

DEVELOPMENT AND USE OF PROSECUTORIAL PERFORMANCE MEASURES IN THE US

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INTRODUCTION

After evolving from private sector experiences almost 40 years ago, the majority of government agencies in the US today are using some form of performance measurement to support agency management, inform budget requests and help with communicating agency achievements and progress to the public. In the justice sector law enforcement, corrections and the courts have developed several meaningful performance standards and related, often supported by electronic systems to enhance operations and performance tracking. Today, performance measurement is considered an essential activity in many justice sector agencies because it provides information needed to manage operations and resources as well as to assess whether the agency and staff are accomplishing their intended results. The close monitoring and analyses of certain measures of performance such as victim satisfaction with the investigation or court process, timeliness of case resolution, and compliance with restitution orders can, for example, lead to performance improvements and better outcomes for victims.

At the same time, the prosecution profession in the US has come late to a structured development of performance measures and today, only few agencies are applying systematic measures and using them to manage operations. For many years, it was argued that the complexity of criminal cases, differences in US state laws and local legal culture, and case management systems that are inadequate for data collection and analysis are barriers to effective performance measurement in prosecutor's offices (NCSC, 2012). While these are important issues, they apply to other justice agencies too that have managed to address them effectively. In the justice system, the state courts especially have accomplished the development and adoption of national standards and measures for their operations. A more likely reason why performance measures in prosecutor's offices are less advanced than in most other justice agencies in the US is the highly decentralized

organizational structure of prosecutors across the 50 states and the often limited attention specialized prosecutorial performance measures received in the Federal level where the US Attorney's Offices are just one part of the complex structure of the Department of Justice.

This lack of widely used performance measures in prosecution agencies actually stands in stark contrast to what evolved in the state and Federal courts in the US. Already in 1995, the National Center for State Courts (NCSC 1998) released a set of so called Trial Court Performance Standards. The standards were created by a commission of trial judges, court managers and scholars and piloted in trial courts across the nation. Standards of performance for trial courts were developed in five performance areas: (1) Access to Justice; (2) Expedition and Timeliness; (3) Equality, Fairness and Integrity; (4) Independence and Accountability; and (5) Public Trust and Confidence. Despite strong national support and interest, the actual implementation of these standards was, however, not very widespread. The main reason was that most courts did not have the systems and resources to consistently collect, track and analyze the 68 measures associated with the Trial Court Performance Standards. That is why in 2005, a concerted effort led to refining these standards to 10 core measures, known as CourTools (NCSC 2017). These 10 measures provide sufficient information to inform management and budget decisions and can be collected by most courts with relative ease. Today, these measures have even become part of many automated court case management system and have been integrated into systems offered by private vendors. Subsequently, NCSC has helped develop measures specific to child abuse and neglect cases, problem-solving courts (drug courts and mental health courts), and appellate courts. The experience of the state courts could have been used in a similar manner by prosecution agencies, but this did not happen except in just a few state level prosecutor's office.

CURRENT STATE OF PERFORMANCE MEASURES IN PROSECUTION AGENCIES IN THE US

Different from the courts in the US, prosecution offices on the Federal and State level have not come together systematically to develop effective performance measures that could be applied across different agencies with variations as needed.

The need to develop better performance measures for Federal level prosecutors was most recently expressed in a 2014 US Department of Justice Report which identified as one of the challenges for all US Attorney's Offices the need to implement an effective performance based management system. The report stated, among others, that "Meeting this challenge will require the Department to use accurate and reliable data, develop results-oriented measurements, and adopt a data-driven analytical approach in its evaluation of program performance." (Department of Justice 2014).

This lack of effective performance-based management on the Federal level is surprising but not unusual for agencies across the entire federal government.

While the Government Performance and Results (GPRA) Modernization Act of 2010 updated the federal government's performance management framework and placed a heightened emphasis on priority-setting, cross-organizational collaboration to achieve shared goals, and the use and analysis of goals and measurements to improve outcomes, resources (not just financial but especially human expertise resources) were limited and not effectively applied. The Act's aim to establish cross-agency and sector performance measures that would be reported on the website *Performance.gov* to communicate government-wide and agency performance may also have been overly ambitious and possibly impeded a more sequential process of creating meaningful agency performance standards first and then identifying performance elements that could reasonably be collected across various agencies. The quarterly data-driven performance reviews required by the Act were generally modeled after successful evidence-based practices used in other, less complex sectors. In the justice system, such approach was also used and internationally celebrated in the somewhat controversial use of the so called "CompStat" system, the New York City Police Department's performance data system that was implemented in the early 1990s to reduce crime and improve police performance. The fact that CompStat had quite a range of difficult to manage consequences and the many lessons learned from its implementation and later adjustments did not seem to have been well reflected in the formulation and implementation of the GPRA.

Not surprisingly, the above mentioned, 2014 USDOJ report summarized current shortcomings:

Some of the Department's performance goals and indicators are focused on inputs, workload, or processes rather than on outcomes and results. For example, several of the performance measures for the USAOs, such as the number of matters handled or total judgments and settlements, are output rather than outcome focused. These measures may provide information about the number of cases being handled, but they do not assess the significance and impact of those cases on the agency's resources and operations, nor do they address the goals of the department. Given the significant role federal prosecutors play in combating crime, serving justice, and keeping the public safe, meaningful and outcome-based USAO performance measures can serve as powerful incentives to allocate resources and ensure focus toward achieving priorities. Achieving such results-oriented measurement is particularly difficult in areas such as litigation and law enforcement, but of critical importance if the Department is to effectively monitor whether its programs are accomplishing their intended goals. (DOJ 2014).

To date these efforts continue and the last annual report that is published, the 2015 report, still reports mostly output related performance measures, such as number of criminal and other matters handled by type as well as overall disposition data, but no data that would reveal even just timeliness of prosecutorial actions, delay data or cost per case information, not to speak of the more difficult to collect and assess data that would allow some analysis of impact on crime, public trust, or even agency effectiveness.

On the state level efforts in the US initially culminated in a study conducted in 2004 by the American Prosecutors Research Institute (APRI), a subsidiary of the National District Attorneys Association, a professional association of US state prosecutors. The aim was to develop fundamental goals, objectives and performance measures that could be applied across most state level prosecutors' offices (APRI 2005). APRI emphasized the role of prosecutors to ensure "...that justice is done in a fair, effective, and efficient manner," accordingly three goals for prosecutors were identified to be measured:

1. To promote the fair, impartial, and expeditious pursuit of justice
2. To ensure safer communities
3. To promote integrity in the prosecution profession and effective coordination in the criminal justice system

Then, several objectives were created for each objective, each of which was then measured a number of ways. In total, 35 separate performance measures were identified. The measures related just to the first two goals were then tested for implementation in two prosecutors' offices. The results were not very promising. Among others, the study found that few offices had the capacities and data collection systems in place to ensure consistent collection and analysis of the multiple data needed. Even in offices that have automated prosecution case management systems, the information needed to collect and analyze the desired performance data was generally not available. The conclusions were that a set of core performance measures was needed that a majority of offices could apply (and some were suggested), but that "setting such standards would be inappropriate at this time." What was missing especially, was a collaborative effort among US prosecution agencies, such as the efforts that had evolved among the US courts a good decade earlier and which continued to develop and strengthen measurement capacities.

In addition to a less cohesive approach to developing performance measures for prosecutors in the US, the work conducted did also not take full advantage of the many lessons already learned in the US court system. As the APRI project recognized, each prosecutors' office operates within a context that includes varying laws, legal cultures, crime patterns, politics and resources and these influence capacities and willingness to collect and apply performance measures to manage the agency. However, the same is true of courts, law enforcement agencies, corrections and other government agencies—many of which have agreed to a common set of measures that underscore the main values of each organization. What has been missing in the US so far, is a mechanism to come to a consensus for general prosecution performance measures supported by and applicable to a broad range of prosecution offices across the country. Interestingly, a way forward to come to such agreement was developed in 2012 with support of the National Center of State Court which worked with a group of state level prosecution agencies applying the

at least two decades of lessons learned in performance measure development and implantation by US state court, using the example of measuring effective practices associated with prosecuting a particular type of crime, i.e. elder abuse, to create a manageable measurement system (NCSC 2012).

Absent a cohesive national effort, several state level prosecution agencies set out on their own and used the examples of the courts and other government agencies to develop meaningful performance measures that assist them in tracking progress towards performance goals, more efficiently managing the agency and enhanced communication about its performance to the public.

One of several noteworthy examples can be found in Cuyahoga County, Ohio. Serving a population of roughly 1.3 million people in and around Cleveland, the state capital of Ohio, the office is committed to transparency and accountability and collect and analyzes data to improve operational efficiency and effectiveness. The agency tracks a range of performance measures for different agency levels, providing specialized performance dashboards for various units and functions within the office. These dashboards are constantly being updated and refined and are built upon data that are regularly collected by an automated case management system. Longer range plans of the office aim to supplement this data with information from the local court's case management system which would provide not only additional data elements but would allow for triangulation and verification of data that would not only reduced data errors but provide more detailed information for both the prosecution office as well as the court. Other plans aim to track relevant performance data from time of an arrest through sentencing across the justice sector. The data are not only used to enhance agency operations but to compare performance with that of other jurisdictions with the aim to identify and study the best practices of higher performing jurisdictions and set goals to achieve similar or even better results (see Cuyahoga County Prosecutor Office, 2017)

Beyond such more advanced approaches, most state level prosecution agencies in the US today still use more limited, largely output related performance data. While most recognize that output data alone provide only limited insight into the offices performance, few have the resources or support to develop more comprehensive data tracking and analysis schemes such as the one used in Cuyahoga County outlined above. To address the shortcoming in the short run, some have developed other options, such the Kent County (Michigan) Prosecution Office, which uses output data, conviction rate data along with staffing and budget data and compares these to the same data reported by the six largest country prosecution offices in the state.

Kent country also offers valuable information why it is so difficult for state level prosecution offices in the US to move beyond collection of output data: 1) The office only reports felony conviction rates since they are based on the most recent statistics from the Michigan Department of Corrections and they are collected and reported in a consistent format across counties; 2) There office has no meaningful way to compare misdemeanor conviction rates because the various counties count

cases and collect data differently. And, since certain misdemeanor cases are also handled by a different agency, i.e. the city attorney's office, misdemeanor conviction rates can only be established if the office can track the outcome of its own cases alone, which so far has not been feasible. Still, considering the many challenges, the Kent County Prosecution Office has taken good steps towards moving beyond the use of simple output data (Kent County Prosecution Office 2016). Its efforts are an example of the type of performance measurement system that is more likely to be found in prosecutors' offices in the US today.

THE FUTURE OF PERFORMANCE MEASURES FOR PROSECUTION SERVICES IN THE US

The example of the Cuyahoga County Prosecutor's Office outlined above shows that more advanced performance measurement systems are used in select state level offices in the US and continue to evolve. The Cuyahoga County Prosecutor's Office has taken advantage of lessons learned by courts in its jurisdiction and by other agencies in similar situations. The office understood that performance measurement is only meaningful if reliable data collection comes out of a well-designed automated case management system, is used regularly to inform its leadership, managers on all levels, and is ideally available to all staff to help them track performance. The office also understands and emphasizes the use of this information to communicate progress towards its goals, and not just output data and conviction rates, to the public.

Prosecutor's offices that are serious about effective management aim to establish meaningful performance measurement systems and find ways to do so. At the same time, offices in a growing number of US states are under increasing pressure to collect such data and report them for budgeting purposes. The fact that number of US states applying performance based budgeting to all government entities is growing may become the main driver for developing better performance measurement systems in prosecutors' offices in the US. The current limited capacities of prosecutor associations in the US to serve as an effective coordinating and facilitating platform to develop nationally acceptable core measures for state level agencies combined with equally limited capacities on the Federal level stall the development of meaningful core measures and the spread of more effective performance measurement systems across prosecution agencies in the US.

These are important lessons to consider. For prosecutors in other countries, such as Brazil, it is important to not only explore the more advanced performance measurement systems in place in a few US prosecution agencies, such as the one in Cuyahoga County, but to understand that the development of performance measures is a process that evolves over time and requires not just time, resources and agreement to develop but also efforts to ensure that agreed upon measures are systematically collected and used in the agency not just for the purpose of publishing an annual report but for managing the agency based on data.

This is why, the use of a few core measures that apply to offices across a country and can be reasonably collected by them, instead of creating a long list of desirable data is important. What these core measures are depends to some extent on what the responsibilities of prosecutors in a particular jurisdiction and office are and for specialized offices, such as domestic violence or organized crime units adjusted measures may be needed, but there are core measures that tend to apply unilaterally to all agencies and there are good lessons from the US and other countries how to development them.

Today, the earlier mentioned effort to develop core performance measures for the prosecution of elder abuse cases supported by the National Center for State Courts provides one of the most helpful set of instructions for creating such set of core measures.

The starting point for measure development is defining the role of prosecutors. Using a careful review of the core prosecution processes and effective practices, this role was defined for US prosecutors as:

- Enhance victim safety by addressing any special needs of the older victim
- Restore what has been taken from the victim
- Gather evidence and preserve testimony using methods that will improve the likelihood of admissibility at trial should the older victim be unable or unwilling to testify
- Hold the offender accountable and protect the community
- Rehabilitate the offender in appropriate circumstances.

Building upon the lessons learned over time from performance measurement in the courts, eight core performance measures were proposed specifically for handling elder abuse cases. As a result, not all measures would apply to all other case types handle by prosecutors, but most do or can be slightly adjusted. Together the measures address case preparation, case processing, victim outcomes, and offender sanctions, all core functions US prosecutors are involved in.

The eight core measures that are than applied across the four core prosecution outcomes (i.e. case preparation, case prosecution, victim outcomes, and offender sanctions) that were selected are as follows:

4. Use of evidence collection checklists
5. Use of expert consultants
6. Time to case resolution
7. Victim satisfaction ratings
8. Prosecution initiated continuances

9. Early payment of restitution
10. Supervised sentences
11. Contact restrictions

The 2012 document published by NCSC is a very helpful tool to better understand how these measures were selected and how they can be applied in a prosecution agency. Each measure is clearly defined, its goal is articulated, and the rationale for selecting it is outlined. The publication also provides tools to collect, analyze and interpret the data and downloadable forms can be found online www.eldersandcourts.org

While this approach may at first seem unusual since it limits the data collection to just a few elements and does not even include one of the universally used data point, i.e. conviction rates, it is a helpful example for how to develop measures that help prosecutors track more effective practices instead of simply identifying if convictions are achieved or not. Conviction rates alone say very little about the effectiveness of the office and if conviction rates go down or up, the rates alone cannot identify why this may be the case and where in the process the agency should focus on improvements. In contrast, the more limited set of data measures that are based on good practice for core prosecution functions provide such insight. Along with the available data collection forms and explanations they also allow more offices to actually track their performance since the financial and human resources needed are limited.

Overall, these examples show that a range of positive and helpful performance measurement approaches are applied in US prosecutors' offices. Their broader application will be a matter of external demands for greater transparency and accountability related to performance management.

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