Position Paper on Problem-Solving Courts*

Conference of State Court Administrators

August 1999

* When originally published, the white paper was entitled *Position Paper on Therapeutic Courts*. As terminology has changed in recent years and the term "problem-solving courts" is widely used in relation to the type of courts described in this paper, the title page of this document has been changed to assist readers. Readers should substitute "problem-solving courts" for "therapeutic courts" as the paper is read.

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The Conference of State Court Administrators (COSCA) was organized in 1953 and is composed of the principal court administrative officer in each of the fifty states, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, and the Territories of American Samoa, Guam, and the Virgin Islands.

POSITION PAPER ON THERAPEUTIC COURTS

Note: The paper which follows was prepared by the Policy Committee of the Conference of State Court Administrators (COSCA) for presentation at that organization's Business Meeting on August 5, 1999, in Williamsburg, Virginia. The purpose of the paper was to generate discussion and debate, preparatory to the membership being asked to take a policy position on "therapeutic justice". The paper was written in a deliberately provocative manner in order to generate debate. The paper itself was not adopted by the membership; rather, it was a vehicle used by the membership to better understand the issues and the implications of taking various policy positions.

Appended to this paper are the formal motions adopted by the membership at the August 5, 1999 COSCA Business Meeting.

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I. Introduction and Definitions

Recent years have seen exponential growth of "specialty courts" and other approaches that place the court system in a non-traditional role - that of a participant in the therapeutic processes imposed on defendants and others. Drug courts, mental health courts, domestic violence courts, tobacco courts, and some forms of family courts have all gained popular favor because of their success, as compared to traditional court processes, at resolving chronic underlying causes of criminal or other inappropriate behavior. These approaches come under the general scheme of "therapeutic justice."

Therapeutic justice, as used in this paper, refers to court interventions that focus on chronic behaviors of criminal defendants, usually imposed over a period of time, in conjunction with some sort of treatment. Generally the model involves a single judge devoted to a class of cases, using pending or impending sanctions to compel compliance with treatment over a long period of time. While specialty courts are the most tangible manifestation of therapeutic justice, it is the concept of using judges and the judicial system as therapeutic agents that is the focus of this paper.

The traditional role of courts and judges is to provide a fair process for those with a dispute or criminal charge. The process usually involves an adversarial forum, moderated by an impartial judge, according to agreed upon rules and procedures. Particularly in criminal and quasi-criminal matters the focus of the process is on the facts and law presented relative to the specific charge, and great effort is spent to ensure that prior conduct and propensity of the defendant is kept from the fact finder. The pertinent goal, from the perspective of the court, is a fair process. Under a therapeutic justice model, however, the process and the rules may be regarded as secondary, and what is preeminent is the whole defendant, the provision of some sort of treatment, and the outcome of that treatment. While a traditional criminal proceeding focuses on past behavior and its consequences, a therapeutic justice proceeding is directed at immediate and future behavior.

When compared to traditional processes and outcomes, the results of these therapeutic justice programs have been overwhelmingly positive. Of course the relative success of the two processes depends on the definition of success. From a public, legislative and political perspective, success is defined as ending the criminal behavior, and therapeutic justice efforts frequently do. From a judicial system perspective, success has always meant that the *process* was fair.

Given these different expectations, it is not surprising that the public and politicians have gravitated towards therapeutic justice as an alternative to traditional court. In fact, in some instances therapeutic justice initiatives have been foisted on the courts, out of a frustration with the perceived ineffectiveness of the criminal justice system to deal with basic societal problems. Executive branch agencies, legislators, local governments and special interest groups have placed these programs, along with money or the promise of money, on the courthouse steps, and courts have had little practical choice but to adopt them. Regardless of the courts' view of their constitutional role, they are expected to be a part of the solution when a solution is presented. As society's expectations of courts change, or at least become more explicit, courts can either dogmatically continue to declare their traditional role, or they can change their objectives to conform to those of society, and then market that change.

The response of the courts to this widening gulf between public/political expectations of the judicial process and the expectations of the judiciary is critical to winning the public's trust and confidence. As innovations like treatment courts gain public notoriety and support, court systems that drag their feet in adopting these innovations appear more and more out of step with public sentiment, and judges and courts look increasingly out of touch and bureaucratic.

II. Advantages

But beyond political and public relations concerns, there are sound practical and policy reasons for courts to actively lead the establishment of processes that utilize the principles of therapeutic justice. First among these is that there is good reason to believe they work, particularly drug courts, where we have the most experience. The ongoing empirical results of the hundreds of studies of drug courts, as an example, are that recidivism rates among drug court graduates conservatively average out to about 10%. Drug courts also save money as compared to the costs of incarceration, free jail beds, reduce the number of drug exposed infants and children (thus avoiding medical costs), and they successfully treat thousands of substance abusing individuals each year. Other types of treatment courts have similar outcomes that result in tangible savings for the system as a whole, and other long term successes for individuals. While these are outcomes that are not traditionally owned by courts, they should be.

The second advantage to therapeutic justice programs is that they require and promote collaboration among a number of entities. Treatment providers, local governments, law enforcement, prosecution, defense counsel, private counsel, multiple state agencies and the courts are all generally required to communicate and cooperate in order to run one of these programs. This process of collaboration transcends the

individual project and develops good will and institutional relationships that benefit the courts in subtle and not so subtle ways for years to come.

The third direct benefit of these efforts is that defendants are held accountable. Whether it is a drug addict, a mental health patient, an abusive parent or cohabitant, or a teen smoker, the system demands respect and gets compliance. The treatment may or may not ultimately be successful, but the participant complies with the orders of the court, or they face swift consequences - frequently a sentence for an already entered guilty plea. This is one goal where the courts and the public are on the same page, but one where there is rarely agreement that the goal has been attained.

The fourth advantage to promoting therapeutic justice programs is the tremendous public relations benefit. Successful outcomes sell a lot better than sound process. Being able to tell these amazing stories of personal triumph over adversity, stories of caring and dedicated judges, and stories of firm but compassionate programs, all in the context of public safety, go a long way toward developing public trust and confidence in the judiciary. The resulting atmosphere of success and satisfaction without the grind of the adversarial process rejuvenates judges and energizes staff. These stories also provide one of the few opportunities the judiciary has to instigate positive media coverage and to tell "good news."

III. Disadvantages

While the public, politicians and advocates focus on these advantages to therapeutic justice initiatives, there are also disadvantages from the perspective of the courts. The first is the potential impact on judicial neutrality. When a court system steps away from its traditional role of providing a process for dispute resolution and becomes a service provider intent on a specific outcome for those over whom it exercises control, the "separateness" frequently claimed by the judiciary is harder to justify. When the judge becomes a part, if not the focus, of a treatment team, the objectivity of the court can be questioned. And when the outcome of the treatment becomes the court's goal, the court has to then assume some accountability for the effectiveness of the program. When judicial systems assume accountability for social programs, judicial independence is eroded, and the line between the branch that interprets the laws and the one that implements the laws is blurred. As a judge acts as part of a treatment team, that judge sits as an equal member of a work group exercising traditionally core executive branch functions, and the accountability, criticism and political and administrative oversight of that function is hard to avoid.

The second concern about judges serving in these non-traditional roles is that rules and expectations about judicial conduct haven't in the past taken into account this therapeutic role. As the objectivity of the system can be called into question, so too can

that of the judge. Among other things, the Code of Judicial Conduct requires judges to avoid the appearance of bias, and to deter ex parte communications. Yet when the judge is a part of a therapeutic team, frequently cast in the role of the enforcer of treatment's decisions, bias may be inferred. In treatment courts, defendants step into a machine where they may be the only interchangeable part, and to view the judge as "one of them" rather than as a neutral arbiter is understandable. Likewise, ex parte communications are commonplace. Judges may talk with defendants without counsel present, and treatment discussions and decisions about the defendant can occur with only one side or neither side there, with or without the defendant.

At a recent national drug court conference, drug court judges opined that all of them present arguably violated ethical rules on an almost daily basis - they have to in order to make a treatment court work. To institutionally put judges in this position should be a cause for concern.

The third disadvantage to therapeutic justice approaches is the strain they put on basic court organization, administration and on court resources. Though most courts are organized into broad departments, or even smaller divisions, a general principal of therapeutic justice is one judge one court. While there are exceptions, the idea is that the same judge needs to see the same participants repeatedly in order for consistent treatment and rapport to result. How this specialized assignment fits into the general scheme of case assignment and judicial rotation can be problematic, although not insurmountable. Philosophically, these trends toward specialization and splintering of court processes are contrary to the prevailing movement of the last several decades of court unification. The generalist judge, and the efficiencies and flexibility of a unified, single level trial court can quickly go by the wayside if specialty courts become more than an anomaly.

But perhaps the larger issue is the toll these programs take on court resources. Obviously it takes more judge and clerk time to see a defendant 15 or 20 times over the course of a year or more than it does for a judge to take a plea and sentence someone. Only the longest of trials is going to consume as much court time as the multiple hearings involved in a course of treatment in a treatment court. This additional workload affects not only the treatment court judge and the court clerk or clerks, but also other judges and clerks in the judicial district that have to make up the difference.

These resource demands put the court system in the position of having to solicit resources for the judiciary to do work that is not generally considered a core judicial function, yet few court systems would argue that their core responsibilities are adequately funded. Some courts have also chosen to directly provide many of the treatment services, and employ case managers and treatment professionals. Frequently the money available to procure these resources is grant money, so courts start programs on the grant money and

then scramble to find permanent funding after the programs have been in existence for a period of time and built constituencies and expectations.

IV. Recommendations

Despite all of these concerns, it is clear that the upside to supporting therapeutic justice initiatives is still greater than the downside, so long as courts are willing to drive the train rather than just ride along. Therefore, the recommendations are:

1. Courts should assume administrative leadership in developing, implementing and evaluating therapeutic justice programs. Rather than letting external entities define the programs, the goals, and the judiciary's role, judicial administrators should assert the courts' centrality to these processes and shape the progression of these initiatives.

2. Each judicial system should choose a level of programmatic and fiscal participation in therapeutic justice initiatives that makes sense for that system. Courts can be full partners in a therapeutic justice effort and still maintain degrees of independence. For example, by choosing to pass through funds to the service providers or contract with those providers rather than taking on the service delivery role, the court function looks more like a traditional adjudicative model, and the responsibility for the efficacy of the program as a whole is diffused. In some settings controlling the money and providing the services may be the only way to be at the head of the table, but the judicial independence concerns are greater then. The greater the extent to which courts can ask legislatures for traditional resources like judges and clerks rather than treatment beds and money for urinalysis, the more resource flexibility the court will have now and in the future.

3. COSCA and or CCJ should create a study group with appropriate organizations to recommend changes to the model Code of Judicial Conduct to allow for appropriate participation by judges in these unique settings.

4. COSCA and CCJ should formalize and institutionalize the therapeutic justice role for the judiciary by seeking membership on appropriate national forums. As treatment courts in particular gain in prominence, governing entities are emerging to steer their development, frequently without much representation from COSCA, CCJ or their members. For example, there is now a National Association of Drug Court Professionals, as well as a federally funded Congress of State Drug Court Associations. Adequate

representation of the unique interests of the judiciary should not be left to happenstance.

V. Alternatives

As an alternative to adopting some or all of these recommendations, courts could just stay the course and see what develops. Some jurisdictions would continue to actively pursue therapeutic justice alternatives, some would be merely facilitative, and most would wait for some other part of the community to make proposals and then respond as they came. Programs would grow at their own pace, as appropriate for each individual jurisdiction, with control of that growth primarily left to others.

A second alternative would be to retreat, to take "justice" out of therapeutic justice, and insist on a traditional role. Therapeutic interventions would be left to therapists, to administrative processes and to the executive branch. Courts would be left to focus on fairness and process, rather than on individual outcomes and the accountability that comes with it.

VI. Conclusion

The human and political success of therapeutic justice programs is too great to ignore. Being perceived as hiding behind judicial independence and administrative concerns make courts look less responsive to communities and their concerns than ever. But if a court system leads out on the design and implementation of these programs, then a balance can be struck, where the courts are responsive to changing times and changing expectations, but not at the cost of their fundamental roles and responsibilities.

ADDENDUM I

MOTIONS ADOPTED AT COSCA BUSINESS MEETING AUGUST 5, 1999, WILLIAMSBURG, VA

1. State courts should assume administrative leadership in court programs which seek to address and solve the underlying causes of disputes brought before the courts.

2. Each Judicial System should determine a level of programmatic and fiscal participation in therapeutic court initiatives that is appropriate to that system.

3. COSCA and CCJ should create a study group with the American Bar Association and other organizations deemed appropriate, in order to examine the Code of Judicial Conduct in light of the development of these courts for the purpose of clarifying questions of judicial behavior.

4. COSCA and CCJ should seek membership on all appropriate national forums addressing issues relating to therapeutic courts, and establish clear lines of communication with federal agencies.

5. The Presidents of COSCA and CCJ should form a task force and invite the presidents of appropriate organizations to nominate representatives to address and to advance strategies, policies, and recommendations on the future of therapeutic courts to their respective conferences.

ADDENDUM II

DISCUSSION POINTS

Following are some of the points on Therapeutic Justice raised during the discussion by the members during the August 5, 1999 COSCA Business Meeting

- Ø The origin of these courts varies from state to state, with the judiciary or individual judges taking the initiative in some states, while in others the impetus is coming from outside the courts with courts coming along as reluctant partners. Where court systems are being brought along, they are not likely playing much of a role in shaping such programs.

- Ø Where executive and legislative initiatives are leading to the establishment of the courts, there may be an agenda to make the courts more of a social service type agency at the expense of the courts traditional role.

- Ø The title "Therapeutic Court" is problematic and may send an unintended message. Alternatives should be considered.

- Ø Should a policy position on this topic be made only if it is in concert with the Conference of Chief Justices and the court administrators and chief justices are in agreement? Should COSCA lead out on an issue where there may be disagreement with individual chief justices?

- Ø Should unanimity be required in order for COSCA to take a position on such an issue? To only take positions when there is unanimous agreement may result in abdicating to other organizations on issues of importance to courts.

- Ø Taking more ownership in therapeutic courts may result in courts also taking on more responsibility for outcomes and the "quality" of justice being dispensed. A call for judicial accountability for these outcomes will likely emerge.

- Do we know enough about how these courts are actually working to declare them a success? What about the application of this model for actions other than drug cases. Is there enough experience to endorse this model for other case types?

- Isn't there a high level of judicial burnout for these courts and can they be sustained when those who have lead out can no longer continue?

- Are we abandoning the institutional trend of the last several decades of less specialization, more unification, and generalist judges? Are therapeutic courts at odds with this trend and, if so, what are the long term implications if we move these types of courts from the periphery to the mainstream?