

## **MENTORS, FIRST EFFORTS, AND GO BYS:** **HOW DO ATTORNEYS & JUDGES LEARN CRIMINAL LAW?**

Every attorney and judge has a first time doing anything. How does one learn the ropes in criminal law, or the ropes on “the other side”? Even if he or she has participated in many suppression, plea, and sentencing hearings as a prosecutor, an attorney shifting to defense work will find these to be virtually brand new experiences from the “other side.” Little time for supervision; learning by doing; the value of sounding boards.

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### SCR 20:1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. *Notice: No reference to experience, per se, although “reasonably necessary” “skill” is required.*

### COMMENTS INCLUDE:

- “A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.”
  - “The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence.”
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To establish *deficient performance* of a defense attorney, the defendant must show that counsel's representation fell below the objective standard of reasonably effective assistance. Reviewing courts are *highly deferential to counsel's strategic decisions* and make every effort to eliminate the distorting effects of hindsight, to

reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. There is a *strong presumption* that counsel's conduct falls within the wide range of reasonable professional assistance.

- *State v. Domke*, 2011 WI 95, 337 Wis. 2d 268, 805 N.W.2d 364 (holding that counsel's performance was deficient when he called a witness at trial without having fully investigated what she would say on the stand; counsel had information from Domke as to what the witness believed, but counsel did not speak with the witness before calling her to the stand or further investigate what she believed at the time of trial; counsel did not provide any reason for failing to speak with the witness before trial, and thus had not made a strategic decision.)

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“Ineffective assistance of prosecutor.” Is this, as my kids say, not a thing? Cf. *State v. Montgomery*, 148 Wis. 2d 593, 436 N.W.2d 303 (1989) (using the term “prosecutorial negligence” in deciding that prosecutor's *negligent failure to commence prosecution* in juvenile court before defendant turned 18 did not violate due process); *State v. Hagen*, 181 Wis. 2d 934, 512 N.W.2d 180 (Ct. App. 1994) (State's prearrest delay in commencing prosecution for first-degree intentional homicide did not violate due process, *despite prosecutorial negligence or indifference or reckless disregard by prosecutor*, absent proof that state's delay stemmed from improper prosecutorial motive or conduct.)

Fourteenth Amendment protects criminal defendants from misconduct by state authorities that would deprive them of due process of law—including withholding of material evidence favorable to the defendant. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

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What more could be done to help those who are new to prosecution or to defense work perform more effectively and with less stress?