Their statements were usually very compassionate. ... Often they talk to the offender directly and say, ‘When you get your life together, we want you to come back.’”

Regardless of whether community members are in a compassionate or punitive mood, prosecutors need to give defense counsel access to all community statements and advance warning to prepare a response.

Defense attorneys also bring community voices to court, although less frequently than prosecutors. The Bronx Defenders sometimes collects letters of support from both individuals and organizations on behalf of defendants in an effort to mitigate sentences and pleas. Defense attorneys—especially holistic practitioners—also engage the public to shape their own programs and policies. The Community Law Office in Knoxville, Tenn., for instance, offers extensive services for both defendants and the public, including tutoring, vocational training, job placement, life-skills training, stress management classes and leisure activities. The Bronx Defenders conducts “customer” satisfaction surveys and periodic needs assessments to measure public attitudes toward the criminal justice system and evaluate its services.

Collect useful information

Everyone in the courtroom needs information in order to make smart sentencing decisions. In problem-solving courts, defendants are usually assessed at the outset, which often speeds decision making.

“What I love about problem-solving courts and what makes them ideal in these situations is that in a problem-solving court, the first question of a defendant is how did I get here and why am I here—was drug addiction or failure to go to school involved?” said Anne Swern, counsel to Brooklyn District Attorney Charles J. Hynes. “In a problem-solving court, the colloquy changes between the defense attorney and client, the defense attorney and D.A. and defendant and the judge. If there’s a solution to prevent the person coming back to court, they work together to find it.”

The challenge in a traditional courtroom is finding a way to gather key information as early in the process as possible. What kind of information is needed and what’s the best way to obtain it? Different jurisdictions have different answers.

In Indianapolis, the county jail population must comply with a federally mandated cap on its population. As a result, the criminal court issued thousands of emergency release orders in 2005 alone. Unfortunately, judges lacked sufficient information to distinguish low- from high-risk prisoners or establish appropriate conditions of release. In response, criminal justice policymakers in Marion County studied intake procedures and found that various agencies used different forms to collect overlapping information. Administrators created a unified evaluation system that collects more comprehensive information at the outset and is shared with appropriate agencies along the way.

The benefits are many. The new data collection system allows judges to make better decisions about whom to release; helps judges, prosecutors and defense attorneys customize release conditions; saves money by avoiding duplication of effort; and prevents offenders from gaming the system by, for instance, saying one thing during a bail interview and a contradictory thing during a probation interview. The new evaluation tool “allows us to make good decisions upfront on who gets released and to consistently monitor an offender as they go through the system,” said Judge Mark D. Stoner, of Marion County.

Similarly, the Fulton County Criminal Court, to identify offenders with mental illness, enhanced the questionnaire used by pre-trial staff. The new questionnaire allows them to better identify offenders who may not be competent to stand trial and match all offenders to appropriate services. The information also helps social workers and defense attorneys present a fuller picture of the offender to the judge. “The goal is to bring the person into the courtroom in 3D,” said Wardell, of the Alternative Sentencing and Mitigation Institute.

And when courtroom players seek additional information, Wardell’s team of social workers is happy to oblige. “Maybe they need psych records, or school records—whatever they need, we get. You need an evaluation, we’ll get the evaluation. You need us to drive to Lexington, Kentucky, and get the info on the person who really did it, fine.”

Some public defenders are less willing to share information. Mark Stephens, the elected public defender of Knox County, Tenn., has launched a number of social service programs in his Community Law Office in Knoxville but declines to report failures to court. When someone does well, however, Stephens and his staff assure judges and prosecutors that “you’re going to hear about it.”

Make new resources available

It’s sometimes preferable that information about an offender comes from a neutral source, and yet often data is just as reliable when collected by staff in a prosecutor’s or defender’s office. Swern doesn’t question the validity of assessments performed by social workers working for defense counsel. “We have so much volume in Brooklyn that it’s silly for me to question that assessment, at least in misdemeanor and non-violent cases. If it’s a crime of violence or felony, however, the best assessment is an objective assessment.”

Of course, not every prosecutor’s or defender’s office can afford to hire their own social workers to perform assessments or monitor compliance. Some offices link with other organizations who provide those services. Others have partnered with social work schools. Connecticut Public Defender Services, for example, started with an intern from a social work school and today has 40 social workers on staff to cover 39 field offices throughout the state. The Alternative Sentencing and Mitigation Institute in Atlanta bolsters its team of full-time social workers with three or four interns from local social work schools.

Public Defender Mark Stephens’ Community Law Office in Knox County, Tenn., received money from the county to build a new facility that is both a law office and community center. He raised money through government and private grants to hire social workers, a vocational counselor and an education counselor. The challenge now, he said, is to sustain innovative programming as grants expire.

Provide viable alternatives to traditional approaches

Judges can’t issue alternative sentences if alternative sanctions don’t exist. Therefore, court systems, prosecutors and defenders need to work together to identify sanctions or create new ones.

The Fulton County Conflict Defender office identified mentally ill misdemeanor offenders who were not competent to stand trial; nonetheless, they were being processed as if they were competent and often convicted. The office proposed a solution: if the court would supply a magistrate judge once a week, the defender office would supply a social worker. The result was a treatment diversion calendar in misdemeanor court at which a social worker identifies potential clients at intake, offers them a structured treatment program in lieu of a conviction and supervises their compliance for up to six months. Even though case management is “very intensive,” Wardell said, the process is less expensive than the cost of housing the client in jail and watching him or her re-offend down the road.

In Indianapolis, Judge Mark D. Stoner, a Marion County Superior Court judge who also supervises Probation Services, has made some programmatic changes to give judges more potential sanctions. Specifically, he arranged for Probation Services, which is under judicial control, to take over and expand a community work service program. “Before we had only one downtown location” for community work service, Stoner said. Now, “each satellite office has a work crew. We can deliver community work service to every part of Marion County.”

Stoner was motivated to develop the program because of jail overcrowding. “The Department of Corrections is full. Community Corrections is full. What the heck am I supposed to do? ... I was a prosecutor for two decades [before I became a judge, and the] fact that I didn’t have a sanction wasn’t acceptable.”

Get the boss on board

A prosecutor, defense attorney, judge or court administrator who wants to practice problem solving, or encourage his colleagues to do so, should start at the top. This means convincing the head of an office to support the approach. The advantages of getting the boss on board are obvious. Not only can the boss create policies to foster problem solving, he or she can require training on the subject, change incentives for advancement that reward problem solvers and also speak to other criminal justice leaders to promote change.

An elected prosecutor can establish uniform plea policies for certain offenses that institutionalize problem solving. State Attorney for Palm Beach County Barry Krischer requires prosecutors to offer uniform deals for some non-violent, quality-of-life offenses. Offenders who solicit a prostitute, for example, are offered participation in the Prostitution Impact Prevention Education, or PIPE, Program, which provides three hours of classes as well as testing for sexually transmitted diseases. By offering a uniform plea deal Krischer is, in effect, promoting a problem-solving sentence across the board—even among assistant prosecutors not interested in problem solving. A consistent approach also helps defense attorneys get on board. “If I say, ‘My offer is this,’ what alternatives do they [defense attorneys] have? They can plea up to the judge. But it’s not like Kmart. They can’t go up to the next counter and say, ‘Hey, where’s the better offer?’” Assistant States Attorney Neto said.

Supervising judges who are sympathetic to problem solving can encourage a change in attitude through, among other things pep talks, discussions among colleagues and programmatic changes. They can also assign judges to problem-solving courts (either on a permanent or fill-in basis) to expose more judges to the problem-solving model.

Similarly, court administrators can use their authority to encourage change. “You want the support of the top court administrator for any new initiative because he or she can convey the idea to the staff and get the staff to buy into it,” said Brian Wynne, chief clerk of Brooklyn, N.Y. In addition, court administrators can use the judiciary’s communications department to make sure the public is informed about

problem solving and also work closely with legislators, who can provide resources and promulgate supportive legislation.

Use a crisis to promote change

A crisis can naturally spur innovation. Perhaps the biggest crisis in the criminal justice today is jail overcrowding.

In Seattle, for example, the court's access to county jail beds was reduced to only 144 at the beginning of 2006. Judge Fred Bonner, supervisor of the Seattle Municipal Court, thought a community court could provide relief. Under his plan, which was eventually adopted, the court mandates services and community service to offenders who plead guilty at arraignment.

The court also created a day reporting program for offenders awaiting trial. Under the program, offenders who might otherwise have been held in jail are ordered to participate in social services—literacy lessons or alcohol treatment, for example—and must call the court daily or risk penalties. In this way, the court substitutes the problem-solving principle of rigorous monitoring for jail.

Jail overcrowding has spurred innovation in Knox County, Tenn., as well. Under the watchful eye of a federal judge, law enforcement agencies meet regularly to develop responses to the crisis and in the process discuss everything from formulating more jail alternatives to offering more services, like mental health treatment, in jail.

Foster dialogue among judges, prosecutors, defense attorneys and court administrators

It's not easy to get judges, prosecutors, defense attorneys and court administrators on the same page. And that's not always a bad thing, especially when it comes to prosecutors and defense attorneys. Adversarialism is a core principle of the American criminal justice system.

Yet problem solving requires a degree of cooperation to succeed. Although prosecutors may generally have more leverage to push for an alternative sentence, they'll have an easier time if they get defense counsel on board. After all, defenders "have developed a personal relationship with their clients that allows them to be influential with them," according to Mark H. Moore and three co-authors, writing for the Executive Session on Public Defense at Harvard; in addition, they say, public defenders can provide valuable input into shaping alternative responses: "Because public defenders represent so many defendants, they are in a good position to identify gaps in services, ineffective treatment programs, and other barriers to better outcomes."

The best way to foster dialogue is to focus on an issue of universal concern, said Dan Becker, the chief administrator of Utah's court system. "The way that you sell this [problem-solving] and get people engaged is around a particular subject. You have a group of people concerned about drugs or mental health or domestic violence. You need that rallying issue to get people thinking creatively."

In Kalamazoo, Mich., prosecutors reinvigorated an existing steering committee—the Kalamazoo Assault Intervention Project—to improve responses to domestic vio-

lence. The committee, which meets quarterly, includes prosecutors, Legal Aid attorneys, probation and parole officers, representatives of other law enforcement agencies, health professionals and advocates from a local domestic violence program. “The committee was already in existence but kind of languishing,” said Karen Hayter, a senior assistant prosecuting attorney working with the Domestic Violence Liaison Prosecutor Program, “so [another prosecutor] and I went to them and got things going again by saying, ‘We have a project.’” The project was to start a domestic violence court and improve the overall handling of cases. “Now we’re reviewing stats, issues, even particular cases on a regular basis,” Hayter said.

Issues that can help everyone see eye to eye vary from jurisdiction to jurisdiction. One of the most common across-the-board concerns, however, is jail overcrowding. When space is scarce, prosecutors want to make sure that there is room for the most violent and dangerous offenders. Thus it behooves them to prevent overcrowding by finding appropriate alternatives for non-violent offenders. Defense attorneys’ clients benefit when they receive rehabilitative services in lieu of confinement. And judges are more likely to be reelected when they help keep dangerous criminals off the street, oversee initiatives that lower recidivism and participate in a justice system that uses scarce resources wisely.

Recidivism is also a problem that all parties—judges, court administrators, prosecutors, and defense attorneys—have a stake in. Judges don’t like being seen as overseeing a “revolving door” operation. Clerks and court managers are stretched thin by offenders who cycle through the system again and again. Prosecutors have an interest in not only holding offenders accountable but improving public safety; and public safety is obviously undermined when the same offenders commit crimes again and again. Institutionally, defense attorneys may be least interested in recidivism rates, perceiving that their duty extends to their client’s current case not the theoretical future in which their client may be charged with a new crime. And yet, advocates of community defense say that by ignoring high recidivism, public defenders risk being perceived as “pro-crime.” Moore and colleagues argue that public defenders would gain more public confidence, and perhaps more reliable public funding, if they explore taking “actions which would actually work to reduce crime as well as to ensure justice.”

Another issue that affects prosecutors, defense attorneys and the entire courthouse is mental health.

Prosecutors are concerned about the mentally ill because of their high recidivism rate. Defenders would prefer that clients get help—in the form of treatment—rather than be sent to jail for what amounts to a medical condition. Judges are concerned not only that justice be done but that their calendars are not overwhelmed with repeat offenders or offenders whose cases must be continually adjourned because they don’t understand the charges against them.

Cait Clarke said prosecutors interested in a dialogue with defense attorneys would do well to raise the issue of mental health. “The defense bar is often very tired of dealing with the mental health issues because, remember, they’re the ones that have

to sit down and talk to their clients and try to convince them face to face and talk to their family members who often throw their hands up in the air and say, 'I just don't know what else to do.'"

Perhaps the most important ingredient of any conversation is respect. This is especially important when it comes to defense attorneys who feel that they've often been left out of the loop. "I think the key to this is the willingness of judge and district attorneys and heads of probation and court administrators to see the head of the public defender office as an equal," said Carroll of the National Legal Aid and Defender Association. "It seems like a no-brainer that that should be done but in our country public defenders are often left out of those discussions."

Conclusion

Until recently, advocates of problem-solving courts invested almost exclusively in specialized projects like drug courts, domestic violence courts and community courts. But while the projects will continue to be important laboratories for experimentation, many now think the future of problem solving lies in the traditional courtrooms where the vast majority of the nation's cases are processed.

This is certainly the case in many smaller jurisdictions, which may never have the resources to formally launch a separate problem-solving initiative. It may also be the case in high-volume urban settings where limits on staff, time and other resources make full-scale problem-solving courts impossible.

Some fear, however, that problem solving risks being diluted if courtroom practitioners pick and choose among principles and practices, applying them in scattershot fashion across courthouses. In the transferability focus groups, two or three participants in every group expressed the belief that "it may be preferable to allocate limited resources to more intensive interventions in fewer cases, as is currently done in specialized collaborative justice courts. Attempting to apply [problem-solving] solutions to larger numbers of cases on general calendars, some participants feared, could spread resources too thinly."

Fortunately, enough research has been done to indicate that certain models, like drug courts, are having a positive impact on recidivism and offender rehabilitation. Additional research is under way to determine exactly which components of drug court and other problem-solving principles are most effective. In the meantime, practitioners, based on what is known so far through research and personal experience, continue to test problem-solving principles wherever resources and collaboration allow.

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