# MAKING A WINNING RECORD

**by**

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**MAKING A WINNING RECORD**
**by**
**Charles M. Sevilla**

Trial lawyers are like surgeons. Appeals lawyers are like coroners. For most trial lawyers, the goal is to persuade the jury first, the court second (in motions, objections, instructions), and make an appellate record third. The purpose of this paper is to provide suggestions to further all three goals simultaneously so that jury persuasion is not sacrificed in the making of good trial record. Record preservation need not conflict with jury persuasion.

Record making takes time. One has to think out the strategy of the case well in advance of trial in order to know what issues to advance. Sometimes, case load may interfere with one's ability to have the time. In such cases, the discussion that follows assumes counsel has the time. See ABA Formal Opinion (06-441 May 13, 2006), "Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation" which states:

> All lawyers, including public defenders and other lawyers who, under court appointment or government contract, represent indigent persons charged with criminal offenses, must provide competent and diligent representation. If workload prevents a lawyer from providing competent and diligent representation to existing clients, she must not accept new clients. If the clients are being assigned through a court appointment system, the lawyer should request that the court not make any new appointments. Once the lawyer is representing a client, the lawyer must move to withdraw from representation if she cannot provide competent and diligent representation. If the court denies the lawyer's motion to withdraw, and any available means of appealing such ruling is unsuccessful, the lawyer must continue with the representation while taking whatever steps are feasible to ensure that she will be able to competently and diligently represent the defendant.

*See also* ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (2003) Guideline 10.3: "Counsel representing clients in death penalty cases should limit their caseloads to the level needed to provide each client

with high quality legal representation in accordance with these Guidelines."[1] [Hereafter cited as ABA Guidelines].

No winning record can be made when counsel waives issues through inaction. The ABA Guidelines, 10.8A(3)(c) states that every potential claim must be evaluated in light of: "the importance of protecting the client's rights against later contentions by the government that the claim has been waived, defaulted, not exhausted, or otherwise forfeited." Subsection B(1) requires counsel to "present the claim as forcefully as possible, tailoring the presentation to the particular facts and circumstances in the client's case and the applicable law in the particular jurisdiction; and 2. Ensure that a full record is made of all legal proceedings in connection with the claim."

The ABA Guidelines describe the record making duty as a "fundamental" duty of counsel. ABA Guidelines, Commentary to 10.8, The Duty to Assert Legal Claims. Hopefully, some of what follows will be helpful in meeting that obligation.

What follows is divided into three sections: general tips on record making; suggestions for record making on common issues that arise; and record making through use of a motion for new trial.

## I. GENERAL TIPS ON RECORD MAKING.

**A. Talk to the Client.** *See* Beavers v. Balkcom (5th Cir. 1981) 636 F.2d 114, 116 ("'informed evaluation of potential defenses to criminal charges and meaningful discussion with one's client of the realities of his case are (the) cornerstones of (the) effective assistance of counsel'" [Citation.].) There is no substitute for information from the client in preparation for trial, and this will include

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[1] The ABA Guidelines were first published in 1989 and were revised in 2003. See www.abanet.org/deathpenalty. Wiggins v. Smith (2003) 539 U.S. 510, 523, stated the Guidelines are defining prevailing norms of reasonable representation. See also Rompilla v. Beard (2005) 545 U.S. 374, 387; Strickland v. Washington (1984) 466 U.S. 668, 688 (referring to ABA Defense Function Standards).

information relevant to a variety of motions.

**B. Know the Real Rules.** *E.g.,* Cal Rules of Court, Rule 4.111, Pretrial Motions in Criminal Cases, states in (b) that the court may consider the failure without good cause of the moving party to serve and file points and authorities within the time permitted as an admission that the motion is without merit. This rule does not affect in limine motions (which are forms of evidentiary objections). By its terms, it's limited to pretrial motions.

**B.1. Dealing with the Court's Individualized Rules.** Trial judges like to have their own rules for the conduct of cases in their courtrooms. Unless these rules merely duplicate state law (statutes or Judicial Council Rules) or were properly vetted under the controlling state statue as local rules, they are not a basis for the imposition of any sanction. If confronted with one that could damage your case, tell this to the judge: "I wasn't aware this was a mandated rule. Has it been put through the requirements of of Code of Civ. Pro. § 575.1, Gov. Code §§ 68070, 68071, and Rule of Court 981? I'm unaware of it." (*See* Hall v. Superior Court (2005) 133 Cal. App. 4th 908 [superior court issued a rule that stated motions had to be filed and heard at least 30 days prior to trial; held invalid].)

**C. File a Trial Brief.** Raising and preserving issues can be difficult in the heat of battle, so "counsel should file written motions in limine prior to trial raising any issues that counsel anticipate will arise at trial. All of the grounds should be set out in the motion." ABA Guidelines, Commentary to 10.8, The Duty to Assert Legal Claims.

To set forth your legal theory, supportive cases, anticipate evidentiary issues, and to educate the judge early on these points. To set up a motion in limine that sticks during trial, counsel must set forth a specific legal ground to exclude evidence, it must identify a particular identified body of evidence, and must be made at a time before (or during) trial when the trial judge can determine the question in its appropriate context. (People v. Morris (1991) 53 Cal. 3d 152, 190.)

**D. Make the Prosecutor Satisfy His/her Burden of Establishing the Relevance and Foundation for Evidence.** If the testimony is comprised of hearsay, the foundational requirements for its admissibility under an exception to the hearsay rule are the burden of the proponent. Evidence is properly excluded when the

proponent fails to make an adequate offer of proof regarding the relevance or admissibility of the evidence. (People v. Morrison (2004) 34 Cal. 4th 698, 724.)

**E. React to Surprise Evidence with a Motion to Exclude, and Failing That, Ask for a Continuance.** (People v. Ott (1978 ) 84 Cal. App.3d 118.) This can occur is subtle ways. For example, assume a witness for the prosecution who was to simply lay a foundation for documents suddenly is asked questions only an expert can be asked and the prosecutor has not provided any discovery as required by law. Move to exclude it. Failing that: ask for a hearing on the discovery you've been denied and time to hire an expert to assess the information given.

In Leka v. Portuondo (2d Cir. 2001) 257 F.3d 89, 106, the government's failure to disclose the name of a crucial eyewitness with information favorable to the defense "until three business days before trial" was found to violate due process. In language correctly acknowledging the impossibility of investigating the case during trial, the court wrote:

> When such a disclosure is first made on the eve of trial, or when trial is under way, the opportunity to use it may be impaired. The defense may be unable to divert resources from other initiatives and obligations that are or may seem more pressing. And the defense may be unable to assimilate the information into its case.
>
> Moreover, new witnesses or developments tend to throw existing strategies and preparation into disarray. (Id. at 101.)
>
> For the same reasons, a disclosure made on the eve of trial (or after trial has begun) may be insufficient unless it is fuller and more thorough than may have been required if the disclosure had been made at an earlier stage. (Id. at 101.)

*Accord* U.S. v. Gil, 297 F.3d 93 (2nd Cir. 2002) (reversing a conviction for last minute, but before trial, provision of an important Brady document contained within thousands of pages of other discovery.)

**F. If You Want All the Evidence In, Remember Evidence Code §356.**
It provides, in pertinent part: "Where part of an act, declaration, conversation, or

writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party ...." The courts are not to be narrowly focused when considering the application of § 356: "In applying Evidence Code section 356 the courts do not draw narrow lines around the exact subject of inquiry. 'In the event a statement admitted in evidence constitutes part of a conversation or correspondence, the opponent is entitled to have placed in evidence all that was said or written by or to the declarant in the course of such conversation or correspondence, provided the other statements have some bearing upon, or connection with, the admission or declaration in evidence. ...' [Citations.]" (People v. Hamilton (1989) 48 Cal.3d 1142, 1174.)

**G. Use Offers of Proof to Make a Record of Evidence the Court Excludes.** This is best done by declarations of witnesses, and may be even required. (People v. Sahagun (1979 ) 89 Cal.App.3d 1.) For there to be prejudice from the exclusion of defense evidence, there has to be something in the record to show what the witness (or excluded physical evidence) would prove. "[A]ny claim that evidence was wrongly excluded cannot be raised on appeal absent an offer of proof in the trial court. (Evid. Code, § 354.) Defendant made no offer of proof as to how the tapes of his police interviews might correct any missimpressions allegedly created by the testimony and transcripts actually before the jury." (People v. Pride (1992) 3 Cal. 4th 195, 235.)

**H. If You Want to Rely on an Objection of Co-counsel During the Trial, Fine, But Put in the Record That You Are Doing So.** (People v. Brown (1980) 110 Cal. App.3d 24.)

**I. Know When to: Object, Ask for an Instruction and Mistrial.** Where a motion for mistrial is made in a place where a motion to strike and an instruction would cure the harm, the motion will be denied. (People v. Morgan (1978) 87 Cal.App.3d 59.)

**J. Get Rulings and Get Them on the Record.** Nothing is appealable if the judge did not rule. For those judges who are non-responsive to motions or objections, try to get a ruling, and failing that, say, "I take it that is denied." If the court rules in an off the record chambers or side-bar meeting, put it on the record when proceedings resume. If rulings have been made pre-trial on evidentiary issues, make sure to have the court state that these rulings are deemed to have been made

during the trial so that they need not necessitate renewal at trial.

Also, if you object, but the witness answers before the judge sustains the objection, you must quickly move to strike the answer or it is in evidence. (People v. Saam (1980) 106 Cal. App. 3d 789, 795.)

**K. Always Make Penal Code § 1118.1 Motions at the End of the DA's case in Chief.** A PC § 1118.1 motion need not specify the charge to which it applies or the element as to which proof is insufficient. (People v. Smith (1998) 64 Cal. App.4th 1458, 1468.) Accordingly, "unless the defendant has a very good reason not to do so, the close of the prosecution's case should always be followed by a nonspecific section 1118.1 motion directed at all the counts and enhancements." (Ibid.)

**L. Don't Endorse the Court's General Instructions.** Some trial judges will seek an on the record general endorsement of all the instructions after the instruction conference. Don't do it. Instructions are the judge's responsibility. Just say, "submitted." By endorsing the instructional package, counsel risks undermining arguments that appellate counsel finds on appeal. The State will argue the instructional error was invited because defense counsel stated on the record that the defense wanted the instructions. This does not mean that counsel should be silent in the instructional conference, as is discussed next.

**M. Don't Buy Into CALCRIM Unless You are Convinced It is Correct.** There are errors in CALCRIM. Counsel should consult FORECITE on all the instructions to develop objections and alternative instructions. There are tailored defense instructions to be developed and offered. Trial counsel has a duty to request proper jury instructions. (*See* People v. Sedeno (1974) 10 Cal.3d 703, 717, n, 7, *overruled on other grounds* in People v. Breverman (1998) 19 Cal.4th 142; *see also* In re Cordero (1988) 46 Cal.3d 161, 189-91 [J. Mosk, conc.]; U.S. v. Span (9th Cir. 1996) 75 F.3d 1383 [failure to request instruction on available defense was IAC].)

**N. Don't Let A Court Intimidate You By Chiding that Your Argument is Frivolous Because Every Court That Has Considered it, Has Rejected it.** Here's a story of why trial courts should just rule on motions and not criticize counsel for raising an issue that every court in the land has rejected except the

U.S. Supreme Court. In Bousley v. United States (1998) 523 U.S. 614, the defendant pleaded guilty to drug possession with intent to distribute and to the enhancement for "using" a firearm "during and in relation to a drug trafficking crime." He appealed his sentence, but did not challenge the guilty plea's validity. The Eighth Circuit affirmed. Subsequently, he sought habeas relief, claiming his guilty plea lacked a factual basis because neither the "evidence" nor the "plea allocation" showed a connection between the firearms in the bedroom of the house and the garage where the drug trafficking occurred. The District Court dismissed the petition. While the appeal was pending, the Supreme Court held that a conviction for using a firearm requires the Government to show "active employment of the firearm," Bailey v. United States (1995) 516 U.S. 137, 144, not mere possession. In affirming the dismissal in Bousley, the Eighth Circuit rejected petitioner's argument that Bailey should be applied retroactively, that his guilty plea was not knowing and intelligent because he was misinformed about the elements of the gun offense, that this claim was not waived by his guilty plea, and that his conviction should therefore be vacated.

The Supreme Court took the case. It held that Bousley waived his claim by not raising it on direct appeal (and thus but not arguing it at trial too). To argue his way around this default, Bousley claimed "cause and actual prejudice." He argued that the legal basis for his claim was not reasonably available to counsel at the time of his plea and that it would have been futile to attack the plea before Bailey; The Supreme Court held that while this may work when the claim "is so novel that its legal basis is not reasonably available to counsel" (Reed v. Ross (1984) 468 U.S. 1, 16), Bousley's claim does not qualify because his claim was held not "novel" because although never accepted by any court until Bailey (and this means rejected by every appeals court in the country), the issue was being raised. Quoting Engle v. Isaac (1982) 456 U.S. 107, the Court held that "futility cannot constitute cause if it means simply that a claim was 'unacceptable to that particular court at that particular time.'" (Id., at 130, n. 35.) Therefore, petitioner is unable to establish cause for his default.

The long and short of this is: if any lawyer in the nation has thought of an arguable issue and pressed it, it is not "novel" and should be urged in the courts time and again until the U.S. Supreme Court either rejects or accepts it. If not so pressed, the client will default it on habeas review. So, as in Bailey**,** despite no court ever recognizing the issue as valid until the high court did so after repeated

and unanimous rejections in all the courts of appeal, trial counsel should have raised it anyway. By not doing so, the client defaulted what was a winning issue. So when a judge criticizes you for raising an oft-rejected issue, tell the judge this story and press on.

### O. Federalize Every Objection and Motion.

I have been giving out my “mantra motion,” a pre-trial motion for every criminal case going to trial. It contains several motions useful in every case, capital or non-capital, including short motions to stop the prosecutor from referring to the complaining witness as a “victim,” to stop the prosecutor from referring to him or herself as representing the “People,” an argument to have the words “evidentiary certainty” put into the reasonable doubt instruction, and an argument to “federalize” every objection made in the trial court so that counsel does not have to articulate for the record an explicit federal constitutional basis for an objection. The motion can be downloaded from my website at www. charlessevilla.com (go to the publications page). *See also* Gail Weinheimer’s federalization table in the 2006 Monterey materials.

## II. RECORD MAKING ON SPECIFIC ISSUES

### A. Making a Record of Batson v. Kentucky (1986) 476 U.S. 79 Challenges.[2]

"[O]nce the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (**step one**), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (**step two**). If a race-neutral explanation is tendered, the trial court must then decide (**step three**) whether the opponent of the strike has proved purposeful racial discrimination." (Purkett v. Elem (1995) 514 U.S. 765, 767.)

1. Step One - Defense Burden - as soon as you recognize a potential Batson problem, make a Batson-Wheeler motion stating what it is that one may base an inference of intentional discrimination based on race or gender. People v. Buchanan (2006) 143 Cal. App. 4th 139, 141: "It should surprise no one that, as a

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[2] The California Supreme Court has held that People v. Wheeler (1978) 22 Cal.3d 258, imposes the same standard as **Batson.** (People v. Box (2000) 23 Cal.4th 1153, 1188, fn. 7.)

reviewing court, we are only able to consider matters adequately raised in the record." Other than the list of names suggesting the challenged jurors were Hispanic, there was nothing in this record regarding ethnicity of potential, challenged, or seated jurors. Here, numerous persons with similar names remained on the panel. In short, the record was not good enough to preserve the issue.

2. Step Two - Prosecutor's Burden to list "race neutral" reasons for the challenge. Listen carefully and be ready to compare the objections with those used (or not used) on similarly situated non-minority jurors. Also, question whether the reason is a make-weight rationalization for what really is going on. (See Kesser v. Cambra (9th Cir. 2006) 465 F.3d 351 [DA kicked off Native American and Asian jurors. The 9th Circuit reverses under Batson finding, by comparative analysis the DA's explanations did not hold water].)

3. Step Three - Court's burden to determine the credibility of the prosecutor's reason. Best defense argument will be that the record contradicts or does not support the prosecutor. Miller-El v. Dretke (2004) 545 U.S. 231 appears to require comparative analysis for Batson challenges on appeal. The judge must determine the credibility of the prosecutor's proffered explanation. (McClain v. Prunty (9th Cir. 2000) 217 F.3d 1209, 1220, cited with approval in People v. Silva (2001) 25 Cal.4th 345, 385.)

## B. Dealing with Video and Audio Tape Prosecution Evidence

**1.** Get a Transcript Well Before Trial. If the prosecution wants to play such a tape to the jury, make sure they provide you with an accurate transcript well in advance and file it in the record. *See* Calif. Rules of Court, Rule 2.1040(a), requiring such a transcript before electronic recordings may be admitted.

**2.** Check the Transcript Against the Tape and Flag All the Objectionable Material. (In re Cordero (1988) 46 Cal.3d 161, 188 [tape of defendant's interrogation included an officer's statement that the judge who signs the arrest warrant was convinced the defendant killed the victim, as noted in the concurring opinion]; Sager v. Maass, 907 F. Supp. 1412 (D.C. Ore. 1995) ["a competent defense attorney would have listened to the tape before it was played to the jury and sought to remove the irrelevant, inflammatory references to petitioner."]) *See also* Aguilar v. Alexander (9th Cir.1997) 125 F.3d 815, 819 ["We cannot ignore,

however, that Aguilar's counsel apparently did not herself, or have others, review more than one of the twelve two-hour tapes. It surely was her professional duty to know the contents of the tapes before counseling Aguilar to waive his privilege."])

**3.** Make a Motion to Redact. Move to redact everything arguably inadmissible, *e.g.,* the comments are inflammatory, irrelevant, not questions, and commentary unrelated to any answer. *See* People v. Sanders (1977) 75 Cal.App.3d 501, 507-508["The People argue that the officer's narrative statements were admissible as adoptive admissions (Evid. Code § 1221). We disagree. It is fundamentally unfair to expect point-by-point denials of long narrative statements, containing several facts as well as theories and inferences -- particularly where the statements are not in question form"].) Examples of matter to redact:

*a. Expressions of the officer's belief in the guilt of a defendant. (E.g.,* U. S. v. Harber (9th Cir. 1995) 53 F.3d 236 [reversal required where a case agent's report containing a summary of his investigation and his opinion that the suspects were guilty was mistakenly given the jurors]; People v. Torres (1995) 33 Cal.App.4th 37 [peace officer's opinion that defendant committed the crimes did not assist jury and was not beyond common juror experience]; People v. Brown (1981) 116 Cal.App.3d 820, 829-830 [officer's testimony that defendant acted as a runner of drugs, and thus was as guilty as a seller, was reversible error].)

*b. Expressions by the officer that the "victim" is telling the truth.* (People v. Sergill (1982) 138 Cal.App.3d 34, 39-40(reversible error for officer to testify that child victim was telling the truth); U.S. v. Binder (9th Cir. 1985) 769 F.2d 595, 602 [it is an invasion of the jury's responsibility to determine the facts and witness credibility]; Maurer v. Dept. of Corrections (8th Cir. 1994) 32 F.3d 1286, 1287 [denial of due process of law to admit testimony from witnesses, including two police officers, that the victim was "sincere" in her claim of rape]; Cooper v. Sowders (6th Cir. 1988) 837 F.2d 284, 287-288 [officer improperly allowed to testify as expert on credibility which helped produce a "fundamentally unfair" trial].)

*c. References to prior crimes or bad acts. See* People v. Guizar (1986) 180 Cal.App.3d 487 [the court found defense counsel incompetent for failing to redact a tape of a witness' statement which included references to the defendant's previous murders].)

**4.** Federalize the Motion to Redact. Redaction is required to avoid a denial of a federal due process fair trial in violation of the U.S. Constitutional guarantees of the Fifth and Fourteenth Amendments, and (in state courts) article I, sections 7 & 15 of the California Constitution. It is also implicates basic confrontation rights under the Sixth Amendment. *See* Crawford v. Washington (2004) 541 U.S. 36. Also, argue Evidence Code 352, or Fed. Rule Evidence 403.

An example of the terrible impact of not-federalizing is Castillo v. McFadden (9th Cir. 2004) 399 F.3d 993, where a videotaped interrogation was played to the jury in an alleged baby shaking case. The tape was full of police accusations of lying and assertions of "scientific proof" of guilt. The trial judge regretted allowing it to be played and instructed the jury that the police statements were not admitted for proof of guilt. For failure to federalize the issue in state court, the majority panel opinion would not rule of the due process issue and held it not exhausted. But the dissent would have reached the merits and reversed the conviction based on the constitutional violation! The defendant is doing 20 years. See also Dubria v. Smith (9th Cir. en banc 1999) 224 F.3d 995 (9th Cir. 1999) (finding of no constitutional error in playing tape where officer opined about evidence of guilt, reversing 197 F.3d 390, initial opinion reversing conviction based on IAC.

**5.** Argue That No Limiting Instruction Can Alleviate Prejudice. Telling a jury, for example, to pay no attention to the investigating police officers' statements that they believe the defendant is "conclusively" guilty is obviously no cure for prejudice. Even if cautionary jury instructions are close to the mark, "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." Bruton v. U.S. (1968) 391 U.S. 123, 135; *also cited in* Gray v. Maryland (1998) 523 U.S. 185, 190; *see also* Berger v. U.S. (1935) 295 U.S. 78, 85 ["It is impossible to say that the evil influence upon the jury of these acts of misconduct was removed by such mild judicial action as was taken"].)

**6.** Cite the Supporting Case Law. Many of the helpful cases in this area of redaction are appellate reversals finding defense counsel incompetent for not redacting tapes. (People v. Guizar (1986) 180 Cal.App.3d 487, 492 ["Ignoring other possible objections, it is inconceivable to us that defense counsel did not

object to the introduction of this portion of the tape and transcripts on the ground that it was more prejudicial than probative"].) *See also* Sager v. Maass (9th Cir. 1996) 84 F.3d 1212, *affirming* 907 F.Supp. 1412 (D.Or. 1995) [defense counsel was held ineffective in part for failing to object to a 911 tape which contained negative comments about the defendant]; People v. Sundlee (1977) 70 Cal.App.3d 477 [counsel's failure to object to police surveillance tape containing inadmissible hearsay held ineffective assistance].)

**7.** Object to the Tape or Transcript Going to the Jury in Deliberations if some or all of the offending questions are admitted because of the risk that the comments will be given undue emphasis. (*See* People v. Sundlee, *supra* at 485 ["Each juror had a transcript of the inadmissible radio conversations and took it into the jury room, where it may have played a powerful and influential role, dwarfing the admissible eyewitness testimony"]; U.S. v. Hernandez (9th Cir. 1994) 27 F.3d 1403, 1408 [error prejudicial to give jurors transcript of witness testimony where few precautions are taken to insure jury does not give the transcript undue significance].)

**8.** All of the Above Apply to Video Interview Evidence. Often, in child abuse cases, the child is interviewed and the prosecution seeks to play the tape before the jury. Unless there is an evidentiary exception to the hearsay rule, it should not come in. A social worker interview is subject to a pretrial motion to exclude because it is pure hearsay and often contains contaminants such as multiple hearsay and prejudicial comments by the social worker, *e.g.,* "We will make sure he doesn't hurt anyone else." (*See* Webb v. Lewis (9th Cir. 1994) 44 F.3d 1387 [admission of videotaped violated Confrontation Clause where the tape did not fall within any recognized exception to the hearsay rule].)

Even if some parts are admitted, and unless tactics dictate otherwise, never let the videotape go back to the jury room during deliberations. This is like having the accuser appear "live" during deliberations in the most credibility supportive context. (*See* the following cases supportive of exclusion of such tapes in the jury room during jury deliberations: U.S. v. Binder (9th Cir. 1985 ) 769 F.2d 595, 600-601, *overruled on other grounds by* U.S. v. Morales (9th Cir. 1997) 108 F.3d 1031, 1035, fn.1.; Chambers v. State (Wyo. 1986) 726 P.2d 1269, 1276, 1277; Taylor v. State (1986) 727 P.2d 274, 277; Martin v. State (Okla. 1987) 747 P.2d 316, 319-20; People v. Montoya (Colo. 1989) 773 P.2d 623, 626, *superceded on*

*other grounds as stated in* People v. Pahlavan (2003) 83 P.3d 1138; State v. Michaels (N.J. 1993) 264 N.J. Super. 579, 643-644; Summage v. State (2004) 248 Ga. App. 559, 561; Tullis v. State (Fla. 1998) 716 So. 2d 819, 820; Young v. State (1994) 645 So. 2d 965, 968.)

**9.** Tale of the Tapes. Tapes can be damaging evidence but they often contain material that a jury should never hear. Being attentive to the record means being vigilant to contain taped evidence. "An important element of a fair trial is that a jury consider only relevant and competent evidence bearing on the issues of guilt or innocence." (Bruton v. U.S. (1968) 391 U.S. 123, 131, fn. 6.) With the above in mind, the above checklist can be used to guarantee clients their right to be tried upon relevant evidence and not opinions smuggled into the trial through taped evidence.

## C. Making a Record with Evidentiary Objections: Overcoming § 352 to Get Your Evidence Admitted.

No statute is cited more frequently in the criminal courts to exclude defense evidence than Evidence Code section 352. It reads:

> The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

Excluding defense evidence is a serious matter and judges need to be impressed with the law stating that § 352 cannot be blithely employed to bar relevant evidence. Judges too often exercise discretion to utter "352" as if it were the magic "abracadabra" to make evidence vanish. When faced with this reaction, break down the elements of §352 and offer legal arguments to overcome it. Even if you make the argument and it fails, you have done the client a service by making a record for appeal. But let's think positively. These arguments will prevail.

1. Probative Value**.** The first requirement is that your proffered evidence have probative value; that is, is it relevant to some issue in the case? We need

rules of relevance because, as Oliver Wendell Holmes said, they are "the necessary concession to the shortness of life." But what is relevant? As defined by Cal. Evid. Code § 210:

> "Relevant evidence" means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.

Given the breadth of the "any tendency in reason" language, you should have no difficulty showing your evidence is relevant.

2. The Constitutional Imperative. Once the relevancy hurdle is met, your evidence now is entitled to an escort into court in the strong arms of statutory and constitutional mandates. With certain exceptions, "all relevant evidence is admissible," states art. I, § 28 (d) of the California Constitution. Cal. Evid. Code § 351 says the same. Further, the defense has a federal constitutional right to compulsory process and to put on a defense case. (Washington v. Texas (1967) 388 U.S. 14; Holmes v. South Carolina (2006) 126 S.Ct. 1727.

These protections may be violated when relevant defense evidence is excluded. Remind the court: "[E]vidence Code section 352 must bow to the due process right of a defendant to a fair trial and to his right to present all relevant evidence of significant probative value to his defense." (People v. Reeder (1978) 82 Cal. App. 3d 543, 553; see also Fowler v. Sacramento County Sheriff's Department (9th Cir. 2005) 421 F.3d 1027 [granting federal habeas for misuse of 352 to denying confrontation evidence against complaining witness].)

3. Judicial Mandate. Finally, if this weren't enough to get your relevant evidence admitted, urge the court to read this passage from People v. Wright (1985) 39 Cal.3d 576, 584-585:

> We first reiterate, from a unanimous opinion of this court, the "[wise] advice for trial judges in criminal cases (and for prosecuting attorneys) [that] was articulated long ago: 'Questions as to the admissibility of evidence frequently arise, and in the hurry of a . . . trial the best Judge may err. . . . [Whenever] the evidence proposed by

> the defense is not plainly inadmissible, it is better to let it go in, since, in nine cases out of ten, a single equivocal fact, of doubtful bearing upon the case, would have no effect upon the judgment of the jurors, who are usually disposed to pass . . . upon the general merits. . . .' In other words, trial judges in criminal cases should give a defendant the benefit of any reasonable doubt when passing on the admissibility of evidence as well as in determining its weight." (People v. Murphy (1963) 59 Cal.2d 818, 829 [31 Cal. Rptr. 306, 382 P.2d 346].)

In sum, the trial court's exercise of discretion under Section 352 "should favor the defendant in cases of doubt." (People v. De Larco (1983) 142 Cal. App. 3d 294, 306).

4. Substantially outweighed. Assuming the court is determined to engage in the weighing process and consider exclusion, the court must make a finding supported by the record (People v. Clair (1992) 2 Cal. 4th 629, 660) that the value of the evidence is "substantially outweighed" by the "a" and "b" factors discussed next. It is helpful to make your argument on the record to encourage the court to go through a 352 reasoning process. One of the weighing factors is the concept of "substantial." In baseball, if the Giants beat the Dodgers by 14 runs, they have won by a "substantial" margin. If they win by one or two runs, that's not substantial. Only a lopsided outweighing warrants exclusion. Anything close goes to the defendant.

Now let's consider the 352 factors that must substantially outweigh the relevance of the evidence to warrant exclusion.

5. Necessitates undue consumption of time. The production of all evidence takes time, so the focus has to be an "undue" consumption of time. For example, in Andrews v. City and County of San Francisco (1988) 205 Cal. App.3d 938, the trial judge was reversed for disallowing prior bad acts evidence of a law enforcement officer in a suit by a prisoner concerning his mishandling while in custody. The trial judge would not allow the other acts of misconduct to be introduced because it would require time consuming "mini-trials" on those issues. Reversed: "the fact that the jury must resolve conflicting versions cannot justify the exclusion of all such evidence on this [352] ground alone." (Id. at 947.)

Cumulative Evidence. This is a common argument to exclude evidence under § 352 for taking too much time. But there is a reason for putting on cumulative evidence. Evidence that corroborates is necessary to make more credible the issue and thus can't be excluded as merely cumulative. (People v. Brown (1995) 35 Cal. App.4th 1585, 1595-1597.) Additional evidence may be of more probative value than previous versions. "Evidence that is identical in subject matter to other evidence should not be excluded as 'cumulative' when it has greater evidentiary weight or probative value. [Citation.]" (People v. Mattson (1990) 50 Cal.3d 826, 871.)

6. Creates substantial danger of undue prejudice. The best evidence is always “prejudicial” to the other side. *See* People v. Jackson (1991) 235 Cal. App. 3d 1670, 1679 (the evidence “was prejudicial only in the sense that it cast doubt on the prosecution's case against defendant.”) Prejudice does not mean damaging. It means that the evidence has very little relevance and a great potential for unfairly prejudicing the other side. “The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues.” (People v. Karis (1988) 46 Cal. 3d 612, 638; People v. Yu (1983) 143 Cal.App.3d 358, 377.)

To warrant exclusion on this ground, the weighing process requires a finding of lopsidedness such that relevance is minimal and unique prejudice to the State is maximal.

7. Confusing the issues, or of misleading the jury. It is difficult to conceive of relevant evidence that is minimally relevant while being so potent it would substantially confuse the issues or mislead a jury. *See* People v Mayfield (1972) 23 Cal App 3d 236 (reversing for exclusion of testimony by a superior officer concerning the credibility of a deceased undercover cop on this basis; held an abuse of discretion that resulted in a denial of due process.) Instructions to the jury could rectify the potential for confusion.

Use the above as aids in fighting for the admission of your evidence and make every effort to have the court make its analysis on the record. On a motion invoking section 352 the record must affirmatively show that the trial judge did in fact weigh prejudice against probative value. This may be done by implication,

but given this mandate, counsel can urge that it be done on the record. (People v. Wash (1993) 6 Cal. 4th 215, 246.)

### D. Fighting §1054 to Get Your Impeachment or Late Coming Evidence In.

A troubling issue for trial counsel under discovery law is this: when does counsel know or "reasonably anticipate" calling a witness to trial so as to be required to turn over the name to the other side thirty days before trial?

Under 1054(a), the prosecution must give the defense: "The names and addresses of persons the prosecutor intends to call as witnesses at trial." This includes, "[r]elevant written or recorded statements of witnesses or reports of the statements of witnesses." (Id. at (f).) 1054.3(a) puts a similar requirement on the defense. (In re Littlefield (1993) 5 Cal.4th 122, 129 (names and addresses required to be provided.) Failure to abide by the statute may lead to sanctions including "immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter." Exclusion is not to be ordered unless all else has been tried. (1054.5(c).)

In the abstract, the requirement seems clear, but both sides, and especially the defense, face difficulties in "knowing" when one is going to call a witness. Because the prosecution has to put on a case, it knows the names of needed witnesses. But the defense need not call witnesses. Whether to do so may depend on the strength of the prosecution testimony. With "reader" preliminary hearings, it is sometimes difficult to assess the strength of the prosecution case, and thus some witness decisions must await trial. But waiting runs the risk of sanctions.

The statutory trigger to a discovery turn-over thirty days prior to trial is when one "intends to call" the witness. In People v. Izazaga (1991) 54 Cal.3d 356, 376, n.11, the court described this as "including 'all witnesses ... [the party] reasonably anticipates it is likely to call....'" (adopting a standard from an Ohio case). Izazaga also made it clear that the DA must give timely discovery of its witnesses regardless of whether they are case-in-chief or rebuttal witnesses. (People v. Hammond (1994) 22 Cal. App. 4th 1611, 1621.)

As the following cases show, "intends to call" can be a difficult standard. How does one prove to a doubting judge that one did not intend to call the

witnesses until something at trial occurred warranting a change in direction? Consider People v. Jackson (1993) 15 Cal.App.4th 1197, where the Court of Appeal approved the exclusion of defense testimony as a sanction for discovery non-compliance because "the... [trial] judge refused to believe defense counsel did not seriously consider calling the witness until moments before he did." (Id. at 1203.)

In Sandeffer v. Superior Court (1993) 18 Cal.App.4th 672, 678, the Court of Appeal acknowledged the difficulties in trial counsel making absolute determinations thirty days prior to trial about the witnesses to be called: "Even when counsel appears to the court to be unreasonably delaying the publication of his decision to call a witness, it cannot be within the province of the trial judge to step into his shoes.... [T]he court... is limited to the remedies provided in the act for such stonewalling." This was a case involving the issue of whether disclosure of a defense expert witness's reports was required before the defense decided whether to call the expert. Answer: no.

In People v. Walton (1996) 42 Cal.App.4th 1004, the prosecution discovered a new eyewitness during jury selection and promptly turned over the statement to the defense. No continuance was requested and the trial court refused to bar the witness from testifying. The appellate court held no abuse of discretion because:

> until the prosecutor was able to locate the witness she could not "intend to call" him as a witness. (§ 1054.1.) Once she did locate him she promptly fulfilled her disclosure duty. Moreover, appellant was provided with the witness's statement and was afforded an opportunity to interview the witness before he testified. If appellant required additional time to prepare for the witness's testimony he neglected to request it. (Id. at 1017.)

In People v. Hammond, *supra,* the court held that the belated turn-over by the DA of a rebuttal witness's name and address was justified by the failure of the defense to timely provide the name and address of the defense witness whom the rebuttal witness impeached.

In People v. Gonzales (1994) 22 Cal. App. 4th 1744, the court reversed a

conviction for the exclusion of a proffered defendant's cellmate who was only revealed to the DA during trial. In reversing, the court ruled that if exclusion is to be based on prejudice to the other side, "we conclude that the prejudice would necessarily have to be substantial and irremediable," while if punishment is the basis for the sanction, then "absent a showing of significant prejudice and willful conduct, exclusion of testimony is not appropriate as punishment." Under the facts of the case, the court of appeal found neither justification to exist to exclude the witness and reversed the conviction.

In re Thomas F. (2003) 113 Cal. App. 4th 1249, the trial court barred four defense witnesses from testifying because counsel provided the names on the second day of the jurisdictional hearing. Only the lack of an express order for reciprocal discovery by the juvenile court saved the day here to bring about a reversal because 1054's provisions do not automatically apply to a delinquency proceeding. A specific discovery order is required in juvenile cases and none was entered here.

Remember that these discovery rules do not apply to witness impeachment evidence. *See* Izazaga, *supra,* at fn. 14: "the defense is not required to disclose any statements it obtains from prosecution witnesses that it may use to refute the prosecution's case during cross-examination. Were this otherwise, we would be presented with a significant issue of reciprocity." *(See* People v. Tillis (1998) 18 Cal.4th 284 (prosecutor did not violate discovery statute by failing to disclose impeachment evidence it possessed of a defense expert); Hubbard v. Superior Court (1997) 66 Cal. App. 4th 1163 (same rule for the defense).)

For the defense, Gonzales and Walton are good cases to have at the ready if the DA argues that the defense is late in giving it the names and addresses of defense witnesses. As appropriate, argue per Walton that one cannot turn over the name of a witness one has not found and interviewed. Or, argue per Gonzales there was no willful violation and/or no irremediable prejudice to the state. Finally, if all else fails, the statute has a hierarchy of sanctions (listed above) and the non-exclusionary sanctions are to be exhausted before exclusion can be applied.

If the court finds the evidence should have been turned over earlier, the sanction should be a short continuance for the other side and not exclusion. The

court *cannot instruct* the jury to find that counsel's late turnover should be attributed to the defendant to support negative inferences about the evidence. (*See* People v. Saucedo (2004) 121 Cal. App. 4th 937, 943; People v. Cabral (2004) 121 Cal. App. 4th 748, 753; People v. Bell (2004) 118 Cal. App. 4th 249, 257.)

### E. Fighting to Make a Record of the State's Investigative Misconduct

In a significant number of cases we defend, we come across unethical and/or grossly negligent police or prosecution investigation lt in fouled or lost evidence. Because of Arizona v. Youngblood (1988) 488 U.S. 51, it is almost impossible to get a court sanction of suppression or dismissal. However, Kyles v. Whitely (1995) 514 U.S. 419, permits an instructional sanction which may provide a formidable tool in final argument. Kyles, at p. 446 n.15, states: "when . . . the probative force of evidence depends on the circumstances in which it was obtained and those circumstances raise a possibility of fraud, indications of conscientious police work will enhance probative force and slovenly work will diminish it."

Here are the record-making steps to be taken to allow you to argue that the jury must the State's evidence to have no inculpatory value, and, in fact, the jury must find it exculpatory. By showing in cross-examination of the police that they were sloppy, negligent or acted in bad faith, you will be entitled to instruction telling the jury that if it finds the investigation as such, they may use that fact alone to disregard evidence so produced.

In U.S. v. Sager (2000) 227 F.3d 1138, 1145, the court said, relying on Kyles: "We agree with Sager that the district court committed plain error and abused its discretion by instructing the jury not to "grade" the investigation. In one breath, the court made clear that the jury was to decide questions of fact, but in the other, the court muddled the issue by informing the jury that it could not consider possible defects in Morris's investigation. To tell the jury that it may assess the product of an investigation, but that it may not analyze the quality of the investigation that produced the product, illogically removes from the jury potentially relevant information."

A sample instruction to proffer when there is evidence of a sloppy or bad faith investigation:

DEFENDANT'S PROPOSED INSTRUCTION

The defense has presented evidence that the prosecution's investigation of this case has been negligent, or purposefully distorted, and not done in good faith. For example, there has been testimony about [list the problems developed in the testimony concerning certain evidence]. With respect to these items of evidence, the probative value of that evidence depends on the circumstances in which it was [or was not] obtained [tested] [maintained]. If the circumstances raise a reasonable belief of bad faith, fraud or negligence, you may consider that in determining the credibility of the witnesses and the weight, if any, that you chose to give that evidence.

Remember, under the instructions I have given you, if the evidence permits two reasonable interpretations, you must adopt that interpretation which favors the defendant.

Then, in final argument counsel can argue to the jury that with respect to any evidence related to the sloppy, negligent or bad faith investigation, the jury MUST make inferences which favor the defense version. This is because Kyles and Sager say you are entitled to such an instruction permitting the inferences, and CALJIC 2.02 says that if inferences about a fact point in two equally reasonable directions, the jury MUST find for the defense.

## F. Fighting to Make A Record When Your Witness No Shows

1) Invoke the Power of the Court to Enforce the Subpoena. First enlist the aid of the court to enforce the subpoena. While a defendant may have no remedy when the Marshal has done his or her job in attempting to serve a warrant based upon a failure of the witness to obey a subpoena (*e.g.,* People v. Avila (1967) 253 Cal.App.2d 308, 330), that does not mean nothing can be done. In People v. Bossert (1910) 14 Cal.App. 111, a defendant moved the trial court for compulsory process at the commencement of his trial after he learned that some of his witnesses were not present. Instead of issuing process, the court acceded to the prosecutor's suggestion and read the witnesses' previous testimony to the jury. In reversing, the appellate court stated:

> The defendant in the case at bar had regularly subpoenaed the witnesses in question; their testimony was material and important to him. Nevertheless the court held that he was not entitled to the process of the court compelling their attendance, and forced the defendant to submit his case to the jury without the benefit of their oral testimony. By this ruling it is clear that the defendant was deprived of a constitutional right, for which the judgment and order must be reversed. (Id. at 1116.)

2) If the Marshal Won't or Can't, Get a Continuance. Failing to successfully invoke the power of the court to enforce the subpoena, counsel should request a continuance for the day. (*See e.g.,* Adoption of Michael D. (1989) 209 Cal.App.3d 122, 137 ["Trial counsel did not subpoena or obtain declarations from the people Steven claims he contacted. Nor did he seek a continuance to do so when the trial judge indicated such evidence would be important to the defense"].)

In arguing for a continuance, the record should reflect: (a) a particular named and obtainable witness; (b) materiality of the evidence; (c) the necessity of his testimony; and (d) diligence to obtain his attendance. (People v. Valladares (1984) 162 Cal.App.3d 312, 319.)

The failure to secure the attendance of key witnesses is ineffective assistance of counsel. (People v. Rodriguez (1977) 73 Cal.App.3d 1023); see also People v. Shaw (1984) 35 Cal.3d 535; In re Hall (1981) 30 Cal.3d 408); cf., People v. Marquez (1992) 1 Cal.4th 553.)

3) Failing The Above, Counsel Should Have The Witness Declared Unavailable and Have Previously Testimony of the Witness Read to the Jury. This alternative is less attractive, but at least it would put before the jury the critical testimony of the defense witness in the case. See Evidence Code sections 1290-91 (admission of former testimony of unavailable witness); section 1230 (statement against interest).

## G. Fighting to Make a Record of Prosecutorial Misconduct

You rise to object that the DA's argument ("defense counsel knows his

client is guilty") is misconduct, [3] but the judge not only overrules your objection but announces that in his court one does not interrupt opposing counsel during the sacred hour of final argument. All objections are to be reserved for a side-bar session following arguments.

But you know that the law requires an immediate objection or the issue is waived on appeal except for perhaps under the theory of incompetence of trial counsel.[4] You also know as a matter of common sense that allowing the prosecutor to proceed unrestrained will irretrievably corrupt the jury against you and your client. You respectfully say to the judge:

"Since it is the lawyer's duty to make his objections and other points

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[3] This is surely error although it has been deemed harmless error because trial courts gave curative admonitions to the jury. (U.S. v. Tutino (2nd Cir. 1989) 883 F.2d 1125[defense counsel knew his client was guilty; curative instruction given]; Homan v. U.S. (8th Cir. 1960) 279 F.2d 767 [argument that defense counsel knew defendant was guilty deemed improper and curative instruction given]; U.S. v. Kirkland (9th Cir. 1980) 637 F.2d 654 [defense counsel knew their clients were "guilty as sin;" curative instruction given]. It is "improper for the prosecutor to argue to the jury that defense counsel does not believe in his client's defense."] However, in People v. Thompson (1988) 45 Cal.3d 86, 112-114, where it was argued on appeal that such a prosecutorial comment was made because defense counsel did not object, it was held not error and could have been cured if it were.

[4] There are hundreds of cases holding a claim of misconduct is waived for lack of objection. (*E.g.,* People v. Samayoa (1997) 15 Cal.4th 795, 841; People v. Gionis (1995) 9 Cal.4th 1196, 1215; People v. Green (1980) 27 Cal. 3d 1, 24.) There are rare exceptions such as in People v. Hill (1998) 17 Cal.4th 800, where the misconduct was pervasive, a few objections were made, and it would have been fruitless to continue to object. Leaving the issue to an ineffective assistance of counsel claim on appeal is not an acceptable alternative given that the standard of review changes from Chapman v. California (1967) 386 U.S. 18, where federal constitutional violations require reversal unless the beneficiary of the error can prove beyond a reasonable doubt that it did not affect the result, to the much less generous standard of Strickland v. Washington (1984) 466 U.S. 668.

in his client's behalf, it must follow that he is entitled to a timely opportunity to make them. From this it necessarily follows that the judge is without power to foreclose that opportunity by any order or admonition to sit down or to be quiet or not to address the court. The power to silence an attorney does not begin until reasonable opportunity for appropriate objection or other indicated advocacy has been afforded."

The above "sound principle" is a quote taken from Cooper v. Superior Court (1961) 55 Cal. 2d 291, 298. There, legendary defense counsel Grant Cooper was defending a notorious murder case. It was the second trial, the first having ended in a hung jury after long jury deliberations. Now, the second jury was out several weeks in deliberations when the judge did an extraordinary thing. Without discussion with counsel, the judge called out the jury to give them his view of the evidence which included the following: "the explanation given by the defendant Finch as to the circumstances surrounding the firing of the fatal shot to me does not sound reasonable in any of its aspects, and it appears to me to have been concocted by him in an attempt to justify what is shown by the evidence, in my opinion, to be a willful and deliberate taking of human life." (Id. at 297.)

At this, Cooper twice sprang to object to the invasion of the province of the jury and twice the court slapped him down with contempts, stating that Cooper could make his record later outside the presence of the jury. Cooper did not take the contempts lightly. Instead, he took them to the California Supreme Court and won. The Supreme Court observed: "This was the first opportunity counsel had to object to the unusual procedure. An attempt to cure the error by again recalling the jury and instructing them to disregard the comments would be like an attempt to unblow a blown horn." (Id. at 300.)

This holding has direct application to our problem. To permit unanticipated and outrageous jury arguments by the prosecution without immediate objection and correction is extremely prejudicial to the client. Counsel is required to object and move for a judicial admonishment if not a mistrial.

Waiting until its all over to make objections means zero likelihood of getting a ruling that can undo the damage. It is literally "all over." Further, waiting will likely waive the issue for appeal. It also may make the record appear

that the comment was not so awful given the silence of defense counsel after it was made.

The example given may be extreme. Perhaps the court will say something like, "I'm going to ask the lawyers to try and avoid interrupting one another during the argument, and if either attorney should misstate the evidence or the law, and I know that neither would do that intentionally, you are to rely on the evidence as it was presented in the trial and the law as I will be giving it to you." This was the statement the trial court gave in People v. Wilson (2005) 36 Cal. 4th 309, 337 n. 6. The Supreme Court held this did not relieve defense counsel from the duty to object to the misconduct during final argument because the court's statement did not specifically preclude objections during argument, it only suggested it.

Therefore, in addition to preparing your own final argument, be prepared to object when the prosecutor goes off the reservation into the land of misconduct. One way to prepare is to review the many checklists of examples of misconduct in argument. Excellent ones by Tom Havlena, Hank Hall, Kelly Babineau, and Matt Braner are available on CLARA. Have the list in your trial notebook.

Have the cites to Cooper and Wilson at the ready to explain to the court that barring objections during argument undermines counsel's duty to object immediately to stave the prejudice before it irrevocably saturates and prejudices the jury. In convincing the trial court to allow objections during argument, inform the court that it is not only the duty of the court to monitor the fairness of the trial, but when the court gives curative instructions for misconduct, it usually eliminates reversible error.[5] Judges like to have reversal proof convictions so appealing to

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[5] To cure misconduct on the spot, have the court take a cure from People v. Bolton (1979) 23 Cal.3d 208, 215, fn. 5: "But when the defense counsel requests cautionary instructions, the trial judge certainly must give them if he agrees misconduct has occurred. He should aim to make a statement to the jury that will counteract fully whatever prejudice to the defendant resulted from the prosecutor's remarks. In the present case, such a counterbalancing statement might have taken the following form: 'Ladies and Gentlemen of the jury, the prosecutor has just made certain uncalled for insinuations about the defendant. I want you to know that the prosecutor has absolutely no evidence to present to you to back up

(continued...)

that motivation may make them receptive to curing misconduct on the spot.

When objecting, remember: "As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion--and on the same ground--the defendant [requested] an assignment of misconduct and [also] requested that the jury be admonished to disregard the impropriety. [Citation.]" (People v. Samayoa (1997) 15 Cal. 4th 795, 841.)

Federalize all your objections by arguing that the prosecutor's comment "so infected the trial with unfairness as to ... [be] a denial of due process" under the 14th Amendment to the U.S. Constitution. (Donnelly v. DeChristophero (1974) 416 U.S. 637, 643 [questionable argument by the prosecution that the defense wanted the jury to find guilt on a lesser deemed cured by a specific corrective jury instruction.])

## H. Fighting to Make a Record When the Court Imposes Time Limits

In U.S. v. Jones, 982 F.2d 380 (9th Cir. 1992), the court reversed a conviction for confrontation denial deriving from the trial court's blanket prohibition of witness recross examination. *See also* U.S. v. Rutgard (9th Cir. 1997) 116 F.3d 1270, 1279 (in a 79 day trial characterized by repetitive witness examination, the trial court's *three hour* limits for each side on witness examination deemed not an abuse).

If you need more time, argue you were not able to establish credibility by corroborating it with detailed testimony and documentary support (*e.g.,* exhibits). *See* Hart v. Gomez (9th Cir. 1999) 174 F.3d 1067 (failure of counsel to use persuasive corroborating evidence to make credible a single witnesses exculpatory testimony on behalf of a defendant held prejudicial ineffective assistance of

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[5](...continued)
these insinuations. The prosecutor's improper remarks amount to an attempt to prejudice you against the defendant. Were you to believe these unwarranted insinuations, and convict the defendant on the basis of them, I would have to declare a mistrial. Therefore, you must disregard these improper, unsupported remarks.'"

counsel.) . *See also* U.S. v. Brooke (9th Cir. 1993) 4 F.3d 1480, 1489.

## I. Fighting to Make a Record of Spectator Displays before the Jury.[6]

These cases often involve families for both sides attending trial each day. It is highly advisable to anticipate problems by getting a court order banning spectator partisans from wearing buttons or other displays in or around the courtroom. Each side should be assigned seating on opposites sides of the spectator area so that there are no disputes during trial. Finally, the court should warn all spectators that any disruptions or reactions to testimony will not be tolerated.

Violations of the above must be documented on the record. This means describing in factual detail the nature of the problem and then make requests for appropriate judicial action (*e.g.,* admonitions, sanctions, mistrial) based upon the following authority. If the judge initially denies relief, continue to document for the record the problem in detail.

Due process requires that "... if in fact a trial is dominated by a mob so that there is an actual interference with the course of justice, there is a departure from due process of law," and "if the State, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the State deprives the accused of his life or liberty without due process of law." (Moore v. Dempsey (1923) 261 U.S. 86, 91; *see also* People v. Slocum (1975) 52 Cal. App.3d 867, 883 [the judge must prevent conduct which would obstruct administration of justice, such as expression of opinion about merits of case in jury's presence]; People v. Fleming (1913) 166 Cal. 357, 377 [judge's duty to control proceedings to insure public sentiment does not spill over to the court room]; Altemose Const. Co. and Energy Contracting Co. v. N.L.R.B. (3rd Cir. 1975) 514 F.2d 8, 12-13 ["Conducting a hearing in a mob atmosphere demeans the legal process and may well have an intimidating effect

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[6] In Carey v. Musladin (12/11/2006) __ U.S. __, 127 S.Ct. 649, the court reversed a grant of relief by the Ninth Circuit where spectators wore buttons with the photo of the victim on it; the Court held that there was no existing Supreme Court decision applying its rules to non-state actors (like guards) so there was no basis for granting relief under AEDPA.

on the witnesses and influence their testimony. Such an effect may be incalculable....”]; Norris v. Risley (9th Cir. 1990) 878 F.2d 1178 [pre-AEDPA and Musladin conviction reversed because a group wore "Women Against Rape" buttons inside and outside the courtroom in a sexual assault trial]; *see generally* Holbrook v. Flynn (1986) 475 U.S. 560, 568 [practices that pose a threat to the fairness of the fact finding process must be subjected to close judicial scrutiny].)

### J. Fight to Make a Record With Informants

History tells us that if the prosecution calls an informant to the stand, it is almost inevitable that something important about the informant’s background, benefits conferred or the deal he’s made will be suppressed. *See* Wefald & Sevilla, The Rat Manual (distributed at previous conferences) for the ways to make a record in such cases. Suggestion: just prior to trial file a pleading setting forth the discovery provided on the snitch by the prosecution. This will set up several issues: first, if more comes out, it will appear that either the prosecution has suppressed the evidence or the snitch has not revealed relevant evidence to the prosecutor. If new revelations occur after trial, the record will be there to prove that this was not revealed prior to or during trial.

### K. Fighting to Make a Record To Exclude Prosecution Experts

Examine the nature of the prosecution’s proffered expert witness. In every instance, consider challenging the expertise in a pre-trial motion under Evidence Code § 403 and 405.

Section 403 provides: “(a) The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact....”

Evidence Code 405 states: “(a) When the existence of a preliminary fact is disputed, the court shall indicate which party has the burden of producing evidence and the burden of proof on the issue as implied by the rule of law under which the question arises. The court shall determine the existence or nonexistence of the preliminary fact and shall admit or exclude the proffered evidence as required by the rule of law under which the question arises.”

The preliminary fact to context may be whether the science is a basis to prove what it says it can prove, or whether the expert has the credentials to opine.[7]

Even if the motion fails, bringing such a motion will aid the trial attorney in preparing for the expert's trial testimony and make the record for an issue on appeal.

## L. Fighting to Make a Record With Your Defense Mental Health Expert

1. Get Relevant Information and Witnesses to the Expert. To make a record with the expert requires providing the expert with all the tools to give meaningful, persuasive testimony. Thus, provide the basic history: medical reports, medications, drug and alcohol usage, school, military service, job records, history of bizarre behavior, victimization, prosecution discovery of case facts and defendant's interrogations, and relevant defense investigation. Also, determine whether interviews of family members, friends, and persons who witnessed the defendant's behavior before the acts in question.

There is no better way to destroy the credibility of a defense expert than to withhold the damaging evidence, *e.g.*, discovery reflecting consciousness of guilt behaviors just before and after the act. (*E.g.,* Hovey v. Ayers (9th Cir. 2006) 458 F.3d 892, 928 ["This information would have prevented the prosecutor from portraying Dr. Satten as ill-prepared and foolish and thereby impugning his medical conclusions. Because Dr. Satten was not adequately prepared, the prosecution was able to demonstrate that Dr. Satten was completely ignorant of several important facts...."]; Bean v. Calderon (9th Cir. 1998) 163 F.3d 1073, 1080-81 [counsel failed to adequately prepare mental health experts, whose testimony was, as a result, "less than persuasive at best . . . and a seeming artifice at worst"].)

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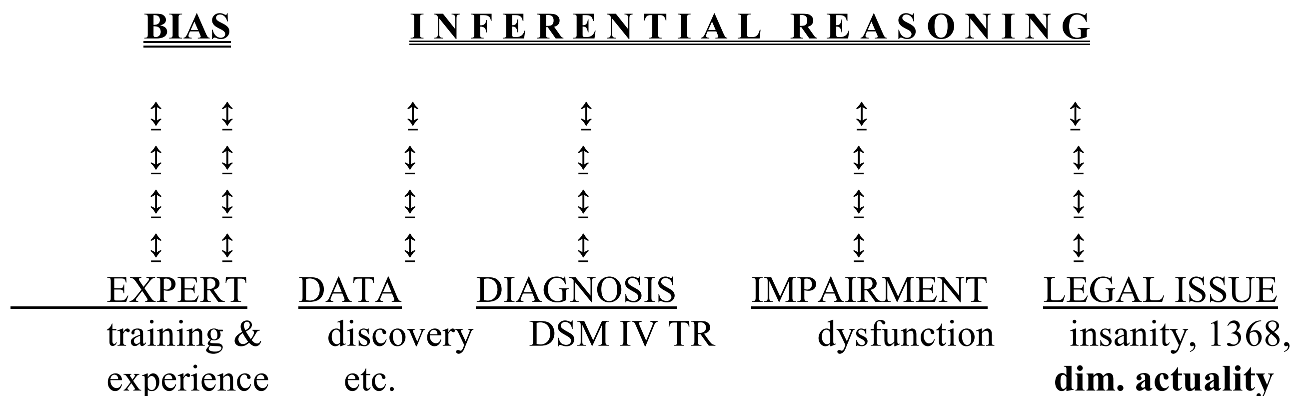
[7] The Commentary to section 405 gives examples of the types of testimony that can be challenged in this manner including the qualifications of an expert witness ("the proponent must persuade the judge that his expert is qualified, and it is error for the judge to submit the qualifications of the expert to the jury".) Two examples of the types of experts challengeable under this section are those on sanity and handwriting. "The witness' qualifications to express such an opinion, therefore, are to be determined by the judge under Section 405...."

2. Preparation for Trial Testimony. To get the most out of the expert, the latter must know the limits of what is permitted.[8] In guilt phase trials, the statutes forbid opinions on the capacity of the defendant to form the intent to commit the crime, and the expert may offer no opinion on whether the defendant actually formed that intent. That is the issue for the jury, so the expert's testimony will focus on the defendant's history, the diagnosis, and the consequent impairment from the disease or disorder. Examine together the chain of inferences that support the expert's opinions which will be the focus of cross-examination:




The goal of defense psychiatric and psychological testimony is to paint a compelling picture for the jury of how the defendant's diagnosed mental disability resulted in impaired functioning in his or her everyday life. Without that testimony, the medical expert's bare opinions of a diagnosis are of little assistance in convincing the jury about the relevance of the impairment to the mental state elements of the offense. Also, the expert must talk in understandable language. Even brilliant insights will not get across to the trier of fact if communicated in jargon only Sigmund Freud would understand (*i.e.,* no psychobabble)

3. Drawing out the Impairment and its Consequences to the Defendant. To make a record, draw out of the expert's credentials and experience, then develop his/her involvement in the case: the time he/she spent with the defendant, all the data reviewed

[8] California limits on mental health testimony are set forth in Penal Code sections 25, 28 and 29. But the constitutional bottom line on excluding such evidence is not at all clear after the Supreme Court opinion in Clark v. Arizona (2006) __ U.S. __; 126 S.Ct. 2709, which upheld the exclusion of certain guilt phase psychiatric testimony, but drew no bright lines for future guidance.

prior to reaching a diagnosis, and the diagnosis. Then it will be time to get to the essence of the opinion, *i.e,* the degree of brain/mind injury that makes the defendant different from a normal person. Ask questions to show how the impairment makes it difficult for the defendant to think, act and accurately perceive what is going on in his or her world.

- Doctor, with this impairment that you have diagnosed, can you describe how the defendant's perceptions of everyday events would be affected?
- Would the defendant have been able to weigh considerations for and against his/her conduct at the time of the alleged conduct? Why not?
- Would he have carefully thought out what he was doing? Why not?
- What role did reasoning play in his decision-making process?
- Would he have acted under the emotion of the moment rather than a reasoned decision-making process?

The answers to these questions would be followed up to extract details. The more examples the expert can use of distorted perception as a result of the brain/mind injury the better. This will meaningfully demonstrate that a person with such a mental disease, defect or disorder and resulting impairment would act (for example) under stress and emotion so as not to have appreciated the life-endangering act necessary for an express or implied malice murder. These are questions permitted by the statutes about a "mental disorder [and are] ... admissible solely on the issue of whether or not the accused actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought...." (Penal Code section 28(a).)

There is authority for such far reaching expert testimony. As stated in People v. Ochoa (1998) 19 Cal. 4th 353, 430: "By its terms, [Penal Code] section 29 prohibits an expert witness from giving an opinion about the ultimate fact whether a defendant had the required mental state for conviction of a crime. *It prohibits no more than that.*" The above questions do not seek prohibited opinions on the capacity to form malice or to premeditate or deliberate, or deal specifically with the intents for the charged crime. Rather, they seek to make real for the jury the diagnosis by describing the impairment and its consequences for the defendant from the mind/brain defect. That is the goal of the testimony – to make understandable that the diagnostic label and inform the jury why it means something -- mental impairment undermining the defendant's formation of the specific intent of the charged crime.

Another avenue for getting at this goal is the **hypothetical question** put to the expert. People v. Coddington (2000) 23 Cal.4th 529, 582-583, found that the trial court committed error, albeit harmless, in restricting defendant's psychiatric testimony at guilt phase. The opinion held that defendant was entitled to have his psychiatrist describe any particular mental illness suffered by defendant and explain that this "form of mental illness can lead to impulsive behavior . . . ." (Ibid.)

The court also did not dispute that the expert *could answer hypothetical questions* concerning "what a person who had a bi-polar disorder or was a paranoid schizophrenic could or could not do . . . [and] tie the disease to [defendant's] conduct . . . ." (Id. at p. 583.)[9] While the court assumed that the exclusion of the hypotheticals was error in the course of finding any error harmless, previous decisions make it clear that a defendant is allowed to elicit expert testimony about "defendant's mental disorders at the time of the commission of the crimes, or a correlation of the evidence of the crimes to the experts' test results. . . ." (People v. Samayoa (1997) 15 Cal.4th 795, 837.)

As held in People v. Nunn (1996) 50 Cal.App.4th 1357, 1365, it is permissible to present "*detailed* expert testimony relevant to whether a defendant harbored a required mental state or intent at the time he acted." For example, an expert must be permitted to express his or her opinion that defendant, "because of his history of psychological trauma, tended to overreact to stress and apprehension." (Ibid.) The expert may not only describe defendant's psychological or psychiatric condition, including at the time of the homicide, but must be permitted "to testify such condition could result in [defendant] acting impulsively under certain particular circumstances." (Ibid.) The expert can "evaluate[] the psychological setting of [defendant's] claimed encounter with the [decedent(s)] and . . . offer[] an opinion concerning whether that encounter was the type that could result in an impulsive reaction from one with [defendant's] mental condition."

Take the mental health testimony to the limits in order to convince the jury and also make the record. If curtailed in the effort, the appeal will have issues pertaining to exclusion of relevant, exculpatory evidence. The better alternative is get the testimony

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[9] Jackson v. Calderon (9th Cir., 2000) 211 F.3d 1148, states: "Counsel's means of avoiding the problem posed by Cal. Penal Code § 29 was to rely on hypothetical questions posed to Dr. Aniline, the one medical expert who did testify." (Id. at 1159.) Counsel posed a hypothetical question to Dr. Aniline as to whether the hypothetical psychological counterpart of defendant Jackson could premeditate. (Ibid.) Whether you can go that far is unlikely, but worth trying.

admitted, of course, and the cases above provide a road map for doing it.

## M. Fighting to Make a Record With An Eyewitness/Mistaken ID Defense

First, investigate the identification. For example, if the officers used a photo six pack, find out if they administered it "blind," *i.e.,* no knowing the suspect. Find out the techniques used so that an expert can counsel you on their weaknesses and then be called to show its unreliability and support instructions on those points.

Second, move to hire the identification expert. In People v. McDonald (1984) 37 Cal.3d 351, overruled on other grounds in People v. Mendoza (2000) 23 Cal. 4th 896, the court considered a similar issue concerning whether an expert could testify to specific factors in a case tending to undermine an accurate eyewitness identification. In that case, the defense proffered the expert, Dr. Shomer, but his testimony was entirely excluded by the trial court. The Supreme Court held that such expert testimony which simply informs the jury of certain factors that may impair the accuracy of eyewitness identifications "falls well within the broad statutory description of 'any matter that has any tendency in reason' to bear on the credibility of a witness." (Id. at 366.) This testimony concerns matters sufficiently beyond common experience so that it can assist the trier of fact, and thus passes the test of Evidence Code §801. (Id. at p. 369.) The error in entirely excluding the expert testimony was deemed reversible because of the closeness of the case and the critical issue of identification.

The expert "may refer to the particular circumstances of the identification before the jury, such testimony is limited to explaining the potential effects of those circumstances on the powers of observation and recollection of a typical eyewitness." (Id., at pp. 370-371.)

Third, adduce the testimony to, at a minimum, make meaningful the specific factor instructions in CALCRIM 315 on eyewitness identification which do not explicitly state that they are factors that undermine an accurate identification. Write and offer tailored instructions to support the expert.

## N. Fighting for Your Tailored Instructions.

Except for advocating for your own instructions and objecting to those that are wrong, a prudence silence (or saying "submitted") is best when the court asks for the

defense position on other instructions. But when you have instructions you want, here's a riff to argue to the court that they must be given.

It is settled in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. (People v. Edwards (1985) 39 Cal.3d 107, 117.) The general principles of law are those closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case. (People v. Sedeno (1974) 10 Cal.3d 703, 715, *overruled on other grounds,* People v. Breverman (1998) 19 Cal.4th 142 [standard of prejudice in not giving a *sua sponte* lesser included instruction changed to the state harmless error standard.]) Here, the instructions are requested and premised on principles of law connected with the facts before the jury. (*See* People v. Moore (1954) 43 Cal.2d 517, 526-27 [reversing where refusal to give defense requested instructions on self-defense resulted in rules of law being stated exclusively from the viewpoint of the prosecution.])

1. In evaluating proffered instructions, a court must view the supporting evidence in a light most favorable to the party requesting the instruction. For the purposes of determining whether the instructions proffered by defense counsel should have been given, "[d]oubts as to the sufficiency of the evidence to warrant instructions should be resolved in favor of the accused." (People v. Wilson (1967) 66 Cal. 2d 749, 763; People v. Ramirez (1990) 50 Cal.3d 1158, 1180; People v. Flannel (1979) 25 Cal.3d 668, 684 ["trial court should not . . . measure the substantiality of the evidence by undertaking to weigh the credibility of witnesses, a task exclusively relegated to the jury"].)

2. Court must instruct on supported defense theories. The court has "an affirmative duty to give, *sua sponte,* a correctly phrased instruction on defendant's theory." (People v. Stewart (1976) 16 Cal.3d 133, 140). This includes an "obligation to instruct on defenses...and on the relationship of these defenses to the elements of the charged offense.... [Citations]." (Ibid.) If the court has such a *sua sponte* duty, its duty is even greater when the instructions are requested. "The trial court should have allowed the jury to determine the self-defense issue by instructing upon it when requested." (People v. Elize (1999) 71 Cal. App. 4th 605, 616.)

3. Test for Giving Requested Instructions. A requested instruction must be given if the accused presents evidence sufficient to "deserve consideration by the jury, *i.e.,* evidence from which a jury "composed of reasonable men could have concluded" the

particular facts underlying the instruction existed. (People v. Flannel (1979) 25 Cal.3d 668, 684.) People v. Sedeno, *supra* "expressly states that when evidence supports a defense and the defendant 'relies' on that defense and requests an instruction on it, the instruction should be given." (People v. Elize (1999) 71 Cal. App. 4th 605, 614.)

4. A defendant need not testify to be entitled to instructions. The test is not whether the defendant testifies, but whether the record shows substantial evidence to support the requested instruction. "The element of intent is rarely susceptible of direct proof and must usually be inferred from all the facts and circumstances disclosed by the evidence." (People v. Kuykendall (1955) 134 Cal. App. 2d 642, 645; *see also* People v. Anderson (1983) 144 Cal. App. 3d 55, 62 ["It is elementary that a defendant's state of mind is most often shown through circumstantial evidence which often prevails over the direct testimony of the defendant to the contrary"].)[10]

_____5. The Proferred Instruction Is Not Inconsistent and, In Any Event, a Defendant Is Entitled to Inconsistent Defenses. A trial court's duty to instruct, even *sua sponte,* on particular defenses arises "if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." (People v. Barton (1995) 12 Cal.4th 186, 195.) Under Barton, the court had a duty to give the requested instructions because appellant explicitly relied on them. But "[i]nconsistent defenses are normally permitted in criminal as well as civil cases; *e.g.,* not guilty and insanity; denial of act and self-defense. [Citations.]." (People v. Atchison (1978) 22 Cal.3d 181, 183 [quoting 1 Witkin, Cal. Crimes, § 177, subd. (1).])

6. Failure to instruct upon a defendant's theory of the case supported by substantial evidence violates the defendant's constitutional right to defend himself. The right to present a defense is guaranteed by the Sixth Amendment right to trial by jury, the Fourteenth Amendment right to due process of law, and state constitutional due process

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[10] Hence, even if the defendant did not testify, the trial court has a *sua sponte* duty to give self-defense instruction if there is substantial circumstantial evidence of self-defense, either complete or imperfect. (*See* People v. DeLeon (1992) 10 Cal. App. 4th 815, 824, citing People v. Wickersham (1982) 32 Cal. 3d 307, 326.) "Substantial evidence of a defendant's state of mind, including an 'honest but unreasonable belief in the necessity to defend against imminent peril to life' (CALJIC 5.17), may be present without the defendant's testimony. [Citations.] [Original emphasis.]" (DeLeon, *supra,* at 824.)

and jury trial protections. (Cal. Const., art. I, section 7, and 15).[11]

In Holmes v. South Carolina (2006) __ U.S.__, 126 S.Ct. 1727; 164 L.Ed.2d 503, the Supreme Court unanimously struck down a state law involving the denial of the right to present evidence in support of the defense that someone else committed the crime, stating, "It follows that the rule applied in this case by the State Supreme Court violates a criminal defendant's right to have "'a meaningful opportunity to present a complete defense.' [Citations]." (Id. at 1735.) The right to a present a defense is meaningless without instructions telling the jury it exists; thus "a defendant has a constitutional right to have the jury consider defenses permitted under applicable law to negate an element of the offense." (U.S. v. Sayetsitty (9th Cir. 1997) 107 F.3d 1405, 1414; *see also* Taylor v. Withrow (6th Cir. 2002) 288 F.3d 846, 851 ("We hold that the right of a defendant in a criminal trial to assert self-defense is one of those fundamental rights, and that failure to instruct a jury on self-defense when the instruction has been requested and there is sufficient evidence to support such a charge violates a criminal defendant's rights under the due process clause.")

Whether the issue be considered as part of the right to present a defense, the right to pursue a defense theory of the case, the required instructions to fully inform the jury of the elements of the charge, or an arbitrary deprivation of a state guaranteed right, the issue is of federal constitutional magnitude. (*See* Beardslee v. Woodford (9th Cir. 2003) 358 F.3d 560, 577 ["Failure to instruct on the defense theory of the case is reversible error if the theory is legally sound and evidence in the case makes it applicable"]; Bradley v. Duncan (9th Cir. 2002) 315 F.3d 1091, 1098-1099 [federal constitutional error for failure to instruct on the entrapment defense]; Davis v. Strick (2nd Cir. 2001) 270 F.3d. 111, 123 [under New York homicide law, a defendant is entitled to have the jury instructed on justification and withholding of the instructions denies the opportunity to present his defense and constitutes a denial of 14th Amendment due process]; Conde v. Henry (9th Cir. 1999) 198 F.3d 734, 739-740 [federal constitutional error to fail to instruct on included offense of simple kidnaping]; Barker v. Yukins (6th Cir. 1999) 199 F.3d 867, 875-76 [instructional error on the state law of justification of constitutional dimension]; U.S. v. Douglas (7th Cir. 1987) 818 F.2d 1317, 1320-1321 ["failure to

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[11] "The trial court has a duty to instruct on all applicable principles of law, including defenses. The right to present a defense is a component of the federal guarantee of due process of law." (People v. Woodward (2004) 116 Cal. App.4th 821, 834, *citing* Crane v. Kentucky (1986) 476 U.S. 683, 690.)

include an instruction on the defendant's theory of the case [that he was a mere purchaser of drugs and not a conspirator] ... would deny the defendant a fair trial. (Citation.)]"; U.S. v. Escobar de Bright (9th Cir. 1984) 742 F.2d 1196, 1201 [giving the defense its theory instructions is basic to a fair trial].)

## O. Fighting to Make a Record on Media Misconduct by Law Enforcement.

In notorious cases that become high profile in the city, region, state, nation or world, prosecutors and law enforcement may release large amounts of damning information about the client over time. Sometimes, this may be from "a source close to the investigation." After an arrest, the defendant may be filmed going into the jail or walking down a courtroom hallway in chains (the "perp. walk"). This may well continue in the period from arrest to and during trial. In this, presumption of innocence may be lost in the community before the first prospective juror is called during voir dire.

There are two arenas in which responses should be made. One is that the defense must be read to deal with the media to counteract the damage that has been done. (*See* Semel & Sevilla, "Talk to the Media about Your Client? Think Again," NACDL Champion (Nov. 1997) pp. 10 et seq (from which the ideas for this excerpt are taken).) How to deal with the media is not discussed further here because it is not directly related to record making, except to say that responses need to be made, but not so as to intensify the media attention.

When the media has been fed by the prosecution and law enforcement to damn the defendant, defense attention to it must be taken to the courtroom. Record making tasks include collecting all press and television coverage of the case. If the leaks are bad enough, "consider using the press revelations by 'a source closely connected to the investigation' as a basis for a gag order, and spending the rest of the case seeking evidentiary hearings on the inevitable violations of the court's order by the prosecutor or prosecutorial agents.[12] This, and the threat of a contempt sanction, may stop future leaks.

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[12] Courts examining claims of prejudice arising from adverse pretrial publicity will consider whether that publicity is generated by acts of the prosecution or its agents. *See* Delaney v. United States (1st Cir. 1952) 199 F.2d 107, 113-115(it is an important consideration whether the government was responsible for the publication of the objectionable material or if it emanated from

(continued...)

"Further, filing pleadings and litigation over pretrial publicity will also pave the way for *voir dire* on prejudicial publicity, if not a change of venue motion. And while a measured defense response to the media is warranted pragmatically and under ethical rules, a vigorous litigation strategy in the face of prosecutorial misuse of the press also serves the client's interests where it may count the most -- in the courtroom." (Semel & Sevilla, *supra* at p. 65.)

## P. Fighting to Make a Record of Judicial Misconduct.

When doing the course of trial, the judge makes clear to the jury that he/she is biased in favor of the prosecution and/or dislikes defense counsel, the problem must be addressed quickly. Nothing undermines a fair trial more than for it to be presided over by a judge favoring the prosecution. But how to make a record (and better yet, stop the biased conduct) is a delicate matter. One cannot, by protesting in front of the jury, provoke more unhelpful judicial comments. But objections have to be made.

Because of the wide varieties of misconduct that may occur, this paper is not the place to discuss them all. (*See* discussion of many of them in Sevilla, "Protecting the Client, the Case and Yourself From an Unruly Jurist," NACDL Champion (Aug. 2004), pp. 28 *et seq* which has plentiful citations to case law covering a wide variety of judicial

[12](...continued)
independent sources); Silverthorne v. United States (9th Cir. 1968) 400 F.2d 627, 633 (" . . . federal courts have been sensitive to claims of prejudice arising from publicity when that publicity is created by acts of the Government."); United States v. Denno (2nd Cir. 1963) 313 F.2d 364, 373 ["The publicity partly sponsored by the prosecution, created opinions of guilt long before trial . . . ."]; Coleman v. Kemp (11th Cir. 1985) 778 F.2d 1487, 1539 ["significantly, the community's ranking law enforcement officer made widely reported and outrageous statements . . ."]; State v. Bell (Sup Ct. La. 1975) 315 So.2d 307, 31 [prosecution-emanated publicity considered in reversing trial court's venue decision]; State v. Stiltner (1971) 491 P.2d 1043, 80 Wash.2d 47, 52 n. 1 [conviction reversed after "astonishing" fact that state released prejudicial material to news media]; People v. Martin (1963) 19 A.D.2d 804, 243 N.Y.S.2d 343, 344 [change of venue ordered after police sponsored televised media interrogation of defendants].)

no-nos and how to deal with them.)

Suffice it to say here that the remedial action for most judicial misconducut is to make a federalized objection, detail the misconduct in writing if possible and with other witness declarations attached if they can be mustered, perhaps a request for a curative instruction to the jury, and/or a mistrial. Failure to do so will likely result in a waiver.

## III. MAKING A RECORD WITH MOTIONS FOR NEW TRIAL

Motions for new trial can be used for a variety of purposes: testing the sufficiency of evidence (People v. Robarge (1953) 41 Cal.2d 628, 634), litigating jury misconduct, raising ineffective assistance of trial counsel, to name a few. The latter two are discussed in this section, but the requirements of each case and the demands of record building will include many other bases.

**A. Jury Misconduct**. Talk to the jurors as soon as you can. Inquiry may reveal that your client did not receive a fair trial. It may reveal, for example, improper contacts by the bailiff (Parker v. Gladden (1966) 385 U.S. 363), or attempts to bribe a juror (Remmer v. United States (1954) 347 U.S. 227), a juror playing expert and misinforming the jury on the law (In re Stankewitz (1985) 40 Cal.3d 391), or the facts (McDonald v. Southern Pacific Transportation Co. (1999) 71 Cal.App.4th 256), that a juror castigated the defendant based on rumors heard about her heard at a local bar (People v. Nesler (1997) 16 Cal. 4th 561), or imported information from her manicurist (People v. Ault (2004) 33 Cal. 4th 1250), or read negative matter about the defendant in the newspaper. (People v. Holloway (1990) 50 Cal.3d 1098.)

If you don't ask, you will never find out if your client was convicted not based on the evidence at trial, but on misconduct by a juror. So the imperative of inquiry is there assuming the trial court has not prohibited all juror contact. (Townsel v. Superior Court (1999) 20 Cal. 4th 1084 (affirming order of trial court prohibiting appellate counsel from such contacts except through the court.)

By law, jurors names are not of record. The names, addresses and telephone numbers of jurors shall be sealed automatically following completion of a criminal trial. (CCP § 237, subd. (a)(2).) So, if you miss the chance to do hallway interviews, even if only to get a name and phone number to talk later, there likely will not be another opportunity.

If you don't have the names, any thought of juror interviews requires a petition for release of juror information. That petition must be supported by a declaration that includes facts sufficient to establish good cause for the release of the juror's personal

identifying information. If a prima facie showing of good cause is made, and there is no showing that establishes a compelling interest against disclosure, the court is to set the matter for hearing. (CCP § 237(b).)

This is an huge obstacle and without good cause, you won't get the names. Conduct the hallway interview. Get as many names and numbers as you can from willing jurors. Then you can talk when you are in a better frame of mind and in a more hospitable setting.

There are rules about juror interviews. First, if you and/or an investigator are to talk to a juror from your trial, it is imperative that you do so very carefully, candidly and unobtrusively. Reason: if the juror gives you a favorable declaration, rest assured that the other side will automatically argue "foul" -- that you and your investigator somehow coerced the declaration. Care must be taken to act so that there is no realistic opportunity to give credence to the accusation. (*See, e.g.,* In re Hamilton (1999) 20 Cal. 4th 273, 303, fn. 23.)

There are rules concerning the contact. They are permitted by statute as long as they are consensual and done at the juror's convenience (i.e., a reasonable date and time). (CCP § 206b.) Any discussion with the juror may not include questions or comments intended to harass or embarrass the juror, or influence the juror's actions in future jury service. (Rules of Prof. Conduct 5-320.) Nothing can be said to the juror that could likely influence his state of mind for current or future jury service. (Ibid.) That's all common sense.

Any interview occurring 24 hours after the verdict requires that prior to the discussion the interviewer inform the juror of the identity of the case, the party in the case on whose behalf the discussion is sought, the subject of the discussion, the juror's absolute right to discuss or not discuss the jury's deliberation or verdict with the person seeking the discussion, and, if one is prepared, the juror's right to review and have a copy of any declaration filed with the court. (CCP 206c.)

At any interview, some suggested generic areas for questioning include (per PC 1181 grounds for a new trial):

- §(2) "When the jury has received any evidence out of court, other than that resulting from a view of the premises, or of personal property;"

- §(3) "When the jury has separated without leave of the court after retiring to deliberate upon their verdict, or been guilty of any misconduct by which a fair and due consideration of the case has been prevented;"

- §(4) "When the verdict has been decided by lot, or by any means other

than a fair expression of opinion on the part of all the jurors;"

Other areas of inquiry during the interview should include, but not necessarily be limited to:

♦ Was any decision-making by the jury done in an arbitrary fashion (e.g., coin flip)?

♦ Were there any discussions about the case with any court personnel such as the bailiff, court reporter, clerk, judge, or alternates?

♦ Premature discussion by a juror indicating that the juror's belief in the defendant's guilt before the case had been submitted to the jury.

♦ Was there anyone or anything other than jurors and admitted exhibits present in the jury room during deliberations?

♦ Did any juror have contact with media information about the case or case related issues, whether by television, newspaper, magazine, or personal contacts with reporters?

♦ Was any information related by a fellow juror about investigation, experiments, dictionary usage, or contacts with outside persons about the case?

♦ Were there any revelations by any juror about matters concerning the juror but which were not revealed in voir dire and should have been made known to the court (e.g., the juror was the victim of the same or similar type of crime)?

♦ Were there any medications, drugs or alcohol used by any juror which might have impacted upon deliberations?

♦ If there were exhibits or tapes or testimony translated by a court interpreter, did any juror give a different meaning to the court interpreter's translation?

♦ Were there revelations by any juror about “evidence” not admitted in the case?

♦ Did any juror express opinions to get other jurors to a unanimous verdict that if they made a mistake, not to worry about it because the defendant could always appeal.

♦ Any mention of gangs? Or race?

♦ Any mention of the cost of retrial to pressure the holdout to give up his/her position?

♦ Ask the juror a final question about anything about the case or jury deliberations he or she is uncomfortable with.

♦ Anything else that seems relevant?

By far, issues of jury misconduct are best brought in a hearing at the motion for new trial when with memories are fresh on the issue. The longer between the trial and raising this issue, the less credible it will be due to possible contamination and deteriorating memory. As Emerson said, "time turns to scintillating ether the solid angularity of fact."

**B. Documenting Trial IAC:** The motion for new trial may be sued to develop an IAC issue. (People v. Fosselman (1983) 33 Cal.3d 572.) Fosselman's trial attorney failed to object to the prosecutor's improper argument to the jury, thus waiving the issue. The Supreme Court held the issue cognizable in a motion for new trial if the error denied Fosselman effective assistance of counsel.

> Thus, in appropriate circumstances justice will be expedited by avoiding appellate review, or habeas corpus proceedings, in favor of presenting the issue of counsel's effectiveness to the trial court as the basis of a motion for new trial. If the court is able to determine the effectiveness issue on such motion, it should do so. The court should have done so in the case at bar. (33 Cal.3d at p. 582-583).

**C. Using the Motion for New Trial to Put in Evidence That May Be Missing from the Record**. For example, if there were rulings made off the record, make a record of them and reiterate the challenge. Were proffered instructions not put in the record? Put them in. In post-trial interviews, did a juror state that the jury saw the defendant in shackles? Make the record.

## CONCLUSION

Attention to making a record is absolutely essential in all criminal cases and especially capital ones. The above suggestions, by no means exhaustive, are meant to aid in that effort while improving trial counsel's goal of winning at trial.