

**Jailhouse Law**  
**Lawyering from Inside Prison**  
A talk with Phillip Miller

- Role of jailhouse lawyer
  - What does a jailhouse lawyer do
    - Refers to an inmate who helps other inmates with legal matters while in prison. May be sanctioned (if working under a formalized state program) or unsanctioned.
    - Handle a variety of cases including divorce, claims related to prison conditions or medical treatment, and criminal matters including appeals and habeas corpus.
    - Do legal research, counsel fellow inmates, write motions or briefs. Cannot represent a fellow inmate in court.
    - Unlike paralegals and legal assistants who work under the supervision of a licensed attorney, jailhouse lawyers are generally not supervised.
  - Addressing a need
    - Jailhouse lawyers exist in most penal systems in part because of lack of adequate access to justice.
    - Right to counsel
      - Sixth Amendment right to counsel for indigent defendants in criminal matters, including in state courts (*Gideon v. Wainwright*). Right to counsel is extinguished after the first appeal of right. No right to counsel for discretionary appeals unless statutorily provided.
      - No constitutional or statutory right to counsel for civil matters like divorce, prison conditions, etc.
    - Providing meaningful access to justice
      - Illiteracy is more prevalent among prison population. Access to legal resources like a law library may not be enough without also providing access to trained legal help.
      - In some states, prisons have reduced legal resources, including law libraries. Some law libraries provide only limited resources, like opinions from their own state or resources on outdated CDs or flash drives, making the need for some kind of trained legal help even more imperative.
      - Prison Litigation Reform Act (PLRA) of 1996 placed several restrictions for filing federal claims, including: (1) exhausting administrative remedies (42 U.S.C. §1997e(a)); (2) requiring full payment of filing fees in full, upfront or in monthly installments through prison commissary account (no waivers allowed) (28 U.S.C. § 1915(b)); and (3) instituting three strikes provisions for

frivolous claims, after which the entire court filing fee must be paid upfront for additional claims (28 U.S.C. § 1915(g)). Raises the bar for access to courts.

- Access to courts as a right
  - *Bounds v. Smith*<sup>1</sup>
    - The Supreme Court held that prison authorities must provide prisoners with “meaningful access to the courts.” “Meaningful access” may be providing access to law libraries or to trained legal help.
  - *Johnson v. Avery*<sup>2</sup>
    - Tennessee prison officials placed William Joe Johnson in solitary for violating a state penitentiary rule prohibiting inmates from legal assistance to other inmates.
    - The Supreme Court held the rule unconstitutional because Tennessee did not provide adequate alternatives to court access.
    - *Johnson* does not assure the constitutionality of jailhouse lawyering; it requires that the state must provide alternatives if it institutes rules banning jailhouse lawyers.
  - *Lewis v. Casey*<sup>3</sup>
    - The Supreme Court affirmed that prisons have an affirmative duty to provide some form of legal assistance. But the Court required a showing of actual injury by a prison providing a substandard law library or legal assistance program. A plaintiff must show it actually hindered pursuing a legal claim.
- Jailhouse lawyering in practice
  - States have varying approaches to jailhouse lawyering. Some states like New York have created law clerk programs that train inmates to provide legal assistance to fellow inmates. For example, Michigan, Florida, and Louisiana have programs where inmates are trained and take standardized exams to work as “offender counsel substitutes.” Others have not instituted such programs and instead may work with law school clinics that make monthly visits or provide access to a law library.
  - Training
    - Established programs provided by state prison systems
    - Former lawyers now incarcerated
    - Self-taught
    - Training from other jailhouse lawyers
  - Payment for services

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<sup>1</sup> 430 US 817 (1977): <http://cdn.loc.gov/service/ll/usrep/usrep430/usrep430817/usrep430817.pdf>

<sup>2</sup> 393 US 483 (1969): <http://cdn.loc.gov/service/ll/usrep/usrep393/usrep393483/usrep393483.pdf>

<sup>3</sup> 518 US 343 (1996): <http://cdn.loc.gov/service/ll/usrep/usrep518/usrep518343/usrep518343.pdf>

- Prisons generally have rules prohibiting payment between inmates. Accepting payment would also violate unauthorized practice of law rules in most states.
    - For jailhouse lawyers seeking to get paid, payment may be cigarettes or other goods from commissary. Some also require payment through family members depositing money into prison accounts
  - Retaliation
    - Some prisons require inmates get permission first before helping another inmate. Prisons are constitutionally allowed to place time, location, and other reasonable restrictions on jailhouse lawyer activities. (*Johnson v. Avery*)
    - There have also been documented cases of prison officials retaliating against jailhouse lawyers, especially in cases where jailhouse lawyers help file claims against the prison.
- Unauthorized practice of law (UPL)
  - Whether a “jailhouse lawyer” is engaging in the unauthorized practice of law in violation of a state statute or court rules depends on the facts and circumstances. Considerations include:
    - Holding oneself out as an attorney
    - Preparing documents
    - Representing others
    - Dispensing legal advice
    - Payment for services
  - States’ UPL laws, rules, and regs
    - California Business & Professions Code §§ 6125<sup>4</sup>, 6126<sup>5</sup>
    - New York Judiciary Law §§ 478 (practicing or appearing as attorney-at-law without being admitted and registered)<sup>6</sup>, 484 (none but attorneys to practice in the state)<sup>7</sup>.
    - Illinois 705 ILCS 205/1<sup>8</sup>
    - Texas Government Code §§ 81.101 (definitions)<sup>9</sup>, 81.102 (state bar membership required)<sup>10</sup>, 83.001(a) (prohibited acts)<sup>11</sup>. Texas Penal Code §§ 38.122 (false holding oneself out as a lawyer)<sup>12</sup>.

<sup>4</sup> [https://leginfo.ca.gov/faces/codes\\_displaySection.xhtml?lawCode=BPC&sectionNum=6125](https://leginfo.ca.gov/faces/codes_displaySection.xhtml?lawCode=BPC&sectionNum=6125).

<sup>5</sup> [https://leginfo.ca.gov/faces/codes\\_displayText.xhtml?lawCode=BPC&division=3.&title=&part=&chapter=4.&article=7](https://leginfo.ca.gov/faces/codes_displayText.xhtml?lawCode=BPC&division=3.&title=&part=&chapter=4.&article=7).

<sup>6</sup> <https://www.nysenate.gov/legislation/laws/JUD/478>

<sup>7</sup> <https://www.nysenate.gov/legislation/laws/JUD/484>

<sup>8</sup> <http://ilga.gov/legislation/ilcs/ilcs3.asp?ActID=1853>

<sup>9</sup> <https://statutes.capitol.texas.gov/Docs/GV/htm/GV.81.htm#81.101>

<sup>10</sup> <https://statutes.capitol.texas.gov/Docs/GV/htm/GV.81.htm#81.102>

<sup>11</sup> <https://statutes.capitol.texas.gov/Docs/GV/htm/GV.83.htm#83.001>

<sup>12</sup> <https://statutes.capitol.texas.gov/Docs/PE/htm/PE.38.htm#38.122>

- Criticisms of jailhouse lawyering
  - Jailhouse lawyers who operate outside formalized state programs may not be sufficiently trained. May be uninformed or even predatory.
  - Poorly trained or uninformed jailhouse lawyers may be wasting the limited chances at appeals or filing fee waivers.
  
- Jailhouse lawyer-client relationship
  - No privilege (See *Bonacci v. Kindt*, 868 F.2d 1442 (5th Cir. 1989); *Storseth v. Spellman* 654 F.2d 1349, 1355-56 (9th Cir. 1981).)
  - No lawyer-client confidentiality generally.
    - Confidentiality may be contractually required under sanctioned inmate law clerk programs like in New York.

Additional Resource:

- The Center for Constitutional Rights and the National Lawyers Guild published *The Jailhouse Lawyer's Handbook* as a resource for prisoners to file lawsuits addressing poor conditions or abuse by prison staff and also contains general information about the American legal system:  
[https://ccrjustice.org/files/Report\\_JailHouseLawyersHandbook.pdf](https://ccrjustice.org/files/Report_JailHouseLawyersHandbook.pdf)