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“PROBLEM-SOLVING” COURTS: THE NEW YORK EXPERIENCE

Chief Judge **Judith S. Kaye** describes the creation and growth of problem-solving courts in New York State



For nearly a decade, I have been privileged to serve as Chief Judge of the State of New York, responsible for oversight of a court system that receives more than three million new case filings each year. While our diverse dockets invariably include lofty constitutional issues, fascinating statutory interpretation matters, and mind-bending common law questions, overwhelmingly our cases are the stuff of everyday life: offenders who return to court again and again on minor criminal charges, landlords and tenants who seek relief for disagreements over rent and repairs, families who turn to us when their relationships sour.

Take the example of New York City. In the City's Family Court, about 250,000 new cases were filed last year, involving such heart-wrenching issues as child abuse, domestic violence and juvenile delinquency. New York City's lower criminal (or misdemeanour) courts and its Housing Court each recorded about 330,000 new cases. These figures are hardly surprising. Courts are, after all, a mirror of society, and we have in recent years seen an explosion in drug arrests, an emphasis on rooting out quality-of-life offenses, an erosion of community support systems, and a rise in family dysfunction. If you were to visit these courts, they would strike you as more like emergency rooms than pristine laboratories of legal analysis.

DOWNWARD SPIRAL

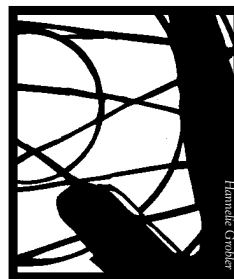
I am proud of the judges on our front lines of these courts who handle the often complex legal issues and do an outstanding job of delivering justice, providing due process and furnishing a service to people in need. But our huge volumes tell us that we are getting lots of repeat business. In a city of some eight million, these figures alone tell us that we are likely recycling the same people, as their lives spiral downward – the drug addict, for example, who is rearrested shortly after release from jail and returns to the streets; or the child who grows up in the courts, often graduating from Family Court to criminal courts; or the abusive spouse in court on an assault charge one day and a homicide not long after. Obvious too is the fact that the most efficient court management in the world may produce faster dispositions, but it will not produce better outcomes for many of these litigants, or for the community, or indeed for the courts.

So we began to ask ourselves whether there is a better way. Can the courts' intervention be a positive, constructive one? Can we help break the cycle, halt the downward spiral? In New York and elsewhere, this re-evaluation has led to the creation of what we call problem-solving courts – such as drug courts, community courts, domestic violence courts and mental health courts. More than a thousand problem-solving courts are now operating in the United States. These courts pride themselves not on the number of dispositions they can report but rather on whether they have achieved meaningful outcomes.

ADDRESSING ADDICTION

How does a problem-solving court work? What's different about this approach? The best way to answer these questions is to take a closer look at a problem-solving court in operation. I'll use the typical drug treatment court

– actually a “part” or division of a traditional court – which links offenders to treatment instead of incarceration, with the court monitoring the treatment process throughout. The differences between these courts and the traditional model start well before the first case reaches the court, because drug courts are the product of rigorous planning among interested parties and members of the local criminal justice community. In New York that means the communities within 62 separate counties. The defence bar and the local prosecutor work together to formulate which defendants will be eligible to participate in the drug court program, and they hammer out a system of graduated sanctions and rewards that will respond both to relapses and to progress in treatment. Judges and court administrators work with drug treatment providers, probation departments and police in advance to establish protocols for reporting back to the court. We discovered in New York that a ‘cookie-cutter’ model for a drug court was not appropriate. Each local jurisdiction defines its own caseload, chooses its own treatment providers, and creates its own programs of sanctions and rewards.



“Every effort is made to ensure a successful transition from addiction to sobriety, and from criminal to law-abiding behaviour.”

All our drug courts share some basic operational features. First, the judge, prosecutor and defence must agree that the defendant meets the established eligibility criteria – typically, a non-violent criminal charge and a history of addiction. Second, all parties must agree to a formal treatment plan that spells out the length and type of treatment, as well as the consequences for non-compliance with court orders. Depending on decisions reached in the planning process, defendants in some drug courts will then plead guilty, with the understanding that if they comply with court-mandated treatment, the court will vacate the plea and dismiss the charges or otherwise reduce the sentence; in other drug courts, prosecution is deferred pending the outcome of treatment. Third, addressing addiction through appropriate treatment is not the entire function of the drug court. Our drug courts also link participants to a wide array of services, like job training, health care, education and housing services. Every effort is made to ensure a successful transition from addiction to sobriety, and from criminal to law-abiding behaviour. Finally, our drug courts, like all problem-solving courts, are also characterised by collaboration and co-ordination – collaboration among the courts, criminal justice agencies, treatment providers, social service agencies, providers of other services and community groups; and co-ordination of all relevant information about the participant's progress in treatment and compliance with all other aspects of the recovery plan.

'SUPER-PROBATION'

In New York, we now have about 40 drug courts, and expect soon to have at least one in each of the State's 62 counties. And they are not limited to criminal courts. Our Family Treatment Courts

try to stop the devastating cycle of parental drug use, followed by child neglect, followed by foster care. The hope is that drug-addicted parents will complete these rigorous programs and reunite with their children, rescuing them from a life of foster care limbo, and worse. We are applying the same approach in "community courts" that assure that low-level, non-violent criminal offenders pay back the injured community by removing graffiti, cleaning streets, tending parks. Indeed, community courts resemble the "restorative justice" concept described by Mel Lofty in the cover article in this publication's January 2002 issue. We're using the approach in our Domestic Violence Courts that emphasise victim safety and defendant accountability. We're using it in a Juvenile Intervention Court to steer offenders under the

"Grown men have told me that, for the first time in their lives, they are able to have an apartment, a credit card."

age of 16 away from a life of delinquency and crime. We're using it in a brand new Mental Health Court, to link criminal defendants with persistent mental illness to long-term treatment as an alternative to incarceration.

In each of these new courts, judges are participants in a problem-solving process. Judges in drug court not only oversee defendants in drug treatment, they also praise them when they achieve a new level of sobriety, sanction them if they fall back a step and, most importantly, remain involved in the process. By providing a means to avoid incarceration, drug courts are not really giving offenders an 'easy way out.' Since participation is voluntary, defendants can and often do opt for adjudication in a regular court. They regard traditional adjudication, often ending with a sentence of "time served," as less onerous than a program that requires regular attendance at court sessions, random drug tests, participation in rehabilitative programs, in-patient or out-patient treatment, education, and job training. One judge has described drug court as "super-probation," the most intensive form of probation imaginable.

REAL JUSTICE

These courts work. We've already had more than 15,000 graduates of our drug courts. We know that court-monitored offenders are twice as likely to stay in treatment as those who seek treatment voluntarily, and we know that recidivism rates are significantly lower. We know that our community courts in Midtown Manhattan, Harlem and Red Hook are helping to reduce crime. And we know that our domestic violence courts have enhanced safety for victims and improved accountability for batterers. These courts have been widely embraced (by, among others, the American Bar Association and the Conference of Chief Justices), and intensively

studied over the last ten years. But instead of quoting statistics, I would like to conclude with a note about people, and the impact of these courts on people.

As a veteran of drug court graduations, I can tell you a little about what the graduates themselves have to say about their experience. Typically at these ceremonies, a lifelong drug addict who never before could complete treatment tearfully thanks everyone, including the judge she reported to weekly, for giving her a chance to start her life again. Frequently I hear, "I wasn't just arrested, I was saved." Grown men have told me that, for the first time in their lives, they are able to have an apartment, a credit card. I've heard addicted parents – now clean and sober – express their gratitude for the opportunity to regain their self-esteem, re-establish connections with family members, raise their children. But maybe best of all on the subject of people – for me even better than the words of the graduates – are the words of the judges in these courts. Like the

"Once-addicted parents now express their gratitude for the opportunity to regain their self-esteem, re-establish connections with family members, raise their children."

Brooklyn Domestic Violence Court Judge who feels so pleased that for six years he has not had a single fatality there. Or the Manhattan

Family Court Judge who, after 21 years on the bench, told me, "This is the best thing I've ever done." Or the Rochester Drug Court Judge, who was at first reluctant to take the assignment and now won't leave it because, in his words, "This is what I became a judge to do."

PROBLEM-SOLVING JUSTICE

I know that these problem-solving courts are a departure from our traditional adversarial model for case dispositions. They need oversight, evaluation and fine-tuning – and they are obviously not the model for all types of cases. But for a large part of our dockets, problem-solving justice means enhanced safety and a greater voice for victims and communities. For offenders, it means a chance to hold their heads up and get a life, provided they are willing to do their part and fulfil their responsibilities. For lawyers and judges, problem-solving justice is an avenue to more lasting and therefore better outcomes – surely a lot better than a sentence of "time served." For society generally, it is an opportunity to save lives as well as hundreds of millions of dollars in prison and foster care costs. And for the courts, it's an opportunity to explore new ways to better manage our business, and a chance to show the public that we are indeed concerned with producing meaningful outcomes – not simply recycling people.

Judith S. Kaye is both Chief Judge of the State of New York and Chief Judge of the seven-member Court of Appeals of the State of New York, the highest court in the State.



LOCAL JUSTICE

Ruth Cole defends the idea of keeping criminal justice as local as possible



When we talk of justice, and in particular the quality of justice, we usually think of factors such as the independence of the tribunal, the quality of representation, the opportunity to prepare one's case and so forth. Over the last twenty years or so, however, a hitherto unregarded dimension to justice has become unexpectedly prominent: the venue of proceedings. The 1980s saw the start of an identifiable trend – the closure of local courthouses. What started with the closure of a few rural court buildings that were, perhaps, in use for barely half a day every couple of weeks, has developed to the stage where even some busy courthouses in large towns are under threat. County courts and magistrates' courts alike have suffered closures.

The attractions of this approach are not difficult to see. Since the 1980s there has been more and more pressure on public finances, and the bodies which are responsible for the administration of courts (magistrates' courts committees in the case of magistrates' courts, the Lord Chancellor's Department, now the Court Service, for others) have not been exempt. There are obvious economies to be achieved by closing underused buildings, especially when the work can be absorbed into other existing sites which themselves may have some spare capacity. There is, too, the capital gain to be pocketed on the sale of a closed building. Running costs can be more easily controlled when a small number of sites do the work.

GOOD BUSINESS SENSE?

Moreover, public expectations of facilities have been raised. Whereas at one time those attending court would have been expected to put up with whatever surroundings they found, the public has now come to demand better facilities. They expect that waiting areas will be reasonably comfortable, proper security will be in place, refreshments will be available, private interview facilities will be on site, and that many other needs will also be catered for. Old buildings may not readily lend themselves to the sort of adaptation required, and, in any event, the cost of providing modern facilities is disproportionately higher when the building is a small one and its use is limited. Concentration of court business in fewer sites makes good business sense for cash-strapped public bodies.

This trend reflects what has happened in many other walks of life. Smaller local hospitals have been merged with larger ones that are often at some distance from the population they serve. Post offices in rural areas have been closed. Other small public offices have given way to larger, more remote, ones. Outside the public sector, many commercial organisations have found it more economical to amalgamate smaller

units that are no longer regarded as viable. (The trend, incidentally, is one that may contribute to the problems of traffic congestion. Individually insignificant, these amalgamations of local offices may cumulatively create the need for many more journeys to be made).

Such developments have not, however, found favour with everyone. Increasingly, local communities have taken issue with many proposals of this sort, and this has been the case, too, with courthouse closures. A fight to save a court does not have the emotive appeal, or the level of public support, attaching to a campaign to keep a local hospital open, but opposition to court closures has been surprisingly vociferous in places.

RESISTANCE

Are campaigners simply opposing change to preserve a status quo to which they have some irrational attachment or is there justification for this resistance to court closures? To return to the starting point of this article, it seems that venue may have an important bearing upon justice. Whilst there are many types of legal proceedings in which it is largely irrelevant where they are held, the location of the hearing is highly material in others, especially the less serious criminal cases. Major crime engages the whole nation, but relatively minor, everyday, offences are of concern primarily to the communities in which they occur.

This is especially true in magistrates' courts, dealing, as they do, with a large number of less serious offences. Disorder in the local High Street, speeding at an accident black spot, vandalism on a housing estate and the like are of special concern to the areas where they occur. One of the major contributions that the magistracy makes is its sensitivity to local concerns. This is not the rule of the mob, but is a tempered judicial approach that is informed by knowledge of local issues and local concerns. When the work of magistrates' courts is concentrated in fewer and larger sites, it is dealt with by benches which cover a much wider area, with the inevitable consequence that the local knowledge becomes diluted and the sensitivity to local concerns is largely lost.

LOST SAVINGS

Nor should we underestimate the importance of accessibility. Closing a local courthouse means that the alternative, more distant, court will be less easily reached by its users. With some courts this does not apply. If the workload of a court comprises offences arising on a major motorway, the likelihood is that defendants will be drawn

from all over the country. The venues of some courts may have little, if any, impact upon the court's users. But such courts are, however, the exception. Overwhelmingly, courts not only deal with local offences, but with local people. Defendants are usually local. Their victims are local. Those who witness incidents are local. There may, perhaps, be some added inconvenience for professional court users in having to travel additional distances, but that is a simple matter of cost. The real concern is that defendants, victims and witnesses will find it increasingly difficult to attend court. For defendants, tending to be drawn from the less affluent sections of society, the cost of travel can be quite significant. Defendants can be forced to attend, although if lateness and non-attendance increase there is again a cost issue. Victims and witnesses, already two groups said to be disenchanted with the court process, are less likely to be compelled to make the journey to court. To put further obstacles in their way can only risk undermining the process of summary justice even further.

There are other arguments in favour of keeping criminal justice as local as possible. Amalgamated courts mean larger benches, with greater problems of management. Many sentencing options depend upon the local availability of community-based programmes.

A good relationship between the bench and the probation service and the local authority youth offending team is vital, and that is best fostered in the context of a bench of manageable size and a local service. There are also many constructive links of an educational nature between benches and the communities they serve. These thrive upon the local nature of the relationship.

It will be apparent, too, that

many of the arguments in favour of centralising courts on cost grounds are not as strong as appear at first sight, many of the savings being nullified by additional costs in other areas.

NOT COST, BUT JUSTICE

The issue, however, should not be one of cost, but of justice. Which arrangement best serves the cause of justice? Leaving aside those with vested interests (magistrates and staff), there has been a wave of support for those courts threatened with closure. Whether, as in the case of the Bolton Magistrates' Court – recently reprieved by the Lord Chancellor – that support will be sufficient to rescue the threatened courts remains to be seen. But no-one need be in any doubt. Benches and their local communities will not go down without a fight.

Ruth Cole is Chairman of the Harrow Bench.

"The venue of a court often has an important bearing upon justice."

"A fight to save a court does not have the emotive appeal, or the level of public support, attaching to a campaign to keep a local hospital open."

ETHICS, RULES AND RELATIONAL JUSTICE

Peter Camp, visiting Professor of legal ethics at The College of Law, considers the rationale behind ethical rules governing the solicitors' profession



Many occupations today are considered 'professions'. Historically, the term was used to refer to a limited number of professional men (and later women) engaged in the area of law or medicine for example. What marked out a "profession" was the fact that the organisation was self-regulated and it imposed upon its members obligations greater than those imposed by general law. The solicitors' profession clearly falls within this definition. It is self-regulated through the Law Society's Practice Rules and other ethical obligations and these rules do impose a greater obligation in many instances than obligations imposed by law.

What is the justification for these more onerous obligations? And can they survive in an age of increased competition and the drive towards cheaper legal services?

The historical justification put forward as the reason for these more onerous obligations was the protection of the public. Indeed, even in recent years, this justification has been used by the courts to explain the reason behind the conduct rules and the penalties imposed for breaching these rules. In *Bolton v The Law Society*¹ the Court of Appeal stated "A solicitor who lapsed from the standard of integrity, probity and complete trustworthiness required by membership of the profession had to expect that severe sanctions would be imposed on him by the Solicitors' Disciplinary Tribunal. The fundamental purpose in making disciplinary orders was not primarily punitive or deterrent but to maintain a well-founded confidence among members of the public that any solicitor whom they might instruct would be of unquestionable integrity and trustworthiness." An example of rules justified under this heading would be the Solicitors' Accounts Rule 1998. These impose detailed requirements relating to the keeping of client money and are clearly designed to protect the public where their funds are deposited with solicitors.

REGULATING RELATIONSHIPS

A second reason often put forward as the justification for a set of ethical rules is the requirement to maintain the reputation of the profession. This, it seems, goes beyond the requirement relating to the protection of the public and is a stand-alone justification for some of the obligations. Rule 1 of the Solicitors' Practice Rules 1990, states "A solicitor shall not do anything in the course of practising as a solicitor...which compromises or impairs...the good repute of the solicitor or of the solicitors' profession". Examples under this heading giving rise to obligations can be found in the recent past where the Law Society imposed stringent

conditions on the ability of a solicitor to publicise his or her practice. Indeed as recently as 1987, solicitors were not able to advertise their services. Obviously this could not be justified on the basis of "public protection". The feeling was that it was unprofessional to advertise and that advertising brought the profession into disrepute.

Thirdly, I would argue that a fundamental reason for ethical rules is to regulate the relationship between members of the profession. Where there is an overriding set of rules applicable to all members of the profession, reliance upon those obligations makes the

practice of the profession run smoothly. An example under this heading would be the Law Society's rules on solicitors' undertakings. A solicitor is able to rely upon the word (or undertaking) of another solicitor given in the course of practice or given as a solicitor. This is despite the fact that there is no

contractual relationship between the giver and receiver. The Law Society will enforce binding undertaking as a matter of conduct.

CHANGES AHEAD

As I mentioned earlier, the Law Society is the source of many of the ethical obligations applicable to solicitors. Whilst the Society's membership is made up of solicitors (and thus the profession is self-regulating) the Society's power to regulate solicitors is statutory. This arises from section 31 of the Solicitors Act 1974 which provides: "...the Council [of The Law Society] may, if they think fit, make rules, with the concurrence of the Master of the Rolls, for regulating in respect of any matter the professional practice, conduct and discipline of solicitors...".

Over the last 15 years there have been significant changes to the rules imposed by the Law Society. Indeed the situation today regarding the conduct rules is unrecognisable when compared to the pre-1987 situation. In 1999 the Law Society set up a Regulation Review Working Party. Its mandate was to look at all the rules and regulations applicable to solicitors and to make recommendations for change. At the time of writing, the Working Party has completed its task and, following a consultation period with the profession, is expected to put its proposals to the Council of the Law Society with a view to any changes taking effect in 2004. Further significant changes in a solicitor's obligations are expected.

As a result of the recent and proposed changes can it still be argued that the rules are

justified under the headings above or is there the need to add further heads such as commercial pressure and political dogmatism? Some examples might assist in answering this question.

COMMERCIAL PRESSURE

Until 1987 the Practice Rules prohibited a solicitor from advertising, inviting instructions or touting as a means of publicising his or her practice. There were, for example, detailed provisions relating to "job advertisements" ensuring that these could not be taken as indirect advertisements for the practice. It was felt that a fundamental principle of professionalism was that the client sought out members of the profession rather than the members seeking clients. It was unprofessional to advertise.

This all changed in 1987 with a new Practice Rule which permitted solicitors to advertise, subject to the conditions set out in a new Publicity Code. Overnight, solicitors were permitted to advertise in the press, on the radio and some enterprising firms started advertising on the television. However, the Code contained certain restrictions, which by today's standards still seem strange. No claim could be made in any advertisement that a solicitor was a specialist or an expert in a particular field. This restriction was lifted in the 1990s. Under the original Publicity Code a solicitor could not publicise his or her practice by means of unsolicited telephone calls. Although this was later amended to allow unsolicited telephone calls to clients or former clients, it was only in 2001 that a further amendment was made which now allows unsolicited telephone calls to be made by way of publicity to commercial organisations or public bodies (but still not to other members of the public).

So does the "free-for-all" regime applicable to advertising today derive from one or more of my three heads of justification, or do we need to look elsewhere? Clearly most solicitors no longer

view advertising as bringing the profession into disrepute. It might be argued that the changes, which have occurred over recent years, have been made with the view to protecting the public – wider access to justice through advertising legal services must be a good thing. However, it is also undeniably a fact that commercial

pressure has played a part in making these changes. Solicitors must now operate in the "market place". They are in competition for work with others. To survive they need to operate on the same basis as their competitors and in consequence must be able to advertise in the same way. Advertising by way of unsolicited telephone calls to non-clients is now a way of

"Members of the public need to be confident that any solicitor whom they might instruct is of unquestionable integrity and trustworthiness."

"A fundamental reason for ethical rules is to regulate the relationship between members of the profession."

life in some commercial firms – is there any justification for this other than commercial pressure?

CONFIDENTIALITY

A fundamental requirement of a solicitor is to maintain client confidentiality. The justification for this duty must be to protect clients' interests and to ensure that clients can communicate openly with their legal adviser without the risk that details of that communication would be disclosed to outsiders.

In recent years, successive governments have made substantial inroads into a solicitor's duty in confidentiality. Since 1994, money-laundering legislation has required solicitors to report their knowledge or suspicion of money-laundering by way of a defence to any possible charge of assisting a money-launderer. Any report to the authorities "shall not be treated as a breach of any restriction upon the disclosure of information imposed by statute or otherwise."²

The Proceeds of Crime Act 2002 extends this requirement to disclose by way of an obligation. This obligation applies to any knowledge or suspicion or reasonable grounds for knowledge or suspicion that a person is engaging in money laundering where the information derived from the course of business. Money-laundering for these purposes is widely defined and includes the act of possession or use of criminal property i.e. the perpetrator of a crime can be involved in money-laundering. Although "privileged information" does not need to be disclosed under these provisions, confidential information is not necessarily privileged. For this reason some commentators have suggested that a solicitor's duty in confidentiality has ceased to apply in many professional relationships.³

Are these changes justified by client protection purposes or by professional reputation or are these changes merely imposed upon the profession as a result of government policy?

THREATENED INTEGRITY

Contingency fees in litigation have also been prohibited. Being paid from the damages in litigation cases, or being paid only in the event of success in litigation cases gives the solicitor an interest in the outcome of the litigation and as such could impair his or her independence or integrity. Practice Rule 8 prohibited contingency fees in contentious proceedings.

However the Courts and Legal Services Act 1990 introduced the concept of conditional fee agreements (CFAs) and lead to a change in the Practice Rule, which now allows for contingency fees "permitted under statute". CFAs are currently permitted in any civil litigation except family law. They allow a "no win; no fee" arrangement, with a success mark-up (based on an appropriate percentage of the solicitor's normal fees) in the event of success. Solicitors entering into such agreement undoubtedly have an interest in the outcome of their client's

litigation. In most cases the solicitor's interest is likely to be the same as the client's: both will want to succeed. However, in some cases, where a solicitor is only paid in the event of success, his interest in accepting a settlement offer (which will be a "success" for the purposes of his fee payment) may be in conflict with the client's best interest to pursue the matter. If the original justification for the restriction was to protect a client from the possibility of a solicitor's interest in the litigation conflicting with the client's interest can it be said that this conflict

disappears just because a statute now allows such funding? Is it more likely that the intention behind this change is to relieve the public purse of funding civil litigation

through legal aid and pass the responsibility for such funding to the solicitor's profession?

CONFLICT OF INTEREST

The current obligation is for a solicitor to refuse instructions where there is a conflict between the interests of two or more clients or where there is a significant risk of such conflicts. The rule provides that if a solicitor discloses the conflict to a client and the client consents to the solicitor acting, the solicitor must not accept the instructions. The justification for the rule is public protection. Further it enhances the profession's reputation since solicitors must be seen to be acting correctly even if the client agrees otherwise.

Current proposals following the regulatory review will allow for exceptions to this rule. Solicitors will be able to act for clients where there is a conflict of interest if that conflict is properly managed (e.g. where clients consent). Why does the Law Society feel it necessary to make such changes? Are these changes in the interest of clients generally or are they being made following commercial pressure from some of the larger firms to regularise their existing practices?

'TESCO'S LEGAL SERVICES'

Practice Rule 7 prohibits solicitors from entering into partnership with anyone other than another solicitor (or certain specified foreign lawyers). Practice Rule 4 prohibits a solicitor employed by a non-solicitor (e.g. a solicitor working as in-house counsel for a corporation) from providing legal services to anyone other than their employer. In recent years, the Law Society has agreed, in principle, to amend both Practice Rules. If these amendments occur (and there is no absolute certainty that they will go through as currently suggested), multi-disciplinary partnerships will be permitted (i.e. solicitors will be able to take into partnership non-solicitors) and companies and others would be permitted to employ solicitors and through those solicitors provide legal services direct to members of the public (the so-called Tesco's Legal Services format).

The reason for the current restrictions is to ensure that the legal profession can offer independent legal services to members of the public fearlessly and objectively and without any pressure from outside influences. Where a major commercial company (such as a retailer who is selling financial services) employs the solicitor to provide legal services to third parties, will the solicitor's advice in dealing with, say, an insurance or banking dispute necessarily be impartial?

The Government supports the changes. They want to see a widening of access to justice through the provision of legal services by bodies other than the legal profession. They argue that changes will benefit the public as a result of wider competition and cheaper services. However, these changes are being introduced by the government at the cost of the ethical and relational reasons that I outlined at the beginning of this article – protection of the public, protection of the profession's reputation and protection of relationships between members of the profession.

PUBLIC DISADVANTAGE

These examples (and others) suggest that the traditional reasons behind professional ethical rules are being eroded and that commercial and other pressures have brought about recent changes. Whilst widening access to justice through advertising, contingency fees, and allowing non-lawyers to provide legal services may be looked upon as a helpful development, the loss of ethical obligations and relational reasons in providing such services may ultimately be to the public's disadvantage.

Peter Camp is visiting Professor of legal ethics at The College of Law

¹ The Times 8th December 1993

² See section 93A(3)(a) Criminal Justice Act 1988 as amended

³ Morris-Cotterill (2001) "Fraud Guide", Law Society Gazette, 14th February.



MISSING OUT

Kelli Brown explores what it is like to have a prisoner in the family



Over the past three years, the Action for Prisoners' Families' Young People's Project (YPP), has been raising the profile of the needs of young people with a family member in prison. This has been achieved by researching their needs and by developing pilot projects in response. Funded by the Diana, Princess of Wales Memorial Fund, the project will conclude in early January 2003. As the project draws to a close, we have gathered significant evidence from hundreds of teenagers about the impact a prisoner in the family can have on a young person's life. Now is an appropriate time to look back at some of the lessons that can be learned.

The incarceration of a loved one is often a cause for grief and distress. Sometimes the young person or their family may not experience the imprisonment of a family member as a loss – especially where violence or abuse in the home precedes the prison sentence. However, it can have all sorts of other effects. For those who live in chaotic families, having a relative in prison may be one further disruption among many. But it can still be a focus of significant concern. A custodial sentence given to a family member can have the effect of seriously intensifying an already difficult family environment.

HIDDEN

We should be clear from the outset that the phrase 'young people with a prisoner in the

family' does not just refer to teenagers who have a parent in prison. It also refers to those teenagers who have other close relatives in custody, whether sentenced or on remand. These relatives may be siblings, aunts, uncles or grandparents. The YPP project found that the removal of any close relative to prison will affect young people in diverse ways. For example, an older brother in custody may have been the

primary role model for the younger siblings left on the outside. Or an aunt receiving a prison sentence may mean that her children move in with their cousins. This can cause practical disruptions such as lack of space within the household, financial pressures and so on.

The project confirmed the extent to which young people with an imprisoned family member are hidden and isolated.

It was clear that statutory bodies charged with working for young people did not give this issue the attention it deserved. When this project began, there was no specific provision of resources to meet the needs of young people with a family member in prison. Now, as a result of our work, there are at least some models of support and some resource materials available to this teenage population. Crucially, the YPP has also expended a great deal of energy in awareness raising activities with generalist service providers. These are designed to ensure that these young people are no longer overlooked,

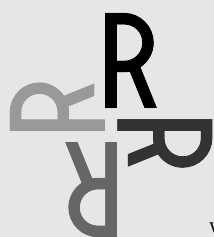
particularly by programmes or policies that are targeted at hard-to-reach young people. But there is still a long way to go.

ISOLATION

As part of the project, we conducted research with 53 young people aged 12-18 from London, Durham and Manchester, all of whom had a parent or sibling in prison.² For the vast majority, their lives were characterised by isolation and discrimination. Most young people did not disclose the fact they had a relative in prison to anyone outside their closest family members and friends. In many instances, when it was discovered that they had a relative in prison, teachers, neighbours, friends and police treated them 'differently' and looked at them 'funny'. Many respondents also felt demonised by the prison regime and visiting procedures.

Most respondents had learned of the arrest or imprisonment of their relative through their mothers. A quarter, however, were informed of the arrest by the police. Many young people had actually witnessed the arrest of their parent or sibling and had been subject to police raids on their homes. One-third of the sample had had to move home as a result of the imprisonment. This was because of community attitudes and the stigma caused by the offence or because they had been taken into care. Others were moved to relatives, commonly grandparents. Often young people had to deal with these experiences with no other support than that of their mothers.

"Most young people did not disclose the fact they had a relative in prison to anyone outside their closest family members and friends."



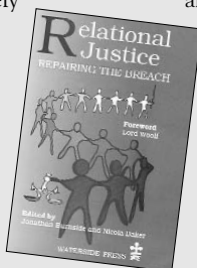
Views expressed are those of the authors and do not necessarily reflect the policies of the Relationships Foundation.

WHO WE ARE

The *Relational Justice Bulletin* is published three times a year by the **Relationships Foundation**, a Cambridge-based charity dedicated to developing new, 'relationships-based', approaches to social, economic and political issues (see www.relationshipsfoundation.org).

Relational Justice is a fresh approach to crime and punishment. Rather than looking at crime solely as an offence against the state, it sees it as a breakdown of relationships between offenders, victims, families and the community.

The concept was developed by the **Relationships Foundation** in the early nineties. It first gained public exposure with the publication of the book *'Relational Justice: Repairing the Breach'* (Waterside Press, 1994), which was welcomed by Lord Woolf as 'a radical new approach which anyone with any concern about the criminal justice system needs to be aware'. Since then, it has been shown to have wide implications for policy and practice.



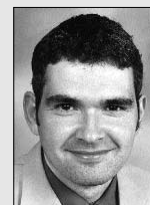
The *Relational Justice Bulletin* was launched as a platform for discussion of the ideas at the heart of **Relational Justice** as well as exchange of good practice across the system.

You are invited to join the growing number of professionals, practitioners and others with an interest in the field already receiving the Bulletin by post or email (see details on the back page). You are also warmly invited to contribute your own ideas and experience.

Your help would also be welcome in publicising the Bulletin. Please feel free to ask for extra copies to pass on, or to send us the details (post or email) of people whom you think would like to receive a sample copy.

Past issues of the *Relational Justice Bulletin* can be viewed on the Relationships Foundation's website at www.relationshipsfoundation.org/relational_justice

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HUSH-HUSH

This lack of recognition of the impact on young people when a family member is imprisoned often exacerbates young people's feelings of isolation within their community. "I didn't [know anyone else]. I was like a bit of an outcast. It was all a bit hush-hush about my dad being in prison. A couple of friends knew but I wouldn't have told anyone if it hadn't've been in the paper and on the radio" (18 year old female). "When it happened in Edinburgh we were asked to move. Now we live in the middle of nowhere..." (16 year old male, father in prison).

Such attitudes make prisoners' families feel unable to disclose the custodial sentence. They also prevent families from being fully and appropriately informed about their rights. Often, adult family members assume it is best not to tell young people exactly what is going on and often the prison service itself does not

"From arrest to release, it is important that young people are informed about what is going on."

recognise young people under the age of 18 as being (independently) entitled to information. However, respondents in our study very clearly wanted to be informed from the very beginning of the imprisonment process. 'We never got any information from anyone, where he was or telling us what was happening' (15 year old male, father in prison). 'I didn't go to court because I wasn't allowed, because I was too young. I wanted to go because I thought I should know all about it because I was closest to mum. It would have been a support for mum. I felt they thought it had nothing to do with me – I wasn't considered' (16 year old female, mother in prison). 'I have a right to know what's going to happen to my brother and to have it explained to me. I want someone to tell me anything, because I know nothing' (18 year old male, father and brother in prison).

STOPPING THE RUMOURS

Not knowing what was going on was often a source of anxiety and worry in prisoners' families. This lack of information could often impede a young person's ability to adjust to the situation. From arrest to release, it is important to be informed. Many young people are not only concerned about the well-being of the prisoner but also about the welfare of the rest of the family. Indeed, many respondents were only too aware of how their mothers were coping and were concerned not to over-burden her.

This caring attitude and the desire to be supportive of their family was evident throughout the entire project, not just through the research. Often young people are portrayed



as self-obsessed and ignorant of others' feelings. This has not been reflected in our research: "We didn't tell anyone. We wanted to stop the rumours about dad because you didn't want people to think badly of your dad. It's better since we moved here because nobody knows around here so they can't think badly of him" (13 year old male, father in prison). "She mustn't think we don't love her... if we don't keep in touch she will think we don't love her and she will harm herself again" (sisters aged 15 and 13, mother in prison). "I think my mum should be supported – a support group or something" (15 year old male, father in prison).

AN EMPTY SPACE

Living with these concerns without being able to share them clearly enhanced the young person's feelings of responsibility to their mothers and the prisoner. However, it also meant that in many cases young people wanted to help make resources available for other people in similar circumstances. As a young woman who was a member of our advisory group said, "I'm helping to make a difference and I'm trying to do something for someone that I never had..."

Overwhelmingly, the most common response expressed by young people about the impact on their lives as a result of having an imprisoned family member, was the feeling that they were missing out on ordinary everyday experiences. Their feeling was that they were no longer a 'normal family'. Often, the worst consequence was simply missing the presence of their incarcerated family member. "When it happened I felt like there was an empty space in my heart, like someone had taken a part of me" (written response from a 12 year old female, father in prison). "We can't do the same things anymore, can't mend anything, or go places, or buy things. And I've missed him.

"I felt like there was an empty space in my heart, like someone had taken a part of me."

I haven't seen him for it feels like years. I have missed having a dad" (12 year old male, step-father in prison).

As a young person with an aunt in prison, involved in the project's Young People's Advisory Group noted: "I come to the group because it is something to look forward to and to learn and do things I would not do if I did not attend. It's to help us learn that we can still live normal lives even if you have someone in prison. And to make others learn that too." The majority of respondents kept in contact with their imprisoned relative via letters, telephone calls and visiting. Eight in ten rated keeping contact 'very' to 'extremely' important. No young person said that contact was of 'no importance at all'. Typically, they missed them and wanted to make sure the prisoner was coping, was well looked after and knew that their family loved them.³ They also wanted some sense of what life was like for the prisoner.

TIGHT EMOTIONS

The main method for maintaining contact with the prisoner was through visits. However, visits cause significant disruption to young people's lives and are often extremely unpleasant experiences for them. As most visits are held during school hours or on weekends, young people often had to miss school or social activities if they wanted to see their imprisoned relative. The following quotes graphically illustrate why visits can be such a difficult experience for young people.

"It makes you feel horrible, like you have done something too. They watch you and make you feel guilty just for being there. They search you and make you take your shoes off and you feel stupid and it's horrible. You don't get used to it. You sit there waiting for them to call you. And waiting to be searched, and give them

MISSING OUT (Continued from page 7)

your lighter and things. And you feel ashamed" (14 year old female, brother in prison).

"We are all keeping our emotions tight. Even though at visiting [time] we all laugh and joke without getting serious, when me and mum leave we are always tearful, but put on a brave face for dad. I don't think any of us want to see dad break down, we are all holding on to our emotions" (18 year old female, father in prison).

Not surprisingly, respondents had many suggestions for how visits could be improved, including provision of age-appropriate activities for teenagers in both the visits centre and the visits area within the prison, having private rooms for families and being able to visit without an adult in attendance so they can have individual time with the prisoner.

"It makes you feel horrible, like you have done something too."

NO SAY

A major finding from the research (which has also been borne out through contacts with young people accessing our pilot projects), was that nearly eight in ten had never been asked by anyone, at any stage, how they were coping and what they wanted or needed by way of support. Nearly nine in ten said that they had had no say about what happened throughout the process of imprisonment.

However, seven in ten felt they *should* have a say about what happened and *should* be consulted on an array of issues. These included being kept informed about arrests and court procedures, the placement of the prisoner, visiting services and support for their family and themselves. "They should be put closer so you can visit. Also, if they are family, you should be allowed to visit in your own right if you are over 16" (17 year old female, brother in prison). "Families should be kept in touch more about what's happening to [the prisoner] and where they are" (13 year old female, brother in prison). "I think the police and prison people should see it from our point of view, see what it's like for us, because they don't think of that side do they?" (13 year old male, father in prison). "We should be able to speak out. We should have a choice about visiting, be consulted" (12 year old male, step-father in prison).

The four main suggestions young people made regarding provision of services or support were:

- Having someone available to talk to, in confidence, who is not part of the criminal justice process;
- Help with visiting and associated practical issues;
- To be kept informed from the very beginning and access to information;
- Provision of a youth space within visitors' centres and the prison visits area

PUTTING IT INTO PRACTICE

Based on these findings, the YPP developed some pilot projects which operated with partner agencies in Durham, Norwich and London. These were:

- Young People's Support Service. This was housed in the visitors' centre managed by NEPACS, attached to HMP Durham. A support worker post was created to establish a room for young people within the visitors' centre, to work with the young people and their families on a one-to-one basis and to undertake outreach work with young people in the region;
- Training of YMCA Pastoral Care Workers (managed by YMCA Norwich). This was based in high schools in Norfolk and Suffolk so that they could run awareness-raising activities within their schools and provide support to individual students who self-refer or are referred to the service;
- Young People's Advisory Group, co-facilitated by the Prisoners' Families & Friends Service in London. They produced a booklet for young people – *Who's Guilty?* and a video – *It Could Be You* – to raise awareness of the issues.

These projects have all been independently evaluated with the service providers and young beneficiaries. A report on all the projects will be available at the end of January 2003.

As a result of our research and subsequent pilot projects, we have been in contact with hundreds of teenagers who have a relative in

prison. This direct contact has enabled us to clearly present their voices and articulate their concerns. Not only has the project established for the first time in the UK evidence regarding the needs of teenagers affected by a family imprisonment, it has also proved that these young people need support to be available. They want information and resources. They want to be acknowledged as often having to cope with particular difficulties.

UNDERSTANDING, NOT JUDGEMENT

The YPP has also shown that young people are willing to be engaged in supporting other people. They regularly put their families' needs above their own. We hope that agencies – both statutory and voluntary; both within the criminal justice sector and within communities – will take these needs on board and provide support under the UN Convention on the Rights of the Child and the Children Act 1989. Whether an imprisonment of a relative is the direct cause of distress within a family or whether it serves to intensify issues already present in fractured families, young people affected by an imprisonment have the right to our understanding not our judgement.

"Nearly eight in ten had never been asked by anyone, at any stage, how they were coping and what they wanted or needed by way of support."

Kelli Brown is Policy Director, of the Action for Prisoners' Families. For details about the work of the YPP and how to obtain the reports from the project please contact Action for Prisoners' Families by phone 0207 384 1987; email info@actionpf.org.uk or log onto www.prisonersfamilies.org.uk.

1 Formerly, the Federation of Prisoners' Families Support Groups
2 Brown, K. 2001. *No-One's Ever Asked Me: young people with a prisoner in the family*.

3 It should be mentioned here that the research sample was self-selected and mainly recruited through prison visitors' centres and support groups. Clearly there are young people who do not wish to have contact with the prisoner. Throughout the project we have heard from young people in both situations and the support provided by the project was led by what the young people wanted. Wanting to maintain contact with the prisoner was by no means a criterion for support or involvement in the project.

Receiving the Relational Justice Bulletin

The *Relational Justice Bulletin* is published three times a year by the Relationships Foundation (see page 6).

There is no subscription charge but if you are able to do so, you are invited to make a donation from time to time to help meet the costs of producing and distributing the Bulletin. These donations can be made by cheque, credit card, or through the secure donation facility on the Relationships Foundation's website www.relationshipsfoundation.org. Also, if you are a UK tax payer, signing a Gift Aid declaration will increase the value of your donation (28p for every £1 donated).

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