

THE CRIME AND JUSTICE INSTITUTE AT COMMUNITY RESOURCES FOR JUSTICE
(<http://cjinstitute.org/projects/webinars>)

WEDNESDAY SERIES VII: SEPTEMBER 8, 2010

USING EVIDENCE TO PROMOTE PUBLIC SAFETY: PRACTICAL
CONSIDERATIONS FOR DEFENSE

FREQUENTLY ASKED QUESTIONS

We were unable to respond to all audience questions during the webinar due to time constraint. The Crime and Justice Institute (CJI) at Community Resources for Justice (CRJ) is pleased to post responses to those questions in this document. These responses have been provided by the Wednesday Series VII panelists and CJI staff.

Please visit <http://cjinstitute.org/projects/webinars/seriesVII> for the audio and visual recording of the webinar, including answers to questions asked during the webinar.

Q. What do you do about EBP sentencing that requires the indigent client to pay for a lot of costly and mandatory treatment or face revocation? It sometimes feels that EBP is a job-creation program for therapists.

A. Christopher Flood, Deputy Chief Defender, Orleans Public Defenders

I do think we need to think carefully about funding the system through imposing fees on defendants. Criminal justice is not and can never be a revenue-generating public function; it is a public expense and should be treated as one. That being said, given that prison and jail beds are a very costly public resource, EBP represents an opportunity for significant savings. That is, from a long-range fiscal perspective, we should be saving money from EBP.

I also think we reach beyond legitimate aims of sentencing when we punish an indigent defendant for her inability to afford services that more well-off defendants can afford. But ethics aside, it's hard to justify charging defendants - and certainly punishing them for not being able to afford costs - for services that actually save money. Finally, I can't comment on whether EBP is a job-creation program for therapists, but I can say that the absence of EBP keeps expensive and outsized jails in operation.

Q. How can a defense attorney challenge the instruments when the logarithms are not publicly available?

A. Christopher Flood, Deputy Chief Defender, Orleans Public Defenders

It should come as no surprise that I think we as defense attorneys need to be involved with the process of implementing EBP from the ground up. We are often the last stakeholder at the table, but for any truly systemic improvement, we have to be at the table. This means that we have to do the hard work of understanding the instruments, and fighting for them to be valid, fair, and inclusive. Where they aren't, or where some claim has been made that they are not publicly available, we need to be ready to challenge their use.

Q. Many risk assessments talk about the offense the client is currently facing. This can obviously be incriminating. If the use could help out during pre trial but may also incriminate the client what do you suggest?

A. Christopher Flood, Deputy Chief Defender, Orleans Public Defenders

This is a huge problem with pre-trial instruments. Even if the questions aren't specifically about the offense, questions can tend to incriminate. Here, for example, I'm thinking about a defendant accused of drug possession being asked about their drug use. This is exactly where defense counsel must play a role. In my practice, I have sat with clients during the interview and advised what questions can safely be answered. This solution is not always feasible, though, and in the event it isn't, participating in the interview might not be a good idea. This, of course, will likely impact the likelihood of release. Because of this tension, and the potentially dispositive stakes, defense attorneys - especially public defenders - must be given adequate time and information to fully counsel their clients. We can't ethically advise our clients without coming to an understanding of their interests, and the tradeoffs here can be drastic. Finally, I would suggest advocacy with your bench and opponents. It would be unfair to detain someone who is not a danger or a flight risk simply for exercising their right to remain silent in a pretrial interview.

Q. Where can we get copies of the actual instruments that are used to make the risk assessment?

A. Kristy Danford, Project Manager, Crime and Justice Institute

There are a number of assessment tools available. In your particular jurisdiction the entity that administers the assessment would be the best source of information (e.g., pretrial services, probation and/or parole.) You can also do research on assessment tools through the many assessment tool providers. The [Ohio Risk Assessment System](#) is one such public domain tool you can get through the University of Cincinnati's Center for Criminal Justice Research. There are also a number of proprietary tools available from various for-profit vendors.