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WHEN IS A SOCIAL WORKER AS WELL AS A LAWYER NEEDED?

*The Honorable Jack B. Weinstein**

More than thirty years ago, Professor Elliot Evans Cheatham wrote "A Lawyer When Needed."¹ His book raised a fundamental question: How can a person obtain justice without a lawyer?

Today, a major contribution might be a book titled, "A Social Worker When Needed." We are responsible not only for the rule of law. We are also accountable for the principle of empathy and humanity.² Let me briefly touch on a few areas.

Before turning to some examples, I should remind you of what appears to be a basic difference in the approaches of social workers and lawyers. It was emphasized by both social workers and lawyers when I interviewed them, preparing for this paper. The social worker tends to expand an inquiry when a social problem is presented to get to the root causes, to solve related difficulties of the whole person, and to stay with the case with continuing help. The lawyer tends to narrow the question, to address and solve the present issue, and then to close the case.

As I sometimes tell my law clerks, "As judges, we must learn to be superficial." This fundamental difference between the two professions may be summed up as "tell me more" versus "get to the point."

CRIMINAL CASES

When we sentence someone to a prison term, the effect on the family may be devastating. Should the lawyer have obligations in this aspect of the client's needs? If so, how shall it be handled?

* Senior United States District Court Judge, Eastern District of New York. My thanks to my Law Clerk Mae C. Quinn for her assistance.

1. ELLIOTT EVANS CHEATHAM, *A LAWYER WHEN NEEDED* (1963).
2. Cf. Jack B. Weinstein, *The Bible, Morality, and Judging (Part I)*, THE JEWISH PRESS, Aug. 2, 1996, at 34; Jack B. Weinstein, *The Bible, Morality, and Judging (Part III)*, THE JEWISH PRESS Aug. 9, 1996, at 66 (moral obligations of judges).

Many of our probation officers in the Eastern District of New York have a social work degree. Drafters of our Federal Sentencing Guidelines apparently thought a degree in mathematics was more useful.³

We are now, I believe, slowly swinging back towards the traditional sentencing system, which was more treatment-oriented, requiring the skills of the social worker. Rehabilitative and therapeutic goals are becoming more important not only for the defendant, but for his or her family as well.

The Probation Office for the Eastern District of New York is taking steps to get back to social work basics, as well as to create innovative ways of dealing with our problems. Do prosecutors and defense counsel have an ethical-professional obligation to cooperate?

Some 130 probation officers oversee our offenders in my district participating in a variety of programs—drug rehabilitation, alcohol treatment, sex offender therapy, job training classes, and the like. Social work school student interns are heavily utilized. Counsel, I find, generally do not want any involvement from probation, except in the narrowest sense—determining guilt or innocence, points off the sentencing guidelines, or whether punishment for probation violations is warranted.

The question is raised—how far should the attorneys and the department of probation go in evaluating the client's "whole" needs? What of the family of the offender? Should the department be responsible for helping its members obtain needed services and resources when a parent or spouse is incarcerated? Should home visits be made for reasons other than to gather information for a presentence report? If so, what would be the appropriate role for the officer? Where there is dysfunction or abuse in the household, should the probation officer report it? Would it be too invasive a mode of "supervision" if the whole family is considered?

One of the lessons of the Agent Orange litigation was that we had to deal with families and utilize many social agencies if we were to effectively help the veterans.⁴ The same is true of prisoners and probationers.

3. For a discussion of the dilemmas facing sentencing courts under the Federal Sentencing Guidelines and the ways in which such courts attempt to ensure fairness at sentencing, see generally Jack B. Weinstein and Nicholas R. Turner, *The Cost of Avoiding Injustice by Guideline Circumvention*, 9 FED. SENT. REP. 298 (May/June 1997).

4. See generally Deborah E. Greenspan, *Final Report of the Special Master on the Distribution of the Agent Orange Settlement Fund* (Sept. 1997), filed in *In re "Agent Orange" Product Liability Litigation*, MDL No. 381; Agent Orange Class Assistance Program, *The Legacy of Vietnam Veterans and Their Families—Survivors of the War: Catalysts for Change* (Dennis K. Rhoades et al. eds., 1995)(Papers from the 1994 National Symposium). See also JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* 157-58 (1995)[hereinafter WEINSTEIN, *INDIVIDUAL JUSTICE*](overview of the Agent Orange settlement and distribution plan).

Our probation department is now trying to devise programs to assist the family in understanding what is happening and how to cope with prison, community or home incarceration. Many of the people the courts deal with have language barriers as well as serious economic and social problems. They may need help ranging from preventing dispossession to instructions on how to travel to prison. And, in our "halfway houses," preparation for release from custody, job training, and other issues of reintroduction into the family and society need attention.

While it does not happen as often as it probably should, the judge could, if he or she thought of it, say at sentence, "Have probation, or the prosecutor, or defense counsel see if there is help out there for this sick child or distraught or penniless spouse."

Our probation department will oblige. Would this raise ethical problems because defense counsel have an ethical duty to minimize state intervention in the client's life? Should defense counsel, the prosecutor, or probation take the initiative?⁵

In one recent case I asked the prosecutor to follow up in the case of a defendant I sentenced to prison.⁶ Her hands had been badly burned so she could no longer work as a seamstress. I asked that she be given help from a plastic surgeon. Defense counsel are sometimes asked by the court to assist in obtaining medical or welfare help for their clients or their clients' family.

In probation violation cases should defense counsel and probation mediate issues and seek to improve home environments to avoid debt violations that might lead to further incarceration? A medical-social work rather than a penal model may be required. Yet, under present practice the attorney's main goal is to avoid any punitive action against his client. Should defense attorneys be working in conjunction with the probation department more often to help solve the socio-economic-psychological problems?

If an appointed lawyer engages in these more extensive interventions, should the Criminal Justice Act fee extend to the lawyer's time? What about the social worker's or other expert's fees for advice, testing, contact with social agencies and the like? If, as I am told, it is beginning

5. See Jack B. Weinstein and Gay A. Crosthwait, *Some Reflections on Conflicts Between Government Attorneys and Clients*, 1 *TOURO L. REV.* 1, 28 (1985) ("while compliance with executive policy should be the norm, a compelling need exists in this society—as in others that have come before it—to mitigate the harshness of the law through the individualization of justice"). See also Jack B. Weinstein, *Some Ethical and Political Problems of a Government Attorney*, 18 *ME. L. REV.* 155, 172 (1966) ("the government's attorney is a political figure, he operates within a framework of professional and ethical responsibility that limits what he can and should do.").

6. *United States v. Lowe*, 97 CR 720 (JBW) (E.D.N.Y. 1998).

to be the case in some family law practices in various states that law firms employ social workers, should the extra overhead from this expense be charged under the Federal Justice Act as part of the fee?

Even prior to sentencing, when a defense attorney prepares memoranda for the court supporting a downward departure, background information produced by social workers or social services agencies is useful. We see such supporting expert reports in the cases of the rich defendants, seldom of the poor.

The Public Defender Service in the District of Columbia has a social worker on staff to assist in providing options to judges at sentencing—such as drug treatment or other programming. So do the Legal Aid Society in Nassau County and at least two private attorneys' firms practicing elder-law. The public defender's office serving the federal court in the Eastern District of New York does not have the same luxury, although this advice is available from our probation staff *when* the court asks for it.

Defense counsel may be limited in many ways in his or her role as an advocate for social work alternatives.⁷ For instance, a defense attorney may be reluctant to approach the Probation Department for help in obtaining a treatment placement for a client, for fear that the client's drug use will be reported to the court as a probation violation.

Defense counsel may not force a defendant to choose what may be in his best interest when it conflicts with the client's expressed interest. ABA Model Rule of Professional Conduct 1.2 provides: "A lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued."⁸

Moreover, defense attorneys may run afoul of ethical rules if they reveal evidence or become a witness against their client.⁹ While the attorney may think a short period of incarceration with treatment for

7. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3, cmt. 1 ("A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's request.").

8. *Cf.* Committee on Professional and Judicial Ethics, Association of the Bar of New York, Formal Opinion 97-3: Lawyer's Right to Engage in Activity or Express a Personal Viewpoint which is Not in Accordance with a Client's Interests (concluding that "[a]s long as client confidences and zealous advocacy in a pending matter are not compromised, a lawyer is entitled to participate in bar association activities and speak publicly on issues which may be contrary to the interest of a former or current client without obtaining client consent.").

9. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.7 ("A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness. . . .")

addiction is in the client's best interest, if a client seeks a probationary sentence, the attorney must respect the client's wishes.¹⁰

I once had a defendant before me—pre-Guidelines. I offered him 3 months in prison or 9 months of house arrest—with permission to work and participate in intensive treatment for an addiction. He chose prison. His angry wife, who wanted his help with the children and a pay check in the home, promptly asked for a “corridor conference.” When he returned, the crestfallen defendant agreed to the nine months of home detention. I refrained from asking whether there had been coercion.¹¹

In the case of the man dubbed “the Unabomber” the nation recently observed the complex ethical conflict between a lawyer's duty to do what the lawyer thinks is best for the client and the duty to do what the client thinks is best for himself. At stake was a life sentence with treatment for a mentally ill person *or* a probable sentence of death. The client chose life but only after an emotional struggle with the lawyer, and, perhaps, the judge in chambers.

CIVIL CASES

Increased federal and state laws against discrimination based on sex, age, race, country of origin, religion and disability have led to a surge of such litigations. The opportunity for fees has made lawyers available where there is a good chance of success.

Many of the *pro se* cases are less than compelling. No private lawyer or legal aid attorney will take the case. In some instances the problem may be one of imagination or excessive sensibilities of the plaintiff with or without foundation in fact.

10. The issue of zealous representation may also collide with that of treatment and rehabilitation in the pre-trial setting. Defendants under the supervision of the Pre-Trial Services offices—in the Eastern District approximately 40% of all defendants awaiting resolution of their case—may need the services of a social worker. The Pre-Trial Services officer can refer the defendant to a number of contract social agencies while he is under supervision. But, should the officer be required to read the defendant his *Miranda* rights prior to discussing any problems with him? How much information disclosed by the defendant can be used against him at trial? What about the defendant who attends AA or NA meetings as a condition of pre-trial release—can his meeting members be subpoenaed as witnesses against him? What is the attorney's role in all of this? See also WEINSTEIN, *INDIVIDUAL JUSTICE*, *supra* note 4, at 53 (“Perhaps most fundamental to our model of professional ethics is the lawyer's duty of loyalty to his or her client. . . . Nevertheless there is a concomitant duty to the court and society independent of obligations to client.”).

11. At sentencing, would the court be wise in learning, through the attorney or a social worker, if a defendant truly desires drug treatment or other therapeutic services before ordering such treatment? Often, forced treatment is not successful. To what extent should such considerations be taken into account by sentencing courts? Recall that slots in many programs are limited. See generally Thomas O'Hare, *Court Ordered Versus Voluntary Clients: Problem Differences and Readiness for Change*, 41 *SOC. WORK* 417 (1996).

We see repeat players. The burden on defendants, often a governmental agency, small employer or landlord, is substantial. After finding the same party before me in successive cases—the same judge is assigned to related cases—I sometimes, out of kindness and concern, want to propose a psychiatrist or social worker.¹² Yet, I remain silent so as not to suggest prejudice. I did ask one *pro se* plaintiff, “Why do you think you are having these problems with so many defendants?” She responded with indignation at my “prejudice.” Does the court have any duty to point out to the litigant that he or she may be in need of something other than legal relief? What limits should there be on judges in these situations?¹³

In the Eastern District of New York, as in other federal courts around the country, we have a *pro se* office staffed by attorneys who assist litigants without lawyers in filing law suits. Should our court’s *pro se* intake law clerks have a social worker on call? They are instructed—properly I think—to help anyone who wishes to commence a *pro se* action. But, what of those situations when there is clearly no merit to the case and intervention by a social worker or mental health agency is appropriate? While the *pro se* clerks of our court believe that having a social worker at the intake level would be of some assistance to the potential litigants, they are dubious that hiring a social worker would lower the number of frivolous suits being brought by *pro se* petitioners. These people, they tell me, “want to see a judge.” What would be the best use of a social worker by *pro se* offices? By the court?

What about those cases where a *pro bono* attorney has been appointed for the indigent plaintiff? The lawyer assigned by the court might be sued for malpractice for the suggestion that the client seek medical-social help rather than pursue a cause of action. The prospective client needs social work help, but should a lawyer be the conduit?

Obviously there are attorney-client and immunity problems lurking here. The danger of suits against appointed counsel and others need consideration.

12. Cf. Weinstein, *INDIVIDUAL JUSTICE*, *supra* note 4, at 90 (“A rigid conception of the judge as presiding passively and neutrally over an adversarial proceeding in which the litigants bear the whole burden of presentation is sometimes inaccurate and unwise.”).

13. For a discussion by this author of the ethical and other limits on judges, see, e.g., Jack B. Weinstein, *Limits on Judges Learning, Speaking and Acting—Part I—Tentative First Thoughts: How Many Judges Learn?* 36 ARIZ. L. REV. 539 (1994); Jack B. Weinstein, *Limits on Judges’ Learning, Speaking, and Acting: Part II—Speaking and Part III—Acting*, 20 U. DAYTON L. REV. 1 (1994); Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 Nw. U. L. REV. 469 (1994).

We have a fund in our court for *pro bono* cases that pays for experts and other assistance. For example, it has been tapped to pay the costs of serving subpoenas for a poor plaintiff or to pay for carfare or even meals. It could be used, on application, for a social worker or medical examination. Should it be?

Civil Rights cases against the police and others sometimes raise the same issues of lack of real merit. How do we winnow out the sensible cases for *pro bono* assignment? Will an aggressive *pro bono* lawyer unnecessarily burden the defendant and himself with "Full Monty" discovery?

Private lawyers who have been retained for a fee may have more freedom and discretion in handling such situations. The safest thing for such lawyers may be to just say "No" to the representation. Under our *pro bono* panel system the lawyer has the option of turning down the case. They often do so after a brief investigation.

If a potential client is turned away, it might still be useful for the attorney to refer the client in need of non-legal assistance. Should that be done?

SOCIAL SECURITY AND DISABILITY

In some social security disability cases I have the sense that a lawyer might do more for some clients by providing psychiatric or medical help rather than by obtaining a pension. Social security checks may leave the claimant with a thoroughly destroyed self-image as a productive working member of society.¹⁴ Contrariwise, some poor people bounced around in clinics can not support a valid claim since they never have had a primary treating physician. We have a small court fund so a *pro bono* lawyer can provide a necessary diagnosis, consultant's report and some limited treatment for disability claim clients.

What of treatment or vocational guidance that will help a claimant to obtain a job? Is a social worker or vocational specialist for such purposes a proper referral for the lawyer consulted to obtain a social security disability pension? If so, who should pay the expert in cases of poor people? Should we try to establish *pro bono* panels of social workers or doctors or vocational specialists for such purposes, along with our *pro bono* lawyer panels?

When what is now Nassau-Suffolk Legal Services was started more than forty years ago, its protocol called for a social worker as well as

14. See *Harris v. Chater*, 998 F. Supp. 223, 227 (E.D.N.Y. 1998); see also *Maya v. Apfel*, 1999 WL 258430, at *10 (E.D.N.Y. April 15, 1999).

lawyers. Today, it has approximately 40 attorneys and 3 social workers on staff. Social work students assist; they answer the hotline and provide crisis intervention—acting generally as “troubleshooters” for the attorneys.

These social workers and students have been able to assist some litigants in obtaining help without lawsuits, particularly in the area of landlord-tenant disputes and welfare entitlements. Lawyers handling matrimonial actions have reduced strains and costs of divorce with mediation.¹⁵ How far should they go in using social agencies to help avoid divorce altogether?¹⁶ Some experienced matrimonial attorneys tell me bad experiences have led them to avoid recommending social or medical intervention to avoid divorce. In domestic violence cases, it might assist a potential client more to find temporary safety by way of a shelter than to file immediately for a divorce action.

Court-annexed mediation is also available through the federal court. In the Eastern District of New York, a social worker has recently completed a study on the possible uses of social workers by the courts.¹⁷ She recommends that a social worker be employed, along with a lawyer, to help assess and manage *pro se* claims.¹⁸ What role should a social worker play in the formulation and presentation of a *pro se* litigant's legal claims? What would be the confidentiality status of the communications between the litigant and the social worker? It is possible for lawyers and social workers to work together, side by side, in a number of different areas. Would it be appropriate, for example, for lawyers and social workers to oversee together alternative dispute resolution?

In Nassau County, Ombudspersons in the Nursing and Adult Homes, sponsored by the non-profit Family and Children's Association,

15. See generally Margaret M. Severson and Tara V. Bankston, *Social Work and the Pursuit of Justice Through Mediation*, 40 Soc. WORK 683 (Sept. 1, 1995). There are turf-entrepreneurial objections to turning over professional work to social workers as well as others in the matrimonial, old-age, and health fields. See Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to NonLawyer Practice*, 1 J. OF THE INSTITUTE FOR THE STUDY OF LEGAL ETHICS 197, 197 (1996) (“Lay competition is an increasingly divisive issue in an increasingly divided profession.”).

16. See generally Barbara A. Babb, *An Interdisciplinary Approach to Family Law Jurisprudence: Application of An Ecological and Therapeutic Perspective*, 72 IND. L.J. 775 (1997).

17. See generally, JANNY HUISMAN, EASTERN DISTRICT CIVIL LITIGANT FUND, SOCIAL WORK INTERVENTION AND THE EASTERN DISTRICT FEDERAL COURT (1998). This Report was adopted by the court. The social worker is now rendering services to litigants at the courthouse and at Brooklyn Law School.

18. See *id.* at 29. The author recommends the use of a “case assessment/management team” comprised of one social worker and one lawyer. The stated goals of this team would be to provide a joint assessment of the litigant's case, to assist the litigant to understand the court's orders and procedures, and to provide appropriate referrals for legal and non-legal issues.

have provided lawyers to assist in obtaining help for the elderly without litigation.¹⁹ For example, this agency now offers a guardianship program with volunteer lawyers and a comprehensive social services component.

There is an ongoing experiment of cooperation among lawyers, Nassau's Ombudservice, and social agencies to protect the rights of older persons. The elderly are assisted in the use of health proxies, in obtaining medicaid, and other settlements. Just as lawyers should turn to social agencies for help, so too, do social workers need to seek aid from lawyers.

CONCLUSION

It is clear that social workers and lawyers do not see eye to eye on all matters. Regardless of the differences in approach, law as well as social work are helping professions. Both can cooperate in obtaining the speedy, efficacious and most cost-effective way of dealing with people who are hurting.

In the law, medical, and social work schools, and particularly in our law school clinical programs,²⁰ future professionals must be sensitized to ways of dealing with prospective clients.²¹ More may be involved than using appropriate techniques for empathetic interviews. Steering a prospective client to a social worker or other non-lawyer instead of to the courts may be what is ethical, legal, and needed in many cases.

19. Cf. F. Ellen Netting, et al., *Elder Rights and the Long-Term Care Ombudsman Program*, 40 Soc. WORK 351 (May 1, 1995)(ombudsman programs assisting in protecting the rights of the elderly).

20. See, e.g., Minna J. Kotkin, *The Violence Against Women Act Project: Teaching A New Generation of Public Interest Lawyers*, 4 J. L. & POL'Y 435 (1996).

21. See Jack B. Weinstein, *On the Teaching of Legal Ethics*, 72 COL. L. REV. 452, 468 (1972)("We ought not to be ashamed to reveal to our students that behind the skilled, crusty, objective, and dispassionate exterior of the law beats a heart as idealistic as that of today's activist youth."); Jack B. Weinstein, *Educating Ethical Lawyers*, 47 N.Y. ST. B. J. 260, 304 (June 1975)("How to get lawyers to feel in their very bones the emotions and needs of individuals who will be affected by their work, how to get them to understand people's needs for institutional reform and how to give them the courage and desire to exercise their individual responsibility towards a larger society are increasingly important questions for teachers of law.").

