The Minnesota Association of Criminal Defense Lawyers

Challenger

Winter 2015

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Town and Country Club

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Distinguished Service Award Recipient

and

Bob Malone
Profile of Courage Recipient

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Challenger is published two to three times a year by MACDL, a Minnesota nonprofit corporation. Its mission is to advance the advocacy skills of MACDL members, to inspire and motivate aggressive, ethical,and effective defense for all accused, and to connect the criminal defense community in Minnesota.

Articles express the opinion of the contributors and not necessarily that of Challenger or the MACDL. Headlines and other material outside the body of articles are the responsibility of the Editor. Challenger accepts letters and unsolicited manuscripts about the practice of criminal defense or the trial of criminal cases. Contact:

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Issue Editor's Column

Ryan Garry

Dear MACDL Members:

We hope you like the latest edition of the Challenger. If you have any comments, concerns, insults, suggestions, etc. regarding this issue or any other aspect of the Challenger, please email me. If you would like your comments published, I am happy to put them in the next edition. Also, if any of you have anything that you would like to share, please do not hesitate to contact me. We are always looking for ideas.

Enjoy.

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Thank you Dan Guerrero for all the pictures....

President's Column

Mike Brandt

O Fourth Amendment, Where Art Thou?

The Fourth Amendment to the United States Constitution reads:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated….

Or so envisioned the framers of the Bill of Rights. The Minnesota Constitution has an identical provision in Article I, Section 10. The framers of the United States Constitution and the Minnesota Constitution are probably rolling over in their graves as they watch the evisceration of the protections they envisioned in each provision of the U.S. and Minnesota Constitutions. So, this brings us to the question—O Fourth Amendment, Where Art Thou?

As attorneys practicing in criminal defense, we are constantly on the search for the Fourth Amendment. The most oft-litigated pre-trial issues deal with improper searches, improper arrests, improper stops of motor vehicles, and the expansions of the scopes of stops as we continually challenge the tactics of law enforcement. However, it can be very disheartening to day after day, week after week, walk away from a hearing with an order by the court denying our motion for suppression. Okay, to be fair, many of the motions we litigate might be long shots, but in many of them it was pretty clear to us that the police had overstepped their boundaries and had trampled on our client's rights. So, where is the Fourth Amendment?

Over the past several decades the appellate courts have bent over backwards to uphold questionable tactics by the police in the name of such policies as officer safety, the war on drugs, the war on DWIs, or whatever the issue *du jour* happens to be. One could argue that the appellate courts (all the way up to the United States Supreme Court) fall prey to politics and find ways of skirting around the Fourth Amendment so that they can help foster whatever public policies are being put forth in society. Simply put, this is wrong.

The Fourth Amendment was not put in place as a convenience for society; the Fourth Amendment was not put in place to help police in their law enforcement tactics; the Fourth Amendment was put in place out of the fear of the abuse of power by the government. When the framers of the U.S. Constitution drafted our Constitution and the Bill of Rights, they had just finished an experience with the English where people's civil rights were trampled; where the King and his men treated the colonists with unfettered abuse. To prevent that abuse from happening in the new system of government, the framers wanted to be assured that protections were put in place to limit the power of the government. This was the idea behind the Fourth Amendment and the protections envisioned. Unfortunately we have come a long way from those protections. There is that old tenet that exceptions to a rule can eventually swallow the rule. It seems that we have rapidly been approaching that tipping point.

For example, in the context of DWIs we recently watched with anticipation as the United States Supreme Court ruled that the single fact that the body is metabolizing alcohol does not justify a warrantless search of a suspected drunk driver. It only took a few months though before the Minnesota courts

found a way to dodge that rule and find that a driver's consent to a blood, breath, or urine test obviates the need for the warrant—even though the consent is *extracted* from a driver by telling them that if they don't consent to the test (search), they are committing a crime. Thomas Jefferson, et al., would be foaming at the mouth if they saw their handiwork dispensed with in such a cavalier fashion by our courts.

The list goes on. Drug paraphernalia in garbage justifies a search warrant. A cop's supersonic smell of raw marijuana in a baggie, in a Mason jar, in a backpack in the back seat justifies a search of the car. Unfortunately trial court judges feel constrained by the low bar created by the appellate cases and throw up their hands. So, what do we do? We do what we as defense lawyers have always done: We fight, we file, we battle, and we litigate. We hold the government accountable and we put them to the task. We make cops get up on the stand and explain themselves. We put their feet to the fire. We don't give up!

Regardless of how bad it gets up in the ivory towers of the appellate courts, we must continue to fight the good fight. We have to file the motions to suppress. We have to litigate the issues. We have to do our best to convince the trial court judges that there *are* limits on the police power—that claiming officer safety is not a catchall, get-out-of-trouble-free card for the police. We need to continue to push the envelope, do our homework, conduct our investigations, and make sure that we have searched under every stone in our zeal for protecting our clients' rights. It is required of us as defense lawyers. It is required of us as guardians of the Fourth Amendment. It is what is required of us as advocates for our clients.

Don't be disheartened. Don't give up. Keep fighting.

Mike Brandt

President

Interview of Criminal Defense Attorney EARL GRAY

January 14, 2015

Interview taken by attorney Peter B. Wold

PW: Why don't you tell us a little bit about your background before college?

EG: I grew up in the West Seventh Street area of St. Paul. Went to Monroe High School. Two kids that I hung around with actually graduated from college; the rest of them went to Schmidt Brewery to work there or Stillwater prison. After Monroe, I went to Gustavus Adolphus College.

PW: Why did you go to Gustavus?

EG: Well I played football in Monroe and they didn't typically have game films in those days; however, they did film one game and that was of a game I played that I got pretty lucky in. My coach sent the film around and they came to see me so I ended up there.

PW: What position did you play?

EG: Linebacker.

PW: And then you went on to a pro-football career after that?

EG: Well if you might recall the AFC was fighting with the NFC and also there was Canadian football and my plan at the end of my college career was to go to Canada, which would help me to evade the draft and also play football if I was a Canadian citizen at that time. I'm not sure what the rules are now; you can have only so many Americans on your team but if you're Canadian you can play, so that was my plan. It didn't happen. I got married and had a kid.

PW: So what year did you graduate from Gustavus?

EG: 1966.

PW: And what happened next?

EG: I was admitted to law school in 1966 when I was in college. I wasn't planning on going because I was married and I was expecting a child, but some tragedies happened in my parents' family and my family the summer of 1966. I was working as a salesman at the time, which did not appeal to me, so I quit that job and went to night law school – *William Mitchell*. And I worked in a warehouse during the day. My wife had our first child – Tammy – on November 8, of that year, so it was my first year of law school.

PW: Had there been any lawyers in your family?

EG: No, my dad was a chef – cook and my mother was a waitress so no … nobody. The only lawyering in my family was watching Perry Mason on the black and white TV and the Defenders with Burl Ives. One guy's name was Capenella and I don't know what the other guy's name was, but I really enjoyed those shows.

PW: What inspired you to be a lawyer?

EG: Well I was brought up being for the underdog. I liked to watch lawyer shows on TV and I thought I'd give it a try … I don't know. When I started the first year – at that time they would let everyone in and then they would weed you out. Then they'd give you this speech – look to your left and your right … one of those two will not be here next year because they will flunk out. At that time at *Mitchell* they flunked out a third of the class your first year. Of course, we both know you don't take any tests until the end of the year. You really don't know how you are doing. At the end of the year after our test we would stop at *O'Gara's* – the students – and discuss all of the issues. I was scared because I was really in a minority on all these issues; I felt it was this way rather than that way. So after the first year of law school because we hadn't received the grades, I enlisted. I went down to join the Air Force in case I flunked. However, I passed – I did real well so I chucked that career and went to my second year of law school and finished all four years. I think the only achievement that really impressed me was when I graduated from law school … I graduated with honors, fifth in my class, which if you told my college buddies that, they wouldn't believe a word of it … because I was pretty much a cut-up in college.

PW: You mentioned working in a warehouse and a salesman job – what other jobs did you have growing up?

EG: Oh, growing up I was a paper boy, a dishwasher, a bus boy. A dishwasher in my dad's restaurant and I got in a fight with a bus boy and hurt him sort of badly in those days. There was no such thing as felony assault for knocking somebody out, but my dad had to fire me, so I lost that job when I was 16 and then I worked as a bus boy at another place. Then they threw me out as a matter of fact, and in the summer time I worked on concrete in nice buildings, marble/concrete mix for flooring. And my grandfather was a grinder and he would grind the floor down and I would follow him with mud buckets and put the refuse – the mud – in buckets and carry it outside and dump it, which was a rough job. And then after that I worked on construction a couple years. I worked at the Ford Plant for two years … loved it. The Ford Plant was a lot of fun because those guys were my kind of guys that worked there. They were good guys, they'd work 62 hours a week and made big money. I almost didn't go back to school one year because it was huge at the time. However, I did go back mainly because of football. So I worked at the Ford Plant, worked construction, I had a lot of jobs. Then when I got out of college and my wife was pregnant and I was really broke. That summer I was a salesman for Del Monte Foods, which wasn't a job I liked; I would have rather worked at the Ford Plant. I decided to take advantage of the law school admission and decided to go.

PW: So you graduated from law school – did you work?

EG: Yeah, I was fired from the warehouse job in my first year of law school and then I got a job at the traffic violations bureau in the St. Paul Courthouse. The next year I worked for the municipal court judges as a clerk until my fourth year of law school. During my fourth year of law school I worked at the Paul Jones public defender's office as a brief writer and investigator, and I worked in Fraser Hall at the University of Minnesota Law School in the basement where Jones's office was and that was a great experience because I worked with Rosalie Wall, Bobby Levy, and an investigator – a guy named Snowy. He was an ex-FBI agent and you learned more from the arguments from him and Levy and Rosalie Wall … mainly Bobby Levy and Snowy because Bobby was very liberal – remember this was early 70's – '72, '71 – riots were going on at the University and they would get into arguments daily about the law and everything. I learned a lot … I would go to prisons with Snowy to interview prisoners who were doing post-convictions and most of them really disliked Paul Jones because at that time there were so many post-convictions, the law had just been passed couple years before that and everybody wanted in on it. So I did the interviewing and wrote briefs on the side. I was also in a clinic program, so I could argue one. There wasn't any appellate court, there was the supreme court only and I had two cases: ***State v. Curtis***, which was a search and seizure case in St. Paul, and ***State v. Siirila***, which was a possession of a small amount marijuana. I choose the ***Siirila*** case because there had been a case before that that pretty much ruled you have to have a user's amount of marijuana before you could be convicted of it, and in the ***Siirila*** case there were little tiny pebbles. Well I managed in my argument to change the law and move it back to where it was … because the Supreme Court ruled that no, if there's pebbles in there that's circumstantial evidence that he possessed before so therefore he's guilty of possession. One of the other issues in that case was that Siirila got 20 years in prison, but in those times it was an indeterminate sentence and I was making a big deal of it in front of the supreme court and I sat down and this shithead from Hennepin County told the supreme court that well it might have been 20 years but he's now in barber school in California on parole. I stood up and objected – that wasn't in the record. Oscar Knutson told me – Mr. Gray we don't do things like that. You don't object here – sit down. And Oscar was quite loud and I sat down. That was my first experience. I got the message.

PW: After law school what was your first legal job?

EG: Jones hired me as a public defender in the misdemeanor office of Hennepin County. At that time Jones and Bill Kennedy – who was the felony public defender in Hennepin County – were fighting over the municipal jurisdiction. And Jones got it, he hired me and then he went and got Tom Tinkham who worked for Dorsey. He was a Harvard graduate, debate champion, you know great credentials and a great lawyer. Tom and I and Wood Foster, Jr. were the three municipal court public defenders in Minneapolis and Bob Oliphant would decide – he was sort of our boss – he would decide that we were not only Hennepin County, so he would send me to Roseville and all over the place. My first trial happened right after I was sworn in. I went out to handle

a first appearance in Roseville for him and it wasn't a first appearance … it was a jury trial in front of Judge Frank, a tough judge. My client was a booster (thief) and was charged with a misdemeanor, receiving and concealing property. I had George Peterson as the city attorney. I had no idea what I was doing but I tried the case, kept the jury out a couple hours before they convicted my client. We did the whole thing in a day – from 9:00 in the morning until 8:30 or 9:00 at night. That was the first case I had.

PW: So you started out as a public defender. How much were you pulling in as a salary that first year?

EG: It was supposedly three-quarter time, but it was really full-time and then some. I think it was about $12,500. Which, $12,500 at that time was pretty good – the lawyering business – there were a lot of lawyers around at that time. It was a great job because of the trial experience and you had a paycheck. And then at night because in my neighborhood on West Seventh Street, I had a lot of friends, one of them was a real estate person and he put me in an office for night lawyering and I would go down there at night after the public defender's office two or three nights a week and meet clients for title opinions in those days, you do title opinions or draft wills. A lot of times after about a half hour I'd end up at *DeGideo's Bar* with my buddies and get home late. It was well intended.

PW: Well you have a pretty big reputation as a title opinion lawyer. But how long were you a public defender?

EG: One year. It was a one-year contract and at the end of the year Joe Livermore and I had a job with Bob Renner in the U.S. Attorney's Office. Jones sent us over for interviews, but it was set up … and Bob Renner – the U.S. Attorney – hired me as a federal prosecutor. He hired Livermore too.

PW: What year was that?

EG: 1971.

PW: How long were you with the U.S. Attorney?

EG: Two years. When I was planning on leaving, Renner was going to square up the office and make, I think, Thor Anderson – one of the lawyers there – head of the civil, and I was going to be head of the criminal, but I had taken a job and I told Renner that. And there was no greater boss than Renner … he told me that he understood that I wanted to go out into private practice.

PW: Did you put anybody in prison as a prosecutor?

EG: Yeah, I had an impeccable record, I tried drug cases. I put an Episcopalian priest from San Francisco in prison on a first degree conspiracy drug case where the defendant never was in Minnesota; he had shipped the stuff here. Back then the DEA sent me a letter saying what a great guy I was. Ten or fifteen years later they tried to put me in jail, but in those days (when I was a prosecutor) I was a great lawyer in their minds.

PW: What was the job you left the U.S. Attorney's office for?

EG: I went into private practice at *Collins & Buckley* because I wanted to get out of there. I wanted to go into private practice; I wanted to be a criminal defense lawyer.

PW: Why?

EG: I was always for the underdog. I never cared for authority. I had some bad run-ins with cops when I was a kid. And I just was brought up in a family where my mother, if any competition, she was always for the underdog. And so was my dad. I always understood that the defendant was the underdog, too. To me it was an unbelievable experience to be a criminal defense lawyer. It was like playing football but with your brain because you know you're up against somebody as an adversary – and if you do real well you might win.

PW: So at *Collins & Buckley* – they had a criminal law practice?

EG: No … well yeah … Ted did, a little bit, but he was also a special prosecutor and I brought in a lot of business. After three or four years I left there and went into private practice – myself and Pat Brink and then Dick Gill set up *Gray, Gill & Brink*. Lasted two years and then dissolved. Since 1980, I have been on my own.

PW: Ok. What's the first not-guilty verdict you remember?

EG: It was back in my public defender days – the second case I tried was one mentally handicapped, a little guy, homosexual black person. He was walking across Hennepin Avenue after getting done with his job as a dishwasher at a strip joint on Hennepin, and three or four tactical force cops (I think that's what they were called at the time) arrested him for assault and (all the cops were drunk) took him to the police station and on the ride up the elevator beat the living crap out of him, put him in jail, and charged him with assault of an officer. So I tried it in front of a judge, which you had to do at that time to get a jury trial, and of course the judge convicts my guy. So I lose and I appeal it for a jury trial. I'm told that the jury trial by the prosecutor who was a veteran but a horseshit lawyer and a judge who is a conservative asshole – I'm asked by both of them "why are you trying this, you're going to lose, you lost it with the judge." This guy kicked a tactical officer – he was accused of kicking a tactical officer in the nuts and I said I'm going to try it. So I tried the case. The tactical cop was 6'4", John Larson I think was his name. Years later I met him and he thanked me for doing this but I tore him apart on cross. I had him stand up and had my client stand next to him and have this client raise his foot up and his foot could never reach the cop's groin. There's no way he could have kicked him. And it got better from there – the jury acquitted my client. Anyway that was my first jury trial victory and that was my first shot of heroin. After that I've been fighting ever since, as you know, Peter. It's a good feeling especially when a judge found him guilty. What was funny about that is I read a newspaper article recently about this and my client spent a week in the hospital. I mean he got his ass killed. Cost him $500. His mother in the article said, "Well we were just going to put it in the hands of God." I should show that to you someday. So that was my first trial.

PW: So you've been in private practice since 1980. Since that time I know you have had a lot of huge cases. Tell me about your favorite cases, your favorite trials.

EG: Well I had a first degree murder trial with a daycare provider back in 1990-

1991, Dakota County. It was *State v. Roers* and she was clearly innocent. I got a newspaper article that was sent to the newspaper by the foreman because the county attorney had said that it was a tough case, and the foreman objected to that; he said it wasn't a tough case, you just charged the wrong person. I blamed it on the mother instead of the daycare provider. It was a big case. A national TV show, like 48 hours or something like that, wanted to do a special on it and they wanted to have all the jurors with my client and me and that's what happened. We had a dinner and I think there were about eight other jurors and then the news people with their TV cameras and my client. That was something; that was memorable.

Another one of the memorable ones was in 1983, 1984, or 1985 – there was a guy from Long Island, New York … an Iranian Jew who was talked into hiring an undercover FBI Agent in Minnesota to kidnap the children of a family New York and extort money from them; that's a brief description. The reason it was in Minnesota was that the undercover snitch that set this up had been a snitch in Minnesota prior to that and he had contact with the FBI in Minnesota. So my client flies here to Minnesota on video tape, hires the undercover cop to go to New York (to kidnap the kids), gives him $500 down, and goes back to New York. And then there are telephone conversations that summer. During the summer the snitch had him send a lot of vacant packages/ empty packages and then make insurance claims at his father's dress store, that they were full of goods and made some fraudulent insurance claims. So then he did talk to the undercover agent during the summer wanting to know when they were going to come to New York and kidnap these people. So he is indicted for extortion and wire fraud with Judge Murphy and it was quite a case because I argued that my client was entrapped. That it was set up by the snitch and one of the reasons I won the case – I actually flew to New York, did my own research (they didn't have computers at the time). I got the files on the snitch and it turned out that the snitch's Minnesota work was on a huge drug case. The snitch said he's going to do prison for ten years; that was his deal on it and then he was going to be deported back to Greece where he's from; he was an illegal alien. A year and a half later I found in his file a letter from the U. S. Attorney's office asking that he be released from prison and he was released and wasn't sent back to Greece. He took off for New York and next thing you know he's setting up my client. Well I had all this stuff on him and the federal judges are so much better, you can get into that stuff, well in state court you can't and that's bullshit. And I had a field day with him and the jury acquitted the guy. That was a remarkable victory.

Then I had a triple homicide in LaCrosse, Wisconsin; the most serious case. This was in 1993 or 1994. My client was accused of beating his wife to death, his mother-in-law and his mother-in-law's boyfriend in a trailer court and my client spent a year and a half in jail before the trial but he was acquitted on all counts. I blamed it on the mother-in-law's sons that lived in the trailer court. I still think they probably did it. I got out of town quickly after that case. I was blaming it on the sons and they were sort of bad people, too. I noticed someone following me around the first week of the trial, and the second week of the trial I brought my 357 Magnum pistol

in my car. I left the pistol in the car … and I'm working into the night in my motel room and you know you get involved in this case and you got all the shit for the next day, the three murders and crazy pictures and all the sudden somebody walks in the room and I just shit – I looked for the gun. Thank god I left it in the car or I probably would have shot the guy. And it was some guy that the dumb clerk had given the wrong room key. Man, you want to talk about your heart bouncing off the top of your head.

PW: So, Earl, I don't think I know anybody that tries as many cases as you do.

EG: No, you do.

PW: Can you come up with an estimate of the number of cases you tried?

EG: No, I really, I don't know, I suppose the average five or ten a year for forty years would be 200 and some, I don't …

PW: How many have you tried in 2014?

EG: Four. That's about right. Well you get ready for a lot more that always get continued. Or five maybe this year – I think five.

The most fun trials are with my friends – Peter Wold, Bill Mauzy, Joe Friedberg – when we can get together in federal court on joint trials. That is where the fun is at and unfortunately the last one we had was that Native American case, but I think back to the 80's and 90's when we'd jointly try cases – it was just a lot of fun.

PW: Looking back to the golden years of criminal defense, it was Earl Gray, Meshbesher, Doug Thompson, Joe Friedberg, Hartigan. Just talk about those experiences.

EG: Well that was really fun because Doug Thompson – sober or drunk – was the funniest guy you'd ever meet. One time I sat with Dougy and Joe and Bill Mauzy for six months in the Midwest Federal case and the fun of that was being there with your comrades.The other part of it is when a witness is talking about somebody else's client, you can daydream for a while and you don't have to be on your toes, which is always nice. I had a case with Ron Meshbesher where he was second-chairing with a lawyer from California and I was riding his ass throughout the case that – you're holding onto the books and Ronny would always say well … Mr. Gray, I got a $100,000 for this, how much did you get? And of course I got about $15,000 or $20,000. And another funny incident was with Doug, oh hell Ronny was in on this case – it was called the Cragnus Gold Mine case and I represented a guy from Houston,Texas – a Ron Prescott – and I had a very good case, I thought. It was a conspiracy; Pragnus was from Minnesota, he bought a gold mine in Alaska and he was selling coke all over the United States, including Houston. Well the prosecutor was pretty low key and he called this girl who was the girlfriend of Cragnus, Ron Meshbesher's client, and they had flown from Alaska or Minnesota to Houston to pick Ron Prescott up and with his family, and then fly to Florida for Easter. Cragnus picked them up and they went on a vacation and Prescott throughout the testimony is pulling on my arm: "ask her, ask her, there wasn't any drugs on that plane, ask her, ask her" … I said no I don't … "yes, you've got to ask her," so I listen to my client – the last time I've ever done that. I get up to the podium,

Judge Devitt is the judge who is a great guy, a kidder. So at the request of my client, I ask the girlfriend of Cragnus, "Well Ms. So-and-So, there weren't any drugs on that plane were there?" And she says, she looks at me and says, "Oh yeah," and I went oh geezes, now where do I go. I did the only thing you could possibly do, well I raise my hand up and making a sign with my finger and saying, "Just a little bit, right?" And she says, "oh no, they had a lot." And the walk from the podium back over to Meshbesher, Dougy, and I think Chuck Hawkins was in there, and maybe Mark Peterson, the walk from the podium to my chair and their snickers, their laughing was unbelievable and I turned to my client and I said, "What the heck are you doing, are you nuts?" And he doesn't deny it, he says, "Geez I don't remember drugs being on it." That's the last time I listened to a client. In those days the biggest sentence was three or four years. Now it would probably be 30 … who knows. Trying cases with those guys, and with you, on jury trials I think that's the – that's the fun times of this practice.

PW: Are you still having fun doing it?

EG: Yeah, yeah.

PW: How long, how much longer, Earl?

EG: Well probably three years at least because I have kids in their second year of college. I spend a lot of money and so I'll probably go for another five. As long as I feel good and it's still fun, I don't golf as you do. I'd like to take up fishing, I like to watch football games. I lift weights; I work out, that's my hobby.

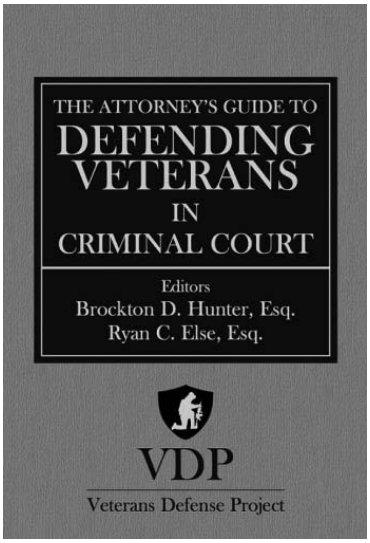
PW: So it might be more difficult today. Do you have any advice for young lawyers that want to be criminal defense lawyers?

EG: Yeah, you either got to get a government job and get the experience or get out of the metropolitan area where you can get in court and try cases … because in the civil practice from what I've seen there's hardly any trials. Now they mediate before they even sue the cases out. And in the criminal practice – the lawyer in my office has a ton of cases and I don't think he tries one case a year. They all settle and a lot of that has to do with – ah I don't want to get into that. The only thing that would cause me to retire would be an appointment of judges, and the judges that have been appointed lately that have no criminal law experience. They do not belong on a criminal bench until at least they try a few criminal cases themselves. And I don't mean be a judge, I mean get down in the pits and see what's it's like.

Special Considerations in the Attorney-Veteran Client Relationship

Brockton Hunter & Joshua London

For as long as warriors have returned from battle, some have brought their war home with them, bearing invisible wounds that haunt in the present. These echoes of war—manifested in self-destructive, reckless, and violent behavior—reverberate through society, destroying not only the lives of these heroes, but their families and communities. When they stumble and fall into the criminal justice system, as we know many of them will, we in the defense bar have an additional, solemn role to play, in helping them up and bringing them the rest of the way home. This article scratches the surface of strategies for addressing the special concerns involved in defending veterans. The ideas are drawn from *The Attorney's Guide to Defending Veterans in Criminal Court*, a comprehensive manual to the art and science of defending military veterans.[1]



1 The Attorney's Guide to Defending Veterans in Criminal Court is available online at www.veteransdefenseproject.org.

As we prepare to defend those who defended us, we must first recognize that we in the criminal defense bar share much in common with our veteran clients. Like soldiers, our job is often gritty and thankless; our mission misunderstood by the general public. Like soldiers, ours is a proud warrior culture, a tight and insular community with an *esprit de corps* not found in many other professions or areas of the law. Above all, we, like our veteran clients, swore a sacred oath to defend the rights and freedoms that make our system of government so special.

With proper preparation and execution, defending veterans can be among the most rewarding experiences a defense attorney can have. We can simultaneously help repay our nation's debt to these heroes for their service and sacrifice, uphold the special protections now afforded them in our justice system, and benefit society by helping turn them back into assets, not threats, to their communities.

So what's the kicker? For many of us, defending this particular group of clients will require that we rethink foundational elements of the attorney-client relationship. By now, most Minnesota defense lawyers should recognize that veteran-defendants present certain challenges and opportunities in courtroom and negotiation strategy. Thanks to advances in medical understanding of military-related disorders and increasing societal awareness, the law today often allows veterans to achieve substantially better, treatment-heavy dispositions. However, these

favorable outcomes are made substantially more likely if the defense lawyer is focused on special attorney-client issues from the moment they first make contact with their veteran-client.

The Initial Meeting

Obviously, identifying a potential or new client as a veteran is a necessary first step. These days, many of our veteran clients are referred to us because of our focus on veteran defense, advocacy, and education. They arrive on our doorstep, already identified as a veteran in need of help. Sometimes, they have even been diagnosed with a service-connected issue and are already engaged in needed treatment. Other times, though, a potential client contacts us, making no mention of prior military service. We can usually spot these individuals as veterans, based on their haircut, wardrobe, or even just speech and mannerisms. Once in a while, though, a veteran evades even our detection.

The only way to ensure these "stealth vets" don't slip through the cracks is to ask all of our clients if they have ever served in the military. Notice, we do not ask them if they are "veterans" as that term carries different meanings to different people. Some younger veterans think of the term as applying only to past generations — the old men in the pointy hats, adorned with pins. Others, particularly female veterans, will sometimes fail to identify themselves as "veterans" because they associate the title only with men who saw direct combat.

With senses honed by the life and death need to read others' character and intent, combat veterans tend to be very perceptive. Your new veteran client will be sizing you up from the first moment you meet, alert to any signs of fraud, insincerity, or disrespect. Building trust is a top priority. If you served in the military, share that fact with your veteran client. Past military service provides an instant foundation of shared experience and culture. Be careful not to brag about or inflate your service, though. Humility and understatement go a long way in earning a fellow veteran's respect.

While prior military service will provide a leg up in building rapport with a veteran client, it is not required. Authenticity is more important than credentials. Tell your veteran client about any of your family members who have served in the military. Show the veteran that you sincerely care by demonstrating at least a basic understanding of the military, the conflict in which he or she served, and the issues that may be relevant in a veteran's case.

The initial meeting is also your first opportunity to observe your veteran client, looking for any signs of mental health, brain injury, and/or substance abuse issues. You may be the first to identify an untreated invisible injury. To that end, it is best to attain a basic understanding of the criteria for Post-Traumatic Stress Disorder (PTSD) and Traumatic Brain Injury. Look for visual cues of service, such as a military haircut or tattoos that appear to be related to the military. Furthermore, pay attention to the client's mannerisms for symptoms of combat trauma. Trauma can reveal itself through a wide range of signs, from hyper-vigilance to a flat, withdrawn disposition.

Once you learn that a client or potential client is a veteran, it is important to inquire further about the person's military service to analyze its relevance to the case. Initially, we only discuss our veteran client's military service in very general terms. We do not typically use a formal questionnaire at this point, as it could be a barrier to establishing trust.

We start with the basic facts of military service: military branch, years of service, military occupational specialty (job), rank, duty stations, and any overseas deployments. Then we ask some open-ended questions about the nature of that service, paying attention to the emotions displayed as much as to the content of the answers. We allow the veteran client's comfort level guide us,

careful not to push him or her too fast, too soon.

Depending on our veteran client's emotional state and the level of trust we feel we have established by this point, we sometimes probe further about the nature and extent of his or her exposure to traumatic experiences. This is very sensitive territory, so we are careful to tread lightly. Without going into too much detail, we inquire about service in a designated combat zone — receiving incoming enemy fire, returning fire on the enemy, contact with casualties, and exposure to explosive blasts — looking for fact patterns that could to contribute to invisible injuries.

We next ask new veteran clients about whether they have been experiencing any symptoms commonly associated with PTSD. We do not mention "PTSD", specifically. We just inquire about symptoms. One favorite is to simply ask, "how are you sleeping?" A common answer among those experiencing PTSD, even when they are in denial about it, is, "Sleep? What is sleep?" We also ask about hyper-vigilant behavior, avoidance of crowded public areas, driving problems, nightmares, and alcohol and/or drug consumption. Often, a veteran client is accompanied by a spouse, other family member, or close friend. If possible, we also ask that person about such symptoms.

Overcoming the Stigma of PTSD

Often, the most challenging step in the case preparation process will be getting your veteran client to open up about his or her service experiences and the effects that those experiences have had on his or her mental health or lifestyle. Due to the stigma surrounding mental health problems and the "Superman syndrome" of unreasonable expectations of perfection that pervades the military, it is very difficult for many veterans to admit that what they are experiencing is related to a possible mental health disorder or even to a physical injury.

In this context, a little education can go a long way. When we encounter a veteran client who appears to be in shame-based denial about a legitimate invisible injury, we provide him or her with a brief overview of the history of combat trauma and its ties to criminal behavior. It helps to tell the veteran that he or she is not alone and that many elite combat veterans throughout history, from Odysseus to Audie Murphy to Hector Matascastillo, have suffered invisible injuries

resulting in criminal behavior. It also helps to tell the veteran that help is available and effective.

Sometimes, the shame of a criminal charge can actually help break through otherwise bulletproof "Superman Syndrome." In this context, we often ask, "okay, Stud, are you a criminal or do you need to get some help?" Most troubled veteran clients, despite feeling deep shame for their aberrant behavior, will ultimately come around to the idea that they might need some help.

To be clear, this discussion is *not* meant to coach the veteran client on malingering

PTSD or other service-related trauma. It is intended for those cases in which we are reasonably confident our veteran client is in denial about legitimate injuries and needs to get help.

Guiding the Client towards the Appropriate Treatment

As we discuss our veteran client's charges and assess the role combat trauma may have played, we are also conscious that the charges themselves and associated stress may be triggering additional mental health issues. Criminal charges can be the final straw for a veteran already in psychological crisis. We employ a "Lawyer as Counselor" approach, ready to administer basic psychological first aid to stabilize our client and guide him or her toward professional care. Be particularly alert to any signs of crisis or hopelessness that could signal a danger of suicide and require a more immediate intervention.

We encourage our veteran clients with potential invisible injuries to get professional screening and help, whether those injuries are relevant to our defense or not. It helps to have an established point of contact at the local VA Medical Center to help with the initial introduction to the system since it may seem overwhelming to a veteran who is already in crisis. The VA now has Veterans Justice Outreach (VJO) Specialists at each of the VA medical centers, tasked with serving as the point of contact to the VA for criminally-charged veterans.[2] VJOs can assist in scheduling a mental health assessment, securing a valid diagnosis, and establishing a treatment plan. With a properly executed "Request For and Authorization To Release Medical Records or Health Information," VA Form 10-5345,[3] the VJO will also provide us with ongoing feedback and assistance in obtaining past and current VA treatment records. This document allows the VA to release records directly to us for up to a year.

The veteran client's treatment will be the starting point to any mental health-related defense or mitigation, so he or she must take it seriously. A successful track record in a treatment program while the case is pending can be very productive in showing the prosecution or the court that the veteran is not a public safety risk and poses a low risk of recidivism.

Attorney-Based Enhanced Techniques for Client Counseling

Psychological First Aid (PFA) best characterizes the attorney's counseling role in its most aggressive form where, under time-limited circumstances, without immediate access to a clinician, the attorney is the only person uniquely positioned to establish a lifeline with the client. Here, we explore some specially-tailored methods for providing PFA to the legal client, which have proven effective in responding to combat veterans' stress responses.

First, the client's survival must be seen as the first priority. Like any squad member on patrol, the attorney on point must have a contingency plan to escape the danger of an overwhelming ambush. She must search vigorously for signals of suicidal ideation beneath the surface of otherwise normal interactions, if for no other reason than the combat veteran's heightened risk of suicide when confronted with criminal charges. This position recognizes that attorneys can often be "the last professional with whom distressed persons have contact before making a suicide attempt."[4] Look for comments or other cues that signal a feeling of hopelessness. As awkward as it may seem, ask direct questions, like, "Do you want to kill

2 VJO contact information is available at http://www.va.gov/homeless/vjo_contacts.asp.

3 Request For and Authorization to Release Medical Records or Health Information, VA Form 10-5345, can be accessed as an online PDF at http://www.va.gov/vaforms/medical/pdf/vha-10-5345-fill.pdf.

4 *QPR for Lawyers: A Basic Gatekeeper Training for Suicide Prevention Program for Lawyers*, *in* ABA Comm. on Lawyer Assistance programs et al., What Lawyers Need to Know About Suicide During a Recession: Prevention, Identity and Law Firm Responsibility (2009), at Tab 4.

yourself?" or, "Are you planning on hurting yourself in any way?" [5]

Although combat-connected mental conditions do not always lead to suicidal ideations or attempts, the defense attorney should have a reliable plan with necessary responsive steps in the event of a serious enough threat. It is simply inexcusable to proceed from the common position, "This has never happened to me yet, so why should I care?"—especially when an estimated 22 veterans are taking their lives each day and another 1,000 under the VA's care attempt suicide each month.[6]

Second, attorneys, by virtue of their multiple obligations, have little time to monitor clients when they are not captive counselees in the office or courthouse conference room. This lack of visibility impairs situational awareness of clients suffering from mental disorders. Attorneys who work with combat veteran clients can make two significant improvements. First, the defense attorney can establish an extended litigation support network for the client based on the client's identification of a primary and alternate trusted point of contact (TPOC). With the client's buy-in, the attorney can meet and indoctrinate TPOCs with responsibilities to observe and report significant information that will help the attorney in the representation.

A second method of surveillance outside the office involves the attorney enabling the client to plan and organize litigation tasks, appointments, and thoughts in a single consolidated place, like a litigation notebook. Because clients with PTSD and TBI regularly face thinking impairments, they are easily confused by complex tasks of a legal nature. These clients easily miss appointments when they fail to write down reminders in an easily accessible location. The litigation notebook ultimately provides the attorney with a method to rapidly assess the client's receptiveness to legal advice and the need for cognitive interventions.

Ultimately, the key to quality veteran client counseling and representation is awareness. Ask the questions that are necessary to fully understand your client's situation, including how their service-connected injuries manifest. You should know not only the client's existing state of mind, but what type of events trigger internal or external reactions. By knowing your client's sensitivities, you can prevent reactions, in the courtroom or at home, that could adversely impact his or her case.

Finally, be aware of what we call "secondary trauma." Secondary trauma has been explained as "the cost of caring . . . the stress resulting from helping or wanting to help a traumatized or suffering person." [7]

While working with any client who has experienced trauma can expose an attorney to secondary trauma, working with combat veterans often poses additional challenges. Veteran clients have often been exposed to significantly more trauma than the average civilian trauma survivor. Veterans will not only have been victims of violence, but will often be struggling with the trauma of having inflicted violence, sometimes a great deal of it. The process of bonding with them and hearing their, often unimaginable, stories of the horrors of war, can leave attorneys feeling the effects of that trauma, ourselves. As Major Evan Seamone vividly notes, "[a]ttorneys working with troubled veterans are inescapably along for the journey, functioning

5 David A. Jobes & Alan L. Berman, *Crisis Intervention and Brief Treatment for Suicidal Youth*, *in* Contemporary Perspectives on Crisis Intervention and Prevention 53, 59 (Albert R. Roberts ed., 1991)("[V]ague suicidal comments should *always* elicit a direct question . . . as to whether the client is thinking about suicide.").

6 Maj. Evan Seamone, *The Counterinsurgency in Legal Counseling: Preparing Attorneys to Defend Combat Veterans Against Themselves in Criminal Cases*, The Attorney's Guide to Defending Veterans in Criminal Court at 151(Brockton D. Hunter, Esq., and Ryan C. Else, Esq., eds., 2014).

7 Charles R. Figley (Ed.) Compassion Fatigue: Secondary Traumatic Stress Disorders from Treating the Traumatized 7 (Brunner/Mazel 1995).f

just like squad members on patrol through the bombed and burning villages in the recesses of our clients' minds."

Though the potential for secondary trauma in working with veterans is likely higher than with other clients, the remedies are the same. All involve awareness, balance, and connection. One set of approaches can be grouped together as coping strategies, such as self-care, rest, escape, and play. A second set of approaches can be grouped as transforming strategies, which aim to help create community and find meaning through the work. Within each category, strategies may be applied in one's personal life and professional life.

Conclusion

"The painful paradox is that fighting for one's country can render one unfit to be its citizen."[8] Thankfully, advances in medical understanding of military-related disorders and increasing societal awareness have led to the most veteran-friendly criminal justice system in history. As the law continues to evolve to account for the unique circumstances presented by veteran-defendants, we defense attorneys must evolve in our understanding of what it means to effectively and vigorously defend our returning warriors.

8 Jonathan Shay, M.D., Ph.D., *No Sugar Coating: Combat Trauma and Criminal Conduct*, The Attorney's Guide to Defending Veterans in Criminal Court 70 (Brockton D. Hunter, Esq., & Ryan C. Else, Esq., eds., 2014)

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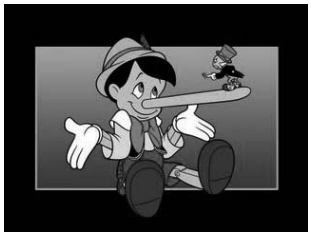
Cross Examination of the "Cooperating Witness"



aka Rat, Snitch, the Prevaricator, the LIAR

Debra Ellis

"A prosecutor who does not appreciate the perils of using rewarded criminals as witnesses risks compromising the truth-seeking mission of our criminal justice system. . . ." *United States v. Bernal-Obesco*, 989 F.2d 331, 333-32 (9th Cir. 1993) (The Honorable Stephen S. Trott).

The perils for the Government, however, are dependent upon our abilities as defense lawyers to expose the witness for his/her lying, evil ways. How do we do that effectively? First and foremost do not rely on being sarcastic with them and repeating the bad things they have said about our clients. For example - in a snide tone:

"So what you are saying here today to this jury is that my client delivered eight balls of cocaine to you three times over the summer?" Or, the classic, "Mr. Snitch, I just want to clarify: you testified that my client actually delivered eight balls of cocaine to you three times over the past summer, is that right." Never ever "clarify" the incriminating testimony. Unless you have proof that this was an absolutely impossibilities, you have just repeated the bad stuff to the jury. And, you have run the risk that the witness could make it worse: "Yes, three times last summer and then once in the spring." **Don't repeat the bad stuff; it could get worse.**

The key to preparing and doing cross examination of a so-called "cooperating witness" is to expose the motivation for him/her to lie. Cross examination is the opportunity to develop the facts upon which you rely and argue are the motivating factors behind the untrustworthy testimony. Although they will say they are testifying truthfully, there is always a self interest and there is often a history of criminal, unlawful, dishonest behavior. Credibility of every witness is fair game for cross examination; credibility of an informant generally allows for more latitude.[1]

The motivation for testifying for the government may boil down to the 3 Fs: **Freedom; Family; Feud**. The witness is

1 *Alford v. United States,* 282 U.S. 687 (1931) ("Cross examination of a witness is a matter of right." *Id.* at 691; "It is the essence of a fair trial that reasonable latitude be given the cross examiner . . .." *Id.* at 692); *United States v. Mansaw*, 714 F.2d 785, 788 (8th Cir. 1983) (Ordinarily defense counsel should be permitted wide latitude in the scope of cross-examination of government witnesses about matters relevant to credibility or bias);

United Staes v. Alvarez-Lopez, 559 F.2d 1155 (9th Cir. 1977) (greater latitude afforded cross examination of a "professional informant"); *State v. McArthur*, 730 N.W.2d 44, 51 (Minn. 2007)(bias which may be induced by self-interest relevant because it is probative of witness credibility).

hoping for a break at sentencing; a post-sentencing motion for a reduced sentence (Rule 35(b), Fed.R.Crim.P.); shortened supervisory release period. An offshoot of the universal motivation to be free from incarceration, is the motive to see one's children grow up or to see mom or dad on the outside before they die. Lastly, revenge or the desire to get even with the defendant can be a motivating factor to testify against the defendant. Had a dispute over money or a lover? Are they rival gang members? Or is just the snitch a gang member - even better. If so, what are the tenants of the gang?[2]

Where to begin? First **dig, dig, dig.** There is no substitute for a thorough investigation and thorough preparation for cross examination of the most challenging witnesses at trial. The following provide a wealth of material to show dishonesty, lying, cheating behavior and lies in the past:

Criminal background -

- Criminal convictions
- Copies of complaints/indictments
- Transcripts of
    - Guilty pleas
    - Sentencings
    - Probation violation hearings

      (Look for the broken promises made to the judge and probation officers)
    - Prior testimony
    - Plea agreements
    - Order For Protection petitions and affidavits

Reports from:

- proffer sessions
- witness interviews
- presentence investigation reports.This will likely require a court order. *See* Minn. Stat. § 609.115, subd. 6; Rule 32, Fed.R.Crim.P

See next article for Susan Johnson's ideas on where to dig, dig, dig.

Before you expose the witness's motivation for testifying against the defendant you may be able to tell some of your client's story through the witness. Use the witness before you abuse him on cross examination. Especially if you do not plan to call your client as a witness, take the opportunity to have his former friend, acquaintance tell what he knows about your client's personal history and background. For example: You and Mr. D grew up in the same neighborhood; went to the same Catholic grade school; went to junior high together at Peaceful Academy; went to high school together at Law Abiding High. Then you went separate ways. Mr. D married his high school sweetheart and they have two children. You had not seen Mr. D in many years and then you ended up in the same softball league last summer. He played on a different team. But you saw each other when your teams played each other. You saw his wife at one game with the children. You had not seen her in several years. You and other guys on your team were using methamphetamine. Not only using but also buying and selling methamphetamine. In fact, six of you were charged in an indictment with conspiracy to distribute methamphetamine. You were facing a mandatory minimum of ten years. Because you have a prior controlled substance offense, the only way you can get under that mandatory minimum sentence is if you can get the government to file a motion on your behalf. That meant that you had to give them someone else to charge, right? As a result, you told them that Mr. D had sold you three eight balls last summer during the softball season. Mr. D who has no prior criminal record and no history of drug use . . . . . Then on to the benefits of the Government's departure motion. Don't forget to get out the good stuff before pointing out

2 *See United States v. Abel*, 469 U.S. 45 (1984) (membership in a prison gang was probative of witness's bias and motive to lie.)

the motivation for lying.

Freedom as the motivation:

- guideline range you are facing?
- mandatory minimum?
- Can't get below that without a motion by the government
- judge has no power to go below mandatory minimum without government motion
- same prosecutor in your case
- same judge in your case
- expecting a 5K motion following your testimony
- Post-sentencing: Hoping for a Rule 35(b) motion (reduction of sentence for substantial assistance). Again, a motion that can only be filed by a prosecutor

Family as the motivator:

- you have children and a wife
- children growing up without their father
- they have to rely on one parent, relatives to support them
- you would do anything to get home to them sooner
- you would do anything to get out of your current living situation
- (or the one you face) which is a 6 x 9 foot cell, cement slab for a bed, toilet within inches of your bed, being told when you can eat, when you sleep, when you get out of your cell
- you would do anything to get home to your family as soon as possible

Each snitch has his/her own unique background and history. Look for the particulars about the witness. When there are multiple snitches, look for ways to individualize the crosses. You can not be in the same attack mode for three, four or five witnesses. If so, the crosses will drone, be predictable, ineffective and even ignored. With multiple-defendant cases, try and coordinate with co-defense counsel on the cross-examination. The jury will not want to hear more than once about how 5K motions work and the benefit of getting below the mandatory minimum.

Cross examination is the most important trial right provided by the Sixth Amendment. As the learned John Henry Wigmore taught us all, cross-examination is "the greatest legal engine ever invented for the discovery of truth." While the right of cross examination is not limitless, any limits imposed by the courts must be reasonable.[3] When it comes to cross examination of the government's criminal or cooperating witnesses, the defense is entitled to far more leeway than with other witnesses.

To repeat: investigate, prepare, tell your version, establish the witness's motives and incentives. Then lay out the facts through the witness that you are going to use later when you argue the incredible, unreliable, untruthfulness of the liar's testimony. You argue in the end the liar's past acts speaks louder than his words. The witness has:

- been convicted of crimes of dishonesty
- lied under oath to judges or juries
- lied to a judge when s/he said he did not use drugs, would never do anything to be back in court again, wouldn't jeopardize his/her freedom
- lied to her probation officer about using
- disobeyed court orders to pay child support
- failed to come to court when ordered; had warrants issued
- was using, even selling drugs while on

3 *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986). In *Van Arsdall* the Supreme Court held that the trial court's restriction on cross-examination of a witness whose charges were dismissed by the State violated the Sixth Amendment right of confrontation. The Supreme Court remanded the case to the Delaware Supreme Court for a determination of whether the error was harmless. On remand the Delaware Supreme Court held that the Sixth Amendment violation was not harmless. Murder conviction reversed. *Van Arsdall v. State*, 524 A.2d 3 (Del. Supr. 1987).

probation

These are actions of a dishonest person.

Don't forget to avail yourselves of the great federal jury instructions (whether in state or federal court).[4] The federal jury instructions parrot Judge Trott's warning that the so-called cooperating witnesses need to be viewed skeptically. Look at the great language of Federal Instruction § 15.02:

> *The testimony of an informant, someone who provides evidence against someone else for money or to escape punishment for his/her own misdeeds or crimes or for other personal reason or advantage, must be examined and weighed by the jury with greater care than the testimony of a witness who is not so motivated.*
>
> *Mr. Rat may be an informant in this case.*
>
> *The jury must determine whether the informer's testimony has been affected by self-interest, or by the agreement he/she has with the government, or his/her own interest in the outcome of this case, or by prejudice against the defendant.*

The instructions for immunized witness (§ 15.03), accomplice (§ 15.04), and drug or alcohol abuser (§ 15.05) all give similar directives to proceed with caution in weighing those witnesses testimony. The instruction regarding the credibility of a drug or alcohol abuser adds: You should never convict any defendant upon the unsupported testimony of such a witness unless you believe that testimony beyond a reasonable doubt." (§ 15.05)

Finally, there is a great instruction on inconsistent statements, specifically *falsus in uno falsus in omnibus* (false in one, false in all). This Latin adage can be used in argument in state court even without the instruction. But the federal instruction (§ 15.06) helps tremendously if the court will give the optional portion that states if the witness has been shown to have knowingly testified falsely concerning any important or material matter . . . "You may reject all of the testimony of that witness or give it such weight or credibility as you may think it deserves."

With the increasing use of "cooperating witnesses," the greater the effort that needs to go into ferreting out the witness's flaws, motivations and past lies. Dig in!

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4 See Federal Jury Practice and Instructions 6th Ed. 1A, Thomson Reuters 2008 (2013 Supp) § 15.02 - Credibility of witnesses - Informant; § 15.03 - Credibility of witnesses - Immunized witness; § 15.04- Credibility of witnesses - Accomplice; § 15.05 - Credibility of witnesses - Drug or alcohol abuser; § 15.06 - Credibility of witnesses-Inconsistent statement (*falsus in uno falsus in omnibus)*; § 15.07 - Credibility of witnesses - Conviction of felony.

Where to DIG, DIG, DIG.

Susan Johnson

The government can be you friend in obtaining background checks on the snitch. Take some time to review the Minnesota Government Data Practices Act (Minn. Stat. §13) and you will see that there is a wealth of information that is publicly available with a simple written request to the appropriate agency. The default position of Chapter 13 is that all data collected, created, received, maintained or disseminated by any government entity shall be public. Of course there are exceptions, but the Data Practices Act provides access to an incredible amount of helpful information.

Judicial records are exempt from Chapter 13 and are controlled by rules promulgated by the Minnesota Supreme Court. Again, the default position is that all court records are public.

Commercial data bank background checks such as those provided by Lexis Nexis provide addresses where the witness has lived and worked. Prior addresses can be helpful to determine various locations where criminal history information and arrest information may be located.

Check both federal and state court records. In Minnesota, you cannot rely on a Minnesota Court Information System(MNCIS) search that is done in your office. Pending criminal cases are only accessible from a courthouse computer. If you have information that the witness lived, worked or had ties to another state, check that state's records. For Minnesota witnesses, it is wise to check border states such as Wisconsin, the Dakotas and Iowa because people frequently travel and may have criminal charges in those states.

Just because you are concerned with criminal matters, don't forget to check civil filings. If your snitch has been involved in a civil lawsuit as either plaintiff or defendant, there is an adverse party that may be willing and able to provide you with great background information.

Law enforcement and court records are not always well coordinated, so it pays to check the Bureau of Criminal Apprehension (BCA) offender data base. You must have a full name and date of birth to access this information.

Arrest records are harder to locate than court records because they are not centralized. In Minnesota, you have to search each law enforcement entity to determine if an arrest record exists. The good news is the Minnesota Government Data Practices Act (Chapter 13) gives you leverage to get not only arrest information, but information if the witness was ever mentioned in a call for service or other incident. Law enforcement can provide you with a history of all police calls to a specific address which may give you information about when, where and with whom your witness was involved.

Digging for public information is not always easy because the courts and government entities will sometimes try to withhold information that is rightfully yours. Experience has shown that a specific request citing to the statue is the best way to force compliance with a public record request.

The federal Freedom of Information Act (FOIA) is a weak tool as compared to the Minnesota Government Data Practices Act because of the time factor. FOIA requests may literally take years for a response whereas the Minnesota law requires a response as soon as "reasonably possible."

Social media and the internet are important sources that may supplement your search for

information on your witness.

Once the searching is done, the final step is to interview anyone who might give you the inside scoop on your witness. People - prior crime victims, those who are owed money, former associates who may be disillusioned with the snitch - may be the key to information that will assist you during your cross-examination.

Susan Johnson is a licensed private investigator who has more than 30 years of experience working for criminal defense lawyers. After graduating from Hamline Law School in 2009, she joined the Ellis Law Office as an associate.

Finally, A Second Chance: Minnesota's New Expungement Law

Kelly Keegan

As many of you are already aware, the Minnesota Legislature and Governor Dayton enacted sweeping reforms to Minnesota's expungement laws this past legislative session. While most provisions of the law will not take effect until January 1, 2015, a critical part of defending our clients now is understanding how records of their criminal charges and/or convictions will (or hopefully will not) follow them through the rest of their lives. I would argue that protecting a person's criminal record as an aspect of their defense is perhaps second in importance to only their actual liberty.

Minnesota has two distinct types of legal authority for expungements: either you qualify for an expungement pursuant to statute, or you qualify pursuant to the court's inherent authority as a product of case law. This dichotomy became most apparent in 2008, with the Minnesota Supreme Court decision in *State v. S.L.H.*[1] *S.L.H.* held that when an expungement is pursuant to the court's inherent authority and not statute, the court is limited to expunging only records held by the judicial branch, namely, the court file and the Minnesota Court Information System (MNCIS) electronic database. In reality, several decisions since the 1970s had articulated this dichotomy, but it wasn't until *S.L.H.* that judges more rigidly adhered to this mandate.

The result was that most defendants, even after persuading a judge the merits of being granted an expungement, were only able to accomplish a partial, and many would argue meaningless, remedy. The vast majority of defendants did not qualify under statute, which provided for all records related to a case to be expunged. Those defendants qualifying under inherent authority were able to have MNCIS and court file records sealed, but many other records, most notably Minnesota Bureau of Criminal Apprehension (BCA) records and Minnesota Department of Human Services (DHS) records, still prevented them from advancement opportunities and employment. With the Minnesota Supreme Court decision in *State v M.D.T.*[2] last year, which reiterated that judges were limited in the scope of records they could expunge pursuant to their inherent authority, it became apparent the fix needed to come from the legislature.

The Minnesota Legislature formed the Expungement Working Group in the fall of 2013, consisting of house and senate members from the public safety and judiciary committees. The purpose was to bring legislators up to speed on what expungements are, what issues existed with current law, and what fixes were being proposed. The conversation focused not on whether a fix was needed, but rather

1 755 N.W.2d 271 (Minn. 2008)

2 831 N.W.2d 276 (Minn. 2013)

how to go about fixing the problems. With a supportive Governor in office, the time to tackle this was now.

The legislation that came out of the process, which was signed by Governor Dayton in May 2014, is outstanding. It is a complete overhaul of our expungement laws – everything from who is eligible, to what factors a judge must consider, to the procedure for filing a petition. I say anecdotally that now, instead of only about 5% of cases qualifying for full statutory expungement, around 85% of cases will qualify for a full statutory expungement at some point. This bill will help our clients immensely, and Minnesota should be proud of now being one of the leading states on this issue. Already, reporters and researchers from other states are looking to Minnesota as a model for fixing the growing problem of electronic records as it affects housing, employability and a qualified workforce.

So, on to the good stuff – the new law and the changes it makes. First, keep in mind that the new law does not, in any way, diminish current availability of expungement. This was stated over and over in the legislative committee hearings. Also keep in mind our dichotomy of two distinct types of legal authority for expungements still exists. We have merely shifted the vast majority of defendants as eligible for only inherent authority expungement over to the vast majority now being eligible under statutory authority. The language of the new law can be found on the legislature's website, as House File 2576 (7th engrossment). Most of the new statutory language, with the exceptions noted below, affects Minnesota Statutes Chapter 609A.

Juvenile Delinquency. The new law clarifies that Minn. Stat. § 260B.198, Subd. 6, allows judges to seal all records related to a juvenile delinquency matter. This is in response to *In the Matter of the Welfare of J.J.P.*[3], where the Minnesota Supreme Court held that Minn. Stat. § 260B.198, Subd. 6, allowed judges to seal only the court order adjudicating a juvenile delinquent – not the juvenile petition or any other documents related to the proceedings. The new law also enumerated several factors for a judge to consider in granting a juvenile expungement, and articulated a preponderance of the evidence standard with the burden on the juvenile defendant/petitioner.

Chapter 609A Statutory Expungement. The new law now allows statutory authority for expungement as follows: diversion cases involving a plea and stays of adjudication are eligible one year after discharge from sentence, petty misdemeanor and misdemeanor cases are eligible two years after discharge, gross misdemeanor cases are eligible four years after discharge, and an enumerated list of felonies are eligible five years after discharge. The list of felonies consists of almost all the offenses in levels one and two of the sentencing guidelines, minus a few. (The felonies are enumerated in the new law because legislative committee members wanted to know specifically which offenses were contemplated, and a few offenses that raised objection were then stripped out.) The most common felony offenses included are: Fifth Degree Controlled Substance, Assault of a Police Horse, Voting Violations, Theft of $5,000 or Less, Possession or Sale or Stolen or Counterfeit Checks, Receiving Stolen Goods, Dishonored Check Over $500, Embezzlement of Public Funds $2,500 or Less, Criminal Damage to Property, Forgery and Aggravated Forgery, Check Forgery, Furnishing a Firearm to a Minor, Interference With Privacy (Subsequent Offense or Minor Victim), and Financial Transaction Card Fraud. The new law also expands the factors a judge is to consider. Most notably, there is a catch-all factor: "other factors deemed relevant by the court." This should allow defendant/petitioners who are petitioning with the purpose of avoiding prospective harm to still meet their burden to show by "clear and convincing evidence that an expungement

3 831 N.W.2d 260 (Minn. 2013)

would yield a benefit to the petitioner commensurate with the disadvantages to the public and public safety of sealing the record and burdening the court and public authorities to issue, enforce, and monitor an expungement order." (Previously, defendants frustratingly had to show they had already suffered a hardship.)

Domestic Assault and Sexual Assault. Petty misdemeanor, misdemeanor, and gross misdemeanor domestic assault, sexual assault, HRO violation, NCO violation, and OFP violation offenses are excluded from statutory authority expungement in the new law, *however*, this exclusion language will sunset on July 15, 2015. Unless the legislature acts this coming legislative session, the domestic-related or sexual assault-related offenses noted above will be eligible for full statutory expungement starting July 15, 2015, assuming a defendant has also met the waiting period requirements consistent with their level of offense.

No Petition Required. *Any* of the cases now eligible under the new Minn. Stat. Chapter 609A are eligible for expungement without the need for filing a formal petition if the prosecutor agrees to the expungement after notifying any victims. Agreement to an expungement is possible prior to the dismissal of charges in cases involving a diversion or a stay of adjudication. It is difficult to foresee from a practitioner standpoint how, functionally, this will be implemented. I envision this as an additional point of negotiation at the time of a dismissal of charges, an acquittal, diversion dispositions, or a stay of adjudication. If a prosecutor does agree to a future expungement (waiting periods for diversion cases and stays of adjudication would still apply), conceivably, a defendant/petitioner would then submit a proposed order to a judge. A judge must grant the expungement unless the judge makes a finding that "the interests of the public and public safety in keeping the record public outweigh the disadvantages to the subject of the record in not sealing it." It remains to be seen whether prosecutors will be aware of this provision and entertain negotiations, whether they will actually agree to a future expungement, how a court will evaluate whether the interest of the public outweighs the interest of a petitioner without the information that would be contained in a petition, and what notice, if any, is required to be given to other agencies.

"**Shall Grant" Expungements**. The current language in Minn. Stat. § 609A.03, Subd. 5(b) stating "the court shall grant the petition to seal the record unless the agency or jurisdiction whose records would be affected establishes by clear and convincing evidence that the interests of the public and public safety outweigh the disadvantages to the petitioner of not sealing the record" is extended in the new law beyond the current eligibility for those who have their case resolved in their favor (no plea) to now also diversion cases involving a plea as well as stays of adjudication.

Filing Confidential Information. A prosecutor or agency can now file confidential information in response to an expungement petition. It does require notice to the defendant/petitioner that confidential information is being filed. Regardless of the outcome of the hearing, the petitioner can ask to have the information kept confidential. This section is the only provision of the new law that became immediately effective after enactment, in May 2014.

Nexus Between Criminal Record and Status As A Victim. A judge may now make a finding that there is a nexus between a criminal record or conviction and a person's status as a victim in determining whether to grant an expungement of that criminal record and/or conviction. What, in the world, you ask, does this mean? A situation that comes to mind is a client who has a conviction for prostitution, which was a product of being sexually exploited or trafficked. If the judge finds there is this nexus, the new law

provides that the expungement "restores the person…to the status the person occupied before the arrest, indictment, or information." This is, essentially, the reversal of the entire proceedings against a person, and a person can deny all existence of being charged, even under the threat of perjury. The only other type of case with this status is expungement for those who have successfully completed diversion pursuant to Minn. Stat. § 152.18.This provision is in response to law enforcement and advocacy groups' efforts over the past few years to re-think viewing persons involved in the sex trade as perpetrators, and instead view them as victims.

Notification to Petitioner. Agencies must now notify petitioner when records have been sealed – but only if requested to do so. Currently, the only non-court agency that routinely does this is the BCA. Now, when a petitioner requests a particular agency do so in the petition, agencies must send notice to the petitioner that their record has been sealed once the 60-day period for filing an appeal has expired and the expungement becomes effective.

Several other minor provisions in the new law make it worth a good look. I encourage everyone to read the new bill in its entirety. There are provisions related to unlawful detainer housing expungement, how agencies are able to share expunged records among themselves, and relief available to a defendant should an agency disseminate information in violation of the new law.

I conclude with some practice tips. First, be sure to revise your current expungement filings. The new law will require an update of cited statutory authority for the expungement request. **Be sure the petition includes a request that agencies notify the defendant/petitioner when their records have been sealed.** The standards of proof have changed for several types of cases (preponderance of the evidence for juvenile cases; presumptive *shall* grant for cases resolved in the petitioner's favor, stays of adjudication and diversion cases; and clear and convincing evidence for others). Be sure to articulate the proper standard in the proposed order you submit to the court. Also, expand the stated facts of your client's situation to support the expanded factors the court now considers. With regard to the timing for filing an expungement petition, the new law states it is effective January 1, 2015. In speaking with several judges, most interpret this to mean petitions must be *filed* after the first of the year, followed by the minimum 60-day wait for a hearing (rather than filing in November and having a hearing after January 1, 2015). But this brings me to another point: there will be a new era of interpretation with this new law. Make bold arguments on behalf of clients! The new law is on the books, but now comes the next battle. Many provisions leave room for shaping "how we do things around here." Prosecutors, judges, and even the appellate courts do not yet know how this new law should be practically applied. We in the defense bar have an incredible opportunity to shape expungement procedure for years to come. This is an issue that greatly affects the vast majority of criminal suspects and defendants. We owe it to our clients to vigorously carve out remedies for them, and to handle their cases in a manner that will allow them a well-deserved second chance.

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The St. Paul Crime Lab: Where are we now? A Report from the State Public Defender's Office

Katie Connors

In July 2012, Lauri Traub and Christine Funk blew the lid open on the charade that was the St. Paul Police Department Crime Lab. There were news reports, there was outrage, and the legislature responded with a law requiring all crime labs in the State of Minnesota to be accredited. The county attorneys in Ramsey, Dakota, and Washington made public apologies and vowed to set things straight.

Two years later, we have not seen these promises fulfilled. The onus fell to the Public Defender's Office to review old files, attempt to contact clients to advise them of their rights, and identify clients who wanted to go forward with post-conviction petitions. The Public Defender's Office put together a team of lawyers and clerks to review files from Ramsey, Dakota and Washington Counties where the majority of the cases originated. They went into the prisons to talk to people about challenging their convictions and tried to work with the county attorneys to come up with solutions. Despite the promises from the county attorneys to "get this right," the only county willing to modify sentences or do really anything at all is Washington.

In January 2014, we decided to add to our efforts by sending letters to clients telling them about what happened at the St. Paul Crime Lab and asking if they wanted to do something about it. Our list of SPCL cases numbered over 7000 going back to 2001, so we had to pick and choose who we could help the most. We grouped people into tiers and continually sent out letters throughout the year. All in all, we sent out approximately 400 letters. The response was overwhelming. About 1 in 5 people we sent letters to called or wrote to us wanting to know more. Given the transient nature of our client population, this was a much greater response than we expected. Some people had heard about what happened at the SPCL, but most of them had not.

So what did we do with all these clients? Since the beginning of the project, we have filed about 54 post-conviction petitions. We have had one evidentiary hearing and six other hearings granted that will happen in December and January. We have seven cases at the court of appeals, two of which have been argued.

It has been an uphill battle, but we are gaining ground. About half the judges in Dakota County believe that we deserve a hearing. As the State has started retesting some of these cases, the ugly truth about the crime lab becomes more and more apparent. The SPCL tested a spoon for a case out of Dakota County and concluded it had marijuana, cocaine, and methamphetamine

on it. A strange combination, to be sure, and the retest results tell us that there are no controlled substances on the spoon. Another case out of Ramsey County involving suspected cocaine had a weight at the SPCL of 28.86 grams, and when it was retested the weight was 31.0 grams. Somehow the substance magically gained *over 2 grams* in weight.

As defense attorneys, we all feel regret that we didn't do more to discover that the people running and operating the SPCL were just playing at science like kids who play house. But we should also feel angry that the county attorneys' offices and the St. Paul Police Department let it all happen. On top of that, we should feel outraged that they are now fighting tooth and nail to keep these convictions in place despite the promises made.

Even though we don't know yet how this will all end up, and we have prepared them for the worst, our clients are so grateful to have someone who cares about their case and the flawed justice they received. The least we can do now is keep fighting this fight and making our clients feel like someone is looking out for them. If you are working on these issues, we are more than happy to share ideas. Please contact me at katie.conners@pubdef.state.mn.us. I split the caseload with Carol Comp, Special Assistant State Public Defender, and we also receive a great deal of help from Carrie Hendricks, our wonderful and dedicated law clerk.

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Effective Assistance of Counsel in Plea Negotiations

Robert D. Richman

Although our favorite war stories arise from our exploits at trial, the reality of any criminal defense practice is that the vast majority of our cases are resolved by guilty plea. Recognizing this reality, the United States Supreme Court has held that the plea negotiation process is a critical stage of the criminal proceeding to which the Sixth Amendment right to effective assistance of counsel attaches.[1] In the federal system, for example, 97% of convictions are the result of guilty pleas, making "the negotiation of a plea bargain, rather than the unfolding of a trial, . . . almost always the critical point for a defendant."[2] In most cases, the decision whether to plead guilty or contest the charges at trial is the most important decision in the entire case. The role of competent counsel in evaluating the options, therefore, is of the utmost importance.[3]

The two-part test under *Strickland v. Washington*[4] applies when evaluating claims of ineffectiveness in the plea bargaining process. Under that standard, the defendant must show first, that counsel's representation "fell below an objective standard of reasonableness," and second, that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[5]

When the defendant *accepts* a plea agreement because of counsel's deficient representation, the question under the prejudice prong of *Strickland* is whether, "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."[6]. On the other hand, when the defendant *rejects* a plea agreement and proceeds to trial due to counsel's ineffective assistance, the relevant question is the opposite—whether there is a reasonable probability that but for counsel's ineffective advice, the defendant would have accepted the plea and received a sentence less severe than that ultimately imposed after trial.[7]

When an attorney's errors result in a defendant losing the benefit of a plea bargain, the fact that the defendant subsequently received a fair trial does not render harmless the prejudice that resulted from counsel's

1 *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012); *See also Lafler v. Cooper,* 132 S. Ct. 1376, 1384 (2012); *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010).

2 *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012).

3 See, e.g., *United States v. Gordon*, 156 F.3d 376, 380 (2d Cir. 1998) ("[t]he decision whether to plead guilty or contest a criminal charge is ordinarily the most important single decision in a criminal case ... [and] counsel may and must give the client the benefit of counsel's professional advice on this crucial decision") (citations omitted).

4 466 U.S. 668 (1984).

5 *Id.* . at 687-88, 694. *See, e.g., Hill v. Lockhart*, 474 U.S. 52, 57 (1985) (applying *Strickland* test to claim that defendant would not have accepted plea agreement if he had been properly advised about length of time he would be required to serve before becoming eligible for parole).

6 *Lockhart*, 474 U.S. at 59.

7 See *Lafler v. Cooper*, 132 S. Ct. 1376, 1385 (2012).

ineffectiveness. A fair trial does nothing to cure the prejudice the defendant suffered at the hands of defense counsel—the trial *is* the prejudice.[8] In *Lafler v. Cooper*,[9] for example, the defendant pointed a gun at the victim's head and fired. The shot missed, and the victim fled. The defendant pursued the victim, repeatedly shooting at her. The victim was shot in her buttocks, hip, and abdomen, but survived.[10] The defendant was charged with assault with intent to murder, firearms offenses, and other charges. During pretrial negotiations, the prosecutor offered to dismiss two of the charges and to recommend a sentence of 51 to 85 months. Although expressing a willingness to accept this offer, the defendant ultimately rejected it on advice of counsel who persuaded his client that the prosecution would be unable to prove an intent to murder because the victim had been shot below the waist. As a result, the defendant proceeded to trial, not surprisingly was convicted on all counts, and received a mandatory minimum sentence of 185 to 360 months.

The Supreme Court agreed that these facts raised a claim of ineffectiveness under *Strickland* and specifically rejected the claim that the fair trial cured any prejudice arising from the ineffective assistance of counsel during plea negotiations. The Court explained:

> In the instant case, respondent went to trial rather than accept a plea deal, and . . . this was the result of ineffective assistance during the plea negotiation process. Respondent received a more severe sentence at trial, one 3 ½ times more severe than he likely would have received by pleading guilty. *Far from curing the error, the trial caused the injury from the error.* Even if the trial itself is free from constitutional flaw, the defendant who goes to trial instead of taking a more favorable plea may be prejudiced from either a conviction on more serious counts or the imposition of a more severe sentence.[11]

In order to ensure that they receive the benefits of the plea bargaining process, "criminal defendants require effective counsel during plea negotiations."[12] The Minnesota Rules of Professional Conduct give insight into the duties owed by competent counsel to their clients during plea negotiations.[13] The Rules require that the lawyer explain the matter to his client "to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Minnesota Rules of Professional Conduct Rule 1.4(b) (2010). At a minimum, of course, this requires that all plea offers be communicated to the client.[14] This is true even if the client has no interest in pleading guilty. "What a criminal defendant

8 See *Lafler v. Cooper*, 132 S. Ct. 1376, 1385 (2012) ("Having to stand trial, not choosing to waive it, is the prejudice alleged"); *United States v. Rea-Beltran*, 457 F.3d 695, 702 (7th Cir. 2006) (fair trial does not undo prejudice where complaint is that defendant "should not have received a trial at all and instead been permitted to plead guilty").

9 132 S.Ct. 1376 (2012).

10 *Id.* . at 1383.

11 *Id.* . at 1386 (emphasis added). See *Wanatee v. Ault*, 259 F.3d 700, 703-04 (8th Cir. 2001) (defendant who rejects plea agreement due to improper advice from counsel may demonstrate prejudice, even though he ultimately received fair trial, by showing that had he been properly advised he would have accepted plea and that had he done so, he would have received lesser sentence); *Engelen v. United States*, 68 F. 3d 238, 241 (8th Cir. 1995) (same). The *Lafler* Court rejected the State's suggestion that "[a] fair trial wipes clean any deficient performance by defense counsel during plea bargaining." 132 S. Ct. at 1388. Rather, because the criminal justice system is, in reality, "a system of pleas, not a system of trials," id., the ultimate guarantee of a fair trial does not act "as a backstop that inoculates any errors in the pretrial process." *Missouri v. Frye*, 132 S. Ct. at 1407.

12 *Missouri v. Frye*, 132 S. Ct. at 1407-08. See *Padilla v. Kentucky,* 130 S. Ct. 1473, 1480-81 (2010).

13 See *Padilla*, 130 S.Ct. at 1482 (noting that ABA standards and the like are guides to prevailing norms of practice).

14 *Missouri v. Fry*, 132 S. Ct. 1399, 1408 (2012); Minnesota Rules of Professional Conduct 1.4 comment 2005 (lawyer must promptly inform client of substance of proffered plea bargain).

wants or does not want is not relevant to counsel's duty" under the Sixth Amendment to permit a defendant to evaluate a plea offer.[15]

Competent counsel must provide the client with sufficient information about the risks and benefits of a plea offer versus a trial to permit the client to make an informed decision about whether to accept the bargain or proceed to trial. This requires an analysis of the law and facts to evaluate the chances of success at trial as well as the defendant's comparative sentencing exposure after trial and pursuant to the plea bargain. "Knowledge of the comparative sentence exposure between standing trial and accepting a plea will often be crucial to the decision whether to plead guilty."[16] In the federal system, given the central role occupied by the Sentencing Guidelines, even post-*Booker*, that means at a minimum that counsel must provide his or her client with best estimates of the guideline calculations after trial on the one hand, and after guilty plea on the other. It is not sufficient for defense counsel to inform the client generally that he will face a longer sentence after trial without pinning the evaluation to specific guideline calculations.[17] Although counsel does not have to predict the relevant guideline factors with complete accuracy, he cannot, consistent with his constitutional duties to his client, "fail to make *any* specific calculations and cannot overlook enhancements or reductions that are reasonably likely to be applicable to the particular defendant based on the information available to counsel."[18]

Based on similar considerations, a number of courts have found that representation by counsel fell below objective standards of reasonableness guaranteed by the Sixth Amendment as a result of providing inaccurate or incomplete advice concerning the consequences of accepting or rejecting a guilty plea.[19]

Although plea negotiation is not a flashy part of our work and is not the stuff of war stories over drinks, it is typically the most important part of the process for most of our clients. It is incumbent on each of us to ensure that in considering a plea offer, our clients fully appreciate the likely sentence under the terms of a proposed plea agreement and their exposure after trial. They must understand the relevant law so that they can reasonably evaluate their chances of success at trial. Without this comparative analysis, the client is unfairly left to make this crucial decision

15 *Wanatee v. Ault*, 39 F. Supp. 2d 1164, 1172 (N.D. Iowa 1999).

16 *United States v. Day*, 969 F.2d 39, 43 (3d Cir. 1992); see *United States v. Gordon*, 156 F.3d 376, 380 (2d Cir. 1998). "When a plea offer is made . . . a lawyer unquestionably has a duty to inform his client of the sentencing exposure he faces if he accepts the plea offer and if he does not." *Carrion v. Smith*, 644 F. Supp. 2d 452, 467 (S.D.N.Y. 2009), aff'd 365 Fed. Appx 278 (2d Cir. 2010). See *Wanatee v. Ault*, 39 F. Supp. 2d 1164, 1172 (N. D. Iowa 1999) (noting "counsel's duty to inform the defendant of the law applicable to the defendant's case, so that the defendant can evaluate a plea offer").

17 See *Kates v. United States*, 930 F. Supp. 189, 191-92 (D. Pa 1996) (counsel ineffective for failing to perform actual guideline calculations, even though he warned client that if he lost at trial "he was going to be sentenced to a very extensive period of time," but never informed him he would qualify as a career offender and would be subject to a mandatory minimum of 30 years); *United States v. Hernandez*, 450 F. Supp. 2d 950, 976 (N.D. Iowa 2006) (defense counsel ineffective for discussing possible sentences only in "generalities," and estimating 20 years after trial without specific guideline calculations–"[p]roviding only such 'generalities' does not approach the level of sophistication that could reasonably be expected of counsel in applying the United States Sentencing Guidelines to the circumstances of a particular defendant").

18 *Kates v. United States*, 930 F. Supp. 189, 196 (D. Pa 1996) *United States v. Polatis,* 2013 U.S. Dist. Lexis 39064 (D. Utah 2013) (counsel's representation was constitutionally deficient because counsel failed to compare proposed plea agreement with likely outcome after trial which was "crucial" in determining whether to plead guilty); *United States v. Wolfe*, 2012 U.S. Dist. Lexis 75369 (E.D. Tenn. 2012) (counsel ineffective for failing to "completely explor[e] the ranges of penalties under likely guideline scoring scenarios" in relation to plea offer).

in the dark. "When the defendant lacks a full understanding of the risks of going to trial, he is unable to make an intelligent choice of whether to accept a plea or take his chances in court."[20] Through full discussion of potential plea offers, our clients will be better able to make informed decisions about their cases, and we are less likely to find ourselves being attacked in post-conviction proceedings.

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19 See, e.g., *Padilla v. Kentucky,* 130 S.Ct. 1473, 1483 (2010) (deportation consequences of drug conviction); *Lafler v. Cooper*, 132 S.Ct. 1376, 1390 (2012) (law applicable to murder charge); *Wanatee v. Ault*, 39 F. Supp. 1164, 1171-72 (N.D. Iowa 1999) (applicability of felony-murder rule and joint criminal liability), aff'd, 259 F.3d 700 (8th Cir. 2001);,*Garmon v. Lockhart,* 938 F.2d 120, 121 (8th Cir. 1991) (parole eligibility); *Riggs v. Fairman*, 399 F.3d 1179, 1183 (9th Cir. 2005) (applicability of California three-strikes law); *Bethel v. United States*, 458 F.3d 711, 717-18 (7th Cir. 2006) ("gross mischaracterization of the sentencing consequences of a plea"); *United States v. Hanson*, 339 F.3d 983, 990 (D.C. Cir. 2003) (applicability of career offender guideline); *United States v. Gordon*, 156 F.3d 376, 380 (2d Cir. 1998) (gross underestimate of sentence exposure after trial); *United States v. Day*, 969 F.2d 39, 44 (3d Cir. 1992) (applicability of career offender guideline); *United States v. Grammas*, 376 F.3d 433, 437 (5th Cir. 2004) (gross underestimate of applicable guideline range); *United States v. Marcos-Quiroga*, 478 F. Supp. 2d 1114, 1138 (N.D. Iowa 2007) (applicability of career offender guideline).

20 *United States v. Grammas*, 376 F.3d 433, 437 (5th Cir. 2004); *Kates v. United States*, 930 F. Supp. 189, 192 (D. Pa 1996) ("The client has a right not to be left in the foggy dark").

MACDL SCHOLARSHIP OPPORTUNITY

The Minnesota Association of Criminal Defense Lawyers proudly offers an opportunity for members of good standing to apply for need-based scholarships to attend a qualifying trial school or to attend the MACDL annual Continuing Legal Education seminar. The board of the Minnesota Association of Criminal Defense Lawyers has established the following criteria for application for a need-based scholarship:

1. A scholarship applicant must be an active member of the MACDL who is presently practices criminal defense for a minimum of 75% of his or her practice in Minnesota State and/or federal courts.

2. An applicant must agree to maintain membership in MACDL for at least a period of three years following receipt of the scholarship. Failure to remain as a member of MACDL for three years following receipt of scholarship funds will require the recipient to refund to MACDL the full amount of the scholarship funds received.

3. The applicant's law practice must reflect a commitment to the representation of criminal defendant's and a demonstrated willingness to apply the knowledge gained for the betterment of the criminal bar practicing in the State of Minnesota.

4. The applicant must demonstrate a financial need for assistance to qualify for scholarship funds.

5. The applicant must clearly outline in their application how attendance at the trial school or the CLE will increase the applicant's aptitude in criminal law, foster a greater level of experience and demonstrate the likelihood of benefiting from the trial school or CLE.

Minnesota Association of Criminal Defense Lawyers

SCHOLARSHIP APPLICATION

The Minnesota Association of Criminal Defense Lawyers proudly offers an opportunity for members of good standing to apply for need-based scholarships to attend a qualifying trial school or to attend the MACDL annual Continuing Legal Education seminar. Please fill out this application and submit to MACDL:

GENERAL INFORMATION

Name _____

Job Title _____

Employer_____

Address_____

Phone numbers office: _____ home/cell: _____

Email _____

Type of Practice

State Public Defender Federal Public Defender Private Attorney

Employer Assistance What financial assistance will your office provide?

None All tuition/housing $___ of tuition/housing

Other _____

If little or no financial assistance is offered by your office, please explain why: _____

_____

_____

_____

PRIVATE ATTORNEYS, complete this section:

Number of lawyers in your firm: Partners_____ Associates _____

Percentage of your work that is criminal Defense: _____

Number of pro bono appointments you take in a typical year: _____

ALL APPLICANTS, complete this section:

Numbers of years you have practiced law: _____

Number of complete jury trials:_____

Previous trial school experience, including program and year attended : _____

_____

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_____

Please explain how attendance at the trial school or the CLE will increase your aptitude in criminal law, foster a greater level of experience and demonstrate how you plan to apply what you learn to your practice:

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Please explain in detail why you need financial assistance (use additional sheet)

Refunds Of Unearned Flat Fees

Patrick R. Burns

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Since the amendment of Rule 1.5(b), Minnesota Rules of Professional Conduct (MRPC), in 2011 lawyers in Minnesota have been permitted to charge clients a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. Rule 1.5(b)(1), MRPC. The rule also permits lawyers to treat such advance payments as their own property, subject to refund, if there is a written fee agreement signed by the client that contains certain required language set forth in the rule. In other words, unlike other types of fees paid in advance of the services rendered, these flat fees do not have to be held in a trust account until they are earned.

Among the provisions required in a written retainer agreement calling for the advance payment of a flat fee is the requirement that the client be notified "that the client will be entitled to a refund of all or a portion of the fee if the agreed-upon legal services are not provided." Rule 1.5(b)(1)(v), MRPC. This requirement reflects the nature of the fee arrangement with the client. Unlike an hourly fee arrangement, the agreement between the lawyer and the client is that certain specified legal services will be rendered to the client for a specified fixed fee. In essence, the lawyer and client are agreeing in advance as to the value of the services to be rendered.

What happens then, when the legal services, for whatever reason, are not fully provided? This may occur either because the client discharges the lawyer prior to completion of the services, the lawyer withdraws before rendering all of the services, or the lawyer or client dies before the services are fully performed. Rule 1.5(b)(3), MRPC, provides the answer. That rule provides, in pertinent part, "Whenever a client has paid a flat fee or an availability fee pursuant to Rule 1.5(b)(1) or (2) and the lawyer-client relationship is terminated before the fee is fully earned, the lawyer shall refund to the client the unearned portion of the fee." (Emphasis supplied).

Recently there have been complaints filed with the Office of Lawyers Professional Responsibility where the lawyer and client have entered into a Rule 1.5(b) flat fee agreement but the agreed-upon legal services were not fully rendered. In some of those instances, the lawyer claimed that no refund was due because the full fee had been earned even though the agreed-upon services had not been fully rendered. In support of that claim, the lawyer argues that he had sufficient time spent on the matter such that the fee – as analyzed on an hourly fee basis – has been fully earned. An hourly fee analysis, however, is inappropriate in determining whether a flat fee has been fully earned. The agreement with the client was not an agreement to provide legal services to be billed on an hourly basis. The flat fee agreement fixes a value for specific legal services to be rendered. If those services are not fully rendered, a refund is due to the client no matter how many hours the lawyer has spent on the matter. In determining the value of the partial set of services rendered by the lawyer, the time spent may be considered, but it is not the exclusive factor. Consideration needs to be given to how far along the lawyer has advanced the client's objectives as set forth in the fee agreement and what remains to be done to accomplish those interests after the termination of the attorney-client relationship.

Simply put, if the client did not receive all of the services promised by the lawyer, a refund of some portion of the advance fee paid is required. This concept works the other way around as well. If a lawyer and client agree that specified legal services are to be valued at a

specific price and the client pays that price in advance, once the lawyer provides the services promised, the fee has been fully earned. For example, if a lawyer and client agree that the lawyer will be paid a flat fee of $5,000 in advance for the defense of criminal charges brought against the client and the lawyer is able to have those charges dismissed in short order – well short of the number of hours that would, on an hourly fee basis, justify the $5,000 fee – the lawyer has nevertheless earned the fee the client agreed to pay.

Finally, when drafting a retainer agreement calling for a Rule 1.5(b) advance payment of a flat fee, lawyers should use the language set forth in the rule in their fee agreements. As noted above, the rule requires that, among other things, the agreement inform the client "that the client will be entitled to a refund of all or a portion of the fee if the agreed-upon legal services are not provided." Some lawyers have not been using this language in their fee agreements, but have been including language to the effect that "if the agreed-upon legal services are not provided, the client may not be entitled to a refund of all or a portion of the fee." Such language is inappropriate and is contrary to the provision of Rule 1.5(b)(1)(v) and (3), MRPC, which provide that if the specified legal services are not fully rendered the client "will be entitled to a refund" and that the lawyer "shall refund to the client the unearned portion of the fee." (Emphasis supplied.) Also note the prohibition in Rule 1.5(b)(3) against describing any advance fee as nonrefundable or earned upon receipt.

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Professional Responsibility

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