

The **BARRISTERS BULLETIN** of the South Bay Bar Association

January/February 2003

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VOLUME 29 NUMBER 1

PRESIDENT'S MESSAGE

I am told by some of my predecessors, who will remain nameless for their protection, that this is a soap box and I may use it accordingly. (I have been told by others, who will also remain nameless, not to worry about it, no one reads it anyway.) One last piece of advice I received was a recommended standard "Be sure what you write won't offend the old guard."

The world has suffered another tragedy with the loss of our six Americans and one Israeli astronaut who were some of the best and brightest citizens of our global village, Earth. I know you join me in extending your condolences to the families, especially the children, friends and colleagues of our fallen heroes and heroines.

We live in interesting times. I feel as if I am revisiting the days of my youth with anti war pro-

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A Special Thank You From The President

I would like to thank the members, judicial officers and friends who attended the celebration of our 50th anniversary at which we honored our judicial officers, conferred awards on Commissioner Carnahan and Jim Hallett and installed our Board of Directors. Most importantly, I would like to thank our Executive Director Shannon Shockley and her assistant Nicole Watson, whom I so thoughtlessly omitted acknowledging at the event. Their hard work, creativity and sincerity made the event the success it was. I was particularly impressed with the fact that this was Shannon's first Judge's Night and Installation, our biggest event of the year. I am deeply grateful to Shannon and Nicole and look forward to working with them on our coming events. (I am told they have our planned wine tasting trip to Temecula scheduled for Saturday March 22, ready to go!). **Thank you Shannon and Nicole.**

Tara McGuinness, President

Ethics and Advocacy A Lesson From People v. Westerfield By Chuck Sevilla

Editor's Note: Chuck Sevilla is known statewide to both prosecutors and defense attorneys as one of the handful of truly great criminal lawyers in California. He has also been a trusted advisor on issues of ethics and professionalism for decades. The following article is not intended in any way to express the official views of the South Bay Bar Association or the Barristers Bulletin. But the issue is both interesting and important, and Chuck's treatment of it is thoughtful and careful, so we share it with you. We welcome any thoughtful submissions which expand upon or contest Chuck's conclusions and look forward to including them in future issues of the Bulletin.

The latest monthly "crime of the century" has concluded here in San Diego. Just following the guilty verdict, a leak to the press by either a prosecutor or law enforcement agent, stated that there had been pre-charge negotiations between the DA and the defense (to wit, that in return for a life sentence the defendant purportedly would reveal the location of the child's body.) Of course, there was no verification of this rumor, but it has raised public turmoil, ethical issues, and a Fox Infotainment Network (FIN) threat to file State Bar charges against defense counsel for arguing to the jury, and presenting witnesses, that the evidence did not prove guilt. Most controversial was the theory that the life style of the parents (drug use and sex partner swapping) may have permitted someone else access to the family home. This essay will address the ethical issue raised when defense counsel tries a case with knowledge from the client that he is guilty.

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Opinions expressed in the Bulletin are not necessarily those of the SBBA, its officers, directors, or members.

The South Bay Bar Association Barristers Bulletin is published monthly, except February and August. Articles on topics of interest and letters from readers are welcomed and will be published as space allows. Submitted materials will be subject to editing and approval of content, with final approval for form and content to be under the authority of the Editorial Staff.

Articles, announcements and advertising copy are due by the 15th of the month preceding publication. Please submit your contribution to: South Bay Bar Association, 3465 Torrance Blvd., Suite C, Torrance, CA 90503, Tel. (310) 543-9773, Fax (310) 543-3273, E-mail: dir4sbba@aol.com

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CALENDAR OF EVENTS

SOUTH BAY BAR ASSOCIATION

**Probate & Estate Planning Luncheon
(1 Hour MCLE Credit)**

Date: Wednesday, February 19, 2003
Time: 12:00 noon
Place: Torrance Marriott, 3635 Fashion Way, Torrance
Speakers: Hon. Deanne Smith Myers, Probate Judge for the LA Superior Court SW District and Carmen Alberio, Probate Attorney
Topic: "Current Development in Division 1"
Prices: Members & Judges: \$25.00 Prepaid \$35.00 Door, Non-Members: \$35.00 Prepaid, \$45.00 Door, Non-Member Attorney: \$50.00 Prepaid, \$60.00 Door

RSVP to the SBBA by Feb. 14th, 2003. In order to receive a discount, payment must be received by the SBBA at least 5 business days prior to the event.

**"STATE OF THE COURTS"
(1 Hour MCLE Credit)**

Date: March 25, 2003
Place: The Portofino Hotel & Yacht Club
Speakers: Hon. Robert F. Dukes & Hon. Eric C. Taylor
Time: 6:00 p.m. Cocktails
6:30 p.m. Dinner
7:00 p.m. Program

Prices: Members & Judges: \$35.00 Prepaid Reservations; \$45.00 at the Door, Non-Members: \$45.00

RSVP to the SBBA by March 18th, 2003. In order to receive a discount, payment must be received by the SBBA at least 5 business days prior to the event.

****NOTE: Please have your credit card available when calling the SBBA to make a reservation. Reservations cannot be made without a credit card. For Reservations for all SBBA meetings – Call SBBA at (310) 543-9773**

Be sure to check out our website for up-to-date information on upcoming events!
www.SouthBayBar.org

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| <p>SAVE THE DATE! "Temecula Wine Tasting Trip" Saturday, March 22, 2003 Details to Follow</p> |
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SAVE THE DATES

**Joint Meeting with the
Long Beach Inns of Court
(1 Hour MCLE Credit)**

Date: March 18, 2003
Place: The Queen Mary, Queen's Salon
Topic: "The Wicked Witch Strikes Back"
Price: \$40.00 per person
Time: 5:30 p.m. Cocktails
6:00 p.m. Program and dinner

**Joint Meeting with the
South Bay Inns of Court
(1 Hour MCLE Credit)**

Date: April 16, 2003
Place: Torrance Hilton, Penthouse Suite
Speaker: "Judge Judy"
Price: \$30.00 per person
Time: 5:30 p.m. Cocktails
6:00 p.m. Program and dinner

Please RSVP to SBBA at (310) 543-9773 for both meetings

IMPORTANT — SBBA EVENT POLICIES

Discounts. The SBBA offers a discount for any person who reserves and pays for an event at least 5 days in advance of the event. Payment can be made by mailing or delivering a check to the SBBA at 3465 Torrance Blvd., Suite C, Torrance, CA 90503, or charging it on a Visa or Master Card by calling (310) 543-9773. In order to receive a discount, payment must be actually received by the SBBA at least 5 business days before the date of the event.

Reservations. Please reserve for events as early as possible. In the event there is not adequate seating at an event, those persons who have reserved and paid for their reservations 3 days or more in advance will be given priority as to seating. Others

will be seated to the extent they can be accommodated. Your early R.S.V.P. and pre-paid reservation will enable the SBBA to ensure that there is adequate seating at its events enable it to avoid being charged for guarantees which are not met.

Cancellation. If the SBBA offices does not receive an adequate number of R.S.V.P.s at least 5 days prior to any event, the event will be canceled without further notice. Anyone who has reserved will be contacted.

Refunds. A full refund will be given if the SBBA cancels an event or if a reservation is cancelled more than 3 business days prior to an event. Otherwise, amounts paid will not be refunded.

Ethics and Advocacy

Continued from page 1

But first, let's address the ethical issue no one is talking about in this matter: the conduct of the person, or persons, who leaked the rumor. The fact that it was just a news leak has not prevented the FIN from proceeding as if the rumor were absolute truth. Nor did it prevent self-appointed "defense experts" all over the country from going on the FIN and other infotainment shows to condemn San Diego defense counsel without one fact being established. Shame!

As for the person who spread the rumor, he or she acted in violation of:

1) The trial court's gag order – violation of a court order is a crime punishable by jail; 2) Evidence Code section 1152 which makes settlement discussions, for obvious reasons privileged; and 3) State Bar Rule of Professional Conduct Rule 5-120, governing lawyer prejudicial comment on pending cases. The only thing that is established about this issue is that the source of the unverified leak is unethical, a criminal, and still an unverified anonymous would-be snitch.

Not surprisingly, the FIN has not sought out this criminal, has not called for a State Bar investigation of him or her, and does not appear to be aware that their source is a unverified rumor. Undaunted, it accepts the rumor as fact, condemns the defense, and threatens a State Bar complaint.

Now to the issue. Since there are no facts in this case, we'll assume a hypothetical client who confesses to counsel that he has murdered a child, and, upon learning that the prosecutor seeks death, goes to trial. What are counsel's legal and ethical obligations in defending the client?

The basics: First, the right to trial is there to force the State to meet its constitutional burden of proof beyond a reasonable doubt – which means convincing a jury standard that there is proof of guilt on each element by an abiding conviction to an "evidentiary certainty" (*Cage v. Louisiana*, 498 U.S. 39, 41 (1990) disapproved on other grounds,

Estelle v. McGuire (1991) 502 U.S. 62, 73, fn.4.), or, as in *Victor v. Nebraska*, 511 U.S. 1, 14, 15 (1994), to a "subjective state of near certitude of the guilt of the accused." All persons accused of crimes have the right to put the State to its proof.

Second, the client's statements to counsel are absolutely confidential. In fact, in California, the protection is broader. Business & Professions Code section 6068 (e) states: "It is the duty of an attorney to do all of the following: ...To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." In resisting the State's attempt to meet its burden of proof, the confidential statements of the client are largely irrelevant (with exceptions noted below).

The apparent FIN position is that if the client on trial has confessed to the lawyer, the latter must do nothing in court that in any way deviates from that knowledge. In other words, the State's evidence cannot be tested by alternative theories or interpretations, and certainly counsel cannot put on witnesses (always truth-tellers) to lead the jury away from the guilt of the client. This position, if adopted, would instill a "potted plant" requirement on the defense.

So what may counsel ethically do when the client convincingly and confidentially informs the attorney of guilt? There are rules: counsel cannot put a defendant on the stand to lie, question him, and argue perjured testimony to the jury. (*People v. Guzman* (1988) 45 Cal.3d 915, 941-946; *People v. Johnson* (1998) 62 Cal.App.4th 608, 624). This extends to other witnesses whom counsel knows will be lying if called to testify. (See *People v. Gadson* (1993) 19 Cal.App.4th 1700, 1712-1714.) And, counsel cannot hide evidence of a crime (*People v. Meredith* (1981) 29 Cal.3d 682, 175 Cal.Rptr. 612, 631 P.2d 46 (criminal defense lawyer must turn over physical evidence of crime to prosecutor after learning of the property's location from the client); see *People v. Pic'l*

(1982) 31 Cal.3d 731, 183 Cal.Rptr. 685, 646 P.2d 847 (lawyer guilty of various crimes when he attempted to negotiate the return of stolen property in exchange for the owner's agreement not to report its theft). Nor can counsel facilitate an on-going criminal offense. (*In re Young* (1989) 49 Cal.3d 257, 261 Cal.Rptr. 59, 776 P.2d 1021 (aiding a client who was a wanted fugitive get out on bail).

But the FIN position is that counsel cannot argue or present alternate theories of innocence. This position is itself unethical and unconstitutional. Expecting defense counsel to sit quietly at trial and ask only a few innocuous questions of the witnesses ("nice day, isn't it?"), but not take a position inconsistent with personal knowledge, is not the representation demanded by the Sixth Amendment.

The FIN position is that the "potted plant" defense obligation is mandated by § 6068(d) of the Business and Professions Code which says that it is the duty of an attorney "to employ, for the purpose of maintaining the causes confided to him such means only as are consistent with the truth, and never seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law." State Bar Rule 5-200(A) and (B) presents similar language: "In presenting a matter to a tribunal, a member: (A) Shall employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with truth; (B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law;..."

Therefore, if counsel "knows" the client is guilty, counsel cannot, either through cross-examination or the presentation of truthful (but mistaken) evidence, argue that a reasonable doubt exists. Applied to our hypothetical example, if the parent's lifestyle reveals opportunities for others to enter the family home and abduct the child, can that be exposed on cross-examination?

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President's Message

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tests, debates on the death penalty and economic uncertainty, all of which deeply effect us as lawyers and citizens.

War is on the agenda and there is the question is whether a case has been made for it. There were the better part of 200,000 people marching on the Mall and in San Francisco simultaneously that said no case has been made for war; those are pretty impressive numbers, though likely exaggerated. You have got to admire the women of Marin, one way or another, who spelled out "PEACE" naked. We still have Tom Hayden to kick around, but I personally miss the Berrigan brothers; Philip Berrigan died December 6, 2002. May he rest in peace.

We are all well aware that Illinois' outgoing Governor Ryan pardoned 4 death row inmates and commuted the sentences of 167 others; that is quite a move for a long time dyed in the wool pro-death penalty Republican.

Governor Davis has had some bad news for us. No matter how bad his math may have been, it's bad news all the way around, particularly for our Courts. I hear rumors that all the San Pedro criminal trials may be transferred to Long Beach.

It is the American way to debate issues of such import and I invite and encourage you to write *printable* letters to the editor on any relevant subject you would like to address. Many Americans don't express their opinions on important matters. Are they fearful or do they not have opinions?

We are lawyers. We debate for a living. Let us debate amongst ourselves. Please write to us, so we can see if anyone reads the President's Message.

Tara McGuinness, President



Ethics and Advocacy

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If the State hires a "bug" expert to assess time of death and the latter comes up with a time when the defendant could not have committed the crime, can that witness be called by the defense?

Popular sentiment would say no, but the answer is yes to both questions. As Justice White stated in his concurring and dissenting opinion in **United States v. Wade** (1967) 388 U.S. 218, 256-258, defense counsel have but one duty – to defend the accused.

"Law enforcement officers have the obligation to convict the guilty and to make sure they do not convict the innocent. They must be dedicated to making the criminal trial a procedure for the as-

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Los Angeles Superior Court Struggles with Economic Problems

At the last Bench & Bar Committee meeting of 2002 Presiding Judge-Elect Robert Dukes presented what amounted to a "state of the courts" address detailing the difficulties being faced by the Los Angeles Superior Court as we begin 2003.

Foremost is a substantial cut in state funding for the Court. To meet the budget shortfall the LA Superior Court as of November 1, 2002, has laid-off 149 employees countywide, and closed 29 referees and commissioner courtrooms. The county has appropriations for 584 bench officers and will operate only 584 courtrooms during 2003. The Court had been operating 612 to 620 courtrooms per day during 2002. The cost is approximately \$400,000 per courtroom per year. The biggest expenses are salaries and the cost of security. Courtroom security takes up approximately 1/4 of the cost, with overtime pay for courtroom staff adding another 10-15% to the costs. A listing of the closed courtrooms is available from the Los Angeles County Bar website: www.lacba.org.

Los Angeles County needs 50 new judicial positions in order to meet the state standard for the number of case processed through the system. However given current budget circumstances these judicial positions will not be filled in the foreseeable future.

The biggest pressure will be felt in long-cause matters. The Court will be taking a much harder look at what is and is not a long-cause matter, and expects to increase the number of long-cause rejections from the present 60% to perhaps 75-80%. This will put additional pressure on calendar courtroom. Attorneys will be expected to "justify" any long-cause request, and all requests will be "vetted" by a long-cause review committee on a case-by-case analysis.

The new Judicial Council Case Management Rules have now been in effect for 3 months and the first cases requiring case conferencing are reaching the Courts. It is expected that this process will reduce the time to trial, promote earlier settlement, and relieve some of the pressure on the courtrooms, provided the attorneys and judges co-operate in applying the process. For those of you who are interested the new Case Management Rules can be found at *California Rule of Court 212*, and the form that is requires is *CM-110*. The rule and the forms can be downloaded from the California Judicial Council website.

Under the Case Management Rules the Court will automatically notify the attorneys at 150 days after the case is filed of the Case Management conference date. The Los Angeles Court will be sending out the conference notices at 100 days after filing for a pre-conference to assist the attorneys and judges to meet earlier and resolve problems earlier, prior to the mandated Case Management conference at 150 days.

Judge Dukes was very adamant that any attorney who has comments or recommendations about the Case Management process or has a problem during the process is free to contact the of-

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Ethics and Advocacy

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certainment of the true facts surrounding the commission of the crime. To this extent, our so-called adversary system is not adversary at all; nor should it be. But defense counsel has no comparable obligation to ascertain or present the truth. Our system assigns him a different mission. He must be and is interested in preventing the conviction of the innocent, but, absent a voluntary plea of guilty, **we also insist that he defend his client whether he is innocent or guilty.** The State has the obligation to present the evidence. Defense counsel need present nothing, even if he knows what the truth is. He need not furnish any witnesses to the police, or reveal any confidences of his client, or furnish any other information to help the prosecution's case. **If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course.** Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth. Undoubtedly there are some limits which defense counsel must observe but more often than not, defense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness who he thinks is lying. In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth."

The ABA Standards, The Defense Function address themselves to this issue in several pertinent references. Standard 1.2(b) (The Function of Defense Counsel) provides that: "The basic duty defense counsel for the accused owes to the administration of justice and as an officer of the court is to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation."

The Commentary to this standard states:

Defense counsel, in protecting the rights of the defendant, may resist the wishes of the judge on some matters, and though such resistance should never lead to disrespectful behavior, defense counsel may appear unyielding and uncooperative at times. In so doing, defense counsel is not contradicting his or her duty to the administration of justice but is fulfilling a necessary and important function within the adversary system. Defense counsel should not be viewed as impeding the administration of justice simply because he or she challenges the prosecution, but as an indispensable part of its fulfillment.

Advocacy is not for the timid, the meek, or the retiring. Our system of justice is inherently contentious, albeit bounded by the rules of professional ethics and decorum, and it demands that the lawyer be inclined toward vigorous advocacy. Nor can a lawyer be half-hearted in the application of his or her energies to a case. Once a case has been undertaken, a lawyer is obliged not to omit any essential lawful and ethical step in the defense, without regard to compensation or the nature of the appointment.

As ABA Opinion 280 (1949) points out: [T]he lawyer...is not an umpire, but an advocate. He is under no duty to refrain from making any proper argument in support of any legal point because he is not convinced of its inherent soundness.... His personal belief in the soundness of his cause or the authorities supporting it is irrelevant.

To put a fine point on the issue, Bus. & Professions Code § 6068(c) makes it the duty of an attorney to "counsel or maintain such actions, proceedings or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense." The exception for criminal defense is clearly intended to protect the constitutional rights of criminal defendants, i.e., the right to challenge and contest the State's evidence.

A Michigan ethics opinion nicely answers the FIN position on defense attorney ethics. The question was whether defense counsel could put on the stand three witnesses, all truth tellers, to say they were with the defendant at a certain time and he was not committing a crime. This was truth. Defense counsel knew from his client that the crime occurred an hour earlier (and the victim was mistaken on this point and said it occurred at the time the alibi witnesses were with the accused.)

(See article entitled "Michigan Ethics Opinion" on page 6.)

There is more that can be said on this point. If you discuss this on the cocktail circuit, some perspective for you listeners is in order. First, defense attorneys know that juries are smart and will reject foolish lines of defense that have no convincing support. Second, most of the accused do confess to their counsel and almost all of them are led to the court's altar to confess openly their offenses and take their punishments (96% of felonies and 99.5% of misdemeanors disposed of by pleas of guilty). Of those few hardy souls who brave the rigors of trial, most of them have told their counsel they are not guilty. So, presumably, even the FIN would accept a vigorous defense of those protesting their innocence. It is the smaller group of defendants, those who confess their guilt in confidence to counsel and end up going to trial, where this question arises. For them, the defense obligation is the same — a vigorous defense within the ethical mandates cited above.

Our system functions best when the State's evidence is properly tested. We have seen too many false convictions where the testing function was inadequate. (See Scheck, Neufeld, and Dwyer, *Actual Innocence* (Signet 2001) chronicling the number of innocent people condemned to death in part due to inadequate defense counsel.) While there are many problems with our criminal justice system, this is not one of them.



Michigan Ethics Opinion

Editor's Note: This opinion is referred to in the foregoing article "Ethics and Advocacy."

SYLLABUS CI-1164 January 23, 1987

A criminal defense lawyer may present truthful alibi witness testimony, even though the lawyer knows the client has committed the crime charged.

References: MCPR DR 7-101, 7-102(A)(4); CI-394, CI-634.

TEXT

A client charged with armed robbery has confidentially admitted the crime to his attorney. The client proposes to call some friends as witnesses at the trial who will give truthful testimony that the client was with them at the time of the crime. Relying on the detectives' notes to help him recall the time, the victim testified at the preliminary examination that the robbery occurred at the same hour and time to which the friends will testify. The client explains the time coincidence by admitting to counsel that he stole the victim's watch and rendered him unconscious so that the victim's sense of time was incorrect when relating the circumstances of the robbery to the investigating detectives. Client and lawyer have decided that the client will not testify at the trial.

The lawyer asks whether it would be ethical for the lawyer to subpoena the friends to trial to testify that client was with them at the alleged time of the crime.

MCPR DR 7-101 requires counsel to represent the client zealously. A defense lawyer may present any evidence that is truthful. If the ethical rule were otherwise it would mean that a defendant who confessed guilt to counsel would never be able to have an active defense at trial.

The danger of an opposite approach is that sometimes innocent defendants "confess guilt" to their counsel or put forth a perceived "truthful" set of facts that do not pass independent scrutiny.

Many crimes have degrees of guilt, as in homicide, where the "true facts" go to the accused's intent; something a jailed defendant may not be in a reflective mood to assess. Criminal defense counsel are not sent to the jail's interview room to be their client's one person jury and they certainly are not dispatched to court to be their client's hangman. Our society has made the decision to permit a person charged with a crime to make full disclosure to his counsel without fear that, absent the threat of some future conduct (such as a threat to kill a witness), the lawyer will not disclose the information so provided.

The role of criminal defense counsel is to zealously defend the client within the boundaries of all legal and ethical rules. Therefore, if the information confidentially disclosed by the client were to prevent counsel from marshaling an otherwise proper defense, the client would, in effect, be penalized for making the disclosure. Such a policy, over a long run, would tend to cause future defendants to fail to disclose everything to their lawyer; the result would be that they would receive an inadequate defense. Such an approach would be fundamentally inconsistent with the implicit representation made to defendants as a part of procedural due process that they may disclose everything to their lawyer without fear of adverse consequences.

It is the prosecution's responsibility to marshal relevant and accurate testimony of criminal conduct. It is not the obligation of defense counsel to correct inaccurate evidence introduced by the prosecution or to ignore truthful evidence that could exculpate his client. Although the tenor of this opinion may appear to risk an unfortunate result to society in the particular situation posed, such an attitude by defense counsel will serve in the long run to preserve the system of criminal justice envisioned by our constitution.

MCPR DR 7-102(A)(4) prohibits counsel from using perjured testimony or "false evidence," but it is perfectly

proper to call to the witness stand those witnesses on behalf of the client who will present **truthful testimony**. The testimony of the friends will not spread any perjured testimony upon the record. The client indeed was with the witnesses at the hour to which they will testify. The victim's mistake concerning the precise time of the crime results in this windfall defense to the client.

In CI-394 the Committee reviewed a situation where there were tire marks at the scene of the crime. Defendant, after being charged with a crime, altered the tire treads on his car. An expert witness, retained by the defense, was misled when he examined the evidence of the tire tracks. We there opined that the defense lawyer could not ethically present evidence through an expert witness when the expert's opinion was based upon a set of circumstances where the client tampered with the evidence. To do so would perpetrate a fraud upon the court. The situation with the friends as alibi witnesses in the instant case does not involve tampering with evidence. One cannot suborn the truth.

We said in CI-634 that it is axiomatic that the right of a client to effective counsel does not include the right to compel counsel to knowingly assist or participate in the commission of perjury or the creation or presentation of false evidence. Thus, where truthful testimony will be offered, it seems axiomatic that a defendant is entitled to the effective assistance of counsel in presenting evidence, even though the defendant has made inculpatory statements to his counsel.

Counsel must never be a party to presenting perjury to a court. However, it must be remembered that litigation involves the independent testing by an impartial trier of fact of perceptions of events recalled by human beings. The civil lawyer enjoys the luxury of being able to scrutinize testimony many months before trial by propounding written interrogatories to witnesses and by deposing them on the record before a court reporter. The criminal lawyer does

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TORT TACTICS

Death By Air Bag

By Lawrence R. Booth of Booth & Koskoff

Cases against manufacturers of automobiles require a tremendous investment in time and money. The last big case we did ran up way over \$100,000 in costs and the file ended up in 82 boxes. It was a child air bag death case. The excellent settlement was confidential. As a result of this case and a few less difficult air bag cases in the past, we have learned a lot.

Air bags do nothing but sell cars and kill and maim people. The NHTSA stats are bogus. They claim they have saved thousands of lives. I don't believe it. More importantly, there is a far less dangerous solution to the problem of people hitting the dashboard and other objects like doors and windows.

Many high-ended cars have what is called pretensioners, which tighten the seat belts just before a crash. Race car drivers use seat belts that cross in front of the chest and glue the driver to the seat. Normal people insist on comfort and so seat belts play out and then stop, but that gets you too close to the deploying air bag and, unfortunately, too close to objects you might hit in the interior of the car.

Air bags deploy at 200 mph and have been likened to a heavy weight boxer hitting you with a short right hand. At least one hundred persons have been killed, especially kids, small women and older people. If you shove the seat back all the way it helps, but in the case of side air bags, you are always right next to them. They have sun visor warning labels which tell you to put kids

in the back. Now that the kids are in the back, they put in rear seat side air bags and nail them there.

Air bags sell cars because they put deceptive commercials on TV which make them look like slow moving fluffy pillows. Actually, they come out like a rocket and make a horrific noise. For a while, they were marketing these fluffy pillows to protect kids even though there had been numerous animal studies with baboons which showed that these things kill, cause brain injuries and lots of very serious other injuries. Now there are disclaimers at the bottom of these commercials which require the world's fastest speed reader to comprehend.

Most recently they are allowing people to disconnect their air bags or have an off/on switch. As every safety engineer knows, such a switch effectively means they will never be used again. I say GOOD. The federal government now mandates these killers and to make things worse, the required warning labels are a joke. First of all, they don't include small women and the elderly. Secondly, they're in the wrong place. No one sees them after a while on the sun visor. Experts all say they should be right on the air bag module in front of your nose. So guess what the politicians and civil servant types do. They now have a warning label which comes with new cars and is hanging on the dashboard to be immediately removed either by the salesman or the first buyer, never to be seen again. With the

new back seat side air bags, they have a warning label on the inside of the door jam, which can't be seen as soon as you close the door. It basically tells parents to have their kids sit perfectly upright and not lean against the door when there is a crash. So you put your kids in the back seat and expecting a crash you read them the label before you close the door. RIGHT.

The so-called smart air bags are even dumber. They reduce the velocity of an air bag if a small person is in the seat. The problem is not the weight of the person but the height of his or her head, because the air bag would hit you or me in the chest. Further, air bags must have tremendous velocity because they have to be fully deployed before the occupant gets to that spot. If the play in the seat belt gets him there first, he will get the full force of the bag and there is hell to pay.

Pretensioners are not as sexy and don't sell cars. Actually, the technology is the same. There are sensors in the car which detect a sudden change in velocity. Most air bag cases involve whether the sensors are set too low and cause injuries from air bags in parking lot accidents. These same sensors can either tighten up the seat belts or blow your head off with an air bag. You choose. Mercedes has both.

The next big round of air bag cases will be against back seat side bags killing kids. It will inevitably happen.



Got An Interesting Article or Announcement? We'd Really Like to Hear About It!

If you have any articles or special announcements on topics which might be of interest to our readers, please send them to us. Articles and/or announcements submitted will be published as space allows and will be subject to editing and approval of content, with final approval for form and content to be under the authority of the Editorial Staff. Articles, announcements and advertising copy are due by the 15th of the month preceding publication.

Please submit your contribution (in electronic form if possible) to:

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Child Dependency Law Overview

By Roy Daniel

The vast majority of lawyers never see a Child Dependency Law case, but every so often attorneys involved in Family Law matters find their clients in the Dependency Court.

This article is intended to provide an overview of Child Dependency Law for attorneys who have not had experience in this area of law.

California Welfare and Institutions Code [WIC] permits the county to remove a child from parental custody whenever the child is not safe in the home of the parent(s) because of physical, sexual, or emotional abuse, or parental neglect [WIC §300(a)-(j)].

A Dependency case is most commonly initiated by a telephone call to the Los Angeles Department of Children and Family Services [DCFS] "Hotline" by a "mandated reporter"- a police officer, health professional, therapist, teacher, clergy, etc., or from a relative, neighbor, concerned person, or by an anonymous caller.

DCFS must investigate all reports of abuse or neglect to either confirm or dismiss the information. If the report of abuse or neglect is substantiated the child can be removed from the parent(s).

When a child is removed from the parent DCFS must file a Petition for a Hearing in Superior Court within 48 hours [WIC §§311, 325]. In Los Angeles County Dependency Hearings are held in the Edelman Courthouse in Monterey Park. The Petition must state the allegations of abuse and/or neglect and report why the child has been removed. The Court must set a Detention/Arrest Hearing within 72 hours of the child's removal [WIC §§353, 319].

If a client contacts you to represent her or him at the Detention Hearing it is best to advise the client to cooperate with the DCFS social worker, and to immediately get involved in programs or activities recommended by DCFS; for example, for the alleged perpetrator to move out of the home, or for the parent to drug test. Participation in services is not an admission of responsibility, and it

can be persuasive to the Court in deciding if the child is at a substantial risk if returned to the parent.

Dependency proceedings are by law confidential to protect the privacy of the children [WIC §300.2]. By law only the parties, their attorneys, court personnel, prosecutors and law enforcement, social services personnel, and probation officers have access to the children's records [WIC §827]. Juvenile Court proceedings are closed to the public and media access is strictly controlled [WIC §346, CRC 1423(b)].

At the Detention/Arrest Hearing the parents are advised of the allegations and the Court decides if continued detention is necessary. The Court must continue to detain the child if there is "prima facie evidence" that the child is "at substantial risk of harm" and "there is no reasonable means to protect the child without detention, ...or if the parent is likely to flee with the child, ...or if the child is refusing to return to the home" [WIC §319].

Paternity is usually established at the Detention Hearing. Only a father who satisfies the definition of a presumed father under Family Code sections 7611, 7540, or 7576 is entitled to reunification services [WIC §§361.2, 361.5(a)]. Alleged fathers and biological fathers are not entitled to services unless the Court makes a specific finding that the best interests of the child are served by offering reunification services.

At the Detention Hearing the Court will appoint counsel for the child and for the parent if the parent is without counsel [WIC §317]. The Office of Los Angeles County Counsel, Children's Services Division attorneys, represents DCFS. The Court will also set the date for the Jurisdiction/Disposition Hearing. The Jurisdiction/Disposition Hearing must be held within 15 days if the child is detained, or within 30 days if the child is released back to the parent, unless waived [WIC §334].

If the child is not returned to the parent at the Detention Hearing the Court

must place the child. The Court will first consider placement with relatives. Since January 2002, relatives must meet all State of California requirements for foster care, including a hazard-free home and lack of a criminal record. If there is no suitable relative available the Court will place the child in foster care [WIC §319].

The Court will also order reunification services for the parent [CRC §1441]. A parent's lack of participation in services will not be held against them at the Jurisdictional Hearing, but it can be of importance at the subsequent Status Review Hearings, and it certainly can affect custody. Counsel should advise the parent to immediately begin participation in all of the Court ordered services.

A social worker will be assigned to the case by DCFS to further investigate the underlying facts, the family's overall situation, and to provide service referrals to the parent(s). The social worker will also prepare a Social Study Report for the Jurisdiction/Disposition Hearing. The Social Study Report must be available to counsel at least two days before the Hearing. If the report is not available it is grounds for a continuance of the Jurisdictional Hearing [WIC §335].

At Jurisdictional/Disposition Hearing the Court will first hear evidence on whether the child was the subject of abuse or neglect or is at a substantial risk of abuse or neglect. This finding must be made by a preponderance of the evidence [WIC §§300, 355]. Special rules of evidence apply to the Social Study Report. The Report including any hearsay evidence contained in the Report is admissible, subject only to a few very specific objections. If counsel is going to object to any of the material in the Social Study Report it should be done in writing [WIC §355]. Counsel has the right to cross-examine the social worker that prepared the Social Study report and the preparer of any other documents offered by the county [WIC §355]. A parent's testimony at the Jurisdictional

Los Angeles Superior Court

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fice of the presiding judge, and that all problems will be handled expeditiously.

It appears that given the financial constraints faced by the Court, the new rules of procedure being imposed by the State, and the disappearance [hopefully] of “local rules” the practice of law is going to be even more interesting. We will all definitely need the CLE stress management training.

Please remember to renew your membership in the South Bay Bar Association for 2003. At \$175.00 it is still a bargain.

I hope you enjoyed your holidays and have a healthy and prosperous 2003.

Thank you,
Roy Daniel



Mystery Photo



Can you identify this distinguished attorney?

Once more – no one guessed the correct identity of the mystery attorney last month – it was none other than Jeannette Wright (we thought the hint that “she likes to hike the Grand Canyon” would have been the clincher but obviously it wasn’t).

If you can identify this month’s mystery photo, call Shannon at (310) 543-9773. As always, the first person (or persons) to guess correctly win our usual “valuable” prize – *special recognition* in the next issue of the Barristers Bulletin.

If you have a “Mystery Photo” (of yourself or someone else in your firm) please send it to **Jim Hallett** or to **Shannon Shockley** at SBBA.

Thanks!

Our Bar Association Needs You - More Than You Think

This year our bar association will celebrate its 50th anniversary. For many of us, we take our bar association for granted. It has always been here and it will always be here, but will it?

As a non-profit organization, we have very limited means to pay our bills on a monthly basis. Our main source of revenue is our annual membership dues. The general meetings and luncheon meetings are priced at a break-even cost.

To illustrate just how important each paying member is to our bar association, consider the following. It takes over fifty-one members dues just to pay rent for one year. Like any other business, we have monthly expenses that include phone, insurance, wages, payroll taxes, office equipment, supplies, etc. And, like your law practices, expenses continue to rise each year.

In order to survive, we need to either increase our membership or increase our membership dues. In the last two years, your board of directors have put a lot of effort into reducing the bar associations expenses. We have reduced expenses as low as possible, without sacrificing the quality of service we provide to our members.

You are important. Our local bar association is important. We need you to attend our functions, we need your continued membership and we need you to bring in new members. We need you to keep our bar association fun and enjoyable.

As we approach the start of our next fifty years, we should strive for 500 members. This goal is really not that difficult to achieve, if we all put a little effort in it. Our annual dues are less than most attorneys’ hourly rate. I doubt that you can find any other way to obtain MCLE credit as inexpensively as through our bar association. We all know a great number of potential members; people we work with, attorneys that we share the same building with and attorneys that we have cases against. All you need to do is ask them if they would be interested in joining or invite them to a meeting as your guest.

You do make a difference. If you haven’t been to a meeting recently, please attend. If you have, we appreciate your support and ask that you invite a guest for the next meeting.

Rick Thomas, Vice President



Michigan Ethics Opinion

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not enjoy this advantage; he goes into the courtroom with, at best, an educated guess at what witnesses for the prosecution may testify and a hope that his own witnesses will not be intimidated into giving testimony different than what he has been led to believe they would. When a witness in a civil case testifies about a daytime event at work he may be expected to have a clear recall of the event. In contrast a witness in a criminal case often testifies about events that occur in the dark of night, diminishing the witnesses' ability to observe. Sometimes a witness will have abused a controlled substance contemporaneous with making his observations, dulling the witnesses' ability to perceive. In practically all criminal cases involving violence the witness is frightened and shocked so that his ability to accurately recall events is affected. Therefore a criminal lawyer must be especially sensitive to the requirement of truthful testimony that Canon 7 places upon him. This burden is more difficult to shoulder than the neat bundle of interrogatories and depositions carried to trial by the civil lawyer.

It should be mentioned that it is appropriate for the lawyer to discuss these concerns with the client. The lawyer must guard against the natural human reaction in a desperate situation (eyewitness testimony to crime with mandatory prison sentence) to become so enamored of an unique defense opportunity that, in contemplating the small tree, he fails to see the forest. It is the convicted client who does the time, not the lawyer. An alibi defense in the instant case may be foolish; the lawyer has a responsibility to counsel his client accordingly. Defendants in serious criminal cases usually are willing to grasp at straws if their lawyer, by word or deed, suggests there is a chance at acquittal using such evidence. It may be in the best interest of the client not to present the alibi defense and, instead, negotiate for a guilty plea to a lesser offense. That evidence could ethically be presented does not mean that it should be. Obviously if the complaining witness gives positive identification of his assailant and if there is other inculpatory evidence, a jury may give very short shrift to the testimony, however true, of defendant's friends.

In the glare of the ethical question, counsel should not be blinded to the difficulty of his client's cause. All the evidence should be weighed and evaluated before deciding to go forward with an alibi defense. This thoughtful consideration of the client and his situation is the mark of a lawyer with high standards of integrity, appropriate discretion, and absolute honesty.



Child Dependency Law Overview

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tional/Disposition Hearing cannot be used against them in any other Court proceeding [WIC §355.1].

If the Court sustains the Petition a Disposition Hearing must be held within 10 days for a detained child to determine the placement of the child, the amount and type of reunification services, if any, to be provided to the parent, and the parent's visitation schedule with the child [WIC §§358, 361]. Reunification services will be ordered unless the Court finds by clear and convincing evidence that the parent fits one or more of the statutory exceptions [WIC §361.5(b)]. Reunification services can be ordered if the Court determines that it is the best interests of the child to reunify with the parent.

If reunification services are not ordered the Court will set a date within 120 days for a Permanent Plan Hearing to determine if the child should be freed from parental rights and placed for adoption, be placed in a Legal Guardianship, or be placed in Long-Term Foster Care.

If reunification services are ordered the parent has 12-months to complete Court ordered programs and services and correct the problem that caused the child to be detained. A Status Review Hearing is held at the 6-month and at the 12-month dates from Disposition for DCFS to present evidence to the Court that by a preponderance of the evidence the child remains at a substantial risk of harm if returned to the parent. The parent's failure to attend or make substantial progress in programs and services can be taken by the Court as evidence that the child remains at substantial risk [WIC §§366.21, 366.22].

For children under the age of three at the time of detention the parent has only 6-months to comply with all programs [WIC §366.21].

The Court has discretion to extend the period of reunification to 18-months from the date of detention only if the parent can establish that there is a substantial probability that the parent can complete the programs and that the child can be safely returned to the parent by the 18-month date [WIC 361.5(a)].

If the parent cannot regain custody of the child within the statutory time the Court must set a Permanency Plan Hearing to determine which of the three permanent plans: Adoption, Legal Guardianship, or Long-Term Foster Care is appropriate for the child.

The purpose of the Dependency process is to secure, as quickly as possible, a stable, secure home for an at-risk child. That stable, secure home may be back with the parent, or in an adoptive home, or with a guardian, or, and this is how about ¼ of all dependent child end up, in long-term foster care until a stable, secure home can be found or the child matures and emancipates from the dependency system.

Editors Note: Roy Daniel is the current Secretary of the South Bay Bar Association and is a Deputy County Counsel with the Office of Los Angeles County Counsel assigned to the Children Services Division where he represents the DCFS in dependency proceedings.



Pro Bono Program

We are currently scheduling Attorneys for our Pro Bono Program at the Torrance Courthouse from 9:00 a.m. to 12:00 noon on Wednesdays.

This is a great outreach program to become involved with. Please contact the SBBA today at (310) 543-9773 to reserve a date on our calendar.

Thank you!

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6. MENTOR PROGRAM - As a lawyer starting out, you can have a mentor who will be available to answer those questions that come up as you are building your practice.

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