

Can Innovation Be Institutionalized?

Problem-Solving in Mainstream Courts



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Written by

Donald J. Farole Jr.
Nora Puffett
Michael Rempel
Francine Byrne

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About the Authors

Donald J. Farole and Nora Puffett are senior research associates and Michael Rempel is director of research at the Center for Court Innovation. Francine Byrne is a senior research analyst with the Judicial Council of California, Administrative Office of the Courts.

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Any opinions and interpretations are those of the authors or, where attributed, of the research participants. They do not necessarily represent official positions of the Administrative Office of the Courts or the Center for Court Innovation. For correspondence, please contact Donald J. Farole, Jr., Center for Court Innovation, 520 8th Avenue 18th Floor, New York, NY 10018, dfarole@courts.state.ny.us.

Problem-Solving in Mainstream Courts

Introduction

In recent years, an array of innovative courts has emerged throughout the country in an effort to address the underlying problems of defendants, victims and communities. Drug courts, which seek to break the cycle of addiction, crime, and repeat incarceration by mandating addicted defendants to treatment, represented the first such innovation. However, since the original Miami Drug Court opened in 1989, other analogous models have also arisen – domestic violence courts, juvenile drug courts, family treatment courts, mental health courts, community courts, peer/youth courts, and homeless courts. Generally known as “problem-solving” or “collaborative justice” courts, these innovations are distinguished by a number of unique elements: a problem-solving focus; team approach to decision-making; integration of social services; judicial supervision of the treatment process; direct interaction between defendants and the judge; community outreach; and a proactive role for the judge inside and outside of the courtroom.¹

At the same time that the number of problem-solving courts has grown, several states – including California, New York, Missouri, Louisiana, and Ohio – have begun to go further, developing efforts to coordinate at least some of their problem-solving initiatives on a statewide level. For example, California, which now features approximately 250 such courts, coordinates its efforts through a special Collaborative Justice Courts Advisory Committee to the state’s Judicial Council. These institutional efforts reflect, in part, the demonstrated effectiveness of drug courts² as well as the public attention and support all of these innovations have garnered.

While specialized problem-solving courts have proliferated, and we have learned a great deal about the practice of problem solving within them, interest has recently begun to surface around the new question of what potential exists to apply problem-solving court practices outside the specialized court setting. In other words, will problem solving be restricted to stand-alone specialized courts dedicated to discrete interventions (e.g., for substance addiction, domestic violence, or mental illness); or can their core principles and practices be productively applied throughout court systems, provoking more sweeping changes in the administration of justice? Understanding the answer to this question can directly inform the growing efforts in many states to institutionalize, or “go to scale,” with a problem-solving approach. Contingent upon on what is feasible and appropriate, institutionalization can involve the system-wide expansion and coordination of specialized problem-solving courts and/or the incorporation of problem-solving practice

throughout conventional court operations. Interest in this issue among justice system representatives was enhanced by an August 2000 resolution of the Conference of Chief Justices and Conference of State Court Administrators, which advocated:

Encourag[ing], where appropriate, the broad integration over the next decade of the principles and methods of problem solving courts into the administration of justice to improve court processes and outcomes while preserving the rule of law, and meeting the needs and expectations of litigants, victims, and the community (see Becker and Corrigan 2002).

This article presents results of an exploratory study, conducted by the California Administrative Office of the Courts in collaboration with the Center for Court Innovation, concerning the opportunities and barriers to applying problem-solving principles and practices outside of the specialized problem-solving court context – in conventional courts and on general (as well as other specialized) calendars. Focus groups and interviews were conducted among a diverse group of judges in California and New York with experience in drug, domestic violence, mental health, and other problem-solving courts. The research addressed three principal questions:

1. Which problem-solving principles and practices are more easily applied in conventional courts (and which are less easily applied)?
2. What barriers might judges face when attempting to apply these principles and practices in conventional courts (and how might those barriers be overcome)?
3. How might problem-solving be disseminated among judges and judicial leaders throughout the court system?

We begin with a brief review of the study background and methodology. We then present key emergent themes and findings from the focus groups and conclude by discussing the implications of these findings for court managers as well as next steps for future research.

Project Background

Many of the issues associated with the application of problem-solving principles in conventional courts are so new that justice system representatives and researchers are only beginning to consider them. Thus the available literature consists largely of descriptive accounts chronicling individual judges' perspectives or personal attempts to apply problem-solving in conventional courts (e.g., Babb 1998, Bamberger 2003, Casey and Rottman 2000, Gilbert, Grimm, and Parnham 2001, Schma 2000, Wexler 2001). A related literature considers how judges and attorneys might apply "therapeutic jurisprudence" in various contexts (Abrahamson 2000, Babb 1998, Leben 2000, Wexler 1993, Wexler 2000).³ In addition, others have considered opportunities and challenges to of institutionalizing or "going to scale" with specialized problem-

solving courts (e.g., Berman 2004; Wolf and Fox 2004; Feinblatt, Berman and Fox 2000; Fox and Berman 2002; Tashiro, Cashman, Mahoney, Brekke, Cooper, Durkin and Jenkins 2002). While these literatures are varied, three consistent themes emerge throughout:

1. The broader use of problem solving requires changing traditional attitudes and role orientations of judges, attorneys, and other justice system actors;
2. Resource constraints (lack of time, money, and staff) can pose serious barriers to attempts to apply specific problem-solving practices more widely; and
3. Judicial leadership is critical in any efforts to expand problem solving, either through the expansion of specialized courts or the integration of problem-solving practice in conventional courts.

Different perspectives also exist regarding the extent to which the practice of problem solving – and therapeutic justice – requires specialized courts (and judges) or, alternatively, can be productively applied in conventional courts (see, e.g., Rottman 2002 for discussion in the therapeutic justice context). Most writings that address these issues, however, do not examine discrete, specific problem-solving principles and practices (e.g., direct interaction between litigants and the judge) which may be more or less easily applied on general court calendars. One evidence-based study does directly address this issue (Casey and Rottman 2003), but it is still in a preliminary stage of research and reporting.

Methodology

The lack of evidence-based hypotheses in the literature necessitates an exploratory approach to the present study. Thus focus groups were deemed the most appropriate research methodology. While neither the focus group participants nor the findings they yield can be considered representative of the general population of judges, focus groups are particularly useful when the goal is to generate information on attitudes, opinions, personal experiences, and suggestions concerning topics about which limited prior information exists.

Accordingly, focus groups and interviews were conducted among judges in California in New York, two states at the forefront of testing new problem-solving court models. In selecting participants, attempts were made to recruit judges familiar with problem-solving practice. In nearly all cases, eligibility was restricted to judges with experience serving in a problem-solving court and with simultaneous or subsequent experience serving in a general calendar assignment. These judges, it was felt, would be most able to speak to the key research issues, perhaps drawing on their own personal experience attempting to apply problem-solving practices in general calendar assignments. The research team worked with the California Administrative Office of the Courts and the New York State Office of Court Drug Treatment Programs to identify and invite judges familiar with the issues of interest.

Four focus groups (two each in California and New York) were conducted in August and September 2003. Twenty-nine judges – 16 from California and 13 from

New York – participated in the focus groups. In addition, individual interviews (in-person and via telephone) were conducted with six other judges; thus, a total of 35 judges participated in the research. These judges were diverse in terms of their location (e.g., urban versus rural; and geographic region within California or New York), current assignments, and, as Table 1 demonstrates, current and prior problem-solving court assignments. Since adult drug courts represent the majority of problem-solving courts nationwide and in these two states, it is not surprising that most participants have drug court experience. Nevertheless, judges with experience in other problem-solving courts are also represented, and several had been assigned to multiple types of problem-solving courts.

Table 1. Problem-Solving Court Experience of Focus Group and Interview Participants

	California	New York	All Judges
1. Drug Court			
Adult drug court	10	12	22
Juvenile delinquency drug court	4	0	4
Juvenile dependency drug court (CA) or family treatment court (NY)	2	2	4
2. Domestic Violence Court			
Criminal domestic violence court	6	3	9
Civil domestic violence court	1	0	1
Integrated domestic violence court (both criminal and civil cases)	0	1	1
3. Mental Health Court			
Adult mental health court	2	0	2
Juvenile delinquency mental health court	1	0	1
4. Community Court	0	1	1
5. D.U.I. Court	1	0	1
Number of Collaborative Justice Assignments	27	19	46
Total Number of Judges ¹	19	16	35

¹ Numbers within individual problem-solving court categories add up to more than the total number of judges, since some judges had experience in multiple types of problem-solving courts.

The focus groups followed a semi-structured protocol designed to give participants considerable latitude to raise issues while addressing three general topic areas: 1) core principles and practices of problem-solving courts that differ from conventional courts⁴; 2) the extent to which these principles and practices might be applied within conventional courts, and 3) strategies to disseminate problem solving more widely throughout the court system. All focus groups averaged two hours in length (individual interviews averaged one hour) and were moderated by the authors. Participants

were not paid but were provided lunch and travel reimbursement. The focus groups were audio recorded and transcribed. All participants were assured that no comments would be personally attributed to them.

Emergent Findings and Themes

The dialogue in all focus groups was surprisingly consistent – there were few substantive differences across states or focus groups – and a number of clear themes emerged. Discussion focused principally on what judges could do to practice problem solving in conventional courts; the role of attorneys and other players received considerably less attention. Most judges, while describing themselves as naturally inclined towards a collaborative, problem-solving orientation, agreed that their own problem-solving court experience enhanced the frequency and effectiveness of their subsequent use of problem-solving principles and practices in conventional courts.

At the outset, some judges raised fundamental objections to the idea of applying problem-solving practices outside the specialized problem-solving court setting. They argued that the first relevant question was not could principles and practices be applied more broadly but should they. Two reasons why they ought not be applied were offered. First, problem-solving courts were created in part because the prior ad hoc administration of problem solving on general calendars was “haphazard” and “non-uniform.” Now that specialized problem-solving courts are established, focus group participants raised the concern that encouraging problem-solving practice in conventional courts would result in a return to poor, inconsistent practice, and possibly siphon off the resources available to the specialized courts. Second, practicing problem solving might ethically or legally compromise the judge and the court process. Some perceived certain elements of problem solving – particularly its non-adversarial, team approach – as incompatible with conventional legal processes. However, these were minority views, which were generally disputed by other focus group participants. Most advocated its broader application, at least under certain circumstances and to the extent feasible.

Discussion was often spontaneous and moved rather abruptly from topic to topic, as is expected from a loosely structured protocol, but additional findings and themes are organized around the three key research questions.

Which problem-solving principles and practices are more easily applied in conventional courts and which are less easily applied?

In all focus groups, the initial response was to cite barriers that might prevent or limit judges from practicing problem solving in conventional courts. However, with further probing, suggestions for overcoming barriers emerged. Five principles and practices emerged as easiest and/or most appropriate to apply on general court calendars.⁵

1. Problem-Solving Orientation of the Judge

Focus group participants generally agreed that the proactive role of the judge in problem-solving courts could be applied to other cases and calendars in various ways –

asking more questions, seeking more information about each case, and exploring a greater range of possible solutions:

Where I otherwise may have just taken the proposed orders of probation from the probation department [and] signed them ... I will now ask the questions, did you look into X, Y and Z, did you look into this treatment option, have they had treatment before, and have they been examined for any mental health [issues]. I will ask those questions where I wouldn't have before.

The information gained may lead judges to craft highly individualized, unconventional court orders – one judge gave the example of mandating an offender to visit the morgue and write an essay on what he saw.

The proactive, problem-solving orientation was deemed widely helpful outside of the problem-solving court setting, particularly in negotiation situations. Judges mentioned Matrimonial Court, Family Court, or other civil assignments as particularly appropriate venues. One judge claimed to have become known, after leaving a problem-solving court, for “thinking outside the box” in civil negotiations.

2. Direct Interaction with the Defendant/Litigant

Direct interaction with the defendant/litigant was deemed a prerequisite for effective behavior modification, enabling the judge to motivate defendants to make progress in treatment, bringing to light the most crucial needs of parties in civil cases, and laying the groundwork for positive solutions. Judges regarded this as one of the easiest practices to apply in conventional courts, perhaps because it requires no additional resources. While some expressed concern that, in criminal cases, defense attorneys would not allow such interactions for fear clients would incriminate themselves, several judges reported that they routinely address defendants directly, with few objections from the defense bar. Explained one judge:

I have never had an attorney say to me, ‘Judge, I won’t let you ask him any questions.’ I may ask questions they don’t like and then they say, ‘I am directing my client not to answer that’ and they don’t answer it. It helps us get through a lot of paperwork and a lot of malarkey.

Several judges drew attention to specific aspects of their interaction with defendants that were deemed to have value both inside and outside the problem-solving court context – treating defendants with respect, showing compassion, having faith in their ability to improve, and seeing them as potential law-abiding citizens.

3. Ongoing Judicial Supervision

Requiring defendants, particularly probationers, to report back to court for treatment updates and judicial interaction was identified as one of the least controversial and most effective practices that could be applied in conventional criminal courts:

I used to give probation terms and wait for them to violate probation, and then we would file a petition and they would come back to court. Now I set review dates so that they have to come back in and prove to me that they have done something. And [I do that] because I know that that's what makes the drug court work, that they have to come back and tell me what is going on.

Recognizing that caseloads are too heavy for probation officers to supervise cases effectively, another judge introduced return court appearances to ensure direct judicial supervision and accountability.

I have started telling people that they are ordered back and I will have them come back once a month. And I intend to use sort of a drug court model. I don't have all the resources of a drug court, I don't have the testing and I can't get probation to really supervise them. But I think the issue of judicial supervision and accountability ... makes a difference.

Judges in all focus groups, however, expressed concern about the limited time available to devote to supervision in conventional courts. Time limitations may force judges to select only a subset of cases for supervision. And the lack of clinical staff means that judges often cannot obtain the thorough treatment reports that could better inform their interactions with defendants. Nonetheless, many judges acknowledged that they had instituted enhanced supervision in their conventional court with at least some cases.

4. Integration of Social Services

Many judges reported that service coordination was a valuable tool in any court – especially for litigants with addiction, mental illness, or vocational/educational needs. However, referring parties to treatment or other services was seen as more difficult in conventional courts, because they lack the additional staff/case management resources typically available in specialized problem-solving courts. Nonetheless, several judges from both California and New York added that their problem-solving court experience increased the frequency with which they set treatment and other conditions (e.g., obtain high school diploma or GED, attend drug treatment or other program) as part of probation pleas. Explained one judge: “When you are in the [problem-solving] court you tend to come out looking at probation as a treatment plan.”

5. Team-Based, Non-Adversarial Approach

Judges discussed the extent to which they could adopt a team-based, non-adversarial approach in general court calendars. While there was less consensus and greater skepticism about this than other practices, judges identified opportunities to adopt such an approach, particularly in juvenile or family law settings, where rules often explicitly foster a problem-solving approach – seeking the “best interests of the child.”

Most focus group participants believed the judge plays a critical role in determining the extent to which an individual courtroom can and will adopt a non-adversarial approach. However, most also stressed that others – particularly attorneys – can enable or derail that approach, and gaining the trust and participation of attorneys greatly facilitates judges’ ability to practice problem solving. It was generally agreed that the players tend not to act as a team until they develop trust, and that takes time. For example, one judge attributed the defense bar’s willingness to let him talk directly to defendants to a “reputation” that inspires trust: “They know I am not going to slam [defendants] into jail...[so] they allow their clients to talk to me.”

Most problem-solving courts hold regular case management meetings of court partners during which they address any recent developments or difficulties with specific cases (e.g., relapses, problems at an assigned program, questions about additional treatment needs, etc.). Some, but not all, judges felt that this practice was essential to functioning as a team, and could be adopted, albeit on a limited basis, in a conventional court. One judge reported that he had successfully introduced a team approach on his family court calendar:

I started with reviews, a kid who I know was in really rough shape ... they come back into court and then in chambers would be all of the service providers, probation officers, the mental health person, the staff worker. Occasionally, we bring the parents in, sometimes we bring a whole crew in and try to problem solve as a group ... It has been a real positive experience.

As suggested above, focus group discussion extended to particular types of cases and calendars most ripe for problem-solving solutions. Appropriate case types were characterized in part as those in which a problem that can be resolved by court intervention and lack of services contributed to the defendant’s criminal behavior. Unsurprisingly, problems identified as appropriate included drug addiction, domestic violence, mental illness, DUI – all issues for which specialized problem-solving courts have been created. Criminal cases involving younger defendants were also cited. One judge summarized by noting that appropriate (criminal) case types are those “where the level of punishment required is diminished by the need to solve the underlying problem and so you’d rather solve the problem than punish the behavior.”

Crimes of serious violence were virtually the only matters that a significant number of judges suggested as inappropriate for problem solving; yet it was also observed that violent offenses are staples of some problem-solving courts (primarily domestic violence but sometimes mental health courts as well). In fact, some judges conceded that if violence were tied to an underlying problem such as substance abuse, a problem-solving response might be appropriate.

Judges also identified specific stages in the criminal justice process – most notably bail and sentencing – as points at which problem solving was both appropriate and easy to implement. Although judges in several groups extended that to

include plea negotiations, at least one judge objected on the grounds that plea bargaining is “a negotiation for what kind of punishment ... they are going to receive, which is not a [problem-solving] court model and is probably inappropriate.”

Criminal trials were also generally seen as inappropriate for problem solving.

In addition to criminal matters, other court calendars were also discussed extensively. Juvenile Delinquency and Dependency courts were widely cited as appropriate venues for problem solving, particularly for practices such as addressing the problems that contribute to recidivism; using a team-based approach; and interacting directly with all parties. Judges in both California and New York noted that the rules governing juvenile court explicitly encourage these practices: “there is already a rule [in California] that says it shall be non-adversarial to the maximum extent possible. There is already a rule in place that says the well-being of the child ... takes precedence over any issue.”

In the California focus groups, family court – like juvenile courts – was perceived as inherently more problem-oriented, and as allowing greater flexibility and discretion than other courts. Judges in California also cited the Substance Abuse and Crime Prevention Act (commonly known as Proposition 36). Courts, which administer court-mandated treatment programs for a wide range of drug possession offenders, as particularly appropriate for problem-solving approaches.⁶

Finally, probation – not a court calendar, but a court-imposed sentence – was widely regarded as an excellent vehicle for problem solving. Setting probation conditions, monitoring compliance, and responding to violations were all activities in which judges reported using problem-solving techniques. However, because probation departments are often overburdened and under funded, judges in both states emphasized that judicial follow-up would often be required to assure defendants were in fact linked to programs and services, and that other probation conditions were met (see Bamberger 2003 for a similar discussion).

What barriers might judges face when attempting to practice problem solving in conventional courts? How might those barriers be overcome?

Focus group participants discussed a number of barriers that they believed could seriously impede the ability to practice problem solving more widely. Limited time and resources and conflicting ideas about the judicial role received the most attention. Other barriers cited included: (1) attorney unwillingness or lack of education about the problem-solving approach, (2) legal and constitutional constraints on what can or should be done in a conventional court, and (3) public safety concerns with regard to violent defendants. These latter issues, however, appeared to concern fewer judges and arose specifically during discussions of conventional adult criminal courts, not juvenile, family law, or civil calendars.

Time and Resources

Limited resources were unquestionably the most significant barrier to practicing

problem solving in conventional courts, according to focus group participants. Judges emphasized the limited time for providing individualized attention to each case, ongoing judicial supervision, and direct interaction with defendants. They also cited institutional pressures to “move cases along.” Explained one judge:

When you leave treatment court ... you don't have time for the individualized attention ... you don't have access to the wide array of services, you are under a great deal of pressure to move cases ... The concern is not what are you doing for the defendant, but what are you doing about reducing your caseload, and you don't have the same kind of pressure in drug courts or [other] problem-solving courts ... It is just kind of frustrating, because you know that it [problem solving] works.

Across all focus groups, judges expressed particular concern about limited time and resources when the subject of return court appearances arose. While ongoing judicial supervision was cited as among the most readily applicable practices (see above), in practice multiple return dates create costs for a large number of personnel, not only the judge, and can incur resentment from other court staff, as one judge explained:

... It [return appearances] is problematic, I think, especially in the budgetary crunch ... and a judge is going to set it, it has to go back to his or her calendar. So then you start getting backlash from your staff ... you are the only judge that does it; nobody else does it. And then we have to break ... we break before noon, we have to break before five, our clerk's offices close down at three.

While all judges agreed that limited resources posed a problem, they tended to be perceived as more critical by judges in higher-volume (generally urban) courts. Note too that domestic violence court judges from both states indicated that they faced high caseloads and pressure to move cases along rapidly within their specialized problem-solving courts. By contrast, drug and mental health court judges were far more apt to contrast the plentiful time available in their problem-solving court to the severely limited time available in other assignments.

Judges further lamented the lack of additional staff resources in conventional courts to link defendants to appropriate services and provide the court with detailed progress reports. Although probation departments have historically been asked to perform similar functions, judges reported that chronic under-funding has rendered probation far less effective than desired. Ideally, if treatment programs could provide detailed progress reports themselves, the need for court-based case management might be lessened. However, judges were generally critical of progress reports directly from the treatment programs. Several believed that without court staff demanding accountability, programs would not provide timely reports with a “sufficient depth of information about client progress” to inform judicial decision-making.

Focus group participants were probed about how resource barriers might be over-

come. Some judges initially seemed paralyzed by the limited resources in conventional courts and could see no way to overcome them, one noting that “there are a lot of things that could be done, but only Don Quixote could do them.” Ultimately, two broad sets of strategies emerged.

The first involved what judges themselves could do, in their own courts and with their current caseload. Among the suggestions was a “triage” approach, in which only the most appropriate cases would be selected for ongoing judicial monitoring: “you have to be able to decide what sort of cases you are going to concentrate on and be able to take that smaller number and give it the increased attention.” Another suggestion was for judges to assume greater personal responsibility for calling treatment providers, demanding timely progress reports, and exerting courtroom leadership to build trust and encourage attorneys and other parties to change their practices over time. Since building trust often depends on seeing the same parties regularly, this would appear particularly effective for judges in smaller jurisdictions, where rotation among key players might be less frequent.

A second set of recommendations focused on longer-term, more systemic (and costly) solutions. Among the suggestions was to make the resources of existing specialized problem-solving courts available to all courts; and to establish court-wide screening, assessment and case management systems as well as additional dedicated staff.

Judicial Role and Personality

Conflicting judicial philosophies were discussed extensively as a barrier to the wider dissemination of a problem-solving approach. The consensus among participants was that in any courthouse, some judges’ conception of the judicial role is inconsistent with problem-solving practice. Judges contrasted a “traditional” judicial role (“deciding cases,” not “solving problems”) with a more problem-solving, collaborative judicial philosophy. One noted that many colleagues view problem-solving approaches as “social work” and thus inconsistent with the “proper judicial role” of “deciding cases.” (See also Hanson 2002 for a discussion of judicial role orientation as it relates to problem solving.) With criminal cases, a philosophical preference for punishment over rehabilitation was also seen as a barrier:

I just get so frustrated at times working with colleagues who snicker and laugh and make fun of the collaborative approach, because they say, well, ‘punishment’ ... I have had PJs [presiding judges] who said, this is the purpose of why we have courts, [it] is to punish people.

In both states, judges from more rural and politically conservative counties tended to report that many, perhaps even the majority, of their colleagues have a more traditional conception of the judicial role. By contrast, several judges from large urban jurisdictions suggested the predominant philosophy in their courts was more conducive to a problem-solving approach, making the primary challenge not one of

changing judges' philosophies but of imparting specific knowledge about how problem solving could be employed in their courtrooms. Indeed, focus group participants repeatedly invoked their experience in a specialized problem-solving court as critical in helping them find productive ways to apply problem solving elsewhere. This in turn raises the question of how to ensure that more judges receive such court experience and how the relevant skills might be imparted to judges without experience in problem-solving courts.

Participants also debated how the judge's personality affects their ability to effectively apply a problem-solving approach. Are certain "innate" personality characteristics necessary to practice problem solving? The issue aroused considerable emotion, and no consensus, in all focus groups. Some judges were vehement that problem solving was inherent to their personality: "Most of us sitting at this table have a personality that no matter what assignment we are in, we are going to be creative problem solvers." A few specific personality traits – empathy, honesty, and interpersonal communication skills – were cited. Some felt that, even with training or experience in problem-solving courts, colleagues without the right personality traits would be ineffective. However, others disagreed, with one observing, "There are some [problem-solving court judges], [whose] personality would be the total antithesis of what you would expect of a collaborative justice court." Another stated that judges must always "be who they are," but that they can still be effective so long as they talk to defendants like real people and have faith in their ability to succeed.

How might problem-solving be disseminated among judges and judicial leaders throughout the court system?

Discussion in the focus groups focused extensively on the need to change the attitudes and practices of judges who may not be familiar with or receptive to opportunities to apply problem solving in general court calendars. This, according to participants, is critical to promoting broader use of problem solving throughout the court systems. Indeed, the topic was raised by judges in all focus groups – prior to it being raised by the moderators – and it received at least as much attention as did the other issues discussed above. As one judge noted, "One of the biggest challenges is convincing other judges to do this."

In general, the dialogue in all four focus groups was consistent, and several common themes emerged. Judges linked receptivity to problem solving not only to judicial role orientation but also to individual personality and temperament. Accordingly, general consensus emerged that, widespread adoption of problem-solving would be a long-term process and that some judges would simply be unwilling to adopt new practices and roles: "You are talking about evolving or changing the role of the judicial officer and the colleagues ... the judicial officers who [came in] 20 to 25 years ago as a general rule don't perceive the position that way."

However, some participants left the door open for judges to come around to new ideas, noting that problem solving is to some extent a "learned behavior" – and

“exposure to the concept” is key to changing attitudes. While some participants affirmed that all judges would benefit from exposure to the problem-solving concept, many suggested that new judges would be most receptive and thus ought to be a principal focus of any efforts: “New judges tend to be won over” and “the key is the crop coming out ... so you gradually over time change the concept or perception.”

Several themes emerged from the conversation about problem-solving dissemination:

Education and Training

Judges emphasized the need for greater education and training of judges (and others) in the principles and practices of problem solving. Education was seen as the most appropriate and effective method available, with judicial colleges and new judge orientations cited as preferred venues for disseminating information. Many, though not all, judges expressed support for mandatory training: “If you make it voluntary, the people who want it come, and the people who don’t, don’t.” One judge noted that new judge orientations have recently placed greater emphasis on the “art of being a judge” and teaching ethics and fairness, so a section on problem-solving justice might be especially appropriate.

While discussion focused on the education and training of bench judges, focus group participants also cited the need to educate and train others “across the board”, including attorneys and presiding judges, in order to build broader understanding and support for problem solving.

Informal Exposure/Word of Mouth

In all focus groups, judges recommended a number of less formal means by which judges might be exposed to problem solving, including mentoring, brown bag lunches among judges to discuss relevant issues, and exposing judges to the results of this new approach (e.g., sharing success stories). One judge felt that the mere presence of the drug court, and the resulting informal dissemination of information about how it worked, had in fact already generated a change of attitudes in the local judiciary. Specifically, it had resulted in a greater understanding of addiction and a greater acceptance of practices that could be used in other courtrooms, such as mandating defendants to treatment and giving them multiple chances after initial noncompliance. A common theme was that receptivity to problem solving is enhanced if judges “hear it from other judges” – rather than from administrators, attorneys or academics.

Assignment/Rotation

Assignment to specialized problem-solving courts also received considerable discussion in the focus groups, on the hypothesis that such experience would enable judges to develop new attitudes and skills that they would take with them to subsequent general calendar assignments (e.g., Chase and Hora 2000). Participants appeared to distinguish – though most often implicitly – the impact of such assignments on judges’ attitudes from its impact on judges’ skills. Participants were skeptical that problem-solving court assignments alone enhance judicial receptivity to problem solving.

While a few noted that their own experiences had moved them from mild opposition or disinterest to enthusiastic support for problem solving, most reported that colleagues who began as strongly opposed to problem solving had been unmoved by their experience in a problem-solving court.

By contrast, there was general consensus that experience can have a lasting, positive impact on judges' skills as well as their ability to apply those skills in future assignments. Despite this, focus group participants were largely unenthusiastic about mandatory assignment to these courts. When asked how to facilitate broader use of problem solving throughout the court system, mandatory assignment emerged unsolicited in one of the four groups, where it was received negatively by several judges. When probed on the issue, participants in the other focus groups all agreed that problem-solving court assignments ought to be voluntary. The lack of enthusiasm was due primarily to concern about the potentially deleterious impact of mandatory assignment (and frequent rotation) on the problem-solving courts themselves. Participants noted that the assigned judge might be hostile to the court's goals or methods, and that too frequent rotation might introduce discontinuity in the problem-solving court team and harm program participants. Similar concerns and themes are found in discussions of other specialized court contexts (e.g., see Babb 1998, Domitrovich 1998, Rottman 2000, Stempel 1995).

Judicial Leadership

Judges in California emphasized the need for presiding judges and other judicial leaders to encourage broader use of problem solving throughout the court system. This need was a prominent theme in California but not the New York focus groups, and was the only significant cross-state difference to emerge in the research.

Participants cited the need for leaders to provide "encouragement" and "institutional validation." Some articulated this in terms of sending positive messages granting judges "permission" to apply problem-solving court principles on general calendars:

And so to transfer some of these principles, there has to be permission from above ... There are people who are in authority for judges, that [have to say] it is okay to do this, it is not really crazy, you are not some kind of radical outlaw bandit ... In fact, it may actually be encouraged. That message needs to be given if you are going to be successful.

Another way [to encourage broader applications] is for the presiding judges to accept that this is appropriate ... I am sure all of you have had people make fun of you for what you do ... who absolutely disagree with what we do in our courts ... Until we can get rid of that pervasive opinion that exists within our system, I think we are going to have problems and you are not going to see these great concepts being passed on to other assignments.

One judge suggested that leaders might help to promote problem solving by

redefining opportunities for promotion and advancement to place less emphasis on traditional case flow management, holding trials, or publishing, and greater emphasis on solving problems:

If one were really honest, one would have to talk about opportunities for promotion and advancement ... I think one way [to promote problem solving] would be to get a very clear message from people who determine judges' career paths and promotions – administrators – that this kind of approach is as important as how many days on trial you had in the last year. Everybody wants to be looked upon favorably by people who evaluate their performance.

Discussion was often vague in terms of which specific leaders were and were not sufficiently supportive of problem solving. While it focused primarily on presiding judges (at the county level), participants in both California focus groups cited the need for buy-in at all levels of the court system and from elected officials as well.

Discussion

Focus group participants did not anticipate that engaging in problem solving outside specialized courts would come easily. For some, the barriers seemed overwhelming:

There are a lot of things that could be done. But only Don Quixote could do them. Because you're tilting at windmills when a lot of people would be resistant to it and wouldn't cooperate. And it would cost a lot of money. And you would have to be indefatigable. And you could never, never give up. Maybe you'd get some things done. And you'd be quite tired by the end of the week. You'd have to sleep all weekend to start again on Monday. So that's my view. I'm not cynical at all. I'm an optimist.

While this judge was more pessimistic than most, the list of barriers that emerged from the focus groups was long and daunting indeed. Chief among those were the limited judicial time and resources in conventional courts; the lack of additional staff to effectively manage treatment program coordination; and philosophical opposition or lack of education among colleagues both on the bench and in judicial leadership positions. At the same time, most judges believed there were opportunities to apply problem-solving principles and practices even within the constraints just identified. Practices such as adopting a problem-solving judicial orientation, engaging in direct interaction with defendants and other litigants, and conducting ongoing supervision of treatment cases were deemed feasible and appropriate in many conventional court contexts. Most participants believed that judges willing to practice problem solving in conventional court assignments can do so, if only on a limited basis and for cases most clearly in need of a creative, collaborative approach.

Participants proposed specific steps that might be taken in the short-term to better inform their colleagues. Included among these was formal education (e.g., incorpo-

rating problem-solving courses in new judge orientation and judicial college; encouraging training for prosecutors and defenders) and various informal methods (e.g., problem-solving court judges might mentor general bench judges and those new to problem solving; judges might be encouraged to observe specialized problem-solving courts or attend a drug court graduation ceremony). Focus group participants, particularly those in California, also suggested positive steps judicial leaders might take, such as encouraging bench judges to practice problem solving when appropriate and to volunteer for assignments to specialized problem-solving courts.

Longer-term, more systemic changes to enhance or more effectively use limited resources were also suggested. These included the centralization of treatment coordination and compliance monitoring staff and resources within each courthouse, and the development of jurisdiction-wide directories of community-based service providers to inform all judges about available programs (e.g., for substance abusers, the mentally ill).

The focus group findings provide additional empirical support to many hypotheses and personal accounts found in the current literature, particularly with respect to the barriers of limited resources (e.g., Bamberger 2003; Tashiro et al. 2002), the need to promote a new view of the judicial role (e.g., Casey and Rottman 2003; Chase and Hora 2000; Fox and Berman 2002), and the importance of judicial leadership in advancing problem solving (e.g., Feinblatt, Berman and Fox 2000). The findings also suggest next steps for future research. For example, while few interstate differences emerged in this study, both California and New York are at the forefront of the problem-solving court movement – experiences and policy challenges in these states are not necessarily representative of those faced by problem-solving court judges nationwide. Thus a national study might explore the experiences and perspectives of problem-solving court judges in other states.

An additional avenue of research might focus on general calendar judges. Focus group participants argued that promoting problem solving more broadly depends on the participation of judges without experience in specialized problem-solving courts. There appeared to be an assumption that many general bench judges are unreceptive to problem-solving principles and that even those receptive are uninformed; but the extent to which these perceptions are accurate remains an empirical question. A survey of judges without experience in specialized problem-solving courts could provide answers to key questions concerning general bench judges' knowledge, attitudes and practices related to problem solving. It could also assess judges' openness to change (e.g., willingness to attend trainings or accept a specialized problem-solving court assignment). Such research would provide court managers and others with a fuller understanding of the judicial landscape, helping to inform their decisions about how problem-solving practice might be most effectively promoted, and the extent to which it ought to be promoted in the first place.

Problem-solving courts are created through cooperation of multiple agencies including probation, prosecutors, defense attorneys, law enforcement and treatment providers. Taking these courts to scale can be accomplished only with the commit-

ment of all justice system partners. While the project explores strategies and techniques that the courts can employ to bring these innovative principles and practices into the mainstream, it should be recognized that the success of these strategies depends on support from throughout the criminal justice and treatment systems.

Endnotes

¹ In California, these projects are referred to as “collaborative justice courts,” while in New York and other states they are referred to as “problem-solving courts.” Throughout this report, we use the more prevalent “problem-solving” terminology. See, e.g., American Bar Association 2003; Berman and Feinblatt 2001; and NADCP 1997 for more about key problem-solving court elements.

² Although it is premature to offer a definitive assessment of the newer problem-solving court models, a consensus has recently emerged regarding the efficacy of adult drug courts. David Wilson and colleagues (2003) reported that 37 of 42 completed studies found lower recidivism rates among drug court participants than comparison groups composed of otherwise similar non-participating defendants. A well-regarded study of the Baltimore City Treatment Court, which used a research design where defendants were randomly assigned either to the drug court or conventional case processing, found recidivism significantly lower for drug court participants over both two- and three-year tracking periods (see Gottfredson, Najaka and Kearley 2003; and Gottfredson, Kearley, Najaka, and Rocha 2003). And a study of six New York State drug courts also reported recidivism reductions extending to three years after the initial arrest across all sites, although the exact significance and magnitude of the reductions varied across the six sites (Rempel, Fox-Kralstein, Cissner, Cohen, Labriola, Farole, Bader, and Magnani 2003). Such evidence recently led Goldkamp (2003) and Harrell (2003) to concur that the evaluation literature now offers clear support for the effectiveness of adult drug courts in reducing recidivism.

³ Therapeutic jurisprudence may generally be defined as a normative legal theory regarding the potential for law to contribute to therapeutic outcomes. Many of the scholars and practitioners associated with this school of thought support efforts to expand the healing capacity of judicial processes (for offenders, victims, communities, and others), in addition to achieving appropriate legal outcomes.

⁴ This part of the focus group protocol was designed primarily as a warm-up period. The findings are not presented here but are included in the complete project report (Farole, Puffett, Rempel, and Byrne 2004).

⁵ Sanctions and rewards, although often identified as a unique and critical element of most problem-solving court models (e.g., NADCP 1997), did not emerge as a prominent topic in the focus groups.

⁶ In November 2000, California voters passed Proposition 36, the Substance Abuse and Crime Prevention Act, which mandated treatment in lieu of incarceration for non-violent drug offenders. As a result of the act, many counties established special-

ized drug court-like calendars. These specialized courts serve to centralize and streamline the processing of eligible cases and to monitor defendants agreeing to enter treatment. Each of California's fifty-eight counties has its own specific list of eligible charges, case processing methods, and programmatic features (Longshore, Evans, Urada, Teruya, Hardy, Hser, Prendergast and Ettner 2003).

Works Cited

- Abrahamson, Shirley S. 2000. "The Appeal of Therapeutic Jurisprudence." 24 *Seattle Law Review* 228.
- American Bar Association. 2003. *Problem Solving Courts*. American Bar Association, Coalition for Justice: 2003.
- Babb, Barbara. 1998. "Fashioning an Interdisciplinary Framework for Court Reform in Family Law: A Blueprint to Construct a Unified Family Court." 71 *Southern California Law Review* 469.
- Bamberger, Phylis Skloot. 2003. "Special Series: Problem Solving Courts and Therapeutic Jurisprudence: Specialized Courts: Not a Cure-All." 30 *Fordham Urban Law Journal* 1091.
- Becker, Daniel J. and Maura D. Corrigan. 2002. "Moving Problem solving courts into the Mainstream: A Report Card from the CCJ-COSCA Problem solving courts Committee." *Court Review*, Spring 2002, p.4.
- Berman, Greg. 2004. "The Hardest Sell?: Problem-Solving Justice and the Challenges of Statewide Implementation." Center for Court Innovation. May 2004.
- Berman, Greg and John Feinblatt. 2001. "Problem Solving Courts: A Primer." 23 *Law and Policy*.
- Casey, Pamela & David B. Rottman. 2003. "Problem solving courts: Models, Commonalities, and Trends. The View from the United States." Prepared for Problem solving courts: An International Perspective, Psychology and Law International, Interdisciplinary Conference, Pre-Conference Workshop. July 8, 2003, Edinburgh, Scotland.
- Casey, Pamela & David B. Rottman. 2000. "Therapeutic Jurisprudence in the Courts." 18 *Behavioral Science and the Law* 445.
- Chase, Deborah and Peggy Fulton Hora. 2000. "The Implications of Therapeutic Jurisprudence for Judicial Satisfaction." *Court Review* Spring 2000, p12.
- Domitrovich, Stephanie. 1998. "Utilizing an Effective Economic Approach to Family Court: A Proposal for a Statutory Unified Family Court in Pennsylvania." 37 *Duquesne Law Review* 1.
- Farole, Donald J., Nora Puffett, Michael Rempel, and Francine Byrne. 2004. *Opportunities and Barriers to the Practice of Collaborative Justice in Conventional Courts*. California Administrative Office of the Courts.
- Feinblatt, John, Greg Berman and Aubrey Fox. 2000. "Institutionalizing Innovation: The New York Drug Court Story." 28 *Fordham Urban Law Journal* 277.
- Fox, Aubrey and Greg Berman. 2002. "Going to Scale: A Conversation About the Future of Drug Courts." *Court Review* Fall 2002, p. 4.
- Fox, Aubrey and Robert V. Wolf. 2004. "The Future of Drug Courts: How States

are Mainstreaming the Drug Court Model.” Center for Court Innovation. May 2004.

Gilbert, Janet, Richard Grimm, and John Parnham. 2001. “Applying Therapeutic Principles to a Family-Focused Juvenile Justice Model (Delinquency).” 52 *Alabama Law Review* 1153.

Goldkamp, J. 2003. “The Impact of Drug Courts.” *Criminology and Public Policy* 2(2) 197-206.

Gottfredson, Denise C., Stacey S. Najka, and Brook Kearley. 2003. “Effectiveness of Drug Treatment Courts: Evidence from a Randomized Trial.” *Criminology and Public Policy* 2(2):171-196.

Gottfredson, Denise C., Brook Kearley, Stacey S. Najka, and C. Rocha. 2003. “Baltimore City Drug Treatment Court: Evaluation of Client Self-Reports at Three-Year Follow-Up.” Draft M.S.

Hanson, Roger. 2002. “The Changing Role of a Judge and its Implications.” 38 *Court Review* 10.

Harrell, A. 2003. “Judging Drug Courts: Balancing the Evidence.” *Criminology and Public Policy* 2(2) 207-212.

Leben, Steve. 2000. “Thoughts on Some Potential Appellate and Trial Court Applications of Therapeutic Jurisprudence.” 24 *Seattle Law Review* 467.

Longshore, Douglas, Elizabeth Evans, Darren Urada, Cheryl Teruya, Mary Hardy, Yih-Ing Hser, Michael Prendergast, and Susan Ettner. 2003. Evaluation of the Substance Abuse and Crime Prevention Act of 2002 Report: Implementation: July 1, 2001 to June 30, 2002. UCLA. Report prepared for the Department of Alcohol and Drug Programs California Health and Human Services Agency.

NADCP (National Association of Drug Court Professionals). 1997. *Defining Drug Courts: The Key Components*. Drug Court Standards Committee: January 1997.

Rempel, M., D. Fox-Kralstein, A. Cissner, R. Cohen, M. Labriola, D. Farole, A. Bader, and M. Magnani. 2003. *The New York State Adult Drug Court Evaluation: Policies, Participants, and Impacts*. New York, N.Y.: Center for Court Innovation.

Rottman, David. B. 2000. “Does Effective Therapeutic Jurisprudence Require Specialized Courts (and Do Specialized Courts Imply Specialist Judges)?” 37 *Court Review* 22.

Schma, William. 2000. “Judging for the New Millennium.” 37 *Court Review* 4.

Stempel, Jeffrey W. 1995. “Two Cheers for Specialization.” 61 *Brooklyn Law Review* 67.

Tashiro, Susan, Victoria Cashman, and Barry Mahoney, with Ed Brekke, Caroline Cooper, Mary Durkin and Mack Jenkins. 2002. *Institutionalizing Drug Courts: A Focus Group Meeting Report*. Justice Management Institute Report submitted to the US Department of Justice, Office of Justice Programs (OJP Grant 1998-DC-VX-0118). Report summary available at <http://www.ncjrs.org/html/bja/idc/intro.html> (last visited October 13, 2003).

Wexler, David B. 2001. “Robes and Rehabilitation: How Judges Can Help Offenders Make Good.” 38 *Court Review* 18.

Wexler, David B. 2000. “Just Some Juvenile Thinking about Delinquent Behavior:

A Therapeutic Jurisprudence Approach to Relapse Prevention Planning and Youth Advisory Juries.” 69 University of Missouri-Kansas City Law Review 93.

Wexler, David B. 1993. “Therapeutic Jurisprudence and the Criminal Courts.” 35 William & Mary Law Review 279.

Wilson, D.B., O. Mitchell, and D.L. MacKenzie. 2003. “A Systematic Review of Drug Court Effects on Recidivism.” Draft M.S.

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Center for Court Innovation

520 Eighth Avenue, 18th Floor
New York, New York 10018
212 397 3050 Fax 212 397 0985
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