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

THE ADVOCATE

The Means of Defense for Those Without

Volume 16, No. 3, June 1994

Larry Pozner & Roger Dodd

on

Cross-Examination

and

A Review of Their Book on Cross

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

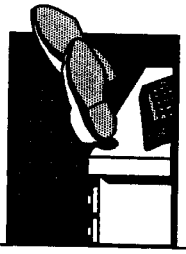
FROM THE EDITOR:

Cross. Pozner & Dodd know cross. They live it. Teach it. Communicate it. We learn from their article in this issue, and we understand from Ernie Lewis' review of their book where to access more of their brilliance.

Expert Funding. New opportunities exist for obtaining funding for experts to help the defense communicate the truth about the accused. David Niehaus brings us new ways to obtain *ex parte* hearings for expert funding as the Fayette rules now afford that right. We also share CHR's views on the limits of KCPC's role.

Problems. Stephen Covey, the national leadership expert, tells us that the way we see the problem is the problem. What does that say to those of us working in the criminal justice systems interdependent system of adversaries? We'd like to begin a discussion in future issues.

Edward C. Monahan, **Editor**



PUBLIC ADVOCATES

1) Anthony M. Wilhoit, 1972-1974
2) Jack E. Farley, 3/75 - 10/1/83
3) Paul F. Isaacs, 10/1/83 - 12/31/91
4) Judge Ray Corns, Acting, 1/1/92 - 5/16/92
5) Allison Connelly, 7/2/92 - present

DPA'S CONSTITUTION (1993)

To provide each individual client with quality legal services, efficiently and effectively, through a delivery system which ensures well-compensated, well-trained, well-respected defender staff dedicated to the interests of their clients and the improvement of the criminal justice system.

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Paid for by State Funds KRS 57.375 & donations.

IN THIS ISSUE

1) West's Review - Julie Namkin 3-7
2) Ask Corrections - Dave Norat & Karen Cronen 8
3) Sixth Circuit Highlights - Donna Boyce 9
4) Plain View - Ernie Lewis 10-12
5) Ethics - Dan Goyette 13-15
6) Interview Techniques - Kevin Batts 15-16
7) Expert Witness Assistance - David Niehaus 17-20
8) Cross Book Review - Ernie Lewis 21-22
9) Controlling the Runaway Witness: Tried & True Techniques for Cross-Examination - Larry Pozner & Roger Dodd 23-25

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.

West's Review

Julie Namkin

Bell v. Commonwealth
92-SC-807, 3/24/94

The defendant was tried and convicted for first degree sodomy of the minor son (A.C.) of his live-in girlfriend.

A.C. testified at trial and described the various acts of sexual and physical abuse. A social worker from CHR, to whom A.C.'s mother had originally reported the allegations, testified about how A.C.'s mother originally reported the allegations to her. Also through the social worker the Commonwealth introduced a detailed picture drawn by A.C. during an interview showing how the defendant ordered A.C. to engage in sodomy and how A.C. tried to resist. A.C.'s fourteen year old brother also testified about how the defendant allegedly sodomized him on two occasions. Although the defendant did not testify, he presented numerous witnesses who testified they never saw him engage in any inappropriate behavior with either child at any time they were in the defendant's home.

On appeal, the defendant challenged the admission of medical records from the doctor who examined A.C. two years after the alleged sexual abuse and one day after the defendant's arrest; A.C.'s brother's testimony which amounted to evidence of uncharged crimes; and the drawing A.C. made in the social worker's presence. Since the admission of the drawing was not objected to, the Court did not address it in its opinion, however, Chief Justice Stephens noted in dissent that the drawing should have been excluded under KRE 801(a)(1)(c).

Although the medical doctor did not testify at trial, upon request of the Commonwealth and over the defendant's objection and mistrial motion, the trial court admitted a certified copy of the doctor's report into evidence. In addition to describing the alleged abuse, the report stated there was sexual abuse and that A.C. identified the defendant as his abuser. As to the number of times the alleged abuse occurred, the number in the report was much higher than either the number contained in the indictment or in A.C.'s trial testimony.

The Kentucky Supreme Court stated that before the doctor's report may be admitted it must be authenticated or a proper foundation must be laid. Authentication involves showing the relevance of the evidence and that the document is what its proponent claims it to be. See KRE 901. The Supreme Court acknowledged the relevance of the doctor's report, but stated that without the doctor's testimony, the genuineness of the report was not established. The Supreme Court also pointed out that it was the responsibility of the Commonwealth, the party offering the report, to subpoena the doctor to authenticate the report.

As to the hearsay nature of the report, the Supreme Court relied on its analysis in *Drumm v. Commonwealth*, Ky., 783 S.W.2d 380 (1990), now codified in KRE 803(4), which looks to whether the doctor is a treating or a non-treating doctor. Since it is not clear from the doctor's report whether she was a treating or a non-treating doctor, the need for her in court testimony was crucial.

Because the doctor's report was not authenticated, and because the report contained hearsay evidence, the Kentucky Supreme Court held the admission of the report denied the defendant his constitutional right to confrontation and required reversal of the defendant's conviction.

The Court also found reversible error in the admission of the testimony of the victim's brother as to uncharged criminal acts committed by the defendant. The Court stated there are three factors (relevance, probativeness, and prejudice) to consider in determining the admissibility of other crimes evidence. Since KRE 404(b) is *exclusionary* in nature, one starts with the premise the evidence is inadmissible and then must show its relevance to an issue independent of the defendant's character or criminal disposition and that it must be more probative than prejudicial.

In the case at bar the Commonwealth argued the brother's testimony was relevant to prove a common scheme or plan. However, in analyzing the evidence, the Court found the dissimilarities in the evidence outweighed the similarities, and thus the evidence did not pass the relevancy test.

As to the probativeness of the uncharged crimes evidence, the question is whether the bare testimony of the victim's brother, who did not come forward with his allegations of sexual abuse until he learned of the victim's abuse, is sufficiently probative of the uncharged acts to warrant its introduction. This question should be answered by the trial court *before* the uncharged crimes evidence is admitted. No inquiry was even made in the instant case.

Even if the other crimes evidence is relevant for a proper purpose and is sufficiently probative of the defendant's guilt, it may still be excluded where the potential for prejudice outweighs the probative value. The Supreme Court will review the trial court's finding under an abuse of discretion standard.

The Supreme Court recognized the "universal agreement that evidence of [other criminal acts] is inherently and highly prejudicial to a defendant." Thus, the trial court "must consider whether a clear instruction limiting the jury's use to its *proper* purpose is likely to be effective."

In the instant case, since the other crimes evidence was not sufficiently relevant to justify its admission under the pattern of conduct exception, "the conclusion that its potential for prejudice substantially outweighed its probative value is inescapable." Thus, it was reversible error for the trial court to admit the victim's brother's testimony at trial.

Commonwealth v. Marcum
93-SC-462-DG, 3/24/94

This case discusses the difference between RCr 11.42, a rule of court, and the right to a writ of habeas corpus, a fundamental right guaranteed by § 16 of the Kentucky Constitution. KRS 419.020-

.110 are the statutory provisions implementing this constitutional right.

In the instant case Marcum filed a petition for writ of habeas corpus claiming he was being illegally detained under a void judgment. The Attorney General responded that the Oldham Circuit Court should not entertain the habeas corpus petition because there is no showing that the RCr 11.42 procedure is inadequate. Marcum should attack the Knox Circuit Court judgment in the Knox, not Oldham, Circuit Court. The Department of Corrections similarly argued that Marcum should make his arguments in the trial court by way of RCr 11.42 or by appeal.

The trial court dismissed the habeas petition, but the Court of Appeals reversed and remanded to the Oldham Circuit Court.

Granting the Commonwealth's motion for discretionary review, the Supreme Court affirmed the Court of Appeals.

In support of its opinion the Supreme Court pointed out that the writ of habeas corpus is an expedited procedure of a summary nature, *See* KRS 419.020-.110, while an RCr 11.42 motion is treated as a routine case and follows normal appellate procedure. The issue involves "the balance between the Commonwealth's need for the orderly procedure as provided by RCr 11.42 and the prisoner's right to an expeditious release through habeas corpus when it is patently obvious he is being unlawfully detained." Although RCr "11.42, like habeas corpus, provides a procedure for 'collateral attack' but it uses the term in a much broader sense than applies when using habeas corpus to attack a void judgment. RCr 11.42 encompasses every issue [both jurisdictional and non-jurisdictional] that suffices as reason to vacate a judgment which could not have been addressed by direct appeal."

In the instant case, the judgment under which Marcum is presently detained is a nullity because it was entered after the trial court lost jurisdiction of the matter. Thus Marcum's petition is qualitatively different from those cases that involve a collateral attack on a judgment alleging defects in the procedure, substantive or procedural, that are not jurisdictional, but are reasons why the judgment should be vacated. Habeas corpus, not RCr 11.42, is the appropriate remedy in Marcum's case.

The Supreme Court recognized "as the general rule that the RCr 11.42 procedure is adequate for a collateral attack by a prisoner in custody under a judgment which he believes to be defective for one reason or another. But we recognize as an exception that the prompt relief available by writ of habeas corpus remains for a prisoner who can establish in a summary procedure that the judgment by which he is detained is void *ab initio.*" "[T] he existence of RCr 11.42 should not, and shall not, deprive the [defendant] of his right to its [writ of habeas corpus] use."

McGinnis v. Commonwealth 92-SC-573-MR and *Terry v. Commonwealth* 92-SC-659-MR, 3/24/94

Striving to clear up confusion in the wake of *Shannon v. Commonwealth*, Ky., 767 S.W.2d 548 (1988), the Supreme Court endeavored to explain when it is appropriate in a homicide prosecution to give an instruction on "wanton murder" when the defendant argues he acted in self-defense. Under Kentucky law, "wantonness" does not suffice for a capital murder conviction unless the additional element of "circumstances manifesting extreme indifference to human life" is present. Prior cases have struggled with- or engendered-several questions: Does a wanton act performed in self-defense supply the required "wantonness?" An act claimed to have been performed in self-defense cannot be characterized as other than "intentional;" is that mental state inconsistent with "wantonness?" And what if the defendant claims he did not mean to kill the decedent? The Supreme Court said that if the defendant presents testimony sufficient to persuade a jury that he intended to shoot, but not to cause the death that in fact resulted, the jury should first be instructed on first-degree manslaughter, qualified by a self-defense instruction, and on second-degree manslaughter and reckless homicide to cover the case in which the jury concludes that the defendant performed a wanton or reckless act of self-defense. Manslaughter II and reckless homicide would also be appropriate verdicts if the jury found the defendant intended no serious physical injury but unreasonably shot in the victim's direction. Those offenses "are sufficient to cover both a jury finding of a subjective belief in the need for self-defense which was objectively unreasonable (wanton or reckless) and a jury finding that, while there was no act of self-defense, there was no intent to kill or seriously injure....The effect of evidence that the accused did not mean to cause the death of the victim, *if believed*, is to establish diminished culpability (*i.e.*, first- degree manslaughter), not to establish wanton murder.... [W]anton murder is no option in the self-defense scenario." The Court overruled *Barbour v. Commonwealth*, Ky., 824 S.W.2d 861 (1992), and *Sizemore v. Commonwealth*, Ky., 844 S.W.2d 397 (1992), "to the extent that [they] have misinterpreted the opinion in *Shannon.*" The dissent objected to the overruling of *Barbour* and *Sizemore* and separately argued it is up to the legislature, not the court, to decide whether a self-defense instruction can be given for wanton murder.

Hughes v. Commonwealth 93-SC-118-MR, 4/21/94

The defendant pled guilty to murder and robbery and received a twenty year sentence. On appeal the defendant raised the following sentencing issue: whether the provisions of KRS 533.010(1) and (2), which was amended in 1990, override those of KRS 533.060(1), which was in existence at the time of the 1990 amendments and apparently conflicts with KRS 533.010.

KRS 533.010(1) allows for "probation, probation with an alternative sentencing plan, or conditional discharge." KRS 533.060(1) prohibits "probation, shock probation, or conditional discharge" when the crime for which the defendant is convicted involves the use of a weapon. Relying on *Brown v. Commonwealth*, Ky., 818 S.W.2d 600, 601-602 (1991), and *Williams v. Commonwealth*, Ky.App., 829 S.W.2d 942, 944-45 (1992), the Supreme Court concluded KRS 533.060(1) controls since it is the more specific statute. Thus, the trial court correctly determined it could not consider the defendant's request for probation with an alternative sentencing plan.

The defendant's counsel also filed a motion for leave to withdraw as appointed counsel pursuant to *Anders v. California*, 87 S.Ct. 1396 (1967). The Court denied the motion because "although the handwriting may have been on the proverbial wall, this was not a wholly frivolous appeal."

Commonwealth v. Jones 93-SC-356-DG, 4/21/94

The defendant was tried and convicted in district court for disorderly conduct arising out of an incident that occurred at the 1991 Pegasus Parade. The circuit court affirmed the conviction but the Kentucky Court of Appeals reversed. The Supreme Court reversed the Court

of Appeals and reinstated the defendant's conviction.

The facts revealed that a police officer received a complaint from a mother with four infant children that Jones was "shouting obscenities at the military components of the parade." The officer told Jones such language was impermissible and to move out of the "safety zone" around the judges stand. Jones refused to move and called the officer a "Nazi pig motherfucker." Jones was arrested and charged with disorderly conduct.

At her trial, the jury was instructed it could find Jones guilty of disorderly conduct if she, in a public place and with intent to cause public inconvenience, annoyance or alarm, or wantonly creating a risk thereof, (1) made unreasonable noise, or (2) created a hazardous or physically offensive condition by any act that served no legitimate purpose. The jury did not designate whether it found Jones guilty under section (1) or (2) of the court's instruction. See KRS 525.060(1)(b)&(d).

On appeal Jones argued the evidence was insufficient to prove her guilt beyond a reasonable doubt. Concluding there was sufficient evidence to prove Jones was making "unreasonable noise," the Supreme Court cited the police officer's testimony that Jones "volume of speech [w]as yelling, being greater than a normal speaking voice. This [testimony] was reinforced by Jones' statement that she was yelling louder than the parade itself." When Jones was asked to calm down, her voice escalated. "Content, volume and surrounding circumstances may be considered together when making a determination of reasonableness."

The Supreme Court also referred to the alternative theory upon which the jury was instructed pursuant to KRS 525.060 (d) as "a catch-all provision" and noted, without mentioning any supporting facts, that there was sufficient evidence to submit this theory to the jury.

The Supreme Court made it clear that this case "is not a 'content of speech' case," and that Jones was not being punished for the content of the noise. Reading the Court's opinion leads one to believe otherwise.

Commonwealth v. J.B. (An Unnamed Child) 92-CA-002717-DG, 3/11/94

This case involves an interpretation of KRS 610.340 which concerns the confidentiality of juvenile court records.

During the course of a homicide investigation, the Louisville Police Department sought permission from the juvenile court for access to a photograph kept at a secure juvenile detention facility operated under KRS 15A.200. The photo was of appellee who was a suspect in the investigation and was to be used in a photopak. After a hearing, at which appellee was represented by counsel, the juvenile court granted the officers' request for access to the photo. The circuit court reversed the juvenile court on the belief that the word "investigation" in the statute "means the investigation *after* the defendant has been charged and a case is being prosecuted."

Granting discretionary review and reversing the judgment of the circuit court, the Court of Appeals noted that KRS 610.340 (1) allows access to some records upon motion to the juvenile court for "good cause," which is what the police did in the instant case. The Court of Appeals also noted that disclosure under KRS 610.340(2) (which is an exception to subsection one) is automatic and does not require a motion and permission from the juvenile court prior to access. The Court also stated the records of committed children in possession of the Cabinet for Human Resources at its secure juvenile detention facilities operated under KRS 15A.200 are included in the definition of "juvenile court records" in KRS 610.340(1). As to the term "public officers" in KRS 610.340(2), this term was not meant to be a term of limitation and must be interpreted as "an inclusive term which necessarily includes peace officers such as the Louisville Police Department."

Contrary to the circuit court's interpretation, the Court of Appeals stated the term "investigation" in KRS 610.340(2) is not limited to an investigation *after* a case has been filed because "investigation needs to take place on the front end to see if prosecution of a complaint is necessary."

Lastly, the Court of Appeals pointed out that before the police can use the juvenile's photograph in a photopak for potential victims to view, they must request such permission from the juvenile court since under KRS 610.340(1), those public officers having access to such records may not breach their confidentiality without juvenile court approval for "good cause."

Farler v. Commonwealth 92-CA-001307-MR, 3/11/94

The defendant was convicted of two counts of first degree sexual abuse and one count of second degree sexual abuse. On appeal he argued the trial court erred in failing to suppress a statement he made to the police before he was informed of his *Miranda* rights.

During the course of their investigation, the police spoke to the victim (the defendant's female cousin who regularly visited and stayed with the defendant's family), the victim's mother and the victim's teacher. Two police officers then went to the defendant's house and asked to speak to him. The defendant agreed and suggested they go inside his home, but the police suggested they talk privately in their cruiser. The defendant agreed and sat in the back seat on the passenger side. The officer testified the cruiser door was open during the questioning, but the defendant testified it was closed. During the questioning the defendant admitted having sexual contact with his cousin, but maintained such contact stopped when he was seventeen years old. The defendant then agreed to give the police a tape recorded statement of what he had just told them. Later the same day the defendant was arrested' and read his *Mir-anda* rights. He then gave an oral state-ment to the police that was not recorded, although its content was the same as the recorded statement.

At trial the defendant moved to suppress his tape recorded statement on the ground it was involuntary since he had not been given his *Miranda* rights. The defendant argued he was entitled to *Miranda* warnings because he was the focus of the officers' investigation. It should be noted that subsequent to the Court of Appeals' opinion in this case the United States Supreme Court reiterated "that any inquiry into whether the interrogating officers have focused their suspicions upon the individual being questioned (assuming those suspicions remain undisclosed) is not relevant for purposes of *Miranda*." *Stansbury v. California*, 55 CrL 2015, 4/26/94.

The Court of Appeals found the defendant was not in custody when he gave his recorded statement so *Miranda* warnings were not necessary. The Court based its finding on the fact that the defendant voluntarily agreed to the questioning by the police and did not contend the police forced or pressured him to speak with them. The Court did not think it was material that the questioning occurred in a police cruiser since the defendant's freedom was not restrained while he was in the car. The environment was not coercive and the defendant left freely. Also, during his recorded statement, the defendant said he didn't mind answering the officers' questions.

Finally, the Court stated that even if the statement was improperly admitted, it was not reversible error because the defendant's subsequent identical statement, made after receiving *Miranda* warnings, was also introduced at trial. In addition, the defendant testified the sexual contact with his cousin occurred when he was seventeen years old.

The other issue the defendant raised on appeal was that he was entitled to a directed verdict of acquittal because the Commonwealth failed to prove he was over eighteen when two of the sexual offenses occurred. The Court found the victim's testimony, that all of the sexual contact occurred after the defendant turned eighteen years old, was sufficient to overcome a motion for a directed verdict. In addition, the Court stated "it was not necessary that [the victim] give specific dates that the offenses occurred. It would be wholly unreasonable to expect a child of such tender years to remember specific dates, especially given the long time period over which the abuse occurred." Beware this language!

Lynch v. Commonwealth
92-CA-2671-DG, 4/8/94

The defendant was convicted in the district court for driving under the influence and his conviction was affirmed by the circuit court. The Court of Appeals granted a motion for discretionary review and by a two to one vote affirmed.

The sole issue on appeal was "whether the Commonwealth can pursue a DUI on private property in accordance with KRS 189A.010."

The facts revealed that two police officers were dispatched to the defendant's home in response to a 911 call of domestic violence. The police encountered the defendant sitting in his truck about halfway up his quarter-mile-long driveway. His speech was slurred and he smelled of alcohol. He failed the eye nystagmus test and the preliminary breath test administered by the police so he was arrested for DUI. A subsequent blood test registered 0.12% blood alcohol content.

The defendant's theory of defense was that KRS 189A.010 should not apply to driving on private property. The Court of Appeals disagreed based on the language in the statute that "[n]o person shall operate a motor vehicle *anywhere in this state* while under the influence of alcohol...." Previous to 1984 the underlined language read "on public highways." Thus, the Court concluded the Legislature intended to make it a crime to drive while under the influence on private property as well as on the public highways, even though the Court acknowledged the purpose of the statute is to protect highway users from drunk drivers and the defendant's conviction does not further the purpose of the statute.

Since three Kentucky cases have held a defendant is not operating his motor vehicle and thus not guilty of driving under the influence when he is asleep or sitting in his vehicle on private property (which is not even his own property), such an argument appears to be a more likely avenue of defense for the individual found sitting in his own vehicle in an intoxicated state on his own property.

Martin v. Commonwealth
92-CA-002894-MR, 12/3/93
Ordered Published 4/15/94

The defendant was involved in a head-on collision in which he was injured as well as the five occupants of the automobile he struck. The defendant's blood alcohol level was 0.22 percent. Out of this incident, the defendant was charged with two counts of first degree assault and three counts of fourth degree assault. The defendant entered a conditional guilty plea to all five counts and reserved the right to appeal the question "whether KRS Chapter 508 was intended to include vehicular accidents within the meaning of 'assaults'."

Relying on *Wyatt v. Commonwealth*, Ky. App., 738 S.W.2d 832, 834 (1987) and *Shepherd v. Suburban Motor Freight, Inc.*, Ky.App., 780 S.W.2d 633, 635 (1989), the Court of Appeals reiterated that an automobile can be considered a dangerous instrument. And, relying on *Hamilton v. Commonwealth*, Ky., 560 S.W.2d 539 (1977), the Court held the defendant could be prosecuted under the assault statute even though the statute does not make reference to the use of alcoholic beverages or the operation of a motor vehicle (as does the present murder statute KRS 507.020).

Rowland v. Commonwealth
92-CA-001615-MR, 4/29/94

The defendant was charged with two counts of second degree assault for the shooting of his stepmother and her daughter.

As a result of the shooting the stepmother received medical treatment that included hypnosis. However, before she was actually hypnotized she gave two separate statements about the shooting to the doctor. In each statement she described the shooting in some detail and identified her stepson as the shooter. Under hypnosis she recalled additional details of the shooting and gave a more specific description of the defendant's appearance at the time of the shooting.

Prior to trial the defendant moved to suppress the stepmother's testimony in its entirety as being tainted by the hypnosis. The trial court denied the suppression motion and the stepmother testified to her pre-hypnosis description of the shooting.

On appeal the defendant argued for a "per se" rule that would preclude any witness who had been hypnotized from testifying. Relying on *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993), and the Kentucky Rules of Evidence (which were not in existence at the time of the defendant's trial), the Court of Appeals stated "it is inappropriate to adopt a per se rule excluding hypnotically refreshed testimony." The Court relied on a Delaware case *Elliotte v. State of Delaware*, 515 A.2d 677, 680 (Del. 1986), that held the trial court should conduct a hearing to determine whether hypnosis has substantially impaired the defendant's ability to cross-examine the witness or was otherwise improper. Since the trial court in the instant case conducted an extended inquiry into the circumstances surrounding the stepmother's hypnosis, and made findings as to each of the six matters referred to in *Elliotte*, the Court held it was proper to admit the stepmother's testimony.

The defendant also argued it was error for the trial court to deny his motion for an expert on traumatic stress syndrome to rebut the testimony of the doctor (who treated the stepmother for depression

after the alleged incident) about this syndrome. The Court stated that since the defendant waited until the day of trial to make his motion for the expert, it was not an abuse of discretion for the trial court to deny the motion.

Johnson v. Commonwealth
93-CA-1285-MR, 4/29/94

The defendant jumped the back fence of the owner's home, pulled an object out of his pocket, cut through screen, put his hand through the screen and opened the door to the screened-in porch. The owner just happened to be looking out the window at the time and witnessed the defendant's actions.

The defendant was tried and convicted of second degree burglary based on the afore-mentioned facts. On appeal the defendant argued he was entitled to a directed verdict of acquittal because the Commonwealth failed to prove he entered a "dwelling" as required under KRS 511.030. He claimed that entry into the screened-in porch was not entry into a "dwelling" and that porches are "qualitatively different from the interior of a house or other building."

The test for determining whether a porch constitutes a "dwelling" is found in *Stewart v. Commonwealth*, Ky.App., 793 S.W.2d 859, 860 (1990), which states that "if a structure's use 'contributes materially to the comfort and convenience of habitation in the dwelling house,' ...then it will be considered part of the dwelling for purposes of the burglary statute." Based on this test the Court of Appeals concluded the screened-in porch was part of the dwelling and the defendant was not entitled to a directed verdict of acquittal.

The Court also held it was not error for the trial court to fail to give the defendant's requested instruction on criminal attempt to commit burglary because whether the porch was a dwelling was a question of law for the court to decide and not a question of fact for the jury. The defendant's conviction was affirmed.

Lewis v. Commonwealth
93-CA-000941-MR, 5/6/94

The defendant was charged and convicted of two counts of fraudulent use of a credit card in violation of KRS 434.650 as a result of purchasing tennis shoes from the shoe department and clothes from the men's department at J. C. Penney's with an allegedly stolen credit card.

Prior to trial and at the close of all the evidence, the defendant argued he could only be charged with one count of fraudulent use of a credit card because KRS 434.650 and KRS 434.690 consolidate all fraudulent credit card transactions which occur during a six month period into one offense. The circuit court disagreed.

The Court of Appeals agreed with the defendant that the terms of the above-mentioned statutes "prohibit and punish a course of conduct over a six-month period, rather than individual acts." After examining the statutes and case law from other states with similar statutes, the Court of Appeals held the defendant "was incorrectly indicted and convicted of two felony counts of fraudulently using a credit card and should have been convicted of [only] one count." The defendant's conviction for the second count of fraudulent use of a credit card was reversed and the case was remanded for resentencing.

Horn v. Commonwealth
92-CA-002568-MR, 5/6/94

A juvenile, while on conditional release, ran away from home. The juvenile's mother reported the incident to a court designated worker employed by the Administrative Office of the Courts. The mother also informed the court worker that her son had attempted suicide and had a tendency for "huffing paint." The court worker informed the district court judge in writing of the attempted suicide, and upon petition duly filed, the court ordered the juvenile placed in detention. The juvenile was placed in an isolated cell and within thirty-five minutes he attempted to take his life.

Although the court worker accompanied the juvenile to the jail, she failed to advise the deputy sheriffs or the jailer of the juvenile suicidal tendencies. As a result, an action was filed against the AOC with the Board of Claims which dismissed the action for lack of jurisdiction under KRS 44.070 *et. seq.* On appeal, the circuit court reversed the Board's order as to lack of jurisdiction but affirmed the dismissal because the AOC enjoyed complete immunity.

Relying on *Ex Parte Auditor of Public Accounts*, Ky., 609 S.W.2d 682 (1980) and *Ex Parte Farley*, Ky., 570 S.W.2d 617, 620 (1978), and the doctrine of separation of powers as set forth in § 27 of the Kentucky Constitution, the Court of Appeals held the Board of Claims lacked jurisdiction to hear the action. The Court also held that the AOC enjoyed absolute immunity from prosecution.

FOOTNOTES:

[1]The opinion appears to contradict itself since it later states the defendant was not arrested until two days after he talked to the police in their cruiser.

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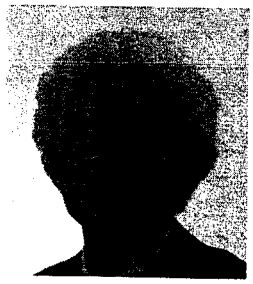
Sixth Amendment, United States Constitution (1791)

"In all criminal prosecutions, the accused shall enjoy the right...to have the assistance of counsel for his defense."

Ask Corrections



Dave Norat

Karen D. Cronen

QUESTION:

My client recently was found guilt of Burglary in the Third Degree, Class D Felony, and found to be a Persistent Felony Offender in the First Degree. He received an enhanced sentence of ten (10) years. Did the General Assembly recently pass a law relating to the Persistent Felony Offender Statute to exclude all Class D Felonies from the requirements of PFO I?

ANSWER:

No. House Bill 390 was enacted by the General Assembly and was signed into law by Governor Brereton C. Jones. House Bill 390 provides, in part, that KRS 532.080, Section (7), is amended to read as follows: "If the offense the person presently stands convicted of is a Class A, B, or C felony, a person who is found to be a persistent felony offender in the first degree shall not be eligible for probation, shock probation, or conditional discharge, nor for parole until having served a minimum term of incarceration of not less than ten (10) years."

House Bill 390 did not exclude Class D Felonies from the requirements of PFO I. Rather, it appears to have excluded Class D Felonies from the restrictions as to eligibility for probation, shock probation or conditional discharge, and the 10 year requirement for parole review.

This revision was not made retroactive, and would apply only to persons convicted and sentenced after the effective date of this revision. This should be come effective July 15, 1994.

QUESTION:

My client wants to know if the victims of the crime can request to be notified of his release from prison?

ANSWER:

Yes, House Bill 390 also made provisions for victim notification. If a victim, as defined in KRS 421.500, requests notification and supplies a current address and phone number, the Department of Corrections will notify them prior to the inmate's release from custody.

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Are We Learning?

The most violent period in U.S. history was in the middle of the 19th century, before and after the Civil War, but we have always been a violent people, as the National Commission on the Causes and Prevention of Violence told us. Remember that commission? Milton Eisenhower was chairman. In 1969, it reported, among other things:

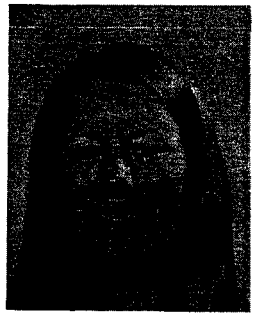
"To be a young, poor male; to be undereducated and without means of escape from an oppressive urban environment; to want what society claims is available (but mostly to others); to see around oneself illegitimate and often violent methods being used to achieve material gain; and to observe others using these means without impunity - all this is to be burdened with an enormous set of influences that pull many toward crimes and delinquency."

What has changed? Nothing. What has been learned? Well, only the part about "impunity." By golly, when we get tough this time, criminals won't get away with it.

But we have gotten tough before. Since the commission's report was issued, the population has grown by 27 percent, and the number of people incarcerated has grown by nearly 500 percent. You want tough. That's tough.

Tom Blackburn is an editorial writer for the ***Palm Beach Post*** *commenting on the latest crime bill rage.*

Sixth Circuit Highlights



Donna Boyce

Judicial Bias

In *United States v. Segines*, 17 F.3d 847 (6th Cir. 1994), the Sixth Circuit Court of Appeals granted three co-defendants a new trial due to comments made by the trial judge that revealed such bias towards the four defense counsel as to deny the defendants their fundamental right to a fair trial.

The first indication of the trial judge's hostility towards the defendants came during a pre-trial conference. Instances of the judge's hostility toward defense counsel multiplied throughout trial. One attorney, who was attempting to have a prosecution witness' testimony stricken as irrelevant and prejudicial, was told by the judge "We can't have motions all the time. We've got to get this thing going." Another attorney, who was trying to impeach the key prosecution witness with his previous involvement in a witness protection program, was admonished by the judge "No. I sustained the objection to that. *Now, if you can't ask the right questions I'll put somebody else up there to ask questions.*"

The Sixth Circuit found the most egregious incident reflecting the trial judge's intimidation of defense counsel when counsel was trying to impeach the key prosecution witness and prevent the introduction of certain parts of his testimony. The trial judge excused the jury to permit counsel to make an avowal. The judge criticized counsel for repeating questions and disregarding his rulings, and advised counsel that "individually you are all fine people, but collectively you're being extremely obnoxious in this case."

The Sixth Circuit held that the attitude and comments of the trial judge violated the three defendant's due process rights to a fair trial. It made this finding based upon the presumptively "chilling effect" of the judge's comments upon the conduct of the trial by defense counsel. As such, it did not require a specific showing of the chilling effect. It found the judge's remarks to have been so egregious as to rise to the level of "forfeited--but reversible error."

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Plain View

Ernie Lewis

Commonwealth v. Litke

In the June, 1993 issue of *The Advocate*, I reviewed the Court of Appeals decision in *Commonwealth v. Litke*. There the court had reversed a conviction based upon a search and seizure of a doctor's office. The court had held that the search warrant was not based upon probable cause due to the stale nature of the the information supplied to the magistrate. The facts given to the trial court did not show that the evidence sought to be obtained by searching could be expected to still be at the doctor's office. The court also held that because no "'reasonably well-trained officer' could have believed that the affidavit in this case was sufficient", the good faith exception of *Crayton v. Commonwealth*, Ky., did not apply.

The Kentucky Supreme Court in a 5-2 decision of the court has reversed the Court of Appeals. The Court stated that the case was "precisely the type of fact pattern envisioned in *Crayton*, an arson case in which we noted that the county attorney had rendered assistance with the affidavit for the search warrant subsequently issued by a district judge. The 'good faith' is at least as clear in this case, in which the extensive affidavit was approved by two assistant attorneys general and then deemed sufficient by an experienced circuit judge...Given *Crayton* and the 'totality of the circumstances' test adopted in *Beemer v. Commonwealth*, Ky., 665 S.W. 2d 912 (1984), probable cause supported this search."

This case demonstrates how fact bound the good faith exception is. In the original decision of the Court of Appeals, two of the judges believed no reasonable police officer could have relied in good faith on the warrant due to the staleness of the affidavit and the absence of particularity in the warrant. One judge dissented. In this case, 5 justices disagreed. Justice Stumbo, joined by Justice Stephens, agreed with the Court of Appeals. The dissenters point out that the affidavit "lacked any information detailing when the evidence sought was seen at the searched location, and whether that material was probably still there." Quoting from Justice Stephens' original dissent in *Crayton*, the dissent viewed this case as demonstrating the "inherent danger in that ruling...'any incentive on behalf of the police to devote great care and attention to providing sufficient information to establish probable cause is lost.... Today's decision will encourage representattives of the Commonwealth to become slovenly, less careful and less prepared in their work.'"

Powell v. Nevada

Is *County v. Riverside v. McLaughlin*, 500 U.S. 44 (1991), the 48 hour probable cause determination case, to be applied retroactively to the defendant whose case was not final at the time of that decision being rendered? Yes, is the simple answer given by the United States Supreme Court, *Powell v. Nevada*, which follows the retroactivity holding of *Griffith v. Kentucky*, 479 U.S. 314 (1987). That much could have been anticipated. If anyone has a case in which retroactivity of the decision was at question, that has been resolved.

Much more interesting, however, are other facets of the case. First, Justice Ginsburg wrote the opinion, her first effort on this area since she joined the court. She was part of a seven person majority, with Justice Thomas penning a dissent joined by Chief Justice Rehnquist. There was no question that *McLaughlin* is going to remain the law, and that there is strong support on the court for its enforcement.

Kentucky practitioners will see other benefits to this case. I have commented before that *McLaughlin* is routinely ignored in Kentucky. RCr 3.02 does not set 48 hours as the absolute limit for a district judge to decide the probable cause issue, preferring the "without unnecessary delay" language of the present rule instead. The Kentucky practice, particularly in rural areas, is for persons to be arrested on, for example, a Friday night, and not to be taken before a district judge until at the earliest Monday morning, beyond the 48 hour limit. This worsens during holidays, where, for example, one could be arrested on Wednesday night before Thanksgiving, and not see a district judge for 108 hours.

Kentucky prosecutors are flirting with the losing of a conviction by Kentucky's adherence to its old rule, and its failure to adopt the changes mandated in *McLaughlin*. (And look for the editorials to blast "technicalities", rather than our arcane rules of procedure). The fact situation in *Powell* will demonstrate how the "disaster" could occur. Here, Kitrich Powell was arrested on a Friday night. The magistrate found probable cause four days later. On that same day, Powell made a statement to the police. (Nevada had a 72 hour rule). He was later given a sentence of death. Under *McLaughlin* and *Powell*, the statement was given outside of the 48 hours during which the magistrate had to make a probable cause determination. The remedy for a violation of the 48 hour rule was not spelled out in *McLaughlin*. The majority in *Powell* remanded the case in order to give to the Nevada Supreme Court an opportunity to determine the remedy, among other things. In a footnote, however, Justice Ginsburg states that whether a suppression of a statement taken in violation of the 48 hour rule is appropriate or not is "an unresolved question". One reason that RCr 3.02 has not been amended is that someone in Powell's situation has not been released for its violation. We need to start litigating this issue when it arises.

One other observation about this case comes to mind. Justice Thomas was only joined by the Chief Justice in dissenting from this opinion. He believed the retroactivity issue was a settled issue, and thus cert. was improvidently granted. However, he wanted to reach the remedy issue unresolved by the majority.

Justice Thomas would have decided that "suppression of petitioner's statement would not be appropriate because the statement was not a product of the *McLaughlin* violation...[T]he violation of *McLaughlin* (as opposed to his *arrest* and

custody) bore no causal relationship whatsoever to his November 7 statement. The timing of the probable cause determination would have affected petitioner's statement only if a proper hearing at or before the 48-hour mark would have resulted in a finding of no probable cause."

United States v. Obasa

This is another in a long line of Cincinnati Airport cases coming out of the Sixth Circuit. Here, Officer Bunning of the Airport Police Department saw two black men getting off a plane from New York. One was dressed in a business suit, and the other in jeans. They talked but did not look at each other, which raised Bunning's suspicion. Bunning found Victor Obasa and talked with him. Victor could not produce his ticket upon questioning, and made some inconsistent statements to Bunning. A consensual search revealed a Virginia driver's license and Visa card in someone else's name. Bunning told Victor he was being "detained for investigation of possible credit card fraud."

Bunning's attention then went to the other man he had seen. He gained knowledge that the man had left in a taxi. Later, Johnson Obasa was pulled over on I-275. Johnson denied having been at the airport. He was taken back to the airport. By the time he arrived, further investigation had revealed that the airline tickets purchased on a credit card had belonged to a Virginia McQuade, and that other cash advances had been drawn using the card. An additional search of Victor revealed two driver's licenses and two Visa cards in different names.

Victor and Johnson Obasa moved to suppress all of the evidence obtained from the searches and the detentions, which was overruled. A conditional plea of guilty was followed by the appeal to the Sixth Circuit.

Judge Lively wrote the opinion, joined by Judges Ryan and Suhrheinrich, reversing Johnson Obasa's conviction. The court observed that when "police actions go beyond checking out the suspicious circumstances that led to the original stop, the detention becomes an arrest that must be supported by probable cause." In this case, the officers did not have probable cause when they searched Johnson Obasa, gave him Miranda warnings, and transported him from I-275 back to the airport. Further, Bunning exceeded the limits of a *Terry* stop, which are set out in "Berkemer, where the Supreme Court stated that during a Terry stop 'the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions...And, unless the detainee's answers provide the officer with probable cause to arrest him, he must then be released.'" Congratulations to Harry Hellings and Dean Pisacano for this victory.

Short View

1. ***Commonwealth v. Roland***, Pa. Sup. Ct., 54 Cr. L. 1496 (2/4/94). Police officers may not go into a home without a warrant after seeing underage persons drinking illegally. Being called to a party, and seeing underage drinking does not constitute exigent circumstances sufficient to allow the officers to enter the home without a warrant and conduct a search. "Given probable cause to believe that the offense of underage drinking was present, police should have obtained a warrant before searching appellant's home. Underage drinking is not a grave crime of violence, such as might have justified a warrantless entry.

2. ***State v. Young***, Wash. Sup. Ct., 54 Cr. L. 1497 (2/10/94). A "thermal scan", by which the police are able to obtain information about heating patterns inside a home using an infrared device is a search. The Washington Supreme Court interpreted both the federal constitution, and their state constitution, which includes the phrase "No person shall be disturbed in his private affairs, or his home invaded, without authority of law," in arriving at their decision. "When the police use sense-enhancing devices to obtain information from someone's home that could not be obtained by unaided observation of the exterior, they should have a search warrant....Because the police did not obtain a warrant prior to using the device in this case, we hold the search also violated the Fourth Amendment."

3. ***State v. Kearns***, Hawaii Sup. Ct., 54 Cr. L. 1498 (2/4/94). The Hawaii Supreme Court had previously held in *State v. Quino*, 840 P. 2d 358 (1992) that the police could not randomly encounter individuals with no suspicion, and then place them in a coercive environment in hopes of obtaining reasonable suspicion. The Court has added a layer of protection onto that provided in *Quino* in this latest opinion, in the context of an airport encounter. A seizure occurs under the Hawaii Constitution whenever the police encounter a citizen and ask to speak with him/her. Further, an "investigative encounter can only be deemed 'consensual' if (1) prior to the start of questioning, the person encountered was informed that he or she had the right to decline to participate in the encounter and could leave at any time, and (2) the person thereafter voluntarily participated in the encounter." "To allow the police to engage in suspicionless, nonconsensual, investigative encounters with travelers in airport terminals would be tantamount to sanctioning the type of general warrant that the constitutional guarantee against unreasonable searches and seizures was designed to prevent."

4. ***Commonwealth v. Mason***, Pa. Sup. Ct., 54 Cr. L. 1517 (2/9/94). The Pennsylvania Supreme Court has utilized its state constitution to limit severely the applicability of the independent source doctrine in that state. Pennsylvania's Constitution is the source of most of Kentucky's Bill of Rights. Here, the police broke into a home while waiting for a warrant to arrive. The court held that because the state exclusionary rule has a purpose not limited to deterrence of police misconduct, because the entry was of a home, and because the entry was forcible, the limited state independent source doctrine would not be used to allow admission of the evidence. "[W]here our task is not merely to deter police misconduct, but also to safeguard privacy and the requirement that warrants shall be issued only upon probable cause, our conclusion is different. Where the police battering ram is at the door, without exigent circumstances and without a warrant, it is plain that the violent shattering of the door constitutes an unconstitutional invasion of privacy of which every person in this Commonwealth may complain."

5. ***Campos v. State***, N. M. Sup. Ct., 54 Cr. L. 1519 (2/18/94). The police may not arrest a suspect without a warrant in public unless there are exigent circumstances. The New Mexico Supreme Court utilized its state constitution in arriving at this decision, which gave New Mexico citizens more protection than that provided in *U.S. v. Watson*, 423 U.S. 411 (1976), which allows for the warrantless arrest of a person where there is probable cause to believe that he or she has committed a felony. "To set forth a clear rule for police officers, we limit our inquiry in reviewing warrantless arrests to whether it was reasonable for the officer not to procure an arrest warrant."

6. ***U.S. v. Ornelas-Ledesma***, 54 Cr. L. 1520 (7th Cir. 2/10/94). Fresh from the Big Brother file is this case. The facts will suffice. The police in Milwaukee apparently cruise motel parking lots looking for suspicious cars or circumstances. They saw a 1981 Oldsmobile (a car drug dealers "like to use") with California (a source state) license plates. The person the car was registered to, and the person who had registered at the motel came back as "hits" on the NADDIS computer. The government successfully resisted telling the district court anything at all about NADDIS. The Seventh Circuit acknowledged that NADDIS could be "no better than a vast compendium of rumors, errors, and libels". The Seventh Circuit likewise viewed the "profile" in this case as "little better than a dragnet for Hispanics." Despite that, the court held that the *Terry* stop of the car and subsequent search of it were reasonable. Unbelievable.

7. A recent issue of the *Search and Seizure Law Report*, February 1994, features an adaptation of a law review article written by Professor Tracey Maclin. It is entitled "The Central Meaning of the Fourth Amendment", and argues that the past twenty years of interpretation of the Fourth Amendment by the Supreme Court has stressed the reasonableness inquiry which is more appropriate to a review of social and economic legislation than for scrutiny of police action. In her view, the "constitutional lodestar for understanding the Fourth Amendment is not an ad hoc reasonableness standard; rather, the central meaning of the Fourth Amendment is distrust of police power and discretion. Viewed this way, the Fourth Amendment synchronizes with other parts of the Constitution designed to limit governmental powers. At a minimum, the Fourth Amendment commands compelling reasons, or at least a substantial justification, before a warrantless search or seizure is declared reasonable."

The "Reasonableness Clause" is one of the core values of the Constitution, according to Professor Maclin. This clause, rather than minimizing the warrant requirement, is a "broad principle" which means that "discretionary police power implicating Fourth Amendment interests cannot be trusted." The present Supreme Court has turned this broad principle into a modification of our rights, resulting in Fourth Amendment rights being "second-class" rights. Why? "My guess is that the Court sees the typical Fourth Amendment claimant as a second-class citizen, and sees the typical police officer as being overwhelmed with the responsibilities and duties of maintaining law and order in our crime-prone society."

Professor Maclin encourages the court to "focus on the underlying vision of the Amendment, which 'places the magistrate as a buffer between the police and the citizenry, so as to prevent the police from acting as judges in their own cause.'"

8. ***United States v. Johnson***, 54 Cr. L. 1570 (5th Cir. 2/28/94). The police may not search a person's briefcase eight feet away incident to arrest, according to the Fifth Circuit. Here, the police executed an arrest warrant on the defendant at his office, where he was a loan officer. While doing so, the police searched the defendant's office, including his briefcase. The briefcase was beyond the area within the defendant's "immediate control", as authorized in *Chimel v. California*, 395 U.S. 752 (1969), and thus could not be searched incident to the defendant's lawful arrest.

9. ***Minnesota v. Dezso***, Minn. Sup. Ct., 54 Cr. L. 1603 (3/11/94). The persistence of a police officer's request to look into a motorist's wallet eventually ruined the motorist's consent, according to the Minnesota Supreme Court. The defendant had been stopped for speeding, had shown his license to the police officer, who believed that the defendant was trying to hide his wallet. Three times the officer asked to see the wallet, which was searched and found to have LSD in it. The Court held that the state had not proven voluntariness of the consent, thereby ruining the search.

10. ***People v. Leftwich***, Colo. Sup. Ct., 55 Cr. L. 1010 (3/7/94). Receiving an anonymous letter and thereafter obtaining a warrant does not shield under the good faith exception a police officer who executes a search warrant. The Colorado Supreme Court held that the failure of the police officer to corroborate the anonymous letter was fatal, and that his reliance upon a warrant that issued following his "bare-bones" affidavit was not reasonable. "If vague, unverifiable allegations accompanied by verifiable, innocuous facts can result in a warrant, the constitutional requirement that a search warrant only issue upon probable cause becomes a nullity."

11. ***U.S. v. Ramos***, 55 Cr. L. 1036 (8th Cir. 3/31/94). The Eighth Circuit has reversed a conviction where the police pulled over a driver for failing to wear a seat belt, and then questioned him for 40 minutes. Acknowledging that the initial detention was supported by probable cause, the court condemned the police detaining the defendant longer than was necessary for writing a traffic citation without any articulable reason for doing so.

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Is any American not frustrated by the crime wave that continues to plague the country and particularly its poor, who seem to suffer most? But President Bill Clinton's proposal to ask public housing tenants to waive their Fourth Amendment rights for the purpose of searching for and seizing guns may be a case of the "cure" causing more harm than the ailment.

...The Founders wrote the Fourth Amendment to protect us from the invasive power of government. The administration's proposal is a serious threat to a fundamental right that will not be reclaimed once it is lost.

- Cal Thomas, Syndicated Columist

Whose Case Is It Anyway?

Editor's Note: *(1) Beginning with this issue of* ***The Advocate****, this column will focus on ethical issues commonly confronted in the practice of criminal law. It will feature recent ethics opinions of note, selected articles of interest to criminal defense advocates and analysis of specific cases, concerns and controversies with pertinent commentary. If readers have particular issues or hypotheticals they would like to see addressed, please forward them to the editor for consideration. However, the purpose of this column is to review professional responsibility issues with broad applicability; it is* ***not*** *intended to serve as a source of advisory opinions on pending matters or as a research service.*

(2) In reading the following article, it should be noted that KRPC 1.2(a) is identical to Model Rule 1.2(a).

"I couldn't believe my ears," said the client about his lawyer's closing argument. "He totally changed everything we had agreed on."

The speaker was Mohammed Salameh, one of the defendants in the World Trade Center bombing trial. Salameh, a 26-year-old Moslem fundamentalist, was complaining about his lawyer's characterization of his co-religionist, Ramzi Ahmed Yousef, as a "devious" and "evil" person who had duped an unwitting Salameh into participating in the terrorist bombing. Also, by acknowledging that there had been a terrorist plot, the lawyer, Robert Precht of the New York Legal Aid Society, was seen as having seriously damaged the defenses of Salameh's three co-defendants.

Assume (although it may not be so) that Precht did adopt a tactic contrary to his client's expressed desires. And assume that it was tactically in Salameh's interest to convince the jury that he had not been aware of the bomb plot and that he had been only marginally involved. On these assumptions, did the lawyer act unethically?

Asked that question by a *New York Times* reporter, New York University law Professor Stephen Gillers answered by saying that a defense lawyer has the final say on courtroom strategy, but that the lawyer is required to consult with his client about it, and that the client has the right to veto the lawyer's decision.

How's that again? The defense lawyer has the final say, but the client has a veto? An exchange of faxes with Gillers revealed, as I had suspected, that his position had been misstated. Gillers had said that on some strategy decisions the lawyer must defer to the client. But even this qualification serves to underscore the murkiness of the American Bar Associations Model Rule 1.2(a).

According to Rule 1.2(a), the lawyer is required to "abide by a client's decisions concerning the objectives of representation," but need only "consult with the client as to the means by which they are to be pursued." In explaining this objectives/means test, the comment acknowledges that a "clear distinction between objectives and means sometimes cannot be drawn."

But why should a distinction be drawn at all between the client's objectives and the means used to achieve them? Whose case is it, the lawyer's or the client's?

Losing on Principle

Take the World Trade Center case. Shouldn't the client be able to decide whether or not betraying his friends and co-religionists is more important to him than avoiding prison?

Or consider a strikingly similar situation that arose in the District of Columbia in 1977 in the murder-kidnap trial of a group of Hanafi Muslims, who had taken over several public and private offices in the District. The defendants objected to their lawyers' proposed strategy of presenting the defendants as dupes and putting the blame on their leader. According to *The Washington Post*, "the defendants were determined to share the guilt for crimes they may not have committed as a gesture of loyalty to their leader and belief in their faith." The *Post* quoted a defense attorney as saying, "They are willing to go down the tube for a principle."

Despite their clients' strong desires, which were based in major part on religious conviction, the lawyers apparently decided to put on evidence against the leader to conduct hostile cross-examination of him. The *Post* further reported that the lawyers understood their decision to be in accordance with their "duty to provide what they think is the best defense possible," even though they would be acting contrary to their clients' instructions. Indeed, the lawyers appeared to have been encouraged in that view by the D.C. Bar counsel.

I once presented the Hanafi case to a group of judges, attorneys, and law professors at a conference on the ethics of advocacy. A majority of the conferees took the position that issues of "strategy" should be decided by the client, but that "tactics" should be decided by the lawyer - another muddy distinction. Tactics were defined as day-to-day issues, such as "whether to call or cross-examine a particular witness." Yet on the specific case of the Hanafi Muslims, the conferees voted overwhelmingly in support of the clients' right to control the decision regarding cross-examination of their leader.

And shouldn't the decision be the same if a husband refuses to exculpate himself by (truthfully) incriminating his wife? Or if a mother in a custody dispute chooses to forgo the tactical advantage of having her child testify, in order to avoid the trauma to the child?

Force-Fed Advice

Each of these cases involves avoidance of harm to third parties. And moral concerns like love and religious dedication are not the stuff of "tactics." The Comment to Model Rule 1.2(a) says that the lawyer "should" -- but not "shall" -- defer to the client on issues involving concern for third parties. Consider, then, the following case, which would seem to come as close as possible to posing a tactical decision uncomplicated by moral considerations.

In *State v. Pratts*, 145 N.J. Super. 79, 366 A.2d 1327 (1975), the lawyer representing a criminal defendant had interviewed a witness who had given the lawyer a statement helpful to the defense. The lawyer learned, however, that shortly thereafter the witness had given the prosecutor a different statement, incriminating the defendant. Thus, the witness - and the defendant's entire case - could have been seriously embarrassed on cross-examination. The lawyer's tactical decision was that the witness should not be called. For similar reasons, the prosecutor also decided not to call the witness.

The defendant disagreed with his lawyer. Fully aware of the risks of calling the witness, the defendant nevertheless decided that the witness was part of the case that he wanted presented on his behalf. When the disagreement was put to the trial judge, he imposed the lawyer's decision on the defendant, and the witness was not called.

The defendant was convicted. On appeal, the intermediate appellate court of New Jersey affirmed. The court said that the issue was not "whether there was an abuse of discretion" by the trial judge, but "who was responsible for the conduct of the defense." The court held that "when a defendant accepts representation by counsel, that counsel has the authority to make the necessary decisions as to the management of the case."

Quoting a federal appeals decision, *Rogers v. United States*, 325 F.2d 485 (10th Cir., 1963), the court added that the defendant "has a right to be cautioned, advised, and served by [court-appointed] counsel so that he will not be a victim of his poverty. *But he has no right . . . to dictate the procedural course of his representation*" (emphasis by the New Jersey court).

I think the appellate judges were wrong. At issue was not the lawyer's day in court, but the defendant's - and the defendant's constitutional rights to call and to confront witnesses. As the Supreme Court has noted in *Faretta v. California*, 422 U.S. 806 (1975), under the Sixth Amendment, "[t]he right to defend is given directly to the accused: for it is he who suffers the consequences if the defense fails." As a defendant once put it to me somewhat more elegantly, "It's my ass that goes into the slammer, not yours."

And I would put the *Pratts* case, too, in the realm of morality. Under our constitutionalized adversary system, an essential purpose of a criminal trial is to respect the dignity of the individual. And a central element of human dignity is personal autonomy, particulary in matters as important as those in which people need lawyers to help them. As Justice William Brennan Jr. wrote in dissent in *Jones v. Barnes*, 463 U.S. 745 (1983), "[t]he role of the defense lawyer should be above all to function as the instrument and defender of the client's autonomy and dignity in all phases of the criminal process."

Moreover, the "assistance" of counsel that is guaranteed by the Sixth Amendment is just that. As the Supreme Court held in *Faretta*, "an assistant, however expert, is still an assistant. . . . [C]ounsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant." Otherwise, "counsel is not an assistant, but a master," with the result that the right to make a defense is "stripped of the personal character upon which the Amendment insists."

For these reasons, I prefer the earlier ABA Model Code, which is both clearer and better than the more recent Model Rule 1.2(a). Disciplinary Rule 7-101(A)(1) of the Model Code requires the lawyer to "seek the lawful objectives of his client through reasonably available means." And Ethical Consideration 7-8 of the Model Code adds that "[i]n the final analysis...the lawyer should always remember that the decision whether to forgo legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself."

On this issue, as on others, the newer Model Rules are less respectful of what the earlier Model Code in its preamble calls "the dignity of the individual and his capacity through reason for enlightened self-government."

One final thought: We'll never know whether Mohammed Salameh's charge against his lawyer was true. Imagine this scenario:

Lawyer: Your only change of getting off is to let the jury know that you were a dupe and that the real bad guy was your leader.

Client: You're out of your mind. They'd probably kill me if I said that.

Lawyer: Then what if we do it this way? I'll argue to the jury that you were just a dupe, and you'll tell your friends that you can't believe your ears, that I totally changed everything that you and I agreed on.

Client: Sounds good to me. Let's do that.

I don't know whether that's what happened, but it wouldn't be the first time that a lawyer took the heat for a client. Ironically, one of the reasons that lawyers have never been high in public esteem is that we do that job - taking the heat for the client - so well.

MONROE FREEDMAN

Monroe Freedman is the Howard Lichtenstein Distinguished Professor of Legal Ethics at Hofstra University Law School. His latest book is Understanding Lawyers' Ethics *(Matthew Bender, 1990). "Cases and Controversies" apears monthly in Legal Times.*

***Daniel T. Goyette** is the Jefferson County Public Defender and has served as Executive Director of the*

Louisville-Jefferson County Public Defender Corporation since 1982. Dan is a past president of both the Louisville Bar Association and the Louisville Bar Foundation. He is currently a member of the ABA House of Delegates and recently served a 3-year term on the ABA Standing Committee on Ethics and Professional Responsibility. He is a current member of the KBA Ethics Committee and a former member of the LBA Committee on Professional Responsibility which he chaired from 1984 through 1987. Since, 1982, he has been a member of the adjunct faculty at the U of L School of Law, and he has lectured on a variety of legal issues and topics both locally and nationally. Dan is a charter Board member of the Kentucky Association of Criminal Defense Lawyers and a past president of the Kentucky Academy of Justice. Among other organizations, he has chaired Citizens for Better Judges and the Center for Educational Leadership. Dan is a graduate of Marquette University, the Rome Center of Liberal Arts, and the University of Oklahoma School of Law.

Kevin Batts

Interview Techniques for Public Advocates

Most encounters with the news media are approached with trepidation when in fact they are golden opportunities. Here are a few basic tips to help you polish up your own interviewing techniques.

COMFORTABLE ATMOSPHERE

- ✓ Avoid noisy, distracting locations such as courthouse hallways.
- ✓ Avoid interviews at the jail. Puts 'guilt' image in public's minds.
- ✓ Interview at TV/Radio stations only if you feel comfortable in those surroundings.
- ✓ Don't hesitate to ask about equipment (lights, boom microphones, etc) prior to the interview to ease any apprehensions. For example, every microphone is different, so there's nothing wrong with asking how close/far you should talk from the mike. If nothing else, observe the reporter and follow their lead.
- ✓ Consider inviting the reporter to your office -- most people are more comfortable in familiar surroundings (and a neat library presents a better backdrop image than a cluttered desk).
- ✓ Don't get TOO comfortable. What you're saying is important. Project that importance!

KEEP EYE CONTACT WITH THE REPORTER

- ✓ Loosen up. Talk to the reporter a few minutes before film/tape starts to roll. Get a feel for his/her personality and how they're going to react to your's.
- ✓ Don't be afraid to use your normal facial expressions and hand gestures.
- ✓ Talk to the reporter, not the audience. Whether you're on radio or TV, you want to project a conversational tone. Talk to just one person, even if thousands are listening in.
- ✓ Keep eye contact with the reporter, not the camera (unless you're doing a commentary). Focus on the reporter and answering his or her question. Do not break that eye contact until you've answered the question.

BE PREPARED

- ✓ Expect the unexpected. Get an associate to play the devil's advocate just like you might in trial preparation. Field some tough, off-the-wall questions in practice so you'll be prepared to lead the discussion during the actual interview.
- ✓ Be ready to explain every minute point of law. Don't leave anything for the reporter's interpretation. Mean what you say and make sure they say what you mean.
- ✓ Organize your concepts into a few basic points and make sure you hit on the most important ones. Prepare a few simple statements that tell your story and be ready to plug them into the interview as the opportunity arises.
- ✓ If you need to straighten your tie or pat down your hair do it BEFORE the interview starts. Don't use such activities as a crutch for nervousness. It's amazing how many people start fumbling with their clothes or running their fingers through their hair AFTER the camera starts rolling film. It denotes lack of preparation and extreme nervousness to the viewer.

STICK TO THE TOPIC

- ✓ Don't ramble. Use the same advice you give your witnesses before they take the stand. Answer the question, then shut up.

- ✓ Think in terms of "sound bites." Film may roll for 20 minutes during a news interview, however in the editing room they'll extract two or three 15-second sound bites that will become *your* story. Make your key points in two or three sentence segments with an attention grabbing opening and a forceful close.

- ✓ Remember, you're not trying a case. Don't hold that "zinger" in your vest pocket too long. In an interview situation, you may lose the chance to get it out.

- ✓ Get to your main points EARLY. You can always go back and expound on them later. Many times it's the producer or editor who decides which bites of film or tape will be aired. He or she probably won't even view the entire interview. If they can extract the three bites they're looking for in the first five minutes, they WON'T listen to the other twenty-five minutes. So make sure your good stuff stands out.

- ✓ If the reporter seems to be asking the same question two or three different ways, don't leave the subject or repeat yourself. She's trying to prompt you into a sound bite she can use. Either your answer was too short or not right on track. Re-phrase your answer by incorporating the question into your answer. For example, "Did the police conduct an adequate investigation?" "We feel the police did not conduct an adequate investigation because they failed to talk to three eye witnesses. We feel that their statements will make a big difference in the outcome of this case."

EMPHASIZE STRENGTHS

- ✓ Organize your strong points and be prepared to emphasize them.

- ✓ Don't let the negative factors in your story cloud your message. Don't avoid them with "NO COMMENT." That's a serious, detrimental mistake in almost every case. It's much better to say something like "We'll address that matter at the proper time."

- ✓ Never swear at the camera or microphone, and encourage your clients and associates not to either. In the old days it was a sure way to keep that segment off the news. Not anymore. Now, they'll run that stuff -- and you're not just swearing at an obnoxious reporter, you're swearing right into the living rooms of thousands of prospective jurors.

- ✓ Be sure to point out even the slightest victories to the media. If they reported last night that your client was on a suspect list, make sure tonight they report he's no longer on that list. Don't leave yesterday's headlines dangling. Make sure they wrap up their story.

- ✓ Point out at every opportunity that your client's not been convicted of anything (if he or she hasn't of course). Remind the public about the basics of our judicial system. "We're here to uncover the truth. And under the American system of justice, Mr. Smith remains innocent throughout the trial process."

C. Kevin Batts, M.B.A., J.D.

Kevin is the Director of Information Systems and Attorney with the Tennessee District Public Defenders Conference. He is also a veteran News Anchor with WSM in Nashville and has been affiliated with the news media for the past twenty years. Batts has authored numerous articles for national publications in the fields of public relations, computer science, law and management. He has appeared on network television and radio programs addressing media relations and technology issues. Batts has provided media consultation for the federal court system, the Department of Defense, the Internal Revenue Service, the U.S.D.A., and the State of Tennessee.

"Having lost sight of our objective, we redoubled our efforts."

- Old Adage

Well before the end of the century, the United States will achieve the distinction of having a million of its citizens in prison. We are not far from that now - over 925,000 - and the number of prison inmates is growing almost as fast as the national debt. In the year ending last June 30 alone, prison popu-lation increased by 70,000....

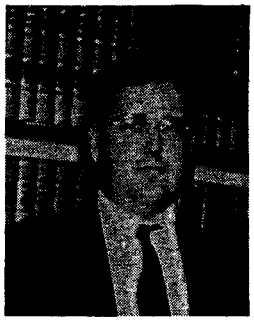
...The incarceration rate in the United States is al-most three times that of Canada and six times that of Italy. Add in the half-million people being held in local jails on any given day and you have a total that is even more impres-sive - or depressing.

In the 1980s, the number in prison and in jail more than doubled. During that decade, the number be-hind bars grew at a rate 10 times higher than the growth of the adult popu-lation. It was 17 times higher than the increase in serious crimes....

....Deterrence is difficult - and less emotionally satisfying than muttering "three strikes and you're out." It starts with effective policing and moves back to job-training, school and even preschool programs that instill decent values and equip youngsters with options outside crime. That is the only approach that will keep us from adding another million wasted lives to our prison population.

- Dave Broder,
Syndicated Columnist

Expert Witness Assistance Under KRS 31.185



David Niehaus

I recently have been advising people to spend some time each week wandering around in the statute books because I think this is time well spent. There are statutes buried in out-of-the-way chapters that can help your client a lot more than federal or state cases do. In this article, I am going to examine arguments based primarily on KRS Chapter 31, the public advocacy chapter, that, as a matter of state public policy, entitle defense lawyers for indigent people to ex parte hearings on motions for experts and which entitle these lawyers to demand preservation of evidence. These grounds stand apart from the due process and equal protection rules of federal constitutional law.

Most attorneys quite reasonably rely on *Arizona v. Youngblood*, 488 U.S. 51 (1988) and *California v. Trombetta*, 467 U.S. 479 (1984) for preservation of evidence and rely on *Ake v. Oklahoma*, 470 U.S. 68 (1985) for ex parte hearings. There is nothing particularly wrong with these cases as authority because they do set the constitutional ground floor of acceptable behavior by the state in criminal cases. But they are not particularly great cases for the defense and usually require a lot of additional argument by defense counsel.

These cases do not say anything about Kentucky law. The U.S. Supreme Court has said many times that it does not prescribe state procedural or substantive law, it merely identifies those cases in which state procedure violates the federal constitution. *Spencer v. Texas*, 385 U.S. 554 (1967). The General Assembly is the agency of government charged with determining what the various executive officers of the Commonwealth must do. Because Kentucky courts rigorously adhere to the separation of powers principle and because the police and prosecutor are agents of the executive branch, Kentucky courts really have little choice but to follow the public policy choices made by the General Assembly in the statutes. *Mash v. Commonwealth*, Ky., 769 S.W.2d 42, 44 (1989). After all, as the Supreme Court observed on page 623 of *Brown v. Barkley*, Ky., 628 S.W.2d 616 (1982), the executive branch exists primarily to do the bidding of the General Assembly. Where the General Assembly has spoken on a subject, courts cannot create common law rights or exceptions for the benefit of the police or prosecutor. When the General Assembly enacts a comprehensive statutory plan it has pre-empted the area and the courts must abide by the policy choices unless the statutes are an unconstitutional limitation on the courts.

The activities of Commonwealth and county attorneys are governed by Chapters 15 and 69 of the statutes. Law enforcement officers are governed by a number of chapters, 16 (state police), 95 (city police), and 70 (sheriffs and county police). The rule in Kentucky has always been that common law governs unless superseded by statute. *N.Ky. Port Authority v. Cornett*, Ky., 700 S.W.2d 392 (1985). The General Assembly has spoken on the subjects of this article and on the duties of various law enforcement officers. Law enforcement officers and prosecutors have statutorily prescribed powers and duties that cannot be altered or excused by the courts under the guise of common law. If the statutes dictate a certain result, the statutes must be followed. Although the Kentucky Bill of Rights may bear on these subjects, both arguments presented here are basically articulations of the public policy expressed in the Kentucky Revised Statutes, primarily Chapter 31.

EX PARTE MOTIONS

In Jefferson County, there is an unfortunate trend of Commonwealth objections to motions for ex parte hearings for the purpose of obtaining expert witnesses. The Commonwealth piously announces that it does not intend to interfere with preparation of a defense case but does assert an interest in fair and financially prudent litigation. However, reference to KRS 31.185 shows that the Commonwealth has no standing even to raise this argument and therefore should not be heard at all on this subject.

Standing requires a "judicially recognizable interest in the subject matter" of the question at issue which interest must be both "present and substantial." *City of Louisville v. Stock Yards Bank & Trust*, Ky., 843 S.W.2d 327, 328-329 (1992).

Examination of KRS 31.185 shows that the General Assembly has made a conscious decision to exclude the Office of the Commonwealth Attorney from the decision making process and to exclude the County Attorney from this process until the bill for services is presented to the fiscal court for payment. The authority to make the decision concerning expert witnesses and funding has been delegated to the trial judge under the statute. This type of delegation is permissible under Sections 27 and 28 of the Constitution as recognized in *Commonwealth v. Raines*, Ky., 847 S.W.2d 724, 728 (1993). The Supreme Court has recognized in two recent cases, *Proffitt v. MSD*, Ky., 850 S.W.2d 852 (1993) and *Bills v. Commonwealth*, Ky., 851 S.W.2d 466 (1993), that once the General Assembly establishes a procedure, courts lack authority to add criteria or add language to the statute to achieve a different result. Because the words of KRS 31.185 are clear and easily understood, a court simply has to read them in order to see the invalidity of the Commonwealth's assertion of a cognizable interest in the decision to allow defense experts.

KRS 31.185 consists of two sentences. The first sentence provides that "any defending attorney" who is appointed to represent a person under KRS Chapter 31 "is entitled to use the same state facilities for the evaluation of evidence as are available to the attorney representing the Commonwealth." This first sentence obviously means that any attorney appointed to represent an indigent person is entitled to use not only the same physical facilities but is also entitled to expert witnesses. The term "facilities" was so construed in *Perry County Fiscal Court v. Commonwealth*, Ky., 674 S.W.2d 954 (1984). In practical terms, this means that defense counsel for a needy person may go to KCPC, the state police labs, or any

other state facility and demand the expert assistance of those agencies, including the expert assistance of the persons employed there. The obvious purpose of this statute is to guarantee the prosecution and defense equal access to expert witnesses and facilities.

The meaning of the second sentence of the statute is equally clear. The statute provides that if he (obviously defense counsel) considers the use of the facilities impractical, "the court concerned may authorize the use of private facilities...." The decision is left up to the court presented with the request. Completely absent from this statutory scheme is any role for an attorney representing the Commonwealth. Because the General Assembly excluded the prosecution from this determination, no court may create a role for the prosecutor without violating both the statutory scheme and the separation of powers requirement of Sections 27 and 28 of the Constitution.

A moment's reflection shows the wisdom of this scheme. It takes little imagination to see that in certain cases the Commonwealth very well could interfere with defense preparation for trial as a matter of tactics and strategy. In addition, KRS 500.070(2) provides that no court can require notice of a defense prior to trial time and RCr 7.24(3)(B) requires dis-

KCPC: CHR'S VIEW

What follows is a February 24, 1994 letter from the Cabinet for Human Resources in response to a request for mental health assistance:

Assistant Public Advocate
Department of Public Advocacy

RE: Expert Assistance in Death Penalty Case

Dear _____,

This is given in response to your letter to me of February 14, 1994, wherein you have requested that the Cabinet for Human Resources supply you with an expert witness to assist you in the preparation of a death penalty case on behalf of _____, who has been charged with capital murder in _____ County. The assistance which you have requested, as presented in your letter is as follows:

> "...I expect such assistance will include: evaluation of records, witness statements and other materials obtained through the defense's effort; confidential evaluation of the accused; consultation with counsel as to availability and viability of potential defenses, and poetential penalty-phase strategies, as well as direction for further investigation to develop such defenses or strategies; assistance in the preparation and presentation of direct testimony of experts and/or lay witnesses necessary to lay the foundation for expert opinions; assistance in the planning and preparation of cross-examination of expert and lay witnesses to be called by the Commonwealth on mental health matters; and expert testimony on the accused's behalf, with preparation for such testimony, as well as for cross and redirect examination."

This is to advise that the Cabinet is unable to provide you with the specific assistance which you have requested because of both budgetary considerations and the need for the Cabinet to observe its objectivity in performing the court-ordered forensic evaluations under the Kentucky Penal Code as specifically set forth by KRS 504.060-504.110. Staff at the Kentucky Correctional Psychiatric Center (KCPC) do perform court-ordered evaluations for individuals charged with felonies to ascertain competency to stand trial and the capacity of the defendant to appreciate the criminality of the defendant's conduct. Depending upon the clinician's conclusions, the evaluation may or may not favor the defendant. KCPC staff do observe the confidentiality of records, information, and their evaluations relating to defendants and consistent with any requirements which may exist in the court order for the evaluation.

I will confirm your understanding that KCPC clinical staff, including Dr. _____ who has evaluated _____, are available to review available and relevant background information and materials concerning the persons whom they evaluate, and which could constitute useful input for their evaluations. They are also available to consult with legal counsel to clarify the findings of their evaluations (if not prohibited by the court order), however, they are not available to provide ongoing consultation with counsel for purposes of preparing for trial or developing legal defenses.

Thank you for your interest in this matter.

Sincerely,

Angela M. Ford
Commissioner

closure of information concerning expert evidence only if that evidence is going to be introduced at trial. It would be anomalous and a denial of equal protection to say that because a defendant is indigent he is denied the protections set out in KRS 500.070(2) and RCr 7.24 (3)(B). Obviously, to avoid these problems, the General Assembly has drafted KRS 31.185 to exclude the attorney from the Commonwealth from any preliminary determination concerning expert witnesses or evidence.

The absence of a role for the attorney for the Commonwealth found in KRS 31.185 also explains why the motion may be made ex parte. In one of the few cases that deal with ex parte motions, *Janin v. Logan*, Ky., 273 S.W. 531, 532 (1925), the former Court of Appeals stated that an ex parte proceeding "necessarily presupposes a right in the petitioner to which there is no adverse party." This is exactly the situation created by KRS 31.185. The rights identified in this statute are the right of the defending attorney to use state facilities or to seek authorization for use of other facilities from the court concerned. At this stage there is nothing else to determine. Because there is no stated duty or right of the prosecutor, it is obvious that ex parte proceedings not only are permissible but expected in this statutory scheme.

The Commonwealth has attempted to get around the statutory scheme by positing some sort of implied duty to protect the public funds of the Commonwealth. This is answered by reference to KRS 31.200(1) or (3), which allocates the duty to provide the money for expert assistance for the defense. The money for indepen-dent experts comes either from the Department of Public Advocacy or from the fiscal court of the county in which the action is being prosecuted. The Com-monwealth Attorney, representing the state, obviously has no legitimate interest in how the Public Advocate or the individ-ual counties spend their money.

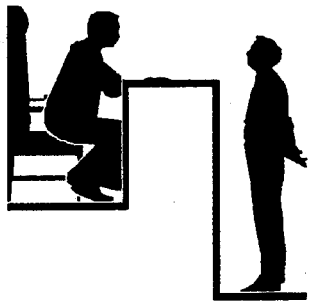
Nor can the County Attorney object at this point. The duty of the County Attorney with regard to expenditure of county funds is set out in KRS 69.210(3) which requires the County Attorney to "oppose all unjust or illegally presented claims." The County Attorney does not act until the bill is presented for payment, usually after the trial is over. At that point the County Attorney may oppose it as being too extravagant or unnecessary or on any other ground.

The statutory scheme sets up a dual check on expenditure of funds. At the front end, the trial judge decides whether the expense is necessary and usually sets the maximum allowable expense. Upon presentation of the bill, the County Attorney may, on behalf of the county, oppose any unfair expense. The scheme obviously prevents the county from interfering with the preparation of defense. Because no "attorney for the Commonwealth" has standing to object under KRS 31.185, the defendant is entitled to an ex parte hearing free from any interference from the Commonwealth. It is therefore unnecessary to rely on *Ake*, although certainly it is wise to include the constitutional claim provided for in that case.

PRESERVATION OF EVIDENCE

The same statute, KRS 31.185 also provides a state statutory basis for demanding preservation of evidence in circumstances not necessarily governed by *Trombetta and Youngblood*. KRS 31.185 gives the attorney "operating under the provisions of this chapter" the same entitlement to the use of state facilities for the evaluation of evidence that "are available to the attorney representing the Commonwealth." On its face, this language clearly authorizes the defense attorney to demand evaluation of evidence by the state police lab, a state supported hospital, KCPC, or any other state facility. And as noted earlier, under the *Perry County Fiscal Court* case, these facilities include the right to services of "individuals who are trained to evaluate evidence" - that is, expert witnesses. This statute means that at the beginning of a case the state chemist, serologist, or firearms expert is as much a potential defense witness as she is a potential prosecution witness. Because this is so, it is unreasonable to say that the prosecutor, the police, or anyone else aligned with the prosecution could, without consulting the defense lawyer operating under Chapter 31, direct the performance of tests or examinations that might destroy or consume whatever is being examined or tested.

The defense, under KRS 31.185, has the same statutory right of access not only to the evidence, but also to the expert witness testimony derived from that evidence. This statutory right cannot be denied by the unilateral action of the prosecutor or the police. Therefore, the defense attorney must at least be notified before the test or examination will be made so that the defendant and his lawyer can decide whether to accept the Commonwealth's evaluation of the evidence or ask for an independent expert under the procedure authorized in the second sentence of KRS 31.185.



It is important to note that any attorney for the Commonwealth must obey RPC 3.4(a) [SCR 1.030] which forbids any lawyer unlawfully to destroy or obstruct access to "material having potential evidentiary value." When this ethical duty is added to the legal duty imposed under KRS 31.185 the result is clear. Defense counsel has the same right of access to "state facilities" as the attorney representing the Commonwealth. This means that the custodians of the property cannot give material up for testing until the defense has been given an opportunity to decide what to do.

Most people do not know that there is a statutory scheme that requires each city and county as well as the state police to appoint a custodian of property. Under KRS 67.592 (county police and sheriffs) and KRS 95.845 (city police), the chief executive of each political subdivision must appoint a custodian of property, the sheriff or chief of police, who must hold the property until directed to dispose of it by court order. KRS 16.210 requires state police officers to turn property over to the property room at each police post. All county police, sheriffs, or city police must turn property over to the property custodian in their political subdivision. This property custodian must hold the evidence until a judge determines how it shall be disposed of.

KRS 67.592(8), applicable to city police, county police, and sheriffs, provides that the custodian may not give up control of the property except "in the manner prescribed by law." KRS 67.594(1) provides that property desired as evidence in court may be released upon an order from that court. Because this is the only "law" regarding release of property, it follows that no property may be released except upon court order. In any event, if the

case demands it, defense counsel immediately upon appointment should file with the appropriate court a motion to preserve evidence until such time as defense counsel has an opportunity to consider the evidence and what should be done. Defense counsel has this right under KRS 31.185 and no court should balk at simply preserving the status quo until both the prosecution and the defense have an opportunity to decide how evidence subject to expert analysis shall be handled.

The Commonwealth will of course predict the end of civilization as we know it if this statutory scheme is followed. This argument is countered first by telling the Commonwealth that it is the policy choice of the General Assembly and that the Commonwealth has no real choice except to follow it. The argument also may be countered by impressing on the judge the leisurely pace at which most evidence is sent for testing and examination in criminal cases. In dope cases there is rarely any big rush to get the substance or the paraphernalia tested. In Jefferson County, blood or serology tests usually aren't even requested of the lab until after samples are taken from the suspect or the defendant. In the vast majority of cases, any delay caused by notification of defense counsel will make no difference whatever in the timeliness of the examination and analysis of the evidence.

Both the prosecutor and the defense attorney must keep in mind that KRS 31.185 does not give defense counsel the right to veto examination of the evidence by experts of the Commonwealth's choosing. Those objections must be based on other grounds. However this statute does prevent the Commonwealth from unilaterally destroying blood samples or other evidence subject to being consumed in testing without giving the defense a chance to test it as well. Under the statutory scheme, a defense lawyer has ample authority for a motion directing the custodian of the property to hold it pending an order of the court authorizing release of evidence subject to expert analysis.

CONCLUSION

Although the subjects discussed in this article are covered by federal constitutional cases they are also covered by state statutory law as well. While the Commonwealth may be able to argue the applicability of *Ake*, or the need for a *Youngblood* instruction, no such room for discussion or distinction exists when the plain language of the statutes is considered. In these circumstances, the court simply has to read the statute and take action to make sure that the attorney operating under KRS Chapter 31 receives the full amount of expert assistance to which he is entitled free from the interference of any attorney for the Commonwealth. This is one instance in which the state law which is not well known provides better protection than the federal constitutional cases on which we generally rely.

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In the Jan. - Feb. 1994 issue of the Fayette County Bar Association's Bar News, Judge James E. Keller announced "Significant Changes in the Rules of the Fayette Circuit Court" which were effective January 1, 1994. One is very significant to criminal defense practice:

RULE 8.B. EX PARTE REQUEST FOR FUNDS FOR EXPENSES IN CRIMINAL CASES

A defendant in a pending criminal proceeding, who is a needy person as defined by KRS Chapter 31, may apply ex parte to the court for the payment of investigative, expert or other services necessary for an adequate defense. The application shall be filed without notice thereof to the commonwealth's attorney. Upon the filing of the application, the judge shall conduct a hearing without the commonwealth's attorney being notified thereof or participating therein; provided, the court shall cause the application and notice of the hearing thereon to be served upon a desginated attorney for the Lexington-Fayette Urban County Government under order not to disclose the application or proceedings thereon without leave of court. The designated attorney shall be authorized to attend and participate fully in the hearing. No persons other than the defendant, the defendant's attorney, the designated attorney and court staff shall attend the hearing. The clerk shall seal that portion of the record containing the application and the proceedings thereon including the record of the hearing and any order issued as a result thereof except as otherwise authorized by the court. Violation of the court's order not to disclose the application or proceedings thereon may be punishable as a contempt of court.

COMMENT: This amendment allows an indigent defendant to apply ex parte to the court for necessary services for his or her defense. The hearing is then conducted without notice to the commonwealth's attorney. A non-indigent defendant prepares a defense without disclosing the defense's strategy to the commonwealth's attorney. This procedure affords the indigent defendant the same right. Since LFUCG will be ordered to pay for any services approved by the court, LFUCG is authorized to participate through a designated attorney under an order of non-disclosure. An indigent defendant's due process right to an ex parte hearing to secure government-provided services was established in *Ake v. Oklahoma*, 470 U.S. 68 (1985).

Buy (Steal?) This Book
A Review of the Pozner/Dodd Book on Cross-Examination

How We Learn to Cross

I had to cross examine the first witness in my life shortly after I passed the bar in 1977. My boss wanted me to drive to Bell County and prove that his client was under 18 at the time he committed an offense that was on appeal. I was petrified. I had been taught nothing about cross-examination in law school. So, I did the next best thing. I tried to find a book to read. I read Francis Wellman's *The Art of Cross-Examination.* I then proceeded to the hearing, and lost. My cross-examinations were not memorable. Wellman's book, on the other hand, was. To read a book in order to obtain a skill seemed unlikely at the time, but in retrospect it appears to have worked.

That began my study of cross-examination. Thereafter, I listened to Irving Younger's outstanding trial practice tapes on cross-examination, and learned about the ten rules. I read Steve Rench's chapter on cross-examination in his book, read his marvelous outlines, and listened to his outstanding lectures on the same topic. I have heard great lawyers lecture on cross-examination at the National Criminal Defense College (NCDC). I must say that I had been immersed thoroughly in cross-examination.

A New Gold Standard

I can now say that there is a new gold standard, a book that should be in every public defender's office, and that should be read by every new and old criminal defense lawyer. It is written by two great lawyers, Roger Dodd of Valdosta, Georgia and Larry Pozner of Denver, Colorado. Both teach at the National Criminal Defense College, lecture widely, and practice in the trenches. Their book is *Cross-Examination: Science and Techniques*, published by The Michie Company (1993).

The Learning of Pozner/Dodd

Kentucky public defenders will remember both Larry Pozner and Roger Dodd. While highly successful private lawyers, both have been uncommonly willing to come to Kentucky to teach us how to become better lawyers. They have done so with great sacrifice to their practice and to their private lives. And whatever success many of us may have had as public defenders must be shared with these two great teachers, and now writers.

The Science of Cross

The basic premise of the book is a comforting one: *rather than be an art form and thus mostly inaccessible to the unartful, cross-examination is more of a science.* This is a significant difference. For those of you who resemble Radar O'Reilly more than Al Krieger, this means that you (and I), too, can become, that is learn, to be competent cross-examiners. It is a skill, yes, but it is one which is capable of being studied, emulated, taught, and performed.

Cross-Examinations Drive the Theory of the Case

The center of their theory is the development of a theory of the case. A theory of the case is "a cogent statement of an advocate's position that justifies the verdict he or she is seeking." The theory comes out of the cross-examinations, which are prepared first. This theory must incorporate all facts beyond change, and must be consistent with the dominant emotion of the case. Cross- examination then becomes the engine which drives the theory of the case. Facts are developed through precise and goal directed cross-examination which proves the theory of the case. Facts which are inconsistent with the theory are tossed aside.

Beyond Cross

This is not just a book about cross-examination. In reality it is a book about trial advocacy, and how to become a more persuasive criminal and civil trial lawyer. The authors do not ignore other facets of the trial. Rather, they build their book around the belief that a trial is a unit, a whole, with the theory of the case being the major organizing principle. Each part of the trial then must be consistent with the theory of the case. Cross-examination then becomes the most important skill proving that theory. The theory is broken into themes, which distill the essence of the theory into one sentence. There are multiple themes involved in most theories, themes which are distilled further into theme lines and phrases, most of which are propelled during cross-examination.

Investigation

Once a theory of the case is chosen, counsel is ready to investigate. For me, the best chapter in the book is Chapter 4, *Cross-Examination-Centered Investigation.* This is a wonderfully rich chapter. I have already routed it to all members of my staff and have introduced it to new lawyers with the Department of the Public Advocacy. Investigation is a resource that should not be wasted. In order not to waste it, the authors recommend a "cross-centered investigation." This means that counsel and their investigator investigate only to the extent needed for cross-examination. A corollary is that one must have some idea of the theory of the case, and the cross-examinations needed to prove the theory, prior to sending out the investigator. Because cross-examination is a science, it is rational and planned. Investigation to prove cross-examination utilizes an investigative checklist.

The Power of Preparation

A solid investigation proving the theory of the case is followed by preparation. Here

is where Radar O'Reilly becomes Al Krieger. The words speak for themselves. "All lawyers recognize that they do not have the voice they would wish, or the physique of a lawyer who physically dominates the courtroom or the razor sharp reflexes of some and the vocabulary of others...But such measurements are illusory, and such attributes are unnecessary. It is preparation more than any other factor that makes a fine lawyer, and preparation has no particular voice or body. Preparation is the quiet work in the office and in the mind...The advocate who desires to become a great cross-examiner has only to better prepare their cross-examinations. Power comes from preparation." (107) These are comforting words for many of us. Thank you Larry and Roger.

3 Preparation Methods

The authors describe three methods for the efficient and comprehensive preparation of cross-examination. These methods are the topic index card, the sequence of events charts, and the witness statement charts. These are wonderful devices that I plan on trying immediately. Each method is appropriate for a particular kind of case. For example, the topic index card method is proposed to be used in *credibility cases*, while the sequence of events chart method is appropriate in *intent and affirmative defense cases*. Numerous examples are given informing the reader exactly how to use the particular method. Examples of the cards and charts are reprinted in the book. The goal is to be able to prepare cross-examinations with one thorough reading of discovery. Thereafter, counsel needs to consult only the index card or the chart in order to write cross-examination. Alert public defenders and others with heavy caseloads should understand that these methods, if used correctly, should enable them to become more efficient in the use of their time.

It is only after the theory of the case has been developed, the investigation completed, and the particular preparation system used that cross-examination is to be planned. And planning is what is called for. Pozner and Dodd have little use for the lawyer who believes that they can wait until direct examination and then strut their stuff. Rather, cross-examination is planned and written in advance.

Goals & Chapters

Cross-examination is broken down into a series of chapters, each of which make a point. NCDC students will recognize the concept of a chapter as similar to Mario Conte's "image goal." Each chapter is a "series of goal focused, leading questions." (187) Each chapter is structured like a paragraph, with a theme, a beginning and an end. Each chapter advances the theory of the case. There can be as many chapters as there are identifiable goals, a concept different from Younger, who stressed no more than three goals per cross-examination. Each chapter is on a different page, so that the chapters can be arranged in sequence to achieve a powerful cross-examination. (This is an example of how useful this book is--rather than being an erudite explication of the principles of cross-examination, it is a book by lawyers who try cases in the gritty courtrooms of this nation, and who no doubt have put two chapters on one page before and then have had to rewrite it the night before when they decided to change the sequence of the chapters). While writing the questions, the source of the answer, whether in a deposition, statement, or transcript, is listed exactly. Room is left on the page for inclusion of direct examination notations and other tactical matters.

Three Rules: Leading, One Fact, Goal

Pozner and Dodd demonstrate themselves to be the progeny of Wellman, Younger, and Rench in their *Three Rules*. Using the familiar format of Irving Younger's 10 rules of cross-examination, they posit that there really are only three immutable rules.

First, counsel should ask leading questions only.

Next, there should be only one new fact per each question.

Finally, counsel should cross-examine in a log-ical progression toward a specific goal.

Those are the rules. Follow them. Enough said.

Advanced Cross

There have been over the years seminars conducted on "advanced cross-examination." Having never attended any of these, I often wondered whether anything different went on there. If Pozner and Dodd were at any of them, I now know. These authors not only instruct superbly on the science of cross-examination for the beginner; they extend their methods to the most advanced levels. They describe, with examples, numerous different methods of advanced cross-examination which will turn the cross-examination, with apologies to the authors, into an art form. When you arrive at this part of the book, you enter the world of serial impeachment, big-bang impeachment, how to control the runaway witness, looping, double-looping, chains of loops, trilogies, trilogy pyramids, double loop juxtapositions, and others. These techniques, while difficult, are precisely described. Because cross-examinations are planned and written, and because examples of these techniques are given, they are accessible to all of us.

How do two people who live thousands of miles apart write one book? Throughout, I tried to figure out who had written what lines, and could not. I do suspect, however, that "it is much harder to plow a field with the other person's mule" was not written by a lawyer from Denver. The authors have done a marvelous job of bringing together the fertile minds of two very different lawyers.

This is a wonderful book. I have recommended to the attorneys in this office, and to new attorneys under the employ of the DPA. I plan on rereading it as soon as possible, and using it in the preparation of my next cases. When I read this book in preparation for this review, I promised myself not to be a shameless shill for this book. I lied.

ERNIE LEWIS
Richmond Office Directing Attorney

Maybe we'll always have the poor with us because it is easier and a lot more emotionally cleansing to bloviate about crime than to deal with the causes of poverty.

- Thomas E. Blackburn

Controlling the Runaway Witness

Tried and True Techniques for Cross-Examination

The greatest fear of the cross-examiner is the runaway witness. This witness cannot be tamed, cannot be stopped. This witness goes on and on when all counsel wanted was a simple "yes" or "no."

Witnesses like this give lawyers a lot of sleepless nights and make us reconsider going to medical school. After several of these witnesses in succession, searching for misplaced commas in documents and pondering the rule against perpetuities begin to look very attractive. Fortunately, there are a number of tried and true methods that the skillful trial lawyer can use to subdue nonresponsive witnesses.

But first, a couple of ground rules. Asking the judge to help you is not a viable way to control runaway witnesses. Few judges are predisposed to be friendly to trial lawyers. If you ask for help, the judge is likely to say something to make a bad situation worse.

At best you will get, "I will permit the witness to give a full and complete explanation if the witness thinks that explanation is necessary for a complete answer." That's help?

More often than not, you may be reprimanded with, "You want this court to direct the witness to answer that question? I have been on the bench 40 years and I cannot understand your question!"

Wise and able trial counsel control their own witnesses. They do not seek the help of judges. Of course, if the court offers help, you should certainly accept it. When the court takes an active interest, the power of the bench is apparent. Permit the court to volunteer; do not seek its assistance.

One more ground rule. When cross-examining a difficult witness, always maintain eye contact with the witness. Body-language specialists tell us that avoiding eye contact is often interpreted as weakness. At your first sign of weakness, a hostile witness will strike like a coiled snake and ruin a perfectly good cross-examination by volunteering a long answer designed to poison your case. By directing your full attention at the witness's eyes, you serve nonverbal notice that you will put up with no nonsense and permit no deviation from the Q & A approach you have been following.

Now for the meat of the matter. After long and painful empirical research, we have come up with 11 tried and true techniques for stopping the runaway witness. With these in your arsenal, you should be able to consciously select one that will stop even the most incorrigible witness's run-on answer.

Repeat three times. You have asked a good basic question. You have asked this question in its briefest, simplest form, using everyday words - no frills, whistles, or bells. The self-evident answer can only be "yes." The witness has ignored the question.

Without taking your eyes from the witness, slowly ask the question again, in exactly the same words and tone of voice, articulating each word. If the witness is so foolish as to ignore the obvious "yes" again, slowly lean slightly forward, never taking your eyes from the witness. You may even want to place your hands on your knees, which will cast your body forward. Repeat the same brief, simply constructed question. We have never known a witness to answer the third repetition with anything but a straight "yes."

The successively slower repetition of the *identical words* emphasizes to the witness, to the court, and (most important) to the jury that the witness is refusing to answer a short, straightforward, easy question.

You may doubt that the judge would permit you to ask the same question three times. In our experience, judges usually insist that the witness actually answer the question, in order to "move it along" (the most-often-voiced ruling in U.S. trial courts today).

Reversal, or ask, repeat, reverse. This is the opposite of the first technique. Instead of repeating your question verbatim, you reverse it. An example:

Q. The car was blue?
A. The car was traveling down the street, it started to go through the red light, I didn't even see brake lights... (*babble, babble, babble*)...and finally it did turn the corner, and I still hadn't seen brake lights."
Q. So the car was not blue?
A. (*Mumble, mumble, mumble*)... no, I wouldn't say that.
Q. The car was blue?
A. Yes

An artistic variation of the reversal if to ask the question twice in identical words, giving the witness two opportunities to tell the truth before resorting, on the third time, to the reversal of the question. (Ask, repeat, reverse.)

This technique is best used when the witness will not confirm even the most obvious statement. If it is used early in the cross-examination during confrontations with the witness over simple, foundation-type questions, it dramatically sets the scene for later use of the repeat-three-times technique.

Formal name. Suppose a previously complaint witness has for the first time run away with an answer. This witness has not willfully decided or been encouraged by opposing counsel to dodge your question. Jurors can sense the lack of willfulness from this witness, so you have to rein in the witness without incurring their hostility. Use the witness's full formal name in the next question.

Q. You saw the blue car?
A. Well, the car was speeding down the road, ran through the red light and...(*babble, babble, babble*)...and that's how it happened.
Q. Franklin Jeremiah Toth, you saw the blue car?
A. Ah, yes I did. Yes I did.

This depends on a reflex established in childhood. When someone calls out our full names in a public place, whether it be an airport, the theater, or the ball park, we do not just look up; we snap to attention. Years of childhood experience have taught us that when authority figures use our full names, we are in trouble. the ingrained drive to avoid trouble with the authorities will ordinarily make the nonwillful, nonmalicious runaway witness resume safe "yes" and "no" answers.

Polite interruption. First, a disclaimer. This is not an artistic, skillful, subtle technique. This is a sledgehammer. Most of us consider ourselves surgeons of cross-examination. But there are times in the courtroom when the old saying "If a hammer doesn't work, get a bigger hammer" applies. This technique is not to be used often. Once during a trial is plenty. (One a year is probably better.) However, it belongs in your arsenal of witness-quelling techniques.

The witness answers and, with devastating effect, begins to run away. The cross-examiner simply interrupts with "Excuse me, I don't think you understood my question."

This will provoke an immediate and savage response from opponents. (We know this because we respond the same way.) A hotly intoned objection interrupts our interruption: "Your Honor, we object. Mr. Samsonite is interrupting the witness." The court's likely, but typically slower, reaction: "Don't interrupt the witness."

The cross-examiner must then immediately apologize to the court, to his opponent, to the jury, and to the witness (preferably at some length). With so much going on, more often than not the witness will have lost the place. Don't hesitate for a microsecond. While the witness is groping, jump in with another question.

You might expect the judge to stop that question and instruct the witness to finish the first answer. We have found that most witnesses, while delighted that the court has so instructed them, cannot remember where they were and say, "I have finished my answer."

Physical interruptions. Effective methods for physically interrupting the runaway witness are numberless. The method of choice depends on the cross-examiner's personal characteristics - body type, size, degree of aggressiveness, and overall personality. The right choice also depends on the behavior of the specific witness. The more offensive jurors find a witness, the more grandiose a physical interruption can be and still be tolerated by jurors. A survey of the most popular forms follows:

- The hand. Remember your first few days in grammar school, when you learned that when the hand goes up, the mouth goes shut? A witness begins to answer your question with a long answer. Simply step forward with your left foot (if you are right-handed) and put up your right hand like a traffic cop's stop signal. It sounds funny, but it works. Try it on someone you don't like at a cocktail party.

- The finger. when the witness begins to answer the question unresponsively and at length, simply shake your index finger back and forth as you would at a naughty child. That simple gesture, with other appropriate body language to support it, makes the witness feel guilty.

- The seat. This technique must be reserved for the witness who obviously is deliberately trying to evade your question - willful or malicious nonresponsive witness. No one is immune to feeling humiliated when someone refuses to listen. You must communicate to the jury, to the judge, to your opponent, and (most important) to the witness that you are refusing to acknowledge or listen to the non-answer.

  Do this by walking slowly back to your table, sitting down, and looking down at the table. Don't read anything. Don't look at anything. Just stare down at the table. Witnesses babble and stutter too a full stop when confronted with this deliberate effort to offend.

  This technique works best when you have been following the principle that you should never take your eyes off a nonresponsive witness. It will heighten the impression that this witness is behaving badly and should be ignored. If you have calculated correctly and jurors consider this witness to be malicious or willful as well as nonresponsive, they will side with you. They may even emulate your conduct and turn away from the witness.

- The whole body. We have only used this technique on very unlikable, noncredible criminal witnesses. In some criminal trials (and in some civil trials too) the opposition uses a reprehensible witness, perhaps one who agreed to testify in order to get himself off the hook. Such witnesses are almost always maliciously nonresponsive. They have either figured out for themselves or been coached that a nonresponsive answer is better than a responsive answer. You must prepare the way by first discrediting this witness, using prior criminal records or inconsistencies in testimony.

While the witness is running on and on with a nonresponsive answer, slowly turn your back ont he witness. Simulate counting the acoustical tiles in the ceiling above your head. If this has not silenced the witness, slowly turn your head over your shoulder. Glance contemptuously at the witness as if to say, "Are you still talking?" Return to counting ceiling tiles. The answer will soon taper off.

The court reporter. The judge is not the only member of the courtroom staff the jury views as holding power. All members of the staff are viewed as "official" and are treated by the jury with special respect.

Having asked the witness a leading question and having received a rambling monologue, turn to the court reporter and ask, "May I please have my question read back to the witness?" All action in the courtroom will be stilled as the reporter slowly articulates each word of the record.

Having the question repeated by a court official, and read back with great clarity, intimidates the runaway witness and brings about the return to short, responsive answers.

"So your answer is yes." This technique is disarmingly simple and easily understood by jurors. It can be used with any witness, whether that witness is willfully nonresponsive or just cannot help answering at length.

After a long nonresponsive answer, without moving or taking your eyes from the witness's eyes and with a slight, helpful smile, you ask, "So your answer is yes?" Usually the response is not the simple yes that was merited. It is much more dramatic - "(*Mumble, mumble, mumble*) yes, yes."

"If the truth is the answer yes you will say 'yes.'" This is a more powerful version of the technique just described. It should be reserved for the obstinate wit-

ness - particularly one you are trying to discredit.

When a nonresponsive answer is given, immediately say, "If the truth is the answer yes, you will say 'yes.'" Obviously the witness has to answer "yes" to the question.

Immediately follow by repeating the identical question that received the nonresponsive answer. The witness will answer with a simple "yes."

Story - three times. Some witnesses seem unstoppable. They are going to tell their stories - usually dramatic and harmful stories calculated to destroy your case. This sort of witness will tell the story as often as possible and seems to have the uncanny ability to recognize the worst possible moment. Only in these dire circumstances is this technique appropriate to use.

We offer three quick scenarios to illustrate the devastating effect of "the story."

- Criminal case: The criminal co-defendant who has agreed to testify against your client says at every opportunity, "Your client made me do it. He put the gun to the officer's head and pulled the trigger. Then he laughed."

- Civil case: An eyewitness to an intersection collision says whenever he can, "That may be true, but I saw your client's car go right through the red light."

- Divorce case: The opposing spouse takes every opportunity to say, "She walked out on my sick child and me. She called form a bar and didn't even ask about the child. She just asked me if I knew Fred B., who was with her."

The witness has repeatedly volunteered this story at critical times during your cross-examination. No matter what question you ask, the same story finds it way into the answer.

To defuse this situation, ask the witness: "You want to tell your story, don't you?" The answer will be "yes." Instruct the witness to tell it to the jury. Then instruct the witness to repeat it. After the retelling, instruct the witness to repeat it again. (We have heard a judge interrupt at this point with "I have heard enough of that story, now let's ask questions and give answers." Counsel can live with that.)

When the witness is finished with the third (progressively less dramatic) telling of the story, ask, "Have you told us your story? Do you want to tell us all one more time? No? Okay, let's go on with my questions." The witness will surely refrain from telling the story again.

Elimination. This technique is particularly valuable early in the cross-examination to each the witness that it is painful - even humiliating - to be a runaway witness.

The question is asked and the witness gives a nonresponsive answer. The cross-examiner begins eliminating other possible factual variations. At some point during this process, the witness will offer to give the "yes" that was warranted by the original question you asked. do not let the witness off the hook. Continue with this technique until the witness insists on giving the response that you first requested.

Q. The car was blue?
A. Well, I really wouldn't say blue, it was more of a .... (Minutes later the answer concludes without ever giving the color of the car.)
Q. The car was black?
A. No.
Q. The car was green?
A. No.
Q. The car was purple?
A. No.
Q. The car was yellow-green?
A. No, it was blue. It was blue.
Q. Thank you.

Spontaneous loops. A loop is the repetition of a key phrase. A spontaneous loop is a repetition of all or part of an unexpectedly good answer. More often than not you will use a simple phrase or word from a long answer that the witness has volunteered.

A word of warning. To fashion effective spontaneous loops, you must listen closely to the witness's answers. Here is an example, which is taken from an actual case:

A. ...and after the shooting we got into the car and drove away like any normal family would do... (*babble, babble, babble*).
Q. Sir, you said that you were *like any normal family.* (Spontaneous loop of the phrase.)
A. Yes.
Q. *Like any normal family* you left town in the dead of the night?
A. Yes.
Q. *Like any normal family* you gave aliases to each family member, including the five-year-old?
A. Yes.
Q. *Like any normal family* you stole license plates every other day as the five-year-old watched?
Judge: All right, counselor, I think the jury has the idea. Move along.

Spontaneous loops work to silence witnesses because they do not want to hear their own words come back at them. None of us is so articulate, so careful, so controlled that we don't use certain words and phrases that we later wish we could take back. Whether the witness is a college professor who has a doctorate in microbiology or a homeless person who lives in a cardboard box at night, if he volunteers a nonresponsive answer, it is likely to include some word or phrase that you will be able to use to discredit him.

You will probably never welcome nonresponsive witnesses. But with these techniques in your arsenal you will no longer fear them. Through these techniques, no only can you control such a witness but you can use a nonresponsive answer as an opportunity to punish the witness, weaken his or her credibility, and teach the virtue of a straight yes or no answer.

LARRY S. POZNER
Pozner, Hutt, Gilman & Kaplan
Denver, Colorado

ROGER J. DODD
Dodd and Turner, P.C.
Valdosta, Georgia

If one advances in the direction of his dreams, one will meet with success unexpected in common hours.

- Henry David Thoreau

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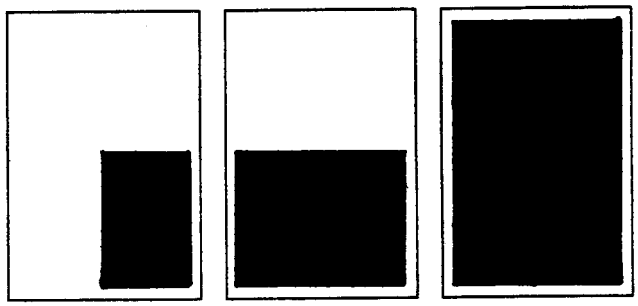

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