

reaching through the prison walls: social work in an appellate defender office

Holistic public defense and forensic social work have been complementary developing fields for a number of years. Collaboration between social workers and lawyers in criminal defense offices is considered helpful for the legal practice and for the client.¹ Social worker-lawyer collaborations are best-equipped to "respond to the myriad needs of those who are poor or marginalized by their social, medical or psychological circumstances."² The criminally accused commonly have a host of concerns that, if not directly related to arrest, are nonetheless exacerbated by it. Issues such as substance abuse, unstable housing, limited economic opportunities, and medical and mental illnesses are common concerns that may contribute to criminal behavior and limit the options available in plea negotiations. These issues may also persist after sentencing and complicate incarceration and/or release.

At the trial level, social workers collaborate with public defenders both to assist with the legal case and to provide additional services to clients in need. Innovative trial offices, such as Neighborhood Defender Service of Harlem, The Bronx Defenders, and the Georgia Justice Project, have created models for holistic trial representation that includes substantial input from social workers.³ The need for holistic representation does not end at sentencing, however.

The criminal justice system, and particularly the defense function within it, has been described as "the catch-basin for the breakdown of social services inside communities."⁴ In this context, the appellate defender office is best equipped to assess how this "catch-basin" ultimately responds. Once an individual is sentenced, and leaves the local detention facility, the difficulty in communicating and the expense of visits and telephone calls commonly results in family and friends losing contact with their incarcerated loved one, particularly if a lengthy sentence was imposed. An appellate defender is most likely to have a relationship with his or her client during incarceration, and may be the only one to advocate on the prisoner's behalf.



Social Work Need In An Appellate Defender Office

The assistance that social workers can provide in an appellate office is similar to that provided in a trial office. Among the roles that a social worker can have in an appellate defender office are (1) assisting with the legal representation through investigation, mitigation, and counseling; (2) providing institutional advocacy on behalf of clients; and (3) providing case management, support and necessary referrals for clients preparing for release.

Assistance With Legal Representation

The value of social workers to assist in the interview, evaluation, crisis response, short-term casework, negotiation and referrals in trial offices is already known.⁵ For criminal defense offices, social worker involvement in the legal practice generally focuses on investigations and mitigation, particularly at the sentencing level.⁶

A critical role in an appellate office is to review the effectiveness of trial counsel's representation. The United States Supreme Court has recognized the importance of presenting mitigation, and has held that an attorney's failure to present this information, at least in a capital case, can amount to ineffective assistance of counsel.⁷ To develop such a claim of ineffective assistance of counsel, an appellate attorney must obtain, assess and evaluate what mitigation information was available and whether it could have been presented in a manner to impact the sentence. Not surprisingly, some capital appellate offices regularly use social workers, or other qualified mitigation specialists, to assist with the review. As a social worker is best-equipped to obtain this information for the trial attorney, she or he also has the expertise to best obtain this information for the appeal or post-conviction review.⁸

Non-capital appellate offices can (and should) also provide zealous sentencing review. In many jurisdictions, including New York, the appellate courts have the power to independently review sentences.⁹ In exceptional circum-

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stances. an attorney may want to seek to expand the record to include information relevant to reviewing the sentence. A social worker can obtain and compile this information in a credible, comprehensive manner.

While not directly related to the court proceedings, an important part of appellate advocacy is communicating with clients and, often, family members. While rarely discussed, this is often one of the most challenging aspects of appellate work. A client who has been convicted after trial or has pleaded guilty on advice of trial counsel will often have negative feelings about the criminal justice system and criminal defense lawyers (including their own), have unrealistic expectations of the appellate process, and/or have anxiety about the appeal. The disproportionate presence of mental illness among criminal defendants¹⁰ — which is often exacerbated by incarceration¹¹ — adds further challenges. A social worker can work with a client about his feelings towards the process and the system to better prepare the client for remaining involved in and contributing to the appellate process. As the majority of appeals are ultimately unsuccessful, a social worker can also work with clients and family members to prepare them for this possibility and to respond to the disappointment or devastation that may come when the conviction becomes final.

Institutional Advocacy

The vast array of issues that arise for prisoners is well documented. Individuals in prison may be subject to inhumane conditions, physical and/or sexual violence, insufficient medical and/or psychiatric care, and an inability to access legal resources, religious services and/or rehabilitative programs.¹² Remediating these concerns generally requires an advocate who is able to contact the appropriate corrections staff and respond to a prisoner who may have nowhere else to turn (or nowhere else he feels comfortable turning) other than his appellate lawyer.

For an appellate defender who is concerned about his or her client's well-being, and wants the client to be able to comprehend and communicate about the legal proceedings, addressing the pressing concerns of prison issues is mutually beneficial. However, the appellate lawyer, acting alone, may not be comfortable or well-equipped to respond to a prison concern. Prisoners rights offices that have managed to survive, despite the Prisoners Legal Reform Act¹³ and other defunding attempts, cannot

respond to every prisoner need and often limit services by focusing exclusively on litigation and/or specific issues.

A persistent social worker who is adept at navigating complex bureaucracies can be as effective as a prisoners rights lawyer in providing non-litigation advocacy within the corrections system. A critical first step in prison advocacy is obtaining and communicating information with correction officials and with the client. A social worker, who is generally viewed as a "helping professional" and not associated with litigation, can sometimes obtain information more readily from corrections staff and negotiate with correction authorities where litigation is not needed.

Assistance with medical and mental health concerns is particularly enhanced by the involvement of a social worker. As part of the treatment community, a prison health professional may be more comfortable speaking with a social worker than with a lawyer — and the social worker may be better able to compile the relevant information, assess the options available, and communicate with high-need clients.

While it is undisputed that connection to family can be a cornerstone to effective rehabilitation during and after incarceration,¹⁴ the ability to maintain contact with family members — particularly for defendants with long prison sentences — is extraordinarily difficult.¹⁵ Maintaining contact with minor children may be particularly difficult if the custodial parent or guardian is unable or unwilling to coordinate visitation. A social worker can help coordinate visits and ensure that an incarcerated parent is able to be a part of his or her child's life.

Institutional advocacy can also go hand in hand with reentry assistance. As discussed below, few offices are better equipped to provide the early intervention needed for effective reentry than an appellate defender office. The best reentry preparation begins while the individual is incarcerated — and incorporates the programs available to the client while in prison.¹⁶ A social worker can counsel a client about the value of programming (and begin to engage the client in long-term reentry planning) and advocate on the client's behalf for programming access.

Reentry Advocacy and Assistance

More attention is being paid to the importance and value of reentry services. Government agencies, social service providers, and trial-level public defender offices have begun to focus on the need

for these services.¹⁷ Appellate defender offices are uniquely situated to assist with this work. Through its legal representation, the appellate defender office has an established connection with clients and an avenue of communication already in place.

It is generally acknowledged that reentry planning should begin early in a prisoner's sentence.¹⁸ Engaging an individual in life planning and treatment services is most effective while the person is incarcerated — the individual is already in a highly structured environment and many of the temptations of street life are not immediately present. Likewise, important release preparation, such as obtaining critical forms of identification, can and should occur while the person is incarcerated to minimize delay in the individual's ability to obtain employment and receive needed services.¹⁹ However, service providers in the community generally do not begin working with individuals until release or near their release date.

Most inmates have an appellate defender well before reentry services are available. A social worker in an appellate defender office can provide comprehensive reentry work that begins early in a client's incarceration, and continues through the transition of release and until the person is firmly settled in the community.

A social worker at an appellate defender office can engage a client in reentry in a manner similar to the mitigation work at sentencing.²⁰ Where a client has an indeterminate sentence (such that he or she will be eligible for parole or other discretionary release), advocacy to the parole board (or other institution determining release) can convey an individual's institutional achievements, explain disciplinary problems and establish community support for release. It is also an opportunity to begin speaking with the client about life planning and decision making, and assessing what needs he or she will have upon release.

Whether with advocacy upon discretionary release or upon full completion of an imposed term, most individuals sentenced to prison will, at some point, return home — and the problems facing them prior to incarceration will often likely increase. Housing options are limited by the bar on public housing for many criminal convictions;²¹ the lack of employable skills will be further hampered by a substantial gap in work history and the inability to obtain student loans for education;²² the temptations of drug addiction may return;

public assistance may be denied;²³ and the lack of comprehensive health care may cause medical and mental health needs to go ignored. A social worker can identify the appropriate resources to respond to these concerns, and help a client navigate the requirements and/or waiting lists for government agencies and private organizations. In jurisdictions that offer documentation of rehabilitation,²⁴ a social worker can also assist with this application.

Clients who are not U.S. citizens generally will be subject to immigration proceedings upon completion of their incarceration, and their conviction will often mandate automatic removal without any avenue of relief.²⁵ A social worker can assist the non-citizen client with this transition as well. Often, after serving the criminal sentence, the non-citizen defendant is placed in immigration custody where he or she remains until immigration officials obtain the necessary paperwork for deportation. A social worker can obtain the client's passport and contact the relevant embassy to help expedite this process. The social worker can also identify relief organizations in the home country that may be able to provide services to the client. Finally, to the extent that the client has family in his or her native country, the social worker can contact the family and let them know when their loved one will be returning home.

For all clients, the social worker in an appellate defender office can provide continuing support through the stressful period of release and reintegration. Life change, even when positive, is incredibly stressful. Learning how to respond to stress, without re-offending, is sometimes the biggest challenge for someone with a drug addiction. In a study of the first thirty days after release for forty-nine people returning to New York City, those who relapsed lacked ties to family or friends and/or did not consistently attend drug treatment programs.²⁶ Providing support and guidance during this period can help avoid relapses and encourage clients to learn healthier ways

of responding that can continue even beyond their association with the appellate office and its social worker.

Enhance Legal Representation

As trial defender offices have discovered, a social worker on staff can be an invaluable resource for attorneys and clients. Appellate offices have yet to fully realize the potential for social worker collaborations after conviction. Case assistance, institutional advocacy, and reentry services are three significant ways in which a social worker can enhance the legal representation of a criminal defendant and provide tangible assistance.

Notes

1. While this article focuses on the presence of social workers in criminal defense offices, the value of social workers in civil legal services has also been noted, particularly in the areas of geriatric law, HIV law, family law and public assistance. See, e.g., Stacy L. Brustin, *Legal Services Provision through Multidisciplinary Practice — Encouraging Holistical Advocacy While Protecting Ethical Interests*, 73 U. COLO. L. REV. 787, 792 (2002); Christina T. Pierce, Patricia Gleason-Wynn, Marilyn G. Miller, *Social Work and Law: A Model for Implementing Social Services in a Law Office*, 34 J. GERONTOLOGICAL STUDIES 61 (2001); Karen Bassuk & Janet Lessem, *Collaborations of Social Workers and Attorneys in Geriatric Community Based Organizations*, 34 J. GERONTOLOGICAL STUDIES 93 (2001); Paula Galowitz, *Collaboration Between Lawyers and Social Workers: Re-Examining the Nature and Potential of the Relationship*, 67 FORDHAM L. REV. 2123 (1999).

2. Brustin, *supra* note 1, at 792. See also Galowitz, *supra* note 1, at 2130.

3. For a discussion of these programs and problem-solving and community-based public defense generally, see Cait Clarke, *Problem-Solving Defenders in the Community: Expanding the Conceptual and Institutional Boundaries of Providing Counsel to the Poor*, 14 GEO. J. OF LEGAL ETHICS 401 (Winter 2001).

4. Clarke, *supra* note 3, at 425.

5. Galowitz, *supra* note 1, at 2126; Lisa A. Stanger, *Conflicts Between Attorneys and Social Workers Representing Children in Delinquency Proceedings*, 65 FORDHAM L. REV. 1123, 1142-43 (1996)

6. Mark S. Silver, *Forensic Social Work Reports Can Play Crucial Role in Mitigating Criminal and Immigration Cases*, 76 N.Y.S. BAR J. 32 (March/April 2004). Federal District Judge Jack B. Weinstein, of the U.S. District Court for the Eastern District of New York, has further discussed the value of social worker involvement in criminal cases, although he focuses on social workers as part of the probation department rather than as advocates. Hon. Jack B. Weinstein, *Legal Ethics: When is a Social Worker as well as a Lawyer Needed?*, 2 J. INST. STUD. LEG. ETH. 391, 391-95 (1999).

7. See *Rompilla v. Beard*, ___ U.S. ___, 125 S. Ct. 2546 (2005); *Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527 (2003).

8. A social worker in a law office is bound by the same ethical rules as an attorney. Thus, a social worker in a public defender office that includes trial counsel may be precluded from assisting in litigation challenging trial counsel's representation. While this may limit the extent to which a social worker in a large public defender office can assist with post-conviction litigation, it highlights the value of a social worker for offices that take conflict cases.

9. See, e.g., N.Y. Crim. Proc. Law § 470.15(6)(b).

10. In 1999, the Bureau of Justice Statistics, drawing on a survey in 1997 of adult prisoners, identified 16 percent of state and federal adult prisoners as mentally ill based on inmates reporting that they had a current mental or emotional condition, or that they had an overnight stay in a mental hospital or treatment program. See Paula M. Ditton, *Mental Health and Treatment of Inmates and Probationers* at 3 (U.S. Department of Justice, Bureau of Justice Statistics, July 1999) (available online at <http://www.ojp.usdoj.gov/bjs/abstract/mhtip.htm>).

11. See Heather Barr, *Prisons and Jails: Hospitals of Last Resort*, at 26-29 (Correctional Association of New York and the Urban Justice Center, 1999)

12. In light of the "compelling evidence of abuse and safety failures inside prisons and jails," a one-year Commission on Safety and Abuse in Prisons was launched this year. See Jennifer Trone, *National Commission to Examine U.S. Prison Conditions*, News Release (March 1, 2005) (available online at http://www.prison-commission.org/pdfs/commission_on_safety_abuse_press_kit.pdf).



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13. Pub.L. No. 104-134, Stat. 1321 §§ 801-810 (April 24, 1996), amended, Pub. L. No. 105-119, 111 Stat. 240 (November 26, 1997).

14. See, e.g., Norman Holt & Donald Miller, *Explorations in Inmate-family Relationships* (California Department of Corrections, Research Division, 1972) (available online at <http://www.fcnetwork.org/reading/holt-miller/holt-millersum.html>); see also Marta Nelson, Perry Dees & Charlotte Allen, *The First Month Out: Post-Incarceration Experiences in New York City*, at 8-11 (Vera Inst. of Justice Sept. 1999) (available online at http://www.vera.org/publication_pdf/first_month_out.pdf) (discussing importance of family assistance upon reentry).

15. A Bureau of Justice Statistics study found that, in 1997, nearly twenty percent of state inmates with children had no contact with their children, and less than forty percent had ever had a personal visit with their children. See Christopher J. Mumola, *Incarcerated Parents and Their Children* at 5 (U.S. Department of Justice, Bureau of Justice Statistics, August 2000) (available online at <http://www.ojp.usdoj.gov/bjs/pub/pdf/iptc.pdf>). Federal prisoners, on average, had more familial contact. *Id.*

16. See Nelson, et al., *supra* note 13 at 29-30.

17. See Clarke, *supra* note 3, at 433-35.

18. See, e.g., Allan Rosenthal & Elaine Wolf, *Unlocking the Potential of Reentry and Reintegration* (Center for Community Alternatives, Oct. 2004) (available online at http://www.communityalternatives.org/pdfs/unlocking_potential.pdf).

19. See Nelson, et al., *supra* note 13 at 29-30.

20. For a discussion of mitigation in non-capital cases, see Mark S. Silver, *Forensic Social Work Reports Can Play Crucial Role in Mitigating Criminal and Immigration Cases*, 76 N.Y.S. Bar Ass'n Journal at 32 (March/April 2004).

21. See, e.g. 42 U.S.C. § 1437d (l)(6) (requiring leases for federally-subsidized housing to "provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy"); *Dep't of Housing & Urban Dev. v. Rucker*, 535 U.S. 125, 122 S.Ct. 1230 (2002) (upholding § 1437d(l)(6)).

22. See, e.g., 20 U.S.C. § 1091(r)(1) (rendering individuals with drug convictions ineligible for federal student financial aid for at least one year)

23. See, e.g., 21 U.S.C. § 862 (denying federal benefits to individuals convicted of a drug offense).

24. In New York, for example, individuals can apply for a Certificate of Relief from Disabilities, N.Y. Corr. L. §§ 701-703, if they have only one felony conviction, or a Certificate of Good Conduct, N.Y. Corr. L. § 703, if they have multiple felony convictions. Both certificates can remove certain statutory bars imposed based on criminal history and provide a "presumption of rehabilitation."

25. See 8 U.S.C. § 1227 (a)(2) (listing grounds of deportation based on criminal offenses); 8 U.S.C. § 1228 (authorizing expedited removal of non-citizens who have committed an aggravated felony). The crimes deemed aggravated felonies for immigration purposes is quite expansive and includes convictions for murder, rape, sexual abuse of a minor, drug trafficking, firearm trafficking, crimes of violence, theft, burglary, running a prostitution business, commercial bribery, counterfeiting, forgery, trafficking in vehicles, obstruction of justice, fraud, deceit, tax evasion, bail jumping and various specified federal offenses. U.S.C. § 1101 (a)(43).

26. Nelson, et al., *supra* note 13 at 19-20. ☐

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