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CRIMINAL TRIAL OUTLINE

By Jon Katz

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While a basic trial checklist (preferably in writing, or else kept at the center of the brain) will not win the trial, the failure to use such a checklist can be fatal. My checklist for a winning Virginia handgun possession trial looked like this:

1. Move to sequester witnesses. Any other preliminary matters. Opening statements.

2. Prosecutor's case in chief.

a. Checklist for elements of the crime:

- Defendant (sometimes the witness does not identify the defendant, which is a ground to move to dismiss)

- Possessed (possession is defined as knowledge, dominion and control)

- Or brought into the following applicable locations

- A dangerous weapon (in this instance, a pistol, revolver, or other weapon designed or intended to propel a missile of any kind)

(NOTE: In Virginia, the firearm does not necessarily need to be operable. *Armstrong v. Com.*, 263 Va. 573, 583-84 (2002). In Maryland, on the other hand, a firearm must be operable to sustain a conviction for possessing a firearm. *Powell v. Maryland*, 140 Md. App. 479, *cert denied*, 367 Md. 90 (2001)).

- Into National Airport's terminals or the airfields or any building that opens onto the airfield on which signs are posted so as to give reasonable notice to the public. (At this trial, I argued that the rule of lenity made the sign requirement applicable to terminals, airfields, and *buildings*, and not just buildings. Nobody paid attention to that issue).

- On [insert date and time]

- At [insert address and county or city where the court sits]

- Without legal justification or public policy excuse

3. Cross examination (First consider whether cross examination will help more than hurt the defense). Be careful whether offering any exhibits into evidence at this stage will preclude the defense from moving for judgment of acquittal after the prosecution rests.

4. Prosecution rests after re-direct examination.

5. Defense moves for acquittal/ to strike the evidence, based on legal arguments, arguments that the prosecutor's burden has not even been met at this stage, and arguments that evidence about one or more of the elements is missing.

6. Defense evidence. Decide with client whether to waive the Fifth Amendment, and whether to introduce evidence.

7. Prosecution's rebuttal evidence (not available if the defense presents no evidence).

8. Defense renews motion to acquit/ strike evidence, and reincorporates by reference the original motion to strike.

9. Closing argument, which may include an applicable discussion of reasonable doubt (e.g., the lying prosecution witness is reasonable doubt defined/personified; if you'd return home on the way to vacation to make sure the stove's not still on, that's reasonable doubt; if a cat's in a box with a mouse and later is alone all smiling, it's still reasonable doubt whether the cat ate the mouse if you find a small hole in the box (and the prosecutor's case is full of holes)).

10. If an acquittal, celebrate. If a guilty verdict, minimize the damage by fighting for the most favorable possible sentence.

11. If the judge orders executed incarceration, argue for an appeal bond, the payment of which will keep the client at liberty pending disposition of an appeal. If the judge denies an appeal bond, go to the next highest court to seek an appeal bond.

12. Have the client advised of the applicable rights to appeal, motion for retrial, and motion to reduce sentence.

October 2006