

## **THERAPEUTIC WHAT?** by Hon. Peggy Fulton Hora<sup>1</sup>

“Judicial educators must teach problem-solving methods and therapeutic jurisprudence to more judges,” states *Future Trends in State Courts 2005* published by the National Center for State Courts.<sup>2</sup> So what is therapeutic jurisprudence, what’s all this about problem-solving courts and how are we going to teach it?

Therapeutic jurisprudence, or TJ as it’s called by its adherents, is a term first used by Professor David Wexler, University of Arizona and University of Puerto Rico Schools of Law, in a paper delivered to the National Institute of Mental Health in 1987. In the early 90’s, legal scholars began to use it when discussing mental health law and its foundations in the personal rights of mental health patients. Along with Professor Bruce Winick, University of Miami School of Law, the professors suggested the need for a new perspective, TJ, to study the extent to which substantive rules, legal procedures, and the role of legal actors (lawyers and judges primarily) produce therapeutic or antitherapeutic consequences for individuals involved in the legal process. In 1999 in a Notre Dame Law Review article<sup>3</sup>, TJ was applied to drug treatment courts (DTC) for the first time and the authors asserted that DTCs were TJ in action and that TJ provided the jurisprudential underpinnings of DTCs.

TJ’s question is: Can we enhance the likelihood of desired outcomes and compliance with judicial orders by applying what we know about behavior to the way we do business in court? And TJ’s other question is: Can we reduce the anti-therapeutic consequences and enhance the therapeutic ones without subordinating due process and other justice values? Essentially, TJ is designed to make us ask whether the law does things to help people. It proposes that we should look at the law as a healing profession. It requires a new perspective that sees the court system as an interdisciplinary, problem-solving, community institution. Trail Court Performance Standard 3.5 says, “The trial court takes appropriate responsibility for the enforcement of its orders” and when a court is engaging in TJ, it is more likely that its orders will be adhered to.

Problem-solving courts, as drug treatment and other outcome-focused, collaborative courts have come to be known, concentrate on the underlying chronic behaviors of criminal defendants and other court users and recognize that the public is looking to the courts to address complex social issues. Drug treatment courts began in the U.S. in 1989 in direct response to jail overcrowding, courts becoming plea bargaining mills and the fact that people with addictions, mental illness and status offenders were clogging the courts with high recidivism rates. It was discovered that three areas particularly lent themselves to a problem-solving, collaborative approach – domestic violence, mental health disorders and substance abuse. Each area offers an opportunity for changed behavior through treatment, intervention or therapy and each lend themselves to conditions imposed by a judge. Each allows the court to address the underlying issues that brought the person to court.

The Center for Court Innovation<sup>4</sup> has developed “Six Shared Principles that Distinguish Problem-Solving Courts from the Conventional Approach to Case Processing and Case Outcomes in State Courts.”

1. **Case Outcomes:** P-S courts seek to achieve tangible outcomes for victims, offenders and society including reduced recidivism, reduced stays in foster care for children under the court’s protection, increased sobriety for substance users and healthier communities.
2. **Judicial Monitoring:** P-S courts rely on judicial authority to solve problems and change behavior of litigants. Judges stay involved with each case throughout the post-adjudication process. Frequent progress reports are expected from collaborating entities.
3. **Informed Decision-Making:** P-S courts improve the quality and quantity of information available in the courtroom. Judges can respond quickly and effectively to performance and hold court users and partner agencies to a high level of accountability.
4. **Collaboration:** P-S courts employ a collaborative approach and rely on government and non-profit partners to achieve their goals.
5. **Non-Traditional Roles:** Some P-S courts, such as drug treatment courts, alter the dynamics of the adversarial process and employ a team approach to the participants’ treatment and recovery. The team works together to craft incentives and sanctions for participants. The judicial role may include being a convener or broker between participating entities.
6. **System Change:** P-S courts promote reform outside of the courthouse and work more visibly with the executive and legislative branches. Outside agencies may be encouraged to adopt new staffing patterns such as attending court sessions and improve case management practices because of reporting expectations.

Thus, problem-solving courts and judicial orders that use a TJ approach work in a way to heal the person before the court and increase the likelihood that mandates will be obeyed. This leads to reduced recidivism, reduced stays in foster care for children under the court’s protection and a higher likelihood of family unification as well as reduced court costs and greater community safety. It additionally results in trust and confidence in the courts by showing judicial orders are taken seriously and people in court are given a voice.

Problem-solving courts further require a new role for the judge who is expected to be more proactive. TJ judges believe they can and should play a role in the problem-solving process and they believe that outcomes – not just case processing – matter. Collaborative courts recognize the therapeutic potential of the court’s coercive powers and find “judicial leverage” to be an appropriate tool.

Work to bring problem-solving courts “to scale” has already begun. California has a Community Justice Project dedicated to building restorative justice principles in the community. Its goals are to enhance awareness and understanding of community justice practices and principles; facilitate information sharing between existing community

justice programs and start-up programs; and, to facilitate the development of local practices consistent with community justice principles.<sup>5</sup>

So how do judicial educators “sell” this idea to judges? Isn’t it just a bunch of activists who have thought up total nonsense? At one time it could have been characterized as such but much has happened to legitimize TJ and P-S courts.

The Conference of Chief Justices (CCJ) is a body made up of the top administrative judge in each state’s court of highest jurisdiction. The Conference of State Court Administrators (COSCA) has a membership of the top administrative employee of the court of each state. At a meeting of both groups in August of 2000, COSCA said, “The human and political success of therapeutic justice programs is too great to ignore.” CCJ/COSCA voted unanimously to support problem-solving courts and further agreed to develop best practices.<sup>6</sup> . It also recognized the need for collaboration and interdisciplinary training. This commitment was reaffirmed in 2004 and in 2006 this august body voted unanimously again and supported the Judges’ Criminal Justice/Mental Health Leadership Initiative (JLI),<sup>7</sup> an organization that grew out of working in mental health courts.<sup>8</sup> These actions by the top leadership of the courts gives legitimacy to problem-solving courts in the United States and allows judges who are interested in working therapeutically to do so without fear of ridicule or reprisal.

CCJ/COSCA agreed to:

1. Encourage the broad integration over the next decade of the principles and methods employed in the problem-solving courts.
2. Support national and local education and training on the principles and methods.
3. Advocate for the resources necessary to advance and apply the principles and methods.

In support of the JLI resolution, CCJ committed to join the organization and urged state supreme court justices to “take a leadership role to address the impact of mental illness on the court system through a collaborative effort involving stakeholders from all three branches of government.”<sup>9</sup> With the imprimatur of CCJ and COSCA, judicial educators may introduce these subjects into their states’ curricula with confidence that they will receive support from their top administration.

The National Judicial College is working on a bench card and benchbook to help judges use problem-solving techniques in a court’s regular docket. NJC also currently offers three courses that take this approach – Managing Cases Involving Persons with Mental Disabilities; Co-Occurring Mental and Substance Abuse Disorders; and, Practical Approaches to Substance Abuse Issues. There is a curriculum for the co-occurring course that is available on CD ROM and the materials for all three courses would be available to judicial educators across the country. The National Drug Court Institute<sup>10</sup> does trainings throughout the states and publishes scholarly materials in the *NDCI Review*. Other resources and guides are being developed by the Center for Court Innovation. The National Center for State Courts has a regular newsletter that can be received by joining its listserv and on its website it additionally has FAQs and a resource

center for P-S courts and TJ. There is an international movement exploring therapeutic jurisprudence and its website<sup>11</sup> has law school and university curricula, a complete bibliography and other useful materials and a listserv sign up.

Therapeutic jurisprudence is not a phrase that rolls easily off the tongue but its concepts are being employed throughout the world in courts, in law schools and other institutions. William and Mary Law School in Virginia has the first TJ Society in the nation. A new breed of law student will become a TJ/P-S lawyer who will then rise to the bench. We must continue to be able to meet this challenge and we already have some excellent tools to do so.

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<sup>2</sup> See: [http://www.ncsconline.org/WC/Publications/KIS\\_CtFutu\\_Trends05.pdf](http://www.ncsconline.org/WC/Publications/KIS_CtFutu_Trends05.pdf) last visited June 26, 2006

<sup>3</sup> Hora, Schma and Rosenthal, "Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America," 74 NDLR 439 (1999)

<sup>4</sup> See: [http://www.problem-solvingcourts.org/ps\\_char.html](http://www.problem-solvingcourts.org/ps_char.html) last visited 26 June 26, 2006

<sup>5</sup> See: <http://www.courtinfo.ca.gov/programs/ccjp> last visited 26 June 2006

<sup>6</sup> See: <http://ccj.ncsc.dni.us/CourtAdminResolutions/ProblemSolvingCourtPrinciplesAndMethods.pdf> last visited 26 June 2006

<sup>7</sup> JLI is coordinated by the Council of State Governments Criminal Justice/Mental Health Consensus Project( See: <http://consensusproject.org/>?) and the GAINS/TAPA Center for Jail Diversion (See: <http://gainscenter.samhsa.gov/html/>)

<sup>8</sup> See: <http://ccj.ncsc.dni.us/CriminalAdultResolutions/resol11JudicialCriminalJusticeMentalHealthInitiative.html> last visited 26 June 2006

<sup>9</sup> *Id.*

<sup>10</sup> <http://www.ndci.org>

<sup>11</sup> <http://www.therapeuticjurisprudence.org>