

Monday, May 7, 2007

**Going to trial with a flowchart.**

Flowchart image from NASA's website. In 1980, I was introduced to Basic computer programming using a Wang computer that saved one's work on an ordinary cassette tape. Aside from the tape's making unusual blipping and beeping sounds when replayed on my audiocassette player, the class introduced me to flowchart planning and decisionmaking. Flowchart planning and decisionmaking is essential to effective criminal defense litigation, together with an effective trial outline (which incorporates flowchart principles) and an idea book (written, in one's head, or both). The flowchart approach is particularly beneficial for switching gears effortlessly when a judge sustains an opponent's objection, or enters and sustains the judge's own objection. Being human, some judges not only will sustain certain objections that the advocate might anticipate might be sustained, but might even sustain objections that have little or no legal basis to sustain. By having a flowchart with the next logical step to take in the event of a sustained objection to a particular line of questioning or arguing, the jury does not get distracted by a lawyer who seems to be fumbling, keeps its attention on a smoothly-flowing line of direct or cross examination (or jury voir dire, opening argument, or closing argument), and, possibly, gives credibility points to the lawyer for showing the lawyer plays by the rules laid down by the law, the judge, and society, regardless of whether the lawyer agrees with those rules. A simple example of the benefit of using flowcharts came last week, when a drunk driving client received a fifteen-day administrative license suspension rather than the customary forty-five days, before an administrative law judge. Here is what happened. A police officer stopped our client for a moving violation and charged him with drunk driving after claiming to have smelled an odor of alcohol on his breath and after administering some junk science field sobriety tests. At our client's hearing before a Maryland administrative law judge ("ALJ") -- parallel to but separate from his criminal prosecution to drunk driving -- I first argued to dismiss the claim against him. I pointed out, for instance, that the cop had utterly failed to fill in the address and county of the incident in the box provided. I said that the reference to "\_\_\_ Rd, MD Rt. 48" in the separate box for incident description was not satisfactory to show that the matter was actionable as having involved driving in Maryland on an applicable roadway. The ALJ responded that the foregoing description was sufficient for the purposes of the hearing. I also pointed out that the cop had failed in his report seeking a license suspension to specifically state that our client had performed poorly on the field sobriety tests or otherwise presented reasonable grounds to request a blood alcohol test, other than to say "HGN 6 clues; WAT 3 CLUES; OLS 2 CLUES." The ALJ said he had no problem determining that the foregoing acronyms (listing them as horizontal gaze nystagmus, walk and turn, and one leg stand) and numbers represented field sobriety tests with clues to establish reasonable grounds to ask our client to submit to a test to determine his blood alcohol level, which he did. The ALJ denied our motion to dismiss the case. Unfortunately, this left us facing the prospect of a forty-five day suspended driving sanction. My flowchart at this point was to argue first for restricted driving privileges to drive during the course of our client's employment as a stay-at-home parent whose family would face substantial hardship for our client to be out of a car for forty-five days; such restricted privileges may be requested for employment, but the Maryland code does not define employment in the context of such suspension hearings. I argued, in the alternative, that if such relief were denied, for the ALJ to exercise his authority to amend a suspension, by substantially reducing the forty-five-day suspension length. The ALJ, who spoke with full respect the whole hearing, refused to treat stay-at-home parenting as applicable employment, but agreed with our argument that a six-week suspension would be a substantial hardship. As a result, the ALJ reduced the suspension from forty-five days to fifteen days. This victory is not as earth-shattering as many of our criminal victories, although it meant a lot to our client's next six weeks as a stay-at-home parent. Nevertheless, it is a good example of the flowchart approach for moving effortlessly in any adjudicatory proceeding to find another path to victory when the judge or any other factor shuts off the primary road to victory. Not only should lawyers use flowcharts themselves, but they can also offer judges and juries suggested flowchart items to minimize the risk that the judge or jury will rule against the client without sufficient basis in law or fact. Sometimes I preface my flowchart argument with: "That idea certainly starts this analysis, but by no means completes it. Here is why: ..." Jon Katz.

Posted by Jon Katz in Persuasion at 00:00

I always wonder how many hobbies do people have, and how unique they are! Many of us are fond of football or music, but for the first time in my life I see a person how is interested so much in criminal defense litigation and has developed his skills in it till such a great level! I think that your work is really worth of people's admiration, hope your blog will find more and more visitors!

Anonymous on Apr 15 2009, 06:11