

NEBRASKA CRIMINAL DEFENSE ATTORNEYS ASSOCIATION
3rd ANNUAL CRIMINAL DEFENSE BOOT CAMP
AUGUST 2-3, 2018
Creighton Law School

*Approved by the Nebraska MCLE Commission for 11.5 hour of General MCLE Credit, including
1.0 hours of Ethics, Activity Number*

Day One – August 2, 2018

8:00 – 8:20

Registration

8:20 – 8:30

Opening Remarks

8:30 – 9:15

Retaining Clients and Getting Paid

A. Retainer Agreements

1. Written vs Oral
2. Flat Rate vs Hourly Rate vs Trust Account vs Contingency Fee
 - i. DUI Cases
 - ii. Misdemeanor Cases
 - iii. Felony Cases
 - iv. When Parents Pay for their Adult Children
 - v. Bond Assignments
 - vi. How to Determine / Set Rates
 - vii. What Do I Do With My Money?
 1. Trust Account Requirements (ethical/reporting)
 2. When / How to Refund Client
 - viii. Cannot use Contingency Agreements in Criminal Cases
 - ix. Even with Flat Fees, keep track of time/expenses

B. State Court Appointments

1. Qualifications
 - i. How Do I Get on the Court Appointment Lists?
 - ii. Billing Requirements – Electronic Fees, Requesting Payment for Experts, Depositions, Court Reporters, What Office Costs Are / Are Not Allowed, How Often You Can Bill the Court, Interim Fees When a Client Goes AWOL
2. Douglas, Sarpy, Lancaster Counties
 - i. Juvenile Courts
 1. GAL
 - a. For Juveniles and Parents
 - b. GAL CLE Requirements
 2. Counsel for Juveniles
 3. Counsel for Parents
 - ii. County Court

1. Criminal
2. Probate
- iii. District Court
 1. Felonies
 2. Special Prosecutors
3. Other Counties in Nebraska
- C. Federal Court Appointments / CJA Panel
 1. Qualifications
 - i. <http://www.uscourts.gov/rules-policies/judiciary-policies/criminal-justic-act-cja-guidelines>
 - ii. John Cambridge, Administrator
 2. How to Apply
 3. Mentoring
 - i. Non-Capital Cases
 - ii. Capital Cases
 4. Billing Requirements
 - i. <http://www.uscourts.gov/forms/cja-forms>
 - ii. New Electronic Filing of Fee
 - iii. Requesting Expert, Investigative Services, Interim Fees

9:15 – 10:15

Meeting Clients – The Client and His Posse

- A. Conflict Checks
 1. Client
 2. Witnesses
 3. Co-Defendants
 4. Alleged Victim(s)
- B. Ethical Considerations in Speaking with Clients
 1. Initial Meeting
 - i. Client Wants to Tell You “What Happened”
 - ii. Client Wants to Tell You They Did / Did Not Do It
 1. Do I Want to Ask; Do I Want to Know?
 2. Subsequent Meetings
 - i. When Should I Get Client’s Side of the Story?
 - ii. Client Wants to Give You Evidence
 - iii. Client Wants to Contact Witness / Alleged Victim
 1. No Contact Orders
 2. Tampering With Evidence/Witness
- C. Ethical Considerations in Speaking with Client Posse
 1. Initial Meeting
 - i. They Want to Tell You “What Happened”
 - ii. They Want to Tell you How Innocent Your Client Is
 1. Do I Want to Ask; Do I Want to Know?
 2. Subsequent Meetings
 - i. When Should I Get Their Side of the Story?
 - ii. They Want to Give You Evidence

- iii. They Want to be a Character Witness At Trial
- iv. They Want to Contact State's Witness(es)
 - 1. Tampering With Evidence
- D. Ethical Considerations in Speaking with Alleged Victim
- E. Getting Client Out of Jail
 - 1. Bond
 - i. Purpose of Bond
 - ii. Bail Reduction Hearing / Remove No Contact or Other Condition of Bond
 - 1. State Court
 - 2. Federal Court

10:15 – 11:00

Rights of Clients versus Attorney

- A. Rights of Client
 - 1. What Plea to Enter (Not Guilty / Guilty)
 - 2. Whether to Accept Plea Offer
 - 3. Whether to Waive Jury
 - 4. Whether to Testify at Trial
 - 5. Whether to Appeal
- B. Rights of Trial Counsel
 - 1. Trial Counsel is in Charge of Trial Strategy
 - i. Trial Counsel is Afforded Due Deference to Formulate Trial Strategy and Tactics, and When Reviewing a Claim of Ineffective Assistance of Counsel, an Appellate Court Will Not Second-Guess Reasonable Strategic Decisions by Counsel
 - ii. Defense Counsel is Entitled to “formulate a strategy that was Reasonable at the Time and to Balance Limited Resources in Accordance with Effective Trial Tactics and Strategies.” *Harrington v. Richter*, 131 S.Ct. 770 (2011)
 - 2. Discovery / Investigation
 - i. How to Get
 - 3. Decision to Call Witnesses at Trial
 - i. The Decision to Call, or Not to Call, a Particular Witness, Made by Counsel, is a Matter of Trial Strategy, Even if that Choice Proves Ineffective, and Will Not, Without More, Sustain A Finding of Ineffectiveness of Counsel
 - 4. Mode of Examination / Cross-Examination of Witnesses, Including Right to Not Cross
 - 5. What Juror to Accept or Strike
 - 6. What Pretrial Motions to Make
 - 7. What Evidence to Introduce
 - i. Objections to Evidence

11:00 to 12:00

Investigating the Case

- A. Investigation – A Defense Attorney has a Duty to Make Reasonable Investigations or to Make a Reasonable Decision that Makes Particular Investigations Unnecessary
 - 1. Watch / Listen to All Recordings
 - 2. Read All Reports
 - 3. Contact Main Witness(es)
 - i. Hostile
 - ii. Helpful
 - iii. Cops
 - 4. Use Investigator
 - i. Locate / Interview Witnesses
- B. Decision to Conduct Expert Testing
 - 1. Obligated to Perform as a Lawyer Possessing Ordinary Training and Skill in the Criminal Law Should Have Performed
 - i. Know What the Basis of Testing Is
 - 1. Familiarize Yourself with Testing Protocols
- C. Motion Under Neb. Rev. Stat. § 27-706
 - 1. The Court of Any Party May Motion For Any Type of Expert Witness To Be Appointed to Assist the Defendant
 - i. Even if Privately Retained
 - 2. In Order to Ensure That the Right to Effective Assistance of Counsel Does Not Become a Hollow Right, it is the Duty of the State Not Only to Provide an Indigent Defendant with an Attorney, But Also to Provide the Lawyer With the Appropriate Tools and Services Necessary to Provide a Proper, Competent, and Complete Defense. *State v. Quezada*, 834 N.W.2d 258 (2013)

12:00 – 1:00

Lunch

1:00 – 1:30

Discovery

- A. Reciprocal Discovery
- B. Copies of State's Evidence
 - 1. Does Defendant Have a Right to Get / Review
 - 2. Does Family Have a Right to a Copy?
 - 3. Audio / Video Recordings
 - 4. Viewing Child Porn Evidence in Federal / State Cases
 - 5. Child Advocacy Center Interviews
- C. Depositions
 - 1. Who Pays for It?
 - 2. Experts – Who Pays for Their Time?

- i. Motion Under Neb. Rev. Stat. § 227-706
 - 3. Defendant Has a Right to Attend
 - 4. Place / Manner / Mode
 - i. Closed Circuit TV so Defendant Can Watch
- D. Interrogatories
- E. Subpoenas
 - 1. Who Pays for It?
- F. Motions to Inspect
- G. Motion to Conduct Testing

1:30 to 2:30 **Pretrial Motions**

- A. Defendant's Motions
 - 1. Temporary Custody Orders (TCO)
 - 2. Motion for Discovery
 - i. Does Defendant Have a Right to Review?
 - 1. Names/Addresses/Personal info of Witnesses
 - 3. Motions in Limine
 - 4. Bill of Particulars
 - 5. Change of Venue
 - 6. Motions to Suppress
 - i. Evidence
 - 1. Warrantless
 - 2. Warrant
 - a. *Franks* Hearing
 - ii. Statements
 - iii. Line Up
 - iv. Witness Identification
 - v. Should My Client Testify at a Motion to Suppress?
 - 7. Speedy Trial
 - i. Constitutional
 - ii. Statutory
 - 8. Motion to Withdraw
 - 9. Motion to Continue
 - 10. Notice Motions
 - i. Alibi
 - ii. Mental Defect
 - iii. Unconstitutionality of Statute
 - 1. On its Face
 - 2. As Applied
- B. Usual Prosecution Motions
 - 1. Motion to Endorse Additional Witnesses
 - i. Prior to Trial
 - ii. During Trial
 - 2. Motion to Amend Information
 - i. Prior to Trial

- ii. During Trial
- 3. Motion for Joinder or Severance of Charges / Defendants

2:30 – 3:15

Plea Negotiations and Offers

- A. Client has a Constitutional Right
 - 1. Attorney Must Relay to Client if an Offer is Made
- B. How
 - 1. Prosecution First
 - 2. Defendant First
 - 3. In Writing?
 - i. Federal Courts
- C. Why Enter?
 - 1. Guilty vs No Contest (Nolo Contendere)
 - i. No Contest
 - 1. Defendant Neither Admits Nor Disputes the Charge but is not Contesting the Charge. The Court Will Then Listen to Factual Basis of Prosecution and Accept the Plea. Will Have Same Legal Effect as Guilty Plea Except in Civil Trial
 - 2. Legal Purpose is that this Plea Cannot Be Used as an Admission of Guilty in a Civil Trial
 - 3. Some Judges Allow and Some Do Not
 - 2. Save Money on Legal Fees
 - 3. Get Out of Jail
 - 4. Resolves Matter
 - i. Avoids the Hassle
 - ii. Bail Conditions – No Contact Orders
 - 5. Less Serious Offense on Record
 - i. Felony vs Misdemeanor
 - 6. Less Socially Stigmatizing Offense
 - i. Domestic Violence Assault vs 3rd Degree Assault
 - 7. Keeps People from Having to Testify
 - 8. Make Sure you Note Reasons
- D. Collateral Effects
 - 1. Immigration Issues
 - 2. Sex Offender Registration Act (SORA)
 - 3. Gun Ownership
 - 4. State May Request Civil Commitment After Serving Criminal Sentence
- E. Manner
 - 1. Court Will Ask How Client Wishes to Plead
 - i. Client Can Withdraw Prior to Sentencing
 - 2. Court Will ask Questions to Make Sure Client is Knowingly, Intelligently, and Voluntarily Making the Plea

3. Will Tell Client that s/he is Giving Up All Rights Except Right to Counsel and Right to Appeal
4. Court Will Normally Ask Client if They Have Had Enough Time to Talk to Their Attorney and Whether They Understand the Nature of the Plea. Some Ask Whether They Are Happy with Attorney Advice and Counsel
5. Will Then Get Factual Basis From County Attorney
 - i. If No Contest Plea, Court Will Not Ask Defendant to Address Factual Basis
6. Will Then Accept Plea

3:15

Closing Remarks and Preview of Day Two

Day Two – August 3, 2018

8:00 – 8:20

Registration

8:20 – 8:30

Review and Opening Remarks

8:30 – 9:15

Jury Selection / Jury Instructions / Jury Deliberations and Questions / Jury Verdicts

A. Jury Questionnaires

1. Lancaster County
2. Other Counties
3. Supplemental Questionnaires

B. Jury Instructions

1. It is the Black Letter Law
 - i. Should ID Issues for Jury and What Law Applies
 - ii. Done Early in Case – Helps Define Your Theory
 1. Help You Determine What Facts Are Important on the Law
2. Keep Them Clear and Concise
3. Model Jury Instructions
 - i. Nebraska Jury Instructions
 - ii. United States Federal Public Defender Website
 - iii. NCDAA Website (if member)

C. Always Submit. It's a Pleading, Not an Exhibit

1. Biggest Issue for Appeals

D. Motion to Sequester Jury

1. During Trial
 - i. Discretionary With the Court
 - ii. Need to Show Prejudice to Defendant
 1. Pretrial Publicity
 2. Evidence Needed
 - a. Anthony Garcia Case
 - i. Poll Taken
 1. Still Not Enough
2. During Deliberations
 - i. Defendant has Absolute Right to Have Jury Sequestered During Deliberations
 1. They Can Leave When Not Deliberating

E. Verdict

1. Form
2. Polling the Jury

9:15– 10:30

Trial Procedure

Suggested Book: Win Case at Two Places – Opening Statement and Cross-Examination by F. Lee Bailey

I. Voir Dire

1. What is?
2. Have Voir Dire Taken Down
3. Establish theme for the Defense through anticipated jury instructions
 - A. Self Defense
 - B. Insanity or other affirmative defense
 - C. Failure of proof as to a material element
4. Can't elicit promises to vote in a certain way if the evidence shows
5. Follow the Court of Life vs. Rules in the Court of Law
 - A. Who actually believes in the presumption of innocence?
 - B. Why is the charge not evidence?
 - C. Why are we here then?
 - D. Then how can the presumption of innocence be evidence?
 - E. Shouldn't the Defendant have to tell his side of story if he is going to ask for an acquittal?
 - F. Burden of Proof
6. Challenges of Cause
 - A. Bias in the "pool"
 - B. After you get the Juror to state they cannot be fair and impartial, you ask the Court to move the Juror for Cause
7. Preemptory Challenges
 - A. Don't pick a jury
 - B. Select who won't be on the jury
 - C. The jury is who is left-over
 - D. *Boston* Challenges- An objection to the validity of a preemptory challenge, on grounds that the other party used it to exclude a potential juror based on race, ethnicity, or sex

II. Opening Statements

1. Make sure they are transcribed.
2. Prosecution
 - A. Make Sure State Does Not Talk About Defendant Testifying
 - B. Make Sure they do not Argue their Case
3. Defendant
 - A. Can Waive or Delay
 - B. Good Opening Line
 1. State Says "Represents People".
 2. We Do, Too – 1 Client at a Time
 - C. Should Reflect the Anticipated Closing
4. Theme

III. State's Presentation of Evidence

1. Objections
 - A. To Do or Not To Do – That is the Question!
 - B. Don't Object just because you can

- C. Make sure only for
 - 1. Establishing Foundation
 - 2. Keep out Inadmissible Evidence/Opinions
 - 3. Scientific Foundation not Established
 - 4. Preserve Pretrial Rulings on Motion to Suppress, In Limine, etc.
 - i. Establishing a Record
 - ii. Watch for Mistrial Issues
- D. Not Be Afraid to Ask But
 - 1. Be Careful What you Wish For
- E. Motion to Dismiss at End of State's Case – Always Do

“The Defendant moves to dismiss on the ground that the state has failed to adduce sufficient evidence on each of the material elements of the offense was guilty of the offense charged, beyond a reasonable doubt”

--- If there is a specific defect, argue it.

IV. Defendant's Presentation

- 1. Do I Call Any Witnesses
 - A. Insufficient evidence as a matter of law
 - B. Preserve crucial evidential ruling
- 2. Should My Client Testify
 - A. Need to vs. want to
 - i. No Matter What...make a record outside the presence of Judge/Jury/Prosecution that you discussed with Client and that this is his choice
 - B. Self-defense/other affirmative defense
 - C. Denial of critical fact
 - D. Rebut factual claim of accuser
 - E. Lack of intent or guilty knowledge
- 3. Character Evidence
 - A. Could be tricky
 - B. Only hearsay and reputation evidence admissible
- 4. Renew Motion to Dismiss – Always Do

V. Closing

- 1. Jury Instructions Before or After?
 - A. Jury Instruction Conference in Chamber
 - B. Official Jury Instruction Conference on Record
 - i. Offer Proposed Jury
 - ii. Object to ones you do not want
- 2. Prosecutor Goes First
 - A. Almost Always Uses Demonstrative/PowerPoint
 - B. Will Go Through Elements
 - C. Watch for Inflammatory Arguments or Facts not supported by Evidence
 - D. Make Objections Only if Critical

- E. Watch to make sure that they DO NOT comment on Defendant silence after arrest or not testifying at Trial
- 3. Defendant's Closing
 - A. Should I Use Demonstrative Evidence?
 - B. Theme consistent with Opening
 - C. Be Very Careful with Alternate Theories
 - i. "I did not kill the dude but if I did, it was in self-defense."
 - D. Use Jury Instructions
 - ii. Stress Reasonable Doubt
- 4. Prosecution on Rebuttal
 - A. Generally saves the Best for Last
 - ii. 911 call
 - iii. Defendant's Recorded Statement

VI. Motion for New Trial

Neb Rev. Stat. § 29-2103

10:30 – 10:45

Break

10:45 – 11:30

Sentencing

- A. LB605 (2015) and LB1094 (2016)
 - B. How Calculated
 - 1. Calculating Good Time
 - 2. Mandatory Minimum Sentences
 - 3. Habitual Criminal Enhancement
 - 4. Multiple Cases / Multiple Counties
 - 5. Parole vs Jam Date
 - C. Discrepancies Between Written & Oral Pronouncements
 - D. Consecutive vs Concurrent
 - E. Sentences in Different Counties / Jurisdictions
 - 1. Must be sentenced / Tried Where Crime Committed
 - i. But You May Be Able to Make Arrangements to Serve Sentence Elsewhere
 - 1. Probation Can Be Transferred With Court's Permission
 - 2. House Arrest Programs / Jails May Work With You
 - 3. Can They Be Concurrent?
 - a. Need to be Sentenced In Order to Be Considered Concurrent
 - b. Whoever Sentences Last Determines Concurrent vs Consecutive
- F. Where Time is Served
 - 1. Juveniles
 - i. OJS (Kearney, Boys Town, etc.)
 - ii. Youth Detention Center

- iii. Never County/State Jail system until age of 18
- 2. Adults
 - i. Felonies of 366 Days or more (More than 1 year) = Nebraska Department of Correctional Services (DCS) (All Begin at D&E in Lincoln, then transferred)
 - ii. Misdemeanors or Felony 365 Days or less = County Jail
 - 1. Unless Consecutive or Concurrent with a Felony & Combined Sentences totaling more than 1 year
 - 2. Work Release
- 3. Federal
- G. How to Prepare for Sentencing Hearing
 - 1. Presentence Investigation Report (PSI or PSR)
 - i. What should be included (defense and state)
 - ii. Review Prior to Sentencing and Share Info with Defendant
 - iii. Sentencing Letters
 - 1. Character Letters from Family, Friends, Employer
 - a. Suggested format of letters
 - iv. Talk to Local Practitioners re Judge
 - 1. Typical Sentences
 - 2. Sentencing Recommendations
 - v. *State v. Decker*, 261 Neb. 382 (2001): Defendant's Age, Mentality, Education, Experience, and Social and Cultural Background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime
- H. Never Guarantee an Outcome
- I. Sentencing
 - 1. Check Sentencing Order for Errors
 - 2. Immediately Following Sentencing, Tell Client of Right to Appeal (30 days)
 - 3. Follow up with Closing Letter to Client
 - i. What sentenced to, including collateral consequences
 - ii. What *could have been* sentenced to
 - iii. Appeal Issues
 - iv. Appeal Deadline
 - v. Copy of Sentencing Order

11:30 – Noon

Interlocutory and Direct Appeals

- A. Interlocutory Appeals vs Direct Appeals
 - 1. Interlocutory

- i. Final Appealable Order
 - 2. Direct
 - i. Trial Counsel has Obligation to Perfect Appeal
 - ii. Issues Available / Not Available
- B. Notice of Appeal
 - 1. After Speedy Trial Decision
 - i. Notice to Appeal
 - 2. After Conviction / Sentence
 - i. Notice to Appeal
 - 1. Filing Fee if not indigent
 - ii. Motion and Proposed Order to Proceed *In Forma Pauperis*
 - iii. Affidavit to Proceed *In Forma Pauperis*
 - iv. Motion and Proposed Order to Appoint Counsel
 - v. Motion and Proposed Order to Forward PSI
 - vi. Praecipe for Bill of Exceptions
 - 1. Deposit if not indigent
 - vii. Praecipe for Transcript
- C. Appeal by Prosecution
 - 1. Their requirements. Watch for error by State in this process and ask for dismissal/summary affirmance
- D. Appellate Actions
 - 1. Briefs of Appellee / Appellant
 - i. Requirements
 - ii. Reply Briefs
 - 2. Motion for Summary Affirmance / Summary Judgment
 - 3. Amicus Curiae
 - 4. Oral Arguments

NOON – 1:00

Lunch

1:00 – 1:45

Post-Conviction Relief

- A. Requirements of Motion
- B. Appointing Counsel for Indigent
- C. Hearing
- D. Ability to Amend

1:45 – 2:00

Break

2:00 – 3:15

View From the Bench

Justice Max Kelch, Nebraska Supreme Court
Judge Riko Bishop, Nebraska Court of Appeals
Magistrate Judge Michael Nelson, US Federal Court – Omaha
Judge Horatio Wheelock, District Court Bench, 4th District
Judge Stephanie Hansen, County Court Bench, 4th District

- A. Making a Good Impression
 - 1. Be on Time, Polite, Professional
 - i. Bailiff is Your Best Friend
 - 2. How Do I...
 - i. Utilize Your Resources
 - 1. Ask More Experienced Attorneys How Courtroom Works
 - 2. Ask Bailiff
 - 3. Ask Judge
- B. Can I Talk to the Judge and Other Ethical Considerations
- C. Presenting Evidence
 - 1. Affidavit
 - 2. Live
- D. Appearance
- E. Collegiality With
 - 1. Court
 - 2. Colleagues
- F. Briefs
 - 1. Make it Succinct
 - 2. Organized
- G. Oral Arguments
- H. Questions and Answers

3:15 – 3:30

Break

3:30 – 4:00

Counsel for Discipline Overview

- A. Overview of Office
 - a. They are NOT the Enemy!
- B. What to Do if you Receive a Letter from Counsel for Discipline
 - a. RESPOND RESPOND RESPOND
- C. Discipline Options
 - a. Private Reprimand
 - b. Public Reprimand
 - c. Probation / Suspension
 - d. Disbarment
- D. Should I file a bar complaint?

4:00

Closing Remarks

4:00

Reception