TRIAL TIPS FOR DEFENSE ATTORNEYS, PROSECUTORS AND JUDGES

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BY:

ROBERT RILEY
LITIGATION DIVISION CHIEF
EL PASO COUNTY PUBLIC DEFENDER'S OFFICE
500 E. SAN ANTONIO, RM. PD501
EL PASO, TEXAS 79901
915/546-8185
FAX 915/546-8186

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TRIAL TIPS FOR DEFENSE ATTORNEYS, PROSECUTORS AND JUDGES

A. Advice for Defense Attorneys

I. First Things First

Read the Petition/Indictment/Information and Complaint

When I was a rookie prosecutor I had the opportunity to try a theft case wherein the defendant had allegedly taken money from a string of seniors by giving them a sob story. Without going into the details of the scam and hence the facts of the case, I must confess my trial was cut painfully short. As a result of the fact this defendant had pulled essentially the same scam on a number of older people his case was publicized in the local newspaper, as I recall, and the complainant in my ill-fated case called the police who set up a sting. When the defendant gave his sob story to the complainant, the complainant gave the details to the police who arranged to be present when the complainant gave the money, provided in check form by the police, to the defendant. When the bust went down the police had their man and recovered the check as evidence. As it turned out, the indictment said an amount of money over the amount necessary to make it a felony, "in United States currency." Immediately after the indictment was read by me to the jury the defense attorney asked to approach the bench at which time he pointed out to the court the discrepancy. The court gave me two hours to attempt to find law that showed that a check which had not been negotiated was "United States currency." I could not and the guy walked. But I learned a valuable lesson. The first thing you need to do when preparing a case for trial is read the charging instrument. Period.

And in case you think that was a rare thing or that the rules are different now, think again. Last August I tried a murder case and knew there was a variance between the name of the complainant (read "dead guy") as my client had known him and as it was in the indictment. It was something like "John Garcia" when she had known him as "Juan Esteban Gutierrez." I mean really, it was that much different. And what I thought going into the case was that my client had known him by an alias, because certainly the State would know the guy's real name! And I intended to try and make as much hay as I could with that little gem (which probably wouldn't have been much except possibly with the jury). But as it turned out the name my client had given me was the guy's real name and the State had made an error. And the State's attorney didn't notice it until she was reading the indictment to the jury. Now I had something. Now I could make hay. So I protected the record the whole way through the trial and the case is currently on appeal.

Will I win? I don't know. But the case the State relied on is Gollihar v. State, 46 S.W.3rd 243 (Tex. Crim. App. 2001). In that case the State had alleged the theft of a go cart and had plead a serial number which was different by one number from the actual number. The court said it was no big deal and affirmed. But, I protected the record and made constitutional objections throughout the trial and I just believe a difference of one number on a serial number is considerably different from a completely different name on an indictment. I guess we'll see. Read your charging instrument! I can't stress that too much.

If You're Going to Try This Thing You'd Better Have Been to the Scene

Going to the scene of the alleged offense can help you in so many ways that it would be utterly impossible to list them here. Suffice it to say if you fail to go to the scene you are setting yourself up for failure.

For example, a witness for the other side might say in response to your question about the lighting at a particular location at midnight, "It was very dark and hard to see." Then, if you have been to the scene (here, after dark) you can say, "Well isn't it true there is a street light approximately 20 feet from the spot you say you were standing?" "And isn't it true the house you were standing in front of has a floodlight in the driveway that is controlled by a motion sensor?"

The point is it can be light or dark, flat or hilly, sandy or rocky, busy or not. But you'll never know unless you actually go to the scene under conditions roughly approximating the conditions under which the alleged offense occurred. It's not rocket science. It's plain ole common sense. This is equally applicable whether you are a defense attorney or a prosecutor. You will know a lot about the physical parameters of your case if you have actually gone to the scene. On the other hand if you fail to do so you will be at least partially blind when you try your case. Granted, there are cases in which having been to the scene is not important; cases such as forgeries or....., well, I'm sure there are others. But believe me there are a whole lot more cases in which going to the scene is important than there are cases in which it is not.

Caveat: Be careful if you're going to gang heaven, someplace physically challenging or any place dangerous. If you are going to a place like that grab one of your investigators or an attorney friend with a promise of a free lunch or a beer. Don't put yourself in harms way.

One final note along these lines. There are many attorneys, especially young attorneys, who take up their craft in a community different from that in which they grew up; in a city or town where they are not natives. For those of you who are in this situation I strongly encourage you to become familiar with the community. Read the local newspaper and watch the local newscasts for at least six months to begin to learn the players and the locales. High schools are fairly critical in learning about similarities and differences in the community. Learn about them. Different areas of town have different socio-economic characteristics. Learn as much as you can about them. It is critically important to you when you are picking a jury, when you are developing your case or when you are developing the facts (with your spin) to the jury.

You need to know when somebody says, "Oh. He's from the west side," or "She went to Irvin High School," what the implications of those statements are. The person communicating that information to you is telling you more than just what the words themselves say on their face. It's a code of sorts for those willing to learn it. It may not all be good or politically correct but if you've got a biker chick as your witness and she's attempting tell you something in her way and your not getting it whose fault is that? Or if you've got a witness from the "rich" side of town and he or she tells you something you need to be keyed in on certain thing vis-a-vis the community and its' people. Trust me, your community is not homogenous and the same through and through. If you can learn to discern nuances you will be miles ahead of the game and the competition.

II. Conceptualizing

Geology – the Two Most Important Lessons I Learned on Trial Tactics

When I was a geology student I didn't waste all of my time partying and playing around. I did learn a number of things, and two things in particular have special importance to jury trials.

Where is Oil Found?

As a geology student I had occasion to read a truly prophetic article written by an exceptional man. The man was Wallace E. Pratt. Dr. Pratt was sent out into the hinterland early in his career, during the 1920's and 1930's, and as a consequence had the opportunity to survey, firsthand, vast stretches of the western United States. As a result he seems to have had an epiphany wherein everything just fell into place for him. In 1952, he wrote the article to which I have already made reference. The article was so brilliant conceptually that as a result of having read it I too had a crystalline moment.

The title of the article was Toward a Philosophy of Oil-Finding, by Wallace E. Pratt, Bulletin of the American Association of Petroleum Geologists, vol. 36, no. 12, pp. 2231-2236, December, 1952. What Dr. Pratt was attempting to communicate in that article was that while oil is very clearly found in the ground, in certain formations and in certain geologic structures, within certain physical, temporal, and geothermal parameters which control whether there will actually be any oil found, that is certainly NOT "where oil is found." Oil is found in the mind of the geologist.

The geologist takes little bits of information, little clues, and based on her gut feeling or her intuition or her deductive powers, creates an entire universe of reality which explains why oil will be found in a particular place. That universe explains what the living breathing environment was like at the moment in time when it was a biotic environment, how that created circumstances favorable to the creation of oil, how the oil migrated, how then that oil was somehow trapped, and overall why and howcum it's there now for us to drill into and collect. All this from the teeniest, tiniest bits of information.

Well, it's exactly the same thing in a jury trial. You have to make the reality that exists conform to your concept of reality. You have to bend the facts to your will. This is not meant to imply the lawyer should lie. Never lie. But, you as a trial attorney are given certain "facts." Your task then is to create a universe from the facts you have and those you can reasonably infer, all to your client's advantage. Trials are won in the mind of the attorney.

The important thing to remember when creating this universe is that it must be internally consistent. If it is not internally consistent you won't be able to sell it to your audience, the jury. Each piece, as much as is possible, must be able to hang by itself, on its' own.. Granted, under many circumstances, this is a daunting task. Nevertheless, it is the objective you must attempt to achieve in order to do your client, and hence the system, justice. Internally consistent does not mean you have to answer every question. The more you can answer, the better. But realistically you won't be able to answer every question. Gloss over or ignore those questions.

Well. O.K. Don't exactly gloss over or ignore. Try to spin those things the best you can. Put the best face on them you can. I'm not saying what we do is easy or that it always works. But by following this concept you have a place to begin and a route to follow. And it works ever so much better than going into court and following a case willy nilly, wherever the opposition takes it and you. This concept will allow you to lead as opposed to following in a case, a trial. It's harder to win when you are following! Always remember, in any case, you must do the best you can given the circumstances, i.e. the facts.

What's "the" Point?

The other thing of import I learned in geology was simply to focus on the main point. As a graduate student I took a course in carbonate petrology, the study of carbonate, primarily limestone, rocks. As a part of that course each student had to read a scientific article and then make an oral presentation to the class. Afterward, the professor would give each student a one-on-one critique.

Professor Pingitore explained that he really liked the article I had chosen to review and noted that I had been very thorough in my coverage of the material. He then asked me, "What was the important point of the article?" I knew the answer and said obviously it was this particular point. He agreed and then asked why I had not spent a correspondingly larger amount of time on that point. In response I said it seemed obvious to me that that was the important point. He pointed out that he knew it was the important point, and he knew I knew it was the important point, but due to the fact I had failed to give it greater coverage, it probably was not at all clear to my audience. And that is the point of this rather long and droll paragraph. Focus on the point!

Once you come up with your internally consistent universe (Some might liken this to a theory of the case. However, as I see it, it's similar but not the same. My "internally consistent universe" is a holistic concept, i.e. it exists in and on its own, irrespective of objective reality. My boss thinks I'm crazy and it is nothing more than a theory of the case but since she's not writing this, I win!), and this is done prior to ever setting foot in the courtroom, you then focus everything you do thereafter on the single point, or few points you need to beat home in order to win over your audience. Before you get into trial you gear all of your motions to whatever is necessary to make your universe a reality. Once in trial, you begin educating the prospective jurors to your universe during voir dire. During the examination of witnesses and the introduction of evidence you hammer on your point. In closing argument you argue your facts and any inferences which can assist in making your universe real. That is how you win. If you simply give people the "facts" as they appear in the police reports and so on you will be dead before you ever enter the courtroom. Conversely, if you take the time to make your own universe, which you have created in your own mind, and take the steps necessary to place your universe in a concrete world where your facts are covered in flesh and blood, you will win cases. You will do justice for your client!

The final point in this area is my admonition to you not to bore your audience; the jury. Let the other side bore them. But you're not going to do that. Certainly one should be as entertaining as possible because then the jury will pay attention to the evidence or argument, but what I'm trying to get at is, keep it short. You have to take as long as it takes to do an effective cross or direct but keep it as short as you possibly can. My rule of thumb is to gear everything you do to the length of a television sitcom. While that's not carved in stone it's a very good approximation. Believe you me, no matter what people tell you the vast majority of them watch television, lots and lots of television. That's why the thirty minute sitcom is such a good measuring rod.

III. Voir Dire Musts

Back when I was a new prosecutor I was under the mistaken impression that what really mattered in a jury trial was the opening and the close, and that if you gave the jury enough evidence to hang their collective hats on, that was all you needed. Fortunately I don't believe that anymore and neither should you. In many respects voir dire is THE most important phase of any jury trial.

In discussing this part of trial I intend to discuss the first three subtopics together. That is, the burden of proof, the quantum of proof, and the elements. The reason for this is that they are integrally intertwined in such a way that during your voir dire, if you're doing it correctly, you'll keep referring to one while you're discussing another. This is so because there is a natural flow from burden of proof and how that is on the State, to a discussion of the standard of proof with a reference back to whose burden it is, followed by a discussion of what it is the State has to prove, i.e. the elements.

If you've done a good job the panel will be able to follow you when you close the discussion saying something like:

YOU: "O.K. Who has the burden of proof?"

PANEL: "The State."

YOU: "How much of the burden?"

PANEL: "All of the burden."

YOU: "And what's the standard of proof?"

PANEL: "Beyond a reasonable doubt."

YOU: "And what do they have to prove?"

PANEL: "The elements."

YOU: "How many of the elements?"

PANEL: "All of the elements."

1. Burden of Proof/Quantum of Proof/Elements

You must convince your jury the State has the burden of proof. It's not hard but it's critical. After you have gone over the points you want to make on this issue ask the panel a "trick question." Single one person out and say something like, "Now, what should Mr. So-And-So to do to demonstrate to you (or prove to you, or show you, or other words to that effect) his innocence?" And you'd be surprised just how many of them will say something like, "If he could give us an alibi," or "Maybe he could give us an explanation of why he did what he did." and that's when you (gently so as not to P.O. any prospective jurors) spring your trap and explain that's exactly what you've been trying to get across to them. That if they expect you to "prove" anything that they are shifting the

burden of proof to your client. And that's not allowed. Your client has zero percent of the burden. It helps the panelists grasp the concept. Remember these people don't live in a legalistic world. They live where people say things like, "Uh uh. Really? Prove it."

After you have covered the burden of proof you should move on to the standard of proof or the quantum of proof. I like to start with a reasonably articulable suspicion giving an example or two of what that standard is. Then I talk about probable cause and how that's the standard for a search warrant, arrest warrant or a grand jury indictment. After that I talk about preponderance of the evidence and explain how that's just slightly more than half and how that's the typical standard in civil cases; cases involving mere money such as contract cases or personal injury cases. On the next level, clear and convincing evidence, I explain how that is the standard used in child custody cases and how it's a higher standard than a preponderance. Finally, I get to the highest level, higher even than cases involving the well being and custody of a child; beyond a reasonable doubt. And that's how I walk them through the different levels explaining how each is higher than the one preceding it.

Finally I talk about the elements and discuss with them what elements are and give them concrete examples of elements. I discuss such things as the ingredients of a cake, the pieces of a puzzle or parts of a bridge. For example, I might ask, "If you were going to build a bridge, what would you need?" The answers would be stuff like "steel," "concrete," "welds," or "cables." Then I ask them, "O.K. Lets say I decided to build a bridge, and I put it all together but I decided to leave out the welds. Would you want to drive on that bridge?" "Why not?" To which they would respond something like, "Because it would fall down!" And you say, "That's right. Why? Because it didn't have all of the elements necessary to make a bridge. It's the same thing with the elements of an offense. If the State doesn't have all the elements they can't make a bridge, and you can't convict." Then you hold their collective feet to the fire by going through the line of questioning I suggested at the introduction to this section. After you've educated them in this way, you bring it home during final argument emphasizing elements the State failed to prove and why. They'll understand. It works.

2. Fifth Amendment

I was going to spend a lot of time on this but instead all I'm going to say is this. Whether your client is going to take the stand or not take the stand you must talk about the Fifth Amendment because she may not take the stand after you hear the State's case. Also, it is a good litmus test for people you do not want on your jury. If you fail, ever, to discuss the Fifth Amendment in your voir dire you are making a grave error. It will bite you in the butt. Period.

3. Facts, Hypos and the Like About YOUR Case

One of the most valuable things I've learned through the time I've been doing jury trials is what voir dire is really all about. I mean really about. Now maybe it's just that I'm a slow learner but it took me several years before the light went on. But when the light came on it was a quantum leap forward in my ability to properly voir dire a jury. All you need to do is talk to them about your facts. It's nothing more than that.

Where I currently practice the courts don't allow you to talk about the facts of the particular case. However, in other jurisdictions where I have tried cases the courts allow you to talk about the facts of the case at bar. In either case you can "talk about your case." Talk about your case and get

'em talk'n 'bout your case with you. The jurors will bare their souls to you if you get them to talk about the "facts" of your case. By this I mean if your case involves drugs, ask questions relating to drugs and drug usage. If it involves sexual assault talk to them about sex and sexual assault. Whatever it involves is what you have to talk to them about. Don't ever be afraid of the answer the prospective juror gives because there are only a few actual outcomes arising from their answers. And it's all good.

First, the juror may say something which buttresses or otherwise helps your position. Obviously that is good for your side. And when someone answers that way get others to talk about their opinions about that position and discuss issues related thereto. That's how you find out the truth about your jurors. When they are just talking. You don't have to try to lead them to any position at all. All you want to do is find out their true position on things which bear on your case. You don't have to waste your time attempting to rehabilitate them right there. If you do that they will all clam up on you.

Think of it like this. Where would you rather have this stuff coming out? In voir dire or in jury deliberations? You can "rehabilitate" your prospective jurors by taking them through various hypotheticals. It's kind of like employing the Socratic Method to which you were subjected in law school. They can come to their own understanding of the different possibilities simply by seeing that the world (your case) is not black and white but in fact exists in varying shades of gray. Generally then you want to ask open ended questions but without seeking commitments from the panelists. See Standefer v. State, No. 778-99 (Tex. Crim. App. October 31, 2001). This case is the current standard. When I was talking to my boss about the case she suggested it was going to put a crimp on our style but I suggested it wouldn't. If you follow the method outlined above you'll be O.K. and you'll get all the information you need to get out of your panelists.

For example, in a particular voir dire, when I explained there might be any number of reasons for a defendant not to take the stand I suggested as potential reasons that the person might be nervous or that I had advised him not to. I then asked the panelists if they could think of any other reasons why someone might not want to testify and among the reasons thrown out were that I was the mouthpiece for the client, that that's what he paid me for, and that the attorney for the State could get the client confused and twist what he said around because, after all, that's what the State paid him to do. So these people threw out excellent examples of reasons why a defendant would not want to take the stand, they came to it on their own, and as a result they enlightened the remainder of the panelists. Now if my client doesn't take the stand they won't be concerned by it if they become jurors.

But remember, when someone has said something which is good for one side they have by definition said something which is bad for the other side. In actuality, that fact is not "bad" for the other side because it has probably uncovered a juror whom they would like to strike. And that's the beauty of this approach. Because that's the other possible outcome of the answers given. That is, the response is in opposition to your position. But then you have uncovered a juror whom you would like to strike. The vast majority of times you get a response, that response will be in one of these two categories. Pro or con. Just remember, either way, you need to know this stuff. The other possible outcome is when you have that way whacked out juror who says stuff that's way out in left (or right) field. That's the juror that neither side wants. And maybe you can get the other side to agree with you to excuse that juror so that neither of you has waste a strike.

Fair and Impartial Jurors

I am often amused to hear attorneys, usually, but not always, young prosecutors, telling the jury panel they want, "fair and impartial jurors." Fair and impartial jurors! Who needs that? Who wants that?

When you are giving your voir dire you have two primary motives; first, to educate the jurors as to your case, the law as it applies to your case and the spin you want to begin putting on your case, and second to cull out those people whom you do not want to be sitting on your jury.

I can hear you asking yourself "Well, so what does this fool mean? What does he mean he doesn't want fair and impartial jurors?" What I mean is I want unfair and partial jurors. I want jurors who are sympathetic to my case either by there own proclivity and nature or because they have been swayed by the weight of my argument and their education during my voir dire! That's who I want. I'm sure it goes without saying but I'm going to say it anyway; don't tell the jurors this fact!

When I hear attorneys telling jury panelists they want fair and impartial jurors it reminds me of the beginning scene in the movie Patton, PG, 171 mins., 1970, starring George C. Scott (Patton), directed by Franklin J. Schaffner, produced by Frank McCarthy. In this particular scene General George Patton is addressing a large group of young recruits during the early months of World War II, and he tells them something to the effect of, "You don't want to die for you're country. You want the other dumb son-of-a-bitch to die for his country!" Remember that! Take it to heart. You DON'T want "fair and impartial jurors." You want jurors that are predisposed to believing in your case before any evidence has ever even been presented. Your winning percentage will go up markedly when you take this advice to heart and make it part of every voir dire you ever do.

IV. O.K. I'll See You in Trial

Fonzie and Richie

The old saw which we all learned in law school (if you didn't I suggest you stop giving to your school's scholarship fund) was to the effect that "the best deals are made on the steps of the courthouse." It's true..... kinda. While you may get a better view from the courthouse steps it doesn't necessarily follow that better deals are had there. So my response to that saying would be more like, "Maybe and maybe not." If we were talking about civil trials I might, I stress "might," agree. But this is a conference about juvenile law and in this respect is much more akin to the criminal justice system. That is to say, a juvenile charged with a crime gets his or her day in court in a jury trial setting which is virtually indistinguishable from a jury trial in the adult criminal justice system, with the exception of the punishment phase, which is markedly different. My question is then, if we're already on the courthouse steps why don't we all just go inside and see who's got who by the what. Most prosecutors see each of their cases as golden. All the defendants or juveniles as "scary." But you know as well as I that all that glitters is not gold! Some cases are better than others, some cases are worthless, some complainants lie, and so forth.

I suspect that whether you are young or old you remember the TV show Happy Days, ABC Television, first aired 1974, starring Ron Howard (Richie), Henry Winkler (Fonzie), a Miller-Milkis production in association with Paramount TV. Well, as it turns out, the Fonz had a great lesson to teach about the art of in jury trials, including the bluff. In one particular episode, Richie had

somehow gotten a black-leather-jacket-wearing-guy mad at him. As a result this guy wanted to fight Richie and Richie, not wanting to appear the chicken, agrees to meet the guy at Arnold's a few nights hence. In the meantime he goes to the Fonz and asks him what he should do. Fonzie sagely tells Richie to go to the meeting and "act tough," to bluster and bluff, and that as a result of this the other guy will probably back down. So Richie dutifully shows up at the appointed time and "acts tough" (if you can just imagine Richie acting tough) and jumps up and down and so forth. And just as the black leather jacket guy is about to pop Richie a good one, Richie calls a timeout and goes over and talks to the Fonz. He says I did this, I did that, I did the other. I did everything you said to do and its not working Fonz. Why? To which Fonzie replies, "Well. There is one little thing I left out. At least once in your life you have to have actually hit someone." Richie points out very wryly that, "That's not a good detail to leave out Fonz!"

What's the point you ask? The point is you have to take the other side to trial or they simply won't respect you, let alone fear you. And that's exactly what you get by taking cases to a jury trial; respect and fear. Your colleagues will respect you if they see you are working and working hard for your clients, and, your opponents will fear you. Fear you? Yes. Fear you. There are many different causes for this fear. You see, the other side may know in their heart their case can't stand up to a withering trial, that the warts will show, will be brought out into the light. Or, they may know you by reputation and think that even if they have a marginally good case they may lose because, "your reputation precedes you." Or it may simply be that if you force this case to trial their weekend is going to be messed up. In any case, it doesn't matter to you what their subjective reason or rationale is for not wanting to face you in trial. Whatever their reason, that will help you to get better deals for your clients.

It's my personal belief that jury trials exist for a reason. They allow us to bring people in from the community and give us, the people involved in the juvenile justice system and the criminal justice system on a day to day basis, a measure of what they actually believe a case is worth, or whether the facts the prosecutor is trying to sell smell to high heaven, or whether it's you that's lost in la la land. There are a thousand reasons for taking cases to a jury for a trial, but ultimately the best reason is it is often what is best for your client. So don't be shy.

V. A Few Things You Absolutely, Positively Gotta Know!

There are a number of things which occur with such frequency in every jury trial that if you know them the judge will think you're a stankin' genius, and if you don't she'll just think you stank. These are issues which arise in a very large number of different fact situations and which you simply keep in your tool chest as those things which you have to carry around with you at all times. When you need it, and you will, you simply pull that tool out and begin using it. You can quote law and the like right there in front of the judge and sound like you really know what on earth you're talking about. And you know what? It works. It impresses the judge, it impresses your opponent, and maybe most importantly, it impresses the jury. So what are these things? I'll suggest a few of these things below. But keep in mind this list is not all inclusive. Don't be afraid to alter and expand the list. Your particular geographic setting or practice may require a number of changes to the list, and you will certainly want to expand it. In addition, time may make some of these issues moot. If that occurs replace them with new ones. Cuz believe me you need to have a list like this.

As you go through this list you may notice there are a disproportionate number of evidentiary points in it. That has to do with my belief that ultimately there are only two things which we are attempting to accomplish in trial; we want to get our evidence in and we want to keep the other side's evidence out. Thus, the large number of evidentiary issues.

1. Rule 403, Texas Rules of Evidence. This rule comes into play when the other side wants to offer evidence which may be somewhat probative of the particular issue but which has a very prejudicial impact on your client. An example follows:

Q. Mr. Moreno, it's true isn't it, that you are on deferred adjudication out of a felony court?

A. Yes.

Q. And it's true, isn't it, that a conviction in this case could result in that offense in the felony court being adjudicated?

A. Yes.

Q. And Mr. Moreno, isn't it true that a conviction in the felony court could result in you going to the penitentiary?

A. Yes.

Moreno v. State, 22 S.W.3rd 482, 484(Tex. Crim. App. 1999).

The accused in this case was charged with a DWI and didn't blow so it was a close case. The State wanted to put this evidence on to show the defendant had a motive to lie. The defense attorney made the proper objection but the court overruled the objection and allowed the line of questioning set out above. The Court of Criminal Appeals overruled the trial court. The issue of Rule 403 is whether the probative value of the proffered testimony is substantially outweighed by the unfair prejudice which the adduced testimony will introduce. The magic words are to this effect, "Objection your Honor. The probative value of the evidence is substantially outweighed by the unfair prejudice to my client. I would request the court engage in the required balancing test under Rule 403 of the Rules of Evidence."

2. File a Request for Notice of Extraneous Offenses Under Rule 404(b), Texas Rules of Evidence

Even if the court has a standard discovery order, file a request for notice of extraneous offenses addressed to the District or County Attorney. This is then valid on its' own whether the court has as part of its' standard order an order to the State to give you notice. It also negates the necessity of having to get a ruling on your motion if you filed it as a motion. Make sure your request asks for written notice at least 7 days before the date of the jury trial. A recent case addressing this issue, i.e., that the State must respond to a request but need not respond to a motion until such time as a ruling is obtained on the motion, is Patton v. State, 25 S.W. 3rd 387 (Tex. App. – Austin, 2000).

3. Fourth, Fifth, Sixth and Fourteenth Amendments and the Texas Constitutional Versions.

O.K. You can learn all of these or, as I do, simply make a chart. When I first went into private practice I purchased a bunch of criminal defense motions and such from, I believe, Gerald Goldstein of San Antonio. So as not to misinform, I didn't "personally" buy them from him, I ordered them from an advertisement in a bar journal. Anyway, included in that material was a chart listing rights with their correlative federal and state constitutional provisions. I hesitate to give you a copy of that chart with this material due to concerns with Mr. Goldstein's intellectual property rights. But what I can do is list the various rights and the provisions for you and you can make your own chart. What I do with my list is keep it on counsel table in front of me during trial and when there is something objectionable I jump up and say something like, "Objection your Honor. That's a violation of my client's 5th Amendment right against self- incrimination as well as a violation under Article 1, Section 10, of the Texas Constitution." This helps protect the record for any appeal which you may need to file because it raises your objection to a constitutional level as opposed to simply a statutory or Rule of Evidence objection. It also shows the jury you know what your doing.

Self-incrimination arises a lot and is protected under the 5th Amendment to the U.S. Constitution and Article 1, Section 10, of the Texas Constitution. Confrontation and cross-examination arises quite often in the form of objections to hearsay testimony and is protected under the 6th Amendment to the U.S. Constitution and Article 1, Section 10 of the Texas Constitution. Illegal searches and seizures are protected against under the 4th Amendment to the U.S. Constitution as well as under Article 1, Section 9, of the Texas Constitution. Assuming you've already had a suppression hearing on the issue, you need to make your objection on this ground when the prosecutor begins her initial inquiry into the facts of the stop, or the search or the seizure, as the case may be. Due process is protected under the 5th Amendment to the U.S. Constitution, and its' Texas counterpart is due course of law under Article 1, Section 19, of the Texas Constitution. This issue might arise when, for example, the court refuses to allow you a continuance to find a subpoened witness or refuses to let you put on certain witnesses. Equal protection of the laws is guaranteed under the 14th Amendment to the U.S. Constitution and Article 1, Section 19, of the Texas Constitution. This might arise when, say, the court is sentencing your client to TYC or prison for an offense which, if your client were a U.S. citizen, he would not be sentenced to. These are just a few of the rights which could be enumerated with examples. But other rights exist which have not been listed here.

They include the right to a grand jury indictment (or to a charging instrument known as a petition in the case of juveniles), protection against double jeopardy, the right to a speedy trial, the right to a jury trial, the right to be informed of the nature of the accusations against you, the right to compulsory process and the right to effective assistance of counsel, without which none of the rest of these rights matter much. These are the rights you are sworn to protect and which you must protect for your client. If you do so diligently you will be doing society a great service.

4. Section 51.095, Family Code, and Section 38.22, Code of Criminal Procedure

Section 51.095 of the Texas Family Code is the juvenile version of the "confession statute." The adult version is of course Section 38.22, Code of Criminal Procedure. Many concepts relating to admissibility are common to each. The concepts which are applicable with regard to these two statutory provisions are separate from constitutional issues and revolve

around what might be considered an informed waiver of rights. They are essentially a codification of the Miranda warnings. Below is a juxtaposition of the two statutes which will allow you to compare them.

Section 2(a)(1) he has the right to remain silent and not make any statement at all and that any statement he makes may be used against him at his trial;

Section 51.095(a)(1)(A)(i) the child may remain silent and not make any statement at all and that any statement that the child makes may be used in evidence against the child;

(2) any statement he makes may be used as evidence against him in court;

There appears to be no juvenile equivalent to Sec. 2(a)(2).

(3) he has the right to have a lawyer present to advise him prior to and during any questioning;

(ii) the child has the right to have an attorney present to advise the child either prior to any questioning or during the questioning;

(4) if he is unable to employ a lawyer, he has the right to have a lawyer appointed to advise him prior to and during any questioning; and

(iii) if the child is unable to employ an attorney, the child has the right to have an attorney appointed to counsel with the child before or during any interviews with peace officers or attorneys representing the state; and

(5) he has the right to terminate the interview at any time.

(iv) the child has the right to terminate the interview at any time.

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You should note there are some significant differences in the two sets of warnings. An attorney needs to be aware of these differences in different settings, i.e. a juvenile case vs. a criminal case. But the main idea or point here is to make certain these rights are printed on the face of the document purported to be your client's statement. If not, raise hell. Well, at least file a motion to suppress and make sure you have a hearing on your motion.

In addition to this basic requirement that these magic words or words very closely resembling them appear on the face of the document, there are other very specific requirements for the admissibility of juvenile statements. For example, Section 51.095(a)(1)(B)(i) requires a juvenile to sign any statement made in the presence of a magistrate without any law enforcement officer or prosecuting attorney present.

The way it generally works for the taking of a statement from a child is as follows:

1. The child is taken into custody. At this point the officers will take the child to "the office or official designated by the juvenile board," Section 52.02(a)(2), Texas Family Code. In my county that is the Juvenile Probation Department and there the child is asked whether she wants to give a statement.

2. After the child agrees to give a statement (it's the rare child – or adult for that matter – who doesn't agree to give a statement), she is next taken to the juvenile processing office where she is given the warnings set out in Section 51.095(a)(1)(A), Section 52.025(b)(4), Tex. Fam. Code.

3. Next, she is taken to a magistrate in order for the magistrate to give her the warnings yet again. If she still wants to give a statement (and she will), the magistrate certifies he has given her the warnings, Section 51.095(a)(1)(C).

4. Now, finally, the officers extract the statement.

5. After the statement is taken the officers take her to a magistrate again and the magistrate says, "Are you sure? You really, really want to do this?" After she says yes, the magistrate has her sign her statement. Section 51.095(a)(1)(B)(i).

6. And ultimately, all of this must be done within six hours, Section 52.025(d).

When the court is hearing your suppression, if the officers made any errors on any of these items you may get the statement thrown out. The courts of appeals tend to scrutinize the rules very strictly with respect to juveniles.

B. Advice to Prosecutors

Please refer to my colleague's, Dave Contreras', paper. I don't want to be redundant and his paper and discussion will touch heavily upon this topic.

C. Advice to Judges

The only advice I feel truly compelled to give judges is to remember you are not a prosecutor on the bench. You are not the second prosecutor in the courtroom. The system is set up to be adversarial between the parties, but the judge really is supposed to be neutral. I realize that's hard. But it's your sworn duty to do so. The Preamble to the Code of Judicial Conduct states in pertinent part, "Tlly is suny 1e9biAftee oftraser anlawer for thh roluectioe od dputater anand ghallvisiamble

D. Epilogue

Well, boys and girls. That's it. I coulda and shoulda written more but I ran out of time and also figured I may not have that much more to tell you. So on the theory I might have to write another of these papers I figured it best not to leave myself with absolutely nothing new to write. I'm pretty sure I didn't get all the cites technically correct but then again I'm certain if you want to find anything to which I've made reference you can do so using the cites provided. If you have any questions or comments (not too terribly rude I would hope) please feel free to call me at the number I hope I've listed on the cover sheet.

Remember, if you're a defense attorney work hard for your clients. If you're a prosecutor, be fair and do justice. And if you're a judge be judicial and not prosecutorial. If each of you do these things the system will function a lot better and each of you will sleep better knowing you did your part on any given day. Good luck to you.