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# *JFH* Health

## HOW THE TENTH CIRCUIT IS IMPROVING THE HEALTH AND PERFORMANCE OF FEDERAL JUDGES

BY MARCIA S. KRIEGER, MICHAEL H. GENDEL & TIMOTHY D. DEGIUSTI

*Being a judge offers many benefits* — prestige, intellectual stimulation, autonomy, and the opportunity to provide a community service. But the simple fact is that being a judge does not make one immune to physical, mental, and emotional problems that afflict anyone. Indeed, being a judge can increase and complicate these problems. If such problems go unnoticed and untreated, they can lead to unnecessary suffering; they can also impact the judge's performance. The problem presented to the judiciary is how to identify and address health issues to maintain public confidence in the judicial process.

Judges may suffer from all types of physical ills: the normal spectrum of psychological issues,<sup>1</sup> addiction to alcohol and other substances, marital and family issues, and physical and cognitive limitations associated with aging.<sup>2</sup> In addition, being a judge brings peculiar stresses. For example,

*For over seven years,* JHEALTH HAS PROVED ITSELF TO BE AN INVALUABLE RESOURCE AND TOOL – FOR SELF-HELP AND GUIDANCE. IT PROVIDES A PROCESS FOR OBTAINING ADVICE FROM MEDICAL PROFESSIONALS IN A CONFIDENTIAL WAY FOR JUDGES, THEIR FAMILIES, AND THE COURT. THE PROGRAM ALLOWS US TO IDENTIFY MEDICAL ISSUES AND TO TREAT THEM, MAKING SURE THE WORK OF THE COURT CONTINUES TO OPERATE AT A HIGH LEVEL.

TIMOTHY TYMKOVICH, CHIEF JUDGE  
U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT

a judge often feels great responsibility in making decisions; the public nature of the judge's work invites criticism to which the judge cannot respond; in every controversy the judge's decision disappoints or angers someone; the judge must be constantly aware of persistent and unexpected security risks to him/herself and to his/her family; the judge witnesses individual and societal dysfunctions that the judge cannot directly address due to ethical and other restraints; the judge must sometime rule contrary to personal feelings and beliefs; and the judge controls neither the workload nor the resources necessary to address too-heavy workloads.

The nature of the judicial role also affects how judges address personal health issues. Judges work in an insular environment, isolated from the social and professional support systems that private citizens often enjoy. In addition, the very qualities that draw judges to the bench — analytical abilities, willingness to work hard, desire to produce a high-quality product, and commitment to public service — often cause judges to overwork, ignore, or hide personal weaknesses and confuse professional and personal identities. Thus, when confronted with a health concern that arises from or impacts judicial work, too often judges view it as a weakness or are reluctant or embarrassed to admit its existence. Even if the judge recognizes a problem, he or she may not know where to obtain high-quality, confidential assistance.

### DEFINING THE PROBLEM, DESIGNING A SOLUTION

Recognizing that unaddressed judicial health issues can lead to performance problems, and that the federal judiciary's formal disciplinary processes<sup>3</sup> address only the most profound judicial misconduct and disabilities, in 2009, Judge Robert Henry, then-chief judge of the U.S. Court of Appeals for the Tenth Circuit, directed the creation of a committee to investigate formal and informal methods of addressing judicial health issues. His charge was broad: to consider concepts of "wellness" and disability, current mechanisms for addressing judicial performance issues including those associated with aging and retirement, the need for confidential assistance to judges, and existing judicial assistance programs. Based on its assessment, the committee was asked to make appropriate recommendations to foster judicial health and address judicial disabilities.

The committee was formed with an eye to diversity. Its members included former and current chief judges, active and senior circuit judges, district judges, and magistrate and bankruptcy judges drawn from all states in the Tenth Circuit, as well as non-judicial members, the circuit executive and staff, and Dr. Michael H. Gendel, M.D., medical director emeritus of the Colorado Physician Health Program. The committee named itself the Judicial Health and Assistance

Committee (JHAC) and embarked on 18 months of reviewing an extensive body of literature directed at judicial health issues, analyzing existing federal and state judicial assistance programs, considering presentations from an array of experts, and conducting two surveys of judges in the Tenth Circuit.<sup>4</sup>

In 2011, JHAC submitted its Report and Recommendations to the Tenth Circuit Judicial Council. JHAC made several findings:

Unrecognized and untreated health issues can lead to mental or physical disability or result in judicial misconduct complaints, which can undermine public confidence in the judicial process. But formal statutorily created disability retirement and misconduct/disability processes primarily serve a regulatory function and are effective in addressing only the most severe problems. In addition, regulation focuses on past conduct and does not inherently address treatment of health issues.

Judicial performance and judicial health are frequently interrelated. Unraveling the nature, cause, and treatment of a particular performance or health problem often requires medical expertise. For example, what may be perceived as inattention by a judge could be the result of a sleeping problem or a hearing or cognitive impairment. Changes in temperament or

perceived overuse of alcohol could be related to physical pain, depression, medication imbalances, or other causes.

Due to the public role of the judge, the job's insular nature, natural fear of criticism or embarrassment, and a host of other reasons, judges with difficulties often are reluctant to recognize or seek the help needed. Chief judges, judicial colleagues, concerned family, and court staff are also at a loss as to when and how to address a judge's health or performance problem. Indeed, 82 percent of chief judges surveyed reported that they have had a concern about a colleague's health or welfare. Of those who had concerns, 41 percent tried to talk to the colleague, 51 percent spoke with other colleagues, and 27 percent did nothing. Of those who did nothing, more than half said that they ignored a problem because they felt uncomfortable addressing it. In the survey of all judges, the most common method for addressing concerns was in a direct conversation with the judge, but only 46 percent reported any success using this method.

Judges are best able to assist each other and are more likely to address their own issues before they cause performance problems if they are educated about health issues and risks and when they can obtain confidential assistance from a highly qualified source. Ninety-three percent of chief judges surveyed had requested written materials about how to address a colleague's health concern, and 48 percent indicated that they would have consulted a medical professional if one had been available. In the survey of all judges, 82 percent said that they

wanted written materials to assist in addressing health concerns, and 65 percent indicated that they would consult with a professional regarding their own or a colleague's issues if a professional was available.

On the recommendation of JHAC in 2011, the Tenth Circuit Judicial Council created JHealth, a voluntary program that provides education and confidential assistance to all judges in the Tenth Circuit. This article summarizes JHealth's efforts over the past seven years to provide knowledge and resources that may be of use to other courts.

## JHEALTH

JHealth is a free, voluntary, and informal program with three components: (1) educational resources about judicial health, (2) services from a Consulting Medical Professional (CMP) retained by the Tenth Circuit to consult with judges, their families, and court staff about judges' performance and health issues, and (3) guaranteed confidentiality for voluntary consultations.

### 1. Education

JHealth provides educational resources on a wide variety of physical and mental health issues, including stress, family issues, chronic illness and disability, aging, depression, anxiety, substance abuse, and burnout. The educational approach is three-fold: (1) to provide current, specific information on strategies to facilitate physical, mental, and emotional health and to counteract the particular demands and stresses of judging; (2) to make judges, their families, and staffs aware of JHealth and reduce barriers to program utilization; and (3) to stay abreast of demographic and attitudinal changes among judges so as to ensure that the program remains responsive and vital.

JHealth maintains an informational webpage accessible from the Tenth Circuit's internal website, where judges can easily—and confidentially—review the basic aspects of the program, become familiar with the consultation process and its assurance of confidentiality, and obtain contact information for the CMP. The webpage includes helpful links to a chief judge's guide, articles of interest and a list of other written resources, a printable program brochure, introductory PowerPoint presentations, and a frequently-asked-questions section.

In addition, JHealth has a visible presence at every Tenth Circuit conference. Formal educational and awareness sessions have addressed a number of topics. Most recently, JHealth presented a program on mindfulness that featured presentations by leading experts in the field followed by a breakout session during which judges and their family members took part in a guided mindfulness meditation session. Less formally, participation of the CMP at each conference helps to make consultations both convenient and opportune.

JHealth also forwards the Ninth Circuit's periodic newsletter, *Courting Good Health*, with commentary and suggestions by the CMP, to all judges within the circuit.

Finally, JHealth goes on the road to visit each judicial district. There is, of course, some variability between the judicial districts within the six-state region of the Tenth Circuit—case-loads vary by numbers and types of cases, as do judge demographics and other location-specific characteristics. Accordingly, the health education and needs of the judges in the District of New Mexico, for instance, may be different than those in the District of Utah. JHealth tailors specific educational presentations to the needs of a particular district as identified by the district's

## *Voluntary participation by judges* IN JHEALTH DEPENDS UPON JUDGES' CONFIDENCE THAT THEIR HEALTH NEEDS WILL REMAIN CONFIDENTIAL AND THAT THEY WILL RECEIVE ADVICE FROM A SKILLED AND EXPERIENCED PROFESSIONAL.

chief judge and delivers that information on request as part of a district's annual workshop training or in seminars specifically scheduled for JHealth training. These tailored presentations are conducted by the CMP and a JHAC member. Prospectively, JHAC will conduct another circuit-wide survey to enable JHealth to refocus, refine, and expand its services.

### 2. Free and Confidential Consultation with the CMP

Being aware of judicial health issues may prevent the emergence of some problems or lead a judge to seek medical care. However, many health problems will emerge despite education, and education is not, by itself, curative. Indeed, identifying the cause, scope, and appropriate treatment of health concerns and unraveling the complex interplay between performance and health problems often require special medical expertise. For example, the judge who is repeatedly inattentive in the courtroom may have a problem with hearing, sleep, mood, or cognitive functioning. The judge who has outbursts of temper on the bench may be buried by work and lack sufficient staff, have family issues, be depressed or anxious, or suffer from chronic physical pain or illness.

Voluntary participation by judges in JHealth depends upon judges' confidence that their health needs will remain confidential and that they will receive advice from a skilled and experienced professional. Sometimes a judge does not recognize his or her own problem, but family, staff, and other judges do. They may not know where to seek help or may be afraid to do so. They also need and rely upon confidential, skilled assistance. If a judge's health issue has become a perfor-

mance issue, a local chief judge or the chief circuit judge may also need skilled and confidential advice in conjunction with formal conduct/disability and disability retirement issues.

To address these realities, the circuit retains and pays for the services of the CMP. Selected<sup>5</sup> by the chief judge of the circuit, the CMP must have the following qualifications: (1) a mental health degree of at least a master's level in psychology or social work; (2) experience in making psychiatric diagnoses and familiarity with neuropsychological problems; (3) experience in employee assistance work, with a recognition of differing obligations to employers and employees; (4) experience with professionals such as doctors, lawyers, etc.; (5) familiarity with experienced assessment and treatment providers in the states that comprise the Tenth Circuit; and, (6) appropriate licenses and malpractice insurance. The CMP is paid with funds appropriated for the circuit's operations, and the cost is generally \$5,000 to \$10,000 a year.

The role of the CMP is to provide preliminary assessment and referrals to judges who seek assistance (self-referred) as well as to judges who consult with the CMP after having a problem brought to their attention by a concerned third party or chief judge.

#### *The Self-Referring Judge*

A judge might contact the CMP and explain that he/she has lost a spouse and is grieving, depressed, and unable to work. Another judge may have had a traumatic injury and is having issues with chronic-pain management. The CMP would confer with each judge, make a preliminary assessment as to whether professional assistance would be helpful,

and make a referral. If the judge seeks assistance outside his or her community to maintain anonymity, the CMP can make appropriate arrangements. The consultation by a self-referring judge is completely confidential except for in extreme circumstances. Extreme circumstances would be limited to those where, in the professional opinion of the CMP, the self-referring judge is a physical danger to him/herself or others. In such an event, the CMP would contact appropriate authorities such as local police or the U.S. Marshal.

#### *Concerned Third Parties*

A member of a judge's family, chambers staff, court staff, or another judge can also contact the CMP with a concern. A third party might seek guidance as to whether there is a problem, how to address it, or whether to alert the local chief judge or chief circuit judge. Alternatively, the third party might request that the CMP alert the chief judge. For example, the third party may have heard about or witnessed declining cognitive abilities of a judge (expressing incomplete or illogical thought, making repetitious statements, or exhibiting difficulty in reasoning) and he/she does not know what to do. A staff member might observe an elderly judge falling asleep at his/her desk or on the bench. A family member may have noticed a hearing problem and worries that it affects the judge in the courtroom. The CMP may offer techniques or approaches to be used to discuss the matter with the subject judge; suggest sources for assessment; or suggest contacting (or offer to contact) the chief judge. Unless waived, the identity of the third party and communications between the concerned third party and the CMP are confiden- ▶



tial. The CMP can gather information, form an opinion, and communicate with the local chief judge or the chief circuit judge. If the CMP contacts the subject judge and wants to self-refer, then confidentiality is maintained as if the judge had initially self-referred.

### *Local Chief Judges*

Although the misconduct and disability complaint process is administered by the chief circuit judge and the Circuit Judicial Council, it is likely that concerns about the health or performance of a district, bankruptcy, or magistrate judge initially will be brought to the attention of the local chief judge or his/her designee. For example, the chief

learns from attorneys that a judge has exhibited unprecedented, profound cognitive difficulties on the bench. The local chief judge might then consult with the CMP, who could provide information about what the problem might be, how it might be assessed, and how to approach the subject judge, and, once a diagnosis is made, what impact the diagnosis and treatment program will likely have on the judge's ability to return to work. The subject judge and the CMP might then work together to facilitate the judge's return to work. Unless waived by the subject judge, these communications remain confidential between the CMP, local chief judge, and, if appropriate, chief circuit judge.

At some point, a local chief judge might meet with a judge and suggest that the judge contact the CMP directly for assessment and referral. For example, the local chief judge might advise a judge that concerns have been raised as to his or her excessive drinking or that the judge seems to be overwhelmed by work or personal issues. Or, in the case of a judge with perceived cognitive problems, a local chief judge might ask the CMP to observe the subject judge in the courtroom and report back. The local chief judge might then talk with the subject judge or the judge's family. If the subject judge consults with the CMP, the consultation is confidential. However, the judge can consent to the release of the CMP's assessment and recommendation for treatment to the local chief judge. If the information is shared with the local chief judge, it cannot be shared with the chief circuit judge unless the problem was not resolved. In that event, the local chief judge would advise the subject judge before informing the chief circuit judge of the problem.

Once the CMP refers a judge for further assessment or treatment — if the CMP, subject judge, and local chief

judge agree — the CMP may monitor the subject judge's progress by contacting the professionals providing treatment to the subject judge. Communications between the treating professional and the subject judge are confidential. The subject judge can execute a release of information to allow the treating professional to relate his/her professional assessment or diagnosis, the nature and duration of the prescribed treatment, progress or lack of progress, and prognosis to the CMP as well as a release to allow the CMP to relay such information to the local chief judge.

At any point, the local chief judge may seek the opinion of the CMP about the likely source of treatment and whether a subject judge's problems can be addressed by further corrective action. If treatment has proven unsuccessful or if further corrective action is not feasible or advisable, a local chief judge may consider whether the judge's health or performance problem should be referred to the chief circuit judge or a disability/misconduct complaint should be filed. In such event, the local chief judge would advise the subject judge of his or her intent to contact the circuit chief before doing so. All information known to the local chief judge about the issue, treatment, etc. would be forwarded to the chief judge of the circuit. With an appropriate consent to release of information, the CMP could also communicate directly with the chief circuit judge.

### *The Chief Circuit Judge*

In assessing both formal complaints and less formally communicated concerns about the health or behavior of a judge, the chief circuit judge must assess the severity and nature of the problem and may consider available means to address it. Using the examples above, a formal complaint could be filed, for instance if



**MARCIA S. KRIEGER** is the chief judge of the U.S. District Court for the District of Colorado and former chairperson of the Tenth Circuit's Judicial Health and Assistance Committee.



**MICHAEL H. GENDEL M.D.** is the consulting medical professional for the Tenth Circuit's JHealth program and medical director emeritus of the Colorado Physician



Health Program. **TIMOTHY D. DEGIUSTI** is a district judge serving on the U.S. District Court for the Western District of Oklahoma and the current chairperson of the Tenth Circuit's Judicial Health and Assistance Committee.

the judge has been intoxicated on the bench or an informal communication might alert the chief circuit judge that a judge's work has suffered due to his/her depression. In both situations, the chief circuit judge must decide initially, and ultimately, whether to treat the information as a health issue or as a disciplinary complaint. As with local chief judges, it is helpful to have input from the CMP on a confidential basis. However, if the CMP has been involved in earlier steps, that consultation may not be possible absent a waiver from the subject judge.

### 3. Experience and Results

The experience of the CMP in the JHealth program is consonant with that envisioned in the development of the program. The CMP has been consulted by judges seeking assistance, third parties, chief judges, and the chief circuit judge for a wide variety of clinical problems. Out of the 144 judges in the circuit, a handful of cases have come forth each year, totaling about 30 thus far.

The problems addressed have included major illnesses such as neurological disorders (including but not limited to dementia), psychiatric conditions including mood and anxiety problems, substance use disorders, stress and burnout, and a host of social and psychological issues such as marital problems or distress about ill family members. Judges have been referred because of their behavior on the bench, such as inattention or unusual anger, or behavior at work outside of the courtroom, including sexual harassment. Most referrals have been voluntary, and most voluntary referrals have been true self-referrals, distinct from situations in which judges have been strongly encouraged to refer themselves.

The great majority of these cases have proceeded in a satisfactory manner. After the CMP consultation, the judge

followed through with the recommended evaluation or treatment, received help, and enjoyed a resulting improvement in quality of life and in some cases quality of work. Some situations involved conditions that would not improve, such as dementia; intervention was successful but judicial performance would not have been expected to improve. Judges were typically followed by the CMP over time to assure that referrals were appropriate and helpful and to assess progress. However, some consultations were limited to one or two phone calls and a referral. In a few cases, the judge disagreed with some aspect of the CMP's recommendation. In these cases, alternative strategies were agreed upon and the outcome was satisfactory.

Most judges were willing to immediately describe the situation that led them to consult with the CMP and were clearly ready to ask for help. To the extent judges were concerned about the CMP consultation process, confidentiality was the most frequent concern expressed. Some judges were concerned about privacy and preferred to be evaluated outside of their immediate community. In no case was it necessary to breach confidentiality.

The degree to which chief judges, at all levels, utilized CMP consultation was somewhat unexpected. Chief judges expressed considerable appreciation for the opportunity to think through approaches to judges about whom they had concern, and especially to do so with someone outside the judicial environment. As noted in the "Education" section above, CMP's visibility at judicial conferences where judges have the opportunity to directly seek consultation has increased the number of consultations.

### CONCLUSION

Over the past seven years, JHealth has achieved its objectives. It has increased

awareness of the importance of judicial health and the relationship between health and performance; provided confidential, skilled medical assistance to more than 20 percent of the judges in the circuit; and provided a resource for chief judges in addressing the needs and performance of their colleagues. Most importantly, it has improved judges' quality of life and, for some judges, the quality of their performance upon which confidence in the judicial process depends.

<sup>1</sup> We come from the ranks of lawyers who experts say are more likely than the general population to suffer from depression, emotional distress, anxiety, addictions, and related mental and physical problems. These are anecdotal reports, as there are few studies of the frequency of illness among lawyers and none among federal judges.

<sup>2</sup> This is particularly true in the federal system, in which judges enjoy long tenure and can elect to serve in senior status. According to the Administrative Office of the U.S. Courts, one-sixth of sitting federal judges are older than 80, and more than three dozen are older than 90. In the Tenth Circuit considering those that are both active and senior status, 60 percent of circuit judges, 40 percent of district judges, 9 percent of magistrate judges, and 5 percent of bankruptcy judges are age 70 or older.

<sup>3</sup> The Judicial Conduct and Disability Act (the Act), 28 U.S.C. §§ 351-364, authorizes and sets out procedures for the processing of complaints alleging that a federal judge is "unable to discharge all the duties of office by reason of mental or physical disability." 28 U.S.C. § 351(a). Federal law also provides that Article III judges who become permanently disabled may voluntarily retire from service upon certification of the disability as set out in 28 U.S.C. § 372(a).

<sup>4</sup> One survey was of past and present chief judges; a second was of all judges in the Tenth Circuit.

<sup>5</sup> Since the advent of JHealth, the CMP has been Dr. Michael H. Gendel, M.D., a licensed psychiatrist, who has extensive experience in assisting high-profile and high-performing individuals (such as doctors, lawyers, airline pilots, etc).