



**What does it
mean to be a good
lawyer?**

Prosecutors, defenders and problem-solving courts

An edited transcript
of a discussion among a judge,
attorneys,
a court administrator,
and academics.

Edited by John Feinblatt and Derek Denckla

Introduction

In recent years, lawyers throughout the criminal justice system have been challenged to re-think their roles as well as the nature of advocacy itself. One of the principal forces driving this reconsideration has been the emergence of “problem-solving courts”—experimental courts that are testing new solutions to persistent problems such as drug addiction, domestic violence and neighborhood

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disorder.

Problem-solving courts—which include drug courts, domestic violence courts, mental health courts, community courts, and others—encourage prosecutors and defenders to think in new ways about the problems that are fueling their caseloads. In particular, they ask these lawyers to get involved in changing the behavior of offenders and ensuring the fu-

ture well-being of communities. This is a significant departure from business as usual. Advocates of problem-solving courts have argued that the standard adjudicatory process is not always well-suited to deal with multi-dimensional problems like drug addiction, domestic violence, and mental illness. They have also argued state courts often do not produce case dispositions of lasting benefit to victims, to communities, or to the offenders themselves.

This critique has helped stimulate the rapid proliferation of problem-solving courts. Today, there are several hundred problem-solving courts in operation around the country, with the prospect of hundreds more opening their doors in the years ahead. This wave of experimentation and innovation raises some important questions for prosecutors and defenders. In what ways do problem-solving courts depart from the standard adversarial system? What impact, if any, does the rapidly changing landscape have on defenders’ ethical obligations? Do problem-solving courts shift the balance of power in the courtroom? Do the new

procedures that are being tested in problem-solving courts impinge upon due process protections? And is there a need for new standards of effective lawyering at problem-solving courts?

These are just a few of the questions that are being examined by the U.S. Department of Justice’s Office of Justice Programs, the Open Society Institute, and the Center for Court Innovation as part of a two-year exploration of problem-solving justice. The centerpiece of this investigation has been a series of roundtable conversations with leading judges, lawyers, academics and court administrators from around the country. The first such discussion, held in December 1999, was dedicated to the role of the judge in problem-solving courts. In that discussion, participants discussed the growth of problem-solving courts, identifying a variety of driving forces behind the movement, including the failures of other government efforts to solve problems like addiction, mental illness, and quality-of-life crimes. But mostly they pointed to increasing frustration—both among

the public and among system players—with traditional case processing and case outcomes. (See “What is a Traditional Judge Anyway?: Problem Solving in the State Courts,” *Judicature* (September/October 2000)).

What follows is an edited transcript from a second roundtable discussion about problem-solving courts held in March 2000 in Washington, D.C. This conversation, which included prosecutors and defense attorneys as well as a judge, a court administrator and various academics, focused on the role of advocates in problem-solving courts.

Moderator

Francis X. Hartmann, Executive Director, Program in Criminal Justice Policy, John F. Kennedy School of Government, Harvard University

Participants

Robert C. Boruchowitz, Director, The Defender Association, Seattle, Washington

Cait Clarke, Lecturer, Harvard University, Kennedy School of Government

Ronald Earle, District Attorney, Travis County, Texas

Douglas F. Gansler, State’s Attorney, Montgomery County, Maryland

Elizabeth Glazer, Chief, Crime Control Strategies, United States Attorney, Southern District of New York

John Goldkamp, President, Crime and Justice Research Institute and Professor, Temple University

John Greacen, Director, Administrative Office of the Courts of New Mexico

Hon. Judy Harris Kluger, Administrative Judge, New York City Criminal Court

Cliff Keenan, Counsel on Community Prosecution, Office of Justice Programs, U.S. Department of Justice

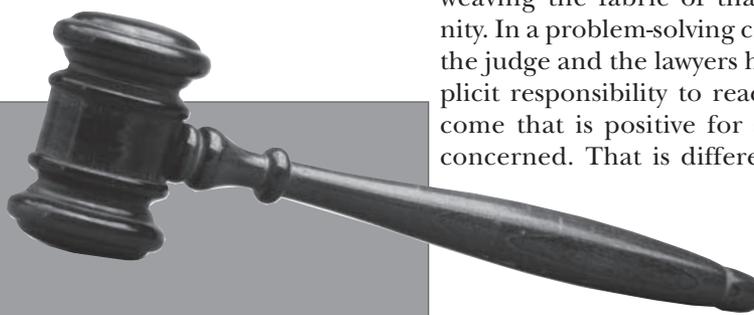
Esther Lardent, President, Pro Bono Institute, Georgetown University Law Center

Effective lawyering

Francis X. Hartmann: I’d like to start by developing some context for our discussion of the role of lawyers in problem-solving courts. So let’s kick off with the question: What does it mean to be a good lawyer, an effective lawyer, in the criminal justice system?

Ronald Earle: Effective advocacy depends on who the client is. Who is the client of the defense lawyer? Well, first, it’s the individual accused. But I suggest that the defense lawyer has a second client and that is the commu-

nity. The community has an interest in maintaining individual freedom and, therefore, the defense lawyer has an interest in the community. The prosecutor represents, of course, the victim, but also represents the community’s interest in public order. It seems to me that what both the prosecutor and the defense lawyer have in common is the community. So one way that problem-solving courts enhance effective advocacy is by bringing the community into the court, making the community a part of the process, and reweaving the fabric of that community. In a problem-solving courtroom, the judge and the lawyers have an explicit responsibility to reach an outcome that is positive for everybody concerned. That is different than a



regular win-lose courtroom. So we are looking at an evolution toward—and I hesitate to use this phrase—a kind of win-win law. It seems to me that the goal of each case in a problem-solving court is to achieve a win-win outcome for everybody—the defender, the community and the victim, if there is one.

Hartmann: That’s a very broad definition of advocacy. From a defender’s point of view, what is effective lawyering?

Jo-Ann Wallace: In my view, effective advocacy meant that I was successful at making the system treat my client fairly and with dignity. I think that, broadly speaking, defense attorneys serve the community, but the community is not their client. In fact, in many instances you could not represent the community and your client, because you would have a conflict of interest under the rules of ethics. At the end of the day, I think that attorneys serve the community when they’re zealously advocating for their client.

John Stuart: What I would like to see come out of the lawyering that I do is better life outcomes for my clients. My role is to give people free-

dom from destructive justice. As I do that work, I also have a lot of hope for these clients. I'm hoping that somehow they will come out of this spell of trouble that they are in and that their best self will emerge, that they will use this freedom to come back into a community and make better choices.

James R. Neuhard: Is there a way for a defender to really address the problems in their client's lives rather than just continuing in the role as a defensive shield? I'm not sure I can find the way through that thicket, but it is certainly something I yearn for. Now, that is not a traditional role for a defense lawyer. The traditional measure of success for a defense lawyer is seeking the least government-imposed restrictions on your clients' freedom.

Hartmann: I'm hearing a theme of "yearning," a yearning to be able to carry through on a broader vision beyond just getting the client off in a particular case. Is this yearning shared by the rest of you?

Kim Taylor-Thompson: I take issue with the notion that defense lawyers should have a "yearning" to do more than get their clients out of the system. When I get my client's case dismissed, charges reduced or sentence shortened, my yearning is satisfied. If the client needs or wants treatment, they should be able to gain access to it outside of the coercive atmosphere of a criminal proceeding.

Michele Maxian: I think that an attorney is effective when they effectuate the wishes—the counseled wishes—of their client. I believe in better life outcomes for my clients, but I want to know who defines what the better life outcome for my client should be. I accord the client the dignity to tell me that herself.

Douglas F. Gansler: I'm not sure about this broader vision for either prosecutors or defenders. A defense lawyer's job is really to keep innocent people out of jail in order to main-

tain the public's confidence in the integrity of the system as a truth-finding institution. And what do prosecutors do? We put bad guys in jail. And we reduce crime. That's the goal of the whole system.

Patrick McGrath: I think it's fair to say there's a sense of yearning out there. If you grab a judge, a defense attorney and prosecutor and sat them down together and bought them a round of drinks, after a few beers, they'll all complain about the same thing: "I have all this education and what do I do? I work on an assem-

"winning" is narrowly defined as an individual case—you are successful. How do we change that culture within district attorneys' offices, within public defenders' offices and within courts?

Elizabeth Glazer: I think that is the \$64,000 question: How do we change the culture? I would sort of rephrase it as: How do you change the incentives or change the goals?

I think if you were to ask most prosecutors what their goals are, they would say: "My job is to put bad guys away." That goal is endorsed by our education and by our culture which ratifies the case as the most important unit of success. Every prosecutor has in his mind—and maybe every defense lawyer, too—standing on the courthouse steps and announcing their victory in the John Gotti case, or their vindication of whomever the client is. That unit of success, I think, turns us into technicians, because that means that we simply process cases. If you

“The traditional measure of success for a defense lawyer is seeking the least government-imposed restrictions on your client's freedom”

—James R. Neuhard

bly line. I don't affect case outcomes." I think in a lot of ways problem-solving courts are addressing all of our yearning to do more than just process cases.

Cait Clarke: The defense bar's yearning is for more resources—including both funding and human resources, like social workers—not necessarily more problem-solving courts.

Anthony Thompson: Resources are an important part of the story. Most urban lawyers can't concern themselves with what's best for their clients when they carry an active caseload of 500. It's just not possible. Public defenders may yearn for better life outcomes for their clients, but I have yet to see defenders promoted for seeking these outcomes. I spent a decade as a public defender and I've spent the last few years training student prosecutors in New York City. I can tell you in both settings we have a culture that says, if you win—and

were to change the goal slightly and say, "Well, I think the goal is to reduce crime," that completely changes both the methods that you use, the partners you choose, and every single aspect of what you do. I think that lawyers are particularly well-placed—but not very well-trained—to be part of this new way of approaching problems.

Coercion and paternalism

Hartmann: Is there something about the structure of problem-solving courts that is more coercive than traditional court?

Taylor-Thompson: If we're talking about a problem-solving court that seeks to address defendants' issues pre-plea, then defenders become very concerned about excessive coercion. It becomes an impossibly difficult either/or question—either you access treatment or you face trial. Worse still, you can opt to protect

your constitutional rights through a suppression motion and forego treatment or you can waive those rights and receive treatment. But, if you're talking about a court that offers defendants treatment or services pre-sentencing or post-plea, then we're in a very different situation. There is far less coercion.

Neuhard: I agree. A lot happens pre-conviction in problem-solving courts. More than in traditional criminal courts. I am concerned that what we are setting up is a wider net in the guise of help or treatment for our clients.

Hartmann: What is your fear about a "wider net?"

Neuhard: I fear that government will exert more control over my clients' lives. There's a real danger in widening the net so early in the game with so little time to make a decision about whether to opt-in or opt-out.

McGrath: Let's face it, in the traditional urban criminal justice system, defense lawyers don't have time to talk to their clients. You don't have time to investigate. You have completely coercive plea setups. You don't have time to do anything.

Hon. Judy Harris Kluger: As it currently stands, many defendants are being pressured to take dispositions that don't ultimately do anything to help them. If we are going to have to apply that kind of pressure, isn't it better that the pressure is in a life-changing direction—toward services and treatment that can make a difference?

Taylor-Thompson: It's not clear to me that we are pressuring defendants in a life-changing, positive direction. Problem-solving courts strike me as somewhat paternalistic in the way they pressure defendants to accept pre-ordained alternatives to incarceration. How are they making judgments about what the proper treatment modality should be for an individual? This is a complicated question. If we answer this question too quickly—without making the complex assessment about what works for each person—then I'm not sure we're building a better system.

Robert Weisberg: My sense is that

problem-solving courts place a great deal of faith in drug rehabilitation and other treatment programs—perhaps well deserved, perhaps not. It strikes me that those services exist on quite a continuum.

Judge Kluger: I don't think that problem-solving courts are paternalistic. Take drug courts. Throughout my career as a prosecutor and as a judge, all I heard from defense lawyers was: "This person needs drug treatment." So, I don't see why it's so difficult for a defendant to decide quickly to opt for drug treatment rather than go to jail.

Taylor-Thompson: The choice between jail and drug treatment is an obvious choice. But what about the decisions that are being made by the judge once the defendant opts for treatment? I'm worried about the paternalism of these decisions.

Weisberg: I think the issue of coercion may arise when defendants are forced to decide whether to proceed in a problem-solving court, but at least the structure is designed to force defendants to confront difficult life choices.

Wallace: Rehabilitation as a rationale for punishment will always be paternalistic to some degree. The danger lies in problem-solving courts' overstepping—basing sentencing decisions on the court's interpretations of social science research.

Judge Kluger: That's where the defense attorney has to step in – to test the appropriateness of the treatment plan for their clients.

Clarke: Another danger that we should be talking about is that government accountability may be swept aside in order for defendants to access treatment. For instance, a defense lawyer may think: "I'm going to have to set aside that Fourth Amendment claim that I should take time to investigate because I only have 15 minutes to advise my client whether to take a plea that will get him into treatment."

Scott Newman: I don't think problem-solving courts require defendants to forfeit due process protections. If defendants want to exercise

due process rights in a problem-solving court, they can.

Judge Kluger: You have to be realistic. Problem-solving courts are not so different than any other kind of plea-bargaining court. Usually, you have until the next day to decide to take this plea or it's off the table.

Robert C. Boruchowitz: Now, that's a structural problem that you're carrying over to problem-solving courts. If high volume, urban courts are lousy generally, then why should we replicate that in problem-solving courts? If defendants need two weeks to investigate and make a decision, they should get two weeks.

Newman: Why can't defendants make this opt-in decision without the usual gamesmanship between lawyers? Your client is going to know right away whether he or she committed the crime or not and whether it makes sense to take advantage of treatment or not. Prosecutors are giving defendants the opportunity to go into treatment programs. And if the defendant is successful, there often won't be a conviction. In problem-solving courts, the criminal justice system is consciously shifting resources out of the process of adjudicating legal guilt and innocence and into treatment services because we don't want to spend so much time playing adversarial games if defendants are going to end up pleading guilty anyway.

Judge Kluger: This is all ground that might be reasonably covered during the planning stage of a problem-solving court. When these courts are starting, one of the things that all the parties should work out is: How much time is needed to give defendants an opportunity to make the most educated decision or to permit defense attorneys to advise defendants in the best way possible? It's in the planning stage where these timing issues can be addressed. Bring everyone to the table and hear what they have to say, and don't go forward without everybody's basic agreement.

John Goldkamp: I think it's interesting that we're getting stuck on these concerns about coercion when

the Seattle and Portland drug courts have already addressed those issues and devised an approach that has satisfied both prosecutors and defenders. These courts offer a two-week trial period where defendants can enter treatment in the drug court. You go into treatment immediately, except that you have a two-week period during which you can opt out. During this period, you have a right to investigate the strength of the evidence and decide whether to go to trial. So, you're not telling the best part of the story, which is there are localities—some of which are even represented here today—that have successfully negotiated these concerns about coercion without defeating the aims or attractiveness of treatment.

Zealous advocacy

Hartmann: What part of defenders' wariness about problem-solving courts comes from fears of altering their roles as zealous advocates?

Neuhard: The fear I have is losing the ability to say the emperor has no clothes. I think what I hear coming from the defense bar isn't that these problem-solving courts are a bad idea. I'm not opposed to the idea of having more alternatives for my clients. The thing I find regretful about problem-solving courts is that we have to somehow give up our traditional role in order to make problem-solving courts work effectively. My question about problem-solving courts is why do we have to change anything about what we do?

Weisberg: If defenders' ethical obligation is limited to "Protect your clients to the maximum extent possible from state coercion," then what's attractive about problem-solving courts and the alternatives they offer? When we talked about effective lawyering, we spoke about defense lawyers' also attaching ethical importance to improving their clients' lives. Then the question becomes: Are problem-solving courts a good means to fulfill that goal? Just as a little thought experiment, let's imagine state coercion did not exist. What would be the nature of your ethical obligation to your cli-

ent? What principles would guide you as you advised your client about the available alternatives to incarceration? Would you use your persuasive powers to the maximum extent possible to get your client into drug rehab, into the mental health system, or into other so-called service systems?

Taylor-Thompson: If you're asking whether I would advise somebody who has jumped a turnstile to go into the mental health system, as it now exists, then my answer would be a flat "No." If you ask whether I would put this person in a program that somebody has investigated, that targets this defendant's particular needs, and that gives this defendant a second chance if that type of treatment doesn't work, then I might have a different reaction.

Newman: I think defense lawyers want to be sure that whatever program their client is sent to has adequate resources and is sincere – not just window dressing – so that the client has a reasonable prospect of a positive outcome instead of being thrown back in jail.

Maxian: I'd like to respond to Professor Weisberg's question about using our persuasive powers. I never turn the full strength of my persuasive powers on my client. I don't for two reasons. First, I have no idea what is in my client's best interests—I'm a nice little white Midwestern girl living in New York City. Second, I believe in the dignity and individuality of my client. It isn't that I don't counsel them or that I don't share my views with them. But I don't lawyer them the same way I lawyer a judge or the same way I might lawyer a district attorney. This doesn't mean that my responsibility towards my clients does not extend beyond the courtroom or that I'm not concerned about their lives.

Cliff Keenan: I'm wondering: Is it the defense attorney's role in a problem-solving court to basically take on social work? During a break, I asked John Stuart: "What about the cases that aren't prosecuted, do you have an interest in that person's problems?" And, I think John's reply was

appropriate: "No, because they're no longer a client." When the attorney-client relationship begins, the lawyer assumes responsibility for that client's legal issues. What is the attorney's obligation, if any, to address the client's non-legal problems?

Glazer: It's dangerous to say: "This is what a social service does and this is what lawyers do." Social service and criminal justice are sort of two halves of the same coin. And if our overall goal is to reduce crime, it's our responsibility to deal with both sides.

Neuhard: Well, I think it is my responsibility to counsel clients on how to keep their life going on a path that will keep them out of prison or jail. You're not lawyering them—you're trying to communicate what's in their best interest for survival.

Wallace: In my mind, attempting to convince your client to take a treatment alternative does not relax the zealousness of your advocacy for that client—whether it takes place at the plea stage or at sentencing. I would use a standard of the client's "informed choice" to guide my ethical obligation. As a defense attorney, I'm trying to give clients as much information as possible. When the client makes an informed decision, I will then advocate for it, even if it is at odds with what I believe to be the client's best interest.

Thompson: I think you act as both attorney and as counselor for your client. You're saying to the client: "You have some options here." My understanding is that client counseling is consistent with client advocacy. You say to the client: "Look at these 20 prior convictions. Let's talk about whether or not this 90 days in jail is what you want to do or whether you want to do 180 days in drug treatment."

Neuhard: But if your client says, "A," can you go into court and say, "Not A" to the judge?

Thompson: There are no circumstances in which you're going to do that.

Judge Kluger: I think if you are being asked to do that, then someone is doing something very wrong. Your

client should never be in the position where he or she does not want to do something and the lawyer is saying the opposite. I think you should always be zealously representing your client in the best way you know how, but it can be done within the context of other options, like treatment.

Stuart: I worry about the effects of collaboration on zealous advocacy. In problem-solving courts, you often have the same prosecutor, the same defender, and the same judge all working together in the same court day after day. Usually, as an advocate, I can tell a certain prosecutor that there is something wrong with his case and then I might not see him again for a week. Or if a particular judge got mad at me because I was making several motions, it wouldn't matter because I would have eight different judges to go to afterwards. I'm concerned about the impact of telling the judge, the prosecutor, and the defender that they are all in this little boat together and they have to get along out there on the ocean. That, I think, could have a deleterious effect on the zealous advocacy of the defense attorney. We always have tried to avoid "horizontal representation," where the public defender is assigned to the courtroom rather than the client.

Judge Kluger: I think that's why it's important to have aggressive, very capable defense attorneys in problem-solving courts. Lawyers have to be trained that you don't stop being an advocate in problem-solving courts. I think the problem is that there isn't enough education or training of the lawyers who are working in these courts about how to do it a little bit differently, but not with less zeal and not with anything less than the client's best interest.

Maxian: I feel more like a patient advocate than like a lawyer in a problem-solving court. Most of the significant advocacy is done during the process of setting up the court. To be an effective advocate in a problem-solving court, defenders have to be closely involved in setting it up because so much depends on what

treatment is mandated and how it is monitored.

Taylor-Thompson: To advocate zealously in a problem-solving court, you need real, long-term training to figure out what kinds of treatment programs actually work, what are an individual's problems, and how to match that individual's problem to a particular program. Defense lawyers, prosecutors, and judges are currently not trained to do this.

Clarke: The training gap could be partly addressed through teaching negotiation skills to criminal lawyers. Lawyers in problem-solving courts are largely engaged in negotiation. But nobody is teaching criminal justice negotiation skills, not one program across the country.

Esther Lardent: Can public defenders and prosecutors really be effective lawyers in this kind of system? Do we really think judges are the right people to decide among various treatment modalities?

Glazer: My understanding of problem-solving courts is that it's not so much the lawyers or the judges that are making these kind of treatment decisions. Rather, the lawyers and judges are relying on trained social service professionals to advise them and tell them what it is that they are seeing in front of them.

Stuart: You don't need to have a specialty certificate to be a lawyer in a problem-solving court. Lawyering in these courts is plain old sentencing advocacy. For a long time before problem-solving courts existed, the defense attorney's function has been mostly limited to sentencing advocacy—minimizing the amount of punishment or government intrusion. It's a rare case that you get to argue that your client is not guilty and go to trial on the merits.

Hartmann: What about the role of the prosecutor?

Keenan: My view is that prosecutors, defense attorneys, probation officers and others all have a role to play in the criminal justice system. No one of us can solve the problems of a defendant, a victim or a community alone. We're all just pieces in a larger puzzle.

Gansler: I don't think that problem-solving courts require any less zealousness from the prosecutor. I do think that they call upon the prosecutor to become more accountable to a broader cross-section of the community. I represent the state and to some extent the victim. But I also represent the community. Now take domestic violence. The victim of today may be the offender tomorrow. So unless I take a broader view of what it is to be zealous, I'll lose an opportunity to reduce crime.

Newman: I'm a believer in zealously seeking retribution for serious crime and I can be very retributive in the area of murders and so on. But I think retribution is more moral if there are earlier opportunities in the person's involvement with the criminal justice system to make another choice—to appeal to that person's higher self. If you treat low-level offenders as a part of the community, if you treat them according to your aspirations for them, then it really makes a difference in reducing crime. So I'm willing to do things differently to get that result. For instance, as a prosecutor in drug court, I had to listen to medical experts and accept the fact that relapse is a normal part of recovery. That's a bitter pill to swallow for very rules-oriented prosecutors, but I had to take that leap.

Earle: In Austin, we brought the public into the process. We found ways to involve the community in almost every aspect of what our prosecutors office does—from setting enforcement priorities to entertaining solutions to gang violence. I think that has made me a better prosecutor not a worse one.

Measures of success

Hartmann: Are problem-solving courts achieving better outcomes for defendants and communities? How should we measure their success?

Judge Kluger: I think it's a difficult question to answer. Different problem-solving courts will have different measures of success. For instance, in drug courts it's clear that success means that a defendant finishes drug

treatment and his case is dismissed. That's not the same in a domestic violence court, where we might measure success by securing the victim's safety.

Hartmann: Is there a measure that cuts across all the different problem-solving models?

Judge Kluger: Maybe helping defendants avoid re-arrest is one common measure of success.

Neuhard: I think there are two measures: one of which is the community measure of what is happening with crime rates, recidivism, and quality of life. The second would be about the individual defendants themselves: a) Do they avoid criminal prosecution, going back to jail, getting real time? And b), have they done things in their lives that are important, like gotten clean, supported their family, insured that their child is not on welfare, not lost custody, not abused their children?

Hartmann: I just want to point out that Jim Neuhard has given us measures that are actually quite broad. I think we can agree, by and large, that traditional courts have failed to produce the outcomes that Jim describes.

Stuart: From my point of view, you can easily measure the success of problem-solving courts. The provision of treatment and services is spectacularly intelligent and cost-effective compared to the alternatives offered by the criminal justice system. For instance, you can take somebody who has a health problem and you can lock them up night and day for five years at a cost of something like \$30,000 a year. Or, you can put them in a treatment program for 26 weeks for a fraction of the cost and they will be able to take care of themselves at no taxpayer cost afterward.

Glazer: At the federal level, we get our resources based on the number of indictments that we do. That's the measure of our productivity. But that one number can't be everything. Maybe our resources should also be

pegged to performance—keeping crime rates low or reducing recidivism.

Boruchowitz: If, in fact, you can show those kinds of outcomes in problem-solving courts, then we should strive for those outcomes in the rest of the courts. While this approach may not apply to every single kind of offense and every single kind of offender, the general idea of strengthening different neighborhoods, trying to have alternatives, having enough resources, paying attention to the individual offender—

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require any less zealotry
from the prosecutor.”**

—Douglas Gansler

those are things in which we would want to invest and bring to the rest of the criminal justice system.

Doing it well

Hartmann: Could we walk through what it means to have a problem-solving court that is well done? I am especially interested in hearing from defense attorneys. Give us a vision of what that problem-solving court looks like or how that system is built.

Maxian: As I said before, you can't be an effective advocate in a problem-solving court unless you're very involved in setting up the system from the beginning. Defense lawyers would not object to problem-solving courts in which defendants have enough time to be properly and fully advised, they have a full opportunity to investigate their case to determine if they are factually and legally guilty, and they freely choose treatment that is effective and will change their lives.

I think defense lawyers' tentativeness arises from the fact that we don't see these features as inherent in this criminal justice system or in its few problem-solving courts.

Wallace: Doing it well means trying to achieve Jim Neuhard's measures of success. Doing it well means that we negotiate how we're going to achieve these beneficial outcomes while still retaining due process fairness. For instance, planners must build in reasonable time periods to make decisions. And decision making must take place in the least coercive environment possible. Doing it well means that there are treatments and services that work. And it requires the utmost fairness, meaning that you don't sanction someone for conduct that they didn't commit. Doing it well means that there are resources to have vigorous and zealous representation that continues beyond the first sentencing hearing and that can continue longer than representation in a traditional court case. And

doing it well means that there must not be ex parte communications with the defendant happening before the defender was really informed or before the defender had a chance to talk to the client.

Neuhard: Keeping the defense attorney involved beyond sentencing can make a profound difference in the life of a person coming before a problem-solving court.

Clarke: To add to the list of how a problem-solving court could be done well, I think we should include some form of opt-out provision to preserve the right to a jury.

Newman: As a prosecutor, I'm very uncomfortable with preserving all trial rights at all times because as time passes I am in a weaker position as to my case and my expenditure of resources. In a year, two months, or 24 months down the road, if we wind up back at square one on a little drug possession case, I may have a difficult

time presenting a strong case—memories are lost, evidence is lost. Why would I make so many resources available to this defendant to avoid the cost and ineffectiveness of the adversarial process only to land back in an adversarial posture six months later? It makes no sense. So, as attractive as that principle may be for defense attorneys, I would ask for some limitation on that one. Any given jurisdiction may agree to that principle, but I don't think it should be a requirement or an absolute prerequisite for all problem-solving courts to be done well.

John Greacen: As a court administrator, I want to raise an issue that is probably obvious to everyone here. Problem-solving courts are resource-intensive. To be done well, we must address the fact that we are providing more resources for a misdemeanor drug offense than we are for a non-capital murder offense or a rape offense. Most states can't afford to continue to do this—politically and fiscally—if problem-solving courts go to scale.

Lardent: To be done well, I would add that the judge ought to be a con- vener of different viewpoints rather than a social worker in black robes.

Clarke: I want to add another point. The backup time in jail or prison for failing treatment or community service at a problem-solving court should not be more severe than what you might get as a sentence in the traditional courts. So, a client facing a couple of weeks jail time for a conviction in a traditional court should not be facing a year in jail after failing to complete a sentence for community service or treatment.

Boruchowitz: I'd say that the reliance on incarceration as an alternative to incarceration is a real problem.

Stuart: Problem-solving courts have to reflect the legal marketplace. If I say to my client, "Look, there's these wonderful community meetings in which, over the course of eight evenings, you will begin to understand the impact of your crime on the community." Or, I can simply advocate for dismissal for time served

and you can go home. Needless to say, all my clients would choose dismissal and all the careful planning of that community meeting would be wasted.

Thompson: I think that problem-solving courts present an opportunity to address the concerns of communities neglected by traditional courts. We need judges going out into the community. As Ronnie Earle mentioned at the outset, we need to get the community into courts. When a problem-solving court is done well, it really departs from business as usual in meaningful ways. It gives the defendant the best shot at re-entering that community. And, it improves the community's confidence that the courts are being just and fair. If that's all problem-solving courts do, that's enough.

Going to scale

Hartmann: There are different ways for problem-solving courts to go to scale. One is to say: "Oh, let's just multiply problem-solving courts. Go from 26 to 52." Another way to think about going to scale is importing some of the values and operations from problem-solving courts into the court system as a whole. Or you could go to scale by using Jim Neuhard's measures of success in all courts.

Goldkamp: Going to scale might involve restoring some balance among judicial discretion, prosecutorial discretion, and legislative mandates. I think that, over time, problem-solving courts may come to be viewed as laboratories for the re-emergence of judicial discretion. Over the last couple of decades in the United States, most courts have had judicial discretion reined in by new penal law provisions passed by legislatures that tend to give greater discretion to the prosecutor. Many problem-solving courts exist because of some arrangement between the court and the prosecutor's office in which the prosecutor cedes some discretion to the court. This dynamic tension between prosecutorial and judicial discretion is important in understanding what's been happening and what's going to happen to prob-

lem-solving courts in the future.

Stuart: In going to scale, we ought to be cautioned by the example of juvenile court. Juvenile court started off with a lot of the same progressive intentions and a lot of the same kind of happy-faced rhetoric—relaxed procedures, collaboration, seeking the best interests of the youth of-fender. We know now that the rhetoric did not match the reality. There was a big need for the Supreme Court to announce the decision *In re: Gault* to curb the abuses that were occurring in juvenile courts. In a sense, juvenile court really was the first problem-solving court. It had good intentions but it also got into some nasty places. Hopefully, problem-solving courts of today won't have to go to all those nasty places that juvenile court went.

Boruchowitz: Another way of going to scale would be to apply what we do in problem-solving courts to all criminal court cases. For instance, if you have a defendant accused of assault who has a drug problem, we should be able to address that issue. If we're truly concerned about treatment, then all courts should be concerned about it. If we can show people the benefits of treating each defendant as a whole person with a history and a future like we do in problem-solving courts, then we could alter the whole criminal justice system—and we can do it without moving away from an adversarial structure.

Newman: I'm a Republican, and I believe there are lots of areas where courts shouldn't be involved, and shouldn't be activists—for example, managing our jails and prisons. But I recognize that much of what's happening today with problem-solving courts is because other institutions are not doing their job. And if we can have better outcomes like improved safety in the community, if we can create a better sense of context for judicial decision making while at the same time building community, then we ought to be doing those things. ☞