

FUTURE BENEFITS

When felony mediation dockets were started in the 54th Judicial Circuit, which comprises Boone and Gallatin Counties in Kentucky, it was created for one reason. In April of 2004 when I became the Circuit Judge, I intended to implement changes to streamline the dockets. Boone County was undergoing tremendous population growth in the county and it was being reflected in both the civil and criminal dockets. The caseload was ranked number one in the state in 2001 at 1,648 new cases while the average caseload for a judge was 920 new cases. The circuit ranked number one in new cases every year, and by 2006 was at 2,612 new cases while the average caseload only increased to 1,081 for a judge. The criminal felony docket also showed a large increase in cases. The felony indictments for 1998 were 294. They increased every year, reaching 937 new felony indictments in 2006. The changes that were intended to be made to the court procedure could not be accomplished because of the tremendous caseload handled by the prosecutors and the public defenders. The felony mediation docket was created to cut back case numbers so the dockets could become manageable.

In 2007 a second judgeship was created. With that help and felony mediation dockets, the criminal dockets became more manageable. Along the way we learned something. Felony mediation had additional benefits.

After we handled the first mediation docket the participants sat down and discussed the process. By participants, I am referring to the judge mediators, the prosecutors, the public defenders, the clerks, my staff attorney, and the bailiffs. We wanted to analyze the good, the not so good, where we might need improvements, and whether to do another docket. There were sixteen cases on the first mediation docket. All sixteen were successfully mediated to plea agreements. The docket was deemed a success, if only that it accomplished the goal of reducing

numbers quickly. When the guilty pleas were taken, I discussed the process with each defendant to get their view point on criminal mediation. We had invited the manager of the state's mediation service to observe the first docket. She came and watched and offered her input and later was the impetus in creating a statewide system.

After the first mediation we made changes. Those changes were primarily to improve the quality of the process. One decision that was made was to explore the outer limits of felony mediation. Each docket thereafter would have a specific focus from which we could learn what works and what does not. The focuses included opening the dockets to private attorneys, mediations conducted in Spanish, focus on highly emotional cases such as sex crimes, and focus on financial crimes where restitution was the main issue. It was when we invited victims into the felony mediation process that we saw potential new benefits for this process.

The present criminal justice system is a system driven by the prosecutor, a member of the executive branch. Under our threefold system of government with separation of powers, the legislature makes the laws and the executive branch executes the laws. Legislators and officials of the executive branch are elected by the voters. As most voters are law abiding citizens, there are benefits that come to those politicians who appear tough on crime. One of the difficulties in developing a successful felony mediation docket is gathering the support of the local prosecutors. They fear the concept of mediating with a criminal defendant may be seen to members of the voting public as a stance of being "soft." In reality, it is done every day, although a much slower method through the plea negotiation process. The criminal system would be crushed under the weight of cases if every case were to be tried. Negotiating, or plea deals, are the only way the present criminal system can survive.

Traditionally, the criminal system has been viewed as a contest between the government and the criminal. The government makes the rules, and if you break them, the government is the party who goes to court to seek justice. The party seeking retribution or to be made whole is not the victim, but society in the abstract. There may be some monetary restitution awarded to the victim, but the victim does not have the final decision in the amount to be awarded him. The prosecutor can agree to an amount he thinks is appropriate notwithstanding the desires of the victim. The prosecutor is focusing on the guilt of the offender and whether these facts support guilt or innocence as defined under a specific set of rules put forth by the legislature as a crime. The process is truly adversarial. The prosecutor attempts to prove facts to show the offender is guilty of breaking the rules. If that be proven, the prosecutor attempts to exact a punishment he believes is just to pay a debt to society. A prosecutor may speak to the victim but in reality the victim is on the peripheral. It is society versus criminal.

This idea of the criminal system may have worked in the past when the populations were smaller and everyone knew everyone in the local community. The prosecutor generally knew the offender and the victim, and the process had a personal touch to it. One day I was looking for something in an old newspaper on microfilm and I ran across this article in the September 4, 1930 edition of the Boone County Recorder which illustrates that point.

“Big courts in Boone County seem a thing of the past. The legal business is light inasmuch as litigation is concerned. Like all county seats a jail is in evidence, but as six months has elapsed since a prisoner has entered its doors, so little is this place of county property used that weeds have grown up high around the main entrance.”

As populations have grown, the contact among the participants has lessened. Prosecutors no longer can know all the members of their community. There are only so many hours in the

day. Despite the outgrowth of victim advocate programs, prosecutors execute the laws the best they can to exact justice, whatever that is at a given time and place. Most often they no longer personally know the defendant or victim.

The result we have seen is the development of an era of get tough on crime attitudes that have resulted in a burgeoning jail population. In Boone County, for example, we have gone from an empty jail in 1930 to a 500 bed jail and work camp that is historically full to overflowing. This is not a situation unique to Boone County.

Looking at statistics on a national level for the past 30 years we see that our prison population has grown from 300,000 people in jail to 2.5 million plus an estimated 5-7 million under some type of court supervision. We have the approximate same crime rate today as in 1970 but the incarceration rate has increased from 115 people per 100,000 to 715 per 100,000 people. Since 1980 this country has built 1,000 new prison and jails. Today eighty billion dollars per year is spent on people in jail. We have grossly overcrowded prisons and jails. The United States has 5% of the world population but 25% of the world prison population.

In Kentucky the prison population has increased 700% since 1974. It has gone from 3000 prison inmates to about 26,000 of whom a third are housed in county jails. It has gone from two major prisons to sixteen, all of which are full. In 2007 (latest data), Kentucky ranked number one in the United States in percentage of population incarcerated. One in ninety-two people are in jail or prison. One in thirty-one people are under some type of incarceration. 57% of felons are sentenced to prison. The crime rate has gone down, but incarceration has gone up. Kentucky spends 22,000 dollars a person per year to incarcerate an offender. Medical costs of prisoners are sixty-two million dollars per year. The state budget increase from 1985 to 2004 has been 200% on prisons and only 3% on higher education.

This year Kentucky adopted the Public Safety and Offender Accountability Act. It is directed at those nonviolent offenders who are sentenced to prison. Of the 26,000 people in Kentucky jails, 11,000 are deemed violent offenders and 15,000 are deemed nonviolent offenders. The thought is that a reasonable reduction in recidivism will mean millions of dollars in savings. This new law is the result of scientific studies performed over the last couple of decades by national groups that have demonstrated that use of certain practices in criminal justice decision making can have a profound effect on reducing offender recidivism.

Under the new Act, the primary objective of sentencing is not only to maintain public safety and hold offenders accountable, but also to reduce recidivism and criminal behavior and improve outcomes for the sentenced offender.

An offender, before he is sentenced, has a risk and needs assessment performed. The sentencing judge must consider this assessment and the likely impact of a potential sentence on the reduction of the defendant's potential future criminal behavior. The risk and needs assessment is a tool scientifically proven to determine a person's risk to reoffend and criminal risk factors that when properly addressed, can reduce the offender's likelihood of committing future criminal behavior. Criminal risk factors under the law are characteristics and behaviors that, when addressed or changed, affect a person's risk for committing crimes. The characteristics include, but are not limited to, antisocial behaviors, antisocial personality, criminal thinking, criminal associates, dysfunctional families, low levels of employment or education, poor use of leisure and recreation, and substance abuse. This revolutionary change in the philosophy underlying the criminal system moves the battle in the adversarial system between prosecutor and defendant from one focused on the offense committed to the nature of

the offender. Nonviolent offenders are diverted to alternative rehabilitation and sanctioning programs designed to make them become better law abiding members of society.

We have firsthand experience that this system works in the Drug Court model. Boone and Gallatin counties obtained funding to start a Drug Court in 2007. We are finding results that mimic the success at the national level. A new way of addressing criminal's conduct and educating them with tools that are new to them will reduce recidivism and produce contributing members of society. We can see that most crimes have some component of drug abuse to them. Unfortunately, reality is that drug abuse is increasing.

The clinical definition for Drug Court is a non adversarial team approach to criminal behavior resulting from addiction. It is an alternative rehabilitation to placing people in prisons. Drug Court adheres to certain guidelines. These guidelines encompass these components:

1. Mandatory alcohol and drug treatment;
2. Team approach utilizing a Drug Court Team in a non adversarial manner;
3. Potential participants are assessed early in the criminal justice process;
4. Access to continuing treatment services;
5. Frequent and random drug and alcohol testing;
6. A judge presides over Drug Court who reviews with the participants their progress
7. Program evaluation is an ongoing process. Statistics are collected, reviewed, and evaluated.
8. Partnership with other public agencies; and,
9. Training for members of the Drug Court team.

It takes a criminal defendant about two years to complete Drug Court. It is a multiphase program consisting of three separate phases. Generally, the phases are as follows:

Phase 1- “Stabilizing Period”

- The participant shall provide at least three random urine drug/alcohol screens per week;
- Attend at least three clinical contact hours per week;
- Attend one court session per week;
- Obtain and/or maintain court-approved full-time employment, training or education;
- Obtain and/or maintain court-approved housing;
- Make arrangements for payments of court obligations;
- Make at least one weekly individual contact with drug court staff;
- Indicate an initial understanding of substance abuse treatment;
- Enroll and attend a self-help program, such as a 12-step program; and,
- Remain drug-free for at least 30 consecutive days before consideration for promotion to the next phase.

Phase 2- “Educational Period”

- The participant shall provide at least two random urine drug/alcohol screens per week;
- Attend two clinical contact hours per week;
- Attend one court session every two weeks;
- Maintain court-approved full-time employment, training or education;
- Maintain court-approved housing;

- Continue paying court obligations;
- Make at least one individual contact with drug court staff per week;
- Indicate an appropriate understanding of recovery principles;
- Continue to attend self-help programs, such as a 12-step program, and,
- Remain drug-free for the final 90 days, consecutively, of this Phase before consideration for promotion to the next Phase.

Phase 3- “Self-Motivational Period”

- The participant shall provide at least one random urine/drug screen per week;
- Attend one clinical contact hour per week;
- Attend one court session every three weeks;
- Maintain court-approved full-time employment, training or education;
- Maintain court-approved housing;
- Continue paying court obligations;
- Make at least one individual contact with drug court staff per week;
- Indicate an appropriate understanding of a recovery lifestyle;
- Continue to attend self-help programs, such as a 12-step program; and,

- Remain drug-free for the full 90 days, consecutively, of this Phase, for a total of 180 consecutive days for both Phases II and III.

The three phases shall take a minimum of twelve months to complete. After the three phases are completed the defendant must do an “aftercare” period for a minimum of six months. During this period the participant shall demonstrate the ability to maintain a drug-free, alcohol-free and crime free lifestyle.

My experience with Drug Court participants who prove to be successful graduates, shows that the participant demonstrates true remorse for their crimes and an effort to make amends to their victims. Drug Court requires that restitution to victims be paid before a participant can graduate from Drug Court. Dialogue in court settings between the judge and participants as the participants move through the program will focus on making amends to victims. As they are in the Aftercare phase, dialogue will focus on what the participant is doing to give back to the community.

Statistics show that Drug Courts are working. Whether one looks at national statistics or Kentucky statistics, the results are similar. Recidivism rates are significantly lower for Drug Court graduates than criminals who did not go through Drug Court. An essential element of success is recognition by the participant that his crimes injures a person, that amends are necessary, and he is a part of and responsible to a larger community.

During the felony mediation process where the victim is involved you see a similar process jumpstarted. A defendant sees his victim and his crime as it really is, a truly injurious act inflicted by his own hands. Apologies to victims are not out of the ordinary. Victims can get other benefits from felony mediation.

Judge Raymond Lape, who has participated in every felony mediation docket conducted in Boone County, shares the story of a case where the deceased victim's toxicology report surprisingly revealed high levels of marijuana. The victims' family was surprised and did not want the reputation of the victim to be tarnished in the community. One of the most important results to be achieved on their behalf was to keep that fact confidential which was accomplished through mediation and would not have been accomplished if the matter had gone to trial.

Sometimes it is the community itself who is the victim. For the past few years we have seen an increase in the number of welfare fraud cases. They were causing a problem for the prosecutors because obtaining government records and getting the correct amount of restitution claimed from the government was difficult. These problems were resolved by creating felony mediation dockets for these types of cases. A representative of the government would come on the day of the docket armed with the records for each case. The offender was usually a low income, lower educated individual with children, confronting the resources of the government. What usually transpired was the settlement of a large amount of cases in a morning where a restitution plan was structured, man hours were saved, and the offender received a better idea of how their conduct was criminal in nature and by this process, a lower recidivism rate.

It is the acknowledgement that crime causes injury to people that felony mediation recognizes. It is a recognition that a component of justice is that those injuries be repaired. It is true that crime causes injury to the community and the community be represented in the process but when the victim participates as a party in the process something powerful can happen. Not only are the direct physical injuries addressed, but the psychological and social injuries as well.

There is a movement that has been going on for some time in this country called restorative justice. It has been described in many different ways, and different scholars have

characterized its guiding principles in different ways. As an example the following is taken from the National Institute of Justice:

Fundamental Concepts of Restorative Justice

1.0 Crime is Fundamentally a Violation of People and Interpersonal Relationships

1.1 Victim and the community have been harmed and need restoration.

1.1.1 The primary victims are those most directly affected by the offense but others, such as family members of victims and offenders, witnesses, and members of the affected community, are also victims.

1.1.2 The relationships affected (and reflected) by crime must be addressed.

1.2 Victims, offenders and the affected communities are the key stakeholders in justice.

1.2.1 A restorative justice process maximizes the input and participation of these parties-- but especially primary victims as well as offenders -- in the search for restoration, healing, responsibility and prevention.

1.2.2 The roles of these parties will vary according to the nature of the offense as well as the capacities and preferences of the parties.

1.2.3 The state has circumscribed roles, such as investigating facts, facilitating processes and ensuring safety, but the state is not a primary victim.

2.0 Violations Create Obligations and Liabilities.

2.1 Offenders' obligations are to make things right as much as possible.

2.1.1 Since the primary obligation is to victims, a restorative justice process empowers victims to effectively participate in defining obligations.

2.1.2 Offenders are provided opportunities and encouragement to understand the harm they have caused to victims and the community and to develop plans for taking appropriate responsibility.

2.1.3 Voluntary participation by offenders is maximized; coercion and exclusion are minimized. However, offenders may be required to accept their obligations if they do not do so voluntarily.

2.1.4 Obligations that follow from the harm inflicted by crime should be related to making things right.

2.1.5 Obligations may be experienced as difficult, even painful, but are not intended as pain, vengeance or revenge.

2.1.6 Obligations to victims such as restitution take priority over other sanctions and obligations to the state such as fines.

2.1.7 Offenders have an obligation to be active participants in addressing their own needs.

2.2 The community's obligations are to victims and to offenders and for the general welfare of its members.

2.2.1 The community has a responsibility to support and help victims of crime to meet their needs.

2.2.2 The community bears a responsibility for the welfare of its members and the social conditions and relationships which promote both crime and community peace.

2.2.3 The community has responsibilities to support efforts to integrate offenders into the community, to be actively involved in the definitions of offender obligations and to ensure opportunities for offenders to make amends.

3.0 Restorative Justice Seeks to Heal and Put Right the Wrongs.

3.1 The needs of victims for information, validation, vindication, restitution, testimony, safety and support are the starting points of justice.

3.1.1 The safety of victims is an immediate priority.

3.1.2 The justice process provides a framework that promotes the work of recovery and healing that is ultimately the domain of the individual victim.

3.1.3 Victims are empowered by maximizing their input and participation in determining needs and outcomes.

3.1.4 Offenders are involved in repair of the harm insofar as possible.

3.2 The process of justice maximizes opportunities for exchange of information, participation, dialogue and mutual consent between victim and offender.

3.2.1 Face-to-face encounters are appropriate for some instances while alternative forms of exchange are more appropriate in others.

3.2.2 Victims have the principal role in defining, and directing the terms and conditions of the exchange.

3.2.3 Mutual agreement takes precedence over imposed outcomes.

3.2.4 Opportunities are provided for remorse, forgiveness and reconciliation.

3.3 Offenders' needs and competencies are addressed.

3.3.1 Recognizing that offenders themselves have often been harmed, healing and integration of offenders into the community are emphasized.

3.3.2 Offenders are supported and treated respectfully in the justice process.

3.3.3 Removal from the community and severe restriction of offenders is limited to the minimum necessary.

3.3.4 Justice values personal change above compliant behavior.

3.4 The justice process belongs to the community.

3.4.1 Community members are actively involved in doing justice.

3.4.2 The justice process draws from community resources and, in turn, contributes to the building and strengthening of community.

3.4.3 The justice process attempts to promote changes in the community to prevent similar harms from happening to others.

3.5 Justice is mindful of the outcomes, intended and unintended, or its responses to crime and victimization.

3.5.1 Justice monitors and encourages follow-through since healing, recovery, accountability and change are maximized when agreements are kept.

3.5.2 Fairness is assured, not by uniformity of outcomes, but through provision of necessary support and opportunities to all parties and avoidance of discrimination based on ethnicity class and sex.

3.5.3 Outcomes which are predominately deterrent or incapacitative should be implemented as a last resort, involving the least restrictive intervention while seeking restoration of the parties involved.

3.5.4 Unintended consequences such as the coaptation of restorative processes for coercive or punitive ends, undue offender orientation, or the expansion of social control are resisted.

As in many government documents, the foregoing is a lot to digest. An easier set of illustrating principles would be the following:

1. Offenders have a responsibility to their victims as well as to the community.
2. Crime is an offense against people, and the offender makes do whatever to make it right.
3. Victims and their communities should have a role in how to repair the harm caused by the crime.
4. Communities have a responsibility for the wellbeing of victims and offenders.

5. Results are best measured by the extent to which the harm was repaired and not by the length of time the offender spends in prison.

An understanding of how restorative justice differs from the current system is illustrated by the following chart:

<u>Retributive</u>	Vs.	<u>Restorative</u>
Crime is violation of the rules		Crime harms people
State is victim		Victim is a person
Parties are state and offender		Parties are victim and offender
Focus on guilt		Focus on amends and repair
Debt owed to society in the Abstract		Debt owed to the victim
Debt paid by punishment		Debt paid by “making right”
Victim on periphery of process		Victim active participant
Offender has no role in the process		Offender responsible, active
Adversarial process		Dialogue-related process
Offender renounced		Harmful act renounced

There are different methods used by advocates of restorative justice to achieve these goals. One is the “circle.” The participants may include the victim, victim supporters, prosecutor, police, offender, offender supporters, and interested members of the community. The people participating in the circle speak in a shared search for understanding the event, assist at arriving at a solution to repair, and prevent future criminal conduct.

Another method used is the “Victim Impact Panels.” Crime victims are given a forum to tell a group of offenders about the impact of crime on their lives as well as the impact on their family and friends. The offenders of the victims presenting their stories are generally not there.

The purpose of the panel is for victims to speak, rather than for the victims and offenders to engage in dialogue.

A third method is types of “Victim Impact Classes.” It is a program designed to educate the offenders how crime affects the victim and the victims family and the community, as well as the families of the offender. Our court presently uses these classes as part of probation in the area of thefts, domestic violence and drunk driving.

Many courts use victim impact statements. This document is a victim’s description of how the offender’s crime has affected their lives and their families. This document is reviewed by the judge prior to sentencing. I also allow victims to orally address the Court immediately prior to sentencing. Unfortunately, I hear victims sometimes complain that no one speaks to them in the criminal justice system or no one cares how this has affected them.

Another method of restorative justice used in our jurisdiction is teen courts. Sometimes they are called youth court or peer court. These courts provide an alternative court system where juvenile offenders can be judged by their peers. Teen courts implement restorative justice principles. They provide opportunities for victims and community members to participate in the justice process and provide input in the decision making process. The system seeks to address the root causes of juvenile offenses and to reduce recidivism. The teen court attempts to send appropriate messages to the offender regarding unacceptable behavior and to reintegrate the youthful offender into the community. Members of teen court receive training, take a bar exam, develop skills in peer mentoring and must comply with a code of conduct which includes an oath of confidentiality.

The method most similar to felony mediation dockets in victim-offender mediation. With the assistance of a trained mediator the victim voices to the offender a description of how the

crime has affected them physically, emotionally, and financially. The mediator attempts to assist the victim in getting answers to lingering questions – the why, and who is this criminal. This is different from traditional methods in that the process is not focused on reaching a settlement although a restitution plan may be reached. The process is more appropriately described as victim-offender dialogue or conference.

Felony mediation dockets provide the opportunity to accomplish the goals of focusing on the nature of the offender to reduce recidivism as well as to repair the harm caused the victim and the community. It is a method whereby all interests can be represented and participate in reaching a satisfactory result. The government has always had an interest in punishing offenders, provide a specific deterrent to this offender, as well as a general deterrent (send a message), and provide rehabilitation. It is well accepted that the present criminal justice model has not been successful in this last category, as shown by recidivism rates and overcrowded prisons. A new model focusing on the nature of the offender appears to be a move in the right direction according to scientific studies. While the goal is to match the level of service to an offender with the risk, the felony mediation process may assist in developing the plan.

The growing movement to a recognition of a victims right to information, input into the process, restitution and protection are promoted by felony mediation dockets. While we need a justice system that seeks to change the behavior of offenders, the criminal justice system must acknowledge the needs of the crime victims. There is a strong argument that the two go hand in hand.

Felony mediation dockets promote a criminal justice system that meets the needs of the people affected. It helps to improve the lives of the victims. It gives them the opportunity for input. It allows the opportunity for closure and to take back control. It gives them the ability to

get on with their lives and it helps the victim to get hard questions answered and gain a better understanding of what and why. It allows the process and victims to impose upon offenders the real human impact of their behavior. Restitution can occur. Lives can begin healing.

Felony mediation dockets can also improve the lives of members of the community. It will help drive down recidivism rates. The current system isolates the public from the halls of justice, and a system where the community participates can only help in a democracy.

Lastly, felony mediation dockets will help to start the process of improving the lives of offenders. Experience shows that an offender must comprehend the impact of their crimes and feel accountability before real transformation can begin in their lives.

In sum, felony mediation dockets are a valuable tool to improving the criminal justice system. We have found that felony mediation works for a victim for any type of case as long as the victim chooses to participate. We have mediated cases involving charges of murder, rape, burglary, assault - any type of criminal offense can be mediated successfully.

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