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An Expert’s View

Expert witnesses play a vital role in many correctional lawsuits. An experienced expert may participate in more inmate lawsuits than any of the lawyers representing the parties in a given case. We thought it would be interesting to get a different view on the litigation process so we turned to Tom Rosazza from Colorado Springs, CO.

Tom Rosazza brings over 35 years of experience in corrections to the witness stand. He worked in corrections in the military, was involved for a number of years with correctional standards in Maryland, and has consulted with correctional agencies for over 20 years, mostly in the areas of liability management, standards development and jail planning. He also has written many monographs, articles and training courses on jail administration. He is the co-author of the *Resource Guide for Jail Administration* and the author of *Jail Inspection Basics*, both of which are available from the National Institute of Corrections. Mr. Rosazza can be reached at www.rosazza.com.

Since this article is about expert witnesses and the court process, we put Mr. Rosazza on the stand and swore him in. The following is his testimony and he is sticking to it.

CLR: How many times have you been retained as an expert witness in a corrections case?

Rosazza: Over 200 times over the past 15 years.

CLR: Of those 200-plus cases, how many times have you actually testified at trial?

Rosazza: Maybe two to three times per year. Deposition testimony tends to happen more often, perhaps once monthly.

CLR: You have worked for both plaintiffs and defendants, haven't you not? What is the approximate breakdown?

Rosazza: The cases are generally split 50/50 between plaintiffs and defendants.

CLR: Aside from expert witnessing, isn't most of your work as a correctional consultant, working with...?

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National Prison Reform Commission Begins Work

by Margo Schlanger

Editor’s Note: Margo Schlanger is Professor of Law, Washington University in St. Louis, and a member of the Commission on Safety and Abuse in America’s Prisons. She is a former trial attorney, U.S. Department of Justice Civil Rights Division. She is the author of a superb article on inmate access to courts: *Inmate Litigation*, 116 *Harvard Law Review* (2003). You can contact her at mschlanger@wulaw.wustl.edu

Chaired by former Attorney General Nicholas Katzenbach and former U.S. Circuit Judge John Gibbons, the Commission on Safety and Abuse in America’s Prisons opened

shop in March and held its first public hearing in April in Tampa, Florida. The Commission is a private group, organized by the Vera Institute of Justice in New York. It brings together 21 commissioners — civic leaders with law enforcement backgrounds, inmates’ advocates, former inmates, corrections professionals (from both jails and prisons), forensic psychiatrists, law professors, and others. Some of the commissioners are very high profile — they include William Sessions, former U.S. District judge and FBI Director; Marc Morial, former Mayor of New Orleans; Gloria Romero, California Senate Majority Leader; Gary Maynard, Director, Iowa Department

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Most of the time though, they may not see the need for an expert until litigation is considerably underway.

CLR: When should someone retain an expert in jail litigation?

Rosazza: I don't know if there is a fast and fast rule on when someone needs to get an expert, but common sense suggests that when there are complex issues of jail management and practices involved, an expert can be valuable. In some cases, the facts seem to speak for themselves, but if one side has an expert, the other side may need one. Or, the attorney may feel that an expert can educate the jury and lend credibility to the claim.

CLR: People mostly think of an expert as testifying in support of a particular position. But are there other tasks that you perform when someone retains you as an expert? For instance, do lawyers use you to analyze and critique the other side's expert to help the lawyer who hired you attack the expert?

Rosazza: An expert must assume that the case will go to trial, even though in my experience that rarely happens. The role of an expert really includes two main functions: that of subject matter expert and that of consultant.

The subject matter expert reviews case materials, develops opinions, constructs an expert report, and testifies in deposition and/or trial. The consultant assists the attorney in technical matters related to jail or prison operations, standards and accepted practices.

I am often asked to critique the other side's expert report especially when that expert is to be deposed. In that case the attorney will ask me to develop questions about the expert's opinions, bases for those opinions, and questions about the expert's background.

CLR: When you are sitting around having a beer with colleagues after work, do you have a favorite "expert witness" story that you like to tell? Can you share it with our readers?

Rosazza: I testified in a § 1983 case where an inmate was severely burned by his cellmate. The jury award \$1.6 million after testimony affirmed that the captain of the cellblock refused to move the plaintiff from the double cell, even after the cellmate told the captain that he would burn the cell. The captain told the cellmate: "I don't care if you burn both of your asses." That statement sort of nailed the deliberate indifference claim.

After I testified on direct, and during a break, I was told by plaintiff's attorney that

the defense counsel was coming after me. I guess he saw his case falling down around him and he needed to discredit me. You could taste the tension in the courtroom.

Counsel then came at me with all guns blazing. He fired off question after question hardly allowing me to finish my answers. He was getting more and more animated with arms flailing and books slamming on the podium. The tension became more intense. The jury was leaning forward and really into the dramatics. My strategy was to remain calm (which was no easy task) and not let him rattle me.

The dialogue went something like the following: "Mr. Rosazza, don't inmates often assault you?" I replied calmly that they do. Then he asked, "It doesn't mean that they are out of control does it?" "Not necessarily," I replied. Then he said, "It's sort of like what's going on here in this courtroom, isn't it? I mean we are in control here, aren't we?" I replied, "Counsel, I'm in control, but I don't know about you."

My response broke the tension and the jury, as a person, broke into continued laughter. Even the judge had a smirk on his face. Counsel's second chair could only look at the floor and shake his head.

No further questions. You may step down.

Rosazza: Thank you, Your Honor! ■

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of Corrections, American Correctional Association President-elect. Some are less well known — me, for example. Our common ambition is to understand the most serious problem in our nations' nearly 5,000 correctional facilities and recommend ways to make them safer for inmates, staff, and the public.

Both national and state blue ribbon prison reform commissions have a long history, of course. In the late 1960s, Chief Justice Warren's interest in prisons led the American Bar Association to found a Commission on Correction Facilities and Services. One of its chairs, Robert McKay, also chaired a commission that examined the causes and course of the 1971 riot at New York's Attica prison. The American Friends Service Committee produced an important set of prison reform recommendations in 1971 and its National Commission on Crime and Justice produced another set in 1993.¹ In the late 1980s, California had its Blue Ribbon Commission on Inmate Population Management. More recently, the ABA had another commission,

the Justice Kennedy Commission, whose recommendations were largely adopted by the ABA this summer.

Some of these and other prison commissions have accomplished a great deal; others less. In either event, history tells us that gains made are likely to erode over time. To the modern eye, jaundiced perhaps by

well-being of all inmates, for inmates to conduct their own affairs", and to reform parole procedures² — seem almost to come from another universe. And the Justice Kennedy Commission introduced its attempted intervention by looking back at its predecessor, writing in its final report that "for all of the resources and energy and tal-

*To the modern eye ... many of the Attica
Commission's recommendations ... seem almost
to come from another universe.*

truth in sentencing, the rise of supermax incarceration, and, most of all, by the increase of the number of incarcerated persons from about 360,000 in the early 1970s to over 2 million today, many of the Attica Commission's recommendations — for example, to make confinement "the least that is administratively necessary," including "the maximum amount of freedom, consistent with the security of the institution and the

ent devoted to its work, it appears that the ABA Commission on Correctional Facilities and Services left little lasting impression on the legal landscape, and its work was all but forgotten in the crime war of the 1980s."³

But even a ten or 20 year improvement seems to me extremely worthwhile. If this new effort is successful at identifying and promoting practical ways to make correc-

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tional facilities more safe, humane, and effective, that could benefit millions of people in one year alone, and many more millions before it's time for the next national prison commission. And perhaps the current climate — in particular, the huge modern inmate populations, the difficult budget situation in state governments, and the public outcry over rape in U.S. prisons and the maltreatment of prisoners of war abroad — is creating a perfect storm for reform. So from my perspective, blue ribbon commissions are looking pretty good, especially as litigated intervention in conditions of confinement grows more rare and more limited.

Our work is just starting. The first hearing was an introduction and overview. Commissioners heard testimony about what is known and unknown about the nature, extent, and causes of violence and abuse by and against inmates and staff in both jails and prisons. Some of the witnesses were former corrections officers, others were former inmates, and still others were experts and advocates of various kinds. The second hearing, in New Jersey in July, will focus on medical care and on systemic and institutional problems

(e.g., as overcrowding, the increasing use of isolation, and mental illness), that may or may not drive violence. The third hearing, in November, will examine the world of the corrections officer, looking at issues like recruitment, training, and support; the job stress and its consequences; and what happens to whistleblowers. A fourth and final hearing, in January, will home in on oversight and standards issues. We aim to present recommendations to Congress, state governments, and corrections departments around March, one year after the Commission was formed.

More information about the Commission on Safety and Abuse in America's Prisons can be found at www.prisoncommission.org

Footnotes

1. Morgenroth, Edwin C. [Chairman], et al., *Struggle for Justice: A Report on Crime and Punishment in America* (1971); National Commission on Crime and Justice, Thurston, Linda M. ed., *A Call to Action: An Analysis and Overview of the United States Criminal Justice System, With Recommendations* (1993).
2. New York State Special Commission on Attica, Attica (1972), at xvi-xviii.
3. Report of the ABA Justice Kennedy Commission, at 4 (2004), available at <http://www.abanet.org/media/jkcrecs.html>.

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outside the cell" and to work collaboratively rather than adversarially, if we ever hope to accomplish this vision.

Despite its packaging as a law review issue, this collection of articles and essays offers an unprecedented analysis of the past efforts at prison reform through litigation in the United States. I predict that the vision it presents of the future of prison reform will stand the test of time.

Copies: Pace Law Review, 78 North Broadway, White Plains, New York 10603. The entire issue of the law review or any of the articles can also be downloaded for free at: http://library.law.pace.edu/research/prison_reform_revisited.html. Additional hard copies of the law review may also be available through Professor Michael Mushlin at Pace Law School, who can be reached at: mmushlin@law.pace.edu.

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