JOURNAL

The Advocate

Journal of Criminal Justice Education & Research

Volume 19, No. 3, May 1997

Section 11 - *Gideon v. Wainwright* (March 18, 1963) - 6th Amendment

DPA's FY 96 Caseload Figures Released: Funding Falls Short of Needs

March 18, 1997 marked the 34th Anniversary of the United States Supreme Court's decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963) holding that a poor person facing a loss of his liberty was entitled to be represented by counsel appointed by the state if he was too poor to hire his own. Twenty-five years ago on September 22, 1972 the Kentucky Supreme Court decided in *Bradshaw v. Ball*, 487 S.W.2d 294 (Ky. 1972) that Kentucky lawyers could *not* be *required* to represent indigents charged with a crime without being compensated since that would be an unconstitutional taking of their property. As a result, the Department of Public Advocacy (DPA) was created as Kentucky's statewide public defender program. Statewide defender caseload figures have been finalized for the last fiscal year and they indicate several harsh realities. In those 25 years, the cases have steadily increased in numbers and complexity. In the last two and a half decades, the funding per case has consistently fallen short of what is necessary to get the job done right.

91,600 trial and post-trial level cases for FY 96 (July 1, 1995 - June 30, 1996) present persistent workload pressures on defenders across Kentucky. More and more defenders face demanding, complex and difficult cases involving sex abuse, DUI, and capital allegations. Combined with the volume of cases a defender must handle at the trial level, anywhere from 200-760 cases, this presents many instances where defenders are unable to meet the level of competent representation required by current ethical and legal standards of practice.

Funding: $153 per case; $3.54 per capita. Kentucky's 91,600 cases in the trial courts are being done for an average of $153 per case, less than the cost of a pair of eye glasses. This is only $3.54 per capita. Twenty year veteran of Kentucky's public defender system, **Ernie Lewis**, who took over leadership for DPA in October, 1996, said that "while this is quite a bargain for the taxpayers, it also implicates serious problems in representing all our clients adequately."

Average trial caseloads of attorneys in the following public defender offices reveal the problems on a personal level. In some cases, the workload is over twice the nationally accepted caseload standards:

London	425/attorney
Paducah	447/attorney
Pikeville	450/attorney
Somerset	500/attorney
Jefferson	760/attorney

Kentucky funding at the bottom nationally. President of *The Spangenberg Group*, West Newton, Massachusetts, 617-969-3820, **Robert Spangenberg**, has compiled 50-state national data on the expenditure and caseload for indigent defense since 1982. Mr. Spangenberg states that the most recent data available in FY 96, places Kentucky at or near the bottom in both per capita funding and cost per case. He further states that Kentucky's ranking has continued to fall to a level lower than reported in the first national data published in 1982, at $127 per trial level case it is now last in this category.

Many go unrepresented. A recent study (see *The Advocate*, Vol. 18, No. 2 at 5 (March 1996)) indicated that thousands of indigents accused of crime in Kentucky are processed through the court system without the benefit of legal representation. This shocking problem is growing annually. The number of indigents accused in Kentucky without legal representation increased from 114,992 in FY 89 to 159,619 in FY 94, or 39% in just 6 years. This has been most recently highlighted in the juvenile arena.

Enhancement of Juvenile Representation Needed. A study in November, 1996 by the Children's Law Center, Inc. of Northern Kentucky, *Beyond In Re Gault: The Status of Juvenile Defense in Kentucky*, indicated that there were deficiencies in DPA's provision of services at the juvenile level. DPA was criticized for placing inexperienced lawyers in juvenile court, having untrained part-time lawyers in juvenile court, and most seriously for having a large percentage of juveniles without lawyers of any kind at the time of their case. A significant increase in juvenile representation is needed.

Defendants are paying for part of their representation to the extent their financial limitations allow. In FY 96, defendants paid $2,551,334 through three different fees: a $40 administrative fee ($621,428), a $50 DUI fee ($1,092,992), and through recoupment ($836,914).

Prosecutors Leap Defenders on Delivery of Services. DPA has fallen substantially behind Kentucky prosecutors in providing representation through *full-time* professionals. Today 64 counties are served by full-time Commonwealth Attorneys yet only 47 counties are covered by full-time public defenders.

(Continued on Page 3)

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.

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

Department of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, KY 40601
Tel: (502) 564-8006; Fax: (502) 564-7890
E-Mail: pub@dpa.state.ky.us

Paid for by State Funds KRS 57.375 & donations

TABLE OF CONTENTS

(Continued from Page 1)

Prosecutors are Compensated Better. Kentucky prosecutors continue to be compensated substantially more than Kentucky defenders. A full-time Commonwealth Attorney is paid $79,832 per year. DPA's starting salary for a directing attorney of its trial offices which cover multiple counties is $35,985. Current DPA directing attorneys average $47,080, over $30,000 less than a Commonwealth Attorney. A *part-time* county attorney and a part-time Commonwealth Attorney receives a salary of $47,899.

Workloads Require More Resources. In reflecting on the state of indigent defense as indicated by DPA caseloads in Kentucky, Public Advocate Lewis stated, "When a reality check is done, the right to counsel is at risk in many places in Kentucky due to overwork, the pressure of cases such as juvenile and capital, and because there are fewer full-time defenders than full-time prosecutors. Additional dollars are needed for the Commonwealth's defenders to be able to meet the challenges of effectively representing all our clients."

DEPARTMENT OF PUBLIC ADVOCACY
FY 96 REPORTED CASES AND FUNDING PER CASE

A SUMMARY OF THE DATA

I. Part-time Trial Contract Counties: TOTAL 73 COUNTIES	
Population	1,496,765
Reported Trial Cases	21,432
Funding Per Case	$ 109.48
II. Full-time Trial DPA Offices: TOTAL 47 COUNTIES	
Population	2,127,841
Reported Trial Cases	66,284
Funding Per Case	$ 132.69
III. TRIAL CASE TOTALS: TOTAL 120 COUNTIES	
Population	3,624,606
Reported Trial Cases	87,716
Funding Per Case	$ 127.02
IV. DPA Post-Trial Services	
Population	Statewide
Appellate Cases	493
Post-Conviction Cases	3,365
Total Cases	3,858
Funding Per Case	$ 437.97
V. GRAND TOTAL: ALL CASES	
Population	3,624,606
Reported Trial & Post-Trial Cases	91,574
Funding Per Case	$ 152.79

HONEST JOHN

by JIM THOMAS

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

Celebrating 25 Years of Independent Defense of Indigents: Preparing for the Next 25 Years of Interdependent Advocacy With a Focus on Defending Drug Cases

Nancy Hollander

Larry Landis

Jim Martorano

Nancy Hollander practices criminal defense law throughout the country from the Albuquerque firm of *Freedman, Boyd, Daniels, Hollander, Guttmann & Goldberg, P.A.*. A past President of the National Association of Criminal Defense Lawyers (NACDL) she teaches in numerous trial practice programs, such as the National Criminal Defense College and Gerry Spence's Trial College. Ms. Hollander also speaks at seminars throughout the country on various subjects including forfeiture, Fourth Amendment practice, expert witnesses, ethics, evidence, and trial practice and has written extensively on these and other criminal law topics. In 1995 Ms. Hollander became the Program Coordinator of the Russian Jury Trial Project of the Southeastern Institute for Law and Commerce. She has taught Russian criminal defense lawyers in Moscow and St. Petersberg, Russia. Ms. Hollander has appeared on such national television programs as *The Gerry Spense Show*, *The Today Show*, *Court TV*, *The Oprah Winfrey Show*, and *The MacNeill/Lehrer News Hour*. She is listed in *The Best Lawyers in America*, and the *National Director of Criminal Lawyers*. Ms. Hollander is co-author with Professor Barbara Bergman of Clark Boardman Callaghan's *Everytrial Criminal Defense Resource Book*..

John Delgado is a 1976 graduate of Emory University in Atlanta, Georgia. Mr. Delgado received his J.D. from the University of South Carolina School of Law in 1975. He serves as an Adjunct Professor of Law at the University of South Carolina School of Law where he teaches Criminal Trial Practice. He is on the faculty of the National Criminal Defense College, Mercer University, Macon, Georgia. Mr. Delgado is a former member of the Board of Governors of the South Carolina Trial Lawyers Association and was Chair of the Criminal Law Section of that body. He is admitted to practice in all state courts, the United States District Court for the District of South Carolina, the United States Court of Appeals for the Fourth Circuit, and the United States Supreme Court. He is a Founding Member of the South Carolina Association of Criminal Defense Lawyers and Editor of the SCACDL's Newsletter. Mr. Delgado is also a member of the National Association of Criminal Defense Lawyers. he has lectured nationally on criminal trial practice at seminars held in Georgia, Kentucky, Indiana, Wisconsin, New Hampshire and Maryland. Mr. Delgado limits his practice to criminal defense in State and Federal Court as well as to prosecuting federal civil rights claims.

Larry Landis has been the Executive Director of the Indiana Public Defender Council since 1980. He received his J.D. from the Indiana University School of Law in 1973 and his B.S. from Indiana University in 1969. Larry served as Chairman of the ABA Criminal Justice Section, Defense Services Committee (1988-90, 1995-97); Chairman, NLADA's Defender Trainers Section (1979-81, 1983, 1985); Member of NACDL since 1976; member of the Indiana Bar Association; Chairman of the Indianapolis Bar Association Legislation Committee (1994); Distinguished Fello of the Indianapolis Bar Foundation; Secretary of the Board of Director of the Indiana Association of Criminal Defense Lawyers (1980-87, 1990-97); Board of Directors of the Indianpolis Legal Aid Society (1984-1990); Board of Directors of the Indiana Civil Liberties Union (1976-83). Larry is the 1996 recipient of the NLADA Reginald Heber Smith Award and the recipient of the Indiana State Bar Association, Criminal Justice Section's 1996 Criminal Justice Service Award.

Jim Martorano has 22 years experience in litigation before New York courts. Since 1977 he has been a public defender with the Legal Aid Society in the Bronx. He has published and lectured across the country on the representation of criminal defendants in drug cases focusing on the scientific testing of the evidence. Since 1991 he has been an elected member of the Yorktown Town Board, a town of 34,000.

Conference Information

Choose from Over 50 Learning Opportunities

As we celebrate 25 years of defending our bill of rights in Kentucky, our selection of criminal defense topics is quite grand and we return to the site of the first Annual Conference...*The Campbell House Inn.* Most of the Conference will provide 5 or more simultaneous sessions for you to select from. You can register for special workshops on drugs and also on appellate advocacy. Over 250 defense advocates will convene at the largest yearly gathering of criminal defenders in Kentucky which provides a splendid opportunity to meet and associate with others representing clients accused of or convicted of a crime. This Conference offers the greatest variety of criminal defense education opportunities of any Kentucky criminal justice CLE program. *There are over 50 diverse presentations from the pragmatic to the cutting edge to choose from based on your individual needs!* Our presenters are prominent Kentucky and distinguished national professionals. This Conference offers rich opportunities to reach new levels of thinking about our challenges since as Einstein has observed, *"We cannot solve the problems we have created with the same thinking that created them."*

Registration/Meals/Lodging

The deadline for registration is May 30, 1997. There is a late registration fee of $25. Cancellations must be received by June 9, 1997. There is a $25 cancellation charge. On-site registration is Monday from 12:00 noon until 2:00 p.m. in the lobby of *The Campbell House Inn*, Lexington, Kentucky. Check-in to the hotel is 2:00 p.m. on Monday. Check-out is 11:00 a.m. on Wednesday. Our program begins at 1:30 p.m. on Monday and ends on Wednesday at 12:00 p.m. with a box lunch to go.

Dinner on Monday; breakfast & lunch on Tuesday; and breakfast and lunch on Wednesday are included in the registration fee. There will be dinner/dance with the presentation of awards and remarks from past public advocates, the Chair of the Public Advocacy Commission and our Public Advocate on Monday evening followed by entertainment. Tuesday's lunch will offer award presentations and remarks from Laura Douglas, Secretary of the Public Protection & Regulation Cabinet.

12.5 KBA CLE Credits Including up to 2 Hours of Ethics Credits

This Conference is approved for 12.5 hours of CLE credits from the KBA CLE Commission, including up to 2 hours of legal ethics. CLE approval will be sought from any state you indicate on your registration form.

Our Conference Programs

There will be programs focusing on the theme of independence and interdependence and drugs, as well as on juvenile advocacy, capital representation, trial litigation skills, sex abuse defenses, mental health dimensions of criminal defense, ethics, persuasion, investigation, and an appellate litigation workshop. Presentations include:

✓U.S. Supreme Court Review
✓Kentucky Evidence Review
✓Appellate Litigation Workshop
✓Effective Preservation
✓Expert Assistance
✓Law Office Management
✓Search & Seizure
✓Successful DNA Litigation
✓Workplace Drugs & Violence
✓Understanding the Influence of Drugs on Behavior
✓Vigorous Drug Defenses
✓Capital Jury Selection
✓Social Histories in Capital Cases
✓Litigating Your 1st Capital Case
✓Capital Caselaw Review
✓Understand the DSM-IV
✓Alternative Sentencing
✓Funds for Experts: Views from the Judiciary
✓Unemployment as a Defense in Nonsupport Cases
✓Defending Arson Charges
✓*Batson* Litigation
✓Defending DUI Cases
✓Field Sobriety Tests
✓Litigating Juvenile Law Cases; Transfer Litigation
✓The Psychological Dynamics of Domestic Violence
✓Finding Expert Help in Sex Cases
✓Case Analysis in Sex Defenses
✓Evidence Litigation in Sex Cases
✓Kids Testimony in Sex Cases
✓How to Raise Competency Issues for Juvenile Clients
✓Transfer Hearings: Strategies for Success
✓Remarks from Public Protection & Regulation Cabinet Secretary
✓Remarks from our past Public Advocates
✓The State of Indigent Defense by the Public Advocate

1997 ANNUAL CONFERENCE REGISTRATION

Deadline for registration is May 30, 1997. Make checks payable to the Kentucky State Treasurer and mail to: Tina Meadows, DPA Training, 100 Fair Oaks Lane, Suite 302, Frankfort, KY 40601; (502) 564-8006; FAX: (502) 564-7890; E-mail: tmeadows@dpa.state.ky.us. (PLEASE NOTE: Checks or cash only/NO CREDIT CARDS ACCEPTED.)

NAME: _____

TITLE: _____

ADDRESS: _____

CITY: _____ STATE: _____ ZIP: _____ TELEPHONE: ( ) _____ FAX: ( ) _____

REGISTRATION *(Check the appropriate boxes)*

*You are entitled to the Kentucky public defender rate if you are a full or part-time public defender, contract public defender, appellate *of counsel* public defender, or are doing 1 or more conflict public defender cases in Kentucky.

Kentucky Public Defenders*:

- ☐ $ 80, no room
- ☐ $130, room at double occupancy
- ☐ $180, private single room (1 person)
- ☐ $205, private double room (4 people/2 double beds)
- ☐ $ 60, Law Clerk, no room
- ☐ $110, Law Clerk, room at double occupancy

Criminal Defense Attorneys & Out-of-State Public Defenders

- ☐ $300, no room
- ☐ $350, room at double occupancy
- ☐ $390, private single room (1 person)
- ☐ $415, private double room (4 people/2 double beds)
- ☐ $ 60, Law Clerk, no room
- ☐ $110, Law Clerk, room at double occupancy

If you checked "Room at Double Occupancy" please list a roommate preference below; otherwise, we will assign you a roommate. Also please make sure you check whether you are a smoker or non-smoker.

Roommate Preference: _____ I am a: ☐ smoker; ☐ non-smoker

☐ I need vegetarian/low fat meals ☐ I need handicapped sleeping room

Due to a disability, do you need any special accommodations? ☐ No ☐ Yes
If yes, identify: _____

Please check your preference:

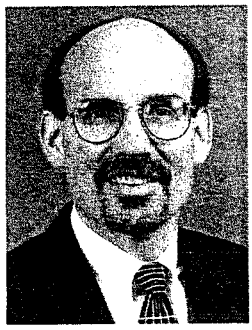
☐ 1) Regular Conference
☐ 2) Special 1-1/2 day Workshop on Appellate Litigation
(limited to the first 24 who register)
(Tuesday & Wednesday with the regular Conference offerings on Monday)
☐ 3) Special day-long Workshop on Drugs by Dr. Pat Sammon, University of Kentucky
(Tuesday with the regular Conference offerings on Monday & Wednesday)

I wish to file for CLE credit in the following states (other than Kentucky):

State #1 _____ State #2 _____

The Department of Public Advocacy does not discriminate on the basis of race, sex, religion, national origin, sexual orientation, age or disability in employment, provision of services and the admission of access to programs, services or activities. All materials will be provided in alternative format upon request.

Reorganization of DPA



Ernie Lewis

Since October of 1996 when I became the Public Advocate, I have been looking at the issue of reorganization for the Department of Public Advocacy. While reorganization certainly can be classified as just so much bureaucratic irrelevance by some, I have made the reorganization of the Department one of my highest priorities for the first six months. One cannot understand this priority for reorganization without understanding the previous organization of the Department.

As presently organized, the Department has two basic divisions, P & A and Law Operations. While "divisions" are defined in KRS 12.010 as "a major subdivision of a Department," both trials and post-trials have remained branches over the past few years. Branches vary in size greatly in the present organization of the Department, from the Juvenile Post-Conviction Branch consisting of fewer than 10 people to the Field Office Branch which consists of some 15 field offices. In my view, the present organization of the Department did not reflect an efficient management structure for such a large Department.

As a result, I have asked and received the permission of the Cabinet for Public Protection and Regulation to reorganize the Department of Public Advocacy. As this article is written, the reorganization is proceeding through the Executive Branch. We hope to have reorganization completed by the time that you receive this article. Under the reorganization there will be 4 divisions. An organizational chart accompanies this article and shows how the four Divisions fit together. The four Divisions are as follows:

1) **Protection & Advocacy (P & A) Division.** This Division will remain unchanged. However, **Maureen Fitzgerald** has recently been named to direct the P & A Division. Maureen is a long-term P & A employee, an expert on education advocacy, a former Peace Corps volunteer, and an advocate of national reputation. We are extremely fortunate to have Maureen head P & A.

2) **Law Operations Division.** The Law Operations Division will continue to be the primary administrative division managing DPA. Since October 1996, **Dave Norat**, a veteran of DPA and former Defense Services Division director has been the division director of Law Operations and will continue to serve in this capacity.

3) **Post-Trial Division.** One of the primary changes under the reorganization will be the creation of a Post-Trial Division. This will be headed by **Rebecca DiLoreto**. Rebecca has served in numerous capacities in DPA. She started as a trial lawyer in the Richmond office and thereafter served as Recruiter/appellate lawyer and the branch manager of the Juvenile Post-Conviction Branch. Under the Post-Trial Division there will be 4 major post-trial branches. **Donna Boyce** will be the Appellate Branch Manager. **Marguerite Thomas** will be the Post-Conviction Branch Manager. **Randy Wheeler** will be the Capital Post-Conviction Branch Manager. The Juvenile Post-Convic-tion Branch now headed by Rebecca DiLoreto will be searching for a new branch manager.

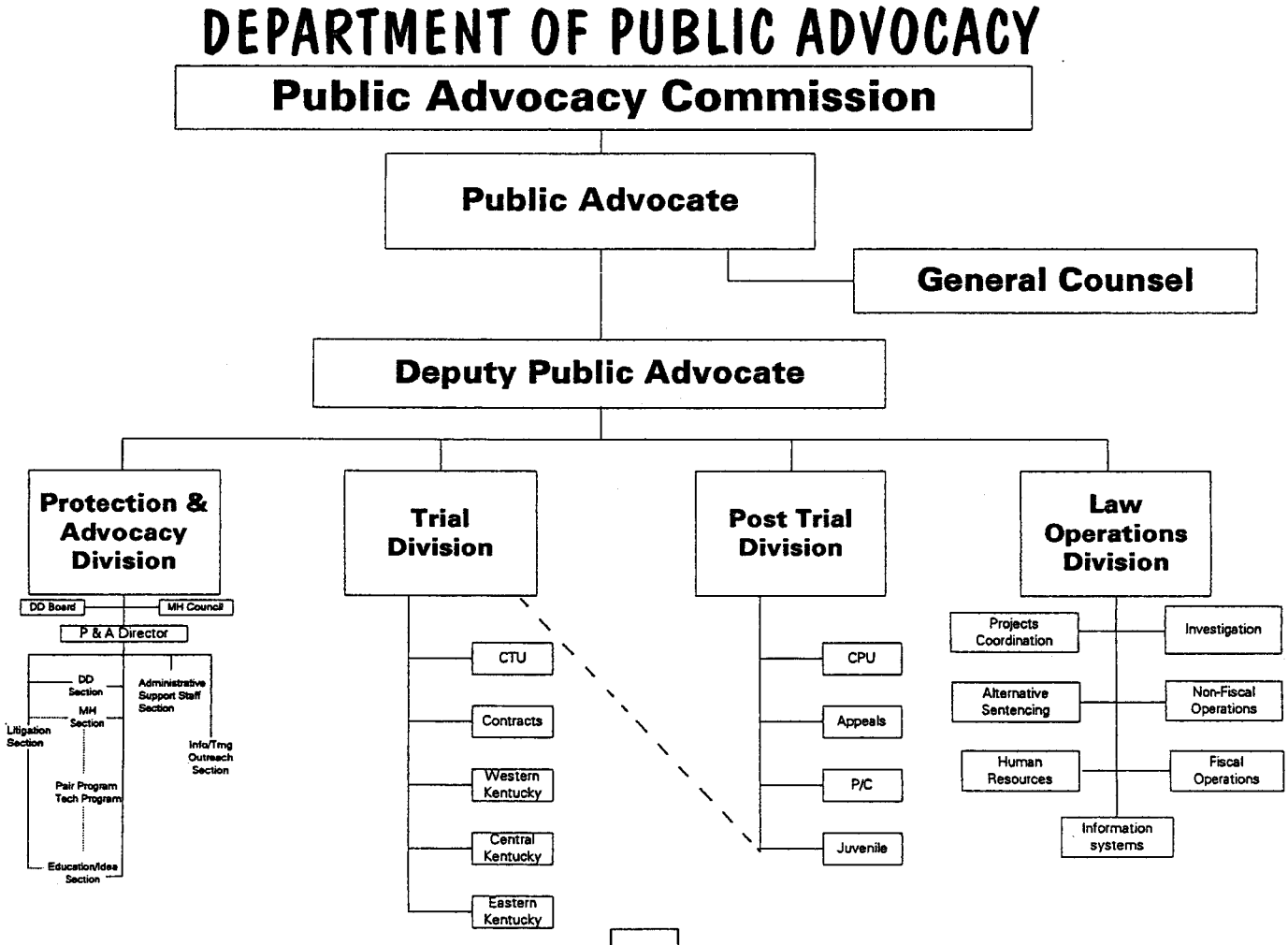
4) **Trial Division.** An equally significant change will be made in the management of the trial area. Under reorganization we will have a Trial Division. This division will be directed by **George Sornberger**. George has also served in many capacities in the Department. He was a public defender in Nebraska for many years before coming to Kentucky. Thereafter he was a trial lawyer in the Somerset office, the first directing attorney of the Frankfort trial office, the first regional office director of the Elizabethtown office, and then was the head of the Capital Trial Unit. George is a talented

trainer, a fine litigator and a person who knows the trial arena backwards and forwards. He will be supervising people who will be responsible for all 120 counties public defender systems. Full-time offices will be managed by 3 regional managers located in the west, central and eastern parts of the state. Each regional manager will be one of DPA's full-time office directing attorneys and will manage approximately 5-6 offices. The regional managers are: **Roger Gibbs** of London for the eastern region, **Lynda Campbell** of Richmond for the central region, and **Rob Riley** of LaGrange for the western region. This will further allow for expansion as DPA's full-time system grows in the future. The Boyd County office will be supervised by the eastern regional manager. The full-time offices in Fayette and Jefferson County will be jointly overseen by the Trial Division Director, the Deputy Public Advocate and the Public Advocate. Those counties which are not full-time will continue to be managed by the contract branch manager who is **John Niland** of Munfordville. Our capital trial efforts will be managed through the Capital Trial Branch which has **Vince Yustas** as acting manager.

These are the four divisions of the reorganized Department of Public Advocacy. What are the ramifications of this? Obviously, reorganization for reorganization's sake is worth nothing more than the paper it is written on. I sincerely believe that this will result in a better managed Department of Public Advocacy. My hope is that there will be smoother lines of communication, better budgeting, better planning and by-and-large a more efficient system.

However, we are to be judged by whether we improve quality of services to our clients. It is also my hope that this system will result in better supervision, quicker filling of vacancies, better coaching in capital cases, more case review, more scrutiny of our contracts and overall higher quality in the delivery of services.

ERWIN W. LEWIS, Public Advocate



Aprile Appointed to ABA Council

In March 1997 Vince Aprile, DPA's General Counsel and 24 year veteran of DPA, was appointed by the National Legal Aid and Defender Association (NLADA) to serve as its representative on the Council of the American Bar Association's Criminal Justice Section. The 33-person Council is the governing body of the Criminal Justice Section. Vince's term expires in August 2000.

Founded in 1920 the ABA's Criminal Justice Section has more than 10,000 members, including private defense lawyers, public defenders, prosecutors, law professors, trial and appellate judges, juvenile justice practitioners, correctional and law enforcement personnel, court administrators, and other professionals interested in improving the criminal justice system and the quality of their practice.

With its interdisciplinary membership, the Section takes primary responsibility for the ABA's work on solutions to issues involving crime, criminal law, and the administration of criminal and juvenile justice. The Section's mission "is to improve the criminal justice system and to serve its members, the profession, and the public." Its goals include "educat[ing] the public about the criminal justice system" and "mobiliz[ing] support for criminal justice improvements."

In her letter confirming the appointment, Ellen Greenlee, President of NLADA and the Executive Director of Philadelphia's public defender program, wrote that Vince's "[y]ears of experience in indigent defense and in the leadership of the NLADA Defender Council and Board [of Directors] plus [his] forceful advocacy of the defender perspective on important bodies like the Prado committee [to review the federal Criminal Justice Act] and the Federal Courts Study Committee, will be of outstanding benefit to the Council and to the advancement of NLADA's positions and interests within it."

Vince has served two separate stints on the NLADA Board of Directors (1982-88, 90-96) and concomitant terms on NLADA's Defender Council. NLADA is the largest national, non-profit membership organization devoting all of its resources to preserving the availability of effective legal assistance, both civil and criminal, for poor and low income Americans.

Vince was appointed by U.S. Supreme Court Chief Justice Rehnquist to the 15-person Federal Courts Study Committee (1989-90) which focused on the future of the federal courts and published in April 1990 a comprehensive report. In August 1991 Chief Justice Rehnquist appointed Vince to the U.S. Judicial Conference's 9-person Committee to Review the Criminal Justice Act (1991-93), which generated its final report in January 1993. Vince is a member of the Editorial Board of the Criminal Justice Section's magazine, *Criminal Justice* (1989-present), and has served two consecutive one-year terms as the Chair of that Board (1991-93).

♦♦ IN MEMORIA ♦♦
William K. Burkhead

Bill's family, friends and the legal community were struck by a terrible loss on Sunday, April 28. Bill died suddenly in his Louisville home. The day before he ran in the 24th annual Louisville mini-marathon.

Bill spent all of his 50 years on the run. In 6 years as a public defender he took one real vacation. It lasted a week. He spent it with his son, Brett, who had just graduated from the Naval Academy. Like his son, Bill began his career as a naval officer. He was a pilot, who flew the P-3 aircraft which was used in the surveillance of enemy submarines. Fortunately, Bill did not have to serve in combat for he was not a warrior. By nature, he was kind and gentle.

His style was to resolve differences through open discussion. A wonderful speaker with a smooth radio announcer's voice, Bill was an advocate for the poor. For awhile he had a newspaper column in the Eddyville *Herald*. It was called *Speaker's West*, and was used as a forum to give the people of Western Kentucky an opportunity to give their views on any subject. He used his own voice to start the Western Kentucky Chapter to Abolish the Death Penalty.

In Louisville, he was known as the Cable Guy because he produced 2 T.V. shows, *Crunch Zone 101* (Louisville's athletic teams and their fans) and *City Skope* (featured interesting people, places and things to do in the Louisville area).

A videocamera was as much as part of Bill as his right hand. Two of his best works were a video on the plight of battered women and a documentary of Lincoln's youth called *Where the Twig was Bent*. Another of his productions was called *Two Hours by a Kentucky Fire*.

Bill didn't call the people he represented in prison clients. He called them his friends, real people he treated with dignity and respect. Everyone always wanted to know how Bill was doing. He was doing alright. Thanks Bill.

Hank Eddy, Directing Attorney
DPA Eddyville Office

DPA Changes Capital Case Compensation Maximum

We have had in Kentucky as long as I remember a severe dilemma. On the one hand we have been one of the poorest funded public defender agencies in the country. On the other hand, we are a state with the death penalty, which requires immense resources. The effect of this has been that over the years, persons accused of capital crimes have been represented by attorneys with high caseloads or attorneys who were inadequately compensated. Too often, the quality of counsel appears to be resource driven.

There have been numerous responses to this problems. Part of the response has been the increase in full-time offices across the commonwealth where better-trained, more-experienced lawyers have been able to represent a significant number of capital defendants. A significant development was the creation of the DPA Capital Trial Unit some years ago which has resulted in numerous people being kept off death row. What has remained, however, is that in all too many cases private lawyers have represented persons charged with capital crimes and have received somewhere between $2500 and more recently $5000 for that representation. Also, in many instances persons have been represented by a single lawyer receiving the "cap" of $2500, or more recently $5000.

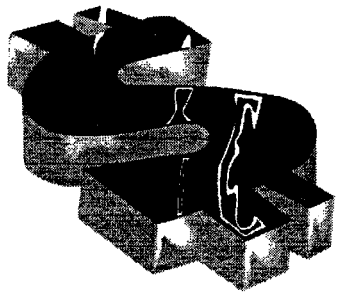
One of the primary goals that I set out to achieve when I became Public Advocate in October of 1996 was to fund the defense of death penalty cases. While the Capital Trial Unit continues to do excellent work, and while full-time offices and contract counties are providing excellent representation in capital cases, one continuing problem has been the $5000 cap that the Department has been able to pay private lawyers in death penalty cases when required to secure their representation.

In February of 1997, the American Bar Association (ABA) House of Delegates passed a resolution calling upon all death penalty jurisdictions to begin a moratorium on executions. The reasons for this call for a moratorium was that the jurisdictions were not complying with the numerous serious concerns that the ABA has previously expressed regarding the administration of capital punishment in the states. Despite taking no position on whether capital punishment was advisable or not, the fact that the states had not implemented corrective procedures forced the ABA to issue their call for a moratorium. Specifically, the moratorium was necessary because states were still executing juveniles and the mentally retarded, states had not taken steps to repair the damage done by the closing the Capital Resource Centers, the new habeas statute caused the ABA concerns, and finally there were continued concerns over the arbitrariness of the death penalty, including inherent racism, inadequate compensation for counsel, among many.

The ABA's call for a moratorium in the context of my stated goals required action. As a result, on April 21, 1997 at a meeting of DPA's Division Directors, a significant step was taken to remedy one of the concerns expressed in the ABA moratorium. As of that date, DPA will pay up to $12,500.00 for the representation of a capital case for each lawyer. Thus, up to $25,000.00 will be paid to two private lawyers for the representation of a capital case. Also, DPA will begin to pay $50.00 per hour both in-court and out-of-court for the representation in these cases. This will also apply to appeals and state post-conviction. This has not been specifically funded in the past. There are many cases for which this compensation will be necessary. There are many arguments relating to the budget against raising the cap in this manner. However, I believe it is our moral imperative to ensure that no one land on death row due to the inadequacy of compensation for private lawyers. It is now our responsibility to ensure that this program works, that experienced capital lawyers are recruited, that lawyers are trained well, and that this money is well-spent in representing persons charged with capital crimes.

Ernie Lewis, Public Advocate

Kentucky Salaries:
Prosecutors v. Public Defenders



Inequities between salaries for public defender managers and chief prosecutors continue to grow despite similar responsibilities.

$11,000 Difference. A *part-time* Kentucky prosecutor who also has a private civil practice starts at nearly $11,000 more than a full-time Kentucky public defender directing a multi-county defender office.

$30,000 Difference. A *full-time* prosecutor makes over $30,000 more than a full-time public defender directing attorney of a multi-county office.

CPI Increases for Prosecutors. A February 5, 1997 letter from the Kentucky Department of Local Government relates what the salaries for Kentucky Commonwealth Attorneys and Kentucky County Attorneys are for 1997, as increased based on the consumer price index changes pursuant to *Matthews v. Allen*, 360 S.W.2d 135 (Ky. 1962) and *Coleman v. Hurst*, 11 S.W.2d 133 (Ky. 1928).

$8,370 vs. $1,764 Increase. Salaries for full-time public defenders are set by the Kentucky Personnel Cabinet. A DPA directing attorney is in charge of a field office which covers multiple counties and cases in both district and circuit court. Since 1993, the Commonwealth Attorney's salary has increased $8,370. Since 1993, DPA's starting directing attorney salary has increased $1,764.

Why? Why the inequity in salaries between Kentucky criminal justice professionals with such analogous responsibilities and why is the inequity so large? Does this reflect perceived differences in responsibilities, or different valuing of these two critical roles, or a desire to attract different sorts of professionals?

Prosecutors & Defenders	1997	1996	1995	1994	1993
1) County Attorney Prosecutorial & Civil Duties	$79,832	$77,294	$75,361	$73,411	$71,462
2) County Attorney Prosecutorial Only	$47,899	$46,376	$45,216	$44,047	$42,877
3) Commonwealth Attorney	$79,832	$77,294	$75,361	$73,411	$71,462
4) *Part-Time* Commonwealth Attorney	$47,899	$46,376	$45,216	$44,047	$42,877
5) DPA Directing Attorney Full-time Starting	$36,984	$36,984	35,220	$35,220	$35,220
6) DPA Directing Attorney Full-time, Current Average	$47,080	$46,376			

Governor Appoints Maureen Fitzgerald to Head DPA's Disability Rights Division

Governor Paul Patton today announced that **Maureen Fitzgerald** will become the Director of Kentucky's Protection and Advocacy Division (P&A). Ms. Fitzgerald will direct the activities of an agency charged by federal and state law with the duty to provide legally based protection and advocacy services to Kentuckians with developmental disabilities, mental illness, and other physical and cognitive disabilities.

The Protection and Advocacy Division is located within the Department of Public Advocacy in the Public Protection & Regulation Cabinet. The Cabinet is headed by **Secretary Laura Douglas**. While an agency located within state government, the Protection and Advocacy Division operates chiefly under the aegis of the federal Developmental Disabilities Assistance and Bill of Rights Act and the Protection and Advocacy for Individuals with Mental Illness Act. These federal laws are the chief funding sources for the Division and guaranty it the authority and independence necessary to effectively investigate instances of abuse and neglect in state and private treatment facilities and to provide individual and systemic legal representation to qualifying persons with disabilities in matters arising out of their disabling condition.

After conducting an innovative and exhaustive national search, a six member search committee made its recommendations to **Ernie Lewis**, the state's Public Advocate. Lewis interviewed the finalists and recommended Ms. Fitzgerald to Governor Patton for appointment. "I was delighted to be presented with a candidate of Ms. Fitzgerald's high standards, experience, and energy. This vital agency is in good hands." Commenting on this appointment, state **Senator David Karem** noted, "It's encouraging when government has the opportunity to take the 'best and the brightest' and promote from within." **Judge Patricia Walker-FitzGerald**, Jefferson Family Court, added, "Ms. Fitzgerald is an excellent choice for this position, having demonstrated, through years of service to this agency, both her firm grasp of the laws involved and her strong management skills. She is an aggressive advocate who is able to work well with other agencies in an effort to bring all parties together to do what is in the best interest of the client." **Dr. Sharon Davis**, Director of Federal Programs for the Jefferson County Public Schools, which serves 10,000 students with disabilities, said, "Maureen Fitzgerald is an excellent choice for the Director of Protection and Advocacy. She is very professional and above all she puts our children with disabilities first."

Ms. Fitzgerald is a 1974 graduate of the George Peabody College of Vanderbilt University with a B.S. in special education. She received her master's of science degree from the Kent School of Social Work at the University of Louisville in 1979. As a Peace Corps volunteer in the 1970s, Ms. Fitzgerald established a national special education teacher training program in Costa Rica. She has been an advocate and a supervisor with the Kentucky P&A for 15 1/2 years, concentrating in the special education arena. In accepting the appointment as Director of the P&A, Ms. Fitzgerald said, "It is an honor to be chosen by the Governor to lead the Protection and Advocacy Division. I have spent my entire career working on behalf of citizens who have disabilities. I shall strive to ensure that P&A continues to provide representation to our citizens with disabilities that is aggressive and of the highest quality." **Curt Decker**, the Executive Director of the National Association of Protection and Advocacy Systems commented, "P&As were established by Congress in direct response to the public outcry over the revelations of abuse, neglect, and lack of programming in institutions for persons with disabilities, most notably the Willowbrook State Hospital in New York in the early 1970s. The role of the P&As has broadened over their 25 year history. P&As represent individuals who have disabilities to ensure that they receive equal access to the same opportunities afforded all members of society. Maureen has been a dedicated advocate for people with disabilities for many years and enjoys an excellent reputation among her peers nationally for her skill, energy, and commitment. She has the experience, vision, and determination to be an excellent director. It is gratifying to learn that Governor Patton has chosen someone so familiar with the Protection and Advocacy system and the national disability rights movement for this very important position."

The Practice of Recusals

Chief Justice Stephens

This is a reprint of an article by the Chief Justice which appeared in The Advocate, Vol. 11, No. 2 (February, 1989). The article appears as it did in 1989 with the 1989 statistics. It is being reprinted since it is one of the most requested articles by our readers.

Recusal Affidavits Filed Pursuant to KRS 26A.020

A. GENERAL CONSIDERATIONS

KRS 26A.020

KRS 26A.020 reads:

(1) When, from any cause, a judge of any circuit or district court fails to attend, or being in attendance cannot properly preside in an action pending in the court, or if a vacancy occurs or exists in the office of circuit or district judge, the circuit clerk shall at once certify the facts to the chief justice who shall immediately designate a regular or retired justice or judge of the Court of Justice as special judge. If either party files with the circuit clerk his affidavit that the judge will not afford him a fair and impartial trial, or will not impartially decide an application for a change of venue, the circuit clerk shall at once certify the facts to the chief justice who shall immediately review the facts and determine whether to designate a regular or retired justice or judge of the Court of Justice as special judge. Any special judge so selected shall have all the powers and responsibilities of a regular judge of the court.

(2) A retired justice or judge serving as a special judge shall be compensated as provided by KRS 21A.110.

KRS 26A.020 is a legislative enactment which directs the Commonwealth's chief judicial officer to determine whether another judicial officer should be disqualified from presiding at a trial. The question of whether this statute is unconstitutional as being in violation of the separation of powers sections of our Constitution has never been judicially determined. However, I, and former Chief Justices since the statute's enactment in 1976, have tried to comply with the statute as a matter of comity.

KRS 26A.020 allows a party to file with the circuit clerk an affidavit that the presiding judge will not afford that party a fair and impartial trial, or will not impartially decide an application for a change of venue.

The statute requires that once the affidavit is filed with the circuit clerk, the clerk is required to certify the facts and send the affidavit to the Chief Justice.

Upon receipt of the affidavit, the Chief Justice must immediately review the facts sworn to in the affidavit, and determine whether the facts as set forth in the affidavit are sufficient, or are insufficient, to require the recusal of the sitting judge and the assignment of a special judge.

KRS 26A.015

It is important to note that a separate statute, KRS 26A.015, sets forth the grounds for the disqualification of a judge. The grounds stated in this statute are substantially the sane as those set forth in our Rule, SCR 4.300 (3)(C). It is appropriate, when filing a motion with a judge which asks that judge to recuse himself or herself, to state grounds relied upon for seeking disqualification as set out in KRS 26A.015. If you believe, in good faith, that a judge should recuse himself or herself because of one or more of the grounds listed under KRS 26A.015, and you file a motion with the judge for the judge to disqualify based upon those grounds, and the judge overrules your motion, then you may also have your client, as a party, file an affidavit with the circuit clerk, who will send it to the Chief Justice pursuant to 26A.020.

Filing an affidavit under KRS 26A.020 is not an appeal to the Chief Justice of a trial judge's adverse ruling on a motion to disqualify. It is a separate and distinct avenue available to a party who does not think he or she will get a fair and impartial trial.

Under the predecessor statute to KRS 26A.020, which was KRS 23.230, the trial judge who was the subject of the motion to disqualify was the one who had to judge the sufficiency of the party's affidavit, and his decision as to the affidavit's sufficiency was reviewable on an appeal of the whole case. But if an affidavit is filed pursuant to KRS 26A.020, the Chief Justice rules on its sufficiency, and there is no appeal from or reconsideration of, the Chief Justice's ruling on the affidavit provided for in the statute.

Difference in Statutes

Please keep in mind that it is one thing when an attorney, moving under KRS 26A.015, files a motion with a judge asking that judge to recuse himself or herself from a case. In such a case, the judge will rule on the motion of recusal, or disqualification.

But it is a completely separate matter, m my view, when a party files an affidavit with the circuit clerk under SCR 26A.020 swearing to facts which support the contention that the party will not receive a fair and impartial trial.

Under .015, the judge rules on a motion, usually signed by an attorney, to disqualify himself or herself; while under .020, the Chief Justice determines the sufficiency of an affidavit, signed by a party, to support the recusal of a judge. When you seek to disqualify, or recuse, a judge from proceeding further in a matter, you can either file a motion with the judge under .015, or your client can file an affidavit with the Chief Justice via the circuit clerk under .020, or you can do both. One does not have any direct connection with the other, except that they both involve a request to have another judge preside over the matter.

A motion, filed under KRS 26A.015 and ruled upon by the trial judge you are seeking to recuse, becomes a ruling in the case which, if designated and raised, can become an issue on appeal later on.

The question of whether a ruling by the Chief Justice on a KRS 26A.020 affidavit, which is adverse to a party who later appeals, can be raised as an error on appeal by the appellant--or whether the appellee can use such an adverse ruling to claim success on a disqualification issue that is raised by the appellant on appeal--these questions have, to my knowledge, never been judicially determined. In order not to have to recuse myself someday when these questions may arise, I will express no opinion on this matter!

B. PROCEDURE IN RULING ON KRS 26A.020 AFFIDAVITS

Requirements for a Ruling

In order for the Chief Justice to rule on the sufficiency of an affidavit filed pursuant to KRS 26A.020, the statute must be strictly complied with, and the following requirements must be met:

a. there must be an affidavit with specific facts,
b. signed by a party (and not signed just by the party's attorney),
c. which is filed with the circuit clerk,
d. timely with the discovery of the facts,
e. the clerk must certify it, and
f. send it directly to the Chief Justice.

The failure of the party to sign the affidavit is fatal.

Once an affidavit, properly signed and certified, is received in my office, I read it, and decide whether the facts set forth in the affidavit are sufficient to recuse the judge and to assign a special judge.

One thing to remember about the statute is that it provides a means for seeking the recusal of a trial judge, not an appellate judge. I have never ruled on an affidavit seeking to recuse an appellate judge, simply because the wording of the statute makes it clear that it applies only to a "judge who will not afford [a party] a fair and impartial trial."

It is also important to remember that, under KRS 26A.020, the filing of an affidavit only is required; the filing of a motion with the affi-

davit is not necessary, but neither is it prohibited. An extensive record, however, should not be sent along with the affidavit.

In reaching a decision as to an affidavit's sufficiency, I rely upon two sources: (1) the grounds set forth for mandatory disqualification under KRS 26A.015, and (2) prior case law dealing with the subject of disqualification of judges. Of course, it is often necessary, even after researching the statute and prior case law, to exercise discretion in order to determine whether the facts stated in the affidavit are sufficient to recuse a judge.

Service

The statute itself does not require that a copy of the affidavit be served either upon other parties to the action or upon the judge who is subject of the affidavit, nor does it require that notice of the affidavit's filing even be given to the judge. However, I read our Rule, CR 5, broadly enough to require service of copies of the affidavit upon all other parties to the action, and upon the judge.

Whether or not the affidavit has been served upon the judge by the party filing it, after I read the affidavit, I will often direct someone on my staff to call the judge for the purpose of informing the judge that an affidavit seeking his or her recusal has been filed, and to ask the judge not to proceed with the case until a ruling has been made on the sufficiency of the affidavit.

There have been instances in which the judge, after seeing a copy of a recusal affidavit which has been sent to me, wishes to formally respond to the affidavit. If a judge insists upon making such a formal response, I do not prohibit him from doing so, but I do not encourage a judge to make a response. I am aware that the cases decided prior to the enactment of the present statute say that a recusal affidavit must stand or fall upon its own facts, and that nothing outside the affidavit can be considered in ruling on its sufficiency. Suffice it to say that in those cases, the trial judge himself was ruling on its sufficiency, and not the Chief Justice. Hopefully, now that there is an impartial third party looking at the affidavit, I find that a formal response from a judge who wishes to make one is appropriate.

Responses to the affidavit filed by other parties to the case, however, are not accepted, and if they are tendered, they are not considered.

Authority for Procedure

The only published procedures that I follow in ruling on recusal affidavits filed pursuant to KRS 26A.020 are found in the statute itself. Other procedures not spelled out in the statute that are followed, such as calling the judge once an affidavit is received to inform him or her of its having been filed, or using the grounds set forth in KRS 26A.015 as a yardstick to determine an affidavit's sufficiency, have been developed by the Chief Justice since the enactment of the statute in 1976. The procedures followed have been found to work best for the prompt and just resolution of an affidavit's sufficiency, but the procedures are not published--they are not even written down--and exist only to expedite the process of promptly ruling on the sufficiency of the affidavits fairly.

Occasionally, a recusal affidavit will be filed with me, and before I have a chance to rule on its sufficiency, the trial judge will disqualify himself or herself from the case. In such instances, which do not occur very often, a ruling on the affidavit is passed as moot, and an order is entered so ruling.

C. NUMBER OF AFFIDAVITS FILED WITHIN LAST 12 YEARS

Total

From 1983 through 1987, our research shows that a total of 183 affidavits were ruled on by the Chief Justice, pursuant to KRS 26A.020, and there have been 10 affidavits ruled on so far in 1988, for a total to date of 193 affidavits over the past 5 1/2 years.

By Year

a. 41 affidavits were ruled on in 1983;
b. 46 in 1984;
c. 45 in 1985;
d. 30 in 1986;
e. 21 in 1987;

By Category

Year	Civil	Criminal
1983	24	17
1984	24	22
1985	28	17
1986	12	18
1987	14	7

D. REASONS RECUSAL AFFIDAVITS WERE FOUND TO BE SUFFICIENT

Recusal affidavits were found to be sufficient to assign a special judge in the following illustrative cases. It is by no means an exhaustive list, and is intended only to provide you with some examples. Remember that specific facts must be alleged in order for a recusal affidavit to have a chance of being found sufficient to recuse a judge:

Civil Cases

a. **Personal Bias.** A trial judge in a Termination of Parental Rights case was recused when the affidavit filed by the Cabinet for Human Resources set forth facts which showed that the trial judge, who was delaying trial on terminating the parental rights of the mother until a future grand jury considered charges of child sexual abuse against the father, made specific statements which showed a personal bias toward the Cabinet and the best interests of the child.

b. **Expressing an Opinion Concerning the Merits of the Proceedings.** A trial judge in a negligence case was recused when the affidavit filed by the defendants set forth facts which showed that the counsel for the plaintiffs in the negligence case had filed on behalf of the trial judge a brief in a mandamus action which arose during the pendency of the negligence case. This affidavit was filed and ruled upon before our Rule, CR 76.36, was amended to specifically allow the real party in interest to participate directly in an original action filed in an appellate court. Therefore, an affidavit based only upon this ground today would be insufficient to recuse the judge.

c. **Prejudice.** A trial judge in a divorce and custody matter was recused when the affidavit filed by the husband set forth concrete facts which showed that the judge had made specific *ex parte* statements to the wife telling her not to worry, that he would see to it that she would get the property and the children.

Criminal Cases

a. **Expressing an Opinion.** A trial judge in a case in which the defendant was charged with the distribution of obscene matter was recused when the affidavit filed by the defendant set forth facts which showed that the judge had made public comments to the press about his views on obscenity during the pendency of the action. Because this may have been a possible violation of the Code of Judicial Conduct, it was thought that the judge should be recused.

b. **Expressing an Opinion.** A trial judge, who presided at an initial murder trial in which the defendant was convicted of murder and sentenced to death, was recused from presiding at the retrial of the defendant when the affidavit set forth facts which showed that the judge had filed a trial judge's report, mandated by KRS 532.075, in which he necessarily expressed his views concerning the weight of the evidence, the merits of the proceedings, and the appropriateness of the death sentence in the first trial. After considering what the judge had written in the trial judge's report, it was felt that, in this particular death penalty case, a different trial judge should preside at the retrial.

c. **Questioned Impartiality.** A trial judge in a case in which the defendant was charged with being a persistent felony offender was recused when the defendant's affidavit showed that the judge, in a prior "life" as a public defender, had represented the defendant on the very charges and convictions being used to enhance the defendant's status to PFO. The affidavit also showed that the defendant had filed a civil suit against the judge during the trial the judge was a public defender. These facts were sufficient to recuse the judge in this case.

E. REASONS 26A.020 AFFIDAVITS HAVE BEEN FOUND INSUFFICIENT

As you can tell from the statistics on recusal affidavits, many more are found to be of affidavits which have been found to be insuffi-

cient. Again, these are only examples, for illustrative purposes only:

Civil Cases

a. **Belief of Affiant.** A defendant's affidavit in a breach of contract case, in which the affiant was "led to believe" that the trial judge would not afford a fair hearing on the retrial which had been reversed on appeal, was found to be insufficient to recuse the judge. The phrase "led to believe" did not state facts upon which a sufficiency ruling could be grounded. This case illustrates a common failing of recusal affidavits, and that is, that merely stating that one believes one cannot get a fair trial is not nearly enough; there must be specific, definite facts detailed in the affidavit for sufficiency to be considered.

b. **Judge's Former Law Firm Representing Party.** A plaintiff's affidavit, in a class action in which negligence was alleged to have contributed to the flooding of a state capital, was found to be insufficient to recuse the judge when it set forth facts which showed that the trial judge had previously been a member of a law firm which had, as a client, the class action's defendant utility company. The affidavit was insufficient because the law firm was not representing this defendant utility company in this particular controversy involving the flood.

c. **Demeanor and Tone of Voice.** A plaintiff's affidavit, in a case involving a dispute over real estate, was found to be insufficient to recuse the judge when the affidavit alleged that the trial judge's "unwelcome demeanor, tone of voice, and unfriendly expression" made the litigant feel unwelcome in the courtroom. In the usual case, an unfriendly look or stern tone of voice will not sustain an affidavit to recuse a judge.

Criminal Cases

a. **Political Affiliation.** A defendant's affidavit was found to be insufficient to recuse the trial judge when the facts showed that the trial judge and the father of defense counsel were currently involved in a hotly contested election for judge. Generally, political affiliation, or being in an election contest, is not a sufficient enough ground, in and of itself, upon which to adjudge a recusal affidavit sufficient to warrant assigning a special judge. By the way, it is also insufficient to recuse a judge if the affidavit states that the judge is a hunting or fishing buddy, or is in the Garden Club with the lawyer for the other side!

b. **Possible Trial Error.** A defendant's affidavit was found to be insufficient to recuse the trial judge when the facts showed that the trial judge raised his bond without first holding a hearing. Even though this may (or may not) have been an error on the part of the trial judge, it is not a sufficient ground to recuse a judge under KRS 26A.020. Generally, trial error will not be sufficient to recuse a judge.

c. **Timeliness of Affidavit.** A defendant charged with murder, kidnapping, robbery, burglary, and then filed a recusal affidavit 5 days before trial was scheduled to begin. The affidavit alleged, first, that the trial judge, as a former prosecutor, prosecuted the defendant for an unrelated crime some 4 years previously, and second, that the judge's secretary was the sister-in-law of the victim of the crimes. This is a close case. The affidavit was found to be insufficient because the defendant knew both of these facts at his arraignment before the same trial judge, which occurred several months prior to the affidavit being filed. The defendant should have filed his affidavit as soon as he knew of the facts supporting his affidavit, and because he did not, he waived his right to raise those grounds in a KRS 26A.020 affidavit. See, *Salisbury v. Commonwealth*, Ky.App., 556 S.W.2d 922 (1977).

It is important to file a recusal affidavit as soon as you discover the facts used to ground the affidavit. It is also important to state in an affidavit that is being filed near to the time of trial because you have just learned of the facts that the facts used to ground the affidavit have just been discovered. You have a duty to file a recusal affidavit under KRS 26A.020 timely.

F. CRITERIA USED TO DETERMINE AN AFFIDAVIT'S SUFFICIENCY

KRS 26A.015

Even though KRS 26A.015 sets out when a judge should disqualify himself or herself, and

is separate and apart from the requirements of a recusal affidavit filed pursuant to KRS 26A.020, I find that it serves as an ideal guide in determining the sufficiency of recusal affidavits. If facts in a recusal affidavit specifically show any of the following, the affidavit will generally be sufficient to recuse the trial judge:

a. personal bias or prejudice concerning a party;
b. personal knowledge of disputed evidentiary facts concerning the proceedings;
c. expressing an opinion concerning the merits of the proceedings;
d. serving as a lawyer in the matter in controversy;
e. rendering a legal opinion as a lawyer in the matter in controversy;
f. practicing law with a lawyer who served as a lawyer in the matter in controversy;
g. serving as a material witness concerning the matter in controversy;
h. practicing law with a lawyer, or the judge's commissioner, either of whom served as a material witness concerning the matter in controversy;
i. where the judge, or the judge's spouse or minor child, has a pecuniary or proprietary interest in the subject matter in controversy;
j. where the judge, or judge's spouse or minor child, has a pecuniary or proprietary interest in a party to the proceeding;
k. where the judge, the judge's spouse, or a relative within the third degree relationship (first cousins) to either of them, or the relative's spouse: (1) is a party, or an officer, director, or trustee of a party; or (2) is acting as a lawyer in the proceeding and the disqualification is not waived by stipulation of counsel in the proceeding; or (3) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; or (4) is to the knowledge of the judge likely to be a material witness in the proceedings; and finally,

l. where the judge has knowledge of any other circumstances in which his impartiality might reasonable be questioned.

Any of these facts that can be shown in the affidavit to exist will be sufficient grounds for recusal of the trial judge. I cannot overemphasize, however, how important it is to, first, be specific in setting forth the facts, and be timely in having your party file the affidavit. Remember, the judge must be shown to be partial to a party, and not to the party's attorney.

Prior Case Law

Because there have been no cases that I have been able to find which deal with rulings under KRS 26A.020 as enacted in 1976, it is necessary to use the cases decided under the prior statute.

The annotations which follow the statute are a guide to what will, and what will not, be sufficient to recuse a trial judge. Though I do not feel bound by all of these cases--because most of them were decided on the basis of the trial judge himself or herself ruling on an affidavit's sufficiency, and not the Chief Justice ruling on an affidavit's sufficiency--I do use the cases to determine general rules of thumb. And you should. too.

G. CONCLUSION

Not all of the issues connected with recusal affidavits filed under 26A.020 have even been raised, much less addressed. It is a special statutory procedure to prevent injustice from occurring because of a biased trial judge, or because of one who could profit by his own decision. However, a party's mere belief in bias is not enough; the belief must be supported with facts which show the bias.

CHIEF JUSTICE ROBERT F. STEPHENS
Supreme Court of Kentucky
Capitol Building
Frankfort, Kentucky 40601
Tel: (502) 564-6753
Fax: (502) 564-5491

Chief Justice Stephens was an Assistant Fayette County Attorney, Fayette County Judge Executive. He was the Kentucky Attorney General from 1975 until 1979. Justice Stephens was appointed by Governor Carroll to the Kentucky Supreme Court in December, 1979, and has been its Chief Justice since 1982.

NLADA's Performance Guidelines: Making Them *Work* for You!

Phyllis Subin

Why bother to read NLADA's *Performance Guidelines for Criminal Defense Representation* (1995)?

As a public defender/assigned counsel trial attorney, your caseload never shrinks -- it multiplies and divides. You constantly battle to successfully juggle the demands of clients, the courts, and the cases themselves.

As a public defender supervisor/manager, you may not only be responsible for your own caseload, but you must also actively monitor your attorneys' cases and courtrooms. You're also somehow expected to find time to coach staff attorneys and to conduct case reviews while you struggle to maintain even current resource levels and support staff.

As a public defender trainer, you may squeeze your trainer role in between caseload preparation and courtroom appearances. It's frequently impossible to accurately evaluate staff training needs or to develop training programs with written training materials on a limited or non-existent training budget. And let's not even mention staff complaints about training or being "forced" to attend presentations.

So, with all these overwhelming daily concerns, stresses, and problems, why should we force ourselves to read NLADA's *Performance Guidelines*?

Because NLADA's *Performance Guidelines*, more than other national standards, rules, or guidelines, offer an excellent, comprehensive and worthwhile definition of what constitutes good solid trial lawyering. These *Guidelines* give realistic meaning to the sixth amendment's right to counsel, and they articulate the ultimate goal for all trial counsel: "zealous and quality representation."

Overall Structure of NLADA'S *Performance Guidelines*

These *Guidelines* do not define the duties of death penalty, post-conviction or appellate counsel. Although they are specifically directed to trial counsel, the *Guidelines* offer a standard of performance that may be used to define effective assistance of counsel in briefs and at post-conviction hearings.

NLADA's *Performance Guidelines* are comprehensive but not exhaustive. The language allows for flexibility. While some actions are absolutely essential, others are left to counsel's considered judgment and discretion, and to the particularities of practice and law in the jurisdiction.

The *Guidelines* are divided into nine sections which I have captioned as follows:

Guideline Section 1 --
Rule, Duties and Education/Training of Counsel

Guideline Section 2 --
Pre-Trial Release Proceedings

Guideline Section 3 --
Counsel's Duties of Initial Appearance, Preliminary Hearing, and with regard to Prosecution Requests for Non-Testimonial Evidence

Guideline Section 4 --
Investigation Discovery, Theory of the Case

Guideline Section 5 --
Pre-Trial Motions

Guideline Section 6 --
Plea Negotiations

Guideline Section 7 --
Duties at Trial

Guideline Section 8 --
Sentencing

Guideline Section 9 --
Post-Sentencing Duties

Each Guideline Section contains multiple *guidelines*, which, taken together, define the role, duties, and obligations of defense counsel. After each *guideline* there are references to the "Related Standards" that include nationally recognized standards, codes that address an aspect of representation, statutes, regulations, and policy manuals developed by public defender and assigned counsel programs. The Commentary, supported by footnotes citing to primary legal and secondary materials, provides an explanation and rationale for each *guideline*.

For all of us who are committed to the delivery of quality criminal defense services at the trial level, the Commentary and footnotes alone make the NLADA's *Performance Guidelines* a must read. The Commentary is thoughtful, well reasoned and additional justification for demanding the resources and training opportunities to support a qualified staff. The footnotes also provide a treasure trove of information, documentation and case citations that all of us should find useful when confronting judges, prosecutors, legislators, the program funding source, and the press.

Performance Guidelines: A Tool for the Trial Attorney

Everyday, in courtrooms around the country, indigent defendants are represented by public defenders or assigned counsel who care about their work and the quality of their representation. Unfortunately, some defense advocates have not received sufficient training or adequate supervision to know or to understand all the tasks that must be accomplished to provide quality representation from initial appearance through post-sentence duties.

NLADA'S *Performance Guidelines* are not only a learning tool, but also an operations manual which offers a concrete statement of tasks for all phases of representation. Even if you have no training and no supervision, the *Guidelines* provide a full checklist of requirements, duties and considerations that every trial attorney must evaluate and, if appropriate, execute.

You may already do many of the representational tasks that are discussed in the *Guidelines*. However, there may be areas where you are less proficient. For instance, in many places, motion practice is not an active part of the attorney's representation plan. *Guideline Section Five* offers an excellent discussion of the decision to file pre-trial motions; the types of motions that may be considered; the filing and arguing of pre-trial motions; and the subsequent filing of pre-trial motions.

As a trial attorney, you may motion the court or your office case supervisor for funds to hire an expert or an investigator. You consider the expert and/or the investigator essential for the defense of the case, but it is a constant, uphill battle for funds and resources. Use these national *Performance Guidelines* as additional justification for your request by citing to *Guideline* 4.1, which calls for expert assistance "when necessary or appropriate to: (A) the preparation of the defense; (B) adequate understanding of the prosecution's case; (C) rebut the prosecution's case."

Law school teaches us how to use statutes, caselaw, law review and other articles to support our arguments. Let's now incorporate national standards for defense representation and performance into our arguments for additional case resources. If these *Performance Guidelines* help us to learn and grow as trial attorneys, let's use them to improve judicial rulings and to educate our own supervisors and managers.

Performance Guidelines: A Tool for Trainers

As a public defender trainer, I know that many trainers constantly search for ways to quickly and efficiently develop quality criminal defense advocates who excel as "courtroom persuaders."

NLADA's *Performance Guidelines* are a first rate training tool for new and experienced lawyers. Here in one cohesive volume is a complete statement of the tasks that our lawyers should consider and execute at every stage of the trial

process. Successful courtroom performance depends upon excellent trial preparation as well as courtroom advocacy skills. The *Guidelines* clearly explain all the preparation building blocks that facilitate a solid advocacy performance.

Public defender organizations have traditionally focused their training on courtroom trial skills. Programs send attorneys to the National Criminal Defense College or to NLADA's Trial Practice Institute, or create their own in-house advocacy institutes. If in-house training exists, it too favors trial advocacy skills programming.

While these programs provide an excellent learning experience, they ignore what remains a major part of our practice: plea negotiation and sentencing advocacy. Driven by changes in state sentencing laws (mandatory sentence statutes, guideline sentencing, habitual offender statutes, sentence enhancements, and victim rights legislation), many defenders or assigned counsel increasingly engage in plea negotiation to limit the horrific sentence exposure that our clients face.

Using NLADA's *Performance Guidelines* as a beginning definition of the skills and tasks necessary for meaningful negotiation (*Guideline Section Six*) and for successful sentencing advocacy (*Guideline Section Eight*), we must add these skill sessions to our training agenda. We need to deal with the reality of case disposition for many clients. Good negotiation skills do not develop by osmosis. They must be nurtured and developed just as we work on courtroom advocacy skills. On too many occasions, we ignore or fail to recognize the many ways that our advocacy and preparation for sentence hearings may impact the pre-sentence report and the sentencing judge's decision. These *Guidelines* define pro-active sentencing advocacy that make it one of the best sections for all attorney levels.

Pro-active sentencing advocacy often means that we must actively seek programming that is an alternative to jail or prison. While some defender organizations employ alternative sentencing specialists or social workers who assist the attorney and who work with the client from evaluation to courtroom presentation, many defender offices do not have funding or sufficient funding to meet client demand. Again, let's use these national *Guidelines* (*Guideline* 8.1) as cited justification in a motion to the court for the necessary funds to hire an alternative sentencing specialist.

Performance Guidelines: A Tool for Defender Organization Managers and Supervisors

NLADA's *Performance Guidelines* are a must read for everyone who has a managerial or supervisory function in an office.

The *Performance Guidelines* are a strong weapon in our continuing battle with funding sources for additional monies and resources. "Zealous and quality representation" requires sufficient funding for lawyers and for professional and administrative support staff as well as experts and alternative sentencing advocates, assuming that the latter must be paid by the defender program and not by court order. "Zealous and quality representation" doesn't necessarily mean budget bloat. Let's use this representation goal to define what is basic and necessary for a lean, spare professional legal program which has the ability to adequately service its client population.

These *Guidelines* also assume that our attorneys and staff receive sufficient, on-going training, and that they are kept up to date on relevant areas of substantive law, procedure and practice. No defender program may adequately accomplish this task unless it provides an in-house training program with qualified trainers who have sufficient time and resources to plan programs, to create information/training materials, and to disseminate that information within the organization. NLADA's *Performance Guidelines* provide additional justification for the funding to create or to improve a continuing in-house legal education program.

Some defender programs have used these *Guidelines* as an "aspirational" goal to which they are moving. Others have employed the *Performance Guidelines* as an "operations manual." In either case, if our managers have a responsibility to train and to supervise attorneys whom they must also evaluate, then we need a quality checklist definition of the repre-

sentation tasks that our trial attorneys must accomplish at all levels of representation. NLADA's *Performance Guidelines* provide a definition which programs may adopt in whole or in part or which they may use as reference in drafting their own guidelines or standards. Beyond just an individual program's adopted Performance Standards, a few defender programs have gone to either their state's appellate courts or to state bar associations, seeking Court or Bar adoption or endorsement of uniform *performance guidelines for criminal defense representation* to guarantee at least a minimal level of defense representation.

Managers and supervisors may also use NLADA's *Performance Guidelines* as a policy tool to oppose or to support procedural practice changes initiated by the legislature, the courts, or the prosecutor. For instance, many jurisdictions are moving to institute video arraignments at initial appearance. Whether you decide to accept or to oppose this change, mold these new procedures in ways that protect our clients. Insist upon the funding of additional, necessary attorney and administrative staff. *Guideline Section* 2, Pre-Trial Release Proceedings, and *Guideline Section* 3, Counsel's Duties at Initial Appearance, provide ample justification for your argument that a meaningful right to counsel must be maintained at initial appearance video proceedings.

Conclusion

Why read NLADA's *Performance Guidelines for Criminal Defense Representation*? Because, whether you're a public defender trial attorney or assigned counsel, trainer or supervisor/manager, you can make these *Guidelines* ***work*** for you. As an educational, supervisory, policy and political tool, using these *Guidelines* makes sense for all of us and for our clients. "Zealous and quality representation" is neither a fantasy nor a dream. NLADA's *Performance Guidelines* help make that goal a reality.

Phyllis Subin
Chair, NLADA Defender Trainers' Section
Assistant Professor
University of New Mexico School of Law
1117 Stanford NE
Albuquerque, New Mexico 87131-1431
Tel: (505) 277-5265
Fax: (505) 277-4367
E-mail: subin@law.unm.edu

A Manual on Defending With the Help of Mental Health Experts

Lawyers who are successful at representing criminals excel at evidencing the humanity of their clients to jurors, judges, prosecutors and the public. With increasing frequency, those lawyers effectively evidence their clients humanity with the help of a mental health professional.

The Department of Public Advocacy has collected significant articles, most previously published in DPA's *The Advocate*, in the *Mental Health and Experts Manual* (2d ed. 1997).

In the Manual, **John Blume** of Columbia, South Carolina sets out in detail the 5 steps of a competent forensic mental health assessment process as the national standard of care:

5 Step Forensic
Mental Health Assessment Process

1) An accurate medical and social history must be obtained.

2) Historical data must be obtained not only from the patient, but from sources independent of the patient.

3) A thorough physical examination (including neurological examination) must be conducted.

4) Appropriate diagnostic studies must be undertaken in light of the history and physical examination.

5) The standard mental status examination cannot be relied upon in isolation as a diagnostic tool in assessing the presence or absence of organic impairment.

Perhaps the most significant deficiency in mental health evaluations is the failure to have a thorough social history. In the Manual, **Robert Walker, MSW, LCSW** of Lexington, Kentucky comprehensively describes the dimensions of a biopsychosocial evaluation. Criminal defense attorneys learning how to be effective in these times understand that social histories are essential for reliable opinions which are capable of persuading those making the decisions about our clients.

Jim Clark, Ph.D., a professor of social work at the University of Kentucky, collaborates in the Manual with others to discuss the use of a consulting, not testifying, expert, and also to detail an 8-step process of attorney/expert collaboration:

Step 1:
Assess Mental Health or
Other Expertise Needs of the Case

Step 2:
Finding and Evaluating Experts

Step 3:
Retaining the Expert

Step 4:
Preparing the Expert for Evaluating

Step 5:
The Direct Examination
of the Expert: Telling the Story Well

Step 6:
Preparing the Expert for
Cross-Examination & Improving
Cross-Examination Answers

Step 7:
Revise Direct Examination

Step 8:
Develop Demonstrative Evidence

Lee Norton, Ph.D., MSW, of Tallahassee, Florida helps us learn how to implement the several goals of mitigation interviews which are: informational, diagnostic, therapeutic. Dr. Norton tells us that "by telling our clients' stories we bear witness to human devastation and in so doing we create a ripple of healing which begins in each of us."

Marilyn Wagner, Ph.D., describes the significant specialty of neuropsychology, and what traditional psychology misses.

The Manual also has extensive examples of sample testimony from a social worker, psychologist and psychiatrist with an example of a timeline.

A copy of the 195 page Manual, including postage and handling can be obtained for $29.00.

Please make check payable to *Kentucky State Treasurer* and send order to:

Tina Meadows
Education & Development
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601
Tel: (502) 564-8006
Fax: (502) 564-7890
E-mail: tmeadows@dpa.state.ky.us

1997 Annual DPA Conference
MEMORABILIA SOUGHT

1997 marks the 25th Anniversary of the establishing of the Department of Public Advocacy. We will be celebrating these past 25 years of work in representing indigent clients accused of committing a crime and convicted of a crime by seeking people who have memorabilia - pictures, etc. - that they would like to either donate or loan to the Department to use for this Anniversary celebration at our 25th Annual Public Defender Training Conference in June of 1997.

If you have anything you would like to donate or loan, please send or contact:

Tina Meadows
Department of Public Advocacy
25th Anniversary Memorabilia
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601
Tel: (502) 564-8006; Fax: (502) 564-7890
E-mail: tmeadows@dpa.state.ky.us

Plain View

Ernie Lewis

***Maryland v. Wilson*,**
117 S.Ct. 882, 137 L.Ed.2d 41 (1997)

Can a police officer order a passenger out of a lawfully stopped vehicle? After the decision in this case, the answer under the Fourth Amendment is yes.

Here, the police saw a rental car driving 64 in a 55 mph interstate highway. The car had no regular license plate. The officer pulled the car over and got out of his cruiser. The driver met him halfway and gave the officer a valid driver's license. The officer told the driver to show his rental agreement. Throughout the process, two passengers in the car kept looking at the officer, ducking below and reappearing, sweating, etc. Eventually, the officer ordered Wilson out of the car; when he got out, crack cocaine came with him. Wilson was indicted for possession of cocaine with intent to distribute. Both the trial court and the appellate court agreed that the search and seizure were illegal due to the officer's demanding Wilson, the passenger, to get out of the car.

The Supreme Court granted cert and reversed in a 7-2 opinion written by the Chief Justice. The Court relied upon their decision in *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), where the Court had held that the police may order the driver out of a lawfully stopped vehicle. The *Mimms* rule was extended from the driver to the passengers in lawfully stopped vehicles.

The Court relied upon the familiar balancing test in reaching their decision, the same balancing test used in *Mimms*. "On the public interest side of the balance, the same weighty interest in officer safety is present regardless of whether the occupant of the stopped car is a driver or passenger... On the personal liberty side of the balance, the case for the passengers is in one sense stronger than that for the driver. There is probable cause to believe that the driver has committed a minor vehicular offense, but there is no such reason to stop or detain the passengers. But as a practical matter, the passengers are already stopped by virtue of the stop of the vehicle."

Of particular importance in resolving this balancing test was the possibility of violence to the officer. "[D]anger to an officer from a traffic stop is likely to be greater when there are passengers in addition to the driver in the stopped car. While there is not the same basis for ordering the passengers out of the car as there is for ordering the driver out, the additional intrusion on the passenger is minimal. We therefore hold that an officer making a traffic stop may order passengers to get out of the car pending completion of the stop."

There were two Justices writing in dissent. Justice Stevens saw astutely the immense reach of the majority opinion. While requiring the driver of a stopped car to get out of the car is lawful when he is suspected of having committed a violation of some sort, this case "raises a separate and significant question concerning the power of the State to make an initial seizure of persons who are not even suspected of having violated the law." Justice Stevens noted that where officers can articulate a threat from a passenger, assumed to exist in this case, then under *Terry v. Ohio*, 392 U.S. 1 (1968) the officer can require the passenger to get out. "But the Court's ruling goes much farther. It applies equally to traffic stops in which there is not even a scintilla of evidence of any potential risk to the police officer. In those cases, I firmly believe that the Fourth Amendment prohibits routine and arbitrary seizures of obviously innocent citizens." Justice Stevens strikes a cautionary note: "How far this ground-breaking decision will take us, I do not venture to predict. I fear, however, that it may pose a more serious threat to individual liberty than the Court realizes." Justice Kennedy joined Justice Stevens in dissent.

Justice Kennedy also wrote a dissenting opinion. He too saw the reach of the opinion, although the lens he used was that of one of the Court's most recent opinions. "The practical effect of our holding in *Whren*, of course, is to allow the police to stop vehicles in almost countless circumstances. When *Whren* is coupled with today's holding, the Court puts tens of millions of passengers at risk of arbitrary control by the police. If the command to exit were to become commonplace, the Constitution would be diminished in a most public way."

One interesting question for Kentucky practitioners is the effect of this case on *Paul v. Commonwealth*, Ky. App., 765 S.W. 2d 24 (1988). There, the Court found illegal a search of a passenger arrested for constructive possession of marijuana found in the front seat of a car lawfully stopped. The Court relied upon both the Fourth Amendment and Section Ten, and did not focus precisely on the authority of the officer to require Paul to alight from the car. Counsel should assert, however, that *Paul* remains good law under Section Ten, and that *Wilson* does not end the question in Kentucky.

Combs v. Commonwealth, 1997 WL 70876 (Ky.App. 1997)

A significant decision has been written by a panel of the Court of Appeals. The case originates out of Madison County. Barry Combs was arrested for DUI after the officer observed his weaving and crossing the yellow line. Three field sobriety tests were failed; thereafter, Combs refused to submit to a blood test. His blood was taken as a result of a search warrant signed by a Madison County District Court Judge. He was indicted for DUI 4th, entered a conditional plea of guilty, and appealed the seizure of his blood.

Combs' primary complaint was that a search warrant to obtain blood was precluded by KRS 189A.105(1)(b) because there had not been an injury accident. The Court, in a decision written by Schroder and joined by Judges Miller and Emberton, agreed that the statute prohibited the issuance of the search warrant. However, the Court went past a reading of the statute and held that KRS 189A.105(1)(b) is "unconstitutional to the extent that it attempts to limit when a search warrant may be issued...any legislative attempt to define or limit when a search warrant may be issued is an infringement upon the executive branch's right to seek a search warrant, and the judiciary's right to grant one based on probable cause."

Combs also complained that the seizure of his blood was a violation of due process of law and of his rights to be free from unreasonable searches and seizures. The Court again rejected his complaint, saying that *Schmerber v. California*, 384 U.S. 757 (1966) is dispositive when it said that a "'blood test does not violate the Federal Due Process Clause, the Fifth Amendment [right] against self-incrimination, the Sixth Amendment right to counsel or the Fourth Amendment right to unlawful search and seizure.'" "[It] is clear that there was no Fourth Amendment violation. A search warrant was procured before Combs' blood was taken. The issuance of the search warrant was based on probable cause, thereby providing further protection against an unlawful search and seizure. The blood was taken by trained personnel in a hospital setting...the intrusion of a needle to extract blood is minimal indeed in light of the state's interest in removing drunk drivers from the road and deterring future drunk drivers. Accordingly, we believe that taking of the blood was reasonable for Fourth Amendment purposes."

The *Combs* decision clearly states that search warrants be issued by the Courts in order to obtain blood to prove a DUI. The Court has stated that it will not allow the legislature to make policy regarding the issuance of search warrants. It will be interesting to see whether this holding will extend to legislative attempts to restrict the application of the exclusionary rule.

United States v. Allen, 106 F.3d 695 (1997)

In 1993, Allen rented a room at Days' Inn Motel in Shepherdsville, Kentucky. During his stay there, his deposit became insufficient to cover his telephone calls. When calls to his room were not answered, the motel manager went to the room and discovered numerous bricks of marijuana. The motel manager "locked up" the room, thereby not allowing Allen to reenter the room. The police were

called; they entered the room with the permission of the motel manager. Thereafter, Allen was arrested as he walked up to the room; a warrant was issued, and Allen was charged with possession with intent to distribute marijuana, possession with intent to distribute cocaine; use of a firearm. Allen's motion to suppress was denied, and after a jury trial, he received 100 months in a federal prison.

The Sixth Circuit affirmed in a decision written by Judge O'Malley joined by Judges Merritt and Milburn. The Court first noted that the motel manager's search of the room was not prohibited by the Fourth Amendment.

Next the Court considered whether the officers' warrantless entry of the motel room was legal or not. The Court recognized that Allen had a "legitimate and significant privacy interest in the contents of the motel room, and this privacy interest was not breached in its entirety merely because the motel manager viewed some of those contents." However, the Court stated that because the manager had utilized a "lock-out" after discovering the marijuana initially, this act, "divested Allen of his status as an occupant of the room, and concomitantly terminated his privacy interest in its contents." Thus, when the manager consented to the search, there was no violation of the fourth Amendment.

Short View

1. Two courts have applied the rapidly shrinking Fourth Amendment to law enforcement officers, both on standing, or reasonable expectation of privacy, grounds. In ***Martin v. State***, 60 Cr. L. 1349 (Md.Ct.Spec.App. 12/30/96), the Court held that an officer had no reasonable expectation of privacy in the cruiser he was allowed to take home. Thus, the warrantless search of the cruiser which resulted in evidence of a sexual assault was ruled admissible. And in ***Sacramento County Deputy Sheriff's Association v. Sacramento County***, 60 Cr. L. 1350 (Calif. Ct. App. 3d Dist. 12/31/96), the Court held that the placing of a video camera in a jail in order to detect thefts was legal.

2. ***State v. Harris***, 60 Cr. L. 1363 (Wis. Sup. Ct. 12/27/96). When a car is stopped, everyone in the car has standing to challenge the stop, according to the Wisconsin Supreme Court. This bright-line rule granting standing to passengers was characterized by the Court as part of a "growing trend in other state and federal jurisdictions."

3. ***U.S. v. Humphrey***, 60 Cr. L. 1399 (5th Cir. 1/13/97). Under limited circumstances a warrant can be issued to search "all records" in a home or business search. "[T]he Fourth Amendment requires much closer scrutiny of an all records search of a residence; however, we conclude that, in the present case, the search warrant was valid in the light of the pervasive nature of the fraud, the considerable overlap of the Humphreys' business and personal lives, and the limitation of the warrant to records pertaining to financial transactions."

4. ***State v. Richcreek***, 60 Cr. L. 1402 (Ariz. Sup. Ct. 1/21/97). The stopping of a car which had slowed at a one-car accident and then sped off was illegal as not based upon even a reasonable suspicion of involvement in a crime. "Random vehicle stops for inspection, when not based on reasonable suspicion of criminal activity, constitute an impermissible seizure under the Fourth Amendment...Hunches, intuition, and 'unparticularized suspicion' are not enough."

5. ***Evans v. State***, 60 Cr.L. 1448 (Md.Ct.Spec. App., 1/29/97). A search incident to a lawful arrest requires a subjective intent to arrest. Thus, where officers search a suspected drug dealer, let him go with the intent to thereafter arrest him on "hit day," the search incident was unlawful and the evidence seized had to be suppressed. "Although the Supreme Court discussions of this aspect of the search incident law have been skimpy...the limited references that have been made insist not only on the fact of a formal arrest as the indispensable predicate for a search incident to lawful arrest but also insist that the arrest be 'custodial' in nature and not simply a processing at the scene of the arrest."

6. ***State v. Putt***, 60 Cr.L. 1455 (Tenn. Ct. Crim. App. 1/23/97). A visitor at a Tennessee state penitentiary does not have a right to leave once she sees the authorities searching

vehicles in the visitors' parking lot. A contrary view was reached in ***Gadson v. State***, Md.Ct. App., 668 A. 2d 22 (1995). Thus, this suspicionless search of Putt's car which resulted in finding marijuana was legal.

Ernie Lewis, Public Advocate
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601
Tel: (502) 564-8006
Fax: 9502) 564-7890
E-mail: elewis@dpa.state.ky.us

ASK CORRECTIONS:
Copies of Inmate's File; Length Corrections Records are Kept

QUESTION #1: My client is currently housed at the Kentucky State Reformatory, LaGrange, Kentucky. How would I obtain copies of his Resident Record Card and other documents contained in his file?

ANSWER #1: Inspection of inmate records is governed under the Open Records Law, KRS Chapter 61. KRS 61.878 allows agencies such as ours to exempt from inspection certain documents contained in our inmate files. Certain documents contained in our inmate files are open upon request. Certain documents are closed and given out only upon an order from a court of competent jurisdiction. To request documents from a person's file, you should submit a request in writing, identifying each item requested by name or with reasonable specificity. Your request may be forwarded to this office, or to the records office at the institution in which your client is housed. Your request will be responded to in accordance with the provisions of the Open Records Act. You will be advised which items requested are open for inspection and/or copying and which items are deemed exempt from inspection. The Corrections Department may charge a fee for the cost of any copy work.

QUESTION #2: My client's grandfather served time in the Kentucky prison system in the early 1960s. He passed away in 1966. My client is seeking information on any family members that your prison records may contain. How long do you keep these records? How would I be able to obtain this information?

ANSWER #2: The Department of Corrections retains inmate files for several years after the person has completed all obligation of his sentence. Central office inmate files are retained for a period of 75 years. The institutional inmate files are retained for five years. Medical records are retained for a period of twenty years. The open records law is intended to provide free and open examination of public records. However, it also provides for a certain right to personal privacy. Information concerning a person's family members may constitute an unwarranted invasion of their personal privacy, and would be exempt from inspection under KRS 61.878(1)(a). Depending upon the nature of the request, we normally require an order of a court of competent jurisdiction for the release of that information.

David E. Norat
Director, Law Operations Division
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601
Tel: (502) 564-8006; Fax: (502) 564-7890
E-mail: dnorat@dpa.state.ky.us

West's Review

Julie Namkin

***Jacobs v. Commonwealth*, Ky.App., 95-CA-2873-MR, 95-CA-2785-MR, Knott Circuit Court, Special Judge F. Byrd Hogg, 2/7/97**

Johnny Jacobs shot and killed his wife. He was tried and convicted of first degree manslaughter. He was sentenced to the minimum of ten years. On appeal, Jacobs presented three arguments.

The first argument is that an improper procedure was employed to appoint a special judge to try his case. This argument has three subarguments. In the first subargument, Jacobs maintained that Knott Circuit Judge John Robert Morgan had no valid grounds to recuse himself. Apparently Judge Morgan determined it was necessary to recuse himself after members of the victim's family questioned his impartiality. The Court of Appeals found that under KRS 26A.015(2)(e) and Canon 3C(1) of the Code of Judicial Conduct, SCR 4.300, Judge Morgan is in the best position to determine whether questions raised as to his impartiality were reasonable and the Court of Appeals saw no reason to second guess Judge Morgan's decision. The Court of Appeals noted that "[a]ffidavits describing the circumstances mandating the recusal are not required."

In his second subargument, Jacobs argued the appointment of Special Judge Hogg was defective because it occurred before Judge Morgan's recusal was effective. The facts reveal that Judge Morgan entered an order of recusal and an order certifying a need for a special judge on May 31, 1994. The Chief Regional Circuit Judge assigned the case to Judge Hogg on June 14, 1994. This assignment was timely. However, sometime in 1995, after Judge Hogg had been presiding over the case for more than a year, a superseding indictment, which was a continuation of the original proceeding, was returned against Jacobs. New recusal and ap-- pointment orders were returned bearing the new 1995 indictment number. However, when these new orders were sent to the circuit clerk, the appointment order was received a few hours before the recusal order. Since Judge Hogg had been presiding over the case for more than a year, the Court of Appeals found this fact pattern to be a "minor procedural error, if it was in fact an error," and did not affect Jacobs' substantial rights.

In his third subargument Jacobs pointed out that the Chief Regional Circuit Judge lacked authority to appoint a retired circuit judge to sit as a special judge. The Court of Appeals acknowledged that Jacobs' argument was correct since only the Chief Justice has the authority to appoint retired judges as special judges. See Ky. Const. § 110, 112(4) and KRS 26A.020(1). Two members of the three judge panel found that because Jacobs had failed to question the authority of the Chief Regional Circuit Judge to appoint a special judge until his appeal, the argument was waived and reversal was not required. A third member of the panel dissented on the ground that the matter of the appointment is jurisdictional and the appointment was thus void from the beginning.

The second argument on appeal was that KRS Chapter 507, which contains the homicide statutes, is unconstitutionally vague. The Court of Appeals, finding this issue was not properly preserved for review because Jacobs did not give the Attorney General notice of his challenge to the constitutionality of the statute before the trial court as required by KRS 418.075(1), failed to address this argument.

Jacobs third argument on appeal was that the circuit court erred when it denied his request to be declared a victim of domestic violence and to be exempted from the restrictions of KRS 533.060 and 439.3401.

The Court of Appeals pointed out that rather than requesting an evidentiary hearing on the domestic violence issue, Jacobs elected to rely

on the evidence produced at trial. [It should be noted that KRS 533.060(1) states "the trial judge **shall** conduct a hearing and make findings to determine the validity of the claim...." making it appear an evidentiary hearing is mandatory.] The circuit court found the record did not support a finding that Jacobs had been a victim of domestic violence because he did not offer proof that he had ever suffered physical injury or serious physical injury as a result of his wife's actions, that he had been sexually abused or assaulted as a result of his wife's actions, or that he was in fear of imminent physical injury, serious physical injury, sexual abuse, or assault from his wife. See KRS 403.720. Although Jacobs' did offer proof his wife had threatened to harm him and burn down their harm, Jacobs was not aware of these threats until after he had shot her. Thus, without knowledge of the threats at the time of the shooting, it was impossible for Jacobs to be in fear of imminent harm at the time he shot his wife. Thus, the Court of Appeals held the circuit court did not err when it found that Jacobs was not a victim of domestic violence and was not exempt from the provisions of KRS 533.060 and 439.3401.

Jacobs conviction was affirmed.

***Commonwealth v. Churchwell*, Ky.App., 938 S.W.2d 586 (1977)**

This opinion was originally released as an unpublished opinion on December 13, 1996, but pursuant to the Commonwealth's motion to publish, the opinion was subsequently ordered to be published.

The sole issue in this case is whether a misdemeanor marijuana trafficking charge may be punished as a felony pursuant to KRS 218A.1421(2) by using a prior conviction for trafficking in a different type of illegal drug, or whether a felony conviction under the statute may only be obtained by utilizing a prior conviction for trafficking in the same type of drug, *i.e.*, marijuana.

The Court of Appeals stated that KRS 218A.010(21) defines a "second or subsequent offense" as one where "prior to his conviction of the [presently charged] offense, the offender has at any time been convicted under this chapter, or under any statute of the United States, or of any state relating to substances classified as controlled substances or counterfeit substances...." Thus, the Court of Appeals concluded that when determining whether a conviction for trafficking in marijuana constitutes a second or subsequent offense for purposes of KRS 218A.1421(2), no distinction should be made between prior convictions for trafficking in marijuana and prior convictions for trafficking in other illegal drugs.

Thus, the defendant Churchwell's present misdemeanor charge of trafficking in less than eight ounces of marijuana could be enhanced to a felony because he had previously been convicted of trafficking in a controlled substance.

Accordingly, the case was remanded to the circuit court for further proceedings including reinstitution of the PFO II portion of the indictment.

***Smith v. O'Dea*, Ky.App., 939 S.W.2d 353 (1977)**

This case deals with the proper standard of review for inmate declaratory judgment petitions.

After being charged and found guilty by a prison adjustment committee, which was affirmed by the prison warden, of violating institutional rules regarding the introduction of contraband into the prison, Smith, an inmate at Eastern Kentucky Correctional Complex, sought judicial review in the Morgan Circuit Court.

Pursuant to KRS 418.040, Smith filed a petition in the Morgan Circuit Court for a declaration of rights, and pursuant to CR 52.01, he moved for findings of fact and conclusions of law. The warden's motion to dismiss Smith's petition for failure to state a genuine controversy as required under KRS 418.040 was granted. In a footnote, the Court of Appeals states the better practice is for the Corrections Department to file a motion for summary judgment rather than a motion to dismiss.

Smith appealed the circuit court's dismissal of his petition to the Court of Appeals.

The Court of Appeals stated the following to be the appropriate standard of review to be utilized by circuit courts when reviewing inmate

petitions for declaratory judgment: "we believe[d] summary judgment for the Corrections Department is proper if and only if the inmate's petition and any supporting materials, construed **in light of the entire agency record** (including, if submitted, administrator's affidavits describing the context of their acts or decisions), does not raise specific, genuine issues of material fact sufficient to overcome the presumption of agency propriety, and the Department is entitled to judgment as a matter of law." Applying this standard, the Court of Appeals, agreeing with the circuit court, concluded that Smith's allegations did not raise an issue of material fact and did not entitle him to the requested relief.

The Court of Appeals also found that the proper standard of review to be used by the circuit court in reviewing prison disciplinary committees' findings of fact is the "some evidence" in the record standard (utilized by federal courts) rather than the "substantial evidence" standard (based on Section 2 of the Kentucky Constitution) proposed by Smith. Applying the "some evidence" standard, the Court of Appeals found the evidence was sufficient to uphold the prison disciplinary committee's decision to sanction Smith.

The judgment of the circuit court was affirmed.

***Nemeth v. Commonwealth*, Ky.App., 95-CA-2357-DG, Oldham Circuit Court, Judge Dennis Fritz, 2/14/97**

Nemeth was arrested on July 4, 1994 for operating a farm tractor on a highway while intoxicated. He was charged with DUI in violation of KRS 189A.010. The district court dismissed the charge on the grounds that a farm tractor was not a motor vehicle under KRS 189A.010 and Nemeth should have been charged under KRS 189.520. The circuit court reversed. The Court of Appeals granted discretionary review to determine whether Nemeth should have been prosecuted under KRS 189.520 rather than KRS 189A.010.

It should be noted that since the date of the charged offense the statute defining "vehicle" has been amended to specifically exclude farm tractors from the definition of "motor vehicle." See KRS 189.010(18), 189.010(19)(b). However, this opinion is based on the law in effect at the time of the offense.

"Motor vehicle" is not defined in KRS Chapter 189A, but "vehicle" is defined in KRS Chapter 189. Thus, the Court of Appeals reasoned that the term "motor vehicle" should be construed in accordance with its common and approved usage. "Since a farm tractor is a vehicle, has a motor, and is frequently operated on public roads and highways, common sense tells us that a farm tractor is a 'motor vehicle' as that term is used in KRS Chapter 189A."

The Court of Appeals noted that *Heath v. Commonwealth*, Ky.App., 761 S.W.2d 630 (1988), held a farm tractor was a "motor vehicle" for purposes of KRS 189A.010, and a person operating a farm tractor under the influence of intoxicants could be prosecuted for DUI under KRS 189A.010.

The order of the circuit court reversing the district court's dismissal was affirmed.

***Brand v. Commonwealth*, Ky.App., 939 S.W.2d 358 (1997)**

Brand burglarized the home of his ex-wife and that of her boyfriend. He also made harassing phone calls to each. Pursuant to a plea agreement, Brand pled guilty to one count of third degree burglary and two counts of harassing communications. One count of burglary was dismissed. He was sentenced to four years in accord with the Commonwealth's recommendation.

Prior to sentencing, the Commonwealth submitted victim impact statements from Brand's ex-wife and her boyfriend. Brand objected to the admission of the statements and moved the trial judge to recuse herself because her knowledge of the contents of the statements would prejudice him at sentencing. The judge sustained the motion to strike the statements, but permitted Brand's ex-wife and her boyfriend to testify at the sentencing hearing regarding the emotional and financial impact of Brand's crimes. The court denied the recusal motion.

On appeal, Brand argued it was error for the trial court to fail to recuse herself. The Court of Appeals disagreed, referring to Brand's recusal motion as "specious."

Brand also argued it was error to allow his ex-wife and her boyfriend to testify at the sentencing hearing because the definition of "victim" in KRS 421.500 includes first and second degree burglary but not third degree burglary. The Court of Appeals rejected this argument and stated it "kn[e]w of nothing that suggests the trial court is without discretion to allow those injured as a result of lesser crimes from testifying as to the impact of the crime on their lives; or for that matter from submitting impact statements. They simply are not afforded the right by statute."

The rulings of the circuit court were affirmed.

***Combs v. Commonwealth*, Ky.App., 95-CA-2978-MR, Madison Circuit Court, Judge Julia Adams, 2/21/97**

Combs' car was observed weaving and crossing the yellow line. When he was stopped by the police, he smelled of alcohol and opened and unopened beer bottles were seen in his car. Three field sobriety tests were administered and failed. Combs was arrested for DUI. When he refused to submit to a blood test (he also refused to submit to a urine test and a breathalyzer) to determine his blood alcohol content, the arresting officer prepared an affidavit in support of a search warrant which was then issued by a district court judge. Pursuant to the search warrant, Combs' blood was taken at a hospital two hours after the stop and arrest.

Combs motion to suppress the blood test results was denied. Combs then entered a conditional guilty plea and was sentenced to two years probation. This arrest was Combs' fourth DUI arrest in four years.

The issue in this case is whether the police may use a search warrant to take blood from an individual arrested for drunk driving pursuant to the Implied Consent Statute when the individual refuses to submit to such a test.

Combs argued that KRS 189A.105(1)(b) authorizes a search warrant for the extraction of blood from an individual who has refused to submit to a blood test **only in cases in which the DUI violation resulted in death or physical injury**. Since no one was injured or killed in Combs' case, he argued it was error to issue the search warrant.

The Court of Appeals agreed that the plain language of the statute supported Combs' argument. However, the Court of Appeals declared that portion of the statute unconstitutional "to the extent that it attempts to limit when a search warrant may be issued." Relying on the separation of powers doctrine, the Court of Appeals held the legislature, through the statutory language, had usurped the power of the judiciary to determine whether probable cause exists to issue a search warrant.

The Court of Appeals also rejected Combs due process challenges to the admission of the blood test results as well as his challenge to the test as an unreasonable search and seizure.

Combs' conviction was affirmed.

***Patterson v. Commonwealth*, Ky.App., 95-CA-000961-MR, Simpson Cir. Court, Judge William Harris, 2/28/97**

Patterson was charged with trafficking in a controlled substance (cocaine) in the first degree. The indictment alleged Patterson committed the act of trafficking "by selling a quantity of cocaine, a controlled substance, to a confidential informant."

On the first day of trial the Commonwealth moved to amend the indictment to read that Patterson committed the act of trafficking "by having a quantity of cocaine in his possession with intent to sell it." Patterson objected stating he had prepared an entrapment defense based on the indictment alleging he had actually sold the cocaine to the informant. He said he would have abandoned that defense and argued mere possession had he known the Commonwealth's theory was possession with intent to sell. The court overruled the objection and permitted the Commonwealth to amend. The court found Patterson was not unfairly prejudiced since the facts were thoroughly gone into at the suppression hearing and the return on the search warrant showed the cocaine was never actually transferred to the informant.

The actual fact scenario was that the informant left Patterson's house under the pretext of going to get the money to purchase the cocaine after establishing on tape that Patterson actually had the cocaine in his house.

After the informant left, the police entered and found the cocaine in Patterson's house.

After being convicted by the jury, Patterson moved for a new trial and again argued he was prejudiced by the amended indictment.

Since the purpose of the indictment is to fairly inform the accused of the nature of the charges, the Court of Appeals searched the record to see what information Patterson had prior to trial regarding the nature of the charges against him. The Court of Appeals pointed out that Patterson had never moved for a bill of particulars; thus it concluded he could not complain about being unaware of the nature of the charges against him. The Court of Appeals also pointed out that the suppression hearing, which was cited by the trial court as evidence that Patterson was aware of the Commonwealth's revised theory of the case, was not part of the record on appeal. The Court of Appeals further noted that in arguing his new trial motion, Patterson's counsel conceded there was no evidence to show that Patterson had sold the cocaine and admitted "I can't sit here and tell the court that I was not familiar with the factual nature of the charge." Thus, the Court of Appeals concluded Patterson's substantial rights were not unfairly prejudiced by the Commonwealth's amendment of the indictment on the morning of trial.

Patterson's conviction was affirmed.

***Cardwell v. Commonwealth*, Ky.App., 96-CA-0927-MR, Christian Circuit Court, Judge Edwin White, 3/14/97**

The charges against Cardwell were the result of an automobile accident which caused the death of one person and serious injuries to another. Cardwell was charged with murder and forst degree assault. Prior to trialon these charges, Cardwell pled guilty to two separate charges of driving on a suspended license. He was sentenced to two years and three years, respectively, which were ordered to run consecutively for a total of five years. A jury found Cardwell guilty of second degree manslaughter and fourth degree assault and sentenced him to ten years and one year, respectively.

The trial court wrote on his court docket that Cardwell was "sentenced to 10 yrs. on mans. (sic) 2nd & 12 months on 4th assault plus $500.00 fine concurrent by operation of law but consec. (sic) to sentences of 5 yr already being served for a total of 15 yrs." However, when the actual final judgment was entered, it did not mention the five year sentence on the suspended license charges or that the manslaughter sentence was to be served consecutively to the five year sentence.

Upon discovering this mistake approximately ten months later, the trial court, on its own initiative and without notice, amended the judgment to reflect that the ten year and twelve month sentences were to run concurrently with each other but consecutively to the five year sentence on the suspended license charges for a total of fifteen years.

Cardwell's RCr 11.42 motion, alleging the amended judgment was void under CR 59.05 since the trial court no longer had jurisdiction over the matter at the time it entered the amended judgment, was denied.

On appeal, the Kentucky Court of Appeals held the trial court's actions properly fell under CR 60.01, which provides that clerical mistakes and errors arising from oversight or omission in judgments, orders or other parts of the record may be corrected by the court, since the court's docket clearly stated the sentences were to run consecutively for a total of 15 years and Cardwell was aware of this fact.

The denial of Cardwell's RCr 11.42 motion was affirmed.

***Commonwealth v. Duncan*, Ky., 939 S.W.2d 336 (1997)**

Duncan was arrested and charged with driving on a suspended license in violation of KRS 186.620(2). After a bench trial in district court, the judge, relying on *Commonwealth v. Dean*, Ky., 732 S.W.2d 887 (1987), found Duncan not guilty because the only evidence introduced by the Commonwealth was a certified copy of Duncan's driving history from the Kentucky Transportation Cabinet.

Pursuant to the Commonwealth's request for a certification of the law, the Kentucky Supreme Court held that a certified copy of the Transpotation Cabinet's driver history is sufficient

proof, without more, for a conviction for driving on a suspended license under KRS 186.629(2). *Commonwealth v. Dean*, *supra*, was thus overruled. *Commonwealth v. Willis*, Ky., 719 S.W.2d 440 (1986), was distinguished since *Willis* involved the use of the Transportation Cabinet's driving history to prove a prior DUI "conviction," while in the instant case the driving history was being used to prove the "status" of having a suspended license. Moreover, in some situations a driver's license may be suspended without ever receiving a court conviction.

***Commonwealth v. Fint*, Ky., 95-SC-357-DG, on review from the Court of Appeals, Jefferson Circuit Court, 2/27/97**

Kenneth Fint stole meat meat from The Kroger Company on four different occasions. Fint used his 1979 Ford pickup to transport the stolen meat. When Fint was arrested for felony theft, his pickup truck was confiscated and held by the police pending final disposition of the charges. See KRS 514.130(4). The total value of the stolen meat was $18,000.00. The value of the pickup was $1,875.00.

Fint pled guilty to four counts of felony theft.

When Fint asked for his truck back, the Commonwealth moved for forfeiture of the truck pursuant to KRS 514.130(1). The trial court denied the forfeiture motion because it believed Fint was already sentenced to a sufficient penalty which included paying court costs, a $500.00 supervision fee, a $500.00 public defender fee and to doing 100 hours of community service. In addition, the truck was 14 years old and Fint needed it for transportation to comply with the terms of his probation; and "forfeiture would be unnecessarily punitive in this particular case."

The Commonwealth appealed and the Court of Appeals affirmed the denial of forfeiture. The Kentucky Supreme Court granted discretionary review and reversed.

The Kentucky Supreme Court noted the forfeiture statue uses the mandatory word "shall." Thus, once the trial court found that Fint's truck was used in the commission of the theft or in the transportation of stolen property, the trial court had no discretion whether to order forfeiture of the truck.

The Court further noted a punitive forfeiture, such as the one in the instant case, is subject to scrutiny to determine if it violates the "excessive fines" clauses of the Eighth Amendment of the federal Constitution and Section 17 of the Kentucky Constitution.

In order to answer this question, findings of fact must be made as to whether the property n question was used in the commission of the offense or in the transportation of stolen goods. If so, then aditional findings must be made using the guidlines set out in *Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), to conclude whether the forfeiture violates he excessive fines clauses of the federal and state constitutions. The trial court's findings and conclusions will be upheld unless "clearly eroneous."

Applying the aforementioned analysis to the case at bar, the Kentucky Supreme Court found that the truck was used in the commission of the offense of felony theft and in the transportation of stolen goods. The Court further found that forfeiture of the truck, valued at $1,875.00, was not greatly disproportionate to the value of the stolen property which was $18,000.00. The Court also compared the forfeiture in this case to forfeitures imposed in other Kentucky cases and found it not to be disproportionate. Nor did the Court find the forfeiture disproportionate to forfeitures imposed in cases in other jurisdictions. Thus, the Court concluded the forfeiture was not excessive.

The Kentucky Supreme Court reversed the opinion of the Court of Appeals and remanded the case to the Jefferson Circuit Court with directions to ener an order forfeiting Fint's 1979 pickup truck.

***Robey v. Commonwealth*, Ky., 94-SC-881-MR, Jefferson Circuit Court, Judge Thomas Knopf, 2/27/97**

Robey was convicted of first degree rape, first degree burglary and being a first degree persistent felony offender. The victim's version of the charged offenses was the following.

The victim knew Robey and invited him to spend the night on the couch in her apartment. Robey said he would probably spend the night with a friend and left the victim's apartment. However, before the victim went to sleep in her bedroom, she placed a pillow and a blanket on her living room couch and left her apartment door unlocked in case Robey changed his mind and returned. Later that evening, the victim was awakened by a man in dark clothing and a gray ski mask at the side of her bed holding a red filet knife to her throat. The man told her to roll on her stomach and take her pants off. She recognized the man's voice as Robey's. The man had sexual intercourse with her and then told her to count to forty and left. The victim immediately left her apartment, went downstairs to a telephone booth and called a friend. The friend told the victim to immediately call the police.

Robey testified about his relationship with the victim, that she invited him him into her apartment and they had consensual sexual relations.

Robey raised four issues on appeal.

1. Prior to trial Robey filed a motion in limine to prevent the Commonwealth from calling a woman who would testify that Robey raped her sixteen years earlier under a fact scenario virtually identical to the one in the instant case. Robey had pled guilty to raping this woman. Robey contended the prior crime was too remote, irrelevant and highly prejudicial. The trial court overruled Robey's motion in limine. Robey again objected when the woman was called to testify during the Commonwealth's case in chief, and his objection was overruled.

The Commonwealth argued the evidence established a pattern or scheme due to the similarity of the two incidents and was admissible to show identity of the masked individual and lack of consent.

The Kentucky Supreme Court pointed out that since Robey admitted having sexual relations with the victim but claimed it was consensual, identity was not an issue. The trial was basically a swearing contest on the issue of consent.

The Kentucky Supreme Court engaged in balancing the probativeness of the prior rape against its prejudicial nature pursuant to KRE 403. The Court concluded the testimony of the prior rape was too remote in time to be admissible. It was highly prejudicial because any inclination the jury might have had to believe Robey's version of the alleged incident would have been destroyed by the testimony about the prior rape. The Court reversed Robey's rape conviction.

2. At trial, the victim's friend was permitted to testify, over Robey's objection that the testimony was improper bolstering, that the victim was hysterical and hyperventilating when she [the victim] called her to tell her what had happened, and the friend had to clam the victim down to understand what the victim was trying to tell her. The trial court permitted the friend to testify under the excited utterance exception to the hearsay rule. KRE 803(2).

On appeal, Robey argued the evidence was not admissible under the excited utterance exception because the friend testified she calmed the victim down before the victim told her what had happened.

The Kentucky Supreme Court indicated the issue was not properly preserved for review because the ground raised at trial was different from the ground raised on appeal. [*Caveat*: trial attorneys must state all possible grounds for a challenge to evidence in order to preserve all possible arguments for appeal.] However, the Court reviewed the issue anyway since it would arise on retrial. The Court held the friend's testimony was properly admitted under the excited utterance exception to the hearsay rule.

3. Robey argued he was entitled to a directed verdict of acquittal on the first degree burglary charge because he had permission to be inside the victim's apartment.

Distinguishing *Tribbett v. Commonwealth*, Ky., 561 S.W.2d 662, 664 (1978), and relying on its recent opinion in *Hedges v. Commonwealth*, Ky., 937 S.W.2d 703 (1997), the Kentucky Supreme Court agreed Robey was entitled to a directed verdict. The Court reasoned as follows. Robey entered the victim's apartment with her permission and then entered her bedroom and

raped her. There was no evidence to indicate his privilege to be in her apartment had been withdrawn prior to his committing the independent act of rape. Unlike in *Tribbett*, *supra*, Robey then left the apartment without removing any property belonging to the victim. The Court noted that "a crime against property is an essential element of burglary."

4. A qualified expert testified on the basis of DNA test results that semen present inside the victim's vagina was from Robey. Robey argued this testimony was erroneously admitted. The Kentucky Supreme Court stated that since Robey admitted engaging in sexual intercourse with the victim, but claimed it was consensual, the DNA test results were merely cumulative. They did not establish the act of intercourse was committed without the victim's consent. Thus, although the Court found "there was no need for this testimony," it did not conclude its admission amounted to reversible error. [Although the Court did not explicitly state, it should be assumed this evidence would not be admissible upon retrial.]

Robey's rape conviction was reversed and remanded for a new trial, and his burglary conviction was vacated and said count of the indictment was dismissed. Upon retrial, the victim's friend's testimony about her phone call with the victim would be admissible, but the testimony about the prior rape committed by Robey sixteen years ago and the DNA test results would be excluded.

***Commonwealth v. Taylor*, Ky., 95-SC-970-MR, Fayette Circuit Court, Judge Mary Noble, 3/27/97**

Taylor was charged with first degree sodomy and first degree sexual abuse. Taylor was fifteen and seventeen years old at the time the charged offenses occurred. The victim was his sister who was four and six years old, respectively. Taylor was over eighteen years old at the time he was convicted of both offenses and sentenced to twenty years.

At the time Taylor was sentenced, the trial court declared him to be a "juvenile sexual offender" and sentenced him to the Cabinet for Human Resources until his twenty-first birthday.

Upon reaching age twenty-one, the trial court noted Taylor's excellent performance in the sexual offender program and granted him probation. The Commonwealth objected, and appealed the trial court's order.

The Commonwealth maintained that KRS 532.045(2) prohibited the trial court from granting probation to Taylor. The cited statute states that "probation shall not be granted to...a person convicted of...[first degree sodomy]...and, who...has substantial sexual conduct with a minor under the age of fourteen years; or...occupies a position of special trust" to the victim of the sexual conduct.

Since Taylor was a relative of the victim, a member of the same household as the victim, and the victim was under the age of fourteen, Taylor was not eligible for probation under the statute.

The Kentucky Supreme Court agreed with the Commonwealth and reversed the order of the circuit court granting probation and remanded the case to the circuit court for resentencing.

***Commonwealth v. Griffin*, Ky., 94-SC-476-DG, Fayette Circuit Court, Judge Mitchell Meade, on review from the Court of Appeals, 3/27/97**

Griffin pled guilty in circuit court and was sentenced to five years probation. A condition of his probation was payment of restitution to the crime victims. Four years into his probation, the Commonwealth moved to revoke due to Griffin's failure to keep up his restitution payments.

At the hearing on the motion to revoke probation, Griffin argued that if the court would extend his probation for five more years, he would recommence paying restitution. The trial court agreed and extended Griffin's probation for five more years.

Three years later the Commonwealth again moved to revoke Griffin's probation for failure to make restitution payments. After a hearing, the trial court revoked Griffin's probation.

Griffin then filed an RCr 11.42 motion alleging the trial court lacked jurisdiction, under KRS 533.020(4), to revoke his probation because it

was more than five years after the original judgment was entered. The cited statute states that a period of probation may be extended or shortened by a court order, but a period of probation, even with extensions, shall not exceed five years.

The trial court denied Griffin's motion and he appealed. The Court of Appeals agreed with Griffin and reversed the trial court's order revoking Griffin's probation. The Commonwealth filed a motion for disretionary review which was granted by the Kentucky Supreme Court.

The Kentucky Supreme Court analyzed the underlying purpose of the statute and found the five year limitation to be for the protection of the convicted defendant and to prevent said defendant from being subjected to a probationary status of indefinite duration. In addition, the purpose of the statute would not be served if it was interpreted to preclude a knowing and voluntary waiver of the five year limitation by a defendant in exchange for avoiding a revocation of his probation and imprisonment. The Court stated that "[w]here, as in this case, the period of probation is extended beyond the statutory five year period at the request of the defendant in order to avoid a more severe sanction for violation the original terms of probation, a statutory interpretation which would disallow such an extension would be contrary to the defendant's interests rather than protective of them. In short, an interpretation that would allow an extension of a probationary period **knowingly and voluntarily requested by a defendant** is more in harmony with the underlying purpose of the statute than an interpretation that would not allow it."

The Kentucky Supreme Court also stated that even if the trial court lacked jurisdiction because of KRS 533.020(4), Griffin is estopped from challenging the court's exercise of that jurisdiction because he voluntarily requested the five year extension of his probation and then accepted the benefits of the court's granting of his request.

The opinion of the Court of Appeals was reversed and the trial court's order was reinstated.

***Prater v. Cabinet for Human Resources, et. al.*, Ky., 95-SC-413-DG, on review from Court of Appeals, Magoffin Circuit Court, Judge Stephen Frazier, 3/27/97**

This case concerns the application and relationship of the business records exception to the hearsay rule, KRE 803(6), and the public records exception to the hearsay rule, KRE 803(8).

The evidentiary questions addressed in this opinion arose in the context of an evidentiary hearing to terminate Appellant's parental rights.

At the hearing, the Cabinet for Human Resources presented the testimony of three social workers and its own case report. Appellant objected to the introduction of the case report under KRE 803(8)(B) because it was an investigative report prepared by CHR and offered in a case in which CHR was a party. CHR argued the report was admissible under the business records exception to the hearsay rule and the trial court agreed.

The case report included hearsay statements of one of Appellant's children and a niece of Appellant's wife, both of whom accused Appellant and his wife of abusing the children in question. The report also contained a letter from Lane Veltkamp, a certified clinical social worker, describing his examination of Appellant's wife's niece and repeating the niece's allegations that Appellant and his wife sexually abused their children. Medical reports of the physical examinations of the children were also introduced. These medical reports also repeated the niece's allegations that Appellant and his wife abused their children.

In its opinion, the Kentucky Supreme Court stated that KRE 803(8)(B) did not result in automatic exclusion of the CHR case report. If the report could meet the stricter foundational requirements set out in KRE 803(6), then the case report could be admitted. The Court noted the definition of "business" in KRE 803(6) was broad enough to encompass a public agency such as CHR. The Court further noted that if a particular entry in the report was inadmissible for another reason, then the information did not become admissible just because

the entire report could be admitted as a business or a public record.

Citing its prior decisions in *Alexander v. Commonwealth*, Ky., 862 S.W.2d 856, 862 (1993) and *Sharp v. Commonwealth*, Ky., 849 S.W.2d 542 (1993), the Court acknowledged that hearsay statments made by children to social workers in the course of an abuse investigation are not admissible simply because they are memorialized in a CHR case report. Thus, the Court admitted that the CHR report containing the niece's and one child's accusations of abuse by Appellant and his wife was inadmissible hearsay, whether testified to by the social worker or reported by her in her CHR report.

However, the Court concluded that since Appellant only objected to the introduction of the report under KRE 803(8)(B) and did not specifically object under the double hearsay prohibition in KRE 805, the error was not preserved for review, and the introduction of the report was not grounds for reversal. The Court likewise held the introduction of the niece's hearsay statements contained in Lane Veltkamp's report were not grounds for reversal. As to the social worker's testimony that the child's and the niece's statements were accurately reported in the case report, the Court held "the repetition of incompetent evidence previously admitted without objection is harmless error."

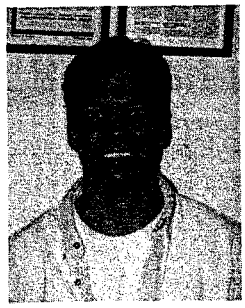
The Court held the medical reports, containing the Appellant's child's statements to the doctor, were admissible under KRE 803(4) and *Drumm v. Commonwealth*, Ky., 783 S.W.2d 380 (1990), thus avoiding the prohibition against the admission of double hearsay in KRE 805. As to the allegations of abuse made by the niece contained in the doctor's report, the Court held their admission was harmless error since the same information had already been introduced over an improper objection.

[Trial attorneys beware: the Court's holding in this case appears to be an extension of the Court's holding in *Robey v. Commonwealth*, decided 2/27/97. You *must cite all* possible grounds for the admission or exclusion of evidence at trial. If you fail to do so, your client's conviction will be upheld on appeal even though the Court rules the evidence was admissible or excludable for a different reason than you offered to the trial court.]

In this case, the Commonwealth offered the evidence under the business records exception to the hearsay rule. The Appellant argued the records were not admissible under KRE 803 (8)(B). The trial court admitted the records. The Kentucky Supreme Court held the records were inadmissible double hearsay under KRE 805, but since the Appellant did not object to the admission of the records on this ground, the Court upheld the trial court's ruling which resulted in the termination of Appellant's parental rights.

JULIE NAMKIN
Assistant Public Advocate
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601
Tel: (502) 564-8006
Fax: (502) 564-7890
E-mail: jnamkin@dpa.state.ky.us

Kentucky Case Law on Driving Under the Influence: The Year in Review



T.J. Wentz

1996 and early 1997 saw the Kentucky Supreme Court and Court of Appeals issue numerous decisions in the area of DUI law. While analysis of the case law indicates that a majority of these decisions were rendered against DUI defendants, the news was not all bad for defense attorneys. The following is a list of significant cases that may be helpful to any attorney's DUI practice.

Constitutional Rights

One area which Kentucky courts were willing to side with DUI defendants was when it involved the denial of constitutional rights. Two recent Court of Appeals decisions set aside convictions because of infringements on the defendants' right to counsel and to trial by jury.

Ronald Eaken was convicted of DUI fourth offense and was sentenced to three years in prison. The defendant appealed claiming the trial court erred by not suppressing a prior DUI in which he was unrepresented by counsel. See generally *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct 1709, 23 L.Ed.2d 274 (1969). In a published opinion, the Court of Appeals held it was reversible error to allow a prior conviction to enhance a DUI when the defendant "received a sentence of imprisonment without being informed of his right to counsel." ***Eaken v. Commonwealth***, 95-CA-511-MR, 1996 WL 324448 (Ky.App. 1996). The Court noted that the defendant's jail sentence of one day was sufficient to trigger the right to counsel thereby requiring the Commonwealth to rebut the defendant's testimony that he was not advised of his right to counsel. Furthermore, the Court rejected the Commonwealth's argument that Kentucky trial courts are no longer required to conduct a hearing into the constitutional underpinnings of a judgment of conviction offered for enhancement purposes. See *McGuire v. Commonwealth*, 885 S.W.2d 931 (Ky. 1994). *Eaken* held that when a "complete denial of counsel" is claimed the conviction may be attacked collaterally.

In an interesting unpublished opinion, the Court of Appeals reversed a misdemeanor DUI conviction because the defendant was forced to waive his right to a jury trial and represent himself at a bench trial. ***Ray v. Commonwealth***, 95-CA-000814-DG (Ky.App. 1996). The defendant's attorney was unable to appear on the date of the jury trial because of another court commitment. The defendant appeared believing his case was to be continued because his attorney was not present. The judge refused to continue the case and gave the defendant two hours to produce his attorney or hire another one. When the defendant was unable to do so, he agreed to waive his right to a jury trial and represented himself at a bench trial. The Court of Appeals concluded that this was a deprivation of the defendant's Sixth Amendment right to counsel. "[The defendant] sitting alone at counsel's table, undoubtedly perplexed at the prospect of representing himself at trial, was asked whether he wanted to waive his right to a jury trial. Under such circumstances, the waiver of his right to a trial by jury cannot be said to have been knowingly and voluntarily made."

Blood Evidence

Numerous courts have recently wrestled with the need to balance governmental desires for the collection of evidence with individual privacy concerns. In Kentucky, these competing interests have surfaced in regard a person's right to refuse blood testing for suspected DUI.

The Supreme Court first addressed this issues in ***Beach v. Commonwealth***, 927 S.W.2d 826 (Ky. 1996). The issue raised on appeal by the defendant was whether or not a peace officer had the right to require a suspected drunk driver to take a blood test before offering the defendant a breath test. The defendant argued that the language of KRS 189A.103(5) requires

the officer to give a breath test first in order to eliminate the "unfettered discretion" of the officer in choosing the proper test. KRS 189A.103(5) states that "[w]hen the preliminary breath test, breath test, or other evidence gives the peace officer reasonable grounds to believe there is impairment by a substance which is not subject to testing by a breath test, then blood or urine tests, or both, may be required *in addition to a breath test, or in lieu of a breath test.*" The Supreme Court rejected this contention by stating that "[t]here is no priority expressed in the statute and no preferred method for determining blood alcohol content." Therefore, the Court held that the implied consent statute is meant to cover all forms of testing and the officer can choose which test to administer.

However, the *Beach* court went on to explain that even if an implied consent violation had occurred the exclusion of the blood test results would not have been proper. "Exclusion of evidence for violating the provisions of the implied consent statute is not mandated absent an explicit statutory directive. Evidence should not be excluded for violation of the statute's provisions where no constitutional right is involved." This dicta most assuredly affected the Court of Appeals in two decisions rendered in 1997.

In ***Combs v. Commonwealth***, 95-CA-2978-MR (Ky.App. 1997), the issue presented was whether police could use a search warrant in order to take a suspected drunk driver's blood after the suspect had refused to submit to such a test pursuant to the implied consent statute. Combs argument was simple. The implied consent statute gave any defendant the right to refuse testing, for which penalties attached and such refusal could be introduced at trial. And KRS 189A.105(1)(b) clearly states that a search warrant could be obtained to override a person's refusal when there is an accident which results in a person being killed or suffering physical injury. In this case, there was no accident, no injury and no death, therefore, he had the statutory right to refuse testing. The Court of Appeals agreed that his interpretation was consistent with the plain meaning of the statute, but overruled the appeal by finding that KRS 189A.105(1)(b) was "unconstitutional to the extent that it limits when a search warrant may be issued, as violative of the separation of powers doctrine."

The Court of Appeals went on to address any constitutional concerns raised by the forcible extraction of the defendant's blood. Relying on the United States Supreme Court's decision in *Schmerber v. California*, 384 U.S. 757, 86 S.Ct 1826, 16 L.Ed.2d 908 (1966), the court found no fourth amendment violation. However, *Combs* did recognize that *Schmerber* set limits on what is reasonable conduct under the fourth amendment: "It would be a different case if the police initiated the violence, refused to respect a reasonable request to undergo a different form of testing, or responded with inappropriate force." *Combs* citing *Schmerber* 384 U.S. at 760 fn. 4. However, the facts in *Combs* did not establish any of these exceptions.

There is case law indicating boundaries to the *Schmerber* opinion. In *Hammer v. Gross*, 932 F.2d 842 (9th Cir. 1991), the court upheld a jury verdict awarding money damages for civil rights violations where the police forcibly extracted blood from a defendant who had agreed to take a breathalyzer test. The jury found that handcuffing the defendant to the chair, wrestling the defendant to the ground and poking him with a needle was unreasonable force in light of the defendant's willingness to undergo another form of chemical testing.

Finally, in an unpublished opinion citing the Supreme Court's *Schmerber* decision, the Court of Appeals refused to suppress the results of a blood test drawn from a defendant while he was unconscious and before he was placed under arrest. ***Burton v. Commonwealth***, 95-CA-3362-MR (Ky.App. 1997). The defendant argued that because he was not under arrest at the time the blood sample was withdrawn, the implied consent provisions were not applicable to him. The Court rejected this claim because the officer had "probable cause to believe that the [defendant] was guilty of a felony involving drunken driving." The Court of Appeals held that "[b]ased upon probable cause and the exigent circumstances appearing in this case, it was not necessary that the police first arrest the unconscious [defendant] before seeking a test of his blood."

Jury Trial Issues

Because of the large deviation in how other jurisdictions handle DUI evidence in trial, the

Kentucky Supreme Court and Court of Appeals issued a number of opinions to clarify legal issues here in Kentucky.

The opinion which rendered the greatest impact on how DUI jury trials are conducted was ***Commonwealth v. Ramsey***, 920 S.W.2d 526 (Ky. 1996). The Kentucky Supreme Court held that prior convictions for DUI were not admissible during the guilt phase of the trial on a charge of felony DUI. The Commonwealth argued that they needed to introduce the prior offenses in the guilt phase in order to show that this was, in fact, a fourth offense and therefore a felony. The *Ramsey* Court rejected the need for introduction of the priors in the case-in-chief because of the "unduly prejudicial" nature of the evidence. The Court concluded that the prior offenses should be introduced in a separate, bifurcated hearing held after guilt or innocence on the present DUI charge was established.

In ***Dedic v. Commonwealth***, 920 S.W.2d 878 (Ky. 1996) rendered the same day as *Ramsey*, the Supreme Court applied the exact same reasoning to misdemeanor, multiple offense DUI charges. "Therefore, we hold that in misdemeanor DUI trials, evidence of previous DUI convictions shall not be introduced until a guilty verdict is rendered on the underlying charge." In an unpublished opinion the Court of Appeals also extended the reasoning of *Ramsey* to multiple offense, driving on a DUI suspended license charges. *Thomas v. Commonwealth*, 95-CA-0768-MR (Ky.App. 1996). Although the Court found that the introduction of the prior KRS 189A.090 violations was "harmless error," the Court agreed that the "convictions were not admissible during the guilt phase of [the defendant's] trial, and that they could only be used during the sentencing phase of the proceedings."

The Supreme Court published an important decision in September of 1996 regarding the Commonwealth's statutory election requirements, the need for expert testimony to prove the absorption rate of alcohol and relate it back to the time of driving, and the proof necessary to introduce blood alcohol results. ***Commonwealth v. Wirth***, 936 S.W.2d 78 (Ky. 1996).

As we all know, a person can be convicted of DUI in either of two ways: (1) if he or she operates or is in physical control of a motor vehicle while the alcohol concentration in his or her blood or breath is .10 or greater (KRS 189A.010(1)(a)); or (2) if he or she operates or is in physical control of a motor vehicle while under the influence of alcohol (KRS 189A.010 (1)(b)). The trial court ruled that the Commonwealth could not proceed under both theories in the same trial, but had to "elect" one theory or the other. In *Wirth*, the Supreme Court rejected this by stating that "[w]here there is evidence to prove one or more theories of the case, the Commonwealth may present all such evidence and have the jury render a verdict thereon." However, the Court did note that "fundamental fairness" required to Commonwealth to provide notice to the defense under which theories it intended to proceed, and a "blanket notice covering all possible violations without regard to the available evidence would defeat the purpose and be tantamount to no notice at all."

Wirth ruled that the Commonwealth was not required to present expert testimony by which the breath or blood test would be related back in time to the point of motor vehicle operation to establish a prima facie "per se" violation. The Court recognized that many jurisdictions require such extrapolation evidence, but refused to so hold in Kentucky because of the following: (1) "[w]hile it is widely acknowledged that one's alcohol concentration level may change between the time of driving and testing, in most cases the delay will favor the defendant by producing a lower reading;" (2) "extrapolation based only on the lapse of time between driving and testing is no more reliable than the result yielded by a breath test a reasonable time later;" and (3) "without the defendant's cooperation, no valid extrapolation can occur" because "a number of facts known only to the defendant are essential to the process."

However, in no way should *Wirth* be interpreted to reject "relation back" as a viable defense. Quite the contrary, the Court simply made "relation back" an affirmative defense that must be argued by the defense. "Certainly nothing would prevent a defendant from producing his own extrapolation expert based on the test administered by the police and the tests voluntarily taken." This language in *Wirth* in combination with *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct 1087, 84 L.Ed.2d 53 (1985), would seem to require trial courts to

grant expert funds for indigent defendants who plan to use a "relation back" defense.

Finally, the Court in *Wirth* addressed the issue of the sufficient proof necessary to establish the accuracy of the breath testing machine in order to introduce the breath alcohol result. The trial court rejected the Commonwealth's attempt to introduce the calibration records of the Intoxilyzer 5000 and required the Commonwealth to produce the testimony of the person who calibrated the machine. The Supreme Court found that "[w]hile breath testing may not be flawless, it has been determined to have sufficient reliability to be admissible in evidence and to sustain a conviction" and therefore introduction of the maintenance records on the machine under the business or public records exception to the hearsay rule was justifiable. "Provided the documentary evidence may be properly admitted, it is unnecessary to produce the testimony of the technician who serviced and calibrated the machine." However, the Court was clear in mandating that the Commonwealth produce either the appropriate maintenance records on the Intoxilyzer 5000 or the actual person who calibrated the machine.

On November 22, 1996, the Kentucky Court of Appeals published an important decision clarifying the introduction of preliminary breath test (PBT) results and horizontal gaze nystagmus (HGN) evidence. ***Commonwealth v. Rhodes***, 95-CA-1495-DG, 1996 WL 672993 (Ky. App. 1996). A Kentucky State Trooper made a traffic stop of the defendant at 1:10 a.m. for suspected DUI. After administering a number of field sobriety tests including an Alco Sensor III PBT, the defendant was placed under arrest at 1:20 a.m. During trial, the trooper was allowed to testify that the defendant "failed" the PBT despite the fact that it was administered prior to the fifteen minute waiting period as required by the manufacturer's own instrument instructions. The Court of Appeals refused to reverse on grounds that the issue was not properly preserved for its review, but clearly indicated that the results were "unreliable given the manufacturer's own instructions." While PBT results have been found to be admissible in *Allen v. Commonwealth*, 817 S.W.2d 458 (Ky.App. 1991), failure to follow the procedural requirements will render any result inadmissible.

The Court in *Rhodes* also examined the foundational requirements for the introduction of the HGN test administered by the officer. The Circuit Court held the HGN test to be "scientific in nature" thereby requiring the Commonwealth to provide a proper foundation as to the scientific validity of the test. Without specifically addressing whether or not the test was scientific in nature, the Court of Appeals found introduction of HGN evidence to be proper when "some foundational testimony that the officer was trained and certified, that the test was properly administered, and that the proper procedures were employed" was offered by the Commonwealth.

"Operation" of a Motor Vehicle

Two cases decided the same day by the Court of Appeals seemingly expanded the definition of "operation" under the DUI statute. However, the Court continued using the four factor test enumerated in *Wells v. Commonwealth*, 709 S.W.2d 847 (Ky.App. 1986): (1) whether or not the person in the vehicle was asleep or awake; (2) whether or not the motor was running; (3) the location of the vehicle and all circumstances bearing on how the vehicle arrived at that location; and (4) the intent of the person behind the wheel.

In ***Commonwealth v. Clare***, 95-CA-2676-DG (Ky.App. 1997), the facts were as follows: a police officer came upon a vehicle which had its front end resting against a guard rail while its front wheel was over a curb. Because of its location the car could not be moved. The driver was asleep, but the engine was running and the transmission was still in drive. The Court found that all *Wells* factors favored operation except that the defendant was asleep behind the wheel. Interestingly, the Court even found the defendant had the intent to operate the vehicle despite his state of incapacitation.

In another unpublished opinion, the Court of Appeals found the defendant was "operating" her motor vehicle despite the fact that the vehicle could only be extricated from a rock cliff by the use of a tow truck. ***Commonwealth v. Bowling***, 95-CA-2727-DG (Ky.App. 1997). Upon arriving at the scene, the police officer saw a truck positioned backwards, against a rock cliff, near the roadway. The defendant was seated in the driver's seat, she was awake, the motor was running and the wheels were spin-

ning forward. However, the officer admitted that he did not observe the vehicle move and, in fact, the vehicle was unable to be moved. The Court of Appeals held this was enough to satisfy all four *Wells* factors and establish the Commonwealth's burden of proving "operation."

It is important to remember that lack of operation is still a viable defense even in accident cases. Both *Bowling* and *Clare* are unpublished opinions. Both involved a situation where at least three of the four *Wells* factors favored the Commonwealth. And both cases involved a driver who was actually observed by the police operating the vehicle. In neither case did the Commonwealth have a problem in showing *when the defendant was operating the vehicle.* Remember that under *Pence v. Commonwealth*, 825 S.W.2d 282 (Ky.App. 1991), the Commonwealth is still required to prove operation *while intoxicated.* Neither *Clare* nor *Bowling* would be determinative if a person involved in a one-car accident is found outside his vehicle, even if he admits that he was the driver. The Commonwealth would still have the burden of proving *when* he was operating the vehicle.

Sentencing

1996 saw the Kentucky Court of Appeals render two separate decisions regarding the 120 mandatory period of incarceration on a conviction for felony DUI. KRS 189A.010(5) sets forth the following sentencing guidelines: "For a fourth or subsequent offense under this section, the minimum term of imprisonment shall be one hundred twenty (120) days, and this term shall not be suspended, probated, or subject to conditional discharge or other form of early release." In both cases, the defendants unsuccessfully attempted to avoid spending 120 days in the county jail.

In ***Commonwealth v. Rhodes***, 920 S.W.2d 531 (Ky.App. 1996), the Commonwealth appealed after the trial court sentenced Rhodes to a total of one year imprisonment, probated for five years on the condition that she serve 120 days home incarceration after a plea to DUI fourth offense. Rhodes claimed that her confinement to home incarceration was a "term of imprison-ment" for purposes of KRS 189A.010 (5). The Court of Appeals rejected this argument by noting that home incarceration was available to misdemeanants only and not felons. See KRS 532.210. The Court remanded the case by stating that "the trial court must order that Rhodes serve at least 120 days in a correctional facility. This sentence may be served in a county or regional correctional institution."

Shortly thereafter, the Court of Appeals took up the issue of whether or not time spent in a drug treatment facility or halfway house could be credited toward the mandatory 120 days imprisonment. In ***Commonwealth v. Guess***, 95-CA-1008-MR, 1996 WL 416263 (Ky.App. 1996), the Court analyzed the issue by determining if the defendant was "in custody" when at the treatment facility. While acknowledging that certain restrictions were placed on the defendant upon his release, the Court concluded that "he was not under the supervision of law enforcement personnel" and therefore not in custody. In rejecting the defendant's claim for jail time credit, the Court indicated that the trial judge had "no discretion" in crediting time spent in a treatment facility toward the 120 day mandatory jail sentence.

While these decisions are disappointing in finding alternative methods to fight drinking and driving, it is clear that courts interpret the legislative intent of KRS 189A.010(5) to require 120 days behind bars for felony DUI convictions.

Driving on a DUI Suspended License

The Kentucky Supreme court and Court of Appeals teamed up to clarify a number of issues regarding the law of driving on a DUI suspended license.

In an unpublished decision that seems difficult to logically take issue with, the Court of Appeals held that a person was not exempt from the penalties of KRS 189A.090 (driving on a DUI suspended license) simply because he or she never possessed a driver's license. ***Commonwealth v. Hoskins***, 96-CA-393-MR (Ky. App. 1996). The defendant convinced the trial court to amend the operating on a DUI suspended license charge to a charge of operating a motor vehicle without an operator's license, KRS 186.620(2), because she was never issued a driver's license. The Court of Appeals noted that this may have been the law before 1991, but that since then the legislature amended KRS 189A.090 to prohibit operating a motor vehicle while his "privilege" to operate has

been revoked for a DUI violation. This 1991 amendment was meant to close any loophole in the law that previously existed. Clearly, the legislature did not want drivers to be exempt from the law simply by never getting a driver's license.

In another unpublished opinion, the Court of Appeals addressed an issue of first impression in the state: whether a pretrial suspension of a driver's license pursuant to KRS 189A.200 falls within the scope of KRS 189A.090. ***Commonwealth v. Roberson***, 94-CA-1952-DG (Ky. App. 1996). The defendant was arrested for DUI second offense and the trial court suspended his license at his arraignment. Approximately three months later, but before his DUI second offense was litigated, the defendant was arrested and charged with another DUI. The Commonwealth charged the defendant with DUI third offense and driving on a DUI suspended license, KRS 189A.090. The Court of Appeals ruled that the defendant's conduct "was undoubtedly flagrant and contemptuous," but that a "violation under this statute [KRS 189A.090] requires that the full panoply of due process be accorded an accused before penalties for the alleged violation can be imposed." Therefore, the defendant's act of driving after his license was suspended pre-trial for a DUI charge was clearly a violation of KRS 186.620 (operating on a suspended license).

In ***Commonwealth v. Duncan***, 939 S.W.2d 336 (Ky. 1997), the Kentucky Supreme Court overruled *Commonwealth v. Dean*, 732 S.W.2d 887 (Ky. 1987), by holding that a certified copy of the defendant's driving history from the Kentucky Transportation Cabinet was sufficient evidence for a conviction of driving on a suspended license, KRS 186.620(2).

However, this decision does not allow the Commonwealth to prove a KRS 189A.090, driving on a DUI suspended license, violation simply with a certified driving record alone. In *Duncan*, the Court cited approvingly *Commonwealth v. Willis*, 719 S.W.2d 440 (Ky. 1986), which held that allowing a copy of the Transportation Cabinet's driving history to *prove a prior conviction* was contrary to the best evidence rule. *Willis* held that a certified copy of the prior judgment of conviction must be introduced to prove a prior DUI. The Court of Appeals has followed this rule in *Toppass v. Commonwealth*, 799 S.W.2d 587 (Ky.App. 1990): the driving history record can be used in a prosecution for a violation of KRS 189A.090 to prove that the suspension in effect at the time of the offense was for a DUI violation, where *independent evidence of the DUI conviction was introduced.*

In *Duncan*, the Court distinguished a KRS 189A.090 violation by noting that the Commonwealth need not prove a prior conviction for a KRS 186.620 violation. The Commonwealth need only "prove that the individual was operating a vehicle while his or her license was suspended."

Zero Tolerance Statute

1996 saw one major statutory change in regard to DUI law. The legislature passed what is commonly referred to as a "zero tolerance" statute to prohibit driver's under the age of twenty one from having any alcohol in their system. KRS 189A.010(1)(e) states that a person shall not operate or be in physical control of a motor vehicle "[w]hile the alcohol concentration in his blood or breath is 0.02 or more based on the definition of alcohol concentration in KRS 189A.005 if the person is under the age of twenty one (21)."

The penalties for a violation of this statute are set out in KRS 189A.010(5). Any violator shall have his driver's license suspended for at least thirty (30) days but no longer than six (6) months. The Court shall also impose a fine of between $100 and $500 or twenty (20) hours of community service in lieu of the fine. No other penalties in KRS Chapter 189A apply to this offense, and it may not be used to enhance any subsequent DUI conviction.

Clearly, constitutional challenges to the "zero tolerance" law will be forthcoming. It is likely the statute will be attacked as being unconstitutionally void for vagueness, unconstitutionally overbroad, and that the statute creates an unconstitutional irrebuttable presumption. While these attacks have generally been unsuccessful in regard to the .10 *per se* law that applies to adults, the arguments may be more persuasive with regard to such a minimal level of blood or breath alcohol. See *State v. Tanner*, 472 N.E.2d 689 (1984).

A more fruitful area of attack may be found in the Kentucky Supreme Courts decision in *Commonwealth v. Raines*, 847 S.W.2d 724 (Ky. 1993). In *Raines*, the Court addressed the issue of whether the legislature could mandatorily suspend pre-trial the driver's licenses of individuals below the age of twenty one charged with DUI. There was no such mandate for those above twenty one years of age. The Supreme Court held that a driver's license is a protected property right under the Constitution and that "[s]uch a classification based on this age, is manifestly unreasonable and arbitrary." The Court went on to rule that the provision applying to only those below twenty one years of age was violative of the "Fourteenth Amendment of the United States Constitution and Section 59 of the Kentucky Constitution" as a denial of equal protection.

The question presented by the "zero tolerance" legislation is whether or not the Commonwealth can provide a rational argument to justify such age based discrimination.

T.J. WENTZ
826 Bard Street
Hermosa Beach, California 90254
Tel: (310) 374-1778

Highlights from 1997 DPA Professional Support Staff Education held at Rough River State Park - April 14-15, 1997

DPA Professional Support Staff

Bill Curtis receives the 1997 *Rosa Parks Award* from Ed Monahan

Patricia Thurman of Governmental Services teaches the employee role in the performance process

DPA Length of Service Recognitions:

Support Staff with 10+ Years of Service with DPA

Left to Right: Janet Jewell, Brenda Kramer, Joe Howard, Debbie Garrison, Beverly Thompson, Tina Hostetler, Kelly Durham, Cheree Goodrich, Kathy Bishop, Linda Burkhalter, Kathryn Power, Donna Robinson. *Not Pictured:* Lisa Collins, Wanda Elam, Cindy Long, Angie Potter, Mary Roberts, Liz Toohey, Christy Wade.

Support Staff with 15+ Years of Service with DPA

Left to Right: Lynn Aldridge, Regina Seabolt, Melodye Steele, Vivian Stewart, Joy Brown, Shirley Champion, Sheila Morris, Bob Rehberg, Kathy Collins, Peggy Redmon, Bill Curtis, Vicki Phillippe, Carl Garrett, Bob Hubbard. *Not pictured:* Lisa Fenner, Marian Gordon, Lowell Humphrey, Joyce Miller.

Support Staff with 20+ Years of Service with DPA

Left to Right: Larry Rapp, Steve Heffley, Joyce Hudspeth, Madeline Jones, Patsy Shryock, Tina Meadows.
Not pictured: Dave Stewart.

Joan Wagner of DISMIS, Inc. teaches at the Support Staff Education

Alma Hall, Ph.D. & Abby Brooks of Georgetown College teach the skills of Win-Win Assertiveness

Personnel Changes at DPA

Recent Hires

MARTHA CAMPBELL joined DPA's Protection & Advocacy Division as an Advocate Specialist December 1, 1996. She received her B.A. from the University of Mississippi in 1974 in Philosophy and her M.A. from U.L. in 1983 on Community Development.

CONNIE BOWMAN joined DPA's Morehead Office as a legal secretary December 16, 1996. She is a former deputy clerk of the Rowan Circuit Clerk's Office.

JILL SIVELLS joined DPA's Hopkinsville Office as a secretary January 1, 1997.

JENNIFER FLEMING joined DPA Law Operations Division as a clerk/receptionist October 1, 1996.

PAMELA WARMAN joined DPA's Law Operations Division as a clerical assistant February 16, 1997.

ANN HARRIS joined DPA's Law Operations Division as the Computer Systems Consultant March 1, 1997. She came to DPA from the Kentucky Arts Council.

BRIAN RUFF joined DPA's Post-Conviction Office in LaGrange as an Assistant Public Advocate November 1, 1996. He is a former Assistant Public Advocate in DPA's Pikeville Office. He received his J.D. from U.L. in 1983.

CLAUDIA SMITH joined DPA's Morehead Office as an Assistant Public Advocate January 1, 1997. She works with DPA's Juvenile Post-Conviction Program. She received her J.D. from U.K. Law School in 1995.

JEFF SHERR joined DPA's Frankfort Office as an Assistant Public Advocate November 16, 1997 for the Juvenile Post Conviction Program. He received his J.D. from U.K. Law School in 1996. He is a former DPA law clerk.

TIM ARNOLD joined DPA's Frankfort Office as an Assistant Public Advocate November 16, 1997 for the Juvenile Post Conviction Program. He received his J.D. from U.K. Law School in 1996. He is a former DPA law clerk.

SAUL SCHNEIDER joined DPA's Hopkinsville Office as an Assistant Public Advocate October 16, 1996. He received his J.D. from Chase Law School in 1991.

TINA SCOTT joined DPA's Frankfort Office as a paralegal March 16, 1997 with the adult post-conviction section. She came to us from DPA's Morehead Trial Office.

ADAM ZEROOGIAN joined DPA's Richmond Office as an Assistant Public Advocate February 16, 1997. He received his J.D. from Western New England College of Law in 1992. He was a former Assistant Public Advocate with DPA's Hopkinsville Office.

ARTHUR HIGGS, III joined DPA's Morehead Office as an Assistant Public Advoccate February 1, 1997. He received his J.D. from U.L. 1993. He is a former Assistant County Attorney in Bullitt County.

VINCE YUSTAS joined DPA's Capital Trial Unit as an Assistant Public Advocate March 1, 1997. He received his J.D. from Rutgers School of Law in 1970. He is a former private attorney from Brandenburg.

KEITH VIRGIN joined DPA's Madisonville Office as an Assistant Public Advocate December 1, 1996. He received his J.D. from U.L. in 1988. He is a former private attorney from Catlettsburg.

SHERRY WRIGHT joined DPA's Capital Trial Unit as a mitigation specialist February 16, 1997. She received her B.S. in Political Administration and A.A. in Paralegal Studies. She is a former employee of the Jefferson District Public Defender's Office.

MEENA MOHANTY joined DPA's Richmond Office as an Assistant Public Advocate April 1, 1997. She received her J.D. from Temple University in 1995.

Recent Departures

AUSTIN PRICE, Assistant Public Advocate with DPA's Somerset Office, has accepted a position with the Pulaski County Commonwealth Attorney's Office.

ARLENE HOWERTON, Legal Secretary with DPA's Morehead Office from 1989 - 1996, retired October 15, 1996.

HEATHER COMBS, Assistant Public Advocate in DPA's Stanton Office, has accepted a position with the Estill County Attorney's Office.

JIM BAECHTOLD, Assistant Public Advocate in DPA's Richmond Office, went into private practice in Richmond.

BOB HARP, Investigator with DPA's Capital Trial Unit, transferred to the Justice Cabinet, Charitable Gaming Division.

STAN COPE, Director of DPA's Law Operations Division, resigned as head of DPA's Law Operations Division to the Justice Cabinet.

KATHY FRANKS, Assistant Public Advocate with DPA's Stanton Office, has accepted a position with the Fayette County Commonwealth Attorney's Office.

Book Review:
The Lost Lawyer: Failing Ideals of the Legal Profession

Anthony T. Kronman
Harvard University Press 1995, 422 Pages

Jim Clark

Anthony Kronman, the Edward J. Phelps Professor of Law at Yale University, has written a book that is best described as an Aristotelian critique of the legal profession. That is a more provocative project than it sounds. The author's major thesis is that law is failing as a profession because lawyers are failing to live out the essential ideals of the profession. The "character issue" -- more precisely, the abandonment of *virtue* as the core of good practice -- is what has led to the great diminishment of the profession in contemporary America. "The profession now stands in danger of losing its soul."

The core of lawyering is a "special talent for discovering where the public good lies and for fashioning those arrangements needed to secure it." This is not a skill to be acquired, but a trait of character that is developed through years of formative experience. Novice attorneys become seasoned through clinical contact with a variety of clients carrying a spectrum of challenging legal problems which do not readily yield solutions. Such experiences help novice lawyers to face problems of moral incommensurableness (*e.g.*, abortion, death penalty), and to eventually act as moral leaders able to assist individual clients as well as the body politic. Such is the "lawyer-statesman" ideal. The great goal of statesmanship is political fraternity, a fraternity that values reform over revolution or stasis.

Traditional law school training helped shape the habit of prudential judgement though the employment of the case method. Case studies involve the examination of conflicting claims (often competing goods) and painstaking analysis of appellate courts' reasoning and decision-making processes. The vantage point of the judge (rather than any advocate) provides the student with a model of deliberation that will serve him/her well. The practicing lawyer must be able to listen to the client's desires but also be ready to identify and counsel clients regarding their actual best interests.

Law schools still use the case method, but Kronman asserts that contemporary professors have little interest in preparing students for real life law practice. Professors are usually non-practitioners who are more interested in pursuing "scientific" programs of research. Teachers are more interested in law-and-economics or critical legal studies than mentoring students toward the lawyer-statesman ideal. Their battles are often obscure and unrelated to the daily practice of the profession.

Law firms--the author focuses on large corporate firms--compound these errors. They push new graduates toward specialized practice, cheating them of the opportunity to practice with a variety of clients and to work through problems which help the new lawyer develop the virtue of deliberative wisdom. Crushing work schedules result in lawyers losing important evenings with the family, weekends pursing community service, and evenings at the theater. Fewer experiences to develop as a person and more hours at the office stunt the growth of the soul and the ability of the lawyer to develop as a complex, fully alive human being.

Finally, Kronman asserts that even the appellate courts have contributed to the great decline of modeling character. They have moved away from their traditional efforts to produce opinions as a body. He suggests that the growth of individual opinions, especially in the Supreme Court, evidences justices' inability to move toward consensus and to speak as one, authoritative voice. Large caseloads have led appellate judges to rely on law clerks (squeaky new Ivy league grads) to write opinions, mov-

ing judges into editorial functions. The least experienced are writing first drafts of (often impenetrable) judicial opinions, which are then studied in the law schools. A vicious and stultifying circle. Additionally, as many judges continue to remove themselves from handling their own calendars they become insulated from many important triage decisions (*e.g.*, what cases to hear or to decline). In sum, Kronman's "model" judge is a rarity.

Kronman ends his book pessimistically. Prudence, deliberative wisdom, living out the ideals of the profession have become less important to most lawyers than power, money, and status. The author argues that while lawyer-statesmen have often possessed all three, these were not the ends of their professional activity, but rewards that came with the pursuit of higher ideals. Kronman sees very little chance of reversal of these trends. The culture of the profession has radically changed and other than holdouts and visionaries, there are few young lawyers who will be able to buck the system and still succeed. The tradition of lawyer statesmen like Cyrus Vance and Archibald Cox, not to mention Lincoln and Jefferson, is probably gone forever.

Kronman joins a group of authors from other professions (medicine, social work, business) who are writing about virtue-based approaches to practice. The goal of such analyses is to argue that good people (those who cultivate the proper habits) will practice with great success at the highest levels of ethical conduct. These writers believe that character development--not skill development-- should be the central mission of professional education.

Kronman's analysis is penetrating and among the most articulate in this genre of philosophical critique. However, he strikes me as fatally insular. He entirely omits any discussion of the public defense bar, which arguably carries on the traditions he cherishes. Kronman's focus on Ivy League graduates who work in large commercial firms as the "best" the profession can offer is a grievous error, a true *scotoma*.

For in fact there are countless city, small-town, and rural lawyers -- civil and criminal attorneys -- as well as prosecutors and judges, who commit themselves to their communities as leaders or even more simply, as effective, ethical practitioners who contribute to the common good. I do not understand why the author undertook a sweeping indictment of such an exclusive group of people--the so called "best and brightest." After John Kennedy appointed his cabinet, Lyndon Johnson exclaimed to Sam Rayburn that the new administration had gathered the smartest people in America. Rayburn drained his glass and remarked that he wished that at least one of them had had the experience of running for county dogcatcher.

While there is wisdom in *The Lost Lawyer* and much for any professional person to ponder, Kronman's analysis is more elegiac than productive. Attorneys who do not fit into the exclusive clique indicted here, may not be "lost." And they are the people who make the profession really run.

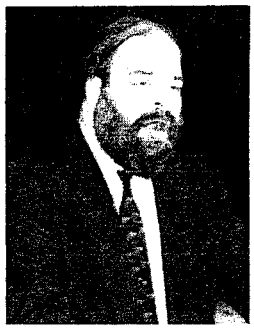
JAMES J. CLARK, PH.D.
University of Kentucky
College of Social Work
Lexington, Kentucky 40506-0027
Tel: (606) 257-2929
Fax: (606) 323-1030
E-mail: jjclar00@ukcc.uky.edu

■ ■ ■ ■ ■ ■ ■ ■ ■ ■ ■

I share Professor Kronman's belief that law schools generally do an inadequate job preparing law students for law practice. Despite the ***MacCrate*** *Report's call for legal educators to do more teaching of skills and values, many schools have responded by only making minor curricular changes. Yet, even though law schools can and should do better, I am not convinced that the profession as a whole is "lost" or that there are fewer good lawyers today than in the past. Indeed, as Jim Clark points out, Kronman's critique ignores the fact that there are a significant number of good ethical practitioners who strive mightily to provide their clients quality representation despite the clients' lack of money or power. In our zeal to improve legal education and the profession, we must not lose sight of the good work that often goes unnoticed and unappreciated.*

Rodney Uphoff
Associate Professor of Law
University of Oklahoma

The Critical Need for Vigorous Advocacy



David Lewis

It is October 1649. In the city of London. At the Guild Hall, the largest area of the city, armed troops surround the place because there a trial is being held. For the fourth time on trial for his life, a man named John Lilbourne stands before his jurors: eight Commonwealth Judges, the Lord Mayor of London, the Recorder of London, four Sergeants of Arms and twenty-six special judges, not one of them a simple citizen.

For here, in the city of London, Lilbourne is charged with high treason for writing that the government was too radical and its acts were unlawful. Lilbourne was a religious man, a pamphleteer, and unbeknownst to him, a patriot. At that trial, in our tradition, he challenged every step of the procedure. He picked to pieces the evidence. He depicted the court as oppressors, and appealed to the jury over the Judges' heads. Not a bad piece of advocacy for a non-lawyer. At one point, he saw the prosecutor and the judge whispering together and he stood up in the middle of it all and said, "All in this courtroom must be done openly and audibly and avowed." Pointing at them, he said, "There shall be no hugger-bugger."

Lilbourne, in his trial, put English justice on trial. The judge charged the jury that Lilbourne, the defendant, "plotted, subverted and tried to put every one of us in blood." The hanging judge delivered a hanging charge. The jury was out for an hour. They came back and declared Lilbourne "not guilty."

For the fourth time, he had saved his own life. The King, in response to Lilbourne's amazing victory, banished him into Holland.

Lilbourne calls to us across the centuries, because he stood before the Court and demanded what he called the "Law of the Land." He told that Court, in London, on that cold October day, that it was not a privilege that he sought, but a right. Lilbourne wrote, and argued and defended himself, believing that for an individual to be free, a government cannot be free to do what it wishes. From across the years from 1649, Lilbourne calls to us, even here in Kentucky.

Three times he requested something of the Judge and three times he was denied. He said, "I again humbly desire to have counsel assigned to me, to consult me, so I may not throw away my life upon form, so I may not destroy myself through ignorance." "I must look upon myself," said Lilbourne, "as a lost, condemned man. I'm resolved to go no further, though I die for it and my innocent blood be upon your head."

Lilbourne knew the essential lesson, as we learn it every day, if a million wolves were to organize for justice, there would still be wolves.

These times, in the life of other work, in our streets and in our courtrooms, are sharp times - precise times. We are no longer in the glorious afternoon of freedom, and we are no longer safe in the twilight of not knowing what's going on. We are on a journey, in dark times, seeking the extinguishment, forever, of liberty. It is not an easy journey, for night covers the road and there is, I assure you, treachery ahead.

But when we look up, we still see stars, because now, thanks to Lilbourne and other men of sacrifice and vision, there is still the guiding hand of counsel.

In all the relationships of this society, the most intimate and the most valuable remains the giving of counsel. Those of us who do this work stand against the passions of the mob, wherever it rages. We stand against legal barbarism. Some of us do it and are well paid; some of us do it and are not. But no matter who we are, we insure fairness from the Judge and from the Court.

Fairness is only enforced, not by law and not be wisdom, but by the vigorous advocacy of defense lawyers. We teach the loneliest lesson of all, that even guilt deserves a fair hearing in order to determine its measurement and to decide what is to be the punishment. The greatest trial lawyers in the world are not the ones on television and not the ones covered by the media. The greatest trial lawyers in the world are you, who do your work in empty courtrooms, without the press, without an audience and sad to say, most of the time without the family of the person you represent. You work each day. You open your mouths for the dumb; for the rights of all who are racked desolate by time, by circumstances, by class, by race, by hatred. What you do each day is guard the human person in all its meanness, in its openhandedness, as well as in its spite, in its venom, seeing both its horror and its beauty. You truly represent the client, with his profanity, his sacredness and the horrible, horrible contradictions that drive them into our arms very often. Each day in courtrooms arise out of juries the relevant central goodness, to rise them up to restrain bad laws. You, as lawyers, insure that the memory of justice cannot and will not fail. You insure that man's insatiable thirst for cruelty will not be gratified. You assure that the lowest and most humble of human beings is exalted by their presence before the BAR of justice.

Make no mistake, you pay a price. You pay a price in time with your loved ones, you pay a price in reputation in your community and you pay a price within the very place that you hold these ideals because you too raise your questions.

But when you wonder about the sacrifice you make, the story of Malsherbes, the French defense lawyer, had his greatest client and saw his greatest downfall. It was he who represented Louis XVI before the tribunal that sentenced the King to death. Malsherbes, in response to his valiant defense of the King, was punished by the Tribunal and the terror that swept through as the French Revolution. He was forced to first watch his daughter and then his grandchildren be executed by guillotine until finally blessed relief came when it was his turn to mount the steps and take the blade. Our sacrifices pale in their own way. Ours replicate them every day. But what gets us through the times we live in and though these challenges is our faith. We have a faith - a simpler faith - of a strange kind. It defies ignorance, it defies fear and it defies hatred. What we have is a constitutional faith. To exercise this faith, to give it life and freedom, to blow the very breath of its existence into it requires nothing more than your courage. Your faith is not limited, it's not dated and it's not overworked. It pervades the hearts and minds of you, is passed on to your clients, to your judges and through the Halls of Justice. When you seek fairness and justice, you find them in the thick of the battle to sell this faith to an unwilling community. And so, if you feel a bit better about what you are and what you do, know that each of you are part of this "great crusade" - the crusade for that constitutional faith and in defense of it. To protect liberty, to return to independent thought and to celebrate the possibilities of freedom, you are part of an amazing, unseen and noble struggle. In this crusade for this constitutional faith we only have three weapons. They are decency, sacrifice and compassion. Those three have always been the greatest armor give to humanity. Every place you go, every thing you do, wear those three pieces of armor proudly, because, when you do, you have spoken to greater parts of every human being - in essence, their central soul that people are seeking to touch.

We will not win this fight in our times. We may not win it in the times to come. We are seeking to force moral evolution on an unwilling planet and an unwilling society. Every step we take is one into light and out of the dark. When you go out there with your compassion, with your sacrifice, and with your decency, don't tell them how bad it is. Tell them what you want them to become. They will rise up to meet you. What you have is in essence that humanity to which everyone else aspires for.

God speed.

DAVID LEWIS
Lewis & Fiore
225 Broadway, Suite 3300
New York, New York 10007
Tel: (212) 285-2290
Fax: (212) 964-4506

Capital Voir Dire Review

Capital voir dire involves skills we are not able to frequently practice. Those co-counsel who are heading to a capital trial are encouraged to spend 1/2 day in Frankfort practicing the individual voir dire in their upcoming case with mock jurors on challenges for cause, rehabilitation, reverse *Witt*, mitigation, aggravation, publicity, race, strategy, using a juror rating sheet. A minimum of one week notice is necessary to set up this review. It must be conducted no later than 1 month before the trial so what is learned can be implemented. Before the review, there must be a written voir dire plan, a one page summary of your case and a juror rating form for your case. A binder of voir dire resources can be obtained from the Director of Education and Development. To set up this review, contact:

Tina Meadows
Dept. of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601
Tel: (502) 564-8006
Fax: (502) 564-7890
E-mail:
tmeadows@dpa.state.ky.us

Upcoming DPA, NCDC, NLADA & KACDL Education

**** DPA ****

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

DPA Post-Conviction Practice Institute
September 8-10, 1997
Holiday Inn, Newtown Pike
Lexington, Kentucky

8th Death Penalty Persuasion Practice Institute
Kentucky Leadership Center
Faubush, Kentucky
October 12-17, 1997

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

**** KACDL ****

Annual KACDL Conference featuring Robert Hirschhorn of Galveston, Texas on effective jury selection
November 21, 1997
Covington, Kentucky

For more information regarding KACDL programs call or write: Linda DeBord, 3300 Maple Leaf Drive, LaGrange, Kentucky 40031 or (502) 243-1418 or Rebecca DiLoreto at (502) 564-8006.

**** NLADA ****

NLADA Defender Advocacy Trial Skills Institute
August 9-15, 1997
Albuquerque, New Mexico

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 ****

NCDC Trial Practice Institutes
Mercer Law School, Macon, GA
June 15, 1997 - June 28, 1997
July 13, 1997 - July 26, 1997

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

"Nothing can stifle innovation more than the attitude that says, 'If it ain't broke, don't fix it.'"

- James M. Kouzes & Barry Z. Posner
The Leadership Challenge (1995)

DEPARTMENT OF PUBLIC ADVOCACY
100 Fair Oaks Lane, Ste. 302
Frankfort, KY 40601

Address Correction Requested

BULK RATE
U.S. POSTAGE PAID
FRANKFORT, KY 40601
PERMIT #1