The Arc

The Attorney Client Relationship: Bridging the Gap

Between Attorneys, Clients with I/DD, and Their Families

Thursday, May 26, 2016

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>> FEMALE: Thank you for bearing with us with our technical difficulties, we appreciate that. Welcome to the national center on criminal justice and disability webinar. My name is Ashley and I am the criminal justice fellow here at NCCJD. We are going to go ahead and get started. Unfortunately, I think our first presenter will not have video due to some technical difficulties. Participants are in listen-only mode. If you need help during the presentation, you can post questions in the chat box on the side of your screen and we will help you. At the end of the session there will be a time for questions. During the presentation you can post questions in the Q&A section or the chatbox. If you don't want your name shared type "private" before your question. You can also email your questions and if we don't have time for your questions during the presentation we will follow up afterward.

The webinar is being recorded. We have one final request, you'll receive a session evaluation after the webinar, please take five minutes to completed and submit it, it really helps us gather the information we need to continue the webinars.

I want to thank our two panelists today, Steve Gordo, parent advocate, and Elizabeth Kelly, a criminal defense attorney. Thank you all for your participation.

Our first presentation today will be from Steve Gordo. Steve is a father and retired schoolteacher from Monterey County, California. He taught in public schools for over 18 years, including seven years teaching special education. His 18-year-old son, Paul, has autism. Steve has become a passionate advocate for the inclusion of people with disabilities and maintains a Facebook group and other social media efforts.

The change.org petition he created on behalf of his son had nearly 13,000 supporters nationwide. Even though Paul has a case that has been resolved, Steve advocates for other people with autism and other related disabilities. Before I turn it over to Steve, one quick programming note. We all wanted Paul, Steve’s son, to join us today, but unfortunately he is unable to do so. As part of his probation he is at a residential center in Kansas and unable to have access to the webinar.

I will now pass it over to Steve. Steve you should be good to go, other than we don't see you. But you should be good.

>> STEVE GORDO: Thank you, Ashley. I want to thank those who are listening. I want you to know that Paul is a very complex person. A lot of people, if you were to -- if he were here right now he would be asking many of you where you went to college. He might ask what your favorite amusement park is. He has a burning curiosity, but he is always trying to figure out what matters to other people. I think that that is an undying characteristic with Paul, he always wants to know what other people are thinking.

I don't know how much people know about autism, but that is right at the core of what most scientists would tell you about autism, is that there is a sort of confusion about theory of mind, what other people might be thinking. It is very hard to read body language. One person described it as it being an anthropologist on the moon. It's a physiological disconnect that makes it really hard for some people with autism to communicate their thoughts. And even more importantly, understand the thoughts and feelings of others.

I want to thank everybody for being here. You would love Paul if you got to meet him. He is a complicated guy. It doesn't mean he is always happy; he would like to be a hero, but there are times when he can be pretty grumpy, and that is how we got in trouble with the justice system.

Here are a couple of pictures of Paul. The one on the left is more recent. The one on the right is from when he was probably about 12 or 13. Maybe even 11 years old.

Paul's autistic. He was diagnosed at the age of four and has been in special education since that time. He is considered-high functioning but for many reasons has not acquired the social skills he needs to realize his potential.

He should receive home and hospital instruction for the local school district. In July 2015, the school district suggested Paul meet with an instructor at the local library. He set a time and date. Local library might be an appropriate setting if a student is doing independent study. But for a home and hospital student, it is called home and hospital for the very reason that there is a medical reason or typically a medical reason why that person needs to be at home or at the hospital. He had that help for about a three-month period. In the meantime, they were looking for a residential placement, and this is back in July 2015.

I delivered Paul to the library, met an instructor for Paul. A brand-new instructor meeting in the library, and I was fearful instructor would not be prepared for Paul and his special needs. I decided to stay in the library while the teacher instructed him.

After about 50 minutes Paul was showing signs of being restless and agitated. The instructor asked my advice and I said it was up to him whether to discontinue instruction. He went to the restroom and then returned from the restroom speaking in a loud voice. The instructor and I told him to be quiet. I was concerned because one of the triggers for Paul is being told what to do. When he is agitated, he likes to be given escape options rather than being told: you need to do this.

I was concerned he would start becoming physically aggressive with his instructor. I went ahead and reaffirmed, I did the classic “shhh,” and put my index finger to my lip, hoping any anger he would have, he would direct it at me rather than the instructor. That was partially successful. But, anyway, Paul yelled and then he ran out through the exit door. Of course, he bumped a total of three people. As he ran past the man at the checkout counter he pushed the man's shoulder, the man took a step and recovered. As Paul neared the exit he pushed another man who bumped into the nearby wall. Finally, he exited the doors and made a path for a car but an older woman was in the way and he extended his hands, pushed the older woman, she fell flat on her back.

As fate would have it, that woman was especially vulnerable as she had Huntington's disease. She had a cane but it was not really apparent how frail she was until she was unable to break her fall. As it turned out she was unconscious for less than one minute. And after being seen at a hospital she was diagnosed as having suffered a mild concussion.

I'm not trying to minimize the damage, that there should have been no damage to this woman, but Paul ended up being charged with a felony for this event, a 5-year-old could have pushed this woman and done used the same force that Paul used.

Paul stopped immediately. He was still agitated from escaping the library. But he seemed to be shocked that the woman fell. The woman lay still an unconscious. Not long after, Paul apologized, but neither the woman or the husband could hear it. The woman's husband rushed at Paul as if he meant to hit him. I honestly thought that is what was going to happen. The man was very upset. He yelled that his wife had Huntington's disease, that Paul was a "thing", and "animal", and that Paul should go to jail. After 15 to 20 seconds of yelling at and about Paul he finally tended to his wife.

I personally felt like I died that day. I was every bit as angry at Paul as the woman's husband was. I was filled with fear and dread. I feared for the woman, for Paul. I took him to the side and I waited for the police. The police took statements from interviewing Paul. One officer report had insisted that I stated that Paul had tackled the woman.

The police officer asked if he knew what he did was wrong. Paul said, yes. The police reaffirmed that he had autism and sent him to a local psych board under 5150. I don't know if that is a nationwide code, but that is danger to self and others and observation for a psychological ward is necessary. I'm grateful they chose this over jail. I have learned that someone under these circumstances with autism behaving impulsively could still be sent to jail where there are no therapeutic services are interventions, not to mention the predatory environment that jail would pose for somebody with autism.

I'm grateful they chose this, Paul was released the next day.

The consequences. The law is a... donkey.

By September 2015 we heard nothing from the authorities until Paul received a notice to appear. And that is what I have pasted in here, just the actual Penal Code with which he was charged. The "crime" occurred in July 2015.

I contacted the assistant district attorney who said people are responsible for their actions regardless of their disability. I was quite shocked that they were proceeding with criminal case. Paul was not only charged with assault and battery, it was later explained to be these were felony counts and subject to California's three strikes law.

Paul was on home and hospital because of these same aggressive behaviors, including pushing people. So, behaviors that Paul will use to escape an unwanted task. These behaviors were well documented as a manifestation of Paul's disability. And this is where I make the contention that you are essentially charging someone with a crime for having autism. Because basically the behavior is a direct result or manifestation of his disability.

What I've learned since then, is there is no coordination between diagnoses that occur within therapeutic or educational environments, versus descriptions or accountability that are part of the law itself. I guess, "justice is blind," right? To me, the law is a donkey. There's another word with that too would start with an "A".

The attorney: we need a hero. We need somebody that understands criminal defense but also understands special needs. Number one, we had never hired a criminal defense attorney before so we had no idea where to turn to, how it works. I'm sort of in a panic. I probably could have done a little more research with some local advocacy groups. I did not know -- the criminal justice division, group here, or the national center of criminal justice and disability, I probably could have referred to them. But again, at the time, how much experience would I, would most people have with this?

So two, I need to find an attorney who has criminal defense experience, knows about developmental disabilities, knows the nuances of the criminal defense for someone with a developmental disability, and someone who has all of the above.

Where do I look? A long list of friends with disabilities who have hired private attorneys for criminal defense? Most of the time this happened at school and Paul pushed someone that could be described as an assault, technically. There were apologies, there was profuse understanding, and people would step away and say, it is okay. Of course, he never really hurt anybody to any degree or seriously -- I take that back -- he had hurt people in the past but no criminal charges have been made and the people he hurt were staff members at school.

Again, do you go the local attorney or somebody that has a specialty? As it turned out, ended up, based on a recommendation from a friend who was an attorney, I retained an out-of-town attorney and was not cheap, but we were not interested in being, in saving money at this point. We were in a panic. Our first attorney was as shocked as we were to find that this case was not being bargained out or summarily dropped. At arraignment the ADA insisted the case was going forward because there was a victim. To me and my argument is that at what point is this distinct from an actual crime where there is a mens rea or an intent to cause harm?

We felt confident that once this was put before a judge and the mitigating facts of Paul's disability came into play, a reasonable and fair judge would press for either dropping the charges or press the DA to at least reduce the charges so they aren't so extreme.

Well, once our first attorney met with the judge which had been assigned, our dreams of reason had left us. Even though Paul had finally been accepted to a Kansas residential program where he is now that would address these same behaviors, she exercised her discretion that Paul could not leave the state.

Only plea deal being offered were that we plead out the felony charges as they were. Basically, I don't know who would do that, why would I plead out or have my son plead out the charges as they are, if you are not offering any kind of step back or any kind of deal that is to his advantage? And that he could go to the Kansas program under probation. The judge recommended no changes to this offer.

Basically, we were wrong, reason did not win out. I am still stunned by that. We learned that the judge had been a prosecutor for 14 years. And it became clear that our position was not being appreciated. In my judgment, it was like having two prosecutors on one case. The judge was absolutely no help to getting Paul his needed help. And I cannot help but reserve some anger about that.

The locals have the inside track. Still, our attorney is an ace but small county politics had enabled the DAs office to maneuver the case into a decidedly unfavorable courtroom. By the time our attorney realized it, we didn't know the local politics of the court and it was too late to ask for change. I began a 10 hour per day social media campaign. Change.org was one of many things I engaged in.

Reaching out to support groups, we had gathered several letters of support including a profoundly well-reasoned letter from Jill Escher of the Autism Society of America. By the way, that is the first autism advocacy society in the United States. I can't say enough about Jill. Our attorney forwarded several psychological reports, conservator forms but it was to no avail.

This ADA, was a layman to all the materials we were providing, I don't even think he bothered reading it. I don't know, I don't want to say he did not care, I mean, he doesn't seem like he is a bad guy, neither he nor the judge seemed like bad people, it is just like they were already quite certain that this should go forward. That everybody is accountable and it does not matter what your disability is.

To be honest, I think that most families would not be fighting, they would just be apologizing and pleading to whatever the DA handed to them. That is the problem. Is that there are nuances to this that need to be understood.

So I already told you about my media campaign. Storming the wall, we will call it that. I will skip forward here.

Again, the only, we did get a little bit of a better deal, and that was basically plead through a non-strike felony, we said, no, to that. That is when the DAs office added a misdemeanor for one of the other people that had been pushed that day. Even though there was no injury.

Hard facts, our first lawyer basically told us, well, you may want to go and plead to the lesser felony. Because there is a 10% chance that Paul could end up in prison. Okay. We were not having that and that is when we went ahead and sought out a local attorney with a great reputation. That is his picture on page 24.

That evening we retained a well-known local criminal defense attorney. He was encountering the same wall, but he started doing a lot of homework. I think his efforts are what really made the difference here. Both of our attorneys came against the same wall of resistance. But Tom Worthington decided to go ahead and emphasize a forensic psychologist report. We proceeded forward with that. He did a tremendous amount of work, well beyond the hourly of his retainer.

The second Tom, Tom Worthington of Salinas, I told you about the psychologist report, I'm on page 26. That is a picture Paul with a different psychologist. That would be Lucy Van Pelt. She did not write a report for this. All three charges were reduced to a misdemeanor, to one misdemeanor assault causing great bodily harm. Again, great bodily harm was another bone of contention. Okay, how long does someone have to be unconscious for it to be great bodily harm? In the end, we felt like even though we could win at trial, we felt the trial could be another six months and that is another six months that Paul would not be at the therapeutic facility where he really needed to be.

We felt extorted -- excuse me, pressured -- to take this new deal. So we go to Kansas.

Is this justice? Well, I will let you read that for yourself. The big problem is, who do you call? I almost feel like there should be a mental health court ombudsman, liaison, available for people with disabilities, because if every person with a disability that pushed someone and that person fell down, was put on criminal trial than the courts would be full all day.

Out of Oz back to Kansas. Paul’s condition is not obvious. I can't help but feel that this would not have been a problem for the ADA if Paul was more obviously disabled. That is one of the insidious things about autism. It is called an invisible disability. There are forms of mental illness that can be that, but those are two different things, by the way. But because of this experience, Paul missed over three months of therapy. He was approved for admission to Lake Mary in Kansas in November but he did not end up going there until late February, early March because of this court ordeal.

He does not trust law enforcement now. And he was actually upset, imagining that he would be tortured for his crimes. Lake Mary has been great; he is making great progress. We will be seeing him. Paul was prosecuted for something that was an established problem. The local library was not appropriate. So he cannot vote, but he was held to be responsible for his disability, even though other people had decided that he would be there with this known problem, he would be there in this environment where harm could happen.

My closing thought is that Mr. Bumble, cruel head of the workhouse in Dickens Oliver Twist declared that "The law is an ass." But "should we, too, be such?

Those are my hashtags. And our Facebook page. I thank you so much for listening and I will stand by for questions.

>> ASHLEY BROMPTON: Thank you so much, Steve, we wish Paul could be there and we understand that he couldn't be we appreciate you giving us some insight into Paul as well. Our next presenter is Elizabeth Kelly. She is a criminal defense lawyer based in Spokane Washington. She travels through the country working on cases involving people with mental illness and intellectual and developmental disabilities. She is serving her third term on the board of the National Association of Criminal Defense Lawyers.

Sponsored by the NACDL and UN commission on drugs and crime, in 2013 she traveled to Cuba as part of a delegation for lawyers and judges. 2015 she led a legal delegation to London and will lead another delegation to India in 2016.

She travels across the US represent persons with mental disabilities and provides commentary for radio and television. Her written book reviews are regularly reviewed on the Federal Lawyer. She has two radio shows.

Here is Elizabeth Kelly.

>> ELIZABETH KELLEY: can you hear me?

>> ASHLEY BROMPTON: Yes, we can.

>> ELIZABETH KELLEY: Hello? Can you hear me? I feel like a Verizon commercial. Good morning or good afternoon to all of you on the East Coast. And thank you for this opportunity to speak with all of you. Last night I was thinking about my remarks and I was very concerned because usually I just speak with lawyers or I just speak with parents and families and other advocates.

I've never spoken to such a mixed audience before. And I was concerned that if I directed my comments towards one portion of the audience the other might feel left out and neglected. Then I realized that was not a valid fear for a couple of reasons. First of all, although we all come to the table from different perspectives, we both wanted the best for our loved ones or in the case of lawyers, the client who is charged with the crime, notwithstanding his or her mental disability.

The second thing that both constituencies have in common is, sad to say, we are used to dealing with people who are profoundly misunderstood. Certainly, parents and families have experienced a lifetime of having their loved ones with mental disabilities shunned by schools, neighborhoods, friends, churches, employers and sometimes the legal system. We, as criminal defense lawyers, deal with people who are accused rightfully or wrongfully of some of the most heinous crimes you can imagine.

In the case of people with mental disabilities, as Steve so well described, they are not just misunderstood, they are often demonized. And they scare people. They scare law enforcement, they scare prosecutors, they scare judges, they scare jurors. So with all that in mind, what I would like to do is comment on a number of things that Steve said. And then certainly at the end of this session I am happy to answer any questions or concerns that people might have.

First of all, in the beginning as well as at the end of his remarks, Steve talked about how Paul is very high functioning. In fact, at the very end he called autism an invisible illness. This leads to a huge challenge for us as criminal defense lawyers. Because so often we are before court and the court assumes so and so, if they have a driver’s license or have graduated from high school or hold a job or has an impressive memory, he or she cannot possibly have a mental disability.

It is up to us as counsel to paint a picture for the court, that, yes, although someone did graduate from high school he or she was in special ed. classes. Or although he or she holds a job, it is a very mechanical type of job and if there are any changes in the workplace those changes have to be explained very slowly and deliberately to the person for them to be able to make the change.

People with autism often spend a good deal of time on the computer. In fact, that is their social network. Unfortunately, sites like Facebook can be a huge trap for people with autism. We need to explain to the court that one of the reasons why they spend so much time online is not because they are trolling, not because they are sexual predators, but this is perhaps their only social outlet.

The next point I want to touch upon is the interview that Paul had where, unfortunately, he confessed to the crime. Now, as the lawyers in the group know, there is still shamefully in our country a high rate of forced confessions. And the population that gives the most false confessions are people with mental disabilities. If there were a do over in this case, and they did a wonderful, beautiful job of advocating their son and protecting for their son, but If there was any deficiency in this case was the fact that Paul, if I understand, Paul did not have counsel at the time of that interview. Paul should never have spoken to law enforcement.

But enforcement should have known better because people with mental disabilities are often very eager to please authority figures and also cannot always weight the consequences of their words.

Another point I want to touch upon is the attitude of the judge and the district attorney's office in this particular case. As Steve said, these are not bad people. But unfortunately, there are a couple of things about them that we, as advocates for people with mental disabilities, should be acutely aware of.

Number one. By and large, they are elected officials. No judge wants to run for reelection against an opponent who has painted him or her as being soft on crime. Certainly, no district attorney once the reputation that his or her office is soft on crime. Or coddles criminals.

I don't know if there was any media coverage of this particular incident, but quite often that plays into the equation. Also make no mistake about the fact that you had a victim in this case. It sounds as if her husband and she, were both pressing for the most serious charges possible and the most serious penalty possible. In most jurisdictions, the district attorney has to run by the victim any plea offer that might be extended. And if the victim does not sign off, if the victim does not agree to the plea offer, it cannot be tendered.

The second important thing to remember about judges and prosecutors is that they don't know a lot about mental disabilities. For 1000 different reasons, I always cringe when there is what we call a rampage shooting, like Aurora or Sandy Hook. Because the thing that the media latches onto is the alleged perpetrator has some type of mental disability. This causes prosecutors and judges to jump to the conclusion that people with mental disabilities are inherently dangerous. And it is our job as counsel to point out to them that it is people with mental disabilities, like Paul, have the proper structure in their lives if they have proper supervision, if they proper treatment, if needed, if they have proper medication, they are not a danger to themselves.

Another point is that medical terms do not equal legal terms. For instance, when you have someone like Paul who has autism, he doesn't have a mental illness per se. But the criminal justice system in most jurisdictions does not recognize that type of nuance. For instance, an attorney representing Paul maybe not in this case but in another case could recommend a plea of not guilty by reason of insanity, and that would be the vehicle whereby Paul could not stand trial for the accusation. But he is not insane, but nonetheless, that is the legal vehicle that there is.

The other plea that could be given in a case for someone like Paul or a plea that could be tried before a judge and jury is not guilty by reason of insanity. Again, that does not cover autism, that does not cover people with mental retardation, that does not cover people with fetal alcohol syndrome, but it is the terminology that we have.

Ashley, how many more minutes do I have? I've lost track.

>> ASHLEY BROMPTON: About 20. You are good.

>> ELIZABETH KELLEY: 20 minutes? Beautiful. Another point Steve raised was the dilemma between entering a plea and going to trial. This is an ethical dilemma that we as criminal defense lawyers have all the time with all of our clients and particularly with people with mental disabilities. For the lawyers in the audience, there is a law review article which I commend to your attention, and if you want to send me an email afterwards I'm happy to forward it to you. It is called "Candor and Zeal". It was published a number of years ago in the American University Law Review.

It is written by a law professor by the name of Jack D. King. Mr. King for many years was a public defender in Washington DC. He gets it; that is to say, he knows that sometimes, for instance, if an attorney on behalf of the client enters a plea of incompetence to stand trial or not guilty by reason of insanity, that client may end up spending many more years, months perhaps decades in an institution being restored to competency, than he or she would if he or she served even the maximum amount on the original charges.

Mr. King raises a very interesting point. If you go into the slides that I have submitted, you can see that attorneys have very important ethical principles, which we are duty-bound to follow. Often, we have a competing ethical strictures of candor towards the tribunal versus zeal. And at bottom, Mr. King comes down on the side of the zeal; that is to say, it is our duty, absolutely, to be a zealous advocate on behalf of our client. But nonetheless, he is sensitive to the different nuances, particularly understanding that sometimes what can and should be done in the case of a misdemeanor is very different than what can and should be done in the case of a felony like Paul was charged with.

Another point that Steve raised was his tremendously powerful social media campaign. An extraordinary social media campaign. If, again, you go to the family guide that I authored, one of the points I raise is families should be very, very circumspect recommending to the lawyer that the lawyer should "take this case to the media". The reason why I say this there are very strict prohibitions about what a lawyer can say to the media.

In particular, outside of the ethical obligations the family should be very sensitive to the fact that the media may not be your friend in this particular instance. The media may not understand the nature of the disability. The media could very much take the side of the victim. And the family could end up being in a media war with the victim and other advocates and supporters of the victim, and this could backfire.

Another point that is very important is that of social media versus traditional media. I have gotten so, and probably a lot of defenders in the audience have gotten to the point, where they also advise the client not to have any interaction with social media during the pendency of their case. Perhaps the family should not have any interaction with social media during the pendency of the case.

Important details of the defense may be inadvertently disclosed, and secondly, things could come up that could be used against the accused. So although what Steve did was powerful and effective, Steve was an extremely savvy user of social media. Social media as well as traditional media should be used very, very cautiously, if at all.

Another point that Steve raised was the appearance of the DA not reading any of the materials that he submitted to the district attorney. This, unfortunately, is often the case. So what I always do is put it in bite sized pieces and not take for granted that the district attorney understands the nature of the disability.

I do not -- I do not -- let the district attorney and I do not let the judge make fun of my client’s disability. As obvious as that may sound, I have had prosecutors and judges make fun of my clients. Thankfully, not in open court, but in chambers and in other places. And this is absolutely, absolutely inappropriate and inexcusable.

Steve mentioned that his second counsel or third counsel, I guess, recommended a wonderful forensic psychologist or psychiatrist who wrote a report on behalf of Paul. The report can often be extremely important, not only in educating the district attorney, but also explaining the fact that it was because of the disability that the person in question committed the acts in question. Often this does not rise to the legal definition of not guilty by reason of insanity, but it can be used as mitigation of penalty, it can be used, as I gather was done here, to persuade the District Attorney's Office to back down from the original charges and offer something which is much more reasonable.

The final point that Steve raised was that of mental health courts. Ashley we'll talk about those a little bit more, and I don't want to take away her remarks, but I would like to talk, issue a brief cautionary note about mental health courts. They are present in most jurisdictions throughout the country. Unfortunately, they don't always cover felonies, like this particular case. So Paul might not have been eligible.

Also make no mistake about the fact that in many jurisdictions, in order to participate in mental health court you basically waive your right to litigate pretrial issues. So, for instance, had Paul been eligible for a mental health court, he might not have been able to raise the issue of suppressing his confession.

Also you should be very sensitive to the fact that mental health courts are work. They are definitely work. If someone is charged with a misdemeanor and your counsel knows or feels relatively certain based on his or her experience with this particular judge that the accused would only get a penalty of such and such, versus two years, even five years on a mental health court docket, then family and advocates might want to strongly recommend that the accused go through the "traditional" docket.

As attorneys know, unfortunately the longer our client is under court ordered supervision -- and not just client with mental disabilities but all clients -- the more likely they are to trip up, inadvertently or not. They cannot report to the probation officer, they may unfortunately use drugs or alcohol, they may pick up another offense. Even a misdemeanor. All of these things can cause them to lapse.

A final point I want to raise, because I'm nearing the end of my time, is that of a lawyer's duty to protect client confidences. It does not sound as if this was a particular issue in Paul's case, but it is in many, many cases involving people with mental disabilities. Very, very often the person charged is an adult in the eyes of the law. However, families are extremely troubled by the fact that their counsel, their loved one’s counsel, does not return calls, will not talk to them, does not seem interested, etc.

Families should know that, number one, we, as attorneys, are bound to keep client confidences unless there is a written waiver executed by the client. This is irrespective of the fact that the family is paying counsel, if counsel is private, this is irrespective of the fact that for many years the family has been making the bulk of decisions on behalf of their loved one.

Now, there are some nuances and that is delved into at greater lengths in the ethical guideline for representing people with diminished capacity. Again, that is not my term, that is the term the ABA model rules use. But nonetheless, families should also be sensitive to the fact that many times the public defender’s office is assigned to represent their loved one. Public defenders’ offices, although they have wonderful resources, although they have wonderful attorneys, many of whom are very, very qualified to handle cases involving persons with mental disabilities, simply have huge dockets.

If they were to return every single family member’s phone call, if they were to meet with every single family, then they would work even longer, more Herculean hours than they already work. Nonetheless, attorneys certainly can communicate with family in terms of sharing nonprivileged information, such as when is an upcoming court date, what is going to transpire during that particular proceeding, and the like.

But nonetheless, as I always tell lawyers, families sometimes, if not always, have the best information about the accused. And they are very, very important in terms of assembly of documentation, providing other information, providing the names and contact information of other people to interview about the specific nature of the accused mental disability.

A final note that I do want to issue. Although we have talked a lot about plea bargains, although we have talked a bit about mental health courts, if this case is a trial case, that is to say if there are a good set of facts and circumstances, by all means this case should be tried within the spirit of the adversarial system within which we as lawyers function.

As I said in the beginning, I am happy to answer any questions or concerns that people might have towards the end.

>> ASHLEY BROMLEY: Thank you so much Elizabeth, we appreciate it. I guess that brings me to a few last minute things. Some tips for those attorneys and families.

Tips for attorneys. Identifying people with I/DD have a lot of ways to adapt so that they come across as highly functioning. As Elizabeth alluded to, just because they graduated high school or have drivers licenses or they work, that does not mean they necessarily don't have an intellectual or developmental disability.

Some ways to identify, look for an IEP, an individualized education plan in school. Past psychological education, family history, get information from family. Another thing to ask is have you ever had SSI or SSDI. Any kind of other services or Medicaid, anything like that.

Some other signs you can look out for, if there's difficulty communicating, if you feel you are not really able to get your point across, do they seem responsive and able to understand the conversation? Answer questions and things like that.

Is there difficulty that you have noticed with reading and writing? Those are all signs to help you identified someone with I/DD. They may not understand the seriousness of the situation or not understand what the consequences are, or are they easily persuaded by others or eager to please or seem like they are not working off what is best for them as opposed to what you are telling them?

Inappropriate behavior, these are things like nonverbal cues, are they smiling inappropriately? Having issues with personal space? Inappropriate facial expressions? Those are ways that are easy to identify I/DD without just coming out and asking. Because sometimes if you do ask you will not get an accurate answer.

Another issue is communication. Quick Tips for attorneys. Make sure you try to use simple wording, no complex terms or legalese. For the attorneys out there we know legalese is hard even for attorneys sometimes to understand let alone someone who is dealing with a cognitive disability. So try to make your arguments and information as approachable and easily understood as possible. Usually a six grade level is good for understanding.

Always ask open-ended questions, not yes/no questions or leading questions, because people with intellectually developmental disabilities -- if they feel you are looking for a specific answer they will try to give you that answer even though it is not accurate. Yes or no questions don't really get across the understanding the client needs to have.

Ask the client to repeat back what you meant. Can they explain back to you, to be sure they understand.

Be flexible and understand the client’s needs. We understand that attorneys are very, very busy, especially public defenders have very large dockets and are completely understaffed most of the time. We understand that but it is important for attorneys to understand that their clients and their family may have more needs, the client may need some more time during an interview just to really get a sense of understanding of the issue. The families may want to be more involved as Elizabeth alluded to, that brings up confidentiality concerns, but I think you have to assess that on a case-by-case basis.

The case may take longer just generally because you have additional issues to be litigated if you have competency concerns. Or if you end up going with an insanity defense or things of that nature, the case may take longer than a traditional case.

Also, ADA accommodations, each courthouse should have an ADA coordinator to help with needed accommodations. So if your client needs accommodations, things like taking periodic breaks, allowing for videotaped testimony or videoconferencing, some jurisdictions allow that, some do not.

Using alternative text or note takers. Alternative seating arrangements or modified schedules, these are some of the accommodations you can try to ask for or work with your local courthouse to get. Again, some of this is in the judge's discretion so it's important to argue why this is important to ensure your client has fully gotten their due process and understands the trial that is going on against them or the proceedings against them if they are not at the trial level.

Do your due diligence. Once a disability is identified, learn more. Try to get an understanding of the disability. You may not think it is relevant to the defense, but I think it is always relevant that your client has this sort of disability. It always impacts their behavior.

NCCJD is one resource, we are here to help attorneys understand disability and help clients get the, help them get the best outcomes for the clients. Remember we are here. And one of the things we do is explain to attorneys what they need to understand.

Tips for families and clients. The other side of the coin. I think this is really about understanding both sides and how both sides need to have some understanding. If you or your family member has a disability, let your attorney know. It will make the process go smoothly or more smoothly if they are aware of the disability and the working on the assumption that the disability exists and get the required documentation and paperwork, as opposed to running the risk of not identifying and not finding it.

Let your attorney know what would make the process easier and more understandable. If you or a loved one is working with an attorney and they say something you don't understand, make sure that you are not just nodding your head and agreeing, make sure you voice, I don't understand this, is there something we can do to make this easier? Let them know because if they don't know, they cannot help you.

Reach out to states protection and advocacy agencies, many of them do advocate for people with disabilities in the criminal justice system. It depends on your state. Reach out to the NCCJD and other national organizations for assistance in speaking with your attorney and resources, and we can speak to your attorney if you would like us to.

One note on guardianship. Paul was under conservatorship, it often does not solve -- he was under guardianship and he is still, he ended up charged with a crime with felonies. Don't think having your loved one under guardianship automatically solve the issues of their case or prevent them from having charges brought against them. That is not necessarily true.

Guardianship has a lot of unintended consequences, and consequences that are unrelated to the criminal justice system. So just think out -- think twice, reach out to disability advocacy organization like we are or talk to your attorney before you take the step just so you know your options and know that guardianship for the sake of avoiding criminal charges is probably not always the best option.

Know that your attorney, whether a public defender or private attorney, is most often doing all they can, as Elizabeth said, the vast majority of attorneys out there really are working as hard as they can in your best interest as a family member. You have to understand their limitations as well, they are sometimes constrained by the criminal justice system. By what the laws allow. And that is why they are there to tell you, this is the law, we have to work within it. But sometimes that is not always, it does not always feel like that is the best option, but it is the way the system works and you have to work within it as well as they do.

Your lawyer is your advocate, they are in the best position to help you as you make your way through the criminal justice system. They know the local laws, they know the local -- as Steve said in his presentation, having a local attorney, knowing the courts and the judges and all of that is externally helpful when you are moving through the system.

Some resources we offer for families and attorneys alike, on our website we've a variety of resources. We have other webinars such as this on all kinds of issues ranging from sex offenses, sex offenders, people with I/DD, juvenile justice, victimization and bullying. We also have a variety of white papers on similar issues. And then most relevant is you will find working with the criminal defense lawyer fact sheet that Elizabeth created for us and had as part of her presentation today. On our website as well as a fact sheet for attorney specifically with the more detailed information and some more tips and tricks for attorneys are present in clients with I/DD.

With that being said, I am going to turn it over to questions. But before I do, please email me all of your questions. Put them in the Q and A box or email or the checkbox. I will make sure that Elizabeth and Steve or myself answer them. Our next webinar will be talking about mental health courts as Elizabeth alluded to. We will have a debate of sorts of the pros and cons on the role of mental health courts of people with I/DD and just generally how it works.

That webinar will be on July 28, 2016 and you can register at the link on the PowerPoint. We will have this PowerPoint as well as the fully recorded webinar and the transcript on our website later this week for you or early next week. Also a link to register for the next webinar as well.

You can also on the website sign up to receive email alerts and our free quarterly newsletter, the NCCJD Bulletin. You can use our information and referral or technical assistance services and refer others help suspects, offenders and victims with I/DD going to the criminal justice system. Give a story or if you need assistance contact us. We are trying to raise general awareness. If you know of a resource or a law in your state that is specific we do have a database on a website that is state-by-state we would love to include.

The first question is more of a comment for Elizabeth. It’s from a retired police officer Michael Sullivan, also on our national advisory committee. He wants to say that as a retired police officer he cannot reinforce the point of, enough, that Elizabeth Kelly makes about their rights of a person arrested. Do not talk to a police officer without a lawyer present, don't talk to the DA. Statements that you think are innocent could end up being an admission. That is very true. So thank you.

Teresa Parks has a question on guardianship. I would defer probably to Elizabeth on this. Does the legally appointed guardian have a role in the individual with I/DD encounters the criminal justice system?

>> ELIZABETH KELLEY: I'm not the best person to answer that actually. I really haven't had that many circumstances where this has been an issue. I do know that sometimes family members feel it wise for to refuse to be represented by counsel in order to avoid any conflict but my expertise is basically criminal defense, and unfortunately, like many criminal defense lawyers, I don't know a lot about guardianship but it is one of the things I should learn more about.

>> ASHLEY BROMPTON: I should say on that note, one of the research projects that and NCCJD is currently working on is examining this intersection between guardianship and criminal justice and whether being under guardianship really does affect these things.

We had another question or comment about that as well that although guardianship may not be the best option it can also provide someone with legal standing to advocate for someone needing a certain level of support. I guess this is jurisdiction specific in the cases we have seen that actually hasn't really helped a lot in helping parents, especially those cases we have seen, help them advocate anymore -- not really given anymore standing to advocate than they would've been not guardians. Sometimes the attorney will defer to them more, however, when it comes to the justice system as a whole and what we have seen it has not made a lot of difference. Again, that might be jurisdiction specific.

Another question we had is -- I will, I'm not sure which one of you would like to take this one -- when schools call police or involve the school resource officer over behavioral incident involving a student with a disability, does the part of the right to be notified? Elizabeth is this jurisdiction specific?

>> ELIZABETH KELLEY: I think it would be but more often than not, if someone is in trouble in a school setting, that person is a minor. As a juvenile, yes, the full panoply of rights should be extended to them, including but not limited to having a parent present.

>> ASHLEY BROMPTON: Okay. Great.

>> STEVE GORDO: I just want to add, as a special ed. teacher, what you are describing would typically be characterized if that person has an IEP, it would be characterized as a behavioral emergency. Yes, absolutely within 24 hours parents have to be notified of a behavioral emergency. In Paul's case they decided we don't want to restrain Paul. So they started deferring to the school resource officer and that is when he started getting this bad reputation with the local police force.

This was mixed because there are a lot of local police that were very understanding and well-trained and dealt with him spot-on appropriately. But there were a few, I want to say, were macho cowboy thing where, oh, you're not going to frighten me. You’re going to fight me you will feel the full force of justice here. It became a fight or flight standoff, because you had cops being asked to play the role of the social worker or behavioral therapy aid.

>> ASHLEY BROMPTON: We can hear you, Elizabeth. Try to unmute yourself again.

>> ELIZABETH KELLEY: How is that? Beautiful. We touched a little bit about police response. I was glad to hear that Mr. Sullivan is on the call. An increasing trend across this country, a wonderful welcome and needed trend, across this country, is CIT training, crisis intervention training offered to local officers. Although the bulk of calls that these trained officers respond to usually involve people with mental illness, certainly an officer could have been called to a situation like Paul was, and probably handle it much more sensitively.

CIT training very briefly is very thorough education of law-enforcement officers to show that traditional police tactics are not necessarily effective, indeed, might be counterproductive with people who have mental disabilities.

Officers are taught, for instance, not to wear uniforms, not to brandish a weapon, to try as much as possible to deescalate the situation and try to divert the person into help the person needs, not necessarily the criminal justice system.

>> ASHLEY BROMPTON: That is great, we have been working with CIT nationwide to bring some more information on intellectual development of disabilities into the fold with that training. Of course, we do our pathways to justice training which trains law enforcement, attorneys and victim services providers together into an interdisciplinary model in the criminal justice systems. Training is very important.

We have a couple more questions. Since we have time. How can a self-advocate and their supporters educate their lawyers about I/DD, generally are they open to it? Elizabeth, are there ways, in your experience, that are helpful and productive?

>> ELIZABETH KELLEY: Well, it depends. First and foremost, I am proud to be a lawyer and I love practicing law. Like any profession however we have some people that are more hard-working and more open than others to new information. Some attorneys are receptive to all kinds of information that a family gifts, and some not so much.

But in particular, if you go back to that family guide, one of the things I point out is the family can play a crucial role in giving the lawyer documentation, names of people to interview, some insight as to what the accused, their daily life is like. That should make the lawyer a more effective, more credible advocate on behalf of the accused.

Understand that you cannot drown your lawyer in paperwork. That I always tell families I would rather have too much information than not enough. I can filter out what might not be relevant, what might not be persuasive or helpful to the court.

We, as criminal defense lawyers, if we care, and if we are good we represent our client is a whole person. A person with mental disabilities, this is part of who they are. And we need to bring that before the district attorney, before the prosecutor, before the court, in order to make sure that our client is treated as fairly as possible. Given the circumstances.

>> ASHLEY BROMPTON: Steve, what advice do you give to a self-advocate and their family when they navigate the criminal justice system?

>> STEVE GORDO: Well, once you recover from the shock that your loved one behaves impulsively, you know that and you probably have spent their lifetime apologizing or forcing them to apologize for things that offend other people. And now somebody has actually taken this to the next level. That was hard to overcome. But to seek out resources, as you mentioned, advocacy groups, like us and the Autism Society of America was especially helpful for us. And really gave us a lot of resources to go with. The forensic psychologist we used was recommended to us by the Autism Society.

But that is just one local resource that came through. I would certainly call the NCCJD. But I do want, before I forget, I want to affirm what Elizabeth said about the media. The media is a crap shoot. As a teacher, I would always have students tell me I was being cyber bullied. I had no experience with it until I put Paul's case out there. And then the R word came up. He deserves it. What are we supposed to do? Let this R word person do whatever he wants?

People are afraid of people with disabilities so they don't know how to deal with it. What I learned as a special ed. teacher is everybody will eventually be disabled. So I think it is a latent fear; if you live long enough you will be disabled at some point. It's a latent fear in everybody's, in the back of their mind. To get back to your question, you have to remain calm and try to understand the whole mentality going on here, and not take it personally. And try to keep a cool head about it.

There were times when I just wanted to reach through the computer screen and punch somebody in the pie hole. That will not do any good and it will affirm, look, they are all on edge like the Sandy Hook kid. That is not where we want to go. I would calmly search for the resources that are out there locally. Try to build a local support and not just put your loved one’s private conflict out there in the media. That being said, I have to say our media campaign probably officially was of no consequence but it was starting to have an impact locally.

I would be, I would try to keep it local and try to keep it calm, and try to keep it on a level to where you can put the toothpaste back in the tube. Because I made this an international thing, now it putting the toothpaste back to the tube, how do I protect Paul's privacy now? How do I seek normalcy since we have had this 15 minutes of cause celebe? Actually, Paul couldn't care less, so it's no big deal for him. But we are recovering.

I would seek out local advocacy groups firstly because they may know a lawyer that has already been dialed in. Our lawyer Tom Worthington is now seeking to make this one of his specialties, this criminal justice for people for special needs.

>> ASHLEY BROMPTON: That is great. One last question for you, Steve. Is Paul getting any training or education on what to do now if he encounters police?

>> STEVE GORDO: Not specific on that. What they're working on, one of his triggers is non-preferred activities or tasks. To escape that he becomes, he learned to become aggressive and loud. We will give you a different task now you don't have to do that. Oh, your parents will pick you up. what they are working on at Lake Mary and what has been his triggers are alarms. You have to go through earthquake drills like he has to do here in California but they do have tornado drills there.

So that was a new variable being thrown at him. He has had mixed success but he is getting better and better. But specifically for police, that is actually a great question, is how to respond appropriately to the police. I will bring that up to his case manager. But nothing specific to that. He has only been there for three months anyway.

>> ASHLEY BROMPTON: Okay, great. Well, unless anyone has any other questions, I don't see any, I thank you all again for being here and I hope you enjoyed it. Don't forget to join us on July 28 for the next webinar. Thank you again to Elizabeth and Steve for being here and providing us with this wonderful information. We appreciate it.