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President’s Column

By Richard Hutton

One of the most unique features that separates CACJ from other criminal defense organizations is the effectiveness of our legislative committee. The committee, chaired by Jeff Stein and Phil Schnayerson, was once again very active during this legislative year, which has just concluded. Our lobbyist, Ignacio Hernandez, did an outstanding job in representing the organization before the legislature.

The bottom line this year is that CACJ took positions opposing 81 bills in the legislature. Of the 81, only 6 passed the legislature and 75 were killed in committee, withdrawn, amended or in other ways redirected, so that they did not get enacted to the detriment of our clients.

Additionally, the committee played a significant role in passing three bills which are currently before Governor Schwarzenegger. These bills, SB511 which addresses mandatory recording of certain statements, SB609 which deals with collaboration of informant testimony, and SB756 that directs a study be conducted for eyewitness identification procedures. These three bills, if they became law, will reduce the most common causes of wrongful conviction as they attempt to address the evils of mistaken eyewitness identification, false confessions and false testimony of informants.

Our legislative committee and lobbyist have done a tremendous job in protecting our clients and the citizens of our state this year. Of course, it requires that our organization, be well funded to continue to contract with our lobbyist. I urge you to tell your friends about our efforts and successes and do your part in increasing our membership.

It was disappointing that SB110, by Senator Gloria Romero, was defeated in the Assembly in a close 34-38 vote. This measure would have created an independent sentencing commission, which would restructure sentencing laws, with the goal to make them more effective.

These recommendations and changes in the sentencing structure which would ultimately result in reducing prison overcrowding. As a result of the defeat of this bill, it appears more likely that the Federal Courts will end up taking control of the California prison system.

CACJ was the leading opponent of Proposition 83, commonly called Jessica’s Law, that passed with over 70% of the vote, in the November, 2006, general election. This proposition, among other things, barred registered sex offenders from living within 2,000 feet of any school or park. One of our major arguments was that this proposition actually make the public less safe because many registered sex offenders will become homeless and unable to find a place to live in most parts of the state, citing the experience of a similar law in the State of Iowa.

That concern is apparently coming true in our state. Recently, law enforcement is starting to enforce the 2000 foot exclusion and there are numerous stories of sex offenders becoming homeless. By example, one such offender is living in a tent in a Ventura river bottom being monitored by a security guard in a nearby vehicle. Law enforcement and others who supported Proposition 83 are beginning to realize that it is much more difficult to effectively monitor these harmless and transient people.

I’ll expect that there will be movement to modify Proposition 83 within the next year and that CACJ will be in the forefront of that movement.

I have enjoyed serving as President of the Board of Governors of this organization for the last year. It is gratifying to serve an organization that actually does make a real difference protecting the rights and liberties of individuals.
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The California Legislature gaveled the end of its 2007 session at around 3:30 a.m. September 13th. As the denizen of Senators, Assembly members, their staffers, and lobbyists departed the halls of the State Capitol, they closed the book on nearly 2,000 pieces of legislation. Just over 890 bills were approved by the Legislature and are now awaiting action by the Governor. He has until October 14th to either sign or veto measures currently on his desk.

Once again, criminal justice legislation — usually in the form of “tough-on-crime” measures — was popular among our 120 legislative representatives. More than 150 of these proposals were officially introduced during the 2007 year. Of these, CACJ identified 81 priority bills to oppose, weighed in on more than two dozen others by crafting amendments, providing expert analysis, or otherwise working to modify the legislation. Without question this was one of CACJ’s most successful legislative years; 75 of the 81 priority bills opposed by CACJ were defeated.

CACJ’s legislative efforts were not limited to defensive action. The organization also lent its support to many bills designed to instill greater balance in the criminal justice system. Key among these proposals are three bills crafted by the Commission on the Fair Administration of Justice, which is lead by CACJ veteran Gerald Uelman. SB 511 requires interrogations for specified violent felonies to be audio or video recorded. The objective of this measure is to reduce the number of false confessions. SB 609 requires jail house informant testimony, without independent corroboration, to be excluded. And SB 756 requires the development of standards and procedures for eyewitness identifications, including photo line-ups. All three are sitting on the Governor’s desk awaiting his decision.

Prison Overcrowding Spurns Greater Analysis and Action Although Sentencing Commission Falls Short

In addition to the bitter fights over specific legislative proposals, CACJ also joined a growing chorus of voices for larger systemic changes to California’s sentencing scheme. In 2007 the Legislature began to look at criminal justice matters through a much more critical lens. Or perhaps more accurately, the lurking possibility of a federal takeover of the California prison system required legislators of all stripes to admit an unfiltered infusion of new prisoners, with longer sentences, was (and has been) a recipe for disaster. Harnessing this sense of urgency, the Little Hoover Commission convened a working group (which included CACJ) to draft the tenets of a California Sentencing Commission. This effort brought an historic coalition into the fold including the American Civil Liberties Union, as well as, the political heavyweight California Correctional Peace Officers Association (CCPOA). The correctional officers union dramatically changed its policy course and endorsed the call for a sentencing commission which would be empowered to redraft all felony sentences into a more proportional scheme. Unfortunately, representatives of law enforcement organizations and the California District Attorneys Association stalled discussions and the working group was unable to forge a consensus proposal. Nonetheless, Senator Gloria Romero introduced legislation to establish a Sentencing Commission with powers similar to what was envisioned by the Little Hoover Commission working group. While the State Senate approved the measure, the California State Assembly failed to deliver the necessary votes putting an end to the prospects of a Sentencing Commission at least until 2008.

CACJ LEGISLATIVE SUCCESSES

In order to shine some light on CACJ’s efforts in the hallways of the State Capitol, here are ten examples of bills that were defeated this year with the assistance of CACJ. Be aware that many of these proposals, while stalled for 2007, can be renewed in 2008, the second year of the 2-year Legislative session.

PAROLE: Extend from 2 years to 5 years the maximum period between parole hearings for those convicted of murder.

SEX OFFENDERS: AB 158 would permit apartment owners to deny housing to registered sex offenders.

CHILD PORNOGRAPHY: AB 235 would extend the statute of limitations for specified offenses.
SEX OFFENSES: AB 261 would eliminate the statute of limitation for specified sex offenses including sodomy, lewd and lascivious acts, and oral copulation.

EVIDENCE: AB 268 would expand the definition of "unavailable" witness to permit introduction of out-of-court statements.

CONTROLLED SUBSTANCE: AB 259 would add Salvia Divinorum as a Schedule 1 drug.

DUI/CHILD ENDANGERMENT: AB 1416 would create a stand alone offense for driving under the influence while a minor is in the vehicle.

PREEMPTORY CHALLENGES: AB 1557 would reduce the number of pre-emptory challenges for misdemeanors from ten to six.

VANDALISM: AB 1628 would permit a prosecutor to aggregate the dollar amount of property damage for multiple acts of vandalism in order to justify a single felony charge.

COURTROOM EXCLUSIONS: AB 1660 would create a new rule to exclude a witness during a trial if the witness is also the victim.

Here is additional insight into two measures opposed by CACJ and defeated this year. Both measures are expected to be renewed in 2008

SEX OFFENDERS IN CYBERSPACE

One of the most hotly contested and debated measures this year was AB 841. Sponsored by Fox Interactive Media, the parent company of the ‘uber’ popular website My Space, the proposal was designed to rid “social networking” websites of registered sex offenders.

My Space claims that it has processed more than 100 million accounts since 2003. There is growing concern among some communities that registered sex offenders are utilizing the technological neighborhood to pursue young victims. Fox Interactive Media was taken to task over an incident in Texas in which a teenage user was lured into meeting a man with prior sexual assault history. The parents of the teenage girl questioned why My Space had not mined its membership roles for registered sex offenders. In response, Fox Interactive Media has launched legislation in many states throughout the country to strip its rolls of registered sex offenders. California’s proposal is contained in AB 841. The bill would specifically require all Penal Code section 290 registrants to also provide email address and instant messaging identities. Failure to update these cyberspace monikers would result in a registration violation.

The bill went even further; it required the California Department of Justice to collect this information and provide it directly to My Space and other social networking websites, though the identifiers would not be available pursuant to the Megan’s Law database. My Space would become the first non-law enforcement entity to have direct access to sex offender registration information.

CACJ launched aggressive opposition to this bill and pointed out numerous flaws, including the reliance on unreasonably expansive 290 registration requirement, wherein individuals with relatively minor offenses are thrown together with the types of offenses that are usually trumpeted as the worst-of-the-worst sex offenses. In addition, CACJ pointed out that the lifetime duration of registration translates into thousands of individuals whose one-time crimes are decades old and who no longer pose any real threat, which is consistent with the national studies that calculate recidivism rate of sex offenders at about 3%.

However, the issue which raised the greatest amount of concern in the face of the enormous political pressure to support the measure, was My Space’s insistence that the California DOJ provide the database to private corporations; private corporations who already had the means to cross-reference the names of their members against Megan’s Law and other sex offender databases. Why should the government subsidize a private company’s public safety protocols?

With Fox Interactive Media mounting an intense lobbying effort, AB 841 was approved in its first two policy committees. However, it was stalled for the year in the Assembly Appropriations Committee in response to concerns with the costs to the State of California. That fiscal committee is chaired by the Assembly member who was CACJ’s Legislator of the Year in 2005. Since the legislation’s demise My Space announced that it would cull its membership list to identify and exclude registered sex offenders — at its own cost. A version of AB 841 is likely to resurface in 2008.

SENTENCE ENHANCEMENT FOR METHAMPHETAMINE — ONE WAY OR ANOTHER

The journey of Assembly Bill 442 gives a glimpse into the sometimes chameleon character of bad legislation, underscoring the critical importance of CACJ’s sustained presence in the State Capitol. In February AB 442 was introduced by an Assemblywoman who has a track-record of pursuing anti-meth legislation. In response to what she described as unsuccessful efforts to stem the use of methamphetamines, she proposed a 5-year penalty enhancement for anyone found to have committed a felony while under the influence of methamphetamine. The California Narcotics Officers threw its political weight behind the measure, arguing for the need to extend incarceration of methamphetamine users whenever possible. CACJ worked feverishly behind the scenes to undermine the measure, pointing out severe penalties already available for each and every criminal offense targeted by the legislation.

In the days leading up to the first policy committee hearing, the authors became increasingly clear that the proposal was facing an uphill battle. As a result, the Assembly member decided to shelve the idea. However, that was not the end of AB 442. With procedural deadlines looming, AB 442 was completely amended to remove the felony enhancement
language and replaced it with a mandatory minimum sentence of six (6) months for any person convicted of selling methamphetamine and who is granted probation, the same punishment contained in Penal Code section 1203.076. Quickly law enforcement organizations threw their support behind the measure, including, the California Police Chiefs Association, the California State Sheriff’s Association, and the California Peace Officer’s Association. Despite opposition from CACJ and other organizations, the legislation garnered unanimous support in policy committee, fiscal committee, and when placed before a vote of the full California State Assembly. Legislators were swayed by the opportunity to adopt stiff sentences for the sale of methamphetamine, especially since the media has helped to ingrain the visions of meth labs into the collective psyche. Elected officials were intoxicated with the notion of “equalizing” the mandatory minimum contained in Penal Code section 1203.76 for the sale of cocaine and PCP. The measure was unanimously adopted by the Assembly Public Safety Committee, the Assembly Appropriations Committee and in a full vote by the California State Assembly.

Despite what appeared a forgone conclusion, CACJ and others maintained their opposition to AB 442. The measure met its fate when it was sent before the Senate Public Safety Committee. The Chair, Senator Gloria Romero, had recently adopted a policy to indefinitely postpone votes on legislation which would further imperil California’s overcrowded jails and prisons. Senator Romero — who in 2006 was CACJ’s inaugural Legislator of the Year — held AB 442 in her committee without even permitting a vote. By placing the legislation on the “ROCCA” file, the measure is on hold until 2008. At that juncture, AB 442 could be renewed or will die a quiet death. Needless to say, CACJ will work feverishly for the latter.
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TIPS & TECHNIQUES

Constitutionalizing Objections to Nontestimonial Hearsay in the Post-Crawford and Davis World

By Raphael Goldman and Ted W. Cassman

For almost a quarter century, criminal defense attorneys employed a standard mantra to preserve and federalize trial objections to hearsay: “Hearsay and Confrontation, Your Honor.” Attorneys urged these objections reflexively every time a witness testified to a statement by a non-testifying declarant. But over the last three years, everything has changed. With surprisingly little fanfare or commentary, the Supreme Court has worked a sea change in its Confrontation Clause jurisprudence, leaving criminal defendants in some ways better protected by the Sixth Amendment (when the proffered statement is “testimonial”), and in other ways less well protected (when the statement is “nontestimonial”). When a proffered out-of-court statement falls into this latter “nontestimonial” category, the Confrontation Clause no longer affords protection, and defenders must seek an alternative method to federalize our objections. This article suggests that defenders who wish to present and preserve a federal challenge should advance due process arguments against the admission of nontestimonial hearsay evidence.

I. The Old Roberts Regime

Prior to 2004, the Confrontation Clause’s protections against the introduction of out-of-court statements against a criminal defendant were governed by standards of reliability. In Ohio v. Roberts, 448 U.S. 56 (1980), the Court held that an unavailable hearsay declarant’s out-of-court statement is constitutionally inadmissible unless it “bears adequate indicia of reliability.” Id. at 66. The Court held that evidence must either fall within a “firmly rooted hearsay exception” or bear “particularized guarantees of trustworthiness” to meet the reliability test. Id.

By focusing on reliability, the Supreme Court’s approach in Roberts closely associated the Confrontation Clause’s limits with traditional hearsay rules. See, e.g., White v. Illinois, 502 U.S. 36 (1992) (reviewing the development of the reliability-based approach, and the Court’s prior holdings that “hearsay rules and the Confrontation Clause are generally designed to protect similar values” and “stem from the same roots”); Roberts, 448 U.S. at 66 (explicitly holding that an extrajudicial statement is admissible under the Confrontation Clause if it falls within a “firmly rooted hearsay exception”). Thus, at least with respect to many hearsay rules, under Roberts the Confrontation Clause and the rules were essentially coextensive — a circumstance that led to the reflexive “Hearsay and Confrontation” objection.

II. Crawford Rejected the Roberts Reliability Approach for Testimonial Hearsay, But Did Not Decide How Nontestimonial Hearsay Should Be Analyzed

In Crawford v. Washington, 541 U.S. 36 (2004), the Court abandoned its reliability approach, at least for one class of extrajudicial statements. The Court announced a per se bar on the admission of statements the Supreme Court labeled “testimonial,” unless the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the declarant regarding the statement. Id. at 59, 68. But the Court declined to determine whether and how the Confrontation Clause’s protections apply to “nontestimonial” hearsay. Id. at 68.
NEW CACJ MEMBERS

The following is a list of those who have recently become members of CACJ. In the coming months, FORUM will continue to list persons who have joined CACJ since the previous issue. If you have colleagues who may want to join CACJ, please call the CACJ office (916) 448-8868, and they will be sent membership information.

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San Francisco
A. Crawford Rejected the Reliability Approach for Testimonial Hearsay

To reach its holding, the Crawford Court reviewed the historical background to the Confrontation Clause, and specifically the development of the common-law bar against admitting extrajudicial and un-cross-examined testimony against a criminal defendant. Id. at 42-50. The Court found that “[t]his history supports two inferences about the meaning of the Sixth Amendment.” Id. at 50. “First, the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused.” Id. Second, “the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.” Id. at 53-54.

The Court held that the Framers — at least where an out-of-court statement is testimonial — did not intend to “leave the Sixth Amendment’s protection to the vagaries of the rules of evidence, much less to amorphous notions of ‘reliability.’” Id. at 61. Rather, “[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.” Id. at 68-69. In short, “[w]here testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.” Id. at 68.

B. The Crawford Court Declined to Decide How the Confrontation Clause Applies to Nontestimonial Hearsay, and Courts Continued to Use the Old Roberts Approach

Crawford left open an important question: whether and how the Confrontation Clause’s protections apply to nontestimonial hearsay. See id. at 68. Yet the Court’s reasoning suggested an answer to the question: that the Confrontation Clause simply does not apply to nontestimonial hearsay. For example, the Court noted that the historical “focus” on excluding ex parte examinations “suggests that not all hearsay implicates the Sixth Amendment’s core concerns. An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted.” Id. at 51. The Court likewise observed that “[t]he text of the Confrontation Clause reflects this focus. It applies to ‘witnesses’ against the accused — in other words, those who ‘bear testimony.’” Id. “The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.” Id.; see also id. at 53 (“even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object”).

Nevertheless, the Crawford Court concluded its discussion by stating that “[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers’ design to afford the States flexibility in their development of hearsay law — as does Roberts, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether.” Id. at 68. Many courts assumed after Crawford that the Roberts constitutional analysis still applied when determining the admissibility of nontestimonial hearsay. See, e.g., Summers v. Dretke, 431 F.3d 861, 877 (5th Cir. 2005) (“With respect to the statements at issue here — nontestimonial out-of-court statements in furtherance of a conspiracy — it is clear that Roberts continues to control”); People v. Corella, 122 Cal. App. 4th 461, 467 (2004) (“After Crawford, a ‘nontestimonial’ hearsay statement continues to be governed by the Roberts standard”).

III. The Supreme Court Resolved the Open Question in Davis

In Davis v. Washington, __ U.S. __, 126 S.Ct. 2266 (2006), the Supreme Court dropped the proverbial other shoe, holding that the Confrontation Clause does not apply to nontestimonial hearsay. The Davis Court found it necessary to “decide . . . whether the Confrontation Clause applies only to testimonial hearsay,” and answered its own question by holding that “[a] limitation so clearly reflected in the text of the constitutional provision must fairly be said to mark out not merely its ‘core,’ but its perimeter.” Id. at 2274; see also id. at 2273 (“It is the testimonial character of the statement that separates it from other hearsay while, subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause.”).

The Davis Court’s holding on this point was not a model of clarity — a seeming deficiency when the principle at hand promises to fundamentally alter the practice of criminal trials throughout the nation. Still, the Court’s holding was profound and far-reaching; practitioners must now recognize that the Confrontation Clause no longer regulates the admission of nontestimonial hearsay. See, e.g., United States v. Earle, 488 F.3d 537, 542 (1st Cir. 2007); United States v. Arnold, 486 F.3d 177, 192-93 (6th Cir. 2007); United States v. Feliz, 467 F.3d 227, 231 (2d Cir. 2006); United States v. Ellis, 460 F.3d 920, 923 (7th Cir. 2006); People v. Cage, 40 Cal. 4th 965, 981 & n.10, 984 (2007); People v. Brenn, 152 Cal. App. 4th 166, 176 (2007); see also Tom Lininger, Reconceptualizing Confrontation After Davis, 85 Texas L. Rev. 271, 273-74, 285-87 (2006); 30A Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure: Federal Rules of Evidence § 6371.3 (Supp. 2007).

IV. How to Federalize Objections to Nontestimonial Hearsay? Try Due Process

Davis’s holding presents a serious problem for defenders and their cli-
ents: the admission of nontestimonial hearsay has been unmoored from constitutional oversight under the Sixth Amendment’s Confrontation Clause. This development is not merely academic. To the contrary, Davis has very significant implications for the defense, especially where the possibility of habeas review in the federal courts is anticipated.

Under the old Roberts regime, hearsay law and the Confrontation Clause provided alternative routes to the same result at trial, but the constitutional anchor was vital on direct and collateral review. Without a constitutional basis for objection, appellate courts “review evidentiary rulings, including those involving hearsay issues, for abuse of discretion,” People v. Zambrano, 41 Cal. 4th 1082, 63 Cal. Rptr. 3d 297, 351 (2007); see also, e.g., United States v. Weiland, 420 F.3d 1062, 1074 n.9 (9th Cir. 2005), whereas they review de novo “the legal question whether admission of . . . evidence was constitutional,” People v. Mayo, 140 Cal. App. 4th 535, 553 (2006) (citing People v. Cromer, 24 Cal. 4th 889, 893-894 (2001)); see also, e.g., Lilly v. Virginia, 527 U.S. 116, 135-36 (1999). Moreover, without a link to a federal constitutional question, hearsay objections in state court are not preserved for federal collateral review. Lewis v. Jeffers, 497 U.S. 764, 780 (1990) (“federal habeas corpus relief does not lie for errors of state law”); 28 U.S.C. § 2254. Thus, trial attorneys need another constitutional anchor for hearsay objections.

Fortunately, a separate constitutional anchor already lurks in the federal jurisprudence. Due process requirements have always prohibited reliance on untrustworthy hearsay evidence. Although the Roberts line of cases directed constitutional inquiries about the admission of hearsay into the Confrontation Clause rubric, that line of cases no longer applies to nontestimonial hearsay and practitioners must now base their constitutional objections in the due process jurisprudence. Indeed, the petitioner in Crawford pointed the Supreme Court to these due process principles, arguing: “To the extent that this Court might be concerned about removing constitutional oversight entirely from the development and application of nontestimonial hearsay law, the Due Process Clause can carry out that role.” Brief for Petitioner, Crawford v. Washington, 2003 WL 21939940 at 34 n.5 (citation omitted).

Federal courts have long applied due process to limit the use of unreliable hearsay in contexts where the Confrontation Clause is not implicated, and “Crawford does not suggest that confrontation is the only mechanism through which the reliability of testimony can be assessed.” United States v. Fields, 483 F.3d 313, 337 (5th Cir. 2007). Consequently, although “the Confrontation Clause is inapplicable to the presentation of testimony relevant” to certain sentencing decisions, due process prohibits sentencing decisions based upon unreliable hearsay. Id. at 337-38. Similarly, an alien contesting deportation is entitled to due process of law, and deportation decisions may not rely on untrustworthy hearsay or the unfair denial of the right to cross-examine witnesses. Hernandez-Guadarrama v. Ashcroft, 394 F.3d 674, 681-82 (9th Cir. 2005); Felzerek v. INS, 75 F.3d 112, 115 (2d Cir. 1996). Finally, parole revocation decisions are subject to like analysis: although no Sixth Amendment confrontation right applies, reliance upon untrustworthy hearsay at a revocation hearing may violate due process. Singletary v. Reilly, 452 F.3d 868, 872-73 (D.C. Cir. 2006) (finding a due process violation where “[a]lmost all the evidence presented at the hearing was hearsay, much of it multilayered”).

Recently, a district court in Northern California followed these precedents to their logical post-Davis conclusion. In United States v. Lin, No. CR-01-20071-RMW, 2007 WL 101665 (N.D. Cal. Jan. 5, 2007), the Hon. Ronald M. Whyte excluded from evidence certain unreliable but nontestimonial hearsay — even though it satisfied a hearsay exception — because “[i]t does not seem consistent with due process that an unreliable hearsay statement made by a declarant who lacks credibility and is not available for cross-examination should . . . be admissible.” Id. at *2 (citing White, 502 U.S. at 363-64 (Thomas, J. and Scalia, J., concurring)).

While the courts have not yet carefully examined the contours of this due process inquiry in the hearsay context, the objection is worth advancing — and preserving for appellate and collateral review. When nontestimonial hearsay is at issue, defenders must abandon reflex and prepare for the post-Davis world: “Objection, Your Honor, hearsay and due process.”

FOOTNOTES

1 Although the Crawford Court did not precisely define “testimonial,” it set forth three formulations that “all share a common nucleus and then define the [Confrontation] Clause’s coverage at various levels of abstraction around it”: (1) “ex parte in-court testimony or its functional equivalent — that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially”; (2) “extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, deposition, prior testimony, or confessions”; and (3) “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” 541 U.S. at 51-52.
On July 19, 2007, the California Supreme Court decided two cases presenting a variety of issues raised by the United States Supreme Court’s opinion in Cunningham v. California (2007) __ U.S. __, 127 S.Ct. 856; 2007 WL 135687; 2007 US Lexis 1324. The United States Supreme Court, 6 to 3, held in Cunningham that the portion of California’s Determinate Sentencing Law (DSL) permitting judges to impose aggravated terms for reasons not admitted by the defendant or found by a jury is unconstitutional. The California Supreme Court’s response to Cunningham came in two cases, People v. Black (2007) __ Cal.4th __; 2007 DJ DAR 11041; DJ, 7/20/07, and People v. Sandoval (2007) __ Cal.4th __; 2007 DJ DAR 11051; DJ, 7/20/07. The decisions in Black and Sandoval raise a slew of constitutional issues. This article discusses some of those issues.

**BLACK**

In Black, the Supreme Court held that the failure of defense counsel to object did not waive any Cunningham challenge, since binding California law precluded any successful challenge to California’s DSL law. That’s the only issue the defense won in Black.

The court ruled that “as long as a single aggravating circumstance that renders a defendant eligible for the upper term sentence has been established in accordance with the requirements of Apprendi and its progeny, any additional fact finding engaged in by the trial court to select the appropriate sentence among the three available options does not violate the defendant’s right to jury trial.” (Emphasis in original.) In other words, if the court can find at least one aggravating circumstance that was found by the jury, admitted by the defendant, or qualifies as an exception to the jury-finding requirement, the sentencing judge is free to impose upper term.

I think the Supreme Court is wrong on this point. They say, “Therefore, if one aggravating circumstance has been established in accordance with the constitutional requirements set forth in Blakely, the defendant is not ‘legally entitled’ to the middle term sentence, and the upper term sentence is the ‘statutory maximum.’” But this is not true. A sentencing court may not impose upper term merely because it finds one aggravating factor true; the court must weigh that factor and find that it justifies upper term. The presumption that a defendant is entitled to the middle term remains unless and until the sentencing court both makes a finding that there is an aggravating factor and weighs that factor to determine that upper term is justified.

The court found two valid aggravating factors. The first was that the defendant used force. The actual court rule on this (Cal. Rules of Court, rule 4.421(a)(1)) refers to “great violence,” or the “threat of great bodily harm.” But the court says that the list of aggravating factors in the court rules is not exhaustive, and essentially any fact related to the crime can qualify. The crimes here were Penal Code section 288.5, continuous sexual abuse, and Penal Code section 288, subdivision (a), lewd acts on a child. The jury found that the no-probation allegation under Penal Code section 1203.066, subdivision (a)(1), was true. That allegation recited that the defendant used force. So the Supreme Court concluded that the jury did find force and the trial court could thus validly rely on that finding to justify upper term.

The court found a second valid aggravating factor: the defendant’s priors. The court first rules that priors are an exception to Cunningham, and then articulates the scope of that exception. First, the court says that priors are an exception, “The United States Supreme Court consistently has stated that the right to a jury trial does not apply to the fact of a prior conviction.” It is true that the United States Supreme Court keeps articulating its rule requiring juries to find facts increasing a defendant’s sentence with an exception. For example, the Supreme Court in Cunningham stated the rule this way: “the Federal Constitution’s jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant.” (127 S.Ct. 856, 860.)

The fly in this ointment is the phrase, “other than a prior conviction.” But our position is that this is not a resolution of whether there is an exception for prior convictions, it is just a notation that the court has not resolved that issue.

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just as with any fact being relied on to increase a defendant’s sentence. The United States Supreme Court has previously ruled that the United States Constitution does not require a jury trial on a prior conviction alleged as an enhancement. (Almendarez-Torres v. United States (1998) 523 U.S. 224 [118 S.Ct. 1219, 140 L.Ed.2d 350].) However, in Apprendi, the United States Supreme Court held that, “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” (Apprendi v. New Jersey (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].) The United States Supreme Court in Apprendi stated that Almendarez-Torres “represents at best an exceptional departure from the historic practice that we have described.” (Apprendi v. New Jersey, supra, 530 U.S. 466, 487.) The court also stated: Even though it is arguable that Almendarez-Torres was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested, Apprendi does not contest the decision’s validity and we need not revisit it for purposes of our decision today to treat the case as a narrow exception to the general rule we recalled at the outset. (Apprendi v. New Jersey, supra, 530 U.S. 466, 489-490.)

Of the greatest importance, the fifth justice voting for the holding in Almendarez-Torres was Justice Thomas, who wrote a concurring opinion in Apprendi. Thomas provided the critical fifth vote, in which he stated that he was wrong in Almendarez-Torres, and concluded, “it is evident why the fact of a prior conviction is an element under a recidivism statute.” (Apprendi v. New Jersey, supra, 530 U.S. 466, 521, Thomas, J., concurring.) Adding the four votes for the lead opinion with the fifth vote from Justice Thomas leaves no doubt that Almendarez-Torres is no longer the law and that a prior conviction must in fact be proved to a jury. Thus, we should argue that the defendant was entitled to a jury trial on all aspects of the alleged prior conviction.

The second question presented with respect to prior convictions is the scope of the exception for prior convictions. In Black, the California Supreme Court stated that the exception for prior convictions includes “not only the fact that a prior conviction occurred, but also other related issues that may be determined by examining the records of the prior convictions.” This is dead wrong; in fact the United States Supreme Court has already considered and rejected the claim that the exception for priors is broader than the mere fact of the prior conviction itself.

In his dissent in Cunningham, Justice Kennedy wrote:

The Court could distinguish between sentencing enhancements based on the nature of the offense, where the Apprendi principle would apply, and sentencing enhancements based on the nature of the offender, where it would not. California attempted to make this initial distinction. Compare Cal. Rule of Court 4.421(a) (Criminal Cases) (West 2006) (listing aggravating [f]acts relating to the crime), with Rule 4.421(b) (listing aggravating [f]acts relating to the defendant). The Court should not foreclose its efforts. (Cunningham v. California, supra, __ U.S. __ [127 S.Ct. 856, 872], dis. opn. of Kennedy, J., internal quotation marks omitted.)

The “facts relating to the defendant that Justice Kennedy mentioned, to which rule 4.421(b) refers, are recidivism-related factors. Rule 4.421(b) provides: Facts relating to the defendant include the fact that:

1. The defendant has engaged in violent conduct that indicates a serious danger to society;
2. The defendant’s prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness;
3. The defendant has served a prior prison term;
4. The defendant was on probation or parole when the crime was committed; and
5. The defendant’s prior performance on probation or parole was unsatisfactory.”

The majority in Cunningham said, in response to Kennedy’s point:

Justice KENNEDY urges a distinction between facts concerning the offense, where Apprendi would apply, and facts concerning the offender, where it would not. Post, at 872 (dissenting opinion). Apprendi itself, however, leaves no room for the bifurcated approach Justice KENNEDY proposes. See 530 U.S., at 490, 120 S.Ct. 2348 (“[A]ny fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” (emphasis added [in Cunningham]). (Cunningham v. California, supra, __ U.S. __ [127 S.Ct. 856, 869, fn. 14, quoting Apprendi.)

Thus, Justice Kennedy raised this point and the majority rejected it. So even if prior convictions are an exception to Cunningham, that exception is limited to the fact of the prior conviction, not these so-called “recidivist factors.” On this point the California Supreme Court is dead wrong. Finally, the California Supreme Court ruled in Black that the imposition of consecutive sentences does not violate Cunningham, because the jury’s verdict on the additional counts permits a consecutive term. We disagree on this point too, since Penal Code section 669 says that if the court fails to make a sentence concurrent, it becomes consecutive as a matter of law.

Sandoval

In Sandoval, there are no valid aggravating factors at all to permit imposition of the upper term. So the first question the court resolves is when Cunningham error can be harm-
less. The court holds, ...

if a reviewing court concludes, beyond a reasonable doubt, that the jury, applying the beyond-a-reasonable-doubt standard, unquestionably would have found true at least a single aggravating circumstance had it been submitted to the jury, the Sixth Amendment error properly may be found harmless.

The various aggravating factors relied upon by the sentencing court in Sandoval to impose upper term were all facts relating to the crime, and they were all in dispute. So the court concludes that the error is not harmless. They thus reverse.

Now things get seriously weird. The court decides it is going to clarify what the rules are for sentencing on remand. One solution would be to provide for jury trials on aggravating factors. The court explicitly rejects this alternative:

Although such a process would comply with the constitutional requirements of Cunningham, engrafting a jury trial onto the sentencing process established in the former DSL would significantly complicate and distort the sentencing scheme. Neither the DSL nor the Judicial Council’s sentencing rules were drafted in contemplation of a jury trial on aggravating circumstances. It is unclear how prosecutors might determine which aggravating circumstances should be charged and tried to a jury, because no comprehensive list of aggravating circumstances exists.

For what it is worth, this should put to rest the attempts by prosecutors to file aggravating factors in the information. One Court of Appeal has permitted this (Barragan v. Superior Court (2007) 148 Cal. App. 4th 1478.) Another Court of Appeal rejected it. (People v. Diaz (2007) 150 Cal. App. 4th 254.) We have now won this issue and we should be able to stop courts and prosecutors from proceeding with jury trials on aggravating factors.

Of course, the Legislature has enacted its own fix, S.B. 40, amending Penal Code section 1170, subdivisions (a)(3), and (b), which now makes the three DSL choices a sentencing range, with no presumption of the middle term. However, S.B. 40 was effective on March 30, 2007. The Supreme Court recognizes that it is uncertain whether SB40 can be applied retroactively. What they do instead is rewrite the DSL and make that rewrite fully retroactive.

The rewritten DSL now includes the same sentencing range created by S.B. 40. In brief, the three sentencing choices are now a range. The only restraint on the sentencing court is that the court must state reasons for its decisions. Appellate courts will review that statement of reasons using an abuse of discretion standard.

The obvious problem with judicially rewriting a statute and applying that change retroactively to cases where the crimes have already occurred is that increasing a defendant’s sentence after commission of the crime violates the ex post facto ban. The California Supreme Court assures us that judicial decisions are exempt from the ex post facto ban, because that ban only applies to statutory enactments. They say that the real issue is whether retroactive application of laws rewritten by courts violates due process, which turns on whether a defendant had notice. They conclude that defendants did get the required notice, since when this defendant committed her crime, she knew she could get high term.

The problem with this position is that it is wrong. The California Supreme Court cites the controlling United States Supreme Court decision, but then applies it incorrectly. In Cunningham v. Tennessee (2001) 532 U.S. 451, 121 S.Ct. 1693, the United States Supreme Court scaled back its broad language in Bouie v. City of Columbia (1964) 378 U.S. 347, 84 S.Ct. 1697. The court said that not all judicial expansion of statutes was barred by the due process clause. The court held, “Accordingly, we conclude that a judicial alteration of a common law doctrine of criminal law violates the principle of fair warning, and hence must not be given retroactive effect, only where it is ‘unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.’” (Cunningham v. Tennessee, supra, 532 U.S. 451, 462 [121 S.Ct. 1693, 1700].)

Thus, the issue is whether the court’s ruling was “unexpected.” The California Supreme Court in Sandoval found no due process violation, saying “Defendant was put on notice by section 193 that she could receive the upper term for her offense: the statute specifies that ‘[v]oluntary manslaughter is punishable by imprisonment in the state prison for 3, 6, or 11 years.’ (§ 193, subd. (a).) That notice satisfies the requirements of due process.”

This position is wrong conceptually. A perfectly informed defendant would know that upper term was not available unless aggravating factors overcame the DSL presumption of middle term. Certainly, that mythical defendant could not know that upper term was available event absent any aggravating factors, which is the new DSL as rewritten by the California Supreme Court.

But in any event, the California Supreme Court is applying the Rogers test incorrectly. The issue is not what notice the defendant has. The issue, as just quoted, is whether the change is “unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.” And on this issue we obviously win. In the first Black opinion, People v. Black (2005) 35 Cal.4th 1238, the California Supreme Court ruled that the DSL survived Apprendi and Blakely. Rewriting the DSL was totally unexpected until Cunningham was issued. An argument might be made that once Cunningham was issued, a change in the DSL could be expected. But no reasonable claim could be made that before Cunningham was issued, anyone could expect that the DSL would be rewritten to make the DSL a range.

IS THE FIX CREATED BY THE LEGISLATURE AND ADOPT-
ED BY THE SUPREME COURT
MAKING SENTENCES A RANGE
UNCONSTITUTIONAL UNDER
CUNNINGHAM?

Is there any argument that S.B. 40 and the Supreme Court’s rewrite of the DSL still violate Cunningham? Well, yes. The holding of Cunningham is that any fact that is necessary to allow an increase in a defendant’s sentence must be found true by a jury or admitted by the defendant:

This Court has repeatedly held that, under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence. (Cunningham v. California, supra, 127 S.Ct. 856, 863-864.)

Penal Code section 1170, subdivision (a)(3), as amended by S.B. 40, provides, “In any case in which the punishment prescribed by statute for a person convicted of a public offense is a term of imprisonment in the state prison of any specification of three time periods, the court shall sentence the defendant to one of the terms of imprisonment specified.” Penal Code section 1170, subdivision (b), as amended by S.B. 40, provides, “When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court.” That section also provides, “The court shall select the term which, in the court’s discretion, best serves the interests of justice. The court shall set forth on the record the reasons for imposing the term selected.” S.B. 40 leaves the Rules of Court unchanged, and appellate courts — as before S.B. 40 — review sentences for an “abuse of discretion.”

The Supreme Court in Sandoval rewrote the DSL to apply to cases occurring before S.B. 40 to make the DSL a range. So the same rules applicable under S.B. 40 also apply to the judicial rewriting of the DSL.

If S.B. 40 allowed judges unfettered discretion to choose among the upper, middle, or lower terms, then it would have fixed the Sixth Amendment infirmity with the DSL. In other words, if S.B. 40 allowed a trial judge to impose the upper term for a robbery for the simple reason that it believed robbery was a serious crime — without finding a single aggravating fact to be present — then S.B. 40 would be constitutional. But S.B. 40 does not do that. It requires judges to exercise “sound” discretion and to enter reasons supporting that discretion — reasons that apparently must comport with the Rules of Court. Equally important, California law after S.B. 40 envisions appellate courts reversing sentences that constitute abuses of discretion — that is, sentences which impose upper (or lower) terms without adequate justification.

This system still functionally violates the Sixth Amendment. As the U.S. District Court for the Eastern District of New York recently explained in holding that part of New York’s felony sentencing system violated clearly established law: “[J]udicial factfindings cannot be rescued from Sixth Amendment scrutiny by characterizing them merely as gist for appellate review of sentences (for ‘reasonableness’ in federal court or by reference to the ‘interests of justice’ in New York . . .): It elevates form over substance to assert that findings are required to facilitate appellate review but not to impose the sentence to begin with.” (Portalatin v. Graham (E.D.N.Y. Mar. 22, 2007) 478 F.Supp.2d 385, 403.)

It may be claimed that California law under S.B. 40 is different than New York law because trial courts need not find facts beyond the elements of the crime of conviction to support upper (or lower) term sentences; they need only state “reasons” supporting such sentences. But the Rules of Court, which lay out the permissible bases for trial courts to impose upper (or lower) term have not changed since Cunningham. And the Supreme Court in Cunningham squarely held all of the bases on which the Rules of Court allowed California courts to impose upper terms are “facts” for purposes of the Sixth Amendment. (See Cunningham v. California, supra, 127 S.Ct. 856, 862-863.)

Another way to look at this is to ask whether a court can impose the lower term without making any mitigating findings. May a court say that it finds no mitigation, but just imposes the lower term anyway? If such an order was appealed by the prosecution, and if an appellate court would find that such an order was within the court’s sound discretion, then a sentence which imposes upper term for no reason would also be permissible and this scheme would satisfy Cunningham. However, if low term sentences without mitigation are reversed as an abuse of discretion, then upper term sentences without aggravation would also have to be reversed. This would make the scheme created by S.B. 40 the functional equivalent of the scheme struck down as unconstitutional in Cunningham.

Yet another way to look at this is to focus on the fact that the Supreme Court in Cunningham invalidated the Determinate Sentencing Law because of the presumption of mid term. Current law precludes imposition of the upper term for any fact that is an element of the crime itself. “A fact that is an element of the crime may not be used to impose the upper term.” (Cal. Rules of Court, Rule 4.420, subd. (d); People v. Quinones (1988) 202 Cal. App.3d 1154, 1159-1160.) Moreover, Penal Code section 1170, subdivision (b), provides that a court may not impose upper term based on aggravating factors for enhancements imposed by the court. Absent additional facts — facts which are not elements of the offense or enhancements being imposed — the court could not impose upper term. S.B. 40 requires a statement of reasons. If it is determined that those reasons must specify facts that are not elements of the offense or imposed enhancements, then S.B. 40 has again created the impermissible presumption invalidated in Cunningham.
I would just like to point out in closing that Cunningham has resulted in almost every defendant being worse off — a few, probably no more than a handful, of clients during the window period between Cunningham and the issuance of Black and Sandoval. But all of our clients are now subject to upper term without the courts even having to engage in the sham of finding that aggravating factors justify imposition of upper term; the court can now just pick upper term and the only limitation is a statement of reasons. It is unclear if a statement of reasons is going to really mean anything at all. So we win Cunningham, California’s DSL is unconstitutional, and the actual result is that hardly anyone gets any benefit and everyone is worse off. Nice win.

So what should we actually do now in our cases? In the trial courts, all we have to do to preserve all these issues is make objections to any use of any facts (priors included) used to increase our clients’ sentences, where those facts were not admitted by the defendants or found true by a jury. The objection should cite the Sixth Amendment and Cunningham, and should specify the facts being relied on by the courts to increase our clients’ sentences.

In appellate courts, we should make the arguments discussed above (and other ones you think of) to raise and preserve these issues for the day when the United States Supreme Court again reverses the recalcitrant California Supreme Court.
Suggestions on Preparing to Present Evidence of Incompetence to Stand Trial

by John T. Philipsborn

1. Introduction

Since the publication in 1988 of Dr. Thomas Grisso’s discussion of the competence to stand trial assessment process, there have been a number of developments aimed at improving the performance of defense counsel in the competence assessment process. Rulings from the United States Supreme Court on competence to stand trial definitions, the development of state-specific case law amplifying existing state statutory definitions of the competence assessment process, scholarly research on that process leading to several influential publications, and ongoing training for defense counsel have combined to underscore the need for lawyers to be familiar with the definitions, assessment processes, and methods of adjudication, of the accused’s (in)competence to stand trial.

The objective here is to discuss basic information that should be integrated into the evidence presented in a hearing or trial of a person’s incompetence to stand trial. The basic premise is, admittedly, both simple and simplistic. When lawyers understand the educational and training foundations of mental health experts, the professional standards on which they rely, and the structure of the practice of competence assessment as defined in the literature, they can effectively present (or where necessary attack) competence assessment evidence. There is enough written about competence assessments to allow lawyers a measure of control over, and input into, the competence adjudication process. Conversely, problems arise where lawyers are unable to participate in a standardized assessment process, and a knowledgeable adjudication of competence, because they have failed to educate themselves.

2. The Importance of Concentrating on the Basic Foundation of Education, Ongoing Training, and Experience in Competence to Stand Trial Assessments

Under the California Evidence Code, an expert is a person who has “... special knowledge, skill, experience, training, or education sufficient to qualify him [or her] as an expert on the subject to which his [or her] testimony relates.” The Federal Rules of Evidence set forth a similar threshold definition, as an expert is “a witness qualified... by knowledge, skill, experience, training, or education...”

Too many practitioners concede that a proffered expert is possessed of the basic qualifications to testify on the subject of the assessment of competence to stand trial — either in preparing to present, or to voir dire, or otherwise cross-examine that expert.

A few observations with respect to the training, and credentials, of psychologists and psychiatrists are in order here. First, with respect to psychologists, such persons are often (though not always) possessed of a Ph.D. degree obtained after completion of a course of graduate study of between 5 and 7 years. Many academic institutions require the submission of a dissertation based on original research for completion of this doctorate. That dissertation helps to define the expert’s area of concentration as a doctoral student. Rarely will it have been on the subject of the assessment of competence to stand trial— or even on some related topic.

Not all psychologists obtain a Ph.D., however. Some such experts have obtained a Psy.D., or ‘Doctor of Psychology’ degree. This is a terminal degree often associated with clinical practice.

Still others may practice as psychologists (not always licensed by the State) having obtained an Ed.D., or doctorate in education, specializing in ‘educational psychology’ including developmental and school psychology.

The core courses for psychologists, according to literature from the American Psychological Association (which was founded in 1892 and currently accredits doctoral training programs) approved doctoral programs exist in: clinical; counseling; and school psychology. The National Association of School Psychologists, together with the National Council for Accreditation of Teacher Education, accredit terminal degree programs in school psychology.

Notwithstanding these areas of accreditation, there are several other areas of study for psychologists. A review of graduate programs for
those seeking doctoral degrees in psychology indicates that there are programs in: clinical; counseling; educational; experimental; industrial-organizational; developmental; social; and research psychology.5

All of this seemingly digressive background on the education of psychologists leads to this point—other than obtaining some school based training that provided a foundation for forensic work (theories of psychology; research methodology; statistics may have been among the core courses attended by the proposed expert), little in the expert’s academic education may have centered on material of direct use to forensic work, and especially to the assessment of competence to stand trial.

Thus, part of the process of preparing for the hearing should be the careful review of the expert’s course of study, and consideration of its relevance to the establishment of expertise in competence assessments. With the exception of those who happened to have studied in very obviously relevant areas (some of which are discussed below), it may well be that either for the purposes of direct, or cross, examination, the expert’s academic training will prove to be of little use in establishing relevant expertise.

It was not until relatively recently that the American Board of Professional Psychology (ABPP) began awarding specialty certificates in several fields of psychology, including: clinical psychology; forensic psychology; clinical neuropsychology; counseling and school psychology (among others). Those possessed of ABPP certificates demonstrate credentials including: the appropriate doctorate; post-doctoral training in their area of specialty; at least 5 years of experience; recommendations and endorsements from persons in the field; suitable results on a field specific examination.

There are other professional specialty organizations for psychologists. Several of these have ‘credential’ programs. The question of how well accepted these are is beyond the scope of this writing, but assuming that well known texts are a measure of those organizations which are viewed as reputable ‘providers’ of accreditation, then the affiliates of the American Psychological Association, including the ABPP, can be viewed as well-established and legitimate.6

Psychiatrists follow different courses of study than do psychologists. Many, though not all, study medicine and complete medical internships before going on to further study and residency programs in psychiatry as part of a course of medical studies. However, not all psychiatrists are licensed physicians. Training courses other than medical school education may provide a basis for practice as a psychiatrist, including (at least in some states) obtaining a final degree as a Doctor of Osteopathy.

Some physicians who completed residency programs in psychiatry may not have received prolonged exposure to areas of study like psychopharmacology, or neurochemistry (beyond basic courses)—thus, these experts may not have easily demonstrable academic training in the effects of certain classes of medications that may be of issue in a given case. Their initial training and continuing education may not have emphasized areas that are critical to a given competency inquiry. These are matters that counsel should inquire into.

The American Medical Association (AMA) began accrediting medical schools and internship programs around 1914. Beginning in the late 1920’s, the American Psychiatric Association began formulating requirements for the practice of psychiatry. More recently, the Accreditation Council for Graduate Medical Education (ACGME) and the Residency Review Committees (RRC), in psychiatry and neurology (two separate bodies) establish training requirements, through their affiliations with professional organizations like the American Medical Association.

Several specialty organizations certify physicians in specialty areas. For example, the American Board of Psychiatry and Neurology certifies physicians in: psychiatry; neurology, and child neurology. The American Academy of Psychiatry and the Law emphasizes forensic practice, and forensic credentials. It is one of the organizations that has coordinated with the American Medical Association, and the American Psychiatric Association, in the development of sub-specialty expertise, specialty certificates, standards for education, and requirements for continuing education.

Each of the pertinent organizations or boards (and there are many), explains its relationship (if any) to the predominant organizations. Some of these credentialing bodies publish materials that are useful either to establishing, or attacking, the approaches, and methods, used by a given examiner. For example, the American Board of Psychiatry and Neurology commissioned reports on Core Competencies for Psychiatric Practice, which are published by the American Psychiatric Press—the title speaks for itself.7

Psychiatrists who have completed their residency in psychiatry, and have acquired the relevant experience may develop sub-specialty expertise, and be awarded either specialty certificates, or Board certifications (depending on the credential-awarding organization). Not all of those who conduct forensic examinations will be possessed of board certification, or specific training, in forensic psychiatry as that specialty has been established. Establishing how a given expert has demonstrated his or her expertise in forensic examinations may prove to be a critical part of the competence adjudication proceeding.

There are various groups, and bodies, providing credentials to psychiatrists and psychologists — some highly legitimate and professionally prized, and others less so. The major organizations mentioned here, including the American Medical Association, American Psychiatric Association, and American Psychological Association, all have websites that explain the in-
formation set forth here (as does some of the pertinent literature).\(^9\)

The American Academy of Psychiatry and the Law is one of the specialty organizations related to forensic psychiatry with a clear relationship with the American Psychiatric Association. It sets forth standards specific to forensic psychiatry.

Similarly, Division 41 of the American Psychological Association, which is the American Psychology-Law Society, provides a wealth of information about forensic psychology, including the standards applicable to forensic assessments.

The reason for this tour of the sources of information (and credentialing bodies) about psychiatric or psychological education is that lawyers are sometimes not fully aware of what training psychiatrists or psychologists, with whom they are working, may have had. Since both the American Psychiatric Association and American Psychological Association (and their above-described sub-specialty affiliates) regularly publish practice-related standards, information about continuing education, and maintain and publish ethical codes and standards, failure to pay attention to these sources of information will deprive a lawyer either of the ability to demonstrate a given expert’s adherence to, or departure from, current standards of practice.

Also, academic programs in psychiatry and psychology changed over a period of time – and the advent of programs that offer concentrated training in forensic psychiatry, or forensic psychology, has changed the educational ‘baggage’ that experts possess, depending on when or where they were trained.

For example, many psychologists trained and licensed in clinical psychology, particularly more than 20 years ago, may have had no academic or supervised training at all in forensic psychology and no clinical experience that would have involved competence to stand trial examinations during their supervised clinical training. Thus, their knowledge of the competence to stand trial assessment process may have been learned on the job, and as a result of some continuing education. Indeed, it is surprising to note how many ‘experts’ on competence assessments have little formal training of any kind specific to such endeavors. Similarly, psychiatrists may have had little or no forensic training, and no exposure to the competence to stand trial assessment process until after they left their residency programs and were in practice—and they may not be able to establish any formal relevant training.

The importance of inquiries into qualifications can be illustrated by a brief description of the evidentiary hearing held in People v. Ary, a case remanded by a California Court of Appeal to a trial court for a retrospective competence assessment.\(^8\) Mr. Ary was initially evaluated at the time of his initial trial proceedings (though not specifically for his competence to stand trial). However, evidence of his possible incompetence was argued as a critical issue on appeal. During the post-conviction retrospective competence assessment, Mr. Ary’s competence to stand trial was opined on by at least eight separate mental health professionals, the majority of them psychologists. Some of the experts were retained by the state, others by the defense. Two were considered ‘court experts’, though they were nominated by the parties. Not all of the experts actually examined Mr. Ary, though several did. All of the experts professed to have some opinion about his competence.

The most recently educated psychologist had obtained doctoral training (and a doctorate in clinical psychology), and then had completed a post-doctoral program in forensic psychology that added some 2,000-plus hours of specific training in forensic issues, including the assessment of competence to stand trial. The majority of the other experts had obtained their doctoral degrees at least 20 years before the commencement of the hearing (one had been a practicing psychologist for at least 40 years).

None of these had any training during the course of their undergraduate, or graduate, education that touched either on forensic issues, or on the assessment of competence to stand trial. Only three of the experts professed to have ever been asked about their training in, and knowledge of, the assessment of competence to stand trial in any detail during their careers prior to the hearing.

Four of the experts purported to have recently read cases involving the definition of competence to stand trial, though most recognized that Dusky v. U.S., and Drope v. People v. Ary (2004) 118 Cal.App.4th 1016.

Missouri were case names related to the definition of competence to stand trial.\(^10\) Only two of the eight could even state the formulation of the basic competence test by the United States Supreme Court. Three of the eight professed to be aware of the discussion of the attributes of competence as discussed in Godinez v. Moran—though all three had been asked to review the decision by counsel.\(^11\)

Almost all of these experts identified Dr. Thomas Grisso as an acknowledged expert on the assessment of competence, though only three professed any recent review of Dr. Thomas Grisso’s Evaluating Competencies (2d ed.); Melton et al.’s Psychological Evaluations for the Courts (2d ed.); or Sadock and Sadock’s Comprehensive Textbook of Psychiatry—and each of these had been asked about these sources in advance of the hearing.

Prior to the hearing two of the experts indicated awareness of the research on the CAST-MR (a published instrument purporting to be of assistance in the assessment of the competence of mentally retarded persons). Half of the experts had reviewed any literature pertinent to the CAST-MR (which had been administered to the accused). Only two of the experts professed to be conversant on the limitations of competency assessment instruments, including the CAST-MR.\(^12\)
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All of the experts at issue had previously qualified as experts in criminal cases, some on many occasions. Those quizzed on the reasons for the variation in their foundation noted the differences in the approaches of the lawyers they were working with to prepare their testimony. Admittedly, evidence from one case is an insufficient basis from which to generalize. However, anecdotal information from mental health experts and lawyers alike suggests that there is a wide range of knowledge about competence to stand trial assessments even within the mental health professions. Similarly, anecdotal information suggests that it is a minority of lawyers (prosecutors and defense counsel alike) who have reviewed pertinent literature and case law. There is some reason to be concerned that it is uninformed lawyering that is allowing uninformed experts to continue to operate without the need for current knowledge. Anecdotal information from lawyers handling criminal appeals indicate that it is relatively rare for there to be an extensive inquiry into the basic expertise of a psychiatrist or psychologist testifying on the question of competence to stand trial.13

Assuming that defense counsel prepares by reviewing relevant literature and case law, the defense can bear its burden of proof in part by defining the standard of practice that applies to an expert’s assessment of competence to stand trial. The expert who can specifically link the elements of a given competence assessment to the U.S. Supreme Court’s rulings on competence, as well as to any seminal state rulings, and to the state statutory scheme, will establish the necessary baseline.

Approaching the presentation of evidence of competence (at least from the defense’s viewpoint) with these basics in mind has another advantage—it diminishes the possibility that counsel will rely on essentially uninformed experts to set the tone in the competence assessment adjudications. It is rarely helpful to endorse an expert’s ‘I know it when I see it’ approach. The expert who during preparation sessions is unable to make the basic connections between the legal definitions and assessment process that he or she used is unlikely to make a good impression on cross-examination. Part of the reason that experts get away with displays of blissful ignorance of the legal definitions, and contents of relevant professional literature, is that lawyers let them do so.

Also, there is a way to avoid the problem of the experienced expert whose foundation on competence issues seems weak—counsel should prepare a relevant packet of information about the competence assessment process, including not only copies of the pertinent statutes, and relevant case law, but also copies of that literature, including Grisso, Melton et al., and others whose information will be useful to establishing the adequacy of the work done by the defense expert, and the standards that should be used in a competence assessment process. While this seems a basic insight into the obvious, few lawyers seem to do it. Unlike other areas of expertise which could involve extensive preparation, the task just outlined can be accomplished by accessing a few easily available legal standards, and a few excerpts from widely available literature. Some lawyers will make it a point to make the packet a part of the record, so that the judge reviews it as well.

Using such a packet can also force opposing counsel to pay careful attention to phrasing questions in terms of the actual language of the cases and quoted literature. It also is a relatively easy way of showing a jury (in those jurisdictions which, like California, allow the question of competence to be tried by a jury) that there is a body of written information that plays a part in defining terms and processes applicable to competence to stand trial.

In addition to the materials just described, this packet might include materials on standards of practice applicable to the relevant areas of mental health expertise—an area often overlooked.

Establishing that there are Standards Related to the Expert’s Practice, and to the Statement of Opinions

A number of lawyers report the view that judges, and juries (where juries make competence determinations) generally disfavor competence adjudications, in part because they are viewed as a means of avoiding the underlying case. Thus, some of these lawyers counsel against raising a client’s incompetence even where it likely should be raised. A similar, though more strategic issue is raised by lawyers concerned with the competence to stand trial adjudication process is that the state (or federal government) gets insight into the client that would otherwise not have been provided had there been no competence inquiry.

It appears that some of these concerns are raised because lawyers feel that they cannot control the competence assessment process well enough to ensure the correct outcome where the client is indeed incompetent.

Some of this lack of ‘control’ is attributable to lawyers’ lack of familiarity with the standards of practice, and ethical rules, pertinent to psychiatry and psychology. While there are indeed many variables in any given case that lawyers cannot control, they can point out where the mental health professions do not adhere to their own rules in conducting an assessment, in arriving at a diagnosis or opinion, or in offering courtroom testimony. Armed with some sense of how to define proper for improper practice in the mental health professions, lawyers could more effectively address the process, and outcome, of a competence assessment.

The Ethical Principles of Psychologists and Code of Conduct of the American Psychological Association is a publication that covers a number of issues involved in the practice of psychology, including the assessment process, bases for assessments; test construction; interpretation of test results, etc. They define a number of the limitations that psychologists should
reflect in stating opinions depending on what data is available.

Similarly, for psychiatrists, the “Principles of Medical Ethics with Annotations Especially Applicable to Psychiatry” are viewed as defining standards of practice applicable to the profession. They have been referred to not only in some of the leading publications, but also, and significantly, in rulings of the U.S. Supreme Court.14

A legitimate question can arise about how influential these organizational ethical principles are to an expert who professes not to belong to a given organization — though, as noted, both in decisions of reviewing courts on constitutional law and criminal procedure issues, as well as in civil case decisions pertinent to practice and malpractice by psychologists and psychiatrists, courts have made reference to the predominant ethical codes and statements of standards of practice of the dominant organizations. In specialty areas, as noted above, several well known professional groups publish ethical guidelines, or specialty guidelines. For example, the American Academy of Psychiatry and the Law publishes ‘Ethical Guidelines for the Practice of Forensic Psychiatry’. So do organizations like the American Academy of Forensic Psychology, and American Board of Forensic Psychology.

As is pointed out in the Federal Judicial Center’s Reference Manual on Scientific Evidence, the American Medical Association issued a report, and set of recommendations to state licensing boards, urging that erroneous testimony by physicians be included as a type of malpractice, and be subject to discipline.15 These recommendations clearly would affect psychiatrists. Indeed the AMA, and several states, essentially define providing expert medical testimony as a form of medical practice. This is an important development, as it emphasizes the concern for adherence to standards.

The advantage of a lawyer’s familiarity with ethical rules for psychology and psychiatry, and announced standards of practice for these professions, is that they form the basis not only of establishing for the trier of fact that there is a baseline, but also that departure from these standards must be viewed as demonstrating questionable practices. For example, the evaluator of competence to stand trial who professes to function (depending on the professional specialty) under pertinent rules for psychologists, or psychiatrists where pertinent, and who has not maintained his/her knowledge of the field, including knowledge of pertinent literature, and case law, and who has failed to obtain continuing education on the assessment of competence to stand trial should be the subject of a wide ranging voir dire or cross examination on that subject. Counsel who have previously asked a few questions on an expert’s qualifications would do well to prepare more detailed inquires, and would also do well to obtain continuing education and professional certification records for the proposed experts. A surprising number of experts have simply not kept up.

In addition to the general standards of practice, and generalized ethical standards, pertinent to the mental health professions, there are a number of standards that govern in the arena of competence to stand trial assessments.

Establishing that Standards for Competence Assessments Exist in Well Accepted Literature

Many mental health experts familiar with the courts will profess some knowledge of generally accepted literature. Experienced lawyers will seek to have an expert define how he or she approaches the assessment of competence - is it done the same way in every case? Is the design of the assessment case specific? How did the examiner decide how to structure the examination or assessment in this case? This is not a matter of guesswork. It is a subject addressed in the literature. According to Melton et al., while the assessment of competence to stand trial is rooted in the U.S. Supreme Court’s definitions, it is conducted in a specific context:

With respect to the first prong of the competency test, for instance, a level of capacity sufficient to understand simple charges... may be grossly insufficient when a more complicated offense is involved....16

Melton et al. are not alone in this observation. A similar observation appears in the Comprehensive Textbook of Psychiatry:

The impairment must be considered in the context of the particular case or proceeding. For example, mental impairment that renders an individual incompetent to stand trial in a complicated tax fraud case may not render that individual incompetent for a misdemeanor trial.17

Because of the dearth of detailed analysis in the case law, it is hard to find language that specifically anoints this view of a competence assessment (though there is some in certain state court decisions) — but insofar as the literature often relied upon by the mental health professions, such language is of importance — if for no other reason than to establish what an expert knows, or has not bothered to consider.

There is another important issue that often arises in competence assessments particularly when they are conducted by a court-appointed expert who is paid a flat, usually low, rate and thus can devote only little time to it (and even where the assessment is undertaken in a state hospital setting where time should not be as precious). That issue/question is whether contact should be made with the attorney of record to obtain data pertinent to competence. The literature recommends contact between the evaluator and the attorney representing the accused - particularly on the question of ability to assist counsel. Melton et al. are quite clear:

The consultation process should not be conceptualized as uni-directional, however. The clinician also needs to obtain information.
from the attorney... more important, only the attorney can provide the clinician with information about the length, substance, and nature of previous attorney-client contacts.\textsuperscript{18}

Indeed, and importantly, Melton et al. acknowledged the phrasing contained in Medina v. California that it is often defense counsel who will have "...often have the best informed view of the defendant’s ability to participate in his defense..."\textsuperscript{19}

This same point was made by Grisso in his 1988 pamphlet on Competency to Stand Trial Evaluations, though at that point his view on the subject was narrower than as stated since. He noted that in attempting to obtain background information, "...the examiner should attempt to learn from the defendant’s attorney those specific behaviors of the defendant that raised doubt concerning the defendant’s competency."\textsuperscript{20}

While other mental health professionals have published primers, and practice guides related to the assessment of competence to stand trial, the above quoted sources are significant. It is surprising, particularly when the problem revolves around the accused’s ability to assist counsel (or cooperate in the preparation of a defense), that counsel do not focus on an expert’s failure to contact them.

Many experienced lawyers will pro-actively contact competence examiners to try to spur communication, or at least to make a record that counsel tried to make the contact. Lawyers in those jurisdictions in which competence assessments are conducted in a hospital or locked ward setting, or where competence restoration ‘work’ is done in such settings, should formulate a specific strategy on communication with the mental health experts—though today, the practices of the legal profession in this area are highly variable. Clearly examiners in state or federal hospital settings have no better gauge than do their colleagues in the community on what issues are encountered by defense counsel in a specific attorney-client relationship. They have little understanding of the demands of a specific case, or how the communication between the lawyer and client has occurred.

The lawyer who has created a trail of communication with the examining expert, or who has at least created a paper trail evidencing efforts at communication, is supported by the relevant literature with respect to significant omissions by the mental health experts.

Knowledge of the Available Formats of Competency Evaluations is Important

In establishing, or testing expertise in this area, counsel should become familiar with the various approaches to competence evaluations. Richard Rogers and Daniel Shuman, two well known scholars in the field of forensic mental health, have noted that there are basically three approaches to the diagnostic process in forensic practice. The first is unstandardized, depending on a clinical interview, plus some record review, and collateral interviews as well (meaning interviews of persons other than the defendants). An unstandardized approach emphasizes the ‘I know it when I see it’ type of expertise. It is difficult to validate because it is dependent on one person’s judgment. And it is not unusual for experts relying on an unstandardized approach not to write very detailed reports, making their opinions even more subject to individual judgment rather than verifiable work.

This unstandardized approach can be contrasted with the standardized diagnosis, based on structured interviews empirically validated for use in competence assessments, and including collateral interviews and record review (as well as examination of the accused). The notion is that these diagnoses are based in some verifiable methodology, and in techniques that can be replicated by another examiner.

Third, according to the Rogers and Shuman view, there are extrapolated diagnoses, based on investigating the relationship between results on psychological tests designed and associated with broad diagnostic groups which are related to a clinical assessment process of the individual at issue.\textsuperscript{21}

While other scholars have described the diagnostic process in other ways, the Rogers and Shuman description has a great advantage for lawyers. It is simple, and easily establishes that a mental health evaluation is a process that can, indeed, be subjected to some level of analysis. Lawyers often miss the point in this area. We often want to question how a mental health professional has arrived at a given opinion, but we do not often know how to ask what process was involved. Did you do something that another expert can review, and try to validate? Did you use techniques that have been subject to research and review? Did you write a report according to any published standards or approaches? (Grisso points out the importance of standardized report writing methods.)

Having a compact and easy way to describe the diagnostic process is important in a hearing or competence trial. Counsel has to find a way to differentiate between the methods used by examiners, and to introduce language into the court hearing or trial that differentiates between approaches used by experts. Basically put, lawyers have to be able to explain why the ‘drive by’ evaluation that consists of some time spent with the accused, and some time spent reviewing records, does not produce an easily verifiable opinion. Developing the ability to explain to the trier of fact with explanations of how a diagnostic process can be verified (and where it cannot) is what results from understanding the various approaches to competence assessments.

Competence to stand trial assessments often involve use of fairly well known instruments, which may be described as structured interviews, or inventories, or even as a test. Usually, such instruments (the Competence Assessment Instrument (CAI); the Ma-
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As he puts it: "... forensic clinicians must consider individually the clinical issues associated with each Dusky prong." Attention needs to be paid to the ‘clinical operationalization of the competency standard’. Id. at 161.

These comments frame some inter-related points that will be lost on lawyers who approach competence to stand trial hearings as though the objective were simply to present some expert opinions on an individual’s disorders, and how they are manifested — with the legal issues left to be tied up through counsel’s arguments. Even relatively experienced judges often do not have all of the essential formulations, and phrases, of the United States Supreme Court’s competence definitions in mind. They reference the standardized competency to stand trial jury instruction (which, in California, reiterates a definition that was set forth by the U.S. Supreme Court in 1967, and not updated since, a significant oddity since the statutory definition has not been changed to incorporate the more recent rulings).

From a tactical standpoint, the failure to make use of an expert’s understanding of the various competence to stand trial definitions, and to have the expert explain how each activity engaged in during the assessment (the interview, record review, testing, consultation with counsel, observation of the accused with counsel, etc.) relates to an understanding of this individual’s competency to stand trial represents a failure to explain basic linkages between definitions in an assessment process.

It is in part for this reason that counsel are urged to work carefully with experts to ensure that they are fully aware of the content of the case law, and also that they have thought how their work as psychologists/psychiatrist in the particular case has addressed the salient questions set forth in the law.

Supporting the Basic Showing of Incompetence

It has been pointed out that the U.S. Supreme Court has never required proof of a specific disorder to establish incompetence, or otherwise specified what evidence will establish incompetence. Some state statutes, however, (California's is one) create a linkage between proof of an underlying mental disorder or developmental disability and incompetence to stand trial. Whether this linkage would pass constitutional muster if properly challenged is beyond the scope of this piece. Suffice it to say that when contemplating the presentation of evidence of incompetence, lawyers often contemplate calling one or more mental health experts who are important to the process in part because they provide the diagnostic information.

Some counsel will also call a variety of supporting witnesses including: family members; jail visitors; other jail inmates; jail/prison staff; jail/prison mental health experts; witnesses (including experts) from prior hospitalizations; prior diagnosticians; and others.

It appears that in the cases in which counsel have been successful in establishing incompetence, the trier of the fact was presented with ample, sometimes redundant, testimony from a wide variety of witnesses. Indeed, often the Government (or state) will seek to rebut the defense evidence by calling witnesses from the same categories just defined — notably jail or prison personnel (or state hospital personnel where relevant) who are often offered as sources of information about an individual’s demeanor, behavior, and conduct when the light of a mental health examination is not on them, and when (according to the arguments usually proffered), the accused’s guard is down. Clearly, proactive counsel who undertake the burden of demonstrating the existence of incompetence should avail themselves of this wide range of evidence.

It might be noted that some care should be exercised in choosing lay
witnesses on competence. No doubt some triers of fact will credit a credible lay witness over an expert. But some care should be taken to develop specific parts of the evidence of incompetence through the corroborating witnesses. Often, these witnesses are called to establish that the accused is demonstrating confusion, or incoherence, or paranoia (to name a few) even when no lawyers, doctors, or other ‘officials’ are looking.

Several reported cases discuss, in some detail, the witnesses called on the issue of competence, or restoration to competence, in a way that may assist counsel in formulating plans. One series of such cases centered on New York’s Vincent Gigante — who, over a period of time was the subject of several different competence adjudications.25 The Gigante saga is of some importance because it involved a number of well known psychologists and psychiatrists who lined up on the two sides of the issue, and chronicled, as well, the various lay witness opinions that were introduced.

After the tortured litigation of the competence issues, Mr. Gigante eventually made certain admissions on the record in his federal case to the effect that he had been faking certain aspects of his apparent incompetence. This admission led, among other things, to editorials and commentaries by well known mental health professionals questioning (once again) the usefulness of the injection of mental health opinion evidence in forensic settings.

Another useful discussion of the subject is found in U.S. v. Duhon, another federal District Court case that offers a rich discussion of competence law, and literature pertinent to competence inquiries, as well as a review of the testimony of various witnesses in a competence restoration proceeding.26 Duhon also involved use of an attorney expert in that case, a lawyer called to explain how defense of the case necessitated attorney client communication.

The suggestion to use lawyer experts in competence proceedings has been made over a period of time.27 The attorney-expert contemplated is one who would explain, either specifically (in the appropriate case), or generally: the demands placed on a client in that type of case; the components of the effective representation of an individual given the charges; the existence of the various standards, including ABA Standards (or ABA Guidelines in death penalty cases) that require the lawyer to do specified things to assist the client; the various choices and decisions defined by the Fifth and Sixth Amendments that clients face; the nature of the discussions that take place between counsel and client in a given type of case; the strategic decisions that would need to be discussed as well, according to the case law.28

Use of an attorney-expert provides an alternative for lawyers who are of the view that some evidence from counsel is needed but where counsel of record may not be an appropriate source of information.

**Defining the Problem for the Trier of Fact and Setting the Stage for a Solution (Particularly Where Competence is a Jury Question)**

There is an overarching theme that defense counsel may need to address in a competence case. This involves describing how the competence issue presented in the case impacts the integrity of the process, and what the prospects for restoration (or lack of restoration) of competence may be. Indeed, many of the suggestions offered above might be viewed as secondary to the one discussed here, which is that counsel should have a basic, fact-driven, explanation of how a client’s paranoia, psychosis, or other symptom has compromised the conduct of these criminal proceedings — and what the prospects for restoration may be.

Focusing on this theme is particularly important when the issue of competence is left to a jury’s determination, as well as where the case law requires proof of changed circumstances before a second or third competence to stand trial determination may be undertaken in the same case.

Lawyers who practice in jurisdictions (like California) where a jury ultimately decides competence, have expressed concerns that jurors will view the competence issue as a way of avoiding criminal liability. Surprisingly, however, counsel often do not elicit evidence (through mental health professionals, lawyers, or retired judges, all of whom have been called on such issues) to testify that the systemic response to declarations of incompetence is to try to achieve restoration of competence with the aim of finishing the case — an explanation that helps defuse the notion that the process involves an “out” for the accused.

Counsel who are used to making proportionality and comparison of punishment arguments at sentencing, often censor themselves in the presentation of data which can remind a trier of fact that the actuarial tables favor the resumption of the case when competence is at issue.

This theme may be less dubious to a trier of fact where the underlying disorder can be treated with medication, and where there is evidence that the accused has ‘gotten better’ when medicated. Some experienced lawyers have recommended that their own experts consult with others who work in competence restoration programs that are likely to receive the accused, who are often more than happy to review their relative success rates, thus providing the foundation for some testimony on the issue. Hear-say objections can be circumvented through use of official records, and official reports, as well as through the calling of administrators responsible for the programs at issue.

This is not an area to neglect, as judges (and where relevant, jurors) may have little idea what actually happens in the aftermath of a determination of incompetence.

It is also of some importance for counsel to be specific in describing how an accused’s incompetence is
compromising the defense — even if this statement is made in a submission under seal, or in some other protected format. A generalized statement that the accused is unable to assist may be useful at an early time of crisis in the case, but it becomes less useful if it has become necessary for the same lawyer to raise the same client’s incompetence a second or third time in the same case. Often, case law requires a showing of change in circumstances, and the possibility that competence may have to be addressed again should be contemplated by counsel.

**Conclusion**

In many jurisdictions, the adjudication of an accused’s incompetence to stand trial is taken care of through stipulations to the admission of experts’ reports and other devices that have avoided the need for lawyers to get involved in and become acquainted with contested competence hearings, or trials. Others have specialized in mental health calendars, or in assignments that have led to trials in a number of competence cases. For most members of the legal profession, however, contested competence hearings, and competence trials, are relatively rare. Defense counsels often assume that there is significant resistance to finding an accused incompetent, even though the facts merit such a finding. While this may be a provable assumption, available evidence suggests that well-prepared lawyers have been able to demonstrate a client’s incompetence by exhibiting care in preparing to present the relevant evidence. Some of the valuable lessons learned from successful competence litigations have been described in this writing in the hope of assisting other counsel when it comes to clients who are mentally incompetent to stand trial.

**FOOTNOTES**

1. John Philipbsorn has been a criminal defense lawyer for almost 30 years and CACJ’s Amicus Chair for 15 years. He has authored (and co-authored) numerous publications on competence to stand trial, and has presented competence related evidence in connection with several published cases.
5. Even this does not purport to be a fully exhaustive list.
6. This observation is based in part on a review of a discussion of credentials, and accreditation programs, in Sadock and Sadock’s Comprehensive Textbook of Psychiatry (8th ed.). Sadock was mentioned as an authoritative source by the U.S. Supreme Court when it decided Atkins v. Virginia (2002) 536 U.S. 304.
7. Schriber et al., Core Competencies for Psychiatric Practice: What Clinicians Need to Know.
8. As with psychologists, a good primer on the credentials available to psychiatrists can be found in Sadock and Sadock’s Comprehensive Textbook of Psychiatry (8th ed.).
13. The anecdotes were not collected in a methodical way, but involved the writer’s contacts with lawyers litigating competence to stand trial issues in several California state, and federal, cases.
14. In Washington v. Harper (1990) 494 U.S. 210, 223 fn.9, the court noted that it assumes that psychiatrists (and other physicians) obey the ethics of the medical profession, citing specifically the ‘annotations especially applicable to psychiatry’ of the American Psychiatric Association; see also the discussion of medical ethics in Sadock and Sadock’s Comprehensive Textbook of Psychiatry (8th ed.).
18. Melton et al., at p.150.
19. Melton et al., supra, at p.130, relying on Medina v. California (1992) 505 U.S. 437 which affirmed People v. Medina (1990) 51 Cal.3d 870 — the observation at issue was actually first set forth by the California Supreme Court in its Medina opinion.
23. Id. at 13, emphasis in original.
27. The writer of this piece has been involved in several publications suggesting the use of attorney experts. Fortunately, some of these writings have been supported by other established defense counsel. See, for example, Iversen, Thomson and Philipsborn, 1368 Revisited: Can Your Client Rationally Assist You? (CACJ Forum, 1988, in two parts); Philipsborn, Assessing Competence to Stand Trial: Re-Thinking Roles and Definitions, American Journal of Forensic Psychiatry, Volume II, Issue One, 1990; Burt and Philipsborn, The Assessment of Competence in Criminal Cases: the Case for Cooperation Between Professions, published in the NACDL Champion and CACJ Forum (and California Death Penalty Manual), 1998. The last of these articles was cited by the U.S. District Court in Duhon, supra.
28. Many of the activities that would be contemplated to take place between a lawyer and his or her client, including discussions of specific pleas, waivers of rights, and strategic decisions, is found in Godinez v. Moran, supra, 509 U.S. 389. A useful discussion is also repeated in U.S. v. Duhon, supra. The ABA Standards referred to here are the Standards on the Defense Function. The ABA Guidelines are the 2003 ABA Guidelines on the Appointment and Performance of Counsel in Death Penalty Cases.
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There are three primary reasons for us, as criminal lawyers, to protect our clients’ immigration status as we handle their cases:

1. It is in our clients’ interest for us to do so.
2. If we don’t help the client avoid adverse immigration consequences in criminal court, very often the client cannot be helped at all, and it’s difficult or impossible to recover from a mistake.
3. It is part of our job as criminal lawyers, and it is in our own interest to do a good job.

Fortunately, it is a lot easier to do this than we may have thought. This article will describe the reasons why we must protect our clients from immigration damage resulting from the outcome of a criminal case, and the conclusion will outline a simple way to do so that uses our knowledge and skills as criminal lawyers, but does not require us to learn the complexities of immigration law.

I. It Is In Our Clients’ Interest.

Consider what can happen if a criminal lawyer fails — for whatever reason — to protect the client’s immigration status. Even where the criminal lawyer does a good job of minimizing the crime, and the time, if s/he does not realize that the client is subject to the immigration laws of the United States, the disposition can become a ticking time bomb. This immigration damage, usually permanent, often outweighs the criminal penalties a client will face. In these cases, the criminal defense strategy should often be directed primarily to avoiding the immigration consequences, and only secondarily to minimizing the criminal judgment or sentence.

In the old days, criminal immigrants sometimes slipped through the cracks and could live in the United States for many years. In the wake of 9-11, however, the federal government has devoted ever greater resources toward locating and deporting immigrants convicted of criminal offenses. With more grounds of deportation, and fewer forms of relief, more and more noncitizens are being deported. The number of federal prison inmates incarcerated for immigration offenses rose nearly 400% between 1995 and 2003. Over the last 20 years, the number of noncitizens deported on criminal grounds has increased more than 36 times!

The immigration authorities now troll jails and prisons, placing immigration holds on anyone who appears deportable. Even a traffic stop can bring someone to their attention. Noncitizens cannot get Social Security cards, driver’s licenses or jobs any more without proving lawful immigration status. Criminal history checks are run before the government will renew a noncitizen’s green card. Almost any application for any immigration benefit will trigger a criminal history check. Immigration officials at the airports and other ports of entry have access to the NCIC, the immigration computer databases, and state criminal history databases as well. Therefore, many people who never had problems traveling before are now being arrested at the airport, returning from abroad, and placed in removal proceedings.

The immigration authorities are also actively seeking nonimmigrants to deport, raiding both homes and workplaces. Operation Predator, for example, targets noncitizens convicted of child molestation-type offenses. We must assume that sooner or later, the government will arrest and start to deport everyone who has suffered a deportable conviction.

Most noncitizen defendants with criminal convictions are placed in mandatory immigration detention, without possibility of bond. Those who are released face a $1500 minimum, and actual bonds are often much higher. Detained or not, the noncitizen must suffer through proceedings a second time (if they are lucky enough to see an Immigration Judge) and hire new counsel (if they have the money). Even if they are found eligible for some sort of relief, the Immigration Judge has discretion to deny the relief, and appeal is difficult, time-consuming, and expensive. Many appellants cannot be released from custody on appeal, even if they have prevailed before the Immigration Judge and the government is appealing, until the successful conclusion of the appeal. As a practical matter, once deported, the client can never come back into the United States legally. The deportation process
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J.J. Rollin has co-authored this work, as well as Aggravated Felonies (2006), Safe Havens (2005), and Crimes of Moral Turpitude (2005).

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is irreversible.

Our clients suffer great anxiety once they discover the possibility of deportation, and may feel it was unfair for defense counsel to allow them to plead guilty to a disposition that was favorable from a criminal standpoint, but triggered an immigration nightmare. The innocent family also suffers greatly. The family may be separated, their homes lost, their standard of living destroyed. The family may be either left to fend for themselves here, or lost in a foreign country.

Financially speaking, a client’s continued ability legally to live in the United States is a million-dollar benefit. The client can earn perhaps $40,000 per year here, but not in their native country. If the client has a working life expectancy of 30 years, he or she will lose over $1,000,000 in potential earnings if deported. This can be true even of undocumented immigrants.

If the desperate and unhappy noncitizen re-enters the United States illegally, he or she faces federal prosecution and a maximum of two to 20 years in prison. The family may also face prosecution for harboring.

II. If We Don’t Help the Client in Criminal Court, Very Often the Client Cannot be Helped, and It’s Difficult or Impossible to Recover From a Mistake

Many of us believe — accurately enough — that we are not immigration lawyers and do not know immigration law. We limit our focus to the criminal case, and when the criminal case is over, we may send the client to consult an immigration lawyer. But because the criminal conviction may guarantee an immigration disaster, at that point it is often already too late. If we don’t solve the problem at its source — in criminal court before plea — the damage may be irrevocable.

Unfortunately for many immigrants with criminal histories, deportation is mandatory. If the client has been convicted of an offense considered an “aggravated felony” under immigration law, deportation is mandatory, there is no possibility of release on bond, and the noncitizen is barred from nearly all forms of relief. Even if the conviction is not an aggravated felony, there are many reasons why it may still be impossible to avoid deportation:

1. Noncitizens may not be eligible for any form of immigration relief because they have not been in the United States long enough, or do not have the family connections required for relief. The immigration judge may also deny relief as a matter of discretion.

2. The noncitizen may be unable to afford immigration counsel or bond, particularly if the client is detained and unable to work. Half of all immigrants in deportation proceedings are unable to afford immigration counsel to defend them, and there are no court-appointed counsel in deportation proceedings.

3. Those in mandatory detention are often unable to tolerate the inhuman conditions during the months or years necessary to litigate and win their cases in immigration court or on appeal. Noncitizens often describe their experiences in immigration detention as being worse than prison.

4. Although it may be possible to seek post-conviction relief from the conviction, the difficulties are often insurmountable. Post-conviction work is expensive, it may be difficult to get into court, the client may be deported before post-conviction work can be completed, or the immigration court may refuse to reopen the case or refuse to recognize the effect of a successfully vacated conviction.

III. It is Part of Our Job as Criminal Lawyers, and It’s in Our Interest to Do a Good Job

It is quite common for judges and criminal lawyers to believe that criminal counsel has no responsibility to protect the client against the collateral immigration consequences. This is not true. It has always been our job to protect our clients against convictions and sentences, and investigation of the potential immigration consequences of a criminal case is one means of discovering exculpatory and mitigating facts that can be used to obtain less serious convictions and shorter sentences — i.e., to reduce the direct penal consequences of the case, our core responsibility. The standard of practice has now changed to require us to protect the client against the collateral immigration consequences as well. As criminal counsel, we have a legal and ethical responsibility to protect our clients from damaging immigration consequences of a criminal case. Moreover, it is in our own interest to do so.

Ethical Considerations. It is not okay for us to plead a client out without telling him or her the collateral consequences that will or may inexorably flow from the plea. Real estate lawyers protect their clients against tax disasters, even though they are not tax lawyers. Civil lawyers protect their clients against criminal exposure, even though they are not criminal lawyers. The boundaries of our ethical responsibilities are not set by artificial limits or the semantic labels we attach to our professional specialties, but by the needs of our clients.

If we lack the necessary learning and skill to represent a defendant in a particular case, we must (a) decline the representation, (b) associate another attorney with the necessary skill and learning, or (c) learn what is necessary if we have the time, resources, and ability to do so. The ABA Model Rules of Professional Conduct require counsel to have the legal knowledge and skill necessary to represent a client.

Additionally, we cannot limit the scope of our representation without getting the clients’ “informed consent,” which requires informing them of the material risks of proceeding to handle a criminal case in ignorance of the immigration consequences, and the available alternatives to doing so, i.e., obtaining a different criminal lawyer who is competent to protect the client’s immigration status.

Courts Expect Us To Do It. Increasingly, the courts expect us to protect
the immigration status of our clients as we handle the criminal case. For example, the United States Supreme Court has stated:

Even if the defendant were not initially aware of [the possible waiver of deportation under the Immigration and Nationality Act’s former] § 212(c), competent defense counsel, following the advice of numerous practice guides, would have advised him concerning the provision’s importance.10

“[M]any states have found that it is a breach of professional responsibility for a defense attorney to fail to discuss the immigration consequences of a plea agreement with a criminal defendant.”11

The Standards of Our Profession Require it. The ABA Standards12 establish the duty of defense counsel to “determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea.”13 The Commentary to this Standard states that “counsel should be familiar with the basic immigration consequences that flow from different types of guilty plea, and should keep this in mind in investigating law and fact and advising the client.”14

We should therefore learn the client’s immigration status during the initial interview with the client,15 be fully aware (and inform our clients of) the deportation and other immigration consequences of any potential plea,16 become familiar with the possible immigration effects of possible sentences that may be imposed,17 and be prepared to protect the client’s interests, by avoiding these consequences if possible.

State Statutes Require it. A growing number of states (20 at last count18) require the court taking a plea to inform every defendant of the possible immigration consequences. Since these requirements apply to every single guilty plea, we are clearly on notice in these states of the potential for disaster. This triggers the ethical duty to assist the client to learn the actual level of risk posed by this plea for this defendant, inform the client, discover how much s/he cares about the immigration consequences, and formulate a strategy to minimize them to the extent the client wants to do so.

Ineffective Assistance of Counsel. There are a number of ways in which failure to protect our clients against immigration consequences of criminal cases may be considered ineffective assistance of counsel:

1. Duty to Investigate and Use Mitigating Facts. Regardless of what jurisdiction you practice in, defense counsel has a bedrock duty to investigate all facts closely and openly connected with the case,19 seeking mitigating facts that can be used in plea bargaining or during sentencing to obtain a plea to a less serious offense, or a shorter sentence.20 These latter consequences are direct penal consequences, not collateral consequences. This general duty therefore includes the duty to investigate the immigration consequences of various dispositions and to present the pending immigration disaster to the prosecution and court as a mitigating factor to consider in lessening the seriousness of the offense of conviction or the length of the sentence. This argument is supported by numerous analogous cases.21

Ineffective assistance of counsel can be shown where — absent the error — there is a reasonable probability the defendant would have received a sentence even one day shorter in length,22 such as where counsel fails to present to the court the information that a 365-day sentence will result in making the client deportable as an aggravated felon, while a sentence of 364 days would not.

2. Duty Not to Give Affirmative Misadvice. We render ineffective assistance of counsel if we affirmatively tell the client something about the immigration situation that is not

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accurate. In some jurisdictions, telling the client only that s/he “might” be deported, where deportation is mandatory, is affirmative misadvice.

The basis for these decisions is a recognition that “deportation is a drastic measure and at times the equivalent of banishment or exile,” and therefore the possibility of deportation is a “material matter” for noncitizen defendants faced with pleading decisions in criminal court.

3. Duty to Advise. Federal law is apparently moving toward greater recognition of defense counsel’s duty to research federal immigration consequences and give correct advice concerning them. Many states are also ruling that counsel has an affirmative duty to investigate and advise the defendant of the exact immigration consequences of a plea prior to its entry.

4. Duty to Defend. A California court of appeal stated that counsel also has a duty to defend the noncitizen against a plea that would have adverse immigration consequences. Thus, if it appears that a conviction will trigger an immigration disaster, counsel has a duty to assist the client in attempting to obtain an alternative disposition that would lessen or avoid the disastrous consequences. This makes sense. It does not make sense to tell our clients the plea about to be entered will destroy their lives and then do nothing to help them avoid it.

It Is In Our Own Interest To Defend Our Clients Against Immigration Disaster. Beyond our client’s interests, it is in our own interest to protect our clients for a long list of reasons:

• Desire to deliver excellent legal services.
• Benefits of practice development through total client service.
• Ineffective assistance of counsel.
• Malpractice liability.
• Malpractice insurance rates.
• Eligibility for membership on court appointed panels.
• Damage to reputation within the profession.
• Damage to reputation among client communities.
• Disciplinary sanctions: disbarment and lesser penalties.
• Damage to self-esteem.
• Loss of income.
• Stress and mental distress.
• Costs of attempting to rectify a mistake.

The time has come for us to recognize that in every single case, we must (a) learn whether or not our client is a United States citizen, and (b) if not, investigate the actual immigration consequences of various possible dispositions, inform the client, and try to avoid them if appropriate and if possible.

IV. Conclusion: What Should We Do?

There is a simple way we can use our knowledge and skills as criminal lawyers to protect each noncitizen client against deportation that does not require us to learn the complexities of immigration law. Here are the five steps:

(1) Citizenship. We must get a reliable answer to the question, “Are you a U.S. citizen?” from every client.

(2) Investigation. If the answer is “no,” we must obtain from the client the information necessary to formulate a strategy to avoid unnecessary immigration consequences, i.e., the information that immigration counsel needs to figure out the immigration effects of the possible convictions and sentences.

(3) Consultation. We need to call an immigration expert and discuss the different possible dispositions, seeking a non-deportable target outcome in the criminal case. We need to tell the client the immigration consequences of different courses of action, and find out what the client wants to do in case of any tradeoffs.

(4) Negotiation or Litigation. We need to try to obtain our desired goal by negotiation, or, if necessary, litigation.

(5) Saying Goodbye. At the end of the case, we need to tell the client what to expect from the immigration authorities and refer the client to immigration counsel if necessary.

While the immigration analysis can sometimes be extremely complicated, the bottom line is often very simple. After the immigration analysis has been done, the target disposition will often boil down to something as simple as (a) entering a plea to Count II instead of Count I, or (b) obtaining a sentence of 364 days, instead of 365. Once we know the target disposition that will save the client from deportation, our job is simply to use our normal criminal defense skills to try to obtain it if possible.

These jobs do not necessarily require esoteric immigration knowledge, only our basic criminal defense skills. The immigration lawyers we consult can provide the expert, up-to-date immigration knowledge and analysis as long as we provide them with the necessary information so they can do an accurate job of diagnosis and participate with us in preparing a joint treatment plan.

Training and practice manuals in this area are designed to tell you what you need to know to do a good job of (a) identifying the foreign nationals on your caseload, and (b) protecting them as much as possible against immigration consequences. Books such as CRIMINAL DEFENSE OF IMMIGRANTS are guides to where to get the help you need to do these two jobs.

FOOTNOTES


E.g., Jacobs, Indictments Lurking in Civil Cases, CALIFORNIA LAWYER 20 (February 2006) (describing necessity for civil lawyers to be alert to criminal issues arising in civil cases).

E.g., California Rules of Professional Responsibility 3-110(c).

American Bar Association, Model Rules of Professional Conduct 1.1(2) (“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”).

Under the ABA Model Rules of Professional Conduct, “[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.” ABA Model Rule 1.2(c). “Informed consent” is defined as “the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” ABA Model Rule 1.0(e).

INS v. St. Cyr, 533 U.S. 289, 323 n.50, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001) Jdeenwo v. INS, 224 F.3d 692 (7th Cir. 2000). See also Magana-Pizzano v. INS, 200 F.3d 603, 613 (9th Cir. 1999), on remand from United States Supreme Court sub nom. INS v. Magana-Pizzano, 119 S.Ct. 1137 (1999); Tasisio v. Reno, 204 F.3d 544, 552 (4th Cir. 2000).

Strickland v. Washington, 466 U.S. 668, 681 (1984). See also Kimmelman v. Morrison, 477 U.S. 365, 384, 91 L.Ed.2d 105, 106 S.Ct. 2574 (1986); Hendricks v. Vasquez, 974 F.2d 1099, 1109 (9th Cir. 1992) (vacating conviction); United States v. Burrows, 872 F.2d 915, 918 (9th Cir. 1989) (reversing conviction for failure to investigate a mental defense); Evans v. Lewis, 855 F.2d 631, 637 (9th Cir. 1988) (holding a failure to investigate “cannot be construed as a trial tactic” where counsel did not even bother to view relevant documents that were available).

Williams (Terry) v. Taylor, 529 U.S. 362, 120 S.Ct. 1495 (2000) (effective counsel must investigate and present available mitigating evidence at sentencing, including evidence of social history); Kasir v. Calderon, 283 F.3d 1117 (9th Cir. 2002) (prejudicial ineffective assistance found where counsel failed to investigate and present highly relevant information of abusive childhood; “reasonable probability” existed that jury would find information important in understanding root of petitioner’s criminal behavior culpability); Horton v. Zant, 941 F.2d 1449, 1462 (11th Cir. 1991) (failure to present mitigating evidence at sentencing cannot be strategic, tactical decision where counsel fails to investigate).

Why Are You a Criminal Defense Lawyer and What Are You Going To Do About IT? Part 2

By Tom Adler

Last year *Forum* reprinted an article (Volume 33) that I authored which had originally appeared in the San Diego Criminal Defense Bar newsletter. That article said in relevant part:

“How many of us are actively involved in the issues of global warming, health care, Iraq, corporate fraud and greed, healthcare, education, poverty, discrimination, capital punishment? But, you say, CDBA isn’t the right place for these issues. To this I reply, why not? Criminal defense lawyers are, in my view, perfectly suited to taking on the larger issues destroying our country. They’re trained, smart, tough and take on the government on a daily basis. Who do you trust more to do the right thing — a politician or a criminal defense lawyer? These are serious times for our country and I don’t see too many people doing anything about the forces of evil. No one else is going to win these battles except warriors. I think that’s us.”

Since that time, things have deteriorated even further. I paid close attention to the firing of Carol Lam, the United States Attorney in San Diego and her colleagues and watched the subsequent disintegration of the Department of Justice into an evangelical group of lawyers playing politics with, among other things, the Civil Rights Act. There was a great hue and cry from the Judiciary Committees of both houses, the press had something to feed their talking heads. In Pakistan when the President fired the Chief Justice of the Supreme Court, the lawyers took to the streets in their suits and ties and rioted. In San Diego the City Council just cut funding for the homeless shelter this winter in approximately the same amount of tax dollars they spent on hiring their own lawyers because they were worried about criminal liability arising from the pension debacle.

The list goes on and on. What I still haven’t read or heard anything about is our local criminal defense lawyers doing anything about the parade of constitutional horrors that are occurring in our country. The toughest litigators who regularly take on the government to defend a drunk driving client or murderer seem to feel that these systemic problems are something they have no control over or are too busy to deal with. Should we sit idly by while Libby gets his sentence commuted and 20 year old kids are serving 10 years for a drug conviction? Doesn’t this have anything to do with our own lives and those of our clients? Perhaps we think Washington is some far away place that we are powerless to do anything about. But we can sure try.

I looked over the CDLC/CDBA statement of purposes which appears on the new website. One of the stated purposes is to “Promote justice, adherence to legal principle and the rule of law”. Since the administration of our country controls the Justice Department and has taken over the sentencing powers of the federal court by taking care of their friends who get convicted and are intent on violating the law — the question becomes who is going to intervene? Isn’t it the lawyers charge to right injustice? Isn’t that what we are supposed to do?

President Clinton had a great idea. He held a symposium of business leaders who were charged $15,000 to attend and, in addition, had to commit to taking on a project to solve one of the world’s problems. It was and still is a large success. Why would they do this? Why is Bill Gates devoting his life to giving away money? Why are there successful civil lawyers who travel to the South and spend years defending death penalty cases pro bono? The answer is simple. It’s good work. It’s a lawyer’s work. And if you do it you will be rewarded in ways that mean more than money and which you can’t understand until you’ve done it.

Rants really don’t mean much unless there is a call to action. Here’s what I suggest.

Criminal defense lawyers who can afford it (and you know who you are), take a sabbatical and choose something that really bothers you — whether it is homeless funding, secrecy of government records, denial of health care, conservation, global warming or any other issue where you have an interest and feel you can accomplish something – and go for it. Organize or litigate or badger or do what lawyers do to effect change. For
2007 Joyce O. Yoshioka Scholarship

The public doesn’t always understand why we do what we do, but we do it out of a sense of dedication to the Constitution and the individual — Joyce O. Yoshioka

Joyce Yoshioka, former member of CACJ’s Board of Governors and outstanding criminal defense attorney, died on June 28, 1990, at the age of 42, after a three-year battle with cancer. Joyce served as Ventura County’s Chief Deputy Public Defender for six years and before that, worked for the Los Angeles County Public Defender’s Office as a trial lawyer and supervisor.

As a tribute to her career dedicated to helping others, CACJ has established through the CACJ Foundation the Joyce O. Yoshioka Scholarship Fund. Each year, attorneys, paralegals, law students or investigators involved in criminal defense work are awarded full tuition grants to CACJ programs. Tuition grants awarded for 2008 are the CACJ/CPDA Capital Case Defense Seminar, the Annual Spring Seminar, the Appellate Practice Seminar and the Annual Fall Seminar. Scholarships are available to CACJ members only and are not transferable to third parties or to future programs.

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CACJ's outstanding seminars, workshops and publications enhance the skills of criminal defense attorneys and attest to the dedication of their work. CACJ assists as amicus in many cases every year, and provides pro bono representation for defense attorneys facing contempt charges.

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“Police Science”
An Evolution of Expertise?
By Gene Gietzen

It has been said to understand where you are going you must know where you have been. I have been in forensics and law enforcement for over 33 years and reflecting back one becomes amazed about the advancement in my field. Here are some examples:

1. Thirty years ago blood analysis consisted of specie determination and ABO blood groupings. This was followed by blood enzymes and proteins and now we have DNA that is increasing more specific with smaller and smaller samples.

2. Drug identification went from presumptive tests and thin layer chromatography to Gas Chromatography and finally GC/MS (Gas Chromatography/ Mass Spectroscopy) can positively identify any organic compound.

3. Latent prints developed at a crime scene were relegated to the file unless a suspect was known. Now we have the Automated Fingerprint Identification Systems which allow a latent to be checked against a large computer database. Cases with no suspects can be solved with the click of the “search” button.

Forensic analysts have gone through their own evolution. Back in my era, most labs operated under the “generalist” concept where one analyst was capable of conducting multiple examinations on the evidence. As time progressed and examinations became more time consuming and complex the “specialist” concept began. The staff of a current lab consists of drug chemists, toxicologists, serologists, DNA specialists all concentrating on one area of analysis. For example, if a weapon is submitted for firearms and latent prints, the weapon is handled by at least two examiners.

There also became a slow change in the way evidence was examined in the lab. Not too long ago the forensic scientist was submitted evidence and they conducted the various examinations on the evidence to maximize its potential. Increasing backlogs removed this discretion and in most labs today, the forensic scientist conducts only those examinations requested by the investigator.

Forensic scientist involvement with crime scene work has also been minimized. This was another way to address the increasing backlog situation which shifted there responsibilities towards law enforcement officers, trained in evidence collection and preservation.

These steps on the evolutionary ladder marked a bifurcation in both the forensic sciences and the way various investigations are conducted. We now have the forensic labs headed by uniformed officers, not forensic scientists and the use of law enforcement officers, trained in evidence collection and preservation.

Loosely defined, “Police Science” involves the training of police officers in a science based area. This training consists generally of 40 – 80 hours of instruction very often by non scientific personnel. There is no requirement for any science/education background, rather the most commonly encountered prerequisite is time as a police officer.

Whether one wants to believe this or not, you see examples of “Police Science” in many of the cases defense attorneys in the courtroom.

Gene graduated from the University of Missouri – Kansas City with a B.S. in Biology and a minor in Chemistry. A few weeks later he became employed at the Chemist with the City of Independence Police Lab. In that capacity he was responsible for a wide variety of analytical duties and crime scene investigation. In 1977 Mr. Gietzen became a police officer with the same department and was assigned to both traffic and patrol. In 1980 Mr. Gietzen assumed the position of Serologist with the Springfield Police Dept Crime Lab and was responsible for the inception of the use of blood enzyme/protein analysis, the forerunner of DNA, in that lab. Two years later he assumed the Directorship of that lab and became responsible for the laboratory and identification units. In addition to the management of the lab, Mr. Gietzen remained an analyst conducting various examinations as well as being involved in crime scene investigations. While as the Director, Mr. Gietzen became a state certified instructor, researched, wrote and instructed law enforcement officers and major case investigators in the area of the crime scene investigation, evidence collection and preservation and death scene investigations. In 1992 Mr. Gietzen formed Forensic Consulting Associates and has provided instruction in forensic issues to various attorney groups/associations and was an instructor for the Administrative Office of the U.S. Courts for three years instructing federal defenders and federal panel attorneys in regards to Methamphetamine Labs. Mr. Gietzen has vast experience in the area of impairment/intoxication ranging from arrests made as a police officer to the review of over 1,000 DWI cases which includes preparing blood alcohol estimations, extensive research in the Drug Recognition Program and expert testimony in city, state and federal courts relating to the results of his reviews. Forensic Consulting’s Website can be found at www.forensicconsult.com.
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and prosecuting attorneys receive. The following are examples of “Police Science”: DWI Investigation, Drug Recognition, Clandestine Lab Investigation, Blood stain pattern analysis and other processes such as the application of luminol at crime scenes.

Before we discuss the various areas of this “field” there are two facets that must be addressed.

The first factor is bias. The focus of law enforcement is the apprehension of a person suspect involved in a crime. At the beginning of an investigation very often investigators develop “theories” as well as “persons of interest” or “suspects.” It is this information that can often drive the course of the investigation creating the potential for ignoring or missing of evidence that does not support these theories or paradigms of the time.

The second facet is whether the training the officers receive constitutes their status as a “technician” or an “expert.” This debate has been ongoing throughout the years. By a technician I am referring to someone who has received specific training to conduct a specific function. An “expert” is one that through a combination of education, training and experience not only has the ability to conduct a specific function but understand the basis and theory behind these processes.

These two facets will become more apparent as we look at the individual “police science” areas.

Driving While Intoxicated

These cases amount to a large portion of caseload submissions. The only real science behind DWI cases is the theory of the breath instrument itself. After this, the rest is the subject of debate in the scientific community.

The standardize field sobriety tests are “subjective” in nature and can be affected by a wide variety of health and environmental conditions as well as officer perception. For example, conducting the HGN test with the patrol vehicles strobe lights on anywhere the subject can see them or their reflection creates the potential for opto-kinetic nystagmus which can be mistaken for HGN. The organization which regulates and promotes these types of tests is National Highway Traffic Safety Administration, not considered a part of any “scientific community.”

Most states require only one breath test. The scientific community has a history of promoting “duplicate” testing to ensure the accuracy of the original tests. In forensic labs, most blood alcohol examinations involve the use of triplicate sampling to ensure accuracy and reproducibility in the data. Most states rely on a single breath test which fails to meet “scientific criteria” for quantitative analysis.

Breath patterns during the testing process have also been found to affect the results.

If you look at the breath instrument specs and the maintenance reports, you can find up to three different “margins of error.” The first comes from the instrument manufacturer, the second comes from the simulator solution “certificate of analysis” and the third is an “administrative” margin of error from the state organization responsible for the maintenance and calibration of these instruments.

Here’s how they interplay. Let’s say the instrument company states a +/-2% margin of error. The simulator solution may have a +/-3% margin of error and the state agency provides for a +/-5% margin of error. If a 0.10% simulator solution provides a result of 0.104%, it is beyond the margin of error of the instrument and the calibration solution manufacturer, yet within the state’s authorized 5% margin of error. Scientifically this result is beyond the “margin of error” reported by the instrument manufacturer and the “certificate of analysis” that comes with the simulator solution, but within the administrative “margin of error.”

Related to the calibration of the instruments, many states only require the use of one simulator solution, most often the 0.10% standard. Analytical instruments that provide quantitative information have what is referred to as a calibration curve. Ideally this is a straight line, however in the real world this is not often the case. Many instruments calibrated to a certain level may not read lower and higher levels within the same degree of accuracy. With only one calibration standard, how does one draw a straight line through one point to demonstrate the calibration curve? Please keep in mind the body’s natural metabolic processes can create low level alcohol, so the notion of using the 0.0 point on the chart along with the single calibration run result is not valid.

These issues can be very important from the aspect of those BAC’s slightly above 0.08% and critical to the commercial driver’s license violations which have a 0.04% legal limit.

Drug Recognition

The Drug Recognition Program was developed by the Los Angeles Police Department. The process involves utilizing all of the same SFST as used in alcohol related cases plus the taking of certain vitals such as blood pressure, pulse etc. Based upon these tests and a urine sample, the officer is believed to be capable of providing opinions as to the classification of the drug(s) causing the impairment.

It goes without saying human physiology is a complex subject. The ability to classify as “normal,” “above and below normal” can be difficult to do. For examples, some individuals have high blood pressure naturally and may not know it. For others the stress of the arrest situation elevates both blood pressure and pulse. The manner in which these reading are obtained can also lead to errors. When you consider the potential for mixtures of drugs and some alcohol also can lead to misinterpretation.

As with breath alcohol, the scientific community recommended two urine samples be taken, within 20 – 30 minutes of each other. This procedure was not adopted. The urine test results do not confirm what in the subject at the time of driving, it demonstrates what was found in the bladder since the time of the last urination, some-
thing that is not determined and probably wouldn’t be remembered in the first place. Whatever is in the bladder has no effect on the individual.

The interpretation of the results is also in question. The most commonly found drug is “Carboxy-THC” an inactive metabolite of Marijuana. Being inactive, this substance does not produce any effects on the person, yet many Drug Recognition Officer’s misinterpret these results as being indicative of being under the influence of Marijuana. To quote Barry Levine: “Nevertheless, a positive urine test for cannabinoids indicates only that drug exposure has occurred. The result does not provide information on the route of administration, the amount of drug exposure, when the drug exposure occurred, or the degree of drug impairment.” The finding of Carboxy-THC only means that Marijuana was ingested but provides no clue as to how or when.

I have been unable to find any generally accepted data that indicates the levels for the various drugs that would cause impairment.

As with DWI Investigation, the Drug Recognition Program does not follow strict scientific procedures that would make this process generally accepted in the scientific community.

**Clandestine Laboratory Investigation**

Clandestine Labs have been a national epidemic for a matter of years. In the days of yore, clandestine meth labs were more sophisticated, requiring a great deal more knowledge and expertise than what is needed with the two current methods. The investigation of the old P-2-P labs usually involved the utilization of chemists who had knowledge of their operation.

In today’s world clandestine lab investigators receive 40 hours of training in this area. The culmination of the training requires them to manufacture meth. There is very little training in the area of chemistry, how the reaction occurs or the factors that can affect the synthesis process. The training is mainly geared to evidence collection and preservation, thus adding fuel to the previously mentioned debate of “technician” versus “expert.”

The lack of chemistry and knowledge of proper terminology becomes apparent when the word “precursor” is used to describe things like red phosphorus, anhydrous ammonia, lithium and hydroiodic acid/Iodine. “Precursor” indicates the required substance that will be converted and PSE is the only precursor, these other items are “essential chemicals.” In another case the clan lab investigator opined the use of ammonia cleaning solution was a viable substitute for Anhydrous Ammonia. Wrong! The cleaning solution is ammonium hydroxide which will not convert PSE to Meth. Most recently, I read where a clan lab investigator stated Phenylephrine, the active compound in Sudased PE, is the same compound as Pseudoephedrine and would be converted to Meth. Again, completely wrong.

Speculation can run rampant in these cases and the interpretation of the evidence also creates some unusual findings, much like the investigator who called a particular site an “active” lab even though it was missing the anhydrous ammonia and any evidence of anhydrous. The investigator explained the reason it was an active lab was because all the suspect had to do is “go steal some.”

Multi-suspect cases often fail to involve the use of latent print processing on the evidence. Many investigators will state glass jars, bottles, cans and other items capable of possessing latent prints were not processed due to contamination issues.

I recently reviewed a case where the two boxes of precursor were destroyed with no photographs. The investigator provided precursor dosage information that was four times the actual amount. Where they came up with the numbers is unknown because the manufacturer told me the formulation hasn’t changed in over 10 years. Think of the effect of four times the actual amount of PSE would have on a Federal Theoretical Yield!

Also a recent occurrence is the use of the investigator in calculating theoretical yields in federal cases, thus avoiding the potential testimony of a forensic chemist relating to such facets as conversion factors, effects of precursor extraction and methodology factors affecting the amount of meth that could be produced.

**Blood Stain Pattern Analysis**

This was an area that was specifically a forensic science area, as a matter of fact when I started with Blood Spatter there basically was one school of thought researched and taught by Herbert MacDonald. Now his pioneering work has been “updated” and become another area of training open to just about anyone who wants to attend. Please note, I am not attacking those others who have done extensive research and work in the area of blood spatter, everyone of these individuals is eminently qualified, what I am concerned about is placing this testing process in the hands of individuals who have no biology, chemistry or physics, all of which form the basis of the science.

Blood Stain Pattern Analysis School is 40 hours. During this time the students are instructed in basic concepts of spatter formation, directionality and how to classify certain stains. Ross Gardner, another noted spatter expert wrote:

“Methodology is not taught in most bloodstain pattern analysis courses. Budding analysts are taught all the skills applied in blood stain pattern analysis: recognition of patterns, impact angle determinations, and area of origin determinations to name a few. But few instructors teach students how to apply these skills by providing a methodology that would keep the analyst within the confines of the discipline and help him or her reach valid conclusions.”

It appears the students are not taught to take this information and expand upon it with their own series
of experimentation, to research and learn more before they apply their skills.

You would be amazed at the number of crime scenes that bear spatter patterns that never receive attention until much later in the game. Most of these scenes were photographed without the benefit of scale devices, proper close ups or a series of photos depicting the interrelationships between the spatter. Unfortunately that is not an impediment to some, as they produce reports that read as if they were there from the start. One must view spatter opinions with extreme caution and later in this paper is an example as to why.

Other Scientific Testing Procedures

As Police Science grows, so does the associated tests and procedures being conducted by those with limited knowledge and understanding. Previously in this article I mentioned Luminol, a presumptive test for blood. This test reacts with the heme group in blood to produce a bluish green chemiluminescence that is indicative of blood. This particular reagent requires experience in its application and interpretation.

Several cases have been submitted where the officers using this reagent had little, if any training or experience with its use. In one case the officer testified his training came from another officer who indicated to mix the chemicals, spray it on the item and if it “glowed” it was blood.

Field test kits are readily available for officers to use as a presumptive test for suspected controlled substances. These tests are very similar, if not the same as those used in forensic laboratories, yet there remains certain “constraints” forensic scientists understand that are often missed by untrained and unknowing police officers. For example, multi-drug compounds subjected to these field test kits can provide erroneous results.

I have read preliminary hearing transcripts where the basis for the identification of a controlled substance is the field test kit results. The analytical result did not confirm these tests.

Education, Training and Experience

Since we have examined some of the areas included in the Police Sciences, I think it is also necessary present a discussion of equally inter-related issues: education, training and experience. There are many who lump education and training into the same category. Others believe education indicates more of the academic based college courses while training refers to the more topic specific seminars. No matter what side of the fence you stand on, the real question is “Will more shingles hanging on your walls make you an expert or a better expert?”

What happened to experience? Are you a better attorney today or when you first graduated from law school? When did the criminal justice system trade experience, exposure and OJT in deference to attending some seminar, junket or week long training school? Expertise is gained through experience, exposure, research and a critical part of the educational process that I affectionately refer to as “play time.”

“Play time” is serious experimentation time in which a particular procedure/process is conducted in a controlled environment to gain familiarity with the steps, understanding the procedure/process as well as being exposed to those substances known to cause false positive or to interfere with the reaction long before the procedure/process is used at the scene. It is also used on a case specific basis in an attempt to more thoroughly understand the evidence as shown by the use of models and simulations.

The other benefit of experience is the knowledge to understand when to say “no” or “it can’t be done.” What I am speaking of is learning the limitations of these various processes and when these limitations are reached to the point the data or result can be erroneous.

A very recent case submission accentuates this point. A blood spatter analyst was asked to determine drying time for blood on a galvanized fence post. Since the suspect admitted to handling the evidential pole, this was perceived as a means to substantiate or disprove this story as it relates to how the blood was deposited on his clothing.

There was no means to determine the amount of blood on the evidentiary pole. This should have been the point to say “no” but the analyst continued by spreading the pipe with human blood containing an anti-coagulant, something not found in whole blood. This was followed by a second experiment to determine the drying time in the sun and shade this time using a smaller amount of blood again with an anti-coagulant. While the temperatures were within 5 degrees of the temperature the night of the incident, the humidity was not, differing by almost 20 percent. The times the experiments were conducted were not consistent with the time of the offense and there was no attempt to consider the nature of the crime scene compared to where the experiments were conducted.

In addition to the drying time issue, the same analyst rendered an opinion as to the nature of 3 or 4 small blood drops on the suspect’s shoes. This examination was conducted after swatches and swabbing of the shoes had been taken, meaning the evidence was not in the same or similar condition as it was at the time of collection, actually it had been altered and no photographs of the “pristine” evidence were taken.

The net result of this whole experiment was, in my opinion as well as other sources, unreliable. The information obtained fails to meet the criteria that would be within a reasonable degree of scientific certainty. Oh, by the way, this was the analyst’s first “testimonial” case.

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This adds more shingles and diplomas to hang on one's wall and believe me during trials many witnesses have the recitation of their training and organizations down pat.

I have looked at many of these organizations and have found the requirement for attendance of an “accepted training course of at least 40 hours.” Once again, education and training is considered more important than experience. According to this theory, Albert Einstein couldn’t belong to some physics organizations because he hasn’t received current training. It is almost as if some of these organizations are an attempt to “legitimize” the concept of Police Science.”

Don’t believe me, look at the Clandestine Lab Investigators and Clandestine Lab Chemists Association’s requirements and what you find is a requirement to work for a lab or law enforcement agency. This is called a “closed society” and most “real” scientific organizations are open, meaning their members come from academia, the public and private sector and research institutions.

What if these organizations had a requirement to demonstrate knowledge and experience through some form of testing program, interview process or the submission of past case articles?

The area of “certifications” is somewhat recent on the evolutionary scene. An individual can be knighted with the title “certified” by meeting criteria established by various organizations, examples of such are “certified crime scene investigator” and certified blood spatter analyst.” In addition to the shingles and diplomas, we also have “certification” documents which means one has to increase the size of their office!

Interestingly, I received a host of “invitations” to become “certified.” Guess what I had to do to obtain this designation? Send in an application and a fee. That’s all. Now you tell me how meaningful this is? Things have changed somewhat now but one has to wonder about the credibility of a title that started in this manner.

Summary

Paul L. Kirk, Ph.D. in his book Crime Investigation1 says it best: “Physical evidence cannot be wrong; it cannot perjure itself; it cannot be wholly absent. Only its interpretation can err.” This is a powerful statement when one considers the impact evidence can have on members of a jury or a judge in determining the guilt or innocence of an individual.

On cannot downplay the effect the multitude of television shows such as the “CSI” Series and “Forensic Files,” to name a few, have on the public at large and their perception of what can be done. For the most part police officers are shown conducting intricate scientific testing and interviewing the witnesses and suspects and solving the entire matter in an hour. Scientists with guns — now that’s a scary thought!

Investigations and trials are all about getting at this truth. The unbiased examination of evidence can assist in this goal. Remember according to Kirk, “only its interpretation can err” and it can be very difficult to determine if the opinion is in error. Look at the blood spatter example cited above, it sound plausible, a result of actual scientific testing, yet upon close inspection it became fraught with errors.

I do not mean to imply, by this article, all police officers who conduct these types of examinations are constantly making mistakes in opinions or judgment. I have encountered a number of highly motivated police officers and investigators who conduct themselves and their examinations in a manner better than some forensic scientists. They are thorough, unbiased and know when enough is enough. I have admiration for these individuals.

What I am addressing are the individuals who receive this training, believe they are instant experts and conduct themselves as such, often without a clue as to what they are doing or care about the validity of their opinions.

All science based examinations and opinions must be “within a reasonable degree of scientific certainty” using methods that are “generally accepted within the same scientific community.” I am not aware of anyone recognizing the “police sciences” as a legitimate scientific community.

I would urge all attorneys, on both sides of the aisle, to be aware of the potential impact the “police sciences” can have on a case and to scrutinize the work of these practitioners to ensure a high quality of effort, based upon education, training and experience was the means to derive a quality opinion.

FOOTNOTES

1Levine, Barry, Ph.D. Principles of Forensic Toxicology, American Association for Clinical Chemistry, Inc.
3Kirk, Paul L, Ph.D., Crime Investigation, Interscience Publishers, Inc, NY, NY. 1953 ▲
The National Association of Criminal Defense Lawyers and the California Attorneys for Criminal Justice present the 1st Annual Forensics Seminar:

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   – Keith Inman

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Google Street View
By Albert J. Menaster

In this column I review Google’s new street view, which allows you to view street-level photographs of astonishing quality taken from vans just driving around. I compare it to Microsoft’s live view; in live view, the pictures aren’t at street level and aren’t of such great quality, but the Microsoft pictures are of almost everywhere. Next, I’ll cover a good Palm program that allows you to read pdf documents on the Palm. Finally, I’ll review mp3 player programs for the Palm, focusing on bookmarks, and featuring a truly great alarm program that integrates with the mp3 programs.

Google Street View

I’d be surprised if you haven’t heard about this by now. Google has introduced a new feature for its Google maps, called “street view.” It is truly incredible, and gives you street-level pictures of what you would see driving down the street.

Google had vans drive around each of these cities taking pictures. What you get when you click on street view is an extremely high quality photograph of the location you selected. If Google took a picture at that spot, you will see a map with blue lines. The blue lines show where pictures were taken.

Get to it this way. Go to Google maps, either by clicking on the maps link at www.google.com, or by going directly to maps.google.com. Put in an address. Street view was initially released for only five cities, the only one in California being San Francisco, but in August a whole slew of additional California locations was added, including Los Angeles and San Diego.

Let’s go to San Francisco. So put in a San Francisco address. If you can’t think of one, put in “golden gate bridge san francisco.” You’ll get the usual map from Google. One of the links, in the upper right corner of the map, says “street view.” Click on that. Now click on the graphic of the bridge itself.

Once you have an actual picture up on your screen, you can move around. Using your arrow keys, move forward, by hitting the up arrow key. You might need to click once in the actual picture itself. You will just be driving, virtually, down the street, seeing exactly what it looks like. Hit the left or right arrow key and the view will rotate just as if you are turning your head. Hit the down arrow key and you will go backward. You have to see this to believe it; it is truly incredible. The pictures load in a window on your screen. But you can click on the “full screen” link and get a picture that fills most of your screen.

Of course, people have gone nuts over this. Lots of folks are in a panic over the privacy issue. If you’re out in public, your conduct is no longer private. I have been able to make out faces of people inside a restaurant eating. Of course, there’s no date and time stamp, but even so. There are reports of people being photographed doing all sorts of embarrassing things, like picking their noses. If you’re into this sort of thing, check out mashable.com/2007/05/31/top-15-google-street-view-sightings/, with someone’s idea of the 15 top Google street view sightings.

Microsoft, Live View

Microsoft, not surprisingly, isn’t ready to concede this potential market. For some time now Microsoft has had its Live Local Search available. It’s at maps.live.com. Go there and put in an address, any address, anywhere in the country. You get the usual map. In a box to the left of the map there are choices for Road or Aerial or Hybrid. Aerial generates an actual photograph from space. You can use the box to zoom in pretty far.

Also in this box is a choice of two boxes, map view and bird’s eye view. Click on bird’s eye view. You get an angle shot as though it’s taken from a helicopter at an angle. Again, you can zoom in pretty far. This is pretty amazing, although it’s just not the same as the street-level views of Google.

But the upside is that I’m having a hard time stumping Live Local Search. Google is limited to a few cities, though most of the major California cities are now included. Although I assume that those Google vans are just driving around as we speak. So be careful what you do in public. Live Local Search seems to span the country.

Capturing The Pictures

So why am I telling you about these sites? The bad news is that you can’t just right click on one of these
pictures and save it. But what if you check out the crime scene and find a great picture that illustrates some crucial point in your case? You want that picture, darn it! How can you get it?

The solution is a program that captures your screen and produces that screen into a format you can use. What does that? What, aren’t you reading and memorizing my columns? In just the last column I wrote about such a program, called Gadwin. You can get it at www.gadwin.com/printscreen. It is totally free. You can use it to capture your entire screen or just the part with the picture in it; then you can export the capture to your computer in a file format (like jpg or gif) that you can then work with, by printing it or putting it into a document or a slide show.

A cheap and dirty alternative is to simply press the “Print Scrn” button on your keyboard and then paste the resulting screen capture into your graphics editing program (or even WordPerfect). This does not always work, but it usually does, and is a cheap and dirty solution. But if you need this more than once every once in a blue moon, get Gadwin.

PALM PDF

Some documents are in pdf format. I am not a fan of this format, which is difficult to work with in many ways. You often can’t cut and paste and it’s absurdly difficult to copy anything other than the whole document or an entire page. Another problem is that if you get a document in pdf format and try to view it in your Palm, the usual document reader programs will not work. One solution is to use a program like Corel Presentations X3, which imports pdf documents into WordPerfect format, from which you can then save the documents as ascii text, readable by eReader and other Palm reader programs. But any translation program risks losing content and pictures and such, which may be critical to the pdf file.

Some years ago I tried out a Palm pdf reader program and I was very, very unhappy with it. It crashed a lot and was very difficult to work with. I finally gave up.

Now there’s a new program that actually works. It’s called, cunningly, Palm PDF. And it’s free. It’s not perfect. It takes awhile to load. And it takes a bit too long to go from page to page. But if you positively, definitely have to view a pdf file on your Palm, this is your program.

If you view a picture embedded in the pdf file and it’s too small, or the text itself is too small, Palm PDF has a zoom in and out feature that allows you to blow stuff up pretty well. You can also use your 5-way navigation buttons to move around.

You can get Palm PDF (free!) from www.metaviewsoft.de/en/Software/PalmOS/Freeware/PalmPDF/index.html or www.palmgear.com/index.cfm?fuseaction=software.showsoftware&prodid=115128 or just put “palm pdf” into a Google search.

PALM MP3 PROGRAMS

I have been lauding podcasts in many of my recent tech columns. One problem in listening to podcasts is also a problem for listening to legal books in mp3 format: bookmarks. Let’s say you’re listening to an awesome legal podcast, maybe my Week’s Cases or Terri Towery’s Nuts and Bolts, both of which are posted on the CLARA Web Forums by CPDA. You’re right in the middle of some great and funny point (that would mean you were listening to Terri, obviously). But you have to stop right now. Some Palm mp3 programs, say Real Player, allow you to turn off your Palm and freeze the mp3 file right where it is. If you turn the Palm back on, it shows you where you left off. But if you use the Palm to do anything else, say look up a telephone number, when you restart Real Player you are back to the beginning of the mp3 file. Now you have to guess where you left off, which in a long podcast is a real pain.
This is not true of all programs. For example, tcpmp is a pretty good freeware program and it retains a bookmark for an mp3 file when you turn off the Palm, and keeps that bookmark even when you go to other programs. Tcpmp is freeware and you can get it at picard.exceed.hu/tcpmp/test/. I really like tcpmp, but it doesn’t allow you to make playlists. And you can only bookmark one file.

I actually spent $20 to try to solve the bookmarking problem. Me. $20. Can you believe that? I bought a piece of crap program named Busker; I’m not even going to give you their site. Don’t bother. Busker purports to allow unlimited bookmarks, and it does do that. But at what price, you ask?

Busker turns out to be a very, very buggy program. As in it crashes. A lot. A whole lot. I’m serious; I would estimate that Busker crashed half the time. Crashed as in I had to perform a reset on my Palm. This makes me very cranky. I emailed their tech support. They told me to download the latest version. Much better; now it only crashes a third of the time. Bad. Evil. Spawn of the devil. I really don’t like this program; can you tell?

And there’s a “volume boost” option, that allows you to turn the sound way up. Sometimes I’m in a very noisy area, and I don’t want to stop listening, and I just need to crank the sound way up. Can do.

Pocket Tunes can be configured to play in the background, so you can use other Palm programs while the mp3 file is still playing. You can even set Pocket Tunes to pop up a console from within other programs, to allow you to tweak it on the fly. There are many other features, all of which are documented in the online user’s guide. And I should note that Pocket Tunes is not a program which overly drains your battery.

You can buy Pocket Tunes at www.pocket-tunes.com/. You can find those skins at that location as well, along with the user’s guide. OK, you’re waiting for the other shoe to drop. Here it comes. Pocket Tunes is not free. The Basic version costs $19.95. And the Deluxe version, with those critical bookmarks, is $37.95. I know, that’s an awfully expensive program for a Palm. And I apologize for recommending it. But it is in my opinion far and away the best Palm mp3 player program available. If you use your Palm to listen to lots of podcasts and audio books, and you need bookmarks, Pocket Tunes is the program for you.

2 PLAY ME

One last little pearl. You can use your Palm as an alarm clock. Yes, you already know that you can set alarms in your Palm. But you can also set your Palm to be an alarm that plays an mp3 file. Really. Busker had an alarm built in; but of course it crashed so often you were just rolling dice with whether you would actually wake up to it. But there’s a little program called 2 Play Me. It will actually trigger any Palm application at the time and day of the week you set, and for as many days of the week you want. But it will also trigger Real Player and Pocket Tunes. It plays whatever mp3 file Real Player already has loaded.

But 2 Play Me integrates with Pocket Tunes spectacularly. When you select Pocket Tunes as the program to run when the alarm goes off, 2 Play Me lists every playlist you’ve made in Pocket Tunes and every mp3 file on your Palm and SD card. You can pick a song or a playlist, and 2 Play Me will turn on your Palm and play that song or everything on your playlist at any time on any day (or days) you want.

Now your Palm might be loud enough to wake you up (or alert you, if that’s what you want). Or you can do what I did, which was to buy a clock radio with a line-in feed for my mp3 player. The device turns on and waits for whatever is on my Palm to play. That way I completely control what wakes me or (or alerts me).

You can find 2 Play Me at http://www.mobihand.com/product.asp?id=5785 or just search Google for 2 Play Me. The version you can download only allows one alarm (though you can pick several days or every day of the week with that one alarm), and it has advertising screens when you load it, forcing you to delay for ten seconds. You can buy the full, no-advertising version with 100 alarms for $10 at the same site.
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BOOK REVIEWS

by Albert J. Menaster

Chasing Justice: My Story of Freeing Myself After Two Decades on Death Row for a Crime I Didn’t Commit

By Kerry Max Cook
$25.95 352 pages William Morrow

Kerry Cook did in fact spend 20 years on death row in Texas. And it is quite clear that he did not commit any crime. This book is his story, and it is just spectacular. And infuriating.

The misconduct in Cook’s case was truly astounding. There was police misconduct, prosecutorial misconduct, judicial misconduct. Over and over again. The misconduct pervades this case.

I could write, well, a book on all the misconduct. Let me just mention a few points. There was a witness who saw a guy who was apparently the killer. The witness identified someone other than Cook and admitted this at an early hearing in court. At trial she identified Cook. The defense was not permitted to impeach the witness with the prior identification, since the court reporter had not signed the reporter’s transcript of the prior proceeding.

A snitch testified that the defendant confessed to him. The prosecutor argued that the snitch knew facts that only the killer could have known. The defense was not permitted to impeach the snitch with his priors, but all the defense witnesses who testified that the snitch was never near the defendant in jail were all impeached with their priors. Later, the snitch disclosed that the prosecutor brought the snitch into his office and showed him crime scene pictures, which is how he knew about the facts. Oh, and the snitch testified that he was getting no deal for testifying and the prosecutor argued that he would never give the snitch anything for testifying, then of course the snitch got time served for a murder.

One of the most amazing events in this case was a police criminalist who testified that the defendant’s fingerprints on the victim’s screen door were left within a few hours of their being lifted. The defense called the head of the FBI’s fingerprint lab to testify that you can’t date fingerprints, but this didn’t faze the jury, which convicted Cook.

Cook got his conviction reversed, then got convicted again, with even more misconduct. At one point the Texas appellate court reversed, with several justices dissenting that there should not be a remand, saying that the prosecutorial misconduct had permeated this case so completely that it was impossible for Cook to get a fair trial.

How riveting is this book? I was returning the book to the library, and my 18-year old son Chris, who shows little interest in legal matters, picked it up and started to read it. He asked if he could borrow it. He read the entire book in a day.

Hollywood Station

By Joseph Wambaugh
$24.99 352 pages Little, Brown and Company

Joseph Wambaugh is an outstanding writer, both of fiction and nonfiction, all of which are police-related. In the beginning of his writing career, Wambaugh was very pro-police, but then, in later books, he seemed to turn on the police. That’s when I think he started writing truly great books. Interestingly, Wambaugh’s nonfiction is also outstanding. His last nonfiction work was the excellent Fire Lover, about John Orr, the Glendale Fire Investigator who was ultimately convicted of being a serial arsonist.

In Hollywood Station, Wambaugh returns to fiction and the LAPD in a pro-police story, reminiscent of his earlier work. But even when Wambaugh presents police as occasional heroes, he never idealizes them. These are just people with flaws, great and small.

The narrative follows eight or ten officers working in Hollywood, where there is so much wacky stuff going on, it takes a while before the real story gets going. For example, the police get a call about a fight happening in front of Graumann’s Chinese Theater, where various grifters are dressed in costumes, in order to get tourists to take their pictures and give them money. The call is that Batman has attacked Spiderman. After the police arrive, one officer is sent to arrest Batman. He asks for a description. His partner says, arrest anyone in a cape hanging upside down. If it turns out to be Dracula, we’ll just release him.

Eventually, the plot does kick in: there are robbers who kill, and meth freaks who help them, and police who try to catch them. And while the actual storyline is pretty good, the real power of this novel is in the sharp, specific characterizations of the police and of the various characters in Hollywood itself. I always find that everything Wambaugh writes rings true, and this highly entertaining novel is no exception.
Great Moments in Courtroom History

by Charles M. Sevilla*

Charles M. Sevilla collects verbatim excerpts from courtroom transcripts.
Submissions may be sent care of Law Office of Charles Sevilla, 1010 Second Avenue, Suite 1825, San Diego, CA 92101

1. Jury Note: Mop Up Time (Rebecca Jones, San Diego)

“11 guilty, 1 undecided. We cannot reach unanimous vote. We 11 do not want to let it go undecided. [signed] Floor person.”


Deputies conduct a traffic stop on a vehicle for an equipment violation. The driver appeared to be under the influence of a CNS depressant and was evaluated and placed under arrest for being under the influence of a controlled substance.

When the suspect exited his vehicle for evaluation, deputies observed a large plastic bottle labeled, “Hydrocodone Bitartrate and Acetaminophen” on the driver’s side floorboard. When asked what was in the bottle, the defendant told deputies the bottle contained, “narcotics.” Deputies looked inside the bottle wherein 198 vicodin pills were found.

At this point the defendant was placed under arrest and while being placed in the back of a patrol vehicle, he stated to the deputy, “Your ruined my life. I’m going to be in jail for years after this.” When the deputy told the defendant it was unlikely he would be in jail for years, he responded, “You haven’t searched my car yet.”

3. Sex: Paying by the Hour (David Van Fleet, Chicago)

In an action by the client against her divorce attorney for excessive billing, included was a dispute alleging “legal fees were billed for time during which petitioner and [her attorney] engaged in sexual relations and for personal phone calls to her.” (In re Marriage of Kantar (1991) 581 N.E.2d 6, 9.)

5. Burglary Report: Multiple Thefts (Ellis Johnston, Greenville, S.C.)

Deputy B. responded to the victim’s residence on Blacksmith Road. He was grossly intoxicated. He stated Wanda H. climbed through a window about 9 a.m. and had wonderful sex with him, and then stole $600-700 in cash and $60 in food stamps from him.

5. Multiple Discipline Expert Witness (Bonnie Miller, Montana)

A. No. I’m saying that if the true temperature outside is 90 degrees, and you say it’s 89.999, you’re wrong, but you’re not very wrong. If you say it’s 2 degrees, you’re very wrong. In this context, the central limit theorem guarantees that the size, actual relative size, of the error decreases to zero as the number of terms becomes large. So one wrong doesn’t make a right. Two wrongs don’t make a right, but they make a smaller relative error. Many wrongs, meaning many estimates, each one of which is likely to not be completely accurate, lead to a vanishingly small error for the average. That’s the intuitive substance of several of the central limit theorems.


COUNSEL: Oh, I’m sorry. I mean, I don’t know math, but I mean -- WITNESS: All I’m telling you is, when your vaginally and your vanishingly become confused in your mind, you have deeper issues than the ones we’re dealing with here.

6. Motion to Continue (Ephraim Margolin, San Francisco)

Comes now the Appellant, by counsel, and moves the Court to reschedule Oral Argument. The grounds for this motion are that undersigned counsel will be out of town in Oregon, on a 350-mile bicycle trip from July 30 through August 4, 2007, for no other reason than to please his wife. Counsel assures this panel that Oral Argument would be more enjoyable than the aforementioned bike trip.

7. Judicial Poetry for Juveniles (Leslie Caldwell, Fairfield)

Stallions can drink water from a creek without a ripple;
The lawyers in this case must have a bottle with a nipple.
Babies learn to work by scooting and falling;
These lawyers practice law by simply mauling
Each other and the judge, but this must end soon
(Maybe facing off with six shooters at noon?)
Surely lawyers who practice in federal court can take

* All Rights Reserved © 2007 Charles M. Sevilla
A deposition without a judge’s order, for goodness sake. First, the arguments about taking the deposition at all, And now this—establishing their experience to be small.

So, let me tell you both and be abundantly clear: If you can’t work this without me, I will be near. There will be a hearing with pabulum to eat.

And a very cool cell where you can meet AND WORK OUT YOUR INFANTILE PROBLEM WITH THE DEPOSITION.

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State Judicial Services Building
San Francisco CA
Saturday, October 27th, 2007

ANNUAL FALL SEMINAR
St Francis Hotel
San Francisco CA
Saturday, December 15th, 2007

2008 CAPITAL CASE DEFENSE SEMINAR
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