Kentucky Department of Public Advocacy

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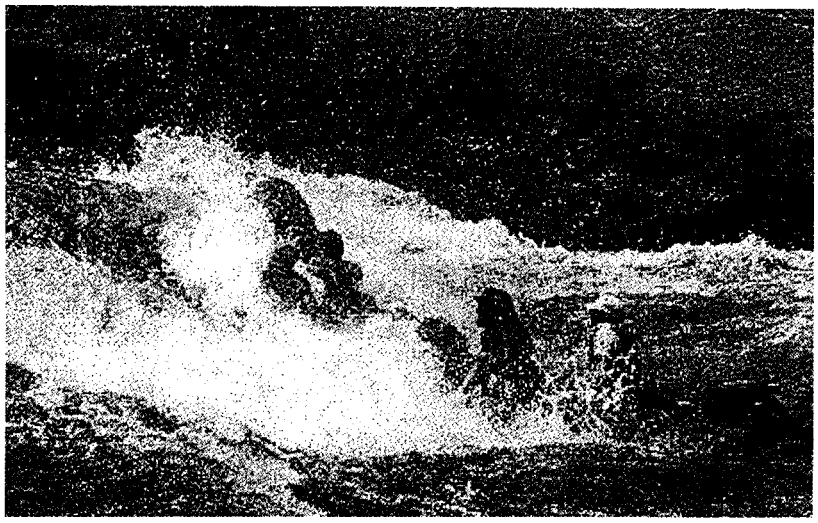

Negotiating the Permanent Whitewater of Defending

M.K. v. Wallace: Legal Services for Juveniles

Expungement of Criminal Records

Civil Commitment Review

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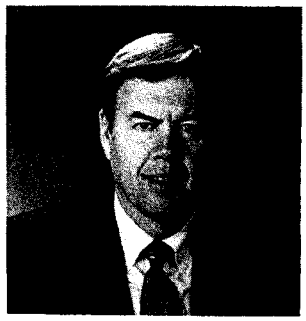

Norman Harned
KBA President
Guardians of the Process

The Advocate

The Advocate provides education and research for persons serving indigent clients in order to improve client representation and insure fair process and reliable results for those whose life or liberty is at risk. *The Advocate* educates criminal justice professionals and the public on its work, its mission, and its values.

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To the degree that individuals are successful at plumbing their depths, those people should be better off, and the companies that employ them may gain competitive advantage. In fact, in shifting markets, the unexamined life becomes a liability.
- Sherman, *Leaders Learn to Heed the Voice Within* (1994)

FROM THE EDITOR:

Whitewater Reflection. Too often we behave with Mark Twain's observation as our guide, "The rule is perfect: in all matters of opinion our adversaries are insane." But there's another way to view the thoughts of others. Professionals who distinguish themselves often reflect on their individual work within its larger context with the help of others who have differing perspectives. As defenders we too seldom reflect on our individual work, our role in the criminal justice system and the functionality of the organization which employs us. We're just trying to get the next case resolved.

Thom Allena, an organizational consultant, who has worked nationally with private business, the National Institute of Corrections and Defenders calls us to a view and practice of leadership that is important for us to reflect on and dialogue about amongst ourselves and with those of differing perspectives.

The Advocate has asked individuals to provide a brief comment on Mr. Allena's article. Of the 44 persons solicited, 16 or 36% have responded...the highest response rate *The Advocate* has ever had to this kind of request. Who responded and who did not respond may be of some interest. 12 public defenders, 9 from Kentucky and 3 nationally, were asked for their thoughts yet only 3 responded, 2 from out-of-state. Only 1 of the 9 defenders in Kentucky gave us their thoughts. Five mental health professionals were asked and 3 provided a comment. Twelve judges were asked, 4 responded. We asked 3 prosecutors and 1 offered comments. One of the 3 law school deans provided his reflections.

Our aspiration is for *genuine dialogue* to help us reflect with greater depth so the whitewater we travel as defenders in our own organizations, the criminal justice system, and society at large will not dislodge us from more effective leadership. *Please give us your thoughts for future publication!*

Edward C. Monahan, **Editor**

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'Know thyself' was the inscription over the Oracle at Delphi. And it is still the most difficult task any of us faces. But until you truly know yourself, strengths and weaknesses, know what you want to do and why you want to do it, you cannot succeed in any but the most superficial sense of the word.
- Warren Bennis

☞ IN THIS ISSUE ☜

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Negotiating the Permanent White Water:
Leadership and the Art of Becoming a Change Agent

5 LEADERSHIP PRACTICES

1) **Challenge the Process**

2) **Inspire a Shared Vision**

3) **Enable Others to Act**

4) **Model the Way**

5) **Encourage the ♥**

Organizational Maps for the 21st Century

Whitewater. Change is most certainly an inevitable occurrence in the life of defender leaders today. Leaders today are being asked to balance new technology and increasing caseloads with human concerns of clients and staff, being frequently asked to do more with less. In short, we are in what author Peter Vaill calls, "*the permanent white water.*" The present environment of chaotic change requires a different response from the traditional management approach of *approach-implement-evaluate.* This change is complex, novel, dangerous, and suggests non-stop movement. For leaders this can be viewed as threatening or can convey a sense of energy and excitement. Actually things are only partially under control, yet the effective navigator of the rapids is not behaving randomly or aimlessly.

Spiritually Smarter. We are called upon to work, not simply smarter which carries with it connotations of increased effort, increased technical knowledge and increased power. Rather, I raise the somewhat risky idea of working "spiritually smarter." It's risky because of all the baggage it carries, especially with a group of liberal lawyers. To work spiritually smarter is to pay more attention to one's own inner qualities, feelings, insights and yearning, or in short, everything they never taught you in law school. It is to reach more deeply into oneself for that which is unquestionably authentic. In modern organizations this not often easy. In the future, managing, will become more and more about being "performing art" where our greatest tools in leading will find in ourselves and others.

Relationship Not Things. This collective aspect of organizations flies directly in the face of a world view given to us a few hundred years ago by a fellow named Newton who convinced us that the world (and organizations) was a machine consisting of interchangeable parts characterized by rationalism and reductionism - a focus on *things* rather than *rela-*

tionships. In her cutting edge text, *Leadership and the New Science* (1993), Margaret Wheatley, advises that new breakthrough sciences such as quantum theory tell us a very different story. In fact, instead of being separate parts, we are actually all interconnected by underlying currents moving toward holism and thus a system. Matter can be observed only in relationship to something else. The quantum view of reality strikes directly against most of our current notions of reality and many of our existing paradigms stand on shaky ground. Some of you are probably wondering, "What's the relevance of all this science stuff for us?" The implications for organizations are significant. The implications for criminal justice agencies are enormous. The implications for defenders groups are, quite frankly, mind-blowing. Consider this for a moment.

Interdependent. One of the organizing myths around the work of defenders (and defense lawyers as well) is that *defenders are the independent voice of the solitarily defendant standing naked and alone against a machine-like system of justice*. For most defenders, it is indeed a frightening thought to ponder the possibility of actually being connected or related to a prosecutor, a judge and god forbid, a correctional officer. Defenders are different and many of us have convinced ourselves of this. We are perhaps unique, but not different. For much of defender work time is spent continuing to act as if we are not really connected to others within a system. The adversarial model only serves to reinforce this belief. After all, isn't the justice system the very machine Mr. Newton most likely had in mind when he postulated his theory. The prices defenders frequently pay for holding this myth is often tendered in separation and isolation. Defenders are often not seen as full players. Let's face it, public defenders are not usually the first ones invited to the policy making or budgeting table and are often not the first names to emerge when judicial nominations surface.

I will go a step further, and hopefully it will not be too far down the slippery slope, and offer prima facie evidence that one of the anchors of our machine is rapidly becoming obsolete: *the adversarial model*. Let us reflect on excerpts from a recent column titled *A Proposal for 'True' Legal Reform* by respected columnist Chuck Green that appeared in the May 21, 1995 *Denver Post*.[1] Some of you will be disturbed by it. Some will find it amusing. Hopefully most of you will be provoked in some respect.

"Instead of administering an oath of witnesses, we need to issue them an advisory. It would go something like this:
Judge: Good morning, Mr. Smith.
Witness: Good morning, sir.
Judge: Do you realize that your appearance here today has nothing to do with the truth, the whole truth and nothing but the truth?
Witness: Yes, sir, I do.
Judge: Do you realize that you are nothing but a tool of the attorneys in this case?
Witness: Yes, sir.
Judge: Do you realize that you will be allowed only to answer the questions asked of you by the attorneys, and that any answer you provide will be strictly limited to what the attorneys want to hear, and you are not to stray from their script?
Witness: Yes, sir.

Mr. Allena's summary of leadership behaviors should be helpful to those who seek to be proactive in our justice system, but I must take issue with him on two points.

First, I disagree with Mr. Allena's assertion that the adversarial system is "rapidly becoming obsolete." I realize that mediation, arbitration, Drug Courts and other programs designed for parties in both civil and criminal cases are non-traditional, but they are merely pendant and supplemental to courts, and will not replace the traditional adversarial system.

Secondly, I strongly disagree with his assumption that public defenders are "often not seen as full players" in the criminal justice system. I am not familiar with his experiences, but in Kentucky our public defenders play an important and active leadership role in the criminal justice system, which is recognized by the other system participants.

- Judge James E. Keller, Fayette Circuit Court, Chief Judge

Judge: If you have information or facts that do not fit into the preconceived theories of the attorneys, you have an obligation to keep those facts to yourself. Do you understand that?
Witness: Yes, your honor.
Judge: Do you realize that any information you offer in this case is subject to distortion, misrepresentation and interpretation by the attorneys at any time, but particularly in their closing statements?
Witness: Yes, your honor.
Judge: Do you understand that if you attempt to offer any information - regardless of the truth or importance of that information - that is not specially elicited by the attorneys in this case, it will be disallowed and you will be subject to a charge of contempt?
Witness: Yes, your honor.
Judge: Do you realize that you are not to volunteer any information to this court, no matter how valid and no matter how truthful it might be unless the attorneys ask you a specific question intended to prompt your response?
Witness: Yes, your honor.
Judge: Do you accept the fact that you are not a witness in this case, whose obligation is to tell the whole truth, but rather that you are merely a pawn of the attorneys, to be manipulated at their will?
Witness: Yes, my lord.
Judge: Do you understand that any testimony you offer is secondary, in the eyes of the jury, to the theatrics of the attorneys - their mannerisms, their inflections, their demeanor, their cute tricks, their antics, their egotistical showmanship?
Witness: Yes, my lord.
Judge: Do you understand that this isn't an exercise in *seeking* the truth, but rather a contest of determining which attorney is the most adept at *excluding* the truth from this case?
Witness: Yes, my lord.
Judge: Do you accept the premise that this isn't a forum for justice, but instead this is a forum for the attorneys to compete for the prize as the most cunning, the most entertaining and the most likable?
Witness: Yes, your excellency.
Judge: Do you promise to tell only part of the truth, the part that the attorneys want the jury to hear, and nothing but what the attorneys ask for?
Witness: Yes, your excellency.
Judge: If an attorney distorts your testimony, do you agree to remain quiet and not to speak until and unless you are asked to speak?
Witness: Yes, your excellency.
Judge: Do you understand that I am an attorney, and that I am supreme, and that you will not testify about anything that you saw, or anything that you heard, or anything that you know, unless I deem it to be important?
Witness: Yes, your excellency.
Judge: Do you accept your role here today as the least important of all the players on this stage, that you are nothing but a pawn of the system, a prop in the scenery?
Witness: Yes, your excellency.
Judge: Do you understand that the jury does not need to understand your testimony, as long as it contributes to the sham being perpetrated by the lawyers in this case?
Witness: Oh, my God, yes.
Judge: You may be seated, Mr. Smith. Bailiff, you may bring in the jury. Tell the producer of Court TV we're ready to roll. The next commercial break will be at 10:45. By the way, Mr. Smith, try to remember not to look directly into the camera."

Allena gets it right. The behaviors and commitments he argues for are genuine antidotes. They offer real relief to leaders seeking to avoid chronic organizational diseases: reducing vision to mechanism, elevating system at the expense of relationship, eradicating spirit in favor of routine. Allena distinguishes the leader's middle way: between the utter cynicism that nothing is worth conviction and the extreme skepticism that nothing can be known for sure. Call his approach principled pragmatism, quality leadership, team empowerment or something else; it works. Just ask anyone who has experienced this kind of leadership first hand. Anything less simply won't do.

- John Bugbee, Governmental Services Center
Frankfort, Kentucky

I suspect that, as sarcastic and caustic a thought it may be, it is a perspective that is becoming increasingly shared by citizens across the country. We can no longer afford to be so arrogant as to dismiss this thinking as either uninformed or unenlightened. As leaders, we are being called to be more proactive and less reactive and defensive.

The Challenge of Leadership

What kinds of leadership are called for to navigate us into the 21st century. One of the more refreshing ideas comes to us from James M. Kouzes and Barry Z. Posner who co-authored, *The Leadership Challenge: How to Get Extraordinary Things Done in Organizations* (1987). Kouzes and Posner set out to study what made leaders successful and went about doing it in a radical manner: they looked at leadership through the eyes of the follower. What they discovered was that leadership is not a title or a position in an organizational hierarchy. Simply put, leadership is a *behavior* and that behavior is observable and visible. Furthermore, the leadership behavior they found in successful organizations was practiced at *every* level of the organization. It was not something reserved for occupants of the penthouses. And most importantly, they discovered, leadership is *relational*.

The leadership challenge in the 21st century for defenders will be to "reinvent" yourselves. To ignore this challenge will mean disastrous consequences. I envision leadership in the next millennium will have a lot less to do with politics and political connections and a lot more to do with vision, values and principles. Less concern with power and more attention to outcomes and results. Less use of deceit, manipulation and fear and more about open and honest communication and mutual trust. Less hierarchy and more high performance teams. Less coercion and more participation. Less need for control and more willingness to be vulnerable. Less interest in winning, losing and being adversarial and more win/win, partnership and collaboration approaches. Less "deal making" and more commitments to holistic forms of justice. Less tolerance for "getting clients off" and more interest in healing offenders, victims and communities.

Here are the five leadership practices and ten commitments that successful leaders make to their organizations given to us by Kouzes and Posner:

1) Challenge The Process

Defenders by their very nature have always been extremely adept at challenging the system and processes through which it operates. The problem is the processes we have challenged are usually someone else's and rarely is it ever our own. Until now, it's been easy to see others (*i.e.*, police, prosecutors, judges, correctional systems) as "the problem." What we know about successful leaders is that they constantly challenge what they are doing and their assumptions about what they are doing. Most importantly, these leaders frequently ask questions like:

- "How can we be even more effective at what *we* are doing?"
- "What will it take for *me* to become a more empowered leader?

> It is encouraging to realize that members of the legal profession are interested in developing improved leadership practices. All such systems should be carefully evaluated, and those that are beneficial should be adopted and those that are fruitless should be abandoned.
>
> - Justice Donald C. Wintersheimer
> Supreme Court of Kentucky
> Covington, Kentucky

Their beliefs about challenging does not stop there. They actually encourage their people to challenge the process as well. They act as if their staff have valuable contributions to make to the organization. There are two commitments that leaders make in the practice of *challenging the process*:

A) Search out challenging opportunities to change, grow, innovate and improve

- Treat every job as an adventure.
- Question the status quo and how "we do things around here."
- Go out and find something that is broken and fix it.
- Encourage innovation.
- Make the adventure fun.

B) Experiment and take risks and learn from accompanying mistakes

- Encourage people to risk failure and model this yourself.
- Create an innovators Hall of Fame.
- Set up experiments.
- Honor and reward risk-takers.
- Become an agent for change within your own organization.

2) Inspire a Shared Vision

Few defenders systems in my experience function using a vision or mission driven approach. Programs with vision statements invest little energy in communicating the vision to staff, clients and stake holders. Living the vision is yet another story. Without a meaningful vision or purpose, direction is often something that is dictated by someone else. It is not unusual then to have the experience of having a court or legislature determine our future for us. The word "vision" evokes powerful images and pictures that invite us "to see" the future. One of the most critical roles of leaders today is vision crafting. The visions they create need to be positive and inspiring and shared and supported with staff. The journey toward vision will provide energy and clarity that permeates the entire organization. Leaders who successfully practice inspiring a shared vision make the following two commitments:

A) Envision an uplifting and ennobling future

- Honor your shared history through an organizational" lifeline."
- Determine what you want and encourage others to do the same.
- Write an article about how you have made a difference. Act on your intuition occasionally.
- Become a futurist and practice looking into the future.

Machiavelli observed in *The Prince* that, "It must be considered that there is nothing more difficult to carry out, nor more doubtful of success, nor more dangerous to handle, than to initiate a new order of things." It certainly takes courage for anyone to risk initiating change of any kind in our tradition-bound criminal justice system. Mr. Allena's discussion of the leadership practices identified by Kouzes and Posner is equally relevant to the field of corrections. Leaders are judges more by what we do than what we say. As Machiavelli pointed out, creating change is not easy, but the commitment to action over mere rhetoric significantly increases the likelihood of success.

- Doug Sapp, Commissioner
Department of Corrections
Frankfort, Kentucky

B) Enlist others in a common vision by appealing to their values, hopes and dreams

- Identify your stake holders and constituents.
- Find the common ground.
- Write and deliver a five minute "stump speech."
- Be positive and optimistic.
- Be genuine.

3) Enabling Others to Act

Contrary to popular Western beliefs leaders cannot do it alone. It takes partners to get extraordinary things done in organizations. Leaders build teams with spirit and cohesion, teams that feel like family. They seek to involve others in planning and decisionmaking and in effect, make others feel like partners and owners rather than hired hands. Most importantly they understand the need to develop collaborative goals and cooperative relationships. They often view adversarial and competitive approaches to resolving conflict as an outdated models. Leaders who effectively *enable others to act* are committed to:

A) Fostering collaboration by promoting cooperative goals and building trust

- Involve people in planning and problem-solving.
- Focus on gains not losses.
- Be a risk-taker when it comes to trusting others.
- Create a climate of trust.
- Always say "we."

B) Strengthen others by sharing information and power

- Get to know people and demonstrate genuine concern.
- Make heroes of other people.
- Use your power in service to others.
- Enlarge other people's sphere of influence.
- Keep people informed.

4) Modeling the Way

Leaders need a guiding set of principles and values by which staff, clients, stakeholders and even adversaries ought to treated. These principles make the organization distinct and unique. It sends a clear message to others about what we stand for and provide a visible baseline for "walking our talk." However, it's more than just words and phrases. Leaders show others by their own example that they live by the values they profess. This is how they gain credibility with others. In *modeling the way*, leaders practice the following two commitments:

Change creates opportunity and excitement. Embrace change as a clarion call for innovative and enthusiastic leadership. Now that's a message!

Allena's leadership dicta: Change now happens at an irregular rate as a continuous, unpredictable process rather than as an occasional event. An individual/organization profits from an explicit game plan and the energy and operationally defined details for implementation of actions within a community of support (the team). You "walk the talk." Remember to listen to your inner self, take your emotional pulse often, and celebrate accomplishments.

Not a bad mission statement to use when fate dictates that we must leave the safe harbor of familiar routine and organizational structure. With such an attitude/itinerary the NEW is greeted with hopeful anticipation and is welcomed.

- William D. Weitzel, M.D., Lexington, Kentucky

A) Set an example for others by behaving in ways that are consistent with stated values

- Write a tribute to yourself.
- Write a leadership credo and publish it.
- Write a tribute to your organization.
- Audit your actions.
- Be a storyteller.

B) Plan small wins that promote consistent progress and build commitment

- Make a model.
- Take one hop at a time and benchmark.
- Reduce the cost of saying "yes."
- Give people choices and make the choices visible.
- Use a natural diffusion process.

5) Encouraging the ♥

Getting extraordinary things done in defender systems is hard work and successful leaders inspire others with hope and courage. Leaders give heart by visibly recognizing people's contributions to the common vision and letting them know about the value of their contributions to the organization. Leaders find ways to celebrate accomplishments and acknowledge milestones. And just what sustains leaders? The answer is found in one word and that one word is rarely uttered in our workplaces: "love." Leaders are in love with their people, with the work of the organization, even their clients. *Encouraging the heart* focuses on the following two commitments:

A) Recognize individual contributions to the success of every project

- Develop measurable performance standards.
- Install a systematic process of rewarding performance.
- Be creative about rewards.
- Let others help design non-monitary compensation.
- Go out and find people who are doing things right.

B) Celebrate team accomplishments regularly

- Schedule celebrations.
- Be a cheerleader - your way.
- Reframe failures.
- Secure your social network.
- Stay in love.

Although I do not particularly accept the idea that the changes we experience today are any more traumatic or chaotic than change at any point of human history, I do believe that all of us must search for our personal and professional methods of adapting to the changes which characterize our society today. I also believe that the lone figure who can ride into town and cure its problems is a wonderful plot for the movies but not very helpful in organizations. The ability to develop a strong consensus throughout an organization is important to the growth of any organization. This can only happen when everyone is treated with respect and dignity which is evidenced by listening to every person's goals and aspirations for themselves and the organization. This is not a very new nor radical concept and is certainly as old as the "Golden Rule." Sometimes the oldest and simplest ideas are the most difficult to remember to do.

- Paul F. Isaacs, Director, Administrative Office of the Courts, Frankfort, KY

Beautiful Mermaids. I would like to close with a story that comes to us from, in my opinion, one of the greatest management texts of our times, *All I Really Need to Know I Learned in Kindergarten: Uncommon Thoughts on Common Things* (1986), by Robert Fulghum. It is a story which reminds us that we need not sacrifice our uniqueness in order to be a player in the game.

"Giants, wizards, and dwarfs was the game to play.

Being left in charge of about eighty children seven to ten years old, while their parents were off doing parenty things, I mustered my troops in the church social hall and explained the game. It's a large-scale version of Rock, Paper, and Scissors, and involves some intellectual decisionmaking. But the real purpose of the game is to make a lot of noise and run around chasing people until nobody knows which side you are on or who won.

Organizing a roomful of wired-up grade-schoolers into two teams, explaining the rudiments of the game, achieving consensus on group identity - all this is no mean accomplishment, but we did it with a right good will and were ready to go.

The excitement of the chase had reached a critical mass. I yelled out: "You have to decide *now* which you are - a GIANT, a WIZARD, or a DWARF!"

While the groups huddled in frenzied, whispered consultation, a tug came at my pants leg. A small child stands there looking up, and asks in a small concerned voice, "Where do the Mermaids stand?"

Where do the Mermaids stand?

A long pause. A *very* long pause. "Where do the Mermaids stand?" says I.

"Yes. You see, I am a Mermaid."

"There are no such things as Mermaids."

"Oh, yes, I am one!"

She did not relate to being a Giant, a Wizard, or a Dwarf. She knew her category. Mermaid. And was not about to leave the game and go over and stand against the wall where a loser would stand. She intended to participate, wherever Mermaids fit into the scheme of things. Without giving up dignity or identity. She took it for granted that there was a place for Mermaids and that I would know just where.

Well, where DO the mermaids stand? All the "Mermaids" - all those who are different, who do not fit the norm and who do not accept the available boxes and pigeonholes?

Answer that question and you can build a school, a nation, or a world on it.

What was my answer at the moment? Every once in a while I say the right thing. "The Mermaid stands right here by the King of the Sea!" says I. (*Yes, right here by the King's Fool, I thought to myself.*)

So we stood there hand in hand, reviewing the troops of Wizards and Giants and Dwarfs as they rolled by in wild disarray.

It is not true, by the way, that mermaids do not exist. I know at least one personally. I have held her hand."[2]

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FOOTNOTES

[1]Reprinted with permission by Chuck Green, *Denver Post.*

[2]From the book *All I Really Need to Know I Learned in Kindergarten* by Robert Fulghum, Copyright © 1988 by Robert Fulghum. Reprinted with the permission of *Villard Books*, a division of *Random House Inc.*

*Since 1984, Thom Allena has been the Managing Partner of **Allena and Associates**, a private consulting firm providing training and consultation to groups and organizations across the country. The firm is recognized for its dynamic, facilitative approaches to leadership, team and partnership development, community-building, conflict resolution, and personal/organizational change. Since 1991 Thom has served as a member on a team of consultants at the National Institute of Corrections which designed and presented a nationally acclaimed change management seminar entitled: **Managing Change**. The seminar has been presented to institutional and community corrections teams from across the country. He is also a co-creator of a five-day leadership seminar entitled **Managing With Heart**, which since 1990, has been offered in conference centers across the country.*

The seminar is known for its "whole person" learning approaches which support people in transforming the their leadership styles, values and practices leading to shifts in workplaces. Thom is a Former Assistant Chief of Judicial Education for the New Jersey Administrative Office of the Courts (1983)-84); former Training Associate for the National Council on Crime and Delinquency (1979-82); received M.S. in Criminal Justice and Public Administration from San Diego State University (1978); former investigator with New Jersey Public Defender (1973-76). He received B.A. in Political Science from Niagara University in 1972.

In Kentucky, Thom has facilitated the development of the Jefferson County Alternative Sentencing Program, and has trained judges, prosecutors, probation and parole officers and defenders at programs in Louisville and Covington.

Defenders like prosecutors are compelled to work within a system that someone else has created. We follow tradition, rules, procedure and schedules that are dictated but increasingly we respond to limitations on time. We comply with dictates but only to the extent that time permits.

This article poses the question, do we simply continue to react or do we lead our system of justice in a new direction?

A lecturer at one of our conferences once stated that lawyers never want to be caught sitting at their desk doing nothing other than thinking. We have spent a major portion of our life developing a brain, learning law and how to apply it but we think it inappropriate to be caught reflecting on these skills.

Certainly there is a time for adversarial encounters but we must look for opportunities to communicate and join together with leadership directing a better way to insure that the "system" serves both defendants and victims.

For all of us who make a career in criminal justice, the toll on our personal lives is increasing. Individuals cannot long endure the mounting pressures and continue to serve clients to the best of our abilities. Change will come. The question is who will define the future? Those of us who know the system best or others who fill the void in leadership created by us who attend to immediate problems rather than systemic problems.

- Thomas V. Handy
Commonwealth Attorney
London, Kentucky

As you no doubt suspected, I found a good deal in the article with which I can wholeheartedly agree, as well as a number of observations and suggestions which I believe all of us in the justice system would do well to ponder. I was particularly struck by Mr. Allena's comments concerning the interdependence of all of us involved in the criminal justice system, and the fact that "[D]efenders are often not seen as fully players."

As to this latter comment, I'm afraid that while it was not really true in the early years of our public defender system, it is probably more true today than most of us would like to admit. While I am not sure why, I have perceived over the years a ten-dency among some engaged in public defender work to take on an attitude that it's me and my client against the world. This romantic notion may be a morale builder to overworked and underpaid de-fense attorneys, but it is neither a true nor ulti-mately productive idea and all too often predisposes to self-righteousness. I am afraid it has led some public defender lawyers, who in times past might have been involved leaders in local civic organiza-tions and the local and state bar, to eschew such involvement and then inevitably to be seen as not being "full players."

Mr. Allena's observation about the "adversarial model" is all too true. Many of us lawyers have this model so ingrained in us that we remain adversar-ial even when, if we thought about it, a different approach would likely better serve our client's cause of any cause we might be advocating. An extensive knowledge of law and procedure does not always equate with wisdom and that understanding of people needed by a truly effective advocate.

Some of what Mr. Allena has to say is reminiscent of advice given to me by the late Frank E. Haddad, Jr. shortly after I was sworn in as State Public Defender. I never knew a more effective or capable criminal defense attorney than Frank, or one who appreciated better the interdependence of the vari-ous components of the criminal justice system and how to employ them all for the welfare of his clients. Frank, himself, a very respected and influ-ential member of the legal profession and his com-munity, warned against those of us int he new sys-tem, allowing ourselves to become anything less than the "full players" we were in the legal system.

I may have told you this before, but some weeks later I noticed that certain members of the Attorney General's staff customarily joined members of the old Court of Appeals for lunch in a small room at the state cafeteria. Thinking of Frank's advice, I decided to join them without an invitation. I still don't believe I had the nerve to do this, but I was well received and continued often afterwards to en-joy the company of these folks at lunch and to be a player at that table at least.

- Anthony M. Wilhoit, Chief Judge
Kentucky Court of Appeals
Versailles, KY

G.K. Chesterton wrote that St. Francis of Assisi was able to realize his great visions because he saw the world "upside down." Such a perspective might serve as well in the 1990's.

Thom Allena reminds us that we need to approach our work with intelligence, compassion, and purposiveness. Most people -- even lawyers -- remain "victims" of the organizational systems wherein they work. In this way they parallel and enact the rigid, often unmerciful, role-relationships found in the criminal justice system, especially the offender-victim transaction.

Allena urges us to transcend these "adversarial" roles through individual actions that lead to team and organizational commitments. These are important reflections that merit careful consideration and bold experimentation.

I would add two *caveats*. First, individual, small group, and organizational changes are often terribly difficult in the context of microsystems driven by impersonal political and economic forces. Therefore, such efforts require great patience and long-term perspective. Managers must be ready to wait as well as to take decisive action. Second, all organizations need cohesive predictability as much as they require innovation. A sense of balance and timing are also crucial for successful management.

- James J. Clark, Ph.D.
College of Social Work
University of Kentucky
Lexington, Kentucky

I thought Mr. Allena's article was excellent! He forces us to realize that, more often than not, the toughest enemy we fight in improving representation for our clients is ourselves. Until we as defenders are willing to step out of our "this-is-the-way-it's-*always*-been done," comfort zone, both our clients and our society will continue to miss all that *might* have been."

- Cathy R. Kelly
Director of Training
Missouri State Public
Defender System

Mr. Allena's article contains some important points to consider for the management of a public defender office.

Mr. Allena is correct when he notes that we cannot view ourselves as isolated and separated from the rest of the criminal justice system. Only by becoming actively involved in the legislative process, both as to specific criminal legislation and our budgets, can we truly represent all of our clients' needs. We must also make ourselves active in the community in order that we can become familiar with the agencies available to help our clients and those agencies can become familiar with our particular clients' needs.

I would take exception with Mr. Allena's notion that we should consider the adversarial process obsolete. A client's right to trial where she is effectively represented is still the greatest protection against the conviction of an innocent person. As public defenders we should work in our communities to cure the misperceptions of the criminal justice system demonstrated in Mr. Allena's article, but we should in no way accept the notion that the adversarial system is obsolete.

The strength of Mr. Allena's article comes in its recitation of five (5) leadership practices and ten (10) commitments that successful leaders make to their organizations. Essentially Mr. Allena gives us ways to energize ourselves as managers and energize our public defenders and support staff towards the commitment to excellent representation.

In our office, with the help of Ed Monahan and Vince Aprile, we have been implementing many of these ideas with good success. We have created representatives meetings where the secretaries, investigators, and attorneys have a strong voice in setting policies and procedures for the office. We have weekly brainstorming meetings where all employees who are able to attend offer ideas on our cases, and thus become informed and excited about our cases. We have death penalty teams involving secretaries, investigators, and attorneys. Thus everyone becomes familiar with the case and excited about saving the client's life. We created a continuing legal education committee and empowered them to bring speakers into our office. This has resulted in very informative meetings. These are just some of the ideas we have tried, and we certainly will continue to experiment with ideas to help us energize ourselves toward the goal of quality representation.

I urge managers to consider experimenting with the ideas in Mr. Allena's article. The results are worth whatever pain changing might create.

- Mark E. Stephens
District Public Defender
Knoxville, Tennessee

Dynamic organizational change does not require inaccessible funds or technology, so Thom Allena recognizes in his article, *Negotiating the Permanent Whitewater*. Instead, Allena reminds us that people, rather than machines, have always been the force majeure behind meaningful change.

The article suggests that managers must not only emphasize but build and expand positive reinforcements in daily operations, whether by compliment, example or directive: the standard expected must mirror the standard demonstrated. While a seemingly oversimplified solution, Allena nevertheless proffers that positive managerial attitude "enables," enables the managers, the employees, the judicial system itself. The ability to recognize, tolerate and build upon inherent individual differences provides the key to managerial success in the defender system. Allena's approach provides a simple and common sense avenue for change and improvement in the legal system.

- Judge Martin E. Johnstone
Court of Appeals of Kentucky
Louisville, Kentucky

The longer I do this work, the more I value the spiritual lessons it offers. We meet with people at the biggest crisis of their lives. Often the power of the State seeks to crush them. We, to the extent we are successful, throw ourselves between the State and our clients. We often feel ground up by the power of the State. We see others around us become dispirited and leave the work. We ourselves often question how long we can continue. At each of these crises, values, principles, ethics, and conscience need to be brought to bear. Only through conscience can we navigate through these difficult times. Only by knowing what we stand for can we assert what is right for our clients. Only by keeping our eye on our mission can we bring healing to broken situations. While we should resist bending to the latest "management-speak," at the same time we need to become familiar with spiritual and value laden concepts so that we can continue to do this important work.

- Erwin W. Lewis
Assistant Public Advocate
Richmond, Kentucky

Mr. Allena's summary of "leadership practices" is well within the mainstream of current literature; compare, for example, Stephen Covey's books including *The Seven Habits of Highly Effective People* and *Principle-Centered Leadership*. A reader may struggle, however, to discern the connection between these "practices" and Mr. Allena's evident disenchantment with our adversarial system of justice.

Although adversarial roles can be (and often are) overplayed in civil disputes, we should view with caution any blurring of role definition in criminal cases. Requiring the government to formulate a specific accusation before hailing a citizen into court, placing a heavy burden of persuasion upon the prosecutor, and furnishing the accused with counsel to test the quality and sufficiency of the state's evidence are procedures that create an adversarial framework -- but they also are touchstones of liberty.

There seldom is a "holistic" win/win option when the state seeks to take a citizen's life, liberty or property. Neither is there a simple path by which "encouraging the heart" can improve a criminal justice system that must serve multiple constituencies and strike a balance among conflicting goals such as truth seeking and rights protection, deterrence and rehabilitation, or efficiency and fairness. Nor does "reinventing" oneself relieve a lawyer of the externally imposed duties of representing clients zealously within the law, acting responsibly as an officer of the court, and serving as a public citizen with a special responsibility for the administration of justice.

To be sure, there is much that needs improving in our legal system, and lawyers must take the lead as "change agents." But we should not passively accept the kind of shallow, uninformed or exaggerated criticism that Mr. Allena quotes from the Denver *Post*. We should answer promptly and emphatically when our critics are wrong; and we should not shrug off the task of educating the public on the needful safeguards and complexities of the law. By parity of obligation, however, we should act just as promptly and emphatically when the critics are right -- even if the resulting changes impair our private interests. That is the noble burden of a public profession.

- Donald L. Burnett, Jr., Dean
University of Louisville
School of Law

The article *Organizational Maps for the 21st Century* goes beyond psychobabble and introduces babble that crosses all professional boundaries and creates an intellectual version of a gas that threatens our ozone layer. This is the sort of pep-rally, cheer leader language that in previous centuries might have been supplied by the latest evangelist who arrived in town with a smile and a shoe shine.

This is flippant writing that is not anchored in much of anything other than slogans and "bullets" of cute ideas that are really compelling like this one: "Be genuine." Why didn't I think of that? This is the kind of writing that can only proliferate because the cost of publishing newsletters and books is so low and the time that people spend actually reading is so brief.

Why propose these ideas for public defenders? What are the ideas? Neither of these two questions are answered to my satisfaction. The author begins with some tired and trite criticisms of Newton. This is very faddish among the chaos science people. Unfortunately, there is no application of the relevance of chaos models to what the author is saying. He is simply camping his trailer on often borrowed ground and, perhaps, assumes that we see the wisdom in talking about Newton as an anti-relationship kind of guy. I don't propose to be a Newtonian scholar; I'm not that smart. I do, however, find some very compelling relationships in Newton's descriptions of the movements of celestial bodies. All those forces seem to manufacture rather balanced and complex interactions that do get a few things done. Anyone who tries to propagate the belief that a Newtonian perspective eschews relatedness is missing something. One of the reasons that "interchangeable parts" are so interchangeable is that the system itself is so finely articulated.

And as to the "cutting edge" of new thinking about organizations and leadership, I have but one question. What in the world does this have to do with being a public defender? Now, admittedly, I ask the question from the perspective of a non-lawyer. I'm a social worker, not a member of the bar, so I might be missing something really important here.

Were I in a panel discussion or debate with Mr. Allena, I would challenge (these people like this word) him to supply you with something other than white bread. This stuff (he likes this word too) is all air. What I would counter with would be this. "Sir, there might be some need for us all to be more mindful and communal in our better thoughts and deeds with each other. And in reflective moments I share your motivations, but in the context of my client's world I'm afraid I have to beat swords out of plowshares. You see, Mr. Allena, this collaborative, lovey-dovey stuff is quite impressive when all the folks have some degree of power and control in their lives. Yuppies can go to meetings and really interact as meaningful colleagues and then drive home in their Beemers and go to their athletic clubs for stress reduction and physiological debriefing.

But, sir, my clients aren't in this gentle, authentic, nature-loving, bookstore-roaming world. They have nothing. And everywhere they look there are nothing but Goliaths leering at them. You see, I think my mission is to try as best I can to level the playing field just a little bit. And if I have to employ all of those terrible divisive techniques that nasty lawyers play, well, tough."

If I were to try to offer more sustenance for the role of public defender, I think it would be along these lines. I wouldn't try to talk them out of what they must do - fight for the rights of those who are disempowered - I would instead remind them of the vast tradition which they must keep alive until Mr. Allena's millennium arrives with peace, love and brotherhood in tow. This is a tradition anchored as far back as the beginnings of the Roman Republic and flowing through Medieval England and the Age of Enlightenment. It is no small matter, this allegiance to the adversarial process.

What is so bad about the adversarial system? Why the guilt about not being consistent with the glib yuppie babble of folks who will never have to worry about the consequences of a failed defense? Forget it. Let's look at what this craft is about and why it is so valuable.

The English speaking people have a thing about challenges to upright power. From the nobles who began insisting on the King's observance of law in 1215, to the present day public defender, there is a deeply embedded belief that the unchecked power of the few is the tyranny over us all. The nobility of the craft lies not in the wealth or distinguishing characteristics of its clients but in the concepts and transfers of power that occasion the well conducted defense. Until we have something better than adversarial process to challenge the metallic surface of superior power, we must lean upon these many unreported and unheralded battles fought in the court rooms all over the country. These are the collective defense of our liberty.

The warm fuzzy world of the Allenas offers no way to check the enveloping group will. After all, in his proposed colloidal society, individualism becomes an unwanted precipitate that separates us into controversy. I am a clinical social worker. I work in a culture that promotes this kind of groupistic, nonadversarial way of treating people. When one detoxifies adversity there remains nothing but a smarmy tyranny of good will. More harm is done to people in the name of noble intentions than any of us could ever count. When all of the professionals on all sides of the issues come together in one of those nice collaborations, the only people who are in trouble are the disenfranchised. And, believe me, the disenfranchised will NOT be at the table.

The only hope for them lies in the hands of the few Lone Rangers out there who will continue to be honey bees at the picnic of the powerful. The public defender must buzz around and occasionally sting the system to remind it of the immense power it wields and the inevitable dictatorship that results from unchecked power. The public defender cannot do this by schmoozing the powerful. The minute the public defender is on the inside playing a harmonizer, the client slides into a yet darker dungeon.

I read the Allena piece as fluff that is supposed to attract us toward a fuzzy communality with a new age theme song to go with it. I reject it outright. This kind of writing is denial at its worst. It makes genuine ignorance look invigorating.

- Robert Walker, MSW
Bluegrass Comprehensive Care Center
Lexington, Kentucky

SEEKING COMPETENT LEADERSHIP

Kouzes and Posner base their leadership framework on empirical data of some magnitude which demonstrates consistency and reliability of their findings. They have 2500 surveys of leaders in the public and private sectors complimented by 5000 shorter surveys. Additionally, they have over 300 in-depth interviews of leaders from around the world. Their Leadership Practices Inventory has a data base of over 60,000 respondents. Their findings indicate that there is no statistically significant difference between the answers of government and business managers. Generally, their findings are consistent across people, genders, and ethnic and cultural backgrounds, as well as across organizations of various sizes.

Those who aspire to competent leadership will surely want to study, reflect on and understand what Kouzes and Posner have empirically discovered about the leadership process and about developing and releasing leadership capacity. I believe what they offer is pragmatic, practical and realistic.

- Sharon Marcum, Training Manager
Governmental Services Center
Frankfort, Kentucky

DEPARTMENT OF PUBLIC ADVOCACY'S DEFENDER SERVICES CORE VALUES & VISION STATEMENTS

COMMITMENT TO CLIENTS. We are dedicated to serving our clients through every aspect of our operation and to preventing the government from taking advantage of our clients at any time, in any manner.

QUALITY. Using state-of-the-art technology, superior training, and fair and sensitive management, DPA continually strives to maintain the best possible system for delivering our services to those people in need of them, at all times recalling the dignities and worth of not only the individual client, but also the legal and support staff of the organization itself.

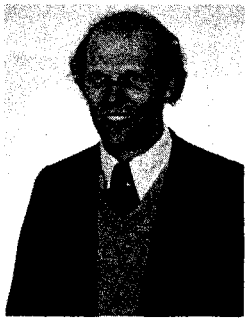
INTEGRITY. Each of us is governed by a steadfastness to achieving our agency's mission, fulfilling our individual responsiblities, and being trustworthy and ethical in all our dealings.

STAFF PROFESSIONALISM. Each employee is empowered to act creatively, innovatively, and responsibly by proper training, compensation, and support in a work environment that values and respects each employee's contribution to the delivery of legal services.

INDEPENDENCE AND INTERDEPENDENCE. Independence is essential to the effective functioning of the criminal justice system as well as the external forces that affect it. The DPA operates under a specific rule of professional conduct which requires independent representation of each of its clients. The Department cannot compromise that core value - to do so would undermine justice and thereby destroy the essential interdependence of the system.

1996 General Assembly Action

1996 Bills Passed into Law



W. Robert Lotz

1. **Senate Bill 105** - *Domestic Violence: Prohibition of Mediation. 3 year orders: Foreign Protective Orders: 24 Hour Accessibility*

Requires Petitioners to inform court of pending divorce or custody cases. Prohibits court from ordering mediation in domestic violence cases unless requested by a victim. Makes domestic violence orders 3 years in duration with reissue period of 3 years and unlimited reissuance. Provides that reissuance is not contingent upon a finding of continued violence or abuse. Provides for recognition in Kentucky of foreign protective orders and requires entry of protective orders into law enforcement network of Kentucky.

Section 6 of the Bill indicates that foreign protective orders be enforced in this state even through they grant relief that is not available in this state. This means that a member of an unmarried couple who have not lived together could go to another state to obtain a protective order. In some states protective orders are granted where physical contact and violence is not involved. Orders from other states may also order relief which is not available in the Kentucky courts. As a result some defenses currently available in Kentucky may not be available against foreign orders.

Section 10 of the Bill indicates that an offense of violation of a foreign protective order is caused by an intentional violation of an order. However this section does not include a service or notice requirement such as those contained under KRS 403.763 the law involving violation of Kentucky domestic violence orders. Due process would require notice and/or service be provided before defendants are convicted.

2. **Senate Bill 108** - *Public Notification of Release: Jail.*

The prisoner release notification system as passed in this Bill is limited to notification to victims and other individuals who request notice, including defense attorneys. Language of concern regarding "public notification" has been eliminated. The notification system is computerized and is based upon the currently existing Jefferson County model.

3. **Senate Bill 137** - *Sale and Purchase of Tobacco Products by Minors.*

Requires sellers of tobacco products to require proof of age from young tobacco buyers, prohibits persons under the age of 18 from purchasing or accepting receipt of tobacco products or from offering fraudulent proof of age for purposes of purchasing tobacco products. Requires tobacco products in retail establishments to be in view of an employee. Increases fines for violation.

4. **Senate Bill 154** - *Nonresidential Methadone Clinics: Narcotic Treatment Programs.*

Sets standards of operation and licensure requirements for nonresidential methadone clinics and narcotic treatment programs.

5. **Senate Bill 158** - *Driver's License: Picture/Homeless.*

Prohibits persons from wearing hats, sunglasses or other attire hindering identification when having a drivers license photograph taken. Allows homeless persons to obtain photo identification cards if they have no permanent resident address.

6. **Senate Bill 169** - *Testimony in Child Sexual Abuse Cases*

Expands KRS 421.350 on the testimony of children by closed circuit equipment outside of Court to other child witnesses under the age of 12 as well as victims. Kentucky Association of

Criminal Defense Lawyers (KACDL) opposed this bill on constitutional grounds. Due to KACDL's intervention a floor amendment was added by Representative Stengel changing the standard for the child's testimony provision to require a Judge to find a "substantial probability that the child would not be able to reasonably communicate because of serious emotional distress produced by the defendant's presence." This language was adapted from the constitutional assessment prepared and submitted by the KACDL Amicus Committee.

Any practitioner facing such out-of-court testimony should file a constitutional challenge. Moreover, since the "emotional distress" as well as the child's reasonable ability to communicate" are issues of proof, counsel should move for funds and access to do a psychological evaluation of the child as it pertains to such issues. Such evaluations can also be utilized in connection with questions of competency of the child to testify. Prosecutors may not be quite as willing to utilize this tool against the defendant if they are aware that the cost is a psychological evaluation of the witness by the defense team.

7. **Senate Bill 176** - *Constitutionality of Statutes: Attorney General Notice.*

Requires notification to the Attorney General of appeals of actions involving the constitutionality of statutes. Requires the Attorney General to notify the LRC upon receipt of petitions and of final judgments in actions involving the validity of statutes.

8. **Senate Bill 214** - *Fraudulent use of Educational Records.*

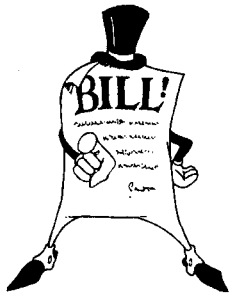
Creates new crime of using fraudulent educational records. This Bill generally prohibits conduct involving false diplomas, certificates, licenses, or transcripts of academic achievement, including the creation, buying or selling, or use of such documents in application for employment, admission to educational programs or awards. This is a class A misdemeanor. The state of mind is "knowingly."

9. **House Bill 9** - *Jailors Transportation of Prisoners.*

Allows jailors as well as sheriffs to transport prisoners.

10. **House Bill 40** - *Concealed Weapons Bill.*

Allows the state police to issue licenses to carry concealed firearms or other deadly wea-pons. Requires a licensees to carry license on their persons ($25.00 non-criminal penalty). Prohibits minors, felons, and persons prohibited by federal law from possessing firearms, from obtaining licenses. Prohibits for 3 years a license to a person convicted of a misdemeanor controlled substance violation or who has 2 or more DUI convictions within a 3 year period before application. Prohibits licenses to certain persons with hospitalization histories under KRS 202A or 202B. Permits denial of licenses to persons convicted of assault, KRS 508.030 or KRS 508.080, within 3 years of application. Permits denial or revocation. Requires education and safety training. Requires licensees to notify state police of change of address or loss of a license within thirty (30) days ($25.00 non-criminal penalty). Requires licensees to surrender licenses when a domestic violence order or emergency protective order is issued against them with automatic suspension of license privileges. Prohibits carrying of concealed weapons into police stations, sheriff's offices, detention facilities, prisons, jails, courthouses (solely occupied by the court of justice courtroom or court proceeding) assemblies of governing bodies, places licensed for alcoholic beverages, airports (after metal detection), places of worship, and locations prohibited by federal law. Allows private businesses, day care centers, family care homes, health care homes, and health care facilities to prohibit carrying a concealed weapon on premises. Allows posting of signs. Allows employers to prohibit employees from carrying concealed weapons in business vehicles (but not their private vehicles). Allows reciprocity for persons licensed in other states to carry a concealed weapon.



11. **House Bill 77** - *Child Sexual Abuse Multidisciplinary Investigation Teams.*

Amends sections of law relating to investigation of child sexual abuse to define membership of multidisciplinary teams, requires local protocols to be approved. Permits counties to form investigation teams together.

12. **House Bill 80** - *Expulsion for Weapon. in School.*

Requires local school district to adopt a policy to expel for a period of one year students who bring weapons to school. Law authorizes modification of penalty on a case by case basis.

13. **House Bill 94** - *Child Fatality Review Boards.*

Permits the department for health services to establish a state child fatality review team and allows local coroners to establish local child fatality response teams. Coroners and local teams have access to all medical and social records of any child under the age of 18 who has died. Requires that reports and records of the state and local teams are confidential and requires coroners to submit monthly reports to state of children under 18 who have died. Requires coroners to contact local social service and law enforcement when a child under 18 dies. Extends privilege to refuse to provide information regarding death of a child to individuals who have clergy privilege.

14. **House Bill 106** - *Child Service Agencies: Record Checks.*

Provides for criminal records checks on persons seeking employment involving children.

Record checks are for felonies and misdemeanor drug and DUI offenses, however there is a 5 year time limit placed on disclosure of misdemeanor drug and DUI offenses.

15. **House Bill 111** - *Tuberculosis Control.*

Allows district courts to intervene when a person with active tuberculosis fails to take precautions to prevent transmission of the infection or refuses to submit to examination and treatment upon reasonable request. Increases penalties for violations of court orders from fines of $500.00 or 6 months in imprisonment to fines of $500.00 to $1,000.00 or imprisonment of 6 to 12 months.

16. **House Bill 117** - *Juvenile Justice Act.*

Requires the commonwealth's attorneys to handle juvenile matters in the circuit court and county attorneys to handle juveniles under jurisdiction of the district court. Makes the administrative office of the court the repository of court records for status offenses, public offenses, and youthful offender proceedings involving juveniles. Requires non-indigent parents or guardians to pay for defense counsel and possibly to bring them before the court if they are not the complainant or victim in the delinquency proceeding. When custody of the child is with the other parent pursuant to divorce or with a public agency there may be no obligation to provide counsel. Provides for assessment of court costs, commensurate with those in district or circuit court, in informal adjustments and adjudications. Provides that the court costs may be assessed against the child's parent or legal guardian (unless they are the complainant or victim of the child's acts). Provides that juveniles may be ordered to pay the court costs on an installment plan or engage in community labor at minimum wage rates to pay off court costs. Provides that court costs collected shall be used in providing services in programs to juvenile public offenders. Subject to the Kentucky Rules of Evidence provides that juvenile court records of adjudication of guilt of felony are admissible in adult court trials. Records may be used for impeachment purposes and during the sentencing phase but they may not be used for determination as to who is a persistent felony offender. Use for enhancement for multiple offenses is not specifically addressed. Treatment, medical, mental or psychological records can be presented as evidence in circuit court. Records resulting from prior abuse and neglect under the Federal Social Security Act is prohibited. Evidentiary use of juvenile convictions is also permitted in capital cases. Defines "deadly weapon" and "firearm" in conformity with the criminal code. Defines "motor vehicle offense" as limited to traffic type offenses. Defines "informal adjustment" to require consultation but not consent of a victim of a crime. Creates new Department of Juvenile Justice and provides that it will operate all post adjudication, juvenile detention or treatment facilities and all post adjudication treatment, rehabilitation,

probation or parole, diversion, or other post adjudication programs. Provides for creation of at least one new criminal correction facility comparable to a medium security adult facility. Limits the authority of court designated worker to dispose of three status or non-felony complaints per child. CDW does not make dispositional recommendations when a child is to be tried as an adult. Point in proceedings when court determines a child is triable as an adult or in the adult session of the district court triggers arrest, post arrest and criminal procedures applicable to adults with the exception of place of confinement. Once the circuit court has jurisdiction over a juvenile it will try all offenses under the same act or series of acts. Public release will occur of juvenile records on indictment and arraignment of a child in the circuit court. Permits victims, their parents, spouses or legal representative to attend juvenile proceedings subject to the rule as to witnesses. Requires that these persons have advance notification of motions for informal adjustment in cases.

Eliminates parental child support obligations under KRS 610.170 when the parent was the victim of the child's criminal conduct or filed a complaint against the child.

Provides for notification to schools of adjudication, petition, disposition, and statement of facts, of students classified as youthful offenders, adjudicated guilty of violent offenses, or felony drug, assault, and sexual offenses. Provides for public access to the petition, order of adjudication, and dispositional records in juvenile delinquency proceedings with adjudications of Class A, Class B, or Class C Felonies or offenses involving deadly weapons. Restricts expungement to status offenses, misdemeanors and violations. Requires court designated workers to refer all felony firearm felonies to the commonwealth attorney and all other felonies to the county attorney. Allows a recommendation of diversion of felony charges that do not involve use of a firearm. Requires court designated workers to refer all misdemeanor cases, violation cases and motor vehicle traffic offense cases, and status offense cases to the county attorney. Requires county attorney to concur in diversionary dispositions.

Expands youthful offender treatment as adults to children with a Class C or Class D Felony who have one prior public offender adjudication for a felony offense. Provides for preliminary hearings prior to transfer to circuit court for offenses involving use of firearms. Requires that the county attorney consult with the commonwealth attorney prior to transferring cases as a youthful offender. Allows a court to order a parent or guardian to make restitution after a hearing, with notice, and a finding that parents failure to exercise reasonable control or supervision was a substantial factor in the child's delinquency. Allows juvenile courts to use home incarceration program after adjudication. Effective July 1, 1997, expands adjudication to detention up to 90 days for children 16 and over and establishes up to 45 days detention for children 14 and 15 years of age. Requires that juveniles convicted of three or more offenses other than violations or status offenses must be maintained under the jurisdiction and supervision of the court until their 18th birthday. Provides that violations of terms of conditional discharge can be punished as contempt of court. Allows status offenders to be ordered to participate in community service work programs and expands such work program participation to all juveniles regardless of age. Changes required findings of a district court in a bindover hearing to require that the court find that two or more of the factors favor transfer. Makes transfer permissive.

17. **House Bill 126** - *Criminal Records Checks Volunteer Fire Department Ambulance Services, and Rescue Squads.*

Allows for criminal record checks of persons applying to work for voluntary fire departments, ambulance services, and rescue squads. Records checks are limited to felony criminal record check for persons seeking such positions.

18. **House Bill 144** - *Medical Costs Assigned to Prisoners.*

Allows imposition of reasonable fee for use of jail medical facilities by prisoners who have the ability to pay.

19. **House Bill 225** - *Black Talon Ammunition.*

Changes definition of Black Talon Ammunition to "flanged ammunition." This does not substantially amend the current code in anyway but simply removes a trade mark name from the description of the type of ammunition involved.

20. **House Bill 226** - *Removal of Criminal Records - Innocent Defendants*

Provides for expungement of all records when charges are dismissed or defendant acquitted, unless by plea agreement. Requires hearing and 60 day waiting period. Records covered include arrest records, fingerprints, photographs, index references, or other data whether in documentary or electronic form relating to the arrest or charge. In order to obtain an expungement the Court must find that there are no current charges or proceedings pending relating to the matter for which the expungement was sought. After expungement the proceedings will be deemed never to have occurred and the Defendant will not be obligated to disclose the fact on an application for employment, for credit or otherwise. A person whose records have been expunged may later move the Court for their inspection if it becomes necessary.

Since dismissal with prejudice can occur through successful completion of diversion, entering into such programs now has an additional advantage. Furthermore care should be taken on the record in multiple charge cases to indicate when a charge is not being dismissed in return for a plea agreement clearly on the record of the case so that a Defendant retains his rights to seek expungement. Expungement is not limited to first offenders. When the practitioner encounters a record of a client which contains dismissed or acquitted charges part of the practitioners duties should now be to advise them of the possibility of having theses matters taken off their records.

An interesting issue arises regarding the conflict between this law and the law providing for license revocations in refusal cases when a Defendant has been acquitted of DUI. Sample motion for expungement in such a case is attached. It is anticipated that litigation regarding expungement of DOT records will occur promptly after July 15th.

A top KACDL legislative priority, this Bill passed without substantial amendment other than to add a $25.00 fee for expungement of misdemeanor convictions (fee does not apply to expungement of acquitted or dismissed charges). *See the motion that follows this article and the articles by Maria Ransdell, page 24 and Judge Paul Gold, page 28, for further discussion of this measure.*

21. **House Bill 236** - *Attorneys for Juveniles: Access to Records*

This bill sponsored by Rep. Gross Lindsey was strongly supported by the KACDL because of its provisions allowing defense attorneys complete access to all government records when defending a child.

This bill is a tremendous weapon for defenders of minors in juvenile court and in adult proceedings as discovery far exceeds the criminal rules.

22. **House Bill 237** - *Jail Standards. Certification for State Prisoners.*

Provides state jail standards apply only to jails in counties desiring to hold state prisoners. Requires county by local regulation to operate a "safe secure and clean" jail.

23. **House Bill 267** - *Retroactivity of 1994 Amendments to Persistent Felony Offenders Act.*

Makes retroactive the elimination of 10 years to the Board for Class D felons convicted of PFO first.

24. **House Bill 271** - *Highway Work Zones.*

Doubles fines assessed for speeding in a highway work zone. Establishes a $50.00 fine for destroying a traffic control device in a work zone.

25. **House Bill 285** - *Inmate Financial Aid.*

Prohibits college financial aid to prisoners ahead of any other citizens.

26. **House Bill 309** - *Domestic Violence: Training and Standards.*

Requires CHR to establish certification standards for professionals and domestic violence perpetrator treatment services. Requires continuing education courses for persons involved in handling domestic violence and development of manual by the Attorney General for policies and procedures of prosecution of domestic violence crimes. Police, judges, and prosecutors are to be educated. There is no CLE requirement for defense attorneys.

27. **House Bill 310** - *Domestic Violence Assault: Harassment. Warrantless Arrest. Conditions of Release*

Expands assault in the third degree states of mind to either recklessly with deadly weapon or dangerous instrument or intentionally. Includes social workers working for DSS at same level as peace officers in assault third. Provides enhancement for a third or subsequent offense of assault in the fourth degree within 5 years to a Class D Felony when all assaults are domestic. Amends KRS 525.070 Harass-ment by making striking, shoving, kicking, or submitting a person to physical contact a Class B misdemeanor. (It is currently a violation).

Expands the warrantless arrest powers of peace officers to situations when the police officer believes there has been family violence and allows the Court to impose release restrictions on defendants charged with sexual and assaultive offenses and make violation of those conditions of release a Class A misdemeanor. Unlike other sections of domestic violence law there is not a specific prohibition against charging a defendant with violating a domestic violence order violating conditions of release. Care should be taken to challenge multiplicity in charging where a single act becomes multiplied into contempt and more than one criminal offense.

Criminal defense practitioners should also now take care to see that in assault four cases that are not domestic in nature the record reflects that fact. Plea bargaining attempts can be made to plea to other offenses such as harassment or terroristic threatening which are not enhancements to later assault four convictions. It is anticipated that it will be difficult for the state to prove the new felony offense of assault four conviction records are inadequate to establish that the prior assaults were in fact domestic in nature. Furthermore in guilty plea situations Boykin challenges are available and defendants convicted in the past were not informed of potential enhancement when they entered pleas.

28. **House Bill 318** - *Victim Advocates.*

Requires victim advocacy training. Authorizes county attorneys to hire victim advocates. Extends counselor-client privilege to some advocates. Counselor client privilege shall not apply to victim advocates employed in commonwealth or county attorney offices. Advocates will not be given the right to address the Court but may accompany victims into court proceedings.

29. **House Bill 323** - *Inmate Litigation Bill.*

Aimed at preventing or discouraging frivolous inmate litigation, this bill creates procedural hurdles and financial and "good time" punishment for inmate litigators. Constitutionality is a question.

30. **House Bill 331** - *Home Incarceration Pre-Trial Release.*

Expands the home incarceration act to allow order of home incarceration as a form of pretrial release with credit against the maximum of sentence. Sets minimum payment of $12.00 per day for work release prisoners.

In multiple DUI cases carrying mandatory minimum periods of incarceration, consideration might be given to requesting home incarceration before trial or plea so that upon disposition of the case the Defendant would have already served the statutory time outside of jail. Individuals currently being incarcerated pending trial may arguably be eligible for home custody status receiving day to day credit against the maximum of their sentence. This will be more useful in misdemeanors than in felony cases.

31. **House Bill 346** - *Sentence Credits: Community Service Programs.*

Permits jailers to give sentence credit on time served for work in the jail or on community service program.

32. **House Bill 372** - *Privatization of County Correctional Facilities.*

Allows fiscal courts to contract with private agencies for county jails, detention or penal facilities for adult and juvenile offenders.

33. **House Bill 400** - *Instructional Permits and Operator's Licenses Drivers Under 18, .02 BA Driving Under the Influence Drivers Under 21*

Set new restrictions on driver's licenses and operators privilege for driver's under 18.

The requirement of a .02 blood alcohol content for drivers under the 21 years was a federal mandate tired to highway funds. As enacted in this, rather than the omnibus DUI Bill, the new offense has been made a lesser offense than regular DUI as follows:

1. The minimum fine is $100.00, and there is an option do the fine or do community service.
2. There is no jail time attached to the offense.
3. There is no alcohol education requirement upon conviction.
4. The license suspension period is 30 days up to 6 months.
5. The conviction may not be used for enhancement of future convictions and there is no enhancement by a prior conviction.
6. The Transportation Cabinet is prohibited from releasing information on the driving history of suspension or conviction.
7. If a person is arrested on the basis of a charge of being under 21 and having a .02 blood alcohol content, and refuses a blood, breath or urine test, there are no penalties attached to the refusal.

34. **House Bill 406** - *Sexual Offender / Sexual Offenses.*

Expands definition of "forcible compulsion" to include fear of another sexual offense. Upon KACDL insistence the original language of "resistance on the part of a victim shall not be necessary' was amended to specifically refer to "physical resistance." The Bill also amends KRS 532.045 to include digital penetration as substantial sexual contact. It requires offenders to pay for evaluation and treatment upon an ability to pay basis.

It is anticipated that prosecutors will be seeking an instruction in rape cases to the effect that "physical resistance on the part of the victim not necessary." Challenges should be made to attempts to include such instructions and it is anticipated that the Appellate Courts will decide whether or not instructions based upon this amendment in the statute will be given to juries.

Practitioners should be aware that even through digital penetration has been included in the definition of substantial sexual contact under KRS 532.045, the statute prohibiting probation for certain sexual offenders, the exemption under KRS 533.030(6) for Class D felonies given split sentences as a condition of probation still exists and digital penetration is still defined as sexual abuse in the first degree a Class D felony.

35. **House Bill 413** - *Legislative Publications / Internet*

Establishes LRC's electronic statutory data base as the official version of the Kentucky Revised Statutes. Provide for public access to the Kentucky Constitution, statutes, acts and administrative regulations over the internet.

36. **House Bill 439** - *Renewal of Motor Vehicle Insurance: Suspensions of Driver's Licenses.*

Requires Transportation Cabinet to suspend drivers license of a person who cancels or does not renew motor vehicle insurance. Requires notification and prosecution of all persons who have their license suspended three times within a 12 month period for failure to maintain motor vehicle insurance. Allows Transportation Cabinet records to be certified and used as prima facie evidence. Amends KRS 186A.065 to require owners to have insurance before operating or permitting the operation of a motor vehicle. Requires agents to notify the Cabinet regarding binder cancellations and amends 186.570 regarding license revocation for failure to maintain insurance.

37. **House Bill 467** - *Interference with State Pharmacy Board.*

Amends KRS 315.990 to increase penalty for impeding officers of the State Pharmacy Board from a Class B Misdemeanor to a Class A Misdemeanor.

38. **House Bill 495** - *Sexual Assault Nurse Examinators, Clinical Experience, Credentialling Requirements of "Sexual Assault Nurse Examinators"*

Allows trained "sexual assault nurse Examinators" to conduct forensic examinations of victims of sexual offenses under a medical protocol developed by the Chief Medical Examiner of Kentucky.

Since Kentucky Law currently permits a defense expert to also do a physical examination of children in sexual assault cases defense

counsel should attempt to obtain qualified physicians to do those examinations particularly when such physicians will be testifying against nurses for the Commonwealth. Attorneys should also obtain the protocol under the Open Records Act for cross-examination.

39. **House Bill 847** - *Omnibus Department of Corrections Bill.*

Amends KRS 196.037 relating to peace officer powers of corrections personnel to include probation and parole officers. Prohibits hand delivery of requests for records from prisoners, requires prisoners to appeal open record request denials to the Attorney General before court action. Amends KRS 440.010 regarding issuance of warrants for inmates mistakenly released. Requires nonindigent sex offenders to pay for their own testing when placed on probation.

40. **HCR 52** - *Elimination of Obscure Unused and Unneeded Criminal Penalties in Statutes.*

This resolution allows the Interim Joint Committee on Judiciary to study and make a recommendation to eliminate all statutes which contain criminal penalties which have not been the subject of enforcement action within the last 5 years. At Representative Clark's request AOC checked the records and found close to 5,000 sections with criminal penalties in the Kentucky Revised Code for which no enforcement or charging action had been taken for a period of 5 years.

41. **HJR 80** - *Direct a Study of the Health & Human Service Delivery System by CHR*

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COMMONWEALTH OF KENTUCKY
KENTON DISTRICT COURT; DIVISION FOUR
CASE NUMBER 95-T-02214
HON. MARTIN SHEEHAN, JUDGE

COMMONWEALTH OF KENTUCKY — PLAINTIFF

vs. **MOTION TO EXPUNGE ALL RECORDS**

RONALD L. HURD — DEFENDANT

****

Comes now the Defendant, Ronald L. Hurd, pursuant to House Bill Number 226, 96 RS HB 226/EN (attached), and moves the Court to expunge all records in state government control. This Bill is effective July 15, 1996.

AS GROUNDS FOR THIS MOTION the Defendant, Ronald L. Hurd, states that on May 18, 1995 the charges in this case of driving under the influence were dismissed at trial on directed verdict and not in exchange for a guilty plea to another offense. Under the just enacted statute attached, this Court has the authority to order the sealing of all records in the custody of the Court and any record in the custody of any other agency or official, including law enforcement records, and records of the Transportation Cabinet regarding this driving under the influence charge.

More than 60 days have passed since the Defendant's acquittal. The Defendant requests the Court to enter this Order on July 15, 1996, the effective date of the new statute or to set a hearing date as soon as possible after that date.

The Rap Sheet

Maria Ransdell

A person's computerized "rap sheet" represents to all the world those misdeeds which we as a society choose to recognize as criminal. The person whose name appears on that sheet carries a serious economic and social burden. The criminal record factors into employment, licensing, insurance and lending decisions; and is readily available to the public. A great many public misconceptions exist concerning criminal records. *All* accusations that are the subject of a criminal court action, which begins with service of a citation, summons or warrant, can be included in electronic records, and these entries are not removed upon dismissal or acquittal. It does not take a physical arrest to cause a public criminal record.

As a criminal defense practioner, I frequently see errors in the various computer systems that provide this type of information. Careful monitoring of criminal record keeping is an important but sometimes neglected aspect of criminal advocacy. I thought it also helpful to all legal practioners to present in this article the types of records available, along with a survey of the state statutes which govern what information may be removed and upon what conditions.

How To Get It

Computerized state criminal records checks can now be procured from many sources including the Federal Bureau of Investigation, Administrative Office of the Courts (AOC), Kentucky State Police, Transportation Cabinet, and the Lexington-Fayette Urban County Police Department.

The official repository and primary source for criminal records is the Clerk of the Court in which the proceeding occurs. Both federal and Kentucky courts allow access to these court records by anyone making a specific request. The court clerk, however, does not usually provide "rap sheets" or computerized compilations of an individual's contact with the court system. Court records are permanently kept, with the exception of Kentucky District Courts, which retain most records for only five years after the proceeding has been concluded.

National

A National Crime Information Center (NCIC) computer record check is available only for law enforcement purposes. However, individuals can request their own nationwide FBI criminal history check pursuant to 28 C.F.R. 1630. These printouts include all charges and convictions provided by agencies that report to the FBI. Since these records are ultimately identified by fingerprint, an individual seeking this information must submit an inked fingerprint card (which can be made by local law enforcement agencies) along with an $18.00 certified check or money order payable to the U.S. Treasury, a copy of proof of identification and all necessary vital statistics, including place of birth, to the FBI, J. Edgar Hoover Building, 10th and Pennsylvania Avenue N.W., Washington, D.C., 20535. The turnaround time for these requests could not be estimated by the FBI. These records are not available to persons other than the subject of the record.

State

The AOC maintains "Courtnet," a computerized record keeping system for all the courts of the Commonwealth of Kentucky. Courtnet records include all matters that have been the subject of a state court criminal proceeding, including traffic offenses. A Courtnet printout is available to any citizen or agency willing to pay $10.00 per record check, and does not require permission of the person for whom the record is sought. Courtnet requests must include the complete name, social security number and date of birth of the subject of the record check, as well as a self-addressed, stamped envelope. Third party requests must

include an additional envelope stamped and addressed to the person who is the subject of the record, so that they can be sent a copy of the record as well. This allows them to address any errors which might exist in their record. Government and non-profit agencies and individuals requesting their own record are not required to pay the $10.00 fee. Courtnet requests must be made in writing to the Administrative Office of the Courts, Pretrial Services, 100 Mill Creek Park, Frankfort, Kentucky, 40601. Checks are made payable to the AOC. Most Courtnet requests I have made have been responded to within two weeks. All Courtnet records checks are stamped "This is not an official record," reflecting the fact that only attested copies of the records themselves are considered official records.

The Transportation Cabinet, Division of Drivers Licensing maintains statewide driver history records; however, these entries are only kept for the previous five years and reflect only convictions for moving violations and offenses which could affect one's driving privilege. These computer printouts are available without the consent of the person who is the subject of the history, and can be requested in writing by sending $3.00, payable to the Kentucky State Treasurer, to the Division of Driver Licensing, State Office Building, Frankfort, Kentucky, 40601. The name, date of birth and social security number of the subject of the record are required, and the request must state whether it is a three year or a five year history that is being sought. These driver history printouts are very slow in coming, however, often taking as long as a month to receive by mail. It should be noted that the driver histories which are included in the District Court case jackets for Driving Under the Influence offenses are not considered by the Clerk's Office to be public record for the purpose of copying, but they can be viewed at the Clerk's Office.

The Kentucky State Police also provide computer criminal history checks. Their statewide information is compiled from records received only from agencies which report to the KSP, and is available to any requesting party without a release of information from the subject of the record. Kentucky State Police checks can be requested by writing the Kentucky State Police, Records Section, 1250 Louisville Road, Frankfort, Kentucky, 40601. A $4.00 check or money order is required, made payable to the Kentucky State Treasurer and name, social security number and date of birth are necessary. A person can request convictions only or a complete check and can expect a response within two weeks.

Local

Law enforcement agencies in the larger communities are likely to have the capability to print out local rap sheets. Whether these records can be released to the general public or only to the individual who is the subject of the record appears to vary widely from place to place. For example, the Lexington Metro Police Department provides local criminal history printouts which it will release for non-law enforcement purposes only to, or with the permission of, the person who is the subject of the criminal history in question.

The initial source of the information provided by the Lexington Metro Police Department is by entry of physical arrest data at the jail, or entry by the court of a charge upon service of summons. This system does not include traffic matters unless there has been service of court-ordered process or arrest. The Court Clerk provides disposition of the matters as the cases are closed. These printouts are provided to individuals at the Police Department upon the payment of $1.00 and proof of identification or production of a notarized release of information. If a person requests a criminal history check at the Metro Police Department and no records exists, they are given a stamped document stating that fact.

The Metro Police Department criminal history record service has a secondary purpose, that being the arrest or summons of persons who have outstanding criminal process. If a person requesting a record check has an outstanding warrant, they are arrested. If their record check has been requested by a third party, that party is notified that the printout cannot be provided due to the fact that there is outstanding process for the subject of the record check. This results in the service of many warrants and summons that otherwise would have not reached their intended subject.

According to Jefferson County practitioners, both Louisville Division of Police and the Jefferson County Police Department provide local criminal history checks upon payment of $3.00.

The Jefferson County Police Department requires a form but releases the records to anyone who requests them as long as the name, date of birth and social security number for the subject of the records check is provided.

How to Clean It Up

Incomplete records or obvious errors in a person's electronic rap sheet can be corrected by providing attested copies of the official court document to the agency promulgating the record. In some situations the court will transmit this information directly to the agency upon notice of the error.

Pursuant to state statute, matters can be deleted or separated by an order of expungment, segregation, or voiding made upon proper request to the court that presided over that proceeding. What follows is the statutory definition of each term and the effect that such an order has on the records.

Expungement and Segregation: KRS 431.078, 510.300, 17.142, H.B. 226

There have been several positive changes in criminal records law in recent years. In 1994, the Legislature enacted KRS 431.078 which mandates expungement of misdemeanor convictions under very specific circumstances. A petition for expungement of a misdemeanor conviction may be filed no sooner than five years after completion of the person's sentence, including any probationary period. Conviction of a sex offense or an offense committed against a child cannot be expunged under this section. The person cannot have had a previous felony offense or have been convicted of any other misdemeanor or violation in the five years *prior* to the conviction sought to be expunged, nor can any offense be pending at the time of the expungement request.

Upon entry of an expungement order the proceeding shall be deemed to never have occurred; all index references shall be deleted and upon inquiry the court may reply that no record exists with respect to that person. The person whose record is expunged does not have to disclose the fact on an application for employment, credit or any other application.

KRS 431.078 did not, however, apply to citizens who had never been convicted of the offenses for which they were charged. With the exception of KRS 510.300, which applies only to sex crimes alleged against a spouse, the 1980 segregation statute, KRS 17.142, was the only authority available to address dismissals and acquittals. That statute provided for the "segregation" of records of any "arrestee" who was acquitted, had all charges relating to an offense dismissed or had all charges relating to the offense withdrawn. "Law enforcement agencies" could be ordered by KRS 17.142 to segregate the person's records in a file separate and apart from records of convicted persons. This segregation statute does not make reference to persons charged by summons, nor does it give much guidance as to the responsibility of the clerk as to the original records.

The AOC, in reliance on *York v. Commonwealth*, 815 S.W.2d 415 (Ky.1991) maintains that because the court is the official repository of the records the clerk is not required to segregate files pursuant to this statute. For that reason the clerk will produce the records upon request, and they will be listed on the Courtnet computer. Law enforcement agencies must honor segregation orders, which results in the removal of segregated entries from criminal histories published by these agencies.

Fortunately, the problem of getting dismissed and acquitted charges expunged was addressed by House Bill 226, which was enacted during the 1996 legislative session and goes into effect July 15, 1996. A new section of KRS 431 was created to allow for the expungement of a criminal charge for which an acquittal had been returned or which had been dismissed *with prejudice*, but not in cases in which the dismissal was in exchange for a guilty plea to another offense. No distinction is made in the statute as to the degree or nature of the offense. An expungement motion can be filed no sooner than sixty days following the order of acquittal or dismissal by the court, and if sustained, orders all records relating to the arrest, charge or other matters arising out of the arrest or charge, sealed. HB 226 provides that the order shall be on a form provided by the AOC which shall list the agencies to whom the order is directed. These agencies are then required to certify to the court within sixty days that the required sealing has been completed. HB 226 does not limit the number of times the process can be used, or impose restrictions based on the person's record.

Although the 1994 statute, KRS 431.078 makes the expungement of a misdemeanor conviction mandatory if all the conditions required by the statute are met, the new section of KRS 431 created by HB 226 is discretionary. The court must make a finding that not only have the charges been dismissed with prejudice or acquitted, but that there are no current charges or proceedings pending relating to the matter for which the expungement is sought. After the expungement of dismissed or acquitted charges the proceedings in the matter shall be deemed "never to have occurred". This language is the same as that contained in KRS 431.078. The person whose record is expunged does not have to disclose the fact of the record or any other matter relating thereto on an application for employment, credit or any other type of application.

HB 226 is retroactive. This practioner would argue that any misdemeanor alleged to have been committed over a year ago could be expunged under this section even if it had been dismissed without prejudice because the misdemeanor statute of limitations of one year would prevent refiling. A joint motion to dismiss with prejudice and expunge could address both issues simultaneously. HB 226 also amended KRS 431.078 to require a $25.00 payment to the Circuit Clerk upon the entry of an order to seal the records of expunged convictions. No such payment is required for the expungement of acquittals or dismissals with prejudice.

HB 226 does not repeal the segregation statute, KRS 17.142; however, it adds to that statute a provision that records subject to expungement shall be sealed as provided in KRS Chapter 431. As a practical matter the term segregation should never be mentioned in an expungement order as it is a completely different remedy. Obviously, expungement is superior to segregation; however, in situations where a dismissal with prejudice is unavailable, segregation still provides for removal of the dismissed charge from law enforcement records.

Voiding: KRS 218A.275(9), 218A.276(8)

Two provisions relating only to drug possession offenses exist in KRS Chapter 218A and allow for the "voiding" of both felony and misdemeanor convictions. KRS 218A.275(9) allows for a discretionary voiding of any first offense controlled substance possession conviction upon satisfactory completion of treatment, probation or other sentence. The statute provides that a conviction voided under this subsection is not deemed a first offense for enhancement purposes or deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime. Voiding of a conviction under KRS 218A.275(9) may occur only once with respect to any person.

KRS 218A.276(8) provides for the discretionary voiding of a possession of marijuana conviction upon satisfactory completion of treatment, probation or other sentence. Unlike the KRS 218A.275(9) provision, the marijuana section does not restrict its application to only one use per person. Neither of the KRS 218A provisions set out a time restriction, but both require completion of sentence prior to application. For example, the payment of a fine could constitute satisfactory completion of sentence which then would allow for an immediate motion to void the conviction.

These sections allowing for convictions to be voided state specifically that convictions so voided shall not be deemed a conviction for enhancement purposes or for any purpose of disqualification or disability imposed by law upon conviction of a crime. For that reason a voided conviction must be treated in the same way as an expunged offense. KRS 218A.275(9) is the only way to remove a felony conviction from a criminal history with, of course, the exception of gubernatorial pardon as set out in Section 150 of the Kentucky Constitution.

Conclusion

The criminal justice system can only benefit by the correct and careful maintenance of its records whether they be in hard copy or electronic form. It is incumbent on the members of the bar to insure that these records are not only correct, but that persons who have been vindicated by the system are not forever tainted by the allegation of wrongdoing. What better way to protect the future of your client than by following every dismissal or acquittal with the proper expungement or segregation motion? Those isolated convictions which can be expunged should also be addressed in a timely fashion since the opportunity to clear them may be forfeited if new charges are lodged. With criminal records now available to anyone

interested in asking for them, it's all the more important to insure that they are correct and fair.

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Expungement of Criminal Records

Judge Paul Gold

Thank you for inviting me to share with you and the readers of *The Advocate* information concerning a new statute that will take effect this July. I am referring to House Bill 226, and I have enclosed a copy of the law with this letter. HB 226 provides that a person who has been charged with a criminal offense has the opportunity to petition the court to expunge the criminal record if the charges are dismissed with prejudice {see CR 41.02 (3) and *Commonwealth v. Hicks*, 869 S.W.2d 35 (Ky. 1994)} or that person is acquitted. HB 226 applies to **any** criminal offense. Current law (KRS 431.078) provides for an expungement procedure in certain misdemeanor cases five years after the date of the conviction. This has led to a bizarre situation where people who were erroneously charged, or acquitted would have a criminal record for many years, and others who were convicted of certain misdemeanors would be eligible to have a record expunged. HB 226 imposes a twenty five dollar fee, effective July 15th, for misdemeanant expungement motions for individuals who were convicted five years ago or longer.

The reason for my involvement in this matter resulted from a case that came before me in November of 1995. A criminal complaint had been taken against an individual alleging that he committed the offenses of burglary, rape and sodomy. An arrest warrant was issued for the alleged perpetrator. The police department determined that the individual named in the complaint was not the person who committed the offenses. Upon the motion of the county attorney, with the investigating police officer present I dismissed the cases. I informed the individual who had been charged that there would be a record of the matter on file, and that there were no provisions under current law to expunge the material. He inquired if prospective employers would be able to discover this matter. I replied that I thought they would. I related to the individual that there was a segregation statute, (KRS 17.142) and on the courts motion his record would be segregated. A recent high profile case in Jefferson County demonstrated that segregated cases are merely kept in a different file cabinet from other files, and that the public does have access to segregated records by simply making a request to view them. This case and others convinced me that it was time to try and correct the law. With the invaluable advice and assistance of House Judiciary Chair Mike Bowling from Middlesboro, who sponsored House Bill 226, and numerous defense lawyers, prosecutors and Judges, positive changes were made. I was invited to testify before the House and Senate Judiciary committees concerning the need for change in this area of law. The Bill easily passed the House and Senate. The Governor signed HB 226, and as previously stated it will take effect in July of this year.

The highlights of House Bill 226 are as follows:

1. It applies to any criminal offense, for which a person is found not guilty, or the charge(s) are dismissed with prejudice. (It does not apply to charges dismissed in exchange for pleas to other offenses.)

2. Motions for expungement shall be filed no sooner than sixty (60) days after the dismissal or acquittal.

3. All records pertaining to the case may be expunged, and ultimately sealed.

4. Notice is afforded to the Commonwealth of the expungement motion.

5. The issuance of orders of expungement are discretionary with the court.

6. Agencies ordered to expunge records must certify to the court that the procedure has taken place within sixty (60) days of receipt of the order.

7. The provisions of HB 226 as they relate to expungement are retroactive.

8. A person who has had a record expunged does not have to disclose the matter on histories for employment. credit or other applications.

I believe that there are many citizens in the Commonwealth who will benefit from this new law. It is my hope that with enough publicity attorneys will become aware of the provisions of this statute and be able to assist present and past clients through the implementation of this law. As with any new endeavor there may be unforeseen problems that require the bill to be amended at a future time. Please let me know of any questions or concerns that you may have about House Bill 226.

I appreciate the opportunity you have given me to publicize this very important legislation.

PAUL S. GOLD, Judge
Jefferson District Court
Jefferson Hall of Justice
600 W. Jefferson Street
Louisville, Kentucky 40202
Tel: (502) 595-4994

***EDITOR'S NOTE**: For a sample motion of expungement see page 23 in this issue.*

Representive Gross Lindsay on the 1996 General Assembly Action at the 24th Annual Public Defender Conference in Owensboro.

Dr. Lee Coleman on Medical Examination in Allege Sexual Abuse Cases at the 24th Annual Public Defender Conference in Owensboro.

Post-Employment Restrictions Under the Executive Branch Code of Ethics

The Executive Branch Code of Ethics, KRS 11A.010 *et seq.*, contains several "revolving door" provisions which regulate the conduct of former state employees. These provisions are designed to prevent a former state employee, for a period of time, from taking a position which involves matters in which he was directly involved as a state employee, from representing a person before a state agency in matters in which he was directly involved, and from acting as a lobbyist or lobbyist's employer. The Executive Branch Ethics Commission (the "Commission") is charged with the enforcement of these provisions.

The three post-employment provisions are found in KRS 11A.040(6), (7), and (8).

KRS 11A.040(6)

The first provision, KRS 11A.040(6), pertains only to officers, as defined in KRS 11A.010(7), and elected officials in the executive branch. The majority of executive branch employees are not covered by this provision.[1] An "officer" is defined as all major management personnel in the executive branch of state government, including persons acting in certain positions, such as general counsels, and "management personnel with procurement authority." KRS 11A.010(7). Under KRS 11A.040(6), a present or former officer and elected official is prohibited, for 6 months following the termination of employment with state government, from accepting employment, compensation, or any other economic benefit from any person or business which contracts or does business with the state in matters in which he was directly involved during the last 36 months of his tenure with the state. The officer or elected official is not prohibited from returning to the same business, firm, occupation or profession in which he was involved prior to his employment with state government, however, he must still not work on any matter in which he was directly involved during the last 36 months of his state employment. This includes returning to the same profession for which the employee was educated and licensed prior to state government service. This does not prohibit a former officer or elected public official from performing "ministerial functions," such as filing tax returns, filing applications for permits or licenses, or filing incorporation papers.

"Doing business with the state" encompasses relationships between a state agency and a person or business regulated by the state agency or receiving grants from the state agency. Any entity which is regulated by a state agency, or which receives grants from a state agency is considered to be doing business with the state under KRS 11A.040(6). A former officer or public servant is not prohibited from receiving moneys disbursed through entitlement programs.

The Commission has interpreted "matters in which he was directly involved" to mean any matter on which the public servant has worked, which he has supervised, or for which he had responsibility. Therefore, the head of an agency is considered to be "directly involved" in any matter which comes before the agency during his tenure, as he has responsibility for such matters.

KRS 11A.040(7)

The second provision, KRS 11A.040(7), applies to all former executive branch employees, not only officials and elected public servants. Thus, former part-time, seasonal, and summer employees are subject to these provisions. This provision prohibits a former public servant from acting as a lobbyist or employing a lobbyist for 1 year after the latter of the date the person leaves office or employment or the date the term of office to which the public servant was elected expires. The former public servant may not serve as either an executive agency lobbyist or legislative agent. An executive agency lobbyist is defined in KRS 11A.201(8) as a person engaged to influence executive agency decisions or to conduct executive agency

lobbying activity on a substantial basis. "Substantial basis" has been defined[2] as contacts which are intended to influence a decision that involves one or more disbursements of state funds in an amount of at least $5,000 per year. An "executive agency decision" involves a decision of an executive agency regarding the expenditure of funds or with respect to the award of a contract, grant, lease, or other arrangement by which those funds are distributed. KRS 11A.201(7).

KRS 11A.040(8)

The third provision, KRS 11A.040(8), which also applies to all former executive branch employees, prohibits a former public servant from representing a person or business before a state agency in a matter in which the former public servant was directly involved. This prohibition is for 1 year after the latter of the date the person leaves office or employment or the date the term of office to which the public servant was elected expires.

The term "representing" encompasses any activity for which the former employee would be communicating with the state agency on behalf of a person or business, including attending or providing legal counsel at an agency proceeding, writing a letter, or otherwise communicating with the state agency on behalf of someone. "In which he was directly involved" modifies the word "matter" and not the words "state agency," although the statute's wording is somewhat unclear. The former employee would be permitted to represent individuals before the state agency, provided that the employee was not directly involved with the entity or the subject matter during his tenure with the state agency.

EXCEPTIONS

The Code of Ethics provides a few exceptions to the post-employment provisions. A former public servant may immediately accept employment with a state institution of higher education following termination of his office or employment with the state. KRS 11A.120. A person employed by and acting on behalf of a state college or university is not considered to be an executive agency lobbyist, pursuant to KRS 11A.201(8)(b). Additionally, under KRS 11A.130, an officer or public servant employed by an agency that is privatized may immediately accept employment from the person or business which operates that privatized agency.

INVESTIGATIONS AND CIVIL & CRIMINAL PENALTIES

The Commission is empowered to conduct confidential preliminary investigations into potential violations of these, or any other provisions of the Code. If, in the course of an investigation, the Commission finds probable cause to believe a violation has occurred, the Commission may issue a confidential reprimand to the alleged violator or may vote to initiate an administrative hearing process. The Commission, upon a finding of clear and convincing proof of a violation of KRS 11A.040(6), (7) or (8), pursuant to an administrative hearing, may issue a cease-and-desist order, may require the filing of any reports, may publicly reprimand the violator, may recommend the removal or suspension of that person if still in office, and may order the payment of up to $2,000 in civil penalties for each violation. Violations of KRS 11A.040(6), (7) and (8) are also Class D felonies, pursuant to KRS 11A.990(1). Under KRS 11A.990(1)(b), any person who violates KRS 11A.040(6) and (7) shall be judged to have forfeited his office or employment held, notwithstanding any provision of KRS Chapter 18A. The Commission must refer violations of KRS 11A.040 to the Attorney General for prosecution and may turn over any evidence collected in the investigation or administrative hearing.

OBTAINING AN ADVISORY OPINION

The Commission issues advisory opinions on these and other provisions regarding the application of the Code of Ethics. You may obtain an advisory opinion by writing the Commission at Room 273, Capitol Annex, 702 Capitol Avenue, Frankfort, Kentucky, 40601. You may also call the Commission's staff at (502) 564-7954 regarding any general questions pertaining to the Code of Ethics.

FOOTNOTES

[1]As originally enacted in 1992, this provision applied to all executive branch employees. However, House Bill 851 amended this provision as of July 15, 1994 to restrict its application to officers and elected officials.

[2]Senate Bill 233 amends KRS 11A.201, effective July 15, 1996, to include this definition of "substantial basis."

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Connelly First Recipient of Heyburn Public Service Award

Allison Connelly

Kentucky's Public Advocate **Allison Connelly** has been named by the University of Kentucky College of Law as the first recipient of the **Henry R. Heyburn Public Service Award.**

This prestigious award was established by U.S. District John G. Heyburn II in memory of his father. The award recognizes University of Kentucky Law alumni who have distinguished the college and the profession through their efforts in public service. Ms. Connelly, Kentucky's first woman Public Advocate, and a career public defender, not only administers Kentucky's statewide public defender system, but also has served as a visiting and adjunct professor at the College of Law since 1986. Ms. Connelly was presented with the 1995-96 Heyburn Public Service Award at the Kentucky Bar Association's Convention in Lexington on June 20, 1996, at the Hyatt Regency.

David E. Shipley, Dean of the University of Kentucky Law School, said, "I could not think of a better person to be the first recipient to this important award because her career has been dedicated to serving the public with the Department of Public Advocacy. Added to that work, she has been an outstanding teacher at the law school for years where she has influenced many students on the lawyer's critical role to serve the public."

William Fortune, professor of law at U.K. Law School, who has known Ms. Connelly for many years observed, "I've never met anyone who has as much concern for other people as Allison Connelly. She's an excellent role model for the law students she's taught."

M.K. v. Wallace: Setting the Stage for Post-Dispositional Legal Services for Juveniles in Kentucky

In the advent of tougher legislative directives which move more and more juvenile offenders into the adult penal system, and which stiffen penalties for juvenile offenders generally, advocates by necessity must develop additional strategies to protect the legal interests of their clients. Kentucky has been a willing participant in this national trend as evidence in the last two legislative sessions.

With more significant consequences being imposed upon juvenile offenders, post-dispositional and post-conviction legal services have become a crucial means of upholding certain fundamental rights of these juveniles. Kentucky is slated to become one of first states to develop a statewide system of legal representation to provide attorneys for post-dispositional legal services to juveniles in state residential treatment facilities. As a result of a recent settlement reached in ***M.K. v. Wallace***, Case No. 93-213 (E.D. Ky. 1995) the Department of Public Advocacy, through a Memorandum of Agreement with the Cabinet for Human Resources, will launch its new juvenile service program to juveniles in these facilities in July, 1996.

M.K. was a fifteen (15) year old female committed as delinquent to the Cabinet for Human Resources who was moved through a string of jails, and ultimately to a group home placement with no representation by counsel. She filed a §1983 claim on behalf of herself and all youth committed as delinquent of public offenders who were in custody in CHR facilities, alleging a violation of her constitutional right to access the courts under the First Amendment, the Fourteenth Amendment Due Process and Equal Protection Clauses of the U.S. Constitution, and the applicable slate constitutional provisions. Specifically, she complained that the state failed to recognize its affirmative duty to provide counsel to her on matters relating to her confinement, and that without such, she was unable as a minor to gain meaningful access to the courts to redress grievances. She brought suit for prospective, injunctive relief against Peggy Wallace, the Commissioner for the Department of Social Services, CHR, as a representative of the Commonwealth of Kentucky.

The right of prisoners to gain meaningful access to the courts, as found in the First Amendment and Due Process and Equal Protection Clauses of the 14th Amendment to the U.S. Constitution, has been recognized by the U.S. Supreme Court in a series of cases ranging back to the 1940's.[1] One of the most significant advances in this realm was made in *Bounds v. Smith*,[2] where the Supreme Court held that the right to access the courts imposes an affirmative obligation on the state to assist prisoners who wish to prosecute civil claims, an obligation which the state does not have with regard to other citizens. Such inmate access must be "adequate, effective and meaningful.[3] To insure meaningful access, *Bounds* required that prisons provide inmates with "adequate law libraries or adequate assistance with persons trained in the law.[4]

Bounds did not impose any one mechanism required by the Constitution under which the state could fulfill its affirmative obligation to assist prisoners in pursuing their right to access to the courts. Lower courts, however, have considered a number of factors in assessing the extent of the state's duty to include the following: 1) the duration of the confinement, 2) the nature of the legal rights at issue and 3) the number of inmates likely to require a certain form of legal assistance during the period of confinement at issue.[5]

Only two Courts have addressed the issue of how the right of access is applied to minors. In 1977, a Mississippi federal district court held in *Morgan v. Sproat*[6] that juveniles committed to state training schools are, no less than adult counterparts, entitled to reasonable access to the court. The court found that the mere provi-

sion of a law library was insufficient to protect the rights of the youngsters before it since the majority were of "subnormal intellectual capacity,"[7] end "the students' ages, their lack of experience with the criminal system, and their relatively short confinement [which] means that [in contrast to adult facilities] there cannot be a system of writ writers...[8] The consent decree which was approved required the training schools to notify current and future residents that they were entitled to contact specific legal service organizations for assistance by means of posting legal services notices in a location accessible to the residents.[9] Additionally, the court ordered the institutions to facilitate access to counsel by assisting residents in writing requests for representation and delivering the requests immediately to the appropriate legal service programs.[10]

The Sixth Circuit Court of Appeals also addressed the issue of access to the courts by juveniles in confinement in *John L. v. Adams*,[11] a Tennessee class action case alleging violations under §1983 on behalf of juveniles held in state custody in residential treatment facilities. The Court distinguished between two categories of claims: those which impose an affirmative obligation of the state to assist prison access, and those which the state is merely barred from impeding.[12] The Court restricted juveniles' claims in the former instance to those involving a violation of a federal constitutional and civil rights claims, and specifically excluded claims arising solely under state civil law.[13]

The Consent Decree in *M.K. v. Wallace* more closely mirrors the holding of *John L.* case in imposing a duty on the Commonwealth to provide a system of legal services for juveniles being held in state residential treatment facilities who are committed to the Commonwealth as public or youthful offenders.[14] Currently, the Cabinet for Human Resources has contracted with the Department for Public Advocacy effective June 1, 1996 to develop and implement a statewide system of legal services for juveniles placed or confined in state residential treatment facilities.[15] Such services include those involving legal claims arising "from or related to the fact, duration or conditions of confinement, or any claims cognizable under 42 U.S.C. §1983 which involve violations of federal statutory or constitutional rights to the extent that such claims are related to the juvenile's confinement." Claims which arise solely under state law which are civil in nature are not included, as well as those which are the legal responsibility of the Department of Public Advocacy pursuant to KRS Chapter 31.

The Cabinet for Human Resources must inform juveniles upon their admission to a residential treatment facility that such services are available and the process to obtain an appointment with an attorney, including the days which the legal service provider will be scheduled to visit the facility. The Cabinet is also required to permit provider staff access to the facilities during reasonable hours to investigate disputes, provide appropriate private consultation areas, and allow telephone access by residents.

The current contract for post-dispositional legal services with DPA promises to play an important role it this agency's increasing emphasis on juvenile representation. Effective May 16, 1996, Administrative Order 96-01 authorized the Public Advocate to establish a Juvenile Post-Conviction Section within the Post-Trial Services Branch which shall be responsible for the provision of legal defense services to juvenile offenders incarcerated in residential treatment facilities. Nine, permanent, full-time classified positions are established within DPA to be used exclusively for this program during the period of the Memorandum of Agreement with CHR.

While children still tend too often to be second class citizens in the legal arena, *M.K. v. Wallace* is one step toward a greater recognition of their rights as individuals when the state has intervened to restrict their liberty. The implementation of this Consent Decree is long awaited, and should play an important role in the Department's overall advocacy efforts in the years to come.

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FOOTNOTES

[1]See *Ex Parte Hull*, 312 U.S. 546, 549 (1941) "[T]he state and its officers may not abridge or impair [the prisoner's] right to apply to a federal court for a writ of habeas corpus."; *Murray v. Giarratano*, 492 U.S. 1, 227, n. (1989), The Supreme Court has also found roots for the right of access in the Equal Protection Clause.; *Wolff McDonnell*, 418 U.S. 539, 556 (1974) (citing *Younger v. Gilmore*, 404 U.S. 15 (1971)); *Johnson v. Avery*, 393 U.S. 483, 385 (1969); and *Bounds v. Smith*, 430 U.S. 817, 821 (1977).

[2]*Id.* at 828.

[3]*Id.* at 822.

[4]*Id.* at 828 (reaffirming *Younger v. Gilmore*, 494 U.S. 15 (1971).

[5]See *Berry v. Department of Corrections*, 697 P.2d 711, 714 (Ariz.Ct.App. 1985) (citing *Cruz v. Hauck*, 515 F.2d 322, 332, 333 (5th Cir. 1975); *Bounds v. Smith*, 430 U.S. 817, 827-28 (1977).

[6]432 F.Supp. 1130, 1135 (S.D. Miss. 1977).

[7]*Id.* at 1159-60.

[8]*Id.* at 1158.

[9]*Id.* at 1159.

[10]*Id.*

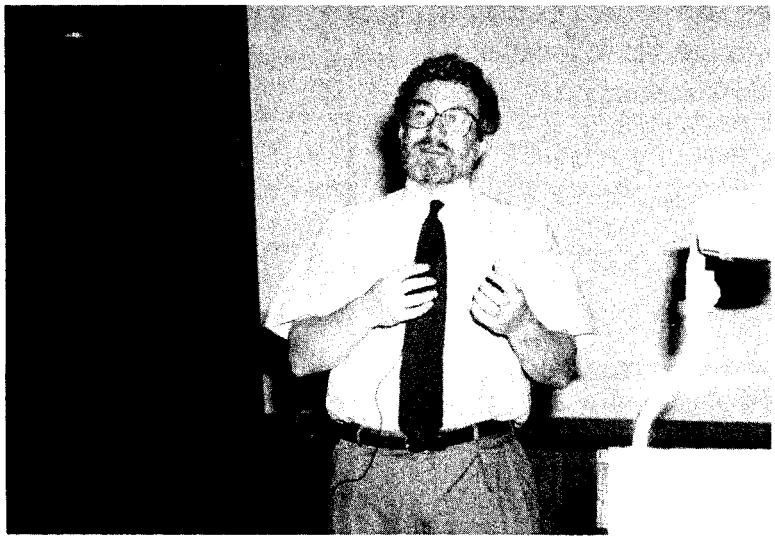
[11]969 F.2d 228 (6th Cir. 1992).

[12]*Id.* at 235.

[13]But note, the Court goes on to recognize that "Merely because juvenile adjudications in Tennessee are designated by state law as civil, as opposed to criminal, in nature, it is not the case that an appeal of a commitment order is a civil matter based purely on state law. First by holding that jeopardy attaches in a juvenile adjudication, the Supreme Court has acknowledged that such proceedings are criminal in nature, regardless of how they are designated under state law. *Breed v. Jones*, 421 U.S. 519, 529, 95 S.Ct. 1779, 1785, 44 L.Ed 2d 346 (1975). In addition, there is an independent constitutional right to counsel for juvenile appeals that is grounded in the Sixth Amendment's right to counsel as applied to the states through the Fourteenth Amendment's Due Process Clause.

[14]The language generally denotes the "Commonwealth" as opposed to a specific agency or cabinet since this is likely to change with HB #117.

[15]This includes Mayfield Boys Treatment Center, Owensboro Treatment Center, Green River Boys Camp, Northern Kentucky Treatment Center, Lincoln Village Treatment Center, Lake Cumberland Boys Camp, Cardinal Treatment Center, Central Kentucky Treatment Center, Morehead Treatment Center, KCH Rice-Audubon Treatment Centers, Johnson-Breckinridge Treatment Center, Woodsbend Boys Camp, and Bluegrass Treatment Center.



Mark Soler from *Youth Law Center* in Washington, D.C. on Juvenile Justice at the 24th Annual Conference in Owensboro

JUROR ATTITUDES & Getting a Clearer View

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The fully influenced persuadee likes what you promise, fears what you say is imminent, hates what you censure, embraces what you command, regrets whatever you build up as regrettable, rejoices at whatever you say is cause for rejoicing, sympathizes with those whose wretchedness your words bring before his very eyes, shuns those whom you admonish him to shun and, in whatever other ways your high eloquence can affect the minds of your hearers, bringing them not merely to know what should be done, but to do what they know should be done.

St. Augustine
De Doctrina Christina, 500 A.D.

That's pretty much what I'd like to be doing when I talk to jurors in trial. Scholars have spent 1500 years since that time trying to figure out just how to get there!

In order to persuade, it is useful to know the pre-existing attitudes of the intended target. As lawyers, we ask jurors questions designed to uncover their attitudes, but frequently receive only a blurred glimpse of the real thing.

It is important to remember that ATTITUDE is reflected by three different components:

- **what a person *thinks***
- **how a person *feels***
- **how a person actually *behaves***

A juror can tell us something about what they think, but observation might reveal that this is not consistent with their actual behavior. A juror can tell us something they have done, but that may not reflect their true feelings about that behavior. Questions that attempt to explore all three aspects of attitude, while tedious, are always more accurate measures of *real* attitude.

While there are three components that make up what an individual's attitude may be, there are two critical aspects of attitude largely ignored by attorneys during jury selection.

Predicting from Attitude
requires information about:

1. The **extremity of** a juror's position.
2. The **strength of** a juror's position.

A person may hold an extreme position, but it is accompanied with little feeling. Another person may voice what appears to be a middle-of-the-road position with considerable passion.

Model for Measuring
strength and extremity
of Juror Attitude

Some people feel [ ].
Others feel [ ].

Where would you place yourself on this scale?

[attitude #1] = 1
[attitude #2] = 7

How **strongly** do you feel about that?

Do you feel:
extremely strongly, very strongly, somewhat strongly, not at all strongly?

In the form of written questions in a *questionnaire*, these items are more effective predictors of juror positions on issues important to the trial than flat questions, which simply ask a juror's opinion. These same questions, however, can, and should be used during *oral voir dire*, in situations where the court did not permit written questionnaires or severely limited them.

Written questionnaires on important attitudes are more accurate reports, in light of studies which consistently show that people who are aware of either the answers of other people or what is popular or socially acceptable will alter their own responses. As a result, this supports an argument in favor of written questions on certain topics.

As a last resort, if the question must be asked orally in court, ask to have the jurors jot down their individual answers on a piece of paper, to be used to reply when it is their turn to respond. This may help them be little more honest when called on, or at least allow them to talk about what they *first* wrote down if they are beginning to change their position in light of the open-court discussion.

Examples of questions designed to elicit ATTITUDES about relevant trial issues

Some people feel that if a witness takes an oath in court to tell the truth, that the jurors must accept that testimony as true. Other people feel that witnesses usually distort the truth to make themselves look good. If a 1 means you feel witnesses who take an oath should be believed, and a 7 means you think witnesses usually distort the facts to benefit themselves, **where would you be** on that scale? *[Answer]*

How strongly do you feel about your position? Do you feel extremely strongly, very strongly, somewhat strongly, or not at all strongly?

This case involves a lawsuit in which the only way the court will allow jurors to give compensation is in money or dollars. Some people feel that lawsuits asking for money are wrong, even if it means a wrongfully injured person will get nothing for their injuries. Others feel that lawsuits are the best way for injured people to try to recover something for the loss they have suffered, even if real compensation means awarding millions of dollars to one person.

If a 1 means you feel any lawsuit for money is wrong, and a 7 means you feel lawsuits and money awards are the best way to deal with wrongful injuries, where would you be on that scale? *[Answer]*

How strongly do you feel about your opinion? Do you feel not at all strongly, somewhat strongly, very strongly, or extremely strongly?

It is expected that scientific experts [doctors] [police officers] will testify in this case. Some people feel that experts are automatically more believable than other witnesses, because they are experts. Other people feel that experts are generally not to be trusted because they are too confident and exaggerate.

If a 1 means you feel that experts are automatically more believable than other witnesses, and a 7 means you feel that experts are generally not to be trusted, where would you be on that scale? *[Answer]*

How strongly do you feel about that? Do you feel not at all strongly, somewhat strongly, very strongly, extremely strongly?

Additional Question Formats that Elicit Juror Attitudes

Please tell me whether you agree or disagree with the following statement:

During jury deliberations, every juror should give respect to the opinions and ideas expressed by each juror.

How strongly do you feel about that? Do you feel extremely strongly, very strongly, somewhat strongly, not at all strongly?

Would you share the **reasons** you have for feeling the way you do?

The mere number of witnesses called to prove a point is never, by itself, sufficient to prove any fact in a trial. Some jurors feel that if more than one witness testifies about some fact, the juror must accept it. What are your own opinions about that? Can you give us an example?

Please tell me whether you agree or disagree with the following statement about credibility of witnesses:

During deliberations, if some jurors believed a witness and others did not, everyone should go along with the majority on this point.

[Answer] How strongly do you feel about that?

Do you believe that witnesses can be mistaken? Under what circumstances? What would you use as a juror to help you determine if someone should be believed on a point? Can you share with us why that is important to you in making the decision about believing a witness?

• *[Following any juror answer:]*

What are your reasons for that opinion?

Tell us some more about **why** you have come to feel this way.

Some people recognize that they would find it very difficult to give a high money award of damages in any case, because money doesn't fix a person's pain. Tell us your feelings about that. *[Answer]* What experiences have you or anyone close to you had that have influenced your opinions?

• **Using prior behavior to predict--**

In order to serve as jurors, each person must talk to and listen to other members of the jury during deliberations. Have you had an experience before in working in a small decision-making group? Tell us about that. What were the positive parts of that experience? The negative parts? Why?

Has anyone had experience as the formal leader or chairperson in charge of a group? What was that like for you? Can you give us an example?

You may hear testimony from a psychologist or psychiatrist (or counselor) in this case. What thoughts do you have about accepting the testimony from someone in this profession?

Give us an example of something they might say that would not have value for you. Why?

In what way do you feel they might help your decision? What are your reasons?

Can you explain some more about your thoughts on that to us?

Each juror will have to rely on their own memory about the testimony in this case, which may be many days or weeks before. Where would you place yourself on this scale:

7: I totally trust my own memory, even if other people strongly disagree with me about what happened

1: I would tend to rely on the memory of others if people disagreed with my memory

How strongly do you feel about that? Why?

What experiences have you had where you have been required to listen carefully to something and remember it much later?

Prediction of both an individual's reaction to testimony in a trial, as well as reaction to the issues during deliberations and, further, juror *voting behavior* becomes more reliable when we design questions to get at attitudes from many different directions:

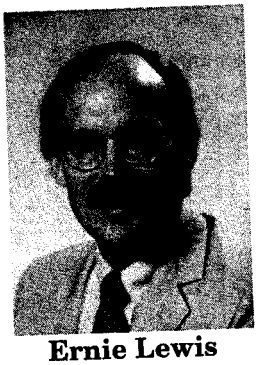
- *What is the attitude?*
- *What experiences did it come from?*
- *What behavior concerning it has the juror engaged in before?*
- *How extreme is the juror on the continuum of possible opinions?*

and

- *How strong a commitment is the juror willing to claim to the attitude?*

□

Plain View



Ernie Lewis

Deemer v. Commonwealth,
920 S.W.2d 48 (Ky. 1996)

United States v. Shamaeizadeh,
80 F.3d 1131 (6th Cir. 1996)

United States v. Guzman,
75 F.3d 1090 (6th Cir. 1996)

Deemer v. Commonwealth,
920 S.W.2d 48 (Ky. 1996)

In *Katz v. United States*, 389 U.S. 347 (1967), a new era in search and seizure law began in this country. That case, which replaced a property/trespass analysis with the reasonable expectation of privacy analysis, has had numerous ramifications. See for example *Rakas v. Illinois*, 439 U.S. 238 (1978), *California v. Greenwood*, 486 U.S. 35 (1988).

The Kentucky Supreme Court has issued an opinion influenced by *Katz*. In this case, Deemer took six rolls of film to Walgreen for processing. The pictures were of children being depicted in sexually explicit poses. Walgreen sent the pictures to Qualex. Qualex discovered the sexually explicit poses during developing, and according to their policy, contacted the police. The police viewed the prints, and instructed the Qualex employee to deliver the pictures to Walgreen. Deemer was contacted by Walgreen. When he did not pick up his pictures, a search warrant was issued. Execution of the warrant revealed further sexually explicit pictures of children. Deemer eventually entered a conditional guilty plea to 30 years in prison.

Justice Lambert wrote the opinion for a unanimous Court affirming the trial court's having overruled the defendant's motion to suppress. The Court held that the defendant's subjective expectation of privacy in the roll of film was not one that society was prepared to recognize as being reasonable. "When an illegal item is revealed to third parties, an examination at their insistence by the government does not violate the Fourth Amendment." Further, the act of reopening the container was not a search requiring a warrant. The Court also rejected out of hand that there were any First Amend-

ment implications of the photographs creating additional privacy protections.

United States v. Shamaeizadeh,
80 F.3d 1131 (6th Cir. 1996)

This is a highly fact-bound decision by the Sixth Circuit. It was litigated in part by Mark Stanziano of Somerset. The decision was written by Judge Jones, joined by Judges Kennedy and Holschuh.

While the facts are complex, a brief description of what occurred is important to understand the Court's holding. A woman named Schmitt called the Richmond Police Department complaining of a possible burglary at her house. She shared the upstairs with Shamaeizadeh, while two other codefendants, Reed and Ford, rented the downstairs. An officer came to the house, and Schmitt asked him to search the upstairs and the downstairs for burglars. After the search, the officer called a second officer, and a second search was conducted, this time without Schmitt's permission, and without a warrant. A third search was conducted thereafter under similar conditions. Finally, a search warrant was obtained, and 393 marijuana plants were located during the execution of the warrant.

After a hearing on the motion to suppress, the district court adopted the magistrate's recommendation finding that while the first search was constitutional, the others were not, and that the redacted affidavit was insufficient to demonstrate probable cause regarding the downstairs apartment. On appeal, the Government challenged only the decision that the redacted affidavit did not demonstrate probable cause.

The Court affirmed the lower court's decision. They analyzed the probable cause determination using *Illinois v. Gates*, 462 U.S. 213 (1983), which looked to the "basis of the informant's knowledge; 2) the reliability of the informant; and 3) the corroborative evidence presented by the government." Here, Schmitt had stated that she believed that other occupants of the house were growing marijuana in the downstairs apartment. However, because it was a separate living unit, and because she did not specifically say that Reed and Ford were growing marijuana in the apartment, this "lacks the particularity needed to establish probable cause for the basement apartment." Because Schmitt's statement was insufficient on its face, the Court did not consider Schmitt's reliability. Finally, the Court looked at Officer Cunigan's statement that he had smelled growing marijuana from the upstairs apartment. However, his redacted statement said nothing about the downstairs apartment. As a result, the Court found that probable cause was not demonstrated in the redacted statement, and affirmed the decision of the district court.

United States v. Guzman
75 F.3d 1090 (6th Cir. 1996)

Guzman was riding in a bus in Memphis, Tennessee, when he encountered officers with dogs working the buses. After an encounter with Guzman, during which the dog was "sniffing real hard," the officers got on the bus and attempted to find the owners of particular baggage located in the overhead baggage area. One officer placed his hand on Guzman's bag, felt several hard bricks inside, and began to talk with Guzman about it. Eventually, after Guzman demanded that the officer obtain "paper" before searching the bag, Guzman was asked to step outside with the bag. He consented to the dogs sniffing his bag; the dogs alerted. Thereafter, a warrant was executed, and 6000 grams of cocaine was found.

The Court, in an opinion written by Judge Milburn and joined by Judges Engel and Weber affirmed the lower court opinion overruling the motion to suppress. First, the Court held that Guzman did not have a reasonable expectation of privacy in the exterior of his bag which had been placed in an overhead compartment. The Court further held that Guzman was seized for Fourth Amendment purposes when he was asked to step off the bus. The Court finally held that there was probable cause to seize Guzman and his bag, based upon the officer's having recognized bricks of drugs when he touched Guzman's bag, and the officer's dog having been "interested" in Guzman's bag.

Short View

1. ***State v. Williams***, 58 Cr.L. 1574 (Neb. Sup.Ct. 3/8/96); ***United States v. Baker***, 58 Cr. L. 1573 (4th Cir. 3/13/96). Two courts have addressed the outer limits of *Terry*, and have pushed that limit further out. In

Baker, the Fourth Circuit allowed an officer to lift up a person's shirt upon observing a "bulge." "[T]he district court erroneously concluded that a patdown frisk was the only permissible method of conducting a *Terry* search...Balancing the officer's interest in self-protection against the resulting intrusion upon Baker's personal security, we hold that Officer Pope's direction was reasonable under the circumstances." In *Williams*, the Court allowed an officer to force open a clenched fist during a *Terry* frisk. "If, under *Terry*, a police officer is justified in conducting a protective weapons search based upon the officer's reasonable belief that a suspect may be armed and dangerous, such a weapons search would necessarily include the right to search a clenched fist."

2. ***Alward v. State***, 58 Cr.L. 1576 (Nev.Sup. Ct. 2/29/96). This is an important case for you campers out there. Here, the Nevada Supreme Court held that a camper has a reasonable expectation of privacy in his tent. "[H]olding that temporary residence at a hotel ensures Fourth Amendment protections, while temporary residence in a tent does not, would limit the protections of the Fourth Amendment to those who could afford them...Thus, we conclude that Alward had a reasonable expectation of privacy in the tent such that the warrantless search of the tent violated the Fourth Amendment."

3. ***State v. Morris***, 59 Cr.L. 1033 (Vermont 3/22/96). Under the Vermont Constitution, the police may not search trash placed at the curb, rejecting *California v. Greenwood*, 486 U.S. 1625 (1988). "[P]eople reasonably expect that, once their refuse is placed on the curb in the customary and accepted manner, it will be collected, taken to the landfill, and commingled with other garbage without being intercepted and examined by the police. The Vermont Constitution does not require the residents of this state to employ extraordinary or unlawful means to keep government authorities from examining discarded private effects."

4. ***State v. Cada***, 59 Cr.L. 1034 (Idaho Ct. App. 3/29/96). The police may not go onto a driveway between a house and a garage 110 feet away. That area, under the Idaho Constitution, is within the curtilage; thus, when the police smelled marijuana while in a place where they had no right to be, and used evidence from that to obtain a search warrant, the evidence obtained in executing the warrant had to be suppressed. This opinion rejects the interpretation of the scope of the curtilage in *United States v. Dunn*, 480 U.S. 294 (1987)."[W]e decline to adopt the *Dunn* formulation. Instead, we adhere to the description of curtilage heretofore applied by Idaho courts, which encompasses the area, including domestic buildings, immediately adjacent to a home which a reasonable person may expect to remain private even though it is accessible to the public."

5. ***United States v. Bayless***, 59 Cr.L. 1035 (DC SNY 4/1/96). No observer of the court system could be less than shaken by this opinion, and the pressures placed upon this judge prior to this opinion. Here, Judge Harold Baer, Jr., a federal district judge, reversed a prior decision suppressing evidence consisting of about 80 pounds of narcotics. He does so after taking additional proof, and crediting testimony newly offered by the police. He had previously suppressed evidence following testimony by the sole police officer.

   That is not the disturbing part of this case. Following his initial decision, presidential nominee Bob Dole called for Baer's impeachment. Dole has included in his stump speech criticism of President Clinton for appointing "liberal judges." Thereafter, presidential press secretary Michael McCurry said that President Clinton might ask for Baer's resignation if he did not reverse himself. It was thereafter that Baer wrote his opinion doing that which was demanded by the President.

   Criticism of Clinton's pressure has been strong. Columnist Carl Rowan said that "in one foolish moment [Clinton] left the federal judiciary naked to enemies who have little reverence for the Constitution. We cannot afford to have our federal judges trembling at the prospect of criticism from desperate political partisans." Judge Jon O. Newman of the Second Circuit, joined by three other federal judges, criticized Dole and Clinton for their "extraordinary intimidation" which threatened to "weaken the constitutional structure of this Nation."

6. ***Lynch v. Commonwealth***. This is an unpublished decision of the Kentucky Court of Appeals, issued on April 12, 1996. While the case goes against the accused, it is an interesting issue and should be published. Here, the Court holds that a person whose telephone records are subpoenaed by a grand jury has no reasonable expectation of privacy in those records. The Court specifically relied upon *Smith v. Maryland*, 442 U.S. 735 (1979), which had held that a person has no reasonable expectation of privacy in the phone numbers dialed from his home. The Court here was unpersuaded that *Smith* was distinguishable based upon the fact that the numbers in this case were all unlisted. "'The Court does not find that obtaining an unlisted number can create any legitimate expectation of privacy against a grand jury subpoena. As a result, the Defendants lack standing to challenge the issuance of the grand jury subpoenas duces tecum.'"

7. ***People v. Gonzalez***, 59 Cr.L. 1171 (NY Ct. App. 5/2/96). A sister consented to the search of the apartment she shared with her brother and sometimes the accused. The police used this consent to search a zipped duffel bag hidden under the mattress of the bed sometimes slept in by the defendant. The New York Court of Appeals held that the sister's consent to a search of the apartment did not extend to the duffel bag, and thus the search was illegal and the evidence seized (a murder weapon) had to be suppressed.

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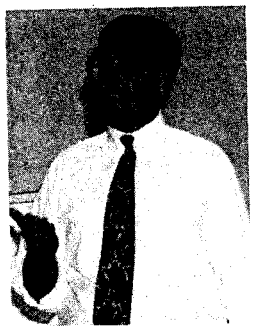
The Night I Spent in Jail

- Ruby Marshall

I never thought I'd see the day,
I'd have to go to jail.
But this woman wouldn't stop,
She just kept raising hell.
My son stopped dating her daughter
On a Friday night,
And when she saw me on Sunday
She was ready to pick a fight.
She threatened me and called me things
I'd never heard before
And late that night I heard the cops
Knocking on my door.
In their hands they had a warrant for me
For Wanton Endangerment in second degree.
I just shook my head in disbelieve
When I walked in the jail house
My son right by my side
The jailer couldn't believe it
I could see it in his eyes
He talked with us and picked and sung
And made it seem alright.
Then they took us to our cells
And that's where we spent the night
I spent the night in jail
It was the worse night of my life,
I paid for things I didn't do
And I know that ain't right.
Then came our day to go to court,
I was shaking in my shoes,
I knew I wasn't guilty,
but I didn't know what to do.
That Judge was fair and honest,
that was plain to see,
And when he finally called my name,
he said... How do you pled.
Then somewhere from behind me,
and I slowly turned around,
This little Lady Lawyer,
That wasn't even from out town
Stood up and said Your Honor,
I will take this case,
The room was filled with silences,
And a smile came on my face.
Well this went on for months and months
And I got to know her well,
We finally had a jury trial,
To try and end this hell.
The jury was selected,
And as they heard the case,
They listened very carefully
With no expression on their face.
The trial was finally over,
Everyone had heard enough,
And when the Judge read the verdict,
The favor was for us.
There were smiles in that courtroom,
That I hadn't seen all day,
They all knew that we weren't guilty,
And that's all I have to say.

Evidence:
Some of This and Some of That



David Niehaus

Daniel v. Commonwealth,
905 S.W.2d 76, 78 (Ky. 1995)

Partin v. Commonwealth,
918 S.W.2d 219 (Ky. 1996)

Perdue v. Commonwealth,
916 S.W.2d 148 (Ky. 1995)

Davis v. Commonwealth,
899 S.W.2d 487 (Ky. 1995)

Eldred v. Commonwealth,
906 S.W.2d 694 (Ky. 1994)

Tungate v. Commonwealth,
901 S.W.2d 41 (Ky. 1995)

Rowland v. Commonwealth,
901 S.W.2d 871 (Ky. 1995)

Mitchell v. Commonwealth,
908 S.W.2d 100 (Ky. 1995)

Clark v. Hauck Manufacturing Co.,
910 S.W.2d 247 (Ky. 1995)

Public Parks v. Modlin,
901 S.W.2d 876 (Ky.App. 1995)

Pickard Chrysler, Inc. v. Sizemore,
918 S.W.2d 736 (Ky.App. 1995)

Harman v. Commonwealth,
898 S.W.2d 486 (Ky. 1995)

Smith v. Commonwealth,
904 S.W.2d 220 (Ky. 1995)

Chumbler v. Commonwealth,
905 S.W.2d 488 (Ky. 1995)

Fields v. Commonwealth,
905 S.W.2d 510 (Ky. App. 1995)

Tucker v. Commonwealth,
916 S.W.2d 181 (Ky. 1996)

This is a good point to see what the appellate courts have been up to over the last year or so.

404(b): Rule of Exclusion

As usual, KRE 404(b) figured prominently with ten mentions in various opinions. However, there is only so much that can be written about KRE 404(b).

The bottom line of this rule is that (1) there must be some legitimate evidentiary use for the other acts, and (2) there must be a pretty convincing argument that the jury is not more likely to use it as bad character evidence (did it before, did it this time) than for the proper purpose before the other acts can be admitted.

Kentucky interprets KRE 404(b) as a rule of exclusion. It is not the defendant's burden to explain away any possible legitimate use. It is the prosecution's (or in some cases the co-defendant's) duty to show the legitimate evidentiary use. Once you get past this, it all depends on the circumstances of the case, the nature of the evidence, and the skill of the lawyers arguing the point. The method of analysis, first adopted in *Drumm*, is repeated in the case of ***Daniel v. Commonwealth***, 905 S.W.2d 76, 78 (Ky. 1995). Lawyers can use these criteria, but it pretty much comes down to convincing the judge one way or the other.

103(a): Avowal Testimony

Some other trends have become quite apparent. First, the Supreme Court has cleared up a question that arose under KRE 103(a). For four years, people have wondered whether an avowal may be in "offer of proof" format by the attorney, or whether the avowal must be the more typical question and answer. In ***Partin v.***

Commonwealth, 918 S.W.2d 219 (Ky. 1996) the Supreme Court has cleared up the problem - the avowal must be in testimony format. In that case, the court said that it did not know whether there was error because it did not know what the witness would have said. Because the duty of making an avowal falls almost entirely on defense counsel, it is necessary to keep this case in mind and to actually do the avowal.

Preservation

This is very important because the Supreme Court is becoming more and more concerned and vocal about appellate lawyers raising unpreserved issues. Just as the Supreme Court several years chastised the Commonwealth for introducing all manner of pseudo-scientific junk and hearsay in sex abuse cases, the Supreme Court is beginning to take the same tone with unpreserved error in criminal cases. In ***Perdue v. Commonwealth***, 916 S.W.2d 148 (Ky. 1995), the Court observed that a witness testified but that because the witness had no personal knowledge the testimony should have been excluded. However, the Court noted the defendant failed to object and therefore the court intended to do nothing.

Perdue is an important case because it announces a standard for review of non-preserved evidence questions. There, the Supreme Court stated that it will not rule that evidence should have been excluded, in the absence of an objection, unless the court concludes that there are no facts or circumstances imaginable which would have justified the admission of the evidence. This is a pretty daunting standard for appellate counsel to face.

On behalf of all appellate attorneys, please take pains to preserve issues. It is important to make sure that these technical matters get done. It is difficult to remember to keep an avowal witness available in the middle of a brawl over the admission of evidence. But it appears that the Supreme Court is going to take an increasingly unforgiving view of unpreserved error. Keep in mind that there are three new members on the court whose views are still somewhat unknown. But it is unreasonable to fail to preserve an issue but still hope that the Court will find an error harmful enough to do something about whether there is an objection or not.

Out-of-State Priors

There is some better news for defense lawyers. In ***Davis v. Commonwealth***, 899 S.W.2d 487 (Ky. 1995), the Court relied on the Kentucky Evidence Rules to hold that out of state priors that were not authenticated by an official of that state were inadmissible unless introduced through a witness who had personal knowledge of them. In *Davis*, the question was the admissibility of out of state priors for PFO purposes. The rule in this case is that without a certification or an act of Congress exemplification, out of state priors cannot be admitted because they are not authenticated. [KRE 901; 902].

Physicians/Patient Privilege

In another interesting turn, the existence of a "physician's privilege" was again hinted at in ***Eldred v. Commonwealth***, 906 S.W.2d 694 (Ky. 1994). Last year *Hardin County Hospital v. Valentine*, 894 S.W.2d 151 (Ky.App. 1995) implied that there was a claim of confidentiality in medical records such that under KRS 422.300 *et. seq.*, a patient could apply to have some of those records sealed. Now in *Eldred*, which was decided in 1994 but only recently put in the advance sheets, the Supreme Court hints at the existence of a physician privilege. This arose in the context of a complaint for denial of exculpatory evidence. The court stated that the defendant is not entitled to unlimited access or use of the evidence sought. Instead, where the doctor or the patient raises the physician-patient privilege, or some other similar privacy interest is raised, an in-camera hearing shall be conducted by the trial court in the presence of the prosecutor and defense counsel to determine which information would be both relevant and material to the witness's credibility. *Eldred*, *supra*, 906 S.W.2d at 702. Apparently Kentucky recognizes a physician/patient privilege of some sort but the outlines of it are very unclear.

Expert Witnesses

There were a couple of interesting expert witness cases. ***Tungate v. Commonwealth***, 901 S.W.2d 41 (Ky. 1995) dealt with an expert on pedophilia while ***Rowland v. Commonwealth***, 901 S.W.2d 871 (Ky. 1995) dealt with the use of hypnosis. In ***Mitchell v. Commonwealth***, 908 S.W.2d 100 (Ky. 1995), the Supreme Court

again noted that the *Frye* rule has been superseded but that DNA evidence may be admitted only on a case by case basis. In a civil case, ***Clark v. Hauck Manufacturing Co.***, Ky., 910 S.W.2d 247 (1995), the Court stated the general rule for admissibility of expert testimony. Courts can exclude expert testimony where jurors can understand the question presented without help. This follows up on a theme set out in ***Public Parks v. Modlin***, 901 S.W.2d 876 (Ky.App. 1995) which discounted the necessity of an expert witness in a "garden variety" negligence case.

Oath Helpers

Some fairly basic points were made as well. In ***Pickard Chrysler, Inc. v. Sizemore***, 918 S.W.2d 736 (Ky.App. 1995), the Court of Appeals dealt with the question of whether the adoption of the rules had changed the requirement that a party cannot bolster a witness's credibility with evidence of good reputation until the adverse party has attacked it. The Court says this rule is unchanged. This leads to hope that the Commonwealth will quit calling its parade of "oath helpers" in every case.

Sexual Immorality

For some reason sex and infidelity played a large part in the published opinions over the past year. The general rule appears to be that inquiries about immorality of a sexual nature are excludable except when directly and clearly related to a true issue in the case. In ***Harman v. Commonwealth***, 898 S.W.2d 486 (Ky. 1995), the Court forbade inquiries about adultery as the basis for attacking the credibility of a witness. In ***Smith v. Commonwealth***, 904 S.W.2d 220 (Ky. 1995), the Court stated the general rule that evidence of marital infidelity is usually irrelevant and amounts only to a smear tactic. The same point was made in ***Chumbler v. Commonwealth***, 905 S.W.2d 488 (Ky. 1995).

Recent Fabrication

There was an interesting development in federal evidence law as well. Last year, the United States Supreme Court decided *Tome v. U.S.*, ___ U.S. ___, 115 S.Ct. 696, 130 L.Ed.2d 574 (1995) which limited the "recent fabrication" exception to the hearsay rule to those instances where the chief requirement of the rule, a real allegation of fabrication or motive, is made. In ***Fields v. Commonwealth***, 905 S.W.2d 510 (Ky.App. 1995), the Court of Appeals adopted the *Tome* approach, and noted that "prior consistent statements at other times do not justify the admission of hearsay. *Id.* at 512. *Tome* was remanded and a new federal appel-late opinion has been rendered. *U.S. v. Tome*, 61 F.3d 1446 (10th Cir. 1995). In this case, it is interesting to note not only the application of the recent fabrication rule which excludes some of the statements, but the application of the medical statements rule, KRE 803(4), which the federal appellate court held to exclude statements made to social workers for the purpose of determining whether a protective order was necessary.

Comprehensive Cases

There are some cases you should photocopy and keep in your trial notebook. These cases have a considerable amount of evidence law in them, and if you carry them with you, you will be able to review a number of points rapidly. The cases are *Daniel*, *Chumbler*, *Eldred*, and *Perdue*.

In Limine

From the decisions rendered this past year it is safe to say that adequate preservation is very important. The Supreme Court especially is trying to tell us something. Remember the rule. You do not have to state a ground unless the judge asks for one. But if the judge asks for one, don't be content just to say one, unless you are absolutely sure that this is the one and only ground on which your objection is justified. Try to use the *in limine* provisions set out in KRE 103(d). But be aware that the Supreme Court in ***Tucker v. Commonwealth***, 916 S.W.2d 181 (Ky. 1996), said that it will not treat a motion *in limine* as disposing of preservation if grounds or circumstances change during the trial of the case.

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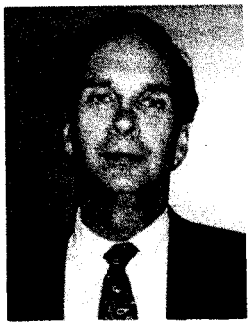
Civil Commitment Review:
Some Recent Cases & Comments

> ***This is very midsummer madness.***
>
> - William Shakespeare, *Twelfth-Night* (1601-1602) Act III, Scene iv, Line 62



Pete Schuler

Commonwealth of Kentucky v. In re: Patrick Nunnally, 920 S.W.2d 523 (Ky. 1996), to be published. In *Nunnally*, the Kentucky Supreme Court was called upon to decide whether a previous voluntary hospitalization brings a patient within KRS 202A.051(4)(g) and subject to a 360-day commitment. Since the patient involved in the case was voluntarily admitted to the hospital for a period longer than 30 days, the Commonwealth sought to deprive him of his right to have an initial 60-day hearing. The Commonwealth argued that time spent as a voluntary patient should be used in the calculation to determine whether a patient had been hospitalized for a period of 30 days within the preceding 6 months. Sheila Redmond, from the Jefferson County Public Defender's Office, was able to persuade the Court and obtain a unanimous opinion that time spent as a voluntary patient could not be included to subject a patient to a 360-day hearing. The Court also noted that it appreciated Ms. Redmond's public policy argument that one should not be subjected to a 360-day involuntary commitment because one has voluntarily sought treatment for a mental or emotional problem. The Court felt that any opposite holding would have a chilling effect on voluntary hospitalization and could lead to the abusive utilization of the procedures contained within KRS Chapter 202A.

In re: McGaughey, 536 N.W.2d 621 (Minn. 1995) is an excellent case with respect to defining the burden that the state must bear in establishing the element of dangerousness in a final civil commitment hearing. This case involved a 53 year old man who had, prior to commitment, been placed in a nursing home. The patient had been diagnosed as suffering from chronic schizophrenia. It was alleged in the petition that the patient sexually harassed female staff members and patients at the nursing home, and later in a mental hospital. The allegations concerning inappropriate sexual behavior involved the following of females in the various facilities, making sexually harassing comments, and being involved in the sex-

ually inappropriate touching of himself and others. The appellate court in this case found that the evidence was insufficient to establish a substantial likelihood that the patient posed a threat of physical harm to himself or others. The court pointed out that speculation as to future behavior is not sufficient to establish the necessity for involuntary commitment. Additionally, the patient's inappropriate sexual behavior was found not to constitute an assault due to the fact that there was no evidence that anyone had been harmed or threatened with harm. Despite the fact that the state produced opinion evidence that the patient would not seek treatment for his mental condition outside the hospital environment, the court failed to find evidence of this fact. Finally, the patient's problems in maintaining his personal hygiene complicated by intermittent incontinence was held to be insufficient to establish the possibility of future harm to the patient.

In re: J.W.B., 898 P.2d 184 (Ok.Ct.App. 1995) the patient was a child who was hospitalized for suicidal and homicidal ideations. The child's mother had originally consented for J.W.B. to receive in-patient mental health treatment. Later, the child's mother revoked her consent for J.W.B.'s continued hospitalization, and the child's psychiatrist petitioned the court for J.W.B. to be treated involuntarily. The child's mother was not present and did not participate in the child's commitment hearing, which resulted in an order for continued involuntary hospitalization. Subsequently, the child's mother moved the committing court for a new trial, asserting that Oklahoma law requires that parents be provided notice 24 hours in advance of the child's hearing. The Oklahoma Court of Appeals reversed the order of commitment. It held that with respect to notice, time is to be computed from when the notice was actually received, not when it was mailed. The Court also held that the state's failure to provide adequate notice in this case constituted a jurisdictional defect, and denied J.W.B.'s mother statutory due process.

This case demonstrates that courts generally construe civil commitment statutes narrowly, giving respondents the benefit of the doubt in cases where the language is ambiguous, or when action is taken against a patient that falls outside of statutory authority.

Adriane A. v. Cuomo, 624 N.Y.S.2d 7 (N.Y. App.Div. 1995). Sometimes, mentally ill patients who do not meet the statutory criteria or others who are ordered released from the hospital by the court continue to remain at the hospital due to the fact that they have no place to go. This fact has proven to be particularly troublesome for those of us who practice civil commitment cases. The issue of whether patients' rights are violated when a state continues to hold patients who are entitled to be released was considered in *Cuomo*. In this case, homeless, mentally ill psychiatric patients claimed that the state violated the New York Mental Hygiene Law by keeping them beyond their date for release while appropriate residential placements could be found. The appellate court in this case found that the law imposes a duty upon state mental health professionals to ensure that mentally ill patients are not "inadequately, unskillfully, cruelly, or unsafely cared for or are unsupervised by any person." Due to the fact that the patients' complaint did not allege that they were being held for an excessive period of time, the court held that their arguments contained no merit.

This problem is not unique to the mental health area. In the practice of juvenile law, young offenders are often held in detention for periods of time subsequent to the time designated for their release, in order to secure an "appropriate" placement. Defense counsel in juvenile, as well as civil commitment, cases should continue to argue for the immediate release of their clients at the time that they are legally entitled to regain their liberty. An individual's right to liberty should not be compromised by the state's inability to secure "adequate" placement, especially in a time when resources for social services are in scarce supply.

Oregon v. Sickler, 889 P.2d 1301 (Or.Ct.App. 1995). At James Sickler's civil commitment trial, two medical doctors testified that they did not believe that Sickler suffered from a mental disease. The court, however, determined that Sickler was mentally ill, and based its decision on the patient's history of chemical dependency as well as his bizarre behavior at the time of the hearing. The appellate court in *Sickler* found that, although Oregon law included chronic alcoholism within the definition of mental disease, not all persons suffering from the physical and mental manifestations resulting from alcohol abuse are subject to

being involuntarily committed. Sickler's involuntary commitment was reversed.

In re: Tiffin, 646 N.E.2d 285 (Ill.App.Ct. 1995). In the *Tiffin* case, an Illinois appeals court held that the committing court committed reversible error when it failed to conduct a sufficient inquiry as to the patient's ability to defend himself at a final commitment hearing. The court also held that it was improper to reinstate an old petition for commitment which had previously been dismissed without first obtaining new medical certificates.

In re: Martens, 646 N.E.2d 27 (Ill.App.Ct. 1995). In this case, the appeals court in Illinois overturned the patient's involuntary commitment order due to the fact that the state failed to serve the respondent's guardian with notice of the proceedings, which is required by statute in Illinois. The patient's failure to object did not constitute a waiver of this issue.

This decision, like the decision in *In Re: J.W.B.*, shows the importance appellate courts place on the state's compliance with required statutory procedures.

In re: R.M., 889 P.2d 1201 (Mont. 1995). In this case, the Montana Supreme Court reversed a commitment order due to the fact that the committing court relied on the testimony of a hospital nurse, rather than appoint either a medical doctor or a certified mental health professional to examine the patient and make recommendations concerning further commitment proceedings. The Supreme Court found that compliance with Montana law with respect to this issue was vital to the civil commitment process.

Oregon v. May, 888 P.2d 14 (Or.Ct.App. 1994). Oregon statutes require trial courts to advise all persons subject to civil commitment proceedings of their rights during their hearings. The patient in this case appealed her voluntary commitment due to the fact that the court had not done so. Despite the fact that the patient's lawyer had not objected when the court failed to advise the patient of her rights, the appeals court ruled that she had not waived her right to be so advised. The patient's commitment was reversed on this basis.

♦ ♦ ♦ ♦ ♦ ♦

With the enactment of KRS Chapter 202A, the Kentucky General Assembly has provided significant liberty protections for an unwilling patient facing the prospect of involuntary hospitalization. Time limits for the scheduling of events is strictly defined. The patient has a right to a preliminary and a final hearing. He or she also has the right to testify, to be present, and to cross-examine witnesses. The court proceedings and the rules of evidence are the same as those in any criminal proceeding. The burden of proof borne by the state is proof beyond a reasonable doubt. The patient also has the right to a jury trial.

Exclusive jurisdiction of civil commitment proceedings rests with the district court. The district court is a court of limited jurisdiction. This fact greatly restricts the discretion of the court and the hospital from straying from the narrow requirements of the law. Any act or omission by the district court which is out of compliance with KRS Chapter 202A is void for lack of jurisdiction.

The cases presented in this survey, for the most part, show that there is a consensus among various jurisdictions, which provides for the strict protection of patient rights in connection with civil commitment proceedings. Patients who become the subject of involuntary hospitalization proceedings are, like juvenile defendants, at a disadvantage because they are impaired with a disability which often inhibits them from understanding and accessing all of their legal rights. Counsel representing clients in these types of cases should take great care to ensure that they are advocating the express wishes of their clients, and that all legal protections are provided in the scope of representation in an aggressive effort to achieve the result desired by the client.

The cases cited show that with good advocacy, our clients' rights can be vindicated.

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Using Jury Consultants in Post-Trial Jury Evaluations

Anyone who has tried or sat through a lengthy, complicated jury trial and then listened to a complex set of instructions given by the Judge cannot help but wonder whether or not the jury could possibly understand and perform its functions properly. The increasingly complex issues presented in both civil and criminal trials and the increasingly complex instructions being given to juries can only increase as the legal system becomes more specialized and as the stakes in each case increase.

Even with the opportunity for voir dire, it often becomes questionable as to whether or not the jury which is selected will be able to understand the volume and complexity of the evidence and the interaction of the witnesses in reaching a final decision. The resentments, prejudices, and fears of jurors are not easily determined, nor easily understood, at the opening of a trial. Even with the use of jury consultants, which is becoming more and more common, in both criminal and civil cases, it is impossible to determine or to know at the beginning of a trial whether the jurors will properly comprehend and properly apply instructions which, in many cases, have not yet been prepared.

In some jurisdictions, voir dire is being limited or being placed under closer control of the courts, in others doors are opening. As a result, it is becoming increasingly common, in cases of significance to utilize jury consultants, jury questionnaires, mock juries, surveys, and other methods to improve the quality of voir dire and jury selection. Even given all of these safeguards, anyone who has ever tried a case to a jury will often be either surprised or mystified when the jury returns a totally unexpected verdict. This is particularly true when either as a result of unusually complex instructions or notorious cases, the attorneys suspect that the jury's decision was inappropriate. While the use of interrogatories to a jury under Civil Rules can provide some limited information regarding the jury's thinking and acting, they cannot effectively examine the dynamics involved in the actual jury deliberations. In circumstances such as these, there is a significant post-trial role which can be played by jury consultants.

While it is not reasonable to evaluate every jury after every trial, there are a number of reasons why counsel would want to consider a jury evaluation after some trials. Most significantly, in cases where an appeal is being considered based upon contested evidence or a jury instruction, or where a jury is suspected of acting out of prejudice, the use of modern social science techniques in evaluating a jury's behavior may be invaluable. Also, in cases where jury instructions themselves, while "legally" acceptable, have been incomprehensible to the jury, a jury evaluation may be the only way to determine that this was, in fact, the case. In criminal cases, where a jury cannot come to a conclusion, a review may help to provide a valuable and essential explanation. While there are very likely numerous other situations which would justify a jury evaluation, it is also something to be considered for the simple purpose of evaluating an attorney's approach or effectiveness in presenting a case to a jury. Whatever the reason or the motivation for the jury review, it is important to incorporate modern day polling techniques in the review process to insure that the data collected will be usable to render valid conclusions.

Traditionally, the task of questioning a jury after a trial has been left up to trial counsel. The attorney trying the case would contact the jurors and discuss the case. For a number of reasons, this approach is generally not advisable and, except in the most extreme cases, is unlikely to produce meaningful results. It is also important to note that many, if not most, jurisdictions have specific rules regarding counsel contacting and talking to jurors. Obviously, local rules and laws must be taken into account in evaluating whether any of these polling techniques are authorized or allowed in any particular jurisdiction.

In cases where counsel expects to utilize polling after a trial it is important to make certain that the jury consultant participates to the greatest extent possible in the trial by either observing the progress of the trial or observing the development of the issues to be polled. Inevitably, the jury evaluation must be tailored not only to each case but tailored to provide valid data with regard to the specific issues presented in that case. The questions need to be well thought out and focused on issues likely to produce meaningful data.

Very often - if not always - the jury polling should be done with someone not directly associated with the case. Jurors often will not talk to counsel themselves and may be intimidated by counsel contacting them directly. At times, jurors will simply refuse to talk to counsel when they may be willing to talk to a neutral, non-threatening person asking the same questions. While this article is much too short to discuss these issues in any detail, it is important to bear in mind that the questioning of jurors should be neither haphazard nor random. In general, the polling needs to be standardized and the questions need to be designed so that they can be asked of all jurors in order to produce standardized results. The questions themselves need to be tailored to get at and to uncover the particular problem, prejudice, or error that counsel is concerned with. Using modern techniques, jury consultants, working with trial counsel, can develop questions and questionnaires that will help to evaluate the honesty and sincerity of jurors in answering the questions. The process is not a simple "hit or miss" process of talking on the telephone. The questions need to be carefully developed by an experienced person in conjunction with counsel and with an understanding of the issues that are being evaluated.

Clearly, the use of a jury consultant to evaluate a jury's actions after a trial is not something which can or should be done in every case. However, in those cases where the role or behavior of the jury itself is a consideration in either an appeal or a request for post trial relief, it is an important tool and should be considered by counsel. In difficult and significant cases, the traditional techniques provided by traditional Court rules, are simply inadequate to insure that a jury has acted appropriately. A properly designed and executed jury review may provide a valid basis for a Court of Appeals to consider a reversal and it may provide a valid basis for a trial Court to reconsider a jury's decision. In the proper circumstance, it is an additional, valuable tool to help insure that a jury has fulfilled its role properly.

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TODD ICE

The following statement was read at a press conference in Frankfort by a CHR spokesman on March 27, 1996...

Mr. Ice is no longer in the Covington area. He has fully cooperated with all aspects of the treatment that has been recommended for him and is continuing to do so. The Commonwealth and its mental health professionals aggressively sought to commit Mr. Ice involuntarily when they felt it was necessary; that is no longer the case. Mr. Ice's former placement was made after fully considering the best interests of both Todd and the community. As a private citizen, Mr. Ice only wishes to get on with the remainder of his life in a peaceful, productive manner. He has paid his debt to society for the tragic events of the past and does not believe that it is fair to now persecute him for mental illness which is being treated and which is under control. Unfortunately, due to the "lynch mob" mentality fostered by the media and others, Mr. Ice feels that disclosure of his present whereabouts is detrimental to his ability to reintegrate into society and poses a threat to his own safety.

In Defense of Abused and Battered Women

This article explores the general principles of the law in Kentucky regarding justification and mitigation in cases involving abused or battered women as defendants. The next article in this series will discuss expert testimony on "Battered Woman Syndrome" and other admissibility issues. The final article will discuss the attorney-client relationship, investigation tips, and post-conviction considerations particular to this topic.

First, The Good News:

In 1992, the Kentucky Legislature expanded the definition of domestic violence, amended the self-defense statutes to aid attorneys defending battered women. If that defense is unsuccessful, courts may now modify the judgment of battered women convicted as violent offenders and consider her a non-violent offender for purposes of parole eligibility. (KRS 403.720, 503.010, 503.050, 439.3401 and .3402.) In 1995, Governor Brereton Jones granted clemency for ten incarcerated battered women. This attention to the problem of domestic violence in Kentucky brought federal funding to the effort, via United States Attorney General Janet Reno, and attracted the attention of researchers to our corner of the world.

One such researcher is Dr. Neil Websdale of Northern Arizona University, who conducted an unprecedented study of rural domestic violence in Kentucky and published his preliminary findings in *Violence Against Women*, Vol. 1, No. 4, December, 1995, pg. 309-338, Sage Publications, Inc., (1995) and *The Journal of Social Justice*, Vol. 22, No. 1, (1995). From the data he collected, Dr. Websdale argues that rural women, who are battered, suffer more acutely and struggle with greater impediments to escape than do urban women. (According to the U.S. Census Kentucky has the second largest rural population in the nation.) Dr. Websdale's extensive findings will be published in the 1997 book, *For Batter or Worse*.

Now, The Bad News:

Lorena Bobbitt was crazy; Lyle and Eric Menendez were conniving liars; and the battering of Nichole Brown, was judged irrelevant by the jury that acquitted her ex-husband, O.J. Simpson. *The Abuse Excuse and Other Cop Outs, Sob Stories, and Evasions of Responsibility* by Alan Dershowitz, the noted defense attorney made defense work that much harder by undermining public confidence in the use of prior abuse with his cries of vigilantism run amok.

Moreover, a new stereotype of abused women has emerged and it is a powerful one. "Battered Woman Syndrome" has become a yardstick with which to measure women. Female defendants who have suffered violence at the hands of their male intimates are now held to the standard of the "syndrome." The defense attorney is placed in the position of trying to determine whether or not the client is a "good battered woman." Is she passive, pathetic, and yet noble enough for an acquittal?

An attorney confronted with a battered woman as a defendant will invariably need to run the now familiar gauntlet of questions in attempting to explain her behavior: How could she kill someone she loves? Why didn't she turn to the law? Why didn't she get assistance from a crisis center? Why most importantly, did she believe at the time she committed the crime that she was facing imminent danger of a kind that was qualitatively different from past battering episodes, where she lived to tell the tale?

What has become apparent to this author, in discussions with attorneys throughout our state and elsewhere, is that a backlash of sorts has developed in the use of prior abuse as a means to mitigate, and in some cases justify, the actions of a defendant. Some fear if they present their defendant as a battered woman suffering from the syndrome she will be seen as merely another criminal attempting to evade punishment.

It is the challenge of the defense attorney to decide if evidence of prior abuse should be brought to life for jurors who might have the perception that they truly understand the issue. It is important to remember that there is no such thing as a "Battered Woman Syn-

drome" defense. It is merely a means to an end. A means for the jurors or factfinders to enter the mind of the defendant and see that her actions were reasonable, rational and absolutely necessary based upon her experience, and thereby justified under the traditional law of self-defense, duress, etc. Superficial knowledge of the stereotypes of battering and its effects will be hazardous to your client. Everyone knows that a little knowledge is a dangerous thing, consequently these articles hope to arm you with specific information that will aid you in your explanation of your "victim" and the reason she should not be convicted of a crime.

Self-Defense

The battle of the sexes (no pun intended) rages on despite the many advancements toward equality. Morally and legally men and women continue to inhabit different positions as a result of tradition, religion, politics and habit. Women seeking justification for acts of domestic homicide or assault, continue to be relegated to excuse defenses more often than justification/ exoneration defenses.

In their paper entitled *Women Who Kill Men: Excuse vs. Justification*, Agnes McCarty-Bars, Hawaii Department of Corrections and Jeanne Payne Young, Sam Houston State University College of Criminal Justice, argue that justification implies an act which should receive commendation not condemnation, whereas, an excuse is designed to invoke sympathy and leniency based upon provocation, mental illness or lack of intention. Lenore Walker's model of Battered Woman Syndrome fits well within the tradition of excuse rather than justification for women, thus its acceptance in the courts. The basic human right to defend one's life is denied women, as it is perceived that only mentally defective women suffering a syndrome retaliate when attacked. Ignoring the socio-political reality of women in this country has led to the obfuscation of justification by legal excuse and psychologism. Understanding the role sexism plays in these cases is essential to your client's defense. If you "just don't get it," ask for help. I recommend Holly L. White, Resource Coordinator for The National Clearing House for the Defense of Battered Women, 125 South 9th Street, Suite 302, Philadelphia, Pennsylvania 19107, telephone: (215) 351-0010, to anyone needing additional help and guidance with such a case.

The Kentucky Statutes

Pargess v. Commonwealth, 123 S.W. 239 (Ky. 1909) was the standard prior to the adoption of the Penal Code. The current self-defense statute is KRS 503.050:

1) the use of physical force by a defendant upon another person is justifiable when the defendant believes that such force is necessary to protect himself against the imminent use of unlawful physical force by the other person. (2) the use of deadly physical force by a defendant upon another person is justifiable under (1) only when the defendant believes that such force is necessary to protect himself against death, serious physical injury, kidnapping or sexual intercourse compelled by force or threat. (3) any

"Women charged in the death of a mate have the least extensive criminal records of any people convicted. However, they often face harsher penalties than men who kill their mates. FBI statistics indicate that fewer men are charged with First or Second Degree Murder for killing a woman they have known than are women who kill a man they have known. Women convicted of these killings are frequently sentenced to longer prison terms than are men."

- Angela Browne, *When Battered Women Kill*
New York, N.Y.: The Free Press 1987, pg. 11

evidence presented by the defendant to establish the existence of a prior act or act of domestic violence and abuse is defined in KRS 403.720 by the person against whom the defendant is charged with employing physical force **shall** be admissible under this section.[1]

KRS 503.060 and KRS 503.120 serve to limit the use of self-defense. An "initial aggressor" is one who provokes the use of physical force by the other person. An "initial aggressor" may rehabilitate herself if under Subsection 3(a) "his initial physical force was nondeadly and the force returned by the other is such that he believes himself to be in imminent danger of death or serious physical injury;" or Subsection 3(b) "he withdraws from the encounter and effectively communicates to the other person his intent to do so and the latter nevertheless continues or threatens the use of unlawful physical force."

KRS 503.120 is titled Justification; General Provisions is another limiting mechanism:

1) "When the defendant believes that the use of force upon or toward the person of another is necessary for any of the purposes for which belief would establish a justification under KRS 503.050 to 503.110 but the defendant is wanton or reckless in believing the use of any force, or the degree of force used, to be necessary or in acquiring or failing to acquire any knowledge or belief which is material to the justifiability of his use of force, the justification afforded by those sections is unavailable in a prosecution for an offense for which wantonness or recklessness, as the case may be, suffices to establish culpability.

2) When the defendant is justified under KRS 503.050 to KRS 503.110 in using force upon or toward the person of another, but he wantonly or recklessly injures or creates a risk of injury to innocent persons, the justification afforded by those sections is unavailable in a prosecution for an offense involving wantonness or recklessness toward innocent persons."

Your defendant may tell you she acted only after the "victim" threatened her children, mother, etc., and not to protect herself. The use of force in the protection of another is provided for under KRS 503.070 and is justifiable under the same circumstances as self-defense if the person that the defendant sought to protect could have legally employed the same physical force against the actor.

A man afflicted by the "violent male syndrome" may use threats of suicide to manipulate the woman into staying in the relationship. KRS 503.100 involves the use of force to prevent a suicide or a crime. It instructs that physical force is justifiable when the defendant believes that it is immediately necessary to prevent a suicide, the infliction of serious bodily injury, or to prevent a crime which endangers human life.

KRS 503.010 supplies the definitions to be used in the Justification Chapter. In 1992 the Kentucky Legislature amended Subsection 3 to provide for a domestic violence context.

KRS 503.010(3) "'Imminent' means impending danger, and, in the context of domestic violence and abuse as defined by KRS 403.720, belief that danger is imminent can be inferred from a past pattern of repeated serious abuse."

KRS 503.020 defines these justifications as a "defense" thereby imposing the burden of raising these issues upon the defense. The 1974 commentary states, "once this responsibility is satisfied as to a particular issue (See KRS 500.070), the prosecution must bear the ultimate burden of persuading the jurors that the defendant was unjustified.

The Kentucky Case Law

The adoption of the code and the definitions within it led to problems of interpretation. The difficulty wrestled with most by the courts, attorneys and consequently juries has been in cases of "imperfect self-defense." In 1987, a call to rewrite the code, or at least interpret it to make it workable, was made by Circuit Judge William S. Cooper and Universityof Kentucky Professor of Law Robert G. Lawson (the principle drafter of the Kentucky Criminal Code). "The cases suggest that the existing statutes may be too complicated to be functional and that legislative intervention is unavoidable." 76 Ky. L.J. 167, at 194.

In *Commonwealth v. Rose*, 725 S.W.2d 588 (Ky. 1987) a battered woman was convicted of man-

slaughter second degree for killing her husband. The facts in *Rose* highlight some of the difficulties commonly faced when defending a battered woman: "The shooting occurred in a house trailer occupied by the respondent, her husband, and 2 young children. The shooting terminated a stormy 7 year marriage during which the wife had been beaten, threatened with death, and otherwise abused on numerous occasions. The respondent testified that on this particular occasion, shortly before the shooting occurred, her husband had kicked her and threatened to kill her. She then went into the trailer's bathroom where she retrieved a loaded gun, came out and fired at her husband who was standing in or near the kitchen. Her husband was unarmed at the time, and from the evidence taken as a whole the jury could have reasonably concluded that the respondent was not in imminent danger of death or serious physical injury that made it necessary to kill her husband at that particular moment.

The evidence of the respondent's mental state at the time of the shooting is, to say the least, confused. Although she shot him between the eyes, she testified in her defense that she didn't intend to shoot him, that 'I didn't plan it or anything, it just happened,' and that she does 'not really' remember shooting the victim. At one point she stated that 'all that was going through my mind was all the things he had done to me in the past and him threatening us,' and the vision of him stabbing her 'all over my chest,' which was imaginary because at the time he had no knife and was not stabbing at her." *Id.*, at 589.

Jury instructions included Murder (Intentional or Wanton), First Degree Manslaughter, Second Degree Manslaughter, and Self-Defense with qualifications regarding her subjective belief that it was not, in fact, necessary to use physical force to protect herself or her children, or if it was, she used more force than was actually necessary and the actions she took in reliance upon her belief amounted to wanton conduct; if this was found she was not privileged to use self-defense and the jury was instructed to find her guilty of Second Degree Manslaughter. The Supreme Court upheld the instructions and specified that "the need for self-defense must be viewed subjectively from the standpoint of the accused, not objectively from the standpoint of a reasonable person, but that the defendant who acts culpably in self-defense because his behavior, viewed objectively, is wanton, shall not go unpunished." *Id.*, at 592.

Accordingly, the Court rejected the defense's argument that the mental states are mutually exclusive, self-defense is always an intentional act, and therefore wanton behavior is inapplicable.

The opinion concludes that the authors of the Penal Code intended manslaughter second degree to be a lesser-included offense to murder. To "punish an unjustified killing under circumstances such as this which warrant a conclusion of diminished culpability, but do not warrant exoneration." *Id.* at 592. The Court in *Rose* does not comment on the lack of a reckless homicide or wanton murder instruction.

Rose essentially reverses *Ford v. Commonwealth*, 720 S.W.2d 735 (Ky.App. 1986). In *Ford*, the jury was given instructions on intentional murder, wanton murder and second degree manslaughter. The Court of Appeals upheld the Commonwealth's argument because battered spouse syndrome had been introduced

- 75 to 80% of battered women defendants who go to trial are convicted or accept a plea.
- On appeal 63% of those convictions are affirmed.
- As of 1994, only 14.4% of the reversals of battered women's convictions were based on the trial courts refusal to admit expert testimony.
- 75 to 80% of battered women defendants are convicted after trial and at roughly the same rate as are defendants in other homicide and serious felony trials, Holly Maguigan, *Battered Women in Self-Defense: Myths and Misconceptions in Current Reform Efforts*, 140 University of Pennsylvania Law Review, 379, 400 at note 77 (1991).

into evidence, it supported a finding that she had acted wantonly and therefore a second degree manslaughter conviction was appropriate. "Evidence that the appellant had suffered from battered spouse syndrome only went to the question of whether she feared her husband. It did not go to the issue of whether her action in shooting her husband 5 times was intentional." The Court followed a line of cases beginning with *Hayes v. Commonwealth*, 625 S.W.2d 583 (Ky. 1982) through *Baker v. Commonwealth*, 677 S.W.2d 876 (Ky. 1984) and *Gray v. Commonwealth*, 695 S.W.2d 860 (Ky. 1985), holding for the principle that intentional and unintentional or wanton conduct are mutually exclusive and that the statutory description of second degree manslaughter does not include imperfect self-defense. The Court then reverses the judgment and because of double jeopardy principles Mrs. Ford was not retried.

In the cases *McGinnis v. Commonwealth* and *Terry v. Commonwealth*, 875 S.W.2d 518 the Supreme Court went to great lengths attempting to reconcile the statutory definitions of wanton and reckless behavior with wanton murder, and self-defense limitations in the code. Citing extensively from *Shannon v. Commonwealth*, 767 S.W.2d 548 (Ky. 1988), the court explained the element of wantonness necessary for an instruction on wanton/depraved heart murder is not only "wantonness" but the additional circumstances manifesting extreme indifference to human life. The Court distinguished the mere wantonness necessary for manslaughter in the second degree and wanton/depraved heart murder as "the actor is indifferent to who is/are the victim(s)." *Id.* at 520.

The opinion addresses the dichotomy between the subjective standard in KRS 503.050 with the objective qualification in KRS 503.120 (1): "...if a defendant, in killing another, believes himself in danger of death but is wanton in having such a belief, he cannot be convicted of murder, but since Manslaughter in the Second Degree is committed through 'wantonness' and since this subsection denies a defendant justification for such an offense, he can be convicted of this lesser degree of homicide." *Id.* at 526.

To sum up the complex opinion, it is now clear that once a self-defense theory is introduced, the menu given the jury should include the cafeteria selections of: intentional murder, (*not* wanton/depraved heart murder) qualified by a self-defense instruction. In cases where the defendant admits to intending to cause injury but did not mean to kill, manslaughter in the first degree, qualified by a self-defense instruction; and where evidence warrants, an extreme emotional disturbance instruction as a mitigating factor to the murder instruction; and as qualifiers to all of the self-defense instructions: manslaughter second degree and reckless homicide, to depend upon the culpability of the defendant's actions and/or reasonable nature of the belief in the necessity to use force.

"Where the crime otherwise requires greater culpability for a conviction, it is neither fair nor logical to convict when there is only negligence as to the circumstances that would establish a justification." 76 Ky.L.J. 167, 196. The distinction made is that the evidence of unreasonableness of the belief can either go to the jury's conclusion that the defendant did not in fact believe the force was necessary and therefore she deserves a murder conviction, or merely that it was a mistaken belief arrived at upon an unreasonable ground and she should be convicted for negligence either reckless or wanton in nature (second degree manslaughter or reckless homicide). The defense attorney should become familiar enough with the interplay of these statutes in order to adequately explain to the jurors how your defendant's case fits into this puzzle.

One tactic worth trying is tendering particularized instructions that fit with the theory of defense. Kentucky case law seems to support the right to do so: "When a defendant admits he committed the deed charged, and attempts to justify or excuse the act, the theory of the case must be presented to the jurors in appropriate instructions. *Johnson v. Commonwealth*, 105 S.W.2d 641 (Ky. 1937) as quoted in *Carnes v. Commonwealth*, 453 S.W.2d 595 (Ky. 1970). *Carnes* involved a defendant who was afraid of a group of individuals acting in concert. The Court held that the instruction was not specific enough as it lacked the defendant's theory of the case *i.e.*, a group threat. *Id.* at 597.

If your instructions are not accepted by the trial court, there may not be appellate relief. In *Lucas v. Commonwealth*, 840 S.W.2d 212 (Ky. App. 1992), the defendant's counsel tendered

instructions particularized to include a reference to a "reasonably prudent battered wife" and adding the requirement of a finding that the defendant was not suffering from battered woman syndrome in order to find her guilty of reckless homicide or second degree manslaughter. The trial court refused the defendant's tendered instructions and used instructions that did not include the specific references. The appeals court found no error in the trial court's general instructions stating that the issue was only whether or not she acted in self-defense, citing *Commonwealth v. Duke*, 750 S.W.2d 432 (Ky. 1988).

Duress/Coercion - Lack of Intention

It is entirely likely that you will have a female client who has committed criminal activity at the behest of, and in fear of, retribution from her abuser.

Beth I. Z. Boland in *Battered Women Who Act Under Duress*, Vol. 28: 603 New England Law Review, 603-635, Spring, 1994, argues that the same issues present in self-defense cases are present in duress cases. A court in California has actually held exactly that. *People v. Romaro*, 10 Cal.App.4th 11150, 13 Cal.Rptr.2d 332 at 338 (Cal.App. Dist. 1992) (finding evidence of past abuse a fortiori relevant where a woman participated in robberies at her batterer's insistence.) Post Traumatic Stress Disorder (PTSD) and the hallmarks of the traditional theory of battered woman syndrome fit well within the psychology of battered women who commit crimes under duress. Amnesty International's, *8 Forms of Psychological Torture*, are reported to occur in battering relationships as well: (1) social isolation, (2) exhaustion stemming from deprivation of food and sleep, (3) monopolization or a perception manifested in obsessive or possessive behavior, (4) threats including threats of death against the women, her relatives and friends, (5) humiliation, denial of power and name-calling, (6) administration of drugs and alcohol, (7) induction of altered states of consciousness and (8) indulgences which feed the woman's hope that the abuse will cease. "The characteristics described by Dr. Walker and Dr. Brown also bear striking resemblance to the 'brainwashing' techniques of coercive persuasion found by Professor Richard Delgado, which in combination "can produce behavioral and attitudinal change in even the most strongly resistent individual[s]". Boland, *Id.* at 608.

Jerry J. Bowles, Director and Chief Prosecutor of the Jefferson County Attorney's Office for Domestic Violence and Sexual Assault Unit unwittingly aids duress defenses when he describes the rationale for Jefferson County's "no-drop policy" in prosecuting batterers. Mr. Bowles believes the policy to be necessary in the face of the extreme manipulation by the abuser on the woman. In an article published in the Louisville Bar Association's "Why Doesn't She Leave" Manual to the CLE Program on domestic violence, he writes: "Recognizing the ploys of manipulation [by the batterer] the prosecutor cannot be influenced by the victim's attempts to circumvent the perpetrators accountability for the criminal offense."

KRS 501.090 provides that in an offense other than an intentional homicide "it is a defense that the defendant engaged in the proscribed conduct because he was coerced to do so by the use of, or a threat of the use of, unlawful physical force against him or another person which a person in his situation could not reasonably be expected to resist."

The Model Penal Code definition of duress was adopted with little change in Kentucky. Kentucky maintains the common-law rule that it is a defense unavailable to intentional homicide. (The Model Penal Code's definition, however, would also cover cases where the defendant was "brainwashed" as a result of the coercers use of force in the past.) "Immanency" is not a requirement in the Kentucky Statute and there is also no requirement that the harm threatened be that of deadly force.

In the infamous case of *Foster v. Commonwealth*, 827 S.W.2d 670 (Ky. 1991) cert.den. 113 S.Ct. 337, 121 L.Ed.2d 254 (1992), it was held that defendant Powell was not entitled to an instruction on voluntary manslaughter in support of her duress claim because the record indicated that she had "intentionally or wantonly placed [herself] in a situation in which it was probable that [she] would be subject to coercion." KRS 501.090(2). (Finding that such evidence was only properly introduced in mitigation.)

Unfortunately, the Supreme Court also refused to recognize the existence of battering in homosexual relationships holding that while battered woman's syndrome is generally accepted in the medical community as a mental condition it was inapplicable in *Foster* as the relationship in issue was lesbian in nature.[2]

Diminished Capacity Defenses: Insanity and Extreme Emotional Disturbance

In the past, defense attorneys automatically relied upon insanity/diminished capacity defenses for women who committed homicide or assault. Women have been historically viewed as more prone to emotion, hysteria and panic than men and Sigmund Freud merely legitimized the common misconception. These stereotypical presumptions lead women charged with crimes to be viewed as disturbed which carried over into the attorney-client relationship and thus, the theory of defense. Hence, the right of self-protection was not an equal opportunity defense. *Womens Self-Defense, Cases: Theory and Practice*, Michie Bob Merrill, edited by Elizabeth Bochnak, (1981). Certainly years of physical and sexual abuse by an intimate will create psychiatric damage. Post-traumatic stress disorder is defined in the DSM IV and specifically lists domestic battering as one of the interpersonal stressors associated with PTSD. As a result of the guilty but mentally ill verdict in Kentucky and the difficulty of receiving acquittals for insanity cases this defense should be used only as a last resort. However, cases involving veterans of war gaining acquittals to homicide as a result of a PTSD diagnosis are documented. Lauren E. Guoldman, 1994 Case Western Reserve Law Review, 1994, 45 Case.Res. 185. Note 118, *In Defense of Battered Women.*

KRS 500.070 establishes the burden of proof in criminal cases. Section 3 states: "(3) The defendant has the burden of proving an element of a case only if the statute which contains that element provides that the defendant may prove such element in exculpation of his conduct." No guidance is given as to the amount/type of evidence which will meet this burden. The 1974 commentary states, "...it would be inequitable to require the state to disprove insanity beyond a reasonable doubt." By inference it is equitable to require the state, once a defense designated as such is raised to "establish its [insanity] negative beyond a reasonable doubt." (Commentary to KRS 500.070)

KRS 504.020 represents an attempt to combine the "McNaughten" test with the "irresistible impulse" test: "(1) a person is not responsible for criminal conduct if at the time of such conduct, as a result of mental illness or retardation, he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." Statutorily, mental illness does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct. KRS 504.060 defines insanity, mental illness and mental retardation. Mental illness is defined as any other psychological pathology that does not rise to the level of insanity. KRS 504.060 §6.

In 1982 the Kentucky Legislature came up with a fourth verdict; guilty but mentally ill (GBMI) KRS 504.120. Under 504.130, the grounds for finding a defendant guilty but mentally ill are: (1) the prosecution prove beyond a reasonable doubt the defendant is guilty of the offense; and (2) the defendant prove by a preponderance of the evidence that she was mentally ill at the time of the offense.

Once a defendant is found to be GBMI, the attorney should ask for a psychological evaluation at the time of sentencing, to determine

Kentucky Statistics:

- 11,977 persons are felony inmates in Kentucky prisons.
- 4,696 of those are violent offenders.
- 613 women are incarcerated in Kentucky.
- 173 of those 613 are violent offenders.

Kentucky Department of Corrections, Planning and Evaluation, January, 1996.

whether or not she is competent to be sentenced. What attorneys know but juries do not, is that the GBMI verdict is essentially a guilty verdict, which guarantees a defendant so convicted nothing in terms of treatment once custody is transferred to the Kentucky Department of Corrections. An evaluation must be made once the defendant enters into the penal system, but treatment thereafter is not required. (KRS 504.150.)

Manslaughter in the first degree, a lesser included offense to murder, carries a penalty of 10-20 years. KRS 507.020 defines extreme emotional disturbance (EED) and mandates a subjective standard: the defendant must show she was acting under an EED for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the *defendant* believed them to be.

In *Cecil v. Commonwealth*, 888 S.W.2d 669 at 673 (1994), the Court rejected the claims of the defendant that she had been abused by the victim, and holding that the defendant was mentally ill but not acting under an EED. In the opinion, the court quotes *Foster, supra*, "Since the adoption of the penal code, we have undertaken to set out what evidence is required to support an instruction of extreme emotional disturbance. We have explained in prior opinions that the event which triggers the explosion of violence on the part of the criminal defendant must be sudden and uninterrupted. It is not a mental disease or illness. It is also not equivalent to duress as [a defendant] urges us to believe. Thus it is wholly insufficient for the accused defendant to claim the defense of extreme emotional disturbance based on a gradual victimization from his or her environment, unless the additional proof of a triggering event is sufficiently shown."

To conclude, EED is a temporary state of mind so enraged, inflamed, or disturbed as to overcome one's judgment, and to cause one to act uncontrollably from the impelling force of extreme emotional disturbance rather than from evil or malicious purposes. It is the old "sudden heat of passion" doctrine. Prior to the adoption of Kentucky's Penal Code of 1975, the general requirement was that the defendant must testify and/or there be independent eye-witness testimony of the triggering event or of the extreme emotional disturbance in order for an instruction to be given. See *Morgan v. Commonwealth*, 878 S.W.2d 18, 20 (Ky. 1994), citing *Brown v. Commonwealth*, 275 S.W.2d 928 at 933 (Ky. 1995). This remains an important consideration when deciding whether or not your client should testify.

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Footnotes

[1]Under KRS 500.080 "he" means any natural person and, where relevant a corporation or an unincorporated association.

[2]For more information on this topic please see *Violence Against Women: Lesbian Battering, Breaking the Silence*, Pam Elliot Coordinator, Lesbian Battering Intervention Project of the Minnesota Coalition for Battered Women, and Island, David & Patrick Letellier, *Men who Beat the Men who Love Them*, Harrington Park Press, (1991).

Dr. Linda Meza, San Bernadino, California on Scripts and Capital Issues at the 24th Annual Public Defender Conference in Owensboro

Appalachians as a Cultural Group

Cris Brown

Introduction

A rose may be a rose, may be a rose, whatsoever called, but people are not the same. Becoming a person involves imitation, absorbing the language, and the behaviors of people around us. We are taught how to be a part of the world by our parents or family members. What we are taught may be limited by our environment, or the limitations of those teaching us, or what is thought to be appropriate to teach culturally.

Few children below the age of 4 are taught how to deal with a poisonous snake bite, but I was. My family lived on an old homestead on my grandparent's farm, across a river, several miles from the highway, 40 or more miles from a hospital. Our survival depended on our ability to perform the procedure, if necessary. My brothers and I gathered around on the porch stoop as my mother took apart the oblong snakebite kit we were required to carry with us, and demonstrated on an apple the proper way to cut the teeth marks, suction the wound, and apply a tourniquet.

A baby comes into the world with little more than a small arsenal of instincts, his or her senses, whether perfect or imperfect, and innate intelligence, in a great or limited amount, to absorb the nuances of the culture around them, to learn core language skills, and to master developmental skills, such as walking.

An effect of geographical location on learned language, for example, is that some individuals have an "ear" for proper grammar merely because they were reared by persons who spoke grammatical English. For persons in Appalachia, the child may or may not be reared to speak the English language "correctly."

Similarly a person coming into Appalachia from the "outside," may have trouble understanding Eastern Kentucky people, and the idioms peculiar to them. That may lead them to make a serious error in judgment as they presume a lack of intelligence, merely because Appalachians may use less than standard language. Their ignorance may lead them to find Appalachians lacking or lesser. Whatever strides we may have made, people are still judged on matters of class and culture. As we approach clients and their families and prepare cases, we need to be aware of these issues.

Some testing instruments recognize that cultural differences may lead to false low IQ scores for persons not reared in a standard middle class America culture from which the test questions were geared. For example, children were presented with a drawing of a broken toothed comb and were asked to draw an appropriate setting for the comb. Some children drew a wastepaper basket, some children drew the comb in their hair as an ornament, and some children drew the comb in a purse or a pocket. The "correct" response was a drawing of the comb in a wastebasket, but were the other children incorrect? Not according to their culture - in their reality a broken comb had value.

The Cultural Defense

One of the hottest death penalty mitigation topics today is the cultural defense. For those of you who believe that Kentucky is as plain as white bread, Kentucky has a variety of cultures including urban gang members, the Mennonite community, the Afro-American community, and that of the Appalachians of Eastern Kentucky to name only a few.

> There is a very good possibility that the reality that your client understands is widely divergent from yours, and most of the members of the jury - the very people his or her life may depend upon.

...

It is incumbent on defense counsel to investigate, establish and then present to the jury a clear and comprehensive picture of the world in which the client was raised and lived.

Though the geographical distance could be measured in miles, the client may live a world away from the people who will determine whether the sentence will be life or death.

Mitigation Workbook, The Tennessee Federal Capital Resource Center, Chapter VI. "SOCIAL AND CULTURAL FACTORS," page 118.

It is important to understand your client, and his family values, the limitations of his education, access to adequate medical care and nutrition, the stability of his home environment, genetically inheritable traits, economic opportunities, exposure to criminal behavior and violence, and moral development in order to communicate with him/her and the family. Further the information must be transferred to your mental health expert. Finally, the information may figure into the defense that is presented to the fact-finders. It may be vital to place this information before the jury so that they understand the context of the crime, or the "why," in order to decide the client's fate.

Appalachia

The Appalachians are a mountain range that stretches from Quebec to Alabama. People who live there are predominantly of Scotch-Irish descent. Many Eastern Kentuckians will also claim to be of Native American descent and may talk of having a progenitor marched off in the "Trail of Tears," when persons of a certain blood percentage of Cherokee [or other tribe] were marched off to a reservation. Whether your client is of Cherokee or other Native American descent will remain to be seen until it is borne out with genealogical research.

There are certain traditions that are the core of Appalachian life. With apologies for the generalities, what follows is a short, and by no means exhaustive, list:

I. **Agrarian culture** - the raising of tobacco as a cash crop, and crops and livestock for food. Canning fruits and vegetables for seasonal use. Hunting and gathering. Living off the land - such as finding water cress and polk for food, or hunting for fallen nuts in the woods in the fall or game.

II. **Home doctoring**. For example - treating sprains with mustard wraps, home births, old fashion remedies such as herbal teas, due to necessity, not choice as there's no extra money for doctors.

III. **Adversity** - living off the land, living on welfare, deaths of young children, maiming of children due to farm accidents, mining accidents which kill or maim or steal a man's breath away or accidental deaths from hunting or deaths due to intentional gunshot wounds.

IV. **Hatred of government and big coal businesses**: Government can be either state or federal representatives, - from the welfare lady who talks down to you, and assumes that you can't fill out your application for welfare to the federal government that sent out federal agents during prohibition to stop alcohol production. Coal companies bought property mineral rights for pennies and mined the land underneath the Appalachian people, causing them to lose homesteads that had been theirs or their family's for years.

V. **Suspiciousness of strangers**, particularly keeping a closed mouth and not sharing information. Minding ones own business, which can include seeing, but doing nothing to stop, spouse abuse and child abuse.

VI. **Religion**: Deeply ingrained and sometimes mystical religious beliefs, which may include a belief that a man has a right to beat his wife and children.

VII. **Stubbornness** and pride: that may have led to hardship as the father refused to allow his wife to accept charity or welfare, even from family members.

VIII. **Lawlessness**. A need to perform illegal acts in order to survive such as lying

on government forms, or spending foodstamps for soap powder.

A subculture of violence where aggression is present in every day life, and matters are taken into their own hands, and resolved through violence, rather than appealing to the law or the court system for help.

Lawlessness among the legal community from magistrates, county clerks, jailers, judges, lawyers, prosecutors, Kentucky State Police, FBI Agents, and individuals used as their agents, informants and operatives. A place where with money and standing one can buy their way out of trouble. Where all are thought to be "crooked."

Generational imprisonment: where ones father, brothers, uncles, cousins, grandfathers, etc. have been imprisoned, perhaps for the same offense. Where prison may be the place the person finally receives regular meals, has shelter and receives medical care.

IX. **Social Programs** that minimally meet needs. Families that may have been on public assistance for generations.

Corruptness in the medical community where ones ability to get medical help is based on income, and the ability to pay. The quality of services may be substandard to welfare recipients. Medicare or medicaid fraud. Illegal prescriptions for drugs. Failure to respond to emergencies where the ambulance service may not come when called for an emergency if they know the family is poor, and may not be able to pay.

X. **Fatalism** - the acceptance of one's fate. That life is already written out and cannot be changed, or life on earth is hard, and one's reward will be in heaven. Low expectations for children's future.

Coal Country

One cannot discuss Eastern Kentucky without a discussion of the impact of coal mining on Eastern Kentucky's economy and people. Mining has been called the most dangerous occupation in America. Rarely a week passes that one does not hear of a coal mining accident.

From the hovel of company houses to the indentured service of coal miners who ran up large accounts at the company store, to the bloody battles over unionized labor and wildcat strikes, to the breaking of one's health due to toxins, mining accidents, and the breathing of coal dust resulting in anthracosis, a form of pneumoconiosis, the stories of the life of miners and their families is a story that should be told.

I have included matters related to coal mining in the screening device, but for an in depth discussion of the coal mining industry, and the economic conditions of economically depressed Eastern Ky., please refer to two works by Henry M. Caudill: *Night Comes to the Cumberland* (1963) and *The Watches of the Night* (1976).

Alcohol + Guns = Violence

Appalachians have a large number of guns. Handguns, pistols, shotguns, rifles, all makes and models. Guns hold a special place in the culture of Eastern Kentucky as they sometimes mean the difference between eating and not eating. Male children are taught at an early age how to handle, shoot, and respect a gun. Males may be given their first gun when they are 8-9 years old.

There are old war weapons in Eastern Kentucky - guns, bayonets, etc. My grandfather had several hand grenades in his barn. There's also ready access to dynamite. My Dad used to get dynamite to blow tree stumps out of the fields.

Time on Eastern Kentuckian's hands, coupled with mental illness and ready fire power concomitant with drinking, leads to violence such as child or spouse abuse, and fights with relatives. Matters sometime escalate to deaths and woundings.

There is a strong sense of property and one's right to protect the property in Eastern Kentucky. Disputes over boundary lines, trespassing, and the discovery of attempted thefts, and resistance of burglaries have led to killings.

Poverty

America is the land of the "haves and the have nots." Poverty, is yet another cultural factor in Kentucky, and rural poverty, a subset of poverty, is an inseparable part of Appalachian life. Notwithstanding that Pikeville, Kentucky may have the greatest concentration of millionaires in the United States, a majority of Eastern Kentuckians are on welfare, social security benefits and workman's compensation.

Payments for disabilities arise from mental deficits, physical deficits, injuries at work or in the mines. Some are Veterans, who served their country and came back physically or emotionally scarred.

The unemployed have time on their hands. Some spend it eking out a living cultivating fields and hillsides, or picking up soda cans. With the advent of television, Eastern Kentuckians became aware of the American dream of conspicuous consumption. It is not unusual to see a satellite dish next to a very humble dwelling. For an animated and dead on discussion of the effects of the recognition of the deprivation, please see *The Causes of Crime*, a panel discussion at an Annual Public Defender Seminar, where Gary Johnson spoke eloquently of the effects of poverty as a causation of crime.

Poverty has an effect on one's:

1) Health: nutrition, medical care and treatment, and environment;
2) Education: opportunities, enrichment and standard of education;
3) Social/Psychological factors: psychological stressors, breakdown of institutions, exposure to crime for personal and financial survival.

A client may walk with a limp because he was "home-doctored" for a broken leg, as the family could not afford medical treatment, or the roads were too impassable to get to a doctor. They may have tried to straighten the leg by tieing it to a board or stick. Consequently, the leg healed incorrectly.

Cultural matters affect not only one's perception of the world around them, but also may leave psychological scars due to unique experiences beyond the control of an individual.

A neighbor of ours, one of the most stable people you'd ever meet, blew her brains out with a shotgun at her home at the top of a hill in Roark Branch Hollow. But before she did that, she shot her 10 year old daughter in the head, so the girl wouldn't have to endure the loss of her mother, since her father had taken up with another woman. Fortunately, or not, the girl lived, with a partial brain and the memory of her mother shooting her and perhaps seeing her mother turn the shotgun on herself. These experiences remain indelibly etched in one's psyche. How can they not?

What follows is a screening device for matters related to the Appalachian culture that can be used in the practice of any defense case involving a defendant, witness or relatives from Eastern Kentucky or Appalachia.

Time may be short, or the matter may be urgent, but Eastern Kentuckians cannot be rushed. I learned that during a summer internship with the Appalachian History Project before college. They are cautious and laconic around people they don't know. They are very careful not to tell gossip or what they have heard due to religious reasons. If they weren't there, they won't speak of it. Talking to them may be like trying to pull teeth. My advice is to wade into subjects slowly. Spend time with them, when you have no agenda. Be careful not to offend, or judge. With time, they may talk to you about these matters.

It is always important when conducting an interview to separate those things that have been seen and done from things the person has heard of or gossip that the person has second hand knowledge of, *i.e.*, fact from hearsay.

Matters reflected here may have been more true 20-30 years or longer ago, and therefore will be applicable to only some of our clients. Be aware that younger clients may not have had an experience similar to older clients, and older clients may have experienced a certain lifestyle in early life and later had a fairly middle-class lifestyle.

I am from Eastern Kentucky - Breathitt County. I would caution you to use the following areas for exploration as a place to start, rather than a chart of events of Appalachian rural life. No one's experience is exactly the same, even when from a certain culture.

For instance, my grandfather was in medical school when his mother called him home from the University to take care of the family farm when his father died. My father was college educated, as were his siblings, and that is somewhat atypical of Eastern Kentucky.

Therefore the following list will not be true of all Eastern Kentucky people. But, in order to have done a complete assessment, you will need to go over the following and see if any of it applies to your client, and ask matters of his family.

Transplanted Appalachians in Ohio or Michigan, who left Eastern Kentucky for jobs, must be screened for these matters as well.

Prenatal Conditions/Birth

The early years, when a child is conceived, in the womb, or vulnerable as a newborn baby is an especially important time to document. Clearly, a juror can understand that a genetic condition or injury during birth, cannot be controlled by a defendant.

Often this most critical information is lost due to a purging of records, death of mother, death of attending relative, doctor or midwife. Obviously the client has no recall of the events, but may have heard some family stories. Sometimes, the mother or father is reluctant to share the history.

Matters related to child bearing in Eastern Kentucky are sensitive, as they are everywhere. Children are born out of wedlock. Mothers are often teenagers, when their first child is born. I recently had a client whose mother was age 12 when she gave birth to her first child, her husband was in his 40's at the time.

Inappropriate sexual behavior may be no different in Eastern Kentucky than other culture or economic groups where clear boundaries are crossed, but it does happen. However, people will not give up that information easily. One social worker, who knew that an allegation of sexual abuse had been made by our client's sisters years prior was quick to dismiss the incident as having no bearing on our case as it did not name the defendant as the person abused. She also chided me for unfairly stereotyping Eastern Kentuckians as incestuous.

Sometimes a child is conceived because a male had intercourse with a young female by force. Rape and sexual abuse are as prevalent among family members in Eastern Kentucky as anywhere else. I have had clients who were the product of incestuous relations by a grandfather, who is both grandfather and father to the child.

Matters will be discussed in an ascending order from pregnancy to current events on the screening device that follows.

Pregnancy

Sometimes ignorance of hygiene and sexual behavior, particularly basic knowledge about where children come from, is kept from women due to modesty. One woman reported she thought children were "shat out."

Eastern Kentucky women do not have the luxury of lying about during their "confinement." They continue their regular load of daily chores, and may cause harm to their unborn child, without being aware of it.

Given the economic limitations, there is no money for doctor's bills. County health departments play a large role in giving pregnant women prenatal care, if any prenatal care is sought at all.

Determine if the mother had any complications with the pregnancy, pregnant out of wedlock, falls during the pregnancy, beating during the pregnancy, prenatal care by health department, doctor, nutrition of the mother. If was a planned child, if parents had to get married or shotgun wedding held, was a certain sex of baby wanted, mother's alcohol/drug/tobacco use during pregnancy, age of client's mother at pregnancy with her first child. Reaction of family to pregnancy - particularly note beatings, forced to leave home, shaming, wear binding clothing, forced to drink concoctions to lose the baby. Mother's feelings about the pregnancy. Home remedies for any illnesses during the pregnancy or to attempt to lose the baby, or for nausea. Maternal workload during the pregnancy - particularly pulling plow or heavy lifting. Kidney infections during the pregnancy. Child by whom - father, grandparent, former lover, neighbor, sibling. Pregnant by man of another race.

"Omens or signs" [wive's tales] during the pregnancy such as snake crossing path marking the baby, cat on baby's chest, crosses made with charcoal on the breast, etc. Particularly bad signs.

Birth

Was the labor brought on by use of a herb, hard work, beating, date of the client's birth, full name, aliases, what client likes to be called, where was the baby born: home; in a car, hospital, clinic, doctor's office, the doctor/midwife/relative in attendance, if the mother had any complications with the labor, or at birth, if born full-term, if forceps used, if the baby refused to come out, and had to be pulled out, and if there are any family stories about the client's difficulty at birth: breech birth: arms, legs, buttocks first, caul [birth sac] around baby when born, cord around neck, born blue, etc. at birth. Birth weight/length. Was the child a "throwback?" [Resemble a grandparent or another due to hair or eye color or features.]

Were any children stillborn? Hysterical preg nancies/miscarriages. Babies that died in infancy due to croup, etc.

Any adopted children of no relation, and taken-in children such as grandchildren that lived in the home and were reared by the mother or father?

Any cures for teething or digestion problems, or restlessness such as kerosene sugar "tits" to suck on, whiskey on the gums, alcohol in the bottle to quieten the child down, castor oil for digestion problems.

Was the client dropped as a baby? Any falls, down steps, off the porch from a tree, from a moving car.

Any illnesses as an infant - high fevers, swallow bleach, eat rat poison, weed killer, veterinarian mixtures ingested accidentally, allergies, poisonings, seizures?

Developmental

How long was the client breast fed, or bottle fed? Did the client walk, talk, potty train in a normal time frame. Was the child carried around a lot. Who took care of the child, an older sibling, grandmother, relative, primarily? How did the family potty-train the child? Was the child punished for "mistakes." Was there a slop pot for the child to use, did they use the floor, or did they go outdoors, or to the outhouse.

Any family stories about the retarded development of the client, bad teeth due to bottle feeding past the time primary teeth came in, advanced development or exceptional talents in learning to talk, etc. Did the child not speak except later in childhood and then in complete sentences.

Did the client experience any of the following: bedwetting, nightmares, stuttering, obesity, baby talking, lisps, or phobias? Was the child afraid to go to kindergarten? Shy around company, hiding behind mother's skirts or the door.

Parents/Grandparents/Relatives

With any luck your client's mother or grandmother or someone will have kept the family Bible which will have a several generation record of family members and events in the family such births, marriages, and deaths. In the event that has been lost or destroyed, there may be a family historian, who has kept or researched the family genealogy.

From mere memory, most Eastern Kentuckians can go back several immediate generations reciting long lists of brothers and sisters, aunts and uncles and their progeny on both sides of the family.

A visit to the family cemetery can be helpful as well, as members are buried in the same resting place so that upon Resurrection Day beloveds are easily found and they may rise to greet one another again.

Find out the following information:

Find out what their politics are, if they were Union men or fought the UMW, if any family members fought in the Civil War, any mining history regarding exposure to blasting caps, coal dust, chemicals, petroleum products, carbon monoxide, etc.

Farming history regarding cultivated cash crops, and pesticides, etc. routinely used, any

exposure to lead, or lead based paints, asbestos, poisons, etc.

People love to talk about taking in washing and making 8 cents per week, and working all week in the mines back-breaking work for a dollar. It happened and there is a pride that they survived harsh conditions.

a. Find out which set of children the client came from. Which wife/woman he was from, or which marriage he was from. Get Mother and Father's name, mother's maiden name, their ages, address, telephone number, occupations: length of employment, average salary per year, if known; find out if s/he's alive or deceased: if deceased get the date of death, cause of death and age at death, state of health, level of education, contact: when last visited the client, wrote a letter, called; criminal history? Did s/he have close friends? What were their names? Was the parent very dependent on the children? How was the client and his mother/father's relationship? Was there a point when the relationship changed? Why? Her relationship with her parents, and in-laws.

   Did the mother and father allow the children to visit and socialize or were they kept at home, so they wouldn't cause any trouble. Were other children allowed to visit the home, and eat meals, spend the night?

   Ask about the natural parent if the client reveals that his or her mother or father is not the natural parent.

Maternal/Paternal Grandparents

Grandparents are second fathers and mothers. They might have seen more of the client, than his own parents. They have beliefs and values they passed on to your client. They shored up a dysfunctional family situation by providing love and caring and shelter or they made the situation worst by not becoming involved.

They had special talents that they passed on such as quilting or flower gardening or whittling or playing a musical instrument.

Their deaths might have been the first experience your client had with death. If the grandparents are deceased find out what they died of and at what age.

Find out the name of the grandparents, if the client had any contact with them. Explore if they: spent the night, babysat, lived with, disciplined; alcohol use by grandparents; Relationship of the client with older people in the family and those who were not blood-relatives, but called Granny, Auntie, etc.

b. Find out if there are any aunts or uncles that the client had significant contact with, get their names, current addresses/telephone number, ages, if those people lived in the house with the client,

   It will be very important to get a listing of the families that the client is related to even as far back as 4th cousin, and please remember that in some cases they aren't blood related but are closely aligned nevertheless.

c. Find out who the family went to visit on holidays; What holidays and birthdays were like, if birthdays were celebrated, if toys or gifts were bought at X-mas, if special meals were had on Thanksgiving.

d. Find out the same information about foster-parents; step-parents; adopted parents; any persons the client depended upon.

e. If adopted, at what age, biological parents names if known, any siblings, reasons gave up for adoption, locations of group or foster homes/parents, names of caretakers or caseworkers, social worker or agency worker who placed child, any problems with the home or placement. Relationship with adopted family. Desire or fantasies as they related to natural parents, feelings about being adopted, treatment by adopted parent's relatives.

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Funds for Firearms & Gunshot Wound Experts

Perry County Fiscal Court v. Commonwealth, 674 S.W.2d 954 (Ky. 1984)

Commonwealth v. Bolduc, 441 N.E.2d 483 (Mass. Ct.App. 1980)

Barnard v. Henderson, 514 F.2d 744 (5th Cir. 1975)

United States v. Pope, 251 F.Supp. 234 (D.Neb. 1966)

U.S. v. Bryant, 311 F.Supp. 726 (D.C. 1970)

State v. Gainer, 272 S.E.2d 666 (W.Va. 1980)

Relatively New Science; Complex; Numerous Deaths by Firearms

The admission of testimony from firearms experts in criminal trials is a relatively recent development. According to Paul C. Giannelli and Edward J. Imwinkelried in *Scientific Evidence* (2d ed. 1993) the Illinois Supreme Court was one of the first courts to permit firearms evidence at trial in *People v. Fisher*, 172 N.E. 743, 753 (Ill. 1930). *Scientific Evidence*, Chapter 14 at 372.

Not only is the science fairly new in the criminal justice system, it has a level of significant difficulty. "Forensic examination of firearms, bullets and gunshot residue patterns is a subject of considerable complexity...."

There are also a lot of cases nationally and in Kentucky involving firearms. Of the 241 homicides in Kentucky in 1994, "67% of the victims were killed with a firearm. *Crime in Kentucky 1994* (October 27, 1995) at 5. "Firearms are involved in almost two-thirds of all homicides in the United States. Understanding of the patterns and injuries produced by firearms are, therefore, crucial to the defense in many criminal trials. Vital questions often raised in such cases are: (1) How is the wound size or pattern related to range, direction of fire, type of bullet and manner of death? (2) Could the manner of death be other than homicide? (3) Can the range of the shooting be estimated from the characteristics of the gunshot wound? (4) Can the relative positions of the assailant and the victim be determined from the pattern and path of the gunshot wound? (5) When several wounds are present, which was inflicted first, etc.?" Larkin and Wecht, "Firearm Injuries" §25.04 in *Forensic Sciences* (Wecht editor 1996).

Identification Methods

Class characteristics and individual characteristics are used to identify firearms. Class characteristics include the following caliber and rifling specifications:

1) land and groove diameters and numbers, width;

2) direction of rifling, left or right twist;
3) the degree of the rifling twist.
Scientific Evidence, *supra*, Chapter 14.

Individual characteristics include the microscopic striations imprinted on the bullet as it passes through the base of the firearm. *Id.* at 378.

Subjectivity

The myth that pervades this science is that a positive identification by an expert involves an entirely objective process. "Although a positive identification is based on objective data - the striations on the bullet surface - the examiner's conclusion is essentially a subjective judgment. This judgment rests on the reproducible points of identity. There are no objective criteria used for this determination: 'Ultimately, unless other issues are involved, it remains for the examiner to determine for himself the modicum of proof necessary to arrive at a definitive opinion.' In this sense, firearms identification is more of an art than a science." *Id.* at 379.

As an indicator of the subjective nature of the science, qualified experts in the same case have disagreed on the ultimate firearms issue. Giannelli and Imwinkelried identify case examples of disagreements and misidentifications: *State v. Nemeth*, 438 A.2d 120, 123 (Conn. 1980); *Commonwealth v. Ellis*, 364 N.E.2d 808, 812 (Mass. 1977); *People v. Kirschke*, 125 Cal.Rptr. 680, 684 (Calif.App. 1975).

Other Experts

In addition to firearms expertise, other areas that require the evaluation by experts include the range and direction of fire, entrance and exit wounds, examination of clothing and firearm residues, and interpretation of firearm wounds. See Patrick E. Besant-Matthews, Chapter 5 "Examination and Interpretation of Gunshot Injuries" in *The Pathology of Trauma* (J.K. Mason editor, 2nd ed 1993); Vincent J.M. DI Maio, *Gunshot Wounds: Practical Aspects of Firearms, Ballistics and Forensic Techniques* (1985).

Myths

Eight myths concerning gunshot wounds are detailed in "Firearm Injuries," in *Forensic Sciences*, Ch. 38 (Wecht editor 1996):

1. It is possible to tell the caliber of a bullet by the size of the hole produced.

2. An exit wound is always larger/ smaller than an entry wound.

3. If a bullet traverses the body completely, a line extending through the wound track will indicate the direction of fire, which can be calculated with a high degree of certainty.

4. The bullet is sterile.

5. An autopsy performed on a gunshot victim is an easy and routine procedure.

6. A suicide will pull clothing away from the selected target before firing.

7. A suicide always removes his or her glasses before shooting.

8. Many people accidentally shoot themselves while cleaning a pistol.

Funds for Firearms, Ballistics and Gunshot Wounds Experts

When a matter concerning firearms, ballistics or gunshot wounds is material to the defense, courts recognize the need for the defense to employ their firearms expert to view the evidence from the perspective of the defense theory of the case.

In Kentucky, the Supreme Court had no difficulty in declining to second guess a trial judge's determination that a ballistics expert was necessary for the defendant's case, and that funds had to be forthcoming for defense employment of these experts. ***Perry County Fiscal Court v. Commonwealth***, 674 S.W.2d 954 (Ky. 1984).

In ***Commonwealth v. Bolduc***, 411 N.E.2d 483 (Mass.Ct.Ap. 1980), *rev'd on other grounds*, 422 N.E.2d 764 (Mass. 1981) the court held that the defendant was entitled to a ballistics expert who would analyze the defendant's jacket to see if there was gun powder residue on it, indicating whether or not its wearer fired a weapon even though the prosecutor had the

jacket analyzed by a police department criminalist who found no trace of gun powder.

"There is no question that the evidence desired by the defendant was relevant to one of the issues in the case, namely, the identity or not of the defendant as one of the two participants in the holdup who had fired at the police. There was no question as to the admissibility of such evidence.... it is doubtful that the judge considered the amount of the requested expense in light of the other expenses the Commonwealth would necessarily incur in the course of a lengthy trial. The judge does not appear to have considered the likelihood that a solvent defendant, able to finance his own defense, would prefer to select and employ a competent expert of demonstrated credibility rather than rely on the testimony of a police criminalist of undisclosed qualifications who might well be a hostile witness. And the judge failed to recognize that the desired evidence might well be all the more valuable to the defendant because his substantial criminal record might deter him from taking the stand in his own behalf." *Id.* at 486.

In ***Barnard v. Henderson***, 514 F.2d 744 (5th Cir. 1975) it was held that the defendant was entitled to have the murder weapon and bullet examined by an expert of his own choosing.

"The question is not one of discovery but rather the defendant's right to the means necessary to conduct his defense. Justice Barham of the Supreme Court of Louisiana pointed out in his dissent to the majority opinion in *Barnard* that 'the only means by which the defendant can defend against expert testimony by the State is to offer expert testimony of his own.' 287 So.2d at 778. We agree. Fundamental fairness is violated when a criminal defendant on trial for his liberty is denied the opportunity to have an expert of his choosing, bound by appropriate safeguards imposed by the Court, examine a piece of critical evidence whose nature is subject to varying expert opinion." *Id.* at 746.

In ***United States v. Pope***, 251 F.Supp. 234 (D.Neb. 1966) the defendant was entitled to have funds for expert witnesses who examined and tested the gun used to commit the offense even though the defendant admitted the killings in his testimony at trial since the defense should be afforded the fullest opportunity to prepare their case.

"The rule in allowing defense services is that the Judge need only be satisfied that they reasonably appear to be necessary to *assist* counsel in their preparation, not that the defense would be defective without such testimony." *Id.* at 241.

United States v. Bryant, 311 F.Supp. 726 (D.C. 1970), *aff'd* 471 F.2d 1040 (D.C.Cir. 1972) held it proper to pay a ballistic expert $923.70 to insure "full preparation of the defense...." *Id.* at 727.

State v. Gainer, 272 S.E.2d 666 (W.Va. 1980) determined it was appropriate to pay an *advance* retainer of $1,000 to a ballistics expert who was being used by the defense to counter testimony by a state expert. *Id.* at 668.

Conclusion

Firearms, ballistics, gunshot wounds may seem simple, objective, matter-of-fact sciences which allow for little disagreement, difference of opinion or potential for error. The facts and caselaw shoot down this myth. When defenders have an issue involving one of these sciences which is material to the defense, they are on target in asking for funds for a defense expert to consult, analyze and report.

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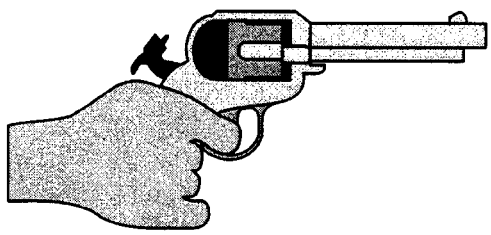
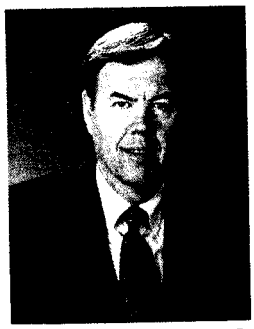


Guardians of the Process

An Interview with KBA President Norman E. Harned



Norman Harned

The Advocate: Tell our readers about yourself and about your Criminal Defense experience?

President Harned: I appreciate this opportunity to speak with *The Advocate* readers. I am a native Kentuckian. I was born and raised in the little town of Boston in Nelson County - about 300 people there. My father ran a country store and our family was originally all farmers and we came to Kentucky shortly after the state was settled. I went to Nelson County public schools and then to the University of Kentucky, both undergraduate and Law School. I had a degree in Engineering and decided after a while, due to my interest in Public Affairs, that I wanted to go on to Law School. While in College, I went through ROTC and took a commission. After graduating from Law School, I went into the Judge Advocate General's Department in the Air Force. I prosecuted cases and I defended cases in the Air Force and then after I got out I went to Bowling Green to practice law. When I started, I did a variety of types of practice, as young lawyers at that time did, appointed criminal cases being among them. And as some of your readers may know, in those days we didn't get paid any fees. I remember, in particular, one case that I was appointed to defend was a murder case and I might say that I had the "willies" over defending that murder case at that time in my career, but I think I did a credible job. I think if I hadn't had a real wily prosecutor who got my client real angry on the stand, I might have gotten a not guilty. I had pleaded self-defense for her - she wound up getting five years, but I think that was probably the highlight of my criminal defense experience - to have the challenge of defending a murder case.

The Advocate: Could you tell our readers why it's important for the rights of the least among us, criminal indigent defendants, to be secured?

President Harned: It's important to focus on the word 'rights.' If we do not make available the rights to the least in our society, those who are without income or without status to afford a defense to secure those rights, then we will not have them available to any of us. We can simply not have a system that provides the individual guarantees, the individual liberties, the individual rights available to only those who can afford to assert them on their own behalf.

The Advocate: Please tell us how Public Defenders and Criminal Defense Attorneys can foster their important role in Kentucky?

President Harned: Justice is about process. It's not about outcome. It's the use of the same rules for everyone, rich man, poor man, beggar man and thief. We need to communicate that to the public - that that is the role of the Defender - to see to it that the rules are used for everyone. Sometimes the work of the Defender in a case is not popular because of the nature of the offenses of which some persons are charged, but we must communicate the importance of assuring that those persons receive adequate defense along with those who are able to afford defense.

The Advocate: How can the interest of the Kentucky Bar Association members in Indigent Criminal Defense be increased?

President Harned: It will come as no surprise to anyone, money 'papers over' a lot of problems, but the opportunity to expand money into the program is probably going to be limited, so I believe that the interest of the Public Advocacy program as well as affording opportunities to private members of the Association could be improved and enhanced if the more peripheral benefits to lawyers could be ex-

plained - such as the opportunity, particularly to young lawyers, to get hands-on trial experience. Many of them are in firms that have practices that are moving fairly large, significant civil cases where they are not going to get much hands-on experience as a young attorney, but it's crucial for their professional development that they get in front of juries and begin to try some cases. In this area of Public Advocacy and working as a Public Defender, on a volunteer basis or as one on the panel, I believe they may be able to get some experience and get some direct client contact that would enhance their professional career. I would encourage, particularly, young lawyers to do that.

The Advocate: Litigation experience is one of the big benefits which the Public Advocacy program offers young attorneys.

President Harned: Yes, and as I mentioned earlier, when I started practicing, the first criminal cases that I did in the private sector were on an appointed basis and in those days we didn't get paid any fees.

The Advocate: And you're still reaping the investment of those early days of litigation experience?

President Harned: I had clients come to me because they had seen me in front of a jury - not necessarily jurors, but persons (to whom) the jury member had indicated that they had seen me in court.

The Advocate: Tell us your goals and visions for your year as President of the Bar Association.

President Harned: First, I don't want to take myself too seriously. The opportunity of any President of an Association like this is limited. It's one year, so I have to be realistic about what I can accomplish, but most importantly, I want to help focus on the role of lawyers in our society. Our Republic was designed by lawyers. The KBA is just not another trade association. We're deeply intertwined with the existence of our Republic, its government and its institutions at every level and I want to help lawyers communicate that to the public. Within the Bar Association I would hope to improve the professionalism of the organization, I hope to improve the responsiveness of the KBA to the needs of its members and to help members to adapt to the changing practice needs that we are all dealing with at this time. But more importantly, I hope to help improve the image of lawyers in our society. The KBA is much more than its officers and staff. The KBA is an association that meets its members and the KBA needs the support and help of all its members. In the Spring 1996 issue of *Bench & Bar* is a form - an opportunity for each member of the Association to volunteer to contribute their time in the Association's work. And I think this would be an especially good way for those lawyers who are involved in the Public Advocacy program to get involved with the KBA work and raise the image of those Public Defenders within the profession.

The Advocate: How good of you to take the time to communicate with us. We very much appreciate it.

President Harned: Thank You. I appreciate having the opportunity.

"Lawyers do get called on to represent those who are unpopular." But "when you stand up in a courtroom for due process, for justice, for the First Amendment and for our legal rights - whatever the issue may be - you're going to be the winner and our system is going to be the winner."

- Morris Dees, *Southern Poverty Law Center*
KBA Convention, Lexington, June 20, 1996

The State of Indigent Defense in Kentucky: If We're Silent, Then It Will Occur

The following remarks were made at the 24th Annual Public Defender Conference held in Owensboro, Kentucky.

I want to speak to you from my heart. If you all want to know what the State of Indigent Defense in Kentucky is, then I suggest you look around. Seriously, turn and look and see who you're sitting next to, because what you're looking at is the face of a Defender, someone with the heart of a Defender, the soul of a Defender and in this room, what you are looking at is Kentucky's only hope for equal justice. So, that is the State of Indigent Defense in Kentucky. The fate of equal justice is in all of our hands. We rise and we fall together. If we don't stand for the same thing, then we stand alone. If we don't dream about the same thing and share the same vision, then we'll never achieve what we all desperately want to achieve -- and that's fairness in the system.

I want to tell you something. Some of you may know it, but some of you may not, but I believe it was really a turning point in why I became a Public Defender. My mother was a German. She and her family fled Nazi Germany in 1934. They weren't Jewish. I think my grandfather belonged to a socialist organization which made him a target for the harassment that was going on at that time. They went to France in 1934, the year Hitler became Chancellor. It was four years before Krystal Nacht, the Night of the Broken Glass. A year later, my mom came to this country and I grew up with German in my household. When my grandmother, grandfather and mother didn't want me to know what was going on, they spoke German -- so they did that quite a lot. My grandmother was very open - she loved this country - but my mother was somewhat of a tortured soul. She would go into states of depression, and when she went into this depression, she would read voraciously - books on World War II. She was greatly troubled by how her country could do what it had done; how her people could do what they had done; how her relatives could play a part in the horrendous events of Nazi Germany -- and she was fueled by a desire to determine the reason why it could happen. And I'll never forget -- I was in high school - and we were sitting there at breakfast, which was in itself very unusual because she didn't eat breakfast and we just happened to end up there and she looked at me and said, "*He got control of the courts and no one objected*"! And I said, "What?" She said, "*Hitler got control of the courts and no one objected!*" And in that moment, it was like a veil lifted from her eyes and I think that look on her face was probably the happiest I'd ever seen her, before or after. It was kind of subliminal. I didn't really realize it at the time, but it's something that I've never forgotten and I've never forgotten that look on her face. And I do believe that for that high school student, who at that point in time, cared more about basketball (and it is still a particular craving of mine), it was the thing that led me in the direction that I now am following. Because, as I view it, we've got to object -- that's our job. We are, as Norman Harned says, the *Guardians of the Process*. We're what stands between something like that ever happening again. If we're silent, then it will occur.

Allison Connelly during her talk on the State of Indigent Defense at the 24th Annual Public Defender Conference in Owensboro

Last Friday, I had the pleasure of participating in the Appalachian Research & Defense Fund's Reunion celebrating their 25th anniversary. And even though they are facing, after 25 years, their very existence - loss of all their funding by year 1998 - it was a joyous occasion. I walked into that room and I felt at home. I felt like these are people I want to be as my friends. These are people whose footsteps I want to follow in. These are people whose lives I want to model my life after. Steve Bright was there; Scott Wendlesdorf; other people that I had never really seen, but only heard about. And then there was John Rosenberg, a man who in fact did escape Nazi Germany. And despite the fact that he is facing the loss of his entire funding in two years, he was optimistic. And when I look at him I think he's what a Defender system is all about. He has devoted his life to public service because, as he said in the newspaper, this country gave him so much. And when his family passed the Statue of Liberty there were flags flying, because they came, I think, on Flag Day, and he thought the flags were flying for him. And so, he became a public servant and has done that his entire life - been at APALRED 25 years. He's a man of great integrity and he's a man who believes in the independence of his lawyers to practice the type of case that they must practice. That is why he's going to fight the new LSC regulations, despite the ABA Ethics Opinion that says it's OK that people that are poor don't have a right to class action or lawyers. Moreover, he has used the community to enhance his standing as a "poor person's lawyer." Now, his greatest supporters, the greatest supporters of a man of foreign origin, in Prestonsburg, Kentucky, are those people in his own community. And finally, and most importantly, he never gave up. He never thought about leaving legal services; he's never thought about it despite the fact that he could make more money elsewhere; despite the fact he's facing the loss of all his funding -- he simply refuses to give up.

That's the same lesson that I see for us as a system. We've got to have individuals that are here for the long-term; that view the Public Defender system as a career. Who take their experience and plow it back into the system. Who mentor the younger people who come along and give them courage and give them spirit and show them the way. We've got to have a system that's independent from all outside influences, because each one of you are the masters of your own case. We have got to lead our lives with great integrity, because we're always under a microscope and if they can find one small human thing, one small human flaw, they will use it against us. We have to understand how important the community is - the ABA, the KBA, the lawyers, the judges, the people in whose lives we work, the places we practice in and ourselves - the community of Defenders, because without each other, we really have nothing and are nothing - we are no force. And most of all, I think that we have to realize that, in times like this, we absolutely can't give up. When times are toughest, it's the most critical that we do this type of work. When times are toughest we must continue despite the odds and with the belief that we will ultimately succeed. It's like Steve Bright said about the underground railroad. People who participated in the underground railroad, and here we are on the Ohio which meant freedom for so many African-Americans, those people who put their lives at great risk, didn't know when slavery would end. They didn't know who would win the Civil War. They took one person at a time, hand-to-hand, person-to-person, until they crossed that river to freedom. We have to have that same attitude, despite increasing caseloads; despite low salaries. We don't know when there's going to be equal justice. We just have to know that we can achieve it. The road's been a lot tougher for many of those that came before us. The Thurgood Marshalls, the Clarence Darrows - people like that who really didn't even have the Warren Court to depend on (and we don't have much of it left), but they got nothing for their labors.

We can't give up, Folks! If we do, I will have let my mother down. If we do, we will have let all those people we care about down. If we do, we will have let this country down, because if WE give up, THEY win! That means money matters, classism matters and racism wins and we can't let that happen. So, if you want to know what the State of Indigent Defense is today, look inside yourselves and look at your neighbors, because WE'RE It.

1996 *Gideon* Award Recipient

Remarks of Allison Connelly, Public Advocate, at the 24th Annual Public Defender Conference in Owensboro, Kentucky, Monday, June 17, 1996.

This year's *Gideon* Award winner is really kind of a surprise in a sense and in a sense not. This individual had 23 separate nominations from judges, prosecutors, clerks, other public defenders, but most importantly, his entire office. One of his favorite sayings, and this was repeated in one of the many letters I received on his behalf is: "Who will represent the poor if I'm not here?" I couldn't say it any better than a couple of letters that I want to read to you before I announce the name of this individual.

> "He has won big cases in his career; he has won difficult cases, but any lawyer can do that sometimes. What distinguishes this person and qualifies him for the *Gideon* Award is not fairly demonstrated by citing a particular flash of brilliant insight in one case or a stroke of luck in another. His contribution to the principle that the accused shall enjoy the right to have assistance of counsel for his defense is best demonstrated by the fact that he has executed that principle every day for more than 13 years.
>
> In short, his dedication to the principle that poor people are entitled to the best defense possible is proven by his endurance and perseverance. The quality of his commitment is proven by just result that he has continuously achieved for his clients. Ethics and the Rule of Law are to some secondary to winning. This individual represents every client vigorously, honestly, honorably and gracefully. (*The word "grace", I think, popped up in about 15 letters.*) He has won the trust of the judges that preside over his clients' cases and he secures for his clients the benefit of that trust."

That's from one judge and here's from a member of the Bar:

> "He exemplifies all the best qualifications a person could hope to possess as a Criminal Defense attorney. Central of these qualities is his commitment to the principles for which the *Gideon* Award stands. He provides principled, effective and virtually loving representation for his clients, people who, in general, have not had the benefit of such positive influences in their lives. By his example, he makes lawyers around him better advo-

Allison Connelly with Jim Cox,
1996 *Gideon* Award Recipient

cates for the poor in this Commonwealth. Because of his dedication to the cause of equal justice for all, regardless of their socioeconomic status, he has made all of us more free and has improved the quality of all our lives. It seems to me, (*and I have to agree and I'm sure you will too*) that the *Gideon* Award is meant for a special kind of criminal defense attorney. **Jim Cox** is just such a public defender."

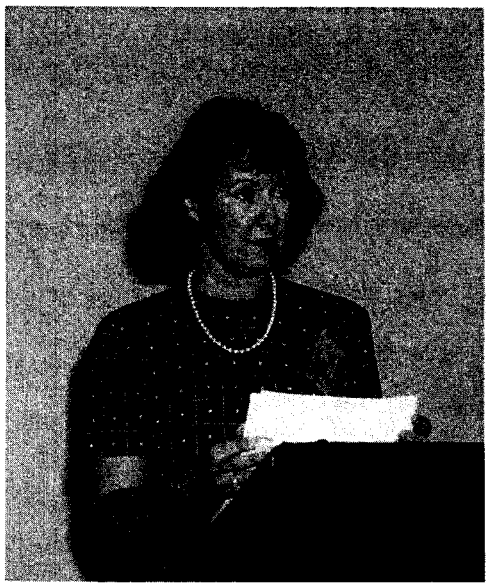
Jim Cox's remarks in accepting the award were: I wish that I could say that I expected it, but I didn't. There are a few things I would like to say. I have to attribute that, I guess, to David Lewis' talk today about storytelling. When I came from Tennessee to Kentucky, I didn't know what to expect. One of the greatest things that happened though was that I got this job. It's been a big privilege and it's been a big honor. I kind of would like to say this, when I first got there in Somerset, I had the privilege to have somebody come into the office, somebody that had a lot of experience and that was willing to share that experience and gave me a lot of insight into this work and also instilled in me that there could be some sort of pride and dignity and I took a great deal of pleasure in doing this work with him. That's George Sornberger. I think he's one of the finest attorneys that I've ever had the privilege to work with.

The second great thing that happened to me is that I met Carolyn Clark. She taught me that sometimes your heart and compassion for people are more important than your legal knowledge and for that I thank her. She has also helped me through some times when I thought I didn't know how much more I could go. She's been a great deal of strength to me.

Thirdly, I want to say that my staff, Teresa, Rob, Austin, Kelly, Joe, and my secretaries, Vicky and Kathy, have been the greatest things that have ever happened to me. I think I told them one time that they're just like my family - they really are. I don't think I express to them enough how much I think of them and how much they help me. So, I just wanted to say that here and now.

The fourth thing I want to say is that I've been privileged to work with Allison Connelly and with somebody like Ed Monahan. If I'm any good at all, it's because I've had this many years experience coming to training like this and to other training. For that I'm greatly appreciative. I thank you for this.

Mark Stanziano on Sexual Abuse at the 24th Annual Public Defender Conference in Owensboro

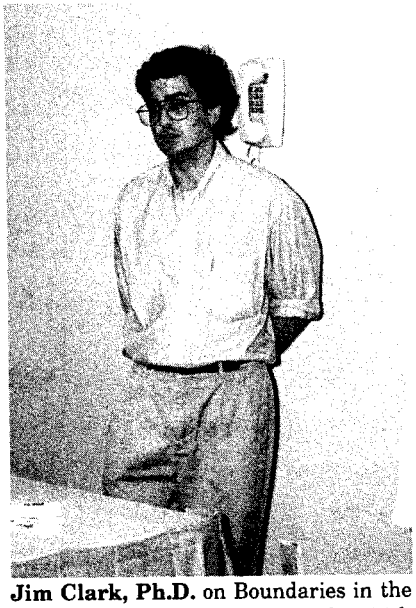


Jill LeMaster on Executive Branch Ethics at the 24th Annual Public Defender Conference in Owensboro

Highlights from the 24th Annual Public Defender Conference in Owensboro, Kentucky on June 17-19, 1996

Trina Jennings, George Sornberger, Rob Riley & Dr. Eric Drogin on Workplace Violence at the 24th Annual Public Defender Conference in Owensboro

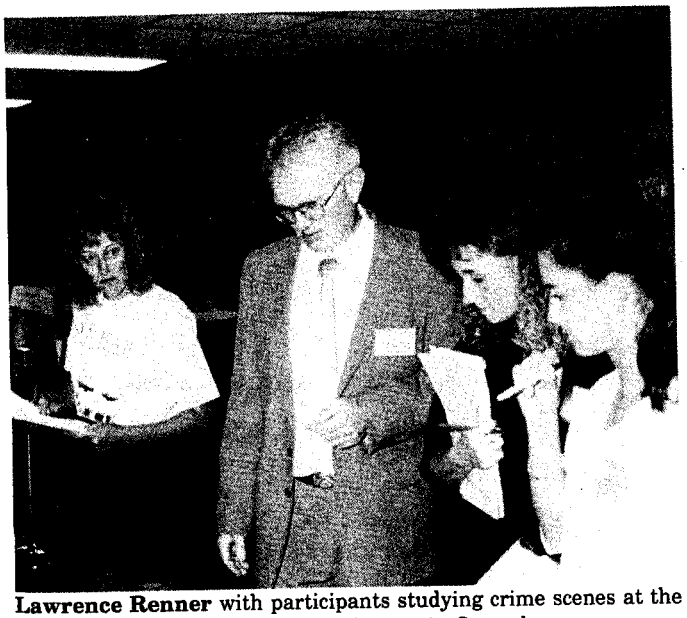
Dr. John McGregor on Mental Health Issues in Juvenile Cases at the 24th Annual Public Defender Conference in Owensboro



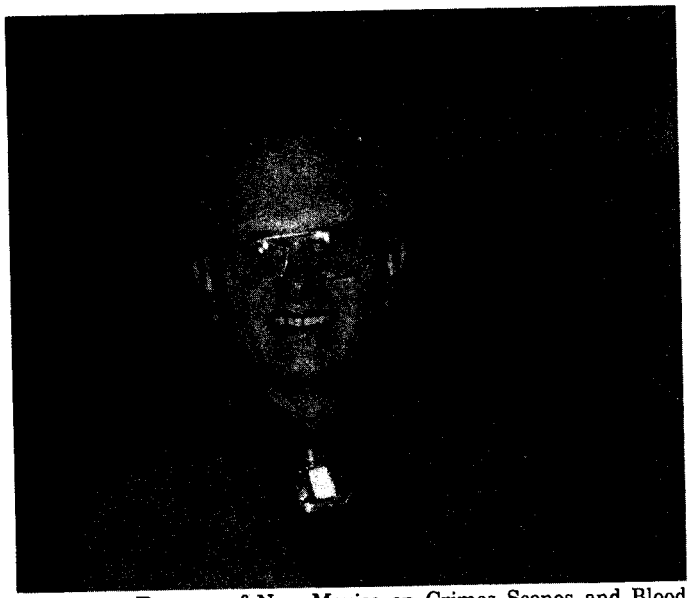
Jim Clark, Ph.D. on Boundaries in the Criminal Justice System at the 24th Annual Public Defender Conference in Owensboro

Joan Wagner of *Dismas Charities, Inc.* at the 24th Annual Public Defender Conference in Owensboro

Joe Howard with Lynn Aldridge and Robin Wilder on Plaster Casting and Lifting Fingerprints at the 24th Annual Public Defender Conference in Owensboro



Lawrence Renner with participants studying crime scenes at the 24th Annual Public Defender Conference in Owensboro



Lawrence Renner of New Mexico on Crimes Scenes and Blood Spatter at the 24th Annual Public Defender Conference in Owensboro

1996 *Rosa Parks* Award Recipient

Remarks of Allison Connelly, Public Advocate, at the 24th Annual Public Defender Conference in Owensboro, Kentucky on Monday, June 17, 1996.

This is a job I really love to do - it's to recognize people that have given their all and have excelled in every way possible toward the benefit of the poorest. Most of you already know who has won the *Rosa Parks* Award, the award that was established a year ago to recognize the individual who contributes so much to the public defender system, who really causes changes, not because of position or the amount of power that he or she has, but because of their action.

This particular person began as a clerk-typist 19 years ago. She was nominated by six separate people and has grown to be the heart and soul of training. While it is agreed that Ed Monahan is a visionary - he creates the most wonderful training, I think, in the country - it's **Tina Meadows** that makes it happen.

Every time, as Rob Riley once said a long time ago, Ed raises his hand and volunteers to do something, he raises Tina's as well. Tina brings our training to life and she takes great pride in everything she does.

She has incredible organizational skills, she has incredible people skills, she has a tremendous attitude. She knows how to push me around, she knows how to push Ed around, she knows how to get the maximum value out of people without us ever knowing it. She has more initiative that just about anyone I've ever met. She's not defined by job description - she's defined by, "What more can I do?"; "How can I improve what we're doing now and how can I improve what we're doing as a group?"

I found a letter in her file. It had been written to Tina in 1992 by Jamie Kunz in Chicago and this is what it said:

> Thanks for everything. There's nothing that should be changed about the staff of the Trial Practice Institute. Eventually, you should be bronzed and sent around the country on a special train for all to see, but not now.

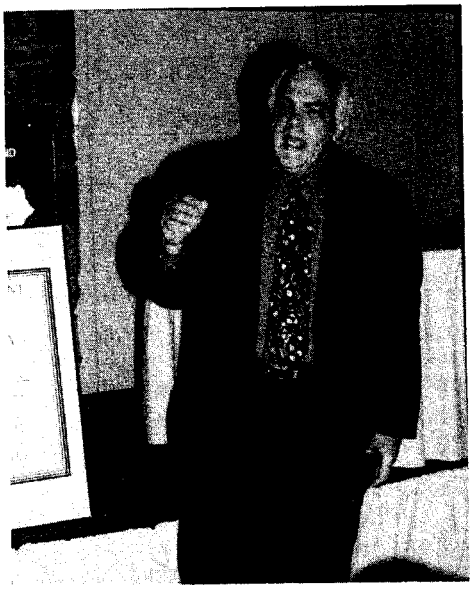
That's right, because she's here to stay with us!

Tina Meadows' remarks in accepting this award:

As most of you know, my remarks were short and sweet at the Annual Support Staff Conference and at the Annual Conference. 'Thank you.' I do want you to know how honored I am to have received this award. I have to say in all my years working at DPA that I've had the privilege of working with the best (to name a few): Ernie Lewis, Kevin McNally, Neal Walker, and last but not least, Ed Monahan. Ed and I have become an inseparable team and I can't ever imagine doing anything else other than training with him. He's taught me a lot and is still trying to teach me everyday and I'm grateful I've been given the opportunity to work him. I've literally grown up here at DPA and all you are like my second family. I wouldn't trade any one of you for anything else. So like Allison said - I'm here to stay - as long as DPA will have me. Thanks again, it really means a lot to me.

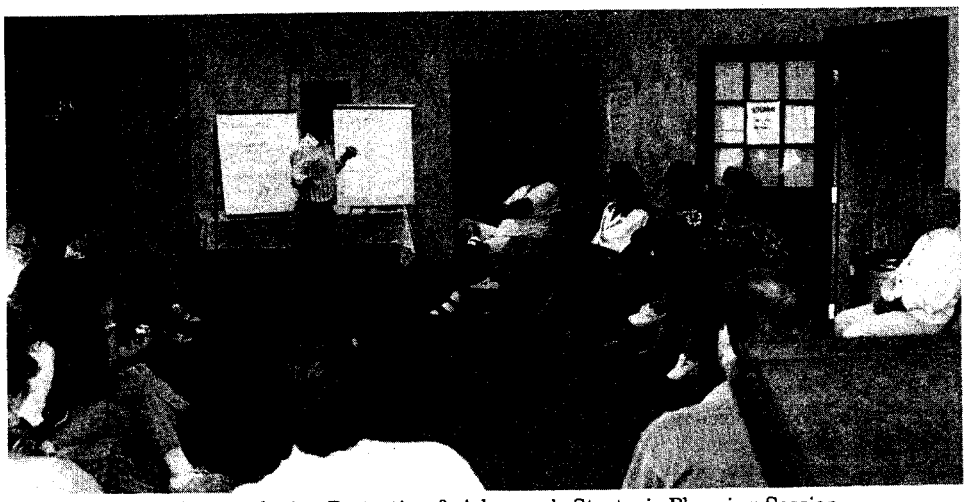
Allison Connelly with Tina Meadows, 1996 *Rosa Parks* Award Recipient

Highlight at the 1996 Annual Professional Support Staff Conference at Lake Cumberland State Park



Joe Guastaferro, Chicago on Communication

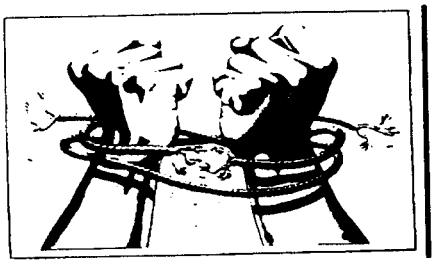
Lee Cowherd, Governmental Services, on Conflict Management



Mark Stein, facilitator, during Protection & Advocacy's Strategic Planning Session

Members of DPA's Professional Support Staff during Unauthorized Practice of Law Session

In October, 1996, a group of criminal defense litigators will spend one intensive week at the Kentucky Department of Public Advocacy's Trial Practice Persuasion Institute. Join them.



If you litigate criminal defense cases, this program is for you!

EVER WISH you had time and a place to consider where you and your criminal defense practice are going? Time to talk to criminal defense attorneys like yourself, to discuss your practice with respected advocates, to fill gaps in your practice, education, and acquire new litigation techniques?

Well, take the time - one week - and come to the **Trial Practice Persuasion Institute** (TPPI) conducted by the Kentucky Department of Public Advocacy. You will join a group of successful men and women who have attended this intensive week of devleopment and who are making their mark with criminal cases they defend.

At the TPPI, you'll exchange real-life litigation experiences with your colleagues, learning from them as they learn from you. At the TPPI, you can build a network of capable, talented people whom you'll confide in and learn from all your life.

Over 20 master criminal defense advocates from across the nation serve as coaches during the week. All are defense veterans: *innovators who have pioneered new persuasion theories, strategies, and tools.* They are teachers, too, and they share their expertise and talk shop with you, in small group practice sessions and afterwards.

For your convenience, and to maximize the program's relevance to your level, the TPPI is separated into three tracks. Throughout the three tracks you will focus on the key issues you face. A broad range of topics will be covered: creative thinking, persuasion, client relationships, voir dire, opening statements, cross-examination, direct examination, closing arguments.

This educational program involves you in the challenges of litigating a case. Your study, discussion and practice of with a case problem or actual cases in extensive small groups is supplemented by lectures and simulations. The results: several years of defense realities are compressed into a week.

The Kentucky Department of Public Advocacy's program is an intensive, comprehensive educational experience for defense persuaders. We invite you to send for information and an application. Applications are due six weeks before the start of the program. Later applications will be reviewed on a space-available basis. Enrollment is limited. We expect a waiting list.

CALL, FAX OR E-MAIL TODAY:
Enrollment is Limited

The next TPPI begins Sunday, October 6, 1996, and ends Friday, October 11, 1996. For brochures and applications, please telephone, fax, or e-mail:

Tina Meadows, Training & Development
Department of Public Advocacy
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SMITH DEFENDER DONATES FEE TO PUBLIC DEFENDER SYSTEM

Columbia, South Carolina. The Washington state lawyer appointed to defend Susan Smith in Union County last year has donated her entire fee to help provide legal assistance other indigent defendants in south Carolina capital cases.

Judy Clarke, a 1977 University of South Carolina Law School graduate who serves as federal public defender for eastern Washington State and Idaho, presented a check for nearly $83,000 to John Blume, head of South Carolina's Post-Conviction Defender Organization, at a death penalty defense training seminar in Columbia on February 2, 1996.

Appointed by Judge William Howard to help defend Smith last February, Clarke logged more than 1000 hours on the case. On July 28, 1995 Smith was sentenced to life imprisonment by a Union County jury for the murder of her two young sons.

In an order signed last December 18, 1995, and made public February 2, 1996, Judge Howard said that the Smith case presented many unusual challenges to defense counsel, and that Clarke's "abilities and her actual performance needed to and actually did exceed the average range of attorneys in capital cases in South Carolina." For this reason, Howard said, he was setting Clarke's compensation at $80.00 per hour for out-of-court time, and $100.00 per hour for in-court time.

South Carolina state law sets a normal hourly rate of up to $50.00 to $75.00 for court-appointed counsel in capital cases, but permits trial judges to award higher rates where appropriate.

David Bruck, a Columbia lawyer who was Clarke's co-counsel in the Smith case, said today that Clarke told him long before the trial that she intended to donate her entire fee to help further indigent defense in South Carolina. Bruck said he urged her to keep at least some of the fee, since she had already taken unpaid leave from her federal defender job in order to represent Smith, and had spent thousands of dollars of her own money to travel between Washington state and South Carolina in the months before the Smith trial.

But Clarke was adamant, Bruck said, that in light of the desperate financial state of South Carolina's public defender system, the state's death-sentenced prisoners needed the money more than she did.

"It's pretty ironic, in view of this extraordinarily selfless action, that it was Judy Clarke's appointment that caused the General Assembly to pass a budget rider forbidding South Carolina trial judges from appointing out-of-state lawyers in the future," Bruck said. "No other state in the nation has such a law, and maybe the General Assembly will rethink whether South Carolina should."

Clarke, a nationally-known criminal law expert, has served as a federal public defender for all but one year of her 18-year legal career. She is due to begin a one-year term as President of the National Association of Criminal Defense Lawyers later this year.

John Blume said that Clarke's gift will initiate a fund to create a fellowship for recent law school graduates. Recipients of the fellowship will spend a year assisting in the representation of indigent South Carolina prisoners under death sentence.

Blume pointed out that the need for such private assistance is must greater now than in the past, because Congress recently eliminated all federal funding for defender organizations specializing in capital cases. In May, 1995, South Carolina Attorney General Charlie Condon appeared before a Congressional budget committee and successfully urged the elimination of all such federal aid. As a result of this cut-off, South Carolina's Post-Conviction Defender Organization is now laying off most of its staff.

In Memoriam

Bob Little

Bob Little, Assistant Public Advocate, a 13 year employee of the Department of Public Advocacy at the Paducah Trial Office and the Eddyville Post-Conviction Office passed away Wednesday, July 3, 1996 at the Marshall County Hospital. Bob had been on medical leave since last summer. He was a graduate of Murray State University and University of Kentucky Law School. Bob was a deacon of Zion's Cause Baptist Church and on the Board of Directors of the Purchase Area Development District and Marshall County Hospital.

Those who knew Bob will attest to his dedication to this clients and his abiding belief in the dignity of humanity. His life was always one of service to others. Wherever Bob saw a person in need, he was there to help. He practiced his faith through good works in both his personal and professional lives, never seeing a difference between the two. For him, the law was never an academic exercise, but a tool he could use to help those in need. He never lost sight of the fact that lawyering is about people. Bob left a legacy of good works that will live long beyond his passing. He was a good soul. We miss him.

American Psychological Association New Report on Family Violence Brings Psychological Expertise to Bear on Troubling Problem

The American Psychological Association (APA) released *Violence and the Family* in February 1996 to summarize psychological research and clinical issues pertaining to family violence. The report was written by the APA Presidential Task Force on Violence and the Family, a group of psychologists with expertise in various aspects of family violence appointed by APA President Dr. Ronald Fox in 1994. Dr. Lenore Walker, of Denver, CO, an internationally recognized authority on domestic abuse, was Chair of the Task Force; Dr. Renae Norton, Cincinnati, OH, a therapist who works with families, was Vice Chair. Other Task Force members included Drs. Christine Courtois, Mary Ann Dutton, Robert Allen Geffner, Rodney Hammond, John Chris Hatcher, Janis Sanchez, and Geraldine Butts Stahly.

The report addresses definitions of family violence and abuse; the extent of family violence in the United States; risk and resiliency factors; efforts of family violence on society; child abuse, partner abuse, including dating violence; elder abuse, adult survivors of child abuse; interventions with victims and perpetrators; the intersection of the law, psychology, and family violence; and promoting violence-free families. At the end of the report, The Task Force recommends actions in the following areas: public policy and intervention, prevention and public education, clinical services, professional training and education, and psychological research.

To receive one free copy of the 156-page soft-cover book please call the Public Interest Directorate at (202) 336-6046; each additional copy costs $5.00; all multiple orders must be prepaid by check made payable to APA.

The Kentucky Department of Public Advocacy's Advertising Rates for *The Advocate*

ADVERTISING RATES

Black & White

	1 Issue	6 Issues
Full Page	$150	$700
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1/4 Page	$ 50	$200

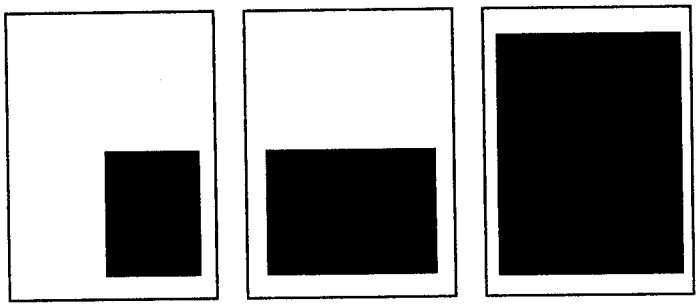
NOTE: *Stapling inside the newsletter up to a 4-sided insert would be double the cost for a full page ad.*

CLOSING DATES

*Published bi-monthly

ISSUE	PUBLICATION	DEADLINE
January	January 15	December 1
March	March 15	February 1
May	May 15	April 1
July	July 15	June 1
September	September 15	August 1
November	November 15	October 1

AD SIZES



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CIRCULATION

Your advertising message is delivered to a highly selective group of readers. *The Advocate* has a circulation of over 2,000 which includes all full-time public defenders, many private criminal defense attorneys, members of the criminal justice system and the judiciary in Kentucky, federal district judges and judges of the 6th Circuit Court of Appeals.

The Advocate is the most comprehensive and effective advertising medium to reach Kentucky's growing criminal justice community and defense bar. *The Advocate* is retained permanently by most lawyers as a resource.

For further information contact:

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Upcoming DPA, NCDC, NLADA & KACDL Education

**** DPA ****

11th DPA Trial Practice Persuasion Institute
October 6-11, 1996
Kentucky Leadership Center
Faubush, Kentucky

25th Annual Public Defender Training Conference
June 16-18, 1997
Campbell House Inn
Lexington, Kentucky

NOTE: DPA Training is open only to criminal defense advocates.

**** KACDL ****

KACDL Annual Conference
November 16, 1996
Paducah, Kentucky

For more information regarding KACDL programs call Linda DeBord at (502) 244-3770 or Rebecca DiLoreto at (502) 564-8006.

**** NLADA ****

NLADA Appellate Defender
October 21-23, 1996
Indianapolis, Indiana

For more information regarding NLADA programs call Joan Graham at Tel: (202) 452-0620; Fax: (202) 872-1031 or write to NLADA, 1625 K Street, N.W., Suite 800, Washington, D.C. 20006.

**** NCDC ****

For more information regarding NCDC programs call Marilyn Haines at Tel: (912) 746-4151; Fax: (912) 743-0160 or write NCDC, c/o Mercer Law School, Macon, Georgia 31207.

Battered Women's Defense Conf.
Sponsored by CHR, KDVC, Ky. Psychological Assoc. & DPA
September 5-6, 1996
Frankfort, Kentucky
Contact Sherry Currans for more information at (502) 875-4132.
**We incorrectly listed the dates of September 9-10, 1996 in the previous Advocate.*

"I don't read *The Advocate*," a criminal defense attorney who just got an acquittal told *The Advocate*, "I study it."

DEPARTMENT OF PUBLIC ADVOCACY
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Frankfort, KY 40601

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