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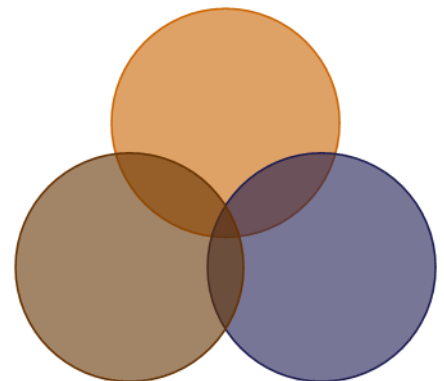
# EVIDENCE-BASED PRACTICES AND CRIMINAL DEFENSE:

## Opportunities, Challenges, and Practical Considerations

August 2008

Authored by Kimberly A. Weibrecht, Esq.

for the Crime and Justice Institute and  
the National Institute of Corrections



This paper is one in a set of papers focused on the role of system stakeholders in reducing offender recidivism through the use of evidence-based practices in corrections.



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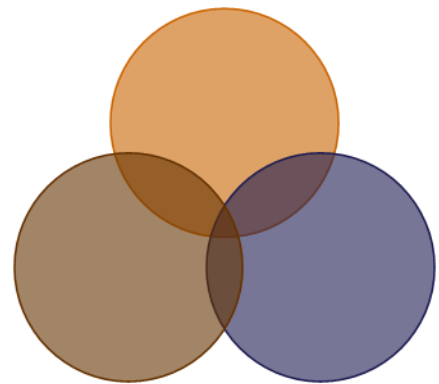
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The Crime and Justice Institute (CJI) and the National Institute of Corrections (NIC) are proud to present a series of seven whitepapers known as the Box Set. The papers are designed to share information with criminal justice system stakeholders about how the implementation of evidence-based practices (EBP) and a focus on recidivism reduction affect their areas of expertise in pretrial services, judiciary, prosecution, defense, jail, prison, and treatment. This initiative stems from a cooperative agreement established in 2002 between CJI and NIC entitled *Implementing Effective Correctional Management of Offenders in the Community*. The goal of this project is reduced recidivism through systemic integration of EBP in adult community corrections. The project's integrated model of implementation focuses equally on EBP, organizational development, and collaboration. It was previously piloted in Maine and Illinois, and is currently being implemented in Maricopa County, Arizona and Orange County, California. More information about the project, as well as the Box Set papers, are available on the web sites of CJI ([www.cj institute.org](http://www.cj institute.org)) and NIC ([www.nicic.org](http://www.nicic.org)).

CJI is a nonpartisan nonprofit agency that aims to make criminal justice systems more efficient and cost effective to promote accountability for achieving better outcomes. Located in Boston, Massachusetts, CJI provides consulting, research, and policy analysis services to improve public safety throughout the country. In particular, CJI is a national leader in developing results-oriented strategies and in empowering agencies and communities to implement successful systemic change.

The completion of the Box Set papers is due to the contribution of several individuals. It was the original vision of NIC Correctional Program Specialist Dot Faust and myself to create a set of papers for each of the seven criminal justice stakeholders most affected by the implementation of EBP that got the ball rolling. The hard work and dedication of each of the authors to reach this goal deserves great appreciation and recognition. In addition, a special acknowledgment is extended to the formal reviewers, all of whom contributed a great amount of time and energy to ensure the success of this product. I would also like to express my appreciation to NIC for funding this project and to George Keiser, Director of the Community Corrections Division of NIC, for his support. It is our sincere belief and hope that the Box Set will be an important tool for agencies making a transition to EBP for many years to come.

Sincerely,

A handwritten signature in black ink, appearing to read "Elyse Clawson".

Elyse Clawson  
Executive Director, CJI





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## EXECUTIVE SUMMARY

The fields of corrections and criminal justice have undergone a dramatic transformation in the last several decades. There now exists an extensive body of research on defendant behavior and correctional and criminal justice practices from which we can distill several core elements on what works in reducing recidivism. This body of research is referred to as “evidence-based practices” (EBP).

EBP supports the creation of an objective, information-driven method of assessing the needs of defendants and responding to those needs in proportional and effective ways throughout the criminal justice system. The implementation of these evidence-based practices is a positive development for criminal defense attorneys because of the numerous potential benefits to clients. Defense counsel’s duty to clients requires taking active steps to understand the impact that EBP implementation has on the rights of defendants and on the practice of criminal defense.

The intent of this paper is to provide guidance for criminal defense attorneys on the opportunities and challenges of EBP to criminal defense, to explore the practical considerations of defending in an EBP system, and to discuss some of the ways that EBP impacts defense counsels’ traditional role in the criminal justice system as advocates and as policy-makers.

Correctional practices are evidence-based if they have been demonstrated through rigorous testing to reduce recidivism. From the research, we can conclude that the correctional and criminal justice programs that have the greatest impact on reducing recidivism are those that:

- Assess defendants’ risk and need level with an objective actuarial risk and need instrument;
- Target higher level treatment or supervision interventions (i) to defendants with a higher risk of recidivism and (ii) to their *dynamic* (amenable to change) criminogenic needs such as antisocial attitudes, vocation, education, and substance abuse. Interventions targeted at low-risk defendants do not result in reduced recidivism and may actually increase recidivism;
- Deliver services that (i) employ cognitive behavioral techniques; (ii) actively support and recruit the defendant’s natural community and prosocial supports; (iii) use case management and treatment services that are responsive to the learning styles, motivations, strengths, personalities,

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and demographics of the defendants served; (iv) emphasize the defendant's strengths rather than deficits; and (v) prioritize positive reinforcement over negative;

- Prioritize the quality of the curricula, the training level of the staff, and the fidelity of the program's implementation; and
- Measure relevant outcomes and provide feedback on progress.

The two evidence-based practices that bring the greatest opportunities and challenges for defense counsel as an advocate are targeted interventions and criminal justice treatment. The principle of targeted interventions benefits defendants by focusing correctional responses on defendants based on their risk and need level. It uses correctional resources in the least restrictive manner possible to achieve the desired end of public safety and defendant rehabilitation. It results in correctional interventions that are more effective at changing defendant behavior and improving defendants' lives. Some of the practical considerations for defense counsel in a jurisdiction using risk and need assessments to target interventions include: whether the risk and need assessment is being used by properly trained assessors, whether it is properly normed and validated, whether it is actuarial, and whether the appropriate type of assessment is being used at the appropriate point in the process.

The development of treatment interventions in the criminal justice system also benefits defendants by providing treatment opportunities that may not have otherwise been available and by providing judges and prosecutors with a community-based treatment option for defendants. Some of the challenges that treatment in the justice system bring for counsel include "net-widening" and the consequences of treatment failure when a defendant is under the court's jurisdiction.

In addition to the benefits that evidence-based practices afford defendants and defense counsel as advocates, they also provide opportunities for defense counsel as policy-makers. EBP initiatives cannot be successful without full stakeholder collaboration, which provides defense counsel the opportunity to bring the voice of defendants to the process. As policy-maker, defense counsel can play an important role by furthering the development of policies to ensure the validity of risk and need assessments, encouraging the use of outcome measures and feedback in correctional programs, and by educating stakeholders on the role and "core duties" of defense counsel.

With the development of EBP initiatives nationwide, defense counsel should take advantage of the opportunity to become sophisticated consumers and become involved in influencing the development of policy that governs them. Specific action steps for counsel may include:

- 
- Get involved with EBP initiatives in his or her jurisdiction;
  - Become educated about risk and need assessments and the methods required to ensure their validity;
  - Engage peers in discussions about the use of and limits to the exchange of defendant information to inform decision points at various stages of the criminal justice continuum;
  - Be prepared to advocate against “widening the net” in the use of treatment and diversionary programs;
  - Use and encourage the use of techniques that positively reinforce a client’s successes, that enhance their intrinsic motivation to change, and that engage their community support system;
  - Encourage the institutionalization of criminal justice system outcome measurement and outcome measurement feedback; and
  - Maintain and reinforce those core defense duties while considering new ways that problem-solving can be incorporated into criminal defense.

Whether in the role of advocate or policy-maker, defense counsel should not forsake this opportunity to ensure that the potential of EBP initiatives to improve the criminal justice system for defendants is fully realized.



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## INTRODUCTION

The fields of corrections and criminal justice have undergone a dramatic transformation in the last several decades as ineffective policies have been replaced with practices that are demonstrated to reduce recidivism. The implementation of these “evidence-based practices” (EBP) brings great opportunities for criminal defense attorneys because of numerous potential benefits to clients.

EBP supports the creation of an objective, information-driven method of assessing the needs of defendants and responding to those needs in proportional and effective ways throughout the criminal justice system. Improving the method by which the criminal justice system targets criminal justice and correctional resources to defendants results in improved life outcomes for defendants, better allocation of criminal justice resources, and enhanced public safety.

Regardless of the extent to which defense counsel accepts the proposition that the implementation of EBP is beneficial to defendants, it is incumbent upon defense counsel to become familiar with EBP. Given the speed with which EBP is being implemented in criminal justice and correctional systems across the country, defense counsel’s duty to clients requires taking active steps to understand the impact that EBP implementation has on the rights of defendants and on the practice of criminal defense.

For those who conclude that EBP is to be embraced rather than merely accepted, the implementation of EBP provides an incentive and an opportunity for defense counsel to become involved in policy-making. It is generally understood among experts that the implementation of EBP requires collaboration among criminal justice stakeholders, and defense counsel is recognized to be a key player in the process. The importance of collaboration in EBP implementation sets the stage for defense counsel to play a prominent role at the policy-making table, and defense counsel should take advantage of this opportunity to impact the manner in which EBP is implemented in their jurisdiction.

The intent of this paper is to provide guidance for criminal defense attorneys on the opportunities and challenges of EBP to criminal defense, to explore the practical considerations of defending in an EBP system, and to discuss some of the ways that EBP impacts defense counsel’s traditional role in the criminal justice system.





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## PRINCIPLES OF EVIDENCE-BASED PRACTICE

Much has been written about evidence-based practices for reducing recidivism. Rather than recreate the excellent work already in existence, this paper will provide a brief summary of some of the key principles and will encourage the reader to review the more extensive discussion contained in the judicial stakeholder paper authored by the Honorable Roger Warren entitled, *Evidence-Based Practices to Reduce Recidivism: Implications for State Judiciaries*.<sup>1</sup>

In the 1970s, there was a belief in the field of social science that correctional programming did not impact recidivism to any significant degree.<sup>2</sup> This belief that “nothing worked” resulted in the disfavor of correctional programs and treatment and formed the basis for correctional policies that emphasized incarceration. In the two decades that followed, this principle was reevaluated as new, more comprehensive research suggested that certain types of correctional programming and practices did, in fact, have a substantial positive impact on recidivism rates.<sup>3</sup>

There now exists an extensive body of research on offender behavior and correctional and criminal justice practices from which we can distill several core tenets on what works in reducing recidivism. These core elements are referred to as “evidence-based practices,” which is a term used in many science disciplines to describe those professional practices that have been shown, through rigorous research, to produce a particular desired outcome.<sup>4</sup> In corrections and criminal justice, the outcome most commonly evaluated is the reduction of recidivism. The emergence of these evidence-based practices has given rise to a national movement to reform correctional and criminal justice practices in an effort to bring them in line with the current research.

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<sup>1</sup> Roger K. Warren, *Evidence-Based Practices to Reduce Recidivism: Implications for State Judiciaries*, Crime and Justice Institute (2007) available at [www.cjinsitute.org](http://www.cjinsitute.org) and [www.nicic.org](http://www.nicic.org). See also Donald A. Andrews, *Principles of Effective Correctional Programs*. In Motiuk and Serin (eds), *Compendium on Effective Correctional Programming*, Ch. 2 (2000) available at [http://epe.lac-bac.gc.ca/100/200/301/csc-scc/compendium\\_2000-e/text/rsrch/compendium/2000/index\\_e.shtml](http://epe.lac-bac.gc.ca/100/200/301/csc-scc/compendium_2000-e/text/rsrch/compendium/2000/index_e.shtml) and Crime and Justice Institute, *Implementing Effective Correctional Management of Offenders in the Community: The Principles of Effective Intervention* (2004) available at [www.cjinsitute.org](http://www.cjinsitute.org) and [www.nicic.org](http://www.nicic.org) for general discussion.

<sup>2</sup> Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, 35 *The Public Interest* 22 (1974).

<sup>3</sup> Warren, *supra*. at n. 1.

<sup>4</sup> *Id.*

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Some of the practices may seem obvious to defense counsel; however, because these practices have now been subjected to scientifically rigorous review, they have the potential as never before to be accepted and integrated into criminal justice policy. A thorough review of the elements and the research supporting them will be useful for defense counsel advocating for their adoption.

The key elements as culled from the most current available research are:

***Target Interventions through the use of Risk and Needs Assessments***

The research indicates that a higher likelihood of reduced recidivism results when higher level treatment or supervision interventions (i) target defendants with a higher risk of recidivism and (ii) target their *dynamic* (amenable to change) criminogenic needs. These concepts are referred to as the Risk and Needs Principles. Interventions targeted at low-risk defendants do not result in reduced recidivism and may actually result in increased recidivism.<sup>5</sup>

Defendants' risk and need levels are most accurately determined through the use of an actuarial assessment tool.<sup>6</sup> A risk assessment measures a defendant's risk to reoffend based on certain *static* (unchanging) factors (e.g.: age of first arrest and criminal history) that have been shown to correlate with recidivism. A common misperception of correctional risk assessments is that high-risk defendants are those commonly considered the most dangerous. Because risk to reoffend does not necessarily correlate to risk of violence, a defendant who engages in low-level shoplifting may be at high risk to reoffend but may not be considered a serious threat by the criminal justice system. Conversely, a defendant who commits an isolated but serious offense may score relatively low on a risk assessment.

A needs assessment evaluates a defendant's *dynamic* (amenable to change) risk factors, such as changing antisocial attitudes and cognitions, increasing opportunities for prosocial relationships, vocation, education, and substance abuse. Research indicates that effective programming targets defendants' dynamic criminogenic needs.<sup>7</sup> Activities sometimes targeted by offender programming that are not criminogenic include increasing fear of punishment, enhancing cohesiveness of antisocial peer groups, and focusing on non-specific personal/emotional problems that have not been linked with

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<sup>5</sup> Don Andrews & Craig Dowden, *The Risk-Need-Responsivity Model of Assessment in Human Service and Prevention and Corrections: Crime Prevention Jurisprudence*, 49 Canadian Journal of Criminology and Criminal Justice 439 (2007).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

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recidivism.<sup>8</sup> Scarce programming resources should not be spent on programming or services that are not targeted to defendants' criminogenic factors. The type of programming made available and offered to defendants should directly correlate with the defendant's needs as identified on the needs assessment.

To satisfy the EBP principle of targeted interventions, a criminal justice system would strive to ensure that there are sufficient program interventions available to meet the criminogenic needs of the given population of defendants, as identified by a risk and needs assessment. This requires program administrators to quantify the needs of defendants in a given community, and to compare that against the capacity of programming available. Gaps in capacity must be addressed to ensure that all defendants can avail themselves of the necessary programming to respond to identified criminogenic needs. In addition to asking whether there is a sufficient range of programming options to target the criminogenic needs of the defendants in a given population, administrators would also ask whether the programming available is proven through rigorous testing to reduce recidivism.

The research on defendant recidivism has identified several other evidence-based factors relating to programming content that occur with greater frequency in programs shown to reduce recidivism<sup>9</sup>:

### ***Cognitive Behavioral Interventions***

Research is clear that effective interventions employ cognitive behavioral techniques, not only within group curricula, but throughout case planning and in all interactions with the defendant. Defendant services are most effective when heavily infused with cognitive behavioral and social learning techniques of modeling such as role playing, reinforcement, and extinction. The best structure of correctional programs seeks to disrupt antisocial networks rather than encourage them. Specific training should be offered to staff to develop their skills in these techniques.

### ***Engage Support of Natural Communities***

Research indicates that programs that actively support and recruit the defendant's natural community and prosocial supports produce positive results on reducing recidivism.

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

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### ***Responsivity***

Research also indicates that the case management and treatment services offered are most effective when they match the learning styles, motivations, strengths, personalities, and demographics of the defendants served.

### ***Reinforcement Approach***

Interactions with defendants, especially case management, are most effective when they emphasize the defendant's strengths over deficits, employ positive reinforcement, but still hold the defendant accountable for non-compliance.

### ***Balancing Surveillance with Treatment***

Research has shown that punishment alone does not reduce recidivism. Supervision that overemphasizes surveillance and control of defendants is an inefficient use of resources and, in fact, may have a detrimental impact on recidivism. Instead, emphasis should be placed on providing targeted cognitive behavioral services, while providing the least amount of control necessary to ameliorate the identified risk.

### ***Program Quality***

Research has shown that the quality of the program provided impacts the effectiveness of the program at reducing recidivism. Programs are most successful when based on tested curricula, delivered with fidelity to that plan, and implemented by properly trained staff. Failure to administer the program with fidelity to the model cannot be assumed to produce the intended result. Ideally, a system of quality assurance would be developed to ensure that correctional programs are satisfying key benchmarks for program and organizational integrity.

### ***Outcome Measures***

Another factor that is predictive of a program's effectiveness in reducing recidivism is the degree to which it has a system of measuring outcomes and providing feedback on outcome measurement. Engaging in system reform without outcome measurement and a way to provide feedback on the results has been compared by experts in the field to 'flying a plane without instruments.' If an administration is to ensure that programs are adhering to EBP, it is necessary that there be a system of measuring such outcomes and providing feedback to staff and administrators so that successes can be recognized and setbacks can be adjusted.

*Supervision that overemphasizes surveillance and control of defendants is an inefficient use of resources and, in fact, may have a detrimental impact on recidivism.*

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## THE ROLE OF DEFENSE COUNSEL AS ADVOCATE IN AN EBP CRIMINAL JUSTICE SYSTEM

### **Opportunities, Challenges, and Practical Considerations**

The implementation of EBP in a criminal justice system raises opportunities and challenges for defense attorneys. EBP benefits defendants by ensuring a data-driven method of assessing the needs of defendants and responding to those needs in proportional and effective ways throughout the criminal justice process. It also results in the development of much needed treatment programs for defendants. A discussion of these benefits, however, inevitably implicates both the potential tension between the goals of EBP and criminal defense, and the fact that EBP challenges defense counsel to expand his or her role with clients while maintaining the core values of defense. This section will discuss both and will conclude by highlighting some challenges and practical considerations that defense counsel in an EBP system should be aware of to ensure that defendants' interests are adequately protected.

Obviously, defense counsels' response to EBP will vary depending on the extent to which a jurisdiction has implemented EBP. In a jurisdiction in which EBP has been or is in the process of being implemented, the practical considerations of counsel might include becoming involved in the management of an EBP initiative through policy-making or educating themselves on the EBP initiatives in their jurisdictions so that they can advise clients accordingly. In a jurisdiction which does not have existing EBP initiatives, defense counsel might respond by educating him or herself on EBP and advocating the application of EBP in individual cases or, time and resources permitting, by engaging other stakeholders to collaborate on the implementation of EBP initiatives.

To the extent that parts of the following discussion appear to be most relevant to those practitioners currently practicing in a jurisdiction with existing EBP initiatives, counsel in non-EBP jurisdictions would be well advised to read on. Familiarity with EBP principles can serve as a valuable advocacy tool in advancing the client's interests in a given case. Also, defense counsel may find him or herself at some point either leading or responding to an EBP policy-making initiative. When that time comes, familiarity with EBP will be important in the protection of defendants' interests.

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## Targeting Interventions through use of Risk and Needs Assessments

The most important benefit to defendants in an EBP system is the application of the risk-need principle in key decision-making points along the criminal justice continuum. For example, in an EBP system, the decision of how to sentence a defendant or whether to consider her for pretrial diversion might be informed by the defendant's risk and needs, as determined through an objective actuarial assessment. This enables the targeting of appropriate and effective interventions to defendants that will most benefit from them. Whether guiding a pretrial diversion or release decision or a sentencing decision, this principle should be used to inform the *type* of treatment ordered and may be used to determine the *level* of restraint imposed.

*...research...further states that treatment interventions are more effective when provided to defendants while they are in the community rather than in an institutional setting.<sup>11</sup>*

The EBP research indicates that higher-intensity correctional interventions should be reserved for those defendants that are higher risk, while low-risk defendants should be placed in low-level community-based interventions or diverted from the criminal justice system entirely. Placing low-risk defendants in high-intensity programs actually increases recidivism.<sup>10</sup> The research further states that treatment interventions are more effective when provided to defendants while they are in the community rather than in an institutional setting.<sup>11</sup> The application of these principles dictates that treatment programs should be ordered only when they are indicated by an objective assessment and only in the intensity level or dosage indicated by the assessment. So for example, prior to a defendant being ordered to a residential 28-day substance abuse program or to a 36-week domestic violence course, the defendant should be objectively assessed and found to need those *types* of programs and in the *level* of intensity ordered.

The principle of targeted interventions challenges a criminal justice system to use its correctional and criminal justice resources in the least restrictive manner possible to achieve the desired end of public safety and defendant rehabilitation. To achieve this outcome, it requires that corrections and justice decisions be objective and data-driven rather than subjective.

The first step in appropriately targeting interventions is the objective assessment of a defendant's risk and needs. The primary tool used to ensure targeted interventions is the risk and needs assessment. Risk assessments are instruments that predict the likelihood of a particular result (e.g.: recidivism) given the existence of particular offender characteristics, known as risk

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

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factors. Instruments that measure risk of recidivism do a statistical comparison of the risk factors of a particular offender with the risk factors of offenders in a sample population who are known to have recidivated.

This principle of targeted intervention and the use of risk-needs assessments can be applied to many of the decision-points of criminal defense but this discussion will focus on the four primary areas – pretrial release, pretrial diversion, sentencing, and violations of conditional release.<sup>12</sup>

### ***Pretrial Release***

Generally, pretrial services agencies assess defendant risk and recommend the least restrictive supervision conditions with which a defendant can be safely managed in the community while awaiting trial. A lack of research to date has made it difficult to correlate pretrial supervision to recidivism reduction,<sup>13</sup> however, the underlying principle of pretrial services is similar to the risk-need principle in that both encourage courts to carefully assess the risk of defendants and both share a presumption that defendants be managed in the community so long as doing so does not compromise public safety.

### ***Pretrial Diversion***

Pretrial diversion programs are effective mechanisms through which low-risk defendants can be diverted from the criminal justice system, while still being held accountable for their criminal conduct. Ideally, the application of EBP in a criminal justice system will encourage prosecutors or courts to develop pretrial diversion programs. Pretrial diversion is consistent with the principle that little or no intervention is often the best criminal justice response to low-risk defendants. Diverting low-risk defendants serves not only the defendant's interest but it furthers the integrity of the criminal justice system by reserving the more intensive criminal justice responses to the defendants who are medium to high-risk and who, the research indicates, are most likely to respond to such interventions.

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<sup>12</sup> For simplicity purposes, throughout this paper, the term “defendant” is used to apply to clients at all stages of the criminal justice process, including at those points in which the term “defendant” may not be technically accurate because of the absence of a pending court action (e.g.: a probationer).

<sup>13</sup> Marie VanNostrand, *Legal and Evidence-Based Practices: Application of Legal Principles, Laws, and Research to the Field of Pretrial Services*, Crime and Justice Institute (2007) available at [www.cjinststitute.org](http://www.cjinststitute.org) and [www.nicic.org](http://www.nicic.org).

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### ***Sentencing***

The vast majority of criminal cases focus on plea bargaining, rather than trial preparation. Regardless, in all cases, whether litigated or negotiated, a substantial part of defense counsel's work is spent gathering information about a client's mitigating circumstances. This then forms the basis for either the negotiated disposition counsel seeks with the prosecutor or the sentencing argument counsel makes to the judge.

So, for example, in the case of a single mother, counsel might argue to the prosecutor or judge for community supervision to allow her to continue caring for a child; for an addicted client, in-patient substance abuse treatment to address the underlying addiction; or for a mentally ill client, mental health case management in the community to maintain continuity of therapy and medication.

In an EBP criminal justice system, it will not be left solely to defense counsel to bring the unique needs of a defendant to the fore. Instead, an objective assessment of a defendant's needs will be done and the recommendation to the court will involve a plan to ameliorate these risks and needs.

The use of risk and needs assessments during sentencing is a provocative issue and one that engenders hearty debate among experts in the field.<sup>14</sup> The majority view is that risk assessments are an important tool to assist correctional administrators and judges in targeting appropriate interventions to defendants through the setting of probation conditions *so long as* the quality of implementation is ensured.<sup>15</sup>

The less settled question is whether risk and needs assessments should inform the decision whether to incarcerate a defendant (the "in/out decision"). Although there are jurisdictions using the risk-needs assessment in this way, experts are cautious about taking risk-needs tools which were originally designed for offender management in the community (i.e.: appropriate supervision levels and treatment interventions) and applying them to the decision of whether to incarcerate.

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<sup>14</sup> Compare David Cole, *The Umpire Strikes Back: Canadian Judicial Experience with Risk-Assessment Instruments*, 49 Canadian Journal of Criminology and Criminal Justice 493 (2007) and Paula Mauretto & Kelly Hannah-Moffatt, *Understanding Risk in the Youth Criminal Justice Act*, 49 Canadian Journal of Criminology and Criminal Justice 465 (2007) with Andrews & Dowden, *supra* at n. 5 and James Bonta, *Offender Risk Assessment and Sentencing*, 49 Canadian Journal of Criminology and Criminal Justice 519 (2007).

<sup>15</sup> These implementation and validity issues are discussed in greater detail in the subsequent section on practical considerations in the use of risk assessments.



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Another provocative question that the use of risk assessments at any pre-conviction stage raises is whether the comprehensiveness of the type of assessment conducted can be reconciled with the legal protections afforded of a defendant who is still considered innocent under the law. This subject will be discussed in more detail in the section of this paper dedicated to the practical considerations of risk assessments but it is an issue worth noting now.

### ***Violations of Conditional Release***

A similar process will occur in response to violations of sentencing conditions, including violations/revocations of probation. Again, in response to such violations, an objective assessment will be conducted of the defendant's risks and needs and the proposed disposition will respond to this. Incarceration will be used in a systematic manner as a limited deterrent and only in those cases in which it is deemed necessary to ensure public safety or future compliance with sentencing conditions. Instead, emphasis will be placed on maintaining the defendant's supportive structure in the community.

### ***Potential Benefits for Defendants***

The application of the principle of targeted interventions has several potential benefits for defendants. First, it results in the more efficient use of resources within the criminal justice and corrections system by correlating defendant risk level with proportional correctional and criminal justice responses. It will create a paradigm shift in which incarceration is used as the exception rather than the norm. Targeting interventions also benefits defendants generally by improving the sorting process of criminal cases. For example, when a system is set up to screen low-risk cases into diversion programs early on, defense counsel can conserve their case preparation resources for those defendant's who have cases in which extensive litigation is necessary.

Second, the use of risk and needs assessments provides an objective, evidence-based response to a defendant's risks and needs. The proper use of a risk and needs assessment will result in the prioritization of community-based punishment that is responsive to those very special needs of a defendant and that defense counsel often focuses their mitigation work on, such as substance abuse treatment, mental health treatment, education, and life skills.

Third, the implementation of targeted interventions results in the elimination of unnecessary litigation as the parties share in the task of assessing and responding to defendants' needs. As it stands now, in most jurisdictions much of defense counsel's work is geared not toward avoiding consequences for a client; but rather, advocating that the *appropriate* consequence be imposed. In those cases, litigation often centers around defense counsel's

*As it stands now, in most jurisdictions much of defense counsel's work is geared not toward avoiding consequences for a client; but rather, advocating that the appropriate consequence be imposed.*

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telling of the client's 'story' of mitigation – whether it be childhood trauma, illiteracy, addiction, mental illness, or domestic violence. Institutionalizing the process of targeted interventions engages all criminal justice stakeholders to assess and determine how best to respond to a defendant's needs.

Finally, in those cases in which mitigation is the strategy for defense counsel, the defendant may benefit from the institutionalization of the process of needs assessment. For example, sometimes defendants seeking treatment or a tactical advantage in their case, will seek out a risk and need assessment. Clients do this in many jurisdictions now, for example, when they submit to a pretrial bail risk assessment or a substance abuse evaluation. Although not a frequent occurrence, in such cases, the institutionalization of risk and needs assessments could serve as a convenience for defense counsel. Rather than defense counsel researching and procuring a risk-needs assessment independently and at the defendant's expense, one would be readily available at no cost to the defendant.

## **Treatment Interventions and the Criminal Justice System**

Another ancillary benefit that the implementation of EBP brings to defendants is the increased availability of appropriate treatment programs. A goal of an EBP system is the assessment of defendants' criminogenic needs and the targeting of effective correctional interventions to those needs. This goal requires that there be appropriate treatment interventions in the jurisdiction to which defendants can be referred. In an effort to ensure the availability of appropriate treatment programs, criminal justice stakeholders should assess the availability of different treatment programs and identify gaps. Many jurisdictions have solved the problem of service gaps by creating or encouraging the creation of defendant treatment programs such as drug treatment courts, jail substance abuse treatment programs, dual-diagnosis groups, and pretrial supervision with specialized mental health caseloads.

### ***Potential Benefits for Defendants***

The obvious advantage to defendants of these programs is that they provide a cost-effective way to access treatment that had previously been unavailable. This benefits defendants, their families and the public. These therapeutic interventions also provide, to varying degrees, a supportive structure that has been shown to be extremely effective in motivating defendants. Defense counsel need only attend a drug court graduation ceremony or speak with a pretrial supervision mental health case manager to be convinced that the existence of the intervention has a life-changing impact on many of its participants.

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Additionally, the development of such therapeutic alternatives has increased the likelihood that a defendant will be permitted to remain in the community pre and post-conviction. For example, the advent of specialized mental health pretrial supervision results in less mentally ill defendants remaining in jail on a cash bail order; the development of community-based substance abuse treatment for defendants results in less addicted clients sentenced to jail.

## **Reconciling the Goal of Rehabilitation with Effective Criminal Defense Advocacy**

The benefits of EBP notwithstanding, the use of risk and needs assessments and court-imposed treatment is not without controversy. There will be cases in which undergoing a risk and needs assessment or seeking court-imposed treatment will further the defendant's interests; there will also be at least as many cases in which the client's desired outcome in a case is to avoid both. EBP and the principles of targeting interventions and court-imposed treatment presume a goal of defendant recidivism reduction, or 'rehabilitation.' To many, the prospect of defendant rehabilitation is an acceptable, even laudable, goal. It is not always consistent, however, with defense counsel's duties as an advocate.

To illustrate this point, consider the following scenario: defense counsel has completed the client interview; while discussing history of substance abuse treatment, the client admits to being addicted to drugs. Later, when discussing goals for disposition, the client says that he would prefer a jail sentence to probation and treatment because he doesn't intend to stop using drugs and he knows that his drug use will be detected during probation supervision. The accurate assessment of this defendant's risk and needs or the imposition of treatment would not further his case strategy. In such a case, defense counsel would want to minimize the defendant's exposure to a risk and needs assessment and argue against court-imposed treatment.

From the perspective of the other criminal justice stakeholders and according to EBP, the optimal case disposition for such a defendant would include substance abuse treatment. The standards of professional conduct that govern defense counsel, however, dictate that counsel work to achieve the client's goal of avoiding supervision or treatment. The scenario raises the question: can defense counsel satisfy her obligations to a client while still supporting, perhaps even furthering, the rehabilitation of that client?

To answer this question, defense counsel must consider the extent to which it is appropriate to take on a problem-solving role as counsel to one's client. Problem-solving criminal defense, used here, is meant to describe

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representation that is broader than strict trial advocacy; defense counsel who take a problem-solving approach to criminal defense may choose to explore with a client those factors that contributed to the client's criminal justice involvement and what personal changes the defendant thinks could be made to reduce her risk of future criminal justice involvement.<sup>16</sup>

When considering the role that discussions of rehabilitation may have in the attorney-client relationship, we must acknowledge that there are instances in which such discussions are *required* as part of effective client representation and there are instances in which they are *permitted* at counsel's discretion, depending on defense counsel's practice philosophy. We will first discuss the non-discretionary scenarios and then we will consider the extent to which discussions of rehabilitation are appropriate when they are not required as part of case preparation.

It is clear that if a client is not interested in incorporating rehabilitative measures into the case disposition, defense counsel has no authority to advocate for such measures. This is not to say that the topic of rehabilitation doesn't ever have a place in attorney-client discussions. In fact, there are several instances in which rehabilitation must become the focus of attorney-client discussions if defense counsel is to give effective client representation.

First, it is important for defense counsel to discuss the issue of rehabilitation to better assess the needs of a client. This is necessary to enable counsel to adequately fulfill his ethical duty to explore the full range of dispositional options with a client.<sup>17</sup> A result of such strategizing may be that a client acknowledges having a problem in need of treatment -- such as substance abuse or mental illness -- and sets treatment as a dispositional goal of the case.

Second, regardless of whether a client acknowledges a problem, it will be important for defense counsel to inquire into a client's treatment history and current status on treatment to assess the extent to which other stakeholders may perceive the defendant as having a problem in need of treatment. If there is information known to the prosecutor, judge, or probation officer that suggests the defendant has a problem, defense counsel must be aware of it and prepared to respond to it.

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<sup>16</sup> Cait Clarke, *Problem-Solving Defenders in the Community: Expanding the Conceptual and Institutional Boundaries of Providing Counsel to the Poor*, 14 Geo. J. Legal Ethics 401 (2001).

<sup>17</sup> NLADA Guideline 6.1(a) and (e): Defense counsel has a duty to "explore with the client the possibility and desirability of reaching a negotiated disposition of the charges rather than proceeding to a trial" *available at* [http://www.nlada.org/Defender/Defender\\_Standards/Performance\\_Guidelines](http://www.nlada.org/Defender/Defender_Standards/Performance_Guidelines).

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For example, defense counsel must assess for a client how a prosecutor would view those publicly available facts that support a conclusion that the client has a substance abuse problem. Although a client disputes a heroin addiction, it will be important for defense counsel to know that, for example, the client's friend may reveal to the prosecutor an extensive pattern of conduct that is suggestive of addiction. To elicit such information, counsel must have a frank and non-judgmental conversation about the client's conduct and treatment history, if any.

Knowing that a particular prosecutor or judge is privy to facts that will likely prompt a requirement for treatment is also an important part of strategizing options with a client. There are many tactical decisions that could be explored in response, such as the use of an objective evaluation to rule out a substance abuse problem or a negotiated agreement to a more acceptable form of treatment than that which might result from a non-negotiated agreement.

Those are a few instances in which it is not only permissible but required that defense counsel discuss rehabilitation with a client in order to provide adequate client representation. The more provocative question that defense counsel in an EBP system is challenged to answer is to what extent it is appropriate to take a more problem-solving role by affirmatively raising the topic of rehabilitation. There is a debate among defense practitioners and academics as to the appropriateness of discussing, or even advocating for, a client's rehabilitation outside of those instances in which such a discussion is *necessary* for purposes of effective representation.

David Wexler argues that rehabilitation is indeed an appropriate topic for defense counsel to raise with a client and he calls for defense counsel to see themselves as "change agents."<sup>18</sup> He advocates the practice of "therapeutic jurisprudence" at all relevant stages of the criminal justice system.<sup>19</sup> He suggests that such a practice might extend to using psychological approaches to solicit agreement with plea agreements -- such as a victim impact statement video library with which to elicit the defendant's "acceptance of responsibility" for his or her actions in the charged offense.<sup>20</sup>

Professor Wexler's perspective is at one end of the spectrum and is not necessarily representative of a majority view. Professor Mae Quinn responds to Dr. Wexler's article and comments that while many of Dr. Wexler's

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<sup>18</sup> David B. Wexler, *Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defense Lawyer*, 17 St. Thom. L. Rev. 743 (2005).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

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suggested practices are “wholly consistent with current conceptions of good defense lawyering,” some of them present a “host of legal and ethical concerns.”<sup>21</sup> Professor Quinn acknowledges that zealous advocacy can certainly include attempting to improve a client’s circumstances or assisting in rehabilitation efforts.<sup>22</sup> Professor Quinn, however, cautions against overstepping the presumption of innocence or professional qualifications by making inquiry in a way that presumes that a client is dysfunctional and in need of rehabilitation.<sup>23</sup>

Attorney Cait Clarke embraces problem-solving by criminal defense by “broadly interpreting the role of ‘counsel’” such that counsel “view[s] a case in the context of a client’s life and larger community problem that resulted in criminal justice intervention.”<sup>24</sup> She describes this “whole client” or “holistic advocacy” as follows:

The primary goal of such contextual advocacy is to use the trauma of a criminal arrest to improve an accused’s life conditions and thereby reduce recidivism. . . . A defender examines a client’s internal problems, such as personality disorders, mental illness, addiction, or anger management, . . . and tr[ies] to address these problems . . . to prevent future breaches of the law and to promote integration back into the community.<sup>25</sup>

According to a balanced application of the problem-solving approach, it would appear to be appropriate for counsel to discuss the issue of rehabilitation in a problem-solving tone, so long as in doing so, counsel does not abandon his or her core defense functions.

As counsel considers whether or how to engage in problem-solving discussions, it is important that counsel not lose sight of the need to provide nonjudgmental advice to clients. The standards of professional conduct require defense counsel to establish a relationship of trust and confidence with the accused,<sup>26</sup> and to not permit his or her professional judgment to be affected by biases.<sup>27</sup> Inherent in these principles is the concept that defense counsel

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<sup>21</sup> Mae C. Quinn, *An RSVP to Professor Wexler’s Warm Therapeutic Jurisprudence Invitation to the Criminal Defense Bar*, 48 B.C. L. Rev. 539 (2007).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Clarke, *supra* at n. 16.

<sup>25</sup> *Id.*

<sup>26</sup> American Bar Association, *Criminal Justice Section Standards*, 4-3.1(a), available at [http://www.abanet.org/crimjust/standards/dfunc\\_blk.html](http://www.abanet.org/crimjust/standards/dfunc_blk.html).

<sup>27</sup> *Id.* at Standard 4-3.5(a).

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must be non-judgmental in his or her counsel to clients; that whatever personal biases defense counsel may have be compartmentalized to allow defense counsel to advise his or her client in a truly non-judgmental manner.<sup>28</sup> Failing to do so risks compromising the integrity of the attorney-client relationship.

This requirement prohibits defense counsel from allowing a personal opinion that a client may be ‘in need of rehabilitation’ to influence his or her legal advice to the client. There must be a recognition by defense counsel that in the attorney-client relationship, counsel often wields a great deal of power because many clients will be predisposed to defer to counsel’s judgment. Therefore, extreme care must be made when exploring dispositional options not to unduly influence a client’s decision.

Professor Kruse cautions against allowing bias or paternalism to undermine the client-attorney relationship:

There is a real difference . . . between helping someone achieve what she really wants or values, and imposing what you think she should really want or value on her. This distinction marks off the boundary between enhancing her autonomy and paternalistically intervening into her decision-making.<sup>29</sup>

Somewhere along the continuum between discussing client rehabilitation only when necessary for case preparation and paternalistically intervening with a rehabilitation agenda, defense counsel can and should consider ways to engage in problem-solving discussions with clients about rehabilitation. Done appropriately and with recognition of the constitutional and ethical constraints that must govern, defense counsel is in a position to support defendants in the choice to use criminal justice engagement as a jumping off point for rehabilitation. Such choices ultimately benefit defendants, their families, and their communities.

## **Practical Considerations for Defense Counsel as Advocate**

Recognizing the ways that EBP can benefit defendants, we now turn to some of the challenges that EBP initiatives bring and some practical considerations that defense counsel can use to ensure that defendants’ rights are protected.

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<sup>28</sup> Quinn, *supra* at n. 21.

<sup>29</sup> Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 *Clinical L. Rev.* 369 (2006).

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### *Risk and Needs Assessments*

As a threshold matter, we must recognize that a challenge in the use of risk and needs assessments is the danger that they may perpetuate racially disparate impacts on minority defendants. This concern is legitimate and currently unresolved. Defense counsel should raise the question in their local jurisdictions and continue to apply pressure for the proper use of risk instruments. Before rejecting the use of risk and need assessments on this basis, however, counsel should consider the alternative: without the use of objective risk and need assessments, the assessment of risk by a decision-maker (e.g.: a judge, prosecutor, probation officer) is informal and based in large part on factors that are not necessarily predictive of risk to reoffend. Use of a risk assessment at least provides some transparency, uniformity, and validity to what has historically been a highly subjective and inaccurate process.

Assuming that counsel is willing to accept the benefits of risk and need assessments in the face of their admitted imperfections, there are several considerations for defense counsel that can ensure the most accurate use of risk and need assessments.

First, risk assessments should be actuarial rather than clinical. An actuarial instrument uses measures that are “structured, quantitative, and empirically linked to a relevant criterion” and can be distinguished from subjective interviews or other psychological assessments such as the Rorschach test, the Bender-Gestalt, and projective drawings.<sup>30</sup> A study of correctional psychologists indicated that less than 11% used one of the three validated assessment tools considered to be the best in assessing risk of defendants.<sup>31</sup> In light of these numbers, it is incumbent upon defense counsel to confirm that appropriate risk assessment tools are being used at appropriate points of the criminal justice process.

Second, a risk assessment should only be used to predict an outcome that it is validated to predict.<sup>32</sup> For example, an assessment that is validated to predict say, psychological-emotional adjustment should not be used to provide an assessment of risk of recidivism. Similarly, assessments being used on special populations such as domestic violence defendants or sexual offenders must be validated to predict the outcomes sought to be measured.

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<sup>30</sup> James Bonta, *Offender Risk Assessment: Guidelines for Selection and Use*, 29 *Criminal Justice and Behavior* 355 (2002).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*



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Third, risk assessments should be normed and validated. Generally speaking, risk assessments screen for characteristics that research has shown correlate with recidivism. Experts strongly suggest, however, that they be normed and validated on the actual defendant population in which recidivism is sought to be predicted.<sup>33</sup> Although this process is costly and time-consuming, it is recognized within the field as the best way to ensure the accuracy of assessing risk within a particular defendant population.

Fourth, risk and needs assessments should only be conducted by trained staff. Research is clear that the validity of an assessment is significantly compromised by lack of assessor training.<sup>34</sup> One consequence that can result from inadequate assessor training and oversight is the misuse of assessor “overrides.” While it is important that a risk assessment have an “override” mechanism by which an assessor’s professional judgment can override an actuarial score, this function must be monitored for overuse or underuse. Inadequate or inconsistent training also impacts assessor reliability. Defense counsel should ascertain the training process of the staff that are conducting risk assessments on clients throughout the criminal justice process and ensure that it addresses these concerns.<sup>35</sup>

Finally, it is important for defense counsel to consider whether the type of assessment used (static versus dynamic) is legally appropriate for the stage of the criminal justice process in which it is used. Risk factors can be of two types: static or dynamic. Static risk factors are unchangeable defendant characteristics (such as race, age, prior criminal history, offense characteristics, age of first conviction) that tend to be predictive of recidivism whereas dynamic risk factors (such as antisocial thinking, low-self control, or substance abuse) are changeable. Assessments differ in the degree to which they measure static or dynamic risk factors or both. A static risk assessment relies on publically available information that can, theoretically, be gathered independent of an interview with the defendant whereas a dynamic assessment is more in-depth and necessitates a defendant interview. Static risk assessments and dynamic risk assessments predict recidivism with a similar level of accuracy.<sup>36</sup> The added utility of dynamic risk assessments, however,

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<sup>33</sup> Kelly Dedel Johnson & Patricia L. Hardyman, *How Do You Know If The Risk Assessment Instrument Works?*, in Topics in Community Corrections, National Institute of Corrections Annual Issue (2004).

<sup>34</sup> Christopher T. Lowenkamp & Edward J. Latessa, *Understanding the Risk Principle: How and Why Correctional Interventions Can Harm Low-Risk Offenders*, in Topics in Community Corrections, National Institute of Corrections Annual Issue (2004).

<sup>35</sup> For a general discussion of potential legal and evidentiary challenges to risk assessments, see Cole, *supra* at n. 14.

<sup>36</sup> Bonta, *supra* at n. 30.

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is that because they provide information on those factors amenable to treatment, they are the best diagnostic tool with which to assess defendants' needs and target correctional interventions.

From a legal perspective, a policy in which a jurisdiction compels the use of a dynamic risk assessment raises potential constitutional issues, at least insofar as it is being conducted prior to conviction. The completion of a dynamic needs assessment requires the defendant to undergo an interview in which he or she will be called upon to incriminate him or herself, if not by disclosing facts of the charged offense, by disclosing personal information that may have a detrimental impact on the dispositional outcome of the criminal case. In contrast, a static risk assessment can theoretically be completed by reviewing public documents and need not involve interviewing the defendant at all. Defense counsel should be aware that if a jurisdiction is in the practice of imposing treatment upon pretrial defendants, they may also be subjecting pretrial defendants to a dynamic needs assessment as a diagnostic tool for this treatment.<sup>37</sup>

There may be instances in which it is to the defendant's advantage in a case to volunteer to submit to a dynamic risk assessment pre-conviction. For example, a defendant may make a tactical decision to affirmatively undergo such an assessment when such an approach bolsters an argument for pretrial diversion or for a particular plea-bargain that involves treatment. In those cases in which it is consistent with the defendant's interests to undergo a dynamic risk assessment, defense counsel must still be concerned with the degree to which the information gathered from such an assessment can be used for other non-treatment purposes, such as sentencing. This is of particular concern if the defendant undergoes the assessment but then decides against the type of treatment recommended by the assessment.

In those instances, when it does not further the defendant's interests in the outcome of the case, defense counsel should be prepared to argue that compelling a defendant to undergo a dynamic risk assessment prior to conviction implicates constitutional protections against self-incrimination and the presumption of innocence.

### *Treatment in the Criminal Justice System*

Although there are advantages to the development of court-imposed treatment, defense counsel must be prepared to advise clients adequately about the challenges that exist as well. For example, while it is true that a defendant

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<sup>37</sup> Barbara M. Hankey, *Pretrial Defendants: Are They Getting Too Much of a Good Thing?* in Topics in Community Corrections, National Institute of Corrections Annual Issue (2008).

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may benefit from the successful completion of a treatment program, it is also true that a defendant who is unsuccessful in a treatment program may face harsher penalties than if he or she had not opted for the treatment program in the first instance. This occurs, for example, when a drug court participant is repeatedly sanctioned to short-term jail stays or when a participant who fails the program altogether is subjected to a harsher sentence than would have originally been contemplated by the court or prosecutor.

A second challenge for defense counsel is what is referred to in correctional research as “net-widening.” This term describes the phenomenon seen in diversionary programs in which criminal justice decision-makers divert a defendant *into* the criminal justice system (or into a higher level of the criminal justice system) than would otherwise be contemplated to enable the defendant to benefit from an available program. An example would be a prosecutor declining to reduce an otherwise borderline felony charge because the prosecutor believes it is in the interest of public safety for the defendant to participate in the felony drug court program. Another example would be a law enforcement officer electing to charge a borderline crime so that a mentally ill community member can access mental health services through the criminal justice system that would be otherwise unavailable in the community.

With any criminal justice program, it is important for stakeholders to remember that a threshold requirement to a defendant being deemed appropriate for a given program is that the defendant be properly under the criminal justice system’s jurisdiction. Defendants who would otherwise fall outside the ambit of the criminal justice system must not be drawn *into* the system because of the development of effective criminal justice interventions.<sup>38</sup>

This tendency must be guarded against with all stakeholders in a system, including defense counsel. Defense counsel must engage in on-going self-assessment to ensure that their practice is not contributing to net-widening. For example, imagine that defense counsel has a mentally ill client charged with a defensible assault charge. The prosecutor offers an attractive disposition that includes court-imposed medication compliance or treatment. Assume that the client is amenable to the court-imposed treatment, concluding: “I was planning to go back on my medication anyways so what is the harm.” It will be important for defense counsel to fully analyze with the client the pros and cons of accepting what may appear to be an attractive

*...while it is true that a defendant may benefit from the successful completion of a treatment program, it is also true that a defendant who is unsuccessful in a treatment program may face harsher penalties than if he or she had not opted for the treatment program in the first instance.*

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<sup>38</sup> For a more extensive discussion on this topic, see James Austin & Barry Krisberg, *Wider, Stronger, and Different Nets: The Dialectics of Criminal Justice Reform*, 18 *Journal of Research in Crime & Delinquency* 165 (1997).

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disposition versus challenging a charge that perhaps should not have been brought in the first place. Obviously, it is the client that will make the ultimate decision whether the anxiety and inconvenience of prolonged litigation outweigh the ease of accepting the offer. Still, counsel should be aware that her advice will hold great weight with the client and should at least advise the client of the competing legal and philosophical issues that are implicated by subjecting himself to the continued jurisdiction of the court.

A third challenge for defense counsel to be aware of is the fact that there can sometimes be a conflict between the clinical interest in getting the defendant into treatment quickly and the constitutional protections that ensure due process and a presumption of innocence. It is a general finding in the field of social science that criminal sanctions are most effective at deterring future non-compliance when imposed in a swift and certain manner.<sup>39</sup> This principle gives rise to practices such as expedited drug court violation hearings.

There may be legitimate correctional or therapeutic reasons to expedite the court process and, in those cases that are uncontested, the defendant may agree to an expedited process. However, in some cases an expedited process may be inconsistent with a defendant's legal right to due process. When that occurs, defense counsel must be prepared to advocate for full protections of a client's due process rights if the client so desires.

*While EBP brings great potential to benefit defendants, its value is limited by the manner in which it is implemented. Therefore, regardless of the degree to which defense counsel agrees with EBP, defense counsel must be involved at a policy level to bring the voice of defendants to the process.*

We see a similar tension in the substance abuse treatment setting between the clinical need for a defendant to take responsibility for her conduct, and a defendant's legal right to pursue all defenses available to her. There is a period of time after a defendant has agreed to apply to a court-imposed treatment program but before his or her application has been approved which raises unique and perhaps irreconcilable conflicts between a defendant's legal interests and clinical needs. For example, consider a drug court candidate whose attorney continues to litigate a motion to suppress while the client's drug court application is pending.

The expectation of those clinicians or stakeholders considering the defendant for treatment may be that the defendant acknowledge the depth of her addiction and end attempts to avoid accountability by litigating the case. In contrast, defense counsel may be encouraging the defendant that the safest

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<sup>39</sup> Faye S. Taxman, et. al. *Graduated Sanctions: Stepping Into Accountable Systems and Offenders*, 79 *The Prison Journal* 182 (1999).

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course of action is to continue to consider alternative options to treatment.<sup>40</sup> These competing interests are both legitimate in the context of their respective universes and yet there is tension between them that must be acknowledged.

In summary, the use of targeted interventions and criminal justice treatment brings the potential to redefine the standard operation of the criminal justice system in ways that provide meaningful and effective responses to defendants. As with any new initiative or procedure, defense counsel has an important role in ensuring that the rights of individual defendants are protected and becoming a sophisticated consumer of the initiatives and their potential pitfalls is an important and valuable role for defense counsel.

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<sup>40</sup> In fact, it is defense counsel's ethical obligation to do so. See NLADA Guideline 6.1(a) and (e), *supra* at n. 17: "The existence of ongoing tentative plea negotiations with the prosecution should not prevent counsel from taking steps necessary to preserve a defense."



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## THE ROLE OF DEFENSE COUNSEL AS POLICY-MAKER

### Opportunities, Challenges, and Practical Considerations

The implementation of EBP provides both the opportunity for defense counsel to get involved in policy-making and the imperative that defense counsel take full advantage of this opportunity so that the rights of defendants are protected. While EBP brings great potential to benefit defendants, its value is limited by the manner in which it is implemented. Therefore, regardless of the degree to which defense counsel agrees with EBP, defense counsel must be involved at a policy level to bring the voice of defendants to the process.

On an encouraging note, because stakeholder collaboration is recognized as critical to the implementation of EBP,<sup>41</sup> defense counsel is not likely to face resistance in efforts to become involved. Collaboration is a necessary component of any successful criminal justice reform initiative. The many interdependencies that exist among criminal justice agencies require that the implementation of EBP system-wide involve extensive collaboration to be successful.<sup>42</sup> Because the application of EBP principles “goes beyond the purview of any particular party,”<sup>43</sup> - spanning a variety of criminal justice agencies - collaboration will be necessary to ensure continuity, coordination, and resource sharing between them.

For example, the use of risk and need assessments impacts many different criminal justice parties, including the sentencing judge, the prosecutor, the defendant, and the probation officer. Similarly, application of the treatment principle, especially insofar as it involves the development and coordination of treatment options, requires the input and coordination of many different entities. Establishment of these reforms must include strategizing by all criminal justice stakeholders.

The principle of collaboration recognizes that each member of the criminal justice system has value to bring to the process of coordinating and reforming the justice system. Defense attorneys are recognized as being key to the

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<sup>41</sup> Crime and Justice Institute, *Implementing Effective Correctional Management of Offenders in the Community: Collaboration for Systemic Change in the Criminal Justice System* (2004) available at [www.cjinsitute.org](http://www.cjinsitute.org) and [www.nicic.org](http://www.nicic.org). See also Andrews & Dowden, *supra* at n. 5.

<sup>42</sup> *Id.*

<sup>43</sup> Judith Berman, *Advocating for Clients: Defenders and Collaboration in the Criminal and Juvenile Justice Systems*, 28 *Cornerstone* (NLADA) 22 (2006).

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success of diversion and alternative incarceration efforts.<sup>44</sup> In a jurisdiction taking on EBP initiatives, representatives of the defense bar should be invited to participate in policy making through mediums such as criminal justice coordinating councils, treatment teams for specialty courts, and advisory councils for community-based treatment agencies.

Whether defense counsel is invited to the table or not, it falls to counsel to affirmatively advocate the importance of defense representation in the collaboration. For support in making this argument, counsel can turn to many sources documenting the importance of criminal defense at the table during the implementation of criminal justice system reform efforts.<sup>45</sup>

Embracing system-wide collaboration may require a shift in the way defense attorneys view their role in the criminal justice system. Criminal defense attorneys have historically identified themselves as the lone actors in the criminal justice system, a role seemingly necessitated by the singular duty to provide zealous advocacy to defendants without regard for the needs or agendas of other criminal justice system actors.<sup>46</sup> Embarking on a collaborative venture might require defense counsel to step outside of this familiar role. The opportunities for defendants to benefit from defense counsels' involvement in collaboration, however, make it more than a worthwhile endeavor.

First, defense counsel can participate in the development and the expansion of services and policies that benefit defendants. Some commentators describe collaboration as “vital” to the work of defense counsel because “collaboration makes possible changes within the . . . criminal justice system that would otherwise be impossible.”<sup>47</sup> For example, defense counsel alone may not be able to persuade a local community substance abuse provider to create a much needed dual-diagnosis substance abuse group, whereas working as part of a criminal justice collaborative, defense counsel can help make this vision a reality.

Second, as a collaborator, defense counsel can impact important policy decisions surrounding the implementation of EBP and ensure that the interests of criminal defendants are given voice in the process. Defense counsel is in a unique position to speak to not only those legal issues for criminal defendants

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<sup>44</sup> American Bar Association, Commission on Effective Criminal Sanctions, *Report on Alternatives to Incarceration and Conviction* (2007) available at <http://www.abanet.org/dch/committee.cfm?com=CR209800>.

<sup>45</sup> *Id.*; Crime and Justice Institute, *supra* at n. 41; Berman, *supra* at n. 43.

<sup>46</sup> Quinn, *supra* at n. 21.

<sup>47</sup> Berman, *supra* at n. 43.



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that are implicated by EBP but also the complexity of obstacles and needs that face many clients. For example, the reality that many criminal defendants are illiterate or do not have transportation is a fact with which defense counsel would be intimately familiar but of which other criminal justice actors may not be equally as aware.

## **Practical Considerations for Defense Counsel as Policy-Maker**

The earlier discussion of practical advocacy considerations included many practice tips pertaining to individual case representation that can and should be generalized to policy-making. As such, defense counsel as policy-maker should review the discussion of practical advocacy considerations with an eye toward identifying underlying policy-issues. For example, defense counsel who is in an advocacy role must ensure that correctional interventions are appropriately targeted in an individual client's case. Defense counsel who is in a policy-making role must ensure that a systemic process is in place by which appropriate interventions are properly targeted to defendants, generally.

### *Targeting Interventions and Treatment*

Defense counsel as policy-maker should educate himself on the types of risk and needs assessments that are conducted in his jurisdiction pre-conviction versus post-conviction and advocate for the appropriate use of dynamic versus static risk assessments. Defense counsel should be prepared to initiate conversations among stakeholders about the appropriate types of information to be gathered from defendants, at what points in the process it is gathered, how to protect the defendant's right to decline to give information or to request counsel's presence, and what use may be made of the information once it is given.

Similarly, with respect to court-imposed treatment, defense counsel as policy-maker should advocate the expansion of appropriate treatment programs for defendants while encouraging stakeholders to adopt policies and practices that prevent net-widening. Defense counsel should attempt to ensure the appropriateness of particular treatment interventions for particular types of clients and should advocate that treatment curricula be used that have a history of producing positive outcomes. In an effort to minimize net-widening, defense counsel should advocate for the appropriate use of screening and referral tools. Counsel should advocate for the adoption of policies and practices that do not infringe upon the defendant's constitutional rights.

Other examples of evidence-based practices that are beneficial to defendants and whose implementation defense counsel can shape as policy-makers are

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the development of quality assurance systems and the reassessment of defendant motivation techniques in the criminal justice system.

### *Outcome Measurements and Quality Assurance*

EBP mandates that a well-functioning, effective criminal justice agency or system engage in outcome measurement to gauge its level of functioning and adherence to evidence-based practices. At the system-level, ideally the members of a governing structure such as a criminal justice coordinating council will determine those factors most indicative of a well-functioning and effective criminal justice system. They might include factors such as length of case processing time, degree to which there is use of risk and needs assessments at key decision points, degree to which sentencing, case planning, and charging/diversion decisions are based on risk and needs assessments, or the degree to which available treatment options have proven effectiveness in reducing recidivism. Once the outcome data is collected and analyzed, feedback must be provided to stakeholders and administrators.

By providing feedback on outcome measures, criminal justice administrators will be able to appreciate and recognize the success of their efforts and to consider and strategize areas that still need work. Moreover, the existence of quality assurance as a value creates a culture of constant reassessment by the stakeholders to ensure that policies are aligned with EBP. It also gives defense counsel a language and a set of standards by which to challenge the system to remain true to its mission.

In the role as policy-maker, defense counsel should help define outcome measures and should encourage the implementation of evaluation procedures. Such procedures are often costly and time consuming, which makes them vulnerable to implementation shortcuts. Defense counsel can encourage the development of strategies that ensure the adoption of evaluation efforts over time.

Defense counsel should also be prepared to advocate for the implementation of EBP at an agency level within criminal justice system agencies, particularly community supervision agencies. Much research has been done on the effectiveness of community supervision when agencies adhere to EBP with fidelity.<sup>48</sup> Defense counsel can play an important role in advocating for such efforts.

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<sup>48</sup> Andrews & Dowden, *supra* at n. 5.

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### *Rethinking Defendant Motivation*

EBP supports the use of positive reinforcement and techniques to enhance intrinsic motivation when interacting with defendants. The wide application of these principles should prompt a systemic change in the way defendants are managed by a local criminal justice system. It calls upon judges, community corrections officers, and prosecutors to alter both the demeanor in which they engage with defendants and the approaches they take in responding to defendants' behavior.

The research on intrinsic motivation indicates that practices that allow defendants to maintain their dignity throughout the criminal justice process encourage defendant compliance.<sup>49</sup> Experts suggest that fair and respectful treatment of defendants, even during the process of arrest or imposition of sanctions, may actually result in increased future compliance.<sup>50</sup> Similarly, the research on positive reinforcement indicates that the emphasis of positive reinforcement over negative reinforcement has the best results of motivating defendant compliance.<sup>51</sup>

A related evidence-based principle suggests that the most effective way to encourage positive behavior change in defendants is to engage their community support system in appropriate ways in the criminal justice system. This might include in certain cases actively identifying supportive family members or friends and engaging them in the criminal justice process.

From a policy-making perspective, defense counsel should advocate for the integration of intrinsic motivation and positive reinforcement among stakeholders in their interactions with defendants. The research does not limit the application of these principles to specialty courts but encourages their use throughout the criminal justice process. These principles can be used to positively impact the effectiveness of probation case management, correctional management of defendants, and judicial responses to violations of community supervision conditions and sentencing.

Defense counsel can also be an advocate for community supports to be included in some aspects of the defendant's case, when appropriate and not in conflict with the client's wishes. For example, during a sentence that includes community supervision it may be helpful to engage supportive family members in the defendant's case plan. Specialty court sessions may also be a

*Experts suggest that fair and respectful treatment of defendants, even during the process of arrest or imposition of sanctions, may actually result in increased future compliance.<sup>50</sup>*

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<sup>49</sup> Taxman, *supra* at n. 39.

<sup>50</sup> *Id.*

<sup>51</sup> See Andrews & Dowden, *supra* at n. 5.

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...at the policy-making table, ...defense counsel must be prepared to address...the reality that the duties and obligations of defense counsel as policy-maker are often in conflict with the goals of other criminal justice stakeholders in an EBP implementation initiative.

place where community supports can come together with criminal justice supports to celebrate a defendant's successes.

There are many direct benefits that defendants reap from defense counsel's participation in policy-making. Moreover, under the standards that govern the professional responsibilities of defense attorneys, counsel has an *affirmative duty* "to reform and improve the administration of criminal justice. . . . [and to] stimulate efforts for remedial action."<sup>52</sup> In light of this mandate, defense counsel is obligated to accept the invitation to strengthen the criminal justice system by becoming involved in collaborative efforts to review and properly implement EBP.

### Reconciling the Goal of Rehabilitation with Effective Criminal Defense Policy-Making

Once at the policy-making table, one issue that defense counsel must be prepared to address is the reality that the duties and obligations of defense counsel as policy-maker are often in conflict with the goals of other criminal justice stakeholders in an EBP implementation initiative. It is true that in policy-making, counsel is not bound by a duty to a particular client and can relax her adversarial posture. With this said, the ethical and legal duties to clients must continue to govern the conduct of defense counsel as policy-maker if defense counsel is going to be an effective voice for defendants in the policy-making process.

It will be important for defense counsel to recognize the tension between the goals of defense counsel as policy-maker and those of other stakeholders and be prepared to encourage discussion about it. It may be up to defense counsel to highlight the importance that other stakeholders understand defense counsel's duty to defendants. Failure to appreciate the ethical and constitutional constraints within which defense counsel operates could result in the misperception by the parties that the defense attorney is obstructionist or 'a non-team player', when counsel believes she is honoring her professional responsibility.<sup>53</sup>

So as not to undermine the role of defense counsel as potential collaborator with other stakeholders, it will be important for the members in an EBP system to understand and respect the role of defense counsel, to recognize that

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<sup>52</sup> ABA Standard 4-1.2(d), *supra* at n. 26.

<sup>53</sup> Berman, *supra* at n. 43; see also Eric Lane, *Due Process and Problem-Solving Courts*, 30 Ford. Urb. L. J. 955 (2003) who describes how pressure on defense counsel can result from the "teamwork overlay" of drug court.

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these limitations are borne out of principle, not obstructionism, and to appreciate that they are, in fact, critical to the integrity of the criminal justice system. Defense counsel is in the best position to facilitate such understanding of duties and obligations.

The first ethical principle worth bringing to the awareness of other criminal justice members because it is core to criminal defense is the duty to provide zealous advocacy for one's client. This rule dictates that defense counsel provide 'zealous and quality' representation and advocate with 'courage and devotion' within the bounds of the law.<sup>54</sup> Most defense counsel understand this to require that counsel use any legitimate means available to secure a favorable result for a client, so long as doing so does not contravene counsel's duty as an officer of the court.<sup>55</sup> The rule presumes that it is the client who defines what constitutes a favorable result. It is under the auspices of this standard that defense counsel is obligated to raise constitutional, ethical, and practical defects as they relate to policy-making.

A companion standard worth sharing with other stakeholders states that it is defense counsel's duty to "develop a plan which seeks to achieve the least restrictive and burdensome sentencing alternative that is most acceptable to the client,"<sup>56</sup> again making clear that the client's role is to define the most favorable case outcome and defense counsel's role is to zealously advocate for that result. The standards also give the client the exclusive veto power over the terms of plea negotiations.<sup>57</sup>

These standards reinforce the point that, except in some limited circumstances, defense counsel's duty is to pursue the outcome of a case, as defined by the client, regardless of whether this outcome is in the public's best interest. Recalling the earlier scenario of the client who was opposed to treatment, it is precisely those standards that dictate that defense counsel pursue the decidedly non-rehabilitative goal of helping the client avoid court-imposed treatment. Stakeholders must be reminded that defense counsel does not have the discretion to advocate for a case disposition that is contrary to the client's wishes.

There is nothing inherently incompatible between defense counsel collaborating on policy-making efforts while still remaining vigilant to the

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<sup>54</sup> ABA Standard 4-1.2(b), *supra* at n. 26; NLADA Guideline 1.1, *supra* at n. 17.

<sup>55</sup> Rodney J. Uphoff, *Role of the Criminal Defense Lawyer in Representing the Mentally Impaired Defendant: Zealous Advocate or Officer of the Court*, Wis. L. Rev. 65 (1988).

<sup>56</sup> NLADA Guideline 8.1(a) 4, *supra* at n. 17.

<sup>57</sup> ABA Standard 4-5.2(a), *supra* at n. 26.

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duties and obligations of defense counsel. The key is for stakeholders to recognize and accept that there is a natural difference between the goals of ethical and legal representation of clients and the goals of EBP. With this said, there is nothing that should dissuade the parties from maintaining a focus on the common ground between them: the integrity and continued improvement of the system.

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## CONCLUSION

Our criminal justice and correctional systems are currently in the midst of an important era of reform. The implementation of EBP is a boon to defendants because it encourages policies and practices that are the most likely to produce positive changes in defendant's lives in the least restrictive manner possible. Because the reforms dramatically impact the standard operation of the criminal justice system and the traditional roles of its stakeholders, patience and an open-mind are essential. Defense counsel will need to strike a balance between remaining vigilant in the protection of defendants rights while also remaining open and supportive of EBP initiatives, generally.

The roles of defense counsel in this process as advocate and as policy-maker are instrumental. To take full advantage of the opportunities in this process to protect the rights of defendants,' defense counsel should:

- Get involved with EBP in his or her jurisdiction – the defense voice is critical to the process and perhaps never before have other stakeholders been as amenable to soliciting defense counsels' involvement;
- Become educated about risk assessments and become an advocate for the use of appropriate, validated risk assessments performed by qualified staff at appropriate points in the criminal justice system;
- Engage peers in a discussion about the use of and limits to the exchange of defendant information to inform decision points at various stages of the criminal justice continuum and be prepared to advocate against “widening the net” in the manner that the criminal justice system uses treatment and diversionary options;
- Watch for opportunities to use techniques that positively reinforce a client's successes, that enhance their intrinsic motivation to change, and that engage their community support system; counsel should also advocate for other criminal justice system stakeholders to do the same;
- Actively encourage their criminal justice system to implement policies and procedures to institutionalize the measurement of criminal justice system outcomes and mechanisms to provide feedback on these outcomes; and
- Reinforce with stakeholders those defense duties that are not subject to compromise while considering the ways that problem-solving can be incorporated into criminal defense.

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Defense counsels' ability to navigate this new territory of reform effectively and with sophistication depends on their ability to engage with these complicated substantive and philosophical issues. The potential for improvement of the criminal justice system and the positive opportunities for defendants, their families, and their communities makes it incumbent upon defense counsel to do so.



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