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atmosphere suggests that the goal of achieving a more representative jury at trial is realistic, defense counsel should consider bringing up jury issues early by filing motions to discover the racial composition of the jury array and to ensure that racial, ethnic and gender divisions are on the record. Counsel should also make sure that basic facts about the racial, ethnic, and gender identities of the defendant, victim, and witnesses are on the record. This puts the trial court and the prosecution on notice early that defense counsel intends to work zealously to achieve a representative petit jury.

In some situations, the best that defense counsel can hope to do with a jury challenge is to preserve a strong record to achieve reversal on appeal. In these cases, building a strong record is paramount. To do so, defense counsel must establish the group affiliation of each individual juror, the defendant, victim, and witnesses on the record. Additionally, a motion to have the prosecution's notes and materials used in the jury selection process sealed and preserved as a part of the appellate record is recommended.

MAXIMIZING YOUR POTENTIAL: THE EFFECTIVE USE OF CO-COUNSEL IN A CAPITAL CASE

BY: COURTNEY S. TOWNES

As any attorney who has defended a capital case well knows, defending a capital case is different. The severe and irrevocable nature of the death penalty places a heavy responsibility upon defense counsel. Effective representation of a client facing the death penalty requires hundreds of hours of fact investigation and legal research as well as limitless energy and staying power. In recognition of the extraordinary demands inherent in capital cases, the American Bar Association recommends that state courts assign two attorneys who are qualified for capital litigation to each individual case.¹ On the federal level, statutory law entitles a capital defendant to dual representation upon the defendant's request.² Although Virginia does not by statute require more than one attorney in a capital case, courts have appointed two attorneys to capital defendants as a matter of course.³

I. Investigation and Division of Labor

A capital case contains two trials, one deciding guilt and one deciding punishment. It is extremely important that the defense devote commensurate time and energy to both the guilt-innocence phase and the penalty trial. Striking the balance, however, is not easy, because defense performance in the guilt phase revolves around theories of innocence, defense counsel is thus inevitably less inclined to prepare for the penalty phase which follows swiftly if there is a guilty verdict. A persistent danger exists, therefore, that, notwithstanding competent counsel, penalty phase preparation will be lost in the shadows while preparing for the guilt-innocence trial. If used properly, having two counsel can enable the defense team to ensure adequate attention is paid to both the guilt-innocence and penalty phases.

Many lawyers choose to divide preparation for the two phases of the trial: while one attorney handles the guilt side, the other is responsible for conducting voir dire and preparing for the possibility of a capital sentencing hearing. Allocating the burdens by splitting the trial into two equally important mini-trials often helps the defense team ensure that preparation is proceeding on both guilt-innocence and sentencing.

Once doubled in size, the defense, charged with two sets of particularized duties, is able to gather crucial information for both phases

more effectively. Both attorneys must dive into the client's social and mental history and aggressively seek the assistance of others in order to tailor that information to the intricacies of their particular stages of the defense. Any overlap between the two phases operates as a safety net, keeping the two attorneys in close communication throughout the process.

Having two defense attorneys also increases opportunities for communication with the accused. Developing a rapport with the client is an essential tool in uncovering mitigation evidence but relationships are often difficult with the restraints of time and personal chemistry. With more time and an additional personality, a two-person defense team is more likely to get to know the client; increased rapport will also aid both attorneys in their investigation of the facts.

In addition to enabling counsel to cope systematically with an overwhelming amount of material, breaking up the mass of information into two logical parts serves two other vital functions: it allows counsel to proceed more aggressively and think thoroughly, and increases the credibility and effectiveness of the defense before the jury.

II. Strategy and Coordination of Skills

Perhaps the most overlooked assistance that co-counsel can provide is professional support and perspective. Although each attorney will be concentrating on different phases of the case, neither attorney should lose sight of the case as a whole. The two phases of trial are closely related and the guilt-innocence and penalty phases must be tightly integrated for a successful resolution of the case. Co-counsel should consult with each other on a regular basis to ensure that both lawyers are familiar enough that they could present the other side of the case if needed. Detailed communication is especially important when only one of the attorneys has significant experience in capital litigation. Moreover, while the experienced attorney can help guide the attorney unfamiliar with capital defense through the thicket of capital punishment law, the inexperienced attorney has the advantage of bringing novel perspectives to the case.

To present the most zealous defense for the client, primary counsel may want to request that the additional counsel come from another

¹ Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guideline 2.1 (1989).

² 18 U.S.C.A. § 3005 (Supp. 1996). The Fourth Circuit Court of Appeals has consistently held that the defendant must actively seek this right, however, or it will be presumed waived. Because the right is statutory rather than constitutional in nature, neither the court nor the Government need inform the defendant of this conditional entitlement. *United States v. Williams*, 544 F.2d 1215 (4th Cir. 1976); *United States*

v. Blankenship, 548 F.2d 1118 (4th Cir. 1976); *United States v. Watson*, 496 F.2d 1125 (4th Cir. 1973).

³ Failure to appoint two counsel in a capital case upon the defendant's request presents a strong claim for ineffective assistance of counsel. If a court refuses to comply with your request for the assignment of an additional attorney, the Virginia Capital Case Clearinghouse has access to motions and memoranda explaining why two defense counsel are constitutionally required in a capital case.

jurisdiction. Counsel from outside the jurisdiction (such as a neighboring county) may be the shield that local counsel needs to test the court's tolerance on sensitive issues without fear of negative consequences. For example, outside counsel may be better able to raise issues of racial discrimination by police or the Commonwealth Attorney's office or even the judge, and be more aggressive in claims of prosecutorial misconduct, thus giving the defense greater leeway in its approach to the case.

III. Maintaining Credibility in the Penalty Phase after a Guilty Verdict

Credibility is at the heart of an effective defense and, therefore, must be a key consideration in planning every capital defense strategy. The jury's first impression of the defendant is paramount. Unfortunately, because of the dual nature of the capital case, the defense must, from the very beginning, investigate the potential jurors' views about the death penalty through voir dire. The defense may lose some credibility if the same lawyer is in the odd position of having to argue the client's innocence just after asking the jurors questions about the appropriateness of the death penalty during voir dire if the defendant is found guilty. By using the attorney who will concentrate on the penalty phase to conduct voir dire, however, the defense can create a buffer between voir dire and the guilt-innocence phase of the trial.

Isolating the guilt-innocence attorney from any negative associations with the penalty phase during voir dire will thus bolster defense credibility at the guilt-innocence phase. The penalty phase will be similarly benefited. The lawyer whose argument for acquittal has been rejected at the guilt-innocence phase is likely to be completely drained. Capital cases require the defense to continue straight through sentencing, allowing no time for the defense to regroup. Instead of spending the remaining stage of the trial trying to shift gears, the guilt-innocence

⁴ If the same attorney argues at the guilt-innocence phase that the defendant is innocent and then has the defendant "come clean" during the penalty trial for mitigation, both counsel and defendant are likely to lose credibility with the jury. Juries are likely to give more latitude to the client if the defense appears to be as consistent and forthright as possible. At a minimum, a fresh face can soften the inconsistencies in the defense

attorney should assume a different role in the defense. Co-counsel, who has played a more passive role in the guilt-innocence phase, has preserved energy, focus and neutrality and is thus better prepared to present mitigating evidence to the jury during sentencing. Without that switch, it may be impossible to recover from a guilty verdict.

Jurors may also hold a single attorney to a much higher standard of consistency in the presentation of both phases of the trial. While it is always difficult for defense attorneys to synchronize post-guilt mitigation defenses with pre-verdict innocence theories so that the jury does not question the defense's sincerity, a new face in the sentencing phase may leave the effect in the jury. The split trial approach can be especially effective if the defense decides to have the defendant express remorse at the penalty stage.⁴

IV. Conclusion

Defendants are constitutionally entitled to quality legal assistance sufficient to prepare an adequate defense at trial; in the context of capital litigation, this means two attorneys must share the heavy responsibilities of representation. Capital defense attorneys can use co-counsel to tackle the amount of material before them by using the natural division between the guilt-innocence and penalty phases. Splitting the trial responsibilities according to the two phases will refine the focus of the defense attorneys involved. A more definite and manageable workload will allow for a more aggressive and attentive adversarial team. More importantly, this division may be crucial to the credibility of the defense throughout the trial. Not only might a jury be more likely not to convict, a credible defense team has a better chance of rescuing the penalty phase from the inherent prejudices against a defendant deemed guilty of a capital offense.

by having the jury's verdict acknowledged by the new counsel ("although we disagree, we accept the jury's hard work in rendering the guilty verdict"), but then explaining that the trial has now moved into a completely different set of considerations ("even if guilty, does the defendant deserve to die?").

TAKING THE OFFENSIVE: PROACTIVE USE OF THE RULES OF EVIDENCE

BY: ANGELA DALE FIELDS

Defense attorneys tend to think of the rules of evidence defensively — how do I minimize the damage? — rather than as tools for actively putting the defense case before the jury. However, the Virginia practitioner often can use the evidentiary concepts behind the Federal Rules of Evidence to take a proactive stance in defending clients in the state courts. This article looks at the concepts behind several federal rules and suggests how the rules can be creatively used to make criminal defense in Virginia more successful. While I focus on the federal rules, where possible, I have drawn parallels to Virginia evidence law. Therefore, this article is intended not only for attorneys who defend against federal prosecutions, but for the Virginia state practitioner as well. I have compiled here just a fraction of the inventive uses possible for federal law concepts in Virginia state courts. My hope is that experienced attorneys will not only use this article as a resource, but will allow it to inspire their ability to invent other ways to use federal law concepts in state courts.

I. Keeping The Government's Evidence In Context

A. Federal Rule 106

Imagine that during the Commonwealth's case, the prosecutor introduced only the incriminating portions of your client's written statement. You knew that, read as a whole, the statement was exculpatory. But by the time your case-in-chief is heard and the exculpatory parts of the statement are finally read, the jury may have decided upon your client's guilt. Persuading the jurors that there is another side to the story will be difficult. Fortunately, Federal Rule 106 provides a more palatable option than waiting your turn: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded