OHIO CRIMINAL SENTENCING COMMISSION

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Chief Justice Maureen O'Connor
Chair

David J. Diroll
Executive Director

MINUTES
of the
OHIO CRIMINAL SENTENCING COMMISSION
and the
CRIMINAL SENTENCING ADVISORY COMMITTEE
October 13, 2011

MEMBERS PRESENT
Municipal Judge David Gormley, Vice-chair
Victim Representative Chrystal Alexander
Staff Lt. Tony Bradshaw, representing State Highway Patrol Superintendent Col. John Born
Paula Brown, OSBA Representative
Common Pleas Judge Janet Burnside
Kort Gatterdam, Defense Attorney
Kathleen Hamm, Public Defender
Prosecuting Attorney Joseph Macejko
Senator Larry Obhof
Mayor Michael O'Brien
State Representative Lynn Slaby
Municipal Judge Kenneth Spanagel
Steve VanDine, representing Rehabilitation and Correction Director Gary Mohr

ADVISORY COMMITTEE MEMBERS PRESENT
Retired Appellate Judge Colleen O'Toole
Gary Yates, Chief Probation Officers' Association

STAFF PRESENT
David Diroll, Executive Director
Cynthia Ward, Administrative Assistant

GUESTS PRESENT
Erich Bittner, legislative aide to Sen. Larry Obhof
JoEllen Cline, Supreme Court of Ohio
Gloria Hampton, Ohio Community Corrections Association
Professor Brian Lovins, University of Cincinnati
Irene Lyons, Dept. of Rehabilitation and Correction
Scott Neeley, Dept. of Rehabilitation and Correction
Alan Ohman, legislative aide to Sen. Shirley Smith
Ed Rhine, Dept. of Rehabilitation and Correction
Stephanie Starr, Dept. of Rehabilitation and Correction
Paul Teasley, Hannah News Network
Juli Tice, Chief Probation Officers' Association

The October 13, 2011 meeting of the Ohio Criminal Sentencing Commission and Advisory Committee was called to order at 10:00 a.m. by Vice-Chair, municipal court Judge David Gormley.

DIRECTOR'S REPORT

Executive Director David Diroll reported that the updated Drug Cards have been distributed, reflecting changes resulting from H.B. 86. Some of the changes relate to presumptions for or against prison for certain F-4 and F-5 drug offenses.

As the Sentencing Commission works on H.B. 86 clean-up issues, JoEllen Cline, Government Relations Counsel for the Ohio Supreme Court, plans to consolidate our concerns with those of other groups, such as the Judicial Conference, DRC, prosecuting attorneys, State Public Defender, law enforcement, community corrections and juvenile advocates.

OHIO RISK ASSESSMENT SYSTEM (ORAS)

Since H.B. 86, effective September 30, requires DRC to use the Ohio Risk Assessment System (ORAS), developed by the University of Cincinnati (UC), to measure the progress and risk factors of an inmate in determining the success of rehabilitation, Dir. Diroll felt it would be helpful to learn more about this system and how it will be used.

Representing DRC, Stephanie Starr reported that most training with the system will be completed by this November. All facilities are expected to be on the system as of April, including halfway houses. She noted that UC is helping to train judges. ORAS can be accessed by the internet, but only by those officially trained, since a secure access code is needed.

Prof. Brian Lovins, from UC, explained that ORAS for sentencing is designed differently than risk assessment tools for pretrial release, prison intake, *etc.* ORAS includes incarceration information, offender investigations, and risk measurements. It is a two step process that connects information vertically and horizontally through the system.

On the dashboard, information can be shared regarding changes and reminders of when things are due for both primary and secondary people assigned to cases. It includes links to the reentry coalition website and the DRC website.

The system manages access for security reasons. Some people have read only access and cannot enter information. Those with user accounts can enter data and information.

The Risk Assessment tab houses all of the assessments. A person can only get access to assessments they are certified to reach. If not trained, they cannot get it. This should cut down duplicate entering of information. The goal was to develop a system that really ties in to the workflow of the staff.

He noted that ORAS includes veterans' information, offender's scores, offenses, completed assessments, bed assignments, job assignments, case plans, program participation, Institute Summary Reports, counties, and offender history in DRC, including infractions and discipline imposed.

In response to a query from Judge Gormley, Prof. Lovins explained that not all inmates are currently in the system. It depends on when the offender was first logged into ORAS (pretrial, admission to DRC, after

assessment, or when). He expects everyone will be in within the next two years, except possibly lifers unless they are about to be released.

Raising concerns about confidentiality, public defender Kathleen Hamm asked if prosecutors will be allowed access.

H.B. 86 includes some requirements pertaining to access to risk assessment tools, said Dir. Diroll. It states that, since ORAS reports are not public record, they may only be disclosed for "penological and rehabilitative purposes" while otherwise maintaining confidentiality.

Retired judge Colleen O'Toole asked if offenders or their counsel will have access to this information or at least an opportunity to challenge what is in it. They support sharing the results, Prof. Lovins responded, but would share a summary, not details, especially details in scoring.

According to Ms. Starr, an oversight committee has been set up who determines who gets access to the system.

To assure that the tools are valid and reliable, a forum is included, said Prof. Lovins, where folks can ask questions about the system. There is also a hands-on quality assurance team checking throughout the state about any concerns with the program and a quality improvement module to flag any cases that are out of the norm.

The process starts with a personal interview with the offender. An assessment can be entered during pretrial, community supervision screening, prison screening, or at levels of management during a prison term. It is recommended that the person is not reassessed any more frequently than 6 months. If a person is assessed sooner than that the system will ask why. It includes a scoring guide and a section for comments to justify the score given, added Prof. Lovins.

Assessments include the offender's criminal history, education, employment, financial situation, family and social support, neighborhood problems, substance and mental health issues, peer associations, criminal attitudes and behavioral patterns, and other areas of concern. Information sources include an interview with the offender, a self report, official file, record check, collateral information, and other sources.

Common pleas Judge Janet Burnside knows of cases where offenders have refused to participate in these interviews. In some of those cases she has ordered them to participate.

If unable to get the offender to participate in the interview, said Prof. Lovins, they must rely on other sources. Overall, he said, the system brings integration of multiple case plans and enables the viewer to see the whole picture of what is going on with this offender in all domains. It also provides a measure of all risks for every domain (criminal history, education, family support, neighborhood, problems, substance abuse, peer association, behavior attitude, responsiveness, and barriers). Because it offers a comparison of scores over time in each domain, ORAS is a dynamic risk assessment, he noted.

The case plan generates a set of needs and priorities and allows the offender to help set goals and priorities. It involves selecting a target for change and setting up objectives and techniques for achieving the goals.

The system lists all treatment programs available by county for referral options. In an attempt to break down barriers that impede offender accomplishment, the hope is to eventually allow users to schedule appointments for offenders and track bus routes/transportation to help the offender get there. He hopes to include a list showing the difference between the various programs to help the system user choose the best one for each offender.

When asked how the scoring system was developed, Prof. Lovins explained that UC did a prospective study by asking 2,000 offenders the same questions and tracked them to see which things show predictability of recidivism. He pointed out that it is not just one item that predicts recidivism. The more items, and combination of those items, the greater the predictability, he said. He noted that the people with whom the offender associates, coupled with attitudes and beliefs are stronger indicators of the potential for future recidivism than substance abuse. It is not always possible to test for those things. The composite risk score is based on how the multiple items stack up. He noted that the predictors for reentry from a prison institution will differ from reentry from a community sanction. Once the system identifies the needs of the offender, the practitioners can individualize a plan.

Representing the Chief Probation Officers' Association, Juli Tice remarked that some municipal courts use the ORAS for misdemeanor cases but find that it assesses misdemeanants low. It seems to work better for felony cases, she commented. Prof. Lovins responded that they are working on a trailer for misdemeanor cases to see how to better adapt it for those as well.

He noted that an override provision is available at both the assessment and supervision levels. It monitors the rate of a user's override use to assure that they are not just ignoring the scoring tools. The hope eventually is to be able to predict the offender's likelihood of committing a future offense of violence.

He pointed out that low risk does not mean no risk. One may know that 1 in 10 of a group of offenders is likely to reoffend, but don't know *which* one. If something disrupts things that make someone low risk, it can result in them becoming a higher risk. The more individualized the plan developed for low risk offenders and the least disruptive, the more successful it proves to be. The goal is to maximize efforts toward those offenders who need help to succeed.

Dir. Diroll asked how composite data might be drawn from this system. According to Prof. Lovins, ORAS can provide offender totals on risk assessment by county. Eventually he hopes to have aggregate level data on where offenders fall out of the program and when they get transferred from one level of supervision to another and why. They also hope to eventually have an ad hoc reporting system that will allow limited access for others needing data.

Noting that H.B. 86 had included a provision regarding probation case management data, Dir. Diroll reported that Chief Justice O'Connor would like to see it gather richer information beyond just case management.

Representing the Chief Probation Officers' Association, Gary Yates remarked that the original purpose for setting up this system was at the request last year of the Council on State Governments to find out how many people are put on probation, how many go off probation per month and why, and how many are on probation altogether.

Public Defender Kathleen Hamm expressed surprise that the courts or someone did not have this information readily available.

It could be a valuable tool, said Dir. Diroll, to know who gets sent where and the numbers in each sanction. He asked if it is possible yet with today's technology to do that without being too cumbersome.

ORAS will help with some of that, said Mr. Yates. With 250,000 currently on probation, that's a lot of data to gather. The 87 probation departments in Ohio do a quarterly census report but it does not include detailed information. It will depend on the questions asked and detail required to determine how cumbersome it will be.

Since the municipal court deals mostly with traffic citations, said Ms. Tice, it would be possible to get some basic information but not much more unless the offender is assigned to probation.

The quarterly report would probably be the most you could expect, said Municipal Judge Ken Spanagel. Since there is inactive versus active probation, the active probation would be easier to track.

ORAS will provide a lot of information, Mr. Yates noted, but it won't be getting as much from misdemeanor courts.

Defender Hamm would appreciate information on the success rates of other counties and what works for them. She would like to know which diversion programs are working.

Noting separation of powers, Atty. O'Toole pointed out that the executive branch cannot order the judicial branch to keep a probation database. Since the Ohio Supreme Court is talking about setting this up under Court Rule, she wondered who would provide the funding.

According to Dir. Diroll, H.B. 86 requires the court to use ORAS "when an assessment is ordered." So misdemeanor judges will control how often ORAS is used. It will be much more common in felony cases, he opined.

ORAS will be used for case plans, said Mr. Yates, but probation departments are not required to do case plans in every case.

Perhaps it would be helpful, said Judge Spanagel, to specify when municipal courts have to use ORAS.

Mr. Yates remarked that the language originally said every case must use ORAS, then it got changed to every case in which an assessment is ordered. He wondered if all 250,000 people on probation are going to be ordered into ORAS. He contends that if someone is on probation now but

had no assessment done, the court is not going to require an assessment just to get them into ORAS.

Atty. O'Toole noted that a uniform entry point is needed to get probationers into the ORAS system.

It will be easiest, said Dir. Diroll, to start with new people coming into the system.

Right now, said DRC Research Director Steve VanDine, the system can only offer data on who enters DRC. Outcome studies regarding evaluation of existing programs are too specialized right now. Some data bases can be merged without having to be initially compatible. It is not necessary to require that they all match in data elements. If we could get some basic numbers on how many offenders are put on probation and how many are removed from probation by felony level, gender, and ethnicity, it would be extremely helpful, he said, for all kinds of decision-making by the state.

It would also be helpful, said Judge Gormley, to get caseload information, such as how many offenders are being served by each probation officer.

Information on the number of investigations conducted by each probation officer would also be useful, Mr. VanDine suggested, since they don't do an investigation on everyone.

Mr. Yates noted that some of the information recommended by Mr. VanDine, *i.e.*, gender and offense level, would be much easier to gather than a lot of the more detailed data required by ORAS.

According to Judge Spanagel, some courts don't even have a probation officer. Sometimes the bailiff handles those matters. He added that some courts honestly could not tell you how many people they have on probation. It might require a Supreme Court Rule mandating the information to be reported by a certain deadline to get it done.

Atty. O'Toole asked why the Supreme Court doesn't just develop a software program to compile this data and send it out to the courts.

As with most departments, it boils down to a lack of funds, responded Judge Spanagel.

According to Judge Burnside, if a judge wants to step outside of ORAS for a certain offender, she can.

Mr. Yates believes that most probation departments can tell how many people they have on probation. To expect more than that would be the real challenge.

Mr. VanDine noted that a few years ago when the Bureau of Justice Statistics surveyed the state probation departments, they only received responses from 160 of the 187 departments and afterwards could not even tell how many are misdemeanants and how many are felony offenders. He noted that there's an overlap with how courts collect information. Based on previous requests, some courts object to collection of data on race, ethnicity, etc.

H.B. 86 ISSUES

Application. H.B. 86 took effect September 30, 2011. Dir. Diroll noted that the bill stated that old law would govern pre-HB 86 cases and new law would govern post-HB 86 cases, with one exception. For theft and drug crimes committed before the bill's effective date but not sentenced until after that date, §1.58(B) would apply, giving them the benefit of any reduced penalty. The act, however, is silent on whether the changes necessitate modified *charges*. In other words, he queried, if X is initially charged with a felony, but his offense now carries an M-1 penalty, is it an M-1 for the record and other purposes? Does §1.58(B) only go to the *penalty* for the offense and not to how it is categorized? If so, then X would remain a felon (since he was a felon at the time of the crime), but could only receive an M-1 penalty.

Judge Burnside stressed that if the category of the offense is being changed, it needs to be in the entry.

H.B. 86 also is not clear, said Dir. Diroll, regarding the application of §1.58(B) to changes in the sentencing *guidance* and sentencing ranges. For an offender charged with possessing 4 grams of crack prior to September 30th, it would result in an F-4 with a presumption in favor of prison. If sentenced after September 30, however, that offender would get an F-5 penalty without the presumption. If, however, an offender is charged prior to September 30 with an F-3 robbery with no prior convictions, there is some question as to whether he would benefit from the post September 30 reduced F-3 penalty range, since robbery is not specified in the application of §1.58(B). However, since the bill did not specifically "notwithstand" the section's application to, say, robberies, §1.58(B) should still be good law and apply, he concluded, adding that clarification would help.

Non-Standard Theft Statutes. The bill is tricky regarding theft thresholds, Dir. Diroll added. Other bills over the past 15 years changed the basic theft statute to create F-1 and F-2 level thefts and inserted lower thresholds when the victims are at least 65 or disabled, but the changes were not uniformly applied to all other thefts and frauds. One must be careful to look individually at each theft, fraud, and related offense before applying the new thresholds. Dir. Diroll said that the Sentencing Commission is well-positioned to standardize how the various theft-related statutes would draw lines.

Major Drug Offenders. It is also necessary, said Dir. Diroll, to clean up the language regarding terms for major drug offenders, since many statutes reference a "10 year" sentence, when the F-1 maximum is now 11 years. The General Assembly may also want to rethink whether an MDO specification remains necessary, since there no longer is a surpenalty beyond the F-1 range.

Limits on Prison for certain F-4s and F-5s. Dir. Diroll reported that Judge Pepple of Auglaize County Common Pleas Court opined on the constitutionality of the new §2929.13(B) language that requires judges to impose a sentence recommended by DRC for certain F-4s and F-5s. Such deference by an elected judge to an administrative body probably violates separation of powers doctrine, Dir. Diroll agreed.

Earned Credit Notice. H.B. 86 increased the amount of credit that an offender may earn for participating in certain programs while incarcerated. The bill requires the judge to consult §2929.14(D)(3) in telling the defendant about earned credit and how it could affect the length of his sentence according to §2967.192. Dir. Diroll suggested that it would be easier if §2929.19 merely required the judge to inform the defendant, if eligible, that the sentence may be reduced by up to 8% for credits earned in prison, but that the credits aren't automatic.

Mr. VanDine remarked that DRC assumes that an inmate serving fewer than six months won't get into a program for earned credit.

Concurrent Probation Supervision. HB 86 attempts to minimize duplicate supervision when an offender is subject to supervision by more than one probation department. It designates the offender to be supervised by the court that imposed the "longest possible sentence". Many exceptions are allowed, however, when the offender is under supervision imposed by two or more municipal, county, or common pleas courts in the same or separate counties "for two or more equal possible sentences", or an agreement is reached among the courts. Concurrent supervision is allowed if courts can't agree. Dir. Diroll believes that the language under this section should be simplified.

Local Incarceration Options. Atty. Hamm raised concern about the 45-day response time from DRC regarding alternative sentencing. She also wondered if it would mean electronic monitoring if DRC recommends sending the offender back to the local jurisdiction.

Mr. VanDine remarked that DRC hopes to recommend something the judge may not have known was available such as a CBCF in a nearby jurisdiction.

OTHER ISSUES

Judge Spanagel raised concerns about issues related to the 3-year to lifetime driving suspensions which had been discussed at an earlier meeting. It involves a 3 year hard suspension for failure to comply if a driver refused to comply with a DUI test. There has been discussion to get it into H.B. 5. He thought the Sentencing Commission already voted on that issue.

Dir. Diroll reported that Senator Larry Obhof is ready to start the process on simplification of the impaired driving law. Judge Spanagel suggested putting the simplification proposal on the website so that other interested parties can view it and hopefully offer support.

Dir. Diroll remarked that the Commission had not planned on tackling the ALS statute, but wondered if it might be worth considering now.

FUTURE SENTENCING COMMISSION MEETINGS

The next meeting of the Ohio Criminal Sentencing Commission is tentatively scheduled for December 15, 2011.

The meeting adjourned at 3:00 p.m.