

COMMENTARY:

THE TRUTH ABOUT WHY YOU CANNOT GET YOUR CIVIL CASE OUT TO TRIAL AND THE DEFENSE BAR'S RESPONSIBILITIES WITH REGARD TO THE SITUATION

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There has been much discussion lately with regard to the congestion in the Riverside County criminal courts and its effect of essentially shutting down civil litigation in Riverside County. It is important to note that the court congestion doesn't only have an effect on the people accused of crimes. It also affects people with civil cases that cannot get to trial because the civil courts are almost always conducting criminal trials. This situation hurts ordinary people, such as a plaintiff who is suing another party who has caused a death, an injury or simply the loss of money, as the defendants in civil cases have no reason to negotiate a settlement in good faith because they know that the plaintiff has little chance of ever getting them to trial in Riverside County. That makes Riverside County prime ground for scammers, con artists and those who are negligent, irresponsible and cause damages to others; there are in reality no civil law consequences because the civil courts have been shut down by the criminal courts' congestion.

Riverside County District Attorney Rod Pacheco has said in the press that he will not compromise public safety and therefore sees no need to charge cases differently or to negotiate dispositions any differently than is now being done. He is essentially saying that people who are guilty of crimes are going to get a hard line and be prosecuted no matter what effect there is on the court system. That is a fine stance to take if the district attorney's office is actually convicting people and not just charging innocent people or overcharging people who have committed a crime but not the more serious crime that is being charged.

Two articles in the Press-Enterprise on the same day last year exemplified how the situation is the result of government waste of taxpayers' dollars. The first article was about the district attorney getting an additional sum of almost a million dollars added to his annual budget; that article appeared at about the same time as there was extensive press coverage concerning schools in the county closing for lack of funds. The second was about California Supreme Court Chief Justice Ronald George asking the state legislature for more money for more judges.

Chief Justice George's example of the malfunctioning court system was my client Robbie Catchings' homicide case, in which, after five years and four months in custody and two trials, he was finally released from jail after a jury acquitted him of all charges. My client didn't have to wait

so long for his trials because of a lack of judges; it was because of an artificially clogged court system that was created by the D.A. charging untold numbers of innocent people. The problem is not a lack of judges. There would be plenty of judges if the criminal case plaintiff in Riverside County, District Attorney Rod Pacheco, were charging and pursuing cases ethically.

The truth is that the district attorney's office is losing an amazing number of cases. The power to prosecute is a truly awesome power. An accused person's life is destroyed, and in almost all felony cases, that person's liberty is taken away just by the charges being filed. Prosecutors therefore have an extraordinary ethical duty to file and pursue only cases in which guilt as to all charges can be proved to a jury beyond a reasonable doubt. Any not-guilty verdict represents a monumental failure of judgment on the part of the district attorney. A civil plaintiff's attorney's duty is merely not to file frivolous cases, so an approach of "We could win or we could lose" is acceptable. However, a district attorney should win all cases, because he or she has the power of the executive branch of the government. Everywhere else in the country, criminal defense attorneys expect to win only three, maybe five, possibly ten percent of cases, because the district attorney should be filing and pursuing only solid cases. That is not even close to the situation in Riverside County.

In the spring of 2007, Judge Gary Tranbarger completed a 16-month rotation as the judge who assigns criminal trials out of the Downtown Riverside Courthouse. He assigned all criminal trials for Riverside, Corona and Banning. He also kept meticulous statistics of the outcomes of the cases he assigned. In 2006, the district attorney secured convictions as charged in only 50.9% of the cases. That is an utterly dismal rate. Another 27.6% of the cases resulted in mixed verdicts, which means the defendant was convicted of some, but not all, of the charges or was convicted of only lesser offenses. A mixed verdict is almost always a victory for the defense. A hung jury, which is also generally considered a victory for the defense, occurred in 6.5% of the cases. That leaves 15% of the cases in which the defendant was innocent and either was found not guilty of everything charged or won a dismissal of the case by the judge. In misdemeanor cases, 25.1% of the trials resulted in not-guilty verdicts on all charges. That is simply unheard of.

Things have only gotten worse for the D.A. since Rod Pacheco took over for Grover Trask on January 2, 2007 (although it is generally believed in the defense community that Pacheco was running the day-to-day operation of the district attorney's office since 2002, when he returned from the State Assembly). According to statistics kept by the courts, 2007 was an even worse year for the district attorney. Convictions as charged fell even further to 42.5%, with 29.5% of cases resulting in mixed verdicts, hung juries increasing to 10.5% and not-guilty verdicts on all charges plus dismissals also increasing to 17.4%.

I am an ordinary deputy public defender. In my last 10 trials, only two clients have been convicted as charged. In the last 20, only three have been convicted as charged; that's a 15% conviction rate. Since Rod Pacheco has been the District Attorney, I have done 11 trials in which the defendants faced life in prison, and in only two of those 11 the district attorney was able to secure convictions on life exposure charges. In five of them, including a rape, a homicide and attempted homicides, my clients were acquitted of all charges. I am in trial almost all the time, and since Mr. Pacheco has been the district attorney, he has had only two victories against me, both in relatively short trials where my clients were convicted as charged. At least anecdotally, all my colleagues in the law offices of the public defender have had about the same trial results. This means that the taxpayers are paying my colleagues and me, as well as a parade of deputy district attorneys, on average more than \$100,000 each a year to try case after case that the district attorney never should have pursued.

So the questions are why is the district attorney losing so badly, and what does it mean (beyond the obvious waste of taxpayer money by the district attorney)? It is certainly not that liberal judges are tilting cases for defendants. In fact, almost every judge in the criminal courthouse is an ex-deputy district attorney, and more are coming down the pipeline to fill judicial vacancies. However fair the ex-deputy district attorney judges may want to be, the reality is that the defense is almost always faced with a prosecutor at counsel table and a judge with a prosecutor's mindset on the bench. It certainly isn't liberal bleeding-heart jurors. Riverside County is a Republican county and is renowned for its conservative, pro-prosecution jurors. It isn't that defense attorneys are hand-picking only the good cases to go to trial, because as appointed counsel, we take every case that is assigned, whether it's a weak case or not. All the factors are stacked in the district attorney's favor, and yet he continues to lose at a phenomenal rate. That leaves only the stark truth: that the district attorney is clogging the criminal courts and shutting down civil courts in order to continue to attempt to persecute innocent people.

The most disturbing aspect of this is trying to imagine how many innocent people have pleaded guilty for fear of losing at trial. Another factor is that, when it comes to bail, a person is not presumed innocent and is not inno-

cent until proven guilty. As per the law, the judges set bail on the assumption that the person committed the crime for which he or she is accused, even though the person has about a 65% chance of not being convicted as charged at trial.

It will only get worse as long as the district attorney continues to lose at this incredible rate. There is no reason for any defendant to plead guilty, as long as he or she has a better than 50-50 chance of essentially winning at trial and an almost one-in-five chance of being acquitted on all charges. And these numbers don't address the even more amazing number of defendants— which appears to be about 90% — who lose their trials and still have a better result than anything that was ever offered by district attorney to resolve the case.

Public safety means charging only cases that can be proved. The public is not safe when it does not have any access to civil redress of grievances. The public is not safe when its tax dollars are wasted on trying to convict innocent people. The public is not safe when it has to have more fear of baseless prosecutions than of crime.

So what can be done? Just as a start, in civil court, when a plaintiff files a frivolous lawsuit, the court charges all the court costs and attorney's fees to the plaintiff who filed that frivolous suit. The district attorney continues to file frivolous law suits; however, those criminal court lawsuits only result in innocent people being locked up until they get to trial. The district attorney should have to pay for all of those costs. Tax dollars are being wasted and will continue to be wasted until the wasting of our money creates some consequences for the district attorney.

Charging and settlement decisions are made at the highest levels of the D.A.'s office by its most experienced attorneys. It is difficult to believe that they are capable of the level of incompetence needed to lose at the rate at which they are losing. That means that there's another purpose, which is clearly to generate work and therefore to generate more budget. Now it appears that it has worked, as the D.A. continues to get budget increases.

Political courage would be for the county board of supervisors and the state legislature to say "no" to any more money for the D.A. until his trial conviction rate is at least out of the laughable range. Perhaps when the D.A. is winning cases more than every now and again, that's when budget increases should be considered. It is difficult to imagine that there is, or ever has been, a more losing district attorney in the county, much less in the state. Until the community focuses on that being the real problem, taxpayer money will continue to be squandered.

Perhaps someday the federal authorities will launch an investigation into the ongoing violation of civil rights that our Riverside County criminal courts maintain, with so many innocent people being charged, held in jail and forced to trial before being exonerated by a jury. But until that happens, we attorneys in the legal community have

a responsibility to make a record of what's happening. We have a duty to inquire and to document who it is that is making the decisions that are sending our cases to trial. The day will come when Mr. Pacheco will claim that he was not aware that he was losing the vast majority of his cases. He will likely claim that his subordinates made the decisions and were therefore responsible for the civil rights violations; he will claim that the judges allowed it and therefore it is their fault; and lastly, he will claim that it was defense bar's fault for doing nothing more about it than continuously pummeling him at trial.

The data that Judge Tranbarger (by the way, one of the many ex-deputy district attorney judges) and the courts have kept are a wake-up call. The legal community and the public at large have got to stop blindly accepting "public safety" as a reason for a district attorney running amok. The public has to say that justice is public safety, and that persecution of innocent people is not public safety and cannot any longer be sold as such.

