

SPECIAL COUNSEL

ELIZABETH KELLEY
HAS BUILT A CRIMINAL
DEFENSE PRACTICE
FOR CLIENTS WITH
MENTAL DISABILITIES,
AUTISM AND DEMENTIA

BY KEVIN DAVIS

Before her client was sentenced for attacking a police officer during the Jan. 6 riot at the U.S. Capitol, Elizabeth Kelley wanted the judge to know that he was not like the others who took part in the violence that day.

Devlyn Thompson, she explained, was diagnosed with autism spectrum disorder. His communication skills were poor, and his understanding of what unfolded that day in 2021 was distorted. When he learned about a rally planned for President Donald Trump, he drove from Atlanta to Washington, D.C., thinking he'd attend a peaceful event. But he was swept up in the moment, Kelley said, became emotionally dysregulated and struck the officer with a baton.

After his arrest, Thompson, then 28, signed a plea agreement admitting his crime and wrote an apology to the officer. "I'm deeply sorry for the danger you were put in on behalf of my recklessness," his handwritten note said.

"Autism is not and should not be an excuse for bad behavior," Kelley wrote to the court, "but rather, it should be considered when a person's individual culpability and degree of social understanding is called into question."

U.S. District Judge Royce Lamberth considered Thompson's autism diagnosis, but he also noted that Thompson acted violently, throwing objects and joining a mob that grabbed riot shields from police. "Your case is a difficult one for me," Lamberth told Thompson. "I take your actions that day as an anomaly."

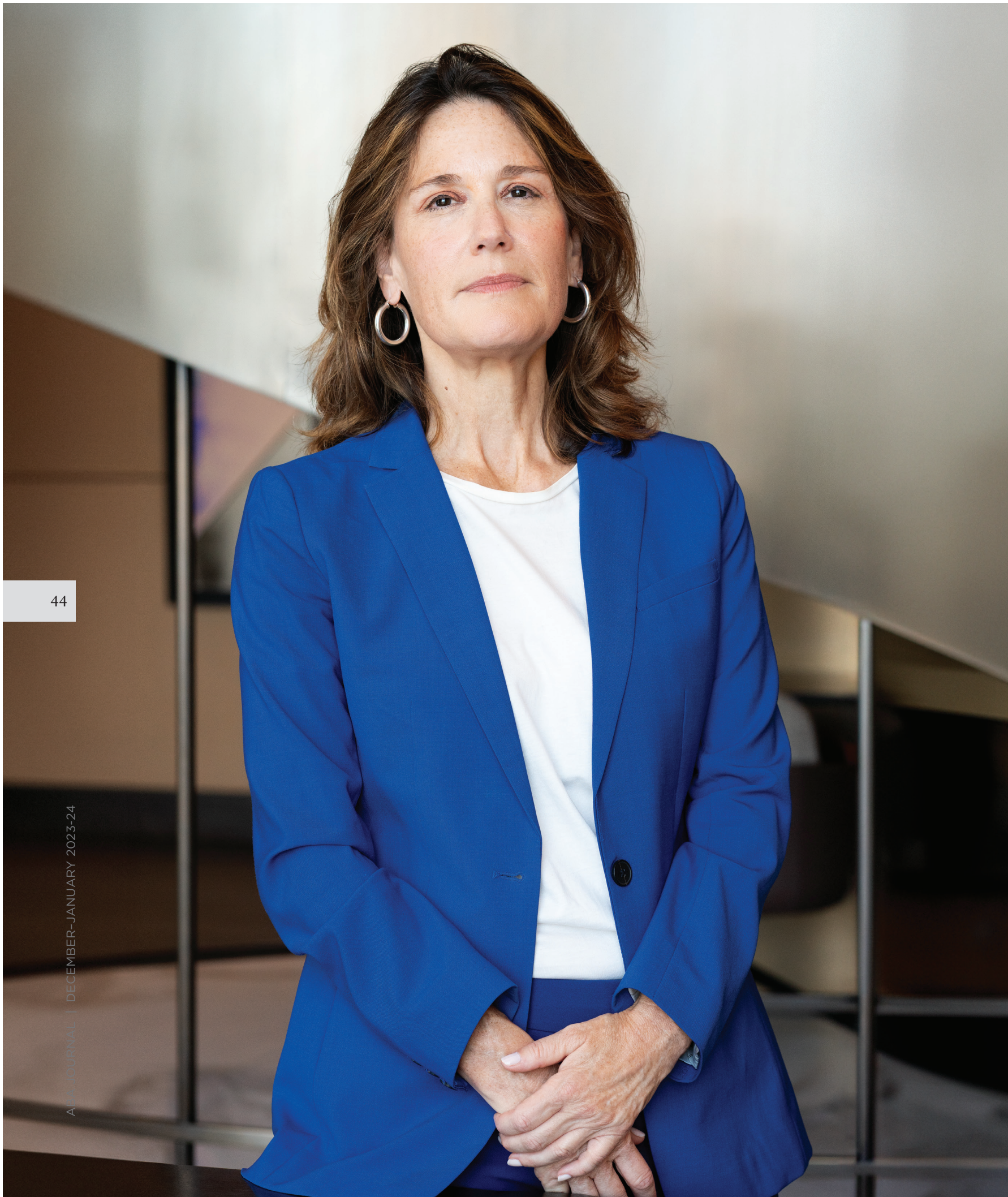
But, he said, "The attack on the Capitol that day was an attack on the very rule of law in our country." He sentenced Thompson to nearly four years in federal prison.

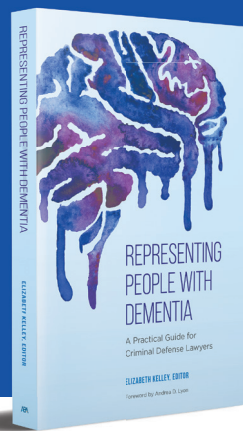
After Thompson began serving his sentence, Kelley said she was concerned his mental health would decline. "He is a world away from his parents, and he's not getting the resources he needs in prison," Kelley says. "He's not getting therapy; he's not getting anything that will help him manage his autism."

These are the challenges facing many of Kelley's clients—clients who have mental disabilities such as bipolar disorder, schizophrenia, autism and dementia. She's built a national practice representing people with such conditions and has become among the foremost experts in the field. Lawyers in other states often hire her to assist them.

Her mission is to get fair and compassionate outcomes—not make excuses—for clients who don't fit neatly into a system that is often ill-equipped to deal with them.

"You use a mental disability as a reason, not as an excuse," Kelley says. "Not all people with mental disabilities get in





trouble or are charged with crimes or commit crimes. Some are more vulnerable to committing crimes for a variety of different reasons, whether it's environmental factors, necessity, coercion by other people or just not understanding circumstances."

From literature to law

As a young woman, Kelley envisioned herself teaching literature rather than joining the family business. Her ancestors founded what was once Spokane, Washington's oldest law firm, Witherspoon Kelley, in 1884. It was acquired by Hawley Troxell in November 2022. Her father, John Kelley, practiced until he died in 2003, and an uncle also was a lawyer for the firm.

Kelley earned an undergraduate degree in English and French at Mills College in California and studied at Oxford University in England and at Paris-Sorbonne University in France before getting a master's in English literature at the University of Chicago.

"I was going to become an English professor, and I was going to specialize in the poetry of the English romantics," Kelley says.

But as graduation neared, she had second thoughts.

"I could not picture myself as an academic for the rest of my life," she says. "I wanted to do something more practical and socially relevant. And then I did a complete turn and went to law school."

Kelley got her JD at Case Western Reserve University School of Law in 1993 and decided she didn't want to work for a big firm. Instead, she started a solo practice in Cleveland, handling mostly civil matters.

At a charity event, a judge suggested she take on some criminal cases, and soon after, the judge began assigning her cases. Among the first was a young man facing robbery charges.

"His parents said to me, 'He's special,'" Kelley recalls. "And I said, 'Well, I understand he's special; I want you to know I treat all of my clients as if they're special.'"

No, no, the parents explained, he was "mentally retarded."

"That was the term that we were using back then,"

Kelley says.

"We now use the term 'intellectual disability.' And this was a young man who was basically persuaded by his so-called friends to be a lookout during a string of robberies."

Kelley worked closely with her client's mental health caseworker and was able to keep him out of prison and get him mental health support services.

"After that case was resolved I felt, if you will, as if I had really made a difference," she says.

Her client's caseworker began recommending Kelley to others who had loved ones in legal trouble.

"So I just started educating myself about the impact of intellectual disabilities on people who are accused of crimes, and why, for instance, they might be more susceptible to coercion by friends and associates," Kelley says. "And why they might

be more vulnerable to giving false confessions; why they may be more intimidated by law enforcement than other people; why they sometimes might become more agitated and act out in frustration."

As Kelley's practice grew, she saw the need for more lawyers who understood how to work with clients who had mental disabilities.

"I noticed that criminal defense lawyers, through no fault of their own, weren't necessarily trained in how to handle these cases, or they didn't have the time to handle these cases," Kelley says.

Kelley, a vice chair at large of the ABA Criminal Justice Section Council, decided to do something. She invited academics, mental health experts and criminal defense lawyers to contribute chapters to a book called *Representing People with Mental Disabilities*, published by the ABA in 2018 (an updated version is scheduled for publication in 2024). It was the first of three books Kelley would assemble and edit that focused on representing clients with mental disabilities.

Judge Bernice Donald, a retired federal appeals court judge, member of the ABA Judicial Division and former chair of the Criminal Justice Section, says Kelley has helped fill a much-needed gap.

"I'm not surprised that she's charting a path to focus attention and meet the needs of people along that spectrum," Donald says. "Thank goodness for people like her."

A national problem

The nation's prisons have been populated with the mentally ill as long as people have been sentenced to prison.

"Prisons and jails have become America's 'new asylums,'" noted a 2014 joint report from the Treatment Advocacy Center and the National Sheriff's Association. "The number of individuals with serious mental illness in prisons and jails now exceeds the number in state psychiatric hospitals tenfold."

According to a report from the Prison Policy Initiative, 43% of people in state prisons and 44% of those in local jails have been diagnosed with a mental disorder. By comparison, about 25% of Americans ages 18 and older have a diagnosable mental disorder.

In the federal prison system, where Kelley's client Devlyn Thompson is incarcerated, inmates have a higher prevalence of

chronic medical and mental health conditions than the general population, and 66% of federal prisoners report not receiving any mental health care.

While states across the country have established mental health courts, and local law enforcement agencies have developed policies and programs to better handle those with mental illness, there remains a need for lawyers who are equipped to represent such clients, Kelley says.

“It is very hard for me to find an attorney who can represent a patient or families of people with the experience of mental illness,” says Dr. Kenneth Paul Rosenberg, a New York City psychiatrist and producer of the documentary film *Bedlam* about the nation’s mental health crisis. In his years of practice and research, Rosenberg—who’s familiar with Kelley’s work—has seen it firsthand.

“When it comes to patients with severe psychiatric needs, it’s fair to say we’ve neglected to serve some of the neediest people.”

Autism and criminal justice

Even when she loses a case, Kelley continues to seek relief for her clients. After Thompson was sent to federal prison in Mississippi, Kelley filed a motion

in December 2022 seeking compassionate release, arguing that his condition was deteriorating because of his confinement. She said her client was not being provided the most basic mental health care.

She wrote that Thompson’s autism affects his communication skills, “leaving him the ability to express himself at the approximate age equivalency of a 6-year-old and to receive communication with the approximate age equivalency of a 4-year-old child.”

But the prosecution and judge pointed out during Thompson’s sentencing hearing that at one time he was able to hold down a \$90,000-a-year job as a portfolio manager.

Kelley says being able to hold down a job is not incongruous with autism spectrum disorder. “Thompson’s intellectual—as opposed to social—abilities are unimpaired. It is for this reason that, when surrounded by the necessary social supports, e.g., his parents, Mr. Thompson was able to hold down a job as portfolio manager.”

Experts agree it’s not unusual that people living with autism spectrum disorder present conflicting personality and intellectual characteristics that make it difficult to fully understand their capabilities and limitations. That creates problems for those such as Thompson who become entangled in the criminal justice system.

Clare S. Allely, a faculty member and researcher in forensic psychology at the University of Salford in Manchester, England, has studied autism spectrum disorder extensively and has served as an expert witness in criminal cases in which defendants present such contradictions.

“AUTISM SPECTRUM IS VERY
CONFUSING TO PEOPLE. ...
EVERYONE HAS TO BE TAKEN
ON A CASE-BY-CASE BASIS.”

— CLARE ALLELY

Photo courtesy of ABA Publishing

Photo by Paul Burrows



“YOU USE MENTAL DISABILITY AS A REASON, NOT AS AN EXCUSE.”

—ELIZABETH KELLEY

“If I could get a penny for every time I heard, ‘Well, they’re high functioning,’” she says. “Even if a person is high functioning, there are other features that potentially play a role in their offending behavior.”

Alley contributed two chapters to Kelley’s second book, *Representing People with Autism Spectrum Disorders*, published by the ABA in 2020. She strongly supports Kelley’s mission to educate others about the challenges facing criminal defendants with autism.

“Autism spectrum is very confusing to people,” Alley says. “Sadly, a lot of defense lawyers are not aware or don’t have any impetus in the situation—there is a real lack of consistency with this. What makes it challenging is that autism is a heterogeneous condition: No [two people] with autism [are] the same, which makes it difficult to argue some things. Everyone has to be taken on a case-by-case basis.”

That’s why Kelley digs deep when meeting new clients, probing their medical, social and personal histories and their reactions to sounds, smells, food and light.

“Do they have any particular fixations, obsessions? What is their speech like? What are their social skills like? Do they have friends? Who are their friends?”

Oftentimes, a lack of social skills gets them into trouble. People with autism spectrum disorder are more likely to commit cybercrimes than other types of crimes, Kelley says. For many, computers and social media are their only social outlets.

“All of a sudden, some people on the spectrum who all their lives had been friendless now had friends,” she says. “So that became a way for them to be vulnerable for different kinds of indecent or pornographic material. It became a way for them to be radicalized into all sorts of unlawful behavior.”

They can be persuaded by ill-intentioned people to commit various online crimes. “It’s really not done with any type of intent to harm or any real depth of understanding,” Kelley says. “The challenge is to persuade the prosecutor and the court that but for the disabilities, this probably would not have happened.”

Many miles, many cases

Being among the few specialists in her field means Kelley is in demand across the country. Her home base is Spokane, but she’s often flying from case to case—from Fairbanks,

Alaska, to Naples, Florida—and towns and cities in between. Over the years, she’s been hired to represent clients charged with sex-related crimes, assaults, robbery, financial crimes and murder.

Earlier in her career, Kelley traveled to New Philadelphia, Ohio, a city of about 17,000, to represent Jason Gordon, who was diagnosed with bipolar disorder as well as schizoaffective disorder. He was charged with fatally beating his girlfriend, Gina Harper. Ryan Styer, the prosecutor in Tuscarawas County, Ohio, who handled that case in 2011, told the court that Gordon was “a clear and present danger to our community.”

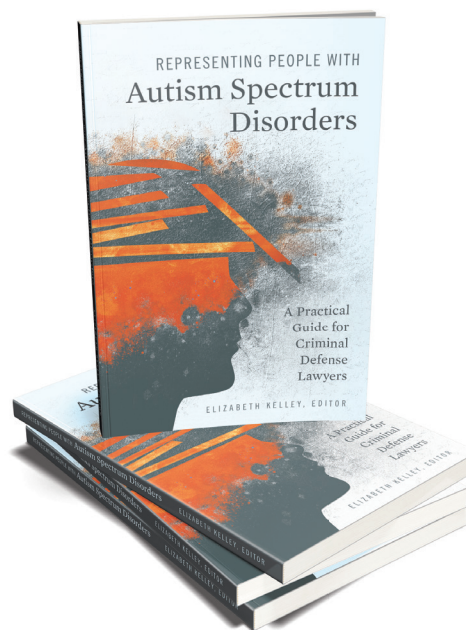
Kelley’s intention was to put on an insanity defense. Gordon had a history of mental illness and had been hospitalized several times since he was a teenager. But successful insanity defenses are rare, even for those with clear mental health problems. The expert Kelley hired said even though her client was suffering from mental illness at the time of the murder, it was inconclusive whether he knew right from wrong. And that’s the key factor in determining insanity.

So Kelley changed the plea to no contest. The only thing left for her to do was to try to create some empathy for Gordon. She read a letter from his grandmother that said he needed “to help others by forming a support group to educate those with bipolar and other forms of mental disease” so that the victim’s life would not have been lost in vain.

The judge was not moved and sentenced Gordon to life in prison, calling the murder “hellish violence that makes you physically sick.”

Looking back, Styer says he admired Kelley’s diligence and professionalism in a very challenging case. Since then, Styer says he’s seen many more mentally ill and intellectually disabled defendants in court on other charges.

“These are difficult cases,” he says. “There is no good way to resolve them. You don’t always feel good and don’t always get justice.”



More recently, Kelley assisted attorneys in Cape Coral, Florida, on another insanity case. Businessman Gerald Koller was charged with shooting to death Jonathan Joseph Breadmore, a boat detailer. After he was arrested, Koller declared, “I’m crazy. Just lock me up.”

While her client’s declaration may have seemed flippant, she took it seriously.

“Different people have different levels of insights into their behavior,” Kelley says. “Many individuals recognize the fact that they have a serious illness and that illness is a lifelong condition.”

Koller had been diagnosed with bipolar disorder. Kelley, who had planned to present an insanity defense, knew it would be another tough battle, as it was in the Gordon case.

“The standard for insanity is very high,” she says. Koller “has been evaluated by numerous forensic psychologists as well as psychiatrists both by the state as well as by the defense.”

But four days before the trial was to begin, Koller pleaded guilty to second-degree murder and was sentenced to 16 years in prison.

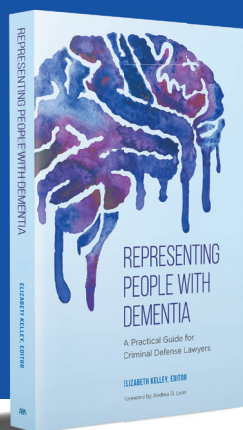
Kelley says there was no dispute whether Koller killed the victim; it was a matter of finding a fair outcome for him.

“In an ideal world, people who have serious mental illness would receive treatment, not punishment,” she said before her client pleaded guilty in September. “Nonetheless, because of certain crimes within our system, that is not always an option.”

Representing people with dementia

Kelley’s most recent mission is educating lawyers about dementia, which can bring on changes in behavior that cause otherwise law-abiding people to commit serious crimes.

Those with dementia may prompt calls to the police when they wander away from home, expose themselves, shoplift, drive erratically, attack staff or fellow patients at health care facilities—or even commit murder. They’re often first-time arrestees in their 70s and 80s.



In February, the ABA House of Delegates passed a resolution urging legislative bodies and governmental agencies “to adopt laws, policies and practices to recognize and address the complex issues associated with persons involved in the criminal justice system who are living with dementia.” David Godfrey, director of the ABA Commission on Law and Aging, says Kelley was helpful in reviewing and making revisions to the resolution.

It's all about compassion

Devlyn Thompson's request for compassionate release was going to be a tough sell. Prosecutors wanted accountability for his attack on the police officer, and Kelley wanted him out to receive treatment.

In a response to her motion, U.S. Attorney Matthew M. Graves said that the prison where Thompson is incarcerated offers psychiatric services, but he found no evidence that Thompson sought them out. Moreover, he argued that Thompson has not shown any signs he was suffering any more than other inmates, all of whom were under restrictions due to COVID-19.

The autism spectrum disorder diagnosis, “which was fully known and briefed to the court at sentencing, is not directly threatening to the defendant's physical health, and the defendant has made no showing through competent evidence, such as from a health report or psychiatric evaluation, that his mental or physical health has significantly atrophied,” Graves wrote.

Thompson submitted letters of support from friends and family, including his mother, who wrote: “The longer Devlyn is in prison, the worse things will be for Devlyn when he is released. He will never be able

“When you're dealing with an older person, they probably have been law-abiding and maybe even very successful up until this point in time,” Kelley says. “But their disability, their dementia, is beginning to overtake their sound reason and judgment, which is why they did what they did, whether it's expose themselves or assault someone in a time of frustration or whatever.”

Recognizing a need for lawyers to educate themselves in this area, Kelley once again reached out to her colleagues and list of experts in the field to contribute to yet another book, *Representing People with Dementia*, published by the ABA in November 2022.

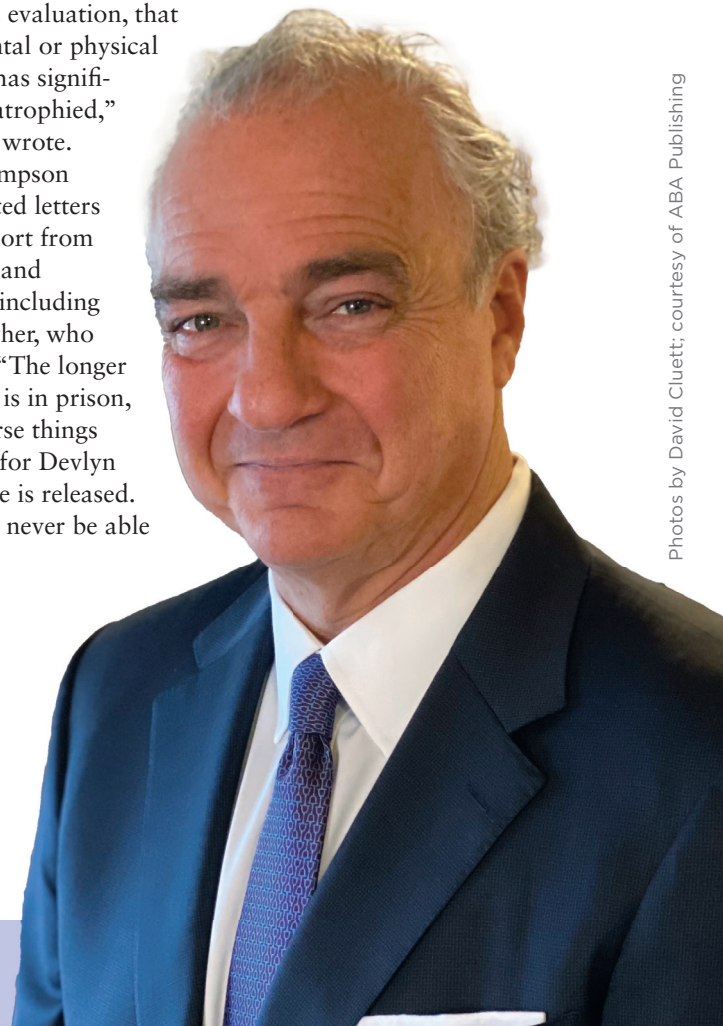
And to confirm her foresight, six months before Kelley's book was released, the ABA Commission on Law and Aging released a report on people with dementia in the criminal justice system. The report found that the number of people with dementia coming to the attention of law enforcement appears to be increasing and is likely to continue to increase over the next decade.

“The criminal legal system is ill-equipped to respond effectively and humanely to people with dementia who commit crimes,” the report says, adding, “Those that are arrested need defense attorneys that recognize the impact of neurocognitive decline on a person's ability to form intent, to control behavior and to make choices.”

Moreover, those with dementia don't fit the legal model for mental illness because “there are no effective cures, treatments or therapies to restore fading capacities,” the report says. “This creates a challenge in pretrial determinations of fitness to stand trial. It also creates challenges in correctional health care, which often has resources to care for physical or mental illness but not for long-term cognitive decline.”

“THERE ARE VERY FEW AREAS
OF THE LAW WHERE ... THERE
WOULD BE LESS SUPPORT.”

—JEFF GRANT



Photos by David Cluett; courtesy of ABA Publishing

Photo courtesy of Judge Bernice Donald

to get his sense of security back, he will have PTSD on top of his autism, he will have no recollection of what it was like to be loved, cared for, treated with respect and dignity.”

The judge denied the motion, and Thompson remains in prison in Mississippi.

That was a tough defeat for Kelley, who says she’s not ready to give up. But taking her mind off of such cases is vital to her own mental health, and she’s found ways to bring peace, enjoyment and relaxation to her life. One of them is yoga.

“Yoga is a significant part of my life. And I practice yoga daily. I have a yoga room. I have gone on many, many yoga retreats.”

Kelley, a former marathon runner, also has hiked portions of one of the ancient Camino de Santiago routes ending in northern Spain.

“It was not only wonderful exercise, but it was tremendously spiritually uplifting,” she says.

“It keeps things in balance and in perspective, and I deal with a lot of tragedy,” she says. “I deal with people who are unhappy, who have been wounded, and it helps me understand where they’re coming from. And it helps me communicate with them.”

New York City attorney Jeff Grant, whose practice focuses in part on defending clients accused of white-collar crimes, understands it well. He has bipolar disorder, was addicted to opioids and served just over a year in federal prison after being convicted of money laundering and wire fraud.

“Because of my background, I came onto her radar, and she wound up coming onto mine,” says Grant, who was in the process of getting his law license reinstated when he met Kelley. “She kind of took me under her wing. She is kind and compassionate and understood that I would need some champions.”

He believes Kelley has chosen a hard road. “There are very few areas of the law where I think there would be less support,

less money, less political will,” Grant says. “So she has chosen a very lonely area of law because there are not a lot of people she can call upon to support it.”

Kelley is aware that victories for her clients are rare. “This is really still very much an uphill battle even though there’s maybe more discussion about mental health,” Kelley says. “It’s difficult for a thousand different reasons. Our laws are such that a judge may or may not have the discretion to impose a sentence that is not prison or jail. Beyond that, there are not enough resources in the community, either inpatient or outpatient, to meaningfully treat someone who becomes involved with the criminal justice system.”

Judge Donald says she admires what Kelley has been able to accomplish.

“Elizabeth Kelley is a lawyer’s lawyer in that she’s selfless, smart, energetic, and she believes that there is no mountain in this fight of hers that she can’t climb,” Donald says. “She is an exemplar of our profession.” ■

“THANK GOODNESS FOR
PEOPLE LIKE HER.”

—JUDGE BERNICE DONALD

