
ALLIANCE OF BLACK WOMEN ATTORNEYS

Newsletter

<http://www.msba.org/links/md/specialty/abwa/index.htm>

Volume 3 ISSUE 2

JULY 2006

Message From The President

Greetings to you all! The time has come for me to share my reflections on my year as President of the Alliance. But before I do that, I would first like to thank my executive board and the student representatives for a job well done. Sheila, Erica, Michelle, Arielle, Jeaneen, Kisha, Savonne & Teresa, this year would not have been such a success without all of your hard work and dedication to the Alliance. I wish you all the best in all of your future endeavors. I would also like to send a special thank you out to Judge Angela Eaves, Judge Lynn Stewart and Kathy Crosby. Thank you so much for coming out to our general body meeting; your presence at that meeting was very instrumental in our ability to successfully plan and host the Celebration of Life luncheon.

This year saw the Alliance hosting many new events like our bowling fundraiser and the Color at the Bar event that was held at the University of Baltimore. These two events made for a very busy February but both events were well worth the effort. Bowling gave us a chance to relax and just have some good, clean, competitive fun. The Color at the Bar event gave those who attended a chance to voice their opinion about the current status quo in the legal profession.



We continued on with the brown bag lunch series and had many great speakers. In addition, we co-sponsored a happy hour event with the University of Baltimore and the University of Maryland's Black Law Students Association. And, finally, I think that by far, the Celebration of Life luncheon could not have been a better way to wrap up this year. We were all very fortunate to be in the presence of Ms. Lena K. Lee as we helped to begin the celebration for her 100th birthday. I will speak more about the luncheon later on in the newsletter.

Thank you to everyone who joined us for the new admittees reception in July. The new officers have taken office and I hope that we will all continue to support the Alliance and dedicate as much of our time as possible to making sure that the Alliance continues to thrive. Thanks again!

Alliance of Black Women Attorneys 2005-2006 Board of Directors

Teresa Epps- President
Sheila Tahir Brooks- President Elect
Michelle Wilson - Treasurer
Arielle Harry-Bess - Secretary
Erica I. LeMon - Historian
Jeaneen Johnson - Member At Large
Kisha Brown - Member At Large

Celebration of Life Luncheon

The Alliance has been blessed to have many distinguished and accomplished past presidents whose visions and hard work have provided a formidable foundation upon which we all stand and which allows us to continue on with a promising future. Therefore, the 2005/2006 board members decided it was time to honor and salute all of the past presidents of the Alliance. On Saturday, May 6, 2006, the Associated Black Charities' African American Jurist Archive Fund (this fund is a designated charitable fund established and administered by the Associated Black Charities of Maryland for the purpose of creating and maintaining an archive of our African-American judges) in support of the Alliance of Black Women Attorneys of Maryland, held a Celebration of Life Luncheon at the beautiful Hampton's Restaurant in the Harbor Court Hotel. The ladies of the executive board looked lovely in their purple and white. We all enjoyed the words of wisdom that all of the speakers shared with us, we had a chance to catch up with old friends and it gave us all a chance to fellowship together while making new friends.

The highlight of the luncheon occurred when the Alliance honored the Honorable Judge Mabel E. Houze Hubbard and Lena K. Lee, Esq. Although Judge Hubbard could not attend, we could all sense her spirit of excellence in the room. Ms. Lee, however, was present, and the Alliance presented her with a small token of our appreciation. We just wanted to show Ms. Lee our appreciation for her dedication to public service. It was music to everyone's ears as we all sang Happy Birthday to Ms. Lee.

Please enjoy the pictures. Remember, we all have wings with which to fly.



**A Slip of the Tongue, an Innocent Mistake,
or Something More Sinister:
Determining Prosecutorial Intent under
Double Jeopardy Mistrial/Retrial Law**

by Stacey L. Martin, Esq.*

In Oregon v. Kennedy, 456 U.S. 667 (1982), the United States Supreme Court set forth a strict standard for those defendants seeking to prevent a retrial pursuant to the double jeopardy clause of the Fifth Amendment where their motion for mistrial was granted during their initial trial due to prosecutorial misconduct. Id. Specifically, Kennedy requires such defendants to establish that the prosecutor “intended to ‘goad’ the defendant[s] into moving for a mistrial.” 456 U.S. at 676. The defendants have to demonstrate, for instance, that the prosecutors’ improper actions constituted a “calculated personal foul,” a “deliberate hitting below the belt” or “gross negligence,” Booth v. State, 301 Md. 1, 5, 481 A.2d 505, 507 (1984), that was intended to cause a mistrial. However, what are the specific factors that are relevant to such a determination?

A few jurisdictions have answered the above question and now require courts to consider certain factors in discerning prosecutorial intent to cause a mistrial from prosecutorial intent aimed at some other purpose. See e.g., Pool v. Superior Court, 677 P.2d 261, 271-272 (Ariz. 1984) (requiring state courts to consider specific factors in certain circumstances in adopting more expansive double jeopardy protections under state law than those set forth under federal law); State v. Pacheco, 26 P.3d 572, 582 (Haw. 2001) (requiring state courts consider the nature of the conduct, the promptness of curative instructions and the strength of the evidence against the defendant in analyzing double jeopardy mistrial/retrial claims); Commonwealth v. McClain, 454 A.2d 1134, 1137 (Pa. Super. Ct.

1983). Unlike courts in Arizona, Hawaii, and Pennsylvania, Maryland’s appellate courts have yet to offer a specific set of factors to determine whether prosecutorial intent to cause a mistrial exists. Thus, determinations by trial courts with respect to the existence of such prosecutorial intent often hinge on a range of factors that may vary from one case to the next. Additionally, the absence of a list of factors could result in trial judges inadvertently failing to consider issues relevant to such determinations (e.g., the prosecutor’s level of experience). Accordingly, the state’s appellate courts should adopt a set of factors for trial courts to consider in determining prosecutorial intent. Adopting such factors would give greater guidance to trial judges and promote consistency in the analysis of such double jeopardy claims.

The following is a proposed list of factors developed from a review of Maryland case law and relevant cases from other jurisdictions:

1. Egregiousness of the Improper Conduct – A violation of an earlier evidentiary court ruling or order is probably not sufficiently egregious to establish prosecutorial intent to prompt a mistrial. See e.g., Giddins v. State, 163 Md. App. 322, 878 A.2d 687 (2005) (concluding double jeopardy posed no bar to retrial where the prosecutor elicited testimony from a witness indicating that the defendant was the target of a prior police drug investigation contrary to the trial court’s previous ruling). Likewise, discovery violations by the prosecutor are unlikely to be sufficiently egregious to establish the requisite prosecutorial *mens rea* to end the trial and begin anew. See e.g., Booth, 301 Md. at 6-7, 481 A.2d at 507-508 (concluding there was no evidence of prosecutorial overreaching or misconduct where the prosecutor failed to reveal exculpatory information to defense counsel until the trial). However, at the other end of the spectrum, it is difficult to characterize a prosecutor’s repeated

references to inadmissible evidence as an unintentional error, see e.g., State v. Laster, 724 P.2d 721, 724 (Mont. 1986) (concluding double jeopardy barred retrial where a prosecutor continually attempted to elicit hearsay testimony from a witness indicating that the defendant had engaged in various sexual crimes although the state had only charged the defendant with a drug-related offense), or a reference to plea negotiations as an innocent slip of the tongue, see e.g., Wilson v. State, 503 S.E. 2d 924, 926 (Ga. Ct. App. 1998) (affirming the trial court’s grant of the defendant’s motion to dismiss on double jeopardy grounds and noting, *inter alia*, that the prosecutor’s error in asking the defendant/witness whether he tried to negotiate a nolo contendere plea in his case was “so blatant and so contrary to the most basic rules of prosecutorial procedure” that it could not have been a mistake), or an inflammatory appeal to racial prejudice as a minor oversight. See e.g., State v. Rogan, 984 P.2d 1231, 1238 (Haw. Ct. App. 1999) (reversing the trial court and barring retrial of the defendant accused of sexual assault where the prosecutor stated in closing argument that it was “every mother’s nightmare [to find] . . . some black, military guy on top of your daughter”).

2. Prosecutor’s Level of Experience

– A prosecutor with several years of trial experience should not make the same mistakes as a new lawyer within his or her first few years of practice. Accordingly, it is more likely that a seasoned prosecutor who engages in egregious conduct (such as referencing the defendant’s prior attempt to negotiate a plea deal during trial) intended to cause a mistrial by doing so. See Wilson, 503 S.E. 2d at 926. It is less likely that a prosecutor with limited trial experience who engages in similarly egregious conduct (such as undermining the defendant’s right not to testify in his or her defense) did so intending to cause a mistrial. See e.g., State v. Chase, 754 A.2d 961, 964 (Me. 2000) (concluding that the prosecutor did not intend to cause a mistrial in

stating during defense counsel’s cross examination of a state’s witness that the defendant could take the stand if she wanted to refute certain claims and noting the trial court’s determination that the statement constituted a “rookie error”).

3. Prosecutor’s Reputation – If the prosecutor has been litigating long enough, chances are that the trial judge has seen him or her before and has formed his or her own opinion as to whether the prosecutor consistently adheres to the rules of ethics. Accordingly, the trial judge should be permitted to take into account his or her knowledge of the prosecutor’s reputation in determining whether the prosecutor intended to cause a mistrial. See e.g., Byrd v. State, 626 S.E. 2d 598, 600 (Ga. Ct. App. 2006) (noting that “[a]lthough not determinative, the court was authorized to consider its own knowledge of the prosecutor’s reputation for ethical behavior”); see also State v. Thomas, 562 S.E. 2d 501, 503 (Ga. 2002) (the trial judge’s personal knowledge of the prosecutor’s integrity is relevant but not controlling).

4. Prosecutor’s Explanation – A prosecutor’s explanation for his or her conduct is also relevant in determining whether he or she intended to subvert the prior proceeding and begin the trial anew, although such an explanation may often be self-serving. But see, People v. Dawson, 427 N.W. 2d 886, 887 (Mich. 1988) (noting where on appeal the state conceded that the prosecution intended to cause a mistrial by asking a witness sexually explicit questions and a series of other questions of no relevance). Additionally, discrepancies between the prosecutor’s explanations offered at trial and those offered during a post-trial hearing on defendant’s motion to dismiss on double jeopardy grounds may be helpful in determining whether the prosecutor is being candid with respect to his or her actual motives.

5. Whether Prosecutor Surprised by Motion for Mistrial/Resisted Mistrial – A prosecutor that appears genuinely surprised by the defendant’s motion for mistrial and/or resists declaration of a mistrial is unlikely to have intended to end the proceedings. See Kennedy, 456 U.S. at 680 (Powell, J., concurring); see also Giddins, 163 Md. App. at 361-362, 878 A.2d at 710-711 (2005) (noting where the prosecutor resisted declaration of mistrial); Bell v. State, 286 Md. 193, 196, 406 A.2d 909, 910 (1979) (affirming the trial court’s denial of the defendant’s motion to dismiss on double jeopardy grounds and noting the prosecutor’s surprise at defendant’s motion for mistrial even though the prosecutor should have anticipated that the state’s witness would implicate defense counsel in the murder of the victim). On the contrary, a prosecutor who fails to object to the defendant’s motion for mistrial or offers minimal resistance to the defendant’s efforts to end the proceedings is more likely to have intended to prompt a mistrial by his or her conduct.

6. A “Sequence of Overreaching” Prior to the Improper Conduct – The prosecutor’s pattern of behavior just prior to the specific act of misconduct that resulted in the mistrial is also relevant in determining his or her intent. For instance, prosecutorial intent to cause a mistrial is more likely to have occurred where the prosecutor consistently engaged in misconduct prior to the actual act of improper conduct that caused the mistrial. On the other hand, such intent is less likely where the objectionable conduct on the part of the prosecutor was an isolated occurrence and not part of a prior pattern of similar behavior. See Kennedy, 456 U.S. at 680 (Powell, J., concurring). See also, Laster, 724 P.2d at 724.

7. The Timing of the Improper Conduct – The earlier in the trial the misconduct occurs, the less likely it is that the misconduct is intentionally designed to prompt a mistrial

because there is generally insufficient evidence in the record at that point from which to determine the likelihood of success or failure of the state’s case. See e.g., Kennedy, 456 U.S. at 692 (Stevens, J., concurring) (“[t]he isolated prosecutorial error occurred early in the trial, too early to determine whether the case was going badly for the prosecution”); See also, Giddins, 163 Md. App. at 360, 878 A.2d at 710 (noting that the prosecutor’s alleged misconduct occurred as the prosecution was questioning its first witness). But see, Dawson, 427 N.W. 2d at 898 (concluding double jeopardy barred retrial of the defendant where, *inter alia*, the state’s case was consistently “going badly,” and there was little evidence linking the defendant to the crime). However, it is more likely that the prosecutor intends to end the trial if his or her misconduct occurs well after the proceedings have begun, and the evidence in the record tends to establish the defendant’s innocence.

In applying the above factors, trial courts should consider the totality of the circumstances and, depending on the facts of the particular case, give certain factors greater weight in determining the existence of prosecutorial intent to cause a mistrial. In any event, the above factors would provide trial judges with a much needed framework to conduct a careful analysis when double jeopardy concerns arise as a result of a mistrial declared at the defendant’s request.

* Ms. Martin is a former law clerk to the Honorable Inez Smith Reid, District of Columbia Court of Appeals.

CONQUERING YOUR SPIRIT FIRST

by Karen P. Moody, Esq.

Before you go to your first bar review session, or read a bar preparation outline, I suggest that you spend time in quiet stillness meditating on any emotions which may loom to undermine your success on the bar examination. In preparing to study, I recommend that you select a simple line of philosophy, scripture, poetry, wisdom or a song lyric which encourages your spirit. Read, write, listen, sing, or say your mantra daily, as often as you need to in order to pave the way for your mind to read, analyze, and write the law you already know. I pen these thoughts because passing the bar examination has much more to do with what is in your spirit than what is in your mind. Therefore, your spirit needs to be prepared as much as, or more than your mind.

My mentor, Charles H. Dorsey, Jr., was relentless in sowing the seed of truth that law school graduates already know enough to pass the bar exam before they start studying. I did not know how powerful his words were the first time I heard them. I now believe that what this sage was telling me was that the cacophony of voices in my spirit telling me that the bar exam was too difficult to overcome was louder than the black letters of the law which rested humbly in the recesses of my mind.

One day, after too many defeats, I decided to embrace the Kwanzaa principal of Kujichagulia which celebrates self-determination. I allowed my spirit to receive messages which affirmed that I was bigger than the fear inside me undermining my success. I listened to Mariah Carey's song Hero everyday

which encouraged me to look inside myself to find my hero. In that season of bar exam preparation, I realized that what was standing between exam success and me was not a lack of knowledge, but, rather, an irrational fear which eroded any effort I had put forth in the past. Eventually, self-determination evicted fear from my spirit, and took up residence in its place.

With steeled resolve, I started studying again. I discovered that the issues on the practice essay exams were pretty much the same, year after year. Moreover, my mentor had been correct! "The bar exam," Mt. Dorsey preached, "simply tests "basic" legal principals. The examiners are not interested in reading everything there is to know about adverse possession and the law of negligence," he would often say.

All along, the basic legal principals were eagerly waiting like tadpoles to jump from my head into the lily pod of the exam booklet, only I couldn't see them because my mind had been betrayed by the demons of fear and self-doubt which I allowed to inhabit and poison my spirit. As the negative emotions matured, they developed into an infidelity which would betray my mind time and time again. Why my spirit would become unfaithful to my mind is a question for psychotherapy. I don't know where those emotions originated. But, my sense is that as the

gatekeeper of all messages entering our minds and spirits, we have the power to oust the negative thoughts and nurture the positive ones. You, the examinee, must identify self-defeating emotions and squelch them before they spread as cancer through your spirit.

Over the years, when I have sensed the often-surreptitious approach of fear, I have remembered the words of the Apostle Paul who said, “God has not given us the spirit of fear, but of power, and of love, and of a sound mind.”¹ A sound mind does not allow the lingering of self-deprecating thoughts such as I can’t, I won’t, and I never will. A sound mind embraces any challenge, looks it squarely in the eyes, reaffirms your purpose, and marches steadfastly into battle to bring back the spoils of conquest. Prepare your spirit. Walk into your destiny.

New Admittees Reception

For the second year in a row the New Admittees Reception sponsored by the Alliance of Black Women Attorneys and the Monumental Bar Association was held at the Clarence Mitchell Courthouse. This year’s event occurred on July 19th and featured remarks by Judge Robert M. Bell, Judge Marcella Holland, Judge William D. Missouri, and Guest Speaker, State’s Attorney Patricia Jessamy.

Ms. Jessamy spoke about being one of the few African-American attorneys graduating from the University of Mississippi School of

Law and later practicing in Mississippi. Among the lessons imparted to the new admittees were (1) that it does not matter if one did not graduate from an Ivy League law school, with hard work and preparation, you can succeed and (2) the need to find a mentor to help navigate your career path.

The Alliance of Black Women Attorneys and the Monumental Bar Association would like to extend special thanks to Judge Holland and her staff for arranging the use of the Mitchell courthouse.



¹ II Timothy 1:7

2006- 2007 Executive Board

Please welcome the Alliance of Black Women Attorneys' 2006-2007 Board of Directors. The new Board was sworn in on July 17, 2006 by Judge Angela Eaves. The 2006-2007 Board members are as follows:

Kisha Brown (President)

Arielle Harry-Bess (President-Elect)

Natasha Moody (Treasurer)

Teresa Epps (Recording Secretary)

Katrina Dennis (Corresponding Secretary)

Kendra Ausby (Member at Large)

Sheila Tahir Brooks (Member at Large)

In addition, Savonne Ferguson (UB) and Shari Hathaway (UM) will serve as student representatives.

Membership Dues Reminder

The Alliance of Black Women Attorneys relies on dues to offer quality programs and events. Please remember to pay your membership dues.

Dues Categories:

Graduated more than 5 years- \$35

Graduated 3-5 years - \$30.00

Graduated less than 3 years - \$25

Law Student Associate Membership - \$5

Please visit the Alliance of Black Women Attorneys' website for the application/dues form:

http://www.msba.org/links/md/specialty/abwa/ABWA_APPLICATION.pdf

The University of Baltimore School of Law will hold its 4th annual Homecoming and Reunion Weekend on October 6 – 8, 2006

This year's theme, "Yesterday, Today and Tomorrow," highlights past memories, enlightens about current activities and inspires future engagement with UB. Nostalgia will abound when the reunion class years of 1956, 1966, 1976, 1981, 1986 and 1996 reminisce about the law school over the last few decades.

Dean's Friday Night Welcome Reception

The Welcome Back Reception takes place Friday, October 6, 6 – 8 p.m., in the Student Center

Dean's Annual Softball Game

Gilbert Holmes, all-star pitcher and dean of the School of Law, returns to the mound on Saturday, October 7 12-2 p.m.

An Evening of Reminiscing, Dining & Dancing

The panoramic nighttime view of the Inner Harbor offered by the Center Club will rekindle Baltimore memories for returning alumni.

October 7, 7-11 p.m.

Collateral Effects of Criminal Incarceration

Panel of Legal Experts to Speak

On Sunday, October 8, an expert panel will be assembled to discuss the collateral effects of incarceration. The program will take place from 10 – 11:15 a.m. in the Student Center.

Live Jazz on a Sunday Morning

Farewell Brunch a Swinging Good Time

A live jazz band will play the lobby of the John & Frances Angelos Law Center on Sunday, October 8, during the farewell brunch

The show begins at 11:15 a.m. and runs until 2:15 p.m.

For more information or to purchase tickets please contact:

Tammi L. Scott-Lynch

Assistant Director of Development, Alumni Relations

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UPCOMING EVENTS

- Alliance of Black Women Attorneys
General Body Meeting- October 10th
5: 30 PM- 6:30 PM
Legal Aid Bureau

- Attorney General Candidate's Debate
Monday, August 21, 2006 7:00 P.M.
University of Baltimore Law School,
Venable, Baetjer & Howard Moot Court
Room, 1420 North Charles Street,
Baltimore.

For more information on this event,
please contact Tammy Rigoli at (410)
810-5490

- ABA Young Lawyers Division Fall
2006 Conference will take place from
October 19-21, 2006 at The Baltimore
Marriott Waterfront hotel.
http://www.msba.org/sec_comm/sections/yls/events/flyers/aba_fallfinal.pdf