

# THE DEFENDER

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Defender

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## The Director's Ledge by Michael J. Machen, Esq.

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Some office wide news since our last newsletter:

The office has engaged a master's student from Pitt's GSPIA program to interview the intake staff and do exit interviews with our clients so that we can review and revise our intake department if necessary;

The investigations staff will utilize up to date procedures through training about a new manual, developed in-house, that encompasses state of the art investigative operating procedures;

The office has applied for a grant that is tied to stimulus finding and is only available for juvenile defenders. As of our latest information, we were one of the 9 (out of 65) PD offices that had applied. We will be notified on October 1;

Appeals is looking to expand our website to incorporate jury instructions so they will be readily accessible;

The G-20 summit is coming September 24-25 and we will have a primary function at the Preliminary Arraignment level. The complete details are still being finalized;

The office renovation (workstations, carpeting, and paint) has preliminary drawings which will be made available soon;

The office has engaged with Pitt's Katz School of Business to review and revise our filing system. This began in earnest in August 2009;

The office through an empirical study determined that our loss of client from preliminary hearing to Formal Arraignment needs to be addressed and we will do our part with a proactive discussion by our preliminary attorneys and a formal request from the Magisterial District Judges to address the importance of appearing at Formal Arraignment. A 60 day review will be made to see the results;

Finally, the office in conjunction with Warden Rustin has established a Public Defender Spanish Task Force. Our office, though an attorney and a paralegal fluent in the language, will immediately be mobilized for those clients who come to the jail and only speak Spanish. This attorney will then provide complete vertical representation to the client.



*Experience is one  
thing you can't get for  
nothing.*

*Oscar Wilde*

## The Legal Edge Case Management System

### By Betty Minnotte

Over the past six months, as a special guest of Michael Machen, I have been fortunate to explore the Office of the Public Defender (OPD) from the inside. My guest status, classified as a consultant, is specifically related to the development and implementation of an updated Legal Edge case management system.

In order to manage any process, one must first try to understand what that process is, how it currently works, and how it should work to best suit the people it is intended to help. The exploration of how things work in the OPD has been enlightening. More than thirty years have past since I had the pleasure of working in the OPD; during those intervening years many things have changed, some things have remained the same. The prominent feature remaining constant in all those years is the passion of the staff to work diligently on behalf of all their clients. The most obvious thing that has changed is the size and scope of the office. There are more attorneys, more staff in every department, and more functions that each employee must perform. Michael's desire to improve the ability of each member of the OPD team to perform their tasks motivated him to bring in a new case management system and the attendant office upgrades that come along with that process. Through this article I hope to share the progress that is being made on the Legal Edge system and some of the related benefits to the office from this upgrade.

A good case management system is built to follow the work flow through the office. The current case file folders provide a map of the major steps along the way in tracking a case from intake through trial. Using this outline of the major events in the life of a case, the Legal Edge project management team within the OPD is working with the Legal Edge development staff to create a web version of Legal Edge that will track cases in that same basic linear format.

The improvement brought by using an electronic case file over a physical case file is considerable. For one thing, losing a file will become an obsolete concept. Tracking the events and deadlines of a case, sharing notes between attorneys, or attaching documents, photos and related evidentiary items will be as simple as attaching a word file to an email.

Beyond the ease of maintaining data within the electronic file, there is the added benefit of interrelating general legal information with the current case. Through the law library within Legal Edge, the attorney working on a case will be able to pull case law, templates of motions and letters, standard jury instructions and other case preparation materials with the ease of navigating a web screen.



## LEGAL EDGE (CONTINUED)



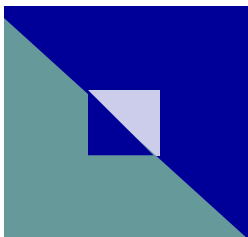
To further enhance the validity of information available to this office, Legal Edge is being developed with the intent of having it hook into other databases, such as those kept by the jail, probation and parole, the department of records and CPCMS. Data portals are being established now through the Department of Computer services that will allow this office to find and copy any data currently stored by the named departments and copy that information directly into our Legal Edge files.

The next obvious question is how will the trial attorney benefit from this electronic file system while prowling the corridors of the courthouse? The long term plan is to furnish the attorneys with laptops. Laptops have been purchased and are now being formatted for use by the pre-trial attorneys in the field. Once the viability of that program has been established, the next phase will be to employ that process for the trial and juvenile staff attorneys.

Along with following the case from intake to trial the other functions of the office have not been ignored. Mental health, probation and parole, and appeals will also benefit from the new Legal Edge system. Managing and tracking hearing dates and case assignments will be calendared in the new legal edge system with a direct link into the outlook calendars now in use on the existing desktop computers. Color coding the calendar function for the appellate division secretaries to easily track attorney due dates is one of the customization packages that is being explored through the purchase of our new Legal Edge. This color coded calendar system would also benefit mental health and probation and parole where several attorneys share diverse caseloads.

Along with the electronic case management system, upgrades of the companion physical filing system will also occur. A team of MBA students with the University of Pittsburgh will be examining our current office wide filing system and presenting options for streamlining and upgrading how and where the office maintains its files. In this context, the idea of certain divisions going paperless is being explored. Our first test project will be to take the mental health department paperless.

The implementation of a new system is exciting and the help of everyone in this office in providing necessary data to bring this change about has been exceptional. Thank you for this opportunity and I look forward to bringing this project to fruition.



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Those who would give up essential liberty to purchase a little temporary safety deserve neither liberty nor safety.

~ Benjamin Franklin

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## 10 Principles of a Public Defense Delivery System

Published by the American Bar Association Standing Committee on Legal Aid and Indigent Defendants, 2002.

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- 1. The public defense function, including the selection, funding, and payment of defense counsel,<sup>1</sup> is independent.** The public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel.<sup>2</sup> To safeguard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems.<sup>3</sup> Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense.<sup>4</sup> The selection of the chief defender and staff should be made on the basis of merit, and recruitment of attorneys should involve special efforts aimed at achieving diversity in attorney staff.<sup>5</sup>
- 2. Where the caseload is sufficiently high,<sup>6</sup> the public defense delivery system consists of both a defender office<sup>7</sup> and the active participation of the private bar.** The private bar participation may include part-time defenders, a controlled assigned counsel plan, or contracts for services.<sup>8</sup> The appointment process should never be *ad hoc*,<sup>9</sup> but should be according to a coordinated plan directed by a full-time administrator who is also an attorney familiar with the varied requirements of practice in the jurisdiction.<sup>10</sup> Since the responsibility to provide defense services rests with the state, there should be state funding and a statewide structure responsible for ensuring uniform quality statewide.<sup>11</sup>
- 3. Clients are screened for eligibility,<sup>12</sup> and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel.** Counsel should be furnished upon arrest, detention, or request,<sup>13</sup> and usually within 24 hours thereafter.<sup>14</sup>
- 4. Defense counsel is provided sufficient time and a confidential space within which to meet with the client.** Counsel should interview the client as soon as practicable before the preliminary examination or the trial date.<sup>15</sup> Counsel should have confidential access to the client for the full exchange of legal, procedural, and factual information between counsel and client.<sup>16</sup> To ensure confidential communications, private meeting space should be available in jails, prisons, courthouses, and other places where defendants must confer with counsel.<sup>17</sup>
- 5. Defense counsel's workload is controlled to permit the rendering of quality representation.** Counsel's workload, including appointed and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels.<sup>18</sup> National caseload standards should in no event be exceeded,<sup>19</sup> but the concept of workload (i.e., caseload adjusted by factors such as case complexity, support services, and an attorney's nonrepresentational duties) is a more accurate measurement.<sup>20</sup>

**6. Defense counsel's ability, training, and experience match the complexity of the case.**

Counsel should never be assigned a case that counsel lacks the experience or training to handle competently, and counsel is obligated to refuse appointment if unable to provide ethical, high quality representation.<sup>21</sup>

**7. The same attorney continuously represents the client until completion of the case.**

Often referred to as "vertical representation," the same attorney should continuously represent the client from initial assignment through the trial and sentencing.<sup>22</sup> The attorney assigned for the direct appeal should represent the client throughout the direct appeal.

**8. There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.**

There should be parity of workload, salaries and other resources (such as benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts) between prosecution and public defense.<sup>23</sup> Assigned counsel should be paid a reasonable fee in addition to actual overhead and expenses.<sup>24</sup> Contracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should specify performance requirements and the anticipated workload, provide an overflow or funding mechanism for excess, unusual, or complex cases,<sup>25</sup> and separately fund expert, investigative, and other litigation support services.<sup>26</sup> No part of the justice system should be expanded or the workload increased without consideration of the impact that expansion will have on the balance and on the other components of the justice system. Public defense should participate as an equal partner in improving the justice system.<sup>27</sup> This principle assumes that the prosecutor is adequately funded and supported in all respects, so that securing parity will mean that defense counsel is able to provide quality legal representation.

**9. Defense counsel is provided with and required to attend continuing legal education.**

Counsel and staff providing defense services should have systematic and comprehensive training appropriate to their areas of practice and at least equal to that received by prosecutors.<sup>28</sup>

**10. Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.**

The defender office (both professional and support staff ), assigned counsel, or contract defenders should be supervised and periodically evaluated for competence and efficiency.<sup>29</sup>

**NOTES:**

1 "Counsel" as used herein includes a defender office, a criminal defense attorney in a defender office, a contract attorney, or an attorney in private practice accepting appointments. "Defense" as used herein relates to both the juvenile and adult public defense systems.

2 National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts, Chapter 13, *The Defense* (1973) [hereinafter "NAC"], Standards 13.8, 13.9; National Study Commission on Defense Services, *Guidelines for Legal Defense Systems in the United States* (1976) [hereinafter "NSC"], Guidelines 2.8, 2.18, 5.13; American Bar Association Standards for Criminal Justice, *Providing Defense Services* (3rd ed. 1992)

[hereinafter "ABA"], Standards 5-1.3, 5-1.6, 5-4.1; *Standards for the Administration of Assigned Counsel Systems* (NLADA 1989) [hereinafter "Assigned Counsel"], Standard 2.2; *NLADA Guidelines for Negotiating and Awarding Contracts for Criminal Defense Services*, (1984) [hereinafter "Contracting"], Guidelines II-1, 2; National Conference of Commissioners on Uniform State Laws, *Model Public Defender Act* (1970) [hereinafter "Model Act"], § 10(d); Institute for Judicial Administration/American Bar Association, *Juvenile Justice Standards Relating to Counsel for Private Parties* (1979) [hereinafter "ABA Counsel for Private Parties"], Standard 2.1(D).

3 NSC, *supra* note 2, Guidelines 2.10-2.13; ABA, *supra* note 2, Standard 5-1.3(b); Assigned Counsel, *supra* note 2, Standards 3.2.1, 2; Contracting, *supra* note 2, Guidelines II-1, II-3, IV-2; Institute for Judicial Administration/ American Bar Association, *Juvenile Justice Standards Relating to Monitoring* (1979) [hereinafter "ABA Monitoring"], Standard 3.2.

4 Judicial independence is "the most essential character of a free society" (American Bar Association Standing Committee on Judicial Independence, 1997).

5 ABA, *supra* note 2, Standard 5-4.1

6 "Sufficiently high" is described in detail in NAC Standard 13.5 and ABA Standard 5-1.2. The phrase generally can be understood to mean that there are enough assigned cases to support a full-time public defender (taking into account distances, caseload diversity, etc.), and the remaining number of cases are enough to support meaningful involvement of the private bar.

7 NAC, *supra* note 2, Standard 13.5; ABA, *supra* note 2, Standard 5-1.2; ABA Counsel for Private Parties, *supra* note 2, Standard 2.2. "Defender office" means a full-time public defender office and includes a private nonprofit organization operating in the same manner as a full-time public defender office under a contract with a jurisdiction.

8 ABA, *supra* note 2, Standard 5-1.2(a) and (b); NSC, *supra* note 2, Guideline 2.3; ABA, *supra* note 2, Standard 5-2.1.

9 NSC, *supra* note 2, Guideline 2.3; ABA, *supra* note 2, Standard 5-2.1.

10 ABA, *supra* note 2, Standard 5-2.1 and commentary; Assigned Counsel, *supra* note 2, Standard 3.3.1 and commentary n.5 (duties of Assigned Counsel Administrator such as supervision of attorney work cannot ethically be performed by a non-attorney, citing ABA Model Code of Professional Responsibility and Model Rules of Professional Conduct).

11 NSC, *supra* note 2, Guideline 2.4; Model Act, *supra* note 2, § 10; ABA, *supra* note 2, Standard 5- 1.2(c); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (provision of indigent defense services is obligation of state).

12 For screening approaches, see NSC, *supra* note 2, Guideline 1.6 and ABA, *supra* note 2, Standard 5-7.3.

13 NAC, *supra* note 2, Standard 13.3; ABA, *supra* note 2, Standard 5-6.1; Model Act, *supra* note 2, § 3; NSC, *supra* note 2, Guidelines 1.2-1.4; ABA Counsel for Private Parties, *supra* note 2, Standard 2.4(A).

14 NSC, *supra* note 2, Guideline 1.3.

## 10 PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (CONT.)

15 American Bar Association Standards for Criminal Justice, *Defense Function* (3rd ed. 1993) [hereinafter “ABA Defense Function”], Standard 4-3.2; *Performance Guidelines for Criminal Defense Representation* (NLADA 1995) [hereinafter “Performance Guidelines”], Guidelines 2.1-4.1; ABA Counsel for Private Parties, *supra* note 2, Standard 4.2.

16 NSC, *supra* note 2, Guideline 5.10; ABA Defense Function, *supra* note 15, Standards 4-3.1, 4-3.2; Performance Guidelines, *supra* note 15, Guideline 2.2.

17 ABA Defense Function, *supra* note 15, Standard 4-3.1.

18 NSC, *supra* note 2, Guideline 5.1, 5.3; ABA, *supra* note 2, Standards 5-5.3; ABA Defense Function, *supra* note 15, Standard 4-1.3(e); NAC, *supra* note 2, Standard 13.12; Contracting, *supra* note 2, Guidelines III-6, III-12; Assigned Counsel, *supra* note 2, Standards 4.1, 4.1.2; ABA Counsel for Private Parties, *supra* note 2, Standard 2.2(B)(iv).

19 Numerical caseload limits are specified in NAC Standard 13.12 (maximum cases per year: 150 felonies, 400 misdemeanors, 200 juvenile, 200 mental health, or 25 appeals), and other national standards state that caseloads should “reflect” (NSC Guideline 5.1) or “under no circumstances exceed” (Contracting Guideline III -6) these numerical limits. The workload demands of capital cases are unique: the duty to investigate, prepare, and try both the guilt/innocence and mitigation phases today requires an average of almost 1,900 hours, and over 1,200 hours even where a case is resolved by guilty plea. *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* (Judicial Conference of the United States, 1998). *See also* ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989) [hereinafter “Death Penalty”].

20 ABA, *supra* note 2, Standard 5-5.3; NSC, *supra* note 2, Guideline 5.1; *Standards and Evaluation Design for Appellate Defender Offices* (NLADA 1980) [hereinafter “Appellate”], Standard 1-F.

21 Performance Guidelines, *supra* note 15, Guidelines 1.2, 1.3(a); Death Penalty, *supra* note 19, Guideline 5.1.

22 NSC, *supra* note 2, Guidelines 5.11, 5.12; ABA, *supra* note 2, Standard 5-6.2; NAC, *supra* note 2, Standard 13.1; Assigned Counsel, *supra* note 2, Standard 2.6; Contracting, *supra* note 2, Guidelines III-12, III-23; ABA Counsel for Private Parties, *supra* note 2, Standard 2.4(B)(i).

23 NSC, *supra* note 2, Guideline 3.4; ABA, *supra* note 2, Standards 5-4.1, 5-4.3; Contracting, *supra* note 2, Guideline III-10; Assigned Counsel, *supra* note 2, Standard 4.7.1; Appellate, *supra* note 20 (*Performance*); ABA Counsel for Private Parties, *supra* note 2, Standard 2.1(B)(iv). *See* NSC, *supra* note 2, Guideline 4.1 (includes numerical staffing ratios, e.g.: there must be one supervisor for every 10 attorneys, or one part-time supervisor for every 5 attorneys; there must be one investigator for every three attorneys, and at least one investigator in every defender office). *Cf.* NAC, *supra* note 2, Standards 13.7, 13.11 (chief defender salary should be at parity with chief judge; staff attorneys at parity with private bar).

24 ABA, *supra* note 2, Standard 5-2.4; Assigned Counsel, *supra* note 2, Standard 4.7.3.

25 NSC, *supra* note 2, Guideline 2.6; ABA, *supra* note 2, Standards 5-3.1, 5-3.2, 5-3.3; Contracting, *supra* note 2, Guidelines III-6, III-12, and *passim*.

26 ABA, *supra* note 2, Standard 5-3.3(b)(x); Contracting, *supra* note 2, Guidelines III-8, III-9.

27 ABA Defense Function, *supra* note 15, Standard 4-1.2(d).

28 NAC, *supra* note 2, Standards 13.15, 13.16; NSC, *supra* note 2, Guidelines 2.4(4), 5.6-5.8; ABA, *supra* note 2, Standards 5-1.5; Model Act, *supra* note 2, § 10(e); Contracting, *supra* note 2, Guideline III-17; Assigned Counsel, *supra* note 2, Standards 4.2, 4.3.1, 4.3.2, 4.4.1; NLADA *Defender Training and Development Standards* (1997); ABA Counsel for Private Parties, *supra* note 2, Standard 2.1(A).

29 NSC, *supra* note 2, Guidelines 5.4, 5.5; Contracting, *supra* note 2, Guidelines III-16; Assigned Counsel, *supra* note 2, Standard 4.4; ABA Counsel for Private Parties, *supra* note 2, Standards 2.1 (A), 2.2; ABA Monitoring, *supra* note 3, Standards 3.2, 3.3. Examples of performance standards applicable in conducting these reviews include NLADA Performance Guidelines, ABA Defense Function, and NLADA/ABA Death Penalty.

## NEW BEGINNINGS ...

The Allegheny County Public Defender's Office lost two long-time Defenders at the end of August, 2009. Mr. Glenn Steimer, Deputy Director of the Pre-Trial Division, has retired from the office after serving for over 25 years in the trenches. Glenn has great plans for his future, which we hope to share in a future edition of *The Defender*. His presence will be missed not only in the pretrial division, but all over the Public Defender's office. Best wishes to Glenn as he starts this new chapter in his career!

Also, the Appellate Division lost one of the backbones of the division, Mr. Kirk Henderson. Kirk had been with the Allegheny County PD's office for 16 years, and was not only our most scholarly attorney, publishing multiple Law Review articles over the years on appellate issues, but also had been a teacher and mentor to many younger attorneys who have served here. Kirk has provided a sterling example to us all regarding his professionalism, competence, and civility in the courtroom. He's leaving our office to join the Federal Public Defender's office in Pittsburgh, focusing on Capital Habeas cases.

We'll miss both these fine gentlemen, and wish them well in their new endeavors.



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## CASE BRIEFS FROM THE SUPREME COURT OF THE UNITED STATES

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### **Yeager v. United States** ( 557 U.S. \_\_\_, June 18, 2009)

In July 2005, a jury in a federal district court acquitted F. Scott Yeager of conspiracy, wire fraud, and security fraud, but hung on 20 counts of insider trading and 99 counts of money laundering in relation to his involvement with Enron Broadband Services. The district court declared a mistrial on these remaining counts. Thereafter, the United States again indicted Mr. Yeager on some of the mistried counts. On interlocutory appeal, Mr. Yeager argued that by acquitting him of securities fraud, the jury "necessarily found that he did not have insider information," and therefore principles of collateral estoppel should prevent the government from retrying him for insider trading and money laundering.

The United States Court of Appeals for the Fifth Circuit held that collateral estoppel does not bar retrial in Mr. Yeager's case. It recognized that Mr. Yeager had the burden of proving the jury *necessarily* found that he was not guilty of insider trading. This burden was not met, as the jury could have found that he was "acting rationally" in determining the not guilty verdict of insider trading and money laundering. The court reasoned that because the jury's rationale for its decisions was unclear, Mr. Yeager's mistried counts did not prevent his retrial on those counts.

The issue for the Supreme Court was whether the Double Jeopardy Clause barred a retrial when a jury acquitted a defendant on some counts, but failed to reach a verdict on other counts whose essential elements must have been decided in the defendant's favor by a rational jury?

The Supreme Court held that apparent inconsistencies between a jury's verdict of acquittal on some counts and its failure to return a verdict on other counts does not affect the acquittal's preclusive force. With Justice John Paul Stevens writing for the majority, the Court stated that in Mr. Yeager's case, "if the possession of insider information was a critical issue of ultimate fact in all of the charges [against him], a jury that decided that issue in his favor protects him from prosecution for any charges for which that [fact] is an essential element."

Justice Antonin G. Scalia dissented, disagreeing with the majority holding, and arguing that it was a departure from not only the original meaning of the Double Jeopardy Clause, but the Court's own precedent. Justice Alito also wrote a separate dissenting opinion, joined by Justices Scalia and Thomas, that acknowledged his disagreement with the majority holding, and argued that in light of the decision, the courts should rigorously apply the doctrine of issue preclusion. Based upon the holding in this case, an acquittal on one charge only precludes indictment for a second charge if a "rational jury" could not have acquitted on the precedent charge without finding in the defendant's favor on the factual element necessary to convict on the second charge. Justice Kennedy also wrote separately, concurring in part and concurring in the judgment. While agreeing with much of the majority holding, he noted the validity of Justice Alito's concerns with the decision.

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POST SENTENCE MOTION PRACTICE -  
PRESERVING CLAIMS FOR APPELLATE REVIEW  
BY BRANDON GING

In Pennsylvania, a post-sentence motion pursuant to Pa.R.Crim.P. 720 (Post-Sentence Procedures; Appeal)<sup>1</sup> was traditionally required in order to preserve any and all claims on appeal.<sup>2</sup> In 1994, the General Assembly amended Rule 720 to give defendants the option of filing a post-sentence motion or appealing directly to the Superior Court.<sup>3</sup> Under current Rule 720, a criminal defendant is not required to request post-sentence relief in order to preserve most claims for appellate review. Claims properly raised before or during trial are preserved on appeal.<sup>4</sup> The defendant may still raise these claims in the trial court in a post-sentence motion in order to argue them on appeal, but such is not required. For instance, suppression issues,<sup>5</sup> timely and specific trial objections,<sup>6</sup> and challenges to the sufficiency of the evidence<sup>7</sup> do not require a post-sentence motion. However, when the claim involved is one that can **only** be decided by the trial court, a post-sentence motion is required. Under these circumstances, the claim will not be deemed preserved on appeal if a post-sentence motion is not filed and the claim is raised for the first time in a statement of errors complained of on appeal.

The two most critical claims that **must** be raised in the trial court are those challenging (1) the weight of the evidence and (2) discretionary aspects of sentence.

A claim that the verdict was against the weight of the evidence is addressed to the sound discretion of the trial court.<sup>8</sup> "Appellate review of a weight claim is a review of the exercise of discretion, not of the underlying question of whether the verdict was against the weight of the evidence."<sup>9</sup> Thus, a challenge to the weight of the evidence must be raised in the trial court or it will be waived on appeal.<sup>10</sup> In *Commonwealth v. Mack*,<sup>11</sup> the Superior Court held that Mack's failure to raise a weight claim in the trial court constituted waiver on appeal, even though the trial court addressed the weight claim in its opinion.<sup>12</sup> "The present rule clearly requires that such a claim be raised initially by a motion to the trial court, and Appellant's failure to do so compels us to find the issue waived."<sup>13</sup> A weight claim can be raised in one of three ways: (1) orally, on the record, at any time before sentencing; (2) by written motion at any time before sentencing; or (3) in a post-sentence motion.<sup>14</sup>

Since appellate review of a weight claim involves the trial court's discretion, relief will only be granted "where the facts and inferences of record disclose a palpable abuse of discretion."<sup>15</sup> Importantly, a challenge to the weight of the evidence, regardless of when or how it is made, "**shall** be stated with specificity and particularity...."<sup>16</sup> A boilerplate weight claim will not warrant appellate review.<sup>17</sup> In *Commonwealth v. Pirela*,<sup>18</sup> the Superior Court held that Pirela waived a weight claim on appeal because it "was raised in boilerplate fashion in post-trial motions...."<sup>19</sup> It is not enough to merely allege that the verdict was against the weight of the evidence. The claim must state **why** the verdict was against the weight of the evidence.<sup>20</sup>

Obviously, the discretionary aspects of a defendant's sentence are "entrusted to the discretion of the trial judge."<sup>21</sup> A challenge to discretionary aspects of sentence can only be decided by the trial court. Therefore, the claim is waived on appeal unless it is raised during the sentencing proceedings or in a post-sentence motion.<sup>22</sup> In *Commonwealth v. Hartman*,<sup>23</sup> the Superior Court held that Hartman waived a

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## A MATTER OF ETHICS

By Richard H. Lindner, Pittsburgh, PA<sup>1</sup>

### ***Setting an Example – Status as a Government Prosecutor or Public Defender as an Aggravating Factor in Disciplinary Cases***

Cases from the Pennsylvania attorney discipline arena have established that lawyers holding public office and/or serving as public employees are sometimes viewed as being subject to a higher standard than private sector lawyers as a means of maintaining public confidence in the integrity of the legal profession. As a result, the status of an attorney as a holder of public office or a public employee may be considered an aggravating factor in determining the type of discipline to be imposed, and attorneys in such public positions may be subject to more severe discipline for certain types of misconduct than would ordinarily be imposed upon private counsel for similar wrongdoing.

Federal and state criminal prosecutors have repeatedly been held to a higher standard of conduct on the basis that they are “given the public trust to uphold the law and to prosecute those who violate it.” Disciplinary authorities have reasoned that, by engaging in violations of the very laws that they are charged to enforce, public prosecutors demonstrate a patent disrespect for such laws and bring the image of the bar into greater disrepute. Among the disciplinary cases involving attorneys serving as government prosecutors or holding other positions in law enforcement are the following:

*In re Anon. No. 72 DB 82*, 27 Pa. D. & C.3d 243 (1983), concerned a district attorney who caused criminal charges to be instituted when he knew or it was obvious that the charges were not supported by probable cause. The respondent was found to have violated the old Code of Professional Responsibility by appearing as the DA at a preliminary hearing on a questionable forgery charge for a nominal amount of money, when a divorce action was pending against the same defendant by the respondent’s private client. The Hearing Committee recommended a private

reprimand. The Disciplinary Board, pointing out that district attorneys have a duty to avoid even the appearance of impropriety, then recommended a public censure. The Pennsylvania Supreme Court ultimately ordered a two-year suspension.

A U.S. government attorney who was involved in liaison work with law enforcement agencies and handled assignments in conjunction with the criminal and intelligence communities was suspended for three years based upon his conviction for making false statements to Federal officials and for possession of cocaine. The Disciplinary Board, relying upon cases involving attorneys who had been public prosecutors, found that such status justified an “aggravated sanction.” The Board chose not to view this respondent’s misconduct in the harshest light, because it did not occur in the performance of his public duties. However, the Board found that the respondent’s public role imposed an elevated expectation of ethical conduct and was still an aggravating factor to some degree. The Supreme Court adopted the Board’s recommendation for a three-year suspension, with Justice Papadacos opining in a dissent that the respondent should be disbarred. See *In re Anon. No. 76 DB 92*, 24 Pa. D. & C.4th 169 (1994).<sup>2</sup>

In *ODC v. Aliano*, No. 25 DB 2003 (2005), the part-time Susquehanna County DA was held to have engaged in a “glaring” conflict of interest, whereby he disregarded the Commonwealth’s interests in seeing that a man was prosecuted for DUI, while simultaneously representing the man’s wife, a potential defense witness, who had a “compelling interest” in having her husband avoid prosecution. The Board found that this dual representation violated conflict principles and that respondent’s use of his office to dismiss serious, provable charges against the accused in order to

assist a private client was also conduct prejudicial to the administration of justice. Despite the attorney's otherwise exemplary record, the Board found that public discipline was required, because his breach of duties occurred while he was serving in a position specifically entrusted with protection of the public.<sup>3</sup>

Lawyers who serve in public defender offices and are paid through public funds likewise have not escaped notice in the disciplinary system for possible harsher treatment under certain circumstances.<sup>4</sup> *In re Anon. No. 76 DB 83*, 47 Pa. D. & C.3d 138 (1987), involved a respondent-attorney who served as an assistant Federal public defender and had been appointed to represent an accused in defense of charges filed by the U.S. Attorney's Office. Over a period of about six months, the respondent accepted, without authorization, a completed patio (valued at \$2,500) built at his residence by the accused, as well as a cash payment of \$1,500 that was delivered by an intermediary for the accused. The Justice Department was alerted to these payments and fined the respondent \$500 for his misconduct. The matter was forwarded to the Pennsylvania Office of Disciplinary Counsel (ODC) for further action. Finding that the respondent had no prior disciplinary history, did not solicit the "gifts," suffered the loss of his post with the Defender's Association, and had an overall laudatory record, including distinguished post-law school military service in Vietnam, the Disciplinary Board recommended that a private reprimand be imposed. The case was then reviewed by the Supreme Court, leading the Court to issue a rule to show cause why respondent should not be disbarred and to eventually order a three-year suspension. [Note: The Board cited this case in *No. 76 DB 92* (see above) for the proposition that a breach of the public trust by an attorney in public office justified the exaction of an enhanced penalty.] See also *In the Matter of Perrone*, 565 Pa. 563, 777 A.2d 413 (2001), a reinstatement proceeding involving an attorney who had been disbarred after a criminal conviction stemming from his protracted pattern of filing false and misleading fee petitions for legal

services he had purportedly provided to indigent defendants in Philadelphia. The reinstatement petition was denied, even though it had been almost eight years since the disbarment order.

"Special" (i.e., more severe) treatment has also been applied in the lawyer disciplinary system to other public officials and employees in light of their status. For example:

*ODC v. Eagen*, 73 Pa. D. & C.4th 217 (2004), involved a judge who was convicted of one count of obstructing the administration of law based upon irregularities in the administration of certain guardianship estates under his supervision in Orphans' Court. The Disciplinary Board found two egregious aggravating factors: 1) the respondent's status as a judge of the Court of Common Pleas at the time of his misconduct, which caused embarrassment to the Bar and the Courts; and 2) his failure to appear at the disciplinary hearing. The Supreme Court adopted the Board's recommendation and ordered disbarment.

*In re Anon. No. 2 DB 88*, 17 Pa. D. & C.4th 505 (1992), involved an attorney who, as a judge-elect, had received \$300 from a local union official in exchange for his agreement to prospectively exercise influence as a judge. The respondent was convicted of extortion under the Hobbs Act. The Board found that the overriding consideration in the case was the respondent's status as a judge-elect at the time of misconduct and, even though he had not yet taken his oath of office, he would be held to the same high standard as a judge. The Board recommended a four-year suspension, retroactive to the date of the respondent's temporary suspension based upon the criminal conviction.<sup>5</sup>

Attorneys in the public sector whose duties involve criminal prosecutions and other law enforcement activities, the defense of indigents, or service in other official capacities must realize that their status may give rise to enhanced scrutiny of their professional lives and their *private* lives by disciplinary authorities. Serving in the "public eye" to a greater extent than most private attorneys, and receiving remuneration through public funds, they must be "squeaky clean" in obeying the law and executing their official duties. Nevertheless, the stricter review that has been applied to public sector attorneys and has resulted (continued on p. 13)

## A MATTER OF ETHICS (cont.)

in harsher discipline than on private attorneys should not automatically extend to all types of misconduct. For example, isolated instances of inadequate diligence and promptness, and other ethical departures not involving scienter, should not be viewed as harshly as intentional misuse of one's office or criminal conduct and may not warrant consideration as an aggravating factor. Moreover, the existence of compelling factors in mitigation (e.g., evidence that mental illness or an addiction was a causal factor in the misconduct) should be just as applicable to public sector attorneys as a means of counteracting aggravating factors and substantially reducing the form of discipline. Finally, since all attorneys are officers of the legal system and members of a learned profession, we should all (public- and private-sector attorneys alike) strive to recognize and fulfill the special responsibility that we have for upholding the law and setting a good example for others.

they face because of the nature of their office (i.e., being overworked and underpaid, lacking selectivity in their caseload, etc.) perhaps their status should qualify as a *mitigating* factor. In fact, I have advanced such an argument on behalf of public defender clients in disciplinary matters. See Also *Reese v. Danforth*, 486 Pa. 479, 406 A.2d 735 (1979), wherein the Supreme Court held in a legal malpractice action that public defenders are not "public officers" and are therefore not entitled to immunity from civil liability.

5. For reasons that are unclear, this case was not finally decided by the Supreme Court until November 19, 1992, almost two years after the Board had adjudicated the matter and more than four years after the temporary suspension. In an unusual decision, the Court vacated its temporary suspension order and immediately reinstated the respondent..

### **Endnotes:**

1. Attorney Lindner served as a disciplinary prosecutor with the Office of Disciplinary Counsel in Pittsburgh for five years before moving into private practice in September 1986. Since then he has concentrated in legal ethics and disciplinary law.

2. *Prior service* in a public capacity may continue to carry with it a higher burden from an ethics perspective, because of the public scrutiny that misconduct by such a prominent attorney entails. See *In re Anon. No. 128 DB 90*, 21 Pa. D. & C.4th 107 (1992), where an attorney's status as a *former* district attorney was highlighted by the Disciplinary Board as a material factor in recommending the imposition of disbarment for his criminal conviction relating to a scheme involving the manufacture of P2P and methamphetamine.

3. The Board Report in *Aliano* can be accessed via the Disciplinary Board website. For additional disciplinary cases involving government prosecutors, see *In re Anon. No. 88 DB 92*, 34 Pa. D. & C.4th 198 (1994); and *ODC v. Preate*, 557 Pa. 4, 731 A.2d 129 (1999).

4. Lawyers serving in public defender offices might



If readers would like to suggest topics for future columns, please submit your suggestions by email to [LindnerLaw@comcast.net](mailto:LindnerLaw@comcast.net).

(continued from page 10) discretionary aspects of sentencing claim when, even though he complied with appellate procedure, he did not make the argument at sentencing or in a post-sentence motion.<sup>24</sup> Thus, merely filing a notice of appeal or including the claim in the statement of errors complained of on appeal will not avoid waiver.<sup>25</sup>

As with all requests for post-sentence relief, a challenge to discretionary aspects of sentence must be set forth with specificity and particularity in order to afford appellate review.<sup>26</sup> In *Commonwealth v. Reeves*, Reeves filed a post-sentence motion challenging discretionary aspects of his sentence.<sup>27</sup> However, he failed to specify how the trial court abused its discretion.<sup>28</sup> The Superior Court held that Reeves waived the claim since he “did not give the sentencing judge an opportunity to reconsider or modify Reeves’ sentence....”<sup>29</sup> It is not enough to merely allege that the trial court abused its discretion in imposing sentence. The claim must state **how** the trial court abused its discretion in imposing sentence.<sup>30</sup>

In conclusion, it is important to understand the reasoning behind properly raising challenges to the weight of the evidence or discretionary aspects of sentence. The purpose behind the motion is not primarily to actually obtain relief in the trial court. Rather, the purpose is to ensure that the claims are preserved on appeal, when the merits can be evaluated through comprehensive legal analysis by the appellate court. Ensuring that the motion explains **how** the sentence is excessive or **why** the verdict should shock the trial court’s conscience is therefore imperative.

#### ENDNOTES:

1. Effective April 1, 2001, Pa.R.Crim.P. 1410 was amended and renumbered as Pa.R.Crim.P. 720. *Commonwealth v. Khalil*, 806 A.2d 415, 420 n. 1 (Pa.Super. 2002).
2. *Commonwealth v. Clinton*, 683 A.2d 1236, 1239 (Pa.Super. 1996).
3. *Clinton*, 683 A.2d at 1239.
4. Pa.R.Crim.P. 720(B)(1)(c). See *Commonwealth v. Holzlein*, 706 A.2d 848, 849 (Pa.Super. 1997) (“As long as an issue is preserved before or in the course of trial, a litigant need not return to the trial court and again request relief after conviction and sentencing.”).
5. *Commonwealth v. Garcia*, 661 A.2d 1388, 1392 n. 9 (Pa.Super. 1995).
6. *Commonwealth v. Baumhammers*, 960 A.2d 59, 73 (Pa. 2008) (citations omitted).
7. Pa.R.Crim.P. 606(A)(7)
8. *Commonwealth v. Wright*, 846 A.2d 730, 736 (Pa.Super. 2004) (citations omitted).
9. *Commonwealth v. Widmer*, 744 A.2d 745, 753 (Pa. 2000) (citations omitted).
10. Pa.R.Crim.P. 607(A) and *Comment*.
11. 850 A.2d 690 (Pa.Super. 2004).
12. *Id.* at 694.
13. *Id.*
14. Pa.R.Crim.P. 607(A).
15. *Commonwealth v. Cousar*, 928 A.2d 1025, 1036 (Pa. 2007).
16. Pa.R.Crim.P. 720(B)(1)(a) (emphasis added).
17. *Commonwealth v. Holmes*, 461 A.2d 1268, 1269 (Pa.Super. 1983).
18. 580 A.2d 848 (Pa.Super. 1990).
19. *Id.* at 852 n. 6.
20. *Holmes*, 461 A.2d at 1269.
21. *Commonwealth v. McFarlin*, 587 A.2d 732, 736 n. 4 (Pa.Super. 1991).
22. *Commonwealth v. Reeves*, 778 A.2d 691, 692 (Pa.Super. 2001) (citations omitted).
23. 908 A.2d 316 (Pa.Super. 2006).
24. *Id.* at 319-320.

## Case Briefs from the U.S. Supreme Court (cont.)

### Melendez-Diaz v. Massachusetts, 557 U.S. \_\_\_ (2009) (June 25, 2009)

Luis Melendez-Diaz was arrested while making a cocaine sale in a parking lot in Massachusetts. At trial, bags of the cocaine alleged to have been distributed by Melendez-Diaz were introduced into evidence along with drug analysis certificates prepared by the lab technician who analyzed the drugs and identified them as cocaine. A jury convicted Melendez-Diaz of distributing and trafficking cocaine in violation of Massachusetts law. Melendez-Diaz appealed, arguing that the State's introduction of the drug analysis certificates violated his Sixth Amendment right to confront witnesses against him under the Court's ruling in *Crawford v. Washington*. *Crawford* had held that so-called "testimonial" evidence cannot be introduced at trial unless the defendant has a chance to cross-examine the witness providing the evidence. Melendez-Diaz characterized the lab analysis as testimonial and argued that *Crawford* required the lab technician to testify on the results. The State argued that Massachusetts had previously held, in *Commonwealth v. Verde*, that lab reports were not testimonial. The Massachusetts Court of Appeals rejected Melendez-Diaz's claims in an unpublished opinion, referring to them in a short footnote as "without merit." The Massachusetts Supreme Court also denied his appeal.

The Supreme Court held that a state forensic analyst's lab report that is prepared for use in a criminal prosecution is subject to the demands of the Sixth Amendment's Confrontation Clause. With Justice Antonin G. Scalia writing for the majority (5-4), the Court reasoned that the lab reports constitute affidavits which fall within the "core class of testimonial statements" covered by the Confrontation Clause. Therefore, when Mr. Melendez-Diaz was not allowed to confront the persons who created the lab reports used in testimony at his trial, his Sixth Amendment right was violated. Justice Thomas wrote a separate concurring opinion, emphasizing that he thought the Confrontation Clause was only implicated by statements made outside the courtroom when they are part of "formalized testimonial materials." Justice Anthony M. Kennedy filed a dissent, criticizing the majority for so cavalierly dispensing with the long held rule that scientific analysis could be introduced into evidence without testimony from the analyst who produced it.

(ENDNOTES CONTINUED FROM PAGE 14)

25. See *Commonwealth v. McAfee*, 849 A.2d 270, 275 (Pa.Super. 2004) ("This failure [to make the argument at sentencing or in a post-sentence motion] cannot be cured by submitting the challenge in a Rule 1925(b) statement.").

26. Pa.R.Crim.P. 720(B)(1)(a).

27. *Reeves*, 778 A.2d at 692.

28. *Id.* at 692-693.

29. *Id.* at 693.

30. *Id.*

*"In university they don't tell you that the greater part of the law is learning to tolerate fools"*

*Doris Lessing*

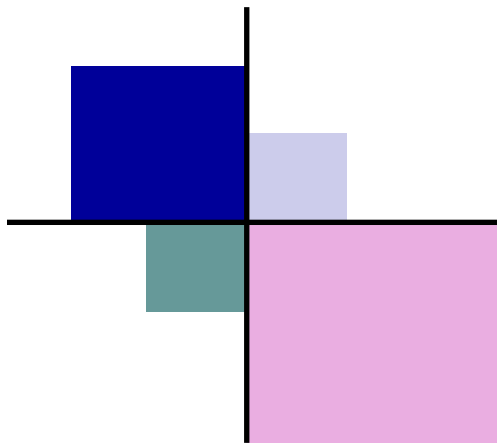
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*“... it is the worst  
oppression, that  
is done by colour  
of justice.”*

*Sir Edward Coke*

# THE BILL OF RIGHTS

## A transcription of the first ten Amendments to the United States Constitution in their Original Form

**Amendment I** Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

**Amendment II** A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

**Amendment III** No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

**Amendment IV** The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

**Amendment V** No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**Amendment VI** In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

**Amendment VII** In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

**Amendment VIII** Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

**Amendment IX** The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

**Amendment X** The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

