



# LITIGATION NEWS

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## The Law and Lore of Leading Your Own Witness

by Robert E. Scully, Jr.

One of the least discussed issues in trial practice is the proper use of leading questions on cross-examination of a friendly witness. At first the explanation seems simple. Leading questions are always permissible on cross-examination. See, Fed. R. Evid. 611(c). Indeed, the late, great Irving Younger taught a whole generation of us, in his lecture "The Ten Commandments of Cross-Examination," cross-examination should be done only with leading questions to which the questioner knows the answer.<sup>1</sup>

Whatever the cause, there is a strong association in the minds of trial lawyers between cross-examination and the right—indeed the duty—to ask only leading questions. We even refer to examining "as if on direct" when we mean to use non-leading questions. This habit of thought has some curious repercussions. Many lawyers and judges believe that whenever counsel is cross-examining a witness called by the opposing party, including an obviously friendly witness, she may use leading questions, at least on the subject matter covered in the direct examination. One of my colleagues at the trial bar, who recently returned from a year spent defending an accused Bosnian war criminal at the International Courts of Justice in The Hague, is an avid proponent and assiduous practitioner of the art of "cross-examining" his own client and other friendly witnesses. He uses short, pointed, argumentative leading questions both at the close of their deposition and whenever the adversary calls them at trial. After being on the

receiving end of this tactic on several occasions I must confess that I adopted it myself, often to good effect.

The reasons for "cross-examining" your own witness at deposition and trial are many and varied, albeit beyond the scope of this discussion. I will mention only two of them. First, it is fun. There is sheer joy, both for you and your client, in closing her deposition or trial testimony with a spirited attack on the opponent's case, conducted by you, as witness, testifying through your client as puppet. Second, since the deposition may be offered in evidence at trial under Virginia Supreme Court Rule 4:7(a)(3) or Fed. R. Civ. P. 32(a)(2) and the "Rule of Completeness" allows you to force the intro-

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## Letter from the Chair

**W**ho are we, really? The University of Richmond offers its students an opportunity to compete for a year of free room, board and tuition or \$23,000 if the student is a senior. The assignment is to submit and justify a theme which can be used across various disciplines as a springboard for discussion. Last year, the winner was "Is Truth in the Eye of the Beholder?" This year, one of my sons has submitted and attempted to justify "Who Are We, Really?" as the unifying theme for discussion in UR's academic community.

I wonder if this might be a legitimate question for the Litigation Section's Board and membership to ponder. Who are we, really? Do Litigation Section members share personality traits and is it important for us to identify examples of "likeness"? Are we lawyers who actually get into the courtroom on a regular basis, or do most of us conduct discovery, prepare briefs, argue motions and reach settlements with or without the aid of alternative dispute resolution? Are we for plaintiffs, defendants, or both? Do we litigate only in narrow areas of the practice, or are we confident (or naive) enough to apply our skills in many practice areas? Are we primarily interested in the

direct benefits that Section membership provides us, or do we want the Litigation Section to use its large membership and receipts from dues to address social needs? And so on.

Your Board of Governors has determined that a survey of our members can provide a better understanding of who our members really are. Therefore, within the next six

**Your Board of Governors has determined that a survey of our members can provide a better understanding of who our members really are. Therefore, within the next six months, we will endeavor to conduct a non-invasive survey...**

months, we will endeavor to conduct a non-invasive survey, probably as a tear-out page in the newsletter. Please take the time to respond as the results will be meaningful. You can find the time to do so.

As this issue of the newsletter is released, I will be concluding my term as Chair of the Litigation Section, and Frank Friedman will take over. Frank and Tom Albro, our Secretary, have been tremendous encouragers and doers. So have your Board members and our VSB Liaison, Pat Sliger. If you can spare a

moment, send a short e-mail to one of the Board members just to say thanks for his or her efforts as a volunteer in the worthy activities of the Litigation Section. It will mean a lot.

Glenn W. Pulley  
Chair, Litigation Section

## The Disturbing Case Of Earl Washington and Its Implications for Virginia Justice

by Robert T. Hall

*(The following comments and criticisms of the Virginia death penalty system are the opinions of the author, and do not necessarily reflect the views of the Litigation Section or the Virginia State Bar. They are published because they are timely and may be thought provoking.)*

In the fall of 1985, Virginia came within nine days of executing Earl Washington for the rape-murder of Rebecca Williams of Culpeper. In October of 2000 he was pardoned for this crime, but not released from prison until February 12, 2001. His journey through the legal system raises real questions about Virginia's administration of the death penalty.

Trial counsel had never handled a capital case before. Forensic evidence gathered at the scene indicated another assailant had raped Mrs. Williams. Washington, mentally retarded and highly suggestible, had been convicted on his "confession," but it was so riddled with inconsistencies it seemed worthless. He said his victim was black. She was white. He said she was alone in the apartment. Her two children were there. He said he stabbed her once or twice. She died from 38 stab wounds. He got facts right when they were provided him by law enforcement officers asking leading questions. Left on his own, his version was invariably wrong. Washington's was a dangerous mix: a white, married mother of three; a black, mentally retarded man who had

confessed to her rape and murder; and inexperienced counsel who didn't understand the evidence.

Washington spent 18 years in prison because of the strange and perverse intersection between Virginia politics and the death penalty.

Once convicted, the system was committed to his execution. After conviction and one direct appeal, the conviction becomes the only truth. "Actual innocence," in the words of a former Virginia Attorney General, "becomes irrelevant." Twenty-one days after the conviction is final and the sentence imposed, the trial court loses jurisdiction over the case. Newly-discovered evidence, such as new DNA testing of old specimens, could not then be presented. Exclusion of newly-discovered evidence or execution of an innocent person doesn't violate the Constitution. See *Herrera v. Collins*, 506 U.S. 390 (1993).

A Petition for a Writ of Habeas Corpus requires the inmate to demonstrate a constitutional defect in his trial before relief can be granted. "Ineffective assistance of counsel" claims die quietly in a profusion of legal rhetoric. One habeas corpus judge ruled that notwithstanding the fact that his trial counsel neither evaluated nor understood the forensic evidence of innocence, he made a conscious decision not to use it. Reversed on appeal, the appellate court concluded his conduct, while ineffective, was not sufficiently prejudicial to warrant the granting of the great writ.

Washington's case is not unique. Professor James Liebman, of the Columbia University School of Law, recently completed a death penalty sentencing study. In it, Virginia ranked at or near the bottom in important categories. The study considered the operation of the death penalty from 1973 to 1995 in 28 study states.

In that period, a national composite of 41% of all death penalty sentences were reversed on direct appeal. In North Carolina, the reversal rate was 61%. In Maryland it was 53%. Virginia

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was in last place at 10%. Texas, which led the nation in the number of executions carried out, had a reversal rate of 31% on direct appeal.

Virginia fared only slightly better in the category of "Known State Post-Conviction Reversals." Stated as a percentage of cases available for post-conviction review, Virginia rose from last place out of 28 states to 23rd place, with a post-conviction reversal rate of 3%. The rate of post-conviction reversal in Maryland was 52%, in North Carolina 10% and in Texas, 6%.

Overall, 77% of death penalty cases eligible for review on direct appeal or post-conviction proceedings were reversed in Maryland, 65% in North Carolina, and 35% in Texas, compared to 13% in Virginia.

Turning to Federal Habeas Corpus statistics, Virginia was next to last with a 6% reversal rate for capital convictions.

Incarcerated in 1983, Washington was ultimately pardoned seventeen and one-half years later. He was not released until February 12, 2001. At the time of the pardon, we was also serving time on an unrelated burglary and wounding charge. One night in 1983 he had broken into a neighbor's house while heavily intoxicated. The neighbor, who knew him, sur-

prised him and he hit her with a chair, lacerating her scalp. He took \$29, her gun, and fled. He was promptly arrested.

Washington's confession to the rape-murder of Rebecca Williams was obtained while he was in custody on the burglary and wounding case. He was sentenced on that case after he had confessed to the murder, and because he was thought to be extremely dangerous, was given fifteen years on the burglary charge and fifteen years on the wounding charge, to run consecutively. The sentence was multiples of the time he would have gotten for those crimes standing alone.

The Parole Abolition and Sentencing Reform Commission, appointed by Governor Allen and which included then Attorney General Gilmore, studied the parole system under which Washington and others had been sentenced. Governor Allen thought that the parole-based system (under which Washington was sentenced) was too lenient. The Commission did a retrospective analysis of the sentences and time served for most major crimes.

For burglary, the average sentence imposed on others during Washington's incarceration was 6.8 years, and the average time served was 2.2 years. For malicious wounding, the average sentence was 8.3 years and the average time served was 2.8 years. Had Washington been given the

## In Our Next Issue

Several issues raised in Deborah Chandler's article, "Exceptions to the Noerr-Pennington Doctrine: Narrowing the Parameters of Immunity from Antitrust Liability," which appeared in our last issue, may have been resolved by a recent Fourth Circuit decision, *Baltimore Scrap v. David J. Joseph Co.*, 237 F.3d 394 (4th Cir. 2001). Another state court decision was recently issued which addresses the matters raised by Ms. Chandler. In the next edition of **Litigation News**, J.L. Novak of McGuire Woods, LLP will discuss these decisions and recent developments concerning the Noerr-Pennington Doctrine.

average sentence on each, to run consecutively, he would have been given 15.1 years instead of 30 and served 5 years instead of nearly 18. Averages, of course, are made up of higher sentences and lower sentences. The Commission found that the one factor which tended to explain an above average sentence was a prior record. Washington had none. His enhanced sentence on the Weeks case was intimately bound up in his "confession" in the Williams case.

The pardon/clemency process was in turn bound up in the political process.

By 1993 his appeals had been exhausted. His

Petition for a Writ of Habeas Corpus had been denied by all courts. The final *coup de grace* had been administered by the Fourth Circuit Court of Appeals, which ruled that, while his trial lawyer had been ineffective in representing him, his ineffectiveness was not sufficiently prejudicial to warrant a new trial. A failure to appreciate forensic evidence of innocence was trumped by the porous confession.

Before his scheduled execution, we filed a Petition for Clemency with the governor. The pre-DNA forensic evidence argued for his innocence. As a condition of clemency, the acting Attorney General requested and obtained DNA testing.

Thankfully, the specimens could still be tested. Following that testing, we were first advised by one of the senior attorneys in the Attorney General's office, "I've got good news. Your guy didn't do it!" He would be pardoned. Within 48 hours, the tune had changed. The test results were now said to be ambiguous.

The ambiguity? DNA from another man had been found on the blanket, but others in the

Attorney General's office suggested that perhaps the other man raped her while Washington watched, then Washington murdered her. Reminded that in her dying declaration the victim said she had been attacked by one man, the Attorney General's office then suggested perhaps she had consensual sex with someone other than her husband in the twelve hours before her death. If so, she had left copious quantities of seminal fluid on her, in her and around her when her husband was due home any minute.

We were told that further testing had been ordered. On the very last day of the Governor's term, Washington's attorneys were

given two hours to accept a "clemency, not pardon" offer. The governor's counsel refused to tell us the results of the additional testing. Washington's sentence was commuted to life imprisonment.

Letters requesting the results of the additional testing went unanswered. Nor would the director of the lab release them without the now ex-governor's permission. Permission was refused. Six years later, Ofra Bikel, producer of PBS *Frontline's* show on the death penalty, obtained a copy of the lab report. The examining scientist had been of the opinion, after retesting, that the seminal stains on the blanket where

the rape-murder took place excluded Earl Washington. Why had Governor Wilder not pardoned him? Was it because he was considering running for the U.S. Senate, and feared that, if released, Washington might commit some other crime and derail his political

**Official Virginia was embarrassed by the Washington case. This wonderful system which worked so well had come with in nine days of executing an innocent man. Surely there would be reforms. The Crime Commission responded with a series of hearings.**

*Earl Washington — cont'd on page 6*

