WASHINGTON DEFENDER ASSOCIATION

PRACTICE TOOL | 5.19.2023 | Sheri M. Oertel

SHERI'S SIDEBAR

Happy Friday everyone.

I am back again with things I wish I had known during practice, things that have changed, interesting tidbits, and random tips for practice. Welcome back to:

SHERI'S SIDEBAR

1. **Are you aware that HB1077 passed and has been signed? What does that mean?**
    a. Effective July 23, 2023
    b. In the original RCW 10.52.110
        i. For use by witnesses in any judicial proceeding
            1. Not just trial, not just state witnesses/alleged victims
    c. RCW 10.52.110 new provision
    d. IT IS NOT ONLY FOR CHILD ALLEGED VICTIMS!

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- If defense establishes a relationship prior to a hearing/trial, defense can use the emotional support dog too. Follow procedures. There are times when it is at the court's discretion – but you can object to an abuse of discretion if the witness is allowed to use it and the defendant as a witness is not. Preserve for appeal. There are other times the court does not have discretion as long as the relationship is established and the procedure is followed.
- My concern will be the state trying to influence the credentialed handlers into not allowing defense to build the relationship with the dog and the defendant. You may have to get a court order forcing the state to cease and desist interference and allow the court dog to establish a relationship with the defendant if s/he/they intend to be a witness too.

i. Likewise, the courthouse facility dog program is an effective intervention for persons who have developmental disabilities**, adults who experienced childhood trauma [almost every defendant]**, and other vulnerable people who could have difficulty engaging with the legal process [many defendants].

e. LIMITS

i. The legislature finds that multiple visits between a potential witness and the courthouse facility dog and handler may be needed ***to establish the relationship supporting an order*** for the courthouse facility *dog's presence in court during testimony*.
ii. .110(2) no judicial discretion if requested for under age 18 or developmentally disabled witness
iii. .110(3) judicial discretion for any other witness
iv. .110(5) Before the introduction of a courthouse facility dog into the courtroom *and outside the presence of the jury*, **the party desiring to use the assistance of a courthouse facility dog must file a motion** setting out: (a) The credentials of the courthouse facility dog; (b) that the courthouse facility dog is adequately insured; (c) *that a relationship has been established between the witness and the courthouse facility dog* in anticipation of testimony; and (d) reasons why the courthouse facility dog ((is necessary to facilitate)) would help reduce the witness's anxiety and elicit the witness's testimony. The motion may be filed in writing or made orally before the court.

(((5) Upon a finding that)) (6) When the court finds the circumstances warrant the presence of a courthouse facility dog ((is necessary to facilitate a witness's testimony)), *the court must state the basis for its decision on the record*. The witness ((must)) should be afforded the opportunity to have a courthouse facility dog accompany the witness while testifying, if a

courthouse facility dog *and certified handler* are available within the jurisdiction of the court in which the proceeding is held.

v. The courthouse facility dog performing this service should be trained to accompany the witness to the stand without being attached to ((the)) a certified handler by a leash and *lie on the floor out of view of the jury* while the witness testifies.
(((7))) (8) In a jury trial, the following provisions apply:
(a) In the course of jury selection, either party may, with the court's approval, voir dire prospective jury members on whether the presence of a courthouse facility dog to assist a witness would create undue sympathy for the witness or cause prejudice to a party in any other way.
(b) To the extent possible, *the court shall ensure that the jury will be unable to observe the (([courthouse])) courthouse facility dog prior to, during, and subsequent to the witness's testimony*.

2. **Are you aware that even if you get a count ruled to be same criminal conduct, the firearm enhancement still counts for sentencing time??? Thanks to Tim L. for the citation.**

   State v. Mandanas, 168 Wash.2d 84 (2010). Despite being the same criminal conduct, HC would have to serve both firearm enhancements when convicted of both counts.

3. **Do you know what objections to make when an officer takes a screen shot or video of another video? Do these as pretrial motions. If your court isn't used to making these decisions correctly, put authority in matching your facts and do a pretrial hearing, don't wait for MIL the morning of trial.**
   a. ER 901 Authentication
      i. The cop can says HIS version is what he purports it to be BUT there is no metadata to prove changes were not made prior to the witness showing the cop whatever the cop then recorded.
         1. With cell phone photo editing, filters, save as a copy with edits, forwarding to remove information and remove the proof of forwarding – there is no way the police can prove authenticity.
      ii. ER 901 (1) Testimony of a witness with knowledge.
         1. The officer does not have personal knowledge of the ORIGINAL video, picture, text etc. that s/he screen shot or took another video of.
         2. The witness would have to come in.
            a. If the state has the witness to authenticate – INVESTIGATE. Demand a cell phone dump to prove no edits were made. Get a copy of the ORIGINAL store video surveillance, not the police copy of a copy of the original.

3. Under 901 if authentication cannot be proven, the evidence is not relevant and not admissible.
4. However, if the court finds a prima facie case for authentication has been proven, preserve the objection and raise the issue in cross examination.
5. ALSO look for other evidence rules that may bar admission. ER 901 is only the first step!
    a. Hearsay
    b. Lack of personal knowledge (officer testifying about his opinion of identity or other issue related to the admitted photo/video when the office does not have personal knowledge is objectionable and not admissible).

b. ER 1001 The Best Evidence Rule
    i. This rule isn't argued much anymore but has times when it should be.
        1. It isn't argued because now photocopies are allowed when previously the original document was required.
            a. Still an exception to a photocopy of a certified document. There must either be an original seal to self-authenticate, or the State must bring a witness to authenticate the copy.
    ii. 1001(b) Photographs: "Photographs" include still photographs, x-ray film, video tape and motion pictures.
    iii. (c) Original. An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect b a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom.
        1. Argue this is similar to required metadata in a digital photo. The metadata cannot be altered. The negative in print photography proves the lack of alterations.
        2. These rules were written when technology was significantly different and editing or altering things took an expert. NO LONGER. A 5 year old with a Google Pix phone can edit movies/video, photos like a pro. Anyone with computer programs can edit, delete and alter as well!
    iv. (d) Duplicate. A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements or miniatures, or by mechanical or electronic recording…which accurately reproduce the original.
        1. This is the argument, there is no proof the image/video the officer recorded on his/her/their cellphone was the original without a witness and/or metadata and/or cellphone dumps which show all the filters and various edited copies made.

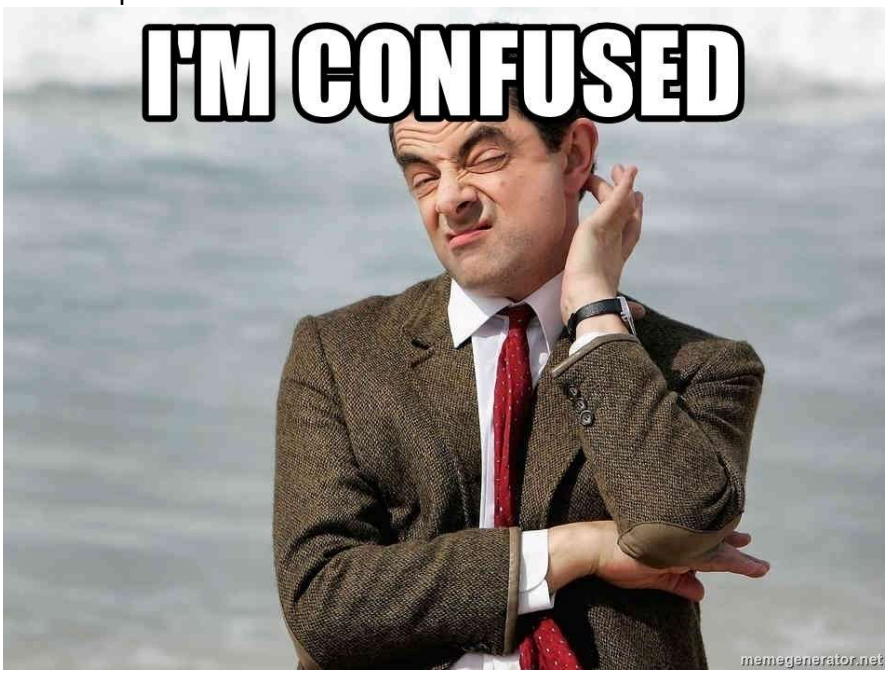
4. **Do you recall *State v. Denton* from last year? This case has possible application to issues related to the attorney shortages.**
    a. Review this case, it is worth it! (attached)
    b. Finding the State cannot get repeated "good cause" continuances for routine backlog at the crime lab when defense objects on the grounds of speedy trial!
    c. So, when you get an in custody client appointed with less than 30 days of speedy, and the client doesn't waive speedy, argue THE VIOLATION OF THE RIGHT TO COUNSEL AND DUE PROCESS by having your now client in jail for over 30 days OF CRITICAL STAGES OF HIS/HER CASE IS NOT GOOD CAUSE TO ALLOW THE STATE A CONTINUANCE, and if they get one, don't let them get repeated good cause continuances.
        i. If routine congestion in the labs, caused by the prosecutors filing so many cases is not good cause, then neither is the now routine backlog of clients, primarily in custody, also caused by the prosecutor filing so many cases (felonies they know they will deal to GM/M and should have been filed in District Court; cases they barely have PC on; cases with recantations or shaky evidence at best).

BECAUSE DUE PROCESS, SPEEDY TRIAL, THE RIGHT TO COUNSEL AND A FAIR TRIAL ARE MANDATORY PRIOR TO THE JURY MAKING ANY DECISION ON GUILT!!

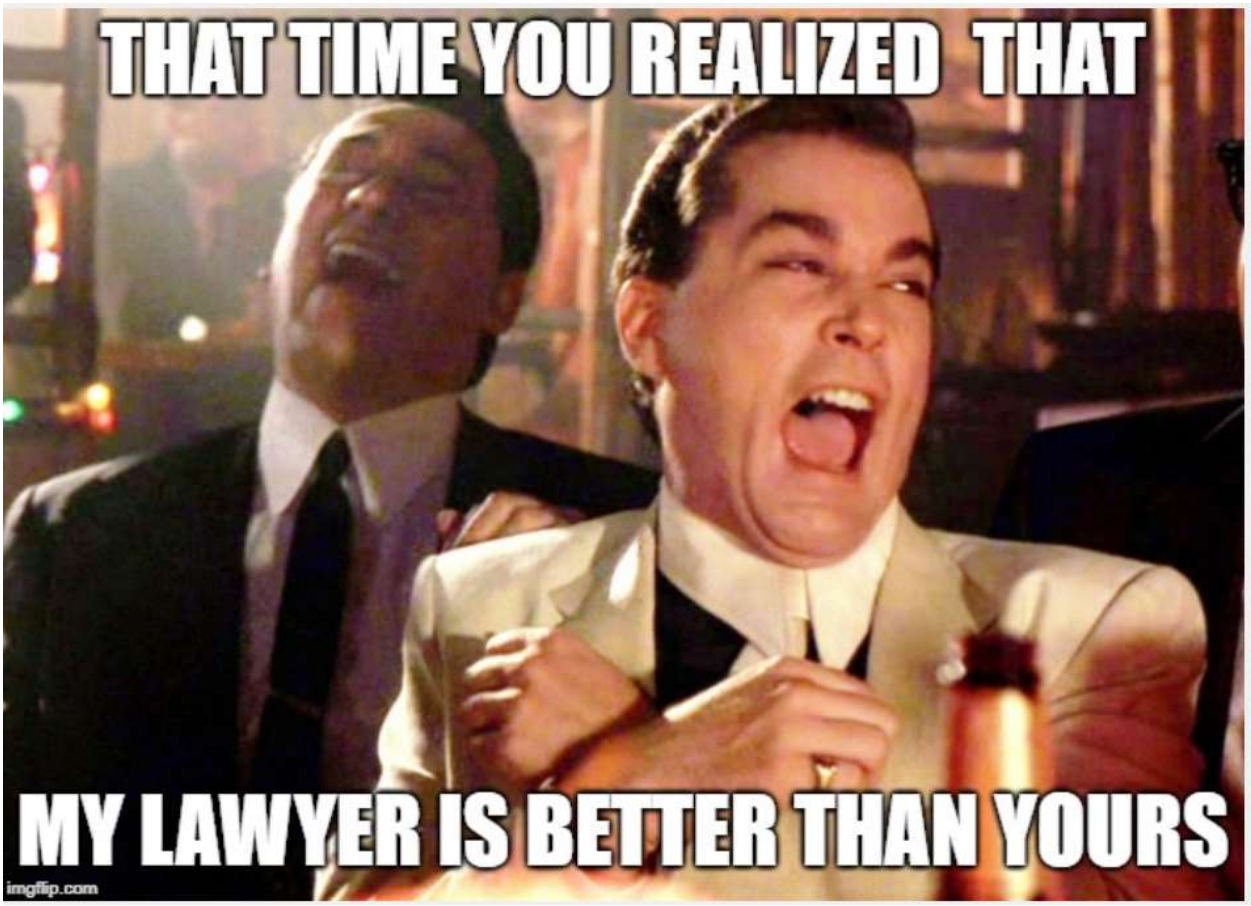
5. **Attorney shortages….where to begin? See above first…**
    a. I have a motion to dismiss – based on speedy trial and CrR 8.3 that one attorney is filing in court as we speak. I can redact and provide it for the website.
        i. As soon as I can catch up from being out, I hope to write another, or modify that one to include due process issues as well – also for dismissal.
    b. If your court is refusing to allow attorneys to withdraw, I have a motion for that. Once filed on multiple cases, on a court date where I personally attended, the judges changed their mind after months of denials and granted withdrawal. There were some specific contract issues but other ethical issues as well in that. Let me know if you need that motion and I can redact and send it to you. You can take out contract issues or other issues not specific to your facts.

6. Do you know how to ***use GR 14.1(a) to your best advantage***?

a. May. 11, 2023 - 37943-4 - *State of Washington v. Darnai Leon Vaile* unpublished
   i. GR 14.1(a) allows you to cite in motions any case that is unpublished which is dated after March 1, 2013.
      1. See e.g. footnote 9, State v. Meza, 83797-4-I (May 15, 2023)
         Under GR 14.1(a), "[u]npublished opinions of the Court of Appeals have no precedential value and are not binding on any court," though they "may be accorded such persuasive value as the court deems appropriate."
   ii. *State v. Vaile* has the lengthy separate partially concurring/partially dissenting opinion by Judge Fearing brutally pointing out the truth on race issues in court.
b. The other best way is to cite unpublished cases with factual likeness or distinctions from yours that will best educate judges.
c. Don't be afraid to cite an unpublished case that works to your client's advantage!
d. You do have to note (unpublished) and Div. 3 once said, it should say (unpublished, non-binding precedent) – I guess in case a Judge doesn't know what unpublished means?



7. **Did you know when I was hired as a prosecutor, the elect actually told me, "only the bottom third of the class apply to become prosecutors [because they can't get hired anywhere else], what are you doing here?"**



EVEN THE PROSECUTORS KNOW THE DEFENSE LAWYERS ARE BETTER THAN THEY ARE! DON'T <u>YOU</u> FORGET IT!!

8. **Do you think we need to add a *regular* section for, "Another inappropriate State argument?"**
    a. **Do you know that when the State asks a defendant, "Why didn't you call the police?" when a defendant testifies that they were assaulted/attacked first, that is a violation of their right to remain silent?**

ANYONE EVER HEARD THE STATE ASK THIS?

b. See e.g. *State v. Smith*, 124 Wn. App. 417, 102 P.3d 158 (2004)(found to be harmless error for lack of prejudice in that defense objected, the court sustained, and the State stopped that line of questioning).
c. The law prohibits the State from commenting on a defendant's silence as substantive evidence of guilt. *State v. Smith*, 124 Wn. App. 417, 428, 102 P.3d 158, 164 (2004), *aff'd*, 159 Wn.2d 778, 154 P.3d 873 (2007)(citing *State v. Romero,* 113 Wn. App. 779, 787, 54 P.3d 1255 (2002) (citing *State v. Lewis,* 130 Wash.2d 700, 705, 707, 927 P.2d 235 (1996)).

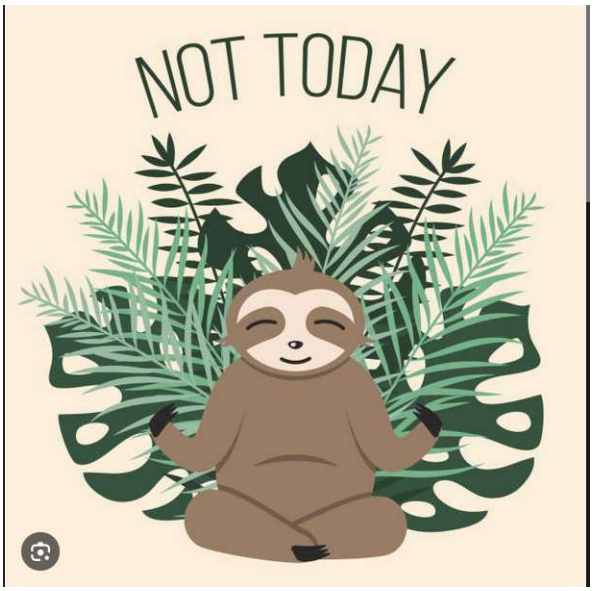
Have a magnificent weekend. Take time off.

***Breath, both in and out apparently*.** **Enjoy the sunshine and flowers.**

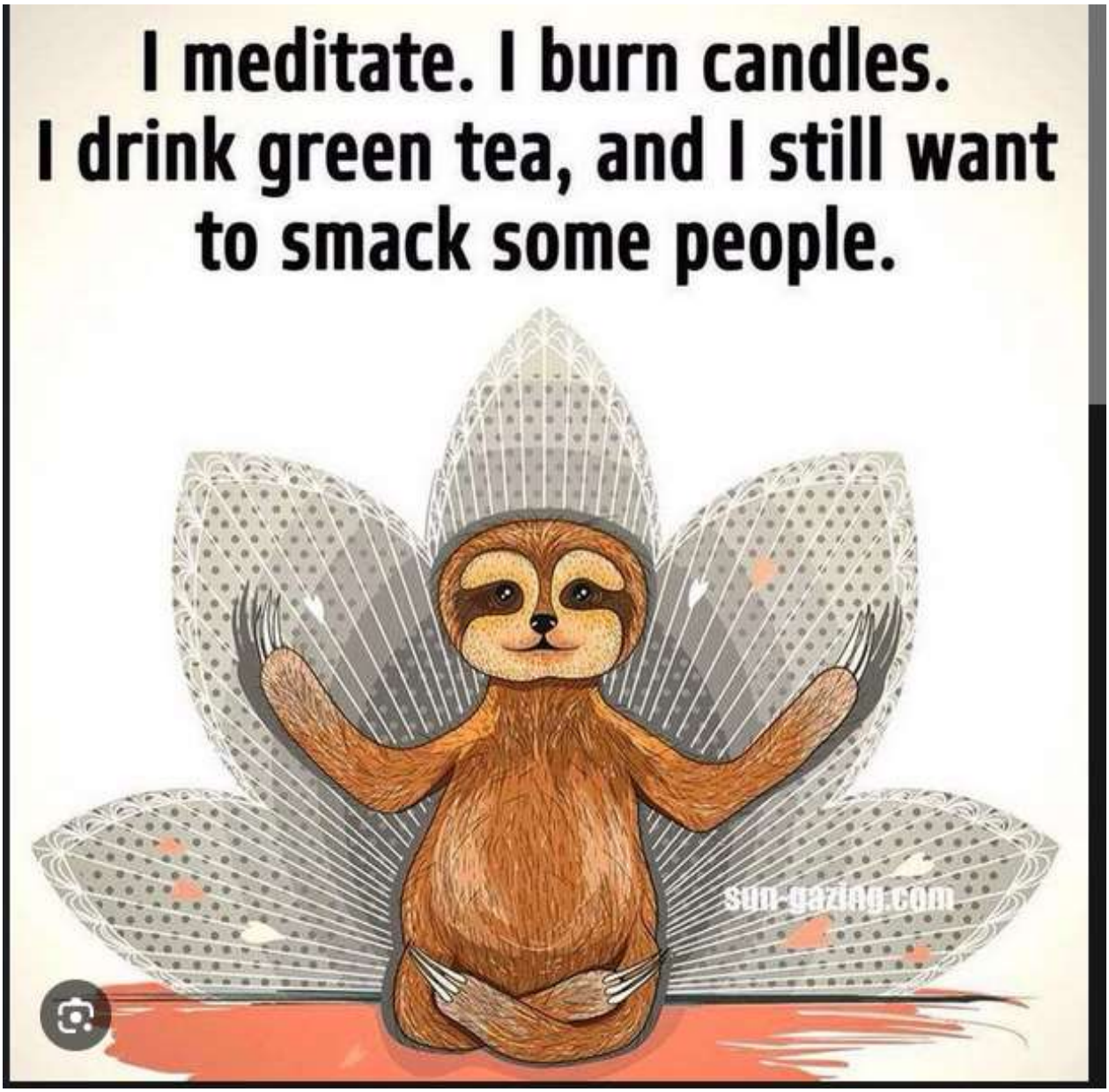
- "Sometimes the most important thing in a whole day is the rest we take between two deep breaths". - Etty Hillesum
- "Sometimes the most productive thing you can do is relax". -Mark Black
- "As important as it is to have a plan for doing work, it is perhaps more important to plan for rest, relaxation, self-care, and sleep." - Akiroq Brost
- "Your mind will answer most questions if you learn to relax and wait for the answer". William S. Burroughs
- "No matter how much pressure you feel at work, if you could find ways to relax for at least five minutes every hour, you'd be more productive." - Dr. Joyce Brothers
    - **Try not to spend that 5 minutes only on a bio break though, trust me that never works for relaxing as you rush back to your desk with your shirt only half tucked in!**


Normal baking experience
What a fun and relaxing activity!
@theintrovertedattorney
Lawyer's baking experience
What constitutes a "handful"?? What size hand are we using?? I don't see a defined terms section in this recipe...


12-2
"Your honor, the defense rests."


NOT TODAY

Me:


I meditate. I burn candles.
I drink green tea, and I still want
to smack some people.

Sheri