

MULTNOMAH COUNTY JUSTICE REINVESTMENT PROGRAM
Judicial Settlement Conference Standards of Excellence Task Force

BEST PRACTICES FOR DISTRICT ATTORNEYS

APRIL 2016

Task Force Members

Judges

Judge Stephen K. Bushong, chair

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I. Before the Judicial Settlement Conference

- Communicate with the victim to provide information on victims' constitutional rights. Discuss the range of possible sentencing outcomes that could result from trial or a plea negotiation. Inform the victim of likely conditions of probation if probation were to be imposed. Ask for input on what the victim would like to see in terms of outcome or sentence in the case. Explain the procedure for staffing the case with other attorneys before an offer is made. Offer to call the victim back with information about the offer after the case is staffed. Discuss and review the JSC process and potential JSC outcomes. Consult with the victim about attending the JSC, plea and sentencing and provide notice of the dates, times and places. Confirm the restitution information in the file.
- Notify the defense attorney and PO if the victim is planning to participate in the JSC process.
- Become familiar with motivational interview techniques; they may be used at the JSC.
- The DDA assigned to the case should plan to attend the JSC if at all possible; don't arrange for coverage unless necessary. Calendar the scheduled JSC as soon as a date is assigned so you can make all reasonable efforts to attend. If the initial date set for the JSC does not work, reschedule as soon as possible. If you know by the Friday before the JSC that you will be unable to attend, contact Joel Bruhn or the designated scheduler to reschedule the JSC. Arrange for coverage if a late conflict arises; don't try to reschedule at the last minute.
- Evaluate the case. Know your case strengths and weaknesses. Send the police report to the PO.
- Get the defendant's prior history. If the defendant has any prior convictions that may be red flags, get those police reports or information.
- Do a preliminary assessment of the case. Determine whether the case is a case where MCDA would typically be receptive to probation, a case where resolution is typically prison, or whether the case falls within a "gray" area that could go either way. Communicate your preliminary assessment to the defense counsel. If the preliminary assessment is for a probation option, consider negotiating the plea directly with defense

counsel, alerting the PO about negotiations before the JSC, and using the scheduled JSC time to do the plea. Remain open to considering other options; do not get “locked in” to your preliminary assessment.

- Identify presumptive and mandatory sentences that will apply if the defendant is convicted. Provide that information to the defense attorney.
- In Tier-3 cases, send a settlement offer to defense counsel as soon as possible before the JSC date.

II. At the Judicial Settlement Conference

- Inform the court and defense counsel if the victim is present for the JSC pursuant to the victim’s constitutional right to be consulted regarding plea discussions. If the victim is present, determine what level of participation the victim wishes to have at the JSC. If the victim is not present, confirm with the court that notice of the JSC hearing was communicated to the victim.
- Do not attempt to control the JSC. Be prepared to listen. Utilize motivational interviewing techniques to encourage the defendant to talk about life circumstances and what specific changes could be implemented to avoid future criminal activity. Assess whether any proposed treatment plan supports these goals.
- Be prepared to explain your preliminary assessment of the case, whether you see the case as one that will likely lead to prison, probation, or is in a grey area. If you think a probation offer is highly unlikely, be willing to listen to proposed options discussed at the JSC, using the LS/CMI Assessment Report as a basis for discussion. Offer your own realistic assessment; do not just say that the case needs to be staffed and that “the committee” will decide. Be prepared to explain what you will recommend when the case is staffed and why.
- Do not attempt to “judge” the defendant or make the defendant feel ashamed about the crime. Emphasize that the charges do not mean that the defendant is a bad person, just that poor decisions were made. Explain that your primary goal is to protect the public, which includes giving the defendant the tools needed to succeed. Explain that you are willing to listen to options that might help you achieve that goal in the resolution of this case.

- Be prepared to explain to the judge any mandatory or presumptive sentences that would apply if the defendant is convicted after trial, and any enhancement factors or consecutive sentences that the state expects to request after a trial. Have a realistic view not only of what sentence could be imposed, but also what sentence is likely to be imposed if the defendant is convicted. Discuss with the judge, not with the defendant, unless specifically requested by the judge.
- In some cases, it may be appropriate to discuss the strengths and any perceived weaknesses in the case at the JSC. Consider whether such a discussion will be productive in any particular case. Be sensitive to any concerns about unrealistic expectations by the defendant, client control issues faced by defense counsel, and other issues that might make a discussion about the case counterproductive. If you have this discussion, present a realistic view of case; don't overstate how strong your case really is.
- Be prepared to explain why the DA's office may be reluctant to agree to probation in cases involving mandatory or presumptive prison sentences. Explain that protecting the public is the primary concern. Explain how prison essentially guarantees that defendant will not victimize others in the community while they are incarcerated, and that foregoing such a guarantee is not something you take lightly. Explain the "public interest" as expressed through citizen ballot initiatives such as Measure II and Measure 57, and why the DA's office is sensitive to those directives from the public.
- Obtain as much information as you can from the defendant, defense counsel, and the PO. Request detailed information about why past treatment or programs did not work, why defendant's past relationships or living arrangements may have led to criminal activity, and what may be different this time (such as removal of triggers). Discuss specific plans for housing, treatment, employment, and other pro-social endeavors.
- After considering all options, if you know that the DA's office will likely never agree to probation in a particular case, be prepared to discuss the parameters of a potential pre-trial resolution that could include a prison sentence that is less than the presumptive sentence (or explain why you are unwilling to negotiate down from any presumptive or mandatory sentence). Encourage the defendant to consider committing to a prison number for you to present to the committee before receiving the state's official offer.

Explain why there may be a better chance for a lower prison amount if the defendant makes a reasonable prison offer *prior* to the state's committee offer.

- If the case is one where MCDA may be receptive to probation, confirm with the PO the complete list of probation conditions that should be included in any probation offer. Discuss how long the defendant would be expected to remain in jail before being released to treatment or housing. Be prepared to explain why the defendant will not be released onto the streets.
- Explain the next steps that the case DDA will take to move the case toward resolution, where appropriate. This will depend upon the case's current status and circumstances. Schedule a follow-up JSC or a date for a possible plea, if appropriate.

III. After the Judicial Settlement Conference

Comment regarding overall best practices: After the JSC, all parties should continue to communicate about the case and the ultimate sentence. The DA should communicate with the victim as appropriate. The DA and defense counsel should include the PO in e-mail negotiations where appropriate, especially if there will be a probation sentence. Allowing the PO to get started on referrals and arrangement of services prior to adjudication will help save jail days and increase public safety upon release.

- Follow-up with the defense attorney, where appropriate. Obtain copies of any mitigation information.
- Follow-up with the PO to clarify conditions of probation, housing, treatment, and other issues where appropriate.
- Consult with the victim, upon request, regarding plea negotiations involving any violent felony. Communicate the pre-trial offer to victims on all cases.
- Present the case to the appropriate committee if required. Each of those committees will be comprised of a Chief Deputy District Attorney (CDDA), a Senior Deputy District Attorney (SDDA) and other experienced attorneys who prosecute similar crimes. Share information learned at the JSC and other sources with an emphasis on PAVRON factors (Professional judgment, Accountability, Victim Input/Impact, Risk, Offense, Needs). Offer your own sentencing recommendation and explain the rationale. Be prepared to discuss the basis for a departure (both dispositional and durational), or alternatively,

why the presumptive sentence is justified, as appropriate to the case. Describe any noteworthy case weaknesses or particular strengths. In prison cases, consider and discuss whether the purposes of the MCJRP support a lower prison sentence.

- The committee will evaluate your analysis of the case and provide feedback. The committee will discuss previous pre-trial offers on cases involving similarly situated defendants, while also noting substantial or noteworthy differences between cases and defendants. Listen to the input and feedback from the committee; be flexible. The CDDA of the committee will authorize a specific case resolution for that defendant or will require you to obtain more information before approving a pre-trial offer. Be prepared to re-present the case to the CDDA or the committee if circumstances significantly change.
- Send an offer to defense counsel. Be prepared to discuss the reasons for the offer. Send a copy of the offer to the PO, unless there are good reasons to exclude the PO from the settlement negotiations. However, if the defendant is in jail, notify the PO if the defendant will be released at the time of the plea.
- Schedule for a further JSC or plea, if appropriate. If the case will be a plea, schedule the plea for the earliest possible date. If the JSC judge is not available, set the plea with another MCJRP judge or follow other program rules for scheduling. The PO should appear at sentencing, but it is generally not critical to have the PO present at the time of plea if the defendant is not going to be sentenced. Consider scheduling the plea with sentencing set over so the PO can attend.