



Chapter 8

Appeal

Once you obtain a conviction in a criminal obscenity case, or get a judgment in a civil obscenity case, you should not be under the impression that your work is finished. Those who deal in the business of "hard core" pornography (and their attorneys) maintain a policy of appealing *every* case, usually to the US Supreme Court. The Court obviously grants *certiorari* in very few of these cases, but it can take at least two years to exhaust all avenues of appeal. Your main concerns will be "finding the defendant" and "collecting the fine" once *certiorari* is denied.

Employees of these businesses are notorious for their transiency. Moreover, the "owners" of these businesses periodically transfer business assets and other indicia of ownership from corporation to corporation. Therefore, if you convict a corporation in 1985 for distributing obscene material in violation of the law, you can be certain that *all* assets will be "owned" by another corporation in 1987. For these reasons, it is essential that you protect your convictions on appeal.

You should review the law in your jurisdiction for specifics relating to appeal, but as a matter of policy, do the following:

(1) Require appeal (or appearance) bonds for *all* defendants, including corporate defendants;

(2) Reduce corporate fines to judgments, signed by the trial court, and file these judgments on the general execution docket of your county, so as to place a lien, or a *lis pendens*, on all property owned by the corporation;

(3) Make it a condition of probation or suspended sentence that individuals not be involved in "adult" businesses, and specify the types of business, i.e., any business dealing in "sexually explicit magazines, books, or films," and any business featuring "nude" or "partially nude" *live* entertainment. In addition, do anything else provided by the law in your jurisdiction to assure that fines will be paid (or can be collected or assets attached), and that "time" will be served.

Once the appeals are final and you wish to collect corporate or individual fines, you often find that a new corporation operates or owns the business. This does not prevent satisfaction of judgment. Attempt execution in the normal course against the original corporate defendant. When it is alleged that the corporation was "sold," begin collection proceedings against the purchaser. Whether this is done in a civil collection case in state court, or an involuntary petition in

bankruptcy is filed in federal court, a criminal judgment creditor can force the "old" corporation and its officers to give depositions and testimony as to who or what company bought the stock and the inventory, how much was paid, who assessed its valuation, and where the assets and stock are. Proceeds can be traced and recovered from the new "owners." All such fraudulent conveyances can be undone and the discovery may be the best source your investigation ever has. A prosecutor's office can also consider hiring a private civil law firm which specializes in collection and bankruptcy law. The firm can do the work, and the state can still obtain most of the judgment.

Only one other subject should be mentioned relating to appeal — the obscenity of the material will be reviewed "independently" at each stage of the appeal's process. The Supreme Court has reserved for itself and other appellate courts the "ultimate power...to conduct an independent review of constitutional claims when necessary." *Jenkins v. Georgia*, 418 U.S. 153, 160 (1974). This should not be a problem, however, so long as your cases relate to materials which depict the "hardcore" types of sexual conduct described in *Miller*, 413 U.S. at 25. See: *Jenkins*, at 160-61; *Mishkin v. New York*, 383 U.S. 502, 508 (1966) (if it is "hard-core pornography" its obscenity is "implicit").

As a practical matter, if a prosecutor wins a conviction at trial, it is usually upheld on appeal.