

Frequently Asked Questions

What Is the Role of Courts in DWI Cases?

In one sense, the role courts play in impaired driving cases is the same role it plays in other criminal cases. Although sometimes considered to be another part of the “criminal justice system,” courts have a very different role to play than law enforcement, prosecution, or corrections. One basic function of courts is to settle disputes through an acceptable, authoritative means.¹ The court hears and conducts pretrial proceedings such as bail hearings, arraignments, and constitutional challenges to evidence. At the trial phase, the court either conducts a jury or a bench trial, depending on the defendant’s request. Finally, in the penalty phase, the court imposes sentences that are consistent with the facts established and the applicable law at issue. In DWI cases, as in all cases, the court must be impartial, not favoring either side. Following a finding of guilty by the court or a jury, courts impose sanctions in an evenhanded fashion, balancing societal needs with the mitigating circumstances of the defendant.

In DWI cases, courts can have a much broader role than in many other types of cases. Through its interaction with law enforcement, prosecutors, defense attorneys, defendants, the public, and the press, the court establishes a tone toward DWI cases in the community. This is evident when the court addresses a defendant at sentencing to stress the severity of a DWI offense, invites school groups to attend DWI trials or dockets, or explains to law enforcement procedural shortcomings following unsuccessfully prosecuted cases. Judges, through their roles on the bench and in their personal lives, are leaders in the community and the attitudes they express are critical to shape public attitude toward DWI prevention and enforcement.

¹ William P. McLauchlan, *American Legal Processes* (New York: John Wiley and Sons, 1977), p 8.

What Are Problem-Solving Courts?

Therapeutic jurisprudence is the study of the role of law as a healing agent, a “lens” through which to view the “extent to which a legal rule or practice promotes the psychological and physical well-being of the people it affects.”² Rottman and Casey note that therapeutic jurisprudence is often the theory that underlies problem-solving courts.³ Problem-solving courts originated not in academia but from the efforts of “practical, creative, and intuitive judges and court personnel, grappling to find an alternative to revolving door justice, especially as dispensed to drug-addicted defendants.”⁴ Problem-solving courts seek to broaden the focus of courts from simply adjudicating cases to changing the future behavior of litigants and ensuring the well-being of the communities they serve.⁵

The problem-solving court movement began with the opening of the first drug court in Dade County, Florida in 1989.⁶ Drug courts spread rapidly based upon anecdotal reports of success in reducing recidivism and an infusion of federal dollars. By the end of 2004, there were 1,621 drug-court programs operational in the United States, with another 215 in the planning stages.⁷ As of June 30, 2007, there were 1,724 programs operating and an additional 323 being planned.⁸ When problem-solving court programs in other areas of the law, such as domestic-violence courts, mental-health courts, and DWI courts, are added to

² Christopher Slobogin, “Therapeutic Jurisprudence: Five Dilemmas to Ponder,” in D. B. Wexler and B. J. Winick, *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (Durham, NC: Carolina Academic Press, 1996), p. 767.

³ See David Rottman and Pamela Casey, “Therapeutic Jurisprudence and the Emergence of Problem-Solving Courts,” *NIJ Journal* (July 1999): 12-19.

⁴ Quote is from David B. Wexler, “Therapeutic Jurisprudence: It’s Not Just for Problem-Solving Courts and Calendars Anymore,” in C. Flango, N. Kauder, K. Pankey, and C. Campbell (eds.), *Future Trends in State Courts 2004* (Williamsburg, VA: National Center for State Courts, 2004), p. 87, and citing B. J. Winick and D. B. Wexler, *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Durham, NC: Carolina Academic Press, 2003), p. 6.

⁵ The conventional term “problem-solving courts” has passed into the language even though most are not separate courts but separate dockets or calendars of larger courts or divisions. In most instances, they involve a single judge periodically handling a single type of case.

⁶ Greg Berman and John Feinblatt, “Problem-Solving Courts: A Brief Primer,” *Law and Policy* 23 (2001).

⁷ C. West Huddleston III, Judge Karen Freeman-Wilson, Douglas B. Marlowe, and Aaron Roussell, *Painting the Current Picture: A National Report Card on Drug Courts and Other Problem Solving Court Programs in the United States* (Washington, DC: Bureau of Justice Assistance, 2005), p. 2.

⁸ BJA Drug Clearinghouse, www.american.edu/justice.

drug courts, the number of problem-solving courts in the United States, as of the end of 2004, rises to 2,558.⁹

Changes in society placed courts in the forefront of many dynamic issues ranging from issues of race and gender diversity to election-law reform. Citizens are not only concerned about the traditional issues of public safety and timeliness, but also want courts to promote more citizen involvement, want more involvement of judges in a problem-solving role, want courts to be more innovative and flexible in handling cases of concern, want greater access to court information, and want courts to form partnerships in the public and private sectors.¹⁰

The basic characteristics of problem-solving courts are “(1) immediate intervention;

- (2) nonadversarial adjudication;
- (3) hands-on judicial involvement;
- (4) treatment programs with clear rules and structured goals; and
- (5) a team approach that brings together the judge, prosecutor, defense counsel, treatment provider, and correctional staff.”¹¹

In contrast, the key characteristics of the adversary process are:

1. it is self initiated by the parties, whether civil litigant or public prosecutor. The court does not seek business. It is up to the parties to come forward with the evidence. The judge is passive.
2. it is objective in the sense that the decision is based upon the evaluation of materials presented by the parties.
3. it is an all or nothing outcome.
4. it is authoritative in that judgment carries force of law.¹²

Roger Warren, president emeritus of the National Center for State Courts, provides a succinct summary of the differences between this traditional conception and transformed court processes.

Chart 1

A Comparison of Transformed and Traditional Court Processes¹³

⁹ Huddleston et al., *op. cit.*, Figure 6, p. 17.

¹⁰ R. W. Tobin, *Creating the Judicial Branch: The Unfinished Reform* (Williamsburg, VA: National Center for State Courts, 1999), p. 197.

¹¹ Rottman and Casey, *op. cit.*, p. 15. See also P. F. Hora, W. G. Schma, and J. T. A. Rosenthal, “Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System’s Response to Drug Abuse and Crime in America,” *Notre Dame Law Review* 74 (1999): 453.

¹² . McLauchlan, *op. cit.*, p. 19

Traditional Process

- Dispute resolution
- Legal outcome
- Adversarial process
- Claim- or case-oriented
- Rights-based
- Emphasis placed on adjudication

- Interpretation and application of law

- Judge as arbiter
- Backward looking
- Precedent-based
- Few participants and stakeholders

- Individualistic
- Legalistic
- Formal
- Efficient

Transformed Process

- Problem-solving dispute avoidance
- Therapeutic outcome
- Collaborative process
- People-oriented
- Interest- or needs-based
- Emphasis placed on post-adjudication and alternative dispute resolution

- Interpretation and application of social science

- Judge as coach
- Forward looking
- Planning-based
- Wide range of participants and stakeholders

- Interdependent
- Common-sensical
- Informal
- Effective

¹³ R. K. Warren, "Reengineering the Court Process," presentation to Great Lakes Court Summit, Madison, Wisc., September 24-25, 1998, reprinted in Rottman and Casey, *op. cit.*, p. 14. The term "therapeutic jurisprudence" has not been favored by some in the court community and so has not been used here. Rather the "transformed" process and "problem-solving" courts and other more acceptable language has been used, but the concepts are obviously similar.

Do Special Problem-Solving Courts Exist for DWI Cases?

The high incidence of crimes committed while under the influence of alcohol, including driving while impaired, has prompted several jurisdictions to develop sobriety or DWI courts, most based on the drug-court model. Threats of punishment alone are not likely to change the behavior of individuals, and the philosophy of DWI courts is to treat the problem as well as punish the offender. DWI courts were established to protect public safety and to reduce recidivism by attacking the root cause of impaired driving—impairment caused by alcohol and substance abuse. The mission of sobriety and DWI courts is “to make offenders accountable for their actions, bringing about a behavioral change that ends DUI recidivism, stops the abuse of alcohol, and protects the public; to treat the victims of DUI offenders in a fair and just way; and to educate the public as to the benefits of sobriety and DUI Courts for the communities they serve.”¹⁴

Specialized DWI courts, which in effect mean specialized dockets in most jurisdictions, are reputed to be better equipped to handle DWI cases, permitting swifter resolutions, reducing backlog, and improving outcomes. Some judges also believe that the use of DWI courts should be expanded, allowing experienced judges to use treatment resources and sentence, sanction, or reward offenders with greater consistency.¹⁵

Common characteristics of sobriety and DWI courts include intense alcohol-addiction treatment and heavy court supervision, with jail sentences as a last resort. Compliance with treatment and other court-mandated requirements is verified by frequent alcohol and drug testing, close community supervision, and interaction with the judge in nonadversarial hearings.

¹⁴ J. Tauber and C. W. Huddleston, *DUI/Drug Courts: Defining a National Strategy* (Washington, DC: National Drug Court Institute, 1999), p. 5.

¹⁵ Robertson, R.D., and Simpson, HM. *DWI System Improvements for Dealing with Hard Core Drinking Drivers: Sanctioning*. (Ottawa, Ontario: Traffic Injury Research Foundation, 2002).

Can Problem-Solving Principles Be Used in Traditional Courts Handling DWI Cases?

Alex Aikman argues that problem-solving courts, as they exist in 2006 or even 10 or 20 years from now, will remain “one tool among many being used by only a fraction of all trial judges on a fraction of the caseload.”¹⁶ The reality of this statement is the reason the Conference of Chief Justices and the Conference of State Court Administrators (CCJ/COSCA) called for “mainstreaming” the problem-solving approach to traditional courts.

On August 3, 2000, CCJ/COSCA passed a resolution in support of problem-solving court principles and methods, which was confirmed by a second resolution passed on July 29, 2004.¹⁷ Point 4 of the original resolution called upon state courts to:

Encourage, where appropriate, the broad integration over the next decade of the principles and methods employed in the problem-solving courts into the administration of justice to improve court processes and outcomes while preserving the rule of law, enhancing judicial effectiveness, and meeting the needs and expectations of litigants, victims, and the community.

The Center for Court Innovation lists six problem-solving principles:

- enhanced information—better staff training combined with better information about litigants, victims, and community context of crime;
- community engagement;
- collaboration not only with the justice system but also with social service providers and treatment agencies;
- individualized justice—linking individuals to community based services in order to change behavior;
- accountability—regular and rigorous compliance monitoring; and
- evaluation.¹⁸

Bruce Winick and David Wexler illustrate how problem-solving principles are introduced into more-traditional courts:

¹⁶ *Ibid.*

¹⁷ See <http://ccj.ncsc.dni.us/CourtAdminResols.html>.

¹⁸ See

<http://www.courtinnovation.org/index.cfm?fuseaction=page.viewPage&pageID=628&nodeID=1>.

The new problem solving courts have served to raise the consciousness of many judges concerning their therapeutic role, and many former problem solving court judges, upon being transferred back to courts of general jurisdiction, have taken with them the tools and sensitivities they have acquired in those newer courts.¹⁹

How can problem-solving principles be expanded for use in all courts that hear DWI cases? Problem-solving approaches are appropriate for serious criminal cases, including DWI, but only for the sentencing phase. Feinblatt, Berman, and Denckla cogently stated: “[Problem solving courts emphasize] traditional due process protections during adjudication and the achievement of tangible, constructive outcomes post adjudication.”²⁰ Especially in criminal cases involving substance abuse, such as DWI cases, the full adversary process with all of its due-process protections could be employed until guilt has been established. After guilt is established, problem-solving principles designed to prevent repeat offenses could be used to select the best sentencing options, whether they be therapeutic or punitive. This should at least mitigate the role conflict between judges with a traditional orientation toward law and advocates of the more “transformed” process of problem-solving courts.

¹⁹ Winick and Wexler, *Judging in a Therapeutic Key*, *op. cit.*, p. 87.

²⁰ J. Feinblatt, Gregg Berman, and D. Denckla, “Judicial Innovation at the Crossroads: The Future of Problem-solving Courts,” *Court Manager* 15, no. 3 (2000): 28-34, p. 31.

How Has the Changing Role of Courts Affected the Role of Judges?

The discussion of a transformed court process (see “What is a Problem-Solving Court?”) necessarily touched upon the transformed role of the judge. Problem-solving courts require judges to be more active, less formal, and personally engaged with each offender, and this personal involvement creates a tension with the traditional role of the judge as a detached, neutral arbiter. This tension provides the base for the charge that problem-solving judges need to become “social workers” or “therapists.”²¹ One *New York Times* article summarized:

The judges often have an unusual amount of information about the people who appear before them. These people, who are often called clients, rather than defendants, can talk directly to the judges, rather than communicating through lawyers.

And the judges monitor these defendants for months, even years, using a system of rewards and punishments, which can include jail time. Judges also receive training in their court's specialty and may have a psychologist on the staff.²²

Building on Roger Warren's typology, Popovic created a typology of judicial officers, a portion of which is presented here:²³

Traditional Judicial Officers	Therapeutic Jurisprudence Judicial Officers
Dispassionate—betray no interest in the litigant as a person, only as a litigant in a legal proceeding	Interested—particularly in the litigant's welfare
Impersonal—as if the litigant is nothing but a “party” in a “case”	Personal—giving relevance to a litigant's personal circumstances—making direct enquiries of the litigant
Decisions made in judicial language and form in order to satisfy legal requirements, particularly with a view to	Decisions made in language understood by parties

²¹ See L. Eaton and L. Kaufman, “In Problem-solving Court, Judges Turn Therapist,” *New York Times* (April 26, 2005): “Now, in drug treatment courts, judges are cheerleaders and social workers as much as jurists” (<http://www.nytimes.com/2005/04/26/nyregion/26courts.html?pagewanted=2&ei=5070&en=17fc6df08c9c39e6&ex=1186632000>).

²² *Ibid.*

²³ J. Popovic, “Judicial Officers: Complementing Conventional Law and Changing the Culture of the Judiciary,” *Law in Context* 20 (2002): 128 (special edition on “Therapeutic Jurisprudence,” edited by M. McMahon and D. Wexler).

review by appellate court	
Limited communication	Open communication—ensuring that the story has an opportunity to be heard
Communicate only with counsel Eye contact only with counsel	Direct dialogue between judge and parties Maintain eye contact with parties

Some basic qualities of judges are the same in both processes: “fairness, consistency, authoritativeness, trustworthiness, respect for the parties, and knowledge of the law.”²⁴

²⁴ *Ibid.*, p. 129

Is the Use of Problem-Solving Principles in DWI Cases Ethical?

The collaborative nature of the problem-solving-court approach may raise questions about the impartiality of the judge. Problem-solving courts require judges to be personally engaged with each offender, and this personal involvement creates a tension with the role of the judge as a detached, neutral arbiter. Judges need to praise and sanction defendants, but should avoid such a degree of involvement that the perception of lack of impartiality exists.

Anne Skove summarized ethical pitfalls for judges, which include:

- ex parte communication with defendants
- confidentiality, particularly if a defendant goes to another court later in the process
- ordering drug testing and obtaining other evidence
- impartiality: the need to praise or sanction the defendant . . .
- coercion: judges can order a defendant to take medications, live in a particular place, . . . etc.²⁵

On February 12, 2007, the ABA House of Delegates adopted the ABA Model Code of Judicial Conduct.²⁶ Problem-solving courts are mentioned in the “Application” section. Comment 3 in that section states that judges in problem-solving courts may be authorized by court rules to act in nontraditional ways.

For example, judges presiding in drug courts and monitoring the progress of participants in those courts’ programs may be authorized and even encouraged to communicate directly with social workers, probation officers, and others outside the context of their usual judicial role as independent decision makers on issues of fact and law.

The new Model Code also states that a judge may “initiate, permit or consider” ex parte communications expressly authorized by law, such as when serving on therapeutic or problem-solving courts.

Sanctions may appear to be coercive because judges may have to tell a defendant where to live or where to work. Judges may set such guidelines to some extent, but this role goes beyond the traditional judicial function. Likewise, sanctions that require defendants to use prescription drugs, such as Naltrexone and Antabuse, or require invasive treatments, like acupuncture, may be perceived as coercive and beyond the scope of judicial authority. Probation may

²⁵ See www.ncsconline.org/WC/Publications/KIS_ProSol_Trends02Ethics_Pub.pdf.

²⁶ See http://www.abanet.org/judiciaethics/approved_MCJC.html.

not be under the control of the court, and the judges are not “in control” of the supervision function.

Some may also consider collaboration in “staffings,” where the judge and treatment team meet in advance of hearings to discuss the offender’s progress in treatment and to reach consensus about rewards and sanctions, to be in conflict with the judicial role. The response is that the collaborative decision-making process “does not violate the judge’s duty of independent judgment so long as the final decision rests with the judge.”²⁷ Canon 2A requires judges to “respect and comply with the law” and “act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”²⁸ Judicial ethics do not require disengagement but impartiality, and so a judge may show concern about recovery, even celebrate the successes, but must be equally concerned about the progress of each offender. DWI court judges can also expect that their own private conduct, whether on or off the bench, will be scrutinized more closely, as these judges are expected to be role models against drinking and driving.

Judicial ethics do not require judges to be disengaged from offenders, but to be sufficiently impartial to extend the same degree of concern to all defendants who appear before them. Canons also require judges to be sensitive to their own private conduct, even conduct off the bench, especially with regard to consumption of alcohol and any driving offense.

The judicial role offers an opportunity for leadership within the court system that is consistent with the canons of judicial ethics. Judges are in the best position to advocate for court reform in general. While judges can have but a limited role as fundraisers from private sources, judges do have the right to petition for increased public funds at the city or town, county, state, or federal level of government. Presiding judges have a special responsibility to represent the judicial branch before other branches of government, funding authorities, and the general public. Their respected position in the community is such that if judges call a meeting to discuss improvements in process and treatment, other community leaders will attend.

Traffic safety is an important public issue, and there is no reason for judges not to participate in, if not lead, a dialogue on the topic. Judges may, for example, meet with representatives from law enforcement, prosecutors, public defenders, and advocacy groups if done in a criminal-justice coordinating council where general policy issues, not specific cases, are discussed. They could participate as well in meetings organized by other branches, such as the Governor’s Office of Highway and Traffic Safety.

²⁷K. Freeman-Wilson, R. Tuttle, and S. P. Weinstein, *Ethical Considerations for Judges and Attorneys in Drug Court* (Alexandria, VA: National Drug Court Institute, 2001). p. 3.

²⁸ *Id.*, p. 5.

Traffic cases constitute the greatest volume of judicial activity and affect the public more directly than any other type of case. Impaired driving can involve issues of life and death as serious public policy issues. Section 4(B) of the Canons of Judicial Ethics permits judges to act as educators.²⁹ This is especially important for judges in problem-solving courts because they must build public support for treatment-oriented programs. Often education involves illustrations using success stories, which is ethical as long as confidentiality is not breached or specific individuals identified.

²⁹ *Id.*, p. 13.

Does Use of Problem-Solving Principles Jeopardize Judicial Independence?

Much like the question “Does active engagement required of a judge employing the problem-solving approach jeopardize the judge’s traditional role as neutral arbiter?” the parallel question for courts is “Does collaboration with other branches and government agencies required by problem-solving principles jeopardize judicial independence?” Berman and Feinbatt ask, “Do problem-solving courts inappropriately blur the lines between branches of government?”³⁰

In the United States, judicial independence is essential to the rule of law as part of the system of checks and balances that ensures that no branch of government dominates. Independence as a separate branch of government is essential if courts are to discharge their responsibility to be impartial. Roger Warren, however, draws a useful distinction between “decisional independence,” the independence of a judge in deciding cases, and “institutional independence,” the independence of the court as an organization.³¹ Even the *perception* that other branches or agencies of government can influence court decisions should not exist. Effective trial courts resist being managed by the other branches of government. A trial court compromises its independence, for example, when it merely ratifies plea bargains, serves solely as a revenue-producing arm of government, or perfunctorily places its imprimatur on decisions made by others. Effective court management enhances independent decision making by trial judges.

Warren notes that with respect to institutional independence, the courts are not superior to any other branch of government, but coequal. Consequently, with respect to institutional independence, the posture should be one of mutual respect, cooperation, dialogue, and effective communication. In his words, “The judiciary cannot operate in a vacuum” isolated from other branches of government. Institutional independence, rather, is served through *interdependence*.³²

For example, a partnership with law enforcement is a necessity for problem-solving courts. To the extent that the partnership educates law-enforcement officers about court practices it creates no ethical concerns.³³ Coordination on such matters as a concentrated enforcement event, like a saturation patrol, is useful so courts can be prepared for an increase in caseload. Any partnership must be careful to avoid the perception that courts are another agency of

³⁰ G. Berman and John Feinblatt, *Problem Solving Courts: A Brief Primer* (New York: Center for Court Innovation, 2001) p. 11, Originally published in 21 *Law and Policy* 2001 .

³¹ *Id.*

³² *Id.*

³³ Freeman-Wilson, Tuttle, and Weinstein, *op. cit.*, p. 4.

enforcement and ensure that courts retain their role as neutral arbiter. Ex parte contacts with law enforcement should be avoided.

What Performance Measures Can Be Used by Courts Handling DWI Cases?

Roger Warren stated: “the rule of law itself is a two-edged sword” because it not only ensures the protection of rights, but also enforces responsibilities.³⁴ The rule of law holds government officials accountable to those in whose name they govern to prevent the abuse of power, and the judiciary is not exempt from this type of general accountability.

Results-driven public organizations begin with shared responsibility for achieving success. The first steps require a plan that includes 1) quantifying a vision by translating it into specific, measurable, and achievable results, and 2) developing the capacity to determine whether the results have been achieved.³⁵ Performance measures are needed to measure progress and to establish a standard for success.

Osborne and Gaebler, in *Reinventing Government*, concisely summarize the critical importance of measuring performance:

- What gets measured gets done
- If you don't measure results, you can't tell success from failure
- If you can't see success, you can't reward it
- If you can't reward success, you're probably rewarding failure
- If you can't see success, you can't learn from it
- If you can't recognize failure, you can't correct it
- If you can demonstrate results, you can win public support³⁶

The first two goals, and associated performance measures, of the American Prosecutor's Research Institute (APRI)—to promote the “fair, impartial and expeditious” pursuit of justice and to ensure safer communities—are relevant to courts as well.³⁷

³⁴ R. Warren, “The Importance of Judicial Independence and Accountability,” unpublished speech made in China, available on the National Center for State Courts Web site: http://www.ncsconline.org/WC/Publications/KIS_JudIndSpeechScript.pdf.

³⁵ M. G. Popovich (ed.), *Creating High Performance Government Organizations* (San Francisco: Alliance for Redesigning Government, Jossey-Bass, 1998), p. 90.

³⁶ D. Osborne and T. Gaebler, *Reinventing Government: How the Entrepreneurial Spirit Is Transforming the Public Sector* (Reading, MA: Addison-Wesley Publishing Company, 1992), pp. 146-55.

³⁷ American Prosecutor's Research Institute, *Prosecution in the 21st Century: Goals, Objectives, and Performance Measures* (Alexandria, VA: American Prosecutor's Research Institute, 2004).

A statement of the Honorable Calvin L. Scovel III, Inspector General, U.S. Department of Transportation, before the United States Senate discussing the reduction of drunk driving as a key component in the overall goal of reducing highway fatalities, noted the need to implement key strategies with better performance measures.³⁸ While this trend toward performance measures is laudable, it is necessary to distinguish the role courts play in DWI cases from the roles played by law enforcement, prosecution, or corrections. One of the potential improved performance measures suggested for “Prosecution and Sanctions” was “Achieve a set percentage of successful convictions for alcohol-impaired driving offenses.”³⁹ Law enforcement performs well if they locate and identify impaired drivers, cite them for the offense, and remove them from the street. Similarly, the role of the prosecutor is to charge the offense and convict the guilty. In that context, perhaps conviction rate is an appropriate measure for the prosecution. It is not, however, an appropriate measure of court performance. The role of the court is to be a forum for impartial decision making, not to maximize convictions. Ideally, this would mean only convicting the guilty parties and releasing the innocent. That ideal is impossible to measure because no one can say what the actual proportion of innocent people who appear before the court is. Indeed, because a key function of courts is to determine guilt or innocence, there is no other objective standard. The court’s role is *not* conviction per se, but to provide a fair hearing—not favoring either outcome, but giving both sides the opportunity to present evidence. Courts need to listen to the evidence and then render an impartial decision based upon the law and the facts in the case. Accordingly, conviction rates are *not* recommended as a measure of court performance.

³⁸ “Effectiveness of Federal Drunk Driving Programs,” U.S. Dept. of Transportation. October 25, 2007;
<http://www.oig.dot.gov/StreamFile?file=/data/pdfdocs/EPWTestimonyonEffectivenessofFederalDrunkDrivingPrograms.pdf>

³⁹ *Ibid.*, Table 3.

If Conviction Rates Are Not an Appropriate Measure of Court Performance, What Are Some Measures that Are?

1. Recidivism Rates

Recidivism rates may be an indicator of the effectiveness of sentences and treatment alternatives. The definition of recidivism does change according to the type of court using it (adult, family, or juvenile). For example, recidivism is measured differently in juvenile drug courts depending whether the juvenile in question was older or younger than 17 years of age.⁴⁰

Recidivism rates have credibility. A survey of Michigan judges and probation officers found that half reported recidivism to be an important determinant of a program's effectiveness.⁴¹ Indeed, recidivism rates are often used as an indicator of success for specialized DWI courts.⁴²

The downside of using recidivism rates is that DWI arrests and crashes are infrequent occurrences even for intoxicated drivers.⁴³ One survey estimated that the number of times a person drives drunk before being arrested is 300.⁴⁴ Obviously, recidivism rates also depend upon level of enforcement in the community.

Courts must use the range of treatment programs available in communities, such as the Alcoholics Anonymous (AA) 12-Step Program, long-term residential treatment centers, and pharmacological treatments, to provide effective intervention and treatment. Not only should recidivism rates be calculated for total DWI offenders, but they should be calculated by types of sentence and treatment. For example, does one type of court-ordered treatment result in less recidivism than other treatment alternatives? Research indicates that the combination of treatment and sanctions is most effective in reducing recidivism. NCSC research on recidivism for DWI cases in Virginia found only three factors related to recidivism: type of referral offense, prior DWI offenses, and district in

⁴⁰ Fred L. Cheesman, Dawn Marie Rubio, and Richard Van Duizend, "Developing Statewide Performance Measures for Drug Courts," *Statewide Technical Assistance Bulletin 2* (October 2004): 5.

⁴¹ M. L. Breer, A. Schwartz, B. A. Schillo, and D. Savage "How Judges Respond to Drunk Drivers," *Judicature* 87 (September-October) 2003): p.75.

⁴² For example, Judge Harvey Hoffman of Eaton County, Mich., noted that DWI court has reduced recidivism rates from 45 percent to 13.5 percent in his court. "DWI Court Treatment Programs Show Effectiveness," reported on Boston University School of Public Health's Web site, "Join Together Online," at http://www.jointogether.org/y/o_2521,570351,00.html.

⁴³ R. B. Voas, "Court Procedures for Handling Intoxicated Drivers," *Alcohol Research and Health* (Winter 2001). Breer, Schwartz, Schillo, and Savage, *op. cit.* 72 note that repeat offenders may drive drunk more than 1,000 times before being caught.

⁴⁴ R. B. Voas and J. M. Hause, "Deterring the Drinking Driver: The Stockton Experience," *Accident Analysis and Prevention* 19 (1987): 81-90.

the state.⁴⁵ The age, sex, time in service, or type of service offered was not related to recidivism.

For what type of DWI offender is incarceration the best option? What percentage of the clientele is so chemically dependent that incarceration is the only option? What is the recidivism rate for people who have been incarcerated? Does the availability of health coverage rather than effectiveness determine the treatment options used? Clearly, it is a deterrent to repeat DWI violations while in jail or prison, but does incarceration have a longer-term impact, and does it depend upon the type of offender?

Sentencing alternatives for courts often depend on the availability of treatment alternatives in the community. Nevertheless, courts do require feedback on the success rates of various treatment programs if they are to improve sentencing behavior. As a baseline, information on the degree to which sentences are in conformity with any sort of sentencing guidelines is needed.

2. Measures of Timeliness

The old saw of “justice delayed is justice denied” applies to DWI cases as well as all other cases. All trial-court functions should be completed in a timely manner consistent with basic standards of fairness. It is believed that the swift disposition of cases has more of an impact on the likelihood of recidivism than the most severe sanction applied much later.⁴⁶ Courts require adequate time to consider each case individually and fully. One obstacle to that individual attention is simply the volume of cases.

Delay in providing services may result in further deterioration of the DWI system. Timeliness questions that courts must address include:

- Is there a formal or informal “triage” system in place to identify cases where treatment has a time-sensitive component?
- Are there case management procedures in place to ensure the timely identification, acquisition, and provision of services?

⁴⁵ F. L. Cheesman et al., *An Evaluation of the Virginia Alcohol Safety Action Program: VASAP Works* (Williamsburg, VA: National Center for State Courts, 2003).

⁴⁶ See J. Yu and W. R. Williford, “Drunk-Driving Recidivism: Predicting Factors from Arrest Context and Case Disposition,” *Journal of Studies on Alcohol* 60, no. 6 (1995); and *National Hardcore Drunk Driving Judicial Guide*, (The National Association of State Judicial Educators and The Century Council, 2004) p. 7 citing the National Highway Traffic Safety Administration and the national Institute on Alcohol Abuse and Alcoholism, *A Guide to Sentencing DUI Offenders* (Washington, D.C.: NHTSA and NIAA, 1996).

- What is the backlog of cases waiting to be screened or waiting for specific services?⁴⁷

Traditionally, it has been easier for courts to focus on timeliness of case processing and decision making, rather than fairness. Trial Court Performance Standard 2.1 recommends establishing and complying with guidelines for timely case processing, while at the same time keeping current with incoming caseloads.⁴⁸ Six measures listed below may be useful to courts interested in measuring timeliness of case processing. All of these measures can be calculated for DWI cases separately, but should be compared to timeliness measures of all cases to determine if DWI cases are being processed more or less expeditiously than other types of cases.

- Clearance Rate.* This is simply the cases disposed as a percentage of the total number of incoming cases. This is a measure of how well courts are keeping up with their caseloads. The percentage is calculated simply by dividing the total number of DWI cases disposed (by any means, including being placed on inactive status because the offender cannot be located) by the number of incoming cases (not only new filings, but also reopened or reactivated cases).
- On-time Case Processing.* The percentage of cases disposed (by whatever means) within established guidelines.
- Average Time to Disposition.* The average time interval between case initiation and final disposition of a case. It may also be useful to compute the *average time to disposition for cases concluded by trial* because trials can be expected to add a considerable amount of time to the time required for disposition. Similarly, the time to *final* disposition is important for those cases that have been appealed. Time to final disposition for cases that have been appealed should be calculated separately.
- Average Number of Continuances per Case.* This is difficult to measure, but if this information, ideally accompanied by the reasons for continuances, were available, it would help explain why some cases took longer to dispose than others.
- Failure-to-Appear Rates.* This is a measure of timeliness for courts that do not have an “inactive” status for cases. It may also indicate a need for more effort devoted to locating offenders if the rate becomes too high. Then the issue becomes fundamental fairness, rather than timeliness.

⁴⁷ These questions are taken from Casey, P. and Hewitt, W.E. (2001). *Court Responses to Individuals in Need of Services: Promising Components of a Service Coordination Strategy for Courts*, Williamsburg, Va.: The National Center for State Courts, p. 15.

⁴⁸ *Id.*; Commission on Trial Court Performance Standards, *op. cit.*

- f. *Trial Date Certainty.* The average number of times trials are scheduled before the case is heard. This is another indicator of case-processing time that the court can control.

3. *Measures of Accessibility and Litigant Satisfaction*

In exchange for judicial independence, the public expects proper and effective court performance. Public trust in courts is engendered to the extent that litigants and the public who use the courts are satisfied that they have had the opportunity to be heard by an impartial judge. Because there has been disagreement over what a “just” decision is, and has been since the time of Plato, the courts are concerned with “procedural fairness”, i.e., that each side has an opportunity to be heard and a decision based on the evidence rendered.⁴⁹ Some have argued that because court cases result in one side winning and one side losing, half of the litigants will always be unhappy with the courts. Research has shown, however, that litigants and other consumers of court services can distinguish and evaluate the way they were treated in court from the case outcome.⁵⁰ Accordingly, it is possible to measure client satisfaction separately from other aspects of court performance.

⁴⁹ T. R. Tyler, “The Quality of Dispute Resolution Procedures and Outcomes: Measurement Problems and Possibilities,” *Denver University Law Review* 66 (1989): 410-36.

⁵⁰ T. R. Tyler, “What Is Procedural Justice? Criteria Used by Citizens to Assess the Fairness of Legal Procedures,” *Law and Society Review* 22 (1988): 103-35.