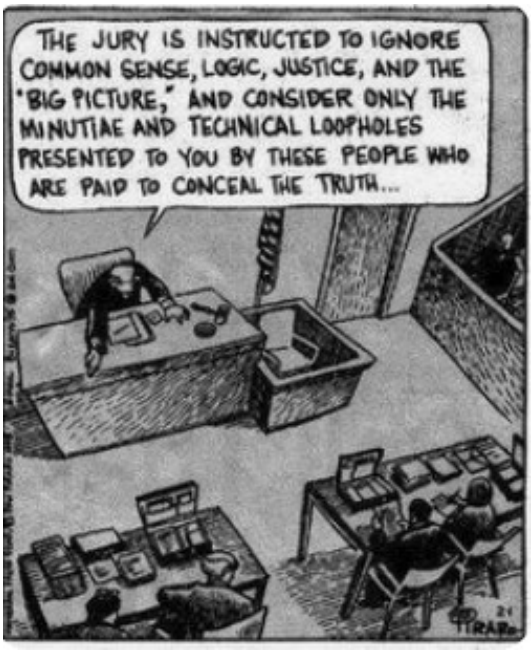
Sheri's Sidebar Edition #24 2-9-2024

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



I want you all to recognize I assume the judge is pointing to the prosecution table; and to also remember, that I don't make these up, I just find them! 

We know, or I assume, that it's the prosecution table because strategically, in many cases:

- When possible, defense counsel tends to put their client closest to the jury box so that the client can present a calm demeanor and occasionally make eye contact.
- And in front of the witness stand so that witnesses who are going to lie about them have a more difficult time because they have to face them.
- Also, defense counsel gives their client a tablet and pen to take notes and to write them notes. This is for several reasons.
    - It prevents the client from constantly leaning over to discuss something with the attorney.
        - Interruptions can cause counsel to miss important testimony, or other oral instructions that are necessary to the client's defense.

- Frequent interruptions can be negatively perceived by the jury as desperation or inaccurately viewed as guilt.
- It prevents the client from fidgeting and generally looking nervous if they have something to do and actually are paying attention.
  - Some clients catch things important new evidence or impeachment evidence in testimony that were not previously known.
  - It can help prevent the client from being overly animated and drawing unwanted attention from the judge or jury
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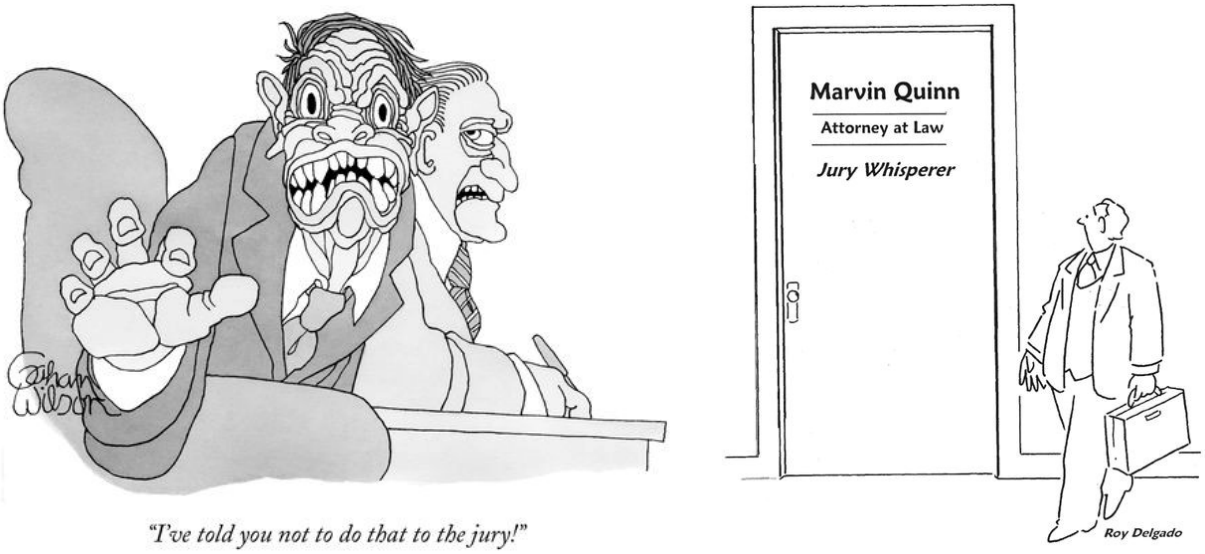

"I've told you not to do that to the jury!"

"Make eye contact with the jury, but not homicidal-maniac eye contact."

Then…Also, I need you to remember that we, as defense attorneys hold a duty and responsibility to be better at strategically using the law, telling the story in a persuasive manner

which the lay person can understand, and presenting the client's defense in such a way that the State's beyond a reasonable doubt standard presentation of evidence fails.

I have faith in each of you. When you have questions, ask for help. That is why I, WDA and the listserv are here. We can help brainstorm, answer legal questions, provide research, and discuss strategy with you as well.

1. **Are you aware when you can get a Deputy Prosecuting Attorney disqualified from the case under limited circumstances? I know you are thinking they are so limited it is almost a "it never occurs." Read the facts and result of the case below. See if this has "never occurred" in a case that you have defended… *State v. Schmitt*, 124 Wn. App. 662, 102 P.3d 856 (2004).**

   In the *Schmitt* case, a witness first told dispatch and the police that Schmitt threatened to shoot her dog. After speaking to the prosecutor, who had a potential bias against Schmitt because she was prosecuting him for felony assault against another neighbor, suddenly the witness' statement changed to Schmitt had threatened to shoot her and her dogs. The police officer testified the prosecutor emailed his Sgt. that she had additional information about Schmitt and his Sgt. told him to contact the witness again. Then, after speaking to the prosecutor, the witness stated Schmitt had threatened to shoot her and the dogs.

   Defense found out later by accident, neither the police nor the prosecutor disclosed the initial contact to defense, or the initial statement without the accusation of the threat to the witness. Defense's theory was it was fabricated after speaking to the DPA, making the DPA a material witness, and thus subject to disqualification. The trial court agreed, and also agreed the entire office was disqualified. The State opposed the motion, arguing Forbes was not a material witness under RPC 3.7 because others could testify to the same information, and any testimony would be inadmissible regardless.

   The trial court found Forbes was a material witness and should be disqualified because defense intended to use Forbes' testimony to show that L's allegations against Schmitt did not include *threats against her* until after the prosecutor, Forbes, personally spoke to her (and had pending similar charges against Schmitt for another neighbor). The higher court held that evidence was not obtainable elsewhere and was key to the defense's theory of the case, making the DPA a material witness. It also made note of the witness' differing accounts of Schmitt's threats and that the account changed after the DPA spoke with her. **The trial court further noted that this will "put the State in the position where it's acting both as a witness trying to persuade the jury as to a particular set of factual events and also an advocate for this set of factual events. This is exactly the**

circumstance that rule 3.7 is designed to avoid." Clerk's Papers at 80. We agree. *State v. Schmitt*, 124 Wn. App. 662, 667, 102 P.3d 856, 859 (2004).

The higher court said to disqualify the entire prosecutor's office was held to be an abuse of discretion. Only if the material witness is the elected prosecutor does the entire office become disqualified. Thus, we hold that the trial court abused its discretion in doing so here. Id., at 669.

- **I know I have had cases where a witness suddenly has new information after speaking to the prosecutor. If that information is facts meeting an essential element or something equally serious, this may be the route you need to take to disqualify the prosecutor, get them on the stand under oath, and anyone else in that room with them.**

2. Are you aware that the police are not authorized to do an entire Cellbrite dump of your client's entire cellphone with a search warrant? They are only supposed to seize that which they have probable cause supporting seizure to obtain?

We conclude that a warrant to search a cell phone is analogous to a warrant to search a person's computer. As the Ninth Circuit held in *United States v. Hill*, 459 F.3d 966, 975 (9th Cir. 2006), "the government [does not have] an automatic blank check when seeking or executing warrants in computer-related searches. Although computer technology may in theory justify blanket seizures ..., the government must still demonstrate to the magistrate *factually* why such a broad search and seizure authority is reasonable in the case at hand." *State v. Alexander*, 26 Wn. App. 2d 1007, *review denied*, 534 P.3d 792 (Wash. 2023)

State v. McKee, 3 Wn. App. 2d 11, 413 P.3d 1049 (2018), *rev'd on other grounds*, 193 Wn.2d 271, 438 P.3d 528 (2019). Police obtained a search warrant authorizing a "physical dump" of "all of the memory of the phone for examination." *Id.* at 29. The warrant then described items to be seized from the cell phone, which included essentially any "electronic data from the cell phone showing evidence" of the crimes being investigated. *Id.* at 18-19. **This court held that the warrant lacked the requisite particularity because it "was not carefully tailored to the justification to search and was not limited to data for which there was probable cause."** *Id.* at 29. In other words, "the search warrant clearly allow[ed] search and seizure of data without regard to whether the data [was] connected to the crime." *Id.* "The warrant gives the police the right to search the contents of the cell phone and seize private information with no temporal or other limitation." This court noted that the search warrant's language left to the discretion of the police what to seize. *Id.* *State v. Alexander*, 26 Wn. App. 2d 1007, *review denied,* 534 P.3d 792 (Wash. 2023).

3. Are you aware whether an alleged suicide attempt is admissible as consciousness of guilt?

State v. Alexander, 26 Wash. App. 2d 1007, review denied, 534 P.3d 792 (Wash. 2023)

The higher court said no, an alleged suicide attempt is not analogous to flight as demonstrating consciousness of guilt. In the factual circumstances of that case, the higher court expressly noted the client stabbing himself in the neck with a pen was not even sufficient to demonstrate a suicide attempt much less consciousness of guilt.

"Are you sure? — I don't *feel* guilty."

4. What do we think about this, shouldn't notice be required to the alleged victims that there is no confidentiality between them and their DV advocate if their advocate works for the prosecutor and/or any law enforcement agency? Because that means that anything the AV tells the DV advocate or the advocate sees or learns can be used as evidence against the defendant, whether or not the AV wants it to be used or agrees for it to be used.

- Does the prosecutor's office and the DV Advocate misrepresent to the AV every that the DV Advocate is there solely for the purpose to support the AV, that what they discuss is confidential, *that they cannot be called to testify against the AV*. 100% false. I don't think the DV advocate is lying, I don't think they know. I think either the DPA's have not been told by their Elected (I was not told this by the elected or the experienced DPAs when I was a prosecutor) that this distinction exists; or the DPA knows and intends to use it, ethical or not; and thereby intentionally causes the DV advocate to mislead the AV.

RCW 5.60.060

(8) **A domestic violence advocate may not, without the consent of the victim, be examined as to any communication between the victim and the domestic violence advocate.**

(a) For purposes of this section, ***"domestic violence advocate" means*** an employee or supervised volunteer from a community-based domestic violence program or human services program that provides information, advocacy, counseling, crisis intervention, emergency shelter, or support to victims of domestic violence ***and who is not employed by, or under the direct supervision of, a law enforcement agency, a prosecutor's office,*** or the child protective services section of the department of children, youth, and families as defined in RCW 26.44.020.

(b) A domestic violence advocate may disclose a confidential communication without the consent of the victim if failure to disclose is likely to result in a clear, imminent risk of serious physical injury or death of the victim or another person. This section does not relieve a domestic violence advocate from the requirement to report or cause to be reported an incident under RCW 26.44.030(1) or to disclose relevant records relating to a child as required by RCW 26.44.030(15). Any domestic violence advocate participating in good faith in the disclosing of communications under this subsection is immune from liability, civil, criminal, or otherwise, that might result from the action. In any proceeding, civil or criminal, arising out of a disclosure under this subsection, the good faith of the domestic violence advocate who disclosed the confidential communication shall be presumed.

5. Did you know that the court is required to consider available alternatives to total confinement if a nonviolent offender is sentenced to one year or less in jail on a felony under the SRA? Effective since 1983.

RCW 9.94A.680 Alternatives to total confinement.

Alternatives to total confinement are available for offenders with sentences of one year or less. These alternatives include the following sentence conditions that the court may order as substitutes for total confinement:

(1) One day of partial confinement may be substituted for one day of total confinement;

(2) In addition, for offenders convicted of nonviolent offenses only, eight hours of community restitution may be substituted for one day of total confinement, with a maximum conversion limit of two hundred forty hours or thirty days. Community restitution hours must be completed within the period of community supervision or a time period specified by the court, which shall not exceed twenty-four months, pursuant to a schedule determined by the department; and

(3) For offenders convicted of nonviolent and nonsex offenses, the court may credit time served by the offender before the sentencing in an available county supervised community option and may authorize county jails to convert jail confinement to an available county supervised community option, may authorize the time spent in the community option to be reduced by earned release credit consistent with local correctional facility standards, and may require the offender to perform affirmative conduct pursuant to RCW 9.94A.607.

For sentences of nonviolent offenders for one year or less, the court *shall consider* and *give priority to available alternatives to total confinement* and *shall* state its reasons in writing on the judgment and sentence form *if the alternatives are not used*.

TIME FOR AN AWESOME WEEKEND, Relax, have fun, take some down time.

Sheri

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