"FROM DAY ONE"[1]: WHO'S IN CONTROL AS PROBLEM SOLVING AND CLIENT-CENTERED SENTENCING TAKE CENTER STAGE?

CAIT CLARKE* AND JAMES NEUHARD†

Abstract: Two significant changes in the American criminal justice system—the prevalence of plea bargaining as a replacement for trials, and the rise of problem-solving courts—have caused criminal defense lawyers to rethink their role of providing effective counsel. In particular, lawyers must rethink what it means to represent a client's best interests and what it means to "win." This paper begins by describing these changes and then raises some ethical concerns for criminal defense lawyers who engage in problem solving for their individual clients or who work within "problem-solving" courts. The paper attempts to highlight some of the ethical boundaries for criminal defense advocates who want to address clients' underlying problems while they resolve the pending criminal matter. It also highlights some of the ethical concerns presented in problem-solving courts. For traditional defense lawyers, work in problem-solving courts can require a difficult shift in attitude and advocacy strategy around what it means to provide "counsel." Taking cases to trial

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* Cait Clarke, S.J.D., is the Director of the National Defender Leadership Institute (NDLI) within the National Legal Aid and Defender Association (NLADA). Prior to directing NDLI, she was with the John F. Kennedy School of Government's Program in Criminal Justice Policy and Management where she managed the Executive Session on Public Defense (ESPD), taught seminars at the Kennedy School and Harvard Law School, and was a special assistant to the Director of the International Graduate Program at Harvard Law School. Prior to earning her doctorate degree from Harvard Law School, she was an assistant professor of law at Loyola Law School in New Orleans, a Prettyman Fellow, and a clinical supervisor in the Criminal Justice Clinic at Georgetown University Law Center. Following her clerkship on the D.C. Court of Appeals, she practiced indigent criminal defense in Maryland. The authors are especially grateful to Sonja Shield and the staff of the *N.Y.U. Review of Law & Social Change* for their valuable editorial assistance.

† James Neuhard, J.D. is the Director of the State Appellate Defender's Office for the State of Michigan. He is the former President of the National Legal Aid and Defender Association, the National Equal Justice Library, and the Criminal Defense Attorneys of Michigan. He has chaired the ABA's Special Committee on Funding the Justice System, has been a member of the ABA Standing Committee on Legal Aid and Indigent Defense, and has chaired the Bar Information Program. He is a principal author of what is now the ABA's "Ten Principles of a Public Defense Delivery System." He was a participant in the Executive Sessions on Indigent Defense at Harvard's John F. Kennedy School of Government. He has argued before the U.S. Supreme Court, has been awarded NLADA's Reginald Heber Smith Award, the Michigan State Bar's Champion of Justice Award, and has been honored by the Michigan Chapter of the National Lawyer's Guild for his career as a lawyer.

1. "From Day One" is taken from SENTENCING PROJECT, TWELVE STEPS TO EFFECTIVE DEFENSE SENTENCING ADVOCACY 1 (1993), *available at* http://www.sentencingproject.org/pdfs/2065.pdf.

remains a critical component of our criminal justice system, but for the vast majority of cases that end in plea agreements or diversion, it is also possible to provide zealous advocacy while expanding the meaning of "counsel" in new problem-solving environments.

I.
INTRODUCTION—THE TRIAL AS ICON

The criminal trial has gripped American legal and popular culture to the point that little else lawyers do reaches public consciousness. Pundits portray criminal defense counsel as despised, resented, or at best, underappreciated. While the public, on some levels, shares this belief, they overwhelmingly believe that the ultimate fairness of the American criminal justice system depends on criminal defense lawyers who zealously advocate for their clients in court.[2] The legal profession, portrayed at its most noble, often involves a lawyer defending her client at trial in the face of overwhelmingly negative public pressure.

Almost without exception, the trial dominates every aspect of law school casebooks,[3] legal training, Continuing Legal Education, practice standards,[4] and the rules of professional conduct. The lawyer at sentencing is seldom seen. Sentencing is too often considered an afterthought rather than seen as a critical stage in a criminal case. Indeed, the initial prosecutor is often entirely absent

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2. *See, e.g.*, BELDEN, RUSSONELLO & STEWART, AMERICANS CONSIDER INDIGENT DEFENSE: ANALYSIS OF A NATIONAL STUDY OF PUBLIC OPINION 1 (2002) (summarizing the findings of a national research project on the public's attitudes toward criminal defense and assigned counsel, including the finding that "support for indigent defense is rooted in the American value of fairness"), *available at* http://www.nlada.org/DMS/Documents/1075394127.32/Belden%20Russonello%20Polling%20short%20report.pdf. *See also* David M. Spitz, *Heroes or Villains? Moral Struggles Vs. Ethical Dilemmas: An Examination of Dramatic Portrayals of Lawyers and the Legal Profession in Popular Culture*, 24 NOVA L. REV. 725, 737 (2000) (describing public sentiment towards lawyers: "Specifically, lawyers are applauded for following their client's wishes and bending the rules to satisfy those wishes, and at the same time, they are condemned for manipulating the legal system, rather than striving to uphold what is right and achieve true justice. . . . Criminal defense attorneys provide a good illustration of this proclivity. . . .").

3. *See, e.g.*, Andrea M. Seielstad, *Community Building as a Means of Teaching Creative, Cooperative, and Complex Problem Solving in Clinical Legal Education*, 8 CLINICAL L. REV. 445, 492 n.153 (2002) ("Since so much of law school revolves around the study of appellate cases derived from trials in which lawyers assume the role of advocates in an adversarial system (and popular images of the lawyer reinforce these preconceptions), it is helpful to be able to discuss the advantages and disadvantages of the litigation model in conjunction with some contrasting lawyering experiences."). *See also* Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1149 (May 2001) ("Over the last ten years, law reviews have published 633 articles on criminal petit juries, but only 62 about guilty pleas or plea bargaining. . . . A glance at a leading criminal procedure casebook reflects a similar disproportion. Saltzburg and Capra, for example, devote 313 pages to jury trials, but only 38 to all aspects of pleas.").

4. *See, e.g.*, Nat'l Legal Aid & Defender Ass'n, Defender Resources, Standards, Compendium of Indigent Defense Standards (containing a complete listing of National Indigent Defense standards and commentary on those standards), *at* http://www.nlada.org/Defender/Defender_Standards/Defender_Standards_Comp (last visited Jan. 20, 2004).

from a sentencing hearing, and stand-ins regularly appear for the defense trial lawyer; clients are virtually indistinguishable from one another as they shuffle past judges. Yet plea bargains and sentencing make up most of lawyers' criminal practice, fill most of the courts' dockets, people the probation programs, and load the prison buses.[5] So why is it that virtually all of our legal teaching and training models use the trial as the singular icon of lawyering in the criminal justice system? The defense bar has barely explored skills development and sophisticated training programs on plea negotiations, sentencing alternatives, and training of sentencing advocates, and has not deeply mined the kaleidoscope of client needs and expectations in diversion and sentencing.

There are several responses to these concerns, but the main premise of this paper is that too little attention has been paid by defense attorneys and other stakeholders to effective and innovative negotiation, diversion, and sentencing advocacy for the vast majority of criminal clients.[6] In fact, many new programs are being created that dramatically affect the treatment of defender clients, with little or no involvement of the defense bar in their creation or operation. Defense attorneys are not viewed by other stakeholders in the system as being equal players or as having an interest in the creation of these programs. Rather, everyone in the system tends to view the defense as focused on individual clients and trials, rather than on treatment programs, community safety, or successful probation programs. Furthermore, defense attorneys remain on the sidelines out of fear that partnering in the creation of treatment programs will compromise

5. Plea rates vary from state to state, and the rates are often significantly different within counties or between urban and rural jurisdictions. Nonetheless, the plea rates in most states are at 70% or higher. *See* BUREAU OF JUST. STAT., FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2000, at 25, 28 (2003) (reporting that in state courts in the nation's largest counties, more than three-fifths of defendants entered a guilty plea at some point in their case; guilty pleas accounted for 95% of convictions obtained within one year of arrest), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/fdluc00.pdf; BUREAU OF JUST. STAT., COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2001, at 55 (2003) (reporting that of defendants convicted in federal criminal cases, 95% had pleaded guilty, while 5% were convicted at trial), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cfjs01.pdf. "Notably, [in 1995] only 5.7 percent of felony cases in New York State were disposed following a trial; the overwhelming percentage of felonies were disposed by guilty pleas (84.8 percent)." Martin Fox, *Associations Join to Oppose Sentence Bill: Pataki Measure Called "Draconian" in Resolution*," N.Y. LAW J., Mar. 21, 1996, at 1, 2. *See also* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 566 n.230 (2001) (noting the increase in guilty plea rates from the 1960s to the 1990s).

6. Trials are the primary focal point for a variety of reasons. Trials tend to involve cases with serious consequences such as the death penalty. Generally, the more serious the consequences, the more experienced the attorney required. Most case law is generated from these trials, and sentencing has only become reviewable on appeal in the latter part of this century. Casebooks and training seminars therefore focus on the trial. Finally, the trial is the adversarial contest between the citizen-defendant and the state; this view of the trial as a shield against the unfettered power of the state has been taught in civics courses almost from the beginning of the nation. Indeed, the recent outcry concerning the release of over 100 inmates from prison and death row as "actually innocent" focused on the breakdown in the trial process—even though almost 20% of the defendants had pleaded guilty. *See generally* JIM DWYER, PETER NEUFELD & BARRY SCHECK, ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (Doubleday 2000).

their ethical commitment to zealous advocacy of their clients' interests. In addition to fleshing out the reasons why defense attorneys are not more engaged in the construction of alternatives, we will argue in this paper that defenders ought not to shrink away from these alternatives but rather should embrace them. Moreover, we will present excerpts from discussions with defender directors who are actively engaged in the creation and operation of creative treatment programs and community outreach initiatives and who remain uncompromisingly committed to the zealous defense of their clients' interests.

Effective representation requires not only scrupulous preparation for trial but necessarily includes zealous advocacy for a sentence that will "work" for the client.[7] This preparation by counsel should begin as early in the representation process as possible. To be effective, defense representation must continue beyond trial to the conclusion of the probation or diversion that is advocated and obtained for the client. This paper is intended to encourage defense lawyers and those who support, oversee, or finance their work to expand their notions of what it means to provide effective assistance of counsel. In this paper, we discuss the two major changes that are occurring in criminal defense practice: the reshaping of what it means to provide effective counsel and the rise of problem-solving courts. These two changes mean that defense lawyers are thinking about problem solving for their clients both at an individual level and at the systemic level and how, as a case progresses over time, the role of counsel is transformed.

II.
INCREASING THE EMPHASIS ON EFFECTIVE SENTENCING ADVOCACY: WHOLE-CLIENT REPRESENTATION AND PROBLEM-SOLVING LAWYERING

Trials do not make up the bulk of the criminal justice system; an overwhelming majority of criminal cases are resolved through negotiated pleas or diversion programs.[8] In response to this reality, and due to a renewed interest in client-centered advocacy, leaders of some defender programs are reshaping the fundamental ideas that form what it means to provide effective "counsel," from arraignment to sentencing and beyond. These criminal defense lawyers work closely with other non-legal professionals to address the underlying problems that brought their clients into the criminal justice system in the first place. Many are trying to "problem-solve" for their clients on issues not directly related to the criminal charges. Creative defense lawyers adjust their practices, thus implicating new ethical questions.

7. A sentence that will "work" generally involves both a carrot and a stick. It is a sentence that has a high probability that the client can successfully complete it and become a productive citizen, while also improving the client's chance of avoiding a return into the criminal justice system. It might include diversion, probation, and/or jail time.

8. *See supra* notes 3–5 and accompanying text.

A. Rethinking What It Means to Provide "Counsel"

As lawyers' roles have evolved, trial advocacy has become paramount and the broader role of "counselor" has faded into distant memory. The trial lawyer is the image most Americans first think of when they think of a lawyer. Most jokes, movies, and dreams of being a lawyer conjure images of Clarence Darrow, Atticus Finch, or a rapacious shark conducting a caustic cross-examination. The best of these icons moved generations of Americans to admire the trial attorney's steadfast determination against all odds and inspired many to become lawyers. The image of a cagey, cynical, committed, battle-tested lawyer ready to tirelessly wage war on their behalf at trial is the standard against which all trial lawyers are measured from the first meeting with a client. Many criminal defense lawyers are comfortable with this self-image. In fact, deep down, many seek to measure up to and be measured against that image. Young lawyers seek to reassure the client that their energy, intelligence, and commitment to the client's case or cause makes up for their lack of experience. Older lawyers sell their experience and knowledge to overcome the fear that they lack the stamina to wage all-out war on the client's behalf. All the while, the image of winning flashes intermittently in the imagination of client and advocate alike, and the feeling is exultant: a vision of the lawyer walking the client as a free person out of the courtroom and down the court house steps after a verdict of "not guilty."

Virtually all attorney-client relationships in criminal cases start after the defendant has been or is about to be charged with a crime. At that moment, the lawyer's primary goal is to have her client declared innocent and freed from all consequences of the arrest. However, the possibility of a plea is present in almost every case, even at the first meeting or upon seeing the charging documents. The prosecution, defense, and judge all know that pleas are necessary and expected and keep the system from grinding to a halt. In fact, the entire system has adapted itself to this overwhelming reality and expectation. Thus, trials and courtroom battles, let alone not-guilty verdicts, make up a very small percentage of the workload moving through American courts. At the felony level, guilty pleas comprise a vast majority of the court dispositions, even excluding those cases that proceed to diversion programs that do not require a plea or conviction for entry.[9] The plea and diversion rates are high at the

9. *See* BUREAU OF JUST. STAT., FELONY SENTENCES IN STATE COURTS, 2000 (2003) ("Guilty pleas accounted for 95% of felony convictions in State courts in 2000."), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/fssc00.pdf. The Court Statistics Project of the National Center for State Courts found that, although guilty plea rates vary from jurisdiction to jurisdiction, guilty pleas accounted for 74% of felony cases of the National Association for Court Management's Trial Court Network. *See Profiling Felony Cases in the NACM Network*, CASELOAD HIGHLIGHTS (Nat'l Ctr. for State Courts), Aug. 2001, *available at* http://www.ncsconline.org/D_Research/csp/Highlights/Highlights_Main_Page.html.

misdemeanor level as well.[10]

In spite of this notable tendency toward non-trial dispositions, the profession nonetheless pays scant attention to the advocate's role leading up to the decision to plead and the goals of representation thereafter. In great part, this lack of attention is generated by the tainted image of the plea bargainer both by the bar and even in the pulp fiction of the day. Those who can "get along and go along" seldom, if ever, try cases. While often extolled by judges for their efficiency, they are referred to by the trial bar as "greet and plead" attorneys. Their clients often see them as tools of the system rather than as independent actors zealously representing their interests against the government prosecutors or police.[11]

Negotiation is viewed very differently in civil matters than in criminal matters. On the civil side, arbitration and mediation to facilitate settlements and close cases are well-accepted as preferable to the length and cost of litigation. Civil lawyers who can settle a case are praised for their resourcefulness. However, those defenders who negotiate or plead away their client's freedoms live in the shadows, seldom get referrals, are never asked to teach, and are surely not recommended to represent our relatives. That negative image does not hold true for all players in the criminal justice system. Lead prosecutors are held in high esteem for negotiating deals, and judges earn reputations as "good" plea judges for the defense and prosecution alike. Moreover, dockets are structured to give the "light sentencing" judges the first shot at the case to close the deal. Despite the difference in perception of the role of negotiation in civil and criminal matters, it is clear that in the vast majority of cases, winning and losing is no longer measured in the heady euphoria of "Madame Foreperson, have you reached a verdict?" Now, the vast majority of cases in America are resolved through bargained deals heard in chambers, hallways, or on cell phones in the early moments of the case. However, while mediation, arbitration, and the art of settlement are taught and extolled on the civil side, similar skills are not only not taught, they are frequently demeaned in many traditional criminal defense circles.[12]

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10. *See* BUREAU OF JUST. STAT., FEDERAL CRIMINAL CASE PROCESSING 2001, 11, tbl.5 (2001) (finding that 7040 of the 7995 defendants convicted of misdemeanors in U.S. district courts from October 1, 2000 to September 30, 2001 pled guilty), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/fccp01.pdf.

11. If too much attention is paid to negotiation or effective sentencing, or if too much emphasis is placed on the benefits to the system of faster dockets or decreased costs, it creates the image of "system" lawyers who are uninterested in their clients and more interested in currying favor with the system or gaining appointments. There is a palpable fear that even teaching effective plea bargaining is negative thinking and has the mephitic aroma of "losers" and "cop out artists." Good criminal defense lawyers have fought for years to shed that image, even to the extent of extreme acts of independence. Attitude, affect, and actions are consciously chosen to increase the appearance of independence from the system.

12. There are a few programs that do value negotiation skills and train lawyers in negotiation. For example, the Wisconsin Public Defender program has regular negotiation skills training. *See* State of Wisconsin Office of the State Public Defender, *at* http://www.wisspd.org (last visited Jan. 20, 2004). Also, the death penalty community has long recognized the value of teaching effective

This has begun to change in some jurisdictions. While courts have become "catch basins" for other system failures, like mental health services or poorly funded and monitored government treatment programs, defense lawyers have begun to focus more attention on sentencing advocacy and the creation of sentencing alternatives. This was spurred by several factors.

First, those involved in defender programs began to realize that many of their adult clients began their defender-client careers as juveniles or minor offenders. Often a child's first contact with the justice system is not for a serious criminal matter; however, the actions of at-risk youths too often escalate into serious matters with severe criminal sanctions. To help address this, judges take social and psychological background information into consideration in juvenile cases from the very start with a focus on the "best interest of the child" rather than on the standard trial practice.[13] Defenders who are interested in problem-solving are involved in monitoring and coordinating contact with the system to ensure that youth will not become major felons.[14] Particularly for juvenile matters, better coordination with social service providers, educators, police, prosecutors, and criminal defense programs is needed.

Second, for every homicide defense, thousands of cases move through the juvenile, misdemeanor, and felony programs.[15] Tens of thousands of cases and clients are disposed of, often with scant attention paid to the differences between them. A series of developments has begun to shine a spotlight on this mass of once indistinguishable cases. Huge overloads in jails and prisons have forced jurisdictions to consider alternatives.[16] National attention has begun to focus on the low impact of traditional probation, the often stunning success of innovative treatment programs which are later shut down due to lack of funds, the growing successes of problem-solving courts, and the emergence of programs that not only reduce or eliminate sentences of jail and prison time, but more importantly reduce the probability of recidivism.[17] Programs and clients have reported not only crime-free lives, but a wide range of quality-of-life improvements: being

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negotiation skills to lawyers. The annual summer death penalty conferences at Santa Clara University teaches negotiation skills for trial lawyers. Professor Ellen Kreitzberg directs this program at the Bryan R. Schechmeister Death Penalty College. *See* Santa Clara University School of Law: The Death Penalty College, *at* http://www.scu.edu/law/socialjustice/death_penalty_college.html (last visited Jan. 20, 2004).

13. *See* Ellen Marrus, *Best Interest Equals Zealous Advocacy: A Not So Radical View of Holistic Representation for Children Accused of Crime*, 62 MD. L. REV. 288, 334–40 (2003).

14. *See, e.g.*, Francie Latour, *State Budget Ax Threatens Legal Aid Group: Project Defends and Guides Indigent Teens*, BOSTON GLOBE, May 6, 2002, at B1 (discussing the work of the Youth Advocacy Project (YAP) in Boston, which provides wrap-around services for juvenile offenders and has an education specialist and social workers on staff).

15. See *supra* notes 3, 9.

16. *See infra* Section III.

17. *See* STEVE BELENKO, NAT'L CTR. ON ADDICTION & SUBSTANCE ABUSE (CASA) AT COLUMBIA UNIV., RESEARCH ON DRUG COURTS: A CRITICAL REVIEW, 2001 UPDATE (2001). *See also* Steve Belenko & Richard Dembo, *Treating Adolescent Substance Abuse Problems in the Juvenile Drug Court*, 26 INT'L J.L. & PSYCHIATRY 87, 95–99 (2003).

able to support their families, hold jobs, get an education, end addictions, and contribute to their communities. As these trends have converged over the last decade, sentencing has slowly taken center stage as an integral part of case preparation from the start of representation.

Systemic failures of many different kinds—zero tolerance in schools and subsequent expulsions, de-institutionalization of mental patients, and funding cuts of other governmental and social services[18]—have increased public defense lawyers' workloads and responsibilities.[19] Often the consequences of these systemic failures for clients include incarceration rather than access to education, work, or provision of mental health or substance abuse treatment. A majority of public defense clients require some form of alcohol, drug abuse, or mental health treatment to curb or prevent recidivist conduct.[20] Those who cannot afford to hire private counsel (which includes the majority of offenders in the state systems)[21] rely heavily on public defense offices to counsel them on treatment programs, housing options, immigration consequences, and employment issues. While trying to address these concerns, defense attorneys must take care to ensure fairness, transparency, and accountability in programs that deal with sentenced individuals. In this climate it is imperative that the "deals" negotiated by defense counsel for their clients do more than dispose of the case. Truth in sentencing also requires that the programs defendants enter have a realistic chance of effectively treating the defendant.[22]

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18. *See, e.g.*, Mark J. Heyrman, *Mental Illness in Prisons and Jails*, 7 U. CHI. L. SCH. ROUNDTABLE 113 (2000); Alicia C. Insley, *Suspending and Expelling Children from Educational Opportunity: Time to Reevaluate Zero Tolerance Policies*, 50 AM. U. L. REV. 1039 (2000–2001); Bruce J. Winick, *Outpatient Commitment: A Therapeutic Jurisprudence Analysis*, 9 PSYCHOL., PUB. POL'Y, & L. 107 (2003); JUST. POL'Y INST., SCHOOLS AND SUSPENSIONS: SELF-REPORTED CRIME AND THE GROWING USE OF SUSPENSIONS (2001), *available at* http://www.justicepolicy.org/downloads/sss.pdf.

19. Defense lawyers hired to represent those unable to hire private counsel are organized in a number of ways, including through state or local public defender ("PD") offices with full-time professional attorneys and staff or through an assigned counsel system. *See generally* Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 LAW & CONTEMP. PROBS. 31 (1995). Another way that the poor can access defense is through a contract system in which a state or local authority enters into a contract with an individual lawyer or group of lawyers to represent a specific number of cases within a negotiated fee structure. The contracts are usually awarded to the lowest bidder, which has caused serious ethical concerns in light of case overloads and lawyer incompetence. *See* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime But for the Worst Lawyer*, 103 YALE L.J. 1835, 1849–55 (1994); Stephen B. Bright, *Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake*, 1997 ANN. SURV. AM. L. 783, 787–90 (1997) (discussing state and local government cost-cutting at the expense of quality defense).

20. *See* Nahama Broner et al., *Arrested Adults Awaiting Arraignment: Mental Health, Substance Abuse, and Criminal Justice Characteristics and Needs*, 30 FORDHAM URB. L.J. 663, 663–64 (2003).

21. STEVEN K. SMITH & CAROL J. DEFRANCES, BUREAU OF JUST. STATS., INDIGENT DEFENSE 1 (1996) (stating that approximately three-quarters of state prison inmates and about half of federal prison inmates received publicly-provided legal counsel).

22. Increasingly, state lawmakers and policy-makers are reassessing mandatory minimum sentencing policies, strict sentencing guidelines, and the "love-affair with incarceration." Vincent

Although rarely seen in this light, sentencing hearings and oversight of the programs beyond the announcement of the sentence also preserve the defense function of "watchdogs" over government programs ostensibly designed for treatment and rehabilitation. Defenders raise concerns about government over-reaching, sentencing disparities—such as the disparities between crack and powder cocaine sentences—and unequal application of the same laws that punish similarly situated individuals or groups differently.[23] Similarly, diversion, probation, and treatment programs require intervention and oversight.

The convergence of all these factors means that the defense function has taken on new and challenging dimensions in a changing system. Thus, the public and their representatives should support a broader role for public defense because, in the end, it is defenders who ultimately protect the fairness of the system and dignity of the criminally accused in the process. Defense lawyers must take the initiative to try to stake out the parameters of their ethical duties in this new situation—as the goals of representation shift or become unclear; as defenders' responsibilities extend beyond sentencing; and as sentencing becomes a "critical stage" of the proceedings.

B. Challenging Traditional Boundaries

Innovative criminal defense lawyers prepare early in their cases for plea negotiations, trial preparation, and sentencing hearings. They see all three stages as critical steps in providing effective and complete counsel for their clients. Some defenders or criminal defense programs engage in team representation or work closely with other non-legal professionals to address the underlying problems that brought their clients into the criminal justice system in the first place. Many try to "problem-solve" for their clients on issues that are often not directly related to the criminal charges. As creative defense lawyers adjust their practices to focus more on negotiation, innovative sentencing advocacy, and problem-solving approaches for clients, they are presented with new ways of practicing law and new ethical questions.

These new frontiers inevitably trigger some psychological discomfort for traditional trial lawyers working within the traditional culture of criminal defense advocacy. Shifting their attention to plea negotiations or expanding the scope of representation into new areas demands new thinking concerning the code of

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Schiraldi, *Finally, States Release the Pressure on Prisons,* WASH. POST, Nov. 30, 2003, at B3; *see also* Fox Butterfield, *With Cash Tight, States Reassess Long Jail Terms*, N.Y. TIMES, Nov. 10, 2003, at A1; *infra* Section III.A.

23. *See* United States v. Thompson, 27 F.3d 671, 678–79 (D.C. Cir. 1994) (summarizing cases upholding cocaine sentencing laws against challenges of discrimination); Andrew N. Sacher, *Inequities of the Drug War: Legislative Discrimination on the Cocaine Battlefield,* 19 CARDOZO L. REV. 1149 (1997); Laura A. Wytsma, *Punishment for "Just Us"—A Constitutional Analysis of the Crack Cocaine Sentencing Statutes*, 3 GEO. MASON INDEP. L. REV. 473 (1995). *See also* CHARLES J. OGLETREE, JR., MARY PROSSER, ABBE SMITH & WILLIAM TALLEY, JR., BEYOND THE RODNEY KING STORY: AN INVESTIGATION OF POLICE CONDUCT IN MINORITY COMMUNITIES (1995).

professional conduct. Similarly, defense practice in the increasing number of problem-solving courts also raises new questions about a defense lawyer's ethical boundaries. Some of the questions that arise include the following:

- How do defenders define what is best for their clients?
- Do they try to "mend" their clients?
- How do they work with judges, probation officers, and prosecutors?
- At the critical decision point, who calls the shots—the client, the judge, or the defense attorney?

Defense lawyers often become involved in the community and with community-based organizations in order to further the problem-solving model of providing "counsel," increase their access to resources, and foster connections with their clients. Examples of such involvement include work with schools, training programs, and treatment programs or religiously-affiliated organizations. Community education initiatives also help clients indirectly by providing information to them and their families through existing community programs or agencies. Regular interactions with community leaders, community organizers, and heads of local organizations can impact the outcome for clients by increasing contacts with and increasing the awareness of available drug and alcohol treatment programs or job training programs. Prevention of crime involves preventative community activities aimed at high-risk groups. This may include trying to stop a high-risk group of teenagers from engaging in some particular behavior or encouraging positive behavior in high-risk groups. For example, there are now popular community education programs that teach young minority males how to interact with police to curb brutality or violence during police-citizen encounters.[24]

Engaging actively in community education and crime prevention strategies will necessarily foster relationships with community organizations and treatment programs. This will enhance the goal of effective client sentencing. Knowledge about programs, their availability, and their appropriateness for particular clients will not only help clients obtain effective sentences—it will also aid in developing mechanisms to improve the effectiveness of the treatment programs themselves, and will facilitate cooperation among these programs as they treat what are often multiple problems faced by clients.

C. Resistance to Problem-Solving Advocacy—Breaking with Tradition

One reason for the slow adoption of a more intense focus on the importance

24. *See, e.g.*, Neighborhood Defender Service of Harlem, NDS Programs, Community Education and Empowerment (Street Law programs, such as the one provided through The Neighborhood Defender Service of Harlem (NDS), teach students about their rights and responsibilities and how to interact safely with police officers. NDS runs a course called "Conflict with Cops" that teaches conflict management, how to diffuse potentially hostile situations with police officers, and how to interact safely with police officers), *at* http://www.ndsny.org/programs.htm#cee (last visited Jan. 20, 2004).

of sentence advocacy is the resistance of leaders in the defense community to this change. Traditional public defender leaders have voiced objection to an expanded notion of the defense function that involves problem-solving or whole-client advocacy and community outreach activities to bolster sentencing options. For example, one public defender leader wrote:

> I have two practical problems with implementing "these sorts of ideas":
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> > 1) My bosses are the members of an Indigent Defense Commission. They tend to have a very conservative notion of what a PD does. Basically, the statute says we represent people in court and so that's all we are going to do. Other than that being a philosophical position, they also believe that we put ourselves at risk politically if we step outside of the letter of our statutory mission. If people get pissed off at us, they have a better target if we are doing something not specifically spelled out by legislation.
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> > 2) Many of the Chief Public Defenders . . . see their roles very narrowly and would complain bitterly that they do not have the time to engage in activities beyond those of the traditional courtroom advocate. Without the resources needed to free up time, people object that the time they have must be dedicated to direct client advocacy. Everything else is a luxury. [We need] some ideas to start changing attitudes (other than "get more money").[25]

These are legitimate concerns in light of the challenges facing new models of defense lawyering in the current political environment—particularly as many states are now facing fiscal crises.[26] In large measure, these concerns raise two issues. First, what is the "traditional" role of a lawyer in getting a "good" sentence? And second, how do you sell "these sorts of ideas" to policy-makers and funders? The answer to both questions is the same: effective sentencing advocacy gets better results for the clients and for the community at large. If the result is better for the client, traditional norms of lawyering demand that the attorney seek those results for each client. An area where intense sentencing advocacy has emerged as a specialty without question is in death penalty cases.[27]

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25. E-mail from an unnamed public defense leader (Apr. 25, 2001) (on file with authors).

26. *See, e.g.*, David M. Herszenhorn, *How Did Such a Rich State Get So Poor?*, N.Y. TIMES, Dec. 22, 2002, § 14 (Conn.), at 1; David Kocieniewski, *Credit Agency Drops Rating on the Debt of New Jersey*, N.Y. TIMES, Mar. 5, 2002, at B6; Mitchell Landsberg, *Troubled Times: State Budget Gap Became an Overriding Issue for Davis*, L.A. TIMES, Sep. 28, 2003, at S3; Lori Montgomery, *Revenue Projections Rebound in Maryland: State Still Looking at Budget Shortfall*, WASH. POST, Dec. 18, 2003, at B1.

27. *See, e.g.*, The Bryan R. Shechmeister Death Penalty College, *supra* note 12 (providing an example of national training programs for the death penalty community aimed at audiences such as public defenders, assigned counsel, investigators, mitigation specialists and others, about how to be effective sentencing advocates and mitigation specialist in capital defense representation. Other such training programs include the "Life in the Balance" program offered annually through the National Legal Aid and Defender Association. In addition, death penalty legal clinics across the

When the stakes are higher, heightened sentencing advocacy is fundamental to a good defense. Similarly, "effective" sentencing plans in defender programs will reduce recidivism, reduce future costs to the system, help place the defendant on the tax rolls, and help keep the defendant and his or her dependants off welfare. All these are better outcomes for the community. In terms of initiating these concepts, community policing, community prosecuting, drug courts, and other specialty courts have most likely already paved the way and proven themselves in the community. Moreover, this enhanced role for defenders in sentencing involvement gives them new ways to approach funders and policy-makers. Heretofore, defenders focused all their efforts on obtaining funding to free defendants that policy-makers had paid to catch, prosecute, and jail. This new approach offers a real chance for defenders to be part of the solution, improving the community as a whole. Public defenders will necessarily become involved in policy decisions and planning long-term programs—areas they have long been excluded from. Although this new approach presents some political risks and the potential for resistance from some defenders, it also presents new opportunities for defenders to improve the lives of their clients, their clients' families, and the community at large.

D. What Is "Winning" a Case?

The standard objection to placing greater emphasis on sentencing and post-sentencing advocacy is that defense lawyers are not social workers and that they should not impose their values on clients. This objection is heightened when the clients had no say in choosing their lawyer, and moreover, when the state is the one "forcing" the client to have this particular defense attorney. However, another way to ask the question is: "What sentencing alternatives or plans do retained counsel prepare for their clients?" Outcome-focused activities that move beyond traditional courtroom advocacy roles are a natural outgrowth of representing a client competently.

In today's criminal justice system, effective representation cannot mean that the professional relationship ends after a finding of guilt or innocence. Rather, it must continue by focusing on further concerns such as finding the appropriate punishment, treatment, counseling, education, and even job training, and by providing what the client bargained for and helping her to successfully complete the program. The probation violation hearing is too late to renew a professional relationship with a client. It is critical to maintain a continuum from negotiations through treatment in a problem-solving court. "Winning" is not only a "not guilty" verdict: it is also such things as helping the client avoid prison or jail, become clean and sober, secure employment, and hold her family together. Our criminal justice system increasingly punishes more severely those defendants

country also teach mitigation skills.), *at* http://www.scu.edu/law/socialjustice/death_penalty_college.html (last visited Jan. 20, 2004).

who have either had a chance and failed or who were previously convicted. In an era of sentencing guidelines, diversion, probation, and prior convictions act as ongoing disabilities which up the ante each time the defendant returns to court.

In the face of these challenges, it is imperative that the programs defendants enter from their first contact with the system—from juvenile court forward—be effective. Reduced recidivism is not the only measure of effectiveness; jobs held, education completed, families supported, and a decrease in the seriousness of later crimes all measure the effectiveness of these programs.

E. Systemic Benefits for More Active Defense Lawyer Participation in Sentencing

A substantial benefit to having defense lawyers pay more attention to the sentencing and treatment stages in their cases is that lawyers can tap into their advocacy skills when it is necessary to hold treatment and social service programs accountable. Defense lawyers can use legal leverage to coordinate programs and ensure that the programs used by the defense organization are of sufficient quality to serve the needs of clients. For example, in larger public defense operations, there could be a defense sentencing unit that locates effective programs, avoids those of lesser quality, helps a client remain in the program through difficult periods, and litigates when the program is not held accountable or does not meet established standards. There are some treatment programs that as a matter of policy, terminate high-risk clients in an effort to maintain a high success ratio; these programs focus primarily on success rates rather than on the overall effectiveness of the program. Defenders need to know which programs will work for their clients and then hold program managers accountable by using their advocacy skills and training beyond the courtroom.

Winning means preserving human dignity and helping clients become productive and peaceful members of a community. Effective representation preserves the human dignity of the offender and helps protect the dignity of all the participants in the criminal justice process. The attempt to provide more whole-client representation and sentencing advocacy throughout the life of a case can improve both the process and the final outcome.

Human dignity is better preserved when the defense gets more deeply involved in the dispositional stage of the process. Diagnostic work needs to be done at the beginning of a case, starting with the first client contact, so that the defense team is better prepared for the dispositional stage. In the event that a case proceeds to trial, the appropriate treatment experts and alternative dispositions should be located early in the process so that lawyer and client can make informed choices as the case evolves. Creative defense lawyers can tap into a number of professional associations and other resources when they seek to improve their advocacy at the dispositional stage. This dispositional focus does not detract from zealous advocacy but enhances it.

In fact, there are nationally recognized professional organizations that promote alternative sentencing and problem-solving lawyering as critical components of a lawyer's role as a zealous advocate. The Washington, D.C.-based Sentencing Project and the National Association of Sentencing Advocates (NASA) provide research and support for alternative sentencing strategies and sponsor innovative training events for mitigation specialists, sentencing advocates, parole and probation professionals, investigators, academics, and criminal defense lawyers. For defense lawyers who are interested in improving their sentencing strategies and their access to alternative sentencing programs, the Sentencing Project and NASA provide an increasing wealth of helpful information.

NASA was established in 1992 as a professional membership organization of sentencing advocates and defense-based mitigation specialists. Members work closely with defense counsel on behalf of the accused, the convicted, inmates, and parolees. In an effort to assist practitioners in navigating the complex world of sentencing, NASA promulgated ethical practice standards for practitioners.[28]

The Sentencing Project provides instructive papers such as "The Twelve Steps to Effective Defense Sentencing Advocacy."[29] For example, this publication states that "[d]efense counsel are expected to know sentencing law and procedures, including court rules and sentencing guidelines, in their jurisdiction. Yet for many criminal defendants, their counsel's application of twelve simple rules for sentencing would greatly improve the sentencing outcome."[30] For the criminal defense lawyer who is interested in problem-solving lawyering and is aware of the high percentage of cases that end in guilty pleas, perhaps the most important step is number two: "*Keep Sentencing in Mind from Day One*: The

28. *See* NAT'L ASS'N OF SENTENCING ADVOCATES, CODE OF ETHICS AND PROFESSIONAL STANDARDS (1997) (providing a list of ethical standards), *available at* http://sentencingproject.org/nasa/pdf/CodeofEthics.pdf.

29. *See* SENTENCING PROJECT, TWELVE STEPS TO EFFECTIVE SENTENCING ADVOCACY (1993) [hereinafter TWELVE STEPS] (the Sentencing Project's "Twelve Steps to Effective Sentencing Advocacy" are: (1) Interview for Sentencing; (2) Keep Sentencing in Mind from Day One; (3) Walk in Your Client's Shoes; (4) Build a Theory of Sentencing; (5) Don't Hesitate to Call for Help; (6) Put the Defendant to Work and to the Test; (7) Prepare a Plan; (8) Let the Prosecutor Help Design the Alternative Sentence; (9) Prepare the Defendant for the Pre-Sentence Interview; (10) Advise and Prepare Witnesses for the Sentencing Hearing; (11) Teach the Defendant to Talk in Court; (12) Consider the Social Implications of Sentencing), *available at* http://www.sentencingproject.org/pdfs/2065.pdf. *See also* SENTENCING PROJECT, COMPONENTS OF AN EFFECTIVE ALTERNATIVE SENTENCING PROGRAM FOR PUBLIC DEFENDERS, *available at* http://www.sentencingproject.org/pdfs/1000.pdf (last visited Jan. 20, 2004); SENTENCING PROJECT, DEFENSE-BASED ALTERNATIVE SENTENCING PROGRAMS: ISSUES AND PROGRAMS, *available at* http://www.sentencingproject.org/pdfs/1010.pdf (last visited Jan. 20, 2004); SENTENCING PROJECT, ELEMENTS OF A DEFENSE SENTENCING PLAN, *available at* http://www.sentencingproject.org/pdfs/1030.pdf (last visited Jan. 20, 2004); SENTENCING PROJECT, THE THINKING ADVOCATE'S LIST OF MITIGATING FACTORS, *available at* http://www.sentencingproject.org/pdfs/1070.pdf (last visited Jan. 20, 2004).

30. TWELVE STEPS, *supra* note 29, at 1.

early stages of a criminal case can shape the outcome at sentencing. With some advance thought, discovery, motions practice, plea negotiation strategies, evidentiary hearings and the trial itself can bring out information useful to your client at sentencing."[31]

In a related project aimed at identifying the critical components and professional aspirations for model sentencing advocates, the Sentencing Project is in the process of endorsing the "Ten Principles of Effective Sentencing Advocacy." Towards that end, the Sentencing Project convened a working group of lawyers, judges, sentencing advocates, academics, policy-makers, and other sentencing experts to set out the fundamental tenets of sentencing advocacy.[32] Several indigent defense leaders who direct some of the most innovative programs in the country support these Ten Principles; other stakeholders support the principles and the emphasis placed on creative sentencing advocacy. A former U.S. Pardon Attorney states that "effective sentencing advocacy, although demanding, requires maintaining a relationship with clients by communicating with them throughout the process and beyond the sentencing hearing. It requires individualized risk assessments while tailoring what happens to people based on who they are as individuals. It requires staying in contact with clients post-disposition and looking for opportunities to advocate for sentence reduction and other systemic advocacy such as petitioning for clemency."[33] As more defenders focus on creative, individualized sentencing advocacy by accessing the expertise of mitigation specialists and social workers, other criminal justice leaders are rethinking models of problem-solving justice and developing new court systems.

III.
RETHINKING THE ROLE OF COURTS—SYSTEMIC REFORM EFFORTS THROUGH PROBLEM-SOLVING COURTS

At the turn of the new millennium, problem-solving courts with problem-solving lawyers, prosecutors, and judges are emerging as one of the most effective tools for restoring defendants to non-criminal lifestyles.[34] Nevertheless, just as community defenders, prosecutors, and courts struggled a great deal before embracing the concept of community policing, they are now slowly

31. *Id.*

32. *See infra* Appendix (containing the Ten Principles of Effective Sentencing Advocacy).

33. Telephone Interview with Margaret Love, Esq., former U.S. Pardon Attorney (Dec. 1, 2003).

34. NAT'L CTR. ON ADDICTION & SUBSTANCE ABUSE (CASA) AT COLUMBIA UNIV., CROSSING THE BRIDGE: AN EVALUATION OF THE DRUG TREATMENT ALTERNATIVE-TO-PRISON (DTAP) PROGRAM 6, 10 (2003) (In a five-year study, drug-addicted, non-violent felony offenders with five prior drug arrests and an average of four years behind bars achieved significantly lower recidivism rates and higher employment rates at half the cost, compared to comparable offenders who were sent to prison, through a drug treatment program developed by the Brooklyn District Attorney in 1990. Participants were 33% less likely to be rearrested, 51% less likely to return to jail, and 350% more likely to be employed).

embracing the notion that dealing effectively with the "little cases" can be far more effective at crime control, restorative justice, and cost effectiveness. This shift is in part a rediscovery of the fact that most criminal cases are not headline murder trials and do not involve talking heads endlessly analyzing the case on television. Tens of thousands of cases that move daily through the criminal justice system have up to now been thought of as routine and undeserving of the most experienced prosecutors or defenders. Problem-solving courts, with their focus on rehabilitation, are now seen as an effective way to deal with these "little cases."

The perception and purpose of both pleas and sentencing have changed profoundly over the last forty years. During that time, much has evolved in the practice of criminal law. First, *Gideon v. Wainwright*[35] required that counsel be provided in all felony cases for those who could not afford an attorney. The appearance of lawyers in all felony cases, particularly in the minor, high-volume thefts, assaults, misdemeanor, and juvenile cases, altered the chemistry of criminal justice. Second, the number of criminal cases overwhelmed court systems.[36] A variety of pressures, such as costs; volume of cases; time; repetition; and specialization of roles, quietly created an environment where pleas became the expected and necessary method of case resolution.[37]

Third, the public rhetoric and legislative goals of sentencing shifted from "penance" (penitentiary), "corrections" (Department of Corrections), and "reform" (reformatory) to retribution (the death penalty), deterrence (mandatory minimum sentences), and incapacitation (three strikes laws). From the late 1960s through approximately 1980, the idea of "correcting the offender" and "treatment" played at least a stated goal in pre-sentence reports, arguments made by counsel at sentencing, and sentences themselves. This framework has now been replaced with goals of retribution and deterrence through incapacitation. Populist bills were passed incorporating ideas such as the death penalty, "three strikes," mandatory minimums, victims' bill of rights, and "truth in sentencing."[38] All sought to decrease the judge's discretion while increasing punish-

35. 372 U.S. 335 (1963).

36. *See, e.g.*, Paul D. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 542–49 (1969).

37. Because they are underfunded and overburdened, public defenders are under pressure to plead clients guilty. *See Conference on the 30th Anniversary of the United States Supreme Court's Decision in* Gideon v. Wainwright*:* Gideon *and the Public Service Role of Lawyers in Advancing Equal Justice*, 43 AM. U. L. REV. 1, 28–33 (1993).

38. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153 (1976) (upholding imposition of the death penalty, which had previously been held unconstitutional in *Furman v. Georgia*, 408 U.S. 238 (1972)); *Commonwealth v. Morgan*, 625 A.2d 80, 83–85 (Pa.Super. 1993) (reviewing trial court's application of mandatory minimum sentencing guidelines); OFFICE OF N.Y. STATE ATTORNEY GENERAL ELIOT SPITZER, CRIME VICTIM'S BILL OF RIGHTS, *available at* http://www.oag.state.ny.us/crime/bill_of_rights.html (last visited Jan. 20, 2004); Press Release, Senator Rick Halford, Halford's "Truth in Sentencing Act" Passes Senate to Strengthen Victims Rights (Mar. 13, 1997) (commemorating the passage of Alaska's version of a "Truth in Sentencing" provision), *available at* www.akrepublicans.org/pastlegs/prhalford031397.htm (last visited Jan. 20, 2004).

ment, purging the failed notion of treatment and excoriating those who were seen as "soft on crime." Penalties for all crimes—from drunk driving to drug dealing—have increased dramatically.[39]

The convergence of these three factors has resulted in the increase of formulaic and guideline-driven sentencing at the state and federal levels. Sentencing has become an afterthought as the criminal courts have become overwhelmed with a tide of mass dispositions. The pre-sentence report forms the core of the judge's sentence and prosecutors and defense lawyers do little more than argue for minor changes around the edges. Prosecutors often fail to appear at sentencing and if they appear at all, say little. Many "lead" defense attorneys have their associates handle the sentencing. Clients say little other than prepared platitudes. Defense lawyers reiterate their variations on the probation/treatment theme—the mantra that their clients deserve and will wisely use probation to improve and prevent their future criminality. All the while, the courtroom thrums during pleas, diversions, and sentencings alike. Judges read, clerks make entries, and court officers walk back and forth. Thus proceeds much of criminal justice in America.

However, notable systemic reform is taking place across the country. Often spurred by the need to move more cases with fewer resources, reformers are seizing this opportunity to revisit mandatory sentencing. Armed with knowledge that alternatives do "work," they are carefully crafting exceptions to the "lock-em-up" attitude of the past two decades. What began as exceptions, however, may become the norm.

A. New Institutions—Providing Counsel in the Client's Best Interest Within Problem-Solving Courts

The rise of problem-solving or specialized courts has changed the nature of representation in many state courts by blending treatment with progress. As described in Section II, community outreach and problem-solving for clients, especially at the sentencing stage, has, even prior to *Gideon*, long been a part of defense representation for the poor.[40] But today's problem-solving courts are organized beyond that informal, ad-hoc level. Problem-solving courts began with the creation of the Dade County Florida Drug Court[41] and have now spread

39. *See, e.g.*, Karen Lutjen, *Culpability and Sentencing Under Mandatory Minimums and the Federal Sentencing Guidelines: The Punishment No Longer Fits the Criminal*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 389, 400–01 (1996).

40. *See supra* Section II.

41. *See* Act effective Oct. 1, 1993, ch. 93-229, 1993 Fla. Laws 2357 (authorizing pretrial substance abuse treatment programs, codified as amended at FLA. STAT. ANN. § 948.08 (West 2001 & Supp. 2003)); Act effective May 17, 2001, ch. 2001-48, 2001 Fla. Laws 312 (establishing drug court programs, codified as amended at FLA. STAT. ANN. § 397.334 (West 2001 & Supp. 2004)); *see also* Mireya Navarro, *Experimental Courts Are Using New Strategies to Blunt the Lure of Drugs*, N.Y. TIMES, Oct. 17, 1996, at A25.

nationwide[42] under the careful watch of defense attorneys.[43] Traditional adversarial courts co-exist with problem-solving courts, and some of the newest examples of problem-solving courts include mental health courts, community courts,[44] and prisoner re-entry courts.[45]

These non-adversarial courts fast-forward through the culpability stage and representation focuses on the sentencing and treatment stage. Because the trial is not the major component of criminal defense representation within this structure, what constitutes the client's "best interest" has evolved. This has forced many defenders to rethink and refocus their goals of representation once the decision is made to enter into the problem-solving court process; the role of defense lawyers is also complicated because their ethical obligations remain undefined.

The overarching goal of these courts is to reduce recidivism. Through a variety of procedures and institutional designs, proponents of these courts try to use the crisis of a criminal arrest and pending case to turn an offender's life around. Procedures in these specialized courts are a far cry from traditional notions of trial advocacy or litigation. These specialized courts are essentially extended sentencing courts designed to support ongoing relationships and monitoring of the offender by a judge and professional service providers who work for the court.

Problem-solving courts often emphasize treatment that arguably is not available or has not been provided outside of the criminal justice system. They are a de facto, practical response to the failure of the accused or society to intervene earlier. While extremely costly, this solution is far less costly than processing these cases through the formal adversary criminal justice system. As a practical and cost-effective method, this new paradigm calls out for an examination of the goals of representation in this environment.

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42. *See, e.g.*, Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U. L.Q. 1205, 1208–09 (1998).

43. *See* NAT'L DRUG COURT INST., CRITICAL ISSUES FOR DEFENSE ATTORNEYS IN DRUG COURT (Apr. 2003) (BJA Monograph Series 4 discussing the role of the defense attorney in drug courts, including ethical considerations, cultural competency, treatment, training, and due process issues raised by the increasing number of drug courts nationwide), *available at* http://www.ndci.org/CriticalIssues.pdf. This Department of Justice Monography also includes the ACCD "Ten Tenets of Fair and Effective Problem Solving Courts." *Id.* at 50.

44. The Midtown Community Court was among the first examples of the community court model. *See* JOHN FEINBLATT ET AL., NAT'L INST. OF JUST., NEIGHBORHOOD JUSTICE: LESSONS FROM THE MIDTOWN COMMUNITY COURT (1998), *available at* http://www.courtinnovation.org/pdf/neigh_just.pdf. *See also* RICHARD ZORZA, NAT'L CTR. FOR STATE COURTS, THE TEN COMMANDMENTS OF ELECTRONIC COURTHOUSE DESIGN PLANNING AND IMPLEMENTATION: THE LESSONS OF THE MIDTOWN COMMUNITY COURT (1994), *available at* http://www.ncsconline.org/D_Tech/CTC/CTC4/308.htm.

45. Laurie Robinson & Jeremy Travis, *Managing Prisoner Reentry for Public Safety*, 12 Fed. Sent. R. 258 (2000) (describing the need for reentry courts because well over 500,000 state and federal prisoners are returning to communities each year, often to a relatively small number of neighborhoods. Reentry courts have been launched, with Department of Justice support, in nine jurisdictions: California, Colorado, Delaware, Florida, Iowa, Kentucky, New York, Ohio, and West Virginia).

B. Concerns with Problem-Solving Courts

Problem-solving or specialized courts have opponents among defenders, prosecutors, and judges.[46] Judge Morris Hoffman writes that the Denver Drug Court has produced a "popcorn effect" whereby enthusiastic police and prosecutors have significantly increased the number of prosecutions due to its very presence, when they would otherwise have dismissed the case or not prosecuted it as a felony.[47]

> [I]t is clear that the mere presence of the Denver Drug Court has stimulated a demand that will probably always outpace our capacity to deal with it. This popcorn effect—called "net widening" in some of the literature—is a well-recognized phenomenon whenever law enforcement resources are targeted at designated kinds of cases.... The popcorn effect caused by the Denver Drug Court has had a real and deleterious impact on our bench, both in and out of the drug court itself."[48]

In addition to concerns about net-widening, some defense attorneys fear that these courts and the defense attorneys who practice in them are forcing their clients into the drug courts, arm twisting them into diversion with a condition of entry being that they take a plea, and/or that the effective treatment is raised above the least restrictive treatment.[49] They believe that this amounts to a shift in the goals of representation, and is a new version of the stereotypical plea mill hack who pleads everyone without preparing for trial.

Critics fear or believe that the "new" problem-solving or specialty courts are thinly veiled railroads that measure success in the tonnage moved rather than in the justice rendered or the impact on their clients. Whatever the noble intentions of problem-solving courts, the wear of the real world and the sheer volume and pressure to move cases, they believe, will overpower any "new" paradigm of the lawyer's role and will dull the shining ideal of our adversary system. Critics also fear that history may prove that the model of problem-solving courts was not a good idea. After all, phrenology, penitentiaries, lobotomies, and even exile were all at one time considered cutting edge reforms that were good for the worthy criminal and made for a safer society.[50]

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46. *See, e.g.*, Morris B. Hoffman, *The Drug Court Scandal*, 78 N.C. L. REV. 1437 (2000).

47. *Id.* at 1501–03.

48. *Id.* at 1503–04.

49. For example, a defense attorney may devote less attention to the desires of the defendant, focusing more on the goals of the "team" (including the defense attorney, prosecutor, judge, and probation officer). An illustration of this would be where the "team" decides the defendant requires in-custody treatment, although the defendant has previously told the defense attorney that she does not want to participate in an in-custody treatment program.

50. *See, e.g.*, Sheldon Gelman, *The Biological Alteration Cases*, 36 WM. & MARY L. REV. 1203, 1214, 1230 (1995) (stating that "lobotomy...recognized by the 1950 Nobel Prize...remained popular throughout the early 1950s...[G]overnment-sponsored review later found that lobotomy promised benefits and carried an acceptable risk of adverse side effects.").

It is critical that the zealous advocate role for defense counsel not be eliminated. Many of these programs are not set up with the involvement of defense counsel. Reasons vary as to why the defense is not at the table when problem-solving programs and courts are established, but the primary reason tends to be that defenders in many communities lack a strong, institutional presence or are excluded from criminal justice policy-making. There may be a weak defender program, a history of ignoring the defense in system planning, or no organized and active criminal defense bar association. When programs in these localities do come into existence, it is generally as a result of the initiative of a well-meaning judge or prosecutor who assumes the defense will approve of the program because it gives their clients the opportunity to lessen or avoid incarceration.

As a result, these programs generally require the defendant to accept the "diversion" early in the process and plead guilty to enter the program. This early plea brings the most benefits to both the prosecutor and the courts. Dockets are freed and if the defendant fails, the prosecutor need not try the case months or even years later. However, the early plea and diversion puts enormous pressure on the defendant and defense counsel. The decision to accept the offer must be made before counsel has had time to investigate, research issues, file motions, or engage in significant discovery. Frequently, the defendant is incarcerated and cannot afford bail. The alternatives to entering the program, when viewed from this perspective, are not promising—even if the defendant is innocent or has a viable defense.

Many prosecutors in problem-solving courts ask for an "early plea" in return for a promise to dismiss the charges after the defendant successfully completes a treatment program. This puts tremendous pressure on poor clients. Because many accused persons have few or no prior convictions, the lure of probation and dismissal can be far too great. Even if innocent, the plea can be too good a deal to pass up. Consider an accused person who is in jail because he or she is too poor to post bond. The choice offered is to plead and be diverted to a treatment program or to stay in jail and wait for trial. The defense lawyer is assigned and has little or no chance to review and investigate the case or file motions. With little hope of winning at trial, the lure of diversion can be overwhelming.

However, it is not so clear whether the plea bargain really is the best deal for either the defendant or the system. Most defendants in this situation would ultimately be given probation regardless of whether they plead early, wait to plead, or go to trial. While the short-term gain to the client is freedom with the relatively minor inconvenience of probation, there can be significant long-term consequences. Aside from probation for the current offense, the client receives a predicate felony on her record. Predicate felonies carry serious future consequences for later convictions as a multiple offender and pose the risk of loss of

public housing, eligibility for federal student loans, entry to licensed jobs or the military, and the possibility of lifelong disenfranchisement.[51] Moreover, forfeiture proceedings can result in the loss of the client's car. In many cities that lack adequate public transportation, this can result in the inability to attend school, keep a job, or visit children.

To address these common pitfalls, successful diversion or drug court programs should not require a plea up-front and should permit advocacy against or mitigation of the aforementioned collateral consequences of the conviction. To make this possible, it is essential that the defense is involved when the programs are established. It is much easier to ensure that all the consequences of a conviction are considered and to fashion remedies appropriate to the crime when the programs are established rather than after the fact. This is when the defender must be a zealous advocate for the community so that programs that are established truly have the ability both to protect the community and to make the defendant a productive part of it.

Drug court judges and other problem-solving court participants, along with innovative defender offices, confront these questions both in theory and in practice. It is their belief that problem-solving courts offer a distinct opportunity to develop more involved roles for defense counsel in the effectiveness of the sentencing process for their clients. Use of problem-solving courts can result in individualized punishments, more effective programs and treatment, lower recidivism, better employment opportunities, education, skills enhancement, and reduction in destructive lifestyles. Proponents of problem-solving courts believe that the effectiveness of the sentence can be enhanced and become a major goal of defense counsel at sentencing.

C. Addressing the Concerns About Problem-Solving Courts

To address some of these concerns and preserve fair process in the creation and operation of problem-solving courts, the American Counsel of Chief Defenders (ACCD) adopted the following "Ten Tenets of Fair and Effective Problem Solving Courts."[52] A preface to the Ten Tenets includes the following language adopted by the ACCD:

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51. *See, e.g.*, Andrea Steinacker, *The Prisoner's Campaign: Felony Disenfranchisement Laws and the Right to Hold Public Office*, 2003 BYU L. REV. 801, 803–04 ("Most states have some restriction on the right of convicted felons to vote. Maine and Vermont are the only states that have no restrictions, currently allowing felons to vote from prison. Fifteen states and the District of Columbia deny the right to vote only while the felon is in prison. . . . Sixteen states disenfranchise both probationers and parolees. Four states disenfranchise parolees but not probationers. Thirteen states disenfranchise some categories of ex-felons who have completed their sentences.").

52. AM. COUNS. OF CHIEF DEFENDERS & NAT'L LEGAL AID DEFENDER ASS'N, TEN TENETS OF FAIR AND EFFECTIVE PROBLEM SOLVING COURTS, *at* http://www.nlada.org/DMS/Documents/1019501190.93 (last visited Jan. 20, 2004) [hereinafter TEN TENETS]. For an explanation of defense lawyers' concerns regarding the rising number of problem-solving courts, see John Stuart, *Problem Solving Courts: A Public Defender's Perspective*, 41 JUDGES' J. 21 (Winter 2002).

> The following guidelines have been developed to increase both the fairness and the effectiveness of Problem Solving Courts, while addressing concerns regarding the defense role within them. They are based upon the research done in the drug court arena by pretrial services experts and others and the extensive collective expertise that defender chiefs have developed as a result of their experiences with the many different specialty courts across the country. There is not as yet, a single, widely accepted definition of Problem Solving Courts. For the purposes of these guidelines, Problem Solving Courts include courts which are aimed at reducing crime and increasing public safety by providing appropriate, individualized treatment and other resources aimed at addressing long-standing community issues (such as drug addiction, homelessness or mental illness) underlying criminal conduct.[53]

ACCD's document then goes on to state and discuss the Ten Tenets:

1. *Qualified representatives of the indigent defense bar shall have the opportunity to meaningfully participate in the design, implementation and operation of the court, including the determination of participant eligibility and selection of service providers.* Meaningful participation includes reliance on the principles of adjudication partnerships that operate pursuant to a consensus approach in the decision-making and planning processes. The composition of the group should be balanced so that all functions have the same number of representatives at the table. Meaningful participation includes input into any on-going monitoring or evaluation process that is established to review and evaluate court functioning.

2. *Qualified representatives of the indigent defense bar shall have the opportunity to meaningfully participate in developing policies and procedures for the problem-solving court that ensure confidentiality and address privacy concerns,* including (but not limited to) record-keeping, access to information and expungement.

3. *Problem solving courts should afford resource parity between the prosecution and the defense.* All criminal justice entities involved in the court must work to ensure that defenders have equal access to grant or other resources for training and staff.

4. *The accused individual's decision to enter a problem solving court must be voluntary.* Voluntary participation is consistent with an individual's pre-adjudication status as well as the rehabilitative objectives.

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53. TEN TENETS, *supra* note 52.

5. *The accused individual shall not be required to plead guilty in order to enter a problem solving court.* This is consistent with diversion standards adopted by the National Association of Pretrial Services Agencies. See Pretrial Diversion Standard 3.3 at 15 (1995). The standards stress that "requiring a defendant to enter a guilty plea prior to entering a diversion program does not have therapeutic value." Id.

6. *The accused individual shall have the right to review with counsel the program requirements and possible outcomes. Counsel shall have a reasonable amount of time to investigate cases before advising clients regarding their election to enter a problem solving court.*

7. *The accused individual shall be able to voluntarily withdraw from a problem solving court at any time without prejudice to his or her trial rights.* This is consistent with the standards adopted by the National Association of Pretrial Services Agencies. See Pretrial Diversion Standard 6.1 at 30 (1995).

8. *The court, prosecutor, legislature or other appropriate entity shall implement a policy that protects the accused's privilege against self-incrimination.*

9. *Treatment or other program requirements should be the least restrictive possible to achieve agreed-upon goals. Upon successful completion of the program, charges shall be dismissed with prejudice and the accused shall have his or her record expunged in compliance with state law or agreed upon policies.*

10. *Nothing in the problem solving court policies or procedures should compromise counsel's ethical responsibility to zealously advocate for his or her client, including the right to discovery, to challenge evidence or findings and the right to recommend alternative treatments or sanctions.*

This document has been distributed to public defense leaders, assigned counsel coordinators, and to core criminal justice stakeholders, including the Department of Justice's Bureau of Justice Assistance working group for problem-solving courts, the Center for Court Innovation, and the Center for State Courts.

State court administrators and judges who run or are in the process of creating a problem-solving court should also note the following prefatory language of ACCD's Ten Tenets of Fair and Effective Problem Solving Courts:

> Despite Department of Justice and other publications that urge inclusion of defenders in the adjudication partnerships that form to establish "Problem Solving Courts," the voice of the defense bar has

> been sporadic at best. Although defense representation is an important part of the operation of such courts, more often than not, defenders are excluded from the policymaking processes which accompany the design, implementation and on-going evaluation and monitoring of Problem Solving Courts. As a result, an important voice for fairness and a significant treatment resource are lost.[54]

It is possible to address concerns about problem-solving courts, but this requires that defenders be full participants in the conception, formulation, and implementation of these courts—not merely invited to participate once decisions have been made. A critical first step, however, is for defenders themselves to define their own roles within the problem-solving advocacy context and inside these new institutions; otherwise, their role will be defined by others.

IV.
WHAT IS THE CRIMINAL DEFENSE LAWYER'S ROLE IN PROBLEM-SOLVING LAWYERING AND IN PROBLEM-SOLVING COURTS?

The criminal lawyer's role can be stated simply: *To zealously assert his or her client's position until the case is completed.* This has been the ethical obligation of defense counsel for almost the entire history of the United States. Indeed, the rules of professional conduct embody this image along with the importance of keeping a client's confidences and secrets. Within the bounds of the law and the code of professional responsibility, the client is in control of the objectives of the representation and the lawyer must honor the client's secrets. But what does this mean in the context of sentencing or diversion?

The anemic effective assistance of counsel standard established in *Strickland v. Washington*[55] is out-of-touch with the pressing reality of important ethical dilemmas in changing criminal justice system proceedings. Despite the multitude of *Strickland*-related jurisprudence and academic writing, too little attention has been paid to what ethical standards should apply to effective assistance in preparation for negotiations and the diversion or sentencing process. Important questions arise that probe the ethical boundaries of a criminal defense lawyer's role during this critical stage of what may begin as trial preparation but will often end with a negotiated settlement.

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54. TEN TENETS, *supra* note 52.

55. 466 U.S. 668, 687–90 (1984) (holding that the ineffective assistance of counsel standard requires the reviewing court to determine whether, in light of all the circumstances, the acts or omissions of defense counsel were professionally incompetent, and whether the decision reached would reasonably likely have been different but for the deficient performance). *See also* David L. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1 (1973); Martin C. Calhoun, *How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims*, 77 GEO. L.J. 413 (1988); William S. Geimer, *A Decade of* Strickland*'s Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91 (1995).

Consider whether *Strickland* has any meaning for judging a lawyer's performance before and during sentencing. How can you prove that the outcome would have been different but for the lawyer's mistake at sentencing?[56] How can you demonstrate that this standard was met when the harm was failing to get effective treatment for the defendant, failing to convince the judge to use an alternative sentence, or failing to obtain a lower number of years in a client's sentence? Yet these tasks comprise the vast majority of lawyers' advocacy for their clients.

Some issues to consider as one thinks about what it means to provide effective assistance of counsel in a negotiation or diversion situation or in a problem-solving court are:

- Does the role or objective of the defense lawyer remain constant throughout a case?
- Can the measure or meaning of "getting what's best for the client" change or evolve after the client agrees to explore the possibility of diversion or a plea?
- Can a lawyer's role or objective change from securing the least restrictive impact on the client's liberty or economic interest to include the goal of obtaining the most effective treatment for their client—even if it may involve greater restriction on the client's liberty interest?
- Are there any circumstances where an attorney can pursue this without the client's consent?

On one level, the answer to these questions is simple: no attorney can abandon or "sell out" their client or work for a result the client does not want. However, the desired outcome may change as the client is made aware of the risks, costs, and probabilities of various strategies. The fact is that an extremely high percentage of cases will ultimately result in a non-trial disposition.[57] It is in these cases where the goals of representation may change; the concept of winning is understood differently; and increased advocacy beyond traditional litigation models can be pursued. In light of changes in many aspects of criminal justice today, a traditional understanding of zealous advocacy—which remains the cornerstone of defense representation—should include negotiation and

56. *Strickland*, 466 U.S. at 694 (requiring that to prove prejudice, in the second half of the ineffective assistance of counsel test,"[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."). The *Strickland* standard is particularly problematic when counsel's errors are of omission rather than commission. *See* Matthew J. Fogelman, *Justice Asleep Is Justice Denied: Why Dozing Defense Attorneys Demean the Sixth Amendment and Should Be Deemed Per Se Prejudicial*, 26 J. LEGAL PROF. 67, 79 (2001–2002) (noting that appellate courts, limited to the record from trial, may have great difficulty "'discern[ing] the prejudicial effects of errors of omission.'" (citation omitted)).

57. *See supra* notes 5, 9–10 and accompanying text.

sentencing advocacy as critical stages in criminal prosecutions and as integral components of case preparation.

A. Shifting Goals of Representation: What Is Ethical Representation in a Problem-Solving Scenario?

As sentencing advocacy takes center stage, there is no tension in those cases where a client agrees with the lawyer about the sentence that should be sought. Where the client tells the lawyer that she wants to contest all aspects of the charges and sentencing exposure, the defense lawyer's advocacy role is relatively straightforward or unconflicted. Where the accused is unclear as to what she wants from the case disposition, however, and is unsure what serves her own "best interests," the ethical quicksand can become quite deep.

Real tension arises regarding the goals of representation in those cases where there are circumstances when the most effective sentence can be sought without a clear understanding on the part of the client. The most obvious dialogue with a client in this ambiguous ethical environment would go something like this:

> *Attorney*: Okay, we have an offer that will get you probation if we can assure the judge that (a) you are not a risk to society; (b) you will deal with your problems and won't end up back in court; and (c) you will pay your debts, stay clean and sober, get your degree, keep a job, and support your family.
>
> *Defendant*: What do I have to do? I don't want to put out a lot of effort and I want this resolved.
>
> *Attorney*: Look, if we don't get you into programs that are going to do (a), (b), and (c), then the judge isn't going to buy it and you will get some days or years.
>
> *Defendant*: What you're saying is for me to be able to stay out, I have to go into this kind of program?
>
> *Attorney*: Yeah.
>
> *Defendant*: What if I don't *or I can't* go through all the hoops this judge wants me to jump through? Will I have to serve more time if I fail than if I cop a plea now and take the sentence you can get for me right now? I might be better off if I just do some time and get it over with rather than trying to fix all these things in my life.

The major ethical concern here is the fear that a defense attorney may abandon the client in order to seek what she perceives to be in the "best interest" of the client, rather than what the client might articulate as her own goal or best interest. It is important to consider whether it is an ethical goal of representation for the attorney to prioritize effective treatment over the least restrictive

sentence, when the client is unclear on or waivers about what she wants from representation.

B. The Continuum of Representation—Protecting a Client's "Best Interests" Throughout the Life of a Case

As the system continues to change and stakeholders from all sides look for creative diversion options or sentencing schemes, defense lawyers face new ethical gray areas. Too narrow a focus on providing representation at the trial stage omits many critical components of what it means to provide effective counsel within ethical boundaries. A starting point for answering some of these ethical questions is to recognize that legal representation is a continuum that does not begin or end at trial.

Each case evolves from investigation and arrest through sentencing and treatment or punishment. A defense lawyer's obligation to a client may evolve over the life of a case as the client's objectives change. Consequently, to provide effective representation at each stage, different representational skills have to be used. Some of the most effective lawyers define zealous representation as preparing for sentencing while simultaneously preparing for trial.

Portrayed as a time line, cases that result in a negotiated settlement move along three paths. First, cases move along a timeline of days, weeks, months, and even years until resolution. Second, they move along and through the criminal justice system from arrest through disposition. Third, there are changes in the attitude of the defendant and the attorney during the life of the case—from first seeking a not guilty verdict or dismissal of all charges, to later making the decision to negotiate or plea-bargain. Clients' attitudes and mind-sets are widely mixed when the attorney first meets with them: angry, resigned, scared, sick, exhausted, withdrawn, anxious, excited, and cynical. Some want the best deal from the start, others want to get out immediately and others ask the attorney what to do. As the case progresses and offers are made, the decision-making process moves quickly on whether to proceed to trial, to plead, or to initiate an offer with a packaged deal of a plea with an alternative sentence. Thus, an effective lawyer anticipates negotiations, and, like any good negotiator, finds alternative negotiation proposals early in a case timeline to be fully prepared for sentencing.[58]

58. In the world of professional negotiators, this would be called the "BATNA" or "Best Alternative to a Negotiated Agreement." *See, e.g.*, ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (Bruce Patton ed., Penguin Books 2d ed. 1991). Harvard Law School's training materials from the Program on Negotiation (PON) and Alternative Dispute Resolution (ADR) literature also discuss ways an effective negotiator can improve her position (and negotiated outcome) by coming to the negotiating table with another alternative or alternatives that would satisfy her client's interests. PON's teaching materials are available on their website at www.pon.harvard.edu.

V.
HOW DO REAL DEFENSE COUNSEL HANDLE THESE ETHICAL ISSUES?

Raising ethical concerns in this plea-dominated, problem-solving environment is not merely an academic exercise. The changes described above for individual defenders who are problem-solving for their clients (either pre-trial or post-disposition), or for those practicing in problem-solving courts, mean that practitioners must gauge their professional ethics in new ways. Below are several scenarios presenting the most common situations where defense attorneys might feel the greatest tension between their ethical duties of zealous protection of the client and enabling her to succeed in treatment on the one hand, and the ability to preserve their own standing within a court as a "team player" on the other. The responses are practical and ethical and occur within programs that are established or are being set up. These ethical scenarios only begin to highlight some of the complex boundaries for deciding when a defense lawyer is acting in the client's best interest or has stepped over the line and is acting in the attorney's best interest. The dialogue below is a shortened compilation of responses and reactions to specific real-world scenarios given by several criminal defense practitioners who are defense-based sentencing advocates.[59]

Scenario 1

Must a Lawyer Report Failure to Comply with Treatment in a Program Run by the Defender Office?

Imagine that you are in a post-sentencing situation and your client has agreed to conditions you designed. Your client has entered an innovative program where some of the treatment ordered by the court is provided in and by your office. She is receiving treatment from someone who is under your control. You become aware that your client has failed to comply with the conditions set by the court. What obligation do you have to report the failures to the court?

1. "We've thought about this exact situation and we will not put ourselves in a position of having to be the reporting entity. Otherwise, it's a direct conflict. We had an example of this when a judge released a juvenile to our youth program. I saw the potential

59. These ethical boundaries were explored with participants in Harvard's Executive Session on Public Defense at the John F. Kennedy School of Government between 1998 and 2001. The authors subsequently interviewed three participants from this Executive Session who run defender programs that place a priority on problem-solving lawyering or whole-client advocacy within in a community-oriented defender program. Authors sent case scenarios to the interviewees by e-mail and then conducted one to two hour telephone interviews with each defender leader. Telephone Interview with Leonard Noisette, Executive Director, Neighborhood Defender Service of Harlem (Apr. 18, 2003); Telephone Interview with Robin Steinberg, Executive Director, Bronx Defenders (Apr. 23, 2003); Telephone Interview with Mark Stephens, Public Defender, Knox County Public Defender Community Law Office (Apr. 10, 2003).

conflict regarding reporting the client's progress to the court, so we just don't do this anymore."

2. "In our Community Law Office (CLO) social services are strictly voluntary—they are not part of the court ordered treatment program. Those services administered by public defenders to clients are voluntary. The CLO programs are not an arm of the state; therefore the defenders have no reporting obligation. Programs offered inside the office are not required by the terms of the probation; therefore we have no obligation to report non-performance."

3. "This is where you engage in counseling a client throughout the process. There may come a time when you have to provide the court with updates, but if the client isn't serious about the program or conditions then you don't want to discourage the client from working on issues in his or her life. Without an explicit question from the court you don't have to report any noncompliance issues, but it's different if the judge asks you explicitly about clients' progress."

Among these practitioners the consensus is that there is no ethical obligation to report a client to the court in this first scenario. Nevertheless, in the interviews each of these conscientious defense attorneys expressed a sense of obligation to counsel their clients through difficult times and to try to address the underlying issues leading to the partial compliance or non-compliance.

Scenario 2

Must a Lawyer Report Failure to Comply with Treatment in a Program Run by Another Organization?

Imagine that you are in a post-sentencing situation again, but this time a local social service department helps lawyers find programs for placement that are administered by another organization over which you have no control. The lawyer and social worker together make arrangements for a client to enter the program. If it is discovered that the client has violated conditions of probation or treatment, must the defense attorney report it? Does the defender have to monitor whether the client participates and is successful?

1. "If the program is under the control of the defender office then the easiest situation is when you bring the client into our office and ask him or her directly what's going on, 'what's wrong with the program?' We try to find out what program changes might help the client participate or if they want to try a new treatment program."

2. "You can't use CLO (defender-based) social service programs to set conditions to anything for clients related to sentencing. The office provides their social services to clients completely outside the court-

mandated treatment programs. In time, the CLO will move into providing sentencing advocacy. Our goal is to provide programs that help the defendant succeed in the court-ordered programs and in their life goals."

3. "If the judge asks the attorney directly, then he or she must try to explain the situation to the judge in a softer way such as 'our client is no longer taking advantage of that service, but we're working on a new, more suitable placement in another program.'"

Effective sentencing advocates in this second scenario affirmed that close client consultations are a critical component to providing quality representation, especially after a sentence has been imposed. It is not enough for a defense attorney to close a case file and pass off client oversight to an external social service coordinator, court administrator, or probation officer. The careful and regular monitoring of a client's progress will give notice to the defense team that there may be problems with an outside program's quality or with a client's participation in a particular program. Adjustments can be made if the links of communication are strong. An effective advocate will work to address these deficiencies prior to being asked by a judge directly whether a client is in compliance.

Scenario 3

What Is the Role of the Defense Lawyer in Drug Courts?

Picture a drug court where a client's case is diverted into the drug court with conditions attached to diversion out of the traditional criminal court process. The team handling the case is made up of the judge, defense attorney, and prosecutor who work full time in the drug court program and monitor the client's progress over time. Clients must regularly report their progress to the team and social service workers. Presume in this scenario that everyone on the team realizes that the original plan isn't working for the client. In the course of revising the program with the prosecutor, judge, defense, and treatment person, members of the team, including the defense lawyer, decide that a more restrictive form of treatment is best, not the current less-restrictive outpatient treatment program. The defense lawyer has not received a waiver or consent from the client prior to these discussions/decisions. The client is passive about the program and the conditions and will most likely do whatever the defense lawyer suggests. Can the defense attorney recommend a more restrictive treatment program without the client's express permission?

1. "The attorney must consult with the client and advocate what the client wants. The defense lawyer can sit in and listen to what everyone on the team has to say, but cannot agree to more restrictive treatment. If the lawyer believes the more restrictive environment

will actually help the client succeed, she has to have a conversation with the client and suggest the best alternative . . . but it's the client's choice. The attorney must have absolute and explicit consent. The lawyer will advocate whatever the client chooses."

2. "The easy answer is no. Community Law Office (CLO) defenders are not a part of the team in deciding conditions for treatment or other disposition in a specialized court. This highlights that the way you structure your drug court is important. The role of the lawyer requires that he/she needs to sit down with the client and explain the conditions; why the lawyer feels strongly about the new conditions; and ask if the client can agree. They cannot advocate more onerous conditions without approval of the client."

   Regarding the issue of the likelihood of success for the client, the Director of the CLO says he relies heavily on his social service team to convince the client that the stronger restrictions are in her best interests. "Treatment doesn't work unless the client wants treatment and voluntarily enters it."

3. "The defense attorney needs to explain all the considerations to the client *before* the team meeting occurs with all the team players. The attorney needs to inform the client of all risks and how the team works. The defender can advocate for more non-restrictive results, but may lose the argument. This team conversation happens behind the scenes, but once back in open court, it occurs in front of the client. The treatment plan is the entire team speaking as one voice. It can be one of the ways a client will succeed if the team makes decisions and is unified in their approach. Therapeutic courts are more effective with a unified approach from all the team members."

4. "Problem-solving courts involve a level of paternalism, and the chance for disempowering a client's choice is staggeringly high. The defense lawyers are often co-opted into the treatment modality out of fear of harsh prison time or caseload pressures which may have seriously eroded their advocacy role. They're a defense attorney and they are on the team, but they're not really present as *counsel for the defendant*."

5. "If the attorney obtained a pre-waiver of confidentiality from the client for information relating to treatment, by explaining to the client that everything said to the attorney could be told to the drug treatment team, including the judge and prosecutor, this would cross a line in the sand that the defense lawyer must honor. The defense attorney must maintain their ongoing responsibility to represent their client's interests at all times. It would be crossing over the line to

have the defense lawyer agree in advance to report a client's failures or agree to a more restrictive setting 'in the client's best interest' without first talking it through with the client."

Clients must be well informed prior to, during, and after the decision-making process, particularly if it is a team decision regarding future treatment or sentencing conditions. Defense lawyers should consider the array of alternatives and do their best to ensure that the final plan is one that a client has a reasonable chance of completing successfully. Clients must be informed of all the risks of not completing the course set out by the judge or disposition team.

The structure and procedures within each drug court—as well as other kinds of therapeutic courts such as mental health courts, domestic violence courts, and community courts—vary significantly across the nation. Consequently, the ethical issues facing defense lawyers can be quite different depending on the jurisdiction. An overarching ethical touchstone, however, for practice in these courts is that defense lawyers must communicate effectively with their clients throughout the specialized court disposition process.

The above dialogue presents a few of the most common concerns about programs where the defense attorney becomes highly involved in shaping and assisting clients in and through innovative sentencing programs or specialized courts. It reflects how these defender leaders maintain their role as the "shield and sword" for the client's best interest—as determined by the client—yet remain active in sentencing-based programs in their communities. Defenders remain concerned that they not be excluded from the early planning stages and development processes of specialized courts in their jurisdictions.

Scenario 4

How Should a Lawyer Respond when There Are Problems with a Treatment Program?

What if the client comes to you and says the program she is in is a sham. When you meet with her she says: "The meetings are all B.S. They don't start on time and are run by useless counselors, and no one is helping me." Would you feel obligated to return to court for the client and attempt to find a replacement program?

1. "I would go to my social worker to see if her assessment of the program is the same, and discuss how to deal with this situation. It might lead to a phone call to the agency. We may ask them if there's a better way to treat the client."

2. "In our community-based defense program we would try to get the client moved to another program."

3. "We're there to articulate the client's needs and interests well. We must always maintain the lawyer's role as an advocacy role. If we don't, we will lose our client's trust and the client community will lose confidence in the role of the defense."

Building and maintaining a respectful relationship with clients and treating them with dignity is a core value for these problem-solving, community-oriented advocates. Trust must be earned. This means listening well to clients, but it does not mean ignoring family members or community concerns. In this scenario, effective defenders listen to their client's concerns, investigate the situation with the advice and consultation of a social service professional, then explore the availability of other options to meet the client's needs. Finding a new program may not be the only answer—effective advocates identify all the interests at stake, bring out the central challenges preventing a client from completing the conditions of a sentence, explore reasonable alternatives, and enable effective advocacy on the client's behalf.

Scenario 5

How Should Defense Lawyers React if the Social Worker Is Placed on the Stand?

What if you went to court with your client for a sentencing disposition and the judge asks the social worker, who works solely for the defense, to be placed on the stand under oath. The judge then ignores the prosecutor and defense lawyers and speaks directly to the defense social worker. How should a defense lawyer deal with this?

1. "Judges look to the social worker for education, understanding, and good judgment. Social workers have a level of expertise that lawyers don't have. They can provide the broader context for the client's conduct. They can explain client behavior in therapeutic terms to the judge. Almost always, this softens the judge's perspective to the client even if they're reporting negative information about a client."

2. "It's rare and very unlikely that a social worker would be called to the stand in our courts. Sometimes the social worker will be asked to speak directly to the judge. Good defense lawyers prepare them for this and try to anticipate the land mines. Social workers do go to court and engage in more informal conversations. There are no formal sentencing hearings for the most part in our courts. . . . Pre-sentence reports and written pre-pleadings reports have the lawyer's name along with the social worker's name. I've never encountered really rigorous questioning outside the content of the report. Generally, there is questioning back and forth, and sometimes social workers are asked questions. Although, I could see [this scenario]

happening where a judge trusts a social worker whose name is on the pre-sentencing report and then decides to put him or her on the stand. This raises concern about losing control of the social worker as a witness."

3. "In a majority of the cases a social worker will provide 'bad' information about a client in a less harmful way. It's almost impossible to imagine a case where the social worker would provide information that would be presented in a more harmful manner than the program staff member or even defense lawyer."

For community-oriented, problem-solving defense lawyers, the use of professionally trained social workers as a part of the defense team is critical. They can provide perspectives on the client's conduct, the family, the community, and the context from which criminal conduct arose. The defenders interviewed emphasized the importance of social workers; they are not simply relegated to assistance with the sentencing process but may play a prominent role in trial preparation. One defender director noted that bringing social workers into the initial interviews with the client significantly aids trial preparation. Lawyers listen in interviews very differently from the way social workers are trained to listen. "Listening for advocacy is totally different from listening for social service support. My social worker is listening for something totally different—she sees the deficits in the full context of a client's life." This defender recalled recently inviting an experienced social work professor to join him in the initial client interview in a death penalty case. After the interview they compared notes and the defender commented: "It was obvious to me that as a lawyer and as a trained social worker we had just seen two completely different people."

Scenario 6

What Information Can a Social Worker Reveal on the Stand?

What if the defense lawyer has not fully prepared the social worker to testify under oath, especially when sensitive information may be revealed? What information can a social worker reveal?

1. "Whenever a social worker is called to the stand, all the information that will be revealed must be cleared with the client first. . . . A social worker can never introduce negative information even if it's sugar coated, unless the client and lawyer approve of it in advance."

2. "I only put a social worker on the stand if he or she has helpful information for the client. I'll never allow a social worker to take the stand to testify under oath when he or she has had only a bad experience with the client."

3. "Social workers and lawyers need to be on the same page from the start of a case. The social worker is offering up information about the environment."

When social workers are part of the defense team, the consensus among many defense lawyers is that the attorney-client privilege attaches to the social worker as well. Even if the social worker has not been formally prepared to testify under oath, as in this scenario, she cannot reveal sensitive or damaging information about a client that breaches the attorney-client privilege. To illustrate this point, one social worker said that they have not had problems with mandatory reporting cases yet. "Someday there will be a case with a horrible set of facts, such as a child abuse case, that in a traditional social worker context would require the social worker under state law, which regulates all professional social workers, to report the conduct of the client." Social workers associated with the Connecticut Public Defender's office obtained an ethical opinion which stated that the social worker's mandatory reporting codes are trumped by attorney-client privileges. Sentencing and treatment can be ethical quagmires for criminal defense lawyers, particularly in sexual abuse cases where there are many complex relational dynamics occurring throughout a case. Children who testify as victims against a parent may suffer great guilt when their parent is incarcerated, while the remaining parent also suffers mixed emotions. In an attempt to handle some of these sensitive issues, some public defender organizations embrace the zealous advocacy role, while concurrently recognizing their role in improving healthy familial relationships in their community.

Scenario 7

How Does the Lawyer's Role Change After Sentencing?

As a community-oriented, problem-solving lawyer, does the lawyer's obligation to provide zealous advocacy ever change? Does your ethical obligation to the client change or evolve?

1. "The relationship with the client changes once the client is sentenced and litigation is over. Once the client is placed on supervised probation, I'm less in control of the decisions that are made. I become more of a *counselor* with a role that is a bit different than legal representation. I'm more of an advisor, whereas with pending cases, I continue to control certain decisions. The role evolves given the status of the case."

2. "The formal role of a defense attorney ends at sentencing. We count the case as over at that point. However, we engage and disengage after assessing the level of lawyering needed depending on the situation. We have an ongoing relationship with our clients. We will re-open a case if the client gets busted on probation. If a client

> comes to the defense lawyer and says: 'They claim I violated my probation for non-reporting and they're coming after me.' Now I'm back into an attorney-client relationship once I hear that. It's like the relationship is idling in neutral or it's a hibernating lawyer-client relationship."

In these models of community problem-solving lawyering, the defenders interviewed for this paper noted that they work with an expanded notion of what it means to provide "counsel." They constantly work with communities in new and varied ways. This pushes them into unexplored ethical areas of practice. Despite the novelty of certain areas of practice, defenders endeavor to provide creative, whole-client representation that continues beyond the sentencing phase. The baseline from which they operate is the belief that the client must be treated with dignity. Clients must be informed throughout the entire process and must have a say in critical decision-making regarding their case. Representation does not terminate with sentencing but continues in different ways over time.

This is not the traditional model of criminal defense lawyering; thus, during a candidate's initial interviews, leaders of these programs must clarify that this is a different kind of lawyering. One defender director who operates a problem-solving defender office noted: "While interviewing potential lawyers to hire, we tell them that they will be required to watch lawyers do initial interviews and they'll get a heavy dose of our model of community-oriented lawyering. From the start we promote the social service component. New lawyers will observe in practice 80 intake interviews with clients. After about a month of observing they will have an understanding that this is a different type of law office." As these practices develop so must the institutional structures that support this important evolution of defense lawyering.

VI.
AN INSTITUTIONAL MODEL TO PROMOTE SPECIALIZATION FOR THE "BEST INTEREST" OF CLIENTS

Defense attorneys, public defense offices, and delivery systems must rethink the goals of representation from the moment representation begins, in order to meet the different needs of each client and the changing demands of representation over time. The heart of all representation begins with zealous advocacy for innocence. However, as the case progresses, that goal frequently shifts towards plea, diversion and sentencing. Those goals are no less important for the client. Effective negotiation and successful treatment depends on aggressive, high quality preparation.

Many defender offices have such a high case volume that they create specialized units to streamline services and better address the needs of their clients. For example, a defender program or office could set up an "intake unit" that decides where each case should go in the early stages to address critical legal issues. The defender office intake unit must be made up of highly

experienced lawyers who would conduct preliminary assessments of a client's case, and then route it to the most appropriate resources or representation team.[60] There could be a "trial unit" made up of experienced litigators with different specialties, a "negotiation team" of highly trained legal negotiators, and a "treatment unit" comprised of lawyers, non-lawyers or both. A defense treatment unit could address a client's personal and familial issues (or issues peripheral to the pending case) such as child support, benefits, and housing. This representational model or "zone representation" can be visualized as a timeline that recognizes that the relationship with a client changes over time and that the client may want to change lawyers or units in order to access specialists. This model of specialized representation allows clients to choose to make institutional adjustments along the way without abandoning the central goal of the representation.

The model of representation as a continuum rejects the notion of a universal defense lawyer who is trained for all stages of representation. Zealous advocacy entails not only knowledge of the law, but also knowledge of yourself as a lawyer and knowledge of the limits of your advocacy skills.

This proposed model is most appropriate for large public defense offices because those operations can afford to hire specialists. Such specialists might include social workers having expertise in specific areas such as mental illness, drug and alcohol addiction, domestic violence, impulse management, or child development expertise for juvenile case representation. Smaller offices cannot afford to hire specialist units or social service professionals as full time staff; however, smaller defense offices or assigned counsel can develop working relationships with specialists in local social service organizations.

To address the complex range of activities and non-legal professionals that a defense lawyer must engage with over the life of a case, a lawyer should be trained in the intricacies of negotiation. Negotiating skills must become as fundamental a concern as the trial outcome or the least restrictive disposition. The payoffs for clients and the entire system can be significant because clients may obtain better deals, including deals that will actually help to reduce recidivism.

VII.
CONCLUSION

A criminal defense lawyer must never abandon the core of the defense function—effective trial advocacy skills—because there are always cases that need to be tried and won in court. However, sentencing advocacy should also be seen as a legitimate goal of every representation. In today's changing criminal

60. This sees defenders as dual diagnosticians and places value on parallel preparation for trial and treatment. In training courses, defense lawyers in capital cases are taught to prepare for trial (guilt/innocence) as well as for sentencing by gathering mitigating evidence early in the case.

justice system, defense lawyers must also think carefully about ethical concerns that may arise as a case matures and evolves.

Defense attorneys with a broad view of what it means to provide "counsel" operate most effectively in today's constantly evolving criminal justice system. A more sophisticated and ethics-sensitive approach to providing effective assistance of counsel is necessary to preserve justice, fairness and human dignity throughout the criminal justice system. Due to their heavy caseloads, defenders experience great pressure to go along with the judges and prosecutors. This is particularly true with the prevalence of plea negotiations and plea offers; in light of mandatory minimum sentencing schemes and sentencing guidelines, the pleas are seen as too good to refuse considering the consequences of going to trial. Outside the more narrow confines of a trial, defenders challenge laws, question inequitable treatment and procedures, hold the government to its burden of proof, and maintain independence and accountability in the system.

Effective and ethical advocacy from the initial stages through sentencing is critical to preserving the defense function, which the public generally desires and needs. When lawyers and judges fully comprehend the ethical issues a defense lawyer faces as she shifts the goals of representation from trial advocacy to sentencing advocacy, the integrity of the system is protected. More importantly, this heightened awareness protects the rights of the accused throughout the criminal justice process.

APPENDIX

The Sentencing Project is a nationally recognized organization that promotes greater reliance on alternatives to incarceration and more effective responses to social problems, including crime, than punishment and prison. It publishes research on the direct and indirect consequences of punishment, documents racial disparity in the criminal justice system, and advocates for the reform of sentencing practices and policies. The Sentencing Project convened an advisory group to consider the "Future of Sentencing Advocacy" ("FOSA") in a changing legal and social environment. The advisory group adopted the goal of articulating the fundamental principles of effective sentencing advocacy in today's evolving criminal justice system.[61]

This Appendix sets forth the advisory group's "Ten Principles of Sentencing Advocacy," the product of arduous consensus and review by the advisory group, defense lawyers, academics, judges, and other criminal justice professionals.[62] Several defender leaders have signified their support for the Ten Principles of Sentencing Advocacy,[63] and these principles are under consideration by other defender and advocacy organizations, including the National Association of

61. This document is written expressly for the adult criminal justice system. Some of the principles resonate within the juvenile justice system but because these systems are founded on fundamentally different principles of law and social policy, different standards will apply depending on the context of individual cases.

62. FOSA panelists, who convened on February 6–7, 2002, included: Patricia E. Allard, Associate Counsel, Brennan Center for Justice at New York University School of Law; Jacqueline Baillargeon, Program Director, Gideon Project of the Open Society Institute; Carol A. Brook, Esq., Deputy Director, Federal Defender Program of Chicago; Hon. Bennett H. Brummer, Public Defender, Law Offices of the Public Defender for the 11th Judicial Circuit of Florida; Alan J. Chaset, Law Offices of Alan J. Chaset; Cait Clarke, Director, National Defender Leadership Institute; Christine Fiechter, Former President of the Governing Board, National Association of Sentencing Advocates (NASA); Ellen T. Greenlee, Chief Public Defender, Defender Association of Philadelphia; Stephen Harper, Capital Litigation Unit, Law Offices of the Public Defender of the 11th Judicial Circuit of Florida; James Hingeley, Public Defender of Charlottesville-Albemarle; Mary Hoban, M.S.W., Chief Social Worker, Office of the Chief Public Defender; Hon. Renee Cardwell Hughes, First Judicial District, Philadelphia; Lori James-Monroe, LCSW-C, President, L.Y. James & Associates, Inc.; Paul Kehir, Director, Fulton County Conflict Defender Inc.; Sheldon Krantz, Esq., Piper & Marbury; Margaret Love, Law Office of Margaret Love; Marc Mauer, Assistant Director, Sentencing Project; Geneva Phillips, Supervising Paralegal, Los Angeles County Public Defender Service; Jeannie Santos, Program Manager, Bureau of Justice Assistance; Robin Shellow, Attorney at Law, Shellow Group; Joel Sickler, Formerly of NCIA; Mark Stephens, Public Defender, Knox County Public Defender Community Law Office; Professor David C. Thomas, Chicago-Kent College of Law; James W. Tibensky, Mitigation Specialist, Federal Defender Program of Chicago; Marsha Weissman, Executive Director, Center for Community Alternatives; Malcolm Young, Executive Director, Sentencing Project.

63. E-mail from Doug Ammar, Georgia Justice Project, to authors (Nov. 17, 2003); E-mail from Leonard Noisette, Executive Director, Neighborhood Defender Service of Harlem, to authors (Oct. 29, 2003); E-mail from Mark Stephens, Public Defender, Knox County Public Defender Community Law Office, to authors (Oct. 26, 2003); E-mail from Robin Steinberg, Executive Director, Bronx Defenders, to authors (Oct. 21, 2003).

Sentencing Advocates, the Sentencing Project, and members of the National Legal Aid and Defender Association.

THE TEN PRINCIPLES OF SENTENCING ADVOCACY[64]

Revised by Cait Clarke, Andrew Wamsley, and Malcolm C. Young

PREAMBLE

Sentencing advocacy is important.

- For the *accused person* who faces the prospect of conviction, sentencing advocacy influences the conditions under which he or she may be required to live, quite possibly for the rest of his or her life.
- For the *community* from which the accused person comes or to which he or she caused injury, sentencing advocacy has the potential of contributing to the community members' sense of justice, of restoring damage and easing pain among those who suffered loss.
- For *judges* who may find the task of sentencing fraught with "discretion and doubts," sentencing advocacy offers assurances of accuracy, fair play, and rationality. Sentencing advocacy aids courts in choosing in each case the goals of sentencing and brings to the court whatever array of public and private services that might help achieve the goals of sentencing. Sentencing advocacy helps courts balance competing values, such as punishment and compassion.

Sentencing advocacy has purpose.

- First and foremost, it is to minimize punitive and non-productive aspects of criminal sanctions upon an accused person and to maximize constructive use of available resources for that person.
- Second, whenever possible, sentencing advocacy seeks to assist the accused person in making sufficiently comprehensive and positive changes to lead him or her away from crime. Although the accused person is the immediate beneficiary, the cumulative impact of sentencing advocacy is improved public safety.

Defense lawyers and sentencing advocates are responsible for sentencing advocacy that measures up to its importance and serves its purposes. Yet the parameters, a set of principles that guide defense lawyers and sentencing

64. Cait Clarke, Andrew Wamsley & Malcolm C. Young, The Ten Principles of Sentencing Advocacy (June 12, 2003) (draft, on file with authors). These Ten Principles are under review by members of NASA and participants in the 2002 FOSA meeting; copies of the most recent version of the Ten Principles can be obtained by contacting the Sentencing Project at staff@sentencingproject.org.

advocates in understanding and meeting their responsibilities, have not been created. To meet the need, an experienced panel of practicing lawyers and sentencing advocates developed these Principles as a guide for their peers. This panel has published these Principles as a contribution to a wider understanding of sentencing advocacy among judges, prosecutors, probation and parole officers, court administrators, victims, defendants and the general public.

I. SENTENCING ADVOCACY IS INDIVIDUALIZED

Sentencing advocacy is guided by the interests and characteristics of each defendant. Sentencing advocates develop and propose, as alternatives to incarceration or long exposure to the criminal justice system, services, community placement and restitution, treatment, and other conditions of sentence that meet each client's needs and conform to each client's expressed interests. Their proposals reflect their client's cultural values. Their proposals respect and make use of their client's unique strengths, weaknesses, special characteristics, and circumstances such as pregnancy or parenthood, mental illness, learning disabilities, the impact of physical, sexual or emotional abuse, drug dependency, and talents or skills that the client can put to use for the benefit of people they have injured or the community.

In order to learn the interests and the individual characteristics of each client, sentencing advocates listen carefully to their clients. They assess the needs of each client from all sources of information including, when indicated, interviews with family members, and medical, mental health, social services, and school records. In the course of a case, sentencing advocates must spend time discussing sentencing issues and options with clients.

Sentencing advocates recognize that each client will be responsible for fulfilling the condition of sentence which a sentencing court may impose, such as to submit to treatment or to change behavior. For this reason, sentencing advocates spend time motivating their clients and obtaining their internalized "buy-in" to the conditions of sentence which the sentencing advocate will recommend to the court. Also for this reason, sentencing advocates assist clients in making difficult choices, such as between short-term incarceration without support services or a long-term, demanding, rehabilitative program. And, for this reason, sentencing advocates must understand the basic limitations of people who are mentally ill, mildly retarded, or children being prosecuted as adults in the criminal court system.

Sentencing advocates must contend with the restrictions placed on judges at sentencing, which include legislated mandatory minimum sentences, sentencing guidelines set by legislation or by rule, and determinate sentencing schemes. These restrictions limit the kinds of cases in which judges are able to impose individualized conditions of sentence. Sentencing advocates must be creative in their efforts to seek departures from guidelines and creative in efforts to get police, prosecutors, and judges to exercise their discretion in favor of a reduced

charge or plea bargain under terms in which a judge can impose an individualized sentence.

II. SENTENCING ADVOCACY IS HOLISTIC

Sentencing advocacy is built around "whole client" or "holistic" representation. Holistic representation addresses the client's immediate legal circumstances but incorporates as well the objective of helping that client live as a law abiding, productive member of the community. Holistic advocacy addresses psychological, emotional, familial, and medical conditions. It recognizes the role of educational and vocational background, and of gender, age, ethnicity and religion as they impact the client's future behavior. The goal of holistic representation is to prevent recidivist behavior, thereby serving the interests of the larger community and giving force to arguments in favor of fewer restrictions, including incarceration, upon the sentenced offender.

For some agencies and lawyers, holistic representation means providing services outside traditional legal representation. Examples of these services can include referrals for mental health and medical treatment, employment or educational assistance, housing, civil legal services, or recreational programs. For some agencies and lawyers, holistic representation may sometimes mean continued involvement with the client after the criminal case for which the agency or lawyer first became involved has been closed.

III. SENTENCING ADVOCACY IS PROBLEM-SOLVING

Sentencing advocacy is an exercise in problem-solving. Sentencing advocacy considers the factors and circumstances which contributed to the client's criminal behavior. It then determines which of these have been eliminated or changed by the crime or other events, which can be changed by the client, and which can be changed by the conditions of the sentence imposed. Sentencing advocacy involves development of a sentencing plan which reinforces and requires change in the factors and circumstances that led to the crime. Sentencing advocacy seeks to persuade the decision maker to substitute the advocate's sentencing plan for a primarily punitive sentence.

Sentencing advocacy considers as well the problems caused to the victim and the community by a client's behavior. It will consider proposing conditions of sentence that address these problems. Examples include financial restitution to repay loss, restrictions on the client which will address the victim's desire to avoid contact with the client, or a means of conveying an apology or regret to a victim for whom that is important.

Problem-solving sentencing advocacy makes a positive and desired contribution to the community. Problem-solving sentencing reduces the likelihood of new offenses while limiting or avoiding the cost of incarceration.

IV. SENTENCING ADVOCACY REQUIRES COMPREHENSIVE PREPARATION

Comprehensive preparation that commences early in a case is the key to effective sentencing advocacy. Sentencing preparation requires aggressively seeking out information about the client's past, current life situation, the criminal conduct and underlying problems of the accused, and then presenting that information clearly and persuasively to decision-makers. It cannot be done at the last moment or on short notice. It must begin as early as possible in a case.

Preparation for sentencing involves:

1. Knowledge of the client, which requires in-depth interviews and a detailed assessment to assure, at a minimum, that his or her behaviors can be understood in the context of the client's life, and that whenever possible there is a sound basis for any recommendation, including those for treatment or other services.
2. Educating the prosecutor, who makes most charging decisions and enters into plea negotiations that may determine the sentence or negotiations about the range of sentencing options available and the merits of each.
3. Engaging in "post-arrest" action to increase the likelihood that clients can demonstrate the ability to participate in rehabilitative recommendations before sentencing. "Post-arrest" action includes helping the defendant obtain release on bond or supervised release and then, as appropriate, enter into treatment, gain or retain employment or educational pursuits, or make restitution.

V. SENTENCING ADVOCACY REQUIRES RESOURCE PARITY

Sentencing advocacy, particularly on behalf of indigent clients, requires adequate resources. Sentencing advocates are highly motivated to keep their clients out of jail and prison. They are equally motivated to reduce their client's criminal behavior. Of all criminal justice professionals, their confidential working relationship with clients gives them the best opportunity to understand the factors and circumstances that contribute to all manner of criminal acts. Properly undertaken, sentencing advocacy requires substantial financial support, but properly undertaken, it offers a high return to the public as well as the client. Ironically, then, while in recent years courts, prosecutors' offices, probation, pretrial release, sheriffs and corrections departments have received substantial federal grants and other public support for the operation of drug courts, the creation of diversion programs, and community policing for the purpose of reducing or preventing crime and minimizing reliance upon jails and prisons, defenders and sentencing advocates have received little similar support.

As a matter of principle and for the sake of making effective use of public funds, sentencing advocacy should be supported on equal terms with other prog-

rams and components of the criminal justice system. Adequate funding would permit full implementation of these Principles, including a program of training for defenders and sentencing advocates, adequate staffing for both defenders and sentencing advocates, and full participation in the problem-solving aspects of the criminal justice system. In addition, sentencing advocates and sentencing advocacy programs should have a seat at the public policy-making table and a voice in public policy debates.

VI. SENTENCING ADVOCACY OPPOSES RACIAL DISPARITY AND CULTURAL BIAS IN CRIMINAL JUSTICE

Sentencing advocacy addresses issues arising out of racial and cultural differences. Disparity in outcomes by race and class is a reality in criminal justice. Sentencing advocacy should be conducted with an acute awareness of the possibilities of disparity along racial, class, ethnic and cultural lines, and with the goal of accommodating racial, ethnic, and cultural diversity in the institutions and processes of criminal justice. Sentencing advocacy, conducted in accordance with these Principles, can serve as a vital bulwark against conscious or unconscious bias in the criminal justice system. Because it focuses on outcome, sentencing advocacy has the potential of offering prosecutors and courts an opportunity through sentencing to offset or correct the cumulative impact of incremental racial, ethnic or cultural disparities introduced as a result of disparities in policing, prosecutorial charging practices, or early court processes such as the setting of bond. Sentencing advocacy should identify and highlight the impact of sentencing laws and policies, including guidelines, on racial disparity. Moreover, the sentencing advocate's knowledge of his or her clients' cultural differences, which follow from individualized sentencing and thorough investigation, can be used to help raise the cultural awareness of all those who come into contact with the client and the system. (See VII, below).

VII. SENTENCING ADVOCACY INFORMS

Sentencing advocacy is an information resource upon which to base effective, racially balanced crime prevention and criminal justice policies. Through its highly individualized approach, its focus on problem-solving, meeting the requirements of comprehensive preparation, and by attending to issues of race, class, and ethnicity, sentencing advocacy provides insights into the circumstances and factors that contribute to crime. As a result, sentencing advocates have the opportunity to learn and understand the reasons for, and causes of, criminal behavior, and practical means of modifying that behavior. Without violating the confidential relationship with individual clients, sentencing advocates can use this information to inform other criminal justice professionals, researchers, policymakers, and the community about these issues. They have a similar opportunity to contribute to cultural awareness within the criminal justice system.

Sentencing advocacy serves equally well its clients, the over-burdened criminal justice system, and the communities in which advocates work, when the understanding and insights that their work provides are used to shape programs and policies that provide less punitive, more effective ways to reduce crime.

Through this Principle, sentencing advocacy can contribute to the transformation of the United States from a nation that readily imposes punishment to one in which the criminal justice system exercises its authority constructively and creatively for the ultimate benefit of society at large.

VIII. SENTENCING ADVOCACY BUILDS COALITIONS

Sentencing advocacy builds coalitions among agencies, individuals and community groups. Effective sentencing advocacy requires that sentencing advocates work cooperatively with existing agencies, religious groups, businesses, community groups and individuals who have resources to address client problems and who provide alternatives to incarceration. Sentencing advocates can build networks and form coalitions from among otherwise disparate organizations that share similar goals for the effective prevention of crime and the reintegration of offenders into their communities. Sentencing advocates can look to coalition members for political and financial support for alternatives to jail and prison and for the means of improving public safety and addressing client problems.

IX. SENTENCING ADVOCACY IS A CATALYST FOR TREATMENT ALTERNATIVES AND COMMUNITY SERVICES

Sentencing advocacy can be a catalyst for the development and provision of effective treatment options and public services for clients, their families and their communities. Many communities, particularly those that are financially disadvantaged, lack sufficient resources to meet the needs of their members. Some are afflicted by inefficient, even corrupt, services. Sentencing advocacy brings advocates close to these communities, and puts experienced sentencing advocates in a position to know about the gaps and inefficiencies in community services. Sentencing advocates can join others in explaining the significance of these gaps to policy-makers. They can make use of their experience to inform policy makers and the public about the need for treatment alternatives and community services in their clients' communities, and about those programs that are less effective or fail to reach the community.

X. SENTENCING ADVOCACY FURTHERS THE GOAL OF FUNDAMENTAL FAIRNESS

Above all, sentencing advocacy strives for fair sentencing for every individual. Sentencing advocates are committed to the proposition that "Equal Justice Under Law" applies to sentencing as well as all other decisions and

proceedings in the criminal justice system. Other Principles are dedicated to assuring the defendant the most favorable sentencing outcome possible. This Principle states the importance of the sentencing hearing without regard to outcome.

The criminal process is adversarial. Witnesses for the prosecution are pitted against witnesses for defendants. There is little opportunity for reconciliation or compromise in most criminal courts. The overcrowded settings and over-burdened attorney staff on either side prevent attention to the needs of witnesses, victims and defendants. Cases that go to trial, or are pled under pressure, often fail to satisfy any party, or any side, in the case.

Sentencing advocacy should always be conducted with a high regard for the dignity of each person involved in a criminal case. It should be focused on healing, restoring, and rebuilding where damage has been inflicted. Whenever possible, sentencing advocacy should help the client attempt to deal with the pain or loss which he or she has caused victims, family members, or the community. Often, it is exactly this strategy that opens the door to a resolution of a case before trial, with a sentence that all parties can agree is reasonably fair.

But when at the time of conviction, the parties remain in an adversarial mode, if for example there have been no successful communications between victims and counsel for the defendant, the sentencing hearing becomes the last opportunity for the sentencing advocate to move the case from its adversarial and confrontational stance to one that provides some degree of satisfaction and hope for eventual peace.

It is also the last opportunity to provide the client with a fair hearing. For the client, a fair sentencing hearing is one at which she has a full, counseled opportunity to tell her story, for it to be heard and acted upon, and to make a plea for leniency or a statement of defiance. It may be the only public opportunity for the defendant to accept or deny personal responsibility as he or she chooses, to acknowledge the harm done to family or victims, or to offer to make amends. It may be the last opportunity to open a door to reconciliation, to eventual treatment for an addiction, or to even a glimmer of an insight into the harm that was done. The choice is the client's. It is the sentencing advocate's duty to try to help the client make this choice, and then to present the hearing that the client elects to have. In fulfilling this duty, even in the most difficult of cases where the prospects are bleakest, sentencing advocacy offers a true "alternative" to the harshness of the criminal justice system and an avenue, no matter how difficult, to true justice.