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"The right to
freedom and
equality of justice
is the cornerstone
of the Republic."
— Reginald Heber Smith

Creating a Capital-Defense Team That is More Than the Sum of its Parts

By Betsy Wilson

Those of us who work in capital defense know that defending a death-penalty case is not a one-person job. Most capital teams are made up of at least two attorneys, a mitigation specialist, and an investigator.¹

Working as a team leads to better representation. Attorneys, mitigation specialists, and investigators all bring unique skills, which, when combined in an effective team, allow each team member to think more creatively and respond to problems more effectively than they could acting alone.

Effective team integration is especially important in the capital context, where the presentation related to guilt must be woven seamlessly with the sentencing presentation. As Russell Stetler explains, “The team is more than the sum of its divided parts. The assignments cannot be compartmentalized because the work must be integrated.”²

The creation of an effective team requires more than gathering a group of qualified people — although that is often exactly and only what happens. Janet Weinstein, who studies multidisciplinary legal teams, tells us:

“The typical scenario [for multidisciplinary teams] is that the lawyer ... calls upon other professionals to assist as the lawyer determines to be necessary, viewing the problem through a law lens ... Unfortunately ... simply bringing together a group of professionals does not necessarily ensure that they will function effectively as a team or make appropriate decisions ... ”³

Instead, teams must work deliberately to ensure that the members are truly working together rather than individually performing their own unconnected tasks.

Cultural Barriers to Effective Teamwork

Capital-defense practitioners know that we must always be aware of cultural barriers between the team and the client. Racial, ethnic, and socio-economic differences can interfere with our ability to work with our clients and their families.

Far less present in our collective consciousness are the barriers our professional cultures create within the team. These unrecognized barriers between practitioners can also interfere with the ability to represent our clients. Weinstein cautions:

“Professions are mini-cultures ... Professionals in any particular discipline have their own values, language, skills, and institutions that set them apart from other professions ... However, professionals do not necessarily recognize these differences to the degree that would give rise to concerns about effective collaboration ... ”⁴

I am an attorney and mitigation specialist, and I have worked in both roles in capital-defense teams. My current

partner is a social worker and mitigation specialist. I have seen the effects — both productive and unproductive — of divergent professional cultures and have learned that cultural diversity can be a strength for the team or a weakness, depending on how the team addresses it.

Professional culture is first learned in graduate school, continues in professional institutions, and affects every professional’s approach to a given problem.⁵ Lawyers are taught to think linearly and analytically.⁶ Law students have already formed “definite images of the ideal lawyer ... these images reflect directive, hierarchical and individualistic methods of advocacy ... ”⁷ Social workers, on the other hand, learn to think multi-directionally, viewing their clients as connected to family and community. Social workers have “skills that enable them to interview family members about highly sensitive information ... [skills that] are incorporated into a world vision that respects the dignity and worth of the person being interviewed ... ”⁸

I conducted an unscientific survey of capital-team members; using in-person discussions and listserv inquiries, I asked attorneys and mitigation specialists to share their team-work experiences. When attorneys and mitigation specialists describe problems that interfere with effective team-work, the effects of divergent cultures are clear.

The Attorney’s Perspective

- “Coddling the client interferes with [the attorney’s] ability to get a plea.”
- Mitigation specialists “bill for too many hours” and “overwhelm the attorney with trivial information.”
- Mitigation specialists “make decisions without consulting with the attorney.”
- Mitigation specialists take the client’s side against the attorney and bad-mouth the attorney to the client or the client’s family.
- Mitigation specialists “second guess the attorney’s legal judgment.”

The Mitigation Specialist’s Perspective

- “Defense attorneys tend to be lone wolves who have to be on top of everything, so control issues can arise.”
- Mitigation specialists feel “devalued or left out” by the attorney.
- “The attorney had facts [that the mitigation specialist and investigator] were never made aware of.”
- Attorneys don’t ensure funding for team members and don’t understand how long the mitigation specialist’s job takes.
- The attorney doesn’t take responsibility for relationships with the client or the family, or may even interfere with those relationships.
- “The attorney did not answer [the mitigation specialist’s] questions, did not respond to [her] emails, and never reviewed anything [the mitigation specialist] submit-

ted.”⁹

Team members have a number of complaints about their colleagues. They do not necessarily reflect a lack of skill or commitment. Rather, these complaints seem to reflect differences in professional cultures that break down team effectiveness.

Some Essential Steps to Creating an Effective Team

These breakdowns can be addressed. Acknowledging them is the beginning. Experts in various fields suggest the next steps.

Business consultants, academics who study multidisciplinary legal teams, and experienced capital-defense practitioners have different advice about creating effective teams. But there are some common elements to their prescriptions:

Step One: Share Information

“[C]ommunication may be the single most important factor influencing the group process.”¹⁰ All team members must be informed about all aspects of the case: mitigation specialists must be familiar with guilt-phase discovery, investigators must know about the findings of the mitigation investigation, and everyone must be familiar with the important legal issues. Mitigation specialist Debra Garvey states, “Healthy teams are inclusive — all team members are included in communications, all team members are welcome to contribute thoughts and ideas, and all team members’ work is valued.”¹¹

Federal Death Penalty Resource Counsel David Bruck suggests, “regular meetings must occur at regular times Attendance by the whole team must be mandatory. And meetings must be scheduled to allow enough time to get through everything that needs discussion.”¹²

Other experienced capital practitioners agree: communication is essential.

When describing their strategies for leading an effective team, attorneys list communication first. They ensure “constant communication” with frequent meetings and conference calls. Attorneys stress that there can be “no exclusions — everyone must be in the loop.” One attorney explains why: “I try to make it a point to see that all members of the team ... have a basic understanding of the legal principles involved and the objectives of the representation. Since the ultimate object is preparation for a trial, all of the members of the team need to understand how their work is designed to advance the trial preparation.”¹³

Mitigation specialists describe their most productive teams as teams that “meet frequently” and have “constant communication,” where “every email and memo that went out had every team member’s name on it.” One mitigation specialist exclaimed that, on her team, “the lawyer and I kept each other informed of what was going on in the case. When I had questions, he answered them. What a concept!”¹⁴

Step Two: Clarify Goals and Objectives

Though it may seem obvious that a capital-defense team’s objective is to keep the client alive, the approach to achieve that objective might mean different things to different team members: Is the team trying to persuade the prosecutor to forgo the death penalty, to encourage the client to accept a plea, to convince the jury to impose life rather than death, or to keep the client emotionally stable enough to avoid in-court outbursts? Often, the objective includes all of these approaches, but the team should discuss the objective’s approaches rather than assume them.

A clear articulation of the team objective can limit cultural conflict. Social-work trained mitigation specialists admit that they find it difficult to resist the desire to act as social worker for their clients and their families. They can be tempted to try to find a suitable school placement for a client’s child or act as therapist for a client’s distraught mother. Such activities may further the team’s objective—for instance, by strengthening the family so that it can support the client in accepting a plea — but sometimes these activities distract from the task at hand. When the team articulates its objective, the team is better able to identify and complete necessary tasks and identify and avoid distractions.

Step Three: Listen (Seriously, Stop Talking)

There is little about legal education or legal culture that helps lawyers with this element: we went to law school because we like to talk, and law school and the legal profession encourage this characteristic. Weinstein notes, “Law school does attend to the ability to express oneself in writing and orally The other half of dialogue — active, empathic listening — is rarely attended to.”¹⁵

Lawyers know that members of our profession are unlikely to be the mouse — the team member who does not willingly contribute. Therefore, according to Gerard Blair, “[i]t is the responsibility of each individual to consider whether they are ”the “loud mouth” on the team.”¹⁶ As team leaders, attorneys need sometimes to hold back their own suggestions to let other suggestions come forth.

Step Four: Be Open to Each Other’s Ideas — and Willing to Try Them

“True interdisciplinary work involves communication and understanding among the team members. Rather than merely contribute a piece of the puzzle that is single-discipline focused, a member of an interdisciplinary team engages in problem solving dialogue with other team members in attempting to arrive at solutions that encompass and build upon the values and knowledge of the array of dis-

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ciplines represented for the benefit of the client.”¹⁷

Because they are ultimately responsible for their cases, attorneys must have ultimate decision-making authority. This leadership position is comfortable for most lawyers. As Weinstein points out, “[i]ndividuals who choose to enter law school ... have greater needs for dominance, leadership, and attention, and prefer initiating activity ...”¹⁸ However, care must be taken in exerting this leadership, lest the potential of the multidisciplinary team be stifled.

Bruck suggests having a checklist of topics to discuss in each meeting. Following this agenda at each meeting, he explains, “can enhance the authority of ‘non-ranking’ team members — working through the agenda can be delegated to ‘second chair’ counsel, or to a mitigation specialist or investigator.”¹⁹

If there is no disagreement, there is a problem. “When groups do not disagree it is [often] because ... the members of the group are afraid to speak up because the leader has not created an environment conducive to disagreement and frank sharing of ideas ...”²⁰

The frank sharing of ideas can be inhibited by differences between professional cultures. When the linear problem-solving employed by lawyers encounters the multi-directional approach of social workers, team members may dismiss the views of the other. For instance, “[o]ne important process in creative problem solving is ‘brainstorming,’ [which] requires nonjudgmental listening, coping with nonlinear thinking, and an appreciation for the creative process [Lawyers’] preference for analytical thinking will make it difficult for them to respect the creative input of others who may not present it in clear, logical terms.”²¹

Attorneys emphasize that collaboration requires “mutual respect ... being open to others’ opinions and ideas, and willing to try them,” and “willingness to learn from each other and accept each other’s ideas, rather than being ego-bound about ‘my way is the best/only way.’”²²

Mitigation specialists want “to be included as key team members” and laud those attorneys who “treat the work as a team effort and [are] open to any and all suggestions and ideas...”²³

Conclusion

Capital-defense practitioners can greatly improve their effectiveness by recognizing and respecting differences. Team members need to “acknowledge that lawyers [are not] social workers (or visa versa), that [they are not] looking at the case in the same way, that [their] training is different” and that they cannot expect each other to know it all.²⁴ Those differences are precisely the reason that a team works better than an individual.

If we acknowledge and respect our differences, the team can be more than the sum of its parts. If all members of the team “become trained, through participation

in group decision making, in an understanding of the [team] objectives and work practices, then each will be better able to solve work-related problems in general.”²⁵

Awareness of the cultural differences between team members and attending to the effectiveness of our team work can help us take advantage of each others’ unique skills and perspectives, engage in more creative problem solving, and focus with more precision and determination on our ultimate objective: saving our clients’ lives.★

Betsy Wilson is an attorney and mitigation specialist who has been working in death-penalty defense for more than ten years, both at the New York Capital Defender Office and as a partner at the Sentencing Advocacy Group of Evanston. She is a member of the NASAMS Executive Committee.

¹ ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 4.1, 31 Hofstra L. Rev. 913, 952 (2003).

² Russell Stetler, Mitigation Investigation, The Champion 61, 66 (2007).

³ Janet Weinstein, Coming of Age: Recognizing the Importance of Interdisciplinary Education in Law Practice, 74 Wash. L. Rev. 319, 322 (1999).

⁴ Id. at 323.

⁵ I recognize that capital team members come from a wide variety of professional and educational backgrounds, which adds to the complexity and richness of our teams. For brevity’s sake, however, I examine in detail the two professional cultures that seem to arise most often in capital-defense teams and that are perhaps the most divergent: the professional cultures of lawyers and social workers.

⁶ Emily Hughes, Mitigating Death, 18 Cornell J.L. & Pub. Pol’y 337, 344 (2009).

⁷ Pualani Enos & Lois H. Kanter, Who’s Listening? Introducing Students to Client-Centered, Client-Empowering, and Multidisciplinary Problem-Solving in a Clinical Setting, 9 Clinical L. Rev. 83, 84 (2002).

⁸ Hughes, supra note 6, at 345.

⁹ Emails and discussions between the attorneys and mitigation specialists and the author.

¹⁰ Weinstein, supra note 3, at 326.

¹¹ Debra Garvey, Team Building and Team Work: Thoughts for the Mitigation Specialist, A Newsletter for Defense Counsel in Federal Capital Cases (Prepared by the Federal Defender Capital Resource Council and the Federal Death Penalty Resource Council Projects), Dec. 2009, at 8, 10.

¹² David Bruck, Getting Organized About the ABA Guidelines: A Capital Checklist Manifesto, A Newsletter for Defense Counsel in Federal Capital Cases (Prepared by the Federal Defender Capital Resource Council and the Federal Death Penalty Resource Council Projects), Feb. 2010, at 13, 19.

¹³ Emails between attorneys and the author.

¹⁴ Emails between mitigation specialists and the author.

¹⁵ Weinstein, supra note 3, at 326.

¹⁶ Gerard M. Blair, Groups that Work, <http://www.see.ed.ac.uk/~gerard/Management/art0.html> (last visited on Feb. 22, 2010).

¹⁷ Weinstein, supra note 3, at 332.

¹⁸ Id. at 330.

¹⁹ Bruck, supra note 12, at 20.

²⁰ Weinstein, supra note 3, at 327.

²¹ Id. at 331.

²² Email from an attorney to the author.

²³ Email from a mitigation specialist to the author.

²⁴ Email from a mitigation specialist to the author.

²⁵ Blair, supra note 16.