Therapeutic Jurisprudence and the Appellate Courts: Possibilities

*Linda M. McGee**

Having read several publications by David B. Wexler and Bruce J. Winick, generously shared with me by the authors during the past two years, I formed an opinion about the developing discussion of whether appellate courts need therapeutic jurisprudence.[1] I also drew upon the benefits of therapeutic jurisprudence that I saw first-hand in a community mediation/dispute settlement program I helped establish several years ago.[2] At that time, it became clear that alternative methods were needed to solve community disputes and to provide legal services to poor people because funds for the Legal Services Corporation were being drastically reduced. When I told my colleagues that I was writing a brief law review article on therapeutic jurisprudence in appellate courts, I was asked whether there was a need for it in courts whose usual role is to review trial tribunal decisions. I was also asked how therapeutic jurisprudence would work in an appellate court.

I. APPELLATE COURTS' NEED FOR THERAPEUTIC JURISPRUDENCE

The caseload at the North Carolina Court of Appeals continues to grow dramatically. Last year, for example, the twelve judges of our court filed full written opinions in 1,650 cases and decided 3,500 motions and petitions.[3] How do we deal with an ever-growing case load? Federal and state appellate courts have pursued various measures in addressing this demand. However, some of these measures

* Judge, North Carolina Court of Appeals.

1. David B. Wexler, John D. Lyons Professor of Law and Professor Psychology, University of Arizona, and Professor of Law and Director, International Network on Therapeutic Jurisprudence, University of Puerto Rico School of Law. Bruce J. Winick, Professor of Law, University of Miami School of Law. *See generally* LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick eds., 1996).

2. Blue Ridge Dispute Settlement Center, Inc. in Boone, North Carolina.

3. John Connell, Report to the North Carolina Court of Appeals (2000) (unpublished, on file with the author).

have resulted in a "countervailing concern."[4] In February 2000, the American Bar Association (ABA) reported:

> [these measures] have hampered the quality of review and decision making and have restricted public information regarding the reasons for decisions. As a result, attorneys, their clients, legal scholars and others may believe that cases have not received full consideration and that the opinions, judgments and orders are inadequate and even unjust.[5]

Furthermore, the ABA report quoted Professor Martha J. Dragrich's observation that, "[t]he courts of appeals' admittedly legitimate concerns with increasing caseloads do not warrant practices that threaten the development of a coherent body of law and fundamentally alter our appellate traditions."[6]

Our court is actively responding to the challenge of an increasing caseload, but it is clear that appellate courts need alternatives. One member of our court has submitted a proposed plan to the National Center for State Courts, outlining a comprehensive training program that fosters both the personal and professional development of judges and court staff. One judge is chair of our state's dispute resolution program, and another judge is involved in *pro se* filing of legal actions, broadening access to the courts in a manner aimed at increasing efficiency and fairness.[7]

To improve the efficiency of our appellate courts, the North Carolina Supreme Court has implemented electronic filing of appeals and the North Carolina Administrative Office of the Courts has submitted a grant application to the State Justice Institute to fund an experimental electronic filing program at our court. Moreover, we are creating outreach programs to make the public aware of problems faced by the courts. For example, our judges are speaking to public organizations and schools about our judicial system and holding court sessions in courthouses and law schools across the state. Credibility with the public is essential, and educating the public about the workings of the judicial system and its role in our democracy is vital.

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4. ABA OF THE DISTRICT OF COLUMBIA, REPORT TO THE HOUSE OF DELEGATES 1 (2000) (recommending that appellate courts set out in case dispositions, at a minimum, the operative facts of the case, the issues presented, and the legal basis for the ruling).

5. *Id.*

6. *Id.* at 3 (quoting Martha J. Dragrich, *Will the Federal Courts of Appeals Perish If They Publish?* 44 AM. U. L. REV. 757, 802 (1995)).

7. Judge John C. Martin, Proposal to the National Center for State Courts (2000) (on file with author).

II. THERAPEUTIC JURISPRUDENCE IN THE APPELLATE PROCESS

The next question is how therapeutic jurisprudence might operate in the appellate process. In our trial courts, our state has seen the success of mandatory mediation for claims under $15,000, and the North Carolina Industrial Commission's mediation program settles more than ninety percent of its cases through mediation. Every federal circuit court in the country has a mediation program. In fact, the Fourth Circuit Court of Appeals has a settlement rate of almost one-fourth of its cases.

It is no coincidence that a committee of our court recently recommended we propose to our state supreme court that a mediation program be established for our court. There are more than twenty-five mediation programs operating in state appellate courts, evidencing the need for another approach to resolving cases.

One might be skeptical that parties can still resolve differences on their own by the time their case reaches the state or federal appeals court. Yet, appellate level cases present an excellent opportunity for mediation for several reasons. As Mori Irvine, the Chief Mediator of the Eleventh Circuit Court of Appeals, writes:

> The parties' professional motives often include a concern with the probabilities of winning on appeal (does the client want to take the risk of losing on appeal?), an interest in protecting a favorable lower court opinion (does the client want to lose that decision?), and the availability of alternative legal avenues that are better suited to resolving the client's problem . . . The parties' practical, business, and personal interests may also push them towards mediation. Ultimately, settlement brings peace of mind to the participants.[8]

Furthermore, Irvine observes, "[e]ven on appeal, cases are not static. Everything continues to evolve: The law changes, circumstances change, the decision makers change, new case law comes down."[9]

Mediation changes the traditional role of appellate courts in deciding whether a trial tribunal committed an error that deprived the appellant of a fair hearing. The Honorable Shirley M. Hufstedler, Circuit Judge on the Ninth Circuit Court of Appeals, defined the work of appellate courts as follows:

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8. Mori Irvine, *Better Late Than Never: Settlement at the Federal Court of Appeals*, 1 J. OF APPELLATE PRAC. & PROCESS 341, 346 (1999).

9. *Id.*

> [a]ppellate courts serve two quite different functions: First, appellate courts review the trial record for error in the particular case. We can call this the review for correctness. Second, appellate courts use the cases before them as vehicles for stating and applying constitutional principles, for authoritatively interpreting statutes, for formulating and expressing policy on legal issues of system-wide concern, for developing the common law, and for supervising each level of the system below them. We can call the second set of tasks the institutional functions—the business of Government.[10]

With therapeutic jurisprudence in the form of mediation, we will no longer determine whether there was error in the trial; we will actually help mold a resolution of the case acceptable to the parties.

Therapeutic jurisprudence means more than just employing mediation at the appellate court level. It invites judges to think in terms of the law as a healing force. Indeed, applying therapeutic jurisprudence at the trial level seems very natural when crafting a practical result with which all the parties can live.

Crafting a written opinion that will assist the parties in healing their disagreements is a new idea that requires judges to have a heightened sensitivity to the language they choose. In their role as wordsmiths, judges can be decisive and still be positive. In addition to referring to our thesaurus for a more precise word when writing an opinion, we need to develop a list of creative methods of resolving the parties' disagreements—therapeutic remedy options. The prospect is a challenging and unique opportunity for those of us who also wish to be problem solvers helping people.

III. CONCLUSIONS: THE POTENTIAL FOR THERAPEUTIC JURISPRUDENCE IN APPELLATE COURTS

Therapeutic jurisprudence has multiple possibilities, provided it does not add another layer of cost, delay, and time to the process. First, we should see "a reduced number of cases for the appellate court to decide, fewer remands and secondary appeals, the streamlining of appeals through partial resolution of issues, the satisfaction of parties' underlying needs and interests, and the reduction of the time a case spends on appeal."[11] Second, the outcome does not have to become part of the case law that applies to similar cases, possibly establishing

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10. Hon. Shirley M. Hufstedler, *New Blocks for Old Pyramids: Reshaping the Judicial System*, 44 S. CAL. L. REV. 901, 910 (1971).

11. Richard Becker, *Mediation in the New Mexico Court of Appeals*, 1 J. OF APPELLATE PRAC. & PROCESS 367, 369 (1999).

negative precedent. Third, mediation allows personal healing and the development of positive, achievable values. Respect for the law and the legal process can develop in a distrustful culture.[12]

These changes should also benefit lawyers. As author Deborah Tannen writes, lawyers will no longer have to be dedicated to "what the adversarial culture does to those who practice within the system, requiring them to put aside their consciences and natural inclination toward human compassion."[13] Therapeutic jurisprudence would satisfy the heritage of the lawyer's duties. Lawyers are "not just means to someone else's ends."[14] Lawyers have a duty "to protect the rule of law as an ideal, to serve the system of justice on which our democracy is based, and to study and promote humanism. . . ."[15]

As Mme. Bertha Wilson, retired Justice of the Supreme Court of Canada, stated, "[t]he goal . . . is not seen in terms of winning or losing, but, rather, in terms of achieving an optimum outcome for all individuals involved. . . . "[16] With therapeutic jurisprudence in the appellate courts, perhaps our judicial system can achieve "that optimum outcome."

12. Hon. Peggy Funton Hora & Hon. William G. Schma, *Drug Treatment Courts: Therapeutic Jurisprudence in Practice* 7 (1999) (unpublished manuscript, on file with author).

13. David B. Wexler, *Therapeutic Jurisprudence and the Culture of Critique*, 10 J. CONTEMP. LEGAL ISSUES 263, 266 (1999) (quoting DEBORAH TANNEN, THE ARGUMENT CULTURE, MOVING FROM DEBATE TO DIALOGUE (1998)).

14. *Id.*

15. Daniel R. Coquillette, *Professionalism: The Deep Theory*, 72 N.C. L. REV. 1271, 1277 (1994).

16. Kathryn Mickle Werdegar, *What Women Bring to the Bench*, AM. LAW. MEDIA, Mar. 3, 2000, at 1.