



**MACDL**

Missouri Association of Criminal Defense Lawyers

# ACTION REPORT

Newsletter

P.O. Box 1543 • Jefferson City, Missouri 65102 • Phone (573) 636-2822 • March, 2001 • www.macdl.net

## President's Letter

Ladies and Gentleman:

It is with great sadness that we note the passing of Jim Worthington of Lexington, Missouri on March 5, 2001. Mr. Worthington, a past president of MACDL, was devoted to the organization, a hard charger with a strong interest on the rights of the accused and devotion to justice and fair play.

Jim continued to be active in the affairs of the association after his presidency and most recently attended our legislative board meeting at the end of January to review pending legislation and formulate positions and proposals to preserve and protect our clients' interests. We will miss his wisdom and enthusiasm.

We send our sympathies to his widow, Kaye and his three sons, James, Clayton, and Josh. James is currently a law student at the University of Missouri - Kansas City.

At present, our most important activity is legislative lobbying in Jefferson City, Missouri. Randy Scherr is in charge and may be contacted by fax, e-mail or telephone. Visit our web site at www.macdl.net. Members of the association including John Simon, Tom Carver, and myself have appeared and testified before legislative committees. The committees do seem to pay attention to and appreciate the expertise that our members are able to provide. Most recently, the Republican majority in Senate has set legislative criteria which include "promotion of greater justice," "compassion for individuals," "less government," "individual freedom," and "is it just." We should be able to quote this back to them to further our goals.

In a recent appearance before the House Criminal Law Committee, I found the axiom, 'If you like laws and sausages, never

watch either being made," has proved to be true in Spades.

Any member with a particular interest or expertise regarding pending legislation should contact Randy to provide assistance on our lobbying effort.

Please note the announcement of our Spring Seminar which is being planned and orchestrated by Cathy Kelly of the Public Defender organization. The lineup of subjects and speakers appears strong and we look forward to seeing all of you at that time.

MACDL has the opportunity to nominate a candidate for the NACDL Board of Directors. The nominee must be a member of both organizations and have attended three NACDL meetings within 24 months before nomination. If you are interested, please let me know before March 28

Yours very truly,  
*Bruce C. Houdek*

## Character Instruction Often Overlooked

By Pat Eng

*Eng & Woods - Columbia, Missouri*

Obviously, the character defense and the character instruction will not be for all of our clients but it is my opinion that this instruction is often overlooked. Instruction 310.40 reads as follows:

"Evidence has been introduced concerning the reputation of defendant as to those traits of character which ordinarily would be involved in the commission of an offense such as that charged in this case. This evidence was received because a jury may reason that a person of good character as to such traits would not be likely to commit the offense charged against the defendant. Therefore, you should consider such evidence along with all of the other evidence in the case in determining the guilt or innocence of the defendant.

If, from all of the evidence in the case, including that relating to those traits of defendant's character which would ordinarily be involved in the commission of the offense charged against him, you are not convinced beyond a reasonable doubt that the defen-

dant is guilty, you should acquit him no matter what his character may have been at or before the time the charge was brought. However, if from all of the evidence in the case, including such evidence of defendant's character, you are convinced beyond a reasonable doubt that the defendant is guilty, you should so find even though he may have been a person of good repute."

I must admit that when I first started practicing I was guilty of overlooking this instruction until I saw Charlie Shaw try a case and use the character evidence impressively. Charlie's argument was, "My client is just an everyday guy like the average person and not well known like say Judge Conley here who everyone knows or say Norm Stewart or Roger Wilson. You have all indicated in voir dire that you did not know my client and so we brought these people in to tell you a little bit about his character so you would know what it is."

Most of the time it is my experience prosecutors pay little attention to character witnesses and do little with them on

cross. Thos makes for the most powerful part of the argument, "these witnesses came in here and told you about my client's good character and that evidence is absolutely unrefuted by the State. You can bet that if there was something bad in the Defendant's character that the State would have brought that to your attention."

Judges will not let you bring an unlimited number of character witnesses and it is my belief that you can bore the jury to death and therefore my practice is to pick three to five. Absolutely no more than five of the best people that your client has to offer. Ideally people the jury would be likely to recognize, like a public official or a popular or well known individual who you believe the jurors would respect.

I have found that preparing these character witnesses is difficult in that the questions that they need to answer is: "Do you know the Defendant's reputation in the community and do you have an opinion as to what that reputation is?" They will always

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**The Missouri Association of Criminal Defense Lawyers  
& the Missouri State Public Defender System**

*proudly presents*

**The 2001 SPRING CRIMINAL PRACTICE SEMINAR**  
*Radisson Hotel, Clayton, Missouri*

**FRIDAY, APRIL 27, 2001**

8:00 – 9:00 Registration & Continental Breakfast

**PART I: DEFENDING EYEWITNESS IDENTIFICATION CASES**

9:00 a.m. Welcoming Remarks  
*Marty Robinson, Director, MO State Public Defender*

9:10 – 10:00 **The Proven Unreliability of Eyewitness Testimony:  
What Every Trial Lawyer Needs to Know**  
*Dr. Gary Wells, Professor of Psychology, Iowa State University*

10:00 – 10:10 Break

10:10 – 11:30 **MO Law & National Developments in Eyewitness ID Cases**  
*Cathy DiTraglia, Office of the Federal Defender, St. Louis, MO*

**Winning Strategies in Eyewitness ID Cases:  
With and *Without* an Expert**  
*James Doyle, Attorney-at-Law, Boston, Massachusetts*

11:30 – 11:40 Break

11:40 – 12:30 **Voir Dire in the Eyewitness ID Case**  
*Richard Kammen, Attorney-at-Law, Indianapolis, IN*

12:30 – 1:30 Lunch

**PART II: SENTENCING ADVOCACY**

1:30 – 2:20 **A. Federal Conspiracy Issues from Trial to Sentencing**  
*Jon Sands, Office of the Federal Defender, Phoenix, AZ*

**B. New Initiatives in MO Department of Corrections**  
*Restorative Justice, Victims Services, & More*

2:20 – 2:30 Break

2:30 – 4:30 **The Sentencing Marketplace**  
An expo-type arrangement of booths manned by representatives from federal and state institutional treatment programs as well as various community programs and alternative sentencing options you need to know about to advocate most effectively for your client at sentencing.

5:00 – 7:00 Reception

**SATURDAY, APRIL 28, 2001**

7:00 – 9:00 Breakfast & **Demonstrative Evidence Expo:**  
Check out what your creative colleagues are doing  
in Demonstrative Evidence!

8:00 – 9:00 MACDL Board & General Membership Meeting

9:00 – 12:00 **CONCURRENT WORKSHOPS:**

A. Defending Sexual Offense Cases

**Investigation of Child Sex Cases  
& the Cross Examination of Children**  
*Annabelle Hall, Attorney at Law, Las Vegas, NV*

**News from the Battle Front: Strategies for Fighting  
MO's Sexually Violent Predator Civil Commitment Law**  
*Panel Presentation*

B. Mental Health Issues Facing Our Clients

**The Legal & Medical Perspectives**  
*Dr. John Rabun, Forensic Evaluation Unit, St. Louis State Hospital. & Ellen Blau,  
MSPD Deputy Trial Division Director*

12:00 – 2:00 **LUNCHEON KEYNOTE & PRESENTATIONS**

**Keynote: Professionalism & Criminal Defense: -- TBA**

Presentation of the Atticus Finch Award;  
Installation of New MACDL Officers; & Closing Remarks  
*Bruce Houdek, President, MO Association of Criminal Defense Lawyers*

**THE 2001 SPRING CRIMINAL PRACTICE SEMINAR**

*Send registration to The Missouri State Public Defender Training Division, 1221 Locust, Suite 410,  
St. Louis, MO 63103, 314/340-7662; FAX: 314/340-7666. **Make checks payable to MACDL.***

Name: \_\_\_\_\_

Address: \_\_\_\_\_

City / State / Zip: \_\_\_\_\_

Phone # \_\_\_\_\_

E-mail: \_\_\_\_\_

Bar Number (if admitted in MO) \_\_\_\_\_

Name as it should appear on badge: \_\_\_\_\_

Registration Fee:

- .. \$195 – Non-MACDL Member
- .. \$165 – MACDL Member
- .. \$100 – Out of state Public Defender
- .. \$ 0 – Missouri Public Defender
- .. \$45 -- Course materials Only

Sorry, no credit card charges can be accepted.

To get the group rate on your lodging arrangements,  
contact the **Radisson Hotel Clayton** *before March 26,*  
*2001* and ask for the MACDL program room block.

Questions? Contact the MSPD Training Division,  
PH: 314-340-7662; FAX: 314-340-7666;  
e-mail: [ckelly@mspd.state.mo.us](mailto:ckelly@mspd.state.mo.us)

PH: 314-726-5400 / FAX: 314-719-1127  
7750 Carondelet, Clayton, MO 63105  
Room Rates: \$89 queen; \$99 King / Double

## Nappy Time By Dee Wampler

Wampler, Wampler, & Catt - Springfield, Missouri

The Sixth Amendment seems to allow sleeping defense attorneys unless it is proven his nap time was "prejudicial" to his client's case.<sup>1</sup>

In a recent case, the accusation was first raised 11 years after the trial. The state trial court found, as a matter of fact, that the lawyers had slept during portions of the trial but denied relief on the ground that the petitioner had failed to demonstrate prejudice.<sup>2</sup>

Taking the matter to the federal district court, the court ruled that prejudice should be presumed.<sup>3</sup>

There are some exceptions to the general rule that counsel's substandard performance must be shown to be prejudicial before it can be held to violate the Sixth Amendment.<sup>4</sup> Acknowledging some exceptions to the general rule, the counsel's substandard performance must be shown to be prejudicial before it can be held to violate the Sixth Amendment right to effective assistance of counsel.

There are situations where government is responsible for the denial of counsel, such as where counsel is prevented from consulting with his client during an overnight recess.<sup>5</sup> In these cases it is "easy to identify" and "easy for government to prevent," but in the case of a sleeping attorney, it is strictly his fault.

There are some cases in which a sleeping defense lawyer was deemed inherently prejudicial.<sup>6</sup> Cases turn on the facts of each case, such as how long were the naps and during what part of the trial.

In *Burdine v Johnson*, it was difficult for the court to know which portions of the trial the attorney slept through. The dissenting judge noted the attorney slept through portions of the guilt/innocence phase in the which the prosecutor was examining witnesses and presenting evidence. He opted for a reversal of the conviction, but was a voice in the wind.

\* The Fifth Circuit granted rehearing *en banc* in *Burdine's* case. Oral argument was heard January 22, 2001. A decision is pending.

### NOTES

1. *Burdine v. Johnson*, 2000 U.S. App. LEXIS 27284 (5th Cir. 2000).
2. *Ex parte Burdine*, 901 S.W.2d 456 (Tex. Crim. App. 1995).
3. 66 F.Supp.2d 854 (S.D. Tex. 1999).
4. *Strickland v Washington*, 466 U.S. 668 (1984); *U.S. Crim. 466 U.S. 648* (1994).
5. *Geders v U.S.*, 425 U.S. 80 (1976).
6. *Javor v U.S.*, 724 F.2d 831 (9th Cir. 1984); *Tippens v. Walker*, 77 F.3d 683 (2d Cir. 1996).

## Character Instruction

(Continued from page 1)

try to answer, "Well, his reputation is exceptional." That should raise an objection by the Prosecution which should be sustained and I have had times when it is embarrassing when they will not say the right thing even though you have prepared them over and over.

Even when that happens, it is only one out of three or five, this jury still gets the idea and it does not harm your case.

Further, on preparation of your witnesses, you should prepare them for an astute prosecutor who might ask, "Well when is the last time that you remember discussing the defendant with someone in the community?" I always prepare my witnesses to recall such an incident and to come back with something like, "Well, as a matter of fact, we were discussing him last week at Bible Study and almost everyone there commented on what a fine fellow he was and what a wonderful father and husband, etc."

You should consider using other witnesses, sometimes even the State's witnesses, and tack on character questions with that witness. In the cases that I have had where the State's witnesses actually would testify that the Defendant was of good character then, of course, your argument is that not only is the evidence unrefuted but even the State's witnesses testified favorably to the defendant.

Further, the argument is that while this instruction states a finding of good character, it does not require acquittal, it surely is a very important instruction, or, of course, Judge X would not have instructed you to consider this as he has.

Always have a character instruction handy even when you do not have specific character witnesses lined up in hopes that somehow during the evidence you can elicit some testimony about the Defendant's good character and thus offer the instruction. It is my experience that most Judges will instruct the jury if there is any evidence to support it.

A guide that I use for the questions to make sure that you can qualify the witness comes from *State vs. Forter*, 665 S.W.2d 348, 352 and 253 where the proper questions and character testimony in general are discussed.

The best tip I ever received was to "go watch good lawyers try cases". For me, it started by watching Charlie Shaw. Be on the lookout for what is going on in your Court-house and sit in as much as you can. I know I do.

MACDL  
P.O. Box 1543  
Jefferson City, MO 65102