A BI-MONTHLY PUBLICATION of the DEPARTMENT of PUBLIC ADVOCACY VOLUME II NUMBER 5

THE ADVOCATE

ADVOCACY ROOTED IN JUSTICE August, 1989

Beginning Salaries for Kentucky Attorneys & Professionals

UK Law School Faculty	$40-$42,000
UL Law School Faculty	$40,000
Chase Law School Faculty	$38,000
Registered Nurse	$25,680
Supreme Court Law Clerk Attorney	$21,504
Kenton County Police Officer	$19,906
Court of Appeals Law Clerk Attorney	$19,512
Kentucky State Police	$18,058
Assistant County Attorney	$18,000
Assistant Commonwealth Attorney	$17,904
Fruit and Vegetable Grader	$17,496
Senior Park Chef	$16,608
Senior Photographer	$16,608
Highway Crew Foreman	$16,608
Assistant Attorney General	$16,608
Assistant Public Defender	$16,608
Lexington Public Defender	$15, 500
Louisville Public Defender	$15,000

Underfunded Public Defender Services and Excessive Caseloads

From The Editor:

Underfunding & excessive caseloads define Ky.'s public defender system. Lexington public defenders are saddled with grossly unfair caseloads and incredibly low starting salaries, $8,000 less than the *average* public defender starting salary of the 7 surrounding states, and $13,000 less than the average salary of Ky. attorneys in private practice. Their caseloads dramatically exceed those recommended as maximums by the ABA Dash Committee. Incredibly a Kentucky public defender starts at a salary below a fruit and vegetable grader working for the state.

At the same time, Tennessee is establishing a full-time state wide public defender system starting their attorneys at $22,000, and West Virginia starts their state public defenders at $28,000. This is truly the *uncommon*wealth.

David Niehaus, a Louisville public defender, authors a new criminal law evidence column for *The Advocate*. His first article provides a needed warning about Kentucky's adoption of the federal evidence code and an excellent discussion of the penal interest exception to the heresay rule.

Barbara Holthaus takes over the Juvenile Law Column this issue with an article on Kentucky's Juvenile Justice System.

ECM

The Advocate

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

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IN THIS ISSUE

THE ADVOCATE FEATURES

The Fayette County Public Defender Office

How many attorneys are in your office?

Eleven attorneys plus the Director.

What other staff do you have ?

Five support staff - 1 administrative assistant/investigator, 2 secretaries, 1 clerk, 1 runner.

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

Felonies -	1,954
Misdemeanors -	2,498
Juvenile -	1,500
Involuntary Commitments -	350
Total	**6302**

How many cases did your attorneys try during 1988?

Felony - 106
Misdemeanor - 150

How many conflict cases did you have in 1988?

Eight.

What do you pay per conflict case?

Misdemeanor - $250 to $500;
Felony - $500 to $1,500;
11.42's - $75

How many felonies/misdemeanors does an attorney in your office on average handle each year?

On average, our attorneys handle a caseload of 326 felonies or 617 misdemeanors.

How can defendants be adequately represented by an attorney handling that many cases?

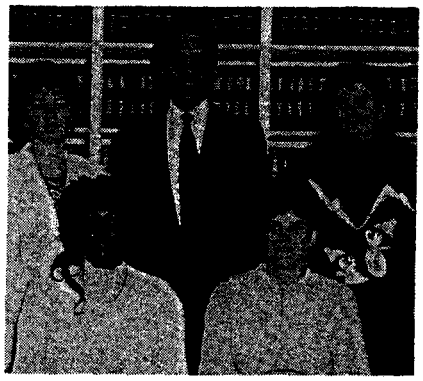
We do the best we can. Our staff is extraordinary but pushed to the limit.

What is the starting salary of your attorneys?

Legal Aid starting salary is $15,500, which was recently increased from $14,500, as compared to the county attorney office which ranges from $18,000, with no experience, up to $25,000. The Commonwealth Attorney office's lowest paid assistant receives $25,000 and has a much lower caseload.

Standing (L to R) Rich Melville (Juvenile Attorney), Gene Lewter (Circuit Court Attorney), Joe Barbieri (Director), Thomas Conn (Assistant Director/Misdemeanor Attorney), Thomas Chapuk (Circuit Court Attorney)

Seated (L to R) Nancy Barber (Misdemeanor Attorney), Kathy Stein (Circuit Court Attorney), Pamela Ledgewood (Circuit Court Attorney and Elizabeth Hill (Circuit Court Attorney). Not Shown Gordon Shaw (Misdemeanor Attorney) and Herbert West (Misdemeanor Attorney).



Standing (L to R) Stefony Taylor (clerk), Joe Barbieri (Director), Diana Roberts (Secretary/-Receptionist Sitting (L to R) Cheryl Witt (Administrative Assistant/Investigator), Blanche Williams (Court Coordinator/Secretary)

How does that compare to the starting salaries of other attorney positions in your city and region?

Anywhere from $2,500 to $10,000 less than attorneys are able to make in a comparable position in public and private sectors.

What was your attorney turnover in 1988?

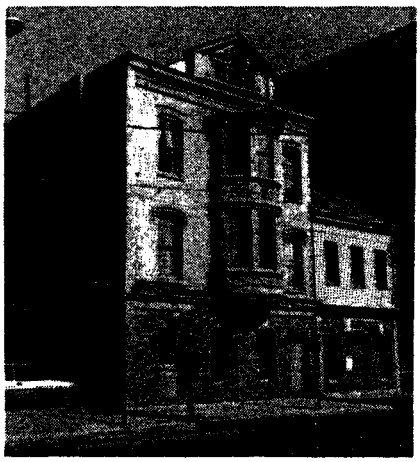
Five resigned, nearly 50% of our staff. A resignation of a staff attorney generally means redistribution of the caseload until a replacement is found. This increases pressure. Although they did not resign at one given time and were here for various amounts of time, replacement requires a substantial effort. It seems that recruiting for public interest attorney positions has become very difficult in the past 5 years. Our average years of public defender service for our 11 attorneys is 3 years.

What are the biggest problems your office faces?

1) Money for competitive starting salary;
2) Salary increase;
3) Necessary increase of staff;
4) Presently no retirement.

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

Poorly.



Fayette County Legal Aid Office

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

$100,000.

What substantive criminal legislative changes would you like to see enacted by the 1990 Legislature?

The abolition of the death sentence as it applies to juveniles and the mentally retarded.

Joe Barbieri is a 1970 graduate of the Kentucky Wesleyan College and a 1973 graduate of the University of Kentucky Law School. He has served as the director of the Fayette County Public Defender's Office since 1979.

Campbell Co. Workers get Raise

Campbell County employees will soon enjoy fatter paychecks thanks to the county's settlement of a 4 year old lawsuit against the state.

The fiscal court voted to give most of the county's 100 employees a 5% pay raise, retroactive to April 1. County police officers will get a $2,500 a year increase. The raises are the first for county employees in more than a year.

Judge-Executive Ken Paul said he wasn't favoring police over other departments. However he noted that officers in Boone and Kenton counties receive more money than those in Campbell.

Campbell County pays a new officer $14,638; Boone County, $18,886; and Kenton County, $19,960. An additional $2,500 in pay represents a 17% raise for a starting patrolman in Campbell. The $2,500 pay boost applies to all county officers except the chief and assistant chief, who will get 5% raises.

The Kentucky Post, July 6, 1989

State Panel Considers Raising Attorney's Rates

A legislative committee charged with overseeing state contracts will review the pay scale for attorneys with an eye toward increasing it. Rep. Lawson Walker, R. Villa Hills, said the state could end up paying more in some cases, under the current maximum scheduled rate of $75 per hour than if it raised the rate. Walker, a member of the Personal Service Contract Review Subcommittee and a lawyer in Northern Ky. said law firms might be charging the state for several hours work by an inexperienced attorney when the same work could be done much more quickly by someone else. "What's worth more, $750 worth of associate time or $250 worth of partner time?" Walker said.

Chairman Jim LeMaster, D. Paris, said the committee staff would seek information from the KBA on prevailing rates for legal work or survey lawyers across the state. LeMaster said the review might be extended to the pay rates for all professional services such as auditors, dentists and doctors.

The current schedule, sets a maximum rate of $75 per hour for attorneys who are partners in a firm. For an indivdual attorney, the maimum rate is $40 per hour.

An example of the rates elsewhere were driven home to the subcommittee when it approved a contract with a San Diego law firm to defend a Kentucky State Police officer being sued in federal court in Southern California. The committee approved a contract that will pay partners in the firm of Higgs, Fletcher & Mack $140 per hour and associates $115 per hour. Larry Fentress, the state police legal officer, said that rate was negotiated down from $165 per hour.

Sen. Ed Ford, D. Cynthiana, a member of the committee said he feared that if the committee sets a new maximum rate, all contracts will eventually be for that amount, just as most are now. Walker agreed that could be a problem. He suggested state agencies need more latitude to negotiate legal fees.

- The Cincinnati Post, July 14, 1989

University of Kentucky Law School Salary Study

A February 29, 1989 survey of attorneys who graduated from the University of Kentucky in 1987 completed by the College of Law further supports the reality that attorneys working for the state are not being fairly compensated.

The survey included the salaries of attorneys who work in the private sector and those who work in governmental service on some level. The survey found the average salary for all employment types of these recent graduates to be $31,328. The average salary of those working in Kentucky in private practice was $28,583.

A salary of $16,608 for an entry level attorney state public defender and a $15,500 salary for a starting Lexington public defender can hardly compete with the private sector in Kentucky or nationally.

THE WIZARD OF ID *by Brant Parker & Johnny Hart*

"By permission of Johnny Hart and NAS, Inc."

UNDERFUNDED DEFENSE SERVICES AND EXCESSIVE CASELOADS

ABA Finds Criminal Justice in Crisis

The Dash Committee

In 1986, at the request of the American Bar Association's [ABA] Criminal Justice Section, the ABA created a special committee, the Special Committee on Criminal Justice in a Free Society, to study the criminal justice system. Sam Dash chaired the committee that consisted of state and federal judges, public defenders, police, prosecutors and distinguished law school professors.

"This report of the Committee's findings and recommendations is addressed to all Americans, because we all have a vital stake in this country's criminal justice system. The report is designed (1) to provide the citizen with a fuller understanding of real problems of the criminal justice system in America, and also, (2) to offer professionals and planners ideas for future study and change.

The Dash Committee found that underfunding of many aspects of the criminal justice system is related to "much of what the public dislikes about the criminal justice system." The underfunding of public defender services and the inappropriately high defender caseloads were one of the areas the committee addressed:

Defender Funding and Caseloads

"Defense Services: Although all facets of the system are hurt by underfunding, the hearings revealed that the problem can by particularly acute for organizations with little or no political power. As noted earlier, because most criminal defendants are indigent, the state is obliged to bear a large part of the cost of providing defense counsel and defense services. Although[citizens] ... believe that indigents receive effective representation, studies conclude that indigent defense systems nationwide are underfunded.

"Several disturbing comments from witnesses who met with the Committee strongly support the findings in the studies.

"One judge claimed that the court-appointed counsel compensation system in his jurisdiction required lawyers

> to carry more cases than a lawyer could effectively handle because, if you don't do that, you go broke. ... [I]t tends to develop a practice that is not what we would hope it would be for indigent criminal defendants.

"Private counsel in that jurisdiction added:

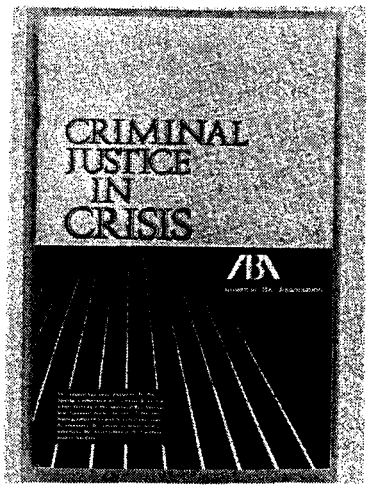
> I think the bar as a whole, for a variety of reasons - numbers of people, financial problems, motivation or lack thereof - probably [does not do a very good job]. I think there are a good number of good to very good attorneys who are practicing criminal law in [this jurisdiction] who do a large number of court appointed cases, but I think there is an even far larger number of people who don't do a very good job, who are either unmotivated or incapable, (f)or whatever the cause may be.

"One assistant public defender felt his office provided effective representation when individual attorneys were carrying average caseloads of 40 to 50 cases, if they were handling felony cases. A judge in that system, however, believed that with any more than 30 to 40 cases a public defender starts to lose track of his or her cases. He added that the public defender did not attempt to cap the number of cases per attorney nor ask for more attorneys for "political reasons."

"In another city, the Committee found a beleaguered defender system overburdened with cases, seriously underfunded - and with no apparent means of changing the situation. The defender there described each attorney's caseload:

> I can give you a profile of what the average lawyer would handle in one year, in our office. That lawyer would handle two Murder 1st Degree cases, one other homicide, 133 other felonies, 144 misdemeanors, 5 post-conviction relief cases, 18 probation revocations, 6 extraditions, one miscellaneous writ, and one petition for a release from a mental institution.

"These caseloads are unmanageable regardless of how industrious the attorneys may be. The ABA supports the following maximum allowable attorney caseloads as adopted by the National Advisory Committee on Criminal Justice Standards and Goals and endorsed by the



National Legal Aid and Defender Association:

a. 150 felonies per attorney per year; or
b. 300 misdemeanors per attorney per year; or
c. 200 juvenile cases per attorney per year; or
d. 200 mental commitment cases per attorney per year; or
e. 25 appeals per attorney per year.

"Moreover, the lawyers in the city noted above are underpaid as well as overworked:

> I have attorneys that are in their third and fourth year with our office, who are making, maybe, a thousand, two thousand more than someone who is just starting, and they're handling homicides. And so, when they come to me with being stressed out, and the case load, and the responsibilities, and ... trying to meet expenses at home, I can't really say too much. (Assistant Public Defender)

"The end result is inferior representation for indigents in that city. The delays created because overworked defenders cannot prepare their cases promptly is the single largest problem facing the prosecutor there.

"The Committee was so shocked by the intolerably overburdened condition of a Public Defender Agency in this jurisdiction that its Chairman met with leaders of the state and local bar associations, who have now, as a consequence of the

Committee's findings, begun efforts to remedy this situation. - [Defense Services section from *Criminal Justice in Crisis Reprinted with permission. The full report is available from the ABA order fulfillment dept. (312) 988-5555.*]

ABA DEFENSE CASELOAD STANDARD

The ABA Standards Relating to Criminal Justice, Providing Defense Services address what defender organizations are required to do when their workloads are intolerable:

"Standard 5-4.3. Workload

Neither defender organizations nor assigned counsel should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations. Whenever defender organizations or assigned counsel determine, in the exercise of their best professional judgment, that the acceptance of additional cases or continued representation in previously accepted cases will lead to the furnishing of representation lacking in quality or to the breach of professional obligations, the defender organizations or assigned counsel must take such steps as may be appropriate to reduce their pending or projected workloads.

In part, the Commentary to this standard explains: "The goal in providing defense services should be to secure quality legal representation for persons unable to afford counsel (standard 5-1.1). This objective should be pursued regardless of whether the defense services provided relate to criminal cases (standard 5-4.1) or to collateral matters (standard 5-4.2).

"One of the most significant impediments to the furnishing of quality defense services for the poor is the presence of excessive workloads. All too often in defender organizations attorneys are asked to provide representation in too many cases. Unfortunately, not even the most able and industrious lawyers can provide quality representation when their workloads are unmanageable. Excessive workloads, moreover, lead to attorney frustration, disillusionment by clients, and weakening of the adversary system.

"The attorney who has too many clients also experiences special concerns about his or her duties under the Code of Professional Responsibility. The code admonishes an attorney not to accept "[e]mployment ... when he is unable to render competent service..." or to handle cases "without preparation adequate in the circumstances." Similarly, the Defense Function standards urge that attorneys not accept more employment than they can reasonably discharge.

Kentucky faces underfunding of defense services and excessive caseloads at every turn. The Fayette County funding and caseloads are stark examples of Kentucky's public defender crisis.

JUDGES , INDIGENT DEFENDANTS, AND MONEY

Counsel appointed to represent the defendant has filed a motion for funds to retain a psychiatrist. Nothing surprising about that, the judge thought. A person too poor to retain his own lawyer understandably lacks the wherewithal to hire a necessary expert.The motion's contents, however, did contain a surprise: The attorney was asking for an allowance of $6,000, for an examination of the defendant, a full written report, consultation time with counsel, preparation for testifying, and (finally) the actual time spent in the witness box.

Admittedly, the case was a difficult one: The defendant stood charged with having conducted an ongoing series of business swindles in an amount totaling more than $1 million.The counsel was proposing to explore the so-called diminished-responsibility defense. Of course, the defendant would not have to establish his mental state. Instead, the prosecution would have to prove (beyond a reasonable doubt) that at the time of each transaction the defendant was not suffering from a mental condition substantially diminishing his capacity either to appreciate the criminality of his actions or to conform his conduct to the law.

Nonetheless, as a practical matter, no defendant can hope to gain an "insanity" acquittal without strong expert testimony. In fact, no lawyer could seriously consider the defense without a solid psychiatric opinion.

On the other hand, if the attorney had any basis for even suspecting that the client had lacked the necessary capacity, she could not safely decline to raise it, absent a professional opinion confirming her judgment. If the attorney had waived the defense without that opinion, any guilty verdict would be reversible on the grounds of ineffective assistance of counsel.

Certain though he was that the counsel was absolutely right to seek a psychiatric expert, the judge found himself troubled. It was not the apparent irony of spending public funds for someone accused of embezzling $1 million: Civil suits brought by some of the purported victims had in fact tied up defendant's assets. In terms of the criminal law, he was a pauper.This in turn presented the judge with an insoluble paradox. The criminal-justice system rests, in large part, on the proposition that anyone is entitled to competent counsel, and that if he cannot afford an attorney, the state will provide one.Many times, however, an adequate defense requires (as in the case of the accused embezzler) more than just an attorney. Logically, and constitutionally, therefore, the state must furnish the wherewithal to obtain those necessaries.

How, though, in terms of constitutional criminal justice, can a judge discern the line between the necessary and the merely desirable? Even if the difference is plain, what should be standard for compliance?Some appellate courts have suggested that the state must furnish everything that a defendant would provide for himself if only he had the money. That view is not very helpful. A millionaire defendant has much more available money than does an indicted day-laborer or, for that matter, an indicted school-teacher.Every day, defendants who are by no means indigent forgo possible lines of defense because they simply cost too much. Even under the acute stress of an indictment, ordinary people have to prioritize their expenditures. Is it then fair to furnish an indigent defendant, at public expense, opportunities a paying defendant could not afford?

Assuming allowance of public funds for an expert, should defense counsel receive whatever she honestly thinks essential? Or should we allow a reasonable amount, and require counsel to do the best she can? To what extent does a judge, considering a request, necessarily have to weigh alternatives - that is, participate indirectly in encouraging or discouraging strategy choices?After all, before a judge can determine reasonableness of allowing $6,000 for a psychiatrist's services, he must first decide if the facts of the case fairly suggest that the services could affect the outcome. But the judge's view may very well differ from, and be less accurate than, that of the attorney involved. A flat refusal, or a parsimonious allowance, may reflect the judge's erroneous rejection of a solid idea that only appears frivolous.

Studying the motion on his desk, the judge remembered the Eleventh Judicial Commandment: Thou shalt not ration justice. Too bad, he thought, no one ever explains how to make sure we have enough to go around.

HILLER B. ZOBEL, Judge Massachusetts Superior Court Reprinted by Permission of the author and the *Christian Science Monitor.*

TENNESSEE BEGINS STATE-WIDE FULL-TIME PUBLIC DEFENDER SYSTEM

On May 25, 1989, the last day of the legislative session, Tennessee enacted into law a state-wide system of full-time public defender offices. The system begins implementation on July 1, 1989.

In 1986 there were 3 pilot full-time public defender offices begun in Tennessee. Four more offices began in 1987. On June 12, 1989 the Governor signed Senate Bill No. 1057, the state-wide public defender bill, into law after overwhelming votes of support in the House (84-12) and the Senate (29-2). The law sets up 21 new judicial district public defender offices headed up by a public defender salaried at $55,000, and staffed by assistants paid according to the following scale:

Years	Salary
less than 1	$22,000
3	$30,250
6	$38,500
9	$46,750

The system is being funded by a $6.00 litigation fee on all civil/criminal cases.

The Tennessee Bar Association led the lobbying for the bill and had the support of the Tennessee Association of Criminal Defense Lawyers (TACDL). Jim Lanier, the President of the public defender conference and former legislator for 14 years, said "the courts and private criminal defense attorneys were extremely pleased with the 7 pilot programs. The private criminal defense bar is happy with a state-wide program because it relieves them of having to take indigent appointments and leaves them to their paying clients. The judges are pleased to have full-time public defenders since they no longer have to find private attorneys to appoint to cases."

TACDL did a survey that found its attorneys in favor of a full-time public defender system by a 10-1 margin. The Tennessee Bar Association used its clout to initiate the legislation and insure it was enacted.

There's no doubt that the full-time public defender system is an asset since judges have current dockets with no criminal case backlog. The full-time public defenders keep the criminal defense system going," said Lanier, who heads up the Dyer and Lake County public defender pilot program.

When asked about the $22,000 entry level attorney salary in Tennessee as compared to Kentucky's $16,608, Lanier said, "I don't see how you can attract full-time professionals to work for that salary. It'll be hard for us to attract entry level attorneys for $22,000."

The substantially higher salaries in the adjoining state of Tennessee provide additional concern for our ability in Kentucky to attract and retain quality attorneys in this region without substantial increases that reflect the regional attorney salary reality.

LAW FIRM OVERHEAD UP 11%; ATTORNEY SALARIES UP 14.4%

The cost of keeping a lawyer at work grew by 11.5% or $9,323 between 1987 and 1988, according to the Altman & Weil Survey of Law Firm Economics. The average overhead expenditures, excluding lawyers' compensation was $90,521 or 45.5% of gross revenue per lawyer in 1988. Gross revenue per lawyer increased from $178,623 to $198,786 or 11.3% from one year to the next. For the first time, average lawyer income (including incomes of associates and partners) exceed $100,000, reaching $108,266, or 54.5% of gross revenue.

The highest overhead expenses per lawyer were reported in California at $118,859. The West-Central states reported the lowest average amount, $72,840. Large firms spent more and earned more than small ones, as in former years, averaging $102,505 per lawyer in expenses. Firms of fewer than 9 lawyers spent 3/4 of that amount, while firms of intermediate size spent between $85,600 and $89,300 per lawyer on overhead.

The starting salaries offered to 1989 law graduates continued an upward trend which had slackened briefly a year ago. The median starting salary in the summer of 1989 is $45,760 compared with $40,000 in 1988. This is an increase of 14.4%. There continued to be a close correlation between starting salaries and firm size, with large firms paying roughly $20,000 more to new lawyers than firms with fewer than 9 lawyers.

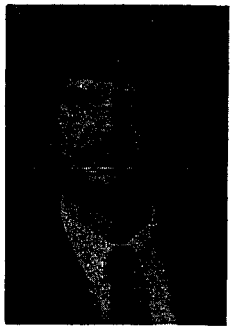
The 1989 survey includes information furnished by 686 law firms, each of which completed a detailed written questionnaire. All but 6 of the firms reported individual information for each full-time employed lawyer and paralegal, including cash compensation, value of benefits, year first admitted to practice, legal specialization, billable hours recorded in 1988, and standard hourly rate as of January 1, 1989. The firms reported on 7,587 partners/shareholders, 5,226 associates and 2,448 paralegal positions. Only lawyers and paralegals working a full year were included. For the first time this survey includes information on gender of lawyers. The study shows that women are distributed evenly throughout law firms of every size. Seventy percent of the participating firms reported having women lawyers in their ranks. Male lawyers with 3 years experience averaged $57,559 in salary plus benefits working an average of 1,918 billable hours, while female lawyers with the same years of experience averaged $55,098 with an average of 1,762 billable hours. Male attorneys with 5 years of experience averaged $65,818, for an average of 1,942 billable hours, while female attorneys averaged $60,526 for an average of 1,732 billable hours.

The median earnings of partners and shareholders in law firms (inclusive of the value of benefits) rose to $134,350 in 1988, an increase of $14,350 from the prior year. Associates' median compensation rose to $55,635, an increase of $6,700 or 14% between 1987 and 1988.

The 1989 Survey of Law Firm Economics is available from Altman & Weil, Inc., Ardmore, PA 19003. Reprinted by permission.

CAPITAL TRIAL DEFENSE

Written Interview with Kevin McNally



Kevin McNally

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?

The first time was the hardest. I was stunned. For me, the decision to kill or not to kill was easy. I wrongly assumed the answer was equally obvious to the jury. It wasn't.

Having won a few, I thought I would never lose a capital sentencing hearing. On the 4 hour drive home that night I realized that this was going to be a lifelong battle. I didn't know if I wanted any part of it. I cried all the way home. I felt it was my fault- even though my client didn't.

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

In talking with survivors of homicide I've been shoved, threatened, menaced with a hammer, etc. However, it's a misconception that the family of the victim always has harsh feelings toward defense lawyers who fight hard. The menacing, threats and hard feelings generally evaporate quickly upon the first expression of human concern and understanding.

The worst and most frequent mistake capital defense attorneys make is treating survivors of the homicide as the enemy. The families of murder victims have repeatedly told me they understand, and even *support* the accused's right to an advocate. It is the absence of communication that causes misunderstanding and bitterness. The victim's family must be involved with the process and sometimes can be an ally in seeking a non-violent resolution of a terrible tragedy.

What are the hardest aspects of defending capital clients?

Three aspects: First, talking to the loved ones of the victim whose lives have been shattered, sometimes destroyed by my client.

Second, talking to parents, friends, neighbors, professionals who have failed, rejected, neglected or otherwise abused my client.

Third, realizing the problems that lead to capital homicide are so complex and realizing that the answer that society provides- execution - is such a phony solution.

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

I thought it would be a good career move before going into politics.

Seriously, I got involved in this work without knowing where it would take me. After more than a decade, I have no regrets. Standing before the community and arguing for life is a privilege. Anyway, my favorite parable is that of the lost sheep, Matthew 18:11-14.

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

It is a cruel joke. David Bruck of South Carolina likes to use the analogy of a nuclear power plant that never opens. We just keep throwing money down the smoke stack and get nothing in return. Politicians, when they're not wrapping themselves in the flag, hold execution out as a solution to violent crime. It's nothing but a cruel, cynical joke on the citizens.

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

$50,000-100,000 for 2 attorneys, an investigator, a paralegal, scientific experts and mental state experts. Studies show that lawyers spend an average of 400 hours competently preparing and trying serious capital cases. A private practitioner with substantial overhead who charged $20,000 to represent a capital defendant would make little or nothing if he associated himself with co-counsel, hired necessary experts, and otherwise did what was necessary.

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?

The Department of Public Advocacy *chooses* to pay $2500 to attorneys willing to defend capital cases. This is done so DPA can use its resources to carry out its other important and statutorily required functions. It is a difficult choice whether to spend money representing a youthful offender or a condemned death row inmate. But DPA must admit it is a choice, albeit a Hobson's choice.

At 400 hours, $2500 equals approximately $6 per hour. If a lawyer's overhead is $25 per hour, he is losing money every hour he works on the case. This is a disincentive to effective assistance of counsel. $2500 is a token payment, essentially *pro bono* work.

To illustrate, this month my law partner Gail Robinson and I have accepted public defender cases in Ohio and Arizona. We've done this to survive economically— while continuing to do this important work. Our assigned investigators in these new cases earn $30 per hour - more than the statutory rate for public defenders in Kentucky. The pay scale for lawyers in Arizona, Ohio and elsewhere varies from $75 per hour to $40 per hour. Across the Ohio river, the cap is $25,000 for 2 attorneys — 5 to 10 times that in Kentucky.

The $2500 cap was a number picked out of thin air by the former public advocate over a decade ago, obviously for budgetary reasons. For the most part, it was used to supplement the payment to contract public defenders who would

otherwise be crushed by the burden of a serious capital case. Due to the "harsh economic realities" (as described by Justice Wintersheimer) of the DPA budget, this policy has evolved to cover all cases at the trial, appeal and post-conviction stage, no matter how difficult or time consuming. This an unconstitutional level of funding. Supreme Courts, such as Florida and West Virginia, across the country have begun addressing the problem. Similarly, state legislatures have responded.

Something must happen in the legislature or the courts to assist DPA in changing the policy. Representative Sheehan's proposal is the most creative I've heard. Perhaps there's hope there.

Regardless, DPA needs to reevaluate this policy. There are too many serious cases for DPA staff to absorb them all. To try to do so would burn out senior staff who remain. On the other hand, it is unconscionable for DPA to spend 10-20 times the resources- depending whether full-time staff or assigned counsel handle the indictment

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?

The Chief Justice has informally indicated our Court feels it unnecessary to adopt NLADA's Standards for Capital Representation. The rationale is that DPA has provided top-notch lawyering in these cases. The Court is correct that much of the work done by DPA staff and assigned public defenders is well above national standards. For a long time I agreed that no criteria should be written in stone. I did not believe that you can accurately quantify caring or pride in one's work.

However, I've changed my mind. I was wrong. Some of the representation provided Kentucky's death row inmates has been grossly inadequate. For the most part, one will search reported Kentucky decisions for 200 years in vain trying to find an appellate court who granted a prisoner relief because his trial lawyer didn't do what he was supposed to. Therefore, the problem must be addressed prior to trial or prior to appointment, if it is to be addressed at all.

For example, before I could be appointed to defend a capital case in Ohio, I had to be certified by a committee appointed by the Ohio Supreme Court and before certification each lawyer must attend a death penalty training seminar.

I was recently contacted by the American Bar Association Committee established to study federal habeas corpus. Inquiries were made regarding the amazing statistic that so many Kentucky death row inmates were represented by lawyers who have since been disciplined. This is an embarrassment to our Commonwealth. Something must be done. My feeling is we should consider adoption of certification or some standards before we permit an appointed lawyer to take a human life in his/her hands.

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

Of course not. Drug king pins have a shorter life expectation than death row inmates. The fact is that drug related homicides are adequately covered by our present statute.

Any other thoughts?

DPA must struggle to find a way to increase the involvement of the private bar in the legal/political battle against this archaic method of criminal justice. This is an enormous untapped resource.

KEVIN MCNALLY
Attorney at Law
P.O. Box 1243
Frankfort, Kentucky 40602
(502) 227-2142

Kevin is a former Assistant Public Advocate with DPA (12 years) as an appellate lawyer, trial services regional manager and more recently as chief of the Major Litigation Section. He has represented numerous capital clients. He is a founding member of KACDL and also a member of the Kentucky Coalition to Abolish the Death Penalty. He is a nationally sought after speaker on capital defense topics.

Fact #5

Most of those on death row could not afford to hire a lawyer

According to capital case monitors, more than 75% of those on death row were financially unable to hire an attorney to represent them at trial.

For more information:
National Coalition to Abolish the Death Penalty, 1419 V St. NW, Washington, DC 20009

It's easy to believe in the death penalty ... if you ignore the facts

PUBLIC ADVOCACY COMMISSION CHAIRMAN WILLIAM R. JONES

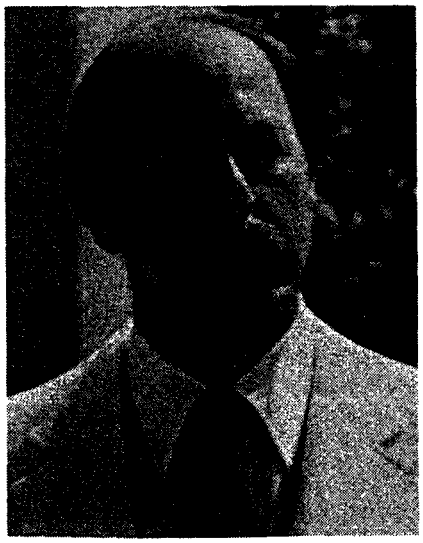
A WRITTEN INTERVIEW

Before answering the questions submitted, I should make it clear that the answers are my personal perceptions and do not necessarily reflect the sense of the Public Advocacy Commission as a body. The Commission simply has not addressed some of the specific questions asked. Some of the questions asked raise issues which are important enough to be specifically addressed by the full Commission in future agendas, if for no other reason than to determine whether the Commission should have a policy relating to the specific item. It would be inappropriate for me to attempt to give specific answers where the Commission has not adopted a position regarding them. There is a question in my mind about whether the Commission should adopt an official position on some of them. Thus, my responses will often be couched in more general and inclusive terms.

What are the Commission's responsibilities?

The Commissions rather limited responsibilities are set out in KRS 31.015. These responsibilities are to select the Public Advocate, review the performance of the public advocacy system and provide general supervision of the Public Advocate, assist the office of public advocacy in ensuring its independence through public education regarding the purposes of the public advocacy system, review and adopt an annual budget prepared by the public advocate and provide support for budgetary requests to the general assembly.

Of these responsibilities, in my view, selection of the Public Advocate is by far the most important. As provided in KRS 31.020, the Public Advocate is the chief administrator of the office for public advocacy. He is appointed for a term of 4 years which is renewable unless removed by the Governor. It takes a majority of the full commission to make a recommendation to the Governor pertaining to the appointment, renewal of appointment, or removal of the Public Advocate.



William R. Jones

The Commission has very limited ability to provide anything more than general supervision over the Public Advocate, given the fact that the Commission is comprised of a shifting membership of 12 persons from throughout the Commonwealth. In general, our supervision is limited to review of a very comprehensive quarterly report submitted to us by the Public Advocate. However, when the occasion presents itself, we have addressed matters brought to the Commission's attention by the Public Advocate, an employee of the Department of Public Advocacy, or a member of the Commission.

A Commission program of public education regarding the purposes of the public advocacy system is simply not possible given the fact that we have no staff and no budget. Individual members of the Commission do make public statements by way of speeches, letters to the editor and such, in an attempt to further the objectives of the system, and to attempt to create an understanding of why the work of the public advocacy system is important to protect the rights of all persons, not just those represented by the system in criminal cases.

We do review the annual budget, and in the review process have an opportunity to ask questions and suggest items. The budget, a fairly complex document which requires an intimate knowledge of the workings of the whole public advocacy system is prepared by the Public Advocate. While the Commission may adopt resolutions, address letters to members of the executive and legislative branches of government in support of the budget, and individually write letters and make contacts with members of the legislature, the Public Advocate necessarily has the primary responsibility for promoting the adoption of the Department's budget. In this, the Public Advocate is understandably restricted to a certain extent by budget preparation guidelines from the Governor's office. There is also the problem of the Department's budget being part of the budget for the Public Protection and Regulation Cabinet, which includes 14 agencies ranging from the public service commission and the department of insurance to the harness racing and the backside improvement commissions. This is one area where the Commission needs to explore better ways to influence the process.

Why is it important to have a Public Advocacy Commission?

Perhaps the question should be rephrased: "Do we need a Public Advocacy Commission?" This is not said entirely tongue-in-cheek. After all, the Department of Public Advocacy was created in 1972 and the Commission was not created until 1982. If the Department functioned effectively without the Commission during its first 10 years, why was the Commission established? It is not clear to me, and legislative history is not revealing, why the Commission was created in 1982. However, I assume that there was a need perceived and some articulated reasons for its creation. It appears to me that the Commission has been useful in several ways: (1) It serves to insulate the Department from the more egregious forms of political interferences; (2) Since the Commission is made up of a group of citizens from throughout

the Commonwealth, its efforts on behalf of the Department may be accorded more credence than may be the case when highly partisan individuals are speaking; (3) The Commission provides a non-partisan, non-political external review of the operation of the Department; and (4) Through the diversity of its membership, the Commission may at times be useful in communicating to the Department of Public Advocacy a general sense of the direction in which the Department should be moving.

In *LRC v. Brown*, 664 S.W.2d 907 (Ky. 1984) the Court ruled that the power of the Speaker of the House and the President Pro Tem of the Senate to appoint members to the Public Advocacy Commission set out in KRS 31.015(1)(b) - (c) was "invalid." *Id.* at 924. It went on to decide that "...any person(s) so appointed may not properly serve. However, since the General Assembly has properly created the boards and commissions in these situations, the governor should fill the vacancies...." *Id.* How has this affected the Public Advocacy Commission and how are these appointments currently being handled?

No doubt the presence of members appointed by the Speaker of the House and the President Pro Tem of the Senate would have improved the Commission's channels of communication with the General Assembly. This may have helped in promoting the needs of the Department of Public Advocacy. However, this is merely conjecture, since the Court ruled these appointments were "invalid" only 18 months after the Commission was established. Currently, the Governor appoints members to fill these 2 positions on the Commission. I do not know whether, or to what extent, Governors Brown, Collins, and Wilkinson have consulted with the Speaker of the House or the President Pro Tem of the Senate in selecting persons to be appointed to the Commission to fill these 2 vacancies.

What priorities does the Commission have for the next year? the next 5 years?

The Commission has not formally adopted any priorities. Based upon continuing discussions in the Commission over a period of time, however, it is obvious that the number one priority is how to increase the amount of funding available to carry out the responsibilities of the Department.

What do you see as DPA's finest aspects?

Without question, the dedicated lawyers, particularly those who have stayed with the department throughout these difficult years, and who have rendered the highest quality of legal services to indigent persons accused of crimes. Without their dedication, skill, imagination and willingness to lay it on the line, and the excellent management of the Department's limited resources, it would be impossible to maintain the high level of service rendered by the Department.

What are DPA's major problems?

Money, Money, Money! This problem is addressed further in question 8.

How is the Commission working to insure DPA's true independence?

I believe that you have true independence. As a member of the Public Advocacy Commission, no one has ever brought to my attention a case of interference with the independence of the advocate to advocate the cause of his client. If such is happening, then the Commission should be made aware of it.

The Department has many significant problems. How do you see the Department solving the below listed problems and what role does the Commission play in those solutions:

A. The gross underfunding of the public defender program in Kentucky as evidenced by contract counties paying their attorneys the minimum wage and full time public defenders starting at woefully uncompetitive and unfair salaries.

Without question, the public defender program in Kentucky is grossly underfunded. The two results referred to may both be addressed in part by increased appropriations from the General Assembly.

A part of the problem with regard to contract counties is that funding comes from two sources: allotments from the Department of Public Advocacy, and grants from the counties served. Both of these sources must be increased. While the Commission may be able to have some effect upon the state appropriation picture, it is unlikely that their efforts can be at all effective when dealing with county governments.

With regard to the very low salaries for full time public defenders, a part of the problem comes from the fact that KRS 31.020 provides that assistant public advocates shall be covered by the merit system. Unless the salaries for the particular merit system classification in which assistant public advocates falls is increased, or the classification into which they are placed is changed, additional appropriations will not alleviate this problem. This is an area where there are various departments of state government which may have attorneys salaries set at unfairly low levels. Perhaps a joint effort of these departments is needed. The Commission's role, again, would be in their contacts with members of the General Assembly for increased funding, and attempts to influence the executive department to work for reclassification of these positions.

Experienced Attorneys Leave DPA

Since August, 1988 14 attorneys have left DPA with a combined total of service and experience to DPA of 81 years.

UK Athletics Resources
vs.
Ky. Public Defender Resources

The UK athletic budget for 1989-90 is $15,971,965. That is a $1,097,865 increase over the 1988-89 athletic budget. DPA's FY 1990 budget is $9 million to handle 70,000 cases across the Commonwealth.

B. The immense burden that capital cases put on the Department's resources, especially the attorneys who handle those cases.

More money? Of course. The Commission has attempted to garner interest in *pro bono* help from the private bar in the capital litigation area. If we cannot get the General Assembly to appropriate more money for these efforts, the system shows signs of total collapse in this one area. Seek to have the death penalty repealed in Kentucky? Litigation on the ineffective assistance of counsel issue? Perhaps a suitable vehicle will come along. In the meantime, working for better appropriations from the General Assembly seems to be the best bet. Keep in mind that inadequate funding is endemic in Kentucky. Kentucky ranks 47th in funds expended for public defender services. But, it also ranks near the bottom in per capita expenditures for education as well.

C. The significant turnover of attorneys in the Department.

Do I need to say it again? Money! The Department has one of the best training programs in the country. And young attorneys can get a lot of experience fast. But, there are not as many dedicated

young attorneys who are willing to make the financial sacrifice necessary to defend the rights of the indigent as was the case 20 years ago.

D. The inability of the Department to hire the best available attorneys due to uncompetitive salaries and the inability of the Department to firmly commit a position to an attorney it wants to hire.

This is a reprise of several previous questions. The inability of the Department to firmly commit a position to an attorney it wants to hire results, as I understand it, from a general freeze on hiring in which each new hire must be submitted and specifically approved. In times of budget crunches, this is a common technique to cut costs. This is particularly devastating in a department such as Public Advocacy where there are not enough people to begin with.

E. The inability to obtain favorable criminal law legislation.

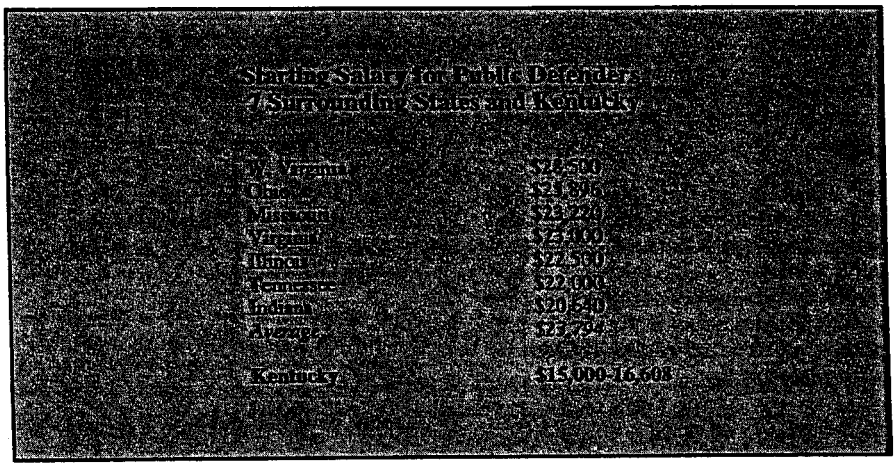
What constitutes favorable criminal law legislation is a question which the Commission has never addressed. Perhaps it is not one which the Commission should address. Probably, there is a substantial difference of opinion among the members of the Commission on this issue. There is probably agreement that the legislatures of Kentucky and other states have over-criminalized much activity in our society today. And some statutory crime has not been updated. For example, Kentucky has a $100 limit for misdemeanor theft. Also, there has been an increase in sentence length. Kentucky has both "truth-in-sentencing" and persistent felony offense sentencing.Clearly, these place additional strains on the prison system which is already under court orders to improve conditions of imprisonment and correct over-crowding. Yet, the legislature represents the electorate and last session refused to increase the misdemeanor limit for theft to $500. Depsite their obvious impact upon the sentencing process, causing sentences to be much longer, apparently the legislature is also of the opinion that their constituency favors such measures as persistent felony punishment and "truth-in-sentencing." Is the Public Advocacy Commission a body which should take a position on criminal law legislation such as this? Should the Department of Public Advocacy be lobbying for amendment or repeal of such legislation? I could state my personal opinion, but the Commission has not adopted a position, and I must decline to present my personal opinion.

Any other thoughts?

It is important to keep in mind that the Commission is a creature of the legislature and has only those powers given to it by the legislature. Those are very limited. The members of the Commission serve without compensation, and the Commission has no staff and no budget. Whatever is accomplished by the Commission comes about as a result of volunteer effort by the members of the Commission. The role of the Public Advocacy Commission since its inception has been more reactive than proactive. This is partly due to the part-time volunteer nature of the commission, partly due to the fact that there is no staff or budget, and partly due to the inability to have very many meetings during the year. Because of the fact that commission membership is scattered throughout the commonwealth and commission members must take time away from their jobs or professions to attend meetings, it is extremely difficult to have even one meeting a quarter at which a quorum is present. Depsite these factors, the Commission has taken some steps to attempt to alleviate the strains on the system. As Chair of the Commission, at the Commission's request, I, along with Paul Isaacs, Public Advocate, appeared before the Board of Governors of the Kentucky Bar Association to ask for a resolution from that group urging its members to devote some of their *pro bono* efforts to capital litigation being conducted by the Department and to ask that consideration be given to distributing some of the Bar's IOLTA funds to the Department. The Commission was instrumental in having the Administrative Office of the Courts adopt a form for use by District and Circuit Court Judges in seeking recoupment from defendants represented by public defenders. This efforts has been successful and the amount of recoupment being channeled back into local defender programs has increased in each quarter since that time. The Commission urged the Department to intervene in the *Wilson* case where the Circuit Court Judge has ordered the Kenton-Gallatin-Boone Public Defender, Inc. to pay the costs of a capital defense.The motion to intervene was granted and we may now have a vehicle to litigate the issue of who is responsible for such defense costs. On a continuing basis, individual members of the commission exert efforts on behalf of the Department of Public Advocacy and local defender programs. As Chair of the Commission, I want to take this opportunity to publicly thank all of the present and past members for their efforts.

It would be easy to focus only on the negative side of the public defender system. But I would like to focus on the positive side, as there are so many very positive things about the system. The commonwealth is extremely fortunate to have been able to attract and keep such a large number of dedicated and highly skilled attorneys, given the extremely heavy case loads and lack of adequate compensation and support services. Kentucky is very fortunate to have a well-managed Department of Public Advocacy which is so efficient in the use of its limited resources. Without these very dedicated individuals and efficient management, it would not be possible to offer such quantity and very high quality of public defender services in the state. Everyone working for the Department has a right to be very proud of their accomplishments. When I look at the statistics on case clearances and results obtained for the Department's clients I am certainly proud to be associated in even this small way with what the Department of Public Advocacy accomplishes.

Bill was appointed to the Commission on July 15, 1982. A former Dean of Chase Law School, 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.



REMARKS OF JUSTICE JOSEPH E. LAMBERT

On the Importance of Criminal Defense Work

Supreme Court Justice Joseph E. Lambert spoke at the 17th Annual Public Defender Training Seminar on the work we do as public defenders:

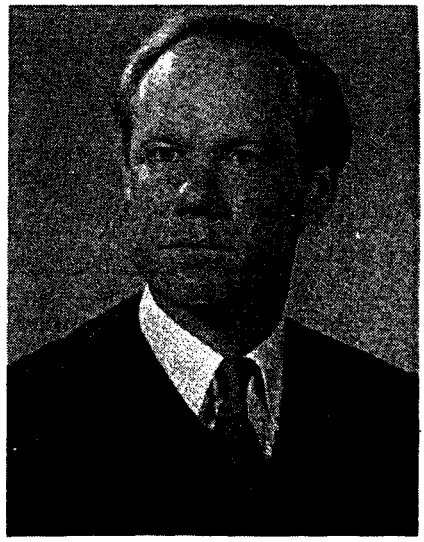
Through the years, I have attended a great many luncheons and from experience have concluded that a luncheon speech should not be substantive, educational, or cause any interference with digestion. A proper luncheon speech should be short, light, humorous if possible, and at most only mildly inspiring. In my remarks today, I promise to abide by these normal rules.

I note from the program that this seminar began on Sunday afternoon with all-day sessions on Monday and today. From the program, it is obvious that by now you have had a rather intense educational experience and that perhaps your circuits are nearing overload. With that in mind, let me suggest that you relax and I'll tell you how your training director prevailed upon me to be here.

About this time last summer, I was walking across Main Street in Lexington with Ed Monahan. I didn't know Ed well but had seen him arguing cases before our Court and had met him on a few occasions. As we walked together, I made some comment that as a new Justice, I appreciated the high quality of work performed by the Department of Public Advocacy. With that Ed said to me, "Would you mind saying that in public?" My response was "Well, no. I feel that way so I have no objection to saying it in public." The next thing I knew, Ed had me signed up, a full year in advance to make a speech at this seminar. Of course, no one can refuse an invitation extended a year in advance, so here I am. The lesson I learned from the experience I have just recounted is this: No good deed or kind word ever goes unpunished.

Now that I've warned you not to expect anything profound, I have collected a few thoughts to share with you.

As I stand before you today, I recognize that some of you may feel that as a public defender you are outside the mainstream of the legal profession in Kentucky. If you hold such a view, it is not surprising since it is an accepted fact that you are woefully underpaid, substantially less I have learned, than your colleagues in surrounding states. I recognize also that many of you struggle with a caseload which exceeds any reasonable level of work which could be expected of an attorney. And perhaps worst of all, I suspect that many of you feel that your work is not only unappreciated by the public, but is condemned by many as amounting to an interference with the judicial process rather than as an integral part of the process.



Justice Joseph E. Lambert

It's a simple and indisputable fact that many of you have law school classmates who were less academically able than you, who nevertheless have lucrative, genteel, country-club law practices. I have no doubt that many of you wonder from time to time why you stay in the business of representing indigent defendants for little compensation, under poor conditions, and with our proper recognition of the service you perform for our society.

Unfortunately, neither I nor the members of my Court are in much of a position to address, let along solve, most of the problems you encounter. Our foremost duty is to decide issues and cases on a case-by-case basis. Of course, we have secondary duties which include rule-making and review of the discipline imposed upon attorneys.

As a political and social realist, it is clear to me that the best avenue to elevate the branch of our profession in which you have chosen to practice is through you. Of course, the judiciary, other branches of government, and the private bar can help, but no person or group of persons is more capable of eloquently stating the importance of representing indigent criminal defendants than you are. In a recent issue of the publication of your organization, *The Advocate*, a speech by John Delgado was reprinted. In his address is the following statement:

> It is my very subjective opinion that the Constitution and the government and state of South Carolina, my personal jurisdiction, are always served and protected when an individual is afforded a fair trial. It is not, in my very humble subjective opinion, their criminal justice system. Those are our guarantees, our rights, our protections, not George Bush's. I think we are the conservators of the 1st, 4th, 5th, 6th, 8th and 14th Amendments of the Constitution. We are the law court officers, not necessarily just those colleagues of ours that wear badges and service revolvers. We are law enforcement officers and those are the rights and guarantees we protect.

If views such as this were more frequently brought to the attention of the public, perhaps the role you play in the criminal justice system would be more fully understood. As public defenders you should take advantage of every opportunity to inform the public that constitutional rights apply to all citizens and that you are officers of the court who have

undertaken to provide indigent persons accused of crimes with their constitutionally guaranteed right to a fair trial.

In addition to increasing awareness of the public interest inherent in protecting the rights of persons accused of crime, public defenders must strive for a greater degree of professionalism. Unlike your counterparts who are Commonwealth Attorneys and your colleagues who devote their efforts to a civil practice, there is less of an assumption that public defenders will at all times practice their profession in a thoroughly professional manner. With full recognition of your duty to represent your clients in a zealous manner, at times you have been perceived as obstructionists willing to engage in any practice, ethical or unethical, to achieve the result you seek. On the other hand and as a general rule, Commonwealth Attorneys are more frequently seen as the people's representatives who operate on a higher ethical plane and in the public interest.

We, of course, know that these general perceptions are nonsense. In my brief tenure on the Supreme Court, several instances of outrageous prosecutorial misconduct have been brought before the Court, and in many instances, such misconduct has been dealt with in a very harsh manner. Likewise, I have encountered instances in which conduct by public defenders gave every appearance of being obstructionism. Such misconduct, whether from the prosecution or the defense, should be condemned not only by the courts, but by colleagues of the offending attorney.

It is my understanding that this is the 17th annual public defenders seminar, and from the program it appears to be an outstanding educational opportunity. Seminars such as this one, professional associations you belong to, and full participation in state bar activities all serve to enhance the level of professionalism within the area of our profession you have chosen.

It is my view that as a greater level of public and professional recognition is accorded public defenders, the more mundane but nevertheless important items of interest to you such as income, caselaod reduction and staff will be addressed by appropriate authorities.

In conclusion and as a personal comment, when I came to the Supreme Court, I confess to a measure of weakness in criminal law and constitutional law as it applied to the rights of persons accused of crime. I recall hearing terms and phrases such as "a *Brady* violation," a *Bruton* error," or a "*Boykin*ized defendant" and not having any idea what counsel was talking about. I won't bore you with an explanation or excuse for my condition, but will say that as a result in large measure of the briefs filed by the Department of Public Advocacy and the arguments presented by your very able appellate attorneys, I was very quickly brought up to speed.

I rarely take the liberty of speaking on behalf of my colleagues on the Court, but on one subject, I will take the risk. The members of our Court have a high regard for the quality of trial and appellate advocacy which comes from the Department of Public Advocacy. Generally speaking, we feel confident that trial counsel is competent and prepared to represent their clients, and that the issues presented by appellate counsel include all issues which might reasonably lead to some appellate court relief.

As you must have gathered throughout this talk, I for one very much respect the work you do. It takes a strong belief in the constitutional rights of citizens to undertake a job whereby you must "take all comers" for inadequate compensation and with inadequate public esteem. But without lawyers such as yourselves who are wiling to make the personal sacrifice and undertake unpopular clients and causes, our system of law could not succeed. Without your efforts, the rights of all citizens would be in jeopardy.

I appreciate the opportunity to appear before you and wish you well in the remainder of this meeting.

Lawyer's contempt charge dropped

By Bill Straub
Kentucky Post Frankfort Bureau

FRANKFORT — Contempt charges against a public defender who questioned a new sentencing law have been dismissed.

In a brief order issued Monday, a three-judge panel of the Kentucky Court of Appeals found that Ernie Lewis of Richmond was not in contempt.

"It was a complete victory," said Ed Monahan, the assistant public advocate who represented Lewis.

The issue dates back to December 1988 and centers on the meaning of a high-sentencing law passed the year before.

Lewis represented Mason Storm, indicted in Madison County for murder and theft in October 1987. Lewis negotiated with Madison Commonwealth Attorney Tom Smith about the possibility of entering a guilty plea for Storm. Because of the new sentencing law, questions arose about how long Storm would have to spend in prison.

Under the new law, anyone convicted of a violent offense is required to serve at least half of the sentence before parole.

But state law also sets parole eligibility for anyone sentenced to life imprisonment at 12 years. It doesn't say whether a person sentenced to more than 24 years also becomes eligible for parole at 12 years. So a sentence of 50 years could actually last longer — at least 25 years — than a life sentence.

"Because parole eligibility is one of the prime considerations in advising a client whether to go to trial or whether to negotiate a plea of guilty, Ernie needed some direction," Monahan said.

Lewis filed a writ of prohibition against Madison Circuit Court Judge James Chenault with the Kentucky Court of Appeals, asking for a ruling on the constitutionality of the new sentencing law before Storm's trial went on. Chenault objected, calling the tactic a "sham" designed to delay the Storm trial. The judge asked for sanctions against Lewis.

Both the Court of Appeals and the State Supreme Court rejected Lewis' request to delay the trial. Chenault stepped aside, and Storm was found guilty of manslaughter and theft during a November 1988 trial. He was sentenced to 15 years.

The high court, in another case, upheld the sentencing laws.

The Kentucky Post, Wednesday, July 12, 1989

WEST'S REVIEW

Linda West

KENTUCKY COURT OF APPEALS

RCr 11.42 RELIEF-PERJURY
Commonwealth v. Basnight
Basnight v. Commonwealth
36 K.L.S. 6 at 1
(June 5, 1989)

The Court withdrew its previous opinion in this case, rendered on February 3, 1989, and issued an amended opinion in which the full names of the minor victims of sexual offenses are replaced with initials only.

JURY POLL-RELIEF IF JUROR IS UNCERTAIN
Glass v. Commonwealth
36 K.L.S. 6 at 8
(June 5, 1989)

During polling of the jury after it returned a guilty verdict at Glass' trial for second degree criminal abuse, one juror indicated that she agreed to the verdict "on a lesser charge." The trial judge then clarified to the juror that second degree criminal abuse was a lesser offense than first degree. The trial judge overruled a defense motion to voir dire the juror.

The Court of Appeals held that Glass had no right to voir dire the juror. If he was dissatisfied he should have asked the trial court to declare a mistrial or to send the jury back for further deliberations. The Court further noted that the juror's "initial ambiguous expression of doubt was cured by her subsequent unequivocal answer that she assented to a guilty verdict on second-degree criminal abuse." The Court found nothing in the record which would indicate a "lack of free and voluntary assent" on the part of the juror.

THEFT BY FAILURE TO MAKE REQUIRED DISPOSITION
Walls v. Commonwealth
36 K.L.S. 7 at
(June 9, 1989)

In this case, the appellant argued that the events which led to his conviction of theft by failure to make required disposition involved a simple contract dispute and that no crime was committed. Walls had agreed to produce 1,000 football programs for the Boyle County and Danville Booster Clubs. Pursuant to the agreement, Walls was to sell advertising space in the programs and divide the proceeds with the Booster Clubs. Walls collected over $13,000 from the sale of the advertising but failed to properly share the funds with the clubs. Instead the funds were spent for Walls' personal use.

The Court of Appeals rejected Walls' argument that his acts did not constitute a crime. "...Walls knew he had the legal obligation by agreements with the booster clubs to give the clubs a definite percentage of all proceeds collected from advertisements. This he failed to do and he intentionally dealt with the proceeds as his own." The Court cited *Blanton v. Commonwealth*, Ky.App., 562 S.W.2d 90 (1978) as authority for its decision.

KENTUCKY SUPREME COURT

PUBLIC DEFENDERS-PRIVATE REPRESENTATION
Ky. Bar Assn. v. Unnamed Attorney
36 K.L.S. 5 at 15
(May 4, 1989)

This decision overrules *KBA v. Kemper*, Ky., 637 S.W.2d 637 (1982), "to the extent it authorizes a part-time public defender to obtain release from his appointed duties and thereafter accept private compensation for representing the client." The respondent in the instant case had, at the behest of his client, obtained leave of court to withdraw as appointed counsel and had then been employed by the client. The Court's decision disallows such an arrangement.

COMPETENCY
Mozee v. Commonwealth
36 K.L.S. 5 at 16
(May 4, 1989)

In this case, the Court held that the trial court did not err when it found Mozee competent to stand trial. Mozee presented evidence at a series of compentency hearings that he was mentally retarded and functioning at the level of a 6 -to-9 year-old child. The commonwealth controverted this proof with evidence that a year prior to trial Mozee was competent and that the deterioration in his condition could be malingering. The commonwealth also introduced lay evidence that Mozee had conducted himself as well as the average prisoner at institution disciplinary proceedings. The Court held that this evidence provided a sufficient basis for finding Mozee competent. The Court also held that Mozee was not entitled to an additional competency hearing prior to sentencing in the absence of some evidence of change in his condition.

COMPETENCY HEARING
Pate v. Commonwealth
36 K.L.S. 5 at 18
(May 4, 1989)

Prior to Pate's trial a competency hearing was conducted, resulting in a finding that Pate was competent. A motion for an additional competency hearing before final sentencing was denied.

The Court noted that in *Moody v. Commonwealth*, Ky.App., 698 S.W.2d 530 (1985) it held that an incompetent defendant may not be sentenced. However, as

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.

in *Mozee v. Commonwealth, supra*, the Court went on to state "[t]here is no right to a continual succession of competency hearings in the absence of some new factor." Justice Combs dissented.

KRS 508.100-CONSTITUTIONALITY/OPINION EVIDENCE
Carpenter v. Commonwealth
36 K.L.S. 6 at 31
(June 8, 1989)

The appellants, husband and wife, argued that KRS 508.100 was unconstitutionally void for vagueness by virtue of its use of the words "permits" and "may" when providing that a person is guilty of first degree criminal abuse when he "*permits* another person of whom he has actual custody to be abused and thereby ...places him in a situation that *may* cause him serious physical injury." (Emphasis added.) The Court held that use of the word "may" in the statute was not unconstitutionally vague since that language is brought into play only when abuse is involved. As to the statute's use of the word "permits" the Court found that this term was unconstitutionally vague unless it was modified by the word "intentionally." The Court adopted this construction of the statute in order to save it. However, the Court nevertheless reversed the wife's conviction since she was found guilty pursuant to a jury instruction which did not require that she have intentionally permitted the victim's abuse.

The Court also held that the trial court did not err in permitting expert testimony that the victim's injuries were intentionally caused. The Court held that this testimony did not invade the province of the jury.

DOUBLE JEOPARDY-MISTRIAL-RETRIAL
Tinsley v. Jackson
36 K.L.S. 6 at 45
(June 8, 1989)

A mistrial was declared over defense objection at Tinsley's trial following a failure by the commonwealth to provide exculpatory evidence. Tinsley subsequently sought to bar his retrial on double jeopardy grounds.

The Court rejected Tinsley's argument. The Court held that: "A party seeking to prevent his retrial upon double jeopardy grounds must show that the conduct giving rise to the order of mistrial was precipitated by bad faith, overreaching or some other fundamentally unfair action of the prosecutor or court." The Court found no indication of bad faith in the prosecutor's action. The Court went on to say that at Tinsley's retrial the problem of the lost evidence might be dealt with by a "missing evidence instruction" as authorized in *Sanborn v. Commonwealth*, Ky., 754 S.W.2d 534 (1988).

EVIDENCE-RELEVANCY
Commonwealth v. Johnson
36 K.L.S. 6 at 32
(June 8, 1989)

At Johnson's trial, the commonwealth was permitted to introduce proof that during a search of Johnson's room police officers wore rubber gloves because they had heard that "he ...might have AIDS..." The Court agreed with Johnson that this evidence was irrelevant but held that it was harmless in view of the overwhelming evidence of guilt. (See Plain View for a discussion of search and seizure issues in *Johnson*.)

TRUTH-IN-SENTENCING STATUTE-PRIOR CONVICTON
Melson v. Commonwealth
Crum v. Commonwealth
36 K.L.S. 7 at 9
(June 29, 1989)

In this case, the Court held that a prior felony conviction may not be used under KRS 532.055, the truth-in-sentencing statute, unless the time for appealing the conviction has expired or an appeal has been taken and the judgment affirmed. The Court held that the introduction of convictions which were on appeal, at the appellant's sentencing hearings on other charges, was harmless since the convictions on appeal were ultimately affirmed. The Court also held that the rule it stated "does not apply...to pending motions for discretionary review." Justices Leibson and Vance dissented from this portion of the opinion.

RIGHT TO COUNSEL
Commonwealth v. Williamson
36 K.L.S. 7 at 5
(June 29, 1989)

This case reverses a decision of the Court of Appeals which held that Williamson was denied his right to counsel when, while being held on misdemeanor charges, he was utilized in a line-up in connection with a robbery investigation and was identified as the robber. Prior to the lineup, Williamson was advised of and waived his right to have counsel present. After being identified, Williamson was given *Miranda* warnings and then gave an incriminating statement.

At the time of the lineup Williamson was not represented by counsel on the charged misdemeanors. The Court additionally found that he had made no request for appointment of counsel on those charges. Thus, in the Court's view, neither *White v. Commonwealth*, Ky., 725 S.W.2d 597 (1987) nor *Arizona v. Roberson*, __ U.S. __, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988) was applicable. "The federal law and the law in the Commonwealth now is that, once a charged defendant has specifically requested counsel in connection with those crimes for which he has been charged, he cannot be further questioned about those charges or questioned concerning separate and independent charges without counsel being informed." Justice Combs dissented.

UNITED STATES SUPREME COURT

HABEAS CORPUS-"CUSTODY"
Maleng v. Cook
45 CrL 3057
(May 15, 1989)

Maleng's 1958 state conviction of robbery resulted in a twenty year sentence which expired in 1978. However, the robbery conviction was used by the state to obtain an enhanced penalty for Maleng on a later conviction. After expiration of the robbery sentence, Maleng filed a federal habeas petition attacking the 1958 conviction. The District Court dismissed the petition on the grounds that Maleng was no longer "in custody" pursuant to the 1958 conviction. The Circuit Court reversed. The Supreme Court, in turn, reversed the Circuit Court, holding that Maleng was not "in custody" as required by 18 U.S.C. 2241(c)(3). The Court held that the fact that Maleng was serving a sentence enhanced by his 1958 conviction was insufficient.

SENTENCING-VINDICTIVENESS
Alabama v. Smith
45 CrL 3073
(June 12, 1989)

In this case, the Court held that the presumption of vindictiveness recognized in *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969) does not apply when a sentence imposed after a trial is greater than one previously imposed following a guilty plea. Smith was given minimum sentences pursuant to a plea bargain. However, he subsequently succeeded in having his guilty plea vacated. Following a trial, the same judge sentenced Smith to the maximum penalties. The Court noted that the sentencing information available to a judge following a guilty plea is far less than that available to him following a trial. Thus, imposition of a harsher penalty may be reasonable. Under these circumstances, the presumption of vindic-

tiveness has "no basis." Justice Marshall dissented.

BURDEN OF PROOF-PRESUMPTIONS
Carella v. California
45 CrL 3097
(June 15, 1989)

At Carella's trial for theft by failure to return a leased car, the jury was instructed that it could presume intent to commit theft if Carella had failed to return the property within 20 days of a written demand for it following expiration of the lease. The jury was also instructed that it could presume "embezzlement" from failure to return the car within 5 days of expiration of the lease.

The Supreme Court unanimously held that the instructions denied Carella due process by relieving the state of its constitutional obligation to prove each element of the offense. *See Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985).

DOUBLE JEOPARDY
Jones v. Thomas
45 CrL 310
(June 19, 1989)

Thomas was convicted of both felony murder and the underlying felony and sentenced to life and 15 years, respectively. The Governor later commuted the 15 year sentence and the trial court subsequently vacated the conviction for the underlying felony on double jeopardy grounds. Thomas sought habeas corpus relief arguing that, since the lesser sentence had been commuted, and thus satisfied, the trial court should have vacated the felony murder conviction. The 8th Circuit agreed with Thomas and held that once he had satisfied one of the two sentences he could not be required to serve the other. The Supreme Court reversed holding that the state court's remedy fully protected Thomas against double jeopardy. Justices Brennan, Marshall, Scalia, and Stevens dissented.

SELF-INCRIMINATION-*MIRANDA*
Duckworth v. Eagan
45 CrL 3172
(June 26, 1989)

At his arrest Eagan was given warnings which deviated from those prescribed in *Miranda* in that he was told that, should he request an attorney, one would be appointed "if and when you go to court." The majority held that this deviation did not render the warnings fatally defective by linking the right to counsel to a future event. Other language in the warnings sufficiently conveyed to Eagan that he could "stop answering at any time until he talked to a lawyer." The Court further noted that: "We have never insisted that *Miranda* warnings be given in the exact form described in that decision." Justices Marshall, Brennan, Blackmun, and Stevens dissented on the grounds that the deviation in the warning could "lead a suspect to believe that a lawyer will not be provided until some indeterminate time in the future *after questioning*."

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Publications Available

Involuntary Civil Commitment a manual for lawyers and judges

A manual for training lawyers and judges on representing clients with mental illness in involuntary civil commitment proceedings is available from the Commission on the Mentally Disabled. This hands-on manual, with sections for the respondent's attorney, the state's attorney and the judge, provides practical guidance for each step of the process, beginning with pre-trial hearing issues and continuing through post-hearing responsibilities.

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ABA Criminal Justice Mental Health Standards

The ABA Criminal Justice Mental Health Standards provide assistance on a wide range of issues concerning the involvement in the criminal justice system of persons with mental disabilities from pretrial evaluations and expert testimony to sentencing offenders with mental illness and mental retardation. The 102 "black letter" standards are official ABA policy. Limited quantities of the 500 page edition **(PC Order Number 509-0041)** are available at no cost. Order from:

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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:

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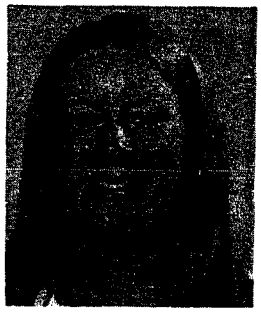
6TH CIRCUIT HIGHLIGHTS



Donna Boyce

RULE 11 AND MONETARY SANCTIONS

The Sixth Circuit addressed the assessment of attorneys' fees sanctions under Rule 11 of the Federal Rules of Civil Procedure in *Jackson v. Law Firm of O'Hara*, __F.2d___, 18 SCR 12, 12 (6th Cir. 1989). The district court had ordered attorney Robert Gettys to pay attorneys' fees of more than $40,000 to three law firms which defended a legal malpractice action brought by Gettys against the law firm of O'Hara. The Court found that the record fully supported the district court's conclusion that Gettys violated Rule 11 by filing a legal malpractice complaint for improper purposes without making a reasonable inquiry into the facts or existing law. Gettys stipulated the reasonable expenses of the law firm representing the O'Hara firm were $14,655 but contested the assessment of $16,308 to the O'Hara firm and $9,500 to a firm representing a former O'Hara partner.

Apparently because of the flagrant nature of the violation, the district court computed attorneys' fees at a rate higher than that ordinarily paid in the community and added 20% to the actual charges for paralegal/secretarial work. The 6th Circuit stated that in most cases, including the present one, a "lodestar" calculation of attorneys' fees and actual charges for related expenses provide a sufficient deterrent. The Court recognized that imposing monetary sanctions pursuant to Rule 11 above a defendants' actual litigation costs may be construed as a fine imposed for criminal contempt and, thus, greater due process safeguards might apply.

The Court also stated that the district court should determine if any equitable considerations exist for setting the total attorneys' fee sanction at an amount less than the total requested by defendants and found reasonable under the standard of prevailing market rate and actual paralegal/secretarial charges. The district court was also ordered to make a specific finding with respect to Gettys' ability to pay the sanction imposed. The Court concluded that because the primary purpose of Rule 11 is to deter filing frivolous lawsuits and filing court papers for improper purposes, full recovery of reasonable time and expenses incurred by the offended party is not invariably required and that extenuating circumstances should be taken into account.

EXCUSABLE NEGLECT STANDARD FOR LATE NOTICE APPEAL

In *Marsh v. Richardson*, _ F.2d _, 18 SCR 10, 17 (6th Cir. 1989), the 6th Circuit dismissed the respondent's appeal of the granting of *habeas corpus* relief to Marsh on the ground that the notice of appeal was untimely filed. Respondent filed a late notice of appeal more than 30 days after final judgment was entered. When Marsh moved to dismiss on that ground, respondent filed a motion to extend the time period within which to file notice of appeal. The district court granted the request, finding that counsel's vacation, his lack of know-ledge that the underlying judgment had issued, the workload handled by his agency and the important nature of the legal issues presented established "good cause" for the tardy filing.

The 6th Circuit held that under F.R.A.P. 4(a)(5), "good cause" is applicable only to cases where the motion to extend is filed before the 30-day time period expires. Otherwise, the grant of an extension should be evaluated under the "excusable neglect" standard which has consistently been held to be strict and can be met only in extraordinary cases. The 3 errors by counsel in this case were found not to be excusable under this standard: (1.) because counsel had no system to bring it to his attention, he did not learn of the judgment in the five days between its entry and his departure for vacation, although his office received notice of it. (2.) counsel did not learn of the decision immediately upon his return 2 weeks later but learned of it 7 days after return from his vacation. (3.), counsel did not file notice of appeal during the 5 days remaining in the 30 day period but instead "miscalculated" the time period and filed the notice late. The Court noted that such errors indicated a serious lack of diligence and inattention to the everyday detail of the practice of law and could not be considered to be inadvertence which occurred despite counsel's affirmative efforts to comply.

EXPENSE OF TRANSPORTING TO TRIAL AND DEPOSITION EXPENSES AS COSTS

In *Sales v. Marshall*, _F.2d___, 18 SCR 10, 5, 45 Cr.L. 2094 (6th Cir. 1989), the Sixth Circuit Court of Appeals addressed the determination and allocation of costs in state prisoners' civil rights actions. The Court held that where a state has been compelled by a writ of *habeas corpus ad testificandum* to transport a state prisoner to and from federal court for trial of his civil rights action, the expense of transportation cannot be taxed as costs against the unsuccessful prisoner-litigant. The Court also held that Sale's indigency did not prevent the taxation against him of the costs of taking and transcribing depositions reasonably necessary for the litigation. The statute that permits an indigent party to proceed *in forma pauperis* merely provides that such a person may commence a suit without prepayment of fees and costs. While such costs can be assessed against an indigent civil rights plaintiff at the conclusion of the action, a determination of the reasonableness of the amount claimed and the party's capacity to pay the assessed costs must be made when a party claims indigency.

DONNA BOYCE

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

Over the past few years, the Reagan-Rehnquist Court has wreaked havoc on the constitutional rights of accused persons, particularly in the 4th Amendment area. It was thus almost with relief that the end of the October 1988 term focused upon such things as abortion and flags, and left alone the now emasculated 4th Amendment. Our attention thus focuses on other Courts, and particularly two decisions of the Kentucky Supreme Court.

THE KENTUCKY SUPREME COURT

The Kentucky Supreme Court recently granted discretionary review of a case involving two particular searches. In 1985, a motel guest at the Penny Pincher Motel called the police, complaining of a disturbance. Upon arriving, the police saw Charles David Johnson, a "known drug user", who appeared to be under the influence. While one officer talked with Johnson, another shined his flash light through an opening in the window curtain. Because drug paraphenalia, a white powdery substance, and a handgun were observed, Johnson was arrested and a search warrant obtained and executed, revealing each of the previously viewed items.

Three days later, Johnson was seen in the parking lot of a Ramada Inn. The police obtained a warrant for Johnson's car; however, the district judge turned down the petition for a search of Johnson's room. The police went to the room in order to execute the warrant on the car, and again discovered the room ajar. Johnson answered the door by stepping in the hallway. After he was told of the warrant to search his car, he agreed to get a key, eventually went back into his room and tried to shut the door. The police kept him from doing so, went into the room and again discovered drugs and paraphenalia.

The Court of Appeals condemned both searches as being in violation of the 4th Amendment and Section 10. The Supreme Court granted discretionary review. ***Commonwealth v. Johnson***, Ky., ____ S.W.2d _____ (1989).

First, the Court, in an unanimous decision authored by Justice Lambert, held that the Penny Pincher search was not unconstitutional. Because Johnson had left his door ajar and his curtains open, he exhibited a reduced expectation of privacy. "[O]ne who asserts that his rights have been violated by an unreasonable search accomplished by looking through a motel room window or door must show that he took precautions sufficient to create an objectively reasonable expectation of privacy." *Id.* (Master Slip Opinion, p. 4). Further, the officer's act of shining a flashlight into an area concerning which the defendant had exhibited this reduced expectation was merely viewing items in plain view from a place he had a right to be.

The Commonwealth did not fare as well on the Ramada Inn search. The Commonwealth attempted to justify that search based upon an officer's safety exception to the warrant requirement. It should be recalled that Johnson had had a handgun in his room but 3 days earlier. That fact justified the officers in following Johnson into his room in order to observe him while he was getting his car key, according to the Commonwealth.

The Court rejected this argument, saying that such a police protection exception would allow the police to "engage in forced, warrantless searches in a multitude of otherwise prohibited circumstances." The Court further expressed concern that such an exception would open the door for pretexual searches.

This decision is remarkable for 2 reasons. First, the call for reduced privacy rights in order to secure increased police safety has long been a difficult temptress to resist. See for example *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 407, 9 L.Ed.2d 889 (1968) and its progeny. Secondly, the Court based its holding entirely upon Section 10 of the Kentucky Constitution. Kentucky's Section 10 has been all but ignored in recent years, after many years of extensive use earlier in the century. It is heartening to see the Kentucky high court vigorously protect the privacy rights of our citizens under Section Ten at the same time the United States Supreme court is turning a deaf ear to the rights protected by the 4th Amendment.

All the Justices agreed upon the affirmance of the defendant's conviction based upon the Penny Pincher search. On the Ramada Inn search, Justices Wintersheimer, Stephens, and Gant dissented. Because Justice Combs did not sit on this review of the Court of Appeals decision, the Court of Appeals was affirmed "by an equally divided Court."

Justice Wintersheimer in dissent "strongly" rejected "any implication from the majority opinion that this search was a pretext. He would have affirmed the conviction related to the search of Johnson's room at the Ramada Inn based upon his concern for the police officer's safety. "The police entry into Johnson's Ramada Inn room was perfectly reasonable to assure that he did not emerge with a gun in hand."

Justice Combs joined the Court to author the 4-3 decision in ***Mash v. Commonwealth***, Ky., 769 S.W.2d 42 (1989). Here, Officer Clovis Lovelace saw two men "hunched over the street" at night. When Lovelace arrived, one man left and went to a house. Mash on the other hand stood up and put money in his pocket. Because Lovelace believed gambling was going on, he arrested Mash, and took him to the jail, where an inventory search was conducted under somewhat suspicious circumstances. The gambling charge was at some point dismissed. Later, Mash filed suit against law enfor-

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.

cement authorities. One year later, the pills were analyzed and said to be LSD. Marsh's suppression motion alleging an illegal arrest was denied, and he ultimately was convicted and sentenced to twenty (20) years as a PFO 2nd.

The Court reversed, holding that Lovelace did not see a misdemeanor committed in his presence. Thus, the arrest was illegal, and the jail inventory search was a tainted fruit of the illegal arrest.

KRS 431.005(1)(d) reads that an officer "may make an arrest...without a warrant when a misdemeanor, as defined in KRS 431.060, has been committed in his presence." Lovelace obviously did not see Mash gambling. It is questionable whether he had probable cause or even an articulable suspicion that anything was going on. Thus, the arrest was reviewed as violative of KRS 431.005(1)(d). "[T]he subsequent search and seizure were also illegal and violative of the rights possessed by appellant under Kentucky Constitution Section 10."

The Commonwealth tried to save the conviction by citing *Cooper v. Commonwealth*, Ky. App., 557 S.W.2d 34 (1979). There, an officer stopped Cooper for speeding and smelled marijuana when he rolled down his window. The Court appeared to hold that because the officer smelled marijuana, he then had probable cause to believe Cooper had been in possession of marijuana.

The Court rejected this argument, saying *Cooper* had "attempted to graft the more relaxed probable cause standard into KRS 431.005(1)(d) where it does not belong." The Court overruled that portion of *Cooper*. By doing so, the Court further breathed new life into KRS 431.005, an important tool for defense attorneys who practice in district court.

Justice Vance dissented, joined by Justices Lambert and Wintersheimer. Justice Vance saw the facts as indicating that Lovelace had seen Mash gambling. Furthermore, the dissent would not have overruled *Cooper*, saying that there, too, the officer had observed the misdemeanor being committed in the officer's presence.

THE UNITED STATES SUPREME COURT

One mid-May decision of the United States Supreme Court is worthy of note. In *Graham v. Conner*, 490 U.S. __, 109 S Ct 1865, 104 L. Ed. 2d 443 (1989), the Court reviewed an appalling arrest. Graham felt an insulin reaction coming on, and had a friend drive him to a store. Because the line at the store was too long, Graham left and asked his friend to take him to another friend's house. Officer Connor followed, thinking something was going on, and stopped the car. Conner called for backup assistance, while Graham passed out. Once the other officers arrived, Graham was rolled onto the sidewalk with his hands cuffed behind his back. He was then shoved face down onto the car hood, and eventually into the car. Orange juice brought by a friend to relieve the insulin reaction was refused by the police. During the ordeal, Graham's foot was broken, among other injuries. Once the police found out that nothing had happened at the store, Graham was released.

Obviously Graham sued, under 42 U.S.C. 1983. The Court reviewed the case in order to determine what standard applies to excessive force cases brought under 1983. Using *Tennessee v. Garner*, 471 U.S. 1 (1985), the Court held that "all claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the 4th Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." The reasonableness standard "is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."

THE SHORT VIEW

Ricks v. State, Ala., 771 P. 2d 1364 (Ct. App. 1989). The police, through an informant, purchased drugs from Ricks, who was serving as a bartender at the time. Fifteen minutes after the arrest, they picked up a jacket on a coat rack 10-15 feet from Ricks, and, after determining that it belonged to him, searched it and found drugs. The Alaska Supreme Court held the search to be unconstitutional, declining the search incident to a lawful arrest exception to the warrant requirement because the coat was outside the defendant's immediate reach at the time of his arrest.

United States v. Maez, 45 Cr.L. 2104 (10th Circuit, April 19, 1989). A SWAT team surrounded the defendant's home, and over loudspeakers demanded the Maezes to come out. When they did, consent to search the truck and house were obtained. The 10th Circuit found these circumstances to be violative of *Payton v. New York*, 445 U.S. 573 (1980), which then tainted the consents to search given by the defendant and his wife. This case represents a reasonable and important extension of the *Payton* rule. "Here the governmental intrusion, without consent and without a warrant, was in the form of extreme coercion which effected the arrest of Maez while he was in his home."

United States v. Boruff, 45 Cr.L. 2109 (5th Circuit, April 21, 1989). Boruff called Howell to testify at a suppression hearing in order to establish standing. When the government then called Howell at trial, Boruff objected, citing *Simmons v. United States*, 390 U.S. 377 (1968), which had held, among other things, that a defendant's testimony could not be used against him at trial, nor could matters revealed by him at that hearing. The Court held that because Howell testified at the hearing, the government could call him at trial consistent with the *Simmons* rule. Counsel should consider this risk, therefore, whenever putting on anyone at a suppression hearing.

State v. Hill, N.J., 557 A.2d 322 (1989). The fact that a car was parked illegally did not authorize the police to enter it looking for identification nor open containers therein. The police should have merely issued a citation under these circumstances; while a community caretaking exception to the warrant requirement exists, it did not apply here where the police did not even take custody of the car, nor was the car parked in such a way as to cause anyone any problems.

Smith v. United States, 45 Cr.L. 2137 (D.C. Ct. App. *en banc* April 28, 1989). The police acted improperly when they detained the defendant after observing him talk to two people who minutes before had engaged in a drug transaction. Neither the fact that the area was a high crime/drug area, nor that the defendant walked away at a fast pace once the plainclothes officers got out of their car were sufficient to constitute a reasonable suspicion.

People v. Robinson, 45 Cr.L. 2150 (Cal. Ct. App. First District April 18, 1989). The act of scraping paint on a newly painted car in order to see what color is underneath is a search and seizure.

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Juvenile Law

Cruel & Unusual Punishment! Louisville's Legal Aid Society Takes on Kentucky's Juvenile Justice System.

Barbara Holthaus

The Legal Aid Society of Louisville, Kentucky has filed a suit in federal court which could open the way to major reforms in the Unified Juvenile Code. The plaintiffs seek injunctive relief from certain types of confinement that have been condemned by Congress as unsuitable for juveniles.

The class action suit, *Jesse James, et al. v. Wallace Wilkerson, et al.*, Civil Action No. C-89-0139-P(CS), United States District Court, Western District of Kentucky at Paducah, was filed on behalf of all children in Kentucky who are at risk of confinement in adult jails and lockups or who as status offenders or non-offenders are at risk of confinement in secure facilities with delinquent offenders. The action assumes that every child in the state is subject to these practices. The number of class members is estimated at more than 1,096,000 persons.

The suit, which involves two distinct legal theories, alleges that in addition to 8th and 14th Amendment violations, the practices create a cause of action under the Juvenile Justice and Delinquency Prevention Act.

Legal Aid attorney, Kelly Miller, hopes to obtain a declaration from the federal court that children in Kentucky cannot be held in any adult facility regardless of the fact that they are separated "by sight and sound from adult prisoners." (The currently practice permitted by the Juvenile Code). In addition, she wants a ruling that non-delinquent offenders cannot be held in any type of locked facility or "mixed in" with delinquent offenders in any institution or facility.

Ultimately, Ms. Miller would like to see all non-delinquent offenders receiving appropriate treatment in community-based facilities in or near their home towns.

Ms. Miller is fairly confident that her request for class certification will be granted. There is currently one named plaintiff for each type of confinement challenged in the suit. However, her office is still interested in receiving information of other children who might qualify as named plaintiffs. In addition, the information she receives through the discovery process may lead to future law suits on related issues.

The Juvenile Justice and Delinquency Protection Act, 42 U.S.C. 601, *et. seq.* was enacted in 1974 in an effort to establish national standards to improve the quality of juvenile justice in the United States. Through various programs, Congress hoped to prevent juvenile delinquency, to divert juveniles from the traditional juvenile justice system and to provide alternatives to the institutionalization of juveniles.

According to Dave Richart, Executive Director of Kentucky Youth Advocates, the Act came about in part due to testimony before congressional hearings about the history of crimes and abuses committed against children who were incarcerated in Kentucky jails in the sixties and seventies.

The Act establishes a formula grant program through which state and local governments can receive funds for programs related to juvenile justice and delinquency. In return for the grant money, the participating states are required to comply with the standards and practices set forth in the Act.

These requirements include a strict mandate that no child be incarcerated in an adult jail or lockup and that non-delinquent children should not be placed in secure detention facilities or secure correctional facilities. The only sanction provided for non-compliance with these requirements is the suspension of the grant money. However, an Illinois lawsuit, *Hendrickson v. Griggs*, which is currently on appeal from the Southern District of Illinois, held that the Act creates a cause of action meriting injunctive relief.

Only two states, Kentucky and Wisconsin, are not in compliance with the Act. Kentucky has been routinely denied funds for its non-compliance and then granted an exemption on an "emergency basis." This year however, the governor's office has been informed that no exemption will be available. Given Kentucky's habitual non-compliance, Mr. Richart feels that a federal court injunction is the only way Kentucky will comply with the federal requirements.

According to Richart, the harm involved in incarcerating children in adult facilities involves far more than the stigma involved or the possibility of exposure to criminality. Children in jail require and are entitled to services that adult are not. None of the adult facilities are currently providing these level of services, required by federal regulation, Richart says. These services include a full-time nurse, full-time recreational and activity director and a full-time educational staff.

"It's good for kids to be active and fully occupied." Richart says. "In addition, it's better for the physical structure of the building. Children are not capable of sitting still for long. Kids in jail and lockup usually have the option of watching television or reading the bible. As a result, they are restless and inclined to tear up the building."

Only two facilities, the detention centers in Jefferson and Fayette counties, are currently in compliance with the federal regulations. Both of these facilities are chronically overcrowded.

The other type of harm alleged in the suit, incarcerating non-delinquent offenders in secure or locked facilities is wrong "because status offenders have family or emotional problems," Richart says. "They don't need to be locked up. They need to be helped."

According to Richart, family based problems cause children to mistrust authority figures. Their treatment often involves teaching them to trust adults. Locking them up only undermines their recovery and rehabilitation.

As for "mixing" non-delinquent with delinquents, Richart says, the harm is obvious. It exposes them to criminal behavior and individuals who are usually older and more sophisticated.

Richart is concerned because the philosophy which traditionally governs the juvenile justice system, that the system should act in the best interest of the child, is being undermined by the current popular outcry for punishment and victim's rights. He sees the suit as a means to educate public officials about the liability they can incur when they incarcerate children. The Act can serve as the standard for determining the liability of state and local officials when harm occurs.

NOTE: Anyone with information about children who may qualify as named plaintiffs can contact Kelly Miller, Legal Aid Society, Inc., 425 W. Mohammed Ali Boulevard, Louisville, Kentucky 40202, (502) 584-1254. The confidentiality of the individual children will be respected.

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EVIDENCE IN CRIMINAL LAW CASES

Mark it down. On January 1, 1992, according to the timetable proposed by the Kentucky Bar Association Evidence Rules Committee, a Kentucky version of the Federal Rules of Evidence will go into effect. At the 1989 KBA Convention in Louisville, the Committee members made a report to the Bar in which they stated that they intended to submit their rules proposals to the Supreme Court in July, 1989, to be followed by consideration by the Court, submission for comment by the bench and Bar, and enactment of enabling and supplementary legislation by the 1990 General Assembly. Although there is still a period of time before the date on which the rules will go into effect a number of important steps are going to be taken within the next 6 to 12 months. Obviously, a new evidence code is going to make a major change in the way criminal cases are prepared, tried and appealed. We as lawyers have to be ready to use these new rules to maximum advantage. In part, the imminent change of evidence law explains the appearance of this evidence column as a regular feature of *The Advocate*. Over the next few years, I hope to be able to review the major features of the new Evidence Code to allow public advocates and others an opportunity to see what the law will be, how it might affect criminal cases, what problems might arise, and what alternatives might be proposed before enactment to prevent these problems.

The new Evidence Code will not be the only topic covered in this column. A number of lawyers have commented over the past few years that *The Advocate* should have a regular feature dealing with evidence, one that tells advocates about new evidence cases decided in Kentucky and federal courts and one that deals with specific evidentiary problems encountered by the trial bar. This column will, I hope, give proper attention to each of these purposes set out above and most likely will deal with one or all of them in each issue. Of course any suggestions for topics or solutions to evidentiary problems will be most welcome and, like as not, will end up being considered in upcoming issues of *The Advocate*.

In this issue, there are two topics to cover. First there is an outline of the proposed Kentucky Evidence Code to provide some information about the general goals and purposes of the Committee and some of their more interesting proposals. The second topic has to do with the admissibility of exculpatory or inculpatory

Drawing by Kevin Fitzgerald

out-of-court statements against penal interest. This is the only Federal Rule of Evidence adopted by the Kentucky courts and it is interesting to examine how the Supreme Court of Kentucky has dealt with it since adoption in 1978.

RULES COMMITTEE REPORT

At the KBA Convention on June 8, 1989, Robert Lawson, Chair of the Committee to adapt the Federal Rules of Evidence in Kentucky and a number of the Committee members gave a report concerning the proposed Rules of Evidence that they intended to submit to the Court in July, 1989. According to Lawson, the Committee has tried to eliminate almost every evidentiary statute and to achieve that end they have included in the proposed codes all the evidentiary privileges that they think are important. The Committee has also prepared a written commentary which they hope will be approved by the Supreme Court so that it can be used like the commentary to the Penal Code or the Uniform Commercial Code. The Committee also hopes to have the Supreme Court establish a permanent review committee for the rules so that changes can be suggested and reviewed by this committee on a structured basis. The Committee intends for the rules to be applicable in all courts of the Commonwealth, but not applicable in determinations of admissibility of evidence, grand juries, preliminary hearings, small claims court, final sentencing, probation hearings, bail proceedings, or contempt hearings.

The proposed evidence code will follow the structure of the Federal Rules of Evidence. One of the striking changes will be on preservation of trial objections. Presently, under RCr 9.22 an issue is preserved by a general objection. A lawyer need state grounds only if the trial judge requires them. Under the new code, this will change and each time an objection is made the lawyer must state the grounds or the issue will not be preserved. The Committee also intends to encourage motions in limine to preserve error and to discourage interruptions that occur when a lawyer who has already lost an objection stands up again to protect the record.

As to preliminary findings of fact necessary for the determination of admission or exclusion of evidence, the Committee has decided to follow the approach set out in *Bourjaily v. U.S.*, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987). That approach provides that in making preliminary determinations of fact a judge may consider anything and everything, except where that evidence is not admissible on the ground of privilege. In theory, at least, this is a major change from present practice.

With regards to presumptions, the Committee followed what they called the "bursting bubble" approach which describes presumptions that only excuse

production of evidence. According to the Committee, once the defendant introduces any evidence of substance on the matter, the presumptive bubble bursts and the Commonwealth will have the duty to go forward and persuade. The Committee has made exception for certain unspecified statutory "overrides" which apparently they feel are necessary.

One major and welcome change is in the area of character evidence. The new code proposes to do away with proof of character by means of reputation. The Committee has followed the federal rules to allow introduction of opinion evidence concerning a person's reputation. One significant addition is a provision that allows the Commonwealth to introduce opinion evidence concerning the peaceful character of a deceased person in any homicide proceeding. The Committee also makes explicit provision for admissibility of habit evidence, something that they felt may or may not already be the law of Kentucky. The rape shield law currently found in Chapter 510 of the Penal Code would be transferred to the Evidence Code and certain changes made, although the Committee did not say exactly what changes would be made.

The Committee proposes to put every privilege of any importance into this code. Privileges will exclude certain matters like the statutory duty of CHR to keep all records and information confidential. However, attorney-client privilege is kept largely intact. The husband-wife privilege is changed to eliminate the "confidential communication" and retain only the spouse's exemption from requirement to testify. In place of the numerous statutory provisions covering physicians, counselors and others the Committee has proposed a single counselor-client privilege which would cover all these different statutes. There are important limitations on this consolidated privilege. If a party injects mental, emotional or physical condition into the case and thereby makes testimony that would otherwise be privileged necessary and relevant the trial court is authorized to admit such testimony into evidence. A second and more dangerous exception authorizes the trial judge to introduce otherwise privileged testimony if the need for it in a particular case outweighs the claim of confidentiality.

As to impeachment, the rules prohibit bolstering a witness before attack. The attack on the witness would be allowed by means of opinion evidence and cross-examination concerning specific bad acts reflecting on truthfulness. The *Richardson* limitation would be eliminated in criminal cases because impeachment would be allowed by means of any felony and by misdemeanors based on dishonesty or false statement. The Commonwealth would not be allowed to identify any of these prior crimes unless the defendant denies them. The defendant is allowed, if it is in his interest, to identify the nature of the prior crimes before the jury. The Committee followed the federal rule and put a 10 year limit on prior convictions unless the judge finds some particular relevance in the prior conviction. A defendant who is currently appealing a prior conviction could, under the new rules, be impeached with that prior conviction. The Committee has decided to do away with the appellate exemption for impeachment.

The final main point of the new code has to do with opinion testimony. The Committee proposes to eliminate the "ultimate fact" rule as well as the distinction between the examining and the treating physician in the use of medical history. When an expert uses hearsay as a basis for his opinion he will no longer have to use the phrase "customarily rely" in order to testify. Rather, under the new rules, the basis for admission is whether any expert would reasonably rely on this hearsay information.

It is not possible now to give more than a thumbnail sketch of what the Evidence Committee has proposed. As soon as the actual proposal is released the important provisions will be examined in this column.

STATEMENTS AGAINST PENAL INTEREST

The good news about the penal interest exception to the hearsay rule is that this rule or something similar to it is probably required by the U.S. Supreme Court case of *Chambers v. Mississippi*, 410 U.S. 284 (1973). This was the reasoning behind the Kentucky Supreme Court's adoption of the rule in *Crawley v. Commonwealth*, Ky., 568 S.W.2d 927 (1978). The other good news is that the question has its own key number, Criminal Law 417(15) and anytime you need to find cases on the issue you can simply turn to this heading. The bad news is that the Supreme Court of Kentucky apparently regrets having adopted the rule. In *Dodson v. Commonwealth*, Ky., 753 S.W.2d 548 (1988) the Supreme Court noted in an opinion that adoption of Federal Rule 804(b)(3) was not necessary to the decision in *Crawley* but that since no one in that case was questioning the application of the rule, it would decide the case on the basis of the rule. [753 S.W.2d at 549]. Review of other cases decided since *Crawley* shows that the Supreme Court intends to give the rule a very limited application. However, when your client's defense is that another person did it, and you have come across an out-of-court statement by the person you claim did it, it is necessary to know how to get this important information before the jury. Review of a few cases show how this can be done.

It is important first to constitutionalize your argument. In *State v. Koedatich*, 548 A.2d 939, 976 (N.J., 1988), the Supreme Court of New Jersey collected a number of federal and state court cases which have interpreted the constitutional holding in *Chambers v. Mississippi* as requiring courts to allow a defendant to prove his innocence by showing that someone else committed the crime for which he is charged. Therefore, you may fairly argue that your client's right to prove that someone else committed the crime is part of the right to present a complete defense under the Due Process Clause of the 14th Amendment and the 6th Amendment of the U.S. Constitution. [*Crane v. Kentucky*, 476 U.S. 683 (1986)]. Your client also has rights under Sections 7 and 11 of the Constitution of Kentucky to present a defense that someone else did the crime. The only limitation that the constitutional rights to present a complete defense would allow are limitations as to relevancy and failure to lay an adequate foundation. Ideally, the statement to be introduced will be the declarant's out-of-court statement in which she admits committing the crime charged and admits that your client had nothing to do with it. In *Chambers*, the declarant gave a written statement admitting that he had shot a police officer. Under the facts of that case, where there was only one shooter and the only issue was the shooter's identity, the exculpatory nature of the statement was obvious. [410 U. S. at 287-288]. However, the long standing federal constitutional rule is that states may still exclude evidence by reason of state evidentiary rules as long as those rules "serve the interest of fairness and reliability." [*Crane*, 476 U.S. at 690]. Thus, if the statement you want to introduce is less obviously exculpatory (*e.g.* "Yeah, defendant was there but I actually did the robbery" where there is an allegation of complicity), the state court may sometimes legitimately exclude the statement. Where the declarant's penal interest is not at stake, courts may exclude the statement. [*e.g. United States v. Albert*, 773 F.2d 386, 390 (1st Cir. 1985), declarant's statement at sentencing; *U.S. v. Evans*, 635 F.2d 1124 (4th Cir., 1980), declarant's admission of guilt to crime charged actually is a defense to a more

serious charge]. Obviously, statements exculpating the defendant made by a co-defendant already convicted and serving time on the charge are viewed with great suspicion. [*Carwile v. Commonwealth*, Ky.App., 694 S.W.2d 469 (1985)]. Although this type of statement is generally dispatched by a ruling of untrustworthiness, some courts have ruled that such a statement is not against penal interest. On the other hand, a statement that does not completely exonerate a defendant but which might reduce the degree of the offense or punishment, should be classified as an exculpatory statement against penal interest. [*State v. Gold*, 431 A.2d 501, 508 (Conn., 1980)]. If your proffered statement is arguably exculpatory, you should argue to the court that the jury should make the ultimate determination of its effect.

There are two critical foundation requirements in Rule 804. The first is the requirement of unavailability. In *United States v. Inadi*, 475 U.S. 387 (1986) the U.S. Supreme Court noted that the unavailable witness requirement is imposed because of a preference for obtaining the stronger and better version of the testimony, in-court, *viva voce* testimony, when at all possible. In *Crawley* the Kentucky Supreme Court adopted Rule 804(a) along with 804(b)(3). [568 S.W.2d at 931]. Of the unavailability provisions, the ones most likely to be encountered in criminal practice are the co-defendant taking the 5th Amendment, the co-defendant refusing to talk despite orders of the court, and death or disappearance of witnesses. The Supreme Court of Kentucky has only dealt with the witness who cannot be located. In *Morgan v. Commonwealth*, Ky., 730 S.W.2d 935, 939 (1987) the court noted that if a party wishes to introduce testimony from a witness who is unavailable because he cannot be located, the party at a minimum has to issue a subpoena to compel attendance of the witness. The other provisions of Rule 804(a) must be interpreted in light of the policy statement set out in *Inadi*. There usually is no problem in showing unavailability when the declarant asserts the 5th Amendment or simply refuses to talk, even when ordered to or held in contempt. The only important thing to remember is that the Rule requires a specific ruling by the trial judge. You must produce the declarant and ask questions that show the futility of trying to put him on the witness stand.

The court in *Crawley* found it necessary to adopt Rule 804(b)(3) to add to the already existing common law exception to the hearsay rule governing pecuniary interests. [*Fisher v. Duckworth*, Ky., 738 S.W.2d 810, 815 (1987)]. In *Dodson v. Commonwealth*, Ky., 753 S.W.2d 548 (1988) the Supreme Court considered that portion of 804(b)(3) that provided for inculpatory statements, that is, out-of-court statements introduced to inculpate the defendant. In this case the court held that, like an exculpatory statement, the inculpatory statement is not admissible unless there are corroborating circumstances which clearly indicate its trustworthiness. [753 S.W.2d at 549].

The published cases in Kentucky so far do not provide much guidance on how to show the trustworthiness of the statement, the second critical foundation requirement. However, there are a number of good cases decided in the federal circuit courts and in state courts, among them being *Commonwealth v. Drew*, 489 N.E.2d 1233 (Mass., 1986), and *United States v. Atkins*, 558 F.2d 133 (3rd Cir. 1977). A more restrictive line of cases arose from the cases of *United States v. Alvarez*, 584 F.2d 694,701(5th Cir.,1978) and *United States v. Bagley*, 537 F.2d 162 (5th Cir. 1976). Jurisdictions following this second line of cases allow the judge to exclude evidence if he is not convinced that the statement was made or that the in-court witness is credible. This differs markedly from the first rule which merely requires the trial judge to make an initial determination that it is reasonably likely that the statement was made. The purpose of the trustworthiness requirement is to guard against fabrication of evidence. The original justification for the exception, that a reasonable person would not falsely admit the commission of a crime, was not considered to be sufficient in criminal cases. In some states very little corroboration is required. [*State v. Anderson*, 416 N.W.2d 276 (Wis., 1987]. However, most jurisdictions have followed the federal rule language which requires proof of circumstances clearly indicating the trustworthiness of the statement. The trouble with the language is that the courts cannot agree on "exactly what needs to be corroborated." [*United States v. Salvador*, 820 F.2d 558, 561 (2nd. Cir. 1987]. A careful reading of *Atkins, Drew, Alvarez* and *Bagley* however leads to the conclusion that the proponent of an against penal interest statement had better be able to show (1) that a reasonable person would have realized that his statement might get him into trouble with the law, (2) that the declarant had no reason to tell a lie to help the defendant, (3) that there is some evidence in the case that will support a belief that the declarant might have committed the crime, (4) that the witness testifying about the statement could have heard it from the declarant, and (5) that the in-court witness has not been put up to giving false testimony by the defendant. These 5 points represent what both "lenient" and "strict" courts have required in the past. Until the Kentucky and United States Supreme Courts have an opportunity to rule on this question of corroboration a lawyer must be prepared to argue both lines of cases.

Because the Kentucky Supreme Court has voiced some doubt about using the federal rule, in each case the safest course is to combine the rule argument with an argument under *Chambers v. Mississippi*. That argument is set out in *Crawley v. Commonwealth*, Ky., 568 S.W.2d 927 (1978). In *Crawley* the Court set out a 4 factor *Chambers* test that examines (1) when the statement was made and the person to whom it was made, (2) the corroborating evidence, (3) the extent to which the statement is really against penal interest and (4) the declarant's availability as a witness. [568 S.W.2d at 931]. Although this analysis does not differ to any great extent from Rule 804 analysis [see *United States v. Stratton*, 779 F.2d 820, 828 (2nd. Cir. 1985)], you should take pains to make clear to the Court that you are presenting both a *Chambers* argument and a Rule 804(b)(3) argument.

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COMPUTER INTEGRATED COURTROOMS

Courtroom of the Future is Present in Danville

Stephen M. Shewmaker

What is the courtroom of the future in Kentucky? Court Reporter? Video? Computer Integrated Courtroom? Traditionally, in Kentucky the circuit court proceedings were recorded by a "Court reporter." This individual ranged in skill level from the judge's former secretary to a stenographically trained court reporter.

Circuit courts in Kentucky range from a multi-judge single county circuit such as Louisville, with 16 sitting judges, to one-judge four-county circuits (Adair, Casey, Cumberland and Monroe Counties of the 29th Judicial Circuit). The case load per judge varies from as few as 500 cases to as many as 1200 cases. There also exists a diversity in time allocation for circuit judges. The circuit judge in a multi-county circuit has significantly greater road time than judges in a single county circuit. For example, the 29th Circuit stretches 120 miles from one end to the other. Also inherently different are the administrative responsibilities to coordinate multiple circuit clerks scheduling motion days and domestic days and trial dates for all counties in the circuit. In the multi-judge circuit, one judge handles most administrative duties freeing the other judges to concentrate on their judicial functions.

Other differences affecting the work of the circuit court includes various socioeconomic differences. Some rural counties' caseloads may include serious crimes but few complicated medical malpractice cases. The urban areas and industrially developed areas' caseloads would reflect different demands on the court and courtroom.

These differences, and many others, affect the needs of circuit courts. Judges have varying degrees of satisfaction with the basic court reporter system. It is difficult to recruit stenographically trained and certified court reporters to the State of Kentucky. Our entry level salaries are $11,055. Court reporters in nearby states earn approximately $30,000 more per year. Consequently, most courts in Kentucky have used court reporters who use shorthand and cassette tapes as backup. These reporters have had little, if any, training. When transcripts must be prepared, a significant time lag is often encountered as the court reporter attempts to fulfill her in-court duties, type transcripts, and have some semblance of private life.

In response to this situation, the Administrative Office of the Courts has adopted the solution of video tape recorders for circuit courtrooms. The start up cost per courtroom is approximately $50,000. The court reporter position is eliminated saving that salary. Usually a judge with video taped proceedings is then provided a law clerk. The salaries and benefits of the law clerk are similar to that of a court reporter. When court is opened in the video courtroom the judge and/or other court personnel places the video cassette tape into the VCR, turns it on, and court proceedings begin. Voice activated microphones are installed in the courtroom to record the proceedings. The camera shifts to focus on the position designated for each microphone as the sounds in that microphone indicate use. A microphone is placed on the judge's bench, the witness chair and each of the parties' tables. If the speaker moves about the courtroom the voice may be heard to fade and/or possibly disappear then reappear as another microphone is

VIDEOTAPE OMISSION REQUIRES NEW TRIAL

On June 23, 1989 the *Lexington Herald* reported that a new trial was granted by Circuit Judge Rebecca Overstreet to a criminal defendant because the defendant's testimony was not recorded by the Fayette County courtroom video system due to a clerical error.

"Prosecutors had opposed Clay's motion for a new trial. They contended that Clay would not be hurt by the omission because a 'narrative' of his testimony had been constructed. This is the first time in Fayette County that a case has been overturned because of problems in the video system.

"Clay, 36 stood trial April 26 in Overstreet's circuit court in the slaying of Martha Sloan, his live-in girlfriend of 11 years. Ms. Sloan, 40, died February 5 of a gunshot wound to the chest after a domestic dispute with Clay.

"During Clay's trial, the video-tape on which the proceedings were being recorded ran out and went unnoticed by any of the court personnel. The tape ran out while Clay was on the witness stand being questioned by his attorney, Larry Roberts.

"Only part of Clay's direct examination by Roberts was recorded and none of his cross-examination by prosecutors was recorded.

"After the trial, Roberts filed a motion for a new trial, claiming that because Clay's testimony was not recorded, he would be denied his constitutional right to an effective appeal. Clay was the only witness for the defense and the only eyewitness to the shooting.

"Using his own memory and notes made by prosecutors in the case, Roberts composed a 'narrative' statement of Clay's testimony and submitted it to Overstreet. However, Roberts said the narrative was insufficient to protect his client's rights on appeal. Overstreet agreed.

"The narrative does not represent the equivalent of a transcript or a videotape of the proceedings and does not constitute a record of sufficient completeness for appellate consideration," she wrote in a June 15 ruling setting aside the conviction and granting the new trial.

triggered. If one is speaking and at a different station a person shifts papers or makes any significant noise, the camera may shift and focus on an inappropriate location. These are shortcomings which as technology increases may be remedied.

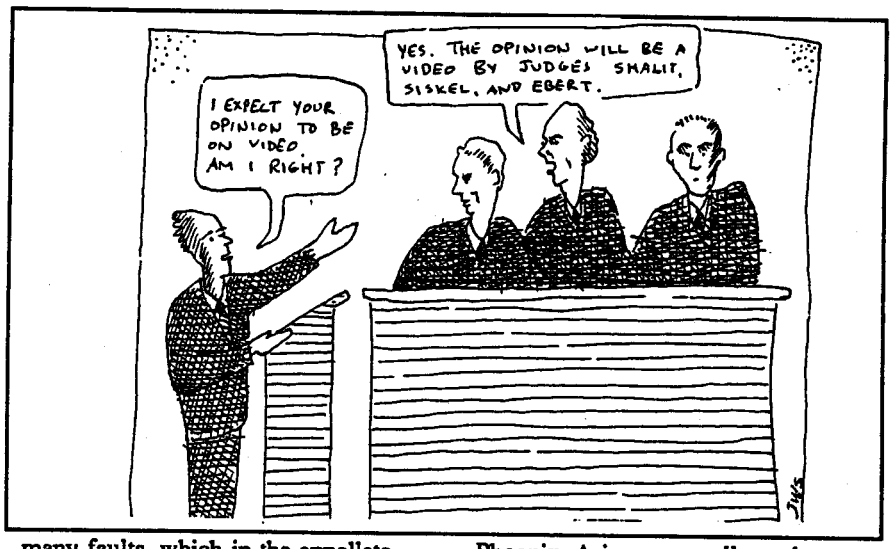
As the proceedings are recorded, the clerk keeps a record of frame numbers for the beginning of direct and cross-examination of each witness. This allows anyone reviewing that tape to have some point of reference to begin their search. Often these frame references are close but not totally accurate.

Video tape has other weaknesses for purposes of review and appeal. In discussions with trial attorneys who have experienced appeals from video, these limitations become more obvious. Attorneys with loud voices in the courtroom, such as John Famularo, have discovered that some records lose his voice and become unintelligible if he moves about the courtroom. This limitation raises serious questions as to the effectiveness of an appeal if the record does not accurately reflect the entire proceedings. The United States Court of Appeals for the Sixth Circuit in *Dorsey v. Parke*, 872 F.2d 163(6th Cir. 1989) experienced an appeal from a video tape recorded trial. The opinion states:

> *The record is replete with difficulties, not the least of which being its presentation as a videotape. First, the videotape is marginally audible at times, particularly when the trial judge and the attorneys whispered their sidebar conferences and whenever two or more participants spoke at once. Second, we are not equipped to produce efficiently the written transcription on which careful review must be founded. Finally, the parties did not have our transcription—indeed, they seemed not to have any transcription—rendering oral argument about the events of the trial an exercise in futility. Though we note that Kentucky's experiment in videotaping trials is receiving praise in the press. "Court Reporters on Way Out?: Courts Experiment with Audio-Video Machines," ABA Journal 28 (Feb. 1989), we wish to call attention to the acute difficulties this innovation presents to courts attempting to fulfill their function of judicial review.*

Their experience with and opinion of video tape trials is shared by a number of the Kentucky Appeals judges according to Judge Charles B. Lester. He states:

> I am still of the view that video is absolutely useless on appeal and has many faults, which in the appellate processes cannot be corrected. As an example, it is not our function to view the witnesses and their demeanor as that is the purpose of the trial judge while ours is to review a "cold" record. You may rest assured that contrary to what two of our colleagues may be saying in their travels to many states that the Kentucky Judiciary is not solidly behind video taping. Again, I must emphasize that we are slowly learning that the man hours involved have not been considered when the advocates of the system pointed how much cheaper it may be.



In fact Franklin County, Ohio tried video tape records in 1973 through 1975. In 1975 the Court of Appeals requested the video appeals be eliminated according to Judge John W. McCormac

> . . . because of the additional costs to attorneys and the fact the record could better be reviewed on appeal by the traditional written transcript.

Attorneys have also discovered that preparing an appeal takes approximately four to five times as long from the video tape as it does from a typed transcript. Searching a video tape takes more time then scanning a typed record. Some law offices have discovered it saves their clients money in the long run to have a typed transcript made of the video taped record. Those offices then work from the typed transcript in preparation for appeal.

In the 50th Judicial Circuit, comprised of Boyle and Mercer Counties a relatively new approach is being tested. The Kentucky Shorthand Reporters Association has provided funding for at least one-year and probably a three year test of a computer integrated courtroom. This system has been used in federal courts in Phoenix, Arizona as well as other court systems across the United States. In the courtroom, the system is comprised of separate monitors and keyboards for plaintiff, defendant, and judge. Additionally there is a monitor for the court reporter and witness. This circuit has for its court reporter, Sandy Cornwell Wilder. She has earned a Certificate of Merit, the highest level of proficiency a court reporter can attain. Her stenographic machine is attached directly to the computer bank which is in a small room off of the courtroom. The entire system is portable and will be used in both courthouses.

The system relies on the court reporter's dictionary immediately translating the information typed through his/her stenographic machine. As the court reporter's dictionary expands, the transcript should be 90 to 95% accurate. There may be certain "nontranslates" which appear on the screen. These quite often are new proper names or technical terms that may come up for the first time in that specific trial.

As the witness on the stand testifies the realtime translation permits the court and lawyers to have a video display of the testimony. As the court reporter records the testimony, it appears on the screen within four to five seconds. This process virtually eliminates all readbacks. So long as the court reporter hears the question then all parties and the court have it whether or not for some reason any of us missed it. If the witness has a low voice that does not carry well but the court reporter and jury can hear it, then the lawyers and judges and parties can check it on the screen.

Those of you who are in the courtroom often can appreciate a situation the judge often faces during a trial. The judge is making a note, reading a memorandum

of law or cases cited to the court, and their attention is diverted from the testimony. The fact of the matter may be that we miss a question just posed and hear only "Objection!" Since the judge may not have heard the question, let alone have any clear basis upon which to make a ruling, the judge previously may have asked you to restate the question or have the court reporter read it back. Now the judge can turn to the monitor, read the question and make a ruling. While on any given objection that might not be significant, it is as the trial unfolds day after day or weeks after weeks and the court is called upon to make an infinite number of rulings. The ability to have the precise formulation of the question before the court on the occasions when you need to refer back to it to make a ruling is going to enhance the quality of the ruling.

This is also a wonderful tool for bench conferences. A criminal defendant has a right to be present at all portions of a criminal trial unless there are purely matters of law that are going to be discussed. For example, a juror during voir dire wants to approach the bench to discuss a matter. When the juror comes forward the attorneys can join the court for the bench conference and the defendant, if agreeable to the attorneys, may remain at the table and review the side conference from the screen. In addition, in all cases at bench conferences second chairs and/or paralegals may review those conversations from the table as well.

This realtime translation is also valuable in the event of a hearing impaired defendant, witness or juror. We are proud to have the Kentucky School for the Deaf in Danville. Consequently we have a significant deaf population. In the past we have relied upon interpreters to translate for those individuals involved in the system. Now those individuals will be able to review the typed testimony as it unfolds. An interpreter will be provided to clarify any concerns or problems, but a great deal of time will be saved and a clearer understanding had by all involved.

Attorneys find the system helpful as well. You may ask a question and after the response be unsure of the answer. You may turn to the monitor to verify the answer. If it is helpful you may ask it to be repeated, but if harmful, ignore it and go on.

In addition to realtime, this system has various other functions. All depositions taken in the action may be integrated into the computer bank on floppy disk. The attorneys and court may access them for review, trial preparation, and/or use during trial. The computer is capable of accessing legal research capabilities such as Lexis and/or Westlaw.

The computer has an infinite number of ways to search the record. The record includes all depositions integrated into the computer prior to trial as well as all testimony up to the point in trial one wishes to search the record. These functions allow attorneys to do their cross-examination from earlier depositions in the system by recalling them to their screen. This would replace the coded marking of typed transcribed depositions. Particularly effective in the impeachment process is to have the witness refer to his screen and make that witness read back the question and answer that is in direct opposition to the testimony given from the stand that day.

This system also allows pre-trial programming by the court or parties. Certain key words may be highlighted and documented by the computer for quick recall and reference by the user. Also combinations of words may be searched and identified. During the realtime translation a user may make notes in the transcript for later use or reference or for cross-examination purposes. This frees judges and lawyers from making notes all during the trial as notes can be made contemporaneously on the realtime transcript on the computer. The process takes only a few seconds.

The individual user's notes and comments are available only to that user and not to the opposition or the court. Your use of the computer during trial whether watching realtime translation, making notes, or searching the record, is not known by the others in the courtroom. You may also obtain a transcript from the court reporter with your notes reflected therein.

Anyone who so desires, may have an immediate transcript of the court proceedings or any portion thereof. You

COURT ORDERS CAPITAL DEFENDANT BE PROVIDED COPY OF VIDEO RECORD AND VIEWING EQUIPMENT

On June 7, 1989 United States District Court Judge Thomas A. Ballantine, Jr. ordered the Corrections Cabinet to provide Lafonda Fay Foster, a capital defendant appealing her conviction and sentence, a videotape of her capital trial record and the equipment to view it.

As we have noted, AOC as a matter of course furnishes written transcripts to inmates under a death sentence. Plaintiff argues that depriving her of a written transcript is a deprivation of equal protection and we agree that failing to furnish a transcript at all would be a denial of equal protection.

Because of the novelty of the issue, the Court has found no authority addressing the question whether great and immediate irreparable injury will result if counsel is forced to prepare a brief from the videotape transcript. The Court's experience with videotape transcripts is limited to a few habeas corpus petitions in which the Court had to review the videotapes. Although the Court finds the procedure unsatisfactory, burdensome, and unduly time-consuming, it is not this Court's function to challenge the wisdom of the Supreme Court of Kentucky in adopting the procedure.

Since the Court will order plaintiff returned to Kentucky during the pendency of her appeal, we find that it will do no violence to Younger to order AOC to furnish plaintiff with the videotape transcript and the necessary equipment to review the videotapes. Id. at 13-14.

Computer Tracks Trials

Circuit Judge Stephen Shewmaker's courtroom is the first in Kentucky to use computers. The system was bought and donated by the KY Shorthand Reporters Association as a test project to "show how computers have taken our courts into the 21st century," according to the President, Laura Kogut.

The organization is encouraging other Kentucky courts to try the computer system before replacing court reporters with video. Advocates of the videotape systems used in 22 Kentucky courts, say they are less expensive for the courts, but Ms. Kogut said video creates an unfair judicial system because of the cost of appeals. Attorneys are paid by the hour to watch videotapes of trials and the fact that some courts will not accept an appeal without a written record.

Kentucky is one of 7 states with the system. It is already in use in Chicago, Detroit, Phoenix, Dallas, San Francisco and Vancouver, Washington.

--Lexington Herald-Leader

may obtain that transcript either in its "dirty" form, with the nontranslates, or a "clean" transcript which would require the court reporter to correct the nontranslates. This could be obtained at lunch, or at the end of the day. The transcript may be obtained in a printed format or on floppy disk for use on the parties' own computer.

This function is especially useful in a lengthy trial where experts have been retained by both parties. As the defendant, you may obtain the actual testimony of the plaintiff's expert to provide for review by your expert prior to his/her testimony. This eliminates the reliance on the attorney's notes taken during trial and provides an actual and accurate foundation for expert testimony on the issues.

Where there are multiple parties in the case, questions and answers need not be duplicated. You as the attorney may review the testimony and previous cross-examination and determine that questions have already been asked and answered and you need not repeat them. This systems also allows for quick research and retrieval of information to be used as the basis for motions made during trial and cross-examination and impeachment.

There are other significant uses of this system. The storage of transcribed testimony may be on floppy disk, hard drive, or on a tape that stores 14,000 pages on an individual tape. This saves space. The system provides a backup if any one mode of storage for some reason is harmed or disabled. The court reporter's stenographic machine will work even without electricity, videos won't. In the event of a power failure the court may continue even though the computer functions may not be available to the parties in court.

Parties may purchase all or a portion of the record. Certain experts are seen quite often by both plaintiff and defendant. A copy of just their testimony may be acquired in floppy disk or transcribed form and used in other litigation for cross-examination or preparation.

Of interest to those practicing attorneys without previous computer experience is: "What training is necessary to work this system?" I can only speak from my experience. I had no previous knowledge of computers except a limited understanding of their capabilities. In less than one hour I understood the functions of the computer and could operate it. At all times at the bottom of the computer screen is a cursor line that provides relatively clear instructions. One need only to refer that cursor, and push the appropriate key and "enter" button key to access the function desired. Certainly typing skills are of some advantage as the keyboard is set up as typewriter with function keys. Typing skills are not necessary for its use. The notes used in the transcript and/or words to be searched and identified may be typed rapidly even by the two-finger approach. My office will cooperate in every way to provide time for training. Preprogramming the computer is available to you if you so desire.

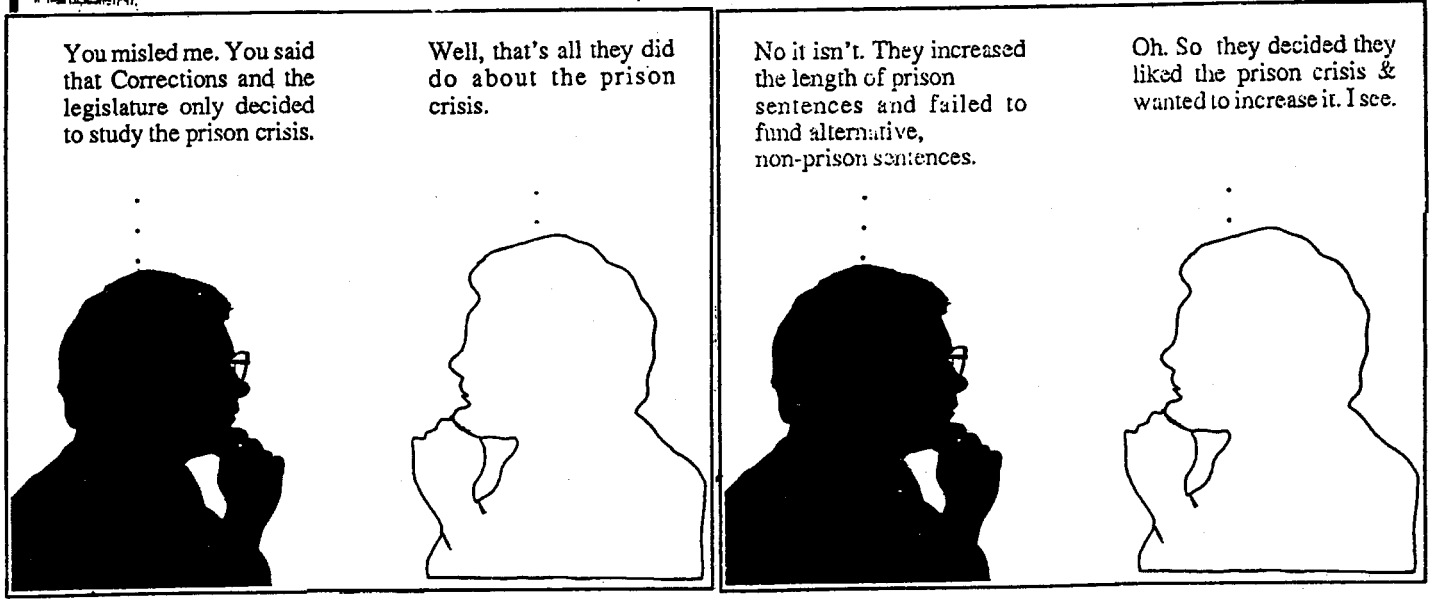
What is the courtroom of the future? I do not pretend to have the answer. Due to the diverse demands and needs of the circuit court systems in Kentucky what may work in Fulton County may not be appropriate for Pike County. What may work in Jefferson County may not work in Clinton County. As the court of original jurisdiction and a court of record, it is our inherent responsibility to provide an accurate, usable, and functional record for the parties and the attorneys involved in the court system. That record historically has been for the Court of Appeals. But in today's more complex litigation, the use of the record in pre-trial motions, trial motions and post-trial motions has increased the demands on the record.

I encourage all of you to take an opportunity to observe this system at work. You, the consumer, should evaluate, compare and determine its value and appropriateness for use in your system of justice. It is obvious the demands on the court system itself are increasing and the complexity of the practice of law puts equally increasing demands upon attorneys. We need to work together to insure our system of justice continues to be the best in the world by responding to the needs and demands of all involved.

STEPHEN M. SHEWMAKER
Circuit Judge
50th Judicial Circuit
Boyle /Mercer Counties

Crime Pays

by Edward C. Monahan



ACCELERATING *PRO BONO* EFFORTS

The American legal profession, despite popular conceptions to the contrary, has and continues to respond to the need for improving the system for delivering civil legal services to the poor. As reviewed by American Bar Association President Stanley Chauvin in an article appearing in the June, 1989 edition of *The Advocate*, the organized bar under the leadership of the ABA has consistently and forcefully urged the U.S. Congress to adequately fund civil legal services programs. Understanding that statements of support are not enough, individual lawyers and law firms have increasingly accepted the obligation of providing *pro bono* services to help close the gap between the number of legal problems of the poor and the constraints under which federally funded legal services programs operate, most notably a lack of sufficient resources.

PRO BONO ACTIVATION: THE ROLE OF THE ABA

The ABA has supplemented its support for legal services by fostering the development of local *pro bono* programs. In 1971, the ABA Section of Individual Rights and Responsibilities, under a grant from the Ford Foundation, initiated its Project to Assist Interested Law Firms in *Pro Bono Publico* Programs. The Project collected, compiled and distributed information to the bar about the efforts of law firms engaged in *pro bono* work. The Project also consulted with firms interested in developing *pro bono* programs. After two years of grant funding the Project was terminated and replaced by the Special Committee on *Pro Bono Publico* Activities which was charged with assisting not only law firm *pro bono* development, but also state and local bar associations and corporate law departments.

In 1975, the ABA House of Delegates, by resolution, recognized the lawyer's obligation to engage in public services activities and called upon the organized bar to assist lawyers in the fulfillment of the obligation. In 1979, the ABA created the *Pro Bono* Activation Project following a study by the Association's Standing Committee on Legal Aid and Indigent Defendants and the Special Committee on Public Interest Practice. The Project, funded by the ABA and the Legal Services Corporation, was charged with the task of assisting state and local bar associations establish formal *pro bono* programs. In 1981, the Project was continued with funding from the Pew Memorial Trust. This effort evolved into the Private Bar Involvement Project (PBIP), now sponsored by the ABA Consortium on Legal Services and the Public.

The PBIP provides assistance to state and local bar associations, *pro bono* programs and legal services programs in 4 ways:

(1) *Assistance and consultation.* PBIP's program consultants assist with the activation of new *pro bono* programs and help develop solutions for problems encountered in existing programs. PBIP also administers a mini-grant program designed to assist new *pro bono* efforts and improve existing programs.

(2) *Information clearinghouse.* PBIP maintains a national clearinghouse of materials on topics of importance in the field of private bar involvement.

(3) *Publications and resources.* PBIP distributes the *PBI Bulletin Board*, a monthly newsletter, and the *PBI Exchange*, a quarterly news magazine, to over 4,300 individuals. The Project also distributes Info Packs containing materials on topics of interest to the *pro bono* community. Each year PBIP complies the *Directory of Private Bar Involvement Programs* containing information on over 625 private bar involvement programs nationwide.

(4) *Conferences.* PBIP and the ABA Standing Committee on Lawyers' Public Service Responsibility sponsor the annual ABA *Pro Bono* Conference. The Conference, first held in 1983, draws more than 400 people annually from throughout the country to discuss issues of common concern and to attend presentations on state-of-the-art techniques in private bar involvement service delivery. Regular features of the Conference include a special training for new *pro bono* coordinators, workshops for bar leaders and a program assistance room containing materials from *pro bono* organizations throughout the country and the latest information from state and national support centers and national advocacy groups. PBIP also works with state groups to design and assist in *pro bono* coordinator training conferences and other presentations.

The most unique and significant service offered by PBIP is program activation and technical assistance. Program consultants provide phone consultations and on-site visits to bar associations and legal services programs to discuss issues including how to:

-determine appropriate delivery structures and methods,
-develop and implement screening, intake and quality control mechanisms,
-promote a program and develop public relations strategies,
-evaluate the effectiveness of existing program operations, and
-make long-range plans for a program.

Prior to an on-site assistance visit, a program consultant will gather information about the program and the environment within which it operates. If necessary, the program consultant will be accompanied on the visit by experienced program managers, consultants or bar association leaders from throughout the country who have expertise in private bar involvement activities. On-site visits range from one to three days, depending on the issues addressed. Visits are followed by a written report which includes observations and recommendations for program improvement. PBIP consultants visit 25 sites each year.

NATIONAL OVERVIEW: CURRENT ISSUES

Through regular contact with *pro bono* programs, PBIP staff becomes familiar with trends and new developments in the

pro bono world. For a variety of reasons, some of which are significant developments themselves, PBIP has witnessed new growth in the number of lawyers participating in *pro bono* organizations.

After the Legal Services Corporation issued its 1981 requirement that all local legal services programs involve private attorneys in the delivery of civil legal services to the poor, there was a dramatic increase in the number of *pro bono* programs and participating lawyers. After several years of continued expansion, the rate of program growth slowed as program geographic coverage increased. Although less than 12% of the current existing private bar involvement programs were created in the past 4 years, lawyer participation has doubled during the same period. PBIP estimates that in 1989 there are more than 120,000 lawyers participating in organized *pro bono* programs. There are several factors which contribute to the increase in lawyer participation.

Legal Needs Studies

Statewide and regional legal need surveys have consistently concluded that despite the best efforts of federally funded civil legal services programs, only 20% of the poor in need of a lawyer to help resolve a legal problem are receiving assistance. For example, statewide studies have recently been completed in Maryland, Massachusetts, New York and Illinois. Maine has announced the initiation of a study. These studies have received national attention, heightening public and professional awareness of the magnitude of the unmet civil legal needs of the poor. Citing these studies, state and local bars have intensified efforts designed to encourage participation in *pro bono* representation. Both the Kentucky and Louisville Bar Associations have recognized the unmet need in their recent efforts to increase *pro bono* efforts. Individual lawyers, understanding their crucial role in the legal system, have increasingly responded to the unmet legal need by joining *pro bono* programs and engaging in other public services activities.

Mandatory *Pro Bono* Proposals

Under ABA policy and the ABA Model Rules of Professional Conduct, the *pro bono* obligation is aspirational in nature. Although 10 states have debated some form of rule or statute that would make *pro bono* service mandatory, none has adopted a mandatory requirement. Several voluntary county bar associations require *pro bono* service as an condition of bar membership. A number of federal district courts have promulgated local rules requiring admitted attorneys to accept assignments in civil matters.

The most comprehensive statewide mandatory proposals have been considered in North Dakota, Maryland, Arizona, Hawaii and New York. After proposing a 60 hour per year mandatory *pro bono* requirement, North Dakota has recently adopted an "opt-out" *pro bono* program for its attorneys. The state bar estimates that 60% of its attorneys will participate. A committee of the highest court in Maryland recommended that all lawyers be obligated to accept at least one civil case annually on behalf of an indigent person. The state bar, however, suggested a plan which was adopted that encourages voluntary participation and reporting of a lawyer's *pro bono* work. Following a study by a bar committee, the Board of Governors of the Arizona State Bar recently approved the concept of mandatory reporting of *pro bono* activities and engaging in a debate on the necessity of mandatory service.

On July 11, 1989, a commission appointed by New York's Chief Judge Sol Wachtler issued a report recommending that lawyers be required to perform at least 20 hours of *pro bono* work per year. The recommendations would allow lawyers in firms of 10 or less to make a financial contribution to a legal services organization of their selection in lieu of representation. Public hearings will be held prior to a final decision on the promulgation of a court rule to implement the recommendations. Judge Wachtler, however, has indicated his support for the concept of mandatory *pro bono*. Both opponents and proponents of mandatory *pro bono* throughout the country will monitor the debate in New York.

Several local voluntary bar associations have adopted a mandatory *pro bono* requirement as a condition of membership. Members of the Orange County Bar Association in Orlando, Florida, either accept 2 family law cases per year or donate $250 to the local legal services program. Tallahassee, Florida bar members accept cases in the areas of family law, child support and landlord/tenant or act as guardian *ad litems*.

A number of courts have adopted programs requiring *pro bono* representation by those admitted before the court. The United States Supreme Court recently dealt with a challenge to a court mandatory appointment program in *Mallard v. District Court for the Southern District of Iowa*, _U.S.__ (May 1, 1989). The Court held that the federal district court judge could not rely on a specific federal statute to compel a lawyer to accept a civil case on behalf of an indigent prisoner. The Supreme Court did not decide if a court has the inherent power to mandatory proposals, but may result in further litigation defining the authority of federal courts to mandate representation.

Faced with the prospect of mandatory *pro bono*, the organized bar's response, as in North Dakota and Maryland, has been to increase efforts directed at recruiting lawyers for voluntary *pro bono* programs. It may be anticipated that as the debate on the need for mandatory *pro bono* widens, other bar associations will undertake efforts to increase voluntary participation. For example, the KBA has adopted the ABA policy which creates an aspirational goal of 50 hours per year of *pro bono* service for each attorney. The Louisville Bar Association has aggressively campaigned to convince law firms in that city to adopt the 50 hour goal.

State *Pro Bono* Support Projects

Seventeen state bar associations operate *pro bono* "support" projects with staff. The projects receive funding through the state bar, often supplemented by Interest on Lawyer's Trust Accounts (IOLTA) funds and subgrants from federally funded legal services programs. State project activities include: activating new programs in areas of the state where they do not exist; conducting recognition events and activities for volunteers; coordinating training programs for local *pro bono* program coordinators; and serving as liaison to state bar committees on *pro bono* and legal services delivery issues.

The number of state bars that have staffed *pro bono* support projects is steadily increasing. Recognizing the importance of the projects to both effective recruiting and maintaining quality programs, PBIP coordinates an annual meeting of state staff.

Law Student *Pro Bono*

While clinical legal experiences have long been available in law schools as primarily an educational experience, *pro bono* programs for students are introducing students to the ethical obligation to engage in public service activities. Tulane University School of Law has completed the first year of its *pro bono* program. Students, as a requirement for graduation, must complete a minimum of 20 hours of *pro bono* work during either the second or third year. Students are placed with local *pro bono* lawyers through the bar sponsored program. Florida State University School of Law

will begin a similar program in Fall, 1990. The University of Pennsylvania School of Law recently announced a mandatory program for students which will require 35 hours of *pro bono* service during each of the second and third years. Other law schools are considering student *pro bono* programs.

It is widely accepted that interest in *pro bono* and legal services work by law graduates subsided after mid-1970's. The escalation of salaries for top law graduates in large law firms is both a cause and effect of young lawyers directing their careers away from public service. Law firm recruiters, however, are increasingly encountering questions about the opportunity for *pro bono* work during employment interviews. Peter Hsiao, a lawyer with a large Los Angeles law firm, has fostered the movement of law graduates to "Just Ask" about law firm *pro bono* involvement during employment interviews.

Law Firm Involvement

Although no survey has yet been conducted measuring the levels of *pro bono* work of lawyers, the PBIP staff has established that as many as 2/3 of the *pro bono* cases that are completed nationally each year are done by sole practitioners and members of small firms. Over the past several years there has been a growing recognition that large law firms possess great resources which must be cultivated to assist in reducing the unmet need for legal services by the indigent.

The ABA, primarily as a project for its Standing Committee on Lawyers' Public Service Responsibility, has undertaken efforts to stimulate law firm *pro bono* activity. Co-sponsored with the 1988-89 ABA President Robert Raven, the Standing Committee hosted a one day conference on law firm *pro bono* on May 1, 1989. Managing partners and *pro bono* coordinators from 50 of the largest law firms in the country attended. Presentations on organizing not only the lawyers of a firm, but other firm resources were made. Small group sessions allowed for peer-to-peer discussions focusing on such problems as developing a firm *pro bono* policy, cultivating partner support for a firm *pro bono* program, handling conflict of interest problems and gaining support of large institutional clients for a firm's *pro bono* work. Participants also received copies of the Standing Committee's publication, *The Law Firm Pro Bono Manual.*

Law firm management has learned that *pro bono* is good for the bottom line. Associates and junior partners receive hands-on and in court experience which is often more valuable than training seminars. The pressure on young lawyers facing increases in billable hour requirements beyond the 2,500 per year range is taking its toll in some firms. Lawyers doing *pro bono* work often experience the psychological satisfaction of completing a case and seeing tangible results for a client, something that may not happen for an associate working on segments of a case for a corporate client. A law firm will certainly benefit from the good will created by its public service work.

Recognizing that a firm can benefit from *pro bono* work by its lawyers, formal *pro bono* programs in firms are becoming more common. Firms are allowing *pro bono* hours to be credited toward billable hour requirements. In New York, Boston and Washington, D.C., bar associations have established special projects to match large law firm resources with legal services and *pro bono* programs. Some law firms have developed "release time" programs where not only lawyers from a firm, but paralegals and secretaries will spend from 3 to 6 months working at neighborhood legal services offices. As widely reported, Skadden, Arps, Slate, Meagher and Flom, a large New York city based firm, has established a $10 million fellowship program to fund law graduates at 32 public interest law firms and legal services programs over the next 5 years.

Special Projects

Pro bono program coordinators constantly struggle to develop new methods of recruiting and motivating volunteer lawyers. One of the best motivators is providing lawyers with interesting and rewarding work. Creating special projects organized to address specific issues or populations, nicknamed "boutique" *pro bono* projects, have attracted many lawyers to organized *pro bono.* Special projects may be either independent programs or part of a general *pro bono* organization. Projects have been created to service segments of the population, such as senior citizens, the disabled and AIDS patients. Other projects have been organized by legal subject matter, such as family law or community economic development.

Special projects not only appeal to the interests of lawyers, but to their expertise. Some lawyers have been hesitant to volunteer for *pro bono* cases because many traditional legal services cases require litigation skills and experience. Non-litigation and transactional lawyers have been able to offer their skills to projects which assist in community economic development activities or offer advice on wills and trusts to AIDS patients.

THE KENTUCKY EXPERIENCE

The history of the development of organized *pro bono* in Kentucky mirrors the national experience. Although a *pro bono* panel was organized in Covington in 1978, early efforts to involve the private bar in the delivery of legal services to the poor coincided with the Legal Services Corporation mandate in 1981. As in the rest of the country, organized *pro bono* started in urban areas such as Louisville and Lexington.

In 1984, the Fayette County Bar Association and Central Kentucky Legal Services jointly sponsored the creation of a *pro bono* program in Lexington. The project was partially supported by a grant from the ABA and a visit form William W. Falsgraf, the 1985-86 ABA President, who heralded the project as a prototype. The program currently has 2 staff members and over 220 volunteer lawyers.

In 1986, the *Pro Bono* Committee of the KBA issued a report offering 12 recommendations. Although the Committee concluded that there was a need for a *pro bono* program on a statewide level, the recommendations acknowledged the importance of working with existing programs and local bar associations. Since that time, new *pro bono* efforts have been generated with the strong support or sponsorship of county bar associations. For example, Lawyers Care was established in Bowling Green as a joint project for the Warren County Bar Association and the Cumberland Trace Legal Services. In Western Kentucky a new *pro bono* project is being initiated as a joint venture of the McCracken County Bar Association and Western Kentucky Legal Services. Both of these groups have received activation assistance from the Private Bar Involvement Project.

An additional impetus to the recent development of organized *pro bono* in Kentucky has come from the availability of IOLTA funding. Initial grant applications for IOLTA funding from civil legal services programs targeted the activation and expansion of *pro bono.* Grant awards for the first 2 years of IOLTA operations have been directed to these proposals. The KBA *Pro Bono* Committee also provided one year funding to several fledgling programs in 1988.

As experienced by PBIP staff over the past 8 years, it is very difficult to establish effective *pro bono* programs in rural areas. Historically, rural legal services

programs faced with the mandate of involving private lawyers in delivery of civil legal services to the poor established compensated programs. Programs contracted with lawyers and firms to handle specific case types such as uncontested divorces and simple bankruptcies. Other programs established judicare type panels where lawyers would be paid a reduced hourly rate to complete cases referred by the legal services programs. Variations of these models exist in many rural areas. Legal services programs have experimented with mixed delivery systems, combining *pro bono* panels for certain types of cases with compensated arrangements for others. A number of rural legal services programs have attempted to transition private attorney involvement from compensated to *pro bono* with varying degrees of success. Similar efforts are being undertaken in a number of Kentucky counties.

PRO BONO IN THE 1990's

Following a period of relatively stagnant growth during the mid-1980's, interest in *pro bono* representation is experiencing a resurgence as reflected in the increase in the rate of new lawyer participation in organized *pro bono* during the past two years. As with the growth of an individual or organization, *pro bono* will transition through new phases in the 1990's. Some of the issues discussed above, such as mandatory *pro bono* and law firm activation, will continue to have an impact on the number of lawyers who will participate in organized *pro bono*.

Significant problems will be encountered by *pro bono* programs if volunteer participation increases as expected. New issues will include:

-the development of more efficient organizations to match lawyer resources with client needs,

-the evolution of the *pro bono* coordinator as a vital component of the legal services delivery system,

-the development of standards of professionalism and quality control for *pro bono* organizations,

-further definition of the roles of the legal profession and government as the ultimate provider of resources for serving the civil legal needs of the poor, and

-the development of plans for integration of all components of the system of delivery of legal services to the poor.

The ABA remains committed to the improvement of legal services delivery systems. The ABA Consortium on Legal Services and the Public, through the Private Bar Involvement Project, offers its assistance to all segments of the profession sharing in this goal. For more information on *pro bono* activation and national trends in the *pro bono*, call the PBIP Information Coordinator at (312) 988-5769.

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Dennis is Staff Director of the ABA Private Bar Involvement Project. Prior to his current position, he was the Executive Director of Western Kentucky Legal Services.

Appalachian Blacks Among U.S. Poorest

William Turner, Berea College's outgoing Goode Professor of Black and Appalachian Studies, remarked at the "Blacks in Appalachia: From Invisibility to Importance," two day seminar held at the college that black Appalachians are among the poorest groups in the country and have an income about one-half that of whites in the poverty stricken region. "If you live in an area where poverty is endemic, does being black make you poorer still? The answer is a resounding 'Yes'" High migration, unemployment and low educational levels help create the situation. The only group worse off than black Appalachians are rural black people in certain parts of the Mississippi Delta.

Despite even worse poverty than their inner city counterparts, Turner said they have avoided high crime and delinquency rates. The families have apparently managed to buffer them and keep them away from the trouble you see in southeast Washington or the south side of Chicago. -Associated Press.

THE CAUSES AND CURES OF CRIME

Doug Magee reflected at our 17th Annual Public Defender Training Seminar on what causes crime and what has the potential to cure it. We present his remarks.

I am an observer in the criminal justice arena, one with a particular perspective, one with a certain set of experiences and biases. I think it fitting, then, though perhaps somewhat self-indulgent, to give you a bit of my background before dealing with the question at hand.

OUR EXPERIENCE

To my mind the most salient feature of that background is the fact that I have lived for the past 20 years in East Harlem, a black and Puerto Rican neighborhood in New York. I moved into the neighborhood directly after college as part of a graduate school program and never left. I have lived in tenements for most of my time there but my life, for the most part, is that of a white, middle class American.

Why, you probably ask, when I could live in the suburbs I grew up in, do I choose to live in what we used to call a ghetto? I can't answer that completely but I can say that when I moved into the neighborhood I did so with Stokely Carmichael's words in my ears. *"Your politics are determined by what you see out of your front window"* he said at one point during the '60s and I agreed with him. I still do.

What I see out my front window is the urban underclass in all its complexity. The crack trade flourishes on the corner across from my building, happy well-cared for children play in a housing project park down the street, garbage collection is shoddy at best, church groups feed the homeless, the schools operate with the most meager resources imaginable, and the police claim they are helpless to wage what they term a war against criminals.

While I am not poor or a minority my perspective on issues such as crime has certainly been informed by the view out my front window. Also from that front window I can look down Lexington Avenue to the Upper East Side of Manhattan and some of the richest real estate in the world. Riding the bus up from downtown I stay on long after the bus has crossed the DMZ separating the Upper East Side from East Harlem. If you harbor some illusion that we live in an integrated society you might want to ride that bus with me some day. The difference between the haves and the have nots is tangible in that ride, I can assure you.

So that's my perspective. Now for the experiences that have brought me here tonight. I first walked into prison when I taught a photography course at Sing Sing in upstate New York while in graduate school. That was shortly after the Attica uprising and in the twilight of what I would call a hopeful period in our criminal justice system. Since those first experiences with prisoners, some of whom I am still in contact with and consider friends, I have worked as a journalist covering criminal justice topics, I have written a book of interviews with people on death row, I have written a book of profiles of families of murder victims and I have been actively opposed to capital punishment. In addition to this work my life has been touched by crime the way many millions of lives in this country have been touched (a friend was raped and murdered). My apartment has been burgled several times, and I have been robbed at knifepoint.

THE PENALTY OF DEATH

I have been, for the most part, an observer of the criminal justice system and only seldom, thank heavens, a participant. But in one area I have become more than an observer and willfully so. That area is the debate over the reimposition of the death penalty in this country during the past fifteen years. Not only have I written about this subject but I have done everything from chaining myself to Bob Graham's fence in Tallahassee to try to prevent him from executing John Spenkelink to being a member of the executive committee of the National Coalition to Abolish the Death Penalty.

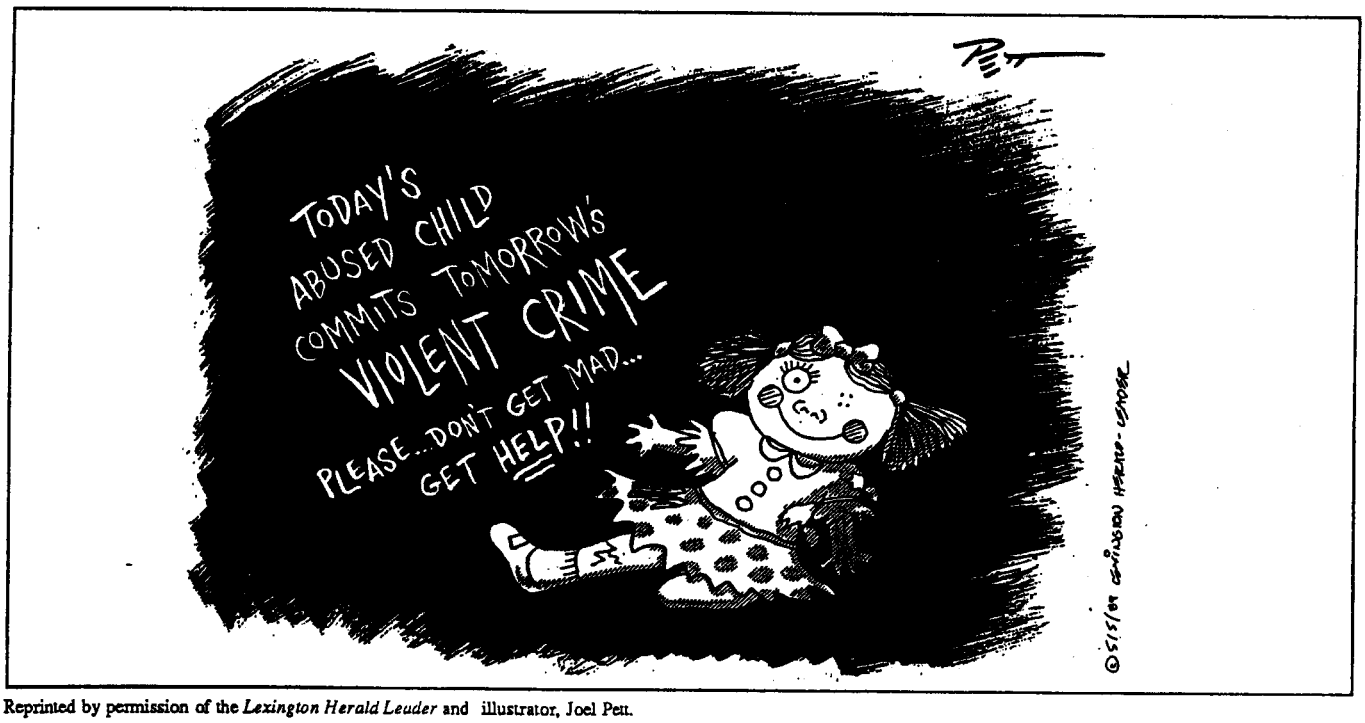
I would like to begin my exploration of the causes and cures of crime with a look at that death penalty debate. I think there is much we can learn from it.

I don't think for this audience I need to rehash the past 15 years of capital punishment brouhaha. During the seventies the mood of the country underwent a sea change with regard to state sanctioned killing, politicians didn't miss this shift and helped to further it, thirty-seven states enacted death penalty legislation, Gary Gilmore called for his own execution, the Supreme Court allowed the state to kill him, and we were off. Since then a hundred and ten people have been executed and the death penalty has become something of a litmus test for politicians and government leaders. We are told by those favoring executions that we need the punishment in order to keep us safe, to protect us from a rising wave of crime.

This sort of reasoning is puzzling to me. The death penalty has never been proven to have a deterrent effect and in fact may have just the opposite effect, it is extremely costly and is a court clogger if there ever was one, it is prone to horrible error and is biased against the poor and minorities. Yet people still see it as the Eldorado of the criminal justice system.

Watching the country turn to the death penalty makes me think of a man who owns a sleek, powerful car and who wants to increase the horsepower of his engine so he ties a horse to the back bumper. To him it sounds right. Horsepower, horse. After driving for a while, though, he finds that not only does the horse not add to the speed of his car but it's slowing him down considerably.

So too with the death penalty. The equation sounds right. We want to increase penalties to keep our streets safe and so we go to the "ultimate" penalty. Like the car owner though I'm sure we will one day come to realize that the death penalty



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is an enormous drag on our criminal justice system.

If you saw a car owner tooling down the highway with a thoroughbred strapped to his bumper you'd have to wonder how much that car owner knew about the engine under his car's hood. So too with the death penalty. Watching the states and how the federal government reach for capital punishment makes you wonder just how much those responsible for criminal justice policy know about crime and its causes.

Of course opponents of the death penalty are, for the most part, not much interested in the causes of crime. For them the cause of a particular crime is contained in the police report. X walked into a certain liquor store, robbed the store, shot Y and left. Those who bring up such things as the murderer's mental state, his background and the abuse he has suffered, the society he was born into, his educational deficiencies, and the easy availability of handguns are, to the death penalty proponent, criminal coddlers, soft-headed liberals.

While the death penalty presents an exaggerated case, in it we see the lines of demarcation in the present attitudes toward crime. Proponents of the death penalty put the entire blame for a crime with the criminal, opponents are more likely to see societal problems as part of the equation.

WE ARE CONNECTED TO OTHERS

I think there is a middle road in this debate, though, one that will lead to a more productive examination of the causes of crime and, hopefully, to a partial cure. The basic tenets of this middle road are that no man or woman is an island and yet some men and women may be peninsulas. That is, we are all in this together as human beings. We have been born into a world and a culture and from birth we have been dependent on others for our survival. We influence others and are in turn influenced. We have free will and a modicum of independence but a central part of our humanness is our connection to others. Some among us, like peninusulas that jut out into the ocean, are aberrant in hurtful ways. We can punish these people all the way to extinction but we cannot sever our ties to them. If indeed we do kill them for their transgressions we kill a part of ourselves.

WHAT IS CRIME?

We, of course, decide what is crime and what is not crime. There are no absolutes. We make up the rules. For instance, one highly addictive substance, tobacco, takes the lives of an estimated 390,000 people in this country every year and is legal. Another highly addictive substance, cocaine, is responsible for far, far fewer deaths each year and yet is illegal. Changing this situation, making both substances legal or making both illegal, would clearly have an effect on crime in America. You might say this is hair-splitting, academic rigamarole, just words but we who live by words would beg to differ. We call the coke dealer a filthy criminal. We call the tobacco salesman a businessman.

I said there are no absolutes when it comes to defining crime and I imagine you thought "What abut murder?" Certainly we can all agree that murder is wrong but here too we have a definitional problem. Killing is not always illegal. The police are given dispensation in certain killings and the state can execute a select few criminals without fear of prosecution. In thinking about the causes of crime and its cures we have to keep in mind the fact that crime is what we say it is.

CRIME IS IRRATIONAL

If you look at any one criminal act closely there is always a question mark at the center of things. In talking to the families of murder victims I found that the word Why was common to all of them. Many victims' families made scrupulous investigations of the circumstances that led to the death of their loved one but even at the end of their investigations the question Why persisted. That is true of lesser offenses as well. The thief who steals bread for his family still must be asked why he didn't find some legal avenue to provide food for his home. In seeking the causes of crime we must realize that criminal behavior is, at base, irrational.

5 CAUSES OF CRIME

That basic irrationality aside, however, let me be specific about some of the things I see contributing to crime, causing some of us to be anti-social in our behavior.

1. EDUCATION

Education is at the top of my list. In a

recent study of ten thousand inmates in the New York State correctional system researchers found that eighty percent of the inmates entered the system without a high school diploma, 50% functioned below the 8th grade level in reading, and 73% functioned below the 8th-grade level in mathematics, yet 69% of these individuals said they had attended school at least until the ninth grade. Similar studies in other states have supported these percentages. Those people our educational system fails are much more likely to end up committing crimes than those who are properly educated.

Once in prison the opportunities to correct for educational deficiencies are minimal and getting smaller. Prisons now are seen as punishment places, warehouses, and efforts to educate prisoners are either irrelevant to work after release, inadequate or unavailable to certain inmates.

Just because a person doesn't do calculus or can't speak French doesn't mean he or she is bound to lead a life of crime, of course. But being without education in our information based society is like being thrown off a train for not having ticket. It's very hard to get back on the train legally. Children who fail in the educational process most often do so when they are very young. This failure and the attendant ostracization from the mainstream leads to early loss of self-esteem, hope, and career possibilities. It's no big wonder that criminal behavior follows in the wake of this failure.

The cure for this cause of crime is obvious but, sadly, one that we are not moving toward with any great speed. I would love to hear a politician running for office make a speech in which he or she tells us about the scourge crime is to our society and then makes a ringing call for a radical improvement in our educational system.

2. PRISONS

Prisons are second on my list. Prisons may not be educating prisoners for a return to society but they are places of a certain form of education. It's a cliche by now that prisons breed criminality but that tired truth is still a truth. People stumping for harsh punishment for criminals often call prisons country clubs. They use the analogy to point up what they feel is the life of Riley behind bars. But the analogy can be used in another way as well. Country clubs often function as a place where the well-to-do do business, a networking nexus. Many a foursome has led to information sharing, increased business contacts and the like. So too in prison does a networking take place. A young thief get sent to prison and begins to meet a variety of people who have had experiences different from his. Like a college freshman meeting kids from other states he makes contact with people from other towns and other parts of his city. When he gets out, when his money runs low, when he has to feed a habit, his networking experience pays off.

With our prisons bursting at the seams as they are now we can be certain that this criminal networking process is being carried on and that those who are released from prison will make the most of their prison experience. Some of us may feel good that we are locking up more prisoners, building prisons, introducing shock incarceration camps and keeping prisoners behind bars for longer periods of time. But I for one think we are making a big mistake.

There are, certainly, some people who must be kept away from society for our safety. But the vast majority of people now in prison don't fall under this category. Most are there to be punished and in punishing them we feel we are somehow curing crime. I think the opposite is true. Our present prison policy is going to cause more crime than it cures.

I have seen letters to the editor in the *New York Times* and other papers in which the writer bemoaned the jails and prisons for not being more harsh in their punishment. These writers said that going from the streets to prison was no big deal for many criminals, an easy change in environments. That may be true to some extent but to say that is to make a comment about the living conditions some of our society are forced to live in rather than that prison is the good life.

Harsh prison sentences are not the answer to the problem of prisons breeding crime. First offender programs that truly work, alternatives to incarceration for victimless and non-violent crimes, and increased educational opportunities for prisoners will speak to the problem in a meaningful way.

3. CHILD ABUSE

Child abuse is third on my list. We most often think of child abuse as a crime in and of itself but I have become convinced that it is most pernicious as a cause of crime. I would like to use the term in its widest application. Children who are ravaged psychologically by parents are abused almost as if they had been beaten. Child abuse in all forms is a widespread phenomena but one that is only rarely in the public view. Like an underground fire, though, it burns up the roots of children and turns them into fearful, distrusting, violent adults who have learned by example a warped and twisted kind of love. I have no statistics at hand but anecdotal evidence is really all you need to understand the link between child abuse and crime. Run through the case histories of the men and women on death row, look at the biographies of prisoners in general and you will be surprised by the incidence of child abuse in this population. Unless you believe children are born criminals, which I don't happen to believe, you have to accept the fact that one widespread and pervasive problem in the society is causing another.

The cure here, of course, is to break the cycle of violence, to attack the problem of child abuse and thereby prevent the criminality that grows from it. That's much easier said than done. Child abuse is an age-old problem and itself is caused by a variety of factors. A beginning, however, would be to acknowledge the role child abuse plays in crime, to make serious attempts to detect it early in juvenile cases, and to treat it as a societal problem not just a domestic one. We must intervene in child abuse cases not only to protect the child but to protect ourselves.

4. TELEVISION

Television is 4th on my list. I must say that I am not much of a television watcher myself but I do appreciate the medium. I think it has enormous potential for good, for knitting us all together, and for teaching and entertaining. But nevertheless I have it on my list of the causes of crime. When I link television and crime you probably imagine I'm talking about the pervasiveness of violence on the box and the way those hundreds of murders and car chases numb us all to the reality of violence. There is that, of course. While doing interviews on death row in Arizona I talked with a man who put it most succinctly. He said, "You watch TV and you see a lot of people get killed on TV. John Wayne dies 5 times a week. He gets up and goes home. In some people's minds that's what capital punishment is...And I guess I felt that way until the first person died of my own hands."

But television as a cause of crime is more subtle than just seeing violence on the screen and copying it. If you believe as I do that crime is often an expression of the disparity between the haves and the have-nots, television is the medium by which this disparity is writ large. I'm speaking here mainly of advertising. The seductiveness of those 30 second spots is

designed to sell a product but it also spawns a desire. Imagine a single mother in my neighborhood, sitting in a barely furnished apartment, locked in a Kafkaesque welfare system, struggling to keep food on the table, watching an ad in which a blissfully married couple coo over their new infant and subliminally entice you to buy baby furniture or clothes the woman can never afford on her checks. She may not run out and hold up a baby furniture store but the desires planted in her by that ad and countless others will build and will find some sort of outlet. Imagine also a young teenager watching a basketball game on television. Every time there is a time out shiny BMW's or Volvos come whoosing at him over undulating roads. If he is living in some neighborhoods he walks out his front door after the game and sees several such cars parked in driveways along a tree-lined street. He knows that one day he too will have a car like those on the screen. If he's living in other neighborhoods the scene is much different, however. He sees no cars like those in the ads except for the ones being driven by the drug dealers.

I don't think the cure for this part of the problem is to ban advertising but I do think that we in this country are going to have to have some part of the education of our young include a visual literacy and a critical appraisal of the things we now so passively accept on television.

5. DRUGS

I'm going to end my list with an obvious one. Drugs. Half of all the homicides in New York last year were drug related. We are told we are in a war against drugs and we have a drug czar at the highest level of government. While unemployment in a neighborhood like mine is astronomical the crack houses are hiring at a land rush pace. Crime rates throughout the country have been effected by the attempts to suppress the drug trade. There is no doubt that drugs cause crime.

And there is no doubt in my mind about the cure for this particular cause. Legalize 'em. Plain and simple. I know this will be offensive to many of you but I don't think half-answers will work here. Our history with Prohibition in this country should have taught us a lesson but apparently it didn't take. Banning mind-altering substances does not work. It only creates an alternative economy, one that saps our resources when we try to control it. Instead of spending millions and millions of dollars trying to interdict shipments or corral street dealers or even nail so-called kingpins, we would be so much farther ahead as a people if we excluded drugs sales and use from our laws and began to take drug treatment programs seriously. I'm sure many of you imagine that such an environment, in which you could walk into a store and buy a gram of coke, would be chaos and would lead to the complete disintegration of society as well as many deaths from drug abuse. I don't dispute that there would be problems but at least we'd be dealing with the proper ones, those concerning the human need to get high, the difference between drug use and abuse. But I'm sure that people in the twenties thought the end of Prohibition would be the end of society too. I see in my neighborhood, where drugs are to some degree legalized as far as use is concerned, patterns of drug use that suggest there would be no chaos, no reefer madness. I trust that people will learn how to deal with legalized drugs just as they have learned to deal with legalized alcohol, cigarettes and caffeine. And our crime rate will drop accordingly.

CRIME EVIDENCES BROKENESS

A high incidence of crime in a society is an indication of a brokenness. Crime, as I have said, is defined by a few and applied to all. When those who make the rules and those who are to follow them are segregated by class, color, religion, whatever, there is bound to be friction and a rising crime rate. Crime can be likened to the bubbles rising from a boiling pot of water. The more heat the more bubbles. The more there is a brokenness and divisions in the society the more crime is prevalent. If we want to stop bubbles from boiling to the top of the pot we turn off the heat, we don't try to skim off the bubbles. All our cures will be for naught if we don't accept the fact that crime, while an act of an individual, is a societal problem at its heart. We are, as I've said, all in this together. When the criminal becomes the devil incarnate and we the angelic guilt-free ones, we have missed a basic tenet of our humanity, our connectedness.

You've probably heard about the young woman jogger in Central Park who was raped, beaten and left for dead by some 30 youngsters. Those kids all live several blocks from my house. I don't know any of them though some of them go to the same school my son attended. And I don't pretend to understand the specific causes of their horrible crime nor could I suggest a cure, something that might have prevented it. But I do know that our reaction to them is crucial. If our concentration is solely on punishing them we will only be feeding the brokenness. If we don't see a bit of ourselves in them we will only be feeding the brokenness. A victim needs our help and some very troubled youths need our help as well. A crime is a wound. The worse the crime the deeper the wound. The deeper the wound the more the whole body has to marshal resources to heal.

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Education

	U.S.	KY	KY'S Rank
High School Graduates	71.1%	67.4%	39
Spending Per Student	$3,977	$2,733	46

Jail Educational Levels
40% of jail inmates and 28% of prison inmates had completed high school compared to 85% of the U.S. population.—Bureau of Justice Statistics

Poverty Level

In 1983 one-half of males in jail who had been out for at least a year had an annual income under $5,600. Female inmates reported a median income of $4,000 during the year before the arrest.

22% depended on welfare, SSI or unemployment benefits (38% of ther women) &% (11% of the women) had an illegal income.
60% had a wage or salary
23% depended on family or friends (31% of women)

74% of the women and 54% of the men in prison have dependent children.—Bureau of Justice Statistics

SELF DEFENSE

BATTERED WOMAN SYNDROME

I. SELF DEFENSE:

A. GENERALLY

Whether circumstances justified a defendant's use of force in self defense is a *subjective* inquiry. The use of force, including deadly force, is *justifiable* when the defendant believes that such force is necessary to protect herself against the use or imminent use of unlawful physical force by another person. See K.R.S. 503.050:

KRS 503.050 Use of Physical Force in Self Protection

(1) The use of physical force by a defendant upon another person is justifiable when the defendant believes that such force is necessary to protect himself against the use or imminent use of unlawful physical force by the other person.
(2) The use of deadly physical force by a defendant upon another person is justifiable under subsection (1) only when the *defendant believes that* such force is necessary to protect himself against death, serious physical injury, kidnapping, or sexual intercourse compelled by force or threat. (Emphasis added)

A critical issue, then, is "When she killed, what did the defendant believe?" What appears to be a totally subjective test, however, is not. The reasonableness of the defendant's belief may be questioned. K.R.S. 503.120 permits the prosecution to make an issue of the reasonableness of the defendant's belief that she had to act in self protection:

K.R.S. 503.120 - Justification; General Provisions

(1) When the defendant believes that the use of force upon or toward the person of another is necessary for any of the purposes for which such belief would establish a justification under KRS 503.050 to 503.110 but the defendant is wanton or reckless in believing the use of any force, or the degree of force used, to be necessary or in acquiring or failing to acquire any knowledge or belief which is material to the justifiability of his use of force, the justification afforded by those sections is unavailable in a prosecution for any offense for which wantonness or recklessness, as the case may be, suffices to establish culpability.
(2) When the defendant is justified under KRS 503.050 to 503.110 in using force upon or toward the person of another, but he wantonly or recklessly injures or creates a risk of injury to innocent persons, the justification afforded by those sections is unavailable in a prosecution for an offense involving wantonness or recklessness toward innocent persons.

Thus, if a defendant acted in what she recklessly or wantonly believed to be self defense, the degree of her culpability may be lessened, but will not be completely forgiven. If the defendant was reckless or wanton in forming her belief that it was necessary to kill in self-protection, she may still be convicted of a lesser included offense for which the required state of mind is wantonness or recklessness. *Smith v. Commonwealth*, Ky., 737 S.W.2d 693, 687 (1987).

K.R.S. 501.020 - Definition of Mental States

(3) "Wantonly"—A person acts wantonly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts wantonly with respect thereto.
(4) "Recklessly"— A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that failure to perceive it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

Thus as both a legal and practical matter, to win a self-defense case you must be able to convince the jury that your client reasonably believed that she had to act in self-defense. Because what the defendant reasonably believed under the circumstances is the ultimate issue in the case, the defendant has virtual carte blanche to produce proof of what she believed at the moment she killed. Her entire life experience, particularly her past experiences with the decedent are material. That principle is no different in a "Battered Woman" case than when applied to a barroom stabbing between men.

Practically speaking, you must also convince the jury that it was out of character for your client to kill someone; that killing this dead person was necessary in this situation; and that if they let her go, your client will never hurt anyone again. It is helpful if you can prove she will go home and raise her children with love and caring. A "battered woman" case is, in essence, just like every other self-defense case. The issues are still:

> At the moment the defendant killed X, did she believe that using deadly force against X was necessary in order to avoid immediate harm or threat of harm to her? Was her belief reasonable?

If the answers are "yes," she goes home. If either answer is "no," she probably doesn't.

B. EVIDENCE OF BATTERED WOMAN SYNDROME

A "Battered Woman Defense" is really a standard self defense case and relies on the same legal principles as other self defense cases. Battered Woman Syndrome evidence can be somewhat different, in that it helps explain the defendant's actions in instances where she acts to protect herself from *anticipated* violence against her, as distinguished from an immediate attack.

Through psychological conditioning that occurs with repeated acts of violence against a woman, she learns to recognize signs that indicate that another attack is imminent. Thus, Battered Woman cases are often "anticipatory self defense" cases, *i.e.*, "I knew he was going to beat me again, so I killed him before he had the chance."

In a "Battered Woman" case, another thing that is different from most other self-defense cases is that the defendant and the dead man usually had a long term relationship. The relationship is often

"husband and wife" or "boyfriend - girlfriend." The name "Battered Woman Syndrome" resulted from the context in which the psychological phenomenon was originally studied and defined. "Battered Woman Syndrome" will be included in the new *Diagnostic and Statistical Manual* (DSM-IV) of the American Psychiatric Association, as a subclassification of Post-Traumatic Stress Disorder. That document, unfortunately, will not be published for several years.

C. POST-TRAUMATIC STRESS DISORDER

Until the DSM-IV is published, attorneys and members of the mental health community must use existkng categories to define and explain the behavior of battering victims. "Battered Woman Syndrome" is constructed from, and has been defined as, a subclassification of "Post-traumatic Stress Disorder," (P.T.S.D.), which is currently recognized by the American Psychiatric Association's *Diagnostic and Statistical Manual* (DSM III-R) as a "disorder." The essential feature of P.T.S.D. is the development of characteristic symptoms following a psychologically distressing event(s) which are outside the range of usual or expected human experience. (*i.e.*, outside the range of such common experiences as simple bereavement, chronic illness, business losses, and marital conflict). Characteristic symptoms involve re-experiencing the traumatic event, avoiding of stimuli associated with the event or numbing of general responsiveness.

The most common traumata involve either a serious threat to one's life or physical integrity; a serious threat of harm to one's children, spouse, or other close relatives and friends; sudden destruction of one's home or community, etc. The trauma may be experienced alone, as is usually the case in battering situations. Sometimes in P.T.S.D. and almost always in Battered Women cases, there is a physical component of the trauma, such as a head injury, involving direct damage to the central nervous system. In fact, the "Psychosocial Stressor Scale" in the DSM III-R lists ongoing physical or sexual abuse as a level 5- "extreme" stressor. Captivity as a "hostage," which is a common feeling among battered woman, is listed as a level 6 -"catastrophic" stressor.

D. BATTERING: CYCLICAL VIOLENCE

It is very important to understand that the same psychodynamics, and thus, the same legal justifications can and do present themselves in other relationships marked by episodic violence. There are battered women; battered men; battered children; and battered elderly people. One should look for evidence of a "Battered Woman Syndrome Defense" any time that the incident from which the charges arose involves a defendant who struck out to"protect himself against the threat of a repeated assault and the person killed had brutalized or bullied the defendant in a substantially long term relationship.

The relationship which gives rise to a "Battered Person Defense" is typically marked by a bizarre mixture of affection, hostility, and violence. There are predictable periods in which affection characterizes the relationship, followed by a period of tension building between the parties, and episodes of acute violence. Those characteristic periods, described by Dr. Lenore Walker and other psychologists and psychiatrists as "Loving Contrition," "Tension Building," and "Acute Violence," occur over and over in a pattern of ever escalating intensity until the violent episodes become life threatening or present an obvious threat of serious physical injury to the victim. This predictable pattern of Loving Contrition-Tension Building- Acute Violence is referred to as the "Cycle"Theory of Violence."

The victim is usually the female or other physically weaker partner, for obvious reasons related to her/his inability to protect herself from her larger, more powerful male partner. After an acute battering incident, the "Loving Contrition" stage is marked by protestations of love and assurances by the abuser that he will never be violent again . His apparent sincerity, remorse, and assurances of reform, in combination with the genuine affections usually involved in the relationship, provide powerful incentives to the abuse victim to refrain from reporting the assaults to the police or other authorities.

In addition, other factors such as embarrassment, economic dependency, fear, and lack of effective response from law enforcement officials in the past may influence the victim not to report the assaults or take other action such as leaving her abuser. Often, the victim's self esteem is so low that she rationalizes that she must have "deserved" being beaten. As counsel for a battering victim, you must analyze your client's motives for staying with her abuser, not reporting the abuse to the police, or failing to take ovher action to protect herself. Those questions *will* be raised at trial and you must be ready to answer them.

As the cycle pattern of violence is repeated over and over, and the assaults on the victim become more extreme, the victim learns to recognize the "signs and symptoms" of an impending attack against her. She may even learn to delay the inevitable acute battering incident by placating her abuser in some way. Eventually though, tension and hostility build toward what the victim intuitively recognizes to be an imminent life-threatening, acute battering incident. It is then that the woman (or other victim) strikes out, usually with a weapon as an "equalizer," to protect herself from a pending attack.

A battered woman has, by definition, taken a lot of abuse. She has a lot of terrible stories to tell and all those awful stories are what goes into determining what the defendant "believed," and whether she was reasonable in her belief. Obviously, if your client has an appropriate self-defense case, she believed that she had to kill her abuser to preserve her own life. That, in a nutshell, is what you have to prove.

While the classic incident is one that involves relationships between emotionally attached men and women, remember that cyclical pattern violence *does* occur in other contexts: abuse of the elderly, in child abuse, and others.

E. PROVING BATTERING

As the attorney representing a battered woman, or other victim of cyclical pattern violence, you must corroborate your client's account of events extensively. The question you want jurors to ponder as you prove years of physical and emotional abuse is, "Why'd she wait so long to shoot that son-of-a-bitch?" By the end of the trial, you must build a case that convinces jurors that "just leaving," calling the police, or taking other less drastic action to protect herself was not realistic and that use of a weapon was the only alternative for the victim.

If you have eye-witnesses who establish beyond doubt that your client acted in self defense, that's great, but chances are you won't. Most battered women who kill their abusers do so in private. That is usually because the women are battered in private. So, you're not likely to have a lot of eye-witnesses.

Who are your witnesses then? People who saw prior incidents of abuse. People who heard the thumps and crashes that go with beatings. People who saw the effects of abuse— broken bones, fractured teeth, black eyes, bruises, cuts, stitches. People she went to for help. People she told about it. Even people to whom she denied being abused and told

elaborate lies to account for her physical injuries. Those are the people who can help prove what the battered woman believed and whether, then, her fear or her abuser was reasonable.

Lots of hearsay evidence may be admitted in any self defense case to show the state of mind of both the decedent and the defendant at the time the defendant killed the decedent. See:"Memorandum of Law in Support of Admissibility of Evidence of Prior Acts and Threats of the Decedent," from *Commonwealth v. Heidi Harmeling*, Kenton Circuit Court, Case no. 86-CR-298 (June 30, 1987), which is available from the author.

Among the information you can develop through hearsay witnesses is proof:

1. That your client told them, in the past, that the decedent had threatened or assaulted her. *Fannon v. Commonwealth*, 175 S.W.2d 531 (Ky. 1943).

2. That the decedent had told the witness that he had threatened or assaulted the defendant in the past, even if the accused did not hear and was not aware of the statement. *Wilson v. Commonwealth*, 551 S.W.2d 569 (Ky. 1977); *Carnes v. Commonwealth*, Ky., 453 S.W.2d 595 (1970); *Wigmore on Evidence*, 3d Ed., Section 110, p. 546.

3. That the defendant had shown the witness bruises or other signs of injury in the past and told the witness that her injuries had been inflicted by the decedent. *Fannon v. Commonwealth*, 175 S.W.2d 531 (Ky. 1943).

4. That the defendant was aware of the violent propensities of the decedent toward others. *Carnes v. Commonwealth*, 453 S.W.2d 595 (Ky. 1970).

5. Any other evidence indicating the hostile attitude of the decedent toward the accused. *Jackson v. Commonwealth*, 200 Ky. 316, 254 S.W. 913 (1923); *McQueen v. Commonwealth*, Ky., 393 S.W.2d 787, 790 (1965).

F. "BATTERED" DEFENSE IN OTHER CONTEXTS

The "cycle theory of violence" appears in relationships other than husband - wife. Elderly parents are sometimes systematically abused, physically and mentally, by their adult children. A bully may harass and assault the same person over and over. Whenever one person has to live in fear of assault and abuse at the hands of another, cyclical patterns of abuse may develop.

Whenever you are dealing with a self-defense case, consider whether a cycle-pattern of violence existed between your client and the person he or she killed. A.V. Conway, of Hartford, Kentucky, successfully defended an elderly man who was charged with murder for shooting his adult son. *Commonwealth v. Charles Chadwick*, Ohio Circuit Court, Case no. 86-CR-053, (December 23, 1987). The son was an abusive drunk who often came to his parents' home and assaulted his ederly mother and father. On one such occasion, the father ordered the son from his home. When the abusive son refused to leave and announced his

intention to assault his father again, his father killed him with a gunshot through the heart.

A.V. Conway recognized that the same cycle pattern of violence existed in the relationship of his elderly client and the client's adult son as exists in spouse abuse situations. At trial, a "Battered Parent" self-defense theory of the case resulted in a complete acquittal.

G. NEGATING OTHER ELEMENTS OF CRIMES

Another very interesting application of "battered woman syndrome" evidence was presented by Ellen Leesfield, Attorney, of Coconut Grove, Florida. Ms. Leesfield utilized evidence of the syndrome to negate the element of "specific intent" in a federal criminal prosecution for check fraud. Her client was accused of having passed money orders which her boyfriend had stolen from packages at his place of employment. At his instruction, Ms. Leesfield's client had endorsed and cashed the money orders. The court admitted expert testimony relative to Battered Woman Syndrome for the purpose of negating specific intent. See: "Faith and Love: Use of the Battered Woman Syndrome to Negate Specific Intent," *The Champion, Journal of the Natl. Assn. of Criminal Defense Lawyers*, pg. 9 (April, 1989).

II. KENTUCKY BATTERED WOMAN CASES

A. Commonwealth v. Rose, Ky., 725 S.W.2d 588 (1987).

In *Rose*, the court upheld a conviction for second-degree manslaughter, where the defense offered was self-defense (specifically, the Battered-Woman Syndrome), but the defendant contended that she did not *intend* to kill the victim. Because intentional murder requires intent to kill, under the circumstances in *Rose*, the jury could have believed that the defendant shot her husband, believing it necessary for her self-protection, but that she did not actually intend to cause his death. The circumstances were such, however, that the jury could believe that her conduct was "wanton" as defined by statute and that she was aware of and consciously disregarded a substantial risk that death would result. Thus, the Court *held* that the instruction on second-degree manslaughter was proper.

Prior to the Supreme Court's decision in *Rose*, in homicide cases where the defense was "self-defense," the cases uniformly supported the proposition that the use of force in self-defense was an "intentional" act, not a "wanton" or "reckless" one. See, *Baker v. Commonwealth*, Ky., 677 S.W.2d 876 (1984); *Gray v. Commonwealth*, Ky., 695 S.W.2d 860 (1985).

The *Rose* court, in an opinion by Justice Leibson, held that evidence on battered woman syndrome was properly admitted to establish that the defendant may have been acting under a subjective perception of need for self-defense. The Court, however, refused to allow the defense expert witness, a registered nurse, to testify that the defendant was suffering from the Battered Woman Syndrome, because (1) the "expert" lacked the training and professional credentials to make a psychological diagnosis, and (2) because the offer of testimony extended beyond a professional opinion regarding the accused's mental condition to the ultimate issue of the accused's state of mind at the time of the act, decisive of her guilt or innocence, thus, invading the province of the jury.

B. *CRAIG V. COMMONWEALTH,*

Craig v. Commonwealth, 87-CA-1709-MR, 35KLS 10, P.9, 1 KYLP 1-12 (Unpublished opinion Rendered 8/19/88) distinguishes *Rose*, holding that it is re-

versible error to exclude testimony of a properly qualified expert that the defendant was suffering from Battered Woman Syndrome at the time she shot and killed her estranged husband. A divided panel of the Court of Appeals distinguished this case from *Rose*, on the grounds that Craig's expert was better qualified to testify than the witness in *Rose*. Craig's expert not only had the experience with battered women claimed by Rose's expert, but also had a master's degree and "further advanced special training focusing on the problems of battered women."

Although not disclosed in the unpublished opinion of the court, the expert witness in *Craig* was Phyllis Alexander, of Lexington, Kentucky. Ms. Alexander is a Counselor in Spouse Abuse who was trained by Dr. Lenore Walker. Ms. Alexander has participated in approximately 30 workshops on the subject of spouse abuse, given numerous presentations on Battered Women, including one to the Lexington Metro Police Department. She testified on the subject before the Kentucky General Assembly when she was the President of the Kentucky Domestic Violence Association. She was retained by the court in Woodford County in *Commonwealth v. Shirley Kimbell* and was accepted by Judge Henry Knox as a qualified expert. Ms. Alexander is a member of the Victim Assistance Network Board, The National Coalition Against Domestic Violence, and The United Way Domestic Violence Group. At the time she testified in the *Craig* case in 1987, Ms. Alexander had approximately 6 years experience dealing with battered women. Currently, Ms. Alexander serves as Director of the Fayette County Spouse Abuse Center.

C. ALL THE CASES AIN'T IN THE BOOKS

Remember that the best self defense cases are the ones which are *not* reported. Although it is possible for the Commonwealth to certify questions of law by post-verdict appeal, appeals of verdicts of acquittal are very rare and, thus, are *not* often the subject of appellate court opinions. Obtain copies of the trial court clerk's records in cases that ended in acquittal. "Network" with the attorneys who represented the defendants in those cases and get their advice about things you can do to maximize your client's chances of acquittal. Most attorneys are only too happy to help; it gives them a chance to talk a little about their past successes. Two successful Battered Person self-defense cases you can start with are *Commonwealth v. Heidi Harmeling*, Kenton Circuit Court, Case no. 86-CR-298 (June 30, 1987), which was tried to acquittal by the author; and *Commonwealth v. Charles Chadwick*, Ohio Circuit Court, Case no. 86-CR-053, (December 23, 1987), tried to acquittal by A.V. Conway, 124 W. Union, Hartford, Kentucky 42347; (502) 298-3231.

D. ADDITIONAL LEGAL READING

Generally, see: *The Battered Spouse Defense in Kentucky*, Elizabeth Vaughn and Maureen L. Moore, 10 N. Ky. L. Rev. 399 (1983); *Fannon v. Commonwealth*, 175 S.W.2d 531 (Ky. 1943); *Faulkner v. Commonwealth*, 423 S.W.2d 215 (Ky. 1968); *Fleenor v. Commonwealth*, 75 S.W.2d 1 (Ky. 1934); *Cessna v. Commonwealth*, 465 S.W.2d 283 (Ky. 1971); *State v. Kelly*, 478 A.2d 364 (N.J. 1984); *State v. Allery*, 682 P.2d. 312 (Wash. 1984); *Wigmore on Evidence*, 3d. Ed., Section 110, P. 546.

E. SUGGESTED NON-LEGAL READING

Lenore E. Walker, Ed.D., A.B.P.P., *The Battered Woman Syndrome*, Springer Publishing Company, N.Y., N.Y. (1984); Lenore E. Walker, *The Battered Woman*, Harper and Row, N.Y., N.Y. (1979); Lenore Walker, *The Male Batterer*, Springer Publishing Co., N.Y., N.Y. (1987).

III. CASE SCREENING AND SELECTION

Try good cases. Settle bad ones. Unless you are forced to trial by an unreasonable prosecutor or client, you should not be in a courtroom with a case you can't win. "Winning" does not necessarily mean "acquittal." Sometimes, winning is life instead of death. Sometimes, it's possession" instead of "trafficking." Sometimes, winning is a misdemeanor instead of a felony. Think pragmatically about what it is you can reasonably expect to win at trial.

Screen Your Cases. Within the bounds of your clients' instructions and your ethical duties, strive to try winners and settle losers. If you know that your client does not have a chance at trial, explain the facts and theories to your client which make it so. If you sincerely believe that you can achieve a better result by plea bargaining rather than by trial, do it. If your clients are kept well informed and properly educated, they will usually follow your advice even if that means entering a plea. "Plea Bargain" is not a dirty word if the bargain serves your client's best interests.

Plea bargaining is not something to be ashamed of or to approach with a negative attitude. If you can get your client a better outcome through plea bargaining than you can reasonably expect to obtain at trial, you are doing your client a disservice by going to trial. Criminal litigation is often a matter of "risk management." What is the defendant's "exposure" at trial? The "deal" of the plea offer is what the defendant risks by going to trial. One must weight the benefits of the offer against the exposure to a worse outcome at trial.

Not only must the risks be identified, but some effort must be made to predict the probability or likelihood of any particular result at trial. In every murder case the defendant is, obviously, exposed to a risk of a life sentence, or worse. That is the "worst case scenario." Lesser included offfenses are other possible outcomes. In well selected trial cases, acquittal is often, but not necessarily, a possible verdict. You must assess your evidence, witnesses, and client; as well as the prosecution's, to determine whether your client has anything to gain by going to trial.

By way of illustration, before and during the trial of Heidi Harmeling, we offered to enter an *Alford* plea to Negligent Homicide, a Class D felony, if the prosecutor and the Court would make a commitment to probate any sentence imposed. That, we believed, would have been a reasonable manner in which to avoid the risk of a murder or manslaughter conviction. Our offer was never presented to the Court, however, because the prosecutors declined it. We were quite fortunate that the trial ended with a complete acquittal, but without a crystal ball there was no way that we could predict the outcome with sufficient certainty to ignore the possibility of plea bargaining.

Even while a case is being tried there are other opportunities for plea bargaining, and, thus, the same analysis and weighing or management of "risks" continues throughout trial. Like Spuds McKenzie, you and your client should know when to say "when."

If you are representing Bonnie Parker and she has just been apprehended after a multi-state crime spree in which she has killed a dozen people, don't try to sell her as a self defense case. Remember that the entire purpose of the court system, rules of evidence, and the rules of criminal procedure are, and certainly should be, to reveal the truth and do justice.

If truth and justice are on your side, you should never be reluctant to try your case.

You should, instead, be confident that trial by jury works and that you will win. Get ready for war. You are battling for someone's survival and freedom. It's just like a gunfight; there are no second place winners!

IV. PREPARING FOR AND CONDUCTING THE TRIAL

A. INVESTIGATION

1. INVESTIGATE YOUR CLIENT

Spend a lot of time with your client. Talk with her. Learn to understand and empathize with her view of her experience. You have to understand her ordeal and her actions in order to make a jury understand. Learn what is important to your client and what her values are . Look for the "bad truths" as well as the "good truths." If someone is going to have something harmful to reveal about your client at trial, it had better be you.

Don't believe anything your client tells you until you have corroborated it through independent investigation. Some people lie. Some people have poor memories. Battered women who have been emotionally and psychologically traumatized for a long time, may experience "disassociative states" or other medical problems with recall. In a courtroom, even an innocent error of recollection or one produced as a result of emotional trauma will look like a lie, if left unexplained.

Similarly, if your client has given a pretrial statement to the police or prosecutor that contains misinformation, you must be prepared at trial to explain why the information was wrong. Under most circumstances, a defendant who is caught in a lie will be convicted. The prosecution theory is simple: "If the defendant is innocent, why did she have to lie?"

Disassociation, flash-backs, fantasy, repression, and other psychological mechanisms that the human mind uses to cope with and survive protracted abuse may make it impossible for a battered woman to give an accurate account of past events or of the homicide. Your mental health experts can help you explain those phenomena and help jurors understanbd that the apparent "lies" were really only a part of the psychological signs and symptoms that are normal for victims of Battered Woman Syndrome. By effective preparation and presentation of the proof, what might have appeared to be a "lie" becomes part of the corrobative defense proof of Battered Woman Syndrome. Thus, you effectively convert potentially devastating prosecution evidence into strong defense proof of self defense.

Carefully examine your client's personal effects for items that help prove your theory of the case. Read diaries and letters. Spending time at your client's home or apartment, with her and without her, will give you insight into her character. Do not be concerned about invading your client's privacy or appearing nosy. You are her champion. You must understand everything about her in order to represent her effectively. When a man or woman

is about to go on trial for murder, it is no time to be terribly concerned about privacy or other sensibilities. Nothing about a defendant should ever be a secret kept from her lawyer. You obviously can not evaluate and use information that you don't know about.

Always go through family photo albums. Find ways to introduce sympathetic photos of your client "looking innocent." For example, in *Commonwealth v. Heidi Harmeling*, we introduced a great photo of Heidi on a beach in Hawaii, holding her son on her lap. It was a lovely, "Madonna and child" type photograph. We wanted it before the jury to convey precisely that message throughout the trial. We justified its admission into evidence by offering it as corroborative proof that Heidi had gone to Hawaii to flee from her ex-husband and to obtain relief from repeated incidents of physical and mental abuse. It was admitted, then left within the jury's view throughout the trial to help create the proper image of Heidi in jurors' minds.

Look through other memorabilia that your client has accumulated for clues to positive character traits that may be helpful at trial.

Obtain and closely examine all of your client's medical records. During your early interviews, obtain the identity of *every* doctor, hospital, or other medical care provider who has *ever* seen your client. Get all of her records and examine them very carefully for information consistent with incidents of physical abuse. It is common for abused women to tell doctors that they were injured as a result of a fall or other accidental cause. After studying the records and identifying injuries that may have been caused by incidents of physical abuse, review the circumstances that led to her medical treatment. If, in fact, the injuries were inflicted by a batterer, medical records may be used to corroborate assaults that are part of the reason for your client's fear of the abuser and, thus, part of her justification for killing him.

Even if the medical records reflect some non-abuse cause of the injuries, such as a fall, present the medical records any way. Your client can explain the humiliation or fear that motivated her to lie about what caused her wounds. Although doctors generally have a duty to report cases of suspected abuse, there may be reasons why they did not. Perhaps the doctors "bought" the victim's other explanation; perhaps they did not want to "get involved;" perhaps they were unaware of their duty to report.

Medical records may also disclose frailties or infirmities, mental or physical, that made it difficult for your client to defend herself without the use of a weapon, or which may help answer the question "Why didn't she just leave him?" that will occur to every juror as well as to the prosecutor.

Check for police records. Was she ever arrested? What for? Check divorce records; civil suits and judgments; work records; *every* place that may be a depository of information about your client.

In every aspect of your preparation for trial, find ways to accent the larger size, weight, and strength of the decedent, and the need of your client to use a weapon as an equalizer.

2. INVESTIGATE THE CORPSE

What you are trying to prove is: "The dead person needed to be killed in this situation! " Was he a drunk? Did he use drugs? Was he a violent person? Was he abused as a child? Did he have a police record? Was he employed? What did his employer and co-workers think about him?

Did he support his children? Was he physically or emotionally abusive to them? Was he ever married before? If so, examine his complete divorce file. Did

he beat and abuse his prior wife? Were restraining orders ever issued against him because of violent behavior or threats? Locate and interview his ex-wife. If there were multiple divorces, do the same thing with regard to *all* prior marriages. Don't overlook girl friends. He may have abused them, too. If so, make them witnesses. If not, don't.

Gather all of the decedent's medical records. If you cannot obtain a release for the documents through the cooperation of the prosecutor, file a motion with the Court for an order compelling the decedent's medical care providers to provide you with copies of their records. Through discussions with your client, you can develop theories of relevance and materiality to make a compelling case in support of a motion for a court order to produce the decedent's records. After you get them, examine the medical records carefully. People say outrageous things to their doctors and most doctors record those things in their files. In addition, the decedent's medical records may disclose injuries indicative of past involvement in violence, *e.g.*, broken hand, fractured nose, black eye, etc.

If the decedent had ever been through treatment for drug or alcohol abuse, or other psychiatric disorders, those records can be particularly helpful because patients in drug, alcohol and psychiatric treatment programs confess their darkest secrets to the health professionals— who promptly record them in the patient's records.

How big was he? Did he play football in high school or college? Did he take karate lessons? Did he participate in any other contact sports? Did he have a reputation for being tough?

Are there any photographs of him available in which he looks mean, angry, or dangerous? Any photos of him with guns, knives, or other weapons? Was he ever in the military? Was he trained to kill? Get his records. Find out.

If your client was aware of the incidents discovered through medical records and other records, the information is admissible because it helps to establish your client's subjective state of mind. *(see, cases cited at page 4, infra).* If your client was not aware of some of the incidents, you may still be able to get these details admitted. Carefully examine the classic exceptions to the rules prohibiting hearsay. Is the evidence you want to admit an "admission against interest?" Prior sworn testimony? Are there indicia of reliability that will help you to get around a hearsay objection? You may be able to admit otherwise inadmissible information through your expert if the information is important to the expert's analysis and opinions and is the type of information that such experts *generally* rely upon. There is a scientifically established correlation, for example, between being abused as a child and being an abuser as an adult. Thus, with a proper foundation, your expert can recount evidence of the decedent's early life experiences that might *not* be admissible under any other evidentiary theory. (see, *Buckler v. Commonwealth*, Ky., 541 S.W.2d 935 (1976); F.R.E. 703; 705; RCr 9.46;)

Finally, remember that *nothing* is inadmissible unless it is objected to and the court says it is not admissible.

3. INVESTIGATE THE INVESTIGATION

Never rely on police reports, the state's list of witnesses, police or prosecutor-conducted interviews, or prosecution witnesses' interpretations of physical or scientific evidence. Conduct your own thorough investigation. Start with the police investigation reports and go from there.

Identify and interview all possible witnesses, including those that the police have already obtained statements from. Do not stop with obvious witnesses, like people who witnessed the killing or those who heard gun shots. Talk to employers, co-workers, friends, family, enemies, neighbors, fellow church members, club members, teachers, and anyone else who knows anything about either your client or the person she killed. Obviously, you are looking for people with good things to say about your client and bad things to say about the corpse.

4. FORENSIC EVIDENCE

Forensic or scientific evidence is vital in a homicide trial. Do not accept the results of the state's "crime scene search." Police officers often overlook vital evidence, especially evidence which is vital to the defense. If you do not know enough about forensic science or case investigation, hire someone to assist you. Retired police detectives and F.B.I. agents are a good source of help. If possible, observe the police crime scene investigation and make careful notes. You may even be able to make suggestions to police investigators which will help them find and preserve evidence helpful to the defense. When the police are finished and have released the "homicide scene," get your own investigators there immediately, before anything is further changed, to re-investigate for evidence and clues that the police may have overlooked. Police Investigators often leave behind evidence of their own errors — non-conforming scene diagrams, investigative notes, etc. Those things too, are important Defense evidence.

Your goal is to absorb the prosecution's case and make it part of your defense. A well prepared self-defense case should be totally consistent with all the scientific and forensic evidence. Police laboratory technicians and medical examiners make great defense witnesses in self defense cases. Evidence of "muzzle-to-garment distance," ballistics, cause and manner of death, and all other scientific evidence should be utilized to corroborate your client's account of events.

5. OTHER INVESTIGATION

You should also investigate all witnesses, both prosecution and defense; the jurors who will be sitting on your jury panel; and the prosecutor(s) you will be trying the case against. Know everything possible about the people you will be trying the case to and against. Exploit their idiosyncrasies and attitudes throughout your case.

B. EXPERT WITNESSES

If your defense involves proof of "Battered Woman Syndrome," and the effects of the syndrome on your client's perception of the necessity to act in self protection, you obviously need a well qualified expert to testify for the defense. You should select an expert who is honest, well-qualified, intelligent, articulate, and thoroughly familiar with Battered Woman Syndrome. I suggest Dr. Lenore E. Walker, of Denver, Colorado.

There are a number of things, in your relationship with your expert witness(es) that you must do in order to fulfill your responsibilities:

A Dozen Pointers On Dealing With Experts

(1) Promptly comply with "Rule 1" ("Get your money in front.") Rule 1 applies to your experts, as well as to you. Recognize that your experts are professionals and that they earn their livelihoods by doing what they do. Discuss their fee and payment requirements candidly at the outset. Comply with the requirements promptly to avoid tension and conflict within the defense team.

(2) Respect your expert's integrity. Make it clear from the beginning that all you are interested in is the truth and honest judgements and opinions from the expert. Do not ask anyone to testify to facts or opinions that are not true. If upon

competent evaluation, the expert tells you that she cannot support your theory of the case, look for another theory or, if you have cause to doubt the qualifications of the first expert, look for another expert.

(3) **Get the expert involved as soon as possible after the homicide.** Symptoms of stress and emotional trauma subside or are repressed over time. The earlier your expert becomes involved, the more accurate the impressions and conclusions of the expert will be. Focus your expert on what factors you want explored. If you believe that your client did what she did because she suffered from Battered Woman Syndrome, say so. Have a clear understanding of the issues that you seek opinions about. Conversely, *always* ask the expert what other opinions or observations she can offer concerning your client. In response to such open ended inquiries in private consultation with your expert, you will almost always get additional helpful information that you did not think to ask for.

(4) **Educate yourself.** Ask your expert for a list of suggested reading material so that you will fully understand the facts, theories, research, and other supporting data about which the expert will testify. Study the materials. Ask questions if there is anything you don't understand. You must achieve a high level of understanding of the theories, facts, opinions, and supporting data about which the expert will testify.

(5) **Supply your expert with copies of documents.** Send investigative reports, witness statements, medical and mental health records pertaining to you client and the deceased, and other investigative materials which may be helpful to the expert in understanding all the dynamics and facts relevant to the case. Index the documents to make it easy for the expert to find specific information and to make large amounts of information more "digestible." Ask, from time to time, if there is anything else the expert wants. If so, get the expert what (s)he wants promptly.

One note of caution: the prosecution is probably entitled to inspect any information that your expert relied upon in reaching his opinions. Thus, some care may have to be exercised in screening information that you supply to the expert. In your pretrial preparation conference with the expert, discuss what she will bring with her when she testifies. Have the expert bring *only* those materials that she did, in fact, rely upon. If the expert testifies that she relied only upon those materials that she brought to trial, along with her own testing and observations, you will be reason-ably secure that you have not opened Pandora's Box.

(6) **Meet, in person, with your expert.** Do this in advance of trial, as many times as necessary, until you thoroughly understand what the expert is prepared to say and why. Do not be afraid to ask "stupid questions" or questions that will disclose your ignorance of the witness' field of expertise. There is no disgrace in not knowing everything from the outset. The time and place to become familliar with the expert's field is during pre-trial meetings and consultation. Stupid questions and lack of full appreciation of the expert's field at trial, on the other hand, is unforgivable. Thus you must be willing to ask questions, read reference works, and do whatever else is necessary to be completely organized and knowledgeable before you set foot in the courtroom.

(7) **Devote adequate time to preparation for your examination of the expert at trial.** Remember that, at trial, you will have a very limited amount of time in which to make the jury understand. Thus, you must give careful consideration to how to succinctly present information so that jurors will fully understand. Work with your expert to develop her direct examination outline.

A technique that I often use to prepare for explaining complex matters at trial is explaining the materials to my children. Then, I ask them to explain it back to me. If I can make a 6 or 8 year old child understand the material, then I feel confident that I can convey it to jurors, even considering time limitations.

(8) **Solicit your expert's advice as to desirable juror profiles.** What kinds of people, in her experience, do you want on the jury? Why? Listen. Learn. Because your expert has been through similar trials, she will have a good understanding of what kind of people will make good jurors, receptive to your theory of the case.

(9) **Solicit your expert's advice about the questions that you will ask her in the courtroom.** The expert has probably testified in similar cases and has the benefit of that experience. (S)he can usually give you, beyond standard qualifications questions, a good idea of how to take her to the central issues of the case. If there are other avenues of inquiry that you think you want to explore at trial, ask the questions of the expert during a pre-trial consultation. Sometimes you discover that there are questions that you don't want to ask. It is better to find that out in advance than to have your boat sunk by a torpedo from your own expert at trial.

(10) **Ask your expert for suggestions about the questions you should pose to the prosecution's experts at trial.** Your expert, obviously, knows her subject matter much better than you. (S)he will be invaluable in helping you prepare for cross examination of the opposit-ion's expert witnesses.

(11) **Take good care of the expert.** If the expert is flying in for trial, have someone at the airport to meet her. See to hotel accommodations. Have someone to take her to the courthouse and to the courtroom or witness waiting area. Don't give your expert the burden of worrying about anything except what she's there for, testifying effectively for your client.

(12) **Do not compete with your own expert.** If you have a fantastic defense expert witness give her the floor at trial and let her perform. Let your expert witness dominate the jury's attention. Give good expert witnesses on your side open-ended questions that allow them to lecture and teach the jury. Go sit down in an inconspicuous place when your witness is "on a roll so that the jury will focus on her. Do *not* compete with your expert for the jury's attention."

When cross examining the prosecution's experts, do just the opposite. Keep command of the action. Ask leading questions that do not give the opposition's experts any opportunity to "sell" their position.

C. JURY SELECTION

Obtain jury data sheets and study them well in advance of trial. Pay close attention to each juror's family profile to determine whether the juror is more likely to identify with your client or with the decedent. For example, if a juror is the father (mother) of daughters, especially those about the same age as your client, he is more likely to identify with your client than the decedent. During the course of the trial, you want the juror to see his own daughter when he looks at your client. You want to leave the juror thinking, "If someone did that to my daughter, he'd deserve to be shot."

Jury data sheets contain a wealth of useful information. We have group meetings at which we study jury data sheets, develop "ideal juror profiles," and numerically rank each member of the panel *before* trial. Numerical rating is kept simple; a "1" is the best possible juror, who fits our ideal juror profile." A "5" is a hangman waiting to get his rope around the Defendant's neck. "2's",

"3's", and "4's" are in between. These ratings are a very useful tool at trial when you have to make decisions about peremptory challenges in a very limited amount of time.

Educate jurors during *voir dire* and warm them up to your theory of the case before the evidence starts. With a well planned *voir dire* examination, you can have jurors on your side from the outset of a trial. We will supply a copy of our voir dire outline for *Commonwealth v. Harmeling*, upon request to our office. It is a good example of advocacy during the jury selection process.

Have someone take notes of things jurors say in response to voir dire questions. You can often quote jurors' comments during closing argument. For example, if a juror says during jury selection that a woman, generally, could not be expected to defend herself against a man without a weapon, or that people have a right to keep guns around for self protection, those are opinions to quote back to them at closing argument time. Whether the juror recognizes that you are quoting him/her is unimportant. You will be certain that your argument reflects the jurors' beliefs and values.

Gun owners make great jurors in all self-defense cases. Gun owners, by definition, are people who believe a citizen has a right to kill in self-defense.

As a generalization, at least, I prefer male jurors when defending a female defendant. Men, I think, have protective impulses toward women. Women tend to be more negatively judgmental toward other women. Women who have never experienced life with an abusive male are more likely to think a battered woman must have done something to "deserve" abuse.

Public consciousness has been raised in recent years about spouse abuse. In working with the jury, give them the opportunity to prove their sensitivity to battered women by acquitting your client. In picking jurors, avoid people who might not be sympathetic to the issue of spouse abuse. Older men and those from particularly "macho" ethnic cultures may harbor the attitude that a man has a right to beat his wife.

Middle-aged men with daughters of marriageable age tend to be more sensitive to battered women. Men in their twenties may not yet be of an age to have thought much about the problem; often they have not entered into long-term relationships with women.

If a potential juror is a feminist, consider keeping her. If she has been the victim of serious physical abuse, consider keeping her. If, before trial, you can discern from data sheets that a potential female juror is divorced (*e.g.* children with different surname) check the clerk's records for indications of abuse, such as restraining orders.

D. COURTROOM INTERACTION WITH YOUR CLIENT

A primary goal throughout the trial is to make jurors like and empathize with your client and to applaud the fact that her abuser is dead. When the whole story of the events that led up to the homicide is told, you want jurors to think, "I would have done the same thing." A juror will not condemn your client for doing something that (s)he would have done, herself, in the same circumstances. Jurors will, likewise, not condemn your client if they identify your client with their own daughters and envision their daughters doing what your client did under similar circumstances.

Before trial, work with your client, if necessary, to soften her appearance. Have her look as "feminine" and "defenseless" as possible. If you don't know much about make-up and clothing, ask your wife, a female lawyer, your secretary, or someone whose opinion about such things you respect. I couldn't dress a salad, so my litigation assistants and secretaries sometimes work with female clients on clothing, make-up, behavior, posture, and other things.

Make certain the jury knows that you like and accept your client. Use non-verbal communication. Casual, non-obvious touching during the trial tells jurors that the citizen-accused is a worthwhile person. Don't let your client sit abandoned, during recesses, before, or after court sessions.

Convey the message that you are in court to vindicate an innocent person. Have your client sit up straight and "look innocent." Look at your client from time to time during trial. If she/he begins "looking guilty," gently remind her/him to straighten up and look innocent. The "look of innocence" is solemn, serious, and confident without being smug. Innocence usually sits up reasonably straight, pays attention, does not crack jokes, chew gum, or chain-smoke cigarettes within view of the jury during breaks.

Most interactions with your client in the presence of the jury should be those meant to comfort and reassure to her. It is good to appear as her champion and protector. Try to avoid asking your client questions in the jury's presence or to "confer" very much. Those things convey that there is something your client didn't tell you; that there is something that you don't understand and need to have clarified. Avoid conveying insecurity. Promote belief by displaying confidence. Think how this principle relates to the next one.

A good way to show the jury that you respect your client's intelligence and counsel is to ask her for help from time to time. Before "passing" a witness at the conclusion of your examination for example, ask her within the presence and hearing of the jury if there is anything that you've forgotten to ask the witness. Then, huddle with your client for a few moments to confer. Sometimes she will mention things you have indeed forgotten and help you do a better job. Other times, she might suggest a subject you avoided intentionally. Sometimes she won't tell you anything at all. It really does not matter. What *does* matter is that your actions tell the jury that the defendant is intelligent and has your respect. You may or may not have additional questions after conferring. If you do, ask them. If not, say "Thank you; That's all," and sit down.

Before trial, explain to your client that you and she will have such conferences during trial. Be sure your client knows that there may be tactical reasons for not pursuing every point or suggestion she makes during in-trial conferences.

Refer to your client by name. Do not refer to her as "the defendant" or "my client," or anything else that leaves her without personhood or identity.

Except in *extraordinary* instances, the defendant should testify. If a defendant is innocent, jurors expect them to get up and say so. Your client usually should, testify *first* in the defense case to prevent the argument, "She listened to everyone else's testimony, then made hers fit." Calling your client first also helps the jury understand the the defense is "fighting fair."

E. GENERAL TRIAL TECHNIQUES

1. COURTROOM "ATMOSPHERE"

The feeling of a courtroom should be like that of a church. Within a courtroom, Truth and Justice are the gods. If you make the trial a mission to "pursue the Truth and do Justice," the jury will follow you. "Pursue the Truth and do Justice" are usually the very first and very last words that I say to jurors. If defense

counsel is the one who keeps talking about truth and justice, then by the end of the trial jurors will identify truth and justice with the defense. In closing argument, of course, you restate the truth — The batterer needed to be killed in this situation — and you define justice as ACQUITTAL.

2. CROSS OF POLICE AND OTHER GOVERNMENT WITNESSES

Don't make personal attacks on police officers or try to make them look like evil people. Jurors, generally, like and respect police officers. If you must attack a police officer on cross-exam do it, but you should usually let the officer off the hook a little bit by blaming inexperience, poor training, too much enthusiasm, or something equally forgivable.

Most police officers, lab technicians, medical examiners, and other law enforcement professionals are honest people. Ask the right questions and they will usually give the right answers. A few examples we have encountered in trials: A decedent had a rotten reputation for violence in the community and the investigating officer was aware of it. When asked about the decedent's reputation for violence during cross-exam, the police officer hesitated and looked very uncomfortable. After a very dramatic pause that served to emphasize the issue, the officer admitted that the decedent had a "terrible" reputation for violence and went on, to explain how awful it was in graphic terms that helped lead to acquittal. In many cases, state police forensic experts have admitted that their testimony was absolutely meaningless in determining whether shots were fired intentionally, accidentally or in self-defense. In the *Harmeling* case, the medical examiner actually reenacted the defendant's account of the shooting with defense counsel in open court, then went on to admit that the defendant's account of the incident was fully consistent with all of the scientific, physical, and forensic evidence.

3. CONTROL THE COURTROOM

Frame the issues from the outset. Voir Dire and opening statement are the times at which the theme and tone of the trial are set. It is the prosecutor's job to press the theme, "locking up a criminal." It is your job to make the theme, "vindicating an innocent citizen-accused." If you are in control of the courtroom, it will feel natural and proper for you to suggest appropriate times for breaks, lunch, and end of day recesses. Do not mistake asking for a lunch break with controlling the courtroom, however. The control I refer to is control of the issues, the evidence, the instructions, and the rulings on objections and issues of law.

Controlling the courtroom as I suggest, requires meticulous preparation and hard work. Know the law so that when you make objections, they are sustained. Don't make objections that you know are not going to be sustained unless there is a compelling legal or tactical reason to do so.

Think about how you intend to get your proof into evidence and be prepared to cite specific law that compels admission of those things in your evidence on which you anticipate objection.

Control of your trials is cumulative. As you develop a reputation among the judges before whom you practice for integrity, diligence, skill, and hard work, it becomes easier to gain control. If a judge knows that when you make a legal argument, it is backed up by good and accurate research; or that when you tell him that you are going to prove specific facts, you will, the court will give you much more latitude to try cases your way.

4. OTHER SUGGESTIONS

Be nice and courteous to almost everyone— bailiff, judge, jurors, spectators, witnesses, and even the prosecutor. If jurors like you, they are more likely to do what you want them to do. Don't act like a sycophant; just be a naturally nice person. The only people you should not be courteous or nice to are those whom you catch in a lie or deception. You can emulsify obvious liars and cheats without concern about jury disapproval.

Call the Prosecutor by Name. Let the jury know that you and (s)he are friends. Casual social touches exchanged with the prosecutors help defuse the "good guys" against the "bad guys" impressions that prosecutors try to convey. A typical trial will give you many spontaneous moments when you can convey the feeling that you and the prosecutor really like one another. If the prosecutor needs a pen, marker, or newsprint pad, loan him yours. If she drops her notes, help pick them up. If the prosecutor is having trouble finding something, help (Eventually, he'll find it anyway).

Good Prosecutors do Just the Opposite. They stay distant from and cool toward the defendant and the defense counsel. Their goal is to send a message to the jury that the defendant and defense counsel are "the enemy," not worthy of common decency or courtesy.

Invite Spectators. Encourage attractive, middle class looking people who care about and who are rooting for the defendant, to sit in the spectator section of the court every day. Priests or ministers, depending on demographics of the trial location, are good to have among your rooters. Talk to your supporters from time to time during breaks so there is no mistake about whose side all those nice people are on.

Open and Close Your Case with Good, Strong Witnesses. Remember the principles of "primacy" and "recency." With these principles in mind, decide when, within the defense case, the defendant will testify. Do you want the jury to begin deliberations with your client's words still ringing in their ears, or do you want them to have time to forget your client's demeanor and words? Likewise, remember the principles of primacy and recency when you are planning your examination of witness. Start and finish with the points that you want the jurors to remember. Repetition helps, too. You can usually have a witness repeat solid, important points several times before you draw an objection of "asked and answered."

Wave The Flag. Don't leave the flag for the prosecutor to wave. Do it yourself. Talk about truth and justice. Present as sacrosanct the rules by which criminal cases are tried. I like to commit jurors to "pursue the truth and do justice." With a good self defense case, that mission statement works well.

Play To Win. Prepare your cases thoroughly and try them with all the dedication, diligence, skill, and tenacity of which you are capable. A "winner" does not mean an "easy" case. To the contrary, most self-defense cases and all "Battered Woman" self-defense cases are difficult, time consuming, complex, and fierce battles. Preparation, hard work, understanding the law and theories of the case, and effective presentation will all maximize your chances and, more importantly, the chances of the citizen whose cause you champion, of a successful outcome — **ACQUITTAL!**

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PRIVATELY-RETAINED PROSECUTORS

KACDL Files Amicus Opposing Private Prosecutors

Gary Johnson

PROCEDURAL HISTORY

On September 9, 1988, the Ky. Court of Appeals ruled that participation in criminal prosecutions by privately-retained prosecutors violated the federal due process clause. *Hubbard v. Commonwealth*, 35 K.L.S. 12, p. 2-3, October 7, 1988, opinion rendered 9/9/88. The Supreme Court of Ky. granted discretionary review of this case on that issue and one other; the case was briefed, and on June 2, 1989, was argued before the Supremes. Both parties argued whether the United States Supreme Court's decision in *Young v. United States, ex rel, Vuitton Et Fils S.A.*, 481 U.S.__, 107 S.Ct. 2124, 95 L.Ed.2d 740 (1987), relied upon by the Ky. Court of Appeals in its decision in *Hubbard*, could be extended to prohibit privately-retained prosecutors from participating in criminal cases in Ky. The Attorney General's Office argued that *Young* was a decision based upon supervisory powers, and counsel for Hubbard argued that a fair reading of *Young* and later cases extends the due process prohibition to this antiquated procedure in Ky.

At the oral argument, several justices questioned whether or not there was a Ky. constitutional issue involved in the case, and whether or not the Supreme Court had the supervisory powers to prohibit the use of privately-retained prosecutor's in criminal cases. Other justices questioned whether there was a fundamental conflict of interest for a lawyer to take money from a private individual and then ostensibly represent the Commonwealth. Most of these issues had not been addressed in the briefs before either the Ky. Court of Appeals or the Ky. Supreme Court.

KACDL ASKS TO INTERVENE

The Ky. Association of Criminal Defense Lawyers (KACDL) was formed October, 1986, as an educational, charitable, and scientific organization. It's membership is restriced to those attorneys in Ky. who are actively engaged in the defense of criminal cases and excludes attorneys whose duties involve the prosecution of criminal cases. KACDL promotes study and research in the field of criminal law, disseminates information by lecture, seminar and publication for the advancement of knowledge in the field of criminal defense practice, seeks to promote the proper administration of criminal justice throughout the Commonwealth, and seeks to encourage the integrity and independence and expertise of defense lawyers in Ky. There are over 200 KACDL members.

In March of 1989, the Board of Directors of the KACDL passed a resolution, in response to the Court of Appeals' decision in *Hubbard*, condemning the practice of privately-retained prosecutors in criminal cases. The board called for the filing of an *amicus curiae* brief.

It is significant to note that some of the members of the Association, including this writer, have in the past, performed the services of privately-retained prosecutors and have made significant fees from that activity. The positions adopted by the association and asserted in the *amicus* brief, could actually take money out of these individuals pockets. They nevertheless felt that the ethical debate is now over- it is simply unethical, and creates the appearance of impropriety, for privately-retained attorneys to conduct proceedings in criminal cases. To their credit, the members of the association have gone on record in favor of making the financial sacrifice in order to improve the delivery of criminal justice to all the citizens of the Commonwealth.

Frank E.Haddad Jr., president of KACDL, and James Dahlberg, KACDL member, and teacher at the Department of Government, Morehead State University, volunteered to prepare and file the brief. They filed a Motion for Leave to file the *amicus curiae* brief on June 15, 1989, in the Ky. Supreme Court, and tendered copies of the brief. The Attorney General's Office has filed a response requesting that the brief not be permitted to be filed.

THE ISSUES RAISED

The formal argument made by the Association is as follows:

> This court should forbid privately-retained prosecutors in criminal cases by executing its supervisory powers, drawing a bright line prohibiting their participation inside the rail in criminal proceedings. The practice of allowing privately-retained prosecutors presents an inherent conflict of interest, violates the due process requirements of the Kentucky Constitution, and is contrary to public policy as expressed by the legislature in the Unified and Integrated Prosecutor System and by this Court's Rules of Criminal Procedure.

SUPERVISORY POWERS

Professor Dahlberg argues that the court has inherent supervisory control of the lower courts. Ky. Constitution, Section 110(2)(a). The Court has the primary duty to assure orderly and effective administration of justice, and has the inherent power to do what is reasonably necessary to obtain that goal. *Ex Parte Farley*, Ky., 570 S.W.2d 617 (1978). The court has the authority to render enforceable opinions on ethical questions arising from the roles of prosecutors in criminal cases. *In Re Kenton County Bar Association*, 314 Ky. 664, 236 S.W.2d 906 (1951). *In Re Kentucky Bar Association, Amended Advisory Opinion* E-291, *Kentucky County Attorneys Association v. Kentucky Bar Association*, Ky., 710 S.W.2d 852 (1986).

INHERENT/ IRRECONCILABLE CONFLICT OF INTEREST

The brief for the KACDL argues that, historically, public prosecutors have a greater duty to insure fairness than does a private practitioner in a mere civil case. *Burger v. United States*, 295 U.S. 78, 88, 79 L.Ed. 13, 14, 55 S.Ct. 629 (1935). Ky.

has long-recognized this increased responsibility by public prosecutors. *Goff v. Commonwealth*, 241 Ky. 428, 44 S.W.2d 306, 308 (1931).

The ABA Code of Professional Responsibility, adopted by the Ky Supreme Court, Rules of Supreme Court, 3.130-(1), has likewise held that publicly chosen prosecutors have a responsibility not shared by private counsel. EC 7-13. The inherent conflict of interest for a privately-retained lawyer who is hired to prosecute a criminal case arises because he has a pecuniary interest in the outcome of the criminal case. Where his fee comes from an individual client or group of clients, either as a contingent fee or a flat rate, rather than being paid by the government, the private prosecutor's loyalties necessarily conflict. EC5-14.

Upon whose behalf does the privately-retained prosecutor make decisions in a criminal case? If he makes those decisions on behalf of the Commonwealth, he may be forced to act in a manner that is adverse to the interest of his paying clients. If he acts only in the interest of his paying clients, as he is required to do, he may perform actions or fail to act in a manner consistent with the interest of the Commonwealth. *In Re Kentucky Bar Association, supra. Cantrell v. Commonwealth*, Va., 329 S.E.2d 22 (1985); *Ganger v. Payton*, 379 F.2d 709 (1967). The inherent conflict of interest cannot be avoided. *Polo Fashion, Inc. v. Stock Buyers Int'l., Inc.*, 760 F.2d. 698, 705 (6th Cir. 1985), cert. denied, 107 S.Ct. 2480, (June 1, 1987).

(Since the Association filed its brief, the Supreme Court has temporarily suspended a prosecuting attorney for participating in private litigation arising from the same incident that brought about the criminal charges. See *Kentucky Bar Association v. Lovelace*, 36 KLS 7, 6/30/89, p. 7, decided June 29, 1989.)

PROSECUTIONS BY ELECTED OR APPOINTED GOVERNMENT OFFICIALS ONLY

RCr 1.06(b) defines "Attorney for the Commonwealth" so as to exclude privately-retained prosecutors. Furthermore, Ky. Constitution, Sections 93, 97, make the Attorney General and Commonwealth and County Attorneys government officials. Their duties are prescribed by law. *Id.*, Section 93. KRS Chapter 15 mandates that the Attorney General is the chief law enforcement officer of the Commonwealth of Ky. Broad powers are given to the Attorney General under that statutory scheme to control and influence the nature of criminal prosecutions. This Unified and Integrated Prosecutor's System allows the Attorney General to replace Commonwealths and County Attorneys with other Commonwealths and County Attorneys from other jurisdictions, where the original government prosecutor has a conflict or cannot serve; the Attorney General may appoint an Assistant Attorney General to handle a particular case. In only one instance under Chapter 15 is the use of a private attorney authorized, and that is where a local prosecutor has been indicted for a felony, and must be replaced. In that particular case and in that case only, the Attorney General may appoint a private attorney to act as the prosecutor for that jurisdiction. KRS 15.734.

KACDL argues that KRS Chapter 15 provides an adequate mechanism for aggrieved citizens to affect the quality of criminal prosecutions in their jurisdiction. The brief points out that the Attorney General may intervene or supersede a local prosecutor when requested to do so by five members of the Prosecutor's Advisory Counsel. That counsel is composed of 9 members, all appointed by an elected official, the governor, and 2 of whom are non-lawyer citizen appointments. Additionally, KRS Chapter 15.200 provides that the attorney general may intervene in local criminal prosecutions when requested to do so by a local mayor, a local court, a local grand jury, a local sheriff, the majority of any city legislative body, or the governor.

Sufficient protection for citizens who fear that a local prosecutor may not proceed with a case as vigorously as warranted is provided by KRS Chapter 15. There are adequate remedies in place to ensure that criminal proceedings are prosecuted with vigor, with fairness, and with all due diligence. Privately-retained prosecutors represent an antiquated mechanism, and they are no longer needed.

Clearly, the legislative intent, and thus the public policy, in Ky. is to place criminal prosecutions in the exclusive hands of elected government officials or their appointed assistants. Privately-retained prosecutors are not contemplated.

KY'S CONSTITUTIONAL REQUIREMENT OF DUE PROCESS

"Absolute and arbitrary power over the lives, liberty, and property of free men exists nowhere in a republic, not even in the largest majority." Ky. Constitution, 2. The Ky. Supreme Court has held that this provision is broad enough to embrace the traditional concepts of both due process of law and equal protection of the law. *Kentucky Milk Marketing v. Kroger*, Ky., 691 S.W.2d 893 (1985). ". . .[W]hatever is essentially unjust and unequal or exceeds a reasonable and legitimate interest of the people. . ." is barred by Ky.'s own constitutional guarantee of due process of law. *Id.*

The Association argued that although the Court is not free to impose a greater federal due process right than does the United States Supreme Court, the Commonwealth is free, as a matter of its own law, to impose greater protections for its citizens. *Oregon v. Hass*, 420 U.S. 714, 95 S.Ct. 1212, 43 L.Ed.2d 570 (1975).

CALL FOR A BRIGHT LINE

Professor Dahlberg argues that the debate about the use of privately-retained prosecutors has always revolved around the question of whether the elected or appointed official retains "control" of the case; the elected prosecutor guarantees that prosecutorial decisions are made by a "disinterested" representative. The previous decisions by the Ky. courts indicate that the use of privately-retained prosecutors is tolerated because a locally elected official "retains control."

This is a fiction.

KACDL argues that the party standing before the court questioning witnesses, jurors, or other counsel, is the person who is in control of the litigation. Since the case of *Stumbo v. Sebold*, 704 F.2d 910, 911 (6th Cir. 1983), there has been little doubt that the actual practice of using privately-retained prosecutors shifts control to the party addressing the participants in the proceedings. In that case, the 6th Circuit reversed the conviction not because the private prosecutor's conduct was *per se* a violation of due process, but that it was *in fact* a violation. One cannot read the opinion and argue that the locally elected prosecutor was in control, considering the extent of the egregious misconduct in that case.

Additionally, the Association argues that KRS 15.733(1)(a), when read in conjunction with RCr 1.06(b), requires a conclusion that "criminal proceedings" are to be conducted only by elected or appointed government officials. If it's in court, it's a "proceeding." If it's a criminal "proceeding", it must be conducted by a government official, not a privately-retained attorney.

The Association argues that no rule should be imposed by this Court that would prohibit a locally elected prosecutor from conferring or consulting with a privately-retained attorney out-

side of the actual courtroom proceedings. Of course a prosecuting attorney should be allowed to confer with anyone they choose in preparing their case. Preparing is different from presenting. When it comes to presenting the case in any court proceeding, the Association argues that a bright line, drawn at the rail, should prohibit the participation of private prosecutors.

WHY IS THIS IMPORTANT?

We may not win this issue in *Hubbard*, but we will win it some day. The movement in the federal courts and all across the country is to invest prosecutorial discretion only in the hands of government officials. Ky.'s retention of this questionable ethical procedure is a throwback to an earlier time. In reality, many governmental prosecutors would probably welcome a rule that would allow them to confer with any attorney retained by a victim's family, but at the same time would allow them exclusively to conduct and control the actual courtroom proceedings as they see fit, in the interest of both the accused and other parties. Although neither the Prosecutor's Advisory Council nor the Commonwealth's Attorney Association have responded to the decision in *Hubbard*, I suspect that a majority of their members might agree with the brief filed by the Association.

This case is important for another reason. Since the Association was formed, this is the first time they have sought leave to file an *amicus* brief. It won't be the last. The Association is growing, and is taking an increasingly aggressive role in issues that relate to criminal defense. At the recent Kentucky Bar Association, several members spoke on proposed criminal rules changes. Legislative suggestions and educational activities for the upcoming legislative session are being planned by committees within the association.

This first effort by KACDL is a good one, and we can look forward to further advocacy by this group.

We should encourage them.

GARY E. JOHNSON
Assistant Public Advocate
Appeals Division
Frankfort

(Copies of the amicus brief may be obtained by contacting Linda DeBoard, Kentucky Association of Criminal Defense Lawyers, P. O. Box 23593, Louisville, Kentucky 40223. Copies of the original briefs in Hubbard can be obtained by contacting DPA.)

ASK CORRECTIONS

TO CORRECTIONS: My client served a continuous 10 months in the county jail before being transferred to Corrections. After his sentence was calculated by Offender Records he was credited with only 2 months jail custody credit.

TO READER: A review of this case reveals that although your client was not received by Corrections until 10 months after his arrest, his prison sentence was calculated as starting to run on the date of his final sentencing which was 8 months prior to his transfer to Corrections. The 2 months credit for jail custody is for jail time served prior to his sentencing date.

TO CORRECTIONS: My client informs me that his parole eligibility date is incorrect. He says his good time allowance has not been subtracted from his parole eligibility date.

TO READER: Good time allowance is not credited toward parole eligibility. Parole eligibility is computed by adding the amount of time to be served as provided by the applicable Parole Board Regulation to the final sentencing date, and then subtracting there from the amount of jail custody credit. Good time is subtracted from the total sentence length.

TO CORRECTIONS: My client has been in the county jail a total of 9 months.He was convicted 6 months ago. It is my understanding he can receive Meritorious Good Time, if he has maintained good behavior in jail. Is this true? If so, how can my client apply for the Meritorious Good Time?

Shirley Sharpe

TO READER: There are two types of Good Time which an inmate can receive. They are:

1) **Statutory** [KRS 197.045(1)] - Any person convicted and sentenced to a state penal institution may receive a credit on his sentence of 10 days for each month served. This good time allowance is not on the actual sentence length, but on actual time served, which amounts to 1/4 of the total sentence. For bookkeeping purposes statutory good time is credited upon admission to a state penal institution or upon sentence computation which is done immediately prior to one meeting the Parole Board.

2) **Meritorious** [KRS 197.045(3)] - In addition to statutory good time you may also be considered for 5 days meritorious good time per month, provided you do not have forfeited good time outstanding. You do not have to apply for meritorious good time as a recommendation will automatically be sent to the jailer and parole officer after you meet the Parole Board. The award of meritorious good time is based on your behavior while in jail. After you receive an award of meritorious good time the first time, you will automatically be considered again every 90 days. Every time you receive an award of meritorious good time, you will receive a memo from the Corrections Cabinet informing you of your new conditional release date. You should allow approximately 4 weeks after you meet the Parole Board before you can expect to receive the memo informing you of your new conditional release date.

> Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution.
>
> *Olmstead v. United States*, 277 U.S. 438, 485 (1928)

FEDERAL HABEAS CORPUS

The Decline of the Great Writ Continues with Teague v. Lane

Randy Wheeler

During the last decade an assault has been mounted from numerous quarters on the availability and scope of habeas corpus review of state criminal convictions under 28 U.S.C. Section 2254. A number of reasons have been posited for this assault, but, generally, the goal has been to give the states more autonomy and finality when dealing with criminal cases. This trend is consistent with the decline of federalism initiated primarily during the presidency of Ronald Reagan. More practically, as Chief Justice Rehnquist indicated during a February speech on the state of the federal judiciary to the American Bar Association, the federal court system is allegedly so overloaded that it has no choice but to cut back in some areas of litigation. Unfortunately, criminal defendants, who, because they are usually poor and because of the nature of their involvement with the system have little political clout, are taking much of the brunt of the ensuing changes.

The attempts to restrict habeas corpus litigation have intensified recently. Senator Bob Graham (D.Fl.) introduced a bill in Congress in January, S.271, which would limit habeas availability by preventing certain claims which were not raised during state proceedings from being entertained, establishing a one year period of limitation and affording state court factual determinations a very broad presumption of correctness. Similar restrictions were also included in President George Bush's recently announced crime package, S. 1225. Former Supreme Court Justice Lewis Powell is also heading an *Ad Hoc* Committee of the Judicial Conference of the United States on Federal Habeas Corpus Review in Capital Cases, which has been formed specifically to examine the "abuses" of federal habeas petitions in death penalty cases. That committee is due to report its recommendations later this year.

Some of the most restrictive measures have issued from the Supreme Court, a Court which, with it's Reagan appointments, has become one of the most conservative ever in the area of criminal law. Specifically, the Court has heightened its unwillingness to excuse procedural defaults committed during state litigation by limiting the ways in which the litigant can show "cause" for the default and by providing higher standards that must be met in order to show the prejudice that has resulted from errors alleged. See *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 2646 (1986); *Amadeo v. Zant*, 486 U.S.__, 108 S.Ct. 1771 (1988). Additionally, the "fundamental miscarriage of justice" exception to procedural defaults has now been equated to an error which would lead the Court to believe that the litigant may have been convicted despite his "actual innocence." See *Dugger v. Adams*, 489 U.S.__, 109 S.Ct. 1211, 1218, n. 6 (1989). The Court has also gotten tough on litigants it perceives have abused the writ of habeas corpus. Indeed, during the term of Court just ended the Court told one litigant who had filed numerous petitions previously never to file again, and instructed the clerk not to accept his filings. *In Re McDonald*, 489 U.S. __, 109 S.Ct. 993 (1989).

Perhaps the greatest blow to habeas review was struck by the Supreme Court during the 1989 term in *Teague v. Lane*, 489 U.S.__, 109 S.Ct. 1060 (1989). In *Teague* a majority of the Court held that *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986) (which held that peremptory challenges can not be used in a racially discriminatory manner) could not be applied because the petitioner's conviction was final at the time *Batson* was decided, citing *Allen v. Hardy*, 478 U.S. 255, 106 S.Ct. 2878 (1986). But a plurality of the Court, including Chief Justice Rehnquist and Justices O'Connor (the author), Scalia, and Kennedy went further and, in relation to a claim that the 6th Amendment's fair cross section requirement applies to the petit as well as the grand jury *sua sponte* considered the general question of retroactivity on collateral review.

The plurality concluded that any new rule of law—one "not dictated by precedent existing at the time the defendant's conviction became final",[1] would not be announced or applied retroactively unless the new rule made the conduct for which the petitioner was convicted no longer criminal or required the observance of fairness protections "implicit in the concept of ordered liberty", supplying a "bedrock procedural element underlying the accuracy of the ajudication" (a test Justices Brennan and Marshall in dissent equated with one of "actual innocence"). *Teague, supra*, 109 S.Ct. at 1069 - 78. Ominously, the plurality noted that it was "unlikely that many such components of basic due process have yet to emerge." *Id.*, 1077. The plurality explicitly concluded that habeas corpus could no longer be used to develop new constitutional procedures unless the aforementioned exceptions were applicable and the rule would benefit all defendants on collateral review retroactively. *Id.*, 1078.

It is significant to note that *Teague*'s retroactivity limitation was not simply restricted to cases in which the Court is asked to *announce* a new rule, in which case retroactivity will be a threshold question which must be resolved before the rule itself can be articulated, a procedure which Justices Stevens and Blackmun considered to be "neither logical nor prudent." *Penry v. Lynaugh*, 45 CrL 3188, 3200 (6-28-89). Teague also applies to cases in which the petitioner is requesting that the Court *apply* a new rule which has developed in another case subsequent to the finality of the petitioner's conviction. In this situation the threshhold question is whether the ruling on which the petitioner seeks to rely is simply an application of settled precedent decided before his conviction became final. See *Yates v. Aiken*, __U.S.__, 108 S.Ct. 534 (1988).

Dissenting in *Teague*, Justices Brennan and Marshall criticized the plurality's broad curtailment of habeas relief, particularly since it did so without the benefit of full briefing or oral argument. *Teague, supra*, 109 S.Ct. at 1086. (The question was addressed in 3 pages of an amicus brief.) The dissenting justices

criticized the plurality for it's "infidelity" to the doctrine of *stare decisis*. *Id.* The justices also went to great lengths to illustrate that the plurality's decision to link the availability of relief to guilt or innocence if the outcome of a case is not "dictated" by precedent would prevent many 5th, 6th and 14th Amendment cases from being brought on federal habeas. The dissent pointed to 19 previous significant decisions which could not have been made under the plurality's retroactivity rule. *Id.*, 1088-89.

Many observers of the Supreme Court believe that the plurality in *Teague*, a non-capital case, had a hidden agenda of restricting further the ability of those sentenced to die by the state to litigate constitutional issues in federal court. The plurality specifically left this question open but did not waste much time in applying the *Teague* rule to a capital case, once again *sua sponte*, in *Penry, supra* (in which the Court held the petitioner was entitled to a specific mitigation instruction on mental retardation and an abused childhood but also held that the 8th Amendment does not prohibit the execution of the mentally retarded). Unfortunately, Justice White, who had not joined the *Teague* plurality did so in *Penry* making the retroactivity rule that of a majority. The Court cursorily stated that the state's finality concerns are as applicable in the capital sentencing context as in any other case.[2]

Certainly an argument can be made for most any issue that it will not require the announcement of a new rule or the application of a rule which developed only after the finality of the petitioner's conviction because issues will almost always have some basis in precedent. But *Teague*, and particularly *Penry*, illustrate that an argument tying the issue to a pre-finality line of cases may not be enough. Justices Brennan and Marshall, in their dissent in *Teague* asserted that the plurality's conclusion that a case announces a new rule if the result was not "dictated" by precedent existing at the time the petitioner's conviction became final was too vague, for it could be concluded in almost every case that a decision had not been "dictated". *Teague, supra*, 109 S.Ct. at 1087 - 88. In *Penry* the Court stated that the petitioner was entitled to the benefit of *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954 (1978), and *Eddings v. Ohio*, 45 W.S. 104, 102 S.Ct. 869 (1982), in relation to the mitigation issue because they had been decided prior to the finality of the petitioner's conviction. But the Court did not stop there; the Court ultimately relied on the nature of the rule that was being requested in it's determination of retroactivity rather than the issue's precedential basis.

The collateral implications of *Teague* are clear. The unavailability of habeas corpus to create or apply new constitutional rules may have a bearing on the Court's determination of whether a petitioner has abused the writ, particularly in relation to successor habeas petitions, which are generally based on new developments in the law. *Teague* may also further dilute the already limited exception of the "novelty" of a claim as reason to excuse a procedural default so that the claim can be raised in a habeas corpus proceeding. See *Reed v. Ross*, 468 U.S. 1, 104 S.Ct. 2901 (1984). Indeed, arguing "novelty" may place the petitioner in a classic "Catch-22" situation.

Teague and *Penry*, as well as other Supreme Court cases restricting habeas relief, place a greater burden at the state level for the correction of constitutional errors. Specifically, attorneys have been given the burden, particularly in capital cases, of raising every issue possible on the direct appeal. See *Smith v. Murray*, 477 U.S. 527, 106 S.Ct. 2661 (1986). Indeed, attorneys must be clairvoyent, forseeing novel issues in the case being litigated as well as those that might be decided after the petitioner's conviction has become final. This emphasizes the need to track percolating issues, particularly in the Supreme Court by examining cases in which certiorari has been granted and concurring and dissenting opinions to see what issues are likely to be successful. Counsel should also consider in appropriate cases the possibility of raising some traditional post-conviction issues on or during the direct appeal requesting a remand or supplementation of the record if necessary in order to avoid the possibility of relief being foreclosed after the finality of the conviction. Also, greater consideration must be given to the filing of a petition for a writ of certiorari after the direct appeal making sure that the petition includes any issue in which it is conceivable that a new rule could be announced or applied.

The Supreme Court's decisions, by truncating the availability of relief, have also placed a greater burden on the state courts to scrutinize issues carefully. This is facilitated in Kentucky, at least in capital cases, by statutory law requiring the Kentucky Supreme Court to consider errors raised on appeal even if unpreserved. KRS 532.075 (2). See *Cosby and Walls v. Commonwealth*, Ky. ___S.W.2d __, 36 K.L.S. 6,34 (6/8/89). However, the need for comprehensive review is hindered by such rules as Cr 76.12 (4)(b)(iii) which places an absolute limitation on the number of pages for death penalty briefs.

Hopefully, the decline of federalism will not be taken as a blanket signal to the states to cut back on constitutional rights. Limitations on procedures or the scope of habeas review in federal court should not be construed to mean that state courts cannot or should not uphold federal constitutional rights or apply new constitutional rules in state court even if unavailable in federal proceedings. Moreover, any limitation on federal constitutional rights does not restrict the state's authority to apply it's own constitution to ensure those rights itself.

RANDALL L. WHEELER
Director
Capital Litigation Resource Center
Frankfort

[1] Finality was defined as the exhaustion of the direct appeal or, if certiorari from the Supreme Court was sought, when it was denied or, if granted, when relief was denied.

[2] The Court, at least, did expand the exception allowing retroactive application if the new rule made conduct no longer criminal, to included those issues in which it was asserted that a particular class of person could not be punished.

NEW IN THE DEATH PENALTY LIBRARY

1. Liebman, James. *Federal Habeas Corpus Practice and Procedure.* 1988 (2 vols.)

2. *Defending a Capital Case in Texas.* Manual from the Texas Death Penalty Resource Center.

3. *Post-Conviction Law and Practice.* Materials from the 1988 Training Seminar for Capital Litigation Resource Center personnel.

4. Various pleadings:

Blystone v. Pennsylvania. 88-6222. United States Supreme Court. Brief for Petitioner.

Requests for materials from the death penalty library or suggestions for acquisitions may be sent to:

Julia K. Pearson
KCLRC
1264 Louisville Road
Frankfort, KY 40601
(502) 564-8006

EFFECTIVE LISTENING FOR LAWYERS

INTRODUCTION

The relationship between lawyer and client has both content and process dimensions. *Content* refers to the exchange of legal advice and information; *process* refers to the relationship between the parties, including their feelings about one another and the manner in which those feelings are manifested. "'Content' is the reason a person seeks legal advice, 'process' may explain why he chose the lawyer he came to see."[1]

Listening is a process skill, and one which attorneys may have been dishabituated from developing. They have been trained within a system which encourages a verbal, adversarial mode of discourse and devalues other styles, even if they would be more effective.

"Most lawyers do not do enough listening. They have not time to listen. They are too busy asking too many questions."[2] The lawyer's role encourages poor listening habits: any professional counseling relationship "always tends to domination by the counselor."[3] There is a rationale for this tendency to not listen: individuals often think they know what the speaker is going to say and are busy formulating or stating their response through interruption, overlap, or inattention before the speaker has actually completed his/her ideas.[4]

Another poor listening habit is impatience, which may be exacerbated by the lawyer's perception to his or her social role. In an interview, one attorney acknowledged:

> *Delay and thoughtfulness are crucial steps in listening. Often the automatic response is incorrect. [Yet, because] attorneys are problem solvers, they need to appear to be heroes. It hurts their egos to say they need to think about something.*

Formulating responses prematurely is a poor listening habit.[5]

Then there is the attorney who, though physically present, finds his or her attention divided by numerous distractions and interruptions.

If we summarize a composite profile of the lawyer as an individual who is preoccupied with talking (not listening), who predicts what the clients *intend* to say before they articulate their ideas, who prematurely formulates his/her own responses, and who yields to external distractions, we have summarized the accepted behavior patterns for poor listening habits.[6]

The essence of counseling skill (legal and otherwise) is providing the client with a balance of information and "freedom."

> *Physicians are often criticized for providing too little information, lawyers are often criticized for providing either too much information, or too little freedom. The one fault is to leave the client in the hang-up of ignorance, the other is to lecture to the client and leave him no room to make choices.*[7]

This "freedom" is possible only through the demonstration and mastery of effective listening skills.

It is generally assumed that a good lawyer is a good talker.

> *Contrary to popular belief [says Sydney J. Harris], it is usually the good talker who makes the best listener. A good talker (by which I do not mean the egomaniacal bore who always talks about himself) is sensitive to expression, to tone and color and inflection in human speech. Because he himself is articulate, he can help others to articulate their half-formulated thoughts. His mind fills in the gaps, and he becomes, in Socrate's words, a kind of midwife for ideas that are struggling to be born.... His listening is keyed for the half tones and dissonances that escape the untrained ear. For it is the mark of the truly good listener that he knows what you are saying often better than you do; and his payback is a revelation, not a recording.*

A good lawyer should be no less. Thus, there is a pressing need to address the demonstration of positive listening ability by attorneys, especially during the lawyer-client interview.

COMMUNICATION AS PROCESS

Interviewing has been defined as "lawyer interaction with a client for the purpose of identifying the client's problem and gathering information on which a solution to that problem can be based," and *counseling* as "a process in which lawyers help clients reach decisions.... Potential solutions with their probable positive and negative consequences are identified and weighed in order to decide which alternative is most appropriate."[8] In both legal interviewing and client counseling the attorney must listen effectively.

To uncover the client's underlying motivation for coming to the lawyer, to ascertain all of the necessary information, and to understand fully the client's basic goals and needs about his or her problem or concerns, the attorney must successfully employ such basic communication strategies as active listening, open-ended questions, empathy, clarity, honesty, fairness, and proper direction of hesitant clients.

Binder, an attorney, and Price, a psychologist, feel that "lawyers [generally] lack the training to uncover and resolve an individual's underlying psychological needs and conflicts" but believe that "without getting into the realm of deep psychological analysis..., lawyers can develop some expertise in dealing with needs that typically block motivation for full participation in the legal interview."[9] They suggest attorneys develop empathetic understanding skills- defined as the ability to (effectively) listen, understand, and suspend judgment. Binder and Price claim that

> *[B]oth clients and witnesses are continually expressing their thoughts and feelings about what has, or is likely to occur. Clients and witnesses do not simply report observed facts. They communicate how they felt when an event occurred, why they believe an event occurred and how they now feel and what the occurrence protends for the future.*[10]

Lawyers who develop the ability to listen empathetically "will usually become recipients of an ever-increasing amount of information," because individuals who feel that they are being listened to empathetically "will be strongly motivated to continue communicating."[11]

Listening ability is fundamental to communication between lawyer and client.

TYPES OF LISTENING

DISCRIMINATIVE LISTENING

Discriminative listening refers to the ability to *distinguish* auditory or visual stimuli; you must not only attend to the client's words, but also you must be able to distinguish: (1) vocal clues (paralanguage); (2) verbal messages (emotionally loaded words, facts versus opinions, sarcasm, argumentativeness, etc.); and (3) nonverbal messages (determination of whether or not there is congruence between the verbal, vocal, and nonverbal communicative acts).

COMPREHENSIVE LISTENING

Comprehensive listening refers to the ability of the listener to understand fully the speaker's message. This is the most easily observable and measurable type of listening, and is the type of listening we use as both student and professional. For the interview to be truly productive and satisfactory to both client and lawyer you should keep the following goals in mind.

Listen for and determine the main ideas/concerns/problems. For example, what is the client's basic motive/intention that brings him or her to the lawyer in the first place?

Attend to significant details. For example, discern among crucial facts, figures, dates, etc. and embellishment, exaggeration, or the inclusion of superfluous or irrelevant information. This is a critical first step in the information gathering stage.

Attempt logical inferences. You need to be able to apply the explicit information you receive from the client in order to make implicit assumptions about the problem/situation.

Take notes when appropriate. You need to be able to record the salient facts and information without allowing notetaking to become intrusive to the interaction with the client.

Formulate meaningful questions. Since you must obtain information to proceed with advising the client on future actions and/or how the client's problem can best be handled, appropriate questioning will allow you to elicit information that the client may have neglected, forgotten, or overlooked.

CRITICAL/EVALUATIVE LISTENING

Critical and evaluative listening refers to the ability to judge what has been communicated, and, based on that judgment, to evaluate the message conveyed. Be alert to source factors that affect judgment.

Identify source credibility. How much information, authority, and access to relevant facts the client possesses are instrumental to your being able to help him or her. How reliable, trustworthy, competent, etc. the client is are also key elements that affect your judgments.

Information analysis. You must be able to discern what information is accurate, relevant, and necessary to the case. Such questions are how the information was arrived at, what the basis of the problem or concern is, and why the client is soliciting the attorney's services are part of the analytic process.

Decoding affective messages. Clients bring to the interview their own experiences, ideas, values, assumptions, and needs. Although with time and experience, the lawyer is able to recognize certain patterns, each individual will manifest distinguishing personality traits. Avoid pre-judging clients and their needs based on past experience with others. Nor should you necessarily accept at face value every utterance. Certainly, knowledge of the client, of the law, and past experience inform your judgments. You must be ever aware of the delicate balance required to integrate the client's intentions, needs, and motives with the facts surrounding the case.

THERAPEUTIC LISTENING

Therapeutic listening lets the speaker *feel* that his or her needs, concerns, ideas, etc. are being fully attended to. While we are not advocating that you should act as a client's therapist during the interview, it is important for the client to be able to interact in an environment that is neither threatening, distant, nor judgmental. "To be with someone who is truly willing to listen, who concentrates sensitively on all that is said, is no longer to need defenses."[12] You need to obtain information that is both relevant and accurate. Gathering this information from a willing (as opposed to resistent) client can be facilitated in a number of ways.

Avoid evaluative feedback. Provide an atmosphere that facilitates revealing rather than concealing behavior. If the client is reluctant to open up for fear of negative reaction, you may have difficulty obtaining all of the information you require. "The major barrier to interpersonal communication is our very natural tendency to judge, to evaluate, to approve, or disapprove the statement of the other person or group."[13]

Listen nondirectively. Pioneer researcher on listening behavior, Ralph Nichols, suggest attentive behavior as a key for non-directive listening.[14] Not only must you be able to listen empathically, you must also try to understand as well the client's orientation, or viewpoint, or order.

Provide a supportive communication climate. Because a barrier is created by the very role distinction between lawyer and client, to assure effective and productive communication, you must allow the transaction with the client to take place in an environment- physical as well as emotional- that is supportive as opposed to threatening, imposing, and distancing. Some of the most effective listening skills and techniques grow out of a therapeutic model of effective communication. One of these techniques, commonly referred to as active listening, is particularly applicable to the lawyer-client interaction.

DEMONSTRATING ACTIVE LISTENING.

Listening is not a one-sided passive process. In the process between lawyer-client, you should encourage the client through positive listening feedback. You can do this by following six aspects of non-verbal communication that signal acknowledgment, attentiveness, and encouragement of the speaker:[15]

(1) Paralanguage, or the appropriate insertions into the conversation of such phrases as "Aha," "I see," "uh-huh," and "Mmm hmm" demonstrates to the speaker a willingness to continue listening.

(2) Head nodding may indicate either encouragement to continue or understanding of what is being said.

(3) Smiling at appropriate points during the exchange also indicates attentiveness to and encouragement of the speaker.

(4) Posture or appropriate body positioning (forward body lean, erectness, forward head movement) can also signal positive listening feedback.

(5) Alert facial expression (eye contact)

provides listening markers.

(6) Note-taking only when important points of information are given (as opposed to doodling) may indicate a desire to maintain an accurate record of what is being said.

In addition to these non-committal acknowledgments and regulators - that give the client the "space" to freely communicate thoughts and feelings - you can also attempt to communicate that you hear and accept the client by restating what the client has said and by attempting to show the client that you understand how the client feels; that is, "pick[ing] up the client's message and send[ing] it back in a reflective statement which mirrors what [you have] heard."[16] Active listening is more than a paraphrase of the client's verbal message, however. In short, the active listener is active not only on the level of interpreting nonverbal and verbal messages but also by affirmatively demonstrating that interpretation through reflective statements.

Active listening has particular application for attorneys, who are prone to believe that the factual content in a communicative exchange is the only relevant or important data. However, how people feel strongly influences the nature and amount of information they provide and the decisions they make. This is information you do not want to be without.

CONCLUSION

Chief Justice Warren Burger, referring to the legal profession, remarked, "The obligation of our profession is to serve as healers of human conflicts." However, before an individual attorney, counselor, mediator or therapist can attempt to heal human conflicts, s/he must be able to hear those conflicts, no matter how cogently or tentatively they are expressed by the parties involved. If attorneys attend to all levels of a client's message, actively engage in process-oriented communication and demonstrate the key aspects of positive listening and feedback, the legal profession could become a model of transactional communication.

LISA MERRILL, Ph.D.
DEBRA BORISOFF, Ph.D.

Lisa is an Assistant Professor of Speech Communication at Hofstra University, a registered Drama Therapist and a private communications consultant. She has lecturered both here and abroad on topics related to communication, drama therapy and cross-cultural communication.

Deborah is an Assistant Professor and Program Director of Speech Communication at New York University and a private communications consultant to individual professionals and corporations. She has lectured here and abroad on topics related to communication and conflict resolution.
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SUGGESTED READINGS

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Freund, Many "Pesky Postulates" Plague Murphy's Lawyers, *Leg. Times* N.Y., Apr. 25, 1983, at A19.

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G. Miller, *Speech Communication: A Behavioral Approach* (1966).

Mosten, The Trouble with Law School Education: A Consultation as a Microcosm, 18 *Creighton L. Rev.* (1985).

A. Watson, *The Lawyer in the Interviewing and Counseling Process* (1976).

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C. Weaver, *Human Listening: Processes and Behavior* (1972).

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FOOTNOTES

1. T. Schaffer, *Legal Interviewing and Counseling in a Nutshell* (1976).

2. D. Binder & S. Price, *Legal Interviewing and Counseling: A Client-Centered Approach* (1977).

3. T. Shaffer, *supra* note 1, at 12.

4. L. Barker, *Listening Behavior* (1971).

5. J. Floyd, *Listening: A Practical Approach* (1985).

6. *Id.*; L. Steil, L. Barker & K. Watson, *Effective Listening: Key To Your Success* (1983); A. Wolvin, & Coakley, Listening (1982).

7. T. Shaffer, *supra* note 1, at 8.

8. D. Binder & S. Price, *supra* note 2, at 25.

9. *Id.* at 8-9.

10. *Id.* at 15.

11. *Id.*

12. Barnlund, *Communication: The Context of Change, in Perspectives on Communication* 41 (C. Larson & F. Dance eds. 1968).

13. C. Rogers, *Client-Centered Therapy* 54 (1951).

14. See generally R. Nichols & L. Stevens, *Are You Listening?* (1957).

15. See M. Knaff, *Essentials of Nonverbal Communication* (1980); G. Miller, *Speech Communication: A Behavioral Approach* (1966).

16. D. Binder & S. Price, *supra* note 2, at 25.

BOOK REVIEW

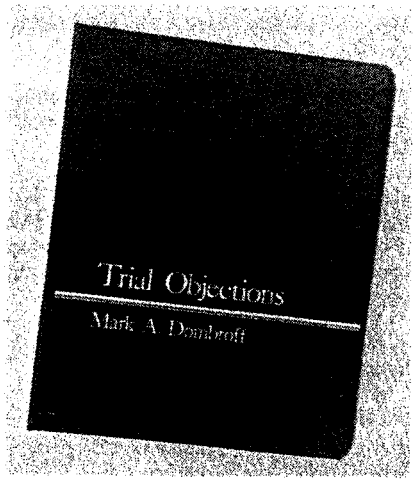
Randy Wheeler

Trial Objections
Mark A. Dombroff
Hughes, Hubbard & Reed
Washington, D.C.
1988
$49.97

In *Trial Objections*, Mark A. Dombroff attempts to identify every issue which might arise at trial and offers clear and concise ways to address those issues through motions and objections. But *Trial Objections* is not simply an evidentiary treatise; it is a practical handbook, specifically organized to be a quick reference in the courtroom. The book is actually a ringed binder containing a number of tabbed sections discussing the various objections and motions that might be necessary at any trial. These tabs are color coded for the following main categories: Preliminaries, Evidence, Witnesses, Misconduct, and Summation. Dividers are also provided within these main categories for reference to specific issues. "Preliminaries" includes jury selection and opening statements. The evidence category examines demonstrative evidence, documentary evidence, hearsay, and hearsay exceptions. The witness category addresses competency to testify, expert witnesses, leading questions and privileges, among other topics. "Misconduct" deals with attorney and judicial actions and "summation" with closing arguments.

Each section dealing with a specific issue includes a brief and straightforward discussion providing sample language for objections that can be paraphrased to fit particular fact situations, comments about the rules governing the objections, the circumstances under which objections should be made, and lists of supporting cases with abbreviated descriptions of the facts and holdings. There is also tactical advice on how to improve the chances of having an objection sustained. Dombroff also includes a heading addressing responses that should be made to objections if you are the opponent.

Although the author states plainly that the book is intended to be used as a



reference during trial, the real value of *Trial Objections* is that it can be used to prepare for trial. Reviewing the book prior to trial anticipating the evidence which will be presented and other actions which might occur would be a good way for the practitioner to know the position that should be taken and what should be stated to support that position at the time that anything objectionable happens. Dombroff's tactical pointers are extremely helpful because of their practicality. He even goes so far as to point out when not to linger so the opponent will not be able to regroup, how to phrase objections and responses so as not to antagonize the judge or jury, and, indeed, even when to apologize to the jury. Obviously, Dombroff could not delineate a tactic for every possible situation, but those provided are useful even if only to provoke thought.

An included biography indicates that Dombroff has extensive experience in civil litigation and this is reflected by *Trial Objections*, which includes sections on a number of civil concerns (insurance, repairs, settlement negotiations, etc.) However, this does not detract from the book for criminal cases, particularly in the area of evidence, which evaluates issues equally applicable to both civil and criminal trials.

The major drawback for the Kentucky practitioner is that *Trial Objections* is not tailored specifically for practice in the Commonwealth and provides very few Kentucky citations. By being concise Dombroff gives issues very general treatment. Using this text alone, without reference to Kentucky law and rules could prove fatal. For example, Dombroff does not indicate that offers of proof (*i.e.*, avowals) are needed to preserve the error of omitting evidence as is required by Kentucky cases applying CR 43.10. Dombroff states only that it is to the litigant's "advantage" to make an offer because it puts the appellate court in a "better position" to review the issue. Perhaps the best way to utilize *Trial Objections* would be as a complement to Professor Robert Lawson's *Kentucky Evidence Law Handbook* (2nd Ed. 1984) and Kentucky rules.

Since it is just as important for a litigator to know when to object as it is what to say and it is usually difficult, if not impossible, to consult a reference book during the heat of a court proceeding to determine whether to object and how to phrase and support an objection, it is doubtful that any book could give more than just occasional support during trial. However, by the use of tabbed and color coded dividers, the bold facing of key words and concise language Dombroff's *Trial Objections* comes as close to providing this immediate reference as any book probably could.

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Director
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Responding to officials who denigrated a particularly recalcitrant offender, John Augustus retorted:"... he has been locked up... hunted by laws and every infirmity of his nature punished. You have tried the experiment fully and now see before you a living witness of the folly of attempting to force a man into reformation."

- Augustus

BOOK REVIEW

Lisa Shouse

SLENDER IS THE THREAD
Tales From A Country Law Office
Author: Harry M. Caudill
The University Press of Kentucky (1987)
$18.00
173 pages

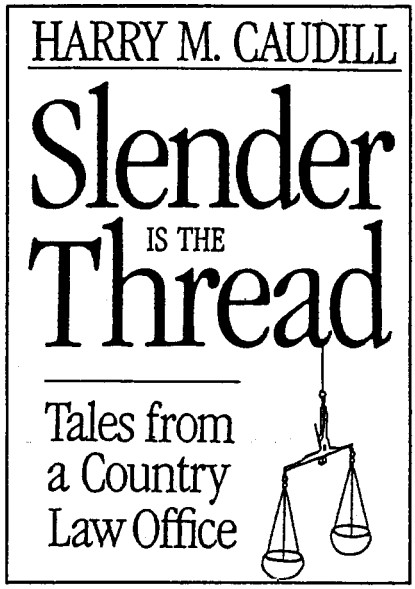
Written by a Letcher County native who has practiced law in Eastern Kentucky for nearly three decades, this book delves into the hills of Appalachia. Its tales reflect the ways of the people, their justice system, and the topography of the region which contributed to both.

After reading these stories, it is my belief that the justice system suffered as much as the people. The system was, often times, compromised at the urgency of the people. This was an era where people would go to such length as to spend numerous hours and days, traveling great distances, and expending public and private funds, to properly execute an estate of a deceased black coal miner; yet would not think twice about paying a jury to return a verdict of death for someone who killed one of their "kin".

The stories in this book reflect the personalities of the people, passed down by their European ancestors. The land was primitive, the mountains wild. As these great mountains divided and forests began to shrink, towns were formed around mining operations and compromised governments.

In this area and time, educational opportunities were few and far between, due in part to isolation and costs. Violence was inbred. Feuding and fighting was standard procedure in most households. Due to this the government suffered too. Votes were bought by pardon or promises of acquittal. Violence was even prevalent in the courtroom, as Mr. Caudill artfully illustrated that blood is thicker than water in a tale of the horror in the Hillsville courthouse. And the violence never fades, as later stories show, it only takes on new faces.

The political system in the Appalachian region has been corrupt throughout its history. Politicians, through their campaign workers, have "wet whistles", "padded pockets", and "promised pardons" in order to get elected, and now they even promise public funds and favors. Through the stories in this book, we see how the legal system supports this stereotype of Eastern Kentuckians. The tales reveal how the justice system also benefits from these same stereotypes.



The author leaves no doubt that the people of Eastern Kentucky live hard from day to day. Their lack of education has surely contributed to their hardened way of life and kept them at an unfair disadvantage. Yet, their hazardous, unskilled labor jobs keep our houses warm in the winter. The people and land remain intact. The ideals do not change, and the violence remains. The legal system is a mere product of the intertwining of culture and topography. If the people of Eastern Kentucky seem hardened and the areas oppressed, then Mr. Caudill's Tales From a Country Law Office may offer some explanation for and add color to these views.

LISA D. SHOUSE
Paralegal
Post-Conviction/Resource Center
DPA Central Office
Frankfort

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Staff Changes

Morehead

Assistant Public Advocate, **Julius Aulisio** joined our Morehead office on July 16, 1989. He is a 1985 graduate of the University of Florida and worked with the Florida Public Defender office in Barton from July 1986 to June 1989.

London Office

Rob Robinson, formerly an Assistant Public Advocate with our London office since 1985 resigned effective June 1, 1989. He now works in Elizabethtown in private practice.

Pikeville Office

Larry Nickell, an Assistant Public Advocate with our Pikeville office since 1988, resigned on June 1, 1989 to join the office of John Paul Runyon, Commonwealth Attorney, P.O. Box 796, Pikeville, KY 41501.

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