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# The Impact of Problem Solving on the Lawyer's Role and Ethics

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## THE IMPACT OF PROBLEM SOLVING ON THE LAWYER'S ROLE AND ETHICS

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JUDGE KLUGER: In 1992, in preparation for sitting in the Midtown Community Court, which was one of the first problem-solving courts in the country, I took a trip to Dade County, Florida, to see a drug court. It had been created in 1989 with the support of Janet Reno, who was then the District Attorney of Dade County.

The concept of the court was simple, although at the time it was considered revolutionary: instead of incarceration, place defendants in drug treatment and have that treatment monitored by a judge.

I entered a courtroom that looked like any other courtroom and watched as prosecutors, who are usually eager to wrap up convictions by plea or trial, agree to place defendants in drug treatment and then dismiss the case after successful completion.

I saw defense attorneys, whose strategy is usually to get the best deal as early on in the proceedings as they could, agree to a year or more of intensive drug treatment, continuous judicial monitoring, repeated drug testing, all the while with the threat of jail looming over the defendant's head, all in the hope that this defendant will be the defendant who makes it out of the revolving door.

I observed defense lawyers, prosecutors, and judges monitor treatment together, discussing appropriate sanctions for failure and rewards for progress.

I saw prosecutors congratulating defendants who were doing well and defense attorneys agreeing that maybe a few nights in jail would be just the thing to make sure that their client stays clean.

And, of course, there was all that applause for the drug court graduates by the whole courtroom, something I have to admit I am still not quite used to.

It seemed to me to be a topsy-turvy world, and certainly unlike anything I had experienced as a lawyer or a judge.

Well, fast-forward ten years to 2002. There are over 500 drug courts nationwide, as well as domestic violence courts, mental health courts, community courts, parole reentry courts, all focused on doing more than just adjudicating the facts of the individual case, but rather trying to address the underlying problems that brought the defendant, this particular individual, before the court.

Courts have become involved in changing behaviors of defendants in hopes of not only helping them, but helping the communities in which they live. This has caused all of us, judges and

lawyers, to reevaluate the roles that we play in the process, and of course has raised many implications about our role and ethics.

Should a defense attorney be concerned with issues broader than their individual client? How do you uphold your responsibility to zealously represent your client when you are considered part of a team? Should you care about how the outcome of a case affects your community? What about Fourth Amendment rights? Are you participating in a process that coerces your client to opt-in too early before you get a chance to investigate the facts of the case?

I think it is important to address these questions in the context of what the criminal justice system in a large urban community looks like today.

I am reminded of a TV commercial that aired several years ago, where the driver of a car said, "This isn't your father's Oldsmobile." Well, this isn't our Founding Fathers' court system either. We live in a world where local courts handle hundreds of thousands of cases a year and the vast majority are disposed of by plea bargains. Three out of four defendants arrested in large urban areas test positive for drugs, and many will recidivate very shortly after they leave jail.

The article in today's paper that Judge Newton mentioned, which follows a defendant from his release from Rikers Island after eight months in jail for selling drugs—he leaves with $3.00 and a Metro card. By 10:15, he is offered marijuana, and by the afternoon, he is offered his old job back, that of selling cocaine. The next time he will be arrested— and you can be assured that he will be arrested again— I think we can protect this defendant's individual rights and still give him and the community something better than eight months and a Metro card.

But how do we work through the concerns of advocates and their roles in the courts? I suggest several solutions.

First, lawyers have to remember that they do not stop being advocates in problem-solving courts. In fact, quality lawyering matters, and it is crucial in these courts. I think some of the institutional public defenders make a serious mistake when they assign their least-experienced, and sometimes their least-able, lawyers to these courts. They erroneously think that strong skills are not important. How wrong they in fact are.

The atmosphere in problem-solving courts is, by design, one of cooperation and consensus building. This, I believe, ultimately benefits the defendant. The challenge for defense lawyers is to take care that cooperation does not turn into capitulation, and that

even after a decision to enter a drug court is made, there are serious issues to address and negotiate in drug courts or in problem-solving courts in general, such as appropriate type of treatment, length of treatment, sanctions for relapse, ultimate sentence if the defendant fails, what is the definition of failure and what is the definition of success, how long is a defendant brought back to court, how long is he monitored?

Prosecutors also have to be mindful of their roles and obligations and ethical responsibilities. Several years ago, I participated in a roundtable discussion, sponsored by the Department of Justice, that addressed this issue of the lawyer's role in problem-solving courts. A law professor recounted how when she visited with a group of students in drug court and was invited to participate in a treatment conference, they all sat down, and one of the students said, "Where is the defense lawyer?" She was the only one who noticed that he was missing. The oversight was immediately corrected. It did not appear to be intentional. But it is certainly a good example of how participants can become too relaxed and reinforces the need for vigilant advocacy.

The judge certainly should have noticed that the lawyer was missing. The DA should have never participated in an ex parte discussion. And where was the defense attorney at this scheduled court appearance?

I have recently seen a disturbing trend in some problem-solving courts: lawyers who, when their clients are doing well, let their guard down and sometimes do not appear for routine monitoring sessions. This, I believe, is unacceptable. There should be no time when your client is before the court and you are not present.

I think the best way to meet the challenges of advocacy and judging in these courts is by education and training for lawyers and judges and by planning collaboratively in setting up these courts. Make the tent as big as possible and invite everyone in. It takes a lot of work, but the results are extremely worthwhile.

One of the things we have learned in the last ten years is that not only do you need to be inclusive for political reasons when you set up these courts, but people who are included can provide insight, ideas, and resources that may not otherwise have been available.

We recently opened an integrated domestic violence court in Bronx County here in the City, where we are merging the work of the Criminal, Family, and Supreme courts, where families have domestic violence cases pending in at least two of these courts.

There were many issues to address: diverse systems, staff, laws, procedures, and rules; different lawyers for plaintiffs, defendants, victims, and children; we had concerns about merging cases; and lawyers had concerns about litigating different cases from different courts before the same judge.

Victim advocates worried, on the one hand, about diluting the criminal case by having it heard in the same court as a civil matter; and on the other hand, worried that victims who did not want to testify in a criminal case might be coerced to do so when they appeared on a civil matter.

The planning process took almost a year and included everyone affected. But the work was worth it. The court has been opened since October, and we continue to monitor how it operates, make changes, listen carefully to the concerns and recommendations of the lawyers and the judges who work there.

I think it is safe to say that problem-solving courts are here to stay. The challenge to the legal community, I think, is to keep a watchful eye and a critical eye, to participate in the planning process, and to educate lawyers and students to understand, embrace, and adapt to change.

**Pat Murrell**

*Leadership Institute for Judicial Education*

I come at this situation from a somewhat different perspective than most of you do. My knowledge of problem-solving courts comes from the literature, conversations, and observations, rather than participation, and I am particularly grateful for the work that Bruce Winick has done to inform my thinking on this topic.

What I would like to do in my time this afternoon is to share with you some ideas about the kind of Judicial Branch education that I think would be useful to a person who is interested in therapeutic jurisprudence or problem-solving courts. And I certainly would not limit this kind of education to those groups, but I think it would be particularly appropriate for those. This, again, comes from my experience with two SJI-funded grants, the Leadership Institute, and an Institute for Faculty Excellence as well.

First, let me list some of the ubiquitous descriptors that appear in the literature and that I have heard in the conversations on the part of the panelists as well as on the part of the conversations during the day.

I hear the word "collaborative." I hear the words "team player," "cooperation," "passion," and "compassion," "empathy," "the baggage that the judge brings"—and other people bring baggage as well; a need to recognize emotion in the process and to be mindful of emotional intelligence, what we know about what that entails. I have heard the word "community," both a community inside the court, but also a relationship with the community outside. I have heard the words "narrative," "attention to voice," "listening," "shared power or authority," "out of the box," "trust," "vibrant on the bench," "charisma," in looking at the results in your court.

Most of these descriptors do not discuss the technical aspects of judging or the technical aspects of other work in the court. That is assumed. But my question then becomes: Are those characteristics that can be taught or learned? I believe that the literature on teaching and learning tells us that they can be learned.

I would like to share with you, first of all, some work in the area of cognitive development that I think helps to inform us in this area.

The whole area of constructivism, that tells us that the individual makes meaning in his or her own way of the situation in which he or she finds themselves. There are numerous schemes or models

for describing the shifts that one goes through in moving from simplistic thinking to more complexity.

The work of William Perry has been very useful to us in the Institute, and it is the one that I would like to describe to you today, although I would want you to know that there are many others and encourage you to look for others.

It is oriented toward adults, it is fairly simple, and it is intuitive, so that it does not clash with most of the beliefs that individuals come into an education session with.

Perry tells us that people move from dualism in the way they think about the world, where everything is right or wrong, black or white, "either/or'iness," as someone says, where learning is seen as an information exchange, where the learner himself or herself has little responsibility to make meaning out of new information or experience, where authority has the answer, multiple alternatives are not recognized, and a right answer exists somewhere for every problem, and if you happen to run into an authority who does not know the answer, it is just because they are a poor authority.

The next level that Perry tells us about is the level of multiplicity, where an individual begins to see a slight crack in that dualism and begins to see some multiple alternatives. What is missing there is any basis on which a judgment can be made. All options are of equal value and anyone's opinion is an appropriate one.

The next level that Perry tells us about is what he calls "contextual relativism," and it is the biggest jump when we go from dualism and multiplicity into the higher levels of cognitive functioning that I want us to think about. The main thing that happens here is that the locus of control for the individual shifts from external to internal, so that the person who is making decisions, whether it is a litigant or whether it is a judge, that individual assumes responsibility for making decisions and making meaning out of the situation.

The individual at this stage is capable of thinking about his or her thinking, or meta-cognition: "I can actually step outside of myself, put my thinking out there, and look at it and weigh my differences"—something that I think certainly judges need to be able to do.

The person who is at this level of cognitive development takes into consideration the context and sees things in their specific and separate environments in which they happen to be working.

There is the capacity for empathy present. If you think about the ability to step outside of yourself and look at your own thinking, the same situation accrues to the presence of empathy. It is very

hard to be empathic with somebody if you are completely embedded with them and cannot get outside of the situation that they are experiencing.

The last level that Perry talks about is the level of commitment, where we make decisions or choices or commitments in the absence of clear or complete information. I suspect those of you who sit on the bench do that all the time and recognize that.

There is an ability to deal with paradox, the individuals can be tolerant of ambiguity, and know that the chances are that all information will never be available. So there is a need to go ahead and make decisions in spite of some information not being there.

The individual who reaches this stage of his or her development Perry defines as "wholehearted while tentative," always knowing that if new information comes up, I'll have to go back and recycle through that again. And there is what he calls a "continual seeking and processing."

I believe that our courts need judges and other personnel at the levels of relativism and commitment. The complexity of the issues—and what we have talked about here all day today certainly leads me to believe this even more—that the complexity of the issues before the court is such that someone operating at a simplistic level of thinking is going to have a very, very difficult time. And I believe that Judicial Branch education can be effective in moving people along that journey.

I would like to suggest that if we are going to have that kind of education, we need to refer to it, or think about it, as education for development, as opposed to simply education for the acquisition of information. Another way of thinking about that is that we move from information to transformation.

There are two tools that we have to do that in judicial education.

One is the curriculum, or the content. I think we need to look at four things when we think about curricular content for Judicial Branch education:

One is substantive content.

Another one is judicial skills.

Another one is personal authenticity, looking at ethics and the development of our philosophy about the judiciary.

And the last one, about personal growth.

If you look at those four different areas, what you are doing is taking into consideration the needs of the organization, which is the courts, but also the needs of the individual, and I think that we need to pay attention to the individual growth.

Then, we have teaching. There are, as you would guess, four ways that I think we can improve our teaching so that we can move people along in their cognitive development:

One is to acknowledge their experience and provide new experience, the concrete experience of doing things, seeing things, feeling things.

We can encourage and plan for reflection. Most professionals, like you are and like most people that I know in the courts, have very little time for reflection, and I think that we need to provide educational opportunities that give that individual the opportunities to step back and reflect.

We need to present appropriate concepts and help our learners derive their own principles.

And lastly, we need to try out our new learning in a safe environment which we can provide for them.

I just have to take one second and respond, because I have heard the talk about acknowledging race and class, and I think Judicial Branch education has a role in that and can provide a place where people can talk safely about those issues.

At the Leadership Institute, we take everyone for an afternoon at the National Civil Rights Museum in Memphis, where Dr. Martin Luther King was assassinated. That is a very powerful experience in and of itself. But the next morning, the processing of that is what is really powerful, and people come way from that I think with a new appreciation for some of those issues that are involved there.

I told him I was going to use this quote, and he is waiting for it, so that he will be ready. This, I think, kind of sums up what I am talking about when I say that we need to change the way we think about things and the way we process information.

Albert Einstein, a good person to quote, said: "No problem can be solved from the same consciousness that created it. We must learn to see the world anew." I think that is what is going to be necessary if we are going to really make problem-solving courts successful.

**Jeffrey Tauber**

*Center for Problem Solving Courts*

There are three points I would like to make in the next ten minutes. The first is that an earlier speaker, Deborah Small, used the phrase that drug courts may be thought of as "harm reduction," and that kind of stuck with me. I think that it is a good phrase. I think it says a lot. I think, in a sense, problem-solving courts are harm reduction for the courts, for the court system. What I mean by that is that they are means by which we can improve and we can reduce the harm that the court does.

My wonderful partner, Judge Susan Finley, often talks to me about the harm that the courts do, and I have thought about that. She has some wonderful stories and experiences that lead her to that conclusion, that the courts do a great deal of harm.

But I also think that we have begun to change that. What we have done and we have struggled to accomplish is not good enough. It is not good enough because we are not reaching enough people; it is not good enough because sometimes we do not have the right people in the right position, or because we are not trained well enough, or perhaps we just do not have the right resources or enough resources. There are lots of reasons why it is not good enough.

But I would suggest to you that you take a very hard look at what we have accomplished in the past ten years, because we have laid a foundation for a new kind of court system—not just dealing with drugs or alcohol, but dealing with societal problems, dealing with each other, and dealing with the very structure of how we deal with problems that the court must deal with ultimately.

I wanted to start off by quoting something that Lisa Schreibersdorf said earlier. She said there has been a remarkable shift in the role of defense counsel. And there has been, and I do not think it can be denied.

When I started as a public defender in 1974, and I was a public defender and defense attorney for something like eleven or twelve years, it was a hell hole being a defense attorney. You were disregarded, you were ignored, you were basically discounted in many, many situations, at least in my communities and communities around me. You were truly on the back of the bus. I would say that you were on the bumper of the back of the bus. It was not a pleasant situation. You fought like crazy for whatever advantage

you could find for your client, but very often you had to take what was handed to you because you were a beggar in many instances.

You were part of a bureaucracy that was processing hundreds and thousands of people through a given court in a month, especially if you were in a DUI court or a drug court—there were drug courts back there—or other courts whose calendars basically dealt with large numbers of cases. It made you feel like you were simply a clerk, or barely that, if that.

During my first few years as a public defender, I must have tried 100 cases or more. But you know what? I really did not have much impact on those cases, no matter how many cases I won, because so many other cases were dealt with through that other system.

The most important work that I did was through my efforts to get people into programs. I kind of took it on myself to get people into programs, whether it be domestic violence programs or drug programs or housing or school programs or other programs, that might be an alternative for jail, for prison, for a much more onerous and a much more punishment-oriented resolution.

I spent so much time at the probation office that I was actually invited to their Christmas party. I knew those probation officers and they knew me because that was the place where I knew the decisions ultimately would be made, or many of the decisions would be made, as to my clients.

When drug courts came along, there was an opportunity to shift the paradigm. At that time, I was a judge. It was 1990. We had a drug court and I was put into it—against my wishes actually—and it occurred to me that this was an opportunity to institutionalize what many of us were trying to do in a haphazard and an individual basis that did not really reach that many people.

That is what drug courts have done. They have institutionalized an approach that says: "We want to keep people out of jail, and prison for sure. We want to give people an opportunity to better their lives. We want to provide people with the kinds of services and rehabilitation that will make a difference in their lives and that will improve our lives, because that is our job. Our job as attorneys is to represent their interests."

I think drug courts and problem-solving courts do that to an extraordinary degree. And, to some extent, it is difficult for me to hear and to listen to the criticisms, and part of that is because I have been part of drug courts for such a long time. Certainly they

are part of me, and it is always hard to hear criticisms about your self or what is close to you.

But I do believe that we have created a new way of dealing with the problems of society, and it is very important that we consider just how different it is from the way we used to be.

The second thing I wanted to leave you with is the following. What is so great about being adversarial? When I started out as an attorney, everybody wanted to go to trial; that was what we were trained to do. But in my experience, the best you can do for your client often was through negotiations.

As a matter of fact, the precedent for problem-solving courts is probably the negotiated plea. The negotiated plea is a non-adversarial process. It is not a fact-finding process. No one is cross-examined. But it is a process by which you try to resolve a problem between individuals. That is what problem-solving courts do, but on a much grander and a much more important basis, because they make the lawyer a part of the process. Where the lawyer before was often on the outside, the lawyer now is accepted, the lawyer is now a full participant and partner in the system, the lawyer now has an opportunity to be heard and to have his or her positions regarded as important and often accepted and adopted.

I was in one court in Portland where—in fact, there have been several courts I have been to, where actually the public defender was the person who called the court, who called the cases, and actually described the cases to the court, and seemed to be the leader in those cases. And there are many courts where the district attorney probably has too much power, too much impact on screening. But ultimately, we are not on the outside of the bus; we are part of what the court is doing in a very, very clear way.

Earlier I heard people using the phrase "coercion" as if it were a dirty word. I do not understand that, because coercion is part of every societal system that has ever existed, the capacity of a society to work or to impact its members so that the members live within certain societal rules and regulations. There is not a society in the world that dos not work on a coercion basis.

We have an opportunity through problem-solving courts to use coercion, but to do it in a benevolent way, to do it in a way that impacts the individual the least, to intervene as little as possible, to use days instead of weeks instead of months instead of years to change a person's behavior.

Now, I am not saying that problem-solving courts are the panacea—and someone else said that before, and I agree with that in-

dividual. Reform is needed, and it is needed now, and it is critically needed. But problem-solving courts have an indisputable part of that reform.

I might suggest to you that I think it is an abomination that anyone can go to prison for drug use. That is how I feel. And I think that those are the kinds of reforms that need to be introduced.

But to eliminate coercion is to eliminate an important tool among many to get people to listen, to get people's attention, and to focus people on their rehabilitation.

Now, there is a whole other argument that we have not gotten into around decriminalization, which I am not going to get into. But the idea of coercion is an idea that has been with us since the beginning, or since the very first court, and I do not think it is something we should shrink away from, but certainly it is something that we should use in an innovative way, we should use as little as possible, and we should try to keep people out of jails and prisons.

My last point. The future: defense attorneys wanted. I think the future is going to be one where we focus on societal problems in courts. I think that we are moving away from punishment as a solution or as an acceptable alternative to dealing with societal problems. I think that we are going to find attorneys who are accepted, who are partners in the system, that are adversarial when it is required. Certainly before someone enters a problem-solving court or at the time someone leaves a problem-solving court, there is a very important place for adversariness. And even within the courts themselves, in staffings or roundtables or whatever you want to say it, it would be ridiculous if an attorney held their tongue because they wanted to preserve the consensus.

It is absolutely critical that attorneys speak their mind but, at the same time, maintain the sense of community that we create in a problem-solving court, because that is perhaps one of our strongest, if not our strongest, suits, and that is the capacity of the people who work around the problem-solving court to become a team, to really see the issue together—not necessarily see the solution together, but see the issue together and see the need for a solution, and then to work together from their various perspectives to make that solution a reality.

I think that we are going to be able to deal with and help far greater numbers of people than we ever have been through the problem-solving court model.

I am disappointed, as other people have indicated, in the numbers that have been admitted to drug courts, and there are reasons for that, and I do not think that they are acceptable. I do not think anything is acceptable but very substantial numbers of individuals of these various populations who are allowed into these different courts.

Let me end by quoting a couple of statistics.

The National Legal Aid & Public Defender Association did a study. They asked public defenders who were working in drug courts—this was a number of years ago, perhaps three or four years ago—what they thought of drug courts. Ninety-eight percent said drug courts were beneficial to their clients, 98 percent.

I finish with a final quote from the Brooklyn Public Defender, whose name I seem to have trouble with [Lisa Schreibersdorf]. She said that she wanted to be part of the solution. It seems to me that that is what the defense bar needs to be. It needs to accept the responsibility to be part of the solution. It has to move forward in an aggressive and in a strong and self-confident way and accept its place as part of this new solution.

**Steven M. Zeidman**

*Fund for Modern Courts*

I have to say I learned a new phrase. I like "benevolent coercion." It reminds me of "compassionate conservative," but I feel like I can take them on the road now. Thank you.

Full disclosure. I come at this as a criminal defense attorney. I practiced, supervised, researched, and taught criminal defense, and that influences my views of problem-solving courts.

I would like to adopt, though, the role suggested by Judge Kluger of the "watchful and critical eye." I say that up-front because mostly what I am going to be doing is offering criticisms, in many ways as the loyal opposition, which I think is an important role.

I, too, recall debating in the early-1980s, when someone talked about the proposition for something called the Midtown Community Court. I felt then, as I do now, that the existing system—that being 100 Center Street, the Criminal Court—certainly was not working, so that this was a remarkable and terrific idea.

But since then, as you have heard, these problem-solving courts have grown at, frankly, an alarming rate. Reading in preparation for today, I was reminded that in 2000 the Department of Justice Drug Courts Program Office doled out a whopping $50 million worth of grants. Unless someone knows that that is a typo, $50 million—it is staggering to me. And it is also important when you put it in context. I do not think this office existed more than four or five years ago—I could be wrong. But it is a remarkable thing.

I also am concerned that this dramatic change—and it is dramatic—in the administration of justice has not been subjected to sufficient amounts of independent critical examination.

Along with some colleagues, friends, fellow defense attorneys, who have tried to pinpoint or really to get a sense of what is it about the defense bar, why do we seem to have a knee-jerk reaction against it—because, certainly, you want to have more than a knee-jerk reaction; you want to have a reasoned reaction.

Part of it—and I do not think we are paranoid—has to do with the seemingly universal enthusiasm and support. The ABA, the Department of Justice, the judiciary, the legislature, the advocacy groups—you begin to wonder, you know, is it like being against Mom and apple pie to say "I'm not sure about this"?

But it seems to me there needs to be a vocal group somewhere, and the natural group is the defense bar, to say: "Just let's hold on a little bit. Let's slow down and take stock of where we are."

Before creating more and more specialized courts, I think we have to ask very clearly and unequivocally whether these courts are doing what they set out to do; and, I say in all seriousness, by asking too: What is that they are supposed to do? How do we measure their effectiveness? Lower crime rates, reduced recidivism, cost savings, increased public trust and confidence, public opinion polls? Is there clear empirical evidence to support any of these purported justifications?

Again, this is apropos of Albert Einstein. My quote is from Groucho Marx.

I don't what to be heard to say, "Whatever it is, I'm against it." However, there are important questions that need to be raised. I think to the extent that when you canvass the existing literature about the growth of these courts, so much of it is in many ways an academic exercise, philosophical debates about the implications of tampering with the heretofore sacrosanct adversarial system, that I think other, more practical concerns remain, and that is what I would like to address.

How do these new courts and their new ways of conducting business impact on defendants and defense attorneys and the relationship between lawyers and clients? Certainly, no less an authority than Judge Kaye herself asked and answered a very fundamental question about problem-solving courts. I would like to quote Judge Kaye, if I could: "Do problem-solving courts raise questions about the roles of attorneys? You bet they do."

I would like to explore just a couple of these.

Being a problem-solving defense attorney presents very real and very practical problems for defense lawyers. Advocates for problem-solving courts want defense counsel to rethink the way he or she approaches representation—rethink, a new model. Yet, as far as I can tell, there has been no corresponding change in the Constitution, in the statutes, in the ABA Standards, in the Model Code of Professional Responsibility—nowhere. How is counsel supposed to navigate and provide the effective—indeed, constitutional and ethical—assistance of counsel without, I think, proper and adequate guidelines?

We have to wonder whether the Constitution and the constitutional interpretation of the Sixth Amendment is so malleable that it can somehow just embrace all these different approaches to

lawyering, and that may well be the case. But it seems to me that new standards should be debated, they should be published, they should be subjected to a period of public comment, and then adopted, before defense counsel is asked to make this fundamental change.

I think we need to ask whether problem-solving courts rely more than ever on institutional players, a regular cadre of judges, prosecutors, and defense lawyers. And indeed, this is nothing new. Concerns about divided loyalties and bureaucratic allegiances have been raised with institutional defenders going back to, I think, the 1920s.

Yet, the problem may well be magnified in the problem-solving court. You read about teams of defense lawyers and prosecutors and judges being trained together, working together, forming a very cohesive unit, which certainly has a lot of appeal on one hand but, I think, does raise some flags on the other.

As with any team, you wonder what happens if one player on the team begins to deviate, because certainly, if one player is not quite on the same page, it affects the performance of the whole team. So you wonder if that player is the defense lawyer who suddenly is taking a more aggressive and zealous attitude towards litigating Fourth Amendment claims, and you wonder how this impacts on the entire team.

We need to ask where are these problem-solving courts proliferating. My read seems to be that they are proliferating in urban Criminal and Family courts, the so-called "lower courts" or "poor people's courts," courts that deal primarily with the poor and with people of color. Now, this is no surprise, I guess.

I joke that I am still waiting for the first problem-solving court to appear in Federal Court or the Commercial Division of New York State Supreme Court—I do not think that is happening any time soon.

But I think we have to look long and hard at the correlation between, for example, in New York City, the quality of life initiative and the evolution of problem-solving courts. Certainly, the Midtown Community Court was premised very much on the "broken windows" theory of Kelling and Wilson, and I think what you end up with is a situation where we widen the net, we are bringing in more and more people, and primarily again people of color. We are bringing them into the legal system and then in the course of providing much-needed help, we subject them to fair amounts of

social control. Or obviously, [inaudible], the "working paternalism," I guess, and the danger of "Big Brother" is very real.

What about the impact of problem-solving courts on due process and concerns about coercion? There have always been concerns about the idea of "plead now in order to get treatment," and I know that has been addressed. Otherwise, you know, "good-bye and good luck, you are on your own." And I know—I say that, but I know we have come a long way since then.

Or worse, "if no plea at this moment here, you may well end being sent downtown." In New York City, that is sort of doublespeak for dirtier, nastier, meaner 100 Center Street.

So is it coercive? I know one commentator has posited that it is no more coercive because you compare the plea rates and they are both more or less the same. I suggest, however, that saying that the plea rates in both courts are so high is really not the appropriate response.

I refer back to the title of this panel, "Lawyer's Role and Ethics." I like to think I would begin a presentation on that topic to attorneys in the regular, generalized criminal court by urging them to think harder about the coercive aspects of that court and striving to overcome it. Indeed, when I taught— and I know clinical professors across the country strive to impress that fact and those goals upon their students.

If we were to craft a new way of doing business, wouldn't one of our priorities be—I hope one of our priorities would be—to remove the coercive nature that leads so many people to plead guilty in Criminal Court early and often.

It is also interesting to recall that in years past, for many, the fundamental flaw of the criminal court was its failure to provide trials, failure to provide an opportunity to be heard.

Why should we care so much about the coercive nature of the plea-bargaining process?

Well, for one thing, let's focus for forty-five seconds on the consumer perspective, which should be obviously of paramount importance to the defense bar.

What is it that criminal clients, defendants, have to say about this? In every single study, from the 1960s on, that looks at the consumer perspective, what do defendants think about their lawyers, they have—let's say they are dissatisfied, to put it mildly.

Part of the problem is systemic. These are free lawyers in a society that believes you get what you pay for. But others have to do with a feeling, repeated over and over in every different survey,

that "all my lawyer cared about was getting me to plead," or "my lawyer never fought for me, my lawyer never said they didn't read me my rights, they didn't give me anything to eat, I wasn't allowed a phone call, they roughed me up at the precinct, God forbid, I didn't do what they claim that I did," "a very truncated or"—we could go on and on about the complaints of the criminal clients.

My concern here is that problem-solving courts may well exacerbate this. One brief example. Researchers have posited that defendants care very much about the process as well as the outcome.

I am reminded certainly of someone like Malcolm Feeler, his book, *The Process Is the Punishment.* It seems to me that in many ways what problem-solving courts have done is change form over substance. The process has changed, but it is still very much punishment.

I think the problem-solving courts ultimately run the risk of being entirely focused on the defendant, on doing things to the defendant, and not paying sufficient attention to what was happening to the defendant, if that is not too hard to digest.

In conclusion, I think it is heartening to see changes in the way the courts function. That is what I personally take away from this. I think it is a dramatic victory.

I was one of those nay-sayers. You look at a monolithic structure like the courts—intractable, change is impossible. It is remarkable. Emphasis on post-disposition versus pretrial intervention is to be applauded. Allowing more room to litigate is terrific. Contrast the Midtown Community Court, an arraignment-only court, with courts like Judge Calabrese's Red Hook Community Justice Center, which handle cases from beginning to end. So much good has come from these courts.

Innovations like these that strive to problem-solve and identify and address the defendant's underlying problem, I want to be clear, in my view are to be embraced. However, especially because they impact so disproportionately on poor people of color, they too should be scrutinized carefully and thoroughly.

**Alex Calabrese**

*Red Hook Community Justice Center*

I wanted to start off by talking about three years ago I was working the lobster shift. The lobster shift starts at 1:00 o'clock in the morning. You are the arraignment judge. Some time between 4:00 and 5:00 in the morning, because everything is kind of hazy after a while, a defendant came before me with approximately twenty-five prior convictions. He is charged with possession of one vial of crack. The district attorney says, "Judge, we would like thirty days." The defense lawyer says, "Judge, how about ten days?"

I said, "Well, what about treatment?" They said, "Well, you know, treatment is really not available." I said, "Well, you mean it is not available like we can't get it today at 4:00 o'clock in the morning, but surely there is treatment that we could refer the defendant to," et cetera. "No, Judge, it is really not available."

And then, speaking to the lawyers, I was thinking: You know, we might as well reserve the defendant's next jail sentence now, because whether it is thirty days or ten days doesn't make any difference for somebody who has such a hard-core habit, who is going to definitely be back again.

That failure to have treatment is a failure to the defendant, it is a failure to the community, and it is a failure for the court. The community deserves to be protected. The court, by not giving treatment, it is clear the defendant is coming back; we are not doing anything for recidivism.

I wanted to be more fact-specific and tell you a little bit about the Red Hook Community Court, and then talk about how the defense lawyers handle their role at the Justice Center.

The Community Court is a very comprehensive model. We have jurisdiction over criminal, family, and housing court cases, we work with three specific precincts, and it covers approximately 200,000 people.

The idea for the Court came from a case you may remember, the unfortunate murder of our local school principal, Patrick Daly, who went out to our local houses, the Red Hook Houses, to get some kids who were truant from his elementary school and bring them back to school. He was caught in a drug gang crossfire and he was killed.

The District Attorney at that time, Charles Hynes, still the District Attorney, prosecuted the case but wanted to do something

more to try to address the community issues surrounding Red Hook.

The Chief Judge, Judith Kaye, brought together a whole host of services to bring into the community to try to solve problems there—services that are available to the court, unquestionably, as part of the mandated sentences; services that are available to people walking in the front door.

And finally, Judge Judith Kluger, who by presiding over Midtown, opening Midtown, and showing that Midtown could be an effective court, really paved the way for our other community courts.

The Justice Center consists of three parts:

We have Youth Court, which, if you don't know Youth Court, almost deserves a day in itself. The Youth Court is a tremendous model. It is run by high school students. They are the judge, they are the jury, they are an advocate for the respondent, they are an advocate for the community. The cases they address are low-level cases, such as truancy. If they can address that case and get the person back on track, then, hopefully, either myself or another judge does not see that person later on.

I was just reminded of a seventeen-year-old who came before me who had not been in school since seventh grade. Well, how exactly do I try to close that gap? It is a very difficult thing to do. Maybe, had that person gone to Youth Court and had that gap closed then and gotten re-engaged back in the community, with social workers helping the family, then there was a real chance that that person was not going to come in front of me.

The only other thing I will point out, especially since I have two teen-aged daughters, is that one thing the Youth Court tells you is that the Youth Court respondents/defendants—we call them "respondents"—who go through that are much more willing to listen to people their own age and teen-agers rather than they are to adults. This is just another way of reaching kids and getting them back on track that is very effective.

We have the AmeriCorps program there, which is the public safety corps. It has received a lot of attention because of volunteerism. They are based at the Justice Center and they work in the community. They do everything from working in the precincts getting domestic violence paperwork to the DA in the courts, to fixing locks on the public houses and fixing windows, and escorting people. They are a friend for the community and they form a natural bridge between the Justice Center and the Community.

Finally, we have the Court. It is only one of three parts of the Justice Center. I have the ability to use all the social services which are on-site and the clinical staff to assess and tell me what a particular defendant needs and design a particular treatment plan for that particular defendant.

The on-site services include youth counseling, which includes individual counseling, group counseling, peer pressure counseling, counseling for substance abuse, counseling to discuss truancy issues, and a mentoring program; they have a marijuana group for adults and for teen-agers; family counseling; anger management—I have to literally read it as a list, because I always forget something—drug and alcohol treatment; a batterers' program; referrals; Safe Horizon, which was formerly Victim Services, is on-site; job training; mediation; child care; and GED classes.

That is just an outline of the Justice Center. It is a project which is near and dear to my heart. And, since you are a semi-captive audience, I was certainly going to talk about it.

Now I want to talk about how the defense lawyers at Red Hook have a somewhat different role and a different battle in community court settings, but they can still be—and are—very effective and are zealous advocates.

The Community Court is clearly designed to take the expertise of a social worker and clinical staff right into the courtroom and provide the Court with a realistic treatment mandate to identify and address the person's individual problems. Usually it is alcohol or drug abuse. They will come to Court with a program.

The defense lawyer's role, it seems to me, in a community court setting is:

(1) Fight the case. If the defendant wishes to fight the case like in traditional court, you can fight the case. There is no punishment. There is no penalty. You fight the case. It works just like a traditional court.

(2) Where a plea is entered which is going to require participation in a drug or alcohol program, the lawyer's role is to ensure that the mandate, the requirement by the Court, is reasonable given the criminal conduct alleged. That is an objective test. Does what you are requiring of the defendant go too far given what the defendant allegedly did and what the defendant is allegedly pleading guilty to having done, or resolving it with an ACD?

Is the mandate reasonable given the defendant's particular circumstances? I think this is obviously very important. In Red Hook, unfortunately, we do have a lot of people with a truly sub-

stantial drug problem. Phoenix House is a wonderful program, it's a great program, but a lot of people can't make Phoenix House. For us to require some of our defendants going to Phoenix House would be setting up a defendant to fail, which is another accusation which I am surprised Mr. Zeidman did not mention at the time. But that is a great catchword, to say that the courts are setting up a defendant to fail.

And finally, that any sanctions for failure are reasonable.

A defense lawyer will fight on each of those items, as Judge Kluger pointed out.

Let's take a case, for example, of someone who is charged with possession of one glassine of heroin, no prior convictions. Well, in the traditional court, the sentence is: Okay, maybe do a day of community service; we'll put the case on track for a dismissal; and you can do the treatment readiness program, a couple days of that—that's fine.

Well, in a community court you might get more, because you might have the clinical staff who realizes that the defendant needs detox, needs twenty-eight days in-patient treatment, needs ninety days out-patient treatment, to really address his or her needs.

Well, what is a fair sentence? If the goal is to help the defendant, if the goal is to protect the community, if the goal is to really get to the issue, well then, that full treatment plan is going to be the fair sentence.

But the defense lawyer will be the first one to tell the judge that is not fair because you are really asking the defendant to do too much considering the fact that it is a first arrest charge of possession of heroin. That is what the defense lawyer's role is, to make sure that mandate is reasonable objectively and reasonable for this particular defendant.

So then, what the lawyer will do is try to work out something where perhaps the detox and perhaps some of the in-patient is mandated but not the rest.

What a defense lawyer has to understand—and obviously critical to any community court—is any order given by a judge has to eventually be able to be backed up by jail. You can do sanctions, you can do essays, you can do everything else, but if the defendant says, "I'm not going to do what you say," you have to be able to back it up by jail. It is the defense lawyer's role to cut down constantly what you are requiring the defendant to do, and they can do that and they do do that.

But now let's just look at the flip side, because this case, the glassine of heroin, is a case where the defendant really had to do more than it would do in a traditional court.

Well, let's look at the flip side. Where you have a treatment program that will accept the defendant right away, right from the arraignment, the treatment program will monitor the defendant, will tell the court whenever the defendant leaves so that you can issue a warrant for the defendant immediately, well then, there are times when the lawyer is going to be saying, "Judge, even though this defendant has a lengthy criminal history, let's do treatment in this case. The defendant will be willing to go into treatment, will be willing to go into the program, wants to do the program, and you will know, Judge, if that person leaves because they are going to tell you, and you can issue a warrant right away, and then, at that point, you could do lengthier jail sentence if you think it is appropriate because the defendant has such a lengthy record."

So there are times when the defense lawyers, as part of our arraignment process, are arguing that I should not consider setting bail in a case because I have all of these services available. So the services can work in a sense to provide a greater mandate for the defendant who maybe is only being involved a first or second time, because you do want to get to the issue, but that can work to the defendant's benefit who has a lengthy criminal history because that is why you have treatment courts. They are there to really address people who have substantial problems and are recidivists.

What I wanted to discuss is not only the defense lawyers have a real voice in a courtroom—because they are there every day, they are with the same prosecutors, they are with the same judge, there is a natural inclination to respect people in a court system when you are going to see them every day. And there is nothing wrong with that. I think it gives them a real voice in the courtroom.

But they also have a real say in designing potential programs that you are looking to implement. Often when you are considering offering certain programs, you can sit down with the District Attorney's Office, with the defense lawyers, and say, "This is what we are going to want to do," and what the defense lawyers will do is advocate for fair sanctions, if there are going to be sanctions; advocate for realistic and proper mandates and then realistic and proper sanctions for failure of the program. So they have a voice not only in the day-to-day operations in the courtroom, but also in planning, and that protects their clients down the road.

Finally, at a Justice Center defense attorneys can have a real voice in the community. At Red Hook, the Legal Aid Society runs "Know Your Rights" workshops in both Housing and Criminal cases, and they can pack a courtroom. They pack my courtroom in the evening with people coming in wanting to know their rights. So they could be an effective advocate for the community and by being part of the Community Justice Court and being part of that setting.

Last but not least, I think that there is a real benefit, there is kind of a reward, when the defense attorney does see the client who has turned his or her life around, who has become healthy. There is a tremendous change that happens, as you know, between someone when you see them at arraignment and then when you see them after successfully completing treatment. They look like two different people, and in a very real sense they are two different people.

It is the defense lawyer who can get the benefit, because they have worked with that person, they have built up a relationship with that person. And simply as a person, as a human being, as a defense attorney, it has to be nice and rewarding to have a client say to you, "Thank you, I appreciate it." Now, the client is not thanking you for making them do anything; they are just thanking you because the defense lawyer was there and the defense lawyer offered support, and sometimes the defense lawyer is the first one to know if the defendant relapses.

From visiting other community courts, I do understand that there is a danger that the defense attorneys can become complacent and become part of the team, in a sense too much part of the team. But I can say that we have the Legal Aid Society Criminal Defense Division of the City of New York at the Red Hook Community Justice Center. I have never heard the word "complacent" applied to them. I do not expect the word "complacent" to ever be applied to them. They can and do zealously and effectively represent their defendants, and even in a Criminal Court and even in a Community Justice setting, and it can be done.

**Susan Hendricks**

*Legal Aid Society*

The Legal Aid Society has long used a problem-solving approach with its clients. We were one of the first public defender offices in the United States to develop a multi-disciplinary approach to criminal defense representation, bringing in social workers to be part of the team that provides defense services to our clients.

We saw in our own cases that treatment interventions could prevent recidivism, but, until recently, that was decidedly a minority view in the criminal justice system. The emphasis instead was on increasing the length of sentences, making those long sentences mandatory, building more and more prisons in upstate New York to hold all the people who would be serving those very long sentences.

Against this backdrop, you can appreciate why we welcomed the advent of problem-solving courts here in New York City.

However, after five years of participation in several courts, I have to say that it has sometimes been a difficult partnership because there is a very real tension between the problem-solving approach and defense attorneys' ethical responsibilities to individual clients.

Problem-solving courts are not especially responsive to constitutional arguments or defense attorneys' ethical concerns because their focus is instead driven by therapeutic goals.

I am going to focus for the most part on points that Steve Zeidman already made, but I am going to bring them down a notch to the actual courtroom level and talk about the impact in a little more detail on defense attorney and client relationships.

One of the areas where ethical issues are most acute is when a defense attorney is counseling a client about the merits of a plea bargain. Traditionally, a successful defense is one that results in a loose restriction on a client's liberty. That means that, short of an acquittal or a dismissal of the case, the defense attorney is seeking the lowest possible sentence.

Problem-solving courts put this value to the test because they generally require the defendant to make a long-term commitment to treatment which can be onerous and difficult.

Some courts erect additional barriers to freedom, requiring that a defendant not only complete treatment but also get a GED, get a job, save $1,000, before they can get their cases dismissed.

Now, defense counsel has an ethical duty to advise our client of any plea offer and to counsel the client about whether it is in her interest to accept the offer. At its best, such discussion is a back-and-forth give-and-take between counsel and client about the pros and cons of the plea offer, including the numerous collateral consequences of a conviction and whether they will be avoided by the plea bargaining.

In the problem-solving context, defense counsel must also lay all the cards on the table, explaining the entire process that lies ahead, the risk of sanctions, and other pitfalls that might occur.

Counseling individual clients on this issue can take a lot of time. That fact alone presents problems in busy urban courtrooms, where there is never enough time for many important matters. Lawyers practicing in problem-solving courts are not going to be able to fulfill their ethical duty unless the court appreciates the importance of counseling clients and adjusts its own schedule to accommodate that goal. Fortunately, in courts that we have been involved in planning before they opened, this has not been a problem, but it has been a problem in other problem-solving courts.

Problem-solving courts are also changing the parameters with respect to client counseling. Counseling clients whose cases are directed to problem-solving courts requires defense attorneys to develop expertise on a host of new topics—the nature of addiction and effective methods for treating substance abuse, for example; or types of mental illness and their treatment, for clients who will be appearing in the new mental health courts that are going to open soon. Attorneys need to know about family law issues for clients whose cases are assigned to domestic violence courts or the new integrated domestic violence parts.

These are kinds of trainings that defense attorneys do not routinely receive. Indeed if you polled a group of defense attorneys on their own knowledge of these issues, I suspect that a proud and significant percentage would tell you that they do not need to know about these topics because they are attorneys, defense attorneys, not social workers.

Now, we offer training on these subjects to our attorneys, but such training is generally not readily available to defense attorneys in the private bar, making it harder for them to meet their ethical obligations to counsel clients fully before they accept plea bargains in problem-solving courts.

Another aspect of plea counseling is that attorneys who regularly work in problem-solving courts are expected to function as a part

of a team, and the team's goal is to address the problem. In drug courts, for example, the problem is addiction and the goal is to assist the addicts to successfully complete treatment.

However, attorneys cannot function as members of the court team when they are counseling individual clients about whether to accept a plea offer, even if the attorney feels that the offer is in the client's best interest. The advent of problem-solving courts has not changed the ethical rule that it is solely the client's decision on whether or not to accept a plea offer.

At the Society, we adhere to the Performance Guidelines of the National Legal Aid & Defender Association, which provide that defense counsel should not attempt to unduly influence the client's decision about accepting or rejecting a plea bargain. This means that the defense attorney cannot be concerned about the broader problem-solving goals when she is counseling her client about the merits of the plea offer.

A remaining problem in the plea area, and historically one that has not been successfully addressed in problem-solving courts in New York City, is that in order to counsel her clients about the merits of a plea offer, the defense attorney has an ethical duty to first investigate the strength of the prosecution's case.

The structure of the drug courts here has made this virtually impossible. Drug courts are structured to take pleas and put defendants into treatment within a few days of arrest, meaning that defense attorneys must counsel clients about the merits of a plea offer at a time when they have virtually no information about the strength of the cases against their clients.

Another area of concern is the duty of loyalty. Problem-solving courts often rely extensively on case conferences involving the team—the judge, the court's counseling staff, the prosecutor, and the defense attorney. In some instances, the defendant is not present; instead, he is the subject of the conference. Court counselors report on how he is doing in treatment. If there are problems, sanctions are discussed.

The defendant's absence presents significant problems for defense counsel. Constitutionally, criminal defendants have a right to attend all proceedings in their court cases.

It is true that they can waive their presence, but when that happens, clients reasonably expect that their lawyers will report on the matters that were discussed. That again creates a tension for the defense attorney.

Ethical rules and case law require defense attorneys to be loyal to their clients. How can we do this in this setting? Do we tell the client that his counselor thinks he is being manipulative? If we do, we will certainly destroy the therapeutic relationship. If we do not, are we being disloyal to our clients?

And when there are allegations that the client has violated the conditions of treatment, do we warn him that the judge plans to remand him to jail for a week or do we keep silent?

How we handle such situations at the Legal Aid Society is simply we tell the clients the facts that are discussed in the conferences.

In the first situation, we would not share the counselor's opinion because it could destroy the therapeutic relationship. On the other hand, we would discuss the events that the counselor described as examples of manipulation. Sometimes these discussions head off problems because the attorney helps the client to see his behavior from someone else's point of view, or because the client discloses information that he is not yet comfortable sharing with the counselor.

In the latter example involving a jail sanction, we would discuss the alleged violations and the possibility of a sanction. We would ascertain whether there are mitigating circumstances or whether the reported violation is wrong.

This brings me to the core problems that defense attorneys experience in problem-solving courts: the inherent tension between our duty to provide zealous advocacy and our role as members of a problem-solving team.

Suppose you are a defense attorney and your client is in a drug treatment program and there has been a urine test indicating that your client has been using drugs. You, the defense lawyer, knows that the judge plans to impose a sanction on the client. The client says there must be some mistake, he has not used drugs. He begs you to challenge the accuracy of the test. You know that the tests are not 100 percent reliable, but you are also worried that you will lose credibility with the judge if you challenge the test. What do you do?

As a defense attorney, you do not have a choice. Defense attorneys have an ethical duty to zealously advocate on behalf of individual clients, and this duty particularly requires them to defend their client's liberty interest, that is, their desire to remain in the community in lieu of a jail sanction.

However, defense attorneys in this situation are right to be concerned about the reaction they may receive from some judges.

Many experts on problem-solving courts have written that lawyers should abandon their adversarial role in problem-solving courtrooms. A publication from the Department of Justice, for example, opines that "a key component of a drug court is that all attorneys shed their traditional adversarial courtroom relationships and work together as a team."

Defenders around the United States report that many judges in problem-solving courts do not understand their distinct ethical responsibilities when clients are facing sanctions.

Many judges assert that traditional due process rules do not even apply in problem-solving courts. Recently, when a Legal Aid attorney tried to explain a client's alleged violation of a treatment condition in a problem-solving courtroom in New York City, the judge said, "I'm not going to allow you to raise this issue, counselor. I do not want the other defendants who are sitting here in this courtroom to think that there is anything lawyers say that can make a difference in what I do."

To defense lawyers, comments like these are as provocative as red flags waved in front of an angry bull. From our perspective, if a client denies violating a treatment condition, the court must engage in fact finding. If a judge refuses to engage in his or her traditional role as a fact finder—for example, by delegating that responsibility to a treatment program—then the court is not fair; it is not a courtroom where the Constitution applies.

A final issue is the advent of some of the more recent courts, the advent of mental health courts and juvenile offender courts. These present unique ethical issues for defense attorneys.

In the first place, defense attorneys owe particular duties when representing clients whose capacity for decision-making is limited, whether by mental illness or by youth. For example, it is unethical to counsel a mentally incapacitated client to enter a guilty plea. For this reason, we are particularly concerned that such courts not make entry of a guilty plea a prerequisite to diversion.

A more serious concern is the specter that these courts will coerce defendants to take medication. Individuals have a constitutional right of privacy to make decisions about medical treatment absent special circumstances. That includes the right to refuse to take psychotropic medications.

In conclusion, I would like to say that the fact that I and other public defenders are troubled by the ways in which some problem-solving courts are insensitive to defense attorneys' distinct ethical duties is not an indictment of innovation. We have long been frus-

trated by the criminal justice system's single-minded focus on processing hundreds of thousands of cases annually as efficiently as possible, treating our clients as so many nameless and faceless statistics.

Despite our reservations about practices in certain problem-solving courts or practices of certain judges, we are finding that therapeutic jurisprudence is a significant advance over its predecessor, which all too often was purely administrative jurisprudence driven by the volume of cases that had to be processed.

But can we make sure that problem-solving courts are fair? I think there are three key things that must be done, two of which were mentioned by Judge Kluger:

Courts must involve defense attorneys in creating the operating rules for the court to ensure that defenders' ethical issues are addressed at the court's inception.

Secondly, problem-solving courts should not treat valid ethical issues as barriers to problem-solving goals. True problem solving requires flexibility. If a judge, a prosecutor, or court staff sees ethical rules as a barrier to problem solving, it is likely that they are thinking too rigidly about their goals and the roles of the diverse players in their courtrooms.

Finally, court systems should provide training on ethical rules. Lawyers and judges practicing in problem-solving courts must understand that the rules have not been repealed and that even defense attorneys who generally support the court's problem-solving goals have an ethical duty to advocate for individualized justice for individual clients.

**Questions and Answers**

QUESTION: I heard you say that you have a panel of youth who help with other youth and they are like the trial judges. Have you considered doing this with adults, or at least having some ex-offenders, some ex-addicts, people who have experience in the system, to at least be advisors for the defense and prosecution and court officers in general?

JUDGE CALABRESE: We have. We were trying to start an after-care group for people who were in out-patient, doing well, where they would have the opportunity to speak to other people. So I think that that is something that we are certainly going to still consider.

We had for a while for kids, or semi-kids, teen-agers, a semi-"Scared Straight" program, where someone who had been wrongly convicted of a crime and been in prison for twenty-to-life would talk to them and also would do some of what we call "life mapping" with them as far as what they want to do and where they are going to go.

I think you can use everyone in a community court. If people want to assist and talk about the values of treatment, they can be very effective. I would agree that that is something that we would like to start doing as an after-care program.

MR. TAUBER: In Dallas, Texas, they actually encourage graduates and members of AA to sit in the jury box as advisors to the court, and they are actually allowed to participate in the proceedings. I, as other people, have seen that court and been very impressed with that innovation.

QUESTION: A very stimulating and fascinating panel tonight. I come at this as a social scientist, and when I hear courts evaluated along the dimensions that are traditional in social science, I get a little worried, because we do not think about evaluating other kinds of courts along those ways.

From simply a judicial point of view, or a legal point of view, I wonder what constitutes an effective court, an effective administration of justice—not from a social science point of view, not from an efficiencies perspective, but from within the context of your own tradition, not from within the context of the social science traditions. Can you give me a feel for what an effective court actually is, if you were going to evaluate it from your own tradition?

JUDGE CALABRESE: I will just say a couple of things. Unfortunately, it is difficult to evaluate the Red Hook Community

Justice Center. I say, "You know, if you were there every day, you know it is a success." That is clearly not an answer for you.

But I think, first of all, what you have to have which makes it effective is a whole different viewpoint of the community and a whole different viewpoint of the defendants. I think that comes from the whole courthouse.

What I mean to say is if you looked at a traditional court, like the main courts at 100 Center or 120 Schermerhorn Street, they are exclusive, where the defendants are seen as outcasts and treated as outcasts. With the volume they have to do, which is a lot—but they are not seen as members of the community. And, like it or not, for every member of the community, the defendants who come before you, especially in a community court, are members of your community and they are going to be members of the community when they finish treatment, when they get out of jail, when the case is over.

So to a certain extent, a large part of it is just from the viewpoint of the community, seeing the court as a tool, as a place you can come to.

If you are looking for specific statistics, I can never do that. I don't want to take too long, but the seventeen-year-old that I was talking about who came before me who hadn't been in school since seventh grade, had that person gone to Youth Court and gotten back on track, I would not have seen that person. Well, how do you measure a success where a Youth Court does well so they don't later on commit a crime? You don't know. So I don't know how it can be evaluated, but I think it is important to make a philosophical change that defendants and families feel part of the community when they come into a community court.

The other thing I would just add is what I love to see, and what I do see, is people who will come back to Midtown or people who will come back to Red Hook after they receive a jail sentence.