Sentencing ‘Best Practices’ a must read for the criminal bar

Boston, Massachusetts

July 28, 2017

By Jack Lu

Jack Lu is Chair of the Massachusetts Sentencing Commission, an Adjunct Professor of Law at Boston University School of Law, and a Superior Court Judge. This analysis of the Sentencing Best Practices is his personal opinion, and does not represent the view of any entity with which he is associated.

From the fall of 2014 through early 2016, committees of judges, prosecutors, defense attorneys, probation officers, professors, and police worked together to develop Sentencing Best Practices based on research and data for use by judges and the bar in the Superior, Boston Municipal, District and Juvenile Courts.

The committees produced Sentencing Best Practices reports for each of those Trial Court departments.[[1]](#footnote-1) The results of the committees’ labor are exemplary: reports reflecting principles for effective methods of reducing reoffending—reducing crime and recidivism—and promoting positive outcomes for justice-involved individuals based on a growing body of research and data regarding the length of terms of incarceration and probation practices. [[2]](#footnote-2)

Prosecutors, criminal defense lawyers and other participants in the criminal justice system should study the Sentencing Best Practice principles. Begin with the Superior Court Best Practices, which consist of 17 best practices principles along with commentary.

The first two best practice principles speak about purposes and goals of sentencing and stress proportionality, rehabilitation, restoration, reintegration, and parsimony (that a sentence should be “no more severe than necessary”).[[3]](#footnote-3) This is an eye toward the future, or utilitarian goals.

Sentencing Best Practices 3 through 7 concern process. Underlying the recommendations are modern sentencing trends. Judges should encourage, solicit, and even require sentencing memoranda, and give careful consideration to other materials submitted by counsel. The typical Massachusetts state criminal case involve no sentencing memoranda (and many cases involve the submission of no materials except the criminal record) while many civil cases involve hours of costly depositions, and much paper discovery in interrogatories, requests for admission and the like. There is a big difference in the resources allotted to determination of criminal defendants’ liberty versus civil, largely monetary, disputes. Busy prosecutors and defenders are unlikely to think that they have the luxury of time to draft sentencing memoranda in every case, but they do have the resources to increase the use of sentencing memoranda.

It is unfortunate that presentence reports or investigations by the Probation Service are unusual in Massachusetts. This is beyond the control of the Probation Service. Nevertheless, since 2011, the service has engaged in a system wide re-structuring and re-orientation involving the implementation of evidence- and research-based hiring, personnel, training, and service practices, an effort for which the Massachusetts Probation Service has received well-deserved recognition.[[4]](#footnote-4) As a result, probation officers are increasingly in a position to provide well-informed and well-reasoned recommendations. In recognition of this on-going change, the best practices principles recommend that judges require that counsel consult with probation about the length of any probation term, and the imposition of special conditions, as probation officers have valuable expertise to lend toward designing probationary sentences that make us safer, and promote positive outcomes for individuals on probation.

Sentencing Best Practices 8 through 14 reflect research and the evolution of modern thinking on probation, including the view that sometimes less is more. All of the best practices on probation practice are based on empirical studies that tie, for example, excessively long probation terms and excessive numbers of conditions to increased recidivism. Conditions of probation should be narrowly tailored to the criminogenic (or crime-causing) needs of the individual to protect the victim and the public; imposing too many conditions may cause crime. Generally probation terms longer than 3 years should be avoided, and incentives (for example, reductions in the length of probation for good behavior) may be effective in reducing recidivism and promoting positive outcomes for probationers. Contrary to views that were widespread just a few years ago, court fees and fines can be destructive to the prospects for an individual’s success and can have an negative effect on an individual and his family.[[5]](#footnote-5) Revocation, that is, imposition of the full sentence, is a last resort; the court should respond to so-called technical violations or low-level criminal activity with other sanctions. Responses should be swift, certain and proportional, a reflection of research that suggests that such responses are more effective than long-delayed excessively harsh sanctions.[[6]](#footnote-6)

Best Practice 13 concerns the use of risk needs assessments by the Probation Service. In Massachusetts, risk needs assessments are done after sentencing at the beginning of probation. If the assessment shows a material change in criminogenic needs, the individual should be brought back before the court for modification of conditions, except that no additional punitive conditions may be imposed.

Sentencing best practices principle 15 discourages “tracking” a probation violation proceeding based on new criminal conduct to await the result of the new criminal charge. This principle is based on the view that probation violations should proceed swiftly to maximize their effectiveness, and that where there is probable cause to believe that a probationer has engaged in further criminal conduct while on probation, that person may be inappropriate for continued probation supervision. But some cases warrant waiting for the new charge, for example, when it may be inappropriate to require that the alleged victim testify twice.

Principles 16 and 17 provide that judges should have access to “empirical data”, including “social science research”, and information from the Probation Service and Sentencing Commission, and the information should be made available through regular educational programs to judges.[[7]](#footnote-7) [[8]](#footnote-8) [[9]](#footnote-9)

The Sentencing Best Practices reports are an impressive exposition of recommended modern sentencing practices based on data that members of the criminal bar should carefully study.

1. Superior Court Working Group on Sentencing Best Practices. (2016). Criminal Sentencing in the Superior Court: Best Practices for Individualized Evidence-Based Sentencing. Available at <http://www.mass.gov/courts/court-info/trial-court/sent-commission/best-practices.html> (hereinafter, SCSBP) [↑](#footnote-ref-1)
2. Although not relied upon by the committees, among many books, the National Research Council’s *The Growth of Incarceration in the United States*; *Exploring Causes and Consequences* lists the devastating negative consequences of incarceration for individuals, their families, communities and society. Travis, J., Western, B., and Redburn, S., eds. (2014). *The Growth of Incarceration in the United States: Exploring Causes and Consequences*. Wash. D.C.: The National Academies Press. Available at: <http://johnjay.jjay.cuny.edu/nrc/NAS_report_on_incarceration.pdf> [↑](#footnote-ref-2)
3. SCSBP, p. 6. [↑](#footnote-ref-3)
4. <https://aclum.org/wp-content/uploads/2017/01/20170117-CSG-Letter.pdf>, p. 8. [↑](#footnote-ref-4)
5. Geller, A., Garfinkel, I., and Western, B. (2011) Paternal Incarceration and Support for Children in Fragile Families. *Demography*. 48. Available at: <https://scholar.harvard.edu/files/brucewestern/files/paternal_incarceration_and_fragile_families_0.pdf> [↑](#footnote-ref-5)
6. Corbett, R. (2015) The Burdens of Leniency: The Changing Face of Probation. *The University of Minnesota Law Review*. 99:5, p. 1724. Available at: <http://www.minnesotalawreview.org/wp-content/uploads/2015/09/Corbett_4fmt_PDF.pdf> [↑](#footnote-ref-6)
7. SCSBP Principle No. 16. [↑](#footnote-ref-7)
8. Empirical data in an accessible form is widely available: Bonta, J. and Andrews, D.A. (6th ed.,2017) N.Y., N.Y.: Routledge. *The Psychology of Criminal Conduct*, Latessa, E., Listwan, S., Koetzle, E. (2013) N.Y.,N.Y.: Routledge. *What Works (and Doesn’t) in Reducing Recidivism,* Smith, Cindy J., Sheldon X. Zhang, and Rosemary Barberet (Eds.). (2011) Abington, U.K: Routledge. *International Handbook of Criminology*. and Byrne, J., & Lurigio, A.J. (2009). Separating science from nonsense: Evidence-based research, policy, and practice in criminal and juvenile justice Settings. *Victims and Offenders: Journal of Evidence Based Policies and Practices*, 4 (4), 303-310. Available at: <http://faculty.uml.edu/jbyrne/SpecialIssue.pdf> [↑](#footnote-ref-8)
9. The Flaschner Judicial Institute has conducted two seminars on evidence- and research-based sentencing for judges. One of them included probation officers. [↑](#footnote-ref-9)