The Kentucky Department of Public Advocacy's Journal of Criminal Justice Education and Research

THE ADVOCATE

Representing 101,000 Poor Kentucky Citizens Yearly

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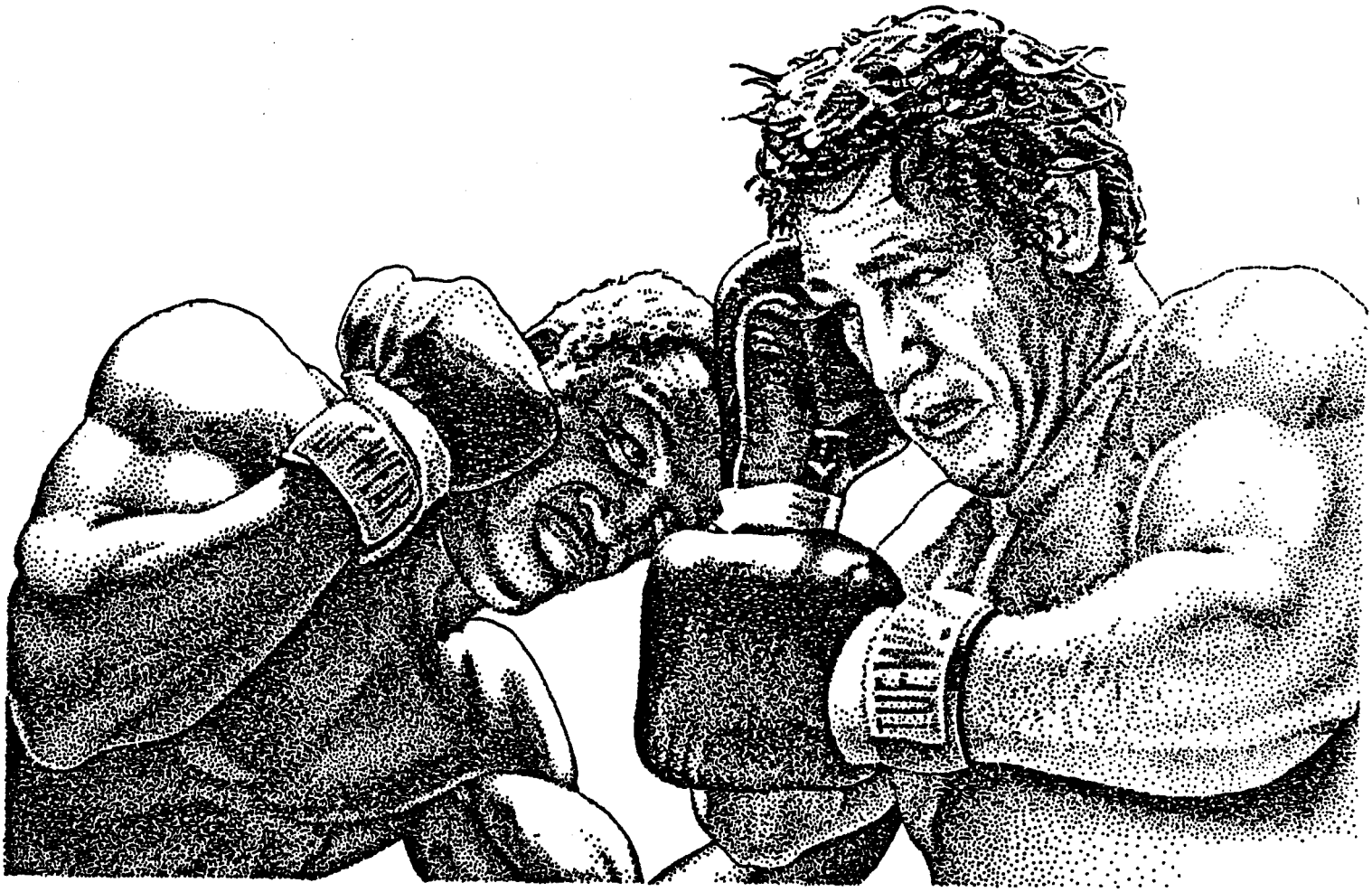

CONFLICT: What's the Use?

All people, rich or poor, have an absolute right to justice and equality before the law.

From the Editor:

Conflict. Conflict is a daily occurence in our personal and work lives, especially as criminal defense advocates. Anne Hall, a public defender with lots of experience, helps us understand conflict in our work environment.

The War on Sexual Abuse. More and more we are learning that Desert Storm was not all it was marketed to be by our leaders. So too, we have to be careful that our Kentucky war on sexual abuse does not distort the truth or violate our cherished individual protections, which wars have literally been fought to protect. Two articles help us see sexual abuse in a greater perspective.

Funding for the Defense of the Poor. We continue to look at the dramatic underfunding of the defense of Kentucky's poor.

Drug Chart. Our marvelous 18 year veteran appellate genius, Larry Marshall, has created a new Drug Chart to help us understand the many changes in KRS Chapter 218A.

Send $. We need more money or printing donations to keep *The Advocate* alive and return it to full coverage of all the areas necessary to insure our clients receive competent representation. Call us with your suggestions, or send your money. We continue to list below those who generously have contributed to this effort.

EDWARD C. MONAHAN

ADDITIONAL *ADVOCATE* DONATIONS

Donations to support the work of *The Advocate* have been received from:

Judge Tommy Chandler
Judge James Keller
Allison Connelly
Judge Larry D. Raikes
Justice Charles Leibson
Judge Stephen N. Frazier
Judge John W. Potter
Judge Charles Satterwhite

To date 91 persons have contributed to *The Advocate* with a total of $15,512.25 collected. THANKS!

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☛ IN THIS ISSUE

The Advocate is a bi-monthly publication of the Department of Public Advocacy, an independent agency within the Public Protection and Regulation Cabinet. Opinions expressed in articles are those of the authors and do not necessarily represent the views of DPA. *The Advocate* welcomes correspondence on subjects covered by it. If you have an article our readers will find of interest, type a short outline or general description and send it to the Editor.

WHAT DIFFERENCE DOES IT MAKE HOW MUCH FUNDING OR WHAT RESOURCES THE PROSECUTION OR DEFENSE HAVE IN A CRIMINAL CASE?

Our life or liberty matter most to us. We do not want the government to take either unless many values are satisfied. To minimize the risk of someone's life or liberty being improperly taken, our criminal justice process is adversarial. The adversarial process' theory is that the truth is most likely to emerge from the clash of opposing viewpoints and interests; the results are most likely to be reliable, and the public is most likely to confidently see the process as principled and one of integrity.

For this theory to work, several prerequisites must be satisfied:

1) each side has an attorney representing its interests;

2) the attorney is trained, competent, and loyal to the client;

3) the resources and funds are sufficient for both sides and relatively balanced; and,

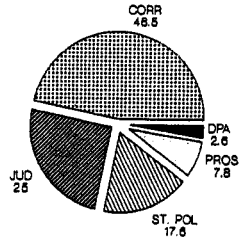
4) the attorneys perform competently.

If these prerequisites are not satisfied, the theory is not likely to work; the results are not likely to be reliable, and the people are not likely to have confidence in the system. If one side has a competent lawyer and the other an incompetent one, the results are questionable. If one side of the fight has inadequate resources or far fewer than the other, then the reliability of the results are questionable.

SO, HOW ARE THE RESOURCES ALLOCATED IN KENTUCKY? IS THE FUNDING ADEQUATE?

The Kentucky criminal justice system receives 8.4% or $410 million of the 4.9 billion total general fund dollars of the state (which excludes $600 million of road funds). As a result, Kentucky ranks 42d in per capita justice expenditures. The funding is imbalanced: DPA has the least. DPA, which each year defends over 100,000 indigent Kentucky citizens accused of a crime including most of the capital cases, has 2.6% of Kentucky's $410 million criminal justice funds. The prosecutors have 7.8% of the resource pie, and the judiciary has 25%. State police has 17.6% and Corrections weighs in at 46.5%. (See Graph No. 1).

CRIM. JUSTICE BUDGET FY94
AGENCY PERCENTAGE



Graph No. 1

Our adversarial system is a 3 legged stool: prosecutors, defenders and judges. If one leg is a significantly different length than the others, dare we rely on using the stool? Can we rely on a system that funds the defense at 1/3 the level of the next leg of the system? The imbalance is increasing.

A HISTORY OF IMBALANCE

A look at a 13 year history of increases in funding for Kentucky criminal justice agencies reveals that the imbalance is increasing. From FY 82 - FY 94 Corrections funding increased $145 million, the Judiciary rose $50 million, the police rose $15 million, prosecutors rose $15 million. DPA increased $5 million.

KENTUCKY ECONOMICS

A 1991 Kentucky Bar Association (KBA) Economic Survey, *Bench & Bar*, Vol. 56, No. 3 (Summer 1992), demonstrated how far the economics of private lawyering outstrips the economics of public defense. Under KRS 31.170 the public defense hourly maximums are $25 per hour for out-of-court work and $35 for in-court. Kentucky public defenders receive funding of an average of $117 per case, in-cluding all capital cases. The KBA survey revealed that the typical hourly rate for criminal cases was $90 per hour with average fees for cases as follows: DUI $508; Misdemeanor $400; Felony $2967.

According to the KBA Economic Survey, the mean starting salary for attorneys in Kentucky is $26,770. Kentucky public defenders start at $21,600. The mean salary of all Kentucky lawyers is $87,861. No one in Kentucky's public defender system is compensated at this level. The funding for indigent criminal cases in Kentucky is an average of $117 per case ...for misdemeanors, DUIs, felonies, sex abuse cases, homicides and capital cases. This places Kentucky at the bottom nationally. At the same time we are spending an average of $12,601.64 per year to imprison each inmate, and $90,000 to build a prison cell.

IMBALANCE OF $

The Commonwealth Attorneys, County Attorneys and Attorney General's offices are funded at $31 million while DPA is funded at $10.2 million. Even recognizing that DPA does not represent all those who are prosecuted, the imbalance is significant. At a 3-1 disadvantage, do we expect the reliability of the results to be affected? Medical and mental health expert services, and experts in serology, DNA, hair, fiber, fingerprinting, firearms, etc. are regularly available to the prosecution and seldom available to the indigent Kentucky citizen accused of a crime. They are critical in criminal cases. Although there are statutory mechanisms for obtaining defense experts for indigent defendants, inadequate funding and the unpopularity of providing governmental funds to an accused result in little or no expert services for the accused indigent.

In FY 92 funds for experts given to DPA attorneys was a meager $59,886 for our 100,000 cases, or an average of 59 cents per case! The reliability of the results are affected.

IMBALANCE OF STAFF

Investigation resources of law enforcement are very substantial. The Department of Public Advocacy programs in the 120 counties have 21 investigators for all types of capital, felony and misdemeanor cases which number over 100,000 cases each year. There are 7578 law enforcement officers in Kentucky. Social workers are critical to criminal defense work in capital cases, sex abuse cases and many others. The distribution of social workers in Kentucky is: Cabinet for Human Resources: 1481 social workers; DPA: 0 social workers. Does the inadequacy of defense social worker resources promote a reliable process?

SECOND LOWEST CASE FUNDING; INCREASING CASES

At $117.40 per case, the Department of Public Advocacy has the second lowest per case funding in the nation. (See Graph No. 2). Consequently, dollar for dollar the state is obtaining the most for its indigent defense investment. However, with a 56% increase in caseload since 1989, the defender system has reached the breaking point. (See Graph No. 3). DPA needs substantial funding help.

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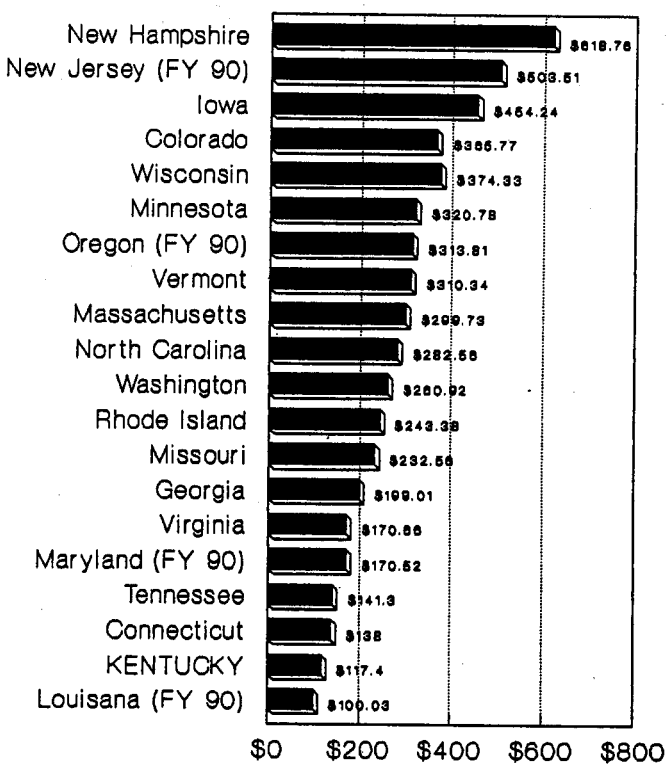
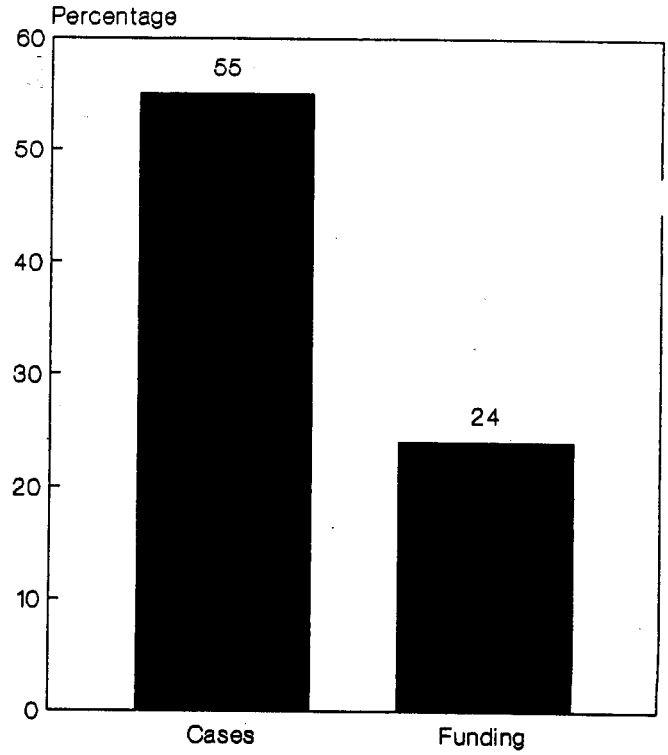
Indigent Defense Spending STATE FUNDING PER CASE



FY 1992

Graph No. 2

% Change in DPA Cases & All Funding FY 89-93



FISCAL YEAR	CASES	FUNDING
FY 89	72,452	$ 9,769,271
FY 93	112,558*	$12,070,651

*projected

Graph No. 3

From the Recruiting Corner:

All the effort in the world can be made to recruit excellent staff. However, if we do not retain those we recruit, we waste our agency's investment of both money and personal commitment. Attrition, in itself, is expensive. It is believed that it takes three years to break even on a law firm's investment in the training and development of a lawyer. Hilliker & Chaskin, *Firms Must React Now to Changing Legal Work Force*, Lawyer Hiring & Training Report, Vol. 13, No. 4 (April 1993).

9 DPA ATTORNEYS LEFT FOR MORE MONEY

Our agency's inability to offer a competitive salary continues to be the number one reason for our failure to retain quality attorneys and support staff. Nine attorneys left DPA in the last year for new jobs with salary increases from $3,000 to $20,000 per year over what DPA could pay. Five of those left to work for the prosecution. Of those five, three received pay increases of $5,000.

Two of the nine secured jobs in other states, representing indigent people for pay increases of $3,000 and $20,000, respectively. While we can be thankful for and proud of our training efforts as our lawyers continue to be competitive in the broader legal marketplace after years of service to DPA clients, our agency's effectiveness is nonetheless hurt when lawyers in whom we have invested time, effort and money leave us.

INABILITY TO RECRUIT THE BEST

Furthermore, our inability to offer a competitive salary has caused us to lose candidates of the highest quality. One such applicant recruited for our Richmond trial office accepted a position with the Ohio Public Defender's Office. The salary was over $5,000 greater than what DPA could offer. Burdened with debts owed for his legal education, the candidate regretfully had to turn down a job in his home state for the better paying position in Ohio.

Another recent graduate, destined for our Pikeville field office, regretfully announced that he could not accept a position with us there because he had been offered a better paying position in the Pikeville area. The budget cuts our agency has suffered and the contingent nature of our offer of employment (as all offers must undergo the process of the Department of Personnel), along with the lower initial salary led to DPA's loss of a well-qualified candidate.

COMPETITIVE SALARIES ARE ESSENTIAL

Where do we go from here? The only road continues upward. We will further our study of DPA's salary disparity and broaden our examination to include all support staff as well. All DPA employees are integral to our agency's mission of defending our indigent accused and convicted clients with the constitution, the law and heart-felt commitment. That same measure of commitment needs to be displayed for those who work for DPA.

The following tables reveal that DPA does not offer competitive salaries for its employees:

STARTING SALARIES FOR PUBLIC DEFENDERS IN KY & 6 OTHER STATES

	ENTRY LEVEL
Ohio	$29,141
Tennessee (Nashville)	$42,280
Tennessee (Knoxville)	$38,500
Illinois	$26,500
Indiana	$26,000
Missouri	$23,220
New Mexico	$28,000
AVERAGE	**$27,545**
Kentucky Public Defender (State)	$21,600
Lexington Public Defender	$18,500
Louisville Public Defender	$17,500

LAW GRADUATES MEDIAN STARTING SALARY		
	1991	1992
University of Kentucky	$49,250	$39,250
University of Louisville	$29,000	$32,000
Salmon P. Chase	$28,542	$30,000

KENTUCKY DEPARTMENT OF PERSONNEL'S 1990 SURVEY OF WAGES				
Class	DPA	KY State Employee Market Avg.	Public Sector Survey Market	Private & Public Sector Survey Market Wage
Assistant Public Advocate	21,600	23,853	28,091	36,081
Assistant Public Advocate Chief	35,220	38,841	41,543	53,810
Legal Secretary	15,072	19,615	19,148	18,760
Administrative Secretary/Senior	16,602	21,600	19,246	18,820

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ASK CORRECTIONS: Restoration of Civil Rights

In the last several months, the Department of Public Advocacy has received a number of questions concerning the current policy relating to restoration of civil rights.

It is the policy of the Governor's Office that in order for an application for restoration to civil rights to be considered one of the following prerequisites must exist.

(a) Ten years must have passed since the expiration of parole;

(b) Ten years must have passed since the receipt of a final discharge from parole; or

(c) Ten years must have passed since the date of serve-out from a state or federal institution;

(Whichever is applicable), and the applicant must not be under indictment.

Once one of these conditions are met, the applicant can obtain an application from any probation and parole office. The probation and parole officer will assist the applicant in completing the application. Applications may also be obtained by writing to the following address: Division of Probation & Parole, ATTN: Marian Young, 514 State Office Building, Frankfort, KY 40601.

Once completed, the application along with a check or money order in the amount of $2.00 made payable to the Kentucky State Treasurer should be forwarded to Ms. Young at the above mentioned address. The application must be notarized or signed by a probation and parole officer.

Once Corrections receives the application in their office, Corrections will verify all information prior to forwarding it to the Governor's Office for his review and action.

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♦ ♦ ♦ ♦

THE REALITY OF FALSE SEXUAL ABUSE ALLEGATIONS IN KENTUCKY

Several years ago when I was a member of the Department of Public Advocacy, I was dispatched to Richmond, Kentucky to assist in the defense of a thirty-year-old man accused of molesting the infant daughters of his girlfriend. As I recall, this man had been living in the same house with his girlfriend for about two years, but the relationship had soured and my client became interested in another woman. He moved out but continued to "keep house" with his former girlfriend on a part-time basis. Eventually she couldn't deal with the competition and it just so happened that her daughters complained of my client's having fondled and penetrated both girls.

In fact, the girls were able to describe this man's behavior, his conversation, and even the color of the semen he produced! They reported this conduct to a doctor, the Richmond police, and a battery of social workers. Frankly, the case looked hopeless.

It was one of those situations where you beg for a reasonable plea offer and then try to convince your client there is no better deal forthcoming; he better take it or plan to be away a long, long time.

This client was a very scared and humble human being; but he steadfastly refused to admit the behavior. His protestations were persuasive but his evidence was nearly nonexistent. The kids told of his actions on days he admitted having been with their mother; he had no alibi witnesses.

He begged me to believe his girlfriend was so vindictive and had made such threats to him--about how she would make him sorry for leaving her--that I began to believe he was literally being set up by this mother--and the two girls.

The more I thought about his dilemma, the more I began to sense the daughters would be unable to stand up to a wide array of questioning about these incidents. Whereas, had they been telling the truth, it was likely the daughters could answer virtually any question about such incidence.

Prior to the daughters taking the stand, Judge James Chenault permitted me an opportunity to personally question the girls outside the presence of the jury, as long as the prosecutor was present. During my few minutes with the daughters it became quickly apparent they were stumbling over questions which should have been fairly easy for them. The prosecutor noticed their discomfort and called off the interview; he would later tell Judge Chenault he stopped the interview because he didn't like the questions being asked--such as "what had their mother told them about these incidents." Nevertheless, there was just enough to repeat those questions once the daughters took the stand, and to follow up on their mother's contribution.

Ultimately, both girls admitted much of their testimony had been suggested or provided by their mother. The proceedings soon ended in a mistrial, but my Motion to Dismiss the case was denied. You know how prosecutors are.

A couple of months later the Commonwealth Attorney indeed took the case back to Madison Circuit Court; this time the jury voted not guilty! When the case returned to trial, Hon. Irene Steen who had co-counseled with me in the first case, represented this young man by herself.

To this day, I still shudder when I think about the hate it must have taken for that woman to involve two children in a conspiracy to convict an innocent man for child molestation.

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Jim Early is a 1973 graduate of the University of Kentucky Law School. He worked in the Frankfort Office of the Department of Public Advocacy from 1972-1978 starting out as DPA's very first law clerk then on to doing trials and appeals. Jim is now a sole practitioner in Lexington doing criminal law (mostly pro bono), personal injury cases, domestic relation cases, personal injury cases, etc.

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Sorry - Wrong Numbers

Once upon a time, the naive conviction prevailed that whatever appeared in print simply had to be true. No such innocence applies today, to judge from the public skepticism about journalism. But a new naivete now afflicts information-seekers. The number has replaced the word as sacred, and statistics - all statistics - are regarded as scientifically true until proven otherwise.

When they first appeared, no one questioned the figures claiming that reports of domestic violence increase an astonishing 40 percent on Super Bowl Sunday. So disturbing were the statistics that at the beginning of this year's game, NBC even ran a public-service announcement about the horrors of wife-beating.

But wait. The next day, embarrassed advocacy groups admitted that those numbers weren't accurate. Most shelters for battered women reported no unusual increase in domestic violence complaints during the game. No one could even say for sure where the inflated statistic came from. Some advocates now worry that the incident will diminish the credibility of their cause - credibility they have spent years building.

Similarly misleading statistics distort the problem of child abuse. Thanks to mandatory reporting laws and heightened public awareness, reports of suspected child abuse reached 2.7 million in 1990 - a figure that gets quoted repeatedly as the definitive statistic on child abuse.

But wait again. The actual number of new, substantiated cases is only a fraction of that total. As Douglas Besharov, who was the first director of the US National Center on Child Abuse and Neglect, explained in a talk prepared for the Rockford Institute, 60 or 65 percent of all reports are dismissed as "unfounded" after investigation. That leaves 35 or 40 percent of substantiated cases - about 1 million children.

But, added Mr. Besharov, who now teaches family law at Georgetown University and the University of Maryland, since each reported family has an average of 1.9 children, the actual number of substantiated cases is 525,000. And about 20 percent of those are repeat reports, which means the unduplicated number of new substantiated cases is about 420,000 per year.

The new math of social problems appears to be It's not enough to have statistics. They must be *truly alarming* statistics. The bigger and scarier the numbers, the reasoning goes, the better the chance that politicians and policy advocates will pay attention and do something.

As Besharov sees it, the problem - what he calls the "politicization of numbers" - starts with advocacy groups, whose members may be tempted to distort figures to gain support from the public and the government. It gets perpetuated by journalists, who need data and drama to catch their editors' and readers' attention. He illustrates his point by saying, "Imagine a story with the following headline: 'Vast Majority of Children Not Abused'.". Readers would yawn and turn the page.

But reducing inflated numbers to a more accurate count presents a challenge: Public opinion then tends to discount the problem. If no critical need is perceived, the danger persists that no action will be taken, no money appropriated.

In the old days, nobody knew how many homeless people there were. or how many children went to bed hungry. Quantifying does serve the purpose of defining the problem. But as people begin to count everything - deaths from drunken driving, deaths from secondary smoking - they can get into a world of discussion by statistics. All the numbers begin to cancel each other out. The very thing advocates wanted - to call attention to a problem - can lead not to action but to a kind of fatalism and helplessness.

Statistics need to be treated with greater skepticism and verified like any other purported facts. And even when they prove accurate, statistics must not be allowed to dominate the public imagination by sheer size so that agendas are determined by the quantities of cases cited.

To respond to thousands of battered children or not to respond if the numbers fall too low, is to treat moral issues like a bookkeeper. The conscience, singular in its focus, doesn't keep score, yet remains the true megapower behind reform. For the conscience, on Super Bowl Sunday or any other day, one battered woman or one abused child is too many.

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FETAL ALCOHOL SYNDROME

In the introduction to the book *Alcohol and Reproduction: A Bibliography*[1], alcohol, the main ingredient in all alcoholic beverages, is defined as a "colorless odorless liquid produced by fermentation". Alcohol is also found in substantial quantities in other substances, such as medicine and cologne. *Id.* at xi.

When consumed, alcohol is absorbed from the small intestine into the bloodstream and then distributed throughout the body. The absorption rate of alcohol varies according to several factors: 1) amount of alcohol in the stomach (food delays absorption of alcohol into the bloodstream); 2) rate at which alcohol is ingested, that is, the faster one drinks alcohol the more alcohol exists in the bloodstream; 3) concentration of the alcoholic beverage; and 4) amount of alcohol consumed by the drinker. *Id.* at xi-xii.

One's individual reaction to alcohol is determined "more as a result of its concentration in the blood than by the actual amount consumed." *Id.* at xii. This helps explain the commonly known fact that although two people may consume the same amount of alcohol, each could be affected in a different manner. In terms of the amount of alcohol consumed, a two hundred pound person and a one hundred pound person can react quite differently.

The individual weighing one hundred pounds could be affected by the alcohol to a much greater degree, resulting in a greater concentration of alcohol in the bloodstream. A person weighing two hundred pounds, having a greater body size, in theory, would be better able to distribute the concentration of alcohol and thus would not be as greatly impaired as the one hundred pound person. *Id.* at xii. Also, one who drinks a greater number of alcoholic beverages of the same strength as the person who drinks a lesser number will obtain a higher concentration of alcohol in the bloodstream more quickly.

In comparison to other countries, the United States ranks fifteenth in overall alcohol consumption. Americans have an estimated intake of 2.7 gallons of absolute alcohol (100%) per adult per year. A light drinker consumes 0.5 drinks per week (52 million Americans). A moderate drinker consumes between four and thirteen drinks per week (32 million Americans). Heavy drinkers consume two or more drinks per day (16 million Americans). *Id.* at xii.

No safe level of alcohol consumption has ever been established by the medical field. A direct relationship between alcohol and "the severity of the abnormal physical feature and the degree of mental deficiency" also exists. McCarthy, "Fetal Alcohol Syndrome and other Alcohol-Related Birth Defects," 33 *Nurse Practitioner* (Jan. 1983).

DISCOVERY OF FETAL ALCOHOL SYNDROME

The obvious harmful effects of a pregnant mother's consumption of alcohol on the fetus have been traced throughout time. Abel, *supra*, intro., at xv. However, the discovery and official naming of fetal alcohol syndrome (FAS) occurred only in 1973 in the British medical journal *Lancet* when two physicians, K.L. Jones and D.W. Smith, presented a study on a pattern of alcohol-related birth defects. Jones and Smith called this series of defects "fetal alcohol syndrome" or FAS. *Id.* at xv. Today, FAS has been recognized by the medical field as the third most frequent cause of birth defects. Francis, *supra*, at 21.

FAS is ubiquitous and is not confined to any particular country or region of the world. Abel, *supra*, intro. at xv. The syndrome has been observed and documented in Australia, Belgium, Brazil, Canada, Chile, Czechoslovakia, France, Germany, Hungary, Ireland, Italy, Japan, Scotland, South Africa, Spain, Sweden, Switzerland and the United States. *Id.* at xv.

ALCOHOL AND THE FETUS

Alcohol from the pregnant woman's bloodstream crosses the placenta and enters the bloodstream of the fetus, concentrating in its blood and making the fetal alcohol level equal to that of the mother. Abel, *supra* intro., at xii. An adult human can eliminate alcohol from the body at .015 percent per hour. *Id* at xii. In comparison, the rate of elimination in the newborn infant is only fifty percent that of an adult human (or .0075).

The only manner in which the fetus can eliminate alcohol from its bloodstream is through "passive diffusion back across the placenta." *Id.* at xii. Therefore, the ability of the fetus to eliminate alcohol depends entirely upon the mother's rate of elimination of her alcohol. Medical journals and alcohol prevention campaigns often rely on the statement that "a pregnant woman never drinks alone." *Id.* at xii.

A fetus constantly exposed to and bathed in high concentrations of ethyl alcohol soon becomes addicted to that alcohol. Enloe, "How Alcoholism Affects the Developing Fetus," *Nutrition Today* 12 (Sept./Oct. 1980). As one leading medical expert comments,

> the fetus doesn't think or walk... [n]onetheless, it is reasonable to suppose that the developing reticulum or mental computer that is constantly bathed in ethyl alcohol soon adapts to that milieu...[s]hort circuits develop and no amount of education in later life can realign them. *Id.* at 13.

In other words, a fetus adapts its body to alcohol and the results of that adaptation remain with the child throughout its entire life. **Alcohol damage in the fetal stage cannot be corrected.**

As is commonly known, alcohol can have a long-lasting effect on the female reproductive mechanism. *Id.* at xix. A woman who has been an alcoholic during her entire adult life and suddenly quits drinking during her pregnancy can still give birth to a child suffering damage from alcohol. *Id* at xix. The effects of alcohol remain in the mother's bloodstream and are passed to the child during the nine months of pregnancy. Therefore, even total abstinence from alcohol by former alcoholics can still result in the birth of a child with FAE, or less commonly, FAS itself.

The fetus's brain maintains the highest and richest concentration of blood in the body of the fetus. Enloe, *supra*, at 14. The majority of alcohol which crosses the placental barrier reaches the fetus's brain in a matter of minutes. *Id* at 14. Thus, the most severe damage to an FAS child

occurs in the brain, further supporting the notion that mental retardation/deficiency is the most serious effect of FAS.

DIAGNOSING FETAL ALCOHOL SYNDROME

FAS is a medical, not a psychiatric, diagnosis. Diagnosis is made most often by a dysmorphologist, *i.e.*, a physician specializing in birth defects. *Lecture* by Dr. Ann Streisguth, medical expert on Fetal Alcohol Syndrome from the University of Washington, Airlie Conference, Washington, D.C., 1990.

The most common abnormalities resulting from alcohol abuse during pregnancy occur in growth patterns, facial characteristics, and the central nervous system. A high percentage of FAS children have small head circumferences and are extremely deficient in length and weight at birth. However, facial abnormalities are the most universally recognized characteristics of these infants. Francis, *supra*, at 22-23.

Facial abnormalities in the FAS child include small eye openings, short, upturned nasal features, an underdeveloped upper lip and thin borders around the lips. These children also develop small or protruding lower jaws in adolescence. Many children possess abnormally large ears which are tilted backward and poorly formed. Also, many have low facial bridges, drooping eyelids and crossed eyes. Extreme motor dysfunction, weak grasps, sleep disturbances, poor hand/eye coordination and poorly developed gross motor skill development are characteristic of FAS sufferers.

Other factors helpful in diagnosing FAS are cardiac problems (generally murmurs), external genital malformations and minor joint abnormalities. Streissguth, *supra*, *lecture notes*. Medical studies have shown that regardless of what environment FAS children are placed in after their birth, their physical and mental deficiencies are lasting. Francis, *supra*, at 22-23; McCarthy, "Fetal Alcohol Syndrome and other Alcohol-Related Birth Defects," 33 *Nurse Practitioner* 34 (Jan. 1983).

In order to make a diagnosis of FAS, one must look for a combination of these characteristics, not merely a few. Streissguth, *supra*, *lecture notes*. Also, many of these facial traits change drastically as the child grows into adulthood. *Id.*, *lecture notes*.

Because of this, Dr. Streissguth highly recommends that attorneys dealing with potential FAS clients obtain photographs of their clients as infants and young children. *Id.*, *lecture notes*. Adult FAS sufferers often resemble their families, while as children they seem identical to other children afflicted with FAS. *Id.*

One of the most significant effects of prenatal alcohol exposure is central nervous system dysfunction, which seriously affects intellectual functioning. Little, Graham and Samson, *The Effects of Maternal Alcohol and Drug Abuse on the Newborn* 107 (1982). Numerous studies have been done on the connection of intellectual dysfunction to sufferers of FAS. *Id.*, at 107. These studies have demonstrated that fetal alcohol children possess an I.Q. "slightly below 70 in the mildly retarded range, with a wide range of individual I.Q. scores." *Id.*

One study indicated that average academic achievement consisted of a fourth grade reading level, a third grade spelling level, and a second grade arithmetic level. Math skills appear to be most affected by FAS. Streissguth, *supra*, *lecture notes*. Studies have further noted that despite the wide range in I.Q. scores, there appears to be a correlation between severity of physical effects and decrease of intellectual performance in FAS children. McCarthy, *supra*, at 33.

Once damage is done to the central nervous system and to other parts of the body, no specific treatment exists for FAS and its effects. Few studies have followed FAS over time, but the few which have report no significant improvement in the abnormalities suffered by these children. Little, et al., *supra*, at 121. Thus, the effects of FAS are permanent.

FETAL ALCOHOL EFFECT

Some children exposed to alcohol *in utero* do not develop the extreme effects of FAS but do have mental deficiencies. This less severe damage is medically known as "fetal alcohol effect", or FAE. Abel, *supra*, intro., at xv. In contrast to Fetal Alcohol Syndrome, FAE is not a medical diagnosis. Streissguth, *supra*, *lecture notes*. However, FAE is commonly seen by the medical field as a lesser form of FAS. The "overall incidence of the 'fetal alcohol effects' is estimated at three to five live births per one thousand." *Id.* at xv. One can exhibit varying degrees of mental deficiency and yet not possess all the characteristics needed to be classified as an FAS child. However, the mental deficiencies of FAE children are just as serious and are just as comparable to deficiencies in children possessing all the characteristics of FAS.

Symptoms of FAE are very similar, if not identical, to the symptoms of FAS. Abel, *supra*, intro., at xvi. The sole exception to the similarity is that FAE symptoms are of a much less severe nature than the corresponding symptoms of FAS. Symptoms of FAE include growth deficiencies, facial abnormalities, limb and joint abnormalities and general mental deficiencies. Streissguth, *lecture notes*.

Dr. Jon M. Aase, a medical researcher specializing in the areas of dysmorphology and genetics, feels that the term FAE has been applied widely and indiscriminately, rendering itself virtually useless as a medical concept. Its general usage implies, believes Dr. Aase, that medical researchers "know the cause of a spectrum of behavioral abnormalities which in reality may be linked to a number of genetic and environmental etiologies." Correspondence with Dr. Aase, March 22, 1993. Expect forthcoming publications concerning the misusage of the term FAE.

MATERNAL CONSUMPTION OF ALCOHOL

The "effects of maternal alcohol ingestion on fetal development are multiple and are responsible for lasting physical and mental disabilities." McCarthy, *supra*, at 33. In the United States, it is estimated that there are one million female alcoholics capable of bearing children. At present, alcohol is the "only common variant in ingestion histories of women now known to have produced affected offspring." *Id.* at 33.

Many pregnant women do not seek medical care at the beginning of their pregnancies. Even women who do realize their pregnancy in the first trimester often do not receive adequate information on FAS from their doctors.

Maternal alcohol abuse during pregnancy is regarded as one of the most "common teratogenic causes of mental deficiency in the Western world." Abel, *supra*, at xv. Studies place the number of FAS child-

ren at one to two live births per one thousand normal births. *Id.* at xv.

The typical mother of an FAS child is approximately thirty years old and has maintained a long history of alcohol abuse for at least seven years. The representative mother has often had two or more pregnancies that were accompanied by problems in both labor and delivery.

This mother also maintains a lower body weight than other typical mothers and smokes heavily, making it difficult for medical experts to differentiate between the effects of alcohol and smoking on the fetus. Francis, "Fetal Alcohol Syndrome", 21 *Journal of Practical Nursing* 22 (June 1982); Abel, *supra*, at xvii.

However, Dr. Streissguth comments that recent laboratory studies testing the effects of alcohol on animals show that smoking is not really a factor in causation of the prenatal malformations linked to alcohol. Streissguth, *supra, lecture notes.*

The ingestion of alcohol by women during pregnancy results in FAS in only thirty-two percent of all offspring of chronically alcoholic mothers. Medical research notes that "one-third of the offspring of chronically alcoholic mothers develop FAS and close to one-half demonstrate varying degrees of mental deficiency." Graham-Clay, "Fetal Alcohol Syndrome: A Review of the Current Health Research," 2 *Canada's Mental Health* (June 1983).

A major concern of doctors treating pregnant women is the time period during gestation at which the fetus is exposed to alcohol. Francis, *supra*, at 22. During the first trimester, a time when many women are not even aware of a pregnancy, heavy alcohol use can result in severe malformations in the development of fetal organs. Second trimester alcohol abuse increases the chances of spontaneous abortion. Third trimester alcohol abuse can retard both body and brain growth. *Id.* at 22. Fully formed organs and rapid growth of the fetus in both size and weight cause the severity of alcohol abuse in the third trimester to be the most damaging. Average consumption may not be as important as the maximum alcohol concentration obtained during a critical period." *Id.* at 22.

> Ironically, the majority seeks to defend its doctrinal innovation on the ground that it will promote respect for the "rule of law." Obviously, respect for the rule of law must start with those who are responsible for *pronouncing* the law... Whatever "abuse of the writ" today's decision is designed to avert pales in comparison with the majority's own abuse of the norms that inform the proper judicial function.
>
> I dissent.
>
> - Justice Thurgood Marshall (*McCleskey v. Zant*, April 16, 1991)

PATERNAL CONSUMPTION OF ALCOHOL

Many medical studies have shown that the influence of paternal factors in diagnosing FAS has not been adequately assessed. Alcohol consumption by men during the month before conception has been proven to lower birth weight in infants. Abel, "Consumption of Alcohol During Pregnancy: A Review of Effects on Growth and Development of Offspring," *Human Biology* 442 (Sept. 1982).

This problem magnifies itself in light of the fact that many alcoholic women who give birth to FAS children also have husbands who are alcoholics. Many male alcoholics are impotent or sterile. Those male alcoholics who are not sterile often produce abnormal sperm. *Id.* at 443.

If these abnormal sperm fertilize an egg, the possibility of abnormal offspring being born exists. *Id.* Thus, paternal drinking habits cannot be ignored when one is trying to assess the effect of alcohol on the developing fetus and its subsequent effect on the child.

PREVENTION OF FETAL ALCOHOL SYNDROME

"Parentage is a very important profession; but no test of fitness for it is ever imposed in the interest of the children," states celebrated playwright George Bernard Shaw in his book *Everybody's Political What's What.* "Termination of Parental Rights: Putting Love in it Place," 63 *N.C. Law Review* 1177 (1985).

How far can the law proceed to prevent a pregnant woman from drinking and potentially causing FAS, while still protecting her constitutional right to freedom and privacy?

Because FAS is the only birth defect that is preventable, the answer lies in educating the general public. Comment, "A Spirited Call to Require Alcohol Manufacturers to Warn of the Dangerous Propensities of their Products," 11 *Nova Law Review* 1611 (1987); McCarthy, *supra*, at 33.

The public is aware that alcohol abuse is dangerous and can cause serious health problems for the abuser. However, the public obviously is not adequately informed about the specific health problems drinking alcohol during pregnancy can cause a developing fetus. *Id.* at 1611-1612.

A widespread national effort must be developed to warn and educate the American public about the "non-obvious dangers" of the consumption of alcohol. Comment, "Mitigating Alcohol Health Hazards Through Health Warning Labels and Public Education," 63 *Washington Law Review* 979 (1988).

The study of FAS is a relatively new field. If no one knows the effect of alcohol abuse on the fetus, then no one can legitimately know what FAS can do to the child during its lifetime. With regard to fetal alcohol abuse, the child is the victim and must be treated as such. The victim of FAS is not the one at fault for his defect. He suffers from something in which he had no part. Thus, he should not be punished for that defect.

GENETIC INFLUENCE ON ALCOHOLISM

The medical concept of alcoholism as an inherited disease has been around for centuries. Cruz-coke, "Genetics and Alcoholism," *Neurobehavioral Toxicology and Teratology* 179-80 (1983). Because alcoholism is considered a medical disease, physicians believe that alcoholism "may have a strong genetic component of multifactorial nature." *Id.* at 179.

However, no conclusive, full evidence of one's ability to inherit alcoholism from either parent has ever been presented. In fact, the only studies in the area of genetic alcoholism which are of any benefit are studies concerning adopted children and twins. *Id.*

Several studies have shown that "sons of alcoholics, separated from their alcoholic parents early in life and educated by foster parents, are significantly more likely to become alcoholics than were adoptees without alcoholic biological parents." *Id.*

Studies on twins' ability to inherit alcoholism have been used to determine the relative contribution of genetic and environmental factors. For example, non-identical twins often possess different tendencies concerning alcohol.

Non-identical twins from which one or both parents are alcoholics often have one twin who is an alcoholic and the other who is not. In striking contrast, identical twins represent genetically identical individuals. Thus, generally both are alcoholics or are not alcoholics. *Id.* at 179-180.

A novel area of medical research concerns the search for genetic markers signifying the inheritance of alcoholism. A medical expert has noted that "the search for association between genetic markers and alcoholism has been extensive, but relatively fruitless." *Id.* at 179.

The few genetic markers documenting inheritance of alcoholism include problems with color vision, a link between alcoholism and different blood groups in saliva and alcoholic hepatitis and in low platelet counts. *Id.*

Two types of genetic markers have been proposed. First, medical experts study genes which might "predispose an individual to alcoholism." *Id.* at 180. Secondly, medical researchers look for genes which might "help protect a person from alcohol addiction." *Id.*

Current medical studies examine these two hypothetical genes and try to discover how they interact with environmental factors. *Id.* It has been noted that a "full demonstration of a genetic predisposition to alcohol addiction will open the way to make an effective primary prevention of this disease in the near future." *Id.*

Michael Dorris, author of *The Broken Cord* (Harper and Row, 1989, p. 90), comments that offspring of alcoholic parents tend to show "a greater tendency toward similar chemical dependence in their own adult lives, whether they grew up in an environment in which heavy drinking took place [or were] adopted and raised by teetotalers." Thus, environmental factors, no matter how strong, cannot overcome a disease that is caused and defined before birth.

INFLUENCE OF RACE ON GENETIC SUSCEPTIBILITY TO ALCOHOL

Some medical studies have revealed that the race of the individual in question can determine his genetic susceptibility to alcohol. Smith, *supra*, at 128. For example, in the most conclusive of these studies, it has been shown that certain Oriental populations, including Japanese, Taiwanese and Koreans, have a greater sensitivity to alcohol and a lower population frequency of alcoholism. *Id.* In contrast, studies on Indian populations show that the Indian culture tends to have a higher alcohol tolerance than the Caucasian population and the Japanese population. *Id.* at 128-129.

Medical researchers processing these studies feel that the major reason for differences among the races concerning genetic susceptibility to alcohol evolves from variations in the rate of metabolism of alcohol and biochemical factors which are particular to certain races. *Id.*

However, Dr. Streissguth disagrees. She feels that race makes no difference whatsoever in genetic susceptibility to alcohol. Streissguth feels that the type of alcohol most commonly ingested by a culture is of greater importance than race, *e.g.*, wine in France, beer in Germany. Streissguth, *supra*, *lecture notes*. Coincidences between genetic markers and alcoholism have not been properly documented at this point in the research. Cruz-coke, *supra*, at 180.

Many medical experts favorable to the idea of using a genetic marker to pinpoint the connection between genetics and alcoholism are currently encouraging research in this area.

FAS, FAE AND CRIMINALITY

Few, if any, studies have been done linking criminality to FAS or FAE. Also, no current studies are being conducted attempting to connect violent behavior with FAS or FAE. Streissguth, *supra*, *lecture notes*. Obviously, few documented studies or cases are available to the defense attorney who is dealing with a client suffering from FAS.

However, a California case, *Harris v. Vasquez*, 913 F.2d 606 (9th Cir. 1990), dealt with a third habeas review wherein the petitioner raised FAS as a mitigator. The Ninth Circuit indirectly was receptive to the argument as a potential mitigator, but believed FAS mitigation was a trial, not an appellate, issue. Harris was subsequently executed on April 21, 1992.

Dr. Streissguth has commented that FAS victims do not understand cause and effect. Streissguth, *supra*, *lecture notes*. Streissguth notes with particularity that FAS children cannot make this important connection. These children tend to repetitively do certain unacceptable actions, even if punished each time. *Id.*

Michael Dorris offered an example of his son, Adam's, actions which demonstrate Streissguth's comments. As he grew older, Adam was allowed to bathe alone. However, each time he ran his water, he forgot to turn it off and, at one point, flooded the entire upstairs of the Dorris home. Dorris and his wife, Louise, always punished Adam, but he continued this behavior each time he bathed. Dorris, *supra*, at 247-248.

Another example is as follows: Josie and Don Defries of Seattle, Washington, adopted a son who was later diagnosed with FAS. The Defries' son, Rusty, once threw water balloons at traffic, causing an accident. After the incident, Rusty stated that he felt the balloon "had a mind of its own." Rusty clearly lacked the ability to grasp cause and effect or the consequences of his actions. National Public Radio, *Morning Edition*, April 21, 1992.

Rusty Defries was often described as having an "angelic innocence," yet dangerous to himself and others. *Id.* Sterling Claren, a researcher at the University of Washington, stated on *Morning Edition* that incarceration is not the answer for FAS offenders; frequent victimization occurs to them in jail or prison. States Rusty Defries about his situation: "I'm coming to realize that it is harder for me to live -- be able to go and live by myself because of the things that I can do as -- out of the blue. I could just think of something, and I think it would be funny." *Id.*

Streissguth further notes that FAS children lack a sense of fear, often injuring themselves by dangerous activities such as climbing onto the roof of a house. Streissguth, *supra*, *lecture notes*. Also, FAS children do not appreciate bodily distances ("personal space") and often touch person when they do not want to be touched.

The criminality connection here is obvious, continues Streissguth, as these FAS children become socially ostracized and go through life as social misfits. *Id.* In other words, these children "never learn the 'code', or that they are violating it." *Id.* Both FAS children and adults are often very isolated and panicked as a result of extreme ostracization by others. *Id.*

Their "response to stimuli is often out of proportion." *Id.* Streissguth says, for example, that an FAS sufferer may smash a cassette if asked not to play it. *Id.* FAS adults do not understand the rules that most people live by but desperately want to live by them. *Id.*

FAS victims are easily influenced because they want to be accepted by others. As a result, these persons are often victimized and led by those wishing to take advantage of them; they are often scapegoated. *Id.*

As an FAS person grows into adulthood and expected independence, mental illness becomes more apparent. The more common mental illnesses suffered by FAS victims are depression, habitual lying, psychosis and suicidal tendencies. *Id.*

Of particular concern, notes Streissguth, is the need to lie about silly things, such as saying "I've eaten" when the statement simply is not true and it is clear that others know the statement is not true.

FAS sufferers often are chronic thieves, stealing to impress others or to prove to themselves that they can accomplish something. *Id.* Further, FAS adults often are psychotic, and, more often than not, child abusers. *Id.*

In her Airlie lecture, Dr. Streissguth provided the following guidelines for attorneys who believe a client may suffer from FAS:

I. Have the client see a dysmorphologist who can diagnose FAS.

II. Take a family history and include the following information:

a. Family history

1. Mother's abuse of alcohol
2. Maternal grandmother's abuse of alcohol (to show that the client's mother may have had FAS).

b. Indirect evidence suggesting maternal alcohol abuse

1. Mother dies before child is grown
2. Mother abandons family
3. Child placed in foster/adoptive home
4. Mother dysfunctional
5. Mother works as a bartender or at other high-risk job
6. Father is alcoholic

c. Early developmental problems

1. Early hospitalization at birth
2. Hypo- or hypertonic (unusual muscle tone)
3. Failure to thrive; repeated pneumonia or ear infections
4. Delayed milestones
5. Delayed schooling

d. School problems

1. Repeated primary grade
2. Special education or remedial courses
3. Math disability or general learning disability
4. Low IQ; brain damage
5. Attention deficits
6. Behavioral problems (lying, stealing)
7. Social isolation
8. Poor school attendance, particularly middle and high school (when school structure decreases)
9. High school dropout

e. Adolescent/Adult Problems

1. Impulsive
2. Poor judgment
3. Restless; transient
4. Poor work habits
5. Victimization

FAS is a growing national problem which must be recognized by every facet of our society, including most importantly, the criminal justice system. The growing awareness of attorneys who deal with clients suffering from FAS will make possible the use of FAS as a mitigator in capital cases or as an explanation for a defendant's behavior, in order to show that he is also a victim and, ultimately, save his life. The *Harris* case will help bring this tragic syndrome to the forefront of public attention and possibly help end its dire and destructive consequences.

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> Power, not reason, is the new currency of this Court's decision making. Four terms ago, a five-Justice majority of this Court held that "victim impact" evidence of the type at issue in this case could not constitutionally be introduced during the penalty phase of a capital trial. By another 5-4 vote, a majority of this Court rebuffed an attack upon this ruling just two Terms ago. Nevertheless, having expressly invited respondent to renew the attack, today's majority overrules *Booth* and *Gathers* and credits the dissenting views expressed in those cases. Neither the law nor the facts supporting *Booth* and *Gathers* underwent any change in the last four years. Only the personnel of the Court did.
>
> - Justice Thurgood Marshall (*Payne v. Tennessee*, dissent, June 27, 1991)

PLAINVIEW

Commonwealth v. Litke

On April 9, 1993, the Court of Appeals issued an important decision on the recently adopted good faith exception. Significantly, the court held that the evidence was properly suppressed by the Franklin Circuit Court, and that *Crayton v. Commonwealth*, Ky., ___ S.W.2d ___ (1993), which had adopted the good faith exception in Kentucky under Section Ten, would not apply.

The case involved allegations of Medicaid fraud. An investigator with the Attorney General's office received an anonymous complaint regarding Dr. Litke. The caller recommended talking to a former employee of Dr. Litke. The employee was contacted, and she related facts which revealed fraudulent billing practices. In the affidavit in support of the search warrant, these facts were detailed. However, the affidavit did not say when the employee made her observations. The only date in the affidavit was from five years before.

The court held that under these circumstances, the search warrant was not based upon probable cause due to the stale nature of the information supplied to the magistrate. Quoting from *Stroud v. Commonwealth*, 295 Ky. 694, 175 S.W. 2d 368 (1943), the court stated that "'the affidavit supporting a search warrant must contain a statement of facts showing the source of the information which must be of such recent occurrence as to create a probable cause for the belief that the forbidden articles were possessed at the time the search was made.'" Because the facts did not show that the evidence sought to be obtained by searching could be expected to still be at Dr. Litke's office, the warrant was invalid.

The court then went on to consider whether the evidence should be suppressed pursuant to *Crayton*. Here, too, the court upheld the trial court. When evidence is seen, and whether evidence is still there, were said to be "*essential* to a finding of probable cause." "We believe that no 'reasonably well-trained officer" could have believed that the affidavit in this case was sufficient." Thus, the good faith exception did not apply, and the trial court's decision was affirmed.

There's hope! Learn those *Leon/Crayton* exceptions, and cite them to your trial court. Cherries to Bill Johnson and J. Guthrie True for their work in this case.

U.S. v. Ogbuh

In November of 1990, two Nigerians bought one-way tickets with cash from Houston to Detroit. They traveled to Detroit, and checked into a hotel. From there, they called a third man, Mostafa Yosuf, who was still in Houston. When Yosuf traveled to Detroit, he was stopped by the DEA, and agreed to be searched, revealing heroin. Yosuf agreed to cooperate. He went to the hotel where the two Nigerians were staying. He went into the room, and within a minute, police officers made a warrantless entry. After the district court overruled the two Nigerians motion to suppress the evidence found in the room, they were convicted.

On appeal to the Sixth Circuit, their convictions were reversed by a panel consisting of Judge Merritt, and Batchedler, and Norris. The court held that the officers had probable cause. However, because the entry and search had been conducted without a warrant, the court held that the search and seizure had been unreasonable.

The government asserted that there were exigent circumstances justifying the warrantless entry of the hotel room. The government's position was that because it would have taken an hour to obtain a telephonic warrant, that exigent circumstances existed. The court rejected this assertion, however, saying that "the government may not erect a system of procedural delay and then use it as an excuse for not obtaining a warrant." The court further noted that "[i]f the police have little incentive to obtain a warrant, they will not do so. The law must provide that incentive; otherwise, the warrant requirement of the Fourth Amendment will become a dead letter."

The court further rejected the government's secondary position that by letting in the informant, somehow the two defendants inside had "consented" to the warrantless entry a minute later by the police.

United States v. Roberts

The state police in Clay County, Kentucky, knew Tommy Roberts, and had been to his house many times to investigate complains of being "drunk and disorderly". On this particular evening, the police received a similar call. However, when they went to his house, he was not there. They drove around, and began to stop cars to see if Roberts was driving the car. When they saw a car on a gravel road, they stopped it, finding Roberts. He was arrested for DUI. A subsequent search of Roberts brought out two bags of cocaine. After unsuccessfully challenging the search, Roberts was convicted of possession with intent to distribute cocaine and other charges.

In a 2-1 decision by the Sixth Circuit and written by Judge Kennedy, the Court affirmed the lower court. The Court held that the police could infer that Roberts was driving drunk as a result of the call from Roberts' landlord. The Court further found that when Roberts swerved away from them when they approached on the gravel road, that further justified the stop of the car. Thus, the Court affirmed the stop under *Terry*.

In dissent, Judge Potter noted that when the troopers stopped Roberts, they had no idea that it was him. Thus, while they had suspicion that Roberts was driving drunk, they had no individualized suspicion that the car they stopped was being driven by Roberts.

U.S. v. Ferguson

A police officer sitting in a motel parking lot in Memphis, Tennessee watching two men get in and out of two cars, and in and out of a particular room. At one point, one of the men laid down in the front seat of the car. Their activities interested him, and he followed them when they left the motel room. After noticing that the car had no visible license plate, he pulled them over. During the stop, he discovered cocaine. The trial court overruled the motion to suppress, rejecting the defendant's allegation that the stop by the officer was pretextual.

However, the Sixth Circuit reversed. In an opinion by Judge Keith and joined by

Judge Jones, the court said that the standard to gauge pretextual stops was that set out in *United States v. Pino*, 855 F.2d 357 (6th Cir. 1988), which held that the proper inquiry "is not whether the officer could validly have made the stop but whether under the same circumstances a reasonable officer would have made the stop in the absence of the invalid purpose." Under this standard, the actions of the police officer fell short. The court gave weight to the fact that the officer had pursued Ferguson before noticing the license plate was missing (there was a temporary license card laying in the rear window). The court also noted that the officer had testified at the suppression hearing that one of the reasons he had stopped the vehicle was based upon what he had witnessed at the motel before noticing the fact that the car had no plate. Finally, the court observed that the officer did not question the occupants about the plate when he stopped them, moving directly into his drug investigation.

Based upon this, the court stated that a "'reasonable officer'" would [not] have stopped Lester because his vehicle had no visible license plate, absent some additional, invalid purpose... there is overwhelming evidence that Writesman stopped the vehicle because he wanted to conduct an investigatory drug stop, suspicious of the activity he observed at the motel."

Judge Boggs wrote a dissent. Judge Boggs accused the majority of using a subjective rather than an objective standard. While there was "no question that Writesman was partially motivated by his suspicion of drug activity"...the "existence of an illegitimate motivation does not render a concurrent legitimate motivation pretextual. To the contrary, it is irrelevant." According to Judge Boggs, "[t]he essence of good police work is to notice what appears to be out of the ordinary, the possible precursors or indicia of unlawful conduct, to take appropriate steps to confirm or deny those suspicions, within constitutional limits, and then to take appropriate action when violations are observed or probable cause appears. That is exactly what happened here."

The Short View

1. ***Commonwealth v. Wilson***, Pa. Super. Ct., 52 Cr. L. 1465 (2/3/93). An anonymous tip regarding what a person usually does does not constitute an articulable suspicion sufficient to justify a stop and frisk. Thus, information that someone usually is on a particular street selling drugs and carrying a gun cannot justify a *Terry* stop. The problem with such a tip is that it does not provide the police with any "'time-frame' within which these activities allegedly were committed by the defendant."

2. ***In re Grand Jury Proceedings***, 52 Cr. L. 1466 (D.C. W. Ky., 2/11/93). A search warrant is the proper way to obtain a blood sample from a suspect for purposes of submitting evidence to a grand jury. A subpoena for the blood sample is an improper way to obtain these samples, according to the U.S. District Court for the Western District of Kentucky. According to the well-reasoned opinion of Judge Simpson, "[u]nder the reasoning of *Schmerber* and *Winston* we believe that the compulsory extraction of blood samples is permissible under the Fourth Amendment only in stringently limited circumstances. At a minimum, the warrantless search and seizure of such evidence when there is not a valid arrest should be subject to the same standards as any warrantless search... We hold that the United States' decision to seek Suleski's blood sample with a grand jury subpoena was not an appropriate use of such a subpoena. To allow the United States to use a Rule 17(c) subpoena for this purpose would abrogate Suleski's Fourth Amendment rights and, thus, transform the subpoena into an instrument by which an illegal search and seizure is effectuated... Therefore, we conclude that the United States must obtain a warrant before we will compel Suleski to comply with the demand for blood samples. To do so, the United States must establish probable cause that Suleski's blood samples will yield evidence of a crime. If the United States passes this threshold of establishing probable cause, then it must establish that its need for the evidence is greater than the extent to which the blood test poses a risk of harm to Suleski and infringes his dignitary interests in privacy. Only if the balance weighs in favor of the United States should be warrant be issued."

3. ***United States v. McKinnon***, 52 Cr. L. 1542 (11th Cir. 3/9/93). Conversations between two people arrested and placed into a police car are admissible evidence, according to the Eleventh Circuit. The Court found that there is no reasonable expectation of privacy in the back of a police car, and thus inculpatory conversations picked up by a recorder were not admitted erroneously at the defendant's trial.

4. ***People v. McMillan***, Colo. Ct. App., 53 Cr. L. 1036 (3/25/93). The bright line rule of *California v. Acevedo*, 111 S.Ct. 1982 (1991) appears a little less bright after this case. Here, an accused was stopped for a traffic violation. During the stop, the officer saw a syringe on the seat of the car. The officer also learned that there was an outstanding warrant for arrest, including possession of drug paraphernalia. The officer searched the car, and the defendant's purse, in which he found speed. The defendant was convicted of possession of a controlled substance. However, the Colorado Court of Appeals reversed, holding the search of the purse to be unreasonable. According to the court, *Acevedo* did not eliminate the rule of *U.S. v. Ross*, 456 U.S. 798 (1982), which had said that where there is no probable cause to search particular parts of the car that that part of the car, including containers, could not be searched. Thus, because there was no probable cause to believe that contraband was in the purse, it was error to expand the search of the car into the purse.

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Isn't is funny that anything the Supreme Court says is right?

- Robert Frost

ACCURATE BLOOD ALCOHOL RESULTS

In an era of increased scrutiny of the blood alcohol level of a DUI suspect, prompted by **per se** legislation, it is more crucial than ever that the jury receive accurate information as to your client's blood alcohol level. Inaccuracies in the breath testing device[1] and slip schod chain of custody procedures[2] call into question the accuracy of the state's blood alcohol level and highlight the defendant's need for accurate information.

Due to these and similar concerns, "a large majority of states have included in their chemical test legislation a provision that the person given a police administered test shall be permitted to have a physician or qualified person of his own choosing administer an additional test."[3] While the right to an independent test is not a newly created right in this Commonwealth, in 1991, with the passage of KRS 189A.105[4] the Legislature mandated for the first time that prior to invoking the implied consent to alcohol testing provisions of the Code, the suspected drunk driver must be advised of certain rights, including his right to an independent test.

Clearly, in creating a requirement that the police advise the suspect of this preexisting right, the drafters of the new DUI Code provisions sought to maximize the likelihood that those statutorily eligible individuals who desire their own test receive it. The specific conditions placed upon this request are that: a) the request must be within a reasonable period of time,[5] and b) that the test be performed at the expense of the individual arrested.[6] By implication, the individual must first submit to the officially requested test.[7] The state, likewise, must act pursuant to the request within a reasonable time.[8]

Upon a proper request, the sole situation excusing the failure to provide the second test and thus salvaging the case or at a minimum the test results, is the "nonavailability of the person chosen to administer the test."[9] This nonavailability is likewise given a reasonable period of time loophole.[10] Practice suggests, however, that it is not the nonavailability of the "person **chosen** to administer the test" which denies the defendant his or her test. It is the failure of the state to grant meaningful access to the testing which causes the problem.

Although no Kentucky case has addressed this issue, the crucial determination would seem to be "of what value is that right if the accused is in custody of law enforcement officials who either refuse or fail to allow him to exercise that right?"[11] Clearly, a failure on the part of the officials who have control of the defendant to scrupulously honor the request renders it meaningless. But, clearly, there must, or should, be a limit to what the official is required to do to effectuate the request. As a matter of constitutional principle,[12] the Arizona Court of Appeals established a reasonableness test in *Smith v. Ganske*,[13] asking whether the suspect was "afforded a fair chance to obtain independent evidence." For the analysis, the Court relied on *In Re Martin*,[14] the grandparent of all defendant test cases. In *Martin*, a case where an arrested suspect had requested a blood test, the California Supreme Court held:

> It is sufficient if, in seeking to establish the fact of the alcoholic content of his blood, the authorities, by their actions or regulations, frustrate his reasonable efforts designed to produce probative evidence. 374 P.2d at 803.

Accepting reasonableness as the standard requires the inquiry - what is reasonable?

In *Ganske*, the defendant was provided a single telephone call, and jail procedures frustrated the defendant's ability to immediately post bond. The Court held:

> [W]e are of the opinion that the failure of the police authorities to provide Ganske with a "reasonable opportunity" to determine the reason for the delay in making bail or to allow bail to be posted in accordance with the master bail schedule, in order to obtain independent evidence of his sobriety, deprived him of due process of law.[15]

Clearly, in Kentucky, individuals with a blood alcohol of greater than .15% are statutorily deprived of the reasonable time rule as they are precluded from release for 4 hours.[16] Additionally, a single phone call policy would preclude reliance on the reasonable time nonavailability exception.[17]

In *Ward v. State*,[18] the defendant, after requesting an independent test, was in route to the hospital when the arresting officer realized that "the state did not have a contract with the [defendant's chosen hospital]."[19] The officer involved then returned the suspect to the jail without benefit of the test he had both a right to and had requested. In finding a violation of the defendant's right to his own test, the Court held:

> The statute says nothing about contractual relationships between the state and qualified facilities for blood tests. It states **only** that arrestee has the right to an additional test by a person of his or her own choosing. The Troopers denied Ward the right to obtain such a test after they had agreed to transport him to ANMC.[20]

Practice would suggest that this may be the most difficult scenario. Logically, the most crucial aspect of the testing procedure for the recent arrestee is the drawing of the sample and its proper storage. Arrangements for the testing can be done at a later date, assuming proper storage. Routinely, the police seem to be able to transport suspects to the local hospital and have blood drawn for analysis. KRS 189A.103(7) and *Ward* are authority that the suspect should be entitled to the same access.

The reasonableness component of KRS 189A.103(7) can best be judged by comparing of the procedures employed in a given case to *State v. Hilditch*.[21] In *Hilditch*, the failure of the police officer to wait at the hospital, while the suspect's wife drove the 16 miles from home with the necessary

funds, was held to deny an Oregon suspect his reasonable opportunity to obtain an independent test.

Clearly, the arresting officer or the jailer will not like the delays involved, especially since the end result may be used to impugn the very case the arresting officer seeks to make. However, the legislative policy is clear. Only by litigating the procedures employed in a given case to deny your client his or her independent test can the legislative policy be given meaning.

In sum, the right to an independent test is a statutorily created right that can **only** increase the accuracy of the fact finding task of the trial court. In analyzing the various ploys utilized to deny that right, bear in mind the words of the U.S. Supreme Court:

> At the same time, it is difficult to identify any interest of the State, other than that in its economy, that weighs against recognition of this right. The State's interest in prevailing at trial - unlike that of a private litigant - is necessarily tempered by its interest in the fair and accurate adjudication of criminal cases. Thus, also unlike a private litigant, a State may not legitimately assert an interest in maintenance of a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained.[22]

FOOTNOTES

[1] Breath testing devices assume that the amount of alcohol in 100 milliliters of blood equals the amount of alcohol in 210 liters of breath air. This 2100 to 1 ratio, called the partition ration, is not accurate across the possible spectrum of suspects and has been the source of litigation and scholarly criticism. See Erwin, *Defense of Drunk Driving Cases*, Section 18.01 - 18.09. Kentucky, rather than address the issue in a manner as to insure accuracy, chose instead to incorporate the inaccuracy into the statutory definition. KRS 189A.005(1).
[2] See *Calvert v. Commonwealth*, 708 S.W.2d 121 (Ky.App. 1986).
[3] Erwin, *Defense of Drunk Driving Cases*, Section 30.03(2).
[4] Effective July 1, 1991.
[5] KRS 189A.105(3)
[6] *Id.* The constitutionality of such a provision is suspect.
[7] KRS 189A.103(7) states: The person tested shall be permitted to have a person...of his own choosing administer a test or tests in addition to any test administered at the direction of a peace officer.
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] 248 S.E.2d 560 (Ga.App. 1978).
[12] Arizona has no statutory right. This case decided on Due Process principles. Kentucky's statutory guarantee should provide even more protection.
[13] 562 P.2d 395 (Ariz.App. 1977).
[14] 374 P.2d 801 (Cal. 1962).
[15] 562 P.2d at 397.
[16] KRS 189A.110. In practice, especially with indigent clients, few, if any, can expect release within a time period that would allow meaningful testing.
[17] KRS 189A.103(7).
[18] 758 P.2d 87 (Alaska 1988).
[19] 758 P.2d at 90.
[20] *Id.*
[21] 584 P.2d 376 (Or.App. 1978)
[22] *Ake v. Oklahoma*, 470 U.S. 68 (1985).

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DUI SERVICE FEE DISTRIBUTION
$150 Fee

KRS 189.050 sets $150 service fee as part of the sentence of a person convicted of DUI. The statute requires the fees to be used for enforcement of DUI laws, support of jails, recordkeeping and treatment and education programs for DUI cases.

Allotted to 4 Entities

109 KAR 11:030 allots driving under the influence service fees as follows:

1. Transporation Cabinet: 4% for furnishing copies of driver history records to courts for use in DUI cases.
2. Cabinet for Human Resources: 45% for treatment programs for indigent offenders.
3. Justice: 26% for enforcement activities under provisions of KRS 189.010.
4. Department of Local Government: 25% for the distribution to counties in which drunk driving convictions are adjudged to assist in expense of maintaining jails and which shall be used in addition to other jail costs allowed by the state.

Dollars Allotted FY 91

The Total Service Fees Collected in FY 1991 were $3,398,964.50. Those dollars were distributed as follows:

25% Counties	$ 849,741
45% CHR	$1,529,534
26% Justice	$ 883,731
4% DOT	$ 135,959

KRS CHAPTER 218A DRUG CHART

The first drug chart appeared in *The Advocate* in October 1983.

Like each prior drug chart, this present drug chart is not designed to replace the statute, but to act as a quick-reference research tool. In this regard, the proscribed conduct is arranged in the following fashion: *trafficking* in controlled substances and conduct relating to trafficking; *possession* of controlled substances; proscribed conduct relating to *marijuana*; and, *miscellaneous* provisions.

CONDUCT	CONTROLLED SUBSTANCE	PENALTY
Trafficking - 1st° KRS 218A.1412	SCHEDULES I or II [narcotic]; CONTROLLED SUBSTANCE ANALOGUE; LSD; PCP	Class C Felony Class B Felony★
Trafficking - 2nd° KRS 218A.1413(1)(a)	SCHEDULES I or II [*non*-narcotic]; SCHEDULE III; [*not* LSD; *not* PCP; *not* MARIJUANA]	Class D Felony Class C Felony★
Prescribe, order, distribute, supply or sell anabolic steroid for a. enhancing performance in sport; or b. hormonal manipulation in the human species without medical necessity KRS 218A.1413(1)(b)	ANABOLIC STEROID	Class D Felony Class C Felony★
Trafficking - 3rd° KRS 218A.1414	SCHEDULES IV or V	Class A Misdemeanor Class D Felony★
Sells or Transfers to Minor [D 18 or over-V under 18] KRS 218A.1401	CONTROLLED SUBSTANCE [Any Quantity]	Class C Felony Class B Felony★ If a more severe penalty for trafficking in controlled substance applicable, then higher penalty shall apply.

CONDUCT	CONTROLLED SUBSTANCE	PENALTY
Trafficking: In any building used primarily for classroom instruction in a school or On any prmises located within 1,000 yards of any school building used primarily for classroom instruction KRS 218A.1411	SCHEDULES I, II, III, IV, or V or CONTROLLED SUBSTANCE ANALOGUE	Class D Felony If a more severe penalty is set forth in Chapter 218A, then higher penalty shall apply.
Criminal Conspiracy to traffic in a controlled substance or controlled substance analogue KRS 218A.1402	CONTROLLED SUBSTANCE or CONTROLLED SUBSTANCE ANALOGUE	Punished as if trafficked in that controlled substance or controlled substance analogue
KRS 218A.1404(1,3) Violation [trafficking in any controlled substance] KRS 218A.1404(4)	CONTROLLED SUBSTANCE	Unless another specific penalty provided in Chapter 218A Class D Felony Class C Felony★
Use and investment of drug-related income derived from trafficking KRS 218.1405	CONTROLLED SUBSTANCE	Class D Felony & in addition to other penalties proscribed by law shall forfeit property derived from income received from trafficking in controlled substance
Possession - 1st° KRS 218A.1415	SCHEDULES I or II [narcotic]; CONTROLLED SUBSTANCE ANALOGUE; LSD; PCP	Class D Felony Class C Felony★
Possession - 2nd° KRS 218A.1416	SCHEDULES I or II [*non*-narcotic]; SCHEDULE III; [*not* LSD; *not* PCP; *not* MARIJUANA]	Class A Misdemeanor+ Class D Felony★
Possession - 3rd° KRS 218A.1417	SCHEDULES IV or V	Class A Misdemeanor+ Class D Felony★
KRS 218A.1404(2) Violation [possession of any controlled substance] KRS 218A.1404(4)	CONTROLLED SUBSTANCE	Unless another specific penalty provided in Chapter 218A Class A Misdemeanor Class D Felony★

CONDUCT	CONTROLLED SUBSTANCE	PENALTY
Trafficking in Marijuana a. less than 8 oz. b. 8 oz. or more but less than 5 lbs. c. 5 lbs. or more KRS 218A.1421	 MARIJUANA MARIJUANA MARIJUANA	 Class A Misdemeanor Class D Felony★ Class D Felony Class C Felony★ Class C Felony Class B Felony★
Marijuana Cultivation with intent to sell or transfer a. 5 or more plants b. Fewer than 5 plants KRS 218A.1423	 MARIJUANA MARIJUANA	 Class D Felony Class C Felony★ Class A Misdemeanor Class D Felony★
Possession of Marijuana KRS 218A.1422	MARIJUANA	Class A Misdemeanor+
KRS 218A.140(1-2) Violation [False prescriptions; etc.] KRS 218A.140(3)	CONTROLLED SUBSTANCE	Class D Felony Class C Felony★
KRS 218A.350 (1-4) Violation [Simulation] KRS 218A.350(7)		Class A Misdemeanor Class D Felony★
KRS 218A.500(2-4) Violation [Paraphernalia] KRS 218A.500(5)	CONTROLLED SUBSTANCE	Class A Misdemeanor Class D Felony★
Advertising Controlled Substance KRS 218A.1403	CONTROLLED SUBSTANCE	Class B Misdemeanor Class A Misdemeanor★

CONDUCT	CONTROLLED SUBSTANCE	PENALTY
Prescribed drugs possessed only in original container KRS 218A.210	CONTROLLED SUBSTANCE	Class B Misdemeanor Class A Misdemeanor★
Revocation or Denial of Operator's License D between 14-17; and convicted of a violation of any offense under Chapter 218A; or adjudged delinquent for an act which would be offense under Chapter 218A Has motor vehicle or motorcycle operator's license KRS 218A.991(1)(a-b)		May recommend revocation of license for 1 year May recommend revocation of license for 2 years so long as suggested period of revocation does not extend past D's 18th birthday★
Has no motor vehicle or motorcycle operator's license KRS 218A.991(1)(c)		May recommend no license be issued for 1 year May recommend no license be issued for 2 years so long as suggested period does not extend past D's 18th birthday★

★ = Subsequent Offense
+ = Optional Commitment Treatment
D = Defendant
V = Victim

WHOSE APPEAL IS THIS, ANYWAY?

> *There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.*
>
> *Griffin v. Illinois*, 351 U.S. 12, 17-19 (1956).

The United States Court of Appeals for the Ninth Circuit recently reversed a defendant's conviction of tax evasion because the trial court had denied defendant's motion to substitute counsel, made on the eve of trial.[1] The Court pointed out that a "defendant can't be denied his choice of...counsel just because the request comes late, or the court thinks current counsel is doing an adequate job."[2] Further, explaining that "[i]n the absence of any finding counsel is ethically unfit, it's irrelevant that the district judge would be more comfortable with another lawyer," the Court stated in stirring words: "It's the client's comfort, not the judge's, that the Sixth Amendment protects."[3]

But only if the client has money. As the Court stated at the outset of its opinion: "A criminal defendant is entitled to the retained counsel of his choice (*though not to the appointed counsel of his choice*). U.S. Const. Amend. IV."[4]

The decision in *Lillie* illustrates what is the first point to be made in considering "whose appeal is it, anyway" -- the issue arises only when the client is a poor person. Privately-retained appellate attorneys *know* whose appeal it is -- *their client's*.

As *Lillie* demonstrates, the Sixth Amendment goes a long way to protect the rights--and indeed "the comfort"--of rich criminal defendants. But thanks in large part to two decisions written by former Chief Justice Warren Burger, the Sixth Amendment is far more parsimonious when it comes to poor people. One of these cases is *Morris v. Slappy*.[5] There, the defendant's appointed counsel fell ill six days prior to trial. The trial court appointed new counsel, and denied the defendant's *pro se* motion for a continuance to allow new counsel more time to prepare.[6] The Supreme Court, Chief Justice Burger writing for the majority, held that the trial court did not abuse its discretion in denying the motion for a continuance. In addition, the Court "reject[ed] the claim that the Sixth Amendment guarantees a 'meaningful relationship' between an accused and his counsel."

In *Jones v. Barnes*,[7] the Court, Chief Justice Burger again writing for a majority, held that "the *indigent defendant* [does not have] a constitutional right to compel *appointed counsel* to press *nonfrivolous* points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points." (emphasis added). The Chief Justice added:

> [B]y promulgating a per se rule that the client, not the professional advocate, must be allowed to decide what issues are to be pressed, the Court of Appeals seriously undermines the ability of counsel to present the client's case in accord with counsel's professional evaluation.... For judges to second-guess reasonable professional judgments and impose on *appointed counsel* a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy... (emphasis added).

Thus, under the Sixth Amendment, the rich criminal defendant counsel is entitled to counsel of his choice, is entitled to a meaningful relationship with counsel, is entitled to be "comfortable" with his counsel, and is entitled to counsel who will press any or all nonfrivolous points. The poor criminal defendant is not entitled to appointed counsel of choice, is not entitled to a meaningful relationship with appointed counsel, is not entitled to be "comfortable" with appointed counsel, and is not entitled to insist that appointed counsel press any or all nonfrivolous points. In short, the Sixth Amendment guarantees the rich criminal defendant an attorney who is fully accountable to his clients. The Sixth Amendment guarantees the poor criminal defendant a case-processing "government attorney" who is not accountable to his clients.

It is, therefore, no surprise that, as Justice William Brennan stated in his concurrence in *Jones*, "indigent clients often mistrust the lawyers appointed to represent them."[8]

Justice Brennan vigorously dissented in *Morris* and to the majority's holding in *Jones* that poor people are not entitled to an meaningful relationship with their appointed attorneys.[9] In *Jones*, Justice Brennan adopted the "radical" view that poor people, despite their poverty, "are capable of making informed judgments about which issues to appeal, and when they exercise that prerogative their choices should be respected unless they would require lawyers to violate their consciences, the law, or their duties to the court."[10] In *Morris*, Justice Brennan wrote:

> It is the defendant's interests, and freedom, which are at stake. Counsel is provided to assist the defendant in presenting his defense, but in order to do so effectively the attorney must work closely with the defendant in formulating defense strategy.... Moreover, counsel is likely to have to make a number of crucial decisions throughout the proceedings on a range of subjects that may require consultation with the defendant. These decisions can best be made, and counsel's duties most effectively discharged, if the attorney and the defendant have a relationship characterized by trust and confidence.[11]

Because Chief Justice Burger's views prevailed in *Morris* and *Jones*, those views govern an appointed attorney's obligations under the Sixth Amendment.[12]

However, they do *not* govern an appointed attorney's ethical obligations. Thus, while an appointed attorney who refuses to press nonfrivolous issues on appeal will not necessarily be found ineffective, the attorney may well violate his or her ethical obligations.

For example, the American Bar Association has embraced Justice Brennan's view in *Jones*, and not the majority's. The Comment to Standard 21-3 of the *American Bar Association Standards for Criminal Justice* reads:

> Another dimension...arises when, in the estimate of counsel, ...the client's decision to press a particular contention on appeal, is incorrect. Counsel has the professional duty to give to the client fully and forcefully an opinion concerning the case and its probable outcome. *Counsel's role, however, is to advise. The decision is made by the client.*[13]

In addition to the attorney's ethical obligations, there is at least one moral reason and numerous practical reasons for an appellate public defender to actively consult with her clients and allow them a significant role in formulating the statement of the facts and in choosing the legal arguments to be presented, their order, and the relief sought.

The moral reason was cited by Justice Brennan in his dissent in *Morris* and was succinctly stated by the Supreme Court in *Faretta v. California*: "Personal liberties are not rooted in the law of averages. The right to defend is personal. *The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction.*"[14]

Some busy appellate attorneys might dismiss this reason as impractical nonsense. They might argue that it is irrelevant that their clients will bear the personal consequences of an affirmance. The point is that they, and not their clients, are qualified to make the difficult decisions that often have to be made in appealing a criminal conviction.

The response to this view is to ask each of these appellate attorneys to imagine herself suffering from a serious illness and consulting with a physician. The physician explains a number of alternative treatments with varying risks and varying degrees of potential benefit, and then recommends one treatment, not very risky but not offering a great deal of potential benefit. The appellate attorney prefers a riskier procedure that offers more potential benefit. Who makes the decision? The appellate attorney:

> Informed consent...is the name for a general principle of law that a physician has a duty to disclose what a reasonably prudent physician in the medical community in the exercise of reasonable case, would disclose to his patient as to whatever grave risks of injury may be incurred from a proposed course of treatment *so that a patient, exercising ordinary case for his own welfare, and faced with a choice of undergoing the proposed treatment, or alternative treatment, or none at all, can, in reaching a decision, intelligently exercise his judgment by reasonably balancing the probable risks against the probable benefits.*[15]

The same logic should apply to an appeal. Because clients, not attorneys, bear the risk of an affirmance by the appellate court, poor clients, like wealthy clients, should be allowed to intelligently exercise their judgment over their appeals.

For those appellate public defenders who remain skeptical, there are a number of practical reasons to actively consult with clients about their appeals. They include:

- The client may be able to provide the attorney with information that justifies seeking a remand to the trial court or suggests postconviction remedies that can be sought before the appeal is filed. "Counsel should examine the whole case of the client represented, not only for purposes of the appeal, but also to take up, evaluate, and pursue any question that might affect the validity of the judgment of conviction and sentence. For example, issues may exist that can be raised only by a postconviction proceeding and that ought to be presented to the trial court before the pending direct appeal matures."[16]

- The client may be able to help to explicate ambiguities in the record. This explication can help with the statement of facts and at oral argument.

- The client can inform the attorney of events that occurred during trial but are either unclear from the record or about which the record is silent. These events can be used to "color" the brief, to assist the attorney in oral argument, or to file post-conviction relief or seek a remand.[17]

Chief Justice Burger's interpretation of the Sixth Amendment may not guarantee the poor appellant anything more than a case-processing "government attorney" who is not accountable to her clients. But we as "government attorneys" can attain to a higher standard, one that accords our clients the rights (and the respect) that wealthy criminal defendants demand and receive.

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NOTE: This article was adopted from a presentation made at the 1993 National Legal Aid & Defender Association's Appellate Defender Training seminar held in New Orleans.

FOOTNOTES

[1] *United States v. Lillie*, 989 F.2d 1054, (9th Cir. 1993).

[2] *Id.* at 1056.

[3] *Id.*

[4] *Id.* at 1055 (emphasis added).

[5] 461 U.S. 1 (1983).

[6] Newly appointed counsel did not join the motion for a contiunance, stating on the record that he was "prepared."

[7] 463 U.S. 745 (1983).

[8] *Jones v. Barnes, supra* (Brennan, J., dissenting), *citing* Burt, Conflict and Trust Between Attorney and Client, 69 Geo. L.J. 1015 (1981); Skolnick, Social Control in the Adversary System, 11 J. Conflict Res. 52 (1967).

[9] Justice Brennan concurred in the result on the ground that the defendant failed to make a timely motion for a continuance.

[10] *Jones v. Barnes*, 463 U.S. at 764.

[11] *Id.*

[12]*But see State v. Boyer*, 712 P.2d 1 (N.M.App. 1985) (under state law, attorney on appeal must present all issues that the defendant wants to present, but may flag specific issues as presented at the request of the defendant).

[13]Comment, *American Bar Association Standards for Criminal Justice*, Standard 21-3.

[14]422 U.S. 806, 834 (1975) (emphasis added).

[15]*ZeBarth v. Swedish Hospital Medical Center*, 499 P.2d 1 (Wash. 1972) (emphasis added).

[16]Comment, *American Bar Association Standards for Criminal Justice*, Standard 21-3.

[17]*Compare Penson v. Ohio*, 488 U.S. 75, 82, n.5 ("One hurdle faced by an appellate court without the assistance of counsel is that the record may not accurately and unambiguously reflect all that occurred at the trial. Presumably, appellate counsel may contact the trial attorney to discuss the case and may thus, in arguing the appeal, shed additional light on the proceedings below").

♦ ♦ ♦ ♦

RIGHT TO COUNSEL CASELAW

In *Gholson v. Commonwealth*, 212 S.W.2d 537 (Ky. 1948) the Kentucky Supreme Court held that a person who is accused of a crime and who is too poor to hire an attorney is entitled to have counsel appointed to represent them.

The United States Supreme Court has determined that if a state wants to take away a person's liberty for criminal conduct, it had to provide an attorney to those persons too poor to hire their own. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

In 1972 the Kentucky Supreme Court ruled that no attorney in Kentucky can be forced to represent an indigent without being paid for that service. *Bradshaw v. Ball*, 487 S.W.2d 294 (Ky. 1972). This ruling coincided with the creation of DPA.

☛ OOPS - CORRECTION ☚

Thanks to Judge James E. Keller we were informed there was an error in the article on Voir Dire, in the April 1993 issue of *The Advocate* at page 18. The correct quote from RCr 9.36(2) under the heading Peremptory Challenges, should read:

> After the parties have been given the opportunity of challenging jurors for cause, each side or party having the right to exercise peremptory challenges shall be handed a list of qualified jurors drawn from the box equal to the number of jurors to be seated plus the number of allowable peremptory challenges for all parties. Peremptory challenges shall be exercised simultaneously by striking names from the list and returning it to the trial judge.

- Julie Namkin & Marie Allison

THE IMPORTANCE OF CONFLICT
in a Defender office
& HOW TO WORK WITH CONFLICT WHEN YOU HAVE IT

All new supervisors dread the idea of conflict within their offices and endeavor to avoid disagreements at all costs. It is ironic that this is also true of Public Advocacy supervisors who work in a legal environment which requires adversarial thinking and behavior in the representation of their clients. The goal for these supervisors is to have an office that is peaceful, one free of infighting and unfulfilled demands.

Conflict occurs when people are in disagreement or when they have contradictory and possibly incompatible needs or demands. However, conflict can be both good and bad. Good conflict occurs when people are acting in cooperation towards a common goal though they may disagree on how to reach that goal. Under good conflict no one will lose if members of a group disagree.[1] Bad conflict occurs when people are in competition with each other or have competitive goals. In bad conflict all except one lose once a decision is made.

Current thinking in organizational management is that healthy and productive offices require productive, or good, conflict. Conflict enables a group to explore options, and test theories before putting them into action. Through this work a group can create solutions which would never have been contemplated individually, without the group process. Conflict also creates a relationship between people that would not have been achieved if they got along and agreed all the time. In fact, most offices need to avoid "groupthink." This happens when individuals are so motivated to remain part of the group that any dissent is suppressed in favor of a smoothly working operation where divergent ideas are not welcome.[2]

The problem with "groupthink" is that differences and disagreements are never truly dealt with. People who are unhappy with the office suppress their feelings but never forget them and become more disenchanted with the office operation. In order to promote a stress-free, peaceful office life the manager must foster caring relationships among the workers which requires open, constructive discussions of conflicts.[3]

HOW TO APPROACH A CONFLICT

There is no substitute to face to face confrontation.

The idea of face to face confrontation with an employee has encouraged many an attorney to stay out of management. However, confrontation need not be the brutal exercise that has been portrayed in popular media. There are different ways to approach different people. Some people will welcome the direct approach, others will appreciate a more diplomatic approach. Here are some suggestions on how to approach a conflict as the manager of a defender office. What approach you take as a manager will depend on the personalities of the people involved. When anticipating a confrontational meeting:

1. **Determine the personality traits of the people involved.** If the employee is bold, explosive, highly emotional then you should stay neutral and not attack the employee. At the same time you should not retreat. Deal with the employee when he or she is calm. If the employee is a detail-oriented perfectionist respect his or her knowledge and use facts, not emotion, to reason with them. Ask employees such as these for solutions. Acknowledge their viewpoint and then ask them to see it in a different way. If the person is indirect, cautious and defensive draw him or her out gently by asking open-ended questions. Be *fair* (this person's favorite word) and patient. If the person loves group approval and is openly agreeable but privately critical, use facts, be direct and specific. Invite suggestions and give reaffirmation to the person, as a team member, but require his or her efforts in the team's behalf.

2. **Never use anger.** "I think anger is a luxury the good manager cannot afford to express. Displeasure, yes. Anger, no. Irritation, yes. Anger, no. Disappointment, yes. Anger, no:... Anger is too risky in that it is too easily used as a weapon and it is too vulnerable to misinterpretation. Anger as a weapon frequently leads to humiliation, and humiliation is the one thing no employee will ever forgive you... You cannot afford to do something with such long-term negative impact." Autry 108-109.

3. **Determine what the employees' needs are, what their objectives are, what their concerns are.** The best way to do this is just to ask them what they want. Your questions could be something simple: "What would you like for me to do?" Or, even better, "How would you like to see this resolved?" Or, "If I could do anything to make this situation okay in your eyes, what would that be?" You'd be surprised how often the other person just wants you to understand his or her viewpoint, nothing else.

4. **Decide what the process will be.** If two people are fighting will you:

a. Talk to the combatants together?
b. Talk to them alone and then bring them together?
c. Get the office involved?
d. Report to the office when the issues have been resolved?
e. Talk to your supervisor?

5. **Decide what you want out of the process, what your goals and objectives are.** You should be prepared to ask the people in conflict what their solution would be. If they don't have a solution, you should have some suggestions how to resolve the situation. These suggestions should be compatible with your goals and objectives.

6. **Be a coach.** The manager is no longer an authoritarian. The manager is the facilitator who encourages people to find the solution to their problems.

RESOLVE THE CONFLICT

Again, the old traditional stereotypes of adversarial confrontation are no longer part of management behavior in resolving conflicts. Rather, managers should look to the win/win solution so often talked about in business organization literature. Win/win means simply that everyone gets something out of the solution to the

problem.[4] Everyone's needs are met in some way. Working relationships require interdependence and if all people to a conflict aren't winning, then all are losing.

If the parties and the manager cannot find a solution to the problem then all have to agree to disagree - amiably. It is the manager's function to get a commitment from the parties that the parties' relationship must remain amiable in spite of no resolution of the problem which created the conflict. This situation is called the No Deal.[5] It is important to this concept that the parties, including the manager, go into the discussion knowing and being able to articulate what their needs and goals are. Knowing that, they are better able to decide whether those needs and goals have been met or not.

If the parties do not agree to the notion of No Deal, that is, if they cannot disagree agreeably, then the supervisor must set boundaries. As a manager you must deal with behavior which destroys the office or impinges on the dignity of people in the office or anyone else involved in the conflict. If negotiation reaches an impasse, if the party(ies) are unwilling to do anything to resolve the situation the manager should consider delineating boundaries. The manager must tell the parties what behavior is unacceptable and that any future occurrence will mean that some certain disciplinary action will be taken. The manager should explain what that action will be and have the party(ies) acknowledge they understand the consequences. As manager, do not set these boundaries unless you *have to* and then, set them only if you mean it and are willing to put those consequences into action.

Remember: you cannot change other people. A manager can motivate and influence others to change themselves but that is the extent of a manager's influence.

Stephen Covey has written a fine book on leadership and management. In *Seven Habits of Highly Effective People* he suggests the following procedure for achieving the win/win solution when faced with conflict:

1. First, see the problem from the other point of view. Really seek to understand and to give expression to the needs and concerns of the other party as well as or better than they can themselves.

2. Identify the key issues and concerns (not positions) involved.

3. Determine what results would constitute a fully acceptable solution. (Remember the question you should ask, "If I could do anything to make this situation okay in your eyes, what would it be?".)

4. Identify possible new options to achieve those results.

The first and most important element in this model is listening. Defenders are experts in listening. Now, as managers, you are just listening to a different group of people. Practice empathic listening. Empathic listening is listening to try and understand, to really understand, the other person. Covey suggests there are four different ways to listen:

1. Mimic content
2. Rephrase the content
3. Reflect the feeling
4. Rephrase the content and reflect the feeling

The fourth alternative, above, is empathic listening. For example: One of your attorneys comes into your office, clearly upset and wants to talk to you. He says that his client is going to be convicted. There are four possible responses you might make.

1. (Mimic content): I understand that you think your client is going to be found guilty if he goes to trial.

2. (Rephrase the content): Sounds as if your client is about to make a bad decision about going to trial rather than taking the offer.

3. (Reflect the feeling): You're frustrated with your client.

4. (Rephrase the content and reflect the feeling): Your client is making a bad decision and you're feeling frustrated about that.

The fourth response acknowledges that you have heard what the attorney has said, you understand how the attorney is feeling, you are open to listening. It also sends a message that the attorney should continue talking, explaining what is going on and how the attorney is feeling. This is empathic listening. Don't worry if you reflect the wrong feeling or thought. You will be corrected and the attorney will feel encouraged to continue and elaborate.

The second element of seeking win/win solutions is to identify the issues. Often parties have trouble coming to any resolution because they never realize that they are all talking about different issues. Ask the parties to articulate what is bothering them and then listen to any hints as to unexpressed concerns.[6]

The third element of seeking win/win solutions is to find out what is acceptable. The best way to do this is to ask the participants what they feel is an acceptable solution, as mentioned above. It may be the ultimate solution is a compromise which includes solutions suggested by all parties. What is important to remember is that each party must find the result acceptable or else there is No Deal.

Finally, the fourth element of win/win solutions is to find a solution. The people in conflict are the ones who find a solution. This kind of exercise will be the most creative experience in your work as a coach. By working together, by creating new possibilities, new alternatives arise. The manager and the parties may come to some resolution that no one individually thought of before. Also, no solution is unworthy of consideration. All ideas are equal when they are first presented. If a manager senses that the idea is impossible or unworkable or lacks consideration, the manager is the last person who should tell the party so. Instead, ask questions. Ask enough questions about the consequences of the idea that the employee will at least anticipate the effect of the idea on other people as well as any possible negative impact it may have. On the plus side, the parties may convince you that the idea is workable.

PREVENTIVE MAINTENANCE

There are certain things that a manager can do to limit the amount of conflicts he or she must resolve. My list for preventive maintenance is not exhaustive but suggests basic behavior consistent with managing a healthy office.

Be honest. Don't fabricate, don't evade, tell the truth. But honesty is not an invitation to tactlessness. Be careful to know the parties and assess the approach that will work with them. It may be tempting to be blunt with all people because that approach gets the problem

out into the open immediately. However, this approach deals with what is bothering you, not what may be bothering the participants. Being blunt may also make the employee defensive. As a result he or she may not be willing to communicate. And without communication there won't be a solution. On the other hand, they want to know how you feel about an issue. It is a fine tightrope to walk.

Share all information. The model for organizational behavior has always held that information is relevant only to those directly involved. I think that modern managerial thinking has found this old model to be invalid. The healthiest organizations are transparent. Transparency works against office infighting, activity which hobbles any organization.

Treat your employees well. Create caring relationships. Understand the individual. Attend to the little things, make their jobs easier. Keep commitments. Clarify expectations. Show personal integrity and loyalty and apologize sincerely.

Motivate the employee. Each year the *Personnel Journal* surveys thousands of employees, asking what motivates them in their work. Employees ranked motivators in this order: 1) Job Satisfaction; 2) Appreciation and Recognition; and, 3) Involvement and Communication.[7]

Money and income were not among the top three motivators, as you can see. Undoubtedly as an office manager you are not in a position to determine pay raises. However, you do have control over the motivators listed above. These motivators are not unreasonable requests for employees to make. If you as a manager are meeting these needs expressed above you are giving them reasons to continue to do what they do and to improve. And you will be doing what you can to create and maintain a healthy, successful and productive work environment.

FOOTNOTES

[1]"For example, project team members can disagree over the best route for the transmission line. One person proposes one route, another opposes that route and offers another, which in turn is opposed. When they recognize they are all pursuing the cooperative goal of the best transmission line possible, and disagree only on how to accomplish that goal, they use conflict to dig into the issue, explore each other's perspective, discover more information, discuss ideas, and create a solution that all can accept. If, on the other hand, they believe they are trying to win, to have their own position adopted, the conflict will be much less productive." Dean Tjosvold, "Putting Conflict to Work," *Training & Development Journal*, December 1988, at 62.

[2]"If you think managing conflict and managing diversity are loaded with problems, then you haven't thought through the problems of managing sameness. I'd far rather be faced with trying to achieve harmony and goodwill among people who are at one another's throats than try to squeeze an ounce of innovation or creativity or risk out of a company full of photocopies of one another." James Autry, *Love & Profit: The Art of Caring Leadership*, (William Morrow & Co. 1991) at 191.

[3]"Caring, genuine relationships require open, constructive discussions and conflicts. As people work together and express feelings, they confront problems, frustrations and anger that, if suppressed and avoided, will undermine relationships within the organization. The philosophy of trust and caring will appear shallow and hypocritical without conflict management." Tjosvold at 61.

[4]"Win/Win is a frame of mind and heart that constantly seeks mutual benefit in all human interactions. Win/Win means that agreements or solutions are mutually beneficial, mutually satisfying. With a Win/Win solution, all parties feel good about the decision and feel committed to the action plan. Win/Win sees life as a cooperative, not a competitive arena. Most people tend to think in terms of dichotomies: strong or weak, hardball or softball, win or lose. But that kind of thinking is fundamentally flawed. It's based on power and position rather than on principle. Win/Win is based on the paradigm that there is plenty for everybody, that one person's success is not achieved at the expense or exclusion of the success of others." Stephen Covey, *The Seven Habits of Highly Effective People*, (Simon & Schuster, 1989) at 217.

[5]"*No Deal* basically means that if we can't find a solution that would benefit us both, we agree to disagree agreeably - No Deal. No expectations have been created, no performance contracts established. I don't hire you or we don't take on a particular assignment together because it's obvious that our values or our goals are going in opposite directions. It is so much better to realize this up front instead of downstream when expectations have been created and both parties have been disillusioned." Covey at 213.

[6]"Most conflicts should be decided through a process of talking honestly about the issues. Your role as a manager is to bring about those conversations, as an advocate for *both* viewpoints (or however many there are). You must sit in the hot spot and ask the questions that bring the real issues to the table. Most of the conflict will be a clash of styles or personalities, so your job is to get to the heart of the disagreement, which, most likely, will be its substance." Autry at 187.

[7]Information from Hal Wood, *Advisory Management Services*, Grandview, Missouri.

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> Tolerance is the virtue of the man without convictions.
>
> - G.K. Chesterton

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