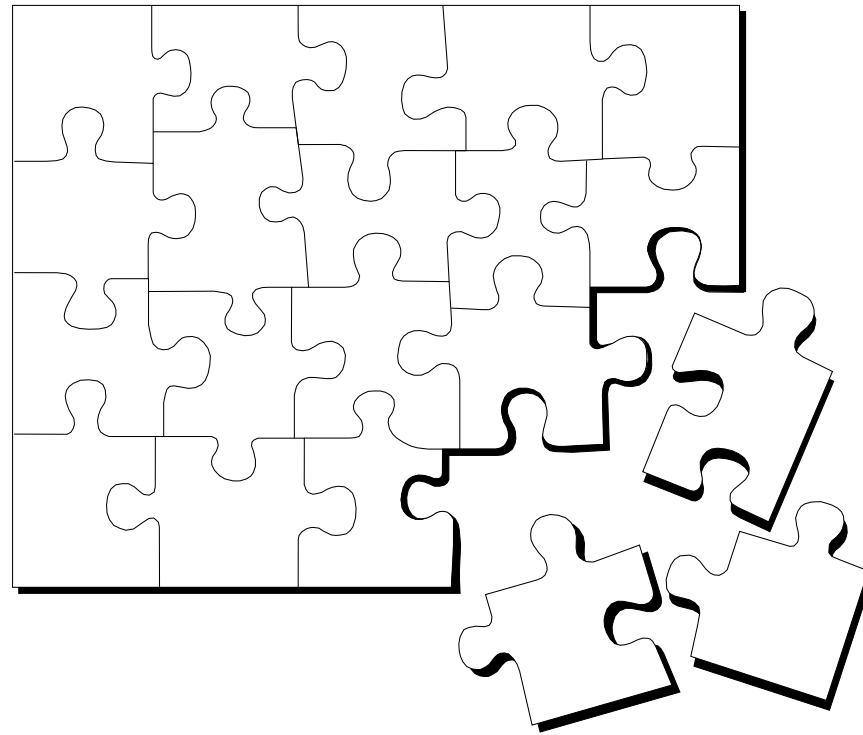


Making a Winning Record

Chuck Sevilla



No record means



"I'll work on the appeal. You try to escape."

Reconciliation Trial v. Appeal

Jenner's Rules

- Trial lawyers are surgeons; appeal lawyers are coroners
- Mutual object: save the patient (client)
- Record preservation is **not** incompatible with jury persuasion
- Approach: anticipatory objections & motions

Anticipatory Motions

Pre-trial Motions & In Limine-- the obvious

- Confessions, stop, search & seizure
- Priors (constitutionality)
- Challenging their evidence
- Proffers of your evidence (e.g., breath exp)
- Anything you want resolved prior to trial

Tough to make a record



E.g. the quest for a speedy resolution

- Counsel: Judge, may I be heard on the matter of bond on appeal and a stay of execution of the sentence?
- Court: Yes, denied.

Tougher yet

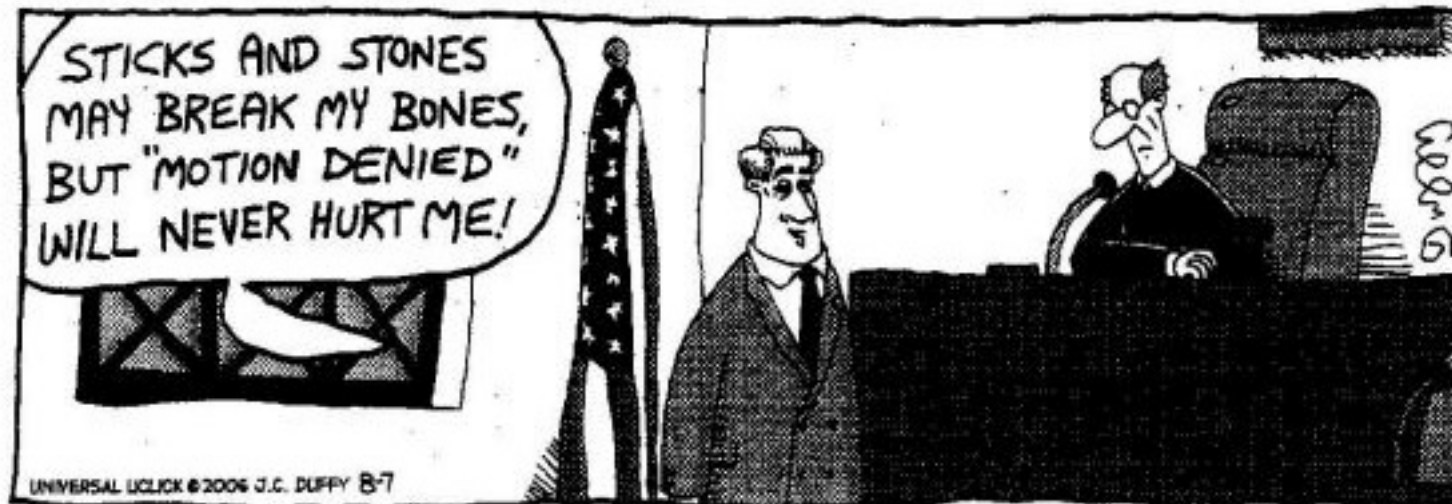
E.g., the limits of justice



- Counsel: But this case calls out for justice.
- Court: Everyone receives justice in this court.
- Counsel: But this case cries out for additional justice.
- Court: I'm sorry counselor, we're all out of additional justice. We used it up on the morning calendar.

But: No Harm in Motions

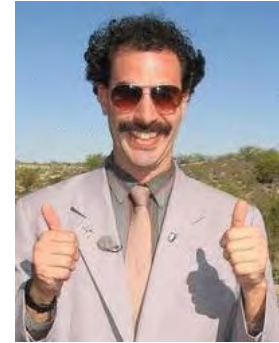
The Fusco Brothers by J.C. Duffy



UNIVERSAL UCLICK © 2006 J.C. DUFFY B-7

Record Making

Via Motion Practice



- It's what makes the practice fun
- It's the chance to be creative and forge new law or practice techniques
- Most important, it's what serves the client by preserving issues and federalizing

Don't take crap!

Remember: today's "frivolous" issue is tomorrow's Mapp,
Miranda, Furman, Crawford, Apprendi

- Bailey issue on gun use and drugs
 - Bailey v. United States (1995) 516 U.S. 137

- Bousley v. U.S. (1998) 523 U.S. 614

Issue held forfeited: issue was not "futile" to raise earlier because it was "being raised" by others even though losing in every single venue before Bailey

Think About the Record Immediately

Pre-trial Motions: what they do

- Win important legal points
- Force resolution of issues to prepare, focus and develop your theory of the case
- Educate the judge
- Preserve record and protect the client
 - **Mantra Motion** www.charlessevilla.com/publications
 - **Gain respect of your opponent & the court**
 - **Keep the system honest by adversarial testing**

E.g., Motion to Foreclose Retrograde Extrapolation

By Darryl Genis

- "mathematical calculation used to estimate a person's blood alcohol level at a particular point in time by working backward from the time the blood [sample]"
- Variables: mental State, amount of food in the stomach (as opposed to type of food), Drinking patt, start and stop times of first and last drink, average alcohol absorption rate

E.g., Okorie Okorochoa Motion re Blood Fermentation Defense

2 days w/o testing unrefridgerated with sodium flouride

- Means microbial growth
- Means ethanol byproduct



Caption it: **“Motion for Fair Trial”**

Then if you lose.....

VOL. CXLIV....No. 50,427

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FRIDAY

One Dollar

NEW YORK TIMES

“All the News That’s Fit, We Print.”

JUDGE DENIES MOTION FOR FAIR TRIAL!

**DEFENSE COUNSEL ARE
SHOCKED AND VOW TO
APPEAL.**

MONTEREY: In an abrupt order which came as a shock to everyone in the court room, Judge Yulburton Abraham Knott denied the defense motion for a fair trial in the case of

sounds of hip-slapping and switch pulling. It was the best music I heard all night.

Second -- a first in Broadway theater -- the immaculately dressed middle-aged woman seated directly in front of me and draped in green (you know who you

the slightest interest in doing so.

It begins with Sam Spade. Second -- a first in Broadway theater -- the immaculately dressed middle-aged woman seated directly in front of me and draped in green (you know who you are, madam) brought her pet chimpanzee to the

Fundamentals

Discovery Motions

- 1. Protect the record
- 2. A basis for sanctions
- 3. Institutionalized violations of § 1054 in San Diego (no prosecutor assigned until 2 weeks prior to trial or less)
- Brady: move for the DA/CA attorney office policy on Brady; see the LA DA scandal.

Fundamentals

E.g., Why discovery motions help with sanctions

- The prosecutor coughs up the expert report
- At trial, if their expert expands upon his report, move to strike it

Brady Applies to Suppression

Get Discovery Pre-1538.5

- U.S. v. Barton (9th Cir. 1993) 995 F.2d 931, 935
- Magallan v. Superior Court (People) (2010) 192 Cal.App.4th 1444: defense entitled to pre-preliminary hearing discovery for PC § 1538.5 motions. Due process right to pre-prelim discovery.

Fundamentals in Trial

Object, Object, Object



- Object timely and properly:
 - ▶ Legal ground; directed to identifiable evidence
- Get **rulings** from the court
- Get significant issues, statements, concessions, proffers **on the record**
- first trial objections don't carry over

Fundamentals in Trial

Making the Record

- Use offers of proof to make a record of evidence the court excludes
- React to surprise evidence: exclude/continue
- Don't concede: argue the point
- If you say "submitted"--put this in writing:
 - ▶ It's not that you concede, but only that the issue is ready for the court to rule

Fundamentals

Taped or Transcribed Records Have Sensory Limits

- The record on appeal does **not** see, smell, hear, or measure distances
- “May the record reflect...”



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“Sorry, the attorney failed to federalize your issues”



Federalize Does Not Mean

- No objection
- “I object!” “I strenuously object!”
- “This is outrageous!”
- “EC 351, 352.”
- “This denies my client a fair trial!”
- “It's unconstitutional!”
- “This violates his state constitutional right to due process of law under article I, sections 7 & 15 of the California Constitution.”



Vangelder and Bad Breath

- **People v. Vangelder** (2011) *pending in Calif Supreme Court, formerly at 197 Cal.App.4th 1* (reversing DUI conviction for trial court's erroneous exclusion of expert testimony that breath machines inaccurately measure breath alcohol.)
- Are you raising this issue? Why not?



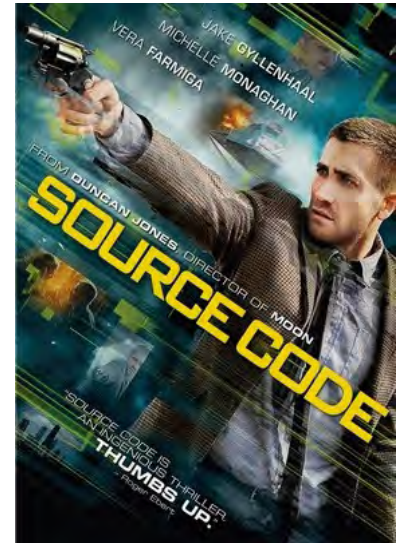
Setting Up the Issue

Breath Tests Are Unreliable

- Declaration from Expert with CV, stating
- Test does not test alveolar air (Title 17 viol.)
 - **and** does not accurately measure breath alcohol
- Add Dr. Hlastala's peer reviewed studies (file them with the expert declaration)
- State v. Cooperman (2012) 282 P.3d 446, 641 Ariz. Adv. Rep. 14 (Arizona appeals court agrees to admit testimony on the point)

Source Code Discovery

- “Here the defense expert was detailed in explaining the existence
- of a series of software errors in breath machines similar to the Intoximeter, defense counsel elicited uncontroverted testimony demonstrating that breath test machine software can fail producing inaccurate results or results outside parameters set by regulation.”



- Access to Intoximeter's source code will provide defendant a **critical opportunity to probe the device's processes for errors** affecting his client's blood-alcohol result. The defendant has, therefore, demonstrated materiality and necessity supporting issuance of an SDT for Intox's records custodian to come to court with the Intoximeter's source code. **The integrity of the source code is central to reliability and the accuracy of the Intoximeter's reported results.**

Source Code Suggestions

This can get expensive

- Proffer the transcript in the Hendrickson hearing where Thomas Workman testified.
- Add the resulting 20 page order of Judge Rubin granting the subpoena for the source code.
- Importance of a record: “home towned” in Mo.

Source Code Discovery

US v. Budziak, 2012 WL 4748704 (9th Cir. Oct. 5, 2012)

- “The district court should not merely defer to government assertions that discovery would be fruitless. While we have no reason to doubt the government's good faith in such matters, **criminal defendants should not have to rely solely on the government's word** that especially so where, as here, **a charge against the defendant is predicated largely on computer software functioning** in the manner described by the government, and the government is the only party with access to that software.” Held: abuse of discretion to deny disc.

No Judicial Obstruction to Record Making

- Court not letting you make your record (Grant Cooper contempt case)



- “Since it is the lawyer's duty to make his objections and other points in his client's behalf, it must follow that **he is entitled to a timely opportunity to make them**. From this it necessarily follows that the judge is **without power** to foreclose that opportunity by any order or admonition to sit down or to be quiet or not to address the court. The power to silence an attorney does not begin until **reasonable opportunity for appropriate objection** or other indicated advocacy has been afforded.”

Cooper v. Sup. Court ('61) 55 Cal.2d 291, 298

Record of the State's Investigative Misconduct

Relevance of sloppy police work

- "when . . . the probative force of evidence depends on the circumstances in which it was obtained and those circumstances raise a possibility of fraud, indications of conscientious police work will enhance probative force and ***slovenly work will diminish it.***"

Kyles v. Whitley, 514 U.S. 419, 446, n. 15 (1995).

Don't Let Court Rules Block You

Hall v. Superior Court (2005) 133 Cal.App.4th 908

- “I wasn't aware this was a rule of this court. Has it been put through the requirements of

133 Cal App. 4th 908

Code of Civ. Pro. § 575.1

Gov. Code § 68070

Gov. Code § 68071

Rule of Court 10.613?

- I thought not.”



Clerk's Can't Stop You

From Adding to the Record

- Voit v. Sup.Ct (2011) 201 Cal.App.4th 1285.
- “If a document is presented to the clerk’s office for filing in a form that complies with the rules of court, **the clerk’s office has a ministerial duty to file it...** Even if the document contains defects, the clerk’s office should file it and notify the party that the defect should be corrected.”

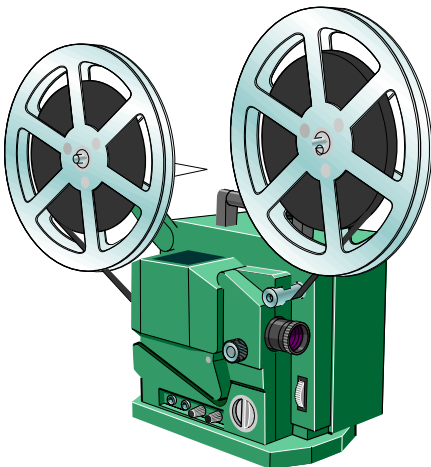
Dealing With DA Misconduct

See lengthy paper at www.charlessevilla.com/publications

- **People v. Higgins** (2011) formerly 191 Cal.App.4th 1075; 119 Cal.Rptr.3d 856 (reversed defendant's convictions of burglary and ADW with a gun based upon a finding of pervasive prosecution misconduct which included, among the many errors, improperly undermining the credibility of the defendant, his counsel and his expert witness, *depublished*)

Dealing with tape/videotapes

- Get, watch, listen, **transcribe**
- Analyze the tapes for redaction, *e.g.*,
 - Accusations, opinions, credibility, undue prejudice
- Look for Crawford issues
- Videos may not be for jury deliberations



That's All Folks

