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Incorporating Social Workers into the Defense Team to Improve Outcomes in All Phases of Litigation

The technology, science, and criminal investigative techniques available to the government have advanced and become more sophisticated; criminal defense practice, therefore, has become more complex. To respond to the state's resources, defense attorneys now employ a huge range of experts in furtherance of individual defense strategies. Defense experts in ballistics, fingerprints, chemistry, accident reconstruction, psychology, identification, and numerous other forensic and scientific fields are common. Hiring and consulting with experts is invaluable, and often essential, to all criminal defense attorneys. Often, however, social workers are conspicuously absent from the list of common defense experts. They should not be. Indeed, it is time for the defense bar to make a concerted and coordinated effort to afford the benefits of social worker experts to more defendants and more courts.

The movement to incorporate social workers into the defense team dates back decades. Many high-capacity public defender agencies have full-time staff social workers. For example, the holistic defense model of the Bronx Defenders, the community-oriented defense model advocated by the Brennan Center, and the client-centered representation of the Massachusetts Committee for Public Counsel Services incorporate social workers into the defense team. Advocates argue these defense models better serve clients and result in reduced rates of incarceration.¹

In 2012 the American Bar Association's (ABA) House of Delegates adopted Resolution 107C, which "formally urges criminal defense attorneys to address clients' civil legal and nonlegal problems through linkages with other service providers." The report accompanying the resolution "makes it clear that all defense attorneys are required to provide comprehensive representation," including using "other service providers," like social workers, when appropriate.²

However, despite the recognized benefits, many other defense attorneys in the public defense community and their clients do not have social workers available to assist them. As such, both attorneys and the courts are denied meaningful information, clinical recommendations, and suggestions for alternatives to incarceration. There is, however, good reason to believe that courts are more and more receptive to the contributions that social workers can make in a case. Defense attorneys routinely need to incorporate retaining social workers as defense experts.

The opioid crisis, not to mention the ongoing debate about mass incarceration and mandatory minimum sentencing laws, and the growing awareness of the role that mental illness plays in confrontations with law enforcement, make this an auspicious time to push for incorporat-

BY MATTHEW FLEISCHNER

ing social workers into the defense team. Social workers are becoming common fixtures in some courts. This is particularly true in specialty courts where they function as case managers focusing on, for example, mental health, substance use, or veterans' affairs. Although court-affiliated social workers may be useful to the defense, lawyers will not want to rely exclusively on them because their responsibilities and goals may be significantly different from those of the defense team.

Given the training lawyers receive and the often-entrenched nature of longstanding court practices, it is not surprising that advocates often overlook the value of social workers. Some defense attorneys retain a range of experts, including social workers, for assistance in sentencing advocacy, but the much broader value social workers can bring throughout the course of a case and the invaluable impact they can have at the case's conclusion are often overlooked. Social workers can create service plans that can help attorneys find alternatives to incarceration, set up conditions of probation, or secure pretrial release. They can recommend the appropriateness (or not) of specialty courts for individual clients. Their work educates judges, district attorneys, and probation officers about a client's personal background, mental health, and/or addiction. These benefits, particularly the education of the court and prosecution, happen both on individual cases and cumulatively over time. This cumulative effect helps normalize and support all parties seeking and accepting alternatives to incarceration. Part of what makes social workers an effective educational tool is their ability to provide a fresh, qualified, clinical voice to the pretrial and sentencing phases of a case. Although defense lawyers hire social workers and they work as part of the defense team, their training and experience often means their recommendations are viewed differently by the court and can elevate the advocacy of defense counsel.

Furthermore, there is the intangible effect created by the relationship that often forms between clients and social workers. When a lawyer hires a social worker, the client's anxiety may go down and the attorney-client working relationship may improve. This is especially true when clients have limited family support or have a mental illness or substance abuse disorder. The social worker adds a level of stability and increased trust.

This article conveys the value of incorporating a social worker into criminal defense practice. First, it discusses services that the social worker can provide the defense team. Second, it exam-

ines the stages of a case at which a social worker can provide useful assistance. Third, the article touches upon the legal and ethical issues involved in retaining a social worker. Finally, it considers the process of retaining funds and services.

Services the Social Worker Can Provide

Social workers can provide many beneficial services to the defense team. However, their work and contributions will vary greatly from case to case and will be tailored to the individual needs and circumstance of each client. Broadly speaking, their services can be broken down into three categories: the psychosocial evaluation, program placement, and client interviews and management.

Psychosocial Evaluation

The psychosocial is a thorough evaluation and report of the individual client outlining biographical information, medical history, family history, work history, mental health, addiction, etc. Attorneys should consider getting the social worker involved early in the case. There is a tendency to consider social workers as most valuable at the sentencing phase of the case. However, as outlined below, a thorough psychosocial report has application throughout the course of a case.

The psychosocial may focus on the client's mental health or addiction in the past, present, or at the time of the incident that gave rise to the case. It may also include treatment recommendations, which can serve as a valuable alternative to incarceration. The social worker writing the report, of course, should be qualified to undertake this kind of evaluation.

As part of preparing a psychosocial report, the social worker should request, analyze, and summarize the client's social and medical service records. For example, typical sources of information include records from the Social Security Administration (particularly if the client receives disability benefits), mental health records, drug treatment records, jail or state prison records, medical records, school records including special education individual education plans, and records from the state's child welfare and juvenile justice agencies. In developing the psychosocial report, a social worker should also rely on client interviews as well as interviews with the client's family, friends, and services providers. It is important for the attorney to coordinate with the social worker and maintain oversight of the interview process. A social worker should not interview the client, members of the

client's family, or those connected with the case without the attorney's permission.

The attorney must ensure that the social worker understands the attorney's goals for the case. This will help the attorney effectively plan and manage potentially limited funds. This will also help the social worker tailor his or her intervention with the client according to each individual case. The social worker must understand that he or she works for the attorney, not the client. This is a different role for many social workers, particularly those who are not on the staff of the public defender agency. Generally, their professional training teaches them to focus on the client and the client's best interests. While that professional ethic is not set aside, it must exist within the goals of the case.

Program Placement

The second service — perhaps one of the most valuable benefits — is the ability of social workers to navigate mental health and addiction treatment programs on behalf of attorneys and clients. Social workers are aware of community resources that can benefit the client and can develop relationships with individual service providers. Accordingly, they can create opportunities for clients that would be otherwise unavailable or unknown to attorneys and the court.

In addition, they can explain the nature of each program to the client and assist in the application process. While some defense attorneys, judges, and probation officers are accustomed to assessing the treatment needs of defendants, a social worker is specifically trained and qualified to identify a client's treatment needs and accurately assess a client's willingness to take part in treatment. Admission to a drug treatment program, mental health program, or supportive agency is a powerful tool for attorneys at arraignment, during negotiations, and at sentencing. The social worker can identify the correct type of program for each client. Such programs might include dual diagnosis programs (providing addiction treatment and mental health services); inpatient drug treatment; outpatient drug treatment; methadone; veterans programs; programs with a secular focus; faith-based programs; individual counseling; and group counseling.

Matching an individual client with the proper program and services is critical to the client's chances of future success. It is important for the social worker to evaluate the client's willingness to engage in treatment and services. Placing a client on probation, with specific treatment condi-

tions, or into a specialty court where the client is unwilling to participate, will likely increase the chances of eventual failure. This is perhaps where the social worker hired by the defense attorney differs from other social workers involved in the sys-

Social workers can discover opportunities for clients that would otherwise be unknown to attorneys and the court.

tem. The defense-oriented social worker can help the defense attorney and the client understand the client's likeliest path to success, which may or may not include structured postconviction programing.

When looking into programs, social workers and attorneys should consider the location of the programs and whether that location is more or less likely to place the client at risk of relapse. They should also consider any potential language, cultural, or transportation barriers that could impact the potential for success. Finally, particularly if the program is residential or inpatient, the social worker can provide transportation directly from court to the program. This is a very effective tool. It allows the attorney to assure the court that the client will be immediately enrolled in treatment upon release and eliminates the concern, often harbored by courts, that a client will be released and relapse before even entering treatment.

Client Interviews and Client Management

Social workers are trained to ask questions that are different from the questions attorneys ask. Indeed, "[s]ocial workers and other experts who work closely with defense lawyers often teach the lawyers interviewing and counseling skills."³

Moreover, the power dynamic between a client and a social worker is different from the one between an attorney and a client. As such, social workers are often able to obtain different information than the attorney, and that information can be used to advocate for the client and better inform the court. Material collected by a social worker may supplement an attorney's work in the areas of alternative theories of defense, possible avenues of investigation, possible fact witnesses, and possible expert witnesses to retain.

In addition, a social worker can provide support for the client and the client's family, can serve as a liaison

between attorney and client's programs and service providers, and can help foster better understanding between the attorney and the client. A social worker can help the attorney avoid challenges in client management by "identifying

and addressing psychological or emotional issues the client may have which can otherwise adversely impact the attorney/client relationship."⁴

Stages of Intervention

Arraignment and bail: The benefits of incorporating social workers into the defense team begin at the inception of the case. It is often difficult to involve a social worker prior to arraignment. However, when bail can be set without prejudice, appealed, or reconsidered by the court at a later date, social worker involvement can benefit the client. Completion of a psychosocial report can increase persuasiveness of attorney arguments at bail or a subsequent review or appeal. Social workers can also identify the client's treatment and program needs while at the same time putting programs in place to meet those needs. They can assist, for example, with admissions into a detoxification program, setting up counseling, and connecting clients with methadone programs and inpatient or outpatient drug treatment.

Investigation and reports: Social workers can provide concrete assistance in specific areas of investigation. For example, when competency is at issue a social worker can perform a preliminary mental health and competency assessment. The social worker can obtain extensive client records including records from the Social Security Administration, medical records, and mental health treatment records. These records can bolster defense counsel's motions and the analysis of defense experts, including psychological or psychiatric witnesses.

Similarly, when criminal responsibility is at issue a social worker can locate records from around the time of offense including crisis intervention records, hospital records, and prison or jail records. In defending charges of possession with intent to distribute, defense counsel often considers a per-

sonal use defense. In that situation, a social worker can document the client's history of substance abuse through interviews with the client and family members. The social worker can obtain medical and treatment records to further a personal use defense at trial.

Pretrial Motions: A social worker can obtain valuable information and review records in support of pretrial motions. In addition, counsel can have a social worker supplement or sign an affidavit in support of a pretrial motion. Information obtained by the social worker can be used in support of a motion for funds to retain an expert in any of the following areas: criminal responsibility expert, competency expert, personal use expert, mitigation expert, and sexually dangerous persons expert.

Trial: During the trial phase of the case, a social worker can be available to work with the client, the client's family members, and other witnesses. For clients facing particularly difficult charges or those who may be young or mentally unstable, the additional presence of a social worker to keep the client calm can be extremely useful to the pre-occupied trial attorney.

Sentencing: To the extent it exists, the traditional role of the social worker in a criminal case is at sentencing. For example, in a capital case, social workers are often part of the mitigation team. There, the social worker provides a fresh, qualified, and compelling voice to the court. In addition, the social worker can assist defense counsel in both sentencing and plea bargaining. "Lawyers in the plea bargaining and sentencing process should be knowledgeable about principles of therapy and rehabilitation and the various rehabilitative programs that exist in their communities."⁵ Social workers can educate lawyers, who can in turn educate the court, about principles of treatment and therapy.

In recent years, the potential impact of the social worker at sentencing has increased as awareness of the opioid crisis and trends in sentencing reform have increased many courts' receptiveness to alternatives to incarceration. A social worker can present those compelling alternatives to the court (e.g., drug treatment, specific programs, and specific counseling).

How should the attorney present the results of the social worker's efforts to the court? The form of the presentation will vary from case to case and is within the discretion of the attorney. A memorandum in aid of sentencing is a common and effective device to edu-

cate and persuade judges, district attorneys, and probation officers. It can be co-authored by the attorney and the social worker. Material provided by the social worker can help humanize the client and provide persuasive arguments to the court.

In such instances the attorney makes the legal arguments and persuasive reasoning. The social worker offers the clinical argument and analysis. The clinical analysis need not be limited to material obtained through client records and interviews. Rather, a social worker can research clinical material specific to facts of the case, such as adolescent brain development, the impact of substance abuse on brain development, or the impact of trauma history and diagnoses like post-traumatic stress disorder. Alternatively, the social worker's affidavit can humanize the client, provide some client history, and offer and justify a series of treatment or program recommendations.

As noted earlier, it is important that the attorney and the social worker are clear about the goals of the case and the purpose of the report. For example, the attorney may ask a social worker to write a broader report to help the attorney identify and explain the client's issues (e.g., addiction, mental health, and trauma history), create a mitigation report focusing on client circumstance at time of arrest (e.g., explain the role which PTSD played in the client's resisting arrest case), or write a letter to the court focusing more generally on the positive support structure in place for the client (e.g., family, friends, religion, Narcotics Anonymous, Alcoholics Anonymous).

Probation Revocation Hearings: All the services a social worker can provide during sentencing can be duplicated for a client facing a violation of probation. In addition, a social worker can assist a struggling client to stay engaged in a program in the hopes of preventing a violation, serve as a liaison between probation and the attorney, and support motions for a change of conditions of probation.

Legal and Ethical Issues

It is critical not to overlook the legal and ethical issues surrounding incorporating social workers into the defense team. Specifically, defense counsel must be aware of state laws governing mandated reporting. Many states require social workers (and those acting in a social worker capacity) to report suspected abuse or neglect of children, elders, or disabled persons. They may also impose on social workers and other

mental health professionals an ethical obligation to disclose confidential information if it is necessary to prevent serious, foreseeable, and imminent harm to a client or other identifiable person.

It is reasonable to take the position that a social worker is part of the client's legal team and is engaged with the understanding that he or she is bound by the rules of confidentiality and privilege that governs the attorney-client relationship. However, an attorney should investigate the laws of her state, screen each case for possible issues, retain a social worker only after reaching agreement with that person on any relevant issues, and carefully advise the client. The professional rules regarding a defense attorney's duty of confidentiality may not extend to the social worker in some circumstances, and the client should be made aware prior to the social worker's involvement of any possible issues that may arise.⁶

The Process of Obtaining Funds and Services

If this is all true, why are social workers so rarely involved in criminal defense cases? Social worker integration and availability varies greatly from state to state. Attorneys working in high-capacity public defender offices are more likely to have easy access to full-time staff social workers.

However, even attorneys who do not work for a high-capacity public defense agency should take advantage of the opportunity to expand the scope of representation by incorporating social workers into the defense team. In appropriate cases attorneys working on contract or on a court-appointed basis should seek funds from the court to retain a social worker. Just as a defense attorney would retain a forensic expert, an attorney seeking to hire a social worker should also look to private practitioners or social service agencies as possible sources for qualified social workers. Some state public defense agencies maintain a list of "approved" social workers. Such lists, however, may only indicate that the social worker is a state-approved vendor. Lawyers should make their own inquiries about the individual's qualifications.

Before retaining a social worker, a lawyer should consider what she hopes the social worker will achieve. Counsel must be clear about the type of final product needed and the focus of that product. Keep in mind that a social worker's training and experience may lead to a different focus in the psychosocial evaluation, letter to the court, or

sentencing memo than what the attorney feels is needed for the case. As such, it is important for attorneys to consider the background and training of the social worker they are considering retaining. For example, it may be important whether the social worker has more of a case management or therapeutic clinical background. The clinical social worker may be most useful in diagnostic and treatment recommendation while the social worker with a case management focus may be better prepared to identify and locate community services. Some can provide both. This may depend on the scope of practice allowed by the worker's state license.

Most states require that a request for funds for costs be presented to a court. The motion for funds to retain a social work expert or advisor can be based on state and federal law. Federal sources include the Fourteenth Amendment to the U.S. Constitution and *Ake v. Oklahoma*, in which the U.S. Supreme Court commented on the fair opportunity to present a defense:

This court has long recognized that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense. This elementary principle, grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness, derives from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake.⁷

State law sources will vary depending on jurisdiction. For example, in Massachusetts, attorneys can cite to the state constitution,⁸ statutory law,⁹ and *Commonwealth v. Lockley*.¹⁰ Like Massachusetts, most states have statutes that allow for state payment of filing fees and other court costs for indigent defendants.¹¹ If the state law or practice does not allow it, defense lawyers should press for ex parte filing and presentation of a motion for costs.¹²

Conclusion

There is no question that social workers provide attorneys access to

different avenues of advocating for clients and help to find or even create compelling alternatives to incarceration. Ultimately, incorporating a social worker into the defense team helps address underlying social and environmental factors contributing to the client's involvement in the criminal justice system. The involvement of social workers can produce tangible benefits for clients both in and out of court. It is left to the defense bar to make a concerted and coordinated effort to afford the benefits of social worker experts to more defendants and more courts.

Notes

1. Cynthia G. Lee, Brian J. Ostrom & Matthew Kleiman, *The Measure of Good Lawyering: Evaluating Holistic Defense in Practice*, 78 ALBANY L. REV. 1215 (2014-2015).

2. *Id.* at 1223, 1238.

3. Cait Clarke, *Problem-Solving Defenders in the Community: Expanding the Conceptual and Institutional Boundaries of Providing Counsel to the Poor*, 14 GEO. J. LEGAL ETHICS 401, 429 (2001).

4. Norma Wassel, *Advantage: Enhancing Criminal Defense Through Social Work Intervention*, CORNERSTONE, January-April 2009, at 15.

5. Bruce J. Winck, *Redefining the Role of the Criminal Defense Lawyer at Plea Bargaining and Sentencing: A Therapeutic Jurisprudence/Preventive Law Model*, 5 PSYCHOL. PUB. POL'Y & L. 1034, 1079 (1999).

6. For a comprehensive discussion of these issues, see Alexis Anderson, Lynn

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About the Author

Matthew Fleischner is a Public Defender in the Superior Court division of the Committee for Public Counsel Services. A graduate of St. Lawrence University and Western New England School of Law, he has fought for the rights of indigent clients in Springfield, Massachusetts, since 2010.



Matthew Fleischner

Committee for Public Counsel Services
Public Defender Division
Springfield, Massachusetts
413-750-1620

EMAIL mfleischner@publiccounsel.net

Senior Resource Counsel	Vanessa Antoun	202-465-7663	vantoun@nacdl.org
Director of Events	Akville Athanason	202-465-7630	aathanason@nacdl.org
Assistant to the Executive Director	Tatum A. Brooks	202-465-7657	tbrooks@nacdl.org
National Affairs Assistant	Shuli Carroll	202-465-7638	scarroll@nacdl.org
Grant Manager	Tom Chambers	202-465-7625	tchambers@nacdl.org
Senior Editor, The Champion®	Quintin M. Chatman	202-465-7633	qchatman@nacdl.org
Membership Director	Michael Connor	202-465-7654	mconnor@nacdl.org
Education Assistant	Cori Crisfield	202-465-7643	ccrisfield@nacdl.org
Resource Counsel	Jessica DaSilva	202-465-7646	jdasilva@nacdl.org
Senior Director of Public Affairs and Communications	Ivan Dominguez	202-465-7662	idominguez@nacdl.org
Junior Graphic Designer	Julian Giles	202-465-7655	jpgiles@nacdl.org
Director of Public Defense Reform and Training	Bonnie Hoffman	202-465-7649	bhoffman@nacdl.org
Education & Research Associate Fourth Amendment Center	Wendy Lee	202-465-7652	wlee@nacdl.org
Associate Executive Director for Programs, Business Services, and Technology	Gerald Lippert	202-465-7636	glippert@nacdl.org
Senior Privacy and National Security Counsel	Jumana Musa	202-465-7658	jmusa@nacdl.org
Public Affairs & Communications Assistant	Ian Nawalinski	202-465-7624	inawalinski@nacdl.org
Associate Executive Director for Policy	Kyle O'Dowd	202-465-7626	kodowd@nacdl.org
Sales and Marketing Manager	Jason Hawthorne Petty	202-465-7637	jpetty@nacdl.org
Senior Litigation Counsel	Michael Price	202-465-7615	mprice@nacdl.org
Director of Advocacy	Monica L. Reid	202-465-7660	mreid@nacdl.org
Executive Director	Norman L. Reimer	202-465-7623	nreimer@nacdl.org
Graphics Assistant	Saira Rivera	202-465-7635	srivera@nacdl.org
Member Services Assistant	Nelle Sandridge	202-465-7639	nsandridge@nacdl.org
Senior Membership and Operations Associate	Viviana Sejas	202-465-7632	vsejas@nacdl.org
Information Services Manager	Doug Shaner	202-465-7648	dshaner@nacdl.org
Fourth Amendment Center Fellow	Zachary Simonetti	202-465-7659	zsimonetti@nacdl.org
Public Defense Reform and Training Counsel	Renee Spence	202-465-7651	rspence@nacdl.org
Associate Executive Director for Strategic Marketing	Jessica Stepan	202-465-7629	jstepan@nacdl.org
Manager — Multimedia Production & Sales	Koichi Take	202-465-7661	ktake@nacdl.org
Counsel for Special Projects and Foundation Manager	Daniel Weir	202-465-7640	dweir@nacdl.org
Art Director	Catherine Zlomek	202-465-7634	czlomek@nacdl.org

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