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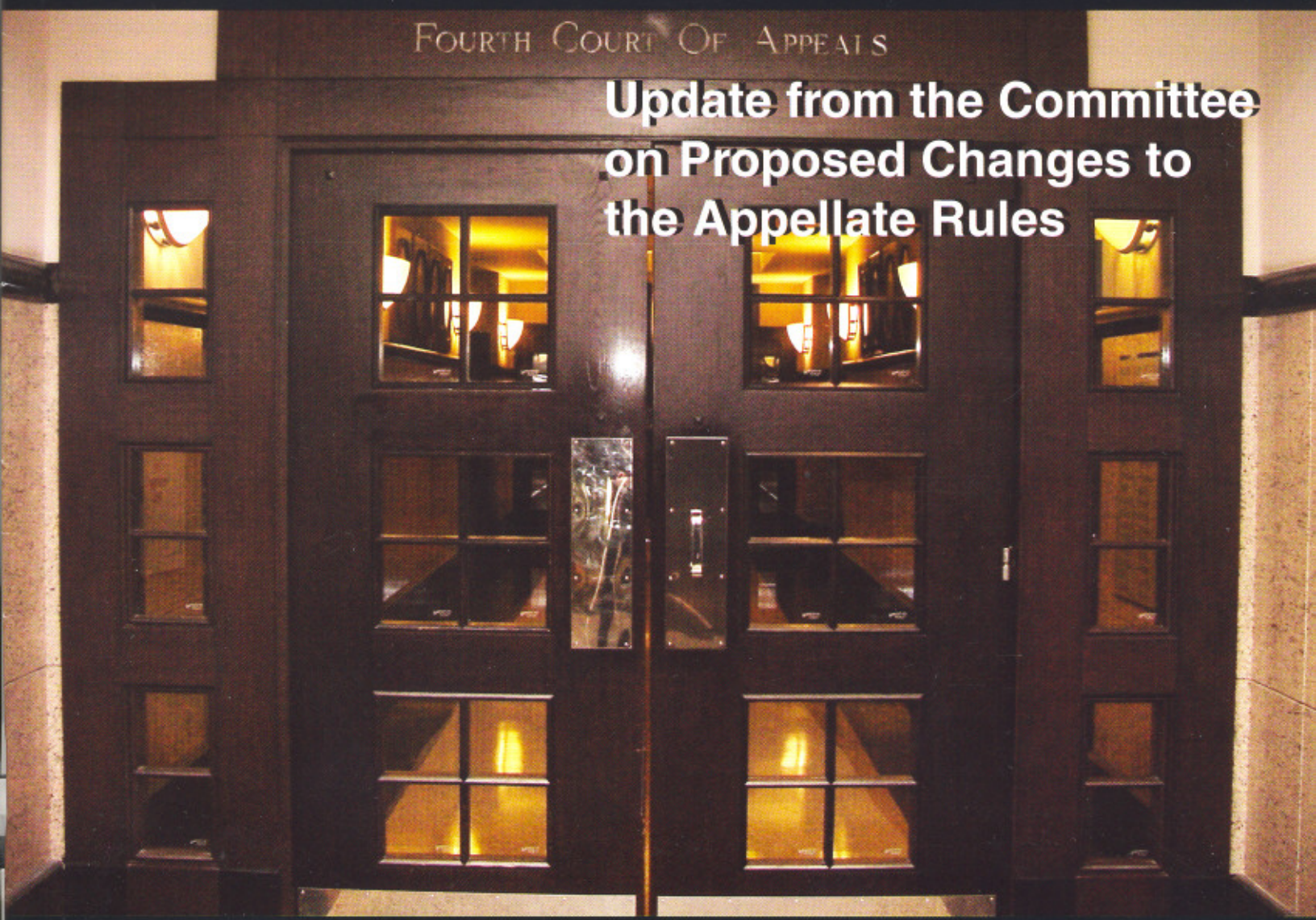

Update from the Committee on Proposed Changes to the Appellate Rules

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To Spill It, Or Not:
A Common Dilemma

by Mark Stevens

The dilemma.

Let's say that you know something about your case - legal or factual - and you believe that it absolutely wrecks the prosecution. The indictment charges the wrong crime. The defendant has an airtight alibi. Your client does not own a dog. Whatever.

Do you share your knowledge with the prosecutors before trial so they will do the "right" thing and dismiss your case? Do you spill your perfect defense early?

Or do you lay behind the log? Do you hold back your silver bullet until it is your turn to put on evidence at trial, fearing that if you bring the deficiency to their attention early on, the prosecutors will not dismiss the case, but just cure the problem?

All experienced criminal lawyers have confronted this dilemma. To spill or not to spill; that is the question. Unfortunately ñ but not surprisingly ñ there is no easy answer that applies in every situation. That's why we get the big bucks. Recently, though ñ in a single day ñ I heard two stories from two different lawyers that reminded me of this recurring problem, and I thought a discussion might be useful.

The rookie experiences harsh reality.

In the first case the lawyer was brand new to criminal defense. The information charged her client with assaulting his wife, Mary Jones, except that his wife was really named Sue Smith. The lawyer went right to the prosecutor with this discrepancy and told him that he should dismiss since he could not prove his case. The prosecutor did not dismiss, though. To the contrary, instead of being grateful, the prosecutor was surly, telling the defense lawyer that there was no problem, that he would just amend the information. When she pointed out the objections she would raise to an amendment, he became even more hostile and told her that he would just dismiss the case, refile it with the complainant correctly identified, and then ask the judge to set a higher bond on the refiled case.

With the benefit of hindsight the young lawyer's mistake is apparent. Although there was some chance this disclosure might cause the case to be dismissed and not refiled, most experienced lawyers would not be surprised at the prosecutor's response.[1] It seems to me the defense would have fared better by not tipping the prosecutor off. Instead, she should have said nothing, letting the trial commence and proceed to the point where the complainant took the stand and identified herself as Smith and not Jones. After that, the only proper response from the court would be to grant a motion for instructed verdict.[2]

Hopefully, this new lawyer learned a valuable lesson. Rarely should we expect prosecutors to roll over and play dead at the first sign their case is in trouble. Like it or not, this work we do is very competitive. If you tell your competitors what is wrong with their case and give them time to fix it, don't be surprised when they do, and then proceed apace with the prosecution of your client, who now has one less defense than before.

The old pro tries his hand.

Although we might criticize the young lawyer's judgment, it is easy to see how it happened. We all like to be smart, and it is always tempting to show just how smart we are by exposing our opponents's weaknesses. It is also tempting to try and derail the prosecution early, before trial, when you compare the few minutes it takes to do this with spending two or three days or more fighting before a jury. And it is certainly true that, while perhaps rare, most of us have

had cases dismissed and never refiled just by telling the prosecutors about their problems up front.

So it is understandable that the tendency to spill prematurely is not confined to rookies. In the second case I heard about, the lawyer was a respected and experienced member of the defense bar. While diligently preparing for trial he came to believe that the substance that the state had charged his client with illegally possessing was not, in fact, listed in the Texas Controlled Substances Act. The lawyer properly retained an expert chemist who wrote a letter confirming that the substance named in the indictment
was not listed in the Act, *per se*. The letter also disclosed, though, that the substance possessed was very similar to another substance that *was* listed in the Act.

In this case the lawyer announced ready for trial, but before the trial began, he spilled. Specifically, he went to the prosecutor and told him he should dismiss, and even gave him a copy of his expert's letter. The prosecutor did not at first agree to dismiss, but instead asked the judge for two hours to consider his options. At 11:00 a.m., the prosecutor returned to court, and very begrudgingly submitted his motion to dismiss. A few weeks later he reindicted the defendant. The prosecutor concluded that, although the defense was right that the substance possessed was not itself named in the Controlled Substances Act, it was an "analogue," because it had a "substantially similar" chemical structure to a listed substance. Under Texas law, as it turns out, it is unlawful to possess not only listed substances, but also their analogues.[3] To add insult to injury, after reindicting the defendant, the prosecutor advised that he intended to use the letter the defense had given him, written by the defense's chemist, to help prove that the substance possessed was an illegal analogue. Talk about ugly. Eventually the defendant pleaded guilty to possessing the analogue and, fortunately for everyone, received deferred adjudication.

Perhaps the lawyer would still make the same disclosure if he had the situation to do over again today. Wouldn't it have been smarter, though, to hold the letter back? Let jeopardy attach. Permit the prosecutor to blunder forward and prove that the client possessed something not proscribed by Texas law, and not, at that time, alleged in his indictment. When the state failed to prove a violation of the law, the defense would request an instructed verdict and win an acquittal that would protect the defendant from future prosecution.[4]

The "right" thing.

When our opponents do something different from what we want, we defense lawyers are quick to accuse them of not doing the "right" thing. I do it all the time. And that is exactly what our two colleagues did. They were positively outraged when the prosecutors met their requests for dismissals with new and improved charging instruments.

Although a challenge to our adversary's ethics is sometimes well taken, it is not always fair. Why, for example, is it necessarily the "right" thing for a prosecutor, whose job, after all, is to prosecute, to dismiss a case just because the wrong person was named in the complaint? Or because their chemist failed to recognize that the substance in question was an analogue?

Don't get me wrong, now. In both such cases, the defense lawyer is duty-bound to exploit those prosecutorial mistakes, and I myself am always ready to do it. In neither of the cases, though, was the defendant actually innocent of a crime.[5] Shouldn't we expect diligent prosecutors, who take their jobs as seriously as we do, to want to fix merely technical problems with their cases, so that they can punish people they believe guilty? Although we should all be outraged when innocent persons are prosecuted, there is nothing unethical about a prosecutor who corrects his mistakes in order to better convict someone he believes really guilty. The only problem then is when we, whose duty it is to defend, are the ones who help correct the mistakes.

When you have to spill early.

To be sure, it is sometimes smart, and occasionally necessary, to spill early. At least three types of cases come to mind.

First, sometimes the law prevents you from

laying behind the log. Years ago we could complain about fundamental errors in a charging instrument for the first time on appeal. So, for example, if you discovered that the indictment failed to contain the formal language, "In the name and by authority of the State of Texas," you could remain silent, try your case, and, if you lost, you could successfully complain of that omission for the first time on appeal. In 1985 the legislature effectively sealed this loophole by enacting article 1.14(b) of the Texas Code of Criminal Procedure. Now, if we do not object before trial to defects in charging instruments we forfeit our right to do so later. Although this statute covers a large variety of pleading errors,[6] it would not have required the defense in either of our two cases to complain early. Clearly, our job as defenders requires us to distinguish those cases in which our defenses must be exposed from those in which it need not be.

Second, sometimes the defect you expose is incapable of cure. For example, if my client was charged with carrying a knife that was illegal because its blade was over five and one-half inches long, and I knew that the blade was in fact only five inches long, I would certainly tell the prosecutor this as soon as possible. I would want to make sure that I measured the knife, correctly, of course, and that the knife was not illegal for some other reason.

Third, very rarely prosecutors will let us know ñ sometimes subtly, sometimes expressly ñ that they do not want to try the case and that they would like an excuse to dump it. I have had prosecutors beg me to give them a good reason to dismiss. When I get that message ñ and for me a subtle message is never enough ñ and when I trust the prosecutor completely, I will tell them why they should dismiss, even if it means fronting my silver bullet. For me, this is done only in the rarest of circumstances, though.

Is there a lesson here?

Notwithstanding the preceding section, the older I get, the less-inclined I am to front my defenses any earlier than I have to. This is true despite the number of times I have had prosecutors come to me after I did present my defense and ask me: "Why didn't you tell me that before trial? We could have saved a lot of time." Unfortunately, experience tells me that more often than not ñ in fact, almost invariably, it seems ñ the prosecutor's response is not to dismiss, but to take the information provided, cure the problem, and go to trial. And win. Call me cynical, I guess, but I prefer that to foolish.

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FOOTNOTES

[1] Well, at least part of the prosecutor's behavior was predictable. Only the more hardened among us would have expected a request for a bond increase. I nominate this prosecutor for "horse's ass" of the year.

[2] If the complainant did identify herself at trial as Smith, not Jones, the defendant would be entitled to a verdict of not guilty. And if this happened after jeopardy attached, the defendant clearly could not be retried for the "same offense." See Tex. Code Crim. Proc. Ann. art. 1.11. Might a clever prosecutor try to argue that, since the defendant was acquitted only of assaulting Smith, jeopardy would not rpeent a subsequent trial for assaulting the true complainant, Jones? I don't know what the case law would say about this, but I can say that, in the real world, I have never seen a reprosecution under similar facts.

[3] *See* Tex. Health & Safety Code Ann. § 481.106.

[4] Or would it? Would a clever - and a persistent - prosecutor argue that the acquittal only barred a subsequnt prosecution for the same substance, and that a prosecution for the analogue would not be jeopardy-barred? *See* note 2.

[5] I am assuming for the purposes of this discussion that these defendants were otherwise uilty, and that their only defenses were the technical ones mentioned. Of course, i have no idea whether they were actually guilty or not.

[6] *See generally Studer v. State*, 799 S.W. 2d 263 (Tex. Crim. App. 1990); *but cf., Cook v. State*, 902 S.W. 2d 471, 480 (Tex. Crim. App. 1995) (a charging instrument that fails to name the defendant is not an "indictment" and therefore may be challenged for the first time on appeal).