

Judges' Journal
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Feature

Waymaker

***18 HOPE FOR YOUR PROBATIONERS**

Judge Steven S. Alm [\[FNa1\]](#)

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As a felony trial judge for the last six years, I have presided over a calendar involving the usual mix of felony cases, including theft, sex assaults, drugs, and murder. As a judge in Hawaii, I have a tremendous amount of discretion at sentencing. I firmly believe that the truly violent and dangerous offenders and those who won't stop stealing need to be sent to prison. But most of the people who come before me do not fall into these categories.

From the first week I started on this calendar in June of 2004, I could see that the probation system was not effective for many offenders. We have good, caring, well-educated probation officers (POs) and smart, dedicated judges. But the system itself was broken. It wasn't working for many probationers and resulted in frequent revocations and many long prison terms.

That first week, I heard several motions to revoke probation, listing multiple violations such as positive drug tests, missed probation appointments, failures at or refusals to attend treatment, and the like, often ending with the offender absconding from probation. For 99 percent of those motions, the probation officer deemed the defendant not amenable to probation and recommended to me that I sentence the offender to the underlying 5-, 10-, or 20-year term. I thought to myself, "This is a crazy system--a crazy way to change anybody's behavior."

Here was the dynamic. For many offenders, probation was not working. At sentencing, one of my colleagues or I had sentenced the offender to probation, ordering him or her to follow a set of rules. But the probationer quickly learned that failure to comply led to no real consequences. There was no mechanism to swiftly address these failings, just vague threats from the PO about severe future penalties if a motion to revoke probation was filed and granted. It was all or nothing. As one judge famously put it, "I can send them to prison or send them to the beach." And, of course, if there are no consequences for failure, you will get more failure.

So, what to do? I thought to myself, "Well, how did I raise my son when he was younger?" I would inform him of the expected behavior and then if he misbehaved, I would give him a consequence right away. It didn't have to be severe, but it did have to be swift, certain, and consistent so he could tie together the misbehavior with the consequence--and learn from it.

The concept of "swift and certain" had certainly been floating around in my brain for years, if not from law school, then from some criminology or sociology class in college. It always sounded great. The problem is that I

had never seen a swift and certain consequence in my 20-plus years in the criminal justice system. And the more severe the consequence, the less swift it would ever be. I decided to rework the system; in essence, to deconstruct that probation revocation motion and go back to the very first violation. For future cases, I wanted to figure out a way to give the offender a swift, certain, and proportionate consequence for each violation of probation starting with the very first one. And if there were additional violations, respond to each in a swift, certain, and proportionate manner.

I knew from the research that if you focused your efforts on the highest-risk probationers, those most likely to fail on probation and/or be arrested for a new crime, you'd get the best bang for your probation dollar. And dollars are certainly in short supply in Hawaii, as elsewhere.

***19** The plan was that from the very first violation, the offender would be arrested on the spot or as soon as possible, and have a hearing on that single violation two business days later. I was convinced that violating a probation condition, getting arrested for it, waiting a couple of days in jail, and then having a hearing in my courtroom two days later with defense counsel and prosecutor would be a teachable moment that would allow the offender to tie together the bad behavior with the consequence, and hopefully learn from it and avoid repeating it in the future.

So how did we go about reworking the probation system to provide swift, certain, and proportionate consequences?

First, *look at the law, the paperwork, and the system*. After reviewing the penal code and court rules and discussing the whole probation revocation process with my court staff, I determined that this could be done using existing statutory authority. Our penal code allows for motions to “modify” as well as to “revoke” probation. Up to then, such modifications had been used, for example, to add an unforeseen mental health treatment condition or to allow an offender to leave the jurisdiction for a job assignment. I felt an appropriate modification for our program would be a short stint in jail and then back to see the probation officer. I felt that the shortest amount of jail that would get the offender's attention and tie together the bad behavior with the consequence would be appropriate.

The paperwork also had to change. All motions to revoke probation require an affidavit and violation report by the probation officer, listing all of the violations up until that point; this can take several hours of PO time to prepare. I instead wanted to use a fill-in-the-blanks form that the PO could prepare in five minutes: the less labor-intensive, the better. That way, the POs could spend their time working with offenders, not writing long reports. I also spoke to my staff to learn about their paper flow and appropriate orders. By doing motions to modify rather than revoke, new judgments did not have to be done and orders were shorter and faster for the staff to prepare.

The POs and law enforcement would have to change as well. POs would lose their discretion and have to move to sanction *every* probation violation. Law enforcement would have to be willing to expeditiously take violating offenders into custody (e.g., when testing positive for drugs at the PO's office) and to go out and look for absconders. My years in law enforcement helped to get their cooperation.

Second, *get all the right criminal justice partners involved*. I met with Cheryl Inouye, the probation supervisor of the high-risk section (sex offenders and those with drug problems who were on probation for a variety of offenses and who had already failed in the general probation unit). Ms. Inouye was interested in improving the probation system and was happy to be trying to build in some accountability. Ms. Inouye agreed to change

her section's procedures to enforce all probation conditions immediately. She knew it would not be easy for all her POs to change, but she recognized that we needed to improve the system to help more offenders. Our statutes allow for motions to revoke or modify to be filed by the probation officer as well as the prosecutor. The probation officer agreed to file the motions with the court. That allowed for much swifter initiation of the process. My staff was responsible for notifying the prosecutor and defense counsel of the hearing.

I then brought a supervisor from the prosecutor's office and the public defender to the table. I explained what we were trying to do, and they were in agreement that the current process wasn't working for many offenders. Both agreed to try something new. I asked the prosecutor supervisor to design a new, fill-in-the-blanks Motion to Modify and run it by the public defender. The public defender noted that the rules were going to be the same but that as we were actually going to be enforcing them for the first time; could we, he asked, warn the offenders of the new program? That proved to be a crucial innovation.

I then spoke to the jail, the Oahu Community Correctional Center. I told them we were planning to start a new program with only a few dozen offenders. *20 That with all the prisoners going back and forth to court every day, they might not notice the impact at first, but that they might want to look at their intake procedures as they might be seeing some of those folks more than once.

Warrant service is critical and traditionally hasn't been given the highest law enforcement priority. Robust warrant service helps the offenders take the program seriously and increases the likelihood they will turn themselves in when they violate. Swift warrant service also means more probationers get arrested for violations before they commit (and get arrested for) new crimes. In a prior life, I was a local prosecutor for nine years and then, from 1994-2001, the U.S. Attorney for the District of Hawaii. I spoke to the director of the Hawaii High Intensity Drug Trafficking Area (HIDTA) program and the U.S. Marshal. The Marshal agreed to have his Federal Fugitive Task Force serve the warrants for my courtroom for the program, and HIDTA agreed to pay for any needed overtime. The probation administrator, noting that our justice system was trying to do evidence-based practices, suggested that we involve the researchers from the state attorney general's office from the start to collect data and see if the program worked. I thought that was a great idea and they came on board.

Third, *be prepared to provide persistent and consistent leadership*. In response to the public defender's request, we started the program with a warning hearing (a brand-new process we invented for this purpose) for 34 offenders (18 sex offenders at 8:30 a.m. and 16 drug offenders at 10:30 a.m.) on October 1, 2004. Instead of "cherry-picking" the lowest-risk offenders, we picked the highest-risk, least-compliant cases. Present were the probationers, their attorneys, a prosecutor, and the probation officers.

I started off very positively, telling the assembled groups that everyone in the courtroom wanted them to succeed on probation. I told them that as they were on probation and not in prison, they were making a deal with me that they would follow the conditions of probation. And a lot of them weren't cutting it. I said that I respected the fact that they were adults and nobody could force them to do anything they didn't want to do. All I could control was what I would do if they violated. I told the probationers that I was here to put them on proper notice so they could make informed decisions.

I informed them that every violation of probation from then on would lead to an arrest and time in jail.

I told them that if that happened repeatedly, they might well find themselves in prison for years. I said that I understood that as human beings, we can all make mistakes or bad choices. And that if they did so but turned themselves in to the PO quickly, I would handle it very differently than if they went on the run. I was and am

trying to create a culture of personal responsibility in our offenders, something that I believe has been lacking in many of their lives.

I asked if there were any questions and answered those that arose.

Given the previous violation rates of those offenders, we would have expected 10 or a dozen violations the first week. We had three the first week, and two the second; clearly, those warnings had done their job.

Over the next six years, as my fellow judges were willing to give it a try, the program has expanded to all 10 felony trial judges and all the **probation** sections. We started **HOPE** with 34 **probationers** on October 1, 2004. We now have more than 1,700 in **HOPE**, and I presently supervise more than 1,500 (of the 8,200 felony **probationers** on Oahu). I wrote a benchbook on **HOPE** philosophy, **probation** case law, and program procedures (with scripts and sample motions and orders), and my court staff and I worked with the other court staffs. At various times, to various people, I've had to encourage, support, convince, cajole, and sometimes just say, "Your concerns are noted, but we *are* going to do this."

After the first year, we also asked the Honolulu Police Department to serve warrants. The police department stepped up and now serves 90 percent of the bench warrants for HOPE. I held a contest among the probation officers and court staff to come up with a name for the program. One of the early tongue-in-cheek entries was "Yank and Spank." When "Hawaii's Opportunity Probation with Enforcement" was submitted, I knew we had a winner.

The Hawaii state legislature has been very supportive. One of the chief selling points of HOPE was that we started with *zero* extra funding. By the time we went to the legislature, we had 15 months of HOPE success under our belts, with statistics to match. They have given us \$1.2 million a year for the past five years. We use most of the funding (\$520,000-\$770,000 per year) for drug treatment. HOPE doesn't impose formal treatment on all its clients; the ones who can clean up their act with the threat of sanctions alone are allowed to do so, and they turn out to be a big majority. Treatment is available for any HOPE probationer who wants it, but only those who repeatedly fail are mandated into treatment; when that happens, it's high-intensity treatment, either a thrice-weekly outpatient program or a residential program. We also added four more POs and three \$25,000-per-year social service aides who do all of the drug testing. Funding was also provided to HOPE for the attorney general's office's continued research. Total cost is about \$1,000 per probationer per year over and above the *21 cost of routine probation, paid for several times over by the reduction in time behind bars due to reduced revocations and reduced new crimes.

From the start, I have chaired a monthly meeting of the probation supervisors and the researchers. This allows us to receive feedback on how the program is going and provides a forum for the POs to raise issues and concerns. I also have been available by phone or e-mail to field questions or concerns. When the program expanded to the other judges, the administrative judge and I were available to deal with PO concerns re how cases were handled in court.

Fourth, *get independent research*. From the start, our state attorney general's office tracked the drug tests and missed appointments. This information was shared at the monthly meetings, so we knew from the start that we were on the right track.

You have probably heard the old joke that an expert witness is a guy from out of town with a briefcase. As good as your local researchers are, it never hurts to have other researchers from other places check out the pro-

gram for themselves. In the fall of 2007, Dr. Angela Hawken, a professor from Pepperdine University, and the principal cost/benefit analyst for Proposition 36, California's massive treatment versus incarceration experiment, received National Institute of Justice and Smith-Richardson Foundation grants to study **HOPE Probation**. Her collaborator in the project was Dr. Mark Kleiman of UCLA. They arranged to do a gold-standard, top-of-the-line randomized controlled trial study of **HOPE Probation**.

The **probation** officers in the General Population Section, with their 160-client caseloads, identified 500 similarly situated offenders who were having problems with **probation**. All were drug involved, mostly with methamphetamine, Hawaii's drug of choice since the mid-80s. They were, on average, in their mid-30s with a median of 16-17 prior arrests, and three-fourths of them were male. Their current felony charges included drugs, property, and violent crimes.

These 500 **probationers** were randomly sorted by Dr. Hawken into **HOPE** (two-thirds) and the control group (the remaining one-third), who were kept in **probation**-as-usual. All 10 courts had warning hearings the following week for the 300+ new **HOPE probationers**. Dr. Hawken then tracked their behavior over the following 12 months. The findings: **HOPE probationers** were 72 percent less likely to use drugs and 61 percent less likely to miss **probation** appointments than the control group. They were 55 percent less likely to be arrested for a new crime and 53 percent less likely to have their **probation** revoked. As a result, they served or were sentenced to *48 percent* fewer days of incarceration, representing a preliminary cost-saving estimate of \$4,000 to \$8,000 per offender. The deterrent effect of consistent sanctioning, with a clear up-front warning, was strong enough that even under tighter monitoring **HOPE probationers** spent no more time in jail than ordinary **probationers**, and much less time in prison. High compliance also translates into low cost at the courtroom level; the average **HOPE probationer** consumes only 20 courtroom minutes a year, including the original warning.

In response to concerns by the deputy prosecutors and public defenders that multiple judges meant inconsistent sentencing and an increasing logistical problem re attending hearings, in the fall of 2009, I took the other judges' HOPE cases and they took most of my jury trials. Several states have expressed an interest, and programs based on HOPE have begun in Alaska, Arizona, California, Delaware, Indiana, Missouri, and Washington. Federal legislation has been introduced to set up 20 HOPE pilot sites in state courts around the country.

In conclusion, HOPE is not magic and it's not a miracle. It does take criminal justice professionals working a little smarter and a little harder to change the creaky old probation system for the better.

Each jurisdiction has different laws, practices, and personalities. The one constant is the judge. As I said at the start, the judge is the only person who has the stature and the authority, who has the leadership, to make this happen. It won't be easy and it won't happen overnight. I would strongly suggest that you start small with only a few dozen offenders. Then you can grow and add offenders to your program as you work through the inevitable challenges that will arise. I would be happy to discuss HOPE with you and see how you might start a HOPE program in your courtroom and your jurisdiction.

HOPE is the best and most satisfying thing I have done since I started in the criminal justice system more than 25 years ago.

Given our great success in Hawaii in reducing victimization, helping offenders and their families, and saving taxpayers millions of dollars, is there any reason for you, my talented brother and sister judges, not to give HOPE a try?

[FN1]. **Hon. Steven S. Alm** was sworn in as a State of Hawaii First Circuit judge on May 14, 2001. He is currently assigned to the felony Criminal Division. Judge Alm chairs the Corrections Population Management Commission and is a co-chair of the Interagency Council on Intermediate Sanctions. In 2004, Judge Alm brought together stakeholders to design and implement **HOPE Probation** (Hawaii's Opportunity **Probation** with Enforcement). The program, the first and only of its kind in the nation, relies on high-intensity supervision to reduce **probation** violations by drug offenders and others at high risk of recidivism. Judge Alm can be reached at Steven.S.Alm@courts.state.hi.us.

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