The Advocate

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FULL SERVICE PUBLIC ADVOCACY PLAN DEVELOPED

A plan for future growth and development of Kentucky's Public Advocacy System has recently been announced by Public Advocate Jack Farley.

"Kentucky's Public Advocacy System must be expanded and improved to meet the ever increasing caseload and we must devise a better way to forecast and plan for system costs" said Farley.

The plan calls for a structured or "mixed" system of 25 to 30 regional advocacy offices covering the whole state. A novel aspect of the plan makes each of these offices responsible for all forms of delivery of defense services in its region. "This is the essence of the system which the Kentucky Bar Association has recently approved," noted Farley.

Quality of service and cost-effectiveness will be the major factors in determining how each region will be served. As Farley explained it, each office in the mixed system will utilize full-time salaried staff attorneys as well as lawyers in private practice who handle cases on a case-by-case basis.

The plan calls for approximately 200 full-time salaried attorneys to serve primarily the more urban counties. Part-time attorneys will continue to serve in the more rural counties.

The greatest management problem of the system is the need for a way to forecast and predict system costs. This can only be brought about by a structured system mainly relying on full-time salaried defenders supplemented by part-time defenders where needed, said Farley.

The plan is being developed by the Office for Public Advocacy and will be presented to the upcoming session of the Kentucky General Assembly. "The plan desperately needs the support and concern of attorneys and clients everywhere. We must continue to provide effective defense services at a constitutional level to all needy Kentuckians," concluded Farley.

Copies of the entire Public Advocacy Plan will soon be available by contacting the Office for Public Advocacy, Frankfort.

At present the Kentucky Public Advocacy System includes 86 full-time salaried attorneys serving as local public advocates in thirty-three Kentucky counties.

Sixty-five counties are served by local public advocacy systems organized as non-profit associations. In these counties volunteer attorneys, primarily in private practice, band together and contract with the local fiscal court to provide local public advocacy services. Money is provided through the budget of the Office for Public Advocacy in an allotment to each of these counties primarily based on caseload and population of the counties.

In 25 other counties, attorneys voluntarily provide their services on a case-by-case (assigned counsel) basis

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WEST'S REVIEW

A number of important decisions were issued during the months of July and August.

In an Opinion and Order denying discretionary review in C.E.H. v. Commonwealth, Ky.App., 28 K.L.S. 11 at 1 (August 14, 1981), the Court of Appeals has held that a district court order waiving jurisdiction of a juvenile offender to the circuit court is interlocutory. The Court had formerly held in an unpublished opinion in Newsome v. Commonwealth, Ky.App., 26 K.L.S. 7 at 3 (May 11, 1979), that a challenge to a "juvenile waiver" must be preserved by an appeal to the circuit court and then, if necessary, to the Court of Appeals. Rejecting its previous position, the Court noted that because "effective means of challenging an improper waiver are available in the circuit court by appropriate motions questioning that court's jurisdiction or that of the grand jury, etc., there would seem to be no policy reason favoring a right of appeal." Id., at 2.

In Kohlheim v. Commonwealth, Ky. App., 28 K.L.S. 10 at 2 (July 10, 1981), the Court held that it was error to refuse the defendant's request for an instruction on self-protection as to charges involving wantonness or recklessness as the culpable mental state. The Court found that under KRS 503.120(1), self-protection is unavailable as a defense to charges for which wantonness or recklessness will establish culpability if "the defendant is wanton or reckless in believing the use of any force, or the degree of force used, to be necessary. . ." The Court held that where the proof presented the issue of whether the defendant was wanton or reckless in believing force was necessary the issue must be submitted to the jury in a proper instruction. However, the Court also held that as to a victim who was an "innocent person" (in this instance a third-party bystander) self-protection was unavailable in a prosecution for offenses involving wantonness or recklessness. The Court founded this portion of its decision on KRS 503.120 (2), which provides that self-protection is unavailable as to such offenses "[w]hen the defendant is justified. . .in using force upon or toward the person of another, but he wantonly or recklessly injures or creates a risk of injury to innocent persons. . . ."

The Kentucky Supreme Court dealt with several important issues in Commonwealth v. Brown, Ky., 28 K.L.S. 9 at 9 (July 7, 1981). Brown was indicted for murder but the indictment against him was dismissed after the trial court made various pretrial rulings which radically diminished the Commonwealth's proof. The commonwealth appealed from the trial court's order dismissing, and challenged the validity of the trial court's pretrial rulings. The Supreme Court upheld the trial court's rulings. Initially, the Court found that the trial court correctly ruled that the Commonwealth lacked authority to grant Brown's accomplices immunity from prosecution so that their testimony against Brown could be compelled. The Court held that, absent a statute specifically empowering a prosecutor to grant immunity from prosecution, no such power exists. The Court also found that the trial court was correct in holding that RCr 9.62, which was abolished on June 18, 1980, but which was in effect at the time Brown allegedly committed the offense, would apply at Brown's trial. The Court reasoned that to deprive Brown of the benefit of RCr 9.62, which required corroboration of accomplice testimony, would be in violation of the ex post facto clauses of the Kentucky and United States Constitutions. This would be so because abolishing the rule would "alter the legal rules of evidence, and receive less, or different testimony, than the law required at the time of the commission

of the offense." Id., at 10, citing Calder v. Bull, 3 U.S. 386, 390 (1798). Finally, the Supreme Court upheld the trial court's ruling that statements made by Brown's accomplices would not be admissible at Brown's trial if the accomplices refused to testify. The Court held that if the accomplices did not testify, their prior statements could not be introduced pursuant to Jett v. Commonwealth, Ky., 436 S.W.2d 788 (1969), to "impeach their silence," as proposed by the Commonwealth. To do so would deprive the defendant of his right to confrontation.

The Court has rejected "amnesia," "partial loss of memory, or distorted memory of events at the time of commission of a crime" as a basis for a finding of incompetency to stand trial. Commonwealth v. Griffin, Ky., 28 K.L.S. 9 at 10 (July 7, 1981). While conceding that amnesia for the charged offense would be a "disadvantage," the Court found it would not necessarily impair a defendant's "substantial capacity to comprehend the nature and consequences of the proceeding pending against him and to participate rationally in his defense." Id., at 11. However, the Court did observe that "[i]f the amnesia is medically confirmed, the trial court can make a determination based on the situation in each case whether 'fair trial' commands that the prosecution should open its files to the defendant." Id. Thus, trial courts may be required in individual cases to take steps to relieve the "disadvantage" imposed on a defendant by his amnesia.

The Court held in Henley v. Commonwealth, Ky., 28 K.L.S. 9 at 11 (July 7, 1981), that the defendant was not entitled to an instruction on first degree manslaughter because he had offered no evidence of "extreme emotional disturbance." In fact, the defendant had put on no evidence whatsoever. The Court has previously held in Gall v. Commonwealth, Ky., 607 S.W.2d 97, 108 (1980) that a jury need not be instructed on extreme emotional disturbance unless there is "something in the evidence sufficient to raise a reasonable doubt as to whether the defendant is guilty of murder or manslaughter." The Court contrasted Henley's case with that of Ratliff v. Commonwealth, Ky., 567 S.W.2d 307 (1978), in which an instruction on first degree manslaughter was required by psychiatric testimony that the defendant was "very likely" psychotic when committing the offense.

The Court reversed the murder conviction of Patrick Howard because of the trial court's action in erroneously instructing the jury on murder. Howard v. Commonwealth, Ky., 28 K.L.S. 9 at 13 (July 7, 1981). Howard had allegedly participated in a

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"I ask you, Your Honor, does my client look like a crook?"

Drawing by Modell; 1980
The New Yorker Magazine, Inc.

robbery along with his brother, during the course of which the victim was killed. In its murder instruction to the jury, the trial court permitted the jury to convict Howard of murder if it found a) that he voluntarily participated in a robbery of [the victim], and b) that during the course of that robbery, and as a consequence thereof, [the victim] was intentionally shot and killed. A separate instruction defined "intentionally." No instruction on complicity liability was given. The Supreme Court reversed, observing that under the trial court's instructions "the jury need not have made any finding at all regarding the existence of any culpable mental state on Patrick's part, whether intentional or wanton. . . .Id.

The United States Supreme Court has issued two plurality opinions elaborating the law governing the search of closed containers found in a searched vehicle. In Robbins v. California, 29 CrL 3115 (July 1, 1981), police stopped the defendant's car for traffic violations and smelled marijuana smoke in the car. The officers searched the car and in the trunk found two packages wrapped in green opaque plastic. The police opened the packages, finding marijuana in each of them. The Court found that the warrantless search of the car was lawful under the "vehicle exception" created by its previous decisions. However, the Court held that the search of the packages or other luggage in the car was unlawful. The Court stated that it "saw no reason to believe that the privacy expectation in a closed piece of luggage taken from a car is necessarily less than the privacy expectation in closed pieces of luggage found elsewhere." Id., at 3116. The Court rejected the state's argument that the appearance of the packages found in Robbins' car deprived them of any expectation of privacy because they resembled possible contraband rather than personal effects. The Court found that such a determination was unreliable. Robbins adds little to Kentucky law since the Kentucky Supreme Court has previously held in Wagner v. Commonwealth, Ky., 581 S.W.2d 352 (1979) that section 10 of the Kentucky Constitution forbids the warrantless search of a vehicle in police custody without the owner's or permissive user's consent.

In New York v. Belton, 29 CrL 3124 (July 1, 1981), the court relied on the "search incidental to lawful arrest" exception to the warrant requirement to uphold the search of a jacket found in a car being searched. As in Robbins, the defendant's vehicle was pulled over for traffic violations, and the police smelled marijuana smoke. The arresting officer then conducted a search of the car during which he unzipped the pocket of a jacket lying in the back seat. The jacket pocket contained cocaine. The Court found the search of the jacket lawful as incidental to the arrest of the occupants of the car. It appears that the Court considered the interior of the car to be an area "within the arrestee's immediate control" because the arrestees remained in the vicinity of the car, while in Robbins the arrestee was placed in a patrol car before the search.

LINDA WEST
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"OF COUNSEL" APPEALS

It is the policy of this Office re appeals of convictions of less than ten years to encourage trial counsel to handle them. If such trial attorneys are unable to handle their own appeals, then counsel is found from a roster of good, experienced attorneys. If any local counsel is interested in handling their own appeals, or is interested in being put on the roster to handle appeals that cannot be processed by local counsel, please contact Tim Riddell in the Office For Public Advocacy. Attorneys doing "of counsel" appeals can collect up to $750 at a rate of $25 an hour out-of-court and $35 an hour in court. For proper handling of fee claims trial counsel who wish to handle their own appeals in cases where the sentence is less than ten years must make prior arrangement with the OPA.

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SHOCK PROBATION

Under KRS 439.265, a defendant who has been convicted can move the trial court for a suspension of further execution of sentence. This motion for shock probation must be made within more than 30 but not later than 60 days after the defendant's delivery to the institution.

The decision to grant or deny shock probation rests solely in the discretion of the court. It is not appealable.

When filing for shock on behalf of a client, the following should be done.

The defendant should write a brief statement explaining why he is a good candidate for shock. Supportive information can include but is not limited to letters from prospective employers, friends, family, officials in defendant's previous community, officials and supervisors at the institution, a minister or religious figure and neighbors. Support from neighbors is most effective in the form of one statement signed by all the neighbors. In addition, letters from the persons who will provide a home to the defendant upon his initial return from prison and initial employment are particularly important.

An application for shock probation should include the motion, an accompanying memorandum and a packet of all supportive statements. Statements should be addressed to the trial judge.

There are certain statutory prohibitions against a grant of shock probation. KRS 533.060(1) precludes shock when a person has been convicted of a Class A, B or C felony if the commission of the offense involved the use of a weapon.

JOANNE YANISH
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JUVENILE CONFERENCE TO BE HELD

The First National Juvenile Justice Litigative Advocacy Conference, sponsored by the Office of Juvenile Justice and Delinquency Prevention, under a grant to the National Juvenile Law Center, Inc., Youth Legal Assistance Project will be held in St. Louis, Missouri, November 15-17, 1981, at the Bel-Air Hilton Hotel, in downtown St. Louis.

Workshops are scheduled on legal challenges to children in adult jails, confinement of status offenders in secure facilities, intake and detention practices, correctional systems and serious juvenile offender jurisdiction, among others. In addition, federal practice and procedure and barriers to federal court litigation will be extensively discussed.

A new, updated litigation manual and appendix of model pleadings prepared by the National Juvenile Law Center staff will be distributed free to all registrants. This manual will mirror the substantive law areas discussed at the conference and is designed to be an ongoing guide to litigation in the juvenile justice area.

The Conference promises to be an unusual opportunity for legal services, public defender, private and public interest attorneys and other juvenile justice advocates to exchange ideas, strategies and legal materials and to improve the possibilities for legal success in the ever changing and challenging field of juvenile justice litigation.

For further information and registration materials contact John Bird or Beth Dockery at: National Juvenile Law Center, Inc., P. O. Box 14200, St. Louis, MO 63178, (314) 652-5555.

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PROTECTION AND ADVOCACY
DIVISION
OFFICE FOR PUBLIC ADVOCACY

NEW JUSTICE DEPARTMENT 504 REGULATIONS MANDATE THAT LAW ENFORCEMENT AGENCIES PROVIDE COMMUNICATIONS ACCESS TO DEAF PERSONS

Police, courts, and correctional agencies on both the state and local level are now specifically required, by the regulations under Section 504 of the Rehabilitation Act of 1973 (29 U.S.C.A. 794) adopted by the U. S. Department of Justice to ensure adequate and appropriate communication to hearing-impaired persons who have a need to, or who are asked to, communicate with these agencies.

Almost all police departments in the United States receive some type of federal assistance and are, therefore, subject to the 504 regulations.

The Requirement of Qualified Sign Language Interpreters

The Sec. 504 regulations require law enforcement officers to provide qualified sign language interpreters for communication with hearing-impaired persons who rely on sign language. The Department of Justice analysis of this Regulation (D.O.J. Regulations pursuant to Sec. 504, 28 C.F.R. Part 42, Subpart G) makes many important points in regard to the provision of interpreters to the hearing impaired.

- The provision of interpreter services is not limited to hearing impaired arrestees. Victims and complainants should also be provided those services.

- It is the responsibility of the law enforcement agency to determine whether the hearing impaired person uses American Sign Language or Signed English to communicate and secure an interpreter competent in that language.

- The interpreter should be certified by a recognized certification agency if at all possible.

- Presentation of a printed Advice of Rights form without an interpreter will seldom, if ever, be sufficient to convey adequately the Constitutional (Miranda) rights warning to a hearing impaired defendant. Courts have and will suppress evidence obtained from defendants even when the warnings were given in sign language by a qualified interpreter where the warnings were not broken down to the defendant's language level.

- All hearing impaired persons must be informed of the law enforcement agency's obligation to have a free, qualified interpreter present during all communications and questioning. Although a printed card will usually suffice, for deaf persons with very limited English language skills, an interpreter will be required to ensure comprehension of even this message.

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The Requirement of Telecommunication Devices for the Deaf (TDDs or TTTs)

The Sec. 504 regulations require the installation of telecommunication devices for hearing-impaired persons in offices having telephone contact with the public, and nowhere is this access more important than in police departments, where the protection of the lives and property of the hearing-impaired citizens of a community is at stake.

State Courts - Criminal Proceedings

The D.O.J. analysis recognizes that the Sixth Amendment right to counsel in criminal cases includes a right to effective representation, which means that there must be an adequate opportunity for consultation and preparation between the accused and counsel before trial. Thus, an interpreter must be provided, since the absence of a qualified interpreter renders the constitutional guarantee of effective assistance of counsel meaningless.

Civil and Administrative Proceedings

Although many states do not provide for interpreters in civil proceedings, the analysis to the D.O.J. Regulation specifically requires that an interpreter should be available, free of charge, to hearing impaired citizens at all stages of any judicial or administrative proceeding. Since administrative proceedings now affect so many areas of our lives, such as worker's compensation, motor vehicle hearings, welfare services, immigration, taxes, licensing, school placement, employment disputes and zoning, deaf citizens must not be prevented from participating in such proceedings by the failure of the state to appoint an interpreter.

Sentencing and Rights for Deaf Prisoners

The Dept. of Justice regulations mandate that qualified interpreters be provided whenever necessary to enable hearing-impaired inmates to participate on an equal basis with nonhandicapped inmates in rehabilitation programs, and to insure that all programs and activities are accessible to the hearing impaired.

A federal judge recently approved a consent decree providing qualified interpreters so that every deaf prisoner in Maryland could understand and participate in the following situations:

- At a prison Adjustment Team Hearing;

- When prison officials give notice to a deaf inmate that a disciplinary report is being written;

- Whenever a deaf inmate is provided with counseling;

- Whenever a deaf inmate is provided psychological, psychiatric, or medical care; and

- In any on-the-job training program, vocational or educational program.

The National Center for Law and the Deaf suggests that this agreement be used as a model to insure that all deaf prisoners are provided basic due process and equal access rights.

Anyone having unanswered questions regarding Sec. 504 and the Department of Justice regulations is welcome to contact The National Center for Law and the Deaf, at 7th and Florida Ave., N.E., Washington, D.C. 20002.

Reprinted from the July 20, 1981 issue of "Protection and Advocacy News," the newsletter of the Developmental Disabilities Law Project, with permission of Beverly J. Falcon, Esquire, Editor.

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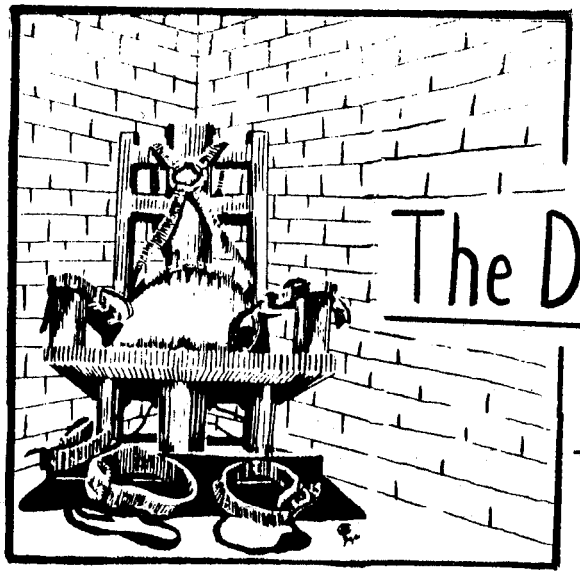
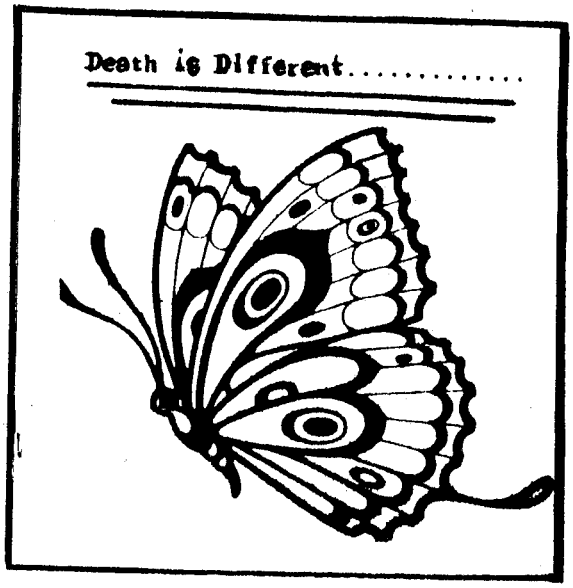


The Death Penalty



DEATH ROW U.S.A.

AS OF AUGUST 20, 1981, TOTAL NUMBER OF DEATH ROW INMATES KNOWN TO THE LEGAL DEFENSE FUND: 848

Race:

Black	349	(41.16%)
White	451	(53.07%)
Hispanic	40	(4.83%)
Native American	4	(0.47%)
Asian	2	(0.24%)
Unknown	2	(0.24%)

Crime: Homicide

Sex:	Male	818	(98.94%)
	Female	9	(1.06%)

DISPOSITIONS SINCE JULY, 1976 (and since 1972 in FL, GA, and TX):

Death sentences vacated under unconstitutional statutes: 533 (est.)

Convictions reversed or sentences vacated on other grounds: 338 (est.)

Executions: 4
Suicides: 7
Commutations 12
Died of Natural causes, or killed while under sentence: 4

Number of Jurisdictions with Capital Punishment Statutes: 38

Number of Jurisdictions with Death Sentences Imposed: 29

CAPITAL CASE LAW

Coleman v. Georgia
101 S.Ct. 2031

On April 27, 1981 the Supreme Court of the United States denied a petition for certiorari in this Georgia capital case. The denial is noteworthy for two reasons: the dissent of Rehnquist and the concurrence of Stevens.

The petitioner was convicted of 1st degree murder and sentenced to death. In a state habeas corpus proceeding, petitioner alleged that prejudicial publicity had unfairly influenced the jurors' decision. An affidavit of petitioner's counsel asserted that jurors, if called to testify, would state they were "affected in their statutory decision-making process by the adverse pretrial publicity." In his petition for cert., the petitioner was alleging the unconstitutionality of the Georgia statute which allowed for compulsory process in civil cases only within 150 miles of the place where the suit was filed.

In his dissent, Justice Rehnquist complained that "the existence of the death penalty in this country is an illusion" because of the "endlessly drawn out legal proceedings" challenging the sentence of death: "I do not think that this Court can continue to evade some responsibility for this mockery of our criminal justice system. Perhaps out of a desire to avoid even the possibility of a "Bloody Assizes,"

(Continued, Page 9)

this Court and the lower federal courts have converted the constitutional limits upon imposition of the death penalty by the States and the Federal Government into arcane niceties which parallel the equity court practices described in Charles Dickens' "Bleak House." Even though we have upheld the constitutionality of capital punishment statutes, I fear that by our recent actions we have mistakenly sent a signal to the lower state and federal courts that the actual imposition of the death sentence is to be avoided at all costs."

Rather than deny cert in capital cases, Rehnquist would - for the sake of the administration of criminal justice - have the Court automatically grant cert. in every capital case, and decide the case on its merits in order to speed up the process.

In rebuttal to Rehnquist, Justice Stevens felt that the "Court wisely declines to select this group of cases in which to experiment with accelerated procedures." Stevens believes the lengthy post-trial procedures do not lessen the severity of the ultimate punishment but rather insure no error of constitutional magnitude has occurred: "The deterrent value of any punishment is, of course, related to the promptness with which it is inflicted. In capital cases, however, the punishment is inflicted in two stages. Imprisonment follows immediately after conviction; but the execution normally does not take place until after the conclusion of post-trial proceedings in the trial court, direct and collateral review in the state judicial system, collateral review in the federal judicial system, and clemency review by the executive department of the State. However critical one may be of these protracted post-trial procedures, it seems inevitable that there must be a significant period of incarceration on death row during the interval between sentencing and execution. If the death sentence is ultimately set aside or its execution delayed for a prolonged period, the imprisonment during that period is nevertheless a significant form of punishment. Indeed, the deterrent value of incarceration during that period of uncertainty may well be comparable to the consequences of the ultimate step itself. In all events, what is at stake in this procedural debate is the length of that period of incarceration rather than the question whether the offender shall be severely punished."

Blake v. Zant
513 F.Supp. 772 (S.D. Ga. 1981)

Petitioner's sanity was in issue in this capital case. The trial court ordered an examination of the defendant by the state-employed psychiatrist who formed no opinion on his mental state at the time of the offense. No other expert testimony was received on the mental condition of the defendant. Recognizing that there was a "critical interrelation between expert psychiatric assistance and minimally effect representation of counsel," the court held that "in a capital case, a defendant whose sanity at the time of the alleged crime is fairly in question, has at a minimum the constitutional right to at least one psychiatric examination and opinion developed in a manner reasonably calculated to allow adequate review of relevant, available information, and at such time as will permit counsel reasonable opportunity to utilize the analysis in preparation and conduct of the defense."

The opinion is of note also on its lengthy discussion of proportionality review; and its holding on that issue: "Thus, this Court concludes that, in reviewing petitioner's sentence, the Georgia Supreme Court did not confine itself to 'similar cases' as required by statute. Twenty of the twenty-three cases which were considered did not resemble the present facts sufficiently to provide any useful comparison to the sentence imposed here. Of the remaining three, only one resulted in a death sentence despite the fact that all were substantially more reprehensible than the present case when considered from the point of view of both the crime and the defendant."

ED MONAHAN

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CAPITAL COMMENTS

Pope John Paul's vicar for the Diocese of Rome has expressed his strong opposition to a referendum which would restore the death penalty to Italy's penal system.

Cardinal Ugo Poletti called upon the priests of Rome to fight the death penalty: "Who is so wise and just - even among the public powers -as to be able to pronounce the definitive sentence of death?" he asked. "Who," he continued, "is such a Master of life, a gift of God, that he has a right to suppress it?"

In November, 1980 the U.S. Catholic Bishops issued a statement opposing capital punishment. In part, they stated:

"We maintain that abolition of the death penalty would promote values that are important to us as citizens and as Christians. First, abolition sends a message that we can break the cycle of violence, that we need not take life for life, that we can envisage more humane and more hopeful and effective responses to the growth of violent crime. It is a manifestation of our freedom as moral persons striving for a just society. It is also a challenge to us as a people to find ways of dealing with criminals that manifest intelligence and compassion rather than power and vengeance. We should feel such confidence in our civic order that we use no more force against those who violate it than is actually required."

In contradistinction, a four-day strategy session of 130 government attorneys from 24 states met in August, 1981. Members of The Association of Government Attorneys in Capital Litigation, an organization of attorney generals and district attorneys who prosecute capital cases, met in New Orleans to discuss among other things methods of executions, prosecution of "high visibility" cases, and development of a central bank of information on how to obtain death sentences effectively.

ED MONAHAN

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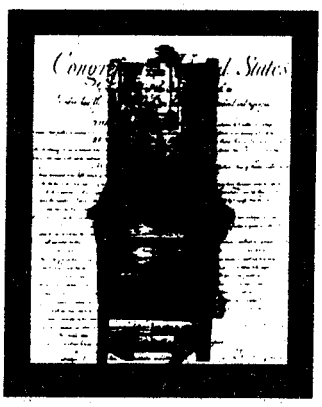

CRUEL AND UNUSUAL

National College of Criminal Defense Lawyers and Public Defenders

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Charles L. Black. Jr.

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DPR—VOL. 1,#10

BRIEF SUMMARIES

Procedure
voir dire
Conduct of Trial
judicial behavior

TRIAL COURT CANNOT INFORM JURY PANEL OF HIS AUTHORITY TO REDUCE SENTENCE AND CANNOT EDUCATE JURY PANEL AS TO PAROLE ELIGIBILITY.

Prior to trial, the trial judge told the jury panel that the court had the authority to reduce a sentence imposed by a jury. Further, the judge discussed parole eligibility giving specific examples of sentences and the amount of time which would have to be served before a defendant would be eligible for parole. The trial court maintained that his comments were offered in an attempt to educate the panel as to their duties and responsibilities. Appellant argues that the probable effect of such comments is an unreasonably severe sentence, and that the judge's motive is inconsequential. Citing existing Kentucky case law, Appellant urges a finding of a denial of his Sixth and Fourteenth Amendment rights to a fair trial by an impartial jury.

Eric Bailey and Mark Crossland v. Commonwealth Brief for Appellant

Voir Dire
peremptory challenge

PEREMPTORY CHALLENGES CANNOT BE USED TO EXCLUDE ALL BLACKS FROM THE JURY.

Eight blacks were on the jury panel. Three (3) were struck for cause and the remaining five (5) were struck by use of all of the state's peremptory challenges. Appellant argues that such an exclusion of an identifiable segment of society violates his right to trial by an impartial jury under §11 of the Kentucky Constitution and the Sixth Amentment to the United States Constitution and his right to equal protection guaranteed by the Fourteenth Amendment.

Appellant contends that the decision in Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965) can no longer control because, 1) the Swain standard provides no protection to the victim of improper exclusion if he happens to be tried before an extended pattern of exclusion surfaces and 2) under the Swain standard not a single challenge to juror exclusion has been successful.

Appellant urges that the states are free to provide greater protections than the United States if the federal constitution does not meaningfully protect defendants. Further, Appellant analyzes current United States Supreme Court decisions to support his theory that the Swain decision is no longer viable.

Raymond D. Thomas v. Commonwealth
Brief for Appellant

Evidence/Witnesses
interest/bias
Defendant's Rights
right to confrontation

QUESTIONS TO ALLEGED VICTIM DESIGNED TO ASCERTAIN WHETHER HE HAS CONSULTED WITH AN ATTORNEY ABOUT FILING A CIVIL DAMAGE SUIT AGAINST A DEFENDANT BASED ON THE ACTS INVOLVED IN A CRIMINAL CASE MUST BE PERMITTED.

Appellant attempted to cross-examine the victim of an alleged assault about whether he had contemplated the filing of a civil damage suit against Appellant and about whether he had consulted an attorney about the matter. Prosecution objections to that line of questioning were sustained. No avowal was made for the appellate record.

Appellant argues basic principles of evidence and established case law to demonstrate the trial court's error in excluding evidence designed to show bias or pecuniary interest on the part

(Continued, Page 12)

of the witness. Furthermore, Appellant submits that because the constitutional right of cross-examination was abridged, prejudice need not be shown. Since a showing of prejudice is not necessary, the failure to make an avowal cannot prevent appellate review.

Cecil Clayborn v. Commonwealth Brief for Appellant

Defendant's Right
right to present defense
right to compulsory process

LIMITING THE TESTIMONY OF AN EXPERT WITNESS TO INFORMATION CONTAINED IN A WRITTEN REPORT PREPARED BY THAT WITNESS IS ERROR.

Appellant called a psychiatrist to testify about Appellant's mental condition at the time of the commission of the offenses. The state objected to the psychiatrist being allowed to testify from his notes on the ground that they differed in some respects from a letter written by the witness and addressed to Appellant's lawyer. The trial court sustained the objection and limited testimony to the confines of the letter on the theory that the Commonwealth should have had the opportunity for discovery.

Appellant argues that such a ruling denied him his Sixth Amendment right of compulsory process. Appellant notes that absent an order conditioning defense discovery on reciprical discovery, there is no independent discovery right by the state. Furthermore, even if that had been the case, exclusion of the testimony as a sanction for the failure to grant discovery would be constitutional error. United States v. Davis, 639 F.2d 239 (5th Cir. 1981).

Larry Sutherland v. Commonwealth Brief for Appellant

MICHAEL A. WRIGHT

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INVESTIGATOR HIRED

The Office for Public Advocacy now has an experienced investigator working at the London OPA Office. Mr. Lowell Humphrey comes to us with 21 years of military service, including experience at the Military Intelligence Service, Ft. Knox. While in service, he was awarded 14 medals and decorations, worked in photography, and gained exposure in the area of physical security, including both physical and computer security.

Lowell holds a B.A. in Psychology from the University of Kentucky and is now a Ph.D. student at the University of Louisville.

We welcome Lowell Humphrey to our staff and wish him well, trusting his varied experience will be useful to indigent clients.

If you need investigative assistance, you may contact Lowell Humphrey at the London Office for Public Advocacy. (205 South Main Street, London, Kentucky 40741; 606/878-8042).

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CORRECTION

The article on Criminal Rules Changes in the August, 1981 Advocate contained at least one mistake. RCr 7.26 continues to relate to statements made by witnesses not "by defendant" as stated in that article.

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TRIAL TIPS

DON'T OPEN THE DOOR WITHOUT KNOWING WHAT'S ON THE OTHER SIDE

You're at the point that everyone's been waiting for. The defendant is going to get up, take the stand, and wait for you to pose questions that may result in his walking out the door, or into a waiting sheriff's van. You know about his criminal record, his prior written or oral statements, and you've practiced his testimony with him. You feel ready.

This article is written to urge you to be aware of one other matter prior to putting your defendant on the stand: by allowing him to testify you are opening him or her up to cross-examination, and the scope of the cross-examination may encompass evidence that you may consider inadmissible. Simply put, when the defendant takes the stand, he may be opening the door to previously inadmissible evidence, evidence which may lead to a conviction.

No such thing was contemplated at the time of Agnello v. United States, 269 U.S. 20, 46 S.Ct. 4, 70 L.Ed. 145 (1925). In that case, the defendant testified on direct examination, saying nothing about a can of cocaine which had been illegally seized from him. On cross-examination, the government asked him about the cocaine. Agnello said he had never seen it. The government then admitted the can of cocaine in rebuttal. The Court held this to be error, quoting from Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392, 40 S.Ct. 182, 64 L.Ed. 319 that "[t]he essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court but that it shall not be used at all." Id., 46 S.Ct. at 7.

The Court backed off the clear rule of Agnello in Walder v. United States, 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed. 503 (1954). There, the defendant testified that he had never purchased, sold or possessed narcotics. On cross-examination, the government asked him about narcotics illegally seized from him in a prior case in 1950, and when he denied any seizure at that point, the government proved the seizure in rebuttal. This rebuttal evidence was about a prior crime, and thus was collateral to the crime charged. The Court held that the defendant is "free to deny all elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case in chief. Beyond that, however, there is hardly any justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility." Id., 74 S.Ct. at 356. Agnello was distinguished by the fact that in that case the government had tried to "smuggle" in the illegal evidence by asking the defendant on cross-examination about a matter not gone into by the defendant on direct. In Walder, on the other hand, the defendant on direct opened the door to the introduction of the illegally seized evidence by denying having ever possessed narcotics.

There it stood until after the demise of the Warren Court. In 1971, in Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971), the Court held admissible a statement taken from the defendant in violation of his Miranda rights where that statement partially contradicted the defendant's direct testimony. In Harris, as in Walder, the defendant invited the introduction of the illegal evidence by

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his own testimony on direct examination. The Court further emphasized the limited use of the rebutting evidence, stating that the evidence could come in only to impeach the defendant's credibility. "Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process." Id., 91 S.Ct. at 645-646. The real change in Harris from Walder is that in Walder, the impeaching evidence was collateral to the crime charged, and could thus be easily confined to impeaching the defendant's credibility. In Harris, the statement was not collateral, but was a statement concerning the charged offense, and thus easily used to convict, rather than impeach, the defendant. See also Oregon v. Hass, 420 U.S. 714, 43 L.Ed.2d 570, 95 S.Ct. 1215 (1975).

The erosion of the Agnello rule continued in the 1980 term of the Court, when the Court wrote two opinions on point. In United States v. Havens, 446 U.S. 620, 100 S.Ct. 1912, 64 L.Ed. 2d 559 (1980), the defendant stated nothing on direct examination about an inculpatory tee-shirt illegally seized from his luggage. On cross-examination, the government asked about the tee-shirt, and upon the defendant's denials, introduced the shirt in rebuttal. The Court held that the tee shirt was admissible notwithstanding the fact that it impeached nothing in the defendant's testimony on direct. The Court stated that they saw "no difference of constitutional magnitude between the defendant's statements on direct examination and his answers to questions put to him on cross-examination that are plainly within the scope of the defendant's direct examination." Id., 100 S.Ct. at 1916.

It must be recognized that Havens gutted the Agnello rule. After Havens, it matters not what you elicit

from the defendant on direct examination. As long as the cross-examination is within the "scope" of the direct, the prosecution can bring in all manner of illegally seized and previously suppressed evidence. Observed Justice Brennan in dissent, "[i]n practical terms, therefore, today's holding allows even the moderately talented prosecutor to 'work in...evidence on cross-examination ... [as it would] in its case in chief...' Walder v. United States, supra, 347 U.S., at 66, 74 S.Ct., at 356. To avoid this consequence, a defendant will be compelled to forego testifying on his own behalf." United States v. Havens, supra, 100 S.Ct. at 1919.

The final word at this time is Jenkins v. Anderson, 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980). In Jenkins, the defendant took the stand and admitted killing the victim, but

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asserted that he had done so in self-defense. On cross-examination, the prosecution impeached him with his prearrest silence, i.e., his failure to tell his self-defense story prior to his arrest. The Court held that this violated neither the Fifth Amendment nor the Fourteenth Amendment. The Court observed indifferently that a "defendant may decide not to take the witness stand because of the risk of cross-examination. But this is a choice of litigation tactics." Id., 100 S.Ct. 2124.

It has been pointed out above that Havens expanded the use of illegal evidence to instances where the question posed on cross is within the "scope" of the direct. In Jenkins, however, no such relationship is required. Justice Marshall, in dissent, noted that while Harris featured contradictory statements, that in Jenkins "there is only one statement, and a silence which is not necessarily inconsistent with the statement. There is no basis on which to conjure up the spectre of perjury." Id., 100 S.Ct. at 2137.

The point of all this is that before you put your defendant on the stand, be cognizant of not only the obvious pitfalls of impeachment, such as prior felonies and prior inconsistent statements, but also the more subtle areas of impeachment such as that introduced by the prosecution in the cases above. Prepare your client thoroughly so that nothing on direct will open the door even a crack to previously inadmissible evidence. Object vigorously if the prosecution goes beyond the scope of direct and attempts to smuggle in inadmissible evidence under the rubric of "impeachment." Argue that the Agnello rule should have as its exceptions only the cases noted above. Assert that a particular exception will impermissibly impair the exclusionary rule. But most of all, be aware of and alert to the pitfalls at that moment when your client slips into the witness chair.

ERNIE LEWIS

THEORY OF DEFENSE INSTRUCTIONS AND THEN SOME

I.

Theory of Defense/When Instruction Warranted/Quantity of Evidence needed to obtain Instruction

Fourteenth Amendment due process requires that an accused be able to put before the jury in concrete form his position, his theory of defense against the charges. See Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)

The trial court must instruct the jury on the whole law of the case. RCr 9.54; Trimble v. Commonwealth, Ky., 449 S.W.2d 348 (1969). The court must "instruct on every state of the case reasonably deducible from the evidence." Ragland v. Commonwealth, Ky., 421 S.W.2d 79, 81 (1967). "It is an established rule that in a criminal case the court should instruct the jury upon all phases of the defense of the accused." Cox v. Commonwealth, Ky., 132 S.W.2d 739, 741 (1939).

Under present case law, a theory of defense which is the converse of the charged offense is not required to be given in this Commonwealth. Stafford v. Commonwealth, Ky., 490 S.W.2d 738, 741 (1973). However, when an accused "admits facts constituting an offense but interposes a legal excuse exonerating him from criminal intent, instructions should submit the excuse to the jury in concrete form." Cooley v. Commonwealth, Ky., 459 S.W.2d 89, 91 (1970).

The defendant bears the burden of introducing the required level of evidence to warrant an instruction on a defense:

> The Kentucky Penal Code codifies or reenacts several "defenses." The only significant

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> difference between these defenses and a simple denial by the defendant that he committed one or more of the essential elements of the crime is that when the defense is raised it requires an instruction calling it to the attention of the jury. A defense is so raised by the presentation of evidence that could justify a reasonable doubt of the defendant's guilt. The sufficiency of the evidence to accomplish that purpose is a question of law for the courts to determine on a case by case basis.
> Jewell v. Commonwealth, Ky., 549 S.W.2d 807, 812 (1977) (emphasis added).

"Once there is evidence sufficient to create a doubt, yes - then the state has the burden of proof and there must be an instruction so casting it." Brown v. Commonwealth, Ky., 555 S.W.2d 252, 257 (1977).

Other terminology (more favorable to the defense position) for what quantity of evidence is necessary to warrant an instruction has been used by the Kentucky Supreme Court. In Martin v. Commonwealth, Ky., 571 S.W.2d 613 (1978) the court held that an instruction is justified when there is "evidence warranting an inference" of a finding for the instruction. Id. at 615.

It can also be argued that the court, in assessing the evidence necessary to obtain an instruction, must view it in the light most favorable to the defendant. See Cooper v. Commonwealth, Ky., 569 S.W.2d 668, 671 (1978).

At the request of the defendant, the court must give instructions on as many defenses as are raised, even if inconsistent. See Pace v. Commonwealth, Ky., 561 S.W.2d 664, 666-67 (1978) (accident and self-defense); State v. Green, 511 S.W.2d 867, 874 (Mo. 1974).

As usual, the case law of other jurisdictions is generally more favorable in this area than Kentucky case law.

It is reversible error for a trial court to fail to adequately present a criminal defendant's theory of defense. United States v. Garner, 529 F.2d 962, 970 (6th Cir. 1976); United States v. Blane, 375 F.2d 249, 252 (6th Cir. 1967); United States v. Vole, 435 F.2d 774, 776 (7th Cir. 1970). "Even when the supporting evidence is weak or of doubtful credibility its presence requires an instruction on the theory of defense." Garner at 970; United States v. Hillsman, 522 F.2d 454, 459 (7th Cir. 1975); United States v. Swallow, 511 F.2d 514, 523 (10th Cir. 1975). In fact, "a defendant is entitled to an instruction on his theory of the case when properly requested by counsel and when the theory is supported by any evidence." United States v. Mathis, 535 F.2d 1303, 1305 (D.C. Cir. 1976); see also 75 Am. Jur.2d Trial Section 727 (1974).

"The judge must, therefore, be cautious and unparsimonious in presenting to the jury all the possible defenses which the jury may choose to believe." Strauss v. United States, 376 F.2d 416, 419 (5th Cir. 1967). "This is true even if the defense is fragile. A defendant cannot be shortchanged nor his jury trial truncated by a failure to charge." Id. If you don't convince the trial judge to instruct on your theory, argue about it on appeal and argue about your theory in your closing argument. Gall v. Commonwealth, 607 S.W.2d 97 (1980) clearly allows defense counsel to talk about legal principles even though an instruction on such a principle is prohibited.

II.

Some Kentucky Penal Code Defenses

The Kentucky penal code sets out numerous defenses: intoxication, insanity, self-defense, entrapment, renunciation, assault under

(Continued, Page 17)

extreme emotional disturbance, and causation. These defenses are in some cases merely a codification of prior case law, and in other cases clear breaks from previous court decisions.

III.

Lesser Included Offenses

Lesser included offenses are in the nature of a defense. As stated in Brown v. Commonwealth, Ky., 555 S.W.2d 252 (1977),

> Likewise, it was further explained in Isaacs v. Commonwealth, Ky., 553 S.W.2d 843 (1977), that in order to call for an instruction on a lower degree of or lesser included offense within the crime charged, there must be something in the evidence reasonably sufficient to justify a doubt based on the theory that the crime committed was of a lower degree or lesser culpability. Whether one is referring to one of these affirmative "defenses" or to a lesser offense, the evidentiary situation and burden of proof are the same. Evidence suggesting that a defendant was guilty of a lesser offense is, in fact and in principle, a defense against the higher charge, though it is not a "defense" within the technical meaning of that term as used in the Kentucky Penal Code, cf. KRS 500.070.
> Id. at 257.

The Supreme Court of the United States has held that "so long as there [is] some evidence relevant to the issue of [the lesser included crime], the credibility and force of such evidence must be for the jury, and cannot be a matter of law for the decision of the court" Stevenson v. United States, 162 U.S. 313, 315, 16 S.Ct. 839 (1896). The failure to give lesser included instructions, where warranted, may be violative of the due process clause. Keebler v. United States, 412 U.S. 205, 213, 93 S.Ct. 1993, 1998 (1973); Hand v. State, Fla., 199 So.2d 100, 102, 103 (1967); People v. St. Martin 83 Cal.Rptr. 166, 463 P.2d 390, 394 (1970). See also State v. Clark, 214 Kan. 293, 521 P.2d 298, 302-303 (1974) for the proposition that the failure to give a lesser included instruction where warranted by the evidence deprives a defendant of his right to trial by jury and denies that defendant his right to present a defense.

Of course, the defense attorney can utilize these cases and concepts to urge the judge to either instruct or refrain from instructing on lesser included offenses. Counsel's decision will turn on his "on the scene" assessment of the evidence, and the benefits to be gained or lost by such instructions.

> What is important for him to decide is whether he wants a particular lesser included offense or any lesser included offenses submitted. The considerations are complex, but boil down basically to the question of whether counsel wants to give the jury a compromise position. A jury faced with the alternatives of convicting on a serious crime or of acquitting may acquit, particularly if (a) the evidence is close, or (b) the defendant is a sympathetic fellow, or (c) there are extenuating circumstances, or (d) the penalty for the offense charged seems incommensurately harsh. Given the option of conviction on a lesser charge, the jury may accept the lesser conviction. If counsel senses that the jury is divided and that the stronger jurors favor the defense, he may well want to have the jury decide guilt or innocence of the offense charged on an all-or-nothing basis. Amsterdam, Trial Manual for the Defense of Criminal Cases, Section 438 (1977).

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IV.

Some Non Penal Code Defenses

There are innumerable defenses which are not listed in the penal code. They are all available to the defendant in an effort to defend himself. A few of these defenses are: Alibi (you will want to call it physical impossibility or presence elsewhere), mistaken I.D., informant, addict informant, accomplice, mutual affray, diminished capacity, being framed, consent, accident, surprise, innocent dupe, good faith.

V.

Appellate Protection

The "erroneous refusal of the trial court to give requested instructions is a fertile field for error and reversal; and although it is not counsel's job to 'plant' error, it is decisively his job to press every legitimate legal claim his client has, and to insist that the client not be convicted except at a trial at which those claims have been rightly decided."
Amsterdam, supra, at Section 440.

VI.

Integration of Theory of Defense Into Entire Case

The theory of the defense of your client must be developed throughout the entire case. It must be consistently and positively inserted into each stage of the proceeding: your investigation, pretrial motions, voir dire, opening statement, direct, cross-examination, closing argument, and instructions.

VII.

Sample Instructions

In order to be complete, your theory of defense instruction must be particularized and enfleshed with the facts of your specific case to make your client's position real and forceful. An example of a theory of defense instruction:

> The defendant's theory of this case is that the tests performed by the Commonwealth's chemist are not specific for heroin and that other substances which are not heroin will give identical results. If his theory of the case and the evidence offered by him create a reasonable doubt in your mind as to the identity of the substance, you might find the defendant not guilty.

VIII.

Want More?

If you would like to see other sample instructions, or obtain a 33 page handout going into greater detail on this topic, contact the Local Assistance Branch attorney for your county or the Librarian at the Frankfort Office.

ED MONAHAN

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ETHICS: QUANDARIES & QUAGMIRES

By: Vince Aprile

Query: Is it ethically required that a criminal defense attorney advise a prospective witness, either during an interview or prior to trial, concerning the possibility of self-incrimination and the witness's need for an attorney?

"It is not necessary for the [defense] lawyer or the lawyer's investigator, in interviewing a prospective witness, to caution the witness concerning possible self-incrimination and the need for counsel." I ABA Standards for Criminal Justice (2nd Ed. 1980), The Defense Function, § 4-4.3(b); emphasis added.

"Occasionally a prospective witness gives a statement to the defense that is helpful to the client on whose behalf the statement is obtained but at the cost of possibly incriminating the prospective witness." ABA Standards, The Defense Function, supra, Commentary, § 4-4.3. Nevertheless, "[t]he lawyer's paramount loyalty to his or her own client must govern in this situation." Id.

Originally, paragraph (b) of this standard stated that "it is proper but not mandatory" for a defense lawyer or a defense investigator to caution a prospective witness concerning possible self-incrimination and the need for an attorney. The change in wording "is due to the belief that the giving of such warnings is probably inconsistent with counsel's responsibilites under the adversary system." ABA Standards, The Defense Function, supra, History of Standard, § 4-4.3.

A criminal defense attorney's primary duty is to the client, not to prospective witnesses - regardless of their need for legal assistance. By cautioning a prospective witness concerning possible self-incrimination and the need for counsel, a defense attorney may influence some witnesses to refrain from speaking with the defense. Gratuitous advice of this nature and its expectable result run counter to defense counsel's duty "to seek the lawful objectives of his client." See ABA, Code of Professional Responsibility DR 7-101(A)(1).

As long as the witness is neither misled nor deceived, the interest of the client seeking the statement must govern the attorney and the investigator. See New York County Lawyers' Association Committee on Professional Ethics, Opinion No. 307 (1933).

Conversely, it is ethically proper for a defense attorney to warn a witness for the prosecution that his or her testimony might incriminate the witness even though the warning is done for the purpose of discouraging the witness from testifying. ABA Committee on Professional Ethics, Informal Opinion No. 572 (1962), cited approvingly in ABA Standards, The Defense Function, supra, Commentary, § 4-4.3.

Defense counsel should be aware that the prosecutor's ethical obligations in comparable situations are quite different. "Whenever a prosecutor knows or has reason to believe that the conduct of a witness to be interviewed may be the subject of a criminal prosecution, the prosecutor or the prosecutor's investigator should advise the witness concerning possible self-incrimination and the possible need for counsel." I ABA Standards for Criminal Justice (2nd Ed. 1980), The Prosecution Function, § 3-3.2(b); emphasis added.

Obviously, prosecutors and their investigators are constitutionally required to warn witnesses of the right to a lawyer and to remain silent if the circumstances of the questioning constitute custodial interrogation. Miranda v. Arizona, 384 U.S. 436 (1966). However, this prosecutorial standard addresses "situations where custodial interrogation is not present." ABA Standards, The Prosecution Function, supra, Commentary, § 3-3.2.

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and submit fee claims to the Office for Public Advocacy, Frankfort, after approval by the local circuit judge.

The major goal of the Office for Public Advocacy's Full Service Plan is to structure and bring into regional systems the allotment counties and assigned counsel counties.

The major problem facing the Kentucky Public Advocacy System is lack of adequate funding to provide the kind of services needed to meet the ever increasing caseloads.

Along with the funding problems, the system has also faced organizational and management problems arising out of the fact that it is mostly a volunteer system with local attorneys and local counties free to opt out at their pleasure.

The essence of the Full Service Plan, said Farley, is to structure the defender services delivery system and provide a regional mechanism for delivery of services, one that can be relied upon to meet whatever caseload problem might arise.

Each region must be served by a central administrative hub, most likely a county seat town in an urban county, which will serve as the center of activities for providing public advocacy services in the host county as well as surrounding counties. Where travel and communications permit, salaried attorneys in cooperation with local courts will attempt to provide full-time services to as many counties as can be feasibly included in each regional system.

Multiple defendant and conflict cases and cases originating in the most rural counties will continue to be served by panels of local attorneys serving on a case-by-case basis.

One of the novel aspects of the Full Service Plan, said Farley, is to place the responsibility for the salaried defenders as well as the local volunteer panels under the same administrative head in each of the regional offices. As far we can determine, said Farley, this has not been done before. It should provide for the maximum effective utilization of very limited resources throughout the Commonwealth, concluded Farley.

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