A BI-MONTHLY PUBLICATION of the DEPARTMENT of PUBLIC ADVOCACY VOLUME 11 NUMBER 4

THE ADVOCATE

ADVOCACY ROOTED IN JUSTICE JUNE, 1989

Public Defenders Work for Minimum Wage in Harrison, Pendleton, Robertson, & Nicholas Counties

L. Stanley Chauvin , Jr. - *Pro Bono Publico*

P. Joseph Clarke on Capital Trial Defense

Section 1983 Actions

Incompetency and the Mentally Retarded

Public Advocacy Commission

Criminal Defense Attorneys Expand the Concept of Judicial Recusals

FROM THE EDITOR:

In a magnificent article in our February, 1989 issue, the Chief Justice enlightened us on the practice of KRS 26A.020 recusals. We present further information on the many situations that require judges to disqualify themselves.

Incompetency is a difficult area. As criminal defense lawyers, we often have failed to do a good job of communicating the incompetency of our clients to the court. Incompetency of the mentally retarded is even more complicated. However, a good instrument is being developed to increase the ability to assess when a mentally retarded person is not competent to stand trial. That work is shared with us.

The defense of DUI cases continues to challenge us in an ever increasingly hostile social environment. Ways to insure our clients are fully defended from unfair conclusions and convictions are explored in this issue.

In interviews with P. Joseph Clarke, Jr. and David Doan we continue to explore the immense toll capital defense work has on us and the enormous underfunding of our public defender work in Kentucky.

This issue we begin a 3 part series on *pro bono* work. The President-Elect of the ABA urges us to commit ourselves to help the poor and those in need. Improper action by a law enforcer often leaves a criminal conviction unchanged, but there are civil consequences. Sec. 1983 law provides some reparation, as Jerome Wallace tells us.

The Advocate

The Advocate is a bi-monthly publication of the Department of Public Advocacy, an agency within the Public Protection and Regulation Cabinet. Opinions expressed in articles are those of the authors and do not necessarily represent the views of DPA. *The Advocate* welcomes correspondence on subjects treated in it.

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IN THIS ISSUE

THE ADVOCATE FEATURES

Pendleton, Robertson, Harrison, Nicholas Public Defender System

How many attorneys are in your system?

There are now 3 attorneys in this system:

David W. Doan, 211 West Shelby Street, Falmouth, Kentucky 41040;

Michael D. Triplett, 102 E. 8th Street, Covington, Kentucky 41011;

Elizabeth Davenport, 103 West Main Street, Carlisle, Kentucky 40311

What counties does your system cover?

Pendleton, Robertson, Harrison and Nicholas

What was your system's caseload for January 1, 1988 through December 31, 1988?

Misdemeanors	112
Felonies	151
Juvenile	14
Other	84
Total	361

How many cases did your system's attorneys try during 1988?

Approximately 30% of the 361 handled.

How many capital cases did the system handle in 1988?

One capital case.

How many indigent felonies/misdemeanors does an attorney in your system on the average handle?

Approximately 15 per month.

How much are your system's attorneys paid for public defender cases?

This amount would vary from 20-45% of the amount billed. We prorate each quarter. We bill at an hourly rate of $25.00 out of court and $35.00 in court. After we prorate based on our available funds, we have paid as low as $5.00 per hour out of court and $7.00 per hour in court.

David Doan
Public Defender Administrator

Do you feel that all of your clients are fully and fairly represented under the circumstances?

I do not feel they are fully and adequately represented as I feel the system is too crowded and there are too few attorneys willing to help out in this matter, therefore, leaving a shortage of time to spend with each client. Additional attorneys would be an excellent answer, however, funds do not seem to be available for the same.

What have been the biggest successes of your system in the last year?

The biggest successes we have had recently is upgrading our pretrial meeting in the court system. We have tried to utilize the pretrial system to determine if the case has merit to go forward or if a plea needs to be entered.

What are the biggest problems your system faces?

The biggest problem we face is there is simply a shortage of time, shortage of attorneys, shortage of funds. We cannot properly run a system that pays attorneys as little as $5-7 per hour, an amount that does not even meet overhead. Every case we do is virtually done *pro bono*. Indigents deserve a vigorous defense by someone who is compensated adequately.

How do your resources compare to the Commonwealth's resources?

The Commonwealth has over 3 times the financial resources that we have. They have a huge investigative advantage over us. In fairness, our funding should be more in line with the prosecution's. Resources influence results.

How much more money do you need to do the job adequately?

Our program receives approximately $7000 per quarter and we feel to adequately represent the clients in the manner that they really should be represented, it would take approximately twice that amount. That would still leave us funded well below the Commonwealth.

What 3 legislative changes would you like to see made in the 1990 Legislature?

1. The first priority has to be

Outrageous Inconsistency

Through February, 1989, the University of Kentucky spent $330,000 on legal expenses for its internal basketball probe. Due to the importance of the matters involved, the University has hired one of Kentucky's leading attorneys at considerable expense. The University's attorney, James Park, Jr., of Brown, Todd and Heyburn charged $158 per hour.

UK paid about $10,900 for an attorney, Jennifer Coffman, to represent 2 recruits during their questioning last year by NCAA investigators, $10,000 to represent Shawn Kemp and $900 for Sean Woods.

increased funding.
2. Truth-in-sentencing has to be reformed or PFO status eliminated.
3. Increase felony theft to $500.

Any other thoughts?

It seems that the attorneys could be far more productive if we could have an increase in attorneys as well as an increase in pay. Realizing that is probably the ultimate that everyone is looking for at this particular time, I can see of no way of trimming corners anymore or cutting back on any other time. The pay public defenders receive is just not adequate to continue covering their expenses as far as travel and office expenses. The attorneys would be at least productive I feel if even a slight increase in funds could be added to the program. It is a problem, however, with contract counties but I feel this can be dissolved with education of the county officials on the particular problems we are having with the Public Defender Program.

David Doan is a 1986 graduate of the Capital University School of Law in Columbus, Ohio. He practices law in Falmouth, Pendleton County, Kentucky. He became the public defender administrator of the Pendleton, Robertson, Harrison, Nicholas system on July 1, 1988. He took over from David Melcher who administered the system from 1983 to 1988.

PD Jobs Available

West Virginia Public Defender Services (PDS) will hire 20-25 attorneys between June 1 and September 1, 1989. Some positions require no trial experience; others substantial trial and administrative experience. Must be member of WV State Bar or eligible for admission.

Minimum starting salary for Assistant P.D.: **$28,500-$38,500**, depending on experience. Minimum for Managing Defender (requires 3 years trial and adminstrative experience): **$42,500.**

Places of employment, several areas of the State of West Virginia. Send resume, references and a writing sample to :

John Rogers
Director of Legal Administration,
Public Defender Services
1800 Washington St. E. Rm. 330
Charleston, WV 25305

PDS is an Equal Opportunity Employer.

Attorneys Leave DPA

Since August, 1988 13 attorneys have left DPA with a combined total of service and experience to DPA of 74 years.

EQUAL JUSTICE ?

To defend its sports improprieties, the University of Kentucky pays its attorney $158 per hour. The state pays up to $75 per hour when it enters into a personal service contract. Yet public defenders in 7 Northern Kentucky Counties receive but $5.00-$18.75 per hour to represent indigent citizens accused of crimes.

So far $330,000 has been spent to represent UK, that is twice the amount spent on 3700 indigent criminal cases in 7 Northern Kentucky Counties.

A full-time Kentucky public defender starts at $14-$16,608, while lawyers working as law clerks to Kentucky appellate judges start at $19,512 -$21,504. Even a Kentucky State Police Trooper starts at $18,058. A registered nurse working for the state starts at $25,680.

Kentucky ranks 47th nationally in money allocated for public defender services.

These inequities are gross. They make a mockery of our resolve to insure equal justice.

Resources for Prosecution, and Public Defenders

Counties	Prosecution	Defense	Defense % of Prosecution $
1. Kenton, Boone, Gallatin	$402,971	$153,656	38%
2. Harrison,Pendleton, Robertson, Nicholas	$ 84,650	$ 28,460	34%
TOTAL	**$487,621**	**$182,116**	**37%**

Hourly Public Defender Rates After Prorating

Public Defender System	Hourly Rates In-Court	Out of Court
1. Kenton, Boone, Gallatin	$18.75	$11.25
2. Harrison, Pendleton, Robertson, Nicholas	$ 7.00	$ 5.00

Public Defender Money Allocated per Case, Kentucky, Nationally

Public Defender System	Amount
1. Kenton, Boone, Gallatin	$45.25
2. Harrison, Nicholas, Pendleton, Robertson	$78.83

States	Rank in Nation	Amount
New Jersey	1	$540
Alaska	2	$468
Wyoming	3	$431
Montana	4	$413
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Kentucky	**47**	**$118**
Virginia	48	$116

Equality for the Poor Unattained

Overall, there is abundant evidence... that defense services for the poor are inadequately funded. As a result, millions of persons in the United States who have a constitutional right to (assistance) are denied effective legal representation....There also are intangible costs, as our nation's goal of equal treatment for the accused, whether wealthy or poor remains unattained.

N. Lefstein, *Criminal Defense Services for the Poor: Methods and Programs for Providing Legal Representation and the Need for Adequate Financing* (1982) at 2.

Covington Teachers Receive 6.4% Pay Raise

Covington teachers will receive a 6.4 % salary increases next year.

The Covington Board of Education voted 4-1 to approve a pay scale that boosts a beginning teacher's salary to $17,200. Last year, a beginning teacher with no experience received $16,442.

Superintendent Don Hunter said the increase was (the) best the school district could offer. Last year, teachers received pay increases that averaged 3.9%. Fran Schulz, president of the Covington Teachers Association, said she was disappointed. "I think the Board is worried because in the last 2 years there has been a large turnover in teachers," she said. "I'm not pleased, but the board is starting to do something." The State this year has provided for a 5% increase.

Board member Pam Mullins said that she would like to find more money to make Covington salaries comparable to the Cincinnati schools. A beginning teacher in Cincinnati public school receives $19,345. A teacher with a master's degree and 10 years of experience receives $32,605. In Covington, the same teacher would receive $24,500.

"My personal feeling is that it is time for the public to decide if a tax increase is warranted," Ms. Mullins said. "No one wants more (property) taxes, but perhaps a utility tax. I want to look at alternatives that will raise the money."

The Kentucky Post, April 14, 1989.

Hourly Rates For Other Legal Work in KY

	Hourly Rates
1.UK NCAA Investigation	$158
2. **Finance Cabinet Personal Service Contract Review Committee** (per Maximum Rate Schedule)	
A. Individual Attorney	$40
B. Firm Attorneys	$75 partner /principal
3. Federal Court Cases	$40-$75

Northern Kentucky University get 7% Wage Hike

The Northern Ky. University Board of Regents trying to keep teachers from leaving has approved a 7% salary increase that would more than double the 3% raise faculty received last year.

The average salary for a full professor at Northern this school year was $40,476. Last year the average salary for a full professor at the University of Cincinnati was $53,100. Last year, President Leon Boothe told the regents that Northern was losing faculty and staff because of the salary differential.

Boothe, who now makes $84,000 a year, received a 7% raise too.

The Kentucky Post.

Starting Salaries in Kentucky

Title	Salary	Education
Registered Nurse	$25,680	licensed
Supreme Court Law Clerk	$21,504	
Court of Appeals Law Clerk	$19,512	
KY State Trooper	$18,058	
Fruit and Vegetable Grader	$17,496	high school
Senior Park Chef	$16,608	high school
Senior Photographer	$16,608	high school
Highway County Crew Foreman	$16,608	read /write
Public Defender	**$14,-16,608**	Law school
Other Kentucky Professionals		
Legal Aid Attorney	$16,500	Law School
Teacher (Kenton Co.)(BA)	$17,200	Certificate

30% Raise 'Urgent' for Judges, Rehnquist says.

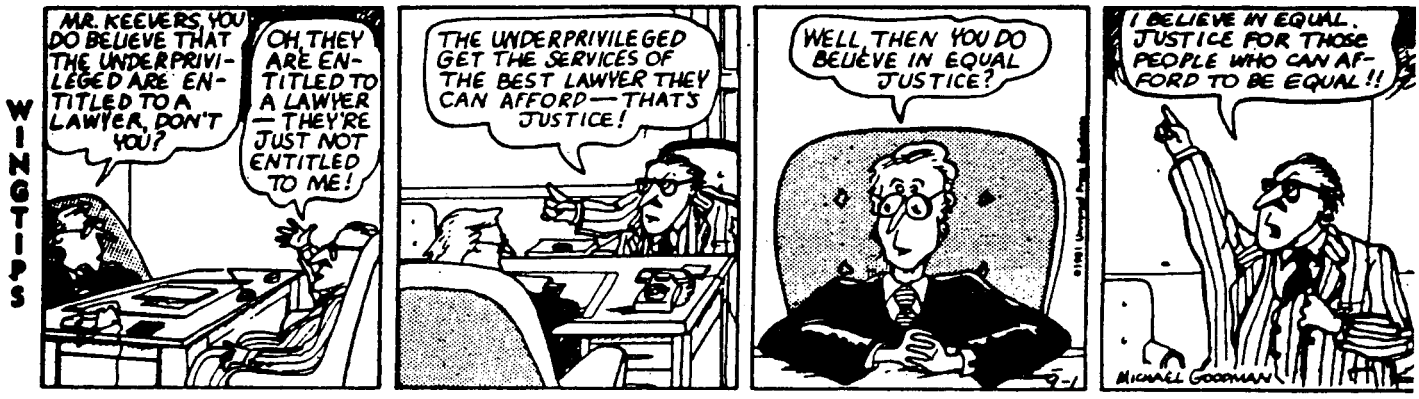
Chief Justice William H. Rehnquist held a televised news conference at the Supreme Court March 15, 1989 to seek public and congressional support for an " urgent" 30% pay raise for federal judges.

According to Supreme Court officials, it was the first news conference any Supreme Court justice has ever held at the court to discuss any subject other than his own imminent retirement.

Rehnquist said he was speaking as chairman of the Judicial Conference of the United States, the federal court's policy-making body.

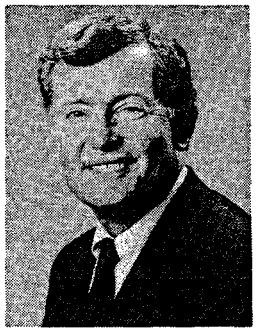
The new proposal would increase the salaries of the 576 federal district judges from $89,500 to $116,350, of the 168 court of appeals judges from $95,00 to $123,5000, and of the Supreme Court's 8 associate justices from $110,000 to $143,000. The chief justice's salary would rise from $115,000 to $149,500.

Lexington Herald-Leader, March 16,1989.



CAPITAL TRIAL DEFENSE

Written Interview with P. Joseph Clarke, Jr.



P. Joseph Clarke, Jr.

You are a prominent Kentucky criminal defense attorney who has defended capital clients. How were you and are you affected by your client being sentenced to death?

I am not sure that you can explain to someone who hasn't experienced it, what you go through after an unsuccessful defense of a capital case. This has happened to me once in 30 years of trying cases. It was a case I thought I could win, *i.e.* acquittal. I defended the case on that basis. When the ultimate penalty is imposed, you agonize about whether your tactics should have been directed toward saving his life. Even in retrospect, given what I had to work with I'm not sure that I would change much of the strategy. You certainly wake up in the middle of the night wondering what you might have done differently. My client would have to speak to the effect on him.

Often victims of serious crimes, especially the family of victims of captial murder, have harsh feelings toward defense lawyers who fight hard for their capital client. What are your reflections about that experience?

This sort of thing happens to any attorney who takes on unpopular causes even when the death penalty is not involved. It is certainly not enjoyable, but it goes with the territory.

What are the hardest aspects of defending capital clients?

Inadequate time and resources to work with. When the stakes are so high, you feel compelled to do everything possible to present the best defense. This can be difficult if not impossible.

Why have you been willing to take on the immense responsibility of defending a capital client?

I'm a lawyer. It's my job. It's what I have been trained and committed to do. In the case in which the death penalty was imposed I had known the defendant and his family for many years.

Having gone through the extraordinary process of a capital trial, do you feel the death penalty serves a useful purpose in our criminal justice sysytem?

No. The only possible rational excuse for the death penalty is that it acts as a deterrent. There is no evidence that I am aware of that the death penalty is in any way a deterrent to crime.

What kind of money and resources does it take to fully defend a capital client in Kentucky?

Very substantial. It is impossible for the lawyer alone unless he is independently wealthy and willing to finance the defense himself to do all the investigative work that is needed. The exact amount would depend on the nature of the case.

The Department of Public Advocacy has been able to pay attorneys handling capital cases only $2500, the lowest attorney fee in the nation for a capital defense. Is that enough for an appointed lawyer in Kentucky to do an adequate job?

That is not even a token amount to undertake a capital case.

Seven of Kentucky's death row inmates had criminal lawyers represent them who are now in prison, disbarred, or disciplined by the bar, or left the profession before being disbarred. Can the ultimate decision survive that kind of representation?

That is obviously one of the many arguments against capital punishment.

Do you think capital punishment for drug dealers will have any influence on the drug problem in Kentucky?

I have not been able to find any evidence that capital punishment has a real deterrent effect in any case. It only satisfies the public demand for vengeance.

Any other thoughts?

The responsibility of defending a case of this kind is overwhelming. The pressures before and after a verdict are substantial. It is no wonder that burnout occurs with lawyers doing this on a frequent basis.

P. JOSEPH CLARKE, Jr.
Clarke and Clarke
120 N. 3rd St.
Danville, KY 40422
(606) 236-2240

P. Joseph Clarke, Jr. has represented criminal defendants in the central Kentucky area for the last 30 years. He is the state representative for the 54th district that includes Boyle and Lincoln counties. He has been the Chairman of the House of Representatives' Appropriations and Revenue Committee since 1970. He is a Kentucky Association of Criminal Defense Lawyers Board Member. Joe represented Frank Tamme who was sentenced to death in 1985 in Washington County. Mr. Tamme's conviction and sentence were reversed by the Kentucky Supreme Court on Sept. 8, 1988.

CAPITAL COMPENSATION

Unreasonably low fees not only deny the defendant the right to effective representation.... They also place an unfair burden on skilled criminal defense lawyers, especially those skilled in the highly specialized capital area. These attorneys are forced to work for next to nothing after assuming the responsibility of representing someone who faces a possible sentence of death. Failure to provide appropriate compensation discourages experienced criminal defense practitioners from accepting assignments in capital cases (which require counsel to expend substantial amounts of time and effort).

NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases, Standard 10.1 Compensation (November 16, 1988) at 51.

PUBLIC ADVOCACY COMMISSION

In 1972 the General Assembly enacted legislation to create a statewide public defender system in response to the litigation that originated in Campbell County challenging the requirement that a lawyer had to represent an indigent criminal defendant *pro bono*. See *Bradshaw v. Ball*, 487 S.W. 2d 294 (Ky. 1972).

KRS Chapter 31 set up a statewide public defender system whose funding was shared by county fiscal courts and the state, with the ultimate responsibility on the fiscal court for any money shortfalls. When established, the public defender's office was within the Justice Cabinet. Its first head was Tony Wilhoit.

In 1982 the General Assembly enacted legislation, KRS 31.015, that created a Public Advocacy Commission. The Department of Public Advocacy became part of the Public Protection and Regulation Cabinet in 1982.

The Public Advocacy Commission reviews and adopts an annual budget for the Department of Public Advocacy and provides support for budgetary requests to the legislature. Upon a vacancy of the Public Advocate position, the Commission recommends 3 attorneys to the Governor for appointment as Public Advocate.

The Commission is charged with insuring the independence of the Department of Public Advocacy.

It is a 12 person Commission. Each person serves a 4 year term. It is currently composed of:

Law School Deans or Designee (3 Positions)

Kathleen Bean- Appointed January 19, 1988. Her term expires July 15, 1990. Kathleen has been an Associate Professor of Law, University of Louisville School of Law since 1987. She is a 1978 graduate of Drake University Law School. Kathleen has been on the Louisville Legal Aid Society Board of Directors since 1987. She replaced Dean Barbara Lewis on the Commission.

William H. Fortune- Appointed July 15, 1984 . Term expires July 15, 1989. Bill has been a Professor at the University of Kentucky School of Law since 1981. He worked as a federal public defender for the Eastern District of Kentucky, Lexington from 1977-1979. He replaced Robert Lawson on the Commission.

William R. Jones- Current Chair of the DPA Commission. Appointed July 15, 1982. Reappointed March 4, 1985 and September 13, 1988 . His term expires July 15, 1992. Former Dean (1980-1985) of Chase School of Law. He received his J.D. from the University of Kentucky in 1968, and his L.L.M. from the University of Michigan in 1970. He is currently a Professor at Chase Law School.

Governor's Appointment From KBA Recommendations (2 Positions)

Robert W. Carran- Appointed February 29, 1985. His term expires July 15, 1989. Appointed by Governor Collins from KBA list. Bob is the administrator of the Northern Kentucky Public Defender System serving Boone, Gallatin and Kenton Counties out of offices located at 314 Greenup St., Covington, Kentucky. He is a 1969 graduate of Chase Law School. He replaced Henry Hughes on the Commission.

Allen W. Holbrook- Appointed May 23, 1986 by Governor Collins from KBA list. His term expires July 15, 1990. Allen is with the firm of Holbrook, Gary, Wimble and Sullivan, 100 Ann St., Owensboro, Kentucky. Prior to private practice, he worked as both an appellate lawyer in Frankfort and trial lawyer in Morehead with DPA, and served as a federal public defender for the Eastern District of Kentucky, Lexington. He replaced Max Smith on the Commission.

Kentucky Supreme Court-Appointments (2 Positions)

Susan Stokley-Clary- Appointed June 26, 1985 by the Court of Justice. Her term expires July 15, 1989. Susan is the Supreme Court Administrator, and serves as General Counsel for the Supreme Court of Kentucky. She is a 1981 graduate of the University of Kentucky School of Law. She replaced Frank Heft on the Commission.

Margaret H. Kannensohn- Appointed May 25, 1988 by the Court of Justice. Her term expires July 15, 1990. Ms. Kannensohn received her J.D. from the University of Kentucky in 1978. She is in private practice at 201 West Short St., Lexington, Ky. She was a Fayette County Legal Aid Attorney 1979-81. She replaced Nora McCormick on the Commission.

Governor's Appointment From Protection and Advocacy Advisory Board Recommendations (1 Position)

Denise Keene- Appointed May 16, 1989 by Governor Wilkinson. She is an Accountant and is active in the Ky.

Commission Chairs and Their Terms as Chairs

Anthony M. Wilhoit from September 29, 1982 to October 28, 1983.

Max Smith from October 28, 1983 to January 6, 1986.

Paula M. Raines from March 21, 1986 to June 10, 1986.

William R. Jones from July 15, 1982 to present.

Association for Retarded Citizens.. Her term will expire on July 15, 1989. She replaced Helen Cleavinger who served on the Commission August 1987 - May 1988.

Governor's Appointments (2 Positions)

Gary D. Payne- Appointed May 16, 1989 by Governor Wallace Wilkinson. His term expires July 15, 1990. Mr. Payne is a Lexington District Judge.He was an assistant Fayette Co. Attorney and lawyer for the Corrections Cabinet. He replaced Jesse Crenshaw on the Commission.

Patsy McClure- Appointed February 20, 1986 by Governor Collins. Her term expires July 15, 1989. Ms. McClure is a private citizen in Boyle County, Kentucky. She replaced James Park on the Commission.

Speaker of the House Appointment (1 Position)

Lambert Hehl, Jr. Appointed June 28, 1982 by the Speaker of the House. Reappointed July 14, 1986 by Governor Collins. His term expires July 15, 1990. He has been a Campbell Co. District Judge since 1984. He is a 1951 graduate of the Chase School of Law.

President *Pro Tem* of the Senate (1 Position)

Currie Milliken- Appointed by Joe Prather, his term expires July 15, 1990. He is a senior partner in the Milliken Law Firm, 426 E. Main Street, Bowling Green. He received his J.D. from the University of Kentucky in 1964. He served as Mayor of Smiths Grove from 1982-85. He replaced Lee Huddleston on the Commission.

Former DPA Commission Members

Kentucky Supreme Court Appointments

J. Calvin Aker, Kentucky Supreme Court Justice - July, 1982-February, 1983.
Frank W. Heft, Louisville Public Defender - February, 1983-July, 1985.
Paula M. Raines, Lexington Criminal Defense Attorney - January, 1984-June, 1986.
Anthony M. Wilhoit, Kentucky Court of Appeals Judge - July, 1982-October, 1983.

Governor's Appointments

Helen Cleavinger- August, 1982-May, 1988. Appointed by Governor Brown.
Jesse Crenshaw- Lexington Criminal defense Attorney- August, 1982-July, 1986. Appointed by Governor Brown.
Lee Huddleston- July, 1986-August, 1988. Appointed by Governor Collins.
Henry Hughes- August, 1982-July, 1985. Appointed by Governor Brown.
Nora McCormick- Paris Criminal Defense Attorney- July, 1986-April, 1988. Appointed by Governor Collins.
James Park, Jr.- Kentucky Court of Appeals Judge- August, 1982-July, 1985. Appointed by Governor Brown.
Max Smith- Frankfort Criminal Defense Attorney- March, 1983- January, 1986. Appointed by Governor Brown.
Paul G. Tobin- Louisville Public Defender- August, 1982-December, 1982. Appointed by Governor Brown.

Law School Deans or Designees

Robert G. Lawson- July, 1982- June, 1984.
Barabara B. Lewis- July, 1982- January, 1988.

President *Pro Tem* of the Senate Appointment

William E. Rummage- July, 1982- July, 1984. Appointed by *Pro Tem* of Senate, Joe Prather. He was reappointed on September 25, 1984.

Chapter 31 Department of Public Advocacy

31.015 Public advocacy commission; members; terms; compensation; duties

(1) The public advocacy commission shall consist of the following members, none of whom shall be a prosecutor or law enforcement official, who shall serve terms of four (4) years, except the initial terms shall be established as hereafter provided:

(a) Two (2) members appointed by the governor;
(b) One (1) member appointed by the speaker of the house of representatives;
(c) One (1) member appointed by the president pro tem of the senate;
(d) Two (2) members appointed by the Kentucky supreme court.
(e) Two (2) members, who are licensed to practice law in Kentucky and have substantial experience in the representation of persons accused of crime, appointed by the governor from a list of five (5) persons submitted to him by the board of governors of the Kentucky bar association;
(f) The dean, ex officio, of each of the law schools in Kentucky or his designee; and
(g) One (1) member appointed by the governor from a list of three (3) persons submitted to him by the Kentucky protection and advocacy advisory board.

(2) At the first meeting of the commission, a drawing by lot shall be conducted to determine the length of each original member's term. Initially there shall be four (4) two-year terms, four (4) three-year terms, and four (4) four-year terms. Vacancies in the membership of the commission shall be filled in the same manner as the original appointments.
Appointments to fill vacancies occuring before the expiration of a term shall be for the remainder of the unexpired term.

(3) The commission shall first meet at the call of the governor and thereafter as the commission shall determine on a regular basis, but at least quarterly, and shall be presided over by a chairperson elected by its members for a one year term. A majority of the commission shall constitute a quorum, and decisions shall require the majority vote of those present; provided that, a recommendation to the governor pertaining to the appointment, renewal for the appointment, or removal of the public advocate shall require a majority vote of the commission. Each member of the commission shall have one (1) vote, and voting by proxy shall be prohibited.

(4) The public advocate shall, upon appointment or renewal, be an ex-officio member of the commission without vote, shall serve as secretary of the commission, and shall be entitled to attend and participate in all meetings of the commission except discussions relating to renewal of his term or removal.

(5) Commission members shall serve without compensation but shall be reimbursed for reasonable and necessary expenses incurred while engaging in carrying out the duties of the commission.

(6) The commission shall:

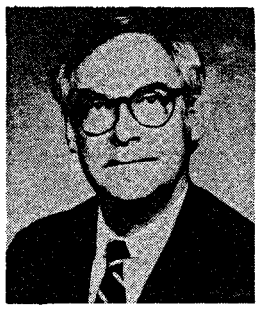
(a) Receive applications, interview and recommend to the governor three (3) attorneys as nominees for appointment as the public advocate;
(b) Assist the public advocate in drawing up procedures for the selection of his staff;
(c) Review the performance of the public advocacy system and provide general supervision of the public advocate;
(d) Assist the office for public advocacy in ensuring its independence through public education regarding the purposes of the public advocacy system; and
(e) Review and adopt an annual budget prepared by the public advocate for the system and provide support for budgetary requests to the general assembly.

(7) In no event shall the commission or its members interfere with the discretion, judgment or advocacy of employees of the office for public advocacy in their handling of individual cases.

History : 1982 c 377 Section 2, eff. 7-15-82

PRO BONO PUBLICO: A CENTURY OF SERVICE

Views of the President-Elect of the ABA



L. Stanley Chauvin Jr.

EQUAL ACCESS

For Law Day USA 1989, the American Bar Association [ABA] selected the theme, *Access to Justice*. Open and equal access to our justice system is a pillar of democracy. Judge Learned Hand, addressing the New York Legal Aid Society in the late 1940's, observed, "If we are to keep our democracy, there must be one commandment: Thou shall not ration justice." Achieving the goal of access to justice is a monumental task. Because of the legal profession's pivotal status within the system of justice, lawyers have a unique responsibility and obligation to make equal access a reality.

For many years the legal profession has realized that despite the best voluntary efforts of individual lawyers and, more recently, federally funded legal services programs, the unmet civil legal needs of the poor are manifold. In 1938, the ABA Special Committee on the Economic Condition of the Bar concluded that there was growing evidence that people in low income groups were going without legal assistance. Since 1980, 25 legal needs studies, 6 conducted on a statewide basis, have documented not only the numbers and types of legal problems encountered by poor households, but the shortcomings of the profession's efforts to meet the need. The studies conclude that less than 20% of the civil legal needs of the poor are currently being served.

In 1980, a legal needs study conducted by the National Social Science and Law Center and the regional legal services program in Western Kentucky found that poor households had 1.4 civil legal problems per year. Extrapolating from poverty statistics, the total yearly legal problems for poor households in the region could exceed 33,000. The federally funded legal services program serving the area currently has resources to meet approximately 15% of the potential need.

PUBLIC SERVIC COMMITMENT

In spite of what appears to be a failure, the legal profession has a long and distinguished tradition of endeavoring to provide equal access to justice. Historically, these efforts have made the transition from individual attorneys acting as a matter of conscience to organized legal aid and *pro bono* programs. This article will trace ancient antecedents of a lawyer's public service responsibility to the parallel development of modern American ethical codes and the growth of legal aid societies. During the modern era of development, the role of the ABA is evident in each of these 2 tracks. A convergence of the tracks occurred in 1981 when events wedded the aspirational character of lawyers' public service responsibility with the reality of serving the unmet needs of the poor. Understanding and building on the history of the profession's commitment to public service will be one of the challenges faced in the 1990's.

THE EARLY DEVELOPMENT

The Latin phrase *pro bono publico*, for the good of the public, identifies the legal profession's public service obligation. The derivation of the obligation has been debated by historians and legal commentators. For a period during early Roman legal history, advocates served without fee, being sustained by distinction and occasional patronage. Because results in the Roman court system were affected by the wealth and power of litigants, no great concern for the poor was evident. In the medieval world, primarily motivated by the development of the Christian faith, a charitable orientation resulted in increased concern for the poor in society and in court systems. Following the Middle Ages, concern for the poor and their ability to participate in the legal systems in Europe began to become institutionalized. A 16th century statute in Milan required that members of the bar provide free services to poor defendants. During the 1700's in Tuscany, a statute made free representation of the poor an obligation of the bar.

ENGLISH TRADITION

As with the American system of laws, the English common law tradition forms the basis for the American legal profession's public service obligation. Although the structure of the early English legal profession is different from that in this country, the genesis of lawyers working for the poor, usually upon appointment of the court, may have started as early as the 14th century with the development of a guild of "sarjeants-at-law." The sarjeants were an elite group of advocates who tried cases before the King's courts. Until the system was abolished in the late 1800's, the sarjeants had a monopoly on practice in the Court of Common Pleas and were in the purest sense considered officers of the court, subject to the order of the court to represent impoverished litigants.

IN THE COLONIES

The development of the lawyer's public service obligation in the colonies and early American states was tempered by both public attitudes toward courts and the relatively non-legal orientation of the newly established judicial systems. Seventeenth century statutes in Massachusetts, Virginia, Connecticut and the Carolinas prohibited paying a lawyer to present a cause before the courts. Courts were understandable to the citizen; the laws were fewer than in modern society; and lawyers were distrusted. Self-representation was considered as not only preferable, but a right of a free people. The Georgia Constitution in 1777, for example, specifically exempted self-representation from unauthorized practice of law statutes.

2 AMERICAN DIRECTIONS

The American development of the lawyer's public service responsibility progressed along 2 tracks: one following the evolution of written ethical codes and

the other the birth and expansion of legal aid societies. The result has been a progression from the view that lawyers should assist the poor as a charitable endeavor to the notion that there has developed a tradition in the profession to insure access to the legal system as an essential component of democracy. The underlying theme of each track rests on the view that all professions have a duty to serve the public. Roscoe Pound, in his seminal work, *The Lawyer from Antiquity to Modern Times*, defined a profession as a group of persons, "pursuing a learned art as a common calling in the spirit of public service - no less a public service because it may incidentally be a means of livelihood."

ETHICAL CODES

The codification of ethical principles for the legal profession in the United States has been traced to lectures by David Hoffman, a Baltimore practitioner, and George Sharwood, a University of Pennsylvania law professor. Sharwood's lectures resulted in a treatise on ethics in 1884. In 1887, Alabama adopted the Canons of Ethics based on the Sharwood treatise. By 1906, 15 states had enacted similar codes.

In 1905, the ABA appointed a study committee which recommended that ethical codes should be adopted by all jurisdictions. In 1908, the ABA promulgated 32 Canons of Ethics which were adopted in almost every state. Canon No. 4 required a lawyer to accept assignments to represent an "indigent prisoner." In 1964, Lewis Powell, then president of the ABA, appointed a committee to evaluate the Canons. The Special Committee on Evaluation of Ethical Standards found, in part, that revision of the Canons was necessary to reflect the changing conditions in the legal system. As a result, the Code of Professional Responsibility was adopted in 1969.

The 1969 Code contained not only "axiomatic norms" for the profession, but Ethical Considerations and Disciplinary Rules. The Ethical Considerations were "aspirational in character and represent the objectives toward which every member of the profession should strive." By contrast, the Disciplinary Rules were mandatory and would establish the minimum acceptable level of conduct. Violation of the Rules could subject a lawyer to sanctions by the appropriate governing authority.

Ethical Considerations [EC] under Canons 2 and 8 of the 1969 Code expanded the embryonic public service obligation formulated in the 1908 Canons. E.C 2-25 provided, in part, that "basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer." E C 2-25 also concluded that "the rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer," thus confirming that a public service obligation was not only a professional tradition, but the obligation was not restricted to representation of indigent prisoners. E C 8-1, 8-2 and 8-3, further reinforced the concept that lawyers had a responsibility to provide free representation to the poor, concluding that such activity was essential to improving the legal system.

Of greater consequence to recent developments in legal aid and organized *pro bono* programs is the final admonition of E C 2-25, which after announcing the obligation of the lawyer to perform free service for those unable to pay, concludes:

> *...(T)he efforts of individual lawyers are often not enough to meet the need. Thus it has been necessary for the profession to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services, and other related programs have been developed, and others will be developed, by the profession. Every lawyer should support all proper efforts to meet this need for legal services.*

Thus, the new Ethical Consideration not only recognized the necessity of organized efforts on behalf of the bar to meet the needs of the poor, but tracked the development of legal aid societies.

In 1975, the ABA House of Delegates enacted a resolution which further defined the public service responsibility of lawyers. The resolution acknowledged that it was the "basic responsibility of each lawyer engaged in the practice of law to provide public interest legal services": either "without fee or at a substantially reduced fee." The resolution set forth 5 areas of law within which a lawyer's public service responsibility could be discharged:

1. poverty law,
2. civil rights law,
3. public rights law,
4. charitable organization representation, and
5. activities which further the administration of justice.

The resolution also charged the organized bar with assisting each lawyer in fulfilling his or her professional responsibility.

Partially in response to the negative public image of the legal profession following the Watergate scandals of the early 1970's, the ABA revisited its ethical prescriptions. In 1977, the Commission on Evaluation of Professional Standards, widely known as the Kutak Commission for its chairman Robert J. Kutak, began a 3 year review of the Code of Professional Responsibility. Although several proposals were the subject of acrimonious debate within the profession, the original draft of the lawyers' public service responsibility requirement drew sharp criticism.

A limited circulation draft of the Kutak Commissions's proposed revision contained a rule requiring 40 hours per year

of *pro bono publico* service or contribution of the financial equivalent. A later discussion draft of the ethical rules released in 1980 deleted the hour requirement, but contained a proposed rule mandating unpaid public interest legal service by all lawyers. The requirement could have been fulfilled by engaging in activities earlier defined in the 1975 House of Delegates resolution. The proposed rule also required each lawyer to file an annual report of the services rendered with the appropriate governing authority. The proposed rule would have abandoned the aspirational nature of the obligation as it was defined in the 1969 Code.

By the time the proposed rules went from the Kutak Commission to the ABA House of Delegates, the mandatory *pro bono* obligation and reporting requirement was deleted. Rule 6.1 of the ABA Model Rules of Professional Conduct reads as follows:

> *A lawyer should render public interest legal service. A lawyer may discharge his responsibility by providing profes-*

sional services at no fee or reduce fee to persons of limited means or to public or charitable groups or organization, by services in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

The ABA's most recent action to further encourage and define the *pro bono* obligation of lawyers was the enactment of a resolution proposed by its Young Lawyers Division at the 1988 Annual Meeting. The resolution, not incorporated in the Rules of Professional Conduct, urges all lawyers to devote no less than 50 hours per year to "*pro bono* and other public service activities that serve those in need or improve the law, the legal system, or the legal profession." Of greater significance is the resolution's urging that law firms attribute *pro bono* hours to billable requirements and that corporate employers give actual work credit for such activities.

LEGAL AID SOCIETIES

As the organized bar in the United States attempted to define a public services requirement in ethical codes, the parallel birth and expansion of legal aid societies and federal funding for legal services also had an impact on the tradition of lawyers' *pro bono* work. In 1876, the German Society of New York incorporated the "Deutscher Rechts-Schutz Verein," which provided, as a matter of charity, legal assistance to immigrants of German birth. The German Society organization ultimately became the Legal Aid Society of New York. The concept of providing legal assistance to the poor through an organized effort soon expanded to other metropolitan areas in the east and midwest. By the start of World War I, 37 cities had some type of organization that served the legal needs of the poor. Throughout the first 2 decades of the 20th century the provisions of services to the poor through an organized program was predominantly viewed as a charitable endeavor funded by community chests, general public contributions, foundation grants and bar associations. While most of the organizations were legal aid societies, governed by independent boards of directors, programs operated out of bar association offices were created in New Orleans, Columbus and Detroit.

During the 1920's, the ABA was instrumental in fostering the continued expansion of legal aid societies. At a convention in St. Louis in 1920, the Special Committee on Legal Aid was created with Charles Evans Hughes as its first chairman. The Special Committee was made a Standing Committee in 1921 with Reginald Heber Smith as its chairman. In 1922, the ABA enacted a resolution urging all state and local bar associations to appoint legal aid committees in order to address local needs. Unfortunately, the response through the Depression was inadequate.

By 1950, 73 cities had legal aid organizations, with 17 of these staffed by volunteers. Although the Ford Foundation funded several neighborhood law offices in the early 1960's, it was not until the "War on Poverty" was initiated by President Lyndon Johnson that federal funding for civil legal services became available and resulted in a substantial increase in the availability of representation for the poor. In 1974, the Congress created the Legal Services Corporation to administer a nationwide system of funding for civil legal services programs for the poor. Much has been written about the short but tumultuous history of the Legal Services Corporation. A critical part of that history, however, is responsible for the tremendous increase in *pro bono* services provided by the private bar during the 1980's.

During the late 1970's, many federally funded legal services programs attempted to involve the local private bar in the delivery of service to the poor through judicare programs, contractual arrangements with lawyers, and *pro bono* panels. Political support for the continued funding of legal services also became more evident within the organized bar, culminating in 1981 when representatives of over 60 bar associations, led by the ABA and its president, William Reese Smith, lobbied Congress to save the Legal Services Corporation. Within 2 weeks of the lobbying efforts, over 100 state and local bar associations had enacted resolutions supporting the continuation of funding for the Legal Services Corporation.

In June 1980, the Legal Services Corporation issued the Delivery Systems Study, as requested by Congress, review-

FIVE LOUISVILLE LAW FIRMS HEED FREE-SERVICE RESOLUTION

Five Louisville law firms that together employ about 450 attorneys have agreed to heed an American Bar Association resolution that calls for lawyers to devote at least 50 hours a year to free legal services for the poor and other public projects. The commitment was announced by the Louisville Bar Association's (LBA) *Pro Bono* and Legal Services Committee, whose chairman, James Moyer, said it puts Louisville "in the forefront" of cities its size in providing an organized framework for offering such services.

Just 6 years ago George Schuhmann II, then president of the LBA, complained that Louisville lawyers lagged behind lawyers elsewhere in providing services *pro bono publico*, or for the public good. The resolution, adopted by the ABA and approved by the KBA, calls for lawyers to devote no less than 50 hours per year to serve "those in need" or to improve the law, the legal system or the legal profession. The resolution also calls for firms to credit the time lawyers spend against the hours they are required to bill each year, noting that "without such credit, the incentive to avoid *pro bono* service out of fear for one's career may be overwhelming."

The participating Louisville firms are Alagia Day Mintmire Marshall & Chauvin; Greenebaum Doll & McDonald; Hirn Reed Harper & Eisinger; Stites & Harbison; and Wyatt Tarrant & Combs. Fifteen large and medium-sized firms were invited to participate, and most are still considering the proposal, Moyer said.

George Dudley, chairman of the management committee at Brown Todd & Heyburn, the largest firm that is still weighing the program, said, "This is a very serious commitment, and when we make it, we want to know how we are going to live up to it." John McGarvey, a partner at Morgan & Pottinger, said his firm considered the proposal but decided to let its lawyers continue to do *pro bono* work on an informal basis.

The ABA says the program, in addition to helping the poor and the public, will boost morale at participating firms, aid in recruiting and win favorable publicity.

The resolution has been pushed locally by Alagia Day, partner L. Stanley Chauvin Jr., the ABA's president-elect, who contends lawyers have a responsibility to provide free services in exchange for the monopoly they enjoy in the courts.

The Louisville lawyers who participate in the *pro bono* program are expected to handle a variety of cases ranging from divorce work to real-estate law to criminal matters. They also will represent non-profit groups for free.

Moyer said they will be matched with clients by the LBA, the Legal Aid Society of Louisville and by the state DPA. About 270 lawyers already participate in the Volunteer Lawyer Project, a program coordinated by Legal Aid in which private lawyers agree to handle 1 or 2 cases a year for free.

- *The Courier Journal*, May 3, 1989

ing a variety of models which were in use to deliver civil legal services to the poor. Based on 4 performance criteria — cost, client satisfaction, quality, and impact — the study concluded that while certain models were superior with respect to one or several criteria, there was no single best way to deliver legal services to the poor. The study concluded, however, that for the organized *pro bono* programs reviewed, effective and economical legal services were provided. Soon thereafter, the ABA House of Delegates enacted a resolution recommending that Congress amend the Legal Services Corporation Act to "mandate the opportunity for substantial involvement of private lawyers in providing legal services to the poor." In 1981, the ABA and the Legal Services Corporation funded a total of 37 new *pro bono* projects.

In 1981, in response to the growing interest by the bar and private lawyers in representing indigent clients, the Legal Services Corporation issued an instruction to all of its local programs to allocate a substantial portion of their budgets to involving the private bar in the delivery of legal services to the poor. Although a number of legal services programs established a compensated system, most sought to involve attorneys in *pro bono* efforts.

PRO BONO PARTICIPATION

The private bar involvement instruction, continued to this day as a regulation currently requiring the expenditure of 12.5% of a legal services program's budget on activities to involve the private bar in representation of the poor, was the impetus for dramatic growth in organized *pro bono* programs. The instruction caused a convergence of ethical principles and the reality of the unmet legal needs of the poor. Prior to 1982, the effective date of the original instruction, 154 programs provided *pro bono* representation. That number has now increased to 519. Over 120,000 lawyers are now participating in these programs. According to a survey by the ABA Private Bar Involvement Project, the number of lawyers participating in organized efforts increased by 12% from 1988 to 1989. As impressive as that statistic may be, the profession still must increase its efforts, as only 18% of all lawyers in the United States are currently working with an organized *pro bono* program.

NEW DEVELOPMENTS

New developments in *pro bono* are defining its future. Efforts by bar associations, law firms, corporate legal departments and existing programs are directed toward increasing the opportunity for lawyers to in engage in *pro bono* work in meaningful and effective ways by removing both formal and informal barriers to lawyer's participation. Controversial issues, such as mandatory *pro bono* and the scope of activities in which a lawyer may engage to discharge his or her obligation, stimulate increased debate and awareness in not only the profession, but the general public.

State and local efforts are directed at breaking down formal barriers to participation in *pro bono* activities by all lawyers. For example, states are adopting rules which would allow retired attorneys limited admission to participate in organized *pro bono* programs. Rule changes have been adopted in Florida, California, Texas and Arizona. Barriers to participation by government lawyers are also being addressed by state attorney generals in at least 8 states, including Kentucky, Washington and North Dakota have enacted state statutes specifically permitting *pro bono* practice by government lawyers.

More often barriers to participation in *pro bono* activities are not found in statutes or court rules, but result from pressures created by the economics of law practice, the lack of structures to effectively involve lawyers in *pro bono* work, or simply not having a *pro bono* ethic integrated into the work of a law firm. Much of the innovative work being accomplished today involves removing these informal barriers to participation.

Although there have been no reliable surveys, those familiar with *pro bono* efforts on a national scale estimate that sole practitioners and lawyers in small firms are completing the majority of *pro bono* cases each year. Efforts to increase *pro bono* participation are now directed at large law firms. The ABA Standing Committee on Lawyers' Public Service Responsibility has recently completed a manual to assist firms in developing in-house structures and policies that will allow them to incorporate *pro bono* into their everyday practices. Managing partners in large law firms are finding that *pro bono* work by both associates and partners does not have substantial negative effects on the firm's bottom line. Firms are finding that engaging in *pro bono* work provides valuable experience to associates not necessarily available to them in their regular work in the firm. A good law firm *pro bono* program aids in recruitment, assists in developing other business and provides a measure of psychological satisfaction for participating lawyers.

Seventeen state bar associations now staff *pro bono* support projects. These ventures, using the ABA Private Bar Involvement Project as a model, help activate new *pro bono* programs, conduct statewide recruitment drives, develop training opportunities for volunteer lawyers, and consult with existing *pro bono* projects to improve their operations. Acitivties are directed at a facilitating participation by volunteer lawyers and improving the quality of services for clients.

Debate within the profession, on such issues as the adoption of a mandatory *pro bono* obligation and the scope of activities which are considered appropriate for the discharge of a lawyer's obligation, has served to stimulate an increase in voluntary activities. For example, 10 states have considered or are currently considering promulgating rules which would require lawyers to perform a specified number of hours of *pro bono* work each year. The discussion generated by mandatory proposals have served to increase both lawyer and public awareness of the unmet needs of the poor and the ethical foundations of the legal profession.

CONCLUSION: INCREASING ACCESS TO JUSTICE

As recognized by the ABA during its periodic attempts to recodify the profession's ethical prescriptions, the changing conditions in our society and legal system have caused an evolution in both the doctrinal foundations underlying lawyers' public services responsibilities and the manner in which the bar strives to meet its obligation. Where *pro bono* activities were once viewed as charity performed by a lawyer as a matter of individual conscience, the activities are now seen as essential to preserving access to justice as a foundation of democracy. Access to justice is meaningless without access to lawyers. Those who enter the judicial system without the assistance of a lawyer, in reality, are being denied access to justice.

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WEST'S REVIEW

Linda West

KENTUCKY COURT OF APPEALS

PROMOTING CONTRABAND
Koonce v. Commonwealth
36 K.L.S. 3 at 20
(March 10, 1987)

In this case, the Court of Appeals held that marijuana constitutes "dangerous contraband" for purposes of KRS 520.050. KRS 520.050 defines the offense of promoting contraband in the first degree as the possession of "dangerous contraband" by one confined in a detention facility. KRS 520.010(3), which defines "dangerous contraband," specifically includes marijuana. Applying this statutory definition the Court held that the possession of any amount of marijuana, no matter how small, will support a conviction of promoting contraband in the first degree. The Court noted that KRS 520.010(3) was amended in 1982 to specify that "dangerous contraband" included marijuana. The amendment overruled the earlier decision of the Court in *Cooper v. Commonwealth*, Ky.App., 648 S.W.2d 530 (1982) which held that marijuana could be insufficient in quantity to constitute dangerous contraband.

APPEALS FROM DISTRICT COURT/*BOYKIN*
Tipton v. Commonwealth
36 K.L.S. 4 at 10
(March 24, 1989)

At his trial for DUI the district court ruled that the results of a Breathalyzer test and Tipton's previous conviction of DUI were inadmissible. The commonwealth appealed the district court's rulings to circuit court and won. The Court of Appeals granted Tipton's motion for discretionary review.

The Court initially held that the commonwealth's appeal of the district court's interlocutory orders was improper. The proper vehicle for review of the district court's rulings was by writ of prohibition. The distinction is important since the granting of a writ of prohibition is subject to a showing of "irreparable injury."

Despite its disposition of the case on procedural grounds, the Court stated it would "share our thoughts on the substantive issues presented..." The Court then opined that guilty pleas to misdemeanors taken in absentia under RCr 8.28(4) are violative of *Boykin* if they are used to obtain an enhanced penalty for a subsequent conviction.

DUI - ELEMENTS OF OFFENSE
Hayden v. Commonwealth
36 K.L.S. 4 at 12
(March 31, 1989).

This case addressed the question of what elements must be proved to sustain a conviction of DUI. KRS 189.010(1) provides: "No person shall operate a motor vehicle anywhere in this state while under the influence of alcohol or any other substance which may impair one's driving ability." The Court held that the statute is violated when one drives while under the influence of alcohol, and that actual impairment of driving ability need not be proven.

DUI - SECOND OFFENSE
Suttle v. Commonwealth
36 K.L.S. 4 at 13
(March 31, 1989)

In this case, the Court of Appeals held that a conviction of DUI, second offense, cannot be predicated on a prior conviction of DUI in another state. The Court reasoned that the language of KRS 189A.010, which prohibits driving while under the influence "anywhere in this state," requires that any prior conviction used to obtain an enhanced sentence have been obtained in Kentucky. The Court also noted that the PFO statute specifically includes foreign convictions while the DUI statute does not.

LESSER INCLUDED OFFENSES - HARASSMENT/UNANIMOUS VERDICT
Hart v. Commonwealth
36 K.L.S. 5 at
(April 21, 1989)

In this case, the Court held that "harassment is not a lesser offense *necessarily included* in the offense of unlawful imprisonment in the first or second degree." The Court thus rejected Hart's contention that at his trial for unlawful imprisonment he was entitled to a jury instruction on harassment as a lesser included offense. Harassment did not fit the KRS 505.020(2) definition of a lesser included offense since it requires proof of an element - intent to harass, annoy or alarm - not required to prove unlawful imprisonment. However, the Court noted that if harassment occurred with intent to restrain the victim then, under that unique set of facts, an instruction on harassment as a lesser included offense to unlawful imprisonment would be justified.

The Court also held that no error occurred when the trial court sent the jury back for further deliberations after a poll of the jury revealed that its initial, announced verdict was not unanimous.

RECEIVING STOLEN PROPERTY OVER $100 - VALUE
Commonwealth v. Gilbert
36 K.L.S. 5 at ___
(April 21, 1989).

In this appeal by the commonwealth, the Court held that the trial court erred in ruling as a matter of law that stolen money orders found in the defendant's possession had a value under $100. The money orders were purchased by the

This regular *Advocate* column reviews the published criminal law decisions of the United States Supreme Court, the Kentucky Supreme Court, and the Kentucky Court of Appeals, except for death penalty cases, which are reviewed in *The Advocate* Death Penalty column, and except for search and seizure cases which are reviewed in *The Advocate* Plain View column.

original owner for their face value of $393.77. However, the money orders were nonnegotiable and thus could not be cashed. The Court held that this fact did not "render them valueless." At the same time the Court stated "we cannot categorically proclaim that the value of these money orders is their face value..." The correct measure of value as enunciated by the Court was "what a willing buyer would pay for the property and a willing seller take."

KENTUCKY SUPREME COURT

PFO - JURY SENTENCING/DOUBLE JEOPARDY
White v. Commonwealth
36 K.L.S. 3 at 22
(March 16, 1989)

White's conviction of first degree PFO was reversed by the Court of Appeals and remanded for sentencing by the trial judge as a PFO II. The Kentucky Supreme Court granted review to hold that White was entitled to a jury trial on the issue of his guilt of PFO II. White was also entitled to jury sentencing. The Court additionally held that White's retrial was not barred as violative of double jeopardy where his conviction of PFO I was reversed because the two prior felonies used to obtain the adjudication of PFO I were held to be a single conviction. Justices Vance, Gant, and Lambert dissented and would have affirmed the Court of Appeals remand for sentencing by the trial judge.

SEPARATE SENTENCING JURY
Williamson v. Commonwealth
36 K.L.S. 4 at 22
(April 6, 1989)

Williamson appealed his 1985 drug trafficking convictions to the Court of Appeals and obtained a retrial limited to the issue of penalty. Williamson did not petition for rehearing or seek discretionary review by the Kentucky Supreme Court. On remand to the trial court, a new jury was impanelled and a new sentence was imposed by it. Williamson again appealed, asserting that KRS 532.055 requires that guilt and penalty be determined by a single jury and that, consequently the Court of Appeals erred in remanding his case for retrial on the issue of penalty alone. The Kentucky Supreme Court rejected this argument. The Court held that Williamson had waived the issue when he did not seek discretionary review of the Court of Appeals' decision. The Court additionally observed that in its view KRS 532.055 does not require a determination of penalty by the same jury which determined guilt.

UNITED STATES SUPREME COURT

HABEAS CORPUS - PROCEDURAL DEFAULT
Bugger v. Adams
44 Crl 3162
(February 28, 1989)

At his death penalty trial, Adams failed to object to an instruction to the jury stating that the jury's role in sentencing was merely "advisory." Adams subsequently failed to raise the issue on direct appeal, in state post conviction proceedings, and in a federal habeas proceeding. Thereafter, *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) held that misleading minimization of the jury's sentencing role violates the 8th Amendment. Adams then filed a second state post-conviction action raising the issue. Relief was denied and the state appellate court affirmed, holding that Adams should have raised the issue on direct appeal. A federal habeas court also held the claim was procedurally defaulted. The 11th Circuit reversed after finding that the novelty of the *Caldwell* issue provided cause for the procedural default. The Supreme Court in turn reversed the 11th Circuit. The Court concluded that there existed state grounds, independent of the federal grounds announced in *Caldwell*, for raising the substantive issue at the time of Adams' direct appeal. The Court held that state grounds for challenging the instruction necessarily existed since a valid *Caldwell* issue requires that the challenged description of the jury's role be inaccurate in terms of state law. Thus, a state grounds for objecting to the instruction was available at trial.

Justices Blackmun, Brennan, Marshall, and Stevens dissented on the grounds that application of Florida's procedural bar rules was not historically even-handed and thus did not constitute an adequate state ground for rejecting Adams' claim. The dissenters also would have reached the merits of Adams' claim despite any procedural default because the asserted error resulted in a "fundamental miscarriage of justice." *Murray v. Carrier*, 477 U.S. 478, 106 S.Ct. 2639, L.Ed.2d (1986).

JURY TRIAL
Blanton v. City of North Las Vegas
44 Crl 3171
(March 6, 1989)

In this unanimous opinion, the Court held that an offense which carries a maximum penalty of 6 months or less is presumed to be a "petty offense" that does not trigger the 6th Amendment right to a jury trial in the absence of additional penalties so severe as to characterize the offense as "serious." The Court specifically held that additional penalties consisting of a $1,000 fine, 48 hours of community service, loss of drivers license for 90 days, and attendance at an alcohol abuse program did not render an offense "serious."

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MOTIONS COLLECTED, CATEGORIZED, LISTED

The Department of Public Advocacy has collected many motions filed in criminal cases in Kentucky, and has compiled an index of the categories of the various motions, and a listing of each motion. Each motion is a copy of a defense motion filed in an actual Kentucky criminal case. They were updated in February, 1989.

COPIES AVAILABLE

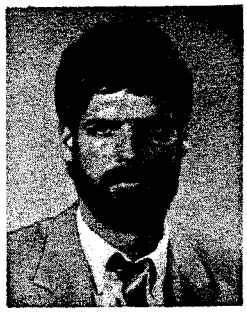
A copy of the categories and listing of motions is free to any public defender or criminal defense lawyer in Kentucky. Copies of any of the motions are free to public defenders in Kentucky, whether full-time, part-time, contract, or conflict. Criminal defense advocates can obtain copies of any of the motions for the cost of copying and postage. Each DPA field office has an entire set of the motions.

HOW TO OBTAIN COPIES

If you are interested in receiving an index of the categories of motions, a listing of the available motions, or copies of particular motions, contact:

TEZETA LYNES
DPA Librarian
1264 Louisville Road
Perimeter Park West
Frankfort, Kentucky 40601
(502) 564-8006 Extension 119

THE DEATH PENALTY



Neal Walker

Capital Punishment is to the Rest of All Law as Surrealism is to Realism. It Destroys the Logic of the Profession. -Norman Mailer

Capital developments reviewed this issue include the reversal of Robert Askew's death sentence and the disbarrment of an attorney who defended 3 of Ky.'s condemned inmates at trial. Also, a divided Court of Appeals rejects David Skagg's collateral attack on his death sentence predicated on the perjured testimony of 2 "expert" witnesses in his case.

KENTUCKY SUPREME COURT

Askew v. Commonwealth, Ky. (4/6/89)

In lifting Robert Askew's death sentence and ordering a new trial, the Kentucky Supreme Court has now granted relief to condemned inmates in 7 of the last 8 capital cases it has reviewed. [1]

HEARSAY IN CAPITAL CASES

Askew, convicted of killing a waitress during the robbery of a Louisville tavern, was granted a new trial because of the admission of prejudicial hearsay evidence. Writing for a unanimous Court (Justice Vance concurred in result only) Justice Lambert put the brakes on the runaway rule of *Jett v. Commonwealth*, 436 S.W.2d 788 (Ky. 1969) which permits the use of a witness' prior out-of-court statements for both impeachment purposes and as substantive proof. Here, after a mid-trial dismissal of his charges, the prosecution called Franklin, Askew's co-defendant, and asked him if he told his wife about the robbery/homicide. After several denials, the prosecution called the wife, who also denied that her husband made any such statements. Finally, two police officers were called to play a tape recorded statement during which Ms. Franklin told the police that her husband told her that Askew told him that he shot the victim.

The Court found that the evidence was not properly presented under *Jett* since the evidence was not material and since a proper foundation was not laid. First, the prosecutor only asked Franklin what he told his wife. The critical question - what Askew told Franklin - was never asked. "Without a direct inquiry as to what [Askew] did or said, Franklin's statements to his wife were not only irrelevant, but are unreliable as well." *Askew*, Slip Opinion (hereinafter p. 9). "Franklin's statements to his wife could have as easily come from information gained on the street." *Id.*

Without evidence of what Askew told Franklin, what Franklin told his wife was collateral to the case. Thus, impeachment was improper. Moreover, "indirectly informing the jury that such a statement was made by [Askew] was highly prejudicial." p. 11.

Similarly, the foundational requirements were not met since *Jett* permits impeachment only of a witness who possesses personal knowledge. Here, impeachment was improper since Ms. Franklin denied that her husband implicated Askew. "If it were otherwise, a long succession of witnesses could be called until finally one was found who would testify that the previous witness told a different story." p. 12. "If under the guise of *Jett* evidence such as this is admitted, the hearsay rule would pass into non-existence." p. 13.

Nevertheless, on retrial the Court held that Ms. Franklin may be asked about the statement attributed to Askew (but may not be impeached if she denies that Franklin made such a statement) even if Franklin himself denies that he repeated the statement to her. This would certainly present a 6th Amendment violation if the out-of-court statement were treated as substantive evidence since, by denying having made the statement, Askew's right to confront Franklin would be meaningless, and since the statement itself (from a former co-defendant) is presumptively unreliable. *Lee v. Illinois*, 106 S.Ct. 2056, 2065 (1986) (upholding "the time honored teaching that a co-defendant's confession inculpating the accused is inherently unreliable and that convictions supported by such evidence violate the constitutional right of confrontation)." Secondly, it would seem that this procedure would violate *Jett* itself, since neither Franklin nor his wife would have the requisite personal knowledge of Askew's involvement in the homicide to allow impeachment (remember that the witness impeached in *Jett* was an eyewitness to the crime).

These considerations notwithstanding, *Askew* represents a significant effort by the Court to purge capital trials of unreliable hearsay. *Askew* is the second capital case within the last year to be reversed on hearsay grounds, the other being *Sanborn v. Commonwealth*, 754 S.W.2d 534 (Ky. 1988) which sounded the death knell for Kentucky's "investigative hearsay" exception of the hearsay rule. The Court now seems to be inching toward fulfilling the U.S. Supreme Court's demand that the factfinding procedures in a capital trial be more reliable than those tolerated in a non-death penalty case. "In capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability." *Ford v.*

KENTUCKY DEATH ROW

As of June 1, 1989	
Death Row Population	28
Women	1
Juveniles	1
Age of Oldest Inmate	72
Black Population	6
Black Victim Cases	0
Inmates Whose Trial Lawyers have been Disbarred or Suspended	6

This regular *Advocate* column reviews all death penalty decisions of the United States Supreme Court, the Kentucky Supreme Court, the Kentucky Court of Appeals, and selected death penalty

Wainwright, 106 S.Ct. 2595, 2603 (1986).

Counsel should object to the admission of any hearsay evidence in a capital case, particularly where the evidence is being presented under a traditional state law exception to the hearsay rule, such as a dying declaration. The objection should allege not only a 6th Amendment violation but also a denial of the 8th Amendment right to enhanced reliability in capital trials.

Conversely, a defendant in a capital case cannot be barred from presenting relevant, reliable evidence on the grounds that the evidence comes within the state's hearsay rule. In *Green v. Georgia*, 99 S.Ct. 2150, 2151 (1979) the Court held that it was unconstitutional to exclude the testimony of a defense penalty phase witness who would have stated that the previously convicted non-testifying co-defendant admitted killing the victim. "Regardless of whether the proffered testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause of the 14th Amendment. The excluded testimony was highly relevant to a critical issue in the punishment phase of the trial...and substantial reasons exist to assume its reliability."

OTHER GUILT AND PENALTY ISSUES

The Court also addressed several other guilt phase and sentencing issues, including Askew's contention that he was prejudiced by the prosecutor's mid-trial open-court dismissal of the co-defendant's indictment. Rejecting this claim, the Court distinguished *Tipton v. Commonwealth*, 640 S.W.2d 818 (Ky. 1982) where it condemned the prosecutor's use of a co-defendant's guilty plea as evidence of the defendant's guilt. "We denounced any attempt to establish guilt by association." p. 5. "Although better practice dictates such a motion be made outside the presence and hearing of the jury, we do not believe [Askew] was prejudiced." *Id.*

A similar approach was taken to a disturbing sentencing issue, where the Court ruled that "better practice dictates strict compliance with the [death penalty] statute," but refused to find a violation of the statute even though the sentencing judge failed to expressly find a statutory aggravating circumstance in sentencing Askew to death. Having waived his right to have a jury fix his sentence (the Court rejected his claim that the waiver was invalid but nevertheless ruled that, on remand, he would have a right to a jury trial on both guilt **and** punishment), Askew submitted the issue of punishment to the judge. Although KRS 532.025(3) provides that a jury "shall designate in writing...the aggravating circumstance" found beyond a reasonable doubt and that "[i]n non-jury cases the judge shall make such designation" the sentencing judge failed to do so. Citing *Bevins v. Commonwealth*, 712 S.W.2d 932 (Ky. 1986), the Court held that "different procedures apply when the judge determines mitigating and aggravating factors, and that it is unnecessary for a judge to instruct himself." *Askew*, p. 7. However, the Court directed the sentencing court to follow the terms of the statute and designate the aggravating circumstance in writing if the same situation is repeated on remand.

***K.B.A. v. Kevin Charters*, Ky. (5/4/89)**

TRIAL COUNSEL FOR 3 DEATH ROW INMATES DISBARRED

On May 4 the Kentucky Supreme Court entered an order disbarring attorney Kevin Charters for, among other things, "neglecting a legal matter entrusted to him...[and] engaging in conduct involving dishonesty, fraud, deceit or misrepresentation." Charters was trial counsel for 3 of Kentucky's death row inmates: Gene Karu White, David Sanders and Michael Clark. Of the 28 people on death row in this state, 7 were represented at trial by attorneys who have since been disbarred or who have resigned rather than face disbarment.

KENTUCKY COURT OF APPEALS

***Skaggs v. Commonwealth*, Ky. App. (3/17/89)**

PERJURY BY "EXPERT" WITNESSES

In this bizarre case a fragmented Court of Appeals addressed consolidated appeals from orders overruling Skaggs' RCr 11.42 motion to vacate his conviction and his RCr 10.06 motion for a new trial based on newly discovered evidence.[2]

Skaggs' death sentence was upheld on direct appeal to the Kentucky Supreme Court in 1985. *Skaggs v. Commonwealth*, 694 S.W.2d 672 (Ky. 1985). Following this Skaggs (who was born in an insane asylum to a mentally deficient mother) discovered that 2 "expert" witnesses at his trial perjured themselves about their qualifications. One of them, Elya Bressler, an imposter posing as a psychologist, was called by Skaggs himself at trial and supported his insanity defense. In this action, Skaggs alleged that his counsel was ineffective for failing to investigate Bressler's credentials (Bressler was later convicted of perjury in an unrelated case). Writing for the 2 judge majority (Judge Hayes concurred in result only), Judge West found that Skaggs was not prejudiced. In dissent, Judge Miller found this to be "a travesty based upon an egregious error which can only be rectified by a new trial." *Skaggs*, Slip Opinion (hereinafter p. 9).

The other witness who lied under oath was Glenn Baxter, formerly a KSP ballistics analyst. At trial, Baxter matched the evidence bullets with the handgun seized from Skaggs. He also testified that he had a degree from Morehead State University. After trial, Skaggs learned that Baxter had not received a degree from Morehead or, for that matter, any University, and filed a motion for a new trial based on the newly discovered evidence of Baxter's perjury. The trial court denied relief and the Court of Appeals affirmed, reasoning that "the testimony of Mr. Baxter was merely cumulative." p. 6. Dissenting, Judge Miller wrote that "[t]he essence of expert testimony is that it be proffered by one expertly qualified. To these ends, college degrees have incredible weight in the minds of members of the jury." p. 10.

The final issue in the case concerned trial counsel's failure to object to an incomplete robbery instruction which failed to require the jury to find that Skaggs intended to use physical force to accomplish a theft. Judge West found this to be a "typographical error" while the dissenting judge believed that a retrial was in order since the jury could have believed that Skaggs used force not to commit a theft, but to escape detection.

The Court also upheld the trial judge's failure to conduct evidentiary hearings on the motions. Judge Miller dissented on this point, too.

One final note about Miller's dissent. Skaggs' original jury was unable to agree on punishment, so a second jury was impaneled and ultimately sentenced him to die. Judge Miller found this procedure to be "highly questionable" from a constitutional perspective. "I believe the hung jury on the question of punishment should have resulted in imposition of the lesser sentence of life imprisonment." p. 8.

DEATH NOTES

Last month Maryland became the second state (joining Georgia) to impose a legislative ban on executing mentally retarded offenders.... To the East, Delaware moved in the opposite direction when Senate leader Tom Sharp introduced a bill which would bring back public whipping for selling hard drugs (from 5 to 40 "well laid on" lashes). Senator Sharp defended his bill by reasoning that, since executing criminals is constitutional "then I don't know why beating them is any worse." ...Aubrey Adams became the 108th person to be executed in the modern era when Florida electrocuted him on May 5.... On April 24, Amnesty International released a 268 page report on the use of the death penalty around the world. The report finds that, despite a range of safeguards, the use of the death penalty in the U.S.A. is arbitrary and racially biased. "There is also widespread concern about the poor quality of legal representation given to defendants charged with capital crimes." *AMNESTY INTERNATIONAL; WHEN THE STATE KILLS*; p. 289 (1989).

NEAL WALKER
Assistant Public Advocate
Chief, Major Litigation Section
Frankfort

FOOTNOTES

[1] For citations to these cases, refer to this column in the April, 1989 issue of *the Advocate*.

[2] Appeals of collateral attacks on death sentences will now be appealed directly to the Kentucky Supreme Court, rather than the Court of Appeals. CR 76.18(2).

OHIO SETS CAPITAL CLE REQUIREMENTS

The Ohio Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases has adopted standards relating to continuing legal education requirements for appointed counsel in death penalty cases. Attorneys on the existing list for appointment as lead counsel in death penalty cases "shall attend and complete no less than 12 hours of Rule 65 Committee-approved 'specialized training in the defense of persons accused of capital crimes' every 2 years, commencing July 1, 1988, in order to be eligible for retention on any list for appointment." Attorneys who are not already on the list must, before seeking placement on the list, show that "they have completed 12 hours of specialized training in the defense of persons accused of capital crimes in a 2-year period prior to making application..."

The standards provide that attorneys who attend out-of-state CLE death penalty seminars may apply for credit for those seminars by "showing proof of attendance, including the curriculum for the seminar and biographical sketches of the faculty."

The standards require that seminars " include no less than 6 hours of instruction devoted to the investigation, preparation, and presentation of a death penalty trial or appeal." The standards also set out regulation for application for certification by the sponsor of death penalty seminars. The curriculum for a certified seminar " should include, but is not limited to, specialized training in the following areas: (1) an overview of current developments in death penalty litigation; (2) death penalty voir dire; (3) trial phase presentation; (4) use of experts in the trials; (5) investigation, preparation, and presentation of mitigation; (6) preservation of the record; (7) counsel's relationship with the accused and his family; and (8) death penalty appellate and post-conviction litigation in state and federal court." 62#6 *Ohio State Bar Ass'n Rpt.* p. A-1, Feb. 6, 1988.

IMPARTIAL PROTECTION

State Rep. Ron Wilson, D-Houston , has a good idea. State law makes it punishable by death to murder a person known to be a peace officer acting in the lawful discharge of an official duty. So why not, asks Wilson, make it punishable by death for a peace officer to murder a prisoner in the officer's custody?

He has a bill to add to the list of capital crimes the murder of a prisoner by a peace officer, a city or county jailer, or guards at Texas Department of Corrections or other authorized correctional facilities.

The bill is encouraging opposition from those who are against the death penalty, period. But we already have capital punishment, and as long as we do, this would be a fairness amendment.

There has been some flagrant brutality leading to prisoner deaths recently, and perhaps some of it would be deterred by making the self-appointed executioners worry about their own lives.

We have tried to protect all peace officers from murder by us, so why shouldn't we try to protect ouselves from murder by the few dumb brutes among them? Any lives we save could be our own.

- *The Houston Post*, February 25, 1989.

CHILDREN FIGHT THE DEATH PENALTY

A daughter of Sen. Robert F. Kennedy and a son of Martin Luther King Jr. helped launch a campaign against capital punishment.

Society should put some killers in jail "and leave them there forever," said M. Kerry Kennedy, who was 8 when her father was assassinated.

"But while we're at it, dismantle the electric chair, the gas chamber. They won't bring back my father. That'll only take someone else's father."

The campaign, called "Lighting the Torch of Conscience," is aimed at getting the religious community to confront the capital punishment issue. It will culminate on June 1990 with a 330 mile pilgrimage from Starke, Fla., where Fla.'s electric chair is located, to Atlanta.

NLADA Death Penalty Newsletter, *Capital Report*

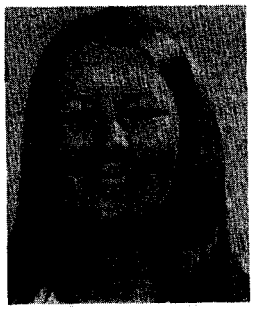
Capital Report is a death penalty defense newsletter available by subscription to attorneys and others involved in capital defense at all levels — trial, appeal, and post conviction. Issued 6 times a year by the National Legal Aid and Defender Association (NLADA), *Capital Report* provides up-to-date, nationwide information on resources, issues and tactics, as well as political developments affecting death penalty litigation.

Capital Report includes notices of upcoming seminars and newly released publications relating to capital defense, along with periodic descriptions of long-term sources of assistance for death penalty defense teams.

Not a "reporter," *Capital Report* makes no attempt to summarize or even note all capital opinions from the Federal Courts or state high courts, but highlights certain decisions involving developments that might impact positively (or negatively) on current death penalty jurisprudence. United States Supreme Court decisions in death penalty cases are addressed, but not comprehensively. Articles about new decisions contain, when possible, expected effects of the decisions and ways in which capital attorneys are responding to the new law.

Submission of articles or information for *Capital Report* is encouraged. Subscriptions are limited to those persons involved in death penalty defense work and are not available to prosecutors. The price to members of NLADA's Death Penalty Litigation Section is $15/year, to other members of NLADA $18/year and to non-members $25/year. Contact Mardi Crawford, NLADA, 1625 K Street NW, 8th Floor, Washington, DC 20006. Phone (202) 452-0620.

6TH CIRCUIT HIGHLIGHTS



Donna Boyce

RIGHT OF CONFRONTATION

The Sixth Circuit Court of Appeals recently found no 6th Amendment violation where cross-examination of a key prosecution witness was only partially limited and where the barred questioning was not aimed at eliciting any additional facts. ***Dorsey v. Parke,*** ___ F.2d ___, 45 Cr.L. 2057, 18 S.C.R. 9, 22 (6th Cir. 1989). Gerald Campbell was the key prosecution witness at Dorsey's burglary trial. Campbell also had been charged with the burglary, but received diversion under the youthful offender statute in exchange for his promise to testify against Dorsey. The burglary charges against Campbell eventually were dismissed. This information was before the jury. The trial court also allowed questions about Campbell's experiences on the night he made a statement to the police, his nervousness and the fact he received mental health treatment because of a suicide attempt he made after implicating Dorsey. Dorsey was barred from his attempts to further impeach Campbell's credibility by showing that Campbell's mental and intellectual abilities were such that he was particularly susceptible to police suggestion. The Court stressed that it was unable to discern any new facts that counsel knew or hoped to elicit on further cross-examination, and concluded that the only purpose to the barred cross-examination was a general one of exposing Campbell's demeanor to the jury while asking questions that suggested his susceptibility to police pressure. Where it is merely the extent of cross-examination that is limited, the Sixth Circuit has recognized that the test of whether the trial court has abused its discretion is whether the jury had enough information or facts, despite the limits, to assess the defense theory. The Court declined to extend the constitutional guarantee to encompass questions that would do nothing more than expose the demeanor of a prosecution witness while he is subjected to questions that probe his credibility. The Court acknowledged that displaying a witness' behavioral reactions to hostile questions is a key function of cross-examination, but a function that is not as constitutionally protected as cross-examination aimed at adducing facts.

PROBLEMS WITH VIDEO RECORDS

The Sixth Circuit also used ***Dorsey v. Parke, supra,*** to address the difficulties that video records present for thorough appellate review. The Court identified a number of problems presented by the videotape record. It found the videotape to be marginally audible at times, particularly during sidebar conferences or whenever two or more participants spoke at once. Additionally, the Court was unable to produce an adequate transcript of the record—and counsel had no transcript at all—rendering oral argument about the events of the trial an exercise in futility. The Court noted that while Kentucky's experiment in videotaping trials was receiving praise in the press, the innovation presented acute difficulties to courts attempting to fulfill their function of judicial review.

COUNSEL FOR WOMEN PRISONERS

In the unpublished opinion of **Caterino v. Wilson** (No. 86-6067, rendered April 10, 1989), the Sixth Circuit held that Kentucky's Corrections Cabinet must hire a half-time attorney for 18 months to assist and train inmates at the Ky. Correctional Institute for Women (KCIW) in legal matters. The district court, after a 4 week trial, found that the legal facilities and assistance that women prisoners had been receiving did not provide them with minimally adequate access to the courts as guaranteed by the constitution, and that the women's facilities were not substantially equivalent to those provided to male inmates in the state. The district court ordered the state to upgrade the prison's library and hire a part-time attorney on a temporary basis. *Caterino v. Wilson*, 546 F.Supp. 174 (W.D.Ky. 1982). The state updated KCIW's law library, increased its hours and increased the number of inmate legal aides. Claiming that this was sufficient to meet the constitutional standard, the state sought to avoid the requirement of hiring an attorney. The district court reiterated its earlier holding that the law library alone was insufficient to compensate the women for the lack of a history of self-help which the male inmates had and was insufficient to satisfy the right of access to the courts. The district court expressly ordered the state to hire a half-time attorney to assist and train the women inmates in areas in which they needed assistance. The Sixth Circuit rejected the state's contention that while **Bounds v. Smith**, 430 U.S. 817 (1977), guaranteed prisoners access to the courts in the form of either an adequate law library or legal assistance, a court may not require provision of both. The Sixth Circuit focused on the district court's findings that there was a disparity between male and female inmates' access to the courts based on the women inmates' lack of a history of self-help and that to cure this disparity the women needed legal assistance and training on a part-time temporary basis. The Sixth Circuit found no error in the district court's reasoning and no basis for disturbing his findings and conclusions.

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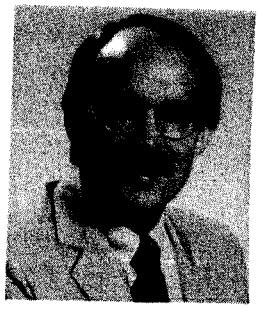
In the 60 years I have been around prisons, I have never known of one man who had wealth or position who has been executed.
-Former San Quentin Warden Clinton Duffy

This regular *Advocate* column highlights published criminal law decisions of significance of the 6th Circuit Court of Appeals except for search and seizure and death penalty decisions, which are reviewed in Plain View and The Death Penalty columns.

PLAIN VIEW

SEARCH AND SEIZURE LAW AND COMMENT



Ernie Lewis

UNITED STATES SUPREME COURT

During the summer of 1966, my brother and I worked as gandy dancers for the Missouri Pacific Railroad. That summer was memorable in many ways, all but one of which are irrelevant to this column. There is one memory, however, that in some ways gives me a unique perspective into one of the cases reviewed herein. That memory has to do with Davy, my short, red faced supervisor. Davy lived with the rest of us in a box car that was moved down track as we progressed in our effort to repair the track from St. Louis to Poplar Bluff that summer. Davy was an alcoholic, more specifically he was a wino. He consumed remarkable amounts of wine, all day and night. Many days he showed up at work with an almost lethal dose of alcohol in his blood. And every night he drove away the demons by drinking to the point of collapse. And Davy was in charge of repairing tracks which would carry heavy equipment, often poisonous, on its rails.

SKINNER

I thought of Davy as I read ***Skinner v. Railway Labor Executives' Association, et. al.***, __U.S.__, 44 Cr.L. 3178 (3/21/89). And I wondered what little Davy would have thought about being required to urinate in a cup for the good of ole Mo-Pac.

Skinner appeared to be an easy case for the Court to resolve, decided by a 7-2 vote. Justice Kennedy authored the majority opinion. His coming-out reveals much.

At issue were certain Federal Railroad Administration (FRA) regulations which mandated blood and urine tests for employees involved in railroad accidents, and which further allowed for breath and urine tests to be administered where the employee has violated certain safety regulations, and where the supervisor has *reasonable suspicion* that an employee has caused an accident.

The Court held the regulations to be constitutional. While recognizing that the tests constituted a *search* within the 4th Amendment, the Court held that the searches involved were reasonable due to the special needs of the railway industry. Further, because of the substantial governmental interest involved, that of the safety of the traveling public, and what was viewed as minimal privacy interests on the employees' part, the Court approved of the searches without a warrant and without individualized suspicion.

There are several interesting facets to this decision. First, it demonstrates the Court's continued expansion of the "special needs" search, where warrants and probable cause are eliminated as prerequisites to an intrusion on privacy. See *O'Connor v. Ortega*, 480 U.S. 709, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987) and *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985).

Secondly, it gives us insight into Justice Kennedy's approach to 4th Amendment jurisprudence. Justice Kennedy started his analysis by asserting that the "Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable." Only then did he recognize that in most criminal cases "a search or seizure . . . is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause," requirements which can be dispensed within the special needs area. By conducting this analysis, Justice Kennedy joins the growing conservative majority who analyze governmental intrusions into personal privacy by conducting a subjective balancing of interests in order to determine what is reasonable.

The dissent was written by Marshall, and was joined only by Brennan (Stevens wrote a brief concurrence). In classic Marshall style, the dissent criticized the burgeoning special needs category, saying that "the majority today completes the process begun in *T.L.O.* of eliminating altogether the probable-cause requirement for civil-searches . . . those undertaken for reasons 'beyond the normal need for law enforcement.'" Finally, the dissent bemoans the majority opinion's giving in to the present anti-drug hysteria. "A majority of this Court, swept away by society's obsession with stopping the scourge of illegal drugs, today succumbs to the popular pressures described by Justice Holmes . . . The immediate victims of the majority's constitutional timorousness will be those railroad workers whose bodily fluids the government may now forcibly collect and analyze. But ultimately, today's decision will reduce the privacy all citizens may enjoy, for, as Justice Holmes understood, principles of law, once bent, do not snap back easily."

VON RAAB

Justice Kennedy also authored the opinion in ***National Treasury Employees Union, et. al. v. Von Raab***, __U.S.__, 44 Cr.L. 3192 (March 21,1989). *Von Raab* was a much closer case than *Skinner* with Marshall, Brennan, and Stevens joining Justice Scalia's dissent. *Von Raab* looked at a United States Customs Service requirement which mandated urinalysis for employees seeking promotions to positions involving drug interdiction, the handling of firearms, and classified material.

The majority upheld the requirement for two categories of employees, and based upon the inadequacy of the record, remanded on the requirements for employees handling classified materials.

This regular *Advocate* column reviews all published search and seizure decisions of the United States Supreme Court, the Kentucky Supreme Court and the Kentucky Court of Appeals and significant cases from other jurisdictions.

The majority based its decision squarely upon the perceived national drug problem and the Customs Service role in addressing the problem. "The Customs Service is our Nation's first line of defense against one of the greatest problems affecting the health and welfare of our population." This interest overwhelmed the interests of the employees, whose privacy interests were said to be diminished by their positions as this nation's chief drug law enforcers. "[T]he Government has demonstrated that its compelling interests in safeguarding our borders and the public safety outweigh the privacy expectations of employees who seek to be promoted to positions that directly involve the interdiction of illegal drugs or that require the incumbent to carry a firearm. We hold that the testing of these employees is reasonable under the Fourth Amendment."

Justice Scalia dissented largely on the basis that the Customs Service had failed to prove that there was a drug problem in the Service. Indeed, he points out that "out of 3,600 employees tested, no more than 5 tested positive for drugs." This contrasted with the *Skinner* case, which Scalia had joined because "the demonstrated frequency of drug and alcohol use by the targeted class of employees, and the demonstrated connection between such use and grave harm, rendered the search a reasonable means of protecting society."

One notable element of the dissent is the expression of honest outrage that the Court would participate in symbolic searching by approving of the Customs Service rules. These rules were meant to "show to the world that the Service is 'clean' and — most important of all — will demonstrate the determination of the Government to eliminate this scourge of our society! I think it obvious that this justification is unacceptable; that the impairment of individual liberties cannot be the means of making a point; that symbolism, even symbolism for so worthy a cause as the abolition of unlawful drugs, cannot validate an otherwise unreasonable search." Such a justification resulted, according to Justice Scalia, in a loss to the dignity of Customs Services employees, and more importantly, a loss to all of us "who suffer a coarsening of our national manners that ultimately give the Fourth Amendment its content, and who become subject to the administration of federal officials whose respect for our privacy can hardly be greater than the small respect they have been taught to have for their own."

BROWER

The Court's third opinion in March was ***Brower v. Inyo County***, __U.S.__, 44 Cr.L. 3175 (March 21, 1989). In *Brower*, one James Caldwell was killed when he crashed into a tractor trailer truck set up as a roadblock across the two lane road Caldwell was using in his effort to elude the police. His estate sued under 42 USC Sec.1983. The district court had dismissed for failure to state a claim, which was affirmed by the 9th Circuit, who held that no seizure had occurred.

The Court, in a unanimous opinion written by Justice Scalia, reversed, holding that the complaint had sufficiently alleged a seizure under the 4th Amendment sufficient to defeat the motion to dismiss. Scalia relied upon *Tennessee v. Garner*, 471 U.S. 1 (1985), also a 1983 case, where the Court had found the 4th Amendment implicated by the shooting of a fleeing felon. "Brower's independent decision to continue the chase can no more eliminate respondent's responsibility for the termination of his movement effected by the roadblock than Garner's independent decision to flee eliminated the Memphis police officer's responsibility for the termination of his movement effected by the bullet."

Justice Stevens concurred in the opinion, joined by Brennan, Marshall, and Blackmun. Scalia had stated in *dicta* that the 4th Amendment was only involved "when there is a governmental termination of freedom of movement through means intentionally applied." Justice Stevens criticized Scalia's opinion for reaching facts not before the Court.

SOKOLOV

Two weeks after these opinions came down, the Court decided ***United States v. Sokolov***, __U.S.__, 45 Cr.L. 3001 (April 3, 1989). ***Sokolov*** is an important case, and should not be dismissed as another in a long line of airport/drug courier profile cases.

Here, one Andrew Sokolov, traveling with a companion and under an alias, purchased tickets with cash for a round trip between Honolulu and Miami. Once in Miami, the couple stayed only 48 hours. None of the four pieces of luggage was checked. Once he arrived in Honolulu, dressed in "a black jumpsuit and gold jewelry," he tried to hail a cab, at which time 4 DEA agents descended. He was taken to the office, his luggage was sniffed by a dog, warrants were issued, and eventually a search of the luggage revealed 1063 grams of cocaine. The 9th Circuit held the seizure of Sokolov, and subsequent search to have been violative of the 4th Amendment. The stop was illegal because there was simply no evidence of ongoing criminal behavior.

A 7 justice majority disagreed. In an opinion by the Chief Justice, the Court held that under *Terry v. Ohio*, 392 U.S. 1 (1968), the stop was legal. The opinion looked at all of the facts under the *Illinois v. Gates*, 462 U.S. 213 (1983) totality of the circumstances standard, and observed that while any "one of these factors is not by itself proof of any illegal conduct and is quite consistent with innocent travel" that when "taken together they amount to reasonable suspicion."

The Court also rejected the contention that under a stop such as this one, the police have an obligation to use the least intrusive method. "The reasonableness of the officer's decision to stop a suspect does not turn on the availability of less intrusive investigative techniques. Such a rule would unduly hamper the police's ability to make swift on-the-spot decisions — here, respondent was about to get into a taxicab —and it would require courts to 'indulge in "unrealistic second guessing." ' "

Justice Marshall was joined by Justice Brennan in dissent. Under the identical facts, the dissent joined the 9th Circuit's analysis. Marshall noted that all of the facts were consistent with that of the innocent traveler, and that "the sole behavioral detail Sokolov noted by the DEA agents was that he was nervous."

Marshall also, as is his wont, is not shy about talking about what is really going on here. He accuses the majority of allowing the DEA to use the "drug-courier" profile as a powerful device in the war on drugs, a dragnet-type device that will sweep many innocent persons into the net. "Reflexive reliance on a profile of drug courier characteristics runs a far greater risk than does ordinary case-by-case police work, of subjecting innocent individuals to unwarranted police harassment and detention." The use of this technique, and indeed the majority's analysis, "serves only to indicate [the majority's] willingness, when drug crimes or anti-drug policies are at issue, to give short shrift to constitutional rights."

HARRIS

Counsel should be aware that in mid-April the Court granted certiorari in an important 4th Amendment case. It has long been the law that confessions given by an illegally arrested person should be

suppressed under most circumstances. *See Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975); *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). In this case, the lower Court suppressed a confession given following a warrantless home arrest in violation of *Payton v. New York*, 445 U .S. 573 (1980). The Court's cert. grant is ominous, and signals a willingness to emasculate further the exclusionary rule — keep your eye on this one. ***New York v. Harris*** is the name of the case.

THE KENTUCKY SUPREME COURT

The Kentucky Supreme Court issued a significant 4th Amendment decision on March 16, 1989 in ***Commonwealth v. Shelton***, Ky., __ S.W.2d __(1989). Shelton's house and vehicles were searched pursuant to a warrant. Cocaine was found in a briefcase; 322 growing marijuana plants were also found. The Court of Appeals reversed the conviction on the basis of the search going beyond the scope of the warrant, the cocaine and briefcase having not been mentioned. Discretionary review was granted.

The Supreme Court, with Justice Stephens, Lambert, Leibson, and Special Judge McGinnis joining Special Judge Busald, affirmed the Court of Appeals. The warrant had been issued in Hickman County by a Fulton County trial commissioner, in violation of SCR 5.030. That was fatal. The Fulton County trial commissioner had no authority "while serving in Fulton County to exercise authority beyond the limits of the county" and thus "was without jurisdiction to issue a search warrant in or for Hickman County." The Court further declined to consider the Commonwealth's good faith argument of *United States v. Leon*, 468 U.S. 897 (1984), saying that "[w]e do not believe that *Leon* would be applicable were we otherwise inclined to follow its precedent."

Justice Gant was joined by Vance in dissent. He would not have considered the issue of the trial commissioner's authority precisely because of the effect of *United States v. Leon*. Calling this "exactly the type of case envisioned by the United States Supreme Court in *Leon*," the dissent would have affirmed the conviction based upon the officers' good faith reliance upon the illegal warrant.

The opinion is important for 2 reasons. First, the Court clarifies that while district and circuit judges have statewide authority to issue search warrants, *Richmond v. Commonwealth*, Ky., 637 S.W.2d 642 (1982), trial commissioners are restricted to the county in which they serve. Secondly, the Court had a clear opportunity to adopt the good faith exception, and declined. This is good news for all of us who value privacy rights.

THE SHORT VIEW

Renckley v. State, Fla. Ct. App. 44 Cr.L. 2447 (2/17/89). A middleman told a police officer that marijuana would be delivered on a particular date; the middleman had on previous occasions visited Renckley's home prior to delivering marijuana. A warrant was issued for a search of Renckley's home on the date the marijuana was to be delivered. The Florida Court of Appeals held that under state law this was an anticipatory warrant, and that for a warrant to issue there must be probable cause to believe that drug laws are then being broken;

State v. Ainsworth, Ore. Ct. App. (*en banc*), 770 P. 2d 58 (1989). The use of state law to enforce privacy rights beyond that of federal law was also used in this case by the Oregon Court of Appeals. Here, the Court held that hovering over a field in a rural area resulting in a warrant and eventual seizure of marijuana, was illegal. Note that under *Florida v. Riley*, 44 Cr.L. 3079 (1989) this would have been constitutional.

Brown v. State, Md. Ct. Spec. App., 553 A. 2d 1317 (1989). This is a remarkable case. The police here decided to cordon off a neighborhood, and to check identification and outstanding warrants of anyone in the area. The defendant was driving there, and was pulled over for no apparent reason. During the subsequent interchange resulting in a search, controlled substances were found. The government tried to compare this operation to a sobriety checkpoint. The Court disagreed, saying that this analogy, "is about as valid as asserting that an anaconda is like an earthworm because they are both elongated and move on their bellies." The search was "foreign to every precept embodied not only in the 14th Amendment but in the very motion of due process of law. The police did not just violate the Constitution; they ignored it;"

Lanes v. State, Texas Ct. Crim. App., 45 Cr.L. 2023 (3/15/89). In what appears to be an expression of the obvious, the Texas Court of Appeals holds here that the probable cause to arrest requirement applies to juveniles. Thus, a juvenile who was seized at school to take his fingerprints pursuant to a "fingerprint order" was held to be seized illegally.

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SEIZURE LAW AND BASIC RIGHTS

If you think accused criminals are innocent until proven guilty consider the case of James Burton.

State police raided Burton's Warren County farm in 1987. They found 138 marijuana plants growing in a sophisticated setup inside a barn. The case was turned over to federal authorities, who charged Burton with 3 felony counts of growing marijuana for sale.

Burton never denied that the marijuana was his, but said that he was growing it for his own use. Burton claimed he used the marijuana to relieve the symptoms of glaucoma. A jury bought his defense and convicted him only of the possession of marijuana, a misdemeanor.

After the trial, federal prosecutors filed a civil suit seeking to have Burton's farm seized. U.S. District Judge Ronald Meredith ordered the farm to be seized under a federal law that allows the government to take property used in felony drug violations.

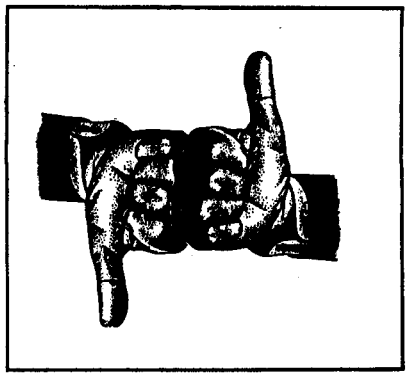
Seizing the property of drug dealers is a legitimate way to fight drug trafficking. And establishing that the property has been used in the commission of a felony is reasonable standard for seizure.

But in this case a jury of Burton's peers has found that he committed no felony. And if no felony has been proved, what gives the government the authority to seize anyone's property?

That's the question now before the 6th Circuit Court of Appeals. And it's a very good question indeed. - *Lexington Herald Leader*, April 23, 1989.

THE RECUSAL OF A JUDGE

The Right of Recusal Continues to Expand



I. DEFENSE LAWYERS EXPAND THE RIGHT OF RECUSAL

Disqualification of judges for prejudice or bias was not permitted under common law because the judiciary engaged in the fiction that all judges were above allowing improper matters to influence their decisions, no matter what. Modern times have seen this convenient fiction jettisoned in recognition that certain matters, situations, and relationships do influence judges just as they influence every person.

Over the years, the law has consistently expanded to require recusal in more and more cases as we continue to increase our understanding of the reality of unfairness due to relationships, statements, prior activity, life itself.

This expansion has also occurred because the judicial system can only be effective if perceived by the people to be fair. The *only* real power of the judiciary is the support and confidence of the people. The fairness of the referee is essential. In fact, objective fairness is no longer enough. The *appearance* of unfairness now requires disqualification. Recusal is now required even when the judge lacks actual knowledge of the disqualifying information or relationship.

DPA RECUSAL PUBLICATION AVAILABLE

DPA has produced an extensive publication on recusal of judges. It contains the categories covered in this recusal article in more depth. It also contains sample recusal motions, and some Kentucky recusal orders.

It is available from DPA for $20.00. Send your check made out to Kentucky State Treasurer to Training Section, DPA 1264 Louisville Road, Perimeter Park West, Frankfort, Ky. 40601.

Why? Because the system will not long survive any hint of unfairness. The litigants and the public require a system that has integrity. The recognition of the reality that judges can be unfair drives the system to new protections.

Indeed, there now are well entrenched protections from unfair judges: the Kentucky and United States Constitutions, Kentucky statutes, Kentucky rules and case law, the ABA and Kentucky Codes of Judicial Conduct and the ABA Standards. All demand or have been interpreted to demand arbiters that are and appear fair.

These guarantees only take meaning when a criminal defense lawyer invokes them on behalf of an individual client. Fair and impartial justice must be nourished, not diminished. The expansion of the law has occurred because criminal defense attorneys have advocated its expansion to insure that a client has a fair process and a fair result. As criminal defense lawyers, it is important for us to see that courts act in a manner which furthers disbelief in judicial bias. The following sampling of the law of judicial disqualification will hopefully aid that end.

II. KENTUCKY JUDICIAL DISQUALIFICATION STATUTES

Currently, Kentucky has 2 statutes which deal with the replacement of a judge.

A. KRS 26A.015

KRS 26A.015, in effect since July 1, 1982, requires any justice, judge or master commissioner to disqualify himself in any proceeding under a wide variety of circumstances from the judge having a personal bias to having a financial or relationship conflict. Under the statute, the chief justice has the responsibility to replace a recused judge. The statute applies to pretrial, trial, appellate and other stages of a proceeding. KRS 26A.015 does not limit recusal to only the listed grounds. Caselaw has expanded disqualification well beyond the statutory grounds.

B. KRS 26A.020

KRS 26A.020, in effect since March 19, 1977, invests the chief justice with the authority to replace a trial judge in a variety of situations, including a party's allegation by affidavit that a judge will not afford him a fair trial or change of venue request. Apparently, this statute only applies to trial judges. KRS 26A.020 clearly requires the following:

1. an affidavit from a party, not a party's attorney; a motion or memo is not required but is accepted and considered;
2. the affidavit must state and show that the "judge will not afford him a fair and impartial trial, or will not impartially decide an application for a change of venue";
3. the circuit clerk certifies it to the chief justice;
4. facts must show unfairness; an affidavit that states only a belief that a judge is unfair is insufficient.

Chief Justice Robert F. Stephens indicated in an article in *The Advocate* (Vol. 11, No. 2, pp. 23-27) that he has imposed additional requirements and procedures under KRS 26A.020 that do not appear in the statute:

1. the Chief Justice reads CR 5 to require service of the affidavit on all parties and the trial judge;
2. a member of the chief justice's staff calls the trial judge and tells him a recusal affidavit has been filed even if the judge has been served with a copy, and asks the judge not to proceed until a ruling is made;
3. a formal response from the trial judge is permitted but the parties are not informed that such a response was made and they do not receive a copy of it. Apparently, the Chief Justice does not apply CR 5 to the judge's response;
4. responses to the affidavit filed by a party are not accepted or considered;
5. the affidavit must be filed as soon

as the facts of unfairness become known to the party;
6. the judge must be shown to be partial to the party and not to the party's attorney;
7. There are no time limits for a ruling from the chief justice.

C. DISTINCTION BETWEEN STATUTES

In his February, 1989 *Advocate* article the current chief justice indicated that from his viewpoint there is a distinct difference in the 2 Kentucky statutes.

KRS 26A.015, according to the chief justice, contemplates a motion to the judge, himself, requesting that the judge recuse himself. The refusal of the judge to disqualify himself then becomes an appealable issue at the conclusion of the case.

KRS 26A.020, according to the chief justice, allows only for a party's affidavit filed with the circuit clerk to be forwarded to the chief justice for his decision. The trial judge does not rule on the affidavit.

When the chief justice refuses to disqualify a judge under KRS 26A.020, it is yet to be decided by any Kentucky court whether that action is reviewable on direct appeal. A cautious attorney would therefore include all the KRS 26A.020 affidavit grounds in a KRS 26A.015 recusal motion.

The chief justice indicates that an overruled motion under KRS 26A.015 in no way prevents a party from subsequently filing an affidavit with the chief justice under KRS 26A.020. But that is not an appeal of the judge's denial to disqualify himself. They are 2 distinct matters.

D. PREVIOUS KENTUCKY STATUTES

Kentucky has had a number of different recusal statutes.

KRS 23.230, now repealed, was enacted in 1944 and provided that the parties, by agreement, could elect one of the attorneys of the court as judge of their case if either party filed an affidavit that the trial judge will not provide a fair and impartial trial or will not impartially decide a request for a change of venue:

> *When, from any cause, a judge of any circuit court fails to attend, or being in attendance cannot properly preside in an action pending in the court or if a vacancy occurs or exists in the office of circuit judge, or if either party files with the clerk of the court his affidavit that the judge will not afford him a fair and impartial trial, or will not impartially decide an application for a change of venue, the parties, by agreement, may elect one of the attorneys of the court to preside on the trial or hear the application, or hold the court for the occasion. If any party to the action is a nonresident defendant, who has not entered his appearance nor been summoned, or is an infant defendant, the attorney appointed to defend for such nonresident or the guardian ad litem for such infant may agree with the other parties to the action upon an attorney having all the qualifications of a circuit judge to try the action. Any special judge so selected shall have all the powers and be subject to all the responsibilities of the regular judge of the court.*

In 1954, KRS 23.230, now repealed, was amended by adding a second section that provided for the chief justice of the then Court of Appeals to designate a regular circuit judge or an attorney to replace the trial judge in the event that the parties could not agree on who should replace the judge:

> *If the parties cannot agree upon an attorney as provided in subsection (1) of this section or if the regular judge determines that sufficient time is not available in which to ascertain if the parties can agree upon a member of the bar to act as judge, as provided in subsection (1) of this section, or if he determines that it is impracticable to attempt to obtain agreement because of the large number of parties to the action to be tried, or for any reason, the clerk shall at once certify the facts to the Chief Justice of the Court of Appeals, who shall immediately designate a regular circuit judge, if one be available, and, if not, an attorney having the qualifications of a judge, to hold the court or try the action.*

Effective June 19, 1970, section 2 of KRS 23.230, now repealed, was amended to make the chief justice of the Supreme Court the designator of a new judge if the parties could not agree.

E. CURRENT STATUTES PROVIDE LESS TO THE PEOPLE

The enactment in 1977 of KRS 26A.020 radically changed the practice of judicial recusals in Kentucky. The practice in existence for many, many years of requiring a trial judge to step aside when a party under oath stated the judge could not be impartial, and of allowing the parties to agree on a new judge was changed in 1977 to requiring a judge to recuse himself if he thought he was unfair, and, if recused, the chief justice designated a new judge.

These drastic changes are unfortunate as the parties in a case and the people of Kentucky are now provided under the current statute with less fairness in important legal disputes.

Every practicing lawyer knows that all too often the judge you have influences critical aspects of a case, sometimes improperly because of subtle, unprovable unfairness. A justice system cannot long afford that reality. We should return to the old, better protections.

F. KENTUCKY STATUTES ARE RIPE FOR CHANGE

A comprehensive review of judicial disqualification led to a recognition that states should have disqualification statutes that further the following values:

(1) justice in particular cases; (2) satisfaction in the minds of the parties that their tribunal was impartial; (3) public appearance of impartial justice; (4) dignity, independence, and authority of the judicial office; (5) good working relationships between bench and bar; (6) avoidance of delay, interruption, and confusion in the scheduling of hearings and trials; and (7) avoidance of unnecessary litigation over procedure.
Staff Report, *Disqualification of Judges for Prejudice or Bias - Common Law Evolution, Current Status, and the Oregon Experience*, 48 *Or.L.Rev.* 311, 400 (1969).

Kentucky's recusal procedure should be judged against these values, and a more liberal statutory scheme should be enacted.

III. KENTUCKY JUDICIAL CODE: DISQUALIFICATION REQUIRED WHEN *IMPARTIALITY MIGHT REASONABLY BE QUESTIONED*

Cannon 3 of Kentucky's Code of Judicial Conduct, SCR 4.300, states:

> *A judge should perform the duties of his office impartially and diligently;*

Cannon 3C of SCR 4.300 contains specific rules on disqualification. The ultimate standard is clear:

> *1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned....*

Taking note of this precise standard is important because it requires recusal when the judge's impartiality might

reasonably be questioned. It does not require proof that the judge is actually partial. It does not require a judge to know of the disqualifying matter. The standard is objective not subjective.

It is also important to note this standard since it is not contained in either KRS 26A.015 or 26A.020. It thus provides greater protection to the individual seeking recusal than the standards in KRS 26A.015 and KRS 26A.020.

IV. ABA CODE OF JUDICIAL CONDUCT

Cannon 3C of the Kentucky Judicial Code comes from Cannon 3C of the ABA Judicial Code. The ABA Code has the added advantage of commentary. Since the wording is nearly identical, cases interpreting the application of the ABA Code will be beneficial to understanding the application of the Kentucky Code.

V. FEDERAL JUDICIAL DISQUALIFICATION STATUTES

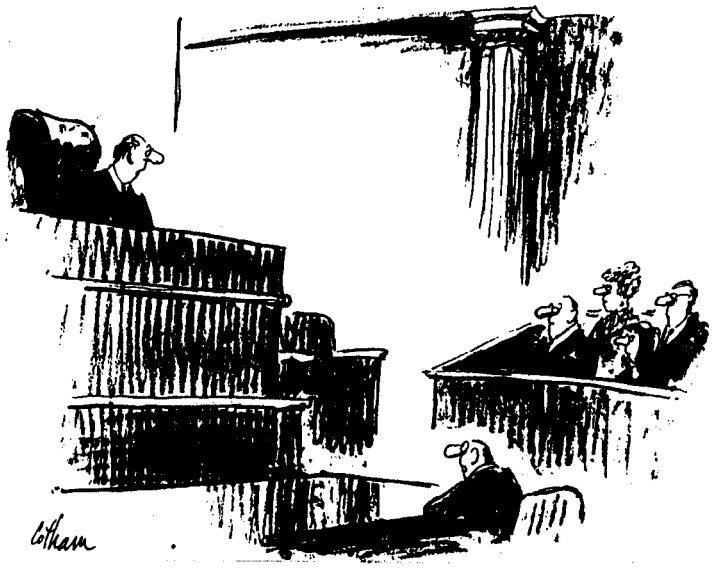
A. 28 U.S.C. Section 144

Under 28 U.S.C. Section 144 a party in any proceeding in a district court is entitled to a different judge if the judge has a "personal bias or prejudice." The recusal request is heard by a different judge.

B. 28 U.S.C. Section 455

Under 28 U.S.C. Section 455(a) a judge must disqualify himself if "his impartiality might reasonably be questioned." It sets forth specifics that follow closely on those in the Kentucky Judicial Code and in the ABA Code of Judicial Conduct and KRS 26A.015. Waiver of disqualification by a party is not permitted under certain grounds but is permitted under other grounds.

Section 455 was substantially revised by Congress in 1974 to conform with the then recently adopted Canon 3C of the ABA Code of Judicial Conduct (1974). Previous to 1974, a federal judge was required to recuse himself when he had a substantial interest in the proceeding or when "in his opinion" it was improper for him to hear the case. In 1974 the objective test of Subsection (a) of 455 replaced the old subjective standard.



"I trust that the court's indiscriminate use of the phrase 'scum of the earth' will not unduly influence the jury in reaching a decision."

Reprinted from The Saturday Evening Post c 1985 BFL&MS, INDPLS.

The congressional purpose of the change to an objective standard was to promote public confidence in the integrity of the judicial process. See S.Rep. No. 93-419, p. 5 ((1973); H.R. Rep. No. 93-1453, p. 5 (1974). Before 1974, Section 455 read:

> *Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.*

In *Liljeberg v. Health Service Acquisition Corp.*, ___ U.S. ___, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988) the court held that a federal district court judge who sat on the Board of Trustees of a University that benefited from a lawsuit decided by the judge had to recuse himself under 28 U.S.C. Section 455(a) since an objective observer would have questioned the judge's impartiality. Importantly, the Court determined that actual knowledge by the judge of the financial benefit to the University was not necessary to require recusal under Section 455(a).

The holding of this case is important for us to note since it interprets language in Section 455(a) which is identical to Kentucky's Code of Judicial Conduct, Cannon 3C of SCR 4.300.

VI. ABA STANDARDS RELATING TO THE SPECIAL FUNCTION OF THE TRIAL JUDGE

The ABA standards contain a number of disqualification standards. Standard 6-1.5, duty to maintain impartiality, states:

> *The trial judge should avoid impropriety and the appearance of impropriety in all activities, and should conduct himself or herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. The judge should not allow family, social, or other relationships to influence judicial conduct or judgment.*

Standard 6-1.7, circumstances requiring recusation, states:

> *The trial judge should recuse himself or herself whenever the judge has any*
>
> *doubt as to his or her ability to preside impartially in a criminal case or whenever the judge believes his or her impartiality can reasonably be questioned.*

VII. PEREMPTORY DISQUALIFICATION

In 1979 the ABA approved a resolution calling for a provision permitting the peremptory challenge of a trial judge under certain conditions. Many jurisdictions by statute provide a defendant a peremptory removal of a judge.

The National Conference of Commissioners on Uniform State Laws is com-

posed of Commissioners from each state. Their objective is to promote uniform state laws where appropriate.

Rule 741(a) of their Uniform Rules of Criminal Procedure allows a defendant an opportunity to obtain substitution of a judge on demand without a showing of cause before trial has commenced, and it limits that right to a defendant:

Rule 741. Substitution of Judge.

(a) On demand. A defendant may obtain a substitution of the judge before whom a trial or other proceeding is to be conducted by filing a demand therefor, but if trial has commenced before a judge, a demand may not be filed as to that judge. A defendant may not file more than one demand in a case. If there are two or more defendants, a defendant may not file a demand, if another defendant has filed a demand, unless a motion for severance of defendants has been denied. The demand must be signed by the defendant or the defendant's lawyer, and must be filed at least [ten days] before the time set for commencement of trial and at least [three days] before the time set for any other proceedings, but it may be filed within [one day] after the defendant ascertains or should have ascertained the judge who is to preside at the trial or proceeding.

Rule 741(c) provides for recusal of a judge for cause, and requires that motion to be heard by a different judge:

(c) Disqualification for cause. A judge may not preside over a trial or other proceeding if on motion of a party it appears that the judge is disqualified for a cause provided [by law or by the Code of Judicial Conduct]. The motion is to disqualify must be heard before another judge regularly sitting in the same court or a judge designated by [the appropriate assigning authority], and, unless otherwise ordered by that judge for cause, must be made at least [10 days] before the time set for commencement of trial and at least [three days] before the time set for any other proceeding, but it may be made within [one day] after the party ascertains or should have ascertained the judge who is to preside at the trial or proceeding.

VIII. METHODS OF RECUSING A JUDGE IN KENTUCKY

In Kentucky there are currently 4 methods of requesting a judge to disqualify himself:

1. affidavit of party with a decision by chief justice under KRS 26A.020;
2. a motion to the judge, himself, under KRS 26A.015 or under caselaw or constitutional law;
3. a direct appeal at the conclusion of the case of the judge's refusal to recuse himself;
4. a writ or prohibition in those cases where the bias or prejudice resulting is irreparable or there is an arbitrary or prejudiced exercise of power. *Middle States Coal v. Cornett*, 584 S.W.2d 593 (Ky.App. 1979).

IX. UNITED STATES SUPREME COURT CASELAW

The United States Supreme Court has recognized that the integrity, and indeed the viability, of the judiciary require both fair judges and judges who appear to the people to be fair. Most of the Court's judicial recusal decisions are either unanimous or decisions by lopsided margins, perhaps an indication of how the Court feels about the message it is sending.

Under Supreme Court caselaw, *actual bias* is not required. If there is so much as an appearance of unfairness, bias or interest, a judge cannot sit. Every situation that provides a *possible temptation* to the objective observer for a judge to not address the interests and rights of the parties impartially requires recusal. When it appears that a judge may have an interest of any sort in the outcome of a case, he must step aside.

In *Cooke v. United States*, 267 U.S. 517 (1925) a unanimous Court expressed its preference that a judge should step aside in a contempt case that involves a personal attack on himself.

Two years later, the Court unanimously set the standard for judicial disqualification under 14th amendment due process protections. The Court held in *Tumey v. Ohio*, 273 U.S. 50 (1927) that a judge, in this case the mayor of a town, whose salary benefitted from the fines he imposed, could not sit without offending due process. *Id.* at 441. The Court stated a broad, stringent standard for constitutional unfitness of a judge:

Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law.
Id. at 444.

Justice Frankfurter believed the appearance of impartiality was essential. He recused himself in *Public Utilities Commission and Pollar*, 343 U.S. 451 (1952), reflecting on how influential the subconscious was:

But it is also true that reason cannot control the subconscious influence of feelings of which it is unaware. Where there is ground for believing that such unconscious feelings may operate in the ultimate judgment, or may not unfairly lead others to believe they are operating, judges recuse themselves. They do this for a variety of reasons. The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact.
Id. at 822-23.

A short 2 years later, the Court, itself, enunciated the *appearance* standard in *Offutt v. United States*, 348 U.S. 11 (1954), and held that a judge who becomes *personally embroiled* with the defense counsel cannot sit and decide whether the trial attorney was in contempt:

The vital point is that in sitting in judgment on such a misbehaving lawyer the judge should not himself give vent to personal spleen or respond to a personal grievance. These are subtle matters, for they concern the ingredients of what constitutes justice. Therefore, justice must satisfy the appearance of justice.
Id. at 13.

The Court reaffirmed the *appearance* standard of *Offutt* and the *possible temptation* standard of *Tumey* in *In Re Murchison*, 349 U.S. 133 (1955). A judge who was functioning under a Michigan statute as a one man grand jury felt a policeman who was a witness before him was lying. The judge held the policeman in contempt. The Court held that 14th amendment due process prohibits a judge from sitting in a case when he was part of the accusatory process. No "man is permitted to try cases where he has an interest in the outcome." *Id.* at 625. That interest is defined by the tests of *Offutt* and *Tumey*.

In 1971 in *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971) the Court unanimously decided that a judge, who was the object of a *pro se* defendant's "highly personal aspersions," had to step aside at the contempt hearing:

Our conclusion is that by reason of the Due Process Clause of the Fourteenth Amendment a defendant in criminal contempt proceedings should be given a public trial before a judge other than the one reviled by the contemnor. See In re Oliver....
Id. at 505.

In *Ward v. Village of Monroesville, Ohio*, 409 U.S. 57 (1972) the judge was the mayor, and any fines went into the city treasury. Fines accounted for a substantial amount of the Village's funds. The Court extended *Tumey* by deciding that the due process clause was offended when a judge was *possibly tempted* to be partial even though the partiality did not benefit himself personally.

In 1971, a Kentucky criminal defense lawyer was found in criminal contempt by a Kentucky trial judge for his actions at the trial of a black man accused of killing 2 policemen. The defense attorney was sentenced to 4 1/2 years imprisonment. The Court addressed this case in *Taylor v. Hayes* 418 U.S. 488 (1974), and held that the trial judge had to recuse himself from the contempt determination since the judge was so personally involved with the actions that caused the contempt citations. In so doing, the Court explained the standard for determining whether the judge was personally involved enough to be required to step aside: Even if the judge is not personally attacked, he still must recuse himself if there is a "likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused." Actual bias is not required. *Id.* at 2704.

Recently in a unanimous opinion, the Supreme Court has again reaffirmed the *Tumey* standard. In *Aetna Life Ins. co. v. Lavoie*, 475 U.S. 813 (1986) an Alabama Supreme Court Justice authored a 5-4 per curiam decision that affirmed a $3.5 million jury award against a Health Insurance provider. Of course, that opinion became the law of Alabama. At the same time the justice was personally suing a different health insurance company for a similar claim.

The United States Supreme Court held that the justice's participation in deciding the case violated the insurance company's due process rights since he was acting as a "judge in his own case" and his interest was "direct, personal, substantial, [and] pecuniary." *Id.* at 1586.

X. KENTUCKY AND OTHER JURISDICTIONS

Judicial recusals may be the only area of Kentucky law where the majority of published cases has been decided in favor of criminal defendants. That is incredible in light of the ultra conservative nature of Kentucky appellate courts in criminal cases. But it is not incredible when you recognize what drives these decisions - the integrity and viability of the judicial system. We briefly review Kentucky and other jurisdictions' caselaw that has held judges must be replaced.

A. JUDGE MAKES BIASED STATEMENTS

An expression of predisposition by a judge has always required his removal in Kentucky. In each of the following cases, the judge was recused:

In *White v. Commonwealth*, 310 S.W.2d 277 (Ky. 1958) the judge had to step aside due to his "mental attitude of hostility or antagonism . . . towards the defendants." *Id.* at 278-79. The defendants were convicted of possessing liquor for sale in a dry territory. The judge stated in court that the defendants were operating a liquor joint and that the defendant was a pimp in the liquor business.

In *Clark v. Commonwealth*, 82 S.W.2d 823 (Ky. 1935) the judge made a statement prior to the proceedings for disbarment in which he presided, "...I'm going to disbar Clark if it's the last thing I ever do." *Id.* at 823-24.

In *Stamp v. Commonwealth*, 243 S.W. 27 (Ky. 1922) the defendant was convicted of murder and sentenced to death. The defendant filed an affidavit stating that the judge had ". . . repeatedly expressed, both privately and publicly, his belief in and opinion of the appellant's guilt of the murder. . . ." *Id.* at 29. Additionally, the judge was a candidate for re-election in a heated contest.

In *Chenault v. Spencer*, 68 S.W. 128 (Ky. 1902), a trial judge stated in a hotel that a party in a civil case before him had no right to the land in controversy.

In *Givens v. Lord Crawshaw*, 55 S.W. 905 (Ky. 1900), a civil case, a party requested recusal of the trial judge since the party opposed the judge in the judge's election and supported the judge's opponent. The judge had stated that those that opposed him would "have a hard road to travel."

In *Massie v. Commonwealth*, 20 S.W. 704 (Ky. 1892) the defendant was charged with murder. Before the second trial of the case, the defendant moved for recusal since the judge had repeatedly expressed his opinion that the defendant was guilty and his killing was the most coldblooded ever. The defendant also stated that the judge was running for re-election and was ruling in particular ways to "satisfy the bloodthirsty throng."

The Arkansas Supreme Court required a judge to step aside from a motion to revoke a suspended sentence since the judge previously told the defendant's attorney to tell his client "to bring his toothbrush with him." *Burrows v. Forrest City*, 543 S.W.2d 488 (Ark. 1976). Even though the remark could have many interpretations, the uncertainty had to be resolved in favor of the defendant.

B.SYMPATHIZING WITH PARTY'S INTERESTS

A judge sympathizing with a group that is a party to a lawsuit and who speaks to the group engages in undue activity to the point that he cannot preside. *Smith v. Word*, 75 S.W.2d 538 (Ky. 1934).

C.OVERINVOLVEMENT OF THE JUDGE IN THE CASE AND DENIGRATION OF THE DEFENSE

When predisposition evidences itself by the judge's repeated injection of himself into a trial in destructive, prejudicial ways against a defendant or his attorney, courts disqualify that judge. *United States v. Hickman*, 592 F.2d 931 (6th Cir. 1979); *United States v. Dellinger*, 472 F.2d 340 (7th Cir. 1972).

D. JUDGE'S RELATIONSHIP

Under the rationale of implied bias, the following relationships require the judge to step aside or require a hearing on the

issue: judge and prosecutor who were uncle and nephew, *Adams v. State*, 601 S.W.2d 881 (Ark. 1980), *Dyas v. Lockhart*, 771 F.2d 1144 (8th Cir. 1985); party represented by son-in-law of judge, *In Re Broome*, 264 S.E.2d 656 (Ga.App. 1980); judge a brother-in-law of counsel, *Middle States Coal Co. v. Cornett*, 584 S.W.2d 593 (Ky.App. 1979); judge married to a first cousin of the husband in a divorce action, *Wells v. Walter*, 501 S.W.2d 259 (Ky. 1973); judge a 3rd cousin of the rape victim's father and 4th cousin of the victim, *Johnson v. Commonwealth*, 203 S.W.2d 12 (Ky. 1947); judge a 3rd cousin of one defendant, a 4th cousin of another defendant and a 3rd cousin of the deceased, *Commonwealth v. Howard*, 102 S.W.2d 18 (Ky. 1937); judge a cousin of the deceased, *Bradley v. Commonwealth*, 201 S.W. 1047 (Ky. 1927); nephew by blood of judge had financial interest in case, *Petrey v. Holiday*, 199 S.W. 67 (Ky. 1917); judge related within 4th degree by marriage to victim. *Byler v. State*, 197 S.W.2d 748 (Ark. 1946).

E. JUDGE AS A WITNESS

In *People v. Short*, 383 N.E.2d 723 (Ill.App.Ct. 1978) the defense lawyer asked for probation plus restitution for the defendants at the sentencing of the two 17 year old boys. The trial judge found the defense sentencing alternatives inadequate and continued the sentencing. A month later the judge sentenced the defendants to the maximum sentence and fine.

The defense asked for disqualification of the judge since the judge informed the defendants' mother that he had continued the sentencing to allow the defendants' parents the opportunity to pay restitution.

The appellate court required recusal since the trial judge was the only witness to the conversation with the defendants' parents, and since "a trial judge should recuse himself when it appears he may be a material witness or would have knowledge *de hors* the record of the truth or falsity of allegations...." *Id.* at 726.

F. IMPROPER KNOWLEDGE CONCERNING THE CASE/ *EX PARTE* COMMUNICATIONS

Ex parte communications of any note preclude a judge from sitting. *Neace v. Commonwealth*, 47 S.W.2d 995 (Ky. 1932).

Where a judge and the brother of the victim have an *ex parte* conversation in a capital case with the brother expressing the feeling that the family wants a death sentence, the trial judge has to disqualify himself. *State v. Valencia*, 602 P.2d 807 (Ariz. 1979).

In *State v. Barker*, 420 N.W.2d 695 (Neb. 1988) the defendant was convicted of manslaughter. After the verdict was announced, the prosecutor told the trial judge that the victim's parents and sister, nonresidents of the state, wanted to talk to him. The defendant's lawyer objected. The prosecutor and defense attorney refused to attend the meeting of the judge with the victim's family. The judge met with the family in chambers without counsel and without recording the meeting. The trial judge refused to recuse himself at sentencing. The Court held that a "judge, who initiates or invites or receives an *ex parte* communication concerning a pending proceeding, must recuse himself or herself from the proceedings when a litigant requests such recusal." *Id.* at 699. No showing of prejudice is required.

See also *Price Brothers Co. v. Philadelphia Gear Corp.*, 629 F.2d 444 (6thCir. 1980).

Canon 3(A)(4) of the Code of Judicial Conduct provides, "A judge should... neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding."

Canon 3(C)(1)(a) requires recusal where a judge has "personal knowledge of disputed evidentiary facts concerning the proceedings."

G.JUDGE WITH PRIOR CONTACTS AS COUNSEL OR AS PRIOR COUNSEL

When a judge has acted as prior counsel for a party or has had contact in some general capacity as counsel for or against a party, recusal is required even if the judge has no recollection of the representation. This includes situations where the judge had no actual contact or representation but his position engendered a relationship: judge was county attorney when the defendant pled guilty in circuit court, *Carter v. Commonwealth*, 641 S.W.2d 758 (Ky. 1982); judge was Commonwealth Attorney when defendant entered plea, *Small v. Commonwealth*, 617 S.W.2d 61 (Ky.App. 1981), or when the defendant was being investigated, *King v. State*, 271 S.E.2d 630 (Ga. 1980); *United States v. Amerine*, 411 F.2d 1130 (6th Cir. 1969); when judge was previously counsel for a sheriff in election contest, *Ledford v. Hubbard*, 33 S.W.2d 345 (Ky. 1930).

H. PARTY'S COUNSEL REPRESENTING JUDGE ON EXTRAORDINARY WRIT

Writs of mandamus/prohibition were filed in *Rapp v. Van Dusen*, 350 F.2d 806 (3rd Cir. 1965), a civil case, in an effort to challenge the transfer of actions from federal court in Pennsylvania to the federal court in Massachusetts. The 3rd Circuit ordered the federal judge to answer the extraordinary writs. He did, and the 3rd circuit held that he was in error when he transferred the cases. The district court judge then obtained certiorari, and the United States Supreme Court reversed the 3rd circuit, saying the cases were properly transferred. The plaintiffs then moved to recuse the federal district judge under 28 U.S.C. Section 455. The judge refused; and that refusal was challenged by way of mandamus in the 3rd circuit.

The trial judge designated attorneys for the defendant as his counsel on the extraordinary writ proceedings challenging his decision to transfer the cases. He consulted with them on the response to the mandamus in the absence of their adversaries. They represented his position on the writ. He had no other connection to the parties.

The 3rd Circuit held it improper for the judge to continue to sit when he was represented by counsel for a party on the mandamus action:

> *For the proper administration of justice requires of a judge not only actual impartiality, but also the appearance of a detached impartiality. Litigants are entitled, moreover, to a judge whose unconscious responses in the litigation may be struck only in the observing presence of all parties and their counsel. This right is impaired when a party is required to meet in his opponent an advocate who has already acted as the judge's counsel in the same litigation. Id. at 812.*

Even though Kentucky rules, CR 76.36(7)(g), were changed in 1985 to eliminate this kind of conflict in Kentucky, Kentucky judges continue to represent themselves as counsel in violation of the holding in *Rapp* subjecting themselves to sure disqualification. But see *Kordenbrock v. Scroggy*, 680 F.Supp. 867, 887 (E.D.Ky. 1988).

I. JUDGE WITH EMPLOYMENT CONTACTS

In *Pepsico, Inc. v. McMillen*, 764 F.2d 458 (7th Cir. 1985) the Court of Appeals granted a writ of mandamus, ordering the

judge to recuse himself from this anti-trust case. The judge was going to be retiring from senior status as a federal district judge and return to a Chicago law firm. The judge employed a headhunter and told him to not contact law firms with cases before him. The headhunter mistakenly contacted both law firms in the anti-trust case.

The Court held that the "appearance of partiality would be created by Judge McMillen's continuing to preside in this case," *Id.* at 460, since "an objective, disinterested observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt that justice would be done" in the prospective financial relationship via employment with one or both sides of the case. *Id.* at 460-461.

The Court determined that mandamus was the appropriate procedure against a judge who refused to recuse himself when required by statute. *Id.* at 460.

J. JUDGE WITH FINANCIAL INTERESTS

Disqualification is necessary when a judge has any hint of a financial interest in a case before him. This includes the following situations: judge's wife owns a few stock in a company involved in a class action suit by stockholders, *In Re Cement Antitrust Litigation*, 688 F.2d 1297 (9th Cir. 1982); when the judge's brother is a member of a law firm involved in a civil case before him *SCA Services, Inc. v. Morgan*, 557 F.2d 110 (7th Cir. 1977); when a prosecuting witness in a receiving stolen property case had purchased stolen property from the defendant for the use of 2 corporations in which the judge co-owned with the witness, *Brunner v. Commonwealth*, 395 S.W.2d 382 (Ky. 1965); when a judge who is a director and stockholder in a bank which is a creditor of a defunct rival bank wrecked by an officer for false swearing. *Anderson v. Commonwealth*, 117 S.W. 364 (Ky. 1909).

K. CONTEMPT

When a judge decides whether a lawyer was contemptuous and the questioned conduct involves the judge as an actor or the relationship between the judge and lawyer has become personal, disqualification must occur. In addition to the United States Supreme Court caselaw previously discussed, see *In Re Martin*,139 Calif.Rptr. 451 (Ca.Ct.App. 1977); *Layne v. Grossman*, 430 So.2d 525 (Fla.App. 1983); *United States v. Combs*, 390 F.2d 426 (6th Cir. 1968).

L. HISTORY OF DIFFICULTIES BETWEEN JUDGE AND LAWYER

It has long been recognized that animus between judge and lawyer requires a judge to step aside to insure a fair adjudication for the parties. In *Turner v. Commonwealth*, 59 Ky.Rpts. 619 (Ky. 1859) the lawyer by affidavit stated that the presiding judge was his "bitter personal enemy," and that because of the judge's "enmity" toward him the judge could not fairly sit in his contempt trial. By affidavit, 5 other persons said the judge was very hostile to the attorney. The appellate court held this was ample legal cause to disqualify the judge from presiding.

In *Hayslip v. Douglas*, 400 So.2d 553 (Fla.App. 1981) the defendant's doctor in the medical malpractice suit filed an affidavit requesting the judge to disqualify himself due to the bias the judge had against his lawyer. The lawyer had previously moved to disqualify the judge in two earlier cases. In response to one of those motions, the judge said, "I'm going to review the file a little more before I rule, but it appears to me that this is a frivolous and perhaps almost champertous motion for me to recuse myself." *Id.* at 555. Also, at a pretrial hearing on a motion of plaintiff's counsel to withdraw the trial judge gratuitously stated that there was another lawyer in the case who should withdraw. The appellate court held that the remarks directed at the defense counsel, not the party, adversely affected the client to the point that a new judge had to be assigned.

M. PREJUDGING SENTENCING POSSIBILITIES

A judge who refuses or is unable to consider the full range of legal sentencing options is disqualified from sentencing a defendant: the inability to consider probation for armed robbery, *Wyatt v. Ropke*, 407 S.W.2d 410 (Ky. 1966); the decision by a judge to sentence all who commit a certain crime to no less than a certain, nonminimum sentence. *United States v. Thompson*, 483 F.2d 527 (3rd Cir. 1973).

N. POLITICAL INFLUENCE

When the politics of a judge seeps into a case, he cannot sit. In the *Kentucky Journal Publishing Company v. Gaines*, 110 S.W.2d 268 (Ky. 1908) libel suit, the newspaper alleged the judge was politically antagonistic to them; and he stated his belief in certain evidence; that the judge was in frequent communication with the plaintiff, and the publication in question arose out of a campaign for United States Senate, in which the judge actively participated.

The judge was required to step aside since these actions by the judge meant his "judicial mind was not in that state of impartial equipoise between the litigants." *Id.* at 270. "Political bias ... is an arch enemy to an impartial trial...." *Id.* at 272.

O. RECUSAL IN DEATH PENALTY CASE RETRIAL AND IN RETRIALS IN OTHER CASES

A judge in a capital case express opinions concerning the weight of the evidence and merits of proceedings, and he fills out the trial judge's report. He also decides on the appropriateness of the sentence of death.

The previous and current (see *Advocate*, Vol. 11, No. 2, pp. 25-26) chief justices of the Kentucky Supreme Court have decided under KRS 26A.020(1) that judges must be recused on retrials of cases where the sentence of death was originally imposed and reversed by the Kentucky Supreme Court:

1. *Johnny Marshall Smith v. Comm.,1980*
2. *Brian Keith Moore v. Comm.*, 1982

In light of this clear standard and history, circuit judges have recused themselves in these circumstances without the matter having to be taken to the Chief Justice:

1. *Comm. v. Larry Lamont White*, 1987
2. *Comm. v. Parramore Sanborn*, 1989
3. *Comm. v. Randy Haight*, 1989
4. *Comm. v. Eugene Frank Tamme, 1989.*

For noncapital retrials, it has been found "salutary and in the public interest" for lengthy criminal cases to be retried by a different judge, at least in multi-judge districts, unless the parties request the same judge. *United States v. Bryan*, 393 F.2d 91 (2nd Cir. 1968). But see *Withrow v. Larkin*, 421 U.S. 35, 57 (1975).

In *United States v. White*, 846 F. 2d 678 (11th Cir. 1988) the Court held that the district court judge could not retry this civil rights criminal case that involved the prosecution of KKK members for acts against blacks during a demonstration since he refused to disregard his original findings and refused to follow

the law of the case and since his "position has become hardened against the Government...." *Id.* at 696. The judge took great offense but recused himself from "all cases wherein the United States is a party and in which any Ku Klux Klan organization, or any person alleged to belong to a Ku Klux Klan organization, is a party. The undersigned also recuses himself until further order in all cases in which the Southern Poverty Law Center is a party or represents a party." *In Re Acker*, 696 F. Supp. 591, 598 (ND Ala. 1988).

P. RACIAL BIAS

Courts do not hesitate to demand recusal when any racist comments are made by the judge. In *Peek v. State*, 488 So.2d 52 (Fla. 1986) the trial judge, after the end of the guilt phase and before the beginning of the penalty phase, referred to witnesses as niggers. He had to step aside.

Q. JUDGE'S STAFF

A judge's or magistrate's staff, his law clerks and secretaries, make up the judge's professional family. When one of the staff have a relationship or interest that would have required the judge to recuse himself if he had that interest then disqualification is required. *Hall v. SBA*, 695 F.2d 175 (5th Cir. 1983).

XI. PROCEDURAL AND OTHER MATTERS

A. RECUSED JUDGE LOSES ALL JURISDICTION IN THE CASE

Once a judge disqualifies himself, he loses jurisdiction forever in the case, *Wade v. Bondurant*, 625 S.W.2d 847 (Ky. 1981), in the absence of an agreement of the parties. *Wedding v. Lair*, 404 S.W.2d 451 (Ky. 1966).

B. PRESERVATION

In *Small v. Commonwealth*, 617 S.W.2d 61 (Ky.App., 1981) there was no motion to disqualify the judge in the circuit court; rather, it was raised for the first time on appeal. This was not a waiver of the issue since "any waiver of such right may be made under proper circumstances, either in writing or on the record, but will not be presumed from silence." *Id.* at 62. See also *Carter v. Commonwealth*, 641 S.W.2d 758 (Ky. 1982).

C. DOUBTS RESOLVED IN FAVOR OF RECUSAL

In order to insure public confidence in the judiciary, any doubts about disqualification must be resolved in favor of recusal. *Dotson v. Burchett*, 190 S.W.2d 697, 700 (Ky. 1945).

"[I]t is a universally recognized tradition of the law that the appearance of impartiality is next in importance only to the fact itself. It cannot be sacrificed to convenience." *Wells v. Walter*, 501 S.W.2d 259, 260 (1973).

D. REMOVAL FROM OFFICE

Failure of a judge to disqualify himself in cases involving friends is "an abuse of office," not just "a mere mistake in judgement," and may require removal from office. *Starnes v. Judicial Retirement Commission*, 680 S.W.2d 922, 923 (Ky. 1984).

E. QUASI-JUDGES

The rule that a fair trial in a fair tribunal is a basic requirement of due process applies to administrative agencies and their deciders. In *American Cyanamid Comp v. FTC*, 363 F.2d 757 (6th Cir. 1966) the chairman of the Federal Trade Commission had to step aside when he formerly was the chief senate counsel for the subcommittee which conducted the investigation of many of the facts and issues involved in the proceeding before the FTC. See also *Gibson v. Berryhill*, 411 U.S. 564 (1973).

F. JUDGE MAY NOT OPPOSE RECUSAL

Once a recusal request is filed, a judge cannot himself or through a legal representative oppose the request. *Isaacs v. State*, 355 S.E.2d 644 (Ga. 1987).

This line of thinking brings into question the current practice in Kentucky that allows a circuit judge to respond to a KRS 26A.020 recusal affidavit filed with the chief justice. (See *Advocate*, Vol. 11, No. 2, p. 24).

G. DISQUALIFICATION OF ALL APPELLATE JUDGES

Judge Cornett v. Board of Trustees of Kentucky Judicial Form Retirement Systems, No. 88-CA-179-S (1/27/89) (unpublished) was an appeal of a Franklin Circuit Court declaratory judgment. Judge Cornett sought to prohibit the Judicial Retirement System from deducting retirement benefits in the amount of benefits previously paid during an earlier retirement. Every member of the Kentucky Court of Appeals recused himself due to a "conflict of interest." The Kentucky Supreme Court appointed a panel of attorneys to decide Judge Cornett's appeal.

XII. DEVELOPMENT OF FACTUAL INFORMATION

It is important to factually support your request for disqualification.

The judge bears a heavy burden to reveal information that would allow the filing of a motion to recuse. When a judge or other person does not readily reveal the information necessary to document your claim, you have the obligation to obtain the information, present it to the judge, and provide it in the record for appropriate review.

How do you insure the record contains all the necessary factural development? You may ask the judge to state the information into the record, or produce documents. You may have to subpoena the documents or records, or take a deposition, or submit interrogatories.

For instance, if your claim is that the judge had improper *ex parte* communications with the victims, you may want to ask him to state exactly what they were, subpoena any letters, have the victims testify as to what was said and done, and perhaps have the judge testify.

XIII. CONSTITUTIONAL GROUNDS FOR RELIEF WHEN ASKING FOR RECUSAL

Constitutional challenges to the propriety of a judge sitting include:

1. United States Constitution, 14th amendment due process:

   a. Due process fairness

   b. Due process right to fair administration of state-created right. See *Evits v. Lucy*, 469 U.S. 387 (1985).

2. Kentucky Constitution, Section 2 due process:

   Kaelin v. City of Louisville, Ky., 643 S.W.2d 590 (1982). Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.

3.United States Constitution, 14th and 8th amendment right to reliability.

4. United States Constitution, 6th and 14th amendment right to fair trial.

Table 1
Number Filed By Category

Year	Civil	Criminal.
1983	24	17
1884	24	22
1985	28	17
1986	12	18
1987	14	7
1988	15	6
1989	2	6
Total	119	93

Table 2
Number Filed By Year

Year	Number Filed
1983	41
1984	46
1985	45
1986	30
1987	21
1988	21
1989	8
Total	212

Table 3
BREAKDOWN OF RULINGS

A) CIVIL

Year	Suff	Insuf.	Moot
1983	3	21	0
1984	7	17	0
1985	4	24	0
1986	1	11	0
1987	1	13	0
1988	0	14	1
1989	0	2	0
Total	16	102	1

B) CRIMINAL

Year	Suf.	Insuf.	Moot
1983	2	14	1
1984	3	17	2
1985	0	16	1
1986	0	18	0
1987	0	7	0
1988	0	6	0
1989	1	5	0
Total	6	83	4

Table 4
26A.020 Recusals Granted, 1983-1989

	Filed	G.	%G.
Civil	119	16	13.4
Criminal	93	6	6.5
Total	212	22	10.4

XIV. KENTUCKY STATISTICS

Statistics provided by the Kentucky Supreme Court staff indicate that from 1983-1988 there have been 204 affidavits filed under KRS 26A.020. In 1989 there have been 8 filed.

Of these 212 requests since 1983, chief justices have only ordered the judge to step aside on 22 occasions or 10.4% of the time.

Since 1983, 13.4% of the civil requests were granted while only 6.5% of the criminal requests were granted. In the last 5 years only 1 affidavit of the 54 filed in criminal cases has been found sufficient by the Chief Justice (or 1.9%).

The accompanying tables are yearly breakdowns of affidavits filed and ruled on.

XV. CONCLUSION

It is important for us to view recusals in historical context in order to understand what current and future possibilities hold. We have travelled a long way from the days when judges were presumed to be able to shed *any* unfairness to a point today that recognizes the importance of avoiding not only unfairness but also the appearance of unfairness. A judge must disqualify himself when his *impartiality might reasonably be questioned.*

The degree to which our concepts of unfairness continue to expand in criminal cases depends on our advocacy. We must be ever vigilant to be conscious in our cases when the judge cannot fairly sit and to find and produce the evidence of it, if it is in our client's interest.

ED MONAHAN

At the Bar: Federal Judge Asked To Step Aside

Lawyers are reluctant to ask judges to recuse themselves- to step down in a given case- and it's easy to understand why. Such motions are rarely granted, and if one is denied an attorney can find himself before a judge fuming over the implication that he's anything but even handed and judicious.

Prosecutors in the U. S. Attorney's Office in Manhattan have even been more leery of seeking such disqualifications. Always, they've maintained a nonaggression pact with Federal district judges as if such tactics were too undignified for the elite institutions of Foley Square.

Thus lawyers were stunned recently when U.S. Attorney Rudolph W. Giuliani asked Judge Kevin Duffy to set aside in the fraud trial of Bess Myerson, the city's former Cultural Affairs Commissioner, and Judge Duffy lashed back.

The prosecutor contended Judge Duffy had ties both to Judge Hortense Gabel, also a defendant in the case, as well as Milton S. Gould, whose firm Shea & Gould, represents her. Mr. Gould played a key role when Judge Duffy's wife, Irene, was named to the N.Y. Family Court a decade ago. In addition, Mr. Guiliani said, Mr. Gould discussed a job for Judge Duffy at Shea & Gould should he ever decide to leave the bench.

In a blistering opinion, Judge Duffy countered that he'd met Judge Gabel only twice. While conceding that he was friendly with Mr. Gould-they'd played golf together, visited one another's homes and talked casually about Judge Duffy's future plans- he insisted such ties weren't sufficient for him to step aside. But acknowledging his rage over Mr. Guiliani, who he said was seeking" to throw a little mud and see if it sticks," he did so anyway.

More than perhaps any of his colleagues, Judge Duffy is "down on prosecutors who fall in love with flashbulbs," as one lawyer put it. In the Myerson case, he has threatened to fine lawyers exponentially (from $2,000 for the first offense to $4,000 to $16,000 to $256,000) for inappropriate comments to reporters. Judge Duffy charged that it was this policy that was really responsible for Mr. Guiliani's motion. Not to be outdone, Mr. Guiliani promptly called Judge Duffy's comments"baseless and dishonest."

The bizarre spectacle prompts the perennial question of when a judge should step aside, not for reasons of blatant bias or financial interest but because he is too cozy with lawyers or the litigants in a case. The recusal statute, which once held that the other way, requiring judges to step aside when their impartiality "might reasonably be questioned." But what is reasonable? Judge Robert W. Sweet begged off the case because he had to serve with Bess Myerson in Major John V. Lindsay's administration. Conversely, Judge John F. Keenan, who got the Myerson case after Judge Duffy, continues to preside despite nodding acquaintances with several principals.

Still many feel Mr. Guiliani's arguments are thin gruel- or, as various people described them this week, "a stretch," "weak" and "off the wall." In New York's incestuous legal community, they say, such connections are common and invariably over looked.

Mr. Guiliani's very visibility over the years has won him ample detractors, inclined to see something Machiavellian in his every act. Even by that standard, however, the feeling is widespread that what concerned Mr. Guiliani most wasn't the company Judge Duffy kept so much as his independence, and what augured for a difficult and high-visibility case coming at the threshold of Mr. Guiliani's political-career.

Though a harsh sentencer, Judge Duffy, like many prosecutors-turned-judges, is known to make prosecutors work hard for everything. He has dismissed juries and set aside convictions for prosecutorial misconduct, and assailed what he called "garbage can" indictments under Federal racketeering statutes. As his opinion indicated, he seems to resent Mr. Guiliani, referring to him once before a jury as "Rudy-Kazootie."

Some see nothing so diabolical, "As a prosecutor in a politically charged case, you don't want anyone to be able to say that friendships played any role in the outcome, however unjust that accusation might be," said Stanley S. Arkin, who heads the City Bar Association's panel on professional discipline.

And then there is a suspicion that for whatever reason, Judge Duffy practically begged to be recused- first with indiscreet remarks about the trial in a judicial conference, and then in comments to the lawyers in court. "Does anybody want me out of the case?" he asked. "I would love to get out of it. I don't need it."

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1983 AND THE CRIMINAL DEFENSE ATTORNEY

Civil Rights Actions for Unreasonable Searches and Seizures under 42 U.S.C. Sec. 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. Sec. 1983.

I. INTRODUCTION

"Victim's Rights!" — A cry that has become increasingly popular with a neo-conservative American public incensed with the supposedly "soft" criminal justice system. All too often, however, these good-intentioned citizens fail to appreciate the full nature of their battle cry in the rush to enact Truth-in-Sentencing laws[1] and federal legislation, such as the Sentencing Reform Act of 1984.[2] Seldom do they appreciate that the "victims" who need protection are just as often those individuals charged with criminal offenses due to the violation of their constitutional rights by law enforcement officials and agencies. It is this second class of "victims," an often unknown and underrepresented class, that this article is dedicated to protecting through the education of the criminal defense bar of Kentucky.

Toward this end, this article discusses the basic elements of civil rights actions arising under 42 U.S.C. Sec. 1983 of the Civil Rights Acts of 1871. In particular, the focus in this instance falls upon those civil rights actions that arise from unreasonable searches and seizures committed by State and local law enforcement officials during the investigation of crime. In this context, the following discussion includes a brief review of the history of Sec.1983, the fundamental requirements for stating a claim for unreasonable search and seizure under 1983, the key considerations in choosing the proper defendants to sue under Sec. 1983, the best means for recognizing and overcoming standard Sec.1983 defenses and basic considerations related to the recovery of damages. As with all articles of this scope, the reader is understandably cautioned that this work is merely an introduction to a subject of much greater depth.

II. THE HISTORY AND ELEMENTS OF Sec. 1983

Ironically, one of the best sources for information on the history and purpose of Sec. 1983 is an unreasonable search and seizure case, *Monroe v. Pape*, 365 U.S.C. 167 (1961). In the late 1950's, 13 Chicago police officers broke into James Monroe's home without an arrest or search warrant. The officers routed the sleeping Monroe family from bed and made them stand naked in the living room as officers ransacked every room in the house. Mr. Monroe was forceably taken to the police station, where he was detained on "open" charges for 10 hours, without being taken before a Magistrate or allowed to call his family or an attorney. As a result of these outrageous acts, the Monroes brought action against the Chicago police officers involved and the City of Chicago under Sec. 1983, alleging a deprivation of their rights, privileges or immunities secured under the Constitution. After their action was dismissed for failure to state a claim in the district court, and affirmed by the 7th Circuit, the United States Supreme Court granted certiorari to determine whether the officers were acting under "color of law" and whether the City of Chicago, as a municipality, could be held liable under Sec. 1983.

Answering the first question affirmatively, the Court noted that Sec. 1983 came onto the books as Sec. 1 of the Ku Klux Act of 1871. Its purpose, as set forth in its title, was to enforce the provisions of the 14th Amendment to the Constitution of the United States. At the time of its passage, racial bias and hatred had run rampant in the South. Many states, notably South Carolina, were refusing to enforce their criminal statutes against white defendants in favor of black victims. To remedy this intolerable discrimination by official sanction, Congress passed the "Third Force Bill," particularly with the Klan in mind. Thus, in every sense, Sec. 1983 can aptly be characterized as "victims rights" legislation of a national character.

At its essence, Sec.1983 requires 2 things: 1) a defendant acting "under color of law," who by so doing; 2) deprives a plaintiff of his or her rights secured by

FLOYD COUNTY SUITS

A federal jury awarded $9,000 in damages to Gary Thornsbury, 29 of Wayland who said he was assaulted 3 times on the head with a flashlight in 1987 by Martin officer Tommy L. Engle who used excessive force during an arrest for intoxication. According to testimony, the incident occurred after Engle drove Thornsbury to the Floyd County Jail in Prestonsburg. Engle is also the former mayor and police chief of Wheelwright. - *Lexington Herald-Leader*, March 24, 1989.

An undisclosed amount of settlement was reached in a civil rights case against Floyd County Jailer Lawrence Hale and his deputy Larry Campbell concerning the death of inmate Thomas Spriggs, who had been arrested for DUI violations and complained of chest pains and requested medical treatment at 3:45 a.m., but was not given prompt medical attention. Medical emergency personnel arrived at the jail at 4:11 a.m. and pronounced Spriggs dead. His attorney, Ned Pillersdorf, said he hoped it served to prevent a repeat of this lack of attention to an inmate's medical needs.
- *The Floyd County Times.*

the Constitution or federal statute.[3] In *Monroe*, it was this second aspect of Sec. 1983 that was at issue. In their defense, the 13 Chicago police officers argued that because their conduct was clearly outside the Constitution and statutes governing searches and seizures under Illinois law, they were not acting "under color of law"[4] for the purposes of Sec. 1983. This proposition was soundly rejected by the Court, which held that

> *Congress has the power to enforce provisions of the 14th Amendment against those who carry a badge of authority of a state and represented in some capacity, whether they act in accordance with their authority or misuse it. Id. at 476.*

Thus, *Monroe* not only establishes the historic origin of Sec. 1983 as victims rights legislation, but also firmly establishes that civil redress for unreasonable search and seizure may be had against those State and local police officers who act outside the confines of their authority.

III. STATING YOUR CLAIM

Over the years, there has been much confusion over the proper means of pleading a complaint under Sec. 1983. Much of this confusion, again, somewhat ironically, can be traced to the dicta of *Monroe v. Pape*, wherein the Court suggests that Sec. 1983 "should be read against the background of tort liability...."[5] In reality, Sec. 1983 provides no remedy for injuries that constitute merely tort claims under state law.[6] While such tort claims should ordinarily be raise under the doctrine of pendant jurisdiction[7] when they arise out of the same nucleus of operative fact as the constitutional deprivations, they are not independently cognizable under the federal statute. Thus, for example, claims for assault and battery would be normally pendant state claims raised along with Sec. 1983 claims for unreasonable search and seizure in violation of the 4th and 14th Amendment.[8]

State tort claims aside, the usual constitutional deprivations alleged in a Sec. 1983 complaint for unreasonable search and seizure are violations of the 4th Amendment and its requirement of reasonableness, and the 14th Amendment, with its protections for procedural and substantive due process. The key point to remember in alleging any constitutional deprivation under Sec. 1983 is that Sec.1983 does not itself give rise to any substantive rights.[9] In other words, the Section is merely a means for civil redress for state-inspired conduct that violates some existing constitutional protection afforded the plaintiff. The 1983 plaintiff must, therefore, look to each of the constitutional rights allegedly violated to establish the fundamental aspects of his claim and the standard of care that is imposed upon the defendant.

Obviously, in most instances, a Sec. 1983 plaintiff will ordinarily rely upon the 4th Amendment and its requirement of reasonableness to seek redress for an improper search or seizure. Directly pleading a 4th Amendment violation has several advantages for the plaintiff. First, the standard of care imposed upon defendants under this Amendment is one of objective reasonableness.[10] This type of broadly-worded standard gives plaintiffs ample leeway in the development and argument of their case to the jury. Second, most judges with criminal trial experience are more likely to be familiar with the standards and case law involving the 4th Amendment than perhaps any other constitutional amendment. Thus, the plaintiff has both, more room to argue, and a better shot at finding a trial court to understand his or her arguments. Finally, relying upon the 4th Amendment, rather than the procedural due process protections of the 14th Amendment, avoids the pitfalls that accompany the complex *Parratt v. Taylor* doctrine and its requirement that plaintiffs exhaust all State, post-deprivation remedies as a prerequisite for stating a procedural due process violation.[11]

Exactly because Sec. 1983 acts simply to incorporate constitutional rights, a plaintiff relying upon the 4th Amendment has available to him or her the full body of case law and protections that have been created through the criminal judicial process.[12] This makes criminal defense attorneys particularly appropriate counsel to pursue 4th Amendment claims under Sec. 1983. The 4th Amendment law that defense attorneys use on a daily basis is just as applicable in the Sec. 1983 setting. Although it is far beyond the bounds of this one, short article to review this body of law, it is interesting to note that unreasonable search and seizure claims under Sec. 1983 run the entire gamut of the search and seizure spectrum normally seen in criminal prosecutions. Section 1983 claims have arisen from warrantless home arrests;[13] apprehension by the use of deadly force;[14] unlawful seizure of personal property;[15] strip searches and body-cavity searches of arrestees and prison visitors;[16] and warrantless seizure of motor vehicles.[17] Indeed, to bring the matter full circle, the Second Circuit has even held that the Ku Klux Klan, the very organization responsible for the origin of Sec.1983, has the right to be free from mass pat-down searches at rally sites.[18] Thus, any search and seizure argument available in a criminal prosecution can ordinarily be alleged as the basis for recovery under Sec. 1983.

Another frequently-pled constitutional violation under Sec. 1983 is the 14th Amendment procedural and substantive due process violations arising from searches and seizures. Although pleading 14th Amendment violations, particularly procedural due process violations, was once simply taken for granted in Sec. 1983 actions, the increasing application of the *Parratt v. Taylor*, 451 U.S. 527 (1981) doctrine has severely limited the ability of Sec. 1983 plaintiffs to recover for procedural due process violations of their liberty interests. Under this doctrine, a plaintiff fails to state a Sec. 1983 claim for procedural due process violation if the deprivation of his constitutionally-protected liberty or property interest could not have been foreseen by the state, and adequate state remedies are available to redress the wrong.[19] Not only must state remedies be inadequate to address the procedural deprivation, the deprivation must be alleged to have been intentional or the result of gross negligence.[20] Mere negligence, standing alone, is insufficient to invoke due process protection under the 14th Amendment. Also, merely pleading the buzz words, "gross negligence," will not be, of itself, sufficient, unless there are sufficient facts pled to support the claim.[21]

While the *Parratt v. Taylor* doctrine does not apply to claims alleging a denial of substantive due process,[22] there are two types of substantive due process. The first type is that which encompasses a right, privilege or immunity secured by the Bill of Rights or other federal law. The second category of substantive due process involves those official acts which, while not expressly prohibited in the Constitution, may not take place, no matter what procedural protections accompany them; or, in other words, those acts which "shock the conscience of the Court."[23] It is important to note that in the 6th Circuit, Sec. 1983 complaints that allege this second type of substantive due process violation arising from claims of tort-related false arrest, false imprisonment and malicious prosecution, have repeatedly been held insufficient to allege a due process violation amenable to recovery under Sec.1983.[24] To successfully plead this type of substantive due process 14th Amendment violation, the Sec. 1983 plaintiff must adequately allege some form of malicious or egregious form of governmental power that is unprovoked and extreme.

In the author's view, it is better simply to avoid the complexities of the *Parratt v. Taylor* doctrine by pleading a 4th Amendment substantive due process violation, if possible. A plaintiff is no less entitled to recovery simply because he or she has chosen to rely on the 4th Amendment, rather than the 14th Amendment. Only where there is no pre-existing substantive due process protection under the Bill of Rights or other constitutional amendment should a Sec.1983 plaintiff attempt to tread the dangerous waters of the *Parratt v. Taylor* doctrine.

Before continuing, one final, important thought should always be kept in mind when pleading a Sec. 1983 claim. Although State tort claims are not independently cognizable under Sec.1983, many State tort principles still apply in Sec. 1983 litigation. In other words, the plaintiff still must plead a constitutional duty, the duty must be violated by an individual or agency acting under color of state law, the violation of the duty must have caused the Sec. 1983 plaintiff injury and the injury must have resulted in some form of damages cognizable under general damage law. All of these elements must be pled in order for the Sec.1983 plaintiff to recover.

IV. CHOOSING A DEFENDANT

Once the plaintiff has chosen which constitutional rights to seek recovery under, the next important questions becomes who to sue and in what capacity. These two questions are particularly important, since naming the proper defendants in their proper capacities will often directly bear upon the plaintiff's ability to recover damages and also attorneys fees under 42 U.S.C. Sec. 1988.

In the first instance, plaintiffs customarily look to the law enforcement officers or officials directly involved in inflicting the unconstitutional injury. There are two significant problems, however, with limiting the defendants merely to the arresting or searching officers. First, if the magnitude of the plaintiff's injuries is great, the individual police officers involved may not have sufficient assets or insurance coverage to adequately compensate the plaintiff. Second, the jury understandably feels great empathy for front-line police officers who are forced to make split-second, life-and-death choices and who are almost universally underpaid for their efforts. Thus, while it is essential that these individuals be named, it is just as important to look beyond them to determine if other parties equally responsible can be named.

The next potential party defendant that plaintiffs look to in the unreasonable search and seizure context is the law enforcement supervisor. These are the individuals who are ordinarily responsible for the training and supervision of "beat" police. To impose Sec.1983 liability upon these individuals, however, the Sec. 1983 plaintiff must allege more than a mere employer-employee relationship. The United States Supreme Court has held in *Rizzo v. Goode*, 423 U.S. 362 (1976) that a Sec. 1983 action cannot lie against a police supervisor for failure to prevent police misconduct, absent a showing of direct responsibility for that improper action. Stated more broadly, the doctrine of respondent superior found in tort law does not apply to impose liability in Sec. 1983 actions. *Monell v. New York Department of Social Services*, 436 U.S. 658, 694 (1978). In order to find a supervisor liable, a plaintiff must allege that the supervisor either condoned, encouraged or participated in the alleged misconduct.[25] Absent such allegations, the chief of police or sheriff, by virtue of his or her position alone, will not be liable under Sec.1983 for the unconstitutional acts of employees.

The next related questions is whether to sue these defendants in their personal capacity, as individuals, or in their official capacity, as employees of the state, or in both capacities. The critical importance of this question is highlighted in a recent Supreme Court case, *Kentucky v. Graham*, 473 U.S. 159 (1985). In *Graham*, the estate of a suspect wanted for the murder of a Kentucky State Police officer brought suit against Hardin County, Kentucky, Elizabethtown, and various local and state police officers, including the Commissioner of the State Police, as the result of an unreasonable search and seizure of the family's home. All of the individuals named in the complaint were named in their personal capacity. The Commonwealth of Kentucky was included, not for damages on the merits, but only for attorneys fees in the event that the plaintiffs prevailed.

On the second day of trial, the case settled for $60,000. The plaintiffs then sought attorneys fees from the Commonwealth, which were awarded by the District Court in the amount of $58,521, and affirmed on appeal by the 6th Circuit. On certiorari, the Supreme Court reversed, holding that liability on the merits and responsibility for fees go hand in hand where a defendant has not been prevailed against ... Sec. 1983 does not authorize a fee award against that defendant.[26] Because none of the State or local law officials had been named in their official capacity, the State as an entity, was not a defendant to the suit, and therefore, not liable for attorneys fees.

Personal-capacity suits impose only personal liability upon a government official for actions he takes under color of state law.[27] Proceeding against an individual in his "official capacity" represents only another way of pleading an action against the entity, of which the officer is an agent. Thus, an official-capacity suit is, in all respects, treated as a suit against the entity.[28] The real party and interest is the entity. A plaintiff seeking to recover damages in an official-capacity suit looks to the governmental entity itself.

There are several other important distinctions to keep in mind when characterizing the defendant as an individual or as an official representative of the entity. First, to establish personal liability in a Sec.1983 action, it is sufficient to show that the official, acting under color of State law, caused the deprivation of a federal right. However, in an official-capacity action, a governmental entity will only be liable under Sec. 1983 when it, itself, is the moving force behind the deprivation. Thus, as discussed more completely below, in an official-capacity suit, the entity's "policy or custom" must have played a part in the violation of the federal right.[29] Also, such personal defenses as qualified immunity are available only to the official in a personal-capacity action, and not to the entity in an official-capacity action. The only immunity that the entity may claim in an

MAN AWARDED $175,000 FOR JAIL BEATING

Thomas Dale Roberts of Fort Thomas was awarded $175,000 in damages over a beating he received on July 10, 1985 at the Madison County Jail in the "drunk tank" by another inmate, Silas Gary Mullins. Roberts received a broken jaw.

Mullins, who had a history of alcohol-related offenses and violent behavior also assaulted 2 other prisoners, one of whom required hospital treatment. The jail had no system to separate violent and non-violent offenders

- *Lexington Herald Leader* April 9, 1988.

official-capacity action are the various forms of sovereign immunity that the entity may possess. The moral of the story seems to be that caution is required in choosing the capacity in which to sue your individual defendants. Usually, the best course, and the one most frequently taken, is to sue individuals in both their personal and official capacity.

The final, and most thorny, question that arises in choosing Sec. 1983 defendants, is whether or not the city or local government, should be named as a municipal defendant in the suit. Municipal liability under Sec. 1983 has proved a troublesome issue for the Supreme Court, which recently described the development of state."[30] Originally, under *Monroe v. Pape, supra*, municipal corporations could not be held liable under Sec. 1983. However, this position was reversed in *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978), in which the Court held that municipalities are "persons," subject to damage liability under Sec. 1983. To be liable, however, the municipality must have established some custom or policy which led to the plaintiff's deprivation of constitutional rights. More exactly, a single incident of unconstitutional activity will not impose municipal liability, unless the proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which can be attributed to a municipal policy maker. If the municipal policy relied upon by the plaintiff is not itself unconstitutional, then considerably more proof than a single incident will be required to establish municipal fault, and the causal connection between the policy and the deprivation. *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 825 (1985). Finally, and most importantly, the Supreme Court has recently held in *City of Canton, Ohio v. Harris*, 489 U.S. ___, 103 L.Ed.2d 412 (1989) that the inadequacy of police training may serve as a basis for Sec. 1983 liability, only where the failure of the municipality to train amounts to deliberate indifference to the rights of persons with whom the police come into contact. Only when this condition is met will such a shortcoming be characterized as a city "policy or custom," actionable under Sec. 1983.

V. DEFENSES

This is another area Sec. 1983 law in which tort concepts play a large role. In essence, most defenses which would normally be raised in a tort action may be raised in defense of a Sec. 1983 action. However, since the standard of care in Sec. 1983 actions is established by the constitutional provisions involved, tort law defenses are not always universally applicable. For our purposes, the two main defenses that bear most heavily in this area are statute of limitation defenses and immunity defenses. The average Sec. 1983 plaintiff should expect to find one or both of these defenses being alleged as a matter of course in response to his or her complaint.

On its face, Sec. 1983 contains no federally-mandated statute of limitations. For many years, the Supreme Court held that the statute of limitations to be applied was the State statute of limitations "most analogous" to the constitutional injury alleged. *Board of Regents v. Tomanio*, 446 U.S. 478, 488 (1980). Unfortunately, this holding resulted in a patchwork of decisions in which statute of limitations were determined more on the basis of artful pleading than rhyme or reason. Parties found themselves expending enormous time and money litigating the question of the timeliness of their action, rather than its merits. Accordingly, in 1985, the Court ruled in *Wilson v. Garcia*, 471 U.S. 261 (1985) that the State's personal injury statute of limitations would apply to Sec. 1983 actions.[31] However, the question continued as to which of the various personal injury statutes of limitation normally found within a state would apply for the purpose of Sec. 1983. This question was answered this term in *Owens v. Okure*, 488 U.S. ___, 102 L.Ed.2d 594 (1989), in which the Court refined its holding in *Wilson*, such that the residual statute of limitations for personal injuries of each state is the statute of limitations for Sec. 1983 purposes.[32]

Two important points remain to bear in mind when analyzing a statute of limitations defense. First, although state residual personal injury statutes determine the length of the period of statute of limitations, federal law still determines when the cause of action accrues for the purpose of the running of the state statute of limitations.[33] Generally, the cause of action will accrue when the violation of the legally-protected interest arises. Also, the second point to bear in mind is that state tolling statutes that stay the running of the statute of limitations also sometimes apply to save otherwise, untimely-filed suites. It is therefore important to look to the state tolling statute of the individual state in which your cause of action arises to determine if your otherwise untimely action has been saved.[34]

Perhaps the most frequently raised defense by individual defendants to a Sec. 1983 claim is the defense of qualified immunity. Very Seldom will any defendant be afforded absolute immunity, with the exception of judges,[35] prosecutors[36] or other court officials who are acting in their official capacity, rather than as administrator. It, therefore, becomes critical that the Sec. 1983 plaintiff be aware of and prepared for a qualified immunity defense.

In essence, qualified or "good faith" immunity is an affirmative defense which must be raised by the defendant official.[37] In its original form the qualified immunity defense had both an "objective" and "subjective" aspect. The objective aspect involved a presumptive knowledge of basic, unquestioned constitutional rights, while the subjective element referred to the defendant's permissible intentions.[38] This objective/subjective test was significantly altered in *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982), in which the Supreme Court concluded that government officials performing discretionary functions are shielded from liability insofar as their conduct does not violate a clearly established statutory or constitutional right of which a reasonable person would have known. Thus in *Harlow*, the Court refined the qualified immunity defense to one that involves "[r]eliance on the objective reasonableness of an official's conduct, as measured by reference to clearly establish law...."[39] The defense was further refined in *Mitchell v. Forsyth*, 472 U.S. 511, 527-28 (1985), in which the Court held that a pretrial order of the district court that denies a defendant qualified immunity is a final and appealable order prior to the entry of a

RELATIVES SETTLE SUIT OVER EPILEPTIC'S DEATH

Robert Hogan Jr., age 25 died July, 1984 in an isolation cell of the Franklin County Jail that the state had ordered closed. An undisclosed amount of settlement was reached in the $9.1 million dollar suit against the Franklin County Jailer, Calvin Stewart. A coroner's jury ruled that Hogan had been denied medication and medical care causing his death.

Lexington Herald Leader, September 24, 1988.

final judgment.

Recently, the Supreme Court has discussed the qualified immunity defense in the context of unreasonable searches and seizures in two separate cases, *Malley v. Briggs*, 475 U.S. 335 (1986) and *Anderson v. Creighton*, 483 U.S. ___, 97 L.Ed.2d 523 (1987). These decisions, in particular *Anderson*, raise some disturbing questions about the scope of qualified immunity that will be extended to law enforcement officials who violate the 4th Amendment.

It is now undisputed that police officers who cause unconstitutional searches and arrests are not entitled to absolute immunity from suit, even when they act pursuant to warrant. This holding was rendered in *Malley v. Briggs, supra*, a Sec. 1983 action brought by a couple who were arrested for possession of narcotics, based only upon a wiretap communication in which the word "toke" was used in the same sentence with one plaintiff's name. Based on this "probable cause," a Rhode Island police officer had arrest warrants issued for plaintiffs for possession of narcotics. Plaintiffs were arrested at their home at 6:00 a.m. and taken to the police station, held for several hours and released. Ultimately, all charges against them were dropped.

On appeal, the police officer argued that he was absolutely immune from liability for damages, or at least, was entitled to qualified immunity. In rejecting this claim, the Court held that defendants such as the police officer will not be immune if, or an objective basis, it is obvious that no reasonably-competent officer would have concluded that a warrant should be issued, but if officers of reasonable competence could disagree on this issue, immunity should be recognized. Thus, the Court applied the standard of objective reasonableness, established in *Harlow*, to the conduct of the officer in securing a warrant. In so doing, the Court made it plain that the mere act of securing a warrant of itself is not so objectionably reasonable as to relieve the arresting officer of liability under a qualified immunity defense. In this regard, the standard of objective reasonableness applied in the context of a Suppression Hearing in *Untied States v. Leon*, 468 U.S. 897 (1984), defines the qualified immunity accorded an officer, whose request for a warrant allegedly caused an unconstitutional arrest.

In *Anderson v. Creighton, supra*, the development of qualified immunity for law enforcement officials who conduct unreasonable searches and seizures appears to have taken a disturbing turn. In this case, an FBI agent conducted a forceable, warrantless search of a home in the mistaken belief that a bank robbery suspect might be found there. The homeowners filed a claim for money damages under the 4th Amendment. The district court granted the agent summary judgment of the lawfulness of the search, concluding that it was based on probable cause and exigent circumstances. The 8th Circuit reversed, holding first, that unresolved factual disputes prevented summary judgment, and that the agent was not entitled to qualified immunity, since the right he allegedly violated, the right of persons to be protected from warrantless searches of their homes, was a clearly-established right.

Before the Supreme Court, the majority, by Justice Scalia, held that a federal law

enforcement officer who conducts a warrantless search in violation of the 4th Amendment will not be held personally liable for money damages if it is found that a reasonable officer would have believed the unconstitutional search to be lawful under the 4th Amendment in light of clearly-established law and the information possessed by the searching officer. Thus, the Court appears to have established the concept of a reasonably unreasonable search, that while violative of the 4th Amendment, will not result in personal liability for the searching officer, so long as the objectively reasonable officer would have believed his conduct to be lawful. In other words, there are now apparently two types of reasonableness for 4th Amendment purposes: that reasonableness, which if absent, will render a search or seizure unconstitutional under the 4th Amendment; and, that reasonableness, which if established by the defendant officer, will render his violation of the Constitution immune from judicial inspection under Sec. 1983.

In the author's view, *Anderson is* a troubling precedent that adds unnecessary, indeed unjustifiable, complexity to an area of law that is already over-complicated with conflicting precedent. Further, it is difficult to accept that a warrantless, night-time entry of a home without exigent circumstances, could ever be considered objectionably reasonable in view of clearly-established precedent. At a minimum, criminal defense attorneys interested in practicing Sec. 1983 in the search and seizure context should keep a close eye on the *Anderson* decision, and make a special effort to read Justice Stevens' insightful dissent.

In conclusion on this issue, one final point should be kept in mind: the subjective belief of an officer in the reasonableness of his actions is never relevant to a determination of qualified immunity.[40] Thus, counsel should, by motion *in limine* or timely objection, seek to prevent any discussion or testimony of the officer's belief on the reasonableness of his own actions.

VI. DAMAGES

Like many other areas of Sec. 1983 law, damages in Sec. 1983 suits is an area that is controlled primarily by tort-law principles.[41] The primary exception to this general rule being that punitive damages are not recoverable against a municipal defendant in a Sec. 1983 action.[42] Otherwise, the plaintiff is fully entitled to a complete range of damages for which he or she could recover in an analogous state tort action. This includes injury to reputation, emotional pain and suffering, loss of consortium, lost wages, medical expenses and any other traditional damages recoverable.

Unlike federal actions based upon diversity jurisdiction, there is no minimum jurisdictional amount imposed on Sec. 1983 actions. In search and seizure cases, under Sec. 1983, the law does not require permanent or even serious injury.[43] Even a short period of restraint that has involved no physical injury will be sufficient to support a Sec. 1983 action.[44] The extent of damages runs only to the amount of recovery, and not to the viability of the cause. As the Court of Appeals for the 4th Circuit has stated, "there is no justification for the incorporation of a *de minimis* rule by way of a limitation on the right of action by an individual for an admitted violation of constitutional rights." *Pritchard v. Perry*, 508 F.2d 423, 425 (4th Cir. 1975). Constitutional protections have their own inherent values, the violation of which is compensable under Sec. 1983,

apart from whatever other physical harms the plaintiff may have endured.[45]

As a practical matter, the criminal defense attorney may wish to engage the assistance of a competent plaintiffs personal injury attorney to assist him or her in litigating Sec. 1983 actions. An experienced personal injury attorney will be much more familiar with the damage aspects of such a suit than an attorney who does nothing but criminal defense work.

VII. CONCLUSION

"Victim's Rights!" is not the recently-developed concept of a reactionary public. Criminal defendants are just as often, if not more frequently, the victims of constitutional deprivations. It is, therefore, natural that criminal defense attorneys are in a unique position to insure that these victims receive the full constitutional protections to which they are entitled, both in the criminal setting and in an action for civil redress under Sec.1983. The burden now falls upon Kentucky's criminal defense bar to take up the cause of victims rights and through the vehicle of Sec.1983, insure that all Americans, including those accused of criminal acts, are guaranteed the full measure of constitutional protection to which they are entitled.

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FOOTNOTES

[1] KRS 532.055 (Michie Cum.Supp. 1988).

[2] 18 U.S.C. 3553; 28 U.S.C. 994(a).

[3] *Flagg Bros. v. Brooks*, 436 U.S. 149, 155-57 (1978); *Ana Leon T. v. Federal Reserve Bank of Chicago*, 823 F.2d 928, 931 (6th Cir. 1987); *Bier v. Fleming*, 717 F.2d 308 (6th Cir. 1983), cert. denied, 465 U.S. 1026 (1984).

[4] For the purpose of 1983, the phrase, "under color of law," and the phrase, "State action," are identical where a14th Amendment violation is involved. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982).

[5] *Monroe v. Pape*, 365 U.S. 167, 188 (1961).

[6] *Bird v. Summit City, Ohio*, 730 F.2d 442 (6th Cir. 1984).

[7] *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966); *Rosado v. Wyman*, 397 U.S. 405 (1970).

[8] An excellent discussion of this distinction between state tort claims and constitutional deprivations for unreasonable search and seizure can be found in *Baker v. McCollan*, 443 U.S. 137 (1979), in which the Supreme Court distinguishes between the state tort claim of false imprisonment and the deprivation of procedural due process arising from a mistaken arrest and confinement.

[9] *Baker v. McCollan*, 443 U.S. 137, 140, 144 n. 3 (1979); Nahmod, *The Law of Civil Rights: Sec. 1983 Liability* (1984).

[10] *Brower v. County of Inyo*, 44 Crim.L.Rep. 3175 (U.S. rendered March 21, 1989) (unreasonably constructed police roadblock that resulted in suspect's death may constitute a "seizure" for 4th Amendment purposes); *Tennessee v. Garner*, 471 U.S. 1, 7-10 (1985).

[11] *Parratt v. Taylor*, 451 U.S. 527 (1981).

[12] *See gen.*, LaFave, *Search and Seizure* (West 1987).

[13] *Anderson v. Creighton*, 483 U.S. __, 97 L.Ed.2d 523, 107 S.Ct. ___ (1987); *Kentucky v. Graham*, 473 U.S. 159 (1985); *Monroe v. Pape*, 365 U.S. 167 (1961).

[14] *Tennessee v. Garner*, 471 U.S. 1 (1985); *Webster v. City of Houston*, 689 F.2d 1220 (5th Cir. 1982); *Grandstaff v. City of Borger*, 767 F.2d 161 (5th Cir. 1985); *Carter v. City of Chattanooga*, 803 F.2d 217 (6th Cir. 1986).

[15] *Wilhelm v. Turner*, 431 F.2d 177 (8th Cir. 1970), cert. denied, 401 U.S. 947 (1971).

[16] *Masters v. Crouch*, No. 88-5477 slip op. (6th Cir. rendered April 18, 1989); *Kirkpatrick v. Los Angeles*, 803 F.2d 485 (9th Cir. 1986); *Weber v. Dell*, 804 F.2d 796 (2nd Cir. 1986) cert. denied, 107 S.Ct. 3263 (1987); *Smothers v. Gibson*, 778 F.2d 470 (8th Cir. 1985); *Blackburn v. Snow*, 771 F.2d 556 (1st Cir. 1985).

[17] *Bigford v. Taylor*, 834 F.2d 1213 (5th Cir. 1988).

[18] *Wilkinson v. Forest*, 832 F.2d 1330 (2nd Cir. 1987) cert. denied, 108 S.Ct. 1593 (1988).

[19] *Parratt v. Taylor*, 451 U.S. 527 (1981).

[20] *Davidson v. Cannon*, 474 U.S. 344 (1986); *Daniels v. Williams*, 474 U.S. 327 (1986); *Nishiyama v. Dickson County, Tennessee*, 814 F.2d 277, 282 (6th Cir. 1987) (*en banc*); *Chesney v. Hill*, 813 F.2d 754 (6th Cir. 1987) (*per curiam*); *McKenna v. City of Memphis*, 785 F.2d 560 (6th Cir. 1986) (*per curiam*).

[21] *Jones v. Sherill*, 827 F.2d 1102, 1106 (6th Cir. 1987).

[22] *Vincent v. Campbell County Fiscal Court*, 820 F.2d 194, 198 (6th Cir. 1987); *Wilson v. Beebe*, 770 F.2d 578, 585-86 (6th Cir. 1985) (*en banc*).

[23] *McMaster v. Cabinet for Human Resources*, 824 F.2d 518, 522 (6th Cir. 1987); *Nishiyama v. Dickson County, Tennessee*, 814 F.2d 277, 282 (6th Cir. 1987) (*en banc*); *Wilson v. Beebe*, 770 F.2d 578, 585-86 (6th Cir. 1985) (*en banc*).

[24] *Vincent v. Campbell County Fiscal Court*, 820 F.2d 194, 198 (6th Cir. 1987); *Davis v. Robbs*, 794 F.2d 1129, 1131 (6th Cir.), cert. denied, 107 S.Ct. 592 (1986);

Coogan v. City of Wixom, 820 F.2d 170, 174-75 (6th Cir. 1987); *Dugan v. Brooks*, 818 F.2d 513, 516-17 (6th Cir. 1987); *Barnier v. Szentmiklosi*, 810 F.2d 594 (6th Cir. 1987).

[25] *Rizzo v. Goode*, 423 U.S. 362, 375-76 (1976); *Dunn v. Tennessee*, 697 F.2d 121, 128 (6th Cir. 1982); *Hayes v. Jefferson County, Kentucky*, 668 F.2d 869 (6th Cir. 1982).

[26] *Kentucky v. Graham*, 473 U.S. 159, 165 (1985).

[27] *Scheuler v. Rhodes*, 416 U.S. 232, 237-38 (1974).

SOMERSET POLICEMAN CONVICTED IN BRUTALITY CASE

Somerset police officer, Brian J. Boclair used unreasonable force when he beat hand cuffed prisoner, Ronnie D. Ard, January 14, 1987 during his arrest for allegedly causing a disturbance at the Humana Hospital Lake Cumberland, and threatening 2 police officers, a jury found in convicting Boclair of a misdemeanor charge of civil rights violation.

Boclair sustained a broken finger when Ard, exiting the police car, attempted to kick Boclair in the groin and in the hand. Boclair thought Ard had Aids and said he struck Ard in self defense because Ard was spitting at him. Somerset Police Chief David Gilbert said Boclair would be allowed to keep his job as a police dispatcher while his case was being appealed.- *Lexington Herald-Leader*, March 26, 1988.

[28] *Brandon v. Holt*, 469 U.S. 464 (1985) (discussing the distinctions between person and official capacity suits).

[29] *See, City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985); *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986); *Coogan v. City of Wixom*, 820 F.2d 170, 176 (6th Cir. 1987).

[30] *Id.* at 820.

[31] *Wilson v. Garcia*, 471 U.S. 261, 279 (1985).

[32] This same question, the application of residual personal injury statutes of limitation in Sec. 1983 actions, was recently addressed by the 6th Circuit in *Browning v. Pendleton*, No. 86-4123 slip op. (6th Cir. rendered March 16, 1989). In its Opinion, the 6th Circuit reached the same conclusion arrived at in *Okure*, that the general residual statute for personal injury actions of each state would apply to determine the statute of limitations for 1983 purposes. *See also Thomas v. Shipka*, No. 86-3230 slip op. at p. 2 (6th Cir. rendered April 19, 1989).

[33] *Sevier v. Turner*, 742 F.2d 262, 272 (6th Cir. 1984).

[34] KRS 413.170.

[35] *Stump v. Sparkman*, 435 U.S. 349 (1978); *King v. Love*, 766 F.2d 962, 966 (6th Cir.) cert. denied, 474 U.S. 971 (1985); *Sevier v. Turner*, 742 F.2d 262, 271-72 (6th Cir. 1984).

[36] *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976); *Joseph v. Patterson*, 795 F.2d 549, 553-55 (6th Cir. 1986) (surveying cases).

WOMEN PAID $5,000 EACH IN JAIL SEX CASE

Kenton County Deputy Jailer, Dale Butcher, was accused of fondling 3 women (at different times) while they were confined in the jail as he escorted them to the jail library. A federal jury awarded $6,000 in damages to each of the women, but an insurance settlement was reached of $5,000. Male guards no longer have any contact with women inmates, as there has been a reorganization of deputy's duties- the Butcher cases being, "only a partial factor in the reorganization." Butcher remains on duty at the jail.

In another case at the Kenton County Jail, a deputy, Carol S. Deaton charged she was sexually harrassed by Deputy Jailer, Jack Kerns who reportedly asked for sexual favors and touched her repeatedly. The amount settled for is reported to be $70,000. The suit has not affected Kerns' employment.

The Kentucky Post, July 21, 1988.

[37] *Gomez v. Toledo*, 446 U.S. 635 (1980).

[38] *Wood v. Stickland*, 420 U.S. 308, 322 (1975).

[39] *Harlow v. Fitzgerald*, 457 U.S. 800, 819-820 (1982).

[40] *Anderson v. Creighton*, 483 U.S. ____, 97 L.Ed.2d 523, 532 (1987). *See Masters v. Crouch*, No. 88-5477 slip. op. (6th Cir. rendered April 18, 1989) (interpreting *Anderson*).

[41] *Malley v. Briggs*, 475 U.S. 335, 339 (1986) (citing *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976)).

[42] *Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) (punitive damages not permitted).

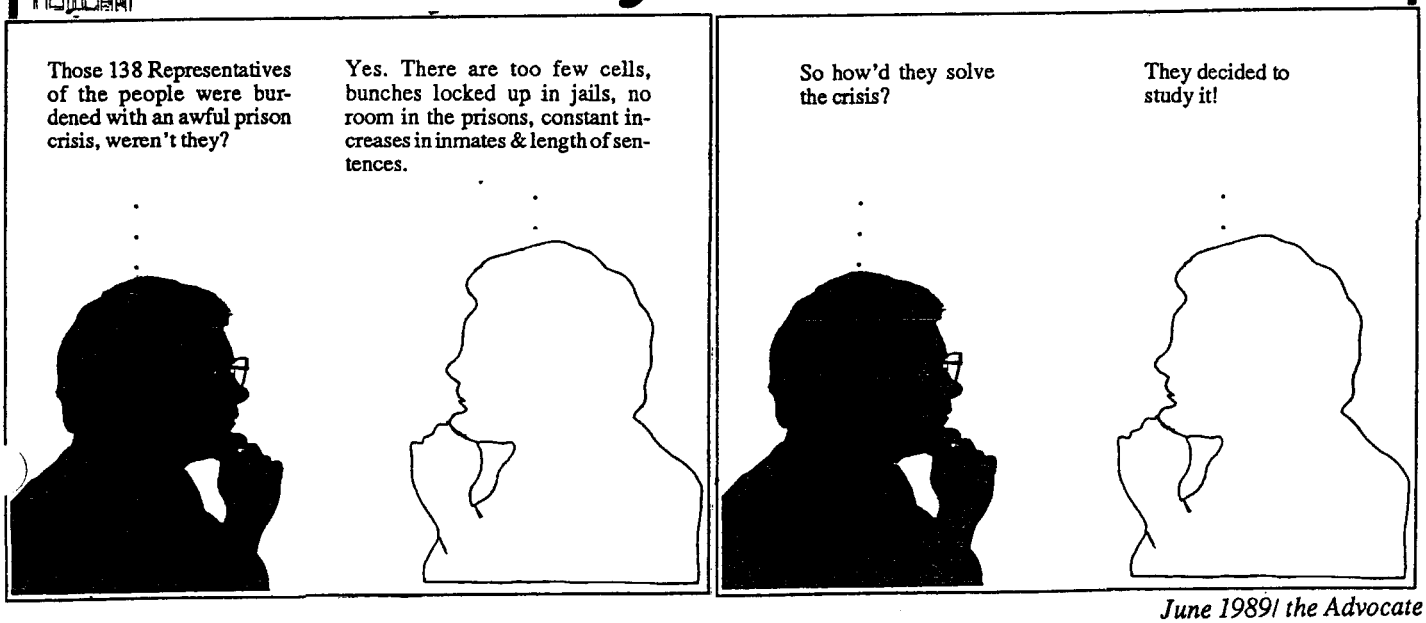
[43] *Howell v. Cataldi*, 464 F.2d 272 (3rd Cir. 1972); *Bowan v. Casler*, 622 F.Supp. 836 (N.D.N.Y. 1985). *See*, Annotation, *When Does Police Officer's Use of Force During Arrest Become So Excessive as to Constitute Violation of Constitutional Rights, Imposing Liability Under Federal Civil Rights Act of 1871* (42 U.S.C. 1983), 60 A.L.R.Fed. 204 (1982).

[44] *Gay v. Wall*, 761 F.2d 175 (4th Cir. 1985); *Rex v. Teeples*, 753 F.2d 840 (10th Cir. 1985) cert. denied, 106 S.Ct. 332 (1986).

[45] *Corriz v. Naranjo*, 667 F.2d 892 (10th Cir. 1981); *Herrera v. Valentine*, 653 F.2d 1220 (8th Cir. 1981); Rothstein, How to Maximize Damages in Civil Rights Cases, *Trial Diplomacy* J., pp. 17-21 (Winter, 1988).

Crime Pays

by Edward C. Monahan



THE *CAST-MR*:

A Resouce for Forensic Evaluators and Attorneys for Determining Competency to Stand Trial in Criminal Defendants with Mental Retardation.

Caroline Everington

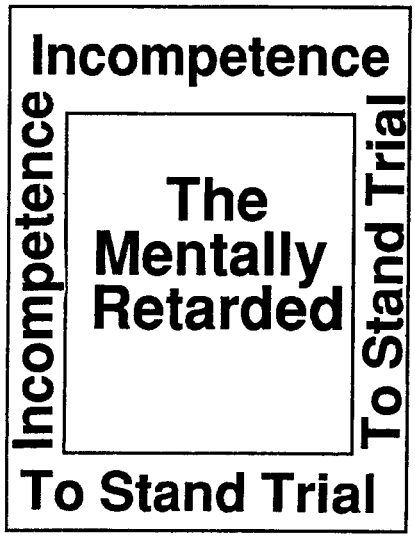
The defendant with mental retardation presents the criminal justice system with critical dilemmas at every stage in the process. (Everington & Luckasson, in press). Because of the nature of this disability, some of the major difficulties center around competence issues, particularly competence to confess, stand trial and plead. (Ellis and Luckasson, 1985). Competence to stand trial is by far the most frequently raised of those issues.

The application of the doctrine of competence to stand trial to the criminal defendant with mental retardation presents many difficulties for both the client and the system, which highlight the critical need for accurate assessment and determination. Erroneous determinations have serious consequences which result not only in loss of liberty and the right to a fair trial but can also have an irreversible impact on the defendant's life. For example, the defendant who is inaccurately declared competent faces the equivalent of a trial in absentia, one in which he or she cannot fully participle in nor understand. For an incompetency finding, the defendant faces the possibility of prolonged hospitalization, which can potentially be more restrictive than the sentence, and the lingering stigma of an unresolved case. Because few facilities offer treatment options which enables the incompetent mentally retarded defendant to return to trial, this defendant is subject to longer periods of institutionalization than his or her counterpart who has mental illness.

Because of the severe consequences of an error in the competence determination, accurate assessment is critical. Unfortunately, the present assessment practices and instruments used appear to predispose misdiagnosis of the defendant with mental retardation. Thus, the impact of the individual's cognitive deficit on the trial participation may not be given full consideration.

In addition, testing is usually conducted by persons who are unfamiliar with the characteristics and needs of persons with mental retardation; thus, responses may be misinterpreted and inappropriate recommendations made. For example, persons with mental retardation have a tendency to answer affirmatively to yes/no questions and questions phrased in a leading manner (Sigelman, Winer and Schoenrock, 1982). While there have been some instruments developed to provide the evaluator with a more objective measurement of the competence process, all are designed for use with defendants with mental illness (Everington, in press).

The assessment needs of the defendant with mental retardation are unique in several aspects. First, the structured testing approach provided by a multiple-choice instrument is more desirable for



assessment of persons who have mental retardation than the open-ended format used by the existing instruments. This format is superior to the open-ended format, as it reduces the demand on the respondent to answer independently (Sigelman, Winer, & Schoenrock, 1982). Second, there is a need for instruments that contain vocabulary and syntax that are appropriate for persons having lower levels of linguistic ability. Third, there is a need for instruments that focus on the legal criteria for competence rather than the diagnosis of mental illness, a factor only tangentially related to the legal criteria and often irrelevant to assessment of persons with mental retardation.

Finally, there is a need for instruments that have undergone traditional test construction inquiries for the determination of reliability and validity (Grisso, 1986). While many of the instruments have undergone some form of empirical investigation, the efforts of most of the researchers have been confined to investigations of criterion-related validity and interobserver reliability.

The Competence Assessment for Standing Trial for Defendants with Mental Retardation (CAST-MR) (Everington & Luckasson, 1988) has been developed specifically for use with criminal defendants with mental retardation. The instrument consists of 40 multiple-choice questions, 25 of which address vocabulary and concepts critical to understanding the nature of the proceedings and 15 which address the client's ability to assist in his or her own defense. There are 10 open-ended questions which assess the client's ability to relate the events surrounding the incident. In development, care was taken to ensure that the vocabulary and syntax were appropriate for persons with lower levels of linguistic ability.

Reliability and validity analyses were conducted on the instrument in 1987 using 96 subjects from 5 sites. The instrument was given to groups of mentally typical and mentally retarded defendants at the pretrial level. Three types of reliability: internal consistency, interobserver, and test-retest, and three types of validity: content, construct and criterion-related, were examined. The results of all the analyses indicate that the *CAST-MR* meets accepted standards for instrument reliability and validity (Everington, in press).

While the results are most encouraging, it was determined that an additional field testing to confirm findings was appropriate. A final validation study using mentally retarded defendants from all jurisdictions of the state of New York

will be conducted from July 1989 to June 1990. At the completion of this phase of the research, the instrument will be ready for dissemination.

The findings of the recently completed *CAST-MR* reliability and validity study are important for the forensic evaluator and attorney who have clients with mental retardation. First, the *CAST-MR* is the first instrument developed for and field tested with this population. Second, the format of the instrument provides a means of obtaining information on the client's skills and abilities which, in some cases, may be unattainable through more traditional interviews. Although requirements for competence will vary with the individual's circumstances and the nature of the defense (Roesch & Golding, 1985), the *CAST-MR* can provide evaluators with more objective data base for decision-making.

Competence to stand trial is one of the most serious issues the defendant with mental retardation faces. To protect client rights and integrity of the system, accuracy in determination is critical. Present practices may not always provide sufficient information and, thus, enhance the probability of error. It is hoped that the *CAST-MR* is a first step among many which will enable the criminal justice system to better protect the rights of this very vulnerable group of individuals.

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Sigelman, C., Winer, J. & Schoenrock, C. (1982). *The responsiveness of mentally retarded persons to questions.* Education and training of the Mentally Retarded, 17, 120-124.

Copies of the above referenced articles can be obtained by contacting Tezeta Lynnes, DPA Librarian.

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Caroline has been an Assistant Professor of Special Education and Educational Psychology since 1987. She received her Doctorate in 1987 at the University of New Mexico, Albuquerque in Special Education; the subject of her Masters and Bachelor's degrees as well. She has published extensively in the assessment of the mentally retarded and their competency to stand trial area as well as other areas.

Jail Populations Outpace Capacity

An increase in drug-related arrests and stricter sentencing requirements have brought about a 7.4% hike in the number of inmates in federal and state prisons, but prison capacity hasn't kept up, according to the Justice Department.

At the end of 1988, a record 627,402 men and women were incarcerated nationwide (about 3,500 more than 1987), but the most opimistic estimate of prison capacity said there was room for 566,898. While the prison population increased by 7.4%, the prison capacity increased by just 5.5%. "The 1988 increases translates into a nationwide need for more than 800 new prison bed spaces per week," said Lawrence A. Greenfield, corrections unit chief for the department's Bureau of Justice Statistics.

The report attributed the hike to the heightened likelihood that a serious offender will receive a prison sentence, and a 113% increases in the number of adults arrested for drug-related crimes.

State prisons are operating 7-23% over capacity, while federal prisons were estimated to be between 33-72% over capacity.

The incarceration rate, based on the number of people sentenced to more than one year in prison, reached 244 per 100,000 residents. In 1980, the rate was 139 per 100,000.

The Western states had the highest increase (11.5) in total prisoners.

The 10 states with the biggest percentage increase in total prison population from 1987-88 were:

Rhode Island	33.5
Colorado	24.7
New Hampshire	17.5
Michigan	16.1
California	13.7
Arizona	11.1
Missouri	10.8
Kentucky	**10.6**
Nevada	10.1
Minnesota	9..9

Kentucky Youth Advocates Look at Juvenile Detention

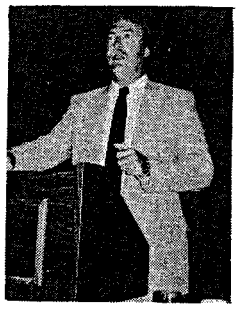
In December of 1988, KYA Director, David Richart, completed a report on the detention provisions of the Kentucky Unified Juvenile Code. These provisions became effective on April 10, 1988. A **Summary for Non-Attorneys of the Detention Provisions in the Kentucky Unified Juvenile Code** was prepared to address the many requests for information KYA has received since the Code was first passed in 1986 and then amended in 1988. Some confusion still exists as to what constitutes a legal detention placement for a juvenile.

This report clearly and simply explains which children can be held in which facilities. It also provides listings of those facilities presently approved by the Corrections Cabinet and the Department of Justice for detention of juveniles. Information about funding currently available from the Department of Justice to provide non-secure alternatives to detention is included as well.

Copies of the report will be mailed upon request. Please contact:

Kentucky Youth Advocates
2024 Woodford Place
Louisville, Kentucky 40205
(502) 456-2140

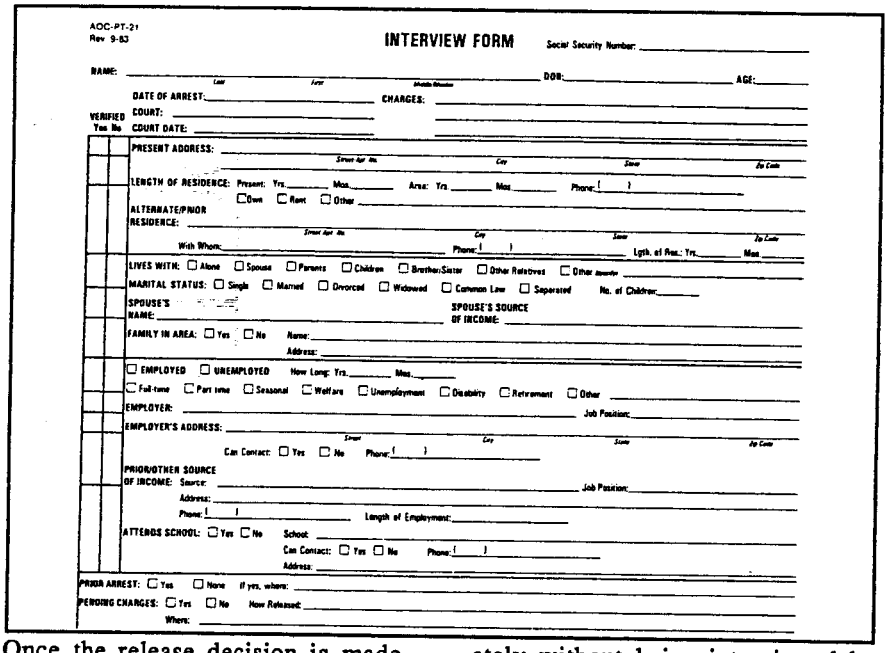
PRE-TRIAL SERVICES



John C. Hendricks

Kentucky abolished commercial bail bonding in 1976, and became the first state to adopt national criminal justice standards to establish a pretrial program. Pretrial Services places the release decision back into the hands of the judiciary and provides each judge with the information needed to make a knowledgeable determination of bail. Kentucky's Pretrial Services is a neutral information gathering arm of the court, which benefits not only those who are accused of committing wrongdoings but provides the community needed protection as well. While the amount of bail set must be logically commensurate with the nature of the charge and cannot be oppressive, statutorily it must also be considerate of past criminal acts and the reasonably anticipated conduct of a defendant.

The basic procedures utilized by Pretrial Services are patterned after those used in several recognized projects operating throughout the United States but modified for a rural state with major urban areas. After arrested persons are placed in custody by law enforcement officers, they are given an opportunity to be interviewed by pretrial officers. Each defendant may accept or decline this opportunity. The interviewer collects information about the family, community and economic ties of the defendant. After the interview form is completed, the pretrial officer verifies the validity of the statements and checks the defendant's past record. Once this process has been completed, the information is evaluated on an objective point scale and conveyed to the appropriate trial judge, quite often by telephone. The trial judge then makes the release decision and causes the issuance of a release form custody order. The pretrial officer does not make recommendations but simply presents the information collected and informs the court as to additional information provided by verifiers. The pretrial officer may also be required to secure an affidavit of indigency from the defendant if a public defender is necessary.



AOC-PT-21
Rev 9-83

INTERVIEW FORM Social Security Number: _____

NAME: _____ DOB: _____ AGE: _____
(Last, First, Middle/Maiden)

DATE OF ARREST: _____ CHARGES: _____

VERIFIED Yes No COURT: _____

COURT DATE: _____

PRESENT ADDRESS: _____
(Street Apt. No., City, State, Zip Code)

LENGTH OF RESIDENCE: Present: Yrs. _____ Mos. _____ Area: Yrs. _____ Mos. _____ Phone: ( )

☐ Own ☐ Rent ☐ Other _____

ALTERNATE/PRIOR RESIDENCE: _____
(Street Apt. No., City, State, Zip Code)

With Whom: _____ Phone: ( ) Lgth. of Res.: Yrs. _____ Mos. _____

LIVES WITH: ☐ Alone ☐ Spouse ☐ Parents ☐ Children ☐ Brother/Sister ☐ Other Relatives ☐ Other (specify) _____

MARITAL STATUS: ☐ Single ☐ Married ☐ Divorced ☐ Widowed ☐ Common Law ☐ Separated No. of Children: _____

SPOUSE'S NAME: _____ SPOUSE'S SOURCE OF INCOME: _____

FAMILY IN AREA: ☐ Yes ☐ No Name: _____

Address: _____

☐ EMPLOYED ☐ UNEMPLOYED How Long: Yrs. _____ Mos. _____

☐ Full-time ☐ Part time ☐ Seasonal ☐ Welfare ☐ Unemployment ☐ Disability ☐ Retirement ☐ Other _____

EMPLOYER: _____ Job Position: _____

EMPLOYER'S ADDRESS: _____
(Street, City, State, Zip Code)

Can Contact: ☐ Yes ☐ No Phone: ( )

PRIOR/OTHER SOURCE OF INCOME: Source: _____ Job Position: _____

Address: _____

Phone: ( ) Length of Employment: _____

ATTENDS SCHOOL: ☐ Yes ☐ No School _____

Can Contact: ☐ Yes ☐ No Phone: ( )

Address: _____

PRIOR ARREST: ☐ Yes ☐ None If yes, where: _____

PENDING CHARGES: ☐ Yes ☐ No How Released: _____

Where: _____

Once the release decision is made, pretrial officers notify defendants of their court appearances and may monitor condition of release set by the judges. For example, a defendant may be released with the requirements that a certain residence be maintained or a job secured.

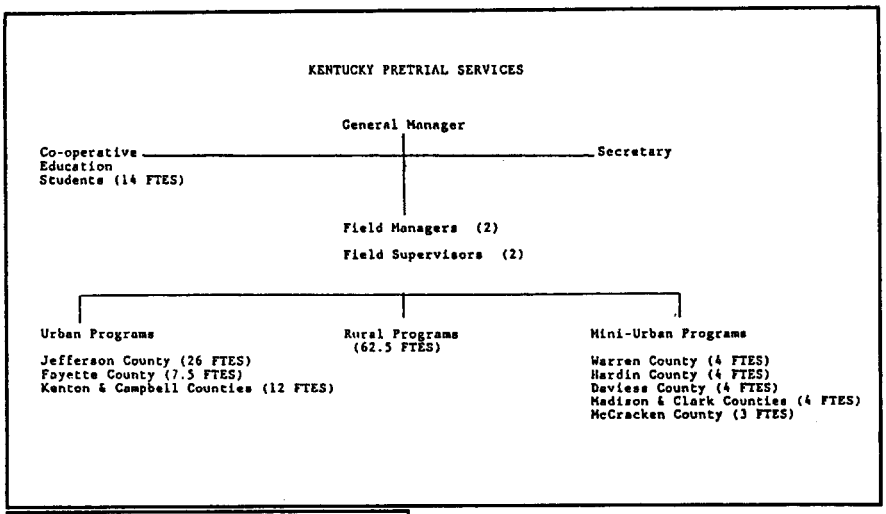
If a defendant declines the opportunity to be interviewed, is found ineligible for the program, or is rejected by a judge for recognizance release, they may be released by an alternative method. The defendant also has the right to have the release decision reviewed after 24 hours if they should remain incarcerated and the pretrial officer provides this information to the courts. Presently, in addition to the mandatory 24-hour review, many offices across the state provide a jail census to the judiciary on a weekly or daily basis.

In the fiscal years 1987-88, 281,244 defendants were arrested and 230,157 defendants were interviewed for an interview rate of 82 %. Kentucky has the 10 percent bail option and some defendants arrested on misdemeanors or traffic offenses may choose to bond out immediately without being interviewed by Pretrial Services.

In fiscal years 1986-88, 29,603 defendants were released on the 10% bail option and 50% of all defendants in the Commonwealth were released from custody without posting money. Of those defendants who were released through the agency only 2.9% failed to make their scheduled court appearance and only 2.6% were rearrested pending trial.

PRETRIAL HANDBOOK AVAILABLE

Kentucky's Pretrial Services has a handbook covering all aspects of pretrial release from the pretrial officer's interview through failures of appearance. A copy of that manual can be obtained for the cost of xeroxing and handling from the Department of Public Advocacy. Send a $10.00 check made out to Kentucky State Treasurer, to DPA Training Section, 1264 Louisville Road, Perimeter Park West, Frankfort, Kentucky 40601.



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Frankfort, Kentucky 40601
(502) 564-2350

John is a 1975 graduate of Eastern Kentucky University. He has a B.S. in Law Enforcement. He is employed by the Kentucky Court of Justice as General Manager of Kentucky Pretrial Services. He is responsible for the administration and supervision of statewide pretrial services program consisting of 17 employees and a $4 million annual budget. He is President of the National Association of Pretrial Services Agencies.

Instructions Collected, Categorized, Listed

The Department of Public Advocacy has collected many instructions filed in criminal cases in Kentucky, and has compiled an index of the categories of the various instructions in a 7 volume manual. Each instruction is a copy of a defense instruction filed in an actual Kentucky criminal case. They are categorized by offense and statute number. They were updated in February, 1989.

COPIES AVAILABLE

A copy of the index of available instructions is free to any public defender or criminal defense lawyer in Kentucky. Copies of any of the actual instructions are free to public defenders in Kentucky, whether full-time, part-time, contract or conflict. Criminal defense advocates can obtain copies of any of the instructions for the cost of copying and postage. Each DPA field office has an entire set of the manuals.

HOW TO OBTAIN COPIES

If you are interested in receiving an index of instructions, or copies of particular instructions, contact:

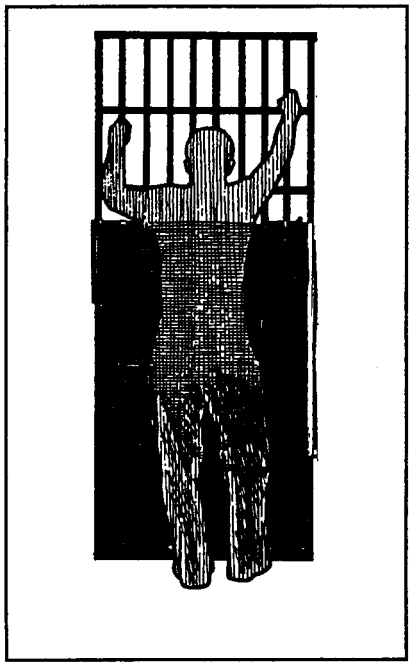
TEZETA LYNES
DPA Librarian
1264 Louisville Road
Perimeter Park West
Frankfort, Kentucky 40601
(502) 564-8006
Extension 119

Correction: The April *Advocate* cover illustration was reprinted from *the Defender*.

PUBLIC ADVOCACY ALTERNATIVE SENTENCING PROJECT (PAASP) UPDATE

*Cases Referred to PAASP	134
Punishment Plans Presented in Court	83
Punishment Plans Accepted in Whole or in Part	37 (45%)
Jail and Prison Beds Made Available to Corrections	37

**Some cases involve the same client due to charges in different jurisdictions or ASP Modifications.*



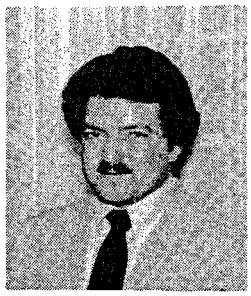
PAASP is a joint private and state funded, multi-agency effort involving the DPA, the Corrections Cabinet, the Developmental Disabilities Council and the Public Welfare Foundation. The initial grantor was the Ky. Developmental Disabilities Planning Council (DDPC).

The Council's grant laid the foundation for the Developmentally Disabled Offender Project (DDOP) which identifies the developmentally disabled felony offender and then seeks to achieve a viable Alternative Sentencing Plan (ASP) through a networking of resources. The Corrections Cabinet contributed to this grant. The Public Welfare Foundation provided the second grant which allowed the DDOP to be expanded to all prison bound clients of the DPA in the project areas. Both grants formed PAASP.

The Department is seeking continuation funds to operate the PAASP to June 30, 1990. The DDPC has approved a continuation grant for the DDOP to June 30, 1990. A request before the Public Welfare Foundation is pending. The Corrections Cabinet has advised that they are unable to contribute to the continuation of the PAASP due to insufficient funds. The Kentucky Crime Commission has turned down a continuation and expansion request. The Department's goal is to receive an appropriation from the 1990 Session of the Ky. General Assembly to continue and expand the PAASP to serve more counties and courts throughout the Commonwealth. Thereby, increasing the jail and prison beds available to Corrections for more appropriate use. If you have any questions or desire additional information contact David Norat, DPA.

Unconstitutional Presumptions of Guilt in Kentucky DWI Cases

Avoiding a Turn for the Worse



Jonathan Cowan, Ph. D.

In the next session of the Kentucky legislature, a number of measures will no doubt be introduced that would further limit the rights of the defendants in DWI cases. As a result of the Carrollton bus crash, these measures will be popular and widely publicized. Is more restrictive legislation truly a wise course for Kentucky?

To understand this issue in depth, the underlying constitutional questions must be explored in a nationwide context. The routine denial of the constitutional rights of DWI suspects has reached epidemic proportions in many jurisdictions, including a large number in Kentucky. The intense political pressure of groups such as MADD has converted yesteryear's frequently overlooked minor offense to one that is often perceived as seriously as crimes such as murder and burglary, which involve more deliberate intent to harm. This social climate has given rise to a number of legislative and judicial shortcuts—in the form of presumptions, *per se* laws, precedents, and erroneous judicial rulings—which, taken together, have closed off many scientifically legitimate defenses and created a situation where many defendants who choose to contest the charge are forced to prove their innocence.

The distinct trend towards stricter presumptions in DWI cases is currently on a collision course with several new precedents established by the U.S. Supreme Court to guarantee the rights of defendants in other types of criminal cases. These precedents clearly establish that the State cannot shift the burden of proof of innocence to the defendant by using presumptions. The outcome of this interaction promises to teach us a great deal about the degree to which the legal system is willing to abandon one of its prime purposes—guaranteeing that each of the many people accused of this offense every year receives a fair trial and the chance to exercise their constitutional rights— to politically accommodate itself to the will of a very concerned majority, inflamed by a constant media barrage. Although other areas of conflict over constitutional issues may appear to be more important, no other type of case brings as many individuals into serious contact with the legal system, providing an opportunity for them to understand the practical application of the constitutional principles they were taught in grade school. Each of these individuals will carry away an impression about the fairness and justice of the court system that will color their attitude toward the law and our society for many years to come.

Consider the hypothetical case of Jerry Green, who was pulled over for weaving in his own lane on the interstate on a cold, rainy night at 3 a.m. He was on a 5 mile drive home from a several hour stop at a friend's house. They had shared a single bottle of wine, finishing the last glass just before he left at 2:50 a.m. He had put in a long day, including working the 3-11 shift as a mechanic—work that involved constant exposure to solvents such as gasoline, carburetor cleaner, and various lubricants, which he inhaled and spilled on his hands, as he cleaned and installed parts. Although the preliminary breath test at roadside showed only a 0.08%, the officer decided to arrest him.

Ten years ago, he would have escorted Jerry home or let him go, but the pressure and rewards are different now. Jerry was tested an hour after he was arrested, and the machine read 0.13%. Unbeknownst to Jerry and his attorney, the machine has had a series of electronic problems, and has been producing unreliable readings for the past 3 weeks. If a breath sample has been preserved, or if Jerry had known about his right to a blood test (and had been permitted to obtain one), his true blood alcohol concentration would have been 0.10% one hour after his arrest.

What are the odds that Jerry will be presumed guilty? Will he have to prove his innocence? Will the Commonwealth successfully hide the evidence that the machine was malfunctioning? Will the judge actually require the Commonwealth to prove that the machine was in proper working order, as the case law mandates? How likely is it that he can obtain an unbiased trial? How much will it cost him? Will he be forced by circumstances to give up and plead guilty? Will he lose his license—and perhaps his livelihood? How will his opinion of our legal system have changed after his ordeal is over? What will his family think?

Chain of Scientific Assumptions

Scientifically, finding a causal relationship between the results of a breath analysis and driving impairment requires verifying 6 links in a logical chain. The first part of the analysis, demonstrating the logical transition between the reading of a breath analyzer and the conclusion that this number actually represents the concentration of alcohol in the blood at the time of the traffic incident in question, presupposes the validity, or provability, of 3 factual assumptions, each of which is a link in the chain. Then 2 additional factual assumptions (links) must be made in order to apply the appropriate statutory standard (the last link), and thereby arrive at the ultimate fact in issue: *whether or not a particular individual's ability to drive a motor vehicle was impaired at the time of the traffic incident by previously consumed alcohol.*

The links in this chain are:

(1) The breath analysis machine reading precisely and validly[1] measures the true breath concentration at the time of testing.
(2) The true breath alcohol concentration precisely and validly measures the most relevant blood alcohol concentration (BAC) at the time of testing.
(3) The BAC at the time of the traffic incident can be precisely and validly determined to be no less than the BAC at the time of testing or the statutory BAC limit.
(4) The brain alcohol concentration at the time of traffic incident can be precisely and validly determined from the BAC at the time of the incident.
(5) The degree of population or self-compared driving impairment can be precisely and validly predicted from the brain

alcohol concentration at the time of the traffic incident.
(6) The defendant's driving impairment fits the statutory definition of driving impairment caused by alcohol.

This chain of factual assumptions is only as strong as its weakest link, and the presence of several faulty links compounds the flimsiness of the chain. The detailed discussion in a forthcoming article will show that each of these assumptions, with the possible exception of the first one, can at best be shown to be only "probably" true, and cannot be proven "beyond a reasonable doubt." Cowan and Jaffee: "Proof and Disproof of Alcohol-Induced Driving Impairment," *American Jurisprudence: Proof of Facts*, (in press).

In most cases, as in Jerry Green's, the chain of assumptions necessary to prove driving impairment due to alcohol is weak in several places. The electronic problems of the analyzer, in combination with the possibility that both the preliminary breath tester and the analyzer were responding to the solvents in Jerry's breath cast very serious doubt on Assumption #1. The solvents may also have shifted the blood to breath alcohol ratio and affected Assumption #2. The third Assumption is not valid because the BAC was rising between the arrest and the test, due to his recent consumption. Jerry's drinking and driving experience, his fatigue, the weather, and a number of other factors combine to complicate the already tenuous Assumptions #4 and #5. Finally, my recent re-analysis of data from a National Highway Traffic Safety Administration study indicated that for every 12 people pulled over for weaving, only one will have a BAC above 0.10%. Thus, weaving, by itself, does not constitute proof of alcohol-induced driving impairment.

Jerry's defense attorney will probably have to prove most of these assertions in order to employ them, yet the prosecution will not have to prove all 6 assumptions. Why?

The recognition that defense attorneys can attack this chain in many ways has led to the enactment of statutory provisions aimed at closing off defenses, by making affirmative proof of certain assumptions unnecessary. In general, these statutes create legal presumptions, which are triggered by proving certain facts; some of these are worded so cleverly that many attorneys and judges may not even recognize them as presumptions. Other evidentiary devices designed to ease the prosecution's burden of proof and/or shift it to the defense have come from the case law. Among them are:

(1) If the prosecution can show that the testing operator followed approved procedures, the analytical result shall be presumed correct.
(2) The defendant shall be presumed to have been driving while impaired or intoxicated for purposes of the statutory prohibition if an alcohol concentration exceeding a certain limit has been proven.
(3) The result of the breath analysis at the time the test was performed can used in place of proof of the BAC at the time of the incident in question.
4) Breath alcohol levels can be used directly as a necessary essential element of the crime, rather than requiring proof of the actual BAC.

5) Proof that an individual is "under the influence" of alcohol can be used in place of proof that the individual's driving was impaired by alcohol.

In Kentucky, all 5 shortcuts are commonly part of DWI prosecutions. Unfortunately, judges usually accept the testimony of the machine's operator that he followed the approved procedure and that the analysis is correct. However, almost every operator in my experience lacks the training, experience, and testing apparatus to recognize when a machine is operating properly. Evidence that the machine had been modified without proper testing to ascertain its subsequent validity is frequently ignored. The mandatory rebuttable presumption of being "under the influence" is read to the jury, and thus constitutes a jury instruction. The third and fourth shortcuts are built into the wording of KRS 189.520. Practically, the myth that the machine determines blood alcohol content allows prosecutors to gloss over Assumption #2 without ever proving it.

The fifth shortcut is fairly unique to Kentucky, where it was recently established by a decision by the Court of Appeals, *Hayden v. Commonwealth & Clark v. Commonwealth* (1989) decision. Unfortunately, the Court of Appeals was not informed of the fact that 31 out of 33 other states which have interpreted the term 'under the influence' "have related their definitions to the impairment of the senses, judgment, and other skills that makes driving after drinking alcohol dangerous." *Commonwealth v. Connolly*, 474 N.E. 2d 1106 (1985).

In *Hayden & Clark*, the Kentucky Court of Appeals did not provide us with a meaningful definition of 'under the influence', except to indicate that it is not necessary to prove alcohol-induced driving impairment for a conviction. The Court of Apopeals opinion frequently refers to *Cruse v. Commonwealth*, Ky. App., 712 S.W. 2d at 365 (1986), which states that "what the enactment tells the 'man on the street' is do not drive a vehicle when your ability to operate it is impaired." Id. at ___. Hence the 'man on the street' may conscientiously believe that his driving is not impaired, may have demonstrated no driving impairment, and yet may be convicted under the lesser requirements of the vague standards of being 'under the influence'. The field of pharmacology and toxicology cannot help to shed light on the meaning of 'under the influence,' since this term is never used or defined, except in a forensic context. It is not even listed in the index of the classical textbook of pharmacology, Goodman and Gilman's *The Pharmacological Basis of Therapeutics.*

Since *Webster's New Universal Unabridged Dictionary* defines 'influence' by requiring that an effect of the influence be demonstrated, one can certainly argue that the prosecution must demonstrate a relationship beween the consumption of alcohol and a demonstrated change in the individual's behavior from before to after consumption. If this rigorous standard is not enforced by the Courts, then the term "under the influence" does become extremely vague. Hopefully, the legislature will soon see the necessity to redefine this crime in terms of actual driving impairment.

The majority of states now have statutes (*per se* laws) that directly prohibit driving with a blood alcohol concentration in excess of established levels. By charging under this law, the result of the breath analysis can be used in place of proof that the individual was driving while impaired, intoxicated, and/or under the influence.

Challenge to Statutory Presumptions in Jury Instructions

Some of the efforts to preclude the use of scientifically legitimate defenses to DUI offenses have been challenged successfully on constitutional grounds, based on the recent U.S. Supreme Court decision in *Francis v. Franklin*, 471 U.S. 307, 85 L Ed. 2d. 344, 105 S. Ct. 1965 (1985). In that case, the Court barred the use of both rebuttable and irrebuttable mandatory presumptions regarding intent in a murder case, stating very broadly:

> *The Due Process clause of the 14th Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact*

necessary to constitute the crime with which he is charged." In Re Winship, 397 U.S. 358 (1970). This "bedrock, 'axiomatic and elementary' constitutional principle," id., at 363 prohibits the State from using evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of crime Francis at 313.

The decision in *Francis v. Franklin* stands on the shoulders of previous Supreme Court cases pointing toward the same constitutional protection against any mandatory presumption that shifts the burden of proof to the defendant, *County Court of Ulster County v. Allen* 442 U.S. 140, (1979); *Sandstorm v. Montana* 442 U.S. 510, (1979). and it appears to go further towards protecting the rights of the defendant. Davis, "DUI/Presumptions, Inferences and the 14th Amendment," *Paper presented at seminar on New DUI Defense Strategies, Louisville, KY (October, 1987)*

This is the basis of the recent challenge to the presumption read to the jury in Kentucky DUI cases, which received a favorable review by a federal Magistrate.

The Supreme Court expressly stated that where the words "are presumed" or "is presumed" are used in an instruction in connection with an essential element of the offense once the state had proved the predicate acts, the jury charge is constitutionally infirm, even if the jury is further instructed that the presumption may be rebutted, since a reasonable juror could have understood the language as creating a mandatory presumption that shifted to the defendant the burden of persuasion on that essential element of the offense. The Supreme Court further stated that the fact that the highest state court had interpreted the offending language as creating no more than a permissive inference that comports with constitutional standards is irrelevant, since the federal constitution question is whether a reasonable juror could have understood such language as creating a mandatory presumption. *Francis* at 315-316. Furthermore in *Ulster County*, the Court stated that the presence in the record of other evidence supporting guilt would be irrelevant in analyzing the validity of a mandatory presumption.

More recently, the Colorado Supreme Court has extended this protection to DUI offenses, declaring that the provision of the state's DUI statute establishing that "it shall be presumed" that the defendant was under the influence of alcohol from a 0.10% BAC cannot be regarded as creating a mandatory presumption. The court stated that statutory presumptions in criminal cases must be construed, and jury instructions based thereon must be worded, to raise only permissive inferences. The trial judge cannot instruct the jury that they "must" presume or accept a defendant's guilt based on the BAC. The instruction in question told the jurors that they "must accept the presumption as if it had been factually established by the evidence" and that they could reject this presumption only if it was "rebutted by evidence to the contrary."

ILLUSTRATION BY ROBERT J. NOVAK

The court concluded that the instruction created a mandatory presumption that defendant was under the influence of alcohol, and therefore violated the true meaning of the statute, since the statute could constitutionally authorize only a permissive inference. *Barnes v. People*, 735 P. 2d 869 (1987).

The Court also noted that courts in other states reviewing presumptions contained in DUI statutes substantially similar to Colorado's have concluded that the statutory language "shall be presumed" or its equivalent creates only a permissive inference that a defendant was under the influence of alcohol. *Barnes, supra*, citing *Commonwealth v. Moreira*, 434 N.E.2d 196 (1982); *State v. Dacey*, 418 A.2d 856 (1980); *State v. Hansen* , 203 N.W. 2d 216 (1972); *State v. Bailey*, 339 P. 2d 45 (1959); *State v. Cooke*, 155 S.E.2d 165 *(1967); Commonwealth v. DiFrancesco*, 329 A.2d 204 (1974). More recently, *Rolle v. State* (Fla. App. 4th Dist, No. 87-2089, 4/27/88), ruled that statutes that state that 0.10% "shall be *prima facie* evidence" of impairment must be transformed to a permissive presumption in jury instructions.[2]

In at least some states, pattern jury instructions have been worded or reworded accordingly, so that they tell the jury that they may, but are not required to, infer the ultimate fact. See, for example, *CALJIC* 12.61 (Rev 1985); *Missouri Approved Instructions*, 3rd Edition (1987), Sections 310 & 331.

Presumptions in *Per Se* Jury Instructions

There is really no scientific distinction between the situation described in a *per se* law and the mandatory rebuttable presumption, although the courts have uniformly upheld the constitutionality of *per se* alcohol offense statutes, Annot.,54 ALR 4th 149 (1984). In many states, the jury instructions stemming from these *per se* laws are actually just as unconstitutional as those concerning the mandatory presumptions they were designed to stiffen.

There are several problems with typical *per se* instructions. To pass constitutional muster it is imperative that the instructions make clear that the prosecution has the burden of proving all preliminary factual presumptions underlying the ultimate fact. (i.e., that the BAC was precise and valid at the time of the offense) beyond a reasonable doubt. See *Brayman* 751 P.2d 294 (1988). In a *per se* case, this chain of presumptions can form the "sole and sufficient basis for a finding of guilt." Therefore, the jury should be instructed that each presumption must be proven beyond a reasonable doubt in this type of case, even if they are only worded as permissive inference in the instructions. Thompson, "The Constitutionality of Chemical Test Presumptions of Intoxication in Motor Vehicle Statutes," *20 San Diego Law Review* 301 at 311 (1983), citing *Ulster County, supra*. The prosecution's burden should include the precision and validity of the breath tests administered to the defendant (Assumption #1), their precision and validity as indicators of blood alcohol content (Assumption #2), and the prediction of blood alcohol content at the time of the traffic incident from that presumed from the test (Assumption #3). Many statutes have converted these assumptions to presumptions by incorporating converted language such as "blood alcohol concentration as shown by measurement of breath" for Assumption #2, or by permitting the BAC at the time of the test to be used in place of the BAC at the time of incident. This type of pyramiding of inferences and presumptions had long been disallowed in common law, *United States v. Ross*, 92 U.S. 281 (1976), although there are some ex-

ceptions involving different threshold tests. *Thompson, supra,* at 326.

Jury instructions which convert these presumptions to language that a reasonable juror could have understood as making them mandatory, or as removing the states's burden to prove each of these assertions beyond a reasonable doubt, are unconstitutional under the *Ulster County* ruling. Logically, if each of these assumptions is converted to a legal presumption, the chain of presumptions should stop at the second link, the presumption that one can prove a BAC from a correct breath alcohol concentration, since this cannot be proven beyond a reasonable doubt—unless one is willing to raise the *per se* level to almost 2100/834 of 0.10%, or 0.25%, to compensate for the lowest known blood/breath ratio, Cowan and Jaffe, *supra.* To correctly prove the third link, the prosecutor would then need to provide expert testimony that, in the particular case, it is clear beyond a reasonable doubt that the BAC at the time of the traffic incident was above the corrected level. If such testimony could be obtained in a particular case, it is doubtful that the expert would withstand skillful cross examination.

Furthermore, the prosecution should also be required to prove the trigger fact of every presumption—including the breath alcohol level—beyond a reasonable doubt, *In re Winship,* 397 U.S. 358 (1970). Even if the breath test can be proven satisfactorily, the variability of the blood to breath ratio, as well as other problems, clearly establishes that a BAC derived from a legal presumption based on Assumption #2 can never be proven beyond a reasonable doubt. Simpson, "Accuracy and Precision of Breath Alcohol Measurements for a Random Subject in the Postabsorbative State," 33(2) *Clinical Chemistry* 261 (1987); Simp-son, "Accuracy and Precision of Breath and Alcohol Measurements for Subjects in the Absorptive State," 33(6) *Clinical Chemistry 753 (1987);* Cowan and Jaffee, *supra.* A precise value for the BAC at the time of the test is required to trigger any legal presumption based on Assumption #3 and thereby reach the ultimate fact in most *per se* law—the BAC at the time of the traffic incident. Hence, no jury instructions in *per se* cases incorporating Assumption #3 (or Assumption #2 in many cases) as either a mandatory or a permissive presumption should be deemed constitutional.

Improving Jury Instructions

In order to bring these *per se* statutes into compliance with the current constitutional law, it is necessary that jury instructions make clear that the assessment of all underlying presumptions and the weight to be accorded them is entirely within the jury's discretion in both DWI and *per se* cases. For example, the *Missouri Approved Instructions,* which were recently rewritten without the impetus of a specific case challenge, state:

> *If you find and believe from the evidence beyond a reasonable doubt:*
>
> *First, that...the defendant operated a motor vehicle, and*
>
> *Second, that he did so when he had ten-hundredths of one percent or more by weight of alcohol in his blood, and*
>
> *Third, that the alcoholic content of his blood was determined by a chemical test of his...breath...*
>
> *then you will find the defendant guilty of driving with excessive blood alcohol content.*
>
> *However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense. Missouri Approved Instructions, Third Revision, 1987, Section 331.04. (emphasis added)*

Although this is clearly more constitutionally sound than many other pattern instructions, there are two additional clarifications that are necessary. The third requirement should read "precisely and validly determine" (or contain equivalent language) in order to eliminate the argument that any determination of the BAC, no matter how slipshod, will suffice. An additional instruction which indicates that it is the prosecution's burden to prove each of these requirements beyond a reasonable doubt, and that the defendant need not offer any evidence in disproof, would bring this into compliance with the *Ulster County* precedent.

The Irrationality of *Per Se* Laws

The recent proliferation of attempts to incorporate some of these assumptions into simplified versions of *per se* laws, by criminalizing the breath alcohol concentration and/or the alcohol level at the time of the test are scientifically invalid abuses of the prerogative of the legislature to frame laws. These simplifications compound the problems with rationality that are already abundant in these laws. Although these new statutes, and their legitimization by the courts, may have been a political necessity, they can hardly be regarded as rational from a scientific perspective. Considering that the validity and precision of the determination that driving impairment is due to alcohol is degraded by each of the 6 links in the chain of assumptions in the light of the weakness of several of the assumed relationships, it is clear that the rational basis of all *per se* laws, and particularly the simplified versions, is not apparent to the thoughtful scientist or layman. Simpson, "Due Process and Drinking Driving Statutes: A Constitutional Attack on Alcohol Testing,"3(8) *DWI Journal, Law and Science* 1 (August 1988), Cowan and Jaffee, *supra.*

The restraint that Kentucky has shown in not passing a *per se* law is well founded. It should not be marred by hasty passage of an irrational law, in response to pressure tactics, public sentiment, and the increased availability of federal highway money.

Reassessing Our Social Priorities

After a number of years of pursuing the path of increased deterrence of drunk driving with great vigor, there are some fundamental questions that must be reconsidered: Is relying on the use of a combination of unconstitutional presumptions and irrational *per se* laws to provide a shortcut to a high conviction rate actually paying a very high price for a marginal improvement in public safety? The increase in penalties and public awareness decreased the number of fatal accidents involving BACs above 0.10% about 24% from 1982 to 1987. The total number of lives saved was approximately 6729 in 1987, or about 0.000028% of the total population. *National Highway Traffic Safety Administration: Alcohol-Related Traffic Fatalities,* 1982-1987. However, most of the deterrent effect was probably due to a change in social attitude from the publicity associated with the new laws and tighter enforcement, rather than the specifics of the laws themselves. This decrease probably would have happened with a more constitutional approach to the problem. Can we continue to rationalize the institutionalization of unconstitutional laws and/or instructions on this basis? Is the damage that these shortcuts do to public confidence in the law more pervasive and important than this drop in fatalities? Are the shortcuts and the increased penalties actually decreasing pain and suffering, and increasing public safety? If safety is the real issue, why have we dragged our collective feet on the deployment of air bags? Why have we allowed the spread of distractions such as car telephone? Is alcohol really just a scapegoat for the many causes of carnage on the highways?

Is there an alternative, more productive way to approach this problem? Clearly, the most justifiable reason for our society's concern about driving impairment is to improve the carrying out this laudable goal, we should work toward eliminating impaired drivers, regardless of the cause of this impairment. Since only 6% of the U.S. nighttime driving population actually has a BAC above 0.10%, and alcohol is only responsible for a fraction of their driving performance, it is important to look for other approaches to improve traffic safety. Lehman, Wolfe, & Kay, "A Computer Archive of ASAP Roadside Breath-Testing Surveys," 1970-1974, *Highway Safety Research Institute*, Ann Arbor, 1975, NHTSA DOT HS-801 502.

The Direct Measurement of Driving Impairment

The approach that would be most consistent with our (presumed) goals of promoting public safety and developing fair and consistent statutes is to directly measure an individual's driving ability shortly after a traffic stop. As I have previously pointed out, microcomputer technology, which has produced computer games resembling driving simulators, such as Atari's *Pole Position*, is currently available. This type of testing would be an excellent starting point for developing appropriate measures of driving impairment. Cowan, "The Complex Relationship Between Blood Alcohol Concentration and Impairment," in *Defense of Drunk Driving Cases: Criminal and Civil*, 14-36 R. Erwin, ed.(1985). The technology for developing a reasonable priced, realistic driving simulator for detecting driving impairment is now available, Cowan and Stein, "Development of a Driving Simulator for Routine Impairment Measurement," Presentation to the National Safety Council Committee on Alcohol and Other Drugs. Orlando (October, 1988). After a series of validation studies with this simulator, a standard operator's performance and a cut-off point for unacceptable driving impairment could be determined, as originally suggested by the Subcommittee on Human Factor of the Committee on Alcohol and Other Drugs.

A testing device that could be placed in a police station could then be developed. This would permit an initial screening of the driving ability of every suspect, including his reaction to simulated emergencies. Failing this screening would constitute the (only) probable cause for an investigation of the reason(s) for this impairment, including a blood alcohol test. Prosecution could then be based on demonstrating both a blood level and driving impairment, along with evidence of observations to confirm the drug effect. This procedure would also help to solve a parallel problem, which is recognized as a major flaw in prosecution for driving under the influence of drugs—the lack of a demonstrable relationship between any drug blood level and impairment performance. See National Institute on Drug Abuse, "Drug Concentrations and Driving Impairment,"254 *Journal of the American Medical Association* 2618 (1985). The benefits of measuring driving ability with a simulator are potentially much greater than those from focusing solely on alcohol, since the other causes of impairment could then be investigated and modified. Drivers who were impaired

because of medical problems, prescription medication, or old age could also be screened out and non-punitive remedial actions taken. This approach may be particularly appropriate for commercial drivers of trucks, busses, and taxis, who log hundreds of thousands of miles a year.

Although the research and development necessary to develop a precise and valid measurement of unacceptable driving impairment will take many years, the research program could be started this year with relatively modest funding.

In the meantime, it is necessary to bring the DWI statutes and their related jury instructions into compliance with both scientific truth and constitutional law. They must be rewritten to eliminate any vestiges of presumed guilt and to permit holistic justice, no matter how inconvenient and time consuming this may seem. Enacting any new Kentucky statutes strengthening or incorporating further presumptions would not be a sound legislative act, considering the trend in U.S. Supreme Court case law. Decisions regarding guilt or innocence must be left to the judgement of the factfinder, acting, unbound by any mandatory presumptions, upon all the admissible evidence in the individual case.

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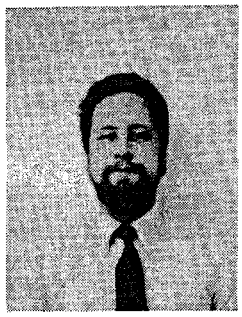
Footnotes

[1] The wording should be carefully noted; the distinction between "precision" and "validity," which makes inclusion of both terms necessary in wording these assumptions, is that a measurement can be precise (*i.e.*, repeatably produce the same value), and still not be accurate or valid. For example, a breath analysis machine can produce a 0.11% value three time in a row. However, if the subject's blood to breath ratio is actually 1720:1, rather than 2100:1, the breath analysis does not validly estimate his true blood level of 0.09%.

[2] For two excellent recent articles on this subject, see Essen, "When *Per Se* Statutes Create Mandatory Rebuttable Presumptions: The Defense Response, 3(6) *DWI Journal, Law and Science 1 (June, 1988); Simpson, "Due Process and Drinking Driving Statutes: A Constitutional Attack on Alcohol Statutes,"3(8) DWI Journal, Law and Science* 1 (August 1988).

TESTIMONIAL PRIVILEGES

In A Criminal Law Context



David Eucker

In a era when privacy rights seem at their nadir, some may find it refreshing to delve into an area such as testimonial privileges, which "serve as important protectors of the right of privacy." Krattenmaker, *Interpersonal Privileges Under the Federal Rules of Evidence; A Suggested Approach*, 66 Geo. L.J. 613, 652 (1976). Kentucky takes a more utilitarian approach to privileges, adopting Wigmore's 4 criteria necessary for a testimonial privilege: 1. The communication must be confidential, 2. Confidentiality must be essential to the relationship between the declarant and the recipient of the communication, 3. Public policy supports the preservation of the relationship, and 4. The injury to the relationship caused by the disclosure of the communication must outweigh benefit to the public of disclosure. *Tabor v. Commonwealth*, 625 S.W.2d 571, 573 (Ky. 1981).

ATTORNEY/CLIENT PRIVILEGE

KRS 421.210(4) establishes the attorney/client privilege in Ky. This privilege applies to confidential communications with an attorney or a necessary representative, in a professional capacity. The privilege does not exist vis-a-vis communications about future acts known by the communicator to be criminal or fraudulent. *Cummings v. Commonwealth*, 298 S.W. 943, 947 (Ky. 1927). Nor does the privilege apply to communications among co-defendants jointly employing the same attorney in litigation involving only those co-defendants. See, *Hunt v. McCloud*, 22 S.W.2d 285, 287 (Ky. 1929). The privilege is solely that of the client, and therefore may be waived with the client's consent. KRS 421.210(4); *Combs v. Roberts*, 35 S.W. 2d 293, 295 (Ky. 1931).

The communicator must intend that the communication be confidential. Thus, communications to an attorney which are to be communicated to a third person are not privileged. *Linthicum v. Pruden*, 233 S.W.2d 98, 99 (Ky. 1950). Nor is a communication privileged, if it is "public," which is the case even if the statement is made merely in the presence of a third person. *Cubbage v. Gray*, 411 S.W.2d 28, 29 (Ky. 1967).

The statements at issue must be communicative. Thus, for example, attorney testimony about a client's mental capacity is not privileged, since such testimony is based on personal observation, not confidential communication. *Stegman v. Miller*, 515 S.W.2d 244, 247 (Ky. 1974).

The statement must be made to an attorney or their representative. In *Commonwealth v. Melear*, 638 S.W.2d 290, 291 (Ky. 1982), for example, the court held privileged statements given to an insurance company employee after an auto accident for which the defendant was charged with manslaughter.

The attorney must be acting in a professional capacity when the communication occurs. In a murder case, statements by the defendant's former attorney that the defendant's mother, the victim, would not divide her property so as to include the defendant, were admissible as a mere relaying of information by the attorney from the mother to the defendant. *Peters v. Commonwealth*, 477 S.W.2d 154, 157 (Ky. 1972). In such a case, the attorney acts as the agent of the mother, and not in a professional capacity. Likewise, the identity of a client is not privileged where the lawyer is employed merely as an agent to return stolen items to police. *Hughs v. Meade*, 453 S.W.2d 538, 542 (Ky. 1970). Communication beyond the lawyer's professional capacity are not privileged. For example, a client's statements concerning inter-vivos gifts, made to a lawyer employed to draft a will, are not privileged, since they do not pertain to the drafting of a will. *Denunzio's Receiver v. Scholts*, 77 S.W. 715, 716 (1903).

Although statements concerning the nature of a lawyer's employment contract with a client are not privileged, *Sacks v. Title Insurance and Trust Company*, 202 S.W.2d 384, 386 (Ky. 1947), statements which are otherwise privileged remain so even if they are made during negotiations for a retainer. *Goode v. Commonwealth*, 44 S.W.2d 301, 302 (Ky. 1931).

HUSBAND/WIFE PRIVILEGE

KRS 421.210(1) establishes both a privilege protecting certain marital communications, and a choice not to testify against one's spouse. *Estes v. Commonwealth*, 744 S.W.2d 421, 424 (Ky.1987). The privilege applies to confidential communications made to another spouse during the marriage, not involving a crime against or a conspiracy with the spouse.

"Confidential" marital communications are those which are known by the spouse only because of the marriage. *Gill v. Commonwealth*, 374 S.W.2d 848, 850 (Ky. 1964). If the subject matter of the testimony involves communications which are or could have been detected by others, then that subject matter is not privileged. *Commonwealth v. Byrd*, 689 S.W.2d 618, 620 (Ky. 1985). In *Byrd*, the wife of a defendant accused of robbery was allowed to testify that she observed the defendant chase an eventual victim in a public parking lot. She was barred from testifying that the defendant later recounted the incident to her, and that her husband previously told her he would commit a robbery.

To be privileged, the communication must be "marital." That is, it must occur during the marriage. KRS 421.210(1). The marital privilege covers only "communications." Such communications are not limited to words or affirmative acts, but include any knowledge gained by the spouse. *Gill v. Commonwealth, supra.* Communication includes an accused's going through a purse he allegedly stole, while at home with his wife. *Byrd, supra.* Giving money at home to a spouse to deliver to a landlord as rent is a privileged communication. *Todd v. Barbee*, 111 S.W.2d 1041, 1043 (Ky. 1938).

Two exceptions to this privilege are relevant to the criminal defense practitioner. Confidential marital communications are not privileged if they

involve criminal acts against the spouse. *Brown v. Commonwealth*, 43 S.W.2d 511, 512 (Ky. 1931). Nor are they privileged if they involve crimes which husband and wife conspire to commit. *Gill v. Commonwealth*, 374 S.W.2d at 851.

The second prong of KRS 421.210(1) provides that neither spouse "may be compelled to testify for or against the other." This choice belongs only to the testifying spouse, not the accused. *Taylor v. Commonwealth*, 302 S.W.2d 378, 380 (Ky. 1957). It applies only where the non-testifying spouse is a party. *Victor v. Commonwealth*, 298 S.W. 936 (1927). It does not apply in child abuse cases. *Commonwealth v. Boardman*, 610 S.W.2d 922, 925 (Ky. 1980). The choice not to testify exists only for those married when their testimony is sought. Thus, testimony at a previous trial by a spouse who marries the defendant after that trial and before retrial is admissible if the wife chooses not to testify at the second trial. *Wells v. Commonwealth*, 562 S.W.2d 622, 624 (Ky. 1978). The choice not to testify may be waived, as where a spouse gives a deposition pursuant to an agreement with the Commonwealth to release her from jail, but later refuses to testify. *Richmond v. Commonwealth*, 637 S.W.2d 642, 646, 647 (Ky. 1982). However, where a spouse gives an otherwise inadmissible statement to police, and later asserts her choice not to testify, the statement is inadmissible. *Estes v. Commonwealth*, 744 S.W.2d 421, 425 (Ky. 1987). This is so because in *Wells* and *Richmond*, the evidence was admissible when given, unlike the unsworn statement to the police officer in *Estes*. Thus, while the spousal choice not to testify has been disparaged and narrowed in *Wells* and *Richmond*, *Estes* signifies the willingness of the Supreme Court to enforce the spousal choice not to testify, however grudgingly, when it feels it has no alternative.

PHYSICIAN/PATIENT

Kentucky has no physician/patient privilege. *H.H. Waegner and Co. v. Moock*, 197 S.W.2d 254, 256 (Ky. 1946). KRS 213.200, however, requires that communications which must be reported to vital statistics bureaus, such as birth and death reports, are privileged. *Boyd v. Wynn*, 150 S.W.2d 648, 650 (Ky. 1941).

PRIEST/PENITENT

KRS 421.210(4) establishes the priest/penitent privilege. Only two cases in Kentucky have construed this statute. In *Johnson v. Commonwealth*, 221 S.W.2d 87, 89 (Ky. 1949), the defendant's statement to his minister that he "lost his temper and killed [the victim]" was held admissible because it was given to a minister as a friend, and therefore not in the minister's professional capacity. For the same reason, a statement revealing the location of a murder weapon was held admissible in *Wainscott v. Commonwealth*, 562 S.W.2d 628, 632-633 (Ky. 1978).

REPORTER/SOURCE

KRS 421.100 establishes a reporter/source privilege. It permits news reporters to refuse to disclose the source of any information but does not permit refusal to disclose the information gained from the source. *Branzburg v. Meigs*, 503 S.W.2d 748, 749 (Ky. 1971).

PSYCHOLOGIST-PSYCHIATRIST/ PATIENT

KRS 319.311, by its terms, places the psychologist/patient privilege on a par with the attorney/client privilege. Neither it nor the psychiatrist/patient privilege of KRS 421.215 permit disclosure of the Comprehensive Care Center files of a convicted defendant for use in his presentence investigation report. *Southern Bluegrass Mental Health v. Angelucci*, 609 S.W.2d 931, 933 (Ky. 1980).

The psychiatrist/patient privilege applies to all communications pertaining to diagnosis or treatment of a mental condition, between a psychiatrist or their agent, and the patient or their family. There is no privilege in commitment proceedings, and no privilege if the communications are admitted at trial only to show mental condition, and were given only after warning the patient that his statements may not be privileged. KRS 421.215.

PROB. & PAROLE OFFICER/ PROBATIONER/PAROLEE

Under KRS 439.510, information obtained, in an official capacity, by any probation or parole officer cannot be used in evidence, and may be disclosed only to the court from which the probation or parole arose. Such information may be heard only in parole and probation proceedings. *Henderson v. Commonwealth*, 507 S.W.2d 454, 458 (Ky. 1974). Dates of birth, imprisonment and discharge, and probation or parole status are not privileged, since they are "status information" necessary to prove a persistent felony offender charge. *Tabor v. Commonwealth*, 625 S.W.2d 571, 573 (Ky. 1982).

STUDENT/COUNSELOR

KRS 421.216 prohibits disclosure of any communication of a student/counselee to their counselor, absent consent of the counselee, or his parents or guardian, if the counselee is under 18.

ACCOUNTANT/CLIENT

A licensed accountant shall not, without client consent, disclose confidential information obtained in a professional capacity, unless nondisclosure conflicts with accountancy ethics rules, or unless the accountant is served with a validly issued subpoena. KRS 325.440.

SOCIAL WORKER/CLIENT

A social worker licensed according to KRS 335.080 to 335.150 may not disclose information gained in a "psychotherapeutic" capacity, *i.e.* when they perform psychotherapy, except when authorized by one of the 7 exceptions to KRS 335. 170. They are: consent of the patient, a communication pertaining to a future crime or "harmful act," when the patient is a victim or subject of a crime and the social worker is properly subpoenaed in a proceeding pertaining to the commission of the crime, communication during a court-ordered examination when the patient is informed in advance his communications are not privileged, when the social worker is a state employee performing activities solely for the Cabinet for Human Resources, if the social worker suspects child abuse or neglect, or if the social worker is the subject of a civil or criminal action.

SEXUAL COUNSELOR/ VICTIM

KRS 421.2151 establishes a testimonial privilege for communications by a "victim" with a "sexual assault counselor" which the victim believes was confidential. This privilege does not apply to chain of custody testimony, testimony of the victim's appearance, claim of perjury, and to testimony concerning the identity of the rapist.

CONCLUSION

While not the most litigated area of criminal law, this lack of judicial gloss makes privileges an area ripe for good lawyering. It is hoped this article provides a start to that end.

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NEED QUICK ANSWERS OR ADVICE?

The attorneys in the Department of Public Advocacy provide quick answers and immediate advice about any legal issues which may arise in your criminal defense practice. **Due to time restraints this is not a research service.** It is merely intended to allow you quick access to the wealth of knowledge that the DPA attorneys have acquired over the years. If your specific issue is not delineated below, please find the nearest relevant issue and contact the attorney listed. An answer to almost any question is just a phone call away. Unless otherwise noted, please call (502) 564-8006.

A.

Appeals, video - Tim
Appellate procedure - Larry, Tim
Arrest, general - Ernie*
Arrest, at home - Ernie*
Arrest, probable cause - Linda, Ernie*

B.

Batson - Vince
Battered Women Syndrome - Neal, Gary
Belated appeals - Allison, Tim, Barbara

C.

Caselaw, recent Ky.& U.S. Supreme Court Cases - Linda
Collateral attacks (11.42/60.02) - Allison
Comment on silence (*Doyle*) - Larry, Donna
Competency to stand trial - Neal, Rodney
Confessions, Anti-Sweating Act - Marie
Confessions, involuntary - Tim
Confessions, juveniles - Kathleen
Confessions, *Miranda* - Tim
Confessions, right to counsel - Oleh
Conspiracy - Larry
Contempt of Court - Vince
Controlled substances - Tim, Gary
Counsel, conflict of interest - Linda, Vince, Gary
Counsel, right to - Linda
Criminal Facilitation - Gary
Criminal Syndicate - Linda

D.

Death Penalty - Neal, Randy, Oleh Kathleen, Donna, Rodney, Ed
Defense, right to present - Larry
Detainers/IAD - Dave, Allison
District Court - Gary
Double Jeopardy - Larry, Rodney
DUI - Gary

E.

Entrapment - Gary
Ethics - Vince
Evidence, admissibility - Rodney
Evidence, character - Linda
Evidence, co-defendant's guilt - Larry
Evidence, flight/escape - Linda
Evidence, hearsay - Linda
Evidence, opinion - Larry, Rodney
Evidence, other crimes/prior misconduct - Marie
Evidence, prior sexual conduct - Marie
Evidence, relevancy - Linda
Evidence, sufficiency - Linda, Larry
Evidence, tampering with - Vince
Ex Post Facto - Linda
Expert witnesses, funds for - Ed, Donna, Neal, Oleh
Extradition - Allison
Extraordinary Writs - Tim
Extreme Emotional Disturbance - Rodney, Ed, Oleh
Eyewitness Identification - Rodney, Gary

F.

Federal Habeas Corpus - Randy, Neal, Rodney, Allison
Federal Habeas Corpus, cause/prejudice - Randy, Linda
Federal Habeas Corpus, exhaustion - Tim, Randy
Federal Habeas Corpus, hearings - Tim
Fiber evidence - Neal
Forensic evidence - Ed, Oleh, Donna, Neal

G.

Guilty pleas, constitutional validity - Allison, Gary
Guilty pleas, withdrawal - Ed

H.

Habeas corpus, state - Allison

I.

Impeachment-bias/interest/hostility - Ed
In forma pauperis, denial review - Tim, Ed
Informants, confidential - John*, Jim*
Involuntary commitments - Marie

J.

Jail Credits - Marguerite
Jett testimony - Julie
Juror, challenges for cause - Oleh
Juror misconduct - Tim
Juror testimony re verdict - Donna, Ed
Juvenile rights and procedure - Rebecca*Paul, Barbara
Juvenile waivers - Barbara
Jury panel challenges - Donna, Oleh, Neal

K.

Kidnapping exemption - Larry

L.

Lesser included offenses, instructions - Larry
Lineup/showup/photo display - Larry, Linda

M.

Mental retardation - Marie
Miranda - Tim

N.

Notice of Appeal - Tim

O.

Offenses, single vs. multiple - Marie

P.

Pardons and commutations - Dave
Parole - Dave, Allison, Gary
Peremptories, improper use of - Tim, Ed
PFO proceedings - Rodney, Ed
Polygraph - Ed
Possession, what constitutes - Marie, Dave
Post Traumatic Stress Disorders - Neal, Gary
Presumptions - Larry
Prior offenses/enhancement - Gary
Prisons - Dave, Allison
Private Prosecutor - Gary
Privilege, husband/wife - Tim
Privilege, psychiatrist/patient - Marie
Prosecutorial misconduct, arguments to jury - Oleh
Prosecutorial vindictiveness - Larry

R.

Rape Shield Law - Rodney
Recusal - Ed, Neal
Records, lost - Julie

S.

Sanctions, Appellate - Tim, Larry
Sanctions, Trial - Ed
Search and Seizure - Ernie, Tim, Linda, Rodney
Self Protection - Tim, Gary
Sentencing alternatives - Dave
Sentencing, delay in - Tim
Separate trials, co-defendants - Marie
Separate trials, counts - Tim, Linda
Sexual Abuse-legal defense & strategies - Vince, Gary
Sexual Abuse Syndrome - Larry
Sexual offenses, mistake as to age - Tim
Shock Probation - Gary, Allison, Barbara
Speedy trial - Linda, Rodney
Stop and frisk - Tim, Ernie*

T.

Trial tactics - Gary
Truth in Sentencing - Kathleen

V.

Vehicular Homicide - Larry, Gary
Venue (change of) - Ed, Donna, Neal, Oleh,
Vietnam Vets - Neal, Gary

W.

Waiver, counsel - Tim
Waiver, effect of mental retardation - Marie
Waiver, jury trial - Tim
Wiretap - Linda
Witness, bias - Randy
Witness, competency - Larry
Witness, confrontation in sex cases - Larry
Witnesses, obtaining (out-of-state) Ed, Randy
Writs, mandamus/prohibition - Donna, Tim

Jim Cox (606) 679-8323
Rebecca Diloreto and Ernie Lewis (606)623-8413
John Halstead (606) 236-9012 (219)

Courts' Indifference to Unfairness

In the capital case of *People v. Garrison*, 47 Cal. 3d 744 (1989) the Court demonstrated that it did not care if criminal defendants, even capital ones, were represented by alcoholics who were drunk during the trial:

> Although it is uncontested that Beardsley was an alcoholic at the time of trial and that he has since died of the disease, defendant has failed to prove that Beardsley's performance was deficient. His reliance on a per se rule of deficiency for alcoholic attorneys is contrary to settled law. We hereafter conclude, therefore, that defendant was not denied his right to effective assistance of counsel.
>
> Blendon Beardsley was court-appointed counsel for defendant from February of 1980 until judgment of death was entered in January of 1981. It is undisputed that Beardsley was an alcoholic at the time of his representation and that he consumed large amounts of alcohol each day of the trial... Beardsley drank in the morning, during court recesses, and throughout the evening. Although these declarations confirm that Beardsley was an alcoholic, they do not address whether Beardsley's addiction adversely affected his courtroom performance to such an extent that defendant was denied effective assistance of counsel.
>
> The trial judge was in the best position to evaluate Beardsley's condition and performance. The judge was put on notice of Beardsley's alcohol problem when, on the second day of jury selection, Beardsley was arrested for driving to the courthouse with a .27 blood-alcohol content.... The judge stated that Beardsley's courtroom behavior had not given him any reason to believe that Beardsley should not continue and told defendant, "I personally can assure you that you probably have one of the finest defense counsel in this county."
>
> In support of his petition for habeas corpus, defendant submits the declaration of Dr. H. Westley Clark. Dr. Clark declares that a chronic alcoholic loses the ability to think through new problems or tasks and often cannot make judgment calls. Defendant concludes from Dr. Clark's analysis that attorneys who are chronic alcoholics should be held ineffective as a matter of law.
>
> Defendant's position cannot be sustained, however, because it would render irrelevant Beardsley's actual performance in court. Our review of the facts indicate that Beardsley did a fine job in this case. Indeed, defendant concedes that Beardsley outwardly appeared competent, but argues that inwardly Beardsley was "a shell of a man." That may be true, but there is no authority for the type of per se rule espoused by defendant. He must still prove specific deficiency.

As criminal defense attorneys, our days are filled with fighting the unfair processes used to convict and sentence our clients. We are often angry with courts that pay little heed to improprieties that undermine the reliability of the decisions made in the criminal justice system. All this is heightened in death penalty cases. Decisions like *Garrison* incur our rightful rage. It is hardly a criminal *justice* system is it?

Ed Monahan

AN INTERVIEW WITH BETTY LOU VAUGHN UPON HER RETIREMENT

Born at Willailla, KY

Most influenced by her parents who gave of themselves to others.

Graduate of Spencerian Commercial College

Broadhead High School, Rockcastle Co.

Department of Commerce, Office of Planning and Zoning, Madisonville, KY -- 1964

Took advice of 2 social workers -- ...Go to Frankfort ... take test and work for state government.

1968 - Dept. of Motor Transportation

1968 Department of Parks

Frankfort Transfer, 1967

Started Corrections - 1969

J. C. Taylor, Corrections Commissioner

Secretary to Harold Black, Deputy Commissioner of Corrections & Director of Institutions

WHETHER OR NOT TO RELEASE AN INMATE?

This decision according to Betty Lou Vaughn is the most difficult aspect of her job. Deciding whether or not to release an inmate based on a court order, when the inmate is serving multiple sentences from different counties and the order pertains to only one county. In the decision process are the pressures of releasing the inmate too early, from the public's standpoint, or too late, from the inmate's standpoint.

Betty Lou Vaughn has made this and numerous other decisions over the almost 20 years she has been with the Corrections Cabinet. When Betty Lou started as a secretary to Deputy Commissioner Harold Black in 1969, all inmate records were under Commissioner Black as Director of Institutions. In 1975 Betty Lou was placed in charge of offender records calculation which was staffed by her and just one other employee. Probation and Parole was responsible for maintaining inmate records. In 1977, all this changed. Betty Lou was given the responsibility to maintain inmate records and to calculate inmate sentences, she then had a staff of 9 people. Back then Betty Lou drafted and typed all her correspondence to prosecutors, inmates and other state officials both in Kentucky and nationwide. Today one offender records specialist operates a word processor, full time, preparing affidavits and responses to the same types of requests, a secretary spends 80% of her time transcribing letters for Betty Lou's signature and 10 other staff people are supervised by Betty Lou. Betty Lou has seen Corrections grow from a 3 institution system (Ky. State Penitentiary, Ky. State Reformatory and Ky. Correctional Institution for Women) to 11 institutions in 1989. In 1969 transfers between KSR and KSP occurred twice a year and a mailbox had just been placed on the yard at KSP which allowed inmates to write the Governor and the Commissioner of Corrections.

Court decisions have brought about great changes in Corrections in the last 20 years. The 2 most significant decisions are the *Polsgrove* decision *[Polsgrove v. Kentucky Bureau of Corrections,* Ky., 559 S.W.2d 736 (1977)] and the Consent decree [*Kendrick v. Bland,* Ky., 541 F.Supp.21 (1981)]. The *Polsgrove* decision significantly changed the way prison sentences were calculated. In *Polsgrove* the court ordered that time spent in jail shall count towards parole eligibility and an inmate would be credited with statutory good time on jail time as well as on institutional time. To implement the decision Betty Lou and her staff were required to work 18 straight weekends recalculating over 3,000 inmate records. As a result of their efforts, many inmates were released due to having reached their release dates or becoming eligible for parole review. Betty Lou states with pride that not one law suit was filed by an inmate based on a recalculated sentence. Betty Lou feels the *Polsgrove* decision was a very fair decision because an inmate should be credited for any time spent in custody regardless of where. The *Polsgrove* decision benefited the individual inmate, the consent decree benefited the total inmate population because it provided for population caps, program services and prison renovations.

The worse change Corrections has experienced in Betty Lou's 20 years is the rapid prison population growth. This growth has added to the stress of her job because of the volume of work, lack of adequate staff and the stress of timetables. The prison population has increased significantly without sufficient money to build needed prisons or to hire adequate staff. The added population has also brought about increased inmate law suits which oftentimes contain inaccurate affidavits executed by inmates. In Betty Lou's opinion, these inmates should be prosecuted when a false affidavit is filed in a lawsuit. Betty Lou would like to see help in those areas affected by prison and jail overcrowding. Help would decrease the stress on her staff and the whole corrections system. While probation and other alternatives to prison are a very valuable correctional tool, Betty Lou believes that until the sentencing laws are changed many convicted felons will not be eligible for these programs with the end result being the need for increased prisons.

The most frustrating part of Betty Lou's job occurs when attorneys or other individuals call concerning an inmate's sentence. Often times the attorney believes the only way out of prison for a client is by parole. Her advice, study the Parole Board regulations, the sentencing statutes and their effects on parole eligibility and sentence calculation. One of the greatest inequities Betty Lou sees under the existing sentencing statutes is the difference between a life sentence and a term of years for parole eligibility due to the "truth-in-sentencing" statute passed in 1986. She states the statute was passed in haste and the proper people were not consulted. She also believes there needs to be a change in the penalties for some of the lesser crimes.

With the complexities of the sentencing laws and regulations, Betty Lou admires the attorney who calls and wants to discuss a possible sentence calculation before there is a conviction. Even though this takes time prior to the conviction, in the long run it avoids problems for the offender, the courts and the Corrections Cabinet if after sentencing there is a dispute as to what was said and what has actually occurred.

When an attorney calls Corrections inquiring about sentence calculation the attorney should have available one or more of the following: the name under which the offender was indicted, the offender's date of birth, institution number if known, or at a minimum, the county of conviction, sentence length and the type of crime.

But, despite all the pressures Betty Lou says the opportunity to work with people, observing how they treat other people and the jobs they do are her most interesting experiences with Corrections.

People, travel, reading human interest stories and reading the newspaper are some of Betty's hobbies.

BUT IS THERE MORE TO BETTY LOU?

In trying to learn more this writer went to another Corrections employee. This employee has been with Corrections for over 22 years. She described Betty Lou as an individual who wants to be fair to everyone, both staff and inmates. Betty wants to do the job right and wants everyone to do likewise which has gotten her the reputation from co-workers and inmates as being hardnosed.

Betty's years of service and efficiency have not gone unnoticed. In 1975 she received the first award ever given to a central office Corrections employee at the Annual Conference of the Ky. Council on Crime and Delinquency (KCCD) which was held that year in conjunction with the American Correctional Association Conference in Louisville.

Before departing I asked Betty Lou what was the most rewarding aspect of her job. She quickly answered, her "PAYCHECK" which she then qualified as being secondary, the first being able to watch employees grow in their jobs.

Betty Lou Vaughn's name and Offender Records stir many emotions in people from inmates to court personnel. I have worked with Betty Lou for almost12 years and while we had our disagreements, I knew I could always talk to her and get an answer. So to Betty Lou I wish her health, happiness and success. She states her retirement goals as making her future husband happy and enjoying the land on a farm in rural Ky. But let me add receiving her paycheck which is now a retirement check for a job professionally performed for almost 20 years.

-DAVE E. NORAT

ASK CORRECTIONS will appear in its regular format next issue. Shirley Sharp assumed the responsibilities as Administrator of Offender Records on May 16, 1989. Ms. Sharp was previously Supervisor of Offender Records at the KY State Reformatory, a position she held since 1982. She has been with Corrections for 22 years.

BOOK REVIEW

THE PERSUASION EDGE: Winning Psychological Strategies and Tactics for Lawyers.
Richard J. Crawford Professional Education Systems, Inc.
P.O. Box 1208
Eau Clair, Wisconsin, 54701
1989
$48

Lynda Campbell

This book presents ideas, techniques, and strategies to guide practicing attorneys in developing their power of persuasion. The author writes as an academic with a doctorate in Communication and as an experienced trial consultant. In his forward to the book, Millard Farmer praises this book for its genius in presenting advice on persuasion needed by attorneys to complement their legal knowledge.

Persuasion Edge challenges lawyers to win juror votes by using a variety of persuasive techniques. Persuasion is defined by the author as "the process whereby one or more persons seek to induce cooperation from others through the use of symbols." (p.1) Influencing jurors in the trial setting is the focus of the book. The author does not claim that legal disputes are resolved by persuasion alone. Also, the author is cognizant of the fact that the outcome of a legal dispute is not determined solely by the evidence, the facts, and the law. The persuasive ability of an attorney affects the jury's verdict. The book challenges lawyers to win juror votes by employing persuasive strategies.

The first chapter explains the fundamental persuasion principles. Doctor Crawford stresses preparing a communication strategy in which options are examined before communication choices are made. The order in which ideas are presented is an important communication choice for the advocate. The theory of primacy suggests that since the attention level of listeners is highest during the opening minutes of any communication, the advocate should lead with strength. The *Recency* theory holds that a speaker should close with strength since words have an impact long after a speaker is finished. This is just one example he offers of the type of communication choice that should be made prior to trial.

In the second chapter these persuasion principles are applied to jury trials. Emphasis is placed on building an honest relationship with the jury. Attorneys induce juror cooperation and thereby win juror votes by establishing credibility with the jury. The author argues that trustworthiness, competence, and likability are qualities which an attorney must establish to have credibility.

In subsequent chapters the author illustrates these principles of persuasion by discussing the various stages of a trial. These chapters are devoted to voir dire, opening, direct and cross examination, and closing arguments. This is the core of the book. The chapters are replete with examples reflecting the author's extensive experience as a trial consultant concerned with actual, practical problems of advocates. The importance of a coherent, persuasive strategy linking the various components of a trial is stressed. The theme apparent in the sample voir dire questions appears in the sample opening statement and again in the sample closing argument. The author thus demonstrates the value of a harmonious approach to a trial. This harmonious approach is further illustrated by examining the defense's persuasion strategy in an actual murder trial. The book concludes with chapters devoted to developing one's persuasion techniques, communicating effectively with judges, and using academic trial consultants.

The book offers excellent advice on composing voir dire questions, direct examination, and opening and closing statements. The strong point of the book is its use of examples drawn from civil and criminal trials. The sample voir dire questions are excellent. Overall, the suggestions offered are of the same high quality as the information presented at DPA's Trial Practice Institute. I recommend the book to attorneys new to civil or criminal litigation.

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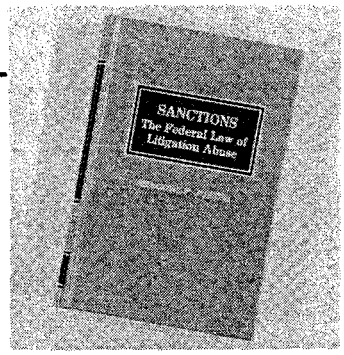
Ed. Note: This book is available in the Frankfort DPA Library. Contact Tezeta Lynes at (502) 564-8006 to borrow it.

Sanctions: The Federal Law of Litigation Abuse

Gregory P. Joseph
the Michie Company
Charlottesville, Virginia,
1989
$75



RULE 11 DETERS ZEALOUSNESS

The ABA Code of Professional Responsibility informs us that, as lawyers we are obliged on behalf of our clients and the legal system to represent our clients with intense belief and unwaivering adherence to the client's interests. EC 7-1.

Rule 11 has reared its ugly head, and threatens to interfere with this duty of zealousness, especially in criminal cases.

KENTUCKY'S RULE 11

Kentucky's Civil Rule 11 was amended Jan 1, 1984 to be the equivalent of the Aug. 1, 1983 amended version of Federal Rule of Civil Procedure 11. Kentucky's rule reads:

RULE 11. SIGNING OF PLEADINGS, MOTIONS AND OTHER PAPERS; SANCTIONS

Every pleading, motions, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by Rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certification by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion or other paper is not signed, it shall be stricken unless it is singed promptly after the omission is called to the atten

RULE!!

tion of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

The rule was amended to "reduce the reluctance of courts to impose sanctions....," Notes of Advisory Committee on Rules (1983), and the standard was changed from the subjective *good faith* of the lawyer to an objective rule of *reasonableness*. Good faith remains a factor in the degree of sanctions. However, the rule change was not intended to stifle vigorous advocacy:

The rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted. Thus, what constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the pleading, motion, or other paper whether the pleading, motion or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel or another member of the bar. Notes of Advisory Committee on Rules (1983).

ADVOCACY AFFECTED

The fear of sanction under the rule is so prevalent in today's practice that it has adversely affected the obligatory zealous advocacy on behalf of clients. *The Nightmare on Elm Street* has become the *Nightmare on Our Street.* But if we step back from the Rule 11 mania, the anxiety and terror of its nightmare is overcome by "awakening" to its limits.

JOSEPH'S BOOK: THE LIMITS OF RULE 11

Gregory P. Joseph, a partner in the New York City firm of Fried, Frank, Harris, Shriver and Jacobson, has authored *Sanctions: The Federal Law of Litigation Abuse* (1989). His monumental work awakens the reader to both the harsh realities of Rule 11 and to its very real limitations.

Joseph reviews in a very well organized topical approach the explosion of reported cases addressing the newly fanged Rule 11. He does us a service in recognizing that Rule 11 is not an all encompassing Big Foot:

Because Rule 11 is so widely touted it is easy to lose sight of the fact that its scope is actually quite limited. For example, the Rule does not interdict any misconduct except the signing of a pleading, motion or other paper that is not well-grounded in fact and law. No other misbehavior is sanctionable under Rule 11....

Further, for Rule 11 to apply, the violative signature must be affixed to the right kind of document - specifically, a civil litigation filing in federal district court. Papers filed on appeal, in criminal cases, in bankruptcy actions and a multitude of other proceedings - not to mention all state court filings - are generally outside the ambit of the Rule....

Even in the limited class of cases to which it does apply, Rule 11 sometimes does less than meets the eye. In some Circuits, for example, Rule 11 sanctions cannot be imposed against a lawyer who files papers in bad faith if those papers are well-grounded in fact and law. Objective merit excuses malicious intent in these courts.
Id. at 3-4.

Rule 11 sanctions are not appropriate merely because a pleading does not prevail on the merits. Losing does not warrant the imposition of sanctions.

Teamsters Local Union No. 430 v. Cement Express, Inc., 841 F.2d 66, 68 (3rd Cir. 1988). "'[L]itigants misuse the Rule when sanctions are sought against a party or counsel whose only sin was being on the unsuccessful side of a ruling or judgment.... Substantially more is required' ....Rule 11 is intended only for exceptional circumstances." *Id.*

"Similarly, just as mere failure to prevail does not trigger a sanction award, neither does advocating new or novel legal theories. The Advisory Committee expressed particular concern that the Rule might be interpreted to inhibit imaginative legal or factual approaches to applicable law or to unduly harness good faith calls for reconsideration of settled doctrine." *Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 483 (3rd Cir. 1987).

Rule 11 is not intended to discourage or stultify the challenge to the constitutionality of new laws or the evolution of the meaning of rights and laws:

> *Despite the tensions of the job, trial judges must have the patience and the resolve to tolerate advocates who are not gracious losers and who argue propositions on the marginal edge of evolving doctrines. For history teaches us that in the evolution of the law, legal propositions that were almost heresy one day often at a later time become the law of the land.*
> *Ford v. Temple Hospital, 790 F.2d 342, 349 n.11 (3rd Cir. 1986).*

KENTUCKY COURT OF APPEALS ADDRESSES THE REAL LIMITS OF THE RULE

"[E]ven if a case is meritless, Rule 11 has no application unless it is demonstrated that a 'party or his lawyer has signed a paper in violation of the Rule.'" *Clark Equipment Co., v. Bowman*, Ky.App., 762 S.W.2d 417, 420 (1988).

Courts have been properly sensitive about not imposing sanctions under Rule 11 in cases involving constitutional challenges since there is a constantly developing area where complete reversals in policy and decisions are not unknown. *See Storage Technology Partners II v. Storage Technology Corp.*, 117 FRD 675, 678 (D.Colo. 1987) ("...different standards inevitably will govern diverse areas of the law. More open textured issues - such as constitutional questions - will be subjected to a less rigorous examination under this test than, for example, a closely knit and specific statutory scheme, such as the Bankruptcy code.").

RULE 11 DOES NOT APPLY TO CRIMINAL CASES

In his book, Joseph tells us that Federal Rule 11 has no application in criminal cases. *State v. Glick*, 782 F.2d 670, 673 (7th Cir. 1986). While Kentucky's CR 11 does arguably apply in criminal cases under RCr 13.04, Kentucky courts should find it inapplicable since the federal system from which it copied the rule has made it inapplicable to criminal cases and since there is compelling rationale for this limitation:

> *We have been unable to find an award of attorneys' fees, or damages in lieu of attorneys' fees, against the defendant in any criminal case. Several considerations support a general reluctance to award attorneys' fees in criminal cases. First, most rules and statutes authorizing awards of fees - e.g., 42 U.S.C. 1988 and Fed.R.Civ.P. 11 - apply only to civil litigation. Second, courts have tolerated arguments on behalf of criminal defendants that would be inappropriate on behalf of civil litigants. Many rules, starting with the special burden to show guilt "beyond a reasonable doubt," recognize the social interest in having a bias against conviction. Novel arguments that may keep people out of jail ought not to be discouraged by the threat of attorneys' fees....*
> *Glick at 673.*

The stakes of a criminal case, a client's life or liberty, are of a much different kind than in civil litigation. The purposes and methods of Rule 11 should not be allowed to interfere with a criminal defense attorney's duty to zealously protect those critical interests of his client.

Joseph points out that Rule 11 is applicable to the quasi civil federal habeas actions. However, he cautions that the stakes of that quasi-criminal action are just too high to have the full force of Rule 11 applied:

> *I cannot imagine a more effective way of chilling putative counsel in habeas cases than the assessment of substantial fees for cases ultimately determined to be without merit. And yet how many of our most significant decisions result from intrepid and imaginative counsel laboring against precedent?*
> *United States v. Quin, 836 F.2d 654, 659 (1st Cir. 1988) (Coffin, J. concurring and dissenting).*

RULE 11 FOR JUDGES

Any lawyer who cares to practice his case on behalf of his client with vigor has experienced the unmitigated wrath of a judge. The Rule 11 craze is now available for judges to use to penalize the zealous lawyer. Our adversary system survives only because lawyers are willing to fight the good fight for their client. If judges are allowed to sanction vigor, the criminal justice system will crumble or become an irrelevant buddy system.

If there really is the necessity for mandatory sanctions under Rule 11 for extremely inappropriate behavior of lawyers, where is the like method for sanctioning highly inappropriate action by judges? If the system truly needs the beefed up Rule 11 sanctioning power for lawyers then its time for an effective method for sanctioning judges.

RULE 11 FOR RULE 11

Let's also not forget that courts understand Rule 11 can be abused, and are now recognizing that Rule 11 motions themselves are subject to Rule 11 sanctions. In *Clark Equipment Co., Inc., supra*, the Kentucky Court of Appeals warned:

> *Also, while the opportunity is present, we will gently warn the bar that poorly conceived Rule 11 motions may well become the subject of sanctions in the future.*
> *Id. at 422.*

CONCLUSION

Any attorney that practices aggressively, as we are ethically charged to practice, has to know that the Rule 11 blade is sharp and poised for combat but Gregory Joseph has helped us understand that Rule 11 is being unevenly and unfairly applied and that it has real limits. His book is indispensible to an attorney on the cutting edge.

ED MONAHAN

Editor's Note: This book is available in DPA's Frankfort Library. Contact Tezeta Lynes at 1264 Louisville Road, Frankfort, Kentucky (502) 564-8006 to borrow it.

For history teaches us that in the evolution of the law, legal propositions that were almost heresy one day, often at a later time, become the law of the land.

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