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Lawyer-Assistance-Program Attorneys and the Practice of Therapeutic Jurisprudence

David B. Wexler

In my recent book, *Rehabilitating Lawyers: Principles of Therapeutic Jurisprudence for Criminal Law Practice*,¹ I sought to provide lawyers and other professionals engaged in the practice of criminal law a collection of practical and comprehensive materials that could help them achieve better results as well as greater satisfaction with their clients and cases. At least one of the contributors to the book also had some connection to a lawyer-assistance program—a program that helps lawyers having problems with drugs, alcohol, and mental illness. Such lawyers are now helped immensely by such programs in all states,² and the lawyers in turn have much insight and experience to offer their clients and other professionals. Lawyer-assistance programs rely heavily on lawyer volunteers, themselves in recovery from a variety of impairing conditions. Many begin their recovery due to some bar disciplinary action, while others find help and assistance through lawyer-assistance programs voluntarily. Those who have received help often willingly “give back” by lending support to other impaired lawyers.³

These lawyers, especially those subject to law-license disciplinary proceedings, are themselves the “recipients” of a therapeutic jurisprudence (TJ) legal approach. Indeed, Dallas lawyer John McShane restricts his practice to TJ, and one important area of his work is the representation of professionals in license disciplinary matters.⁴ Other components of his practice include collaborative divorce and a criminal-defense practice limited to TJ matters, where he is involved not in trial

work but only in the stages of plea bargaining and sentencing.⁵

An important section of the *Rehabilitating Lawyers* book is devoted to portraying the work of TJ criminal lawyers. One such case shows the successful result of an Ottawa law firm (attorney Michael Crystal and director of therapeutic solutions Karine Langley) working with a defendant’s mother in canvassing the neighborhood and producing an affidavit, with attached neighbor letters, supportive of a non-incarcerative community sentence. The neighbor letters asserted that they would not fear for their safety if the defendant were to live with his mother, and that they would be willing to report him if he were in violation of imposed probation conditions.⁶ Another essay details how another Canadian lawyer, David Boulding, an expert in fetal-alcohol spectrum disorder, works with affected young adult defendants in urging non-incarcerative penalties and in proposing, with the help of a family and community support system, truly workable conditions of probation.⁷ The final case, to be discussed in greater detail here, is a “jailhouse intervention” conducted by John McShane.⁸

The thrust of this so-called intervention was for McShane, at the behest of a family, to visit a jail inmate charged with arson and to try to arrange a conditional bond so that the inmate could be released to drug and mental-health treatment. The family had retained a well-known defense lawyer, and they then added McShane to the defense team because of his reputation as a therapeutic-jurisprudence criminal lawyer. In McShane’s words, “My job was to intervene with the defen-

The author expresses his thanks for helpful comments to Don Carroll, Robert Ward, and Michael Perlin.

Footnotes

1. REHABILITATING LAWYERS: PRINCIPLES OF THERAPEUTIC JURISPRUDENCE FOR CRIMINAL LAW PRACTICE (David B. Wexler ed., 2008)
2. On a national level, the American Bar Association’s Commission on Lawyers Assistance Programs acts as a clearinghouse and resource center. Known as CoLAP, its website can be found at http://www.americanbar.org/lawyer_assistance.html (last visited Oct. 20, 2011).
3. As an example, for a discussion of the North Carolina lawyer-assistance program, and a description of their lawyer volunteers, lawyers known as PALS (those working with addiction) and FRIENDS (those working with depression and mental health), see the Symposium on the Lawyer Assistance Program in the Fall 2010 issue of the *North Carolina State Bar Journal*, available at http://www.ncbar.gov/journal/archive/journal_15.3.pdf (last visited Oct. 20, 2011). See also Michael L. Perlin, “Baby, Look Inside Your Mirror”: The Legal Profession’s Willful and Sanist Blindness to Lawyers with Mental Disabilities, 69 U. PITT. L. REV. 589 (2008),

available at <http://ssrn.com/abstract=1111596> (last visited Oct. 20, 2011). For a discussion of the stresses of the legal profession and its impact on lawyer well-being, see Susan Daicoff, *Asking Leopards to Change Their Spots: Should Lawyers Change? A Critique of Solutions to Problems with Professionalism by Reference to Empirically-Derived Attorney Personality Attributes*, 11 GEO. J. LEGAL ETHICS 547, 555-557 (1998). For a discussion of the psychological impact of the adversary system and our “argument culture”—and of the potentially “palliative” role of therapeutic jurisprudence—see David B. Wexler, *Therapeutic Jurisprudence and the Culture of Critique*, 10 J. CONTEMP. LEGAL ISSUES 263 (1999).

4. REHABILITATING LAWYERS, *supra* note 1, at 193.
5. For an explanation of McShane’s approach to criminal law practice, see *id.* at 21, 193-206.
6. *Id.* at 185-186.
7. *Id.* at 186-193. The family and community support system, sometimes referred to as the “external brain,” is discussed in the book at pp. 191-192.
8. *Id.* at 193-206.

dant, convince him to go to treatment, and then persuade the judge at the bond hearing to release him on a conditional bond so he could attend treatment.”⁹

McShane’s essay in *Rehabilitating Lawyers*, which contains copies of his briefs introducing the court to TJ and to McShane’s role as a TJ lawyer, makes for spellbinding reading.¹⁰ He recounts his several interviews with the jailed defendant, culminating in the defendant agreeing to accept McShane as his lawyer.¹¹ And, what’s more, the story has a happy ending: success in treatment, a lenient plea-bargain agreement, a successfully served probationary period, and, as of the time McShane wrote, a clean and sober citizen, reunited with his family, holding a good job, and serving as an upright citizen.

But this case was trickier than it at first appears. For example, McShane was initially retained by the family to attempt an intervention with their jailed relative. The defendant himself was indigent, so any bond would have had to be paid by the family. But as a condition of undertaking the intervention, and because he had the luxury of being in private practice, which left him free to take or leave cases as he saw fit, McShane insisted the family pay only a “going to treatment” bond and not a “getting back on the street” bond.¹²

Later, when McShane saw the defendant at the family’s request, McShane discussed the agonies of addiction and depression, and he suggested that treatment might offer another way to live. Eventually, McShane offered to represent the defendant in an effort to be released from jail and to be transferred to a treatment center. Again, McShane imposed a condition on the representation, one that the client ultimately accepted: his family would only post this bond and stay committed to it if he remained in the treatment center; leaving the treatment center against medical advice or being expelled from it would result in revocation of the bond and re-arrest.¹³

For our purposes, there is an additional, crucially important aspect of McShane’s representation: McShane is himself a recovering alcoholic who, at the time of writing the brief in this particular jailhouse-intervention case, had been clean and sober for more than 26 years.¹⁴ In his brief, McShane recounts how he tells defendants—including the defendant in the case at hand—“how the attorney’s life was almost destroyed by

alcohol and drugs, the availability of treatment for addiction, and the promise of a rich, full, and joyful life if recovery is embraced.”¹⁵

McShane’s status as a long-term recovering alcoholic adds credibility to his court pleadings and surely adds credibility to his work with addicted clients. His conversations with defendants soften their resistance and add to their receptivity to or “readiness” for rehabilitation.¹⁶

The crucial point is that McShane and lawyer-assistance-program lawyers have a special strength and skill to offer, and while lawyer-assistance-program lawyers have typically employed that skill assisting other lawyers in the throes of addiction and depression, that special strength and skill can also be of great assistance to a great many people caught up in the criminal-justice and mental-health systems. The goal of the present article, therefore, is to encourage lawyer-assistance-program lawyers to consider bringing therapeutic jurisprudence into their law practices, and to encourage judges to consider the ways in which lawyer-assistance-program lawyers might be helpful as well.

There are of course many ways of practicing therapeutic jurisprudence—in the civil as well as in the criminal and juvenile-law spheres—and adding a TJ practice of any type will likely constitute a service to clients and lead to greater satisfaction for the attorney. But given the clear link of alcoholism and addiction with criminal and juvenile issues, the strengths and skills of lawyer-assistance-program lawyers will likely shine through more easily in the practice of those areas. Of course, assistance-program lawyers in long-term recovery who, like McShane, feel comfortable talking about their personal histories, will immediately achieve an added credibility with courts and clients. But lawyers who wish to keep such personal matters personal may still have much to add: they will better understand addiction, alcoholism, mental illness; they will understand family dynamics, triggers and coping mechanisms, and attempts at deception; they will have knowledge about treatments, programs, services, and much more. And by bringing TJ into their law practices, they will be fulfilling the twelfth step of 12-step programs: to “practice these principles in all of our affairs.”¹⁷

9. *Id.* at 194.

10. *Id.* at 193-206.

11. *Id.* at 195.

12. *Id.* at 194.

13. *Id.* at 195.

14. *Id.* at 199-200

15. *Id.* at 200. For some background about John McShane, see Steven Keeva, *Passionate Practitioner*, June 2000, A.B.A.J., at 56, available at http://www.law.arizona.edu/depts/upr-intj/pdf/Passionate_Practitioner.pdf (last visited Oct. 20, 2011).

16. David B. Wexler, *Therapeutic Jurisprudence and Readiness for Rehabilitation*, 8 FLA. COASTAL L. REV. 111 (2006), available at <http://ssrn.com/abstract=929014> (last visited Oct. 20, 2011). Graduation talks given at drug-treatment courts by prosecutors and judges who have themselves been clients of those courts can be especially meaningful. See also Alicia Fabbre, *New Prosecutor Says Drug Court Turned Around Her Life; Assistant State’s Attorney Graduated from Program After Arrest 10 Years Ago*, CHI TRIB, Jan.

19, 2011, available at <http://www.nadcp.org/learn/nadcp-news-events/nadcp-news/-drug-court-participant-assistant-states-attorney> (last visited Oct. 20, 2011). The fact that addiction is an equal-opportunity disease, affecting professionals from both sides of the adversarial fence (and judges as well), allows for some prosecutors and judges better to appreciate a more humanistic TJ approach to the law. For a judge’s story, see Michael J. Murphy, *My Story*, available at <http://www.supremecourt.ohio.gov/Boards/OJFN/resources/murphyM.asp> (last visited Oct. 20, 2011). For a powerful New York Times article about a psychotherapist giving hope to her suicidal patients by disclosing her own troubled history, see Benedict Carey, *Expert on Mental Illness Reveals Her Own Struggle*, N.Y. TIMES, June 23, 2011, p. A1, available at <http://www.nytimes.com/2011/06/23/health/23live.html> (last visited Oct. 20, 2011).

17. For a summary of 12-step programs, see the website of Alcoholics Anonymous at <http://www.aa.org> (last visited Oct. 20, 2011).

Traditional criminal lawyers can easily add a TJ dimension to their practice, and that simple “add-on” is likely to be transformative of their practice and their approach with clients. But as McShane’s criminal-law practice clearly demonstrates, one need not be a criminal *trial* lawyer to practice TJ criminal law—so long as cases are properly and carefully investigated and creative, collaborative arrangements are made with criminal trial lawyers to explore all relevant issues and to litigate cases in appropriate instances.¹⁸ Other areas of practice may require special arrangements with public-defender offices—where private lawyers may be designated for some cases as “special deputy public defenders.” These arrangements may be made in cases of civil commitment of the mentally ill—a particularly fertile area for performing useful pro bono work and, at the same time, developing excellent TJ-type skills and sensitivities.¹⁹ So too, they can be made in misdemeanor cases²⁰ and in cases in drug-treatment court, dependency drug court, juvenile drug court, mental-health court,²¹ and in community courts.²² In some instances, arrangements may also be made with law-school clinical programs,²³ where lawyer-assistance-program attorneys might participate and supervise students in TJ-related cases.

Indeed, these sorts of special arrangements need to be made not only to accommodate lawyer-assistance-program attorneys wishing to work in TJ matters but also to open TJ practice to lawyers in general—perhaps especially to recent law-school graduates. Since representation in problem-solving courts is overwhelmingly engaged in by public-defender offices, a young

lawyer wishing to get some TJ experience will be quite limited in opportunities. Special arrangements with public-defender offices could allow for a pro bono opportunity for private lawyers and could thereby help to ease the crushing caseloads of those defender offices. Further, if the volunteer lawyers are drawn not only from lawyer-assistance programs but are broadly based, the confidentiality of lawyer-assistance-program status may be preserved for those who wish to preserve it. The next step, therefore, is for interested persons and groups—including the courts and the bar—to brainstorm about how these practice avenues may be opened to interested lawyers, and to provide training, materials, and overall encouragement to lawyers—those in lawyer-assistance programs and others—who wish to serve others in achieving a rich and full life.²⁴



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The website of the International Network on Therapeutic Jurisprudence (www.therapeuticjurisprudence.org) contains a wealth of materials about therapeutic-jurisprudence theory and practice; there is also a related Facebook page (www.facebook.com/TherapeuticJurisprudence).

18. For a discussion about how representation may be structured, see REHABILITATING LAWYERS, *supra* note 2, at 193; see also *id.* at 131-132 (noting the need for thinking creatively about the provision of defense legal services). The issue of TJ criminal lawyers who are not “full service” criminal lawyers is an important one deserving careful attention. One possibility would be for the traditional criminal trial lawyer to seek out and collaborate with a TJ criminal lawyer, thereby assuring that all bases are covered for a complete defense and full representation. This type of coordination would be possible not only in private practice but also in public-defender offices if certain TJ specialist attorneys were available on staff—or even on a pro bono basis—to consult with trial lawyers and their clients.

19. See *id.* at 207 (comments by North Carolina attorney Robert Ward about the advantages of representing clients facing civil commitment for acquiring skills important in TJ generally). For one of the classic articles on point, discussing also the structure of representation in civil-commitment cases, see Michael L. Perlin & Robert L. Sadoff, *Ethical Issues in the Representation of Individuals in the Commitment Process*, 45 LAW & CONTEMP. PROBLEMS 161, 173-74 (1982).

20. See Ginger Lerner-Wren, *Applying Therapeutic Jurisprudence (TJ) in a Court of General Jurisdiction*, May 2008 (describing Broward County, Florida, Judge Ginger Lerner-Wren’s use of TJ principles she first practiced in a mental-health court to a regular misdemeanor criminal docket), available at <http://www.law.arizona.edu/depts/upr-intj/intj-gc052008.html> (last visited Oct. 20, 2011).

21. These courts are described in JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS 13-92 (Bruce J. Winick & David B. Wexler eds., 2003). All lawyers might enjoy

serving on occasion as a judge in a “teen court” (if such exists in the particular jurisdiction), where the judge is likely to be the only adult in the room. *Id.* at 50. Presiding in a teen court would likely be a very non-threatening way to ease into some TJ professional work. See *id.* at 49-54. There are also some court settings where the focus may appeal especially to certain lawyers. Dependency drug court, for example, often involves addicted mothers threatened with the loss of their children. In some jurisdictions, successful “graduates” of the program serve as “mentor moms,” lending support to women currently caught up in the dependency process. See *id.* at 41-42. Some women lawyer-assistance-program attorneys—especially mothers once themselves worried about the fate of their families—may similarly find work with these clients particularly meaningful and rewarding, and the clients may more easily open up to such attorneys. For the story of a teenage alcoholic mother who turned her life around and became a judge, see Sarah L. Krauss, *My Journey from Alcoholism to Sobriety, Recovery and the Bench*, BAR LEADER, May 1996, available at http://www.tba.org/Journal_TBarchives/nov98/TBJ-nov98-personal.html (last visited Oct. 20, 2011).

22. The Center for Court Innovation provides a variety of materials on community courts on its website at <http://www.courtinnovation.org/topic/community-court> (last visited Oct. 20, 2011).

23. Gregory Baker & Jennifer Zawid, *The Birth of a Therapeutic Courts Externship Program: Hard Labor but Worth the Effort*, 17 ST. THOMAS L. REV. 711 (2005) (discussing the experience of law school clinics at the William and Mary and the University of Miami law schools).

24. See text accompanying note 15, *supra* (quoting statement from brief filed by John McShane).