

## HOW TO LOSE AN OBSCENITY PROSECUTION

*Foundation attorneys are constantly asked questions regarding the level of difficulty of prosecution of obscenity cases. One of the studies undertaken by the staff of the Attorney General's Commission on Pornography was a review of obscenity prosecution statistics in the United States.*

*The following is a brief summary of the remarks of Alan Sears, Children's Legal Foundation's Executive Director, and former Executive Director of the Attorney General's Commission on Pornography, to a seminar for federal and state prosecutors in early 1987. By request this report is being reprinted.*

Seventy two percent of the American people demand a crackdown by the government against pornographers. A majority of the American people believe that the laws against pornography are not strict enough, and almost three out of four women believe that the laws against pornography are not strict enough. Only between 2 and 4 percent of the American public believe there should be no effort by the government to protect citizens from pornography. More than three out of four Americans believe that pornography causes some people to commit rape or sexual violence that it leads some people to lose respect for women, and nearly seventy percent believe that pornography can lead to a breakdown of morals.

*Given such an overwhelming mandate from the citizens of the 50 states, it seems that a prosecutor presenting his/her case to a jury made up of a representative sample of the citizens of virtually any community in the United States would be able to obtain a conviction.* Despite the substantial odds in the favor of the prosecution, a number of prosecutors almost deliberately manage to lose obscenity cases. Experienced obscenity prosecutors have observed over the years that there are a number of techniques which, if consistently followed by a prosecutor, will result in losing virtually every obscenity case.

## TECHNIQUE

### 1

#### Inadequate Preparation

Persons involved in the traffic of illegal forms of pornography, part of a multi-billion dollar criminal enterprise will expend tremendous resources to defend their criminal activity. What many prosecutors have failed to recognize is that resources are available on their "side of the law" as well as that of the criminals.

Children's Legal Foundation provides prosecutive manuals, sample instructions, and other information as well as provide "hands-on" and "in-the-courtroom" assistance for prosecutors. Children's Legal Foundation can be reached at 602/381-1322. The United States Department of Justice National Obscenity Enforcement Unit (NOEU) has both a task force of attorneys and a resource center to assist state and federal prosecutors. The NOEU can be reached at 202/633-5780.

As in all other forms of law enforcement, the prosecutor is on the front line of the domestic defense against criminal activity. If the prosecutor does not perform his/her job adequately, the entire criminal justice system fails. A prosecutor who thinks that they can prepare for and try an obscenity case without expert knowledge in this area of law is setting on a course of almost sure failure.

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*In order to obtain a conviction, it is incumbent upon a prosecutor to prepare well, know the law, not fall into the "one case syndrome" trap, obtain a representative jury through proper voir dire, keep the focus of the trial on the unlawful conduct of the defendant, and obtain legally sound instructions.*

## TECHNIQUE

### 2

#### Adopt the "One-Case Syndrome"

Many prosecutors have been heard to say something similar to "I'll try one or two obscenity cases and, if successful, I'll do more. If I fail, I'll quit." The multi-billion dollar obscenity industry and the criminals who traffic in the bodies of women and children for profit in your jurisdiction are well aware of this unfortunate syndrome. (It seems incongruous that such a philosophy would be adopted by a prosecutor on any issue – few communities drop prosecutions of murder, arson or rape just because of one or two jury acquittals.)

Pornographers are willing to spend vast sums to defend the first cases tried in any jurisdiction because they know that their chances of winning are best when they come into a community where the prosecutors are inexperienced in this area of law, where the police have done few investigations, and the judges are not yet acquainted with pornography defense trial techniques and ethics (and sometimes the lack thereof.).

Convinced that only one or two acquittals are necessary to suspend law enforcement in a jurisdiction, the pornographers will virtually leave no avenue of attack untouched – including the enrollment of public relations personnel to handle press relations, local academics, and to secure the vocal protest of persons who represent the 2 to 4 percent of the members of the average community who oppose enforcement of obscenity laws.

A prosecutor must determine that he/she will simply enforce all of the obscenity violations in their respective jurisdictions and will not engage in artificial "testing of the waters" as the pornographers desire. Prosecutors should recognize that it will take them some period of time to obtain experience in this specialized area of law. They should not be surprised by adverse results in a few preliminary rounds with attorneys who spend virtually their entire professional lives developing expertise and learning all the tricks of the trade to defend this form of criminal activity.

## TECHNIQUE

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### Excuse Good Jurors on Voir Dire

Pornographers know that the American people do not want illegal forms of pornography sold in their local communities. They also know that *if a representative sample of the community is allowed to sit on a jury, the odds highly favor the prosecution.*

Given this knowledge, the defendants will seek through their counsel to exclude representative members of the community from the panel of venireman through techniques during voir dire.

Voire dire is a French term meaning, "to speak the truth." In pornography cases the definition of voir dire could be restated by the pornographers as examination "to drive out the normal." Whether questioning is through the court or direct by attorneys, there will be an attempt through vulgar descriptions of the contents of the material to so intimidate potential jurors that a substantial number will ask to be excused and a like number will state that they are strongly offended by the material. *The standards of objectivity for selection of jurors are not the personal approval or disapproval of material, the acts depicted in the material or such related issues.* Potential jurors in rape, murder and arson trials seldom approve of such crimes or the acts of offenders who engage in such criminal activity. *The standard is whether or not the potential juror can set aside his/her own particular views and decide the case fairly based on the evidence and the law presented.*

A prosecutor must act abruptly and vigorously to prevent the excusal of perfectly qualified jurors who represent a fair and accurate cross-section of the community and not allow the defendant to succeed in striking all representative persons from a potential jury panel. *If all "average" persons are stricken then the state cannot possibly get a fair trial.*

## TECHNIQUE

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### Let the Defendant Take Control of the Trial

Many defendants in obscenity cases attempt to change the focus of the trial from their conduct to a referendum upon the material, censorship community values, or other matters. There are a number of ways that defendants attempt to do this, but the law is clearly in favor of the prosecutor who has good evidence to show *scienter* and is permitted to show evidence of *pandering*.

The defendant may seek to separate the material from the real world, the real world in which it was made, the real world in which it was distributed, the real world in which it was pandered and sold, and the real world in which it was consumed, as is relevant. The defendant will often assert that consumption of the material is limited to "consenting adults" for "use in the privacy of their own home" and similar legally irrelevant issues.

Other attempts to divert attention from the real issues (the elements of the crime) include attempts to introduce polls and surveys that based on biased and irrelevant questions, inaccurately report community standards and allegedly "comparable" materials. The defendant may attempt to introduce the testimony of "sexperts" who will assert that the material is not harmful, that it has serious scientific value, and other ill-founded claims.

A prosecutor must clearly assert proper authority over the progress of the case and not allow the focus of the trial to shift from the criminal conduct to some other irrelevant issue. The prosecutor should work to educate the court on the law on each of these matters.

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**"Prosecutors can successfully obtain obscenity convictions in virtually any jurisdiction in the United States."**

## TECHNIQUE

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### Give it Away in the Instructions

Unless a prosecutor is confronted with a trial situation where the law is improperly applied, he/she should with adequate preparation, be able to benefit from instructions that follow the law of the United States and the respective jurisdiction.

The defendants will proffer many types of instructions which, if left unchallenged, might be included in the charge to the jury. A recent example of this occurred when a defendant proffered an instruction, which a court properly denied that the material involved in the trial "was protected by the First Amendment" and made no reference to the controlling law of *Miller v. California* or respective state decisions. In another recent case, a defendant proffered, and unfortunately obtained an instruction which created a defense "if the purchases of the material were consenting adults."

In reviewing a multitude of cases, it appears that one of the most significant reasons for acquittals is an improper set of instructions. Children's Legal Foundation will provide to any prosecutor in the United States a set of constitutionally sound instructions.

**Prosecutors can successfully obtain obscenity convictions in virtually any jurisdiction in the United States. In order to obtain a conviction, it is incumbent upon a prosecutor to prepare well, know the law, not fall into the "one-case syndrome" trap, obtain a representative jury through proper voir dire, keep the focus of the trial on the unlawful conduct of the defendant, and obtain legally sound instructions.**

*Prosecutors and police officers may obtain a copy of the CLF publication "The Preparation and Trial of an Obscenity Case: A Guide for the Prosecuting Attorney," from the Foundation's office for \$35.*