

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

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**BEST PRACTICES FOR JUDGES**

APRIL 2016

## **Task Force Members**

### **Judges**

Judge Stephen K. Bushong, chair  
Judge Cheryl A. Albrecht

### **Deputy District Attorneys**

Kevin Demer  
Nicole Jergovic/David Hannon

### **Defense Attorneys**

Jon Martz  
Brian Schmonsees

### **Probation Officers**

Jamie Tynan  
David Main

### **Treatment Consultant**

Tim Hartnett, CODA

### **Staff**

Joel Bruhn  
Lily Yamamoto

## **I. Before the Judicial Settlement Conference**

- Read the LS/CMI Assessment Report and any other available evaluation or assessment reports.
- Review the case file. The indictment, the Recognizance Release report, the affidavit of probable cause, and any reports from Pretrial Release Services may have additional helpful information about the defendant and the charges.
- Determine any existing probations and communicate with the probation judge.
- Determine any additional pending cases. Confer with the parties and consider setting other cases to track as needed.
- Consider alternatives, such as START Court, DISP, Mental Health Court, or Veterans Court. Understand entry requirements for specialty courts and check for any updated procedural rules.
- Establish a calendaring system with your judicial assistant or clerk. If the first JSC gets cancelled within the three weeks before the JSC, attorneys should follow the procedure to place it on the Wednesday MCJRP docket in Room 208 or follow whatever other scheduling procedure is in place. Prior to the JSC, review your calendar and be prepared to discuss follow-up dates with the attorneys and PO.
- Understand the MCJRP program rules and procedures. Review reports, updates and other information sent by the program coordinators and others. Confer as needed with Joel Bruhn or other designated coordinator.
- Develop a general understanding of the LS/CMI risk/needs assessment, drug and alcohol assessments, and what types of programming are optimal to address various needs. Develop an understanding of Motivational Interviewing and Change Talk techniques.
- Establish an in-office system for tracking negotiations, to-do lists, and other elements of ongoing discussions (i.e., face-sheets, log sheets, notes, etc.).

## II. At the Judicial Settlement Conference

### A. Preliminary Steps—attorney and PO communications

- Meet with the attorneys and the PO in chambers before meeting with the defendant or the victim. If appropriate, suggest using some of the JSC time to meet with each attorney outside the presence of the other parties, or with the defendant and defense counsel separately, to address confidential matters.
- Determine where the parties are in their negotiations. Get answers to any specific questions you have following your review of the case information.
- Ask the attorneys how you can best help them in the time that you have. Is one side requesting your help to push the other side on negotiations? Does the defendant need education comparing potential trial outcomes (such as mandatory or consecutive sentencing exposure) to the benefits of having input and some control on a pre-trial resolution? Does the defendant need the assurances of a judge to trust the process? Do the parties need help crafting the details of a supervision plan? Does the DA need a commitment from the court regarding the court's amenability to enforcing strict compliance probation conditions?
- If the victim or the victim's counsel is present for the JSC, determine the best method of victim participation in the JSC given the individual circumstances. Do not ask to speak with the victim alone without the presence of victim's counsel or the case DA. Similarly, avoid direct questions to the victim or comments directed to the victim, without first checking with the victim's counsel and the case DA. Note the rights set out in Oregon Constitution Article I, sections 42 and 43.
- Use PO as a resource. The officers are very informed and may be able to answer any questions you may have.
- Address any special issues that may apply, such as county of residence, interstate compact, language barrier, custody of children or other issues.

- If a drug and alcohol assessment is needed, determine when it can be done.
- Consider offering your own opinion about what could be a fair offer. This portion of the discussion should be with the attorneys only. Don't share your opinion with the defendant without discussing it with the attorneys first. Your opinion may be helpful to the DA in communicating with the committee and supervisors.
- If the parties aren't fully ready for the first JSC, or there is a substitute attorney, hold the JSC anyway if possible. Use the opportunity to identify issues, meet the defendant and explain the process, and accomplish what else you can in the time given. This may not apply to subsequent JSCs; use your discretion.

## **B. Communicating with the defendant—informative stage**

- Determine the best approach for communicating with this defendant, e.g., on bench with robe (to convey judicial authority), informal without robe (to put the defendant more at ease). Ask the defense attorney if there are special issues to consider regarding communication with the defendant. Greet and welcome the defendant. Direct your discussion to the defendant.
- Explain that the JSC process is designed to help the parties resolve the case by agreement if the defendant wants to do so, and that everything said in the conference is off the record and cannot be used against the defendant if there is a trial.
- If third parties (family members, etc.) are present, check with the defense attorney whether the defendant wants them present and whether there are any issues the court should know about regarding their presence. If you feel they will impede the JSC's progress, explain to them the confidential nature of the conversation and ask them to wait outside.
- Explain the basic decision the defendant will need to make—trial or plea. Explain what happens at trial. Explain the importance of the decision. Explain sentencing issues—gridblocks, consecutive sentences, departure sentences, mandatory sentences (e.g., Measure 11, Measure 57), if applicable. Explain that the defendant has control over the

sentence if it is part of a plea agreement, but not after a trial. Explain the limitations of mandatory sentences or downward departures, but avoid discussing personal opinions or making editorial comments regarding sentencing laws.

- Explain the judge’s role at the JSC—to facilitate discussion, represent the court’s perspective, answer questions, convey and help evaluate any offers or counteroffers. Explain how this role is different from the trial judge’s role, that you will not be directing people how or whether to resolve the case and that you will not be the trial judge.
- If you have a confidential conversation without the DA present, be clear with defendant about what you will or will not disclose to DA.
- Explain the purposes and goals of the MCJRP program and the roles of the people participating in the JSC. Explain that the DA’s interest is in protecting the public from people who commit crimes. Explain that prison is one way to protect the public, but it is not the only way. Explain that probation, treatment, and other options may be more appropriate than prison in some cases, and that one purpose of the JSC is to determine whether this is one of those cases. Explain that “MCJRP ELIGIBLE” on the indictment and the fact that you may discuss probation as an option does not mean that the defendant will get probation.

### **C. Facilitate Discussions with JSC Participants**

- Encourage the defendant to speak and note there is no obligation to discuss the charges. Explain that it is in the defendant’s interest to talk about current life circumstances, what was going on in the defendant’s life at the time of arrest, and any other facts and circumstances that will help the DA, the PO and the defense lawyer to resolve the case.
- Get the defendants to talk to you, if possible. Ask open-ended questions. Invite defendants to share their story and help them express it. Sometimes starting with “easy” questions (where did you go to high school, do you have kids, what’s the last job you had, what are your goals, etc.) can put defendants more at ease. Use the information in the assessment report to formulate questions and areas of discussion.

- After setting the initial tone, move on to other questions and information that will help move the case toward resolution, including the following: Have you ever done treatment? What did you learn? Why do you think you relapsed? What would be different this time? Are you prepared to put negative influences (e.g., drug users, gang members, change of places and change of faces, etc.) out of your life? Why now and not before? Why do you think positive influences (e.g., supportive family, employment, etc.) did not keep you out of trouble?
- Remember that the goal is not only to resolve the case, but to avoid future prison sentences from revocations. Ask what the defendant needs to succeed on probation. Confirm the defendant's understanding about the consequences of probation violations. Identify desires, goals and action items. Weave Motivational Interviewing, Change Talk or other similar techniques into the discussion where appropriate. Give positive reinforcement for steps already taken or positive attitudes of the defendant.
- Include the DA in the discussion, as needed. What is the presumptive prison sentence if defendant is convicted? Has the DA made an offer? Does the case need to be staffed and when can it be staffed? Is there additional information needed from the defendant that can help the DA's assessment of the case? Hearing from the DA can help defendants better understand the negotiations process. Consider whether a discussion of the strengths and weaknesses of the case from the state's perspective will be useful.
- Include the PO in the discussion, as needed. Has the defendant been evaluated for drug or alcohol addiction? Is a mental health evaluation warranted? Does the defendant need housing or other services? Is the defendant ready for change, or more contemplative or pre-contemplative? What type of services does the PO believe are needed and are those services available? Has the PO evaluated other options, such as START Court, DISP, Mental Health Court, Veterans Court for this defendant? What is the PO's overall sense of defendant's chances for success on MCJRP supervision? Is there anything else about the defendant that the parties should know that may not be revealed in the LS/CMI Assessment Report or other written materials?
- Include the Defense Attorney in the discussion, as needed. Is there mitigation evidence available that might be helpful? How have any co-defendants' cases been resolved? Are there other circumstances (e.g., cooperation agreement, treatment options) that

should be considered in resolving the case? Consider whether a discussion of the strengths and weaknesses of the case from the defense perspective will be useful.

- Consider involving third parties, such as family members, friends, mentors, or employers, in the discussion. While this may be helpful at times, you may avoid doing this if you think there's too much risk of being sidetracked by collateral issues. If you perceive that the presence of third parties is detrimental to the process, ask them to wait in the hallway.

#### **D. Evaluate and Discuss Potential Outcomes**

- After getting additional information, begin evaluating options and discussing possible outcomes. Among other things, discuss with the attorneys (not the defendant) the following: If the DA sees the case as requiring prison and will not consider probation, ask why. Ask the DA to reconsider, if appropriate. If not appropriate, discuss whether a shorter prison sentence might be warranted. If the DA is willing to consider probation, ask what additional information might help in making the decision. Discuss with the PO and DA the conditions of probation and the length of any required local jail time that will be sought if a probation offer is made. Be creative.
- As the case gets closer to the terms of the agreement, consider meeting separately with the DA to determine the bottom line, what information is needed to extend a probation offer, and what to discuss with defendant regarding the DA's offer. Consider meeting separately with defendant and defense attorney to convey generally what the offer is that a DA may extend and what additional information and negotiation steps would be of assistance.
- If it appears that the parties are ready to work out the terms of a plea agreement at the JSC, help them come to resolution, take the plea if possible, and set a date for sentencing if defendant is not sentenced immediately. The PO should be present at sentencing for cases that will be sentenced to probation. It is generally not critical to have the PO present at the time of the plea if the defendant is not going to be sentenced or if the defendant will receive a prison sentence. Consider scheduling the plea with sentencing set over so the PO can attend. Currently, Thursdays are the best for PO appearances.

- If it does not appear that the parties are ready to work out a resolution at the first JSC, but it seems likely that they will come to agreement, set a further proceedings date for a possible plea. Explain what needs to be done before the date set for a possible plea (e.g., drug and alcohol evaluation, DA staffing, offer conveyed to defense counsel and then discussed with defendant, etc.). In choosing dates, be mindful of timelines, including 60-day issues and existing trial dates. Confirm the PO's availability for sentencing if needed.
- Do not automatically schedule a second JSC if the first does not lead to an agreement. Set a further proceedings date for a second JSC only if it seems likely that a second JSC will help the parties reach an agreement. If the parties later determine that the further proceedings date is not needed, they can cancel with the court.
- Pursuant to ORS 135.432(1)(b), a judge involved in plea discussions may proceed with the plea and sentencing only if both parties agree. Do not suggest that the defendant enter a plea and go "open sentencing" before the JSC judge. The DA's office's practice is not to agree to "open sentencing" with the judge who conducted the JSC without approval from the Chief Deputy or Supervising Deputy District Attorney.
- If appropriate, have a final discussion with the attorneys only (not the defendant) and offer your own recommendation on an appropriate resolution of the case. Be realistic; don't urge the DA to make a probation offer when you know the DA's office will not agree to probation. But in appropriate cases, urge the DA to consider probation even if the DA seems "set" on prison and explain reasons why you feel probation is appropriate.
- Summarize everyone's action items at the end. Explain to the defendant what the next steps are and give a realistic timeline. If you don't set a subsequent hearing, tell the attorneys to contact the court if they need to schedule a plea.

### III. After the Judicial Settlement Conference

- **Comment regarding overall best practices:** After the JSC, the 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. The plea should be scheduled for the earliest possible date.

- Make a note of what happened at the JSC and any other information that you think might be useful if the case returns for a second JSC or a plea. Retain the LS/CMI Assessment Report and your notes for future reference. If the JSC results in a plea, keep the report and your notes in your probation file.
- Consider asking the DA to take the case back to supervisors or the committee for reconsideration if appropriate. Do this sparingly.
- Pleas should be set with the JSC judge if at all possible, especially if it will be a probation sentence. If the JSC judge is not available, set the plea with another MCJRP judge or follow other program rules for scheduling. If appropriate, set sentencing over so the JSC judge can be involved.
- The PO should be present at sentencing for cases that will be sentenced to probation. It is generally not critical to have the PO present at the time of the plea if the defendant is not going to be sentenced or if the defendant will receive a prison sentence. If sending a case out from call, assign to the JSC judge first, or another MCJRP judge if the JSC judge is not available.
- Pursuant to ORS 147.512(2)(b)(B), if a victim previously asked to be consulted regarding plea discussions, ask the DA “what reasonable efforts to inform and consult the victim concerning plea negotiations were made and whether the victim agrees or disagrees with the plea agreement.”
- Continue to motivate and encourage the defendant during the plea and sentencing hearing. Create an atmosphere of hope and expected success. Remember that prison hasn’t always worked to deter some defendants from criminal behavior, so the threat of prison may not alone discourage recidivism.
- Attend Milestone graduation ceremonies at the County Building when possible. Commit to attending at least one.