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PROBLEM-SOLVING JUDGES—MEDDLERS OR INNOVATORS?*

Judge John B. Van de North, Jr.[†]

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The person who is responsible for the operation of the Juvenile Court is the judge. All participants in the Juvenile Court look to the judge for leadership in reaching the goals and mandates of the Juvenile Court law. The judge must accept leadership responsibility for ensuring that the goals of the Juvenile Court law are realized.

* This article was initially written as a basis for remarks delivered by Judge Van de North at a symposium on November 4, 2005, sponsored by the Minnesota Supreme Court, celebrating 100 years of juvenile courts in Minnesota and entitled “Emerging and Innovative Ideas in Juvenile Law.”

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1. NAT’L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, EFFECTIVE INTERVENTION IN DOMESTIC VIOLENCE AND CHILD MALTREATMENT CASES: GUIDELINES FOR POLICY AND PRACTICE 43 (1999), *available at* http://www.childrensprogram.org/media/pdf/green_book.pdf. While this statement arises in the context of recommendations from the National Council of Juvenile and Family Court Judges focusing on family violence, it provides a good description of the role of the Juvenile Court judge generally, whether she be presiding over delinquency or child protection cases.

I. PROBLEM-SOLVING COURTS/GENERAL BACKGROUND

Problem-solving courts are getting a lot of attention these days from those working in the field of criminal justice. Problem-solving courts are designed to focus on specific and recurring conditions, such as mental illness and chemical dependency, that accompany and often underlie criminal behavior. The question seems to be whether these courts are an ill-conceived fad or will have—and should have—a permanent place in addressing criminal behavior in the community. Although there are data demonstrating that problem-solving courts are producing positive results,² some have suggested that such courts may be using a disproportionate amount of resources for a limited number of participants.³ The cost/benefit debate is beyond the scope of this Article. However, I will address another group of critics who maintain the judges in these courts are acting as social workers rather than jurists and are inappropriately meddling in legislative matters.⁴

Authors in the July-August 2005 issue of *Judicature* magazine describe problem-solving courts as “innovative” and “an effort to address the underlying needs of defendants, victims, and communities.”⁵ They go on to say:

These “problem-solving” courts all attempt to use the authority of the judiciary in new ways and are characterized by a number of unique elements: a problem-solving focus; a team approach to decision making; referrals to treatment and other social services; ongoing judicial monitoring; direct interaction between litigants and judge; community outreach; and a proactive role for the judge inside and outside of the courtroom.⁶

Any trial judge in Minnesota, and I suspect elsewhere, will tell you that mental illness and chemical dependency issues surface in most juvenile and adult criminal cases, whether they involve truancy, running away, theft, domestic violence, traffic violations, drug use or sale, or any number of other offenses. After three and a half years in family and juvenile court, my anecdotal impression is

2. See *infra* notes 25-30 and accompanying text.

3. Christopher N. Osher, *Drug Court May Stage Comeback: Critics Say the City's Heralded Single-Judge Program No Longer Exists, Leading to Crowded Jails and Delayed Treatment*, DENV. POST, Nov. 13, 2005, at A1, available at 2005 WLNR 18402963.

4. See *infra* Parts IV and V.

5. Donald J. Farole, Jr. et al., *Applying the Problem-Solving Model Outside of Problem-Solving Courts*, 89 JUDICATURE 40, 40 (2005).

6. *Id.* at 40-41.

that these issues are even more prevalent in cases involving family problems and child maltreatment.

In Minnesota, the problem-solving model has been implemented through mental health courts, hybrid child protection/MI-CD courts, and especially juvenile and adult drug courts. The author has presided over the Juvenile Substance Abuse Court for Ramsey County for the past three years. The Juvenile Substance Abuse Court provides a good case study of a problem-solving court. Both anecdotal evidence and hard data from this program, and the views of criminal justice experts, suggest that the problem-solving model is well-suited to juvenile offenders afflicted with chemical dependency and mental health problems.⁷

II. RAMSEY COUNTY JUVENILE SUBSTANCE ABUSE COURT

Juvenile Substance Abuse Court (JSAC) is a cooperative effort between juvenile court and various agencies in Ramsey County, including Community Corrections, the Public Defender, the County Attorney, and Human Services. The JSAC team consists of a district court judge, juvenile probation officer/case manager(s), a school district representative, a Ramsey county attorney, a public defender, a drug treatment professional, and an executive director.⁸ JSAC was patterned after drug courts that have been established in other jurisdictions. The first drug court was created in 1989 in Dade County, Florida.⁹ In the past decade and a half, more than 1200 drug courts have sprung up throughout the country, with another 300-plus in the planning stages.¹⁰ In Minnesota, there are approximately seven drug courts in operation with another half dozen in the planning stages.¹¹

JSAC is a post-adjudication program that allows juveniles to avoid long-term (typically four to six months) out-of-home correctional placements by successfully completing the program.¹² The program, which lasts approximately one year, involves frequent court appearances, formal treatment and recovery

7. See *supra* note †; *infra* notes 25 and 36.

8. SECOND JUDICIAL DIST. (RAMSEY COUNTY, MINN.), JUVENILE SUBSTANCE ABUSE COURT POLICIES AND PROCEDURES MANUAL 5 (2004).

9. Farole, *supra* note 5, at 40.

10. E-mail from Sue K. Dosal, State Court Administrator, Minnesota Supreme Court, to State District Judges et al. (Jan. 13, 2004) (on file with author).

11. *Id.*

12. SECOND JUDICIAL DIST., *supra* note 8, at 3.

programs for chemical abuse, random drug testing, individual and family counseling, and intensive supervision of behavior in the home, at school, and in the community.¹³ Positive behavior is rewarded with incentives, and negative behavior results in swift sanctions.¹⁴ To graduate, participants must achieve six months of sobriety, have satisfactory school attendance, participate in and complete chemical dependency treatment, including aftercare, and develop skills and a plan for preventing relapse.¹⁵ Of course, participants must remain law-abiding and obey the rules at home, at school, and those set down by the probation officers.¹⁶ Graduation from the JSAC program carries with it a discharge from juvenile probation.¹⁷

One important component of JSAC is a weekly staffing meeting that occurs prior to court. At this conference, case managers, public defenders, prosecutors, the judge, and other members of the team review the performance of each participant since his or her last court appearance.¹⁸ Incentives and sanctions are considered collaboratively.¹⁹ However, the judge makes the final decision regarding rewards or sanctions following input from the child, parents, and others in court.²⁰ The direct involvement of the judge during frequent court appearances and a focus on reinforcing positive behavior are hallmarks of JSAC that distinguish it from regular probationary programming. Another distinguishing feature is the advocacy provided by the case managers and other team members for participants and their parents at school, in treatment programs, and with insurance carriers, for example. As one staff member recently commented,

Think about it . . . when a child is on regular probation, the only time he is in court is after he has fouled up and he receives a consequence or punishment from the judge. In drug court, a large percentage of our time is spent praising kids for the good things they do in the program.²¹

13. *Id.* at 5.

14. *Id.* at 5, 12.

15. *Id.* at 9-11.

16. *Id.* at 9.

17. *Id.* at 11.

18. RAMSEY COUNTY (MINN.) JUVENILE SUBSTANCE ABUSE COURT, PARTICIPANT HANDBOOK 6.

19. *Id.* at 6, 15-16.

20. *Id.* at 15-16.

21. Interview with Sara Rohde, Coordinator, Juvenile Substance Abuse Court, in St. Paul, Minn.

When asked by a judge recently for his assessment of whether drug court was worthwhile, one participant stated: “Are you kidding? All these people around here who really care about you and seem to take it personally when you relapse or screw up . . . this isn’t like regular ‘juvie’ court or probation at all.”²²

Problem-solving courts in general, and drug courts in particular, are examples of a broader criminal justice initiative referred to as “restorative justice.” Restorative justice involves the perpetrator, victim, family members, therapists, community leaders, and others in trying to fashion more lasting remedies for criminal behavior.²³ This is the approach used in drug court.

III. JSAC WORKS

The mission of JSAC is “to reduce juvenile crime and related alcohol and drug use by non-violent juveniles . . . by providing intensive judicial oversight and services as well as therapeutic interventions that promote a sober, healthy and productive lifestyle.”²⁴ Recent data suggest that the mission is being accomplished. A study in October 2005 comparing thirty-four JSAC graduates with a group of forty-six juvenile delinquents who had been adjudicated and placed on traditional probation, both during the year 2000, highlights significant differences in outcomes.²⁵ In particular, the study revealed that the rate of new convictions for JSAC graduates (over an eighteen-month period while in the program or following graduation) was 20.6%, while the rate of new convictions in the comparison group was 56.5%.²⁶ Another analysis which tracked the same traditional probationers relative to thirteen JSAC graduates during a twenty-four-month period revealed an even more favorable recidivism rate for the JSAC graduates of 15.4%.²⁷

The recidivism data for JSAC is consistent with the national experience in problem-solving drug courts. For example, the Drug

22. Comment from JSAC program participant.

23. John Braithwaite, *Restorative Justice and a New Criminal Law of Substance Abuse*, 33 *YOUTH & SOCIETY* 227, 227-30 (2001).

24. SECOND JUDICIAL DIST., *supra* note 8, at 3.

25. Memorandum (Recidivism Study) from Sara Rohde, Coordinator, Ramsey County Juvenile Substance Abuse Court, and Cathy Geilfuss, Ramsey County Corrections Juvenile Probation, to the 2d Jud. Dist. of Minn. (Oct. 1, 2005) (on file with author).

26. *Id.*

27. *Id.*

Court Clearinghouse and Technical Assistance Project, funded by the Department of Justice, analyzed recidivism for programs throughout the United States over the first decade of their existence in the 1990s. This study concluded that “drug court programs are experiencing a significant reduction in recidivism among participants’ . . . [ranging] from 5-28%, in comparison to recidivism rates in the range of 50% for non-drug court drug possession defendants.”²⁸ Another study by Mr. Stephen Balenko in 2001, which analyzed a number of drug court programs, concluded that virtually all evaluations demonstrated a lower recidivism rate for those sentenced to drug courts than those in control groups.²⁹

Finally, a study of New York’s drug court system, by the Center for Court Innovation, found that in six sample jurisdictions—including three in New York City—the rearrest rate among drug offenders who had completed a court-monitored treatment plan was 29% lower over three years than the rate for the same type of drug offenders who opt for prison time without treatment.³⁰

Program sobriety goals are also being met or surpassed. For example, although only one-third of those starting JSAC complete the program, approximately 80% complete at least primary outpatient or inpatient treatment programs.³¹ Also encouraging is 2005 data showing that 85% of participants stay sober for thirty consecutive days in the initial phase of the program.³² Further, over 90% of the participants reaching Phases II and III have achieved sixty- and ninety-day periods of sobriety.³³

The positive impact of drug courts is well documented. A more important inquiry, however, involves exploring why they are working. Experts have speculated on a number of possibilities. One explanation for the success of drug courts is the “ritual” in the

28. RYAN S. KING & MARC MAUER, THE SENTENCING PROJECT, DISTORTED PRIORITIES: DRUG OFFENDERS IN STATE PRISONS 15 (2002) (quoting DRUG COURT CLEARINGHOUSE & TECHNICAL ASSISTANCE PROJECT, LOOKING AT A DECADE OF DRUG COURTS (1999)), available at <http://www.sentencingproject.org/pdfs/9038.pdf>.

29. *Id.* at 15 n.28 (interpreting STEPHEN BELENKO, THE NAT’L CTR. ON ADDICTION & SUBSTANCE ABUSE AT COLUMBIA UNIV., RESEARCH ON DRUG COURTS: A CRITICAL REVIEW 2001 UPDATE (2001), which is available at <http://www.casacolumbia.org/absolutenm/articlefiles/researchondrug.pdf>).

30. Paul von Zielbauer, *Courts’ Drug Treatment System Is Found to Be Effective*, N.Y. TIMES, Nov. 9, 2003, at 28.

31. Memorandum from Sara Rohde, Coordinator, Juvenile Substance Abuse Court, to the 2d Jud. Dist. of Minn. (Oct. 19, 2005) (on file with author).

32. *Id.*

33. *Id.*

programming. This ritual seems to help shake kids out of an apathy, which one author describes as “drift.”³⁴ This theory is advanced by John Braithwaite of Australian National University in an article he published in 2001 entitled *Restorative Justice and a New Criminal Law of Substance Abuse*.³⁵

The following Braithwaite comments are reflective of this author’s observations in JSAC:

We know it takes an enormous amount of personal commitment and help from others to turn around a serious problem of substance abuse. We know that people in the grip of an addictive substance drift rather than confront the issues in their lives. It takes something special to shake the person out of this drift. Arrest for a crime has the potential for that special drama. For minor crimes, the production-line processing in a few minutes before a lower court, transacted in the technocratic language of lawyers, has been stripped of drama, especially for repeat players. *Restorative justice processes have much more hope of a ritual impact that might shake a substance abuser out of drift. . . . Restorative justice is partly about returning ritual to criminal process, ritual that requires taking stock rather than perpetuating drift.*³⁶

Braithwaite’s description of “drift” is particularly apropos in discussing fourteen- to seventeen-year-old delinquents who have underlying chemical dependency and mental health issues. It is often hard to get a teenager to focus on problem-solving in the best of circumstances. When they are addled by drugs and alcohol, it is even more difficult to get their attention and to keep them on task in addressing personal issues. The traditional handling of youthful offenders, sometimes pejoratively referred to as “McJustice” (Braithwaite’s “production-line processing”), does little to stem drift, especially among chemical abusers. However, the highly structured, personalized attention given offenders in drug court contains elements of ritual that children thrive on. It provides some hope of shaking them from a “whatever” attitude that can dominate many of their lives.

Because of how it operates, participants in drug court come to

34. Braithwaite, *supra* note 23, at 230.

35. *Id.*

36. *Id.* at 231 (citing John Braithwaite & Stephen Mugford, *Conditions of Successful Reintegration Ceremonies: Dealing with Juvenile Offenders*, 34 BRIT. J. CRIMINOLOGY 139 (1994)) (emphasis added).

believe that the adults there care about them. They respond to attention. Drug court becomes a place where participants feel safe. They let their guards down a bit, and work on problems collaboratively with others in the program. They get revitalized. Of course, they look healthier when detoxified. But, the changes go beyond physical appearances. As a judge, it is easy to pick up on little, but important, signals like an occasional smile or eye contact. These children seem to rediscover a sense of purpose in their lives. As one young woman stated, "I have a problem and instead of always running or hiding from it, I might as well deal with it before it gets too late. . . . Thank you for believing in me and giving me another chance."³⁷ Another child stated, "Smoking pot isn't worth getting locked up for, when I could be doing anything I want to succeed in life."³⁸

The importance of ritual in overcoming juvenile drift has been demonstrated in the success of JSAC's Passport program. The Passports are preprinted cards that are used by participants, staff, and the judge to promote conversation during court appearances. Participants must bring a Passport to every court appearance.³⁹ The Passports contain goals drafted by the participants.⁴⁰ To graduate they must complete a total of twenty-one Passports.⁴¹ The Passport initiative has been surprisingly successful. When Passports were first introduced, the author expected that these three-part forms would go the way of AA/NA attendance cards—usually "eaten by the dog." Not so with Passports. The participants turn them in each week in relatively good shape, free of French fry grease and ketchup. The participants are proud that they have obtained another punch on their ticket to graduation.

In addition to Passports, JSAC employs lots of cheering for educational accomplishments or for completion of treatment; singing Happy Birthday; bestowing one-month, six-month, etc., sobriety medallions; high-fives and Dairy Queen certificates for moving up a phase; and Target gift cards at graduation. Does it sound a bit like forts and tree houses, secret handshakes, merit badges, 4H, and drama club? Sure it does. And what is the

37. Letter from JSAC program participant.

38. Letter from JSAC program participant.

39. RAMSEY COUNTY (MINN.) JUVENILE SUBSTANCE ABUSE COURT, PARTICIPANT HANDBOOK 11.

40. *Id.*

41. *Id.* at 8-10.

common thread? Ritual. Kids love this stuff. Graduations are a particularly big deal. Lots of cake and pizza and emotion. For some, it is the first time they have ever completed anything. The parents beam and cry. Some have told JSAC team members that they still worry about their child, as any parent does, but they no longer wonder if he or she will be alive in a year, or whether they will get calls in the night that their child has been harmed or arrested.

IV. IMPROPER MEDDLERS IN THE LEGISLATIVE PROCESS?

As mentioned above, problem-solving courts and drug courts are not without their critics.⁴² One trial court judge, who participated in an unsuccessful drug court experience in Denver, Colorado, has written about his grave concerns over the operation of such courts.⁴³ Judge Morris Hoffman has stated, “The most profound defect in the drug court model is that it dissolves, and is expressly designed to dissolve, the boundaries between the three branches of government.”⁴⁴

He describes an “Unholy Alliance” and criticizes what he sees as the inappropriate purpose of curtailing social problems.⁴⁵ Judge Hoffman argues:

[A court’s] function is to insure that the rule of law is justly enforced. The job of curtailing a particular crime, or achieving any other particular social end, is a legislative and executive function, not a judicial one.

There is a palpable, day-to-day face to this unholy drug court alliance between the three branches. The entire drug court milieu is constructed as a single, unified institutional response to the scourge of drugs. Prosecutors, defense lawyers, and judges are meant to meld together into a kind of single public service institution designed to do what is best for the drug defendants, or “clients” as they are referred to in many drug courts. Indeed, it is [right] that drug courts cannot operate successfully without the cooperation of judges, prosecutors, police, sheriffs, and defense lawyers. The

42. Morris B. Hoffman, *The Denver Drug Court and Its Unintended Consequences*, in *DRUG COURTS IN THEORY AND IN PRACTICE* 67 (James L. Nolan, Jr. ed., 2002).

43. *Id.*

44. *Id.* at 80.

45. *Id.*

very instant this cooperation is achieved, the bedrock protections inherent in the adversary nature of our criminal justice system and the independence of the judiciary are put seriously at risk.⁴⁶

Persuasive responses to the criticisms of Judge Hoffman have been offered by others around the country, but none more concise than that of Chief Judge Judith S. Kaye of the State of New York: “The flood of cases shows no sign of letting up. We can either bail faster or look for new ways to stem the tide.”⁴⁷

In an op-ed piece in *Newsweek* on October 11, 1999, entitled *Making the Case for Hands-On Courts*, Chief Judge Kaye focuses on the need for finding alternatives to traditional approaches in the criminal justice system:

[I]n many of today’s cases, the traditional approach yields unsatisfying results. The addict arrested for drug dealing is adjudicated, does time, then goes right back to dealing on the street. The battered wife obtains a protective order, goes home and is beaten again. Every legal right of the litigants is protected, all procedures followed, yet we aren’t making a dent in the underlying problem. Not good for the parties involved. Not good for the community. Not good for the courts.⁴⁸

V. THE ROLE OF THE JUDGE

At the end of the day, much of the debate over the propriety of problem-solving courts and their methods focuses on the role of the judge. Some have suggested that if judges wanted to be social workers, they should have skipped law school and gotten a degree in social work.⁴⁹ Judge Kaye and others are on record as saying that judges “can and should play a role in trying to solve the problems that are fueling our caseloads [O]utcomes—not just process and precedents—matter. Protecting the rights of an addicted mother is important. So is protecting her children and getting her off drugs.”⁵⁰ Judge Hoffman’s inappropriate meddler is Judge Kaye’s enlightened innovator.

46. *Id.*

47. Judith S. Kaye, *Making the Case for Hands-On Courts*, NEWSWEEK, Oct. 11, 1999, at 13.

48. *Id.*

49. *See generally* Osher, *supra* note 3.

50. Kaye, *supra* note 47, at 13.

Between 1997 and 1999, the Crime and Justice Research Institute conducted focus groups with drug court participants in six American cities that solicited the views of individuals who were involved in the drug court process.⁵¹ One objective of the focus group process was to test assumptions made about drug court design and operation, including the importance of the role of the drug court judge.⁵² The process was comprehensively reviewed and reported in *An Honest Chance: Perspectives on Drug Courts*, published in April 2002.⁵³

The executive summary of the *Honest Chance* report states the following regarding the consensus from the focus groups regarding the role of the judge:

The hands-on role of the judge is central to the effectiveness of the drug court and plays a powerful role in effective treatment [P]articipants practically unanimously personalized the drug court experience and developed a close connection to the judge, sometimes referring to him or her as a parent figure. Many were impressed that a judge would speak to them at all and could not recall ever having had conversations or interactions with any other comparable authority figure. They thrived on the judge's praise and approval and dreaded disappointing or angering the judge by poor performance. They generally feared sanctions and mostly believed the judge was supportive. They also freely admitted that without the judge, they would not be "forced" to stick to the treatment process, because, as "addicts," they would find a way to "beat" the program.⁵⁴

VI. CONCLUSION

This author comes down on the side of problem-solving judges as constructive innovators rather than inappropriate meddlers in the criminal justice system. This seems especially so in juvenile court where new approaches are helpful in arresting the drift that plagues so many youthful offenders, especially those afflicted by chemical dependency. The concerns of Judge Hoffman are serious

51. JOHN S. GOLDCAMP ET AL., U.S. DEP'T OF JUSTICE, AN HONEST CHANCE: PERSPECTIVES ON DRUG COURTS (2002), <http://www.ncjrs.gov/html/bja/honestchance/execsum.html>.

52. *Id.*

53. *Id.*

54. *Id.*

ones and are not easily dismissed. It is important to recognize that the legislature and the social service agencies it creates and funds also have a leadership role in finding solutions to crime and its causes. Similarly, the adversary process is a critical component in the dispensing of justice. Collaborative pre-court staffing sessions must recognize the independent and equally important roles of prosecutors and defense counsel. The judge must also maintain her independence, especially when meting out sanctions for probation violations. We do that in JSAC. Final decisions are reserved to the judge who relies heavily on input from the entire JSAC team but also considers input from the child, parent, and others in open court. In addition, a team consensus is often not possible. While prosecutors and public defenders work together to advance the best interests of the child, they often cannot agree on sanctions. The County Attorney seeks adequate protection of community interests. The Public Defender may remind me that relapse is part of recovery and therapeutic interventions are particularly important in juvenile court. Juvenile delinquents with chemical dependency and mental health issues are different than other juvenile offenders—that is why we have JSAC. Recognizing the difference helps JSAC work.

In December 2000, the Ramsey County District Court adopted *Standards on Substance Abuse*.⁵⁵ Standard I, entitled *Judge as Leader in Court's Response to Substance Abuse*, echoes the call to leadership by the National Council of Juvenile and Family Court Judges set out at the beginning of this Article. The Ramsey County Standard I states:

Every judge and referee no matter where assigned . . . should serve as a leader in the court's efforts to address substance abuse. Judges and referees should be aware of substance abuse, alert to its occurrence, and prepared to use their authority to take action when it is present.⁵⁶

Finally, the commentary to the Ramsey County District Court Standards on Substance Abuse contains this apt language:

Although some judges and referees may believe that responding to substance abuse is not part of a judge's role, judges and referees who do not take advantage of opportunities to promote recovery of substance abusers

55. RAMSEY COUNTY (MINN.) DIST. COURT, STANDARDS ON SUBSTANCE ABUSE (2000).

56. *Id.* at 2.

are missing a chance to respond to an important societal need which absorbs an inordinate amount of the court's time. Responding appropriately to substance abuse does not convert the courts into a social service agency or require judges to ignore the other issues in a case. Instead, an effective substance abuse strategy is one element, along with many others, of the courts' central mission of resolving disputes and dispensing justice By assuming leadership of the courts' response to substance abuse, judges and referees will help to ensure its effectiveness and enhance the overall administration of justice.⁵⁷

Both the National Council of Juvenile and Family Court Judges and the Ramsey County District Court have urged judicial officers to play a leadership role in addressing societal problems like domestic violence and substance abuse.⁵⁸ One way in which judges can meet this challenge is to work effectively with problem-solving courts and look for ways to expand their effectiveness throughout the court system.

57. *Id.* at 8-9.

58. *See generally* NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, *supra* note 1; RAMSEY COUNTY (MINN.) DIST. COURT, *supra* note 55.