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Anatomy of the Modern Prisoners' Rights Lawsuit: Coping with the Obstacles

William J. Dean*

Though the assigned conference topic is, "Anatomy of the Modern Prisoners' Rights Lawsuit: Coping with the Obstacles," I will focus, not on obstacles, but on an opportunity: The participation by the private bar in prison litigation. Here are three examples of such participation.

Sullivan & Cromwell's Pro Bono Fellowship

Since 1990, the New York City law firm of Sullivan & Cromwell has sponsored a pro bono fellowship.[1] Each year a lawyer starting at Sullivan & Cromwell, after serving a clerkship with a federal court judge, works full-time at the firm representing indigent pro se plaintiffs. The bulk of these cases involve prisoners alleging deprivation of civil rights. The lawyer working on these matters has full use of all firm resources, including the assistance of other lawyers, some of whom may have served as fellows in prior years.[2] The firm has come to develop an expertise on prisoners' cases.

Over this thirteen-year period, lawyers at Sullivan & Cromwell have participated in ninety-four cases, providing representation at twelve trials, handling five appeals and negotiating fifty-six settlements.[3] At a time when the availability of

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1. *See* Sullivan & Cromwell, Pro Bono Fellowship, at http://www.sullcrom.com/display.asp?section_id=920 (last visited Mar. 23, 2003).

2. *Id.*

3. The data presented in this section, concerning Sullivan & Cromwell's pro bono fellowship program, is based on a number of informal interviews conducted by the author in 1999 and 2003.

legal services for prisoners is nothing short of scandalous, this project makes an important contribution.

Debevoise & Plimpton and the Center for Social Justice

In 1996, the New York City law firm of Debevoise & Plimpton was approached by the Center for Social Justice at Seton Hall University School of Law which was concerned with the way mentally ill prisoners were being treated in New Jersey state prisons. According to Debevoise & Plimpton,

> When the lawsuit was filed on April 11, 1996, conditions and treatment services for mentally ill prisoners were deplorable. Mental health staffing was so inadequate that the staff could not identify their patients, much less provide therapy or even minimal monitoring of patients receiving psychotropic medications. Without adequate mental health care, the prisoners' mental health often deteriorated, causing them to act in ways that violated the New Jersey Department of Correction's (DOC) disciplinary code. The DOC frequently responded to these violations by extending the length of their prison sentences and placing these prisoners in solitary confinement where they would remain isolated and virtually untreated. The situation aggravated their illnesses and led to new disciplinary violations. This vicious cycle resulted in some prisoners being in solitary confinement for years, causing great suffering and permanent physical and psychological injuries for far too many.[4]

On behalf of a class of more than 2,000 prisoners in New Jersey suffering from mental disorders, an action was commenced by the firm and the Center for Social Justice against the New Jersey Department of Corrections in the United States District Court for the District of New Jersey. Six lawyers from Debevoise worked with lawyers at the Center in a co-counsel relationship. Discovery involved 12,000 pages of documents, thirty depositions and intensive prison inspections. Shortly before trial, the New Jersey Department of Corrections agreed to satisfy substantially all of the plaintiffs' demands by amending disciplinary regulations, providing mental health assessments to new prisoners within seventy-two hours of arrival and creating three stabilization units for treating mentally ill pris-

4. Press Release, Debevoise & Plimpton (Aug. 3, 1999).

oners experiencing a mental health crisis. The New Jersey Legislature and Governor approved a $16 million appropriation to implement the settlement. The settlement provides for continuing monitoring by a forensic psychiatrist to oversee compliance with the agreement.[5]

The American College of Trial Lawyers

In 2002, the American College of Trial Lawyers was approached by the Legal Aid Society Prisoners' Rights Project, Prisoners' Legal Services of New York and Disability Advocates, Inc., on issues relating to the treatment of mentally ill prisoners in New York State prisons.

The American College of Trial Lawyers (College) is a national organization with state chapters throughout the country. Highly experienced and respected trial lawyers are invited by their peers to become fellows of the College. The College encourages its members to participate directly in litigating major cases on a pro bono basis.[6]

These legal services organizations made a presentation to a committee of College fellows in New York City. Recognizing the importance of the issue, three fellows worked in close collaboration with the legal services lawyers to plan strategy and draft a complaint. A College fellow, a partner at the New York City law firm of Davis Polk & Wardwell, then agreed to take the matter on.

Litigation was commenced by Disability Advocates, Inc. against the New York State Office of Mental Health and New York State Department of Correctional Services in the United States District Court for the Southern District of New York.[7] The College fellow recruited four associates at Davis Polk to work with him on the case. The firm has retained psychiatrists and a security expert. In the discovery phase of the litigation, teams of lawyers, psychiatrists and the security expert have visited facilities for mentally ill prisoners at a number of New York State prisons.

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5. *See* D.M. v. Terhune, 67 F. Supp. 2d 401 (D. N.J. 1999).

6. *See* The American College of Trial Lawyers, *at* http://www.actl.com (last visited Mar. 20, 2004).

7. Disability Advocates Inc., v. N.Y. State Office of Mental Health, No. 02 CV 4002 (S.D.N.Y., filed May 28, 2002).

The law firms participating in these cases bring valuable professional resources to the litigation, as well as the firm's financial resources. In the two mental health cases the pro bono lawyers work in a close co-counsel relationship with legal services lawyers. The private bar and legal services lawyers learn from each other.

In this connection, a College fellow participating in the New York State case commented that finding out about conditions faced by mentally ill prisoners "was a tremendous learning experience for me. I had had no prior contact with prisons. No longer will I shrug my shoulders when I hear about prisons and prisoners."

Here then lies a great opportunity. The pro bono lawyers participating in these and other cases are articulate and influential. They are valuable recruits to the cause of prison reform.