

Wednesday, September 20, 2006

### **Know your judge and jury.**

Criminal defense is about persuasion, strategy, and fighting in the trenches for our clients. This requires knowing our judge and jury, and finding out who they are. For Maryland and Virginia state criminal cases, judges usually are not specially assigned to a case. Depending on the case and the court, the assigned judge's name may not be disclosed until the evening before trial or the morning of trial. Even then, the judge lineup can change at a moment's notice. Our litigation arguments must be tailored to our decisionmaker, so it is critical to know about every judge who sits in a particular courthouse. Beyond knowing about the full-time judges, lawyers in Maryland District Court occasionally deal with visiting or retired judges, and adjunct judges sometimes sit in Fairfax County and other Virginia District Courts. Of course, when we file legal motions and arguments without knowing which judge will consider our filing (and judge's law clerks often will have substantial input into the disposition of those motions), we can only take our best educated guess at the lineup of judges who might be considering our motion. We must also know our juries, including obtaining the list of potential jurors once the list becomes available. In some courts, a list will be made available of all jurors assigned to the particular case. In other courts, only the entire jury list for a particular time period will be available. In other courts, no list will be available before the trial date, which makes it all the more important to arrive early enough to court to digest and analyze the jury list with the client, and to take care of all other matters that typically must be handled in court the morning of trial. Some official and personal ethical and fairness questions arise when the parties investigate the jurors on the list. Aside from issues of invasion of privacy in investigating potential jurors, how would it be fair for prosecutors to have more ready and accurate access than the defense to criminal histories of jurors and their friends and family? It is not fair. In the end, in investigating jurors, the criminal defense lawyer's full obligation is to the client, within the bounds of the governing law and rules. Some courthouses have so many judges, new judges, visiting retired judges, and visiting judges from other courthouses that it simply is not possible to have a scorecard and crystal ball about all of them. Often the public defender lawyers and court-appointed lawyers are the most knowledgeable about the lesser-known judges. As always, caveat emptor about the quality of such input when the public defender lawyer's eyes are focused, justifiably, on the day's clients more than having the luxury of giving enough details about the particular judge. Usually, different lawyers' crystal balls about judges are as varied as advice on the best way to choose a winning lottery number. I sometimes wonder whether some criminal defense lawyers warn against pleading innocent (warning of being punished for doing so if found guilty after a trial) versus guilty before some judges handling bench trials, just to have a better chance at the judge's having time to try their case. Usually I have good experiences brainstorming with my brother and sister criminal defense lawyers, when I choose carefully for the quality of input I might receive. Jon Katz.

Posted by Jon Katz in Persuasion at 00:00