EBDM SENTENCING PROGRAM

INTRODUCTION

The Eau Claire County Evidence Based Decision-Making (EBDM) sentencing program will significantly impact several aspects of our Criminal Justice System from plea negotiations to sentencing and probation supervision. Each component of our sentencing program has been constructed based upon one or more of the following seven governing principles of our EBDM system:

1. Assessment tools should be utilized to identify risk to re-offend, criminogenic needs and appropriate programming;
2. Intense programming is reserved for medium and high-risk offenders;
3. Programming for medium and high-risk offenders is focused on individual criminogenic needs;
4. Responses to misconduct should be swift, certain and proportionate;
5. Positive reinforcements are more effective than sanctions and should outnumber them;
6. Programming delivered in natural settings is more effective than programming in institutional settings, and;
7. Sanctions without programming do not reduce recidivism.

To the extent that decisions regarding plea negotiations and sentencing are not specifically guided by one of the components of our EBDM sentencing program, they should be guided by these seven principles. Literally, through adherence to the components of our sentencing program and these guiding principles, every decision made by practitioners and judges in connection with criminal case disposition can be an evidence-based decision.

PROBATION SENTENCING PROCESS

Historically, in Eau Claire County and virtually all jurisdictions, decisions as to whether to place a defendant on probation or what probation conditions should be imposed have been dependent upon the individual judgment of prosecutors, defense attorneys and judges. This

has led to inconsistent results and countless examples of sentencing decisions which run contrary to our core principles, such as that intense programming or interventions should be reserved for medium and high-risk offenders or that programming should target individual criminogenic needs. In order to reduce these problems, we have agreed that probation supervision should generally be reserved for medium and high-risk offenders and that probation supervision decisions should be guided by our risk assessment tool, the COMPAS instrument.

LOW-RISK INDIVIDUALS

Prior to setting forth our EBDM process for probation sentencing decisions and the use of COMPAS results, a brief discussion of low-risk offenders is necessary. As noted above, we will generally not place low-risk offenders on probation supervision. The initial determination as to whether an individual is low risk will be made by the Proxy, which will be completed at the outset of each case. If a legitimate question arises as to whether an individual is actually low risk, a COMPAS may be completed to provide a more detailed answer to that question.

There are several reasons why we will generally not place low-risk offenders on probation supervision. First and foremost, since these individuals are largely self-correcting, probation supervision is unnecessary. Moreover, it may be counter-productive in the sense that the supervision may interfere with the positive aspects of a low-risk offender's life. Equally as problematic, it may expose the low-risk offender to negative influences because of probation supervision contact with medium and high-risk offenders.

Despite this general policy, there will be instances in which low-risk offenders are placed on probation. Broadly speaking, those exceptions will arise from public safety concerns or the fact that an offense is so serious that the community expects probation supervision. Two examples are provided by many felony sexual assault cases or felony theft cases involving very large amounts of restitution. In order to avoid allowing these exceptions to swallow up the rule, practitioners and judges will be expected to provide a specific explanation as to why probation supervision is necessary in a particular case for a low-risk offender.

PLEA NEGOTIATIONS

The probation sentencing process begins with plea negotiations between prosecutors and defense attorneys. If either a prosecutor or a defense attorney feels that probation supervision may be warranted for a medium or high-risk offender, that attorney must attempt to have a COMPAS completed for the offender. We have agreed to adhere to a specific rule that recommendations or sentencing decisions to place a defendant on probation will not occur unless efforts have been undertaken to have a COMPAS completed. Although, low-risk offenders will generally not be placed on probation, if that does occur, a

COMPAS should likewise be completed for those offenders. Requiring a COMPAS in those situations will help ensure that probation is only imposed when truly warranted.

Defendants who decline to participate in the COMPAS process will be handled in the same manner as pre-EBDM defendants. We anticipate that relatively few defendants will decline to participate in the COMPAS process since prosecutors, defense attorneys and judges will make it clear to defendants that participating in the COMPAS process is in their best interest. To realistically send that message, particularly prosecutors and judges must accept the concept that jail as a condition of probation will only be imposed if truly necessary because of the seriousness of an offense or some other legitimate purpose. Since the primary purpose of probation under our EBDM sentencing program will be to address criminogenic needs, special effort must be undertaken to minimize jail as a condition of probation. The essential point is that if we are looking to address criminogenic needs through probation supervision, we will not punish or sanction individuals only for the sake of punishment.

The COMPAS process will begin with completion of a COMPAS referral form and contact with jail assessment coordinator. The form will provide the basic information as to the charges, identity of the prosecutor and defense attorney and the next scheduled court date. The Assessment Coordinator will then either contact the defense attorney or pro se defendant to set up the COMPAS interview or will assign the matter to Diversion Coordinator, Deferred Acceptance of a Guilty Plea Coordinator or, perhaps, one of the COMPAS-trained jail staff. Obviously, some discussion will be necessary as we implement our EBDM program early next year regarding how COMPAS assignments will be made.

Three other points should be noted regarding this initial stage of the probation sentencing process. First, practitioners should not necessarily wait until a pretrial conference to initiate the COMPAS referral. A prosecutor or defense attorney who believes that probation is a realistic possibility should take steps to begin the COMPAS process as soon as possible. That will minimize any delays in ultimate sentencing.

A second point of note is that COMPAS results will automatically be distributed to all parties and the court. Just as prosecutors and judges will need to accept the proposition that the purpose of probation supervision is treatment, not punishment, defense attorneys and defendants will need to accept the proposition that a COMPAS is being completed to provide assistance to all parties in considering an appropriate sentencing disposition. Realistically, that can only be accomplished if the COMPAS results are automatically distributed to all parties.

A third point which flows from the fact that COMPAS results will in all instances be distributed to both parties and the court is that these COMPAS results will be sealed in a defendant's court file. This could be accomplished by the issuance of an ongoing sealing order by the courts or by submission of a proposed order with each COMPAS.

INTERPRETATION OF COMPAS

Completion of a COMPAS is only the beginning of our EBDM probation sentencing process. The next necessary step is to determine whether the COMPAS results warrant probation supervision. We have agreed that probation supervision for medium or high-risk offenders will only occur if a COMPAS confirms the presence of one or more of the following eight recognized criminogenic needs:

- Anti-social cognition or thinking;
- Anti-social companions;
- Anti-social personality or temperament (e.g., lack of empathy, anger/hostility, poor problem-solving and decision-making, risk taking, impulsivity, lack of focus and narcissism);
- Poor family and/or marital relationships;
- Substance abuse;
- Un or under-employment;
- Poor performance or failure in school;
- Poor use of leisure and/or recreational time;

It should be noted that the first four of these factors are strong predictors of criminal behavior with the other four being predictive but less so than the first four.

Our process will be a bit more complicated than simply identifying the presence of one or more of the criminogenic needs. Some consideration of which criminogenic needs are involved in each case, the level of the need and other related issues must take place. Thus, we have completed a written guide for practitioners and judges which will explain how a COMPAS can be reviewed to determine the presence of these eight criminogenic needs. It also provides insight into what a "probation COMPAS" looks like. The information provided in the guide will assist practitioners and judges in deciding whether the COMPAS results show that probation supervision is warranted.

In the vast majority of cases, a completed COMPAS will lead to a joint recommendation by the prosecution and defense. That is, either an agreement will be reached that probation is appropriate or, on the other hand, that probation is not necessary or warranted. There will, though, be circumstances in which the parties cannot reach an agreement and will advance their most reasoned arguments regarding the probation sentencing issue. A judge will then be in a position to make a decision as to whether probation should be imposed based upon

our general EBDM principles, the COMPAS results, the assistance provided by the COMPAS guide and other relevant circumstances.

TREATMENT PROGRAMS

Once criminogenic needs have been identified at a level warranting probation supervision, the next required step under our EBDM system is to consider whether there are government or community programs available to address those needs. To that extent, the Department of Corrections has completed a resource manual, which identifies and describes the programs available to address criminogenic needs. The manual sets forth the specific needs, which are addressed by each program, the availability of the program and a brief description of it. This manual will assist practitioners and judges in deciding whether probation supervision is actually warranted. There is little sense in imposing a period of probation supervision based upon a belief that a criminogenic need will be addressed if realistically there are no programs available to address that need. Obviously, public safety considerations may warrant imposition of probation regardless of available treatment programs.

CONDITIONS OF PROBATION

This leads to the final aspect of our EBDM probation sentencing process which involves identifying probation supervision terms. Although a completed COMPAS may, in most instances, allow for an identification of appropriate treatment/program conditions, we have decided that other than the limited exceptions discussed below, the actual establishment of probation conditions should be left to the Department of Corrections. The rationale for this decision is that the department will be in the best position to asses both availability of programming and priorities in addressing multiple criminogenic needs. Since defendants placed on probation commonly have multiple criminogenic needs and research has informed us that there is a limit to the number of criminogenic needs which may effectively be addressed at once, it seems most sensible to leave the ultimate decision regarding programming to the department.

Despite this general rule, there will be a number of instances in which practitioners may recommend or a sentencing court will impose specific conditions of probation. This will typically involve non-treatment conditions such as imposition of a no-contact provision with a victim. It also may involve situations in which either practitioners or judges are convinced that public safety considerations mandate certain conditions. For example, a judge may very well conclude that a “no drink” condition in more serious OWI cases or a “no contact with minors” condition in many sexual assault cases may be necessary.

The fact that the department will be ultimately responsible for establishing most specific conditions of probation does not mean that practitioners and judges will be ignoring the issue of what conditions should be imposed. To the contrary, both practitioners and judges should

apprise defendants of likely probation conditions. Judges will be ideally suited to advise and discuss with a defendant what will likely be expected of them through use of a motivational interviewing technique. If, for example, a defendant scores high on anti-social cognition or thinking, and there are a number of programs which potentially may be utilized by the department, a judge can and should discuss those with a defendant. As part of that process, hopefully, defendants will express a willingness to participate in the types of programming identified.

GENERAL POINTS

Three final topics regarding our EBDM probation sentencing process should be addressed. First, in addition to considering risk level and the presence of criminogenic needs, some consideration will have to take place regarding the seriousness of the conduct at issue. In other words, given the limited available resources for both probation supervision and programming, some prioritization based upon seriousness of offenses will be necessary. Every medium or high-risk offender with criminogenic needs which could be addressed through probation supervision should not necessarily be placed on probation. A good number of medium or high-risk offenders with identified criminogenic needs may not be placed on probation because the illegal conduct at issue is relatively minor.

The second point is that we will not be imposing probation supervision simply as a means to collect restitution. Most assuredly, a low-risk offender who commits a $100,000.00 theft may be placed on probation. In that instance, probation would be premised upon the public's legitimate expectation that significant efforts be undertaken to require the defendant to pay a portion of the restitution amount or that probation was required for accountability. On the other hand, a defendant who owes $500.00 in restitution to six merchants for issuing worthless checks should not be placed on probation for that reason alone.

Fortunately, the potential dilemma regarding probation supervision and restitution collection is not as significant as initial thought may indicate. In many instances where restitution is an issue for medium or high-risk offenders, COMPAS results will reveal that probation is warranted independent of any concern regarding restitution payments.

Thus, we are realistically only concerned about the low-risk individuals who have no need for probation supervision and owe restitution or medium and high-risk offenders who engage in minor criminal conduct. In those relatively limited circumstances, practitioners and judges should consider factors such as the amount involved, the victims' need for compensation, the realistic likelihood of obtaining restitution and the availability of alternatives. These alternatives may include utilizing a deferred acceptance of a guilty plea agreement, imposing community service obligations or simply entering a restitution order.

LENGTH OF PROBATION

The third and final topic regarding our probation sentencing program is that the same factors to be considered in determining whether probation supervision should be imposed will also be utilized to determine the length of probation supervision. Rather than arbitrarily determining the length of probation supervision, we will be specifically considering what period of probation should be imposed given the type of programming which will be likely required. Limiting probationary terms to the time actually necessary to accomplish the desired outcome will not only preserve scarce resources but will provide an incentive to defendants to accept probation supervision and work to accomplish the desired outcome.

Consistent with this idea of creating an incentive for individuals placed on probation supervision to succeed, judges and probation officers should advise them that they will potentially receive an early release if they have successfully completed required programming and satisfied other conditions. Of course, judges, probation officers and prosecutors must then be willing to support reasonable early release requests.

JAIL AS A CONDITION OF PROBATION

As noted above, the primary purpose of probation supervision under our EBDM sentencing program is to provide community protection through treatment or programming designed to address a defendant's criminogenic needs. Although there will most assuredly be some "policing" aspects of probation supervision, it is our belief that both short and long-term community protection will best be provided by treating the criminogenic needs of defendants placed on probation supervision.

Under our EBDM sentencing program, a point of emphasis will be to only impose jail as a condition of probation when absolutely necessary and in amounts which are absolutely necessary. Moreover, any jail term imposed as a condition of probation should be imposed in a staggered fashion. That is, a judge will impose a jail term such as six months. He or she will then advise the defendant that he can be released after serving a designated portion, such as three or four months, if he has successfully completed any required jail or community programming and has otherwise complied with the conditions of probation.

Under our EBDM system, decisions as to whether to argue for or impose jail as a condition of probation, and in what amounts, will be based upon a consideration of the seriousness of the offense, including victim impact, and the character of the defendant, including his prior criminal history. However, our decisions as to the imposition of jail as a condition of probation will additionally reflect our position that the ultimate purpose of probation supervision is the treatment of criminogenic needs, not punishment. Consequently, it will

be essential that we strive to only impose jail as a condition of probation when absolutely necessary and in amounts which are absolutely necessary.

Our EBDM process for deciding whether to impose jail as a condition of probation and, if so, in what amount is a direct reflection of our core EBDM principle regarding sanctions and positive reinforcements. This core principle is that "carrots" or positive reinforcements work better than "sticks" or sanctions. Moreover, positive reinforcements should outnumber sanctions.

Imposing jail as a condition of probation in any amount other than as minimally necessary will undermine the treatment aspects of probation since it cannot help but be perceived as a negative sanction. Imposing a significant amount of jail as a condition of probation based upon punitive motivation will make it very difficult to convince a defendant that addressing his criminogenic needs through programming is worthwhile. On the other hand, sincerely endeavoring to minimize jail as a condition of probation, and then explaining why the minimum period of jail is being imposed, will not be as readily viewed as punitive.

Based on these ideas, our EBDM process for addressing jail as a condition of probation will have three components. These three components will be to first determine whether a jail term is absolutely required and, if so, the minimal amount of the incarceration. Second, to provide a specific rationale as to why that jail term was minimally required. Third, to impose any jail terms as a condition of probation in a staggered fashion so that a defendant is able to earn a reduction through positive performance.

It may be easier in theory than practice to suggest that we will only be imposing jail as a condition of probation when absolutely necessary, or in amounts which are absolutely necessary. Nevertheless, there are some points which can be considered to assist us in this endeavor. Beyond the obvious considerations of the seriousness of the conduct at issue and a defendant's history, we ought to ask why jail is actually necessary in each case. Is it really sensible to believe that the particular defendant will be less likely to commit future crimes because of any imposed jail? Is it likewise sensible to suggest that jail for that defendant will result in any deterrence as to others? Will a victim or the community derive as much satisfaction from temporary punishment as from knowing maximum effort has been undertaken to change the wrongdoer so that repeat criminal conduct will not occur?

Under our EBDM sentencing program, some cases will involve conduct serious enough so that jail as a condition of probation must reasonably be imposed. In those instances in which punishment may be legitimate, it ought to be used sparingly. That is especially the case since a defendant who does not comply with rules of probation will be subject to sanctions. Thus, practitioners and judges should argue for or impose incarceration amounts commiserate with the assumption that a defendant will succeed on probation. If that turns out not to be the case, appropriate punishment can be imposed as a sentence after revocation.

Our policy of imposing any required jail as a condition of probation in a staggered fashion is specifically premised upon the idea of creating incentives for individuals to succeed on probation. A staggered jail term which allows a defendant to earn an early release will not only reward past positive behavior but serve as an incentive to continue that positive behavior in the future.

STRAIGHT JAIL SENTENCES

Two key principles provide the basis for our EBDM sentencing program involving the imposition of straight jail sentences. These principles are that sanctions without programming do not reduce recidivism and that positive reinforcements are more effective than sanctions.

The first principle that sanctions without programming do not reduce recidivism is significant since historically straight jail sentences have essentially been a pure example of sanctions without programming. Although we will strive to provide meaningful programming to as many inmates serving straight jail sentences as possible, we will not be able to do so in all instances and must, therefore, be mindful of the fact that straight jail sentences in those instances will not likely reduce recidivism.

As with jail terms imposed as a condition of probation, we will begin by considering the seriousness of the conduct at issue, including impact upon any victim, and the character of the defendant, including his prior criminal history. However, to ensure that any imposed jail sentence is actually accomplishing the desired purpose, practitioners and judges will be expected to both consider and specifically state why a particular sentence is warranted. Simply stating that a six-month jail sentence is warranted because of a defendant's prior history and the seriousness of the criminal conduct at issue is not sufficient. There must be some careful consideration and explication of what specific relevant facts about the offense or offender's history warrant the particular sentence being argued for or imposed.

The vast majority of straight jail sentences in Eau Claire County are imposed following revocation of a period of probation. In those cases, we should not lose sight of the fact that the period of probation itself was a consequence for the behavior at issue. That is a point of importance because so many sentencing arguments and decisions seem to come down to a decision as to what is an appropriate consequence for the behavior at issue.

Even though the period of probation at issue was not ultimately successful, it was a consequence which should be considered when determining what additional future consequences are appropriate. In other words, a more moderate straight jail sentence upon revocation will often be warranted because of that prior consequence. That fact will not be altered because the revocation was precipitated by new criminal conduct since pending

charges for that new criminal conduct will address an appropriate consequence for that conduct.

The second guiding principle for practitioners and judges when addressing straight jail sentence issues is that positive reinforcements or "carrots" are more effective than sanctions or "sticks." Based upon this principle, every straight jail sentencing argument or decision should include a consideration of whether some form of jail or community programming is available to address an identified criminogenic need of the sentenced defendant. If so, the sentence should be imposed in the same staggered fashion as jail terms imposed as a condition of probation. For example, a judge imposing a straight sentence of six months will state that the defendant will be able to be released after serving a lesser time period, such as four months, if he completes a designated program such as the Stop and Think jail program.

The Department of Corrections has agreed to consider the possibility of jail or community programming when fashioning its recommendations for sentences after revocation. The Department will be in an ideal position to engage in this consideration since it will have access to a defendant's COMPAS which will identify criminogenic needs, be aware of the offender's prior programming and also be aware of the availability of jail or community programming for that particular defendant while he is serving his sentence. In appropriate circumstances, the Department will set forth in its probation revocation summaries not only the recommended sentence but a recommended reduction based upon completion of specified programming.

In the limited number of situations in which a non-OWI straight jail sentence is being imposed without a prior period of probation, practitioners and judges should still consider the availability of jail programming. However, in order to do so, a COMPAS will first need to be completed or will need to have been completed recently enough to still be relevant. In those instances, based upon a consideration of COMPAS-identified needs, and the availability of a specific course of programming in the jail or community which can address those needs, a recommendation and decision for a reduction can be made up front at the time of sentencing. That is, the sentencing judge can specifically state that a defendant will be allowed to be released after completing a specified portion of the imposed sentence in return for completing the program at issue.

In the instances in which a COMPAS is not available at the time of sentencing, Jail Assessment Coordinator will review a defendant's situation to determine whether a possible jail reduction is appropriate. If so, he can make arrangements to have a COMPAS completed and then request the District Attorney's Office to process a sentence modification request, which allows for a reduction based upon completion of the appropriate course of programming.

PRISON SENTENCES

The key principle which provides a basis for our EBDM sentencing program as it relates to prison sentences is that programming delivered in a natural setting is more effective than programming in institutional settings. Secondarily, given the lack of programming available for many prison inmates, the principle that sanctions without programming does not reduce recidivism is of considerable significance in this area.

Based on these principles, it is reasonable to suggest that we can reduce both the number and length of our prison sentences without negatively impacting public safety. Consequently, we have established an objective of reducing both the number and length of prison sentences by 15% under our EBDM sentencing program.

Suggesting that there is ample reason to review our prison sentencing practices are not meant to imply that prison sentences are not often, perhaps very often, justified and appropriate in length. Certainly, some defendants present such a serious safety risk that they must literally be incapacitated. That is, most assuredly, the situation in any number of serious sexual assault, physical assault or homicide cases.

We have agreed to impose two specific requirements in connection with the imposition of prison sentences. First, we have agreed that any argument for or imposition of a prison sentence must be accompanied by an attempt to have a COMPAS completed unless a PSI has been ordered. Completion of a COMPAS or PSI in all instances in which a prison recommendation is being made will ensure that the sentencing court has been provided with the best available information as to a defendant's criminogenic needs and the feasibility of addressing those needs in the community. In the event that a defendant declines to participate in the process, the prison sentencing process would occur in the same manner as under our pre EBDM system.

A second requirement we have agreed to establish is that any prison recommendation or sentence must be accompanied by a specific statement of the desired purpose of the sentence and its length. Certainly, some cases may involve such horrific conduct as to warrant a severe prison sentence simply because of legitimate community expectations. Other cases may involve defendants who present such a serious, ongoing and unacceptable risk to the community that a prison sentence is mandated for community protection. Finally, in some instances, there may be a perceived need for programming which can only safely be provided in a confined setting. Whether that is the case, or there are other circumstances which warrant a prison sentence, requiring both practitioners and sentencing courts to specifically set forth the rationale for the recommended or imposed prison sentence is reasonable.

In summary, our EBDM Sentencing Program in connection with prison sentences is designed to accomplish two purposes. First, to ensure that practitioners and sentencing courts are

provided with the best available information in possible prison sentence cases. Second, to require both practitioners and sentencing courts to precisely set forth the legitimate purpose, which provides a basis for both a prison sentence and the length of the sentence at issue.

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