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PROSECUTING GANG HOMICIDES

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INTRODUCTION

A member of a local street gang is shot and killed. Fresh "Placa" is written on a wall nearby. The investigating officers question neighbors, pedestrians, and people who were walking with the defendant at the time of the shooting. Every potential witness denies any knowledge of the incident. After every possible lead is pursued, the case is put on the back burner.

Two weeks later there is a drive-by shooting of another gang member. His gang is a rival to the first victim who was shot. Unfortunately, the same group of witnesses claiming to hear no evil, see no evil, and speak no evil emerges. Another "back burner" for the police? They bring the facts of both cases to the District Attorney's Office. How should it be handled?

Gang cases are not easy to prosecute. Ten years ago the Los Angeles District Attorney's Office was losing a large percentage of them because gang members did not want to testify against rival gang members. Instead, they preferred street "payback." Furthermore, if new gang witnesses were at the scene, they were either too frightened to cooperate or soon became so because of threats, actual physical intimidation, or murder. There was another factor: gang members talked a language unique to their culture. Attorneys did not maximize results because they did not know what questions to ask, or how to ask them.

The problems inherent in gang cases required a new approach: specialized training of prosecutors in gang processes and development of pretrial and trial techniques to maximize case results. This monograph is not intended to cover every aspect of gang prosecutions. However, we would like to present a few of the techniques to be utilized in filing cases and prosecuting gang members, using the homicide case as a model.

FILING THE CASE

INVESTIGATION. Investigating officers are vital to any case. The better the officer, the more likely a crime will be thoroughly investigated. In a gang case you need not only a good officer, but a *gang-trained* officer. Because gangs talk their own language, have very unique means of operation, and leave gang "spore" or signs around the area of the killing, a specially trained officer is essential in preventing the loss of evidence.

For instance, gangs love to leave "placa" or the statement of "why" the killing occurred and the gang members responsible for it in the same neighborhood. An experienced officer can read it and testify as to its meaning in court. (The process of utilizing an "expert" police officer in court will be discussed in another section.) You should be aware of these signs and other aspects of gang activity to intelligently assess your case. This is particularly meaningful when interviewing the gang witness. A strong awareness of gang processes is vital to the success of the interview. Failure to communicate effectively with gang members will hinder your ability to ascertain vital facts and will tempt gang witnesses to proffer false information.

PRE-FILING INTERVIEWS. On the matter of pre-filing interviews, back-up protection is needed in the event that a gang witness recants his prior statements or testimony. If at all possible, personally interview witnesses *and* tape record their testimony. We recommend using videotape equipment. It is amazing what the responses of witnesses and defendants are before a camera. Place the monitor where the witness can see it; they preen, they comb their hair, and stay on camera as long as possible. This is their opportunity to star. The result is complete, visible statements which are clearly non-coerced. Give Miranda admonishments on television. Swear the witness in. Talk about the necessity of telling the truth. Relate the penalty for perjury. They will talk and provide much more information than the police have already obtained from them. Incredibly, we have obtained detailed confessions, not only to the crimes being investigated - murders, rapes, robberies - but to other major crimes not under investigation.

Most important, if you are required to rely on *People v. Green* (1971) 3 Cal. 3d 981 and Section 1235 of the Evidence Code in order to introduce the taped statement for impeachment or as substantive evidence, the trier of fact will also respond strongly to the television recordation.

SEARCH WARRANTS. Search warrants should be left to police officers, said a colleague of ours. Wrong! Even good police officers are not lawyers. They do not see all the holes in their case or realize how far they can "stretch" to get evidence. Experienced gang officers and their expertise can be used to widen the scope of a search warrant affidavit. However, it is up to you to make use of the process.

The approach to a gang warrant is simple: relate the officer's credentials to establish the level of his experience and expertise, then go over the area to be searched and the material to be seized using the officer's expertise for your "stretch." Here is an example of language we have used to obtain weapons unusually late in an investigation:

> "Despite the lapse of time between the commission of the crime and the anticipated search by this warrant, your affiant believes that the weapon used, described as [*insert description*] can still be located at [*insert location, vehicle, person*] since it is your affiant's opinion and experience that gang members frequently hide a firearm, used in a shooting, with a fellow gang member or associate, and that they often retrieve them and keep them at their residences or in their vehicles or in their persons when they believe that they would no longer be subject to a search of their residence, vehicle or person, in connection with the incident being investigated, because of a lapse of time."

We have successfully retrieved corroborating evidence by using this language:

> "It is your affiant's opinion that evidence of gang membership or affiliation with any street gang is important as it may suggest motive for the commission of the crimes, in the instant case, and it may provide evidence which tends to identify the persons who may have knowledge of or be involved in the commission of the crimes in the instant case, or it may tend to corroborate information given by other witnesses.
>
> Affiant believes that these are not the type of items normally disposed of after the commission of a crime and that they will therefore likely still be found in the locations or on the person to be searched."

This last clause suggests something any district attorney trying a gang case should be alerted to: gang members are proud of the fact they are in a gang. Besides wearing gang colors and scrawling graffiti in the streets with their "sign," they will paint their rooms with gang placa, display banners proclaiming their affiliation and maintain books of photographs of themselves and other gang members flashing signs or displaying weapons - all of which is good material for a trial. The critical task is to obtain it, and a search warrant is the best way.

WITNESS PROTECTION. We have mentioned gang witnesses and the possibility of intimidation. The subject of witness protection will be covered in greater detail in a subsequent section. However, thought must be given at this time to beginning that process. If witnesses are in jail, get them housed in different modules than the defendant or the defendant's fellow gang members. It is also important to remember that unless otherwise ordered, sheriff's deputies may transport witnesses to court in the same vehicle or house them together in the court holding cell. Make certain that does not occur. Finally, make sure you get a commitment from your gang officer to keep track of your witnesses. They will be subjected to all kinds of community pressures not to testify. For a number of them, that may mean fleeing. You can not try your case if you do not have witnesses.

VOIR DIRE

Picking a jury is an art which we try to make a science out of. The truth is, much of it is instinct. However, there are a few things to be aware of in gang cases. Voir dire is a time to educate a jury about the facts of your case. Tell them it is a gang case. Stress the particular gang facts. For example, if they involve rivalry between the *Crips* and the *Bloods*, ask jurors if they have heard of them. Have they read newspaper articles about the gang warfare that has been raging in a given area? Are they aware of the retaliatory concept of "payback" wherein one gang will kill members of another gang for revenge. Have they ever seen gang signs? Can they read graffiti? Are they aware that gangs use intimidation as a technique? In addition to uncovering individual prejudices, bear in mind that while questioning prospective jurors you are also painting your picture of the gang case for them.

During voir dire, there are several prejudices to look for. Do any of the veniremen live in the area where the particular gang or gangs in trial hold sway? If so, they may be too frightened to render a people's verdict. On the other hand, they will probably detest the gangs, and thus will be preferable. This is an important matter to explore. Additionally, find out if any of them are related to gang members or if they were gang members themselves at one time. These persons will understand gangs and their viciousness and be able to educate naive jurors about gang problems and processes.

If you intend to utilize an expert witness, make sure that prospective jurors are not anti-police, that they realize an individual can become an expert in an area, and that the evidence and cases will allow them to use expert opinion in arriving at a decision.

EXPERT WITNESSES

EXPERT TESTIMONY AT TRIAL. We have already discussed using the expert for filing and search warrant purposes. However, the expert witness can be most useful during trial. Training and field experience are pre-eminent in making an expert; taking that expertise and translating it to admissible testimony is another matter.

To illustrate what can be done, assume that you want to establish a gang conspiracy for the trier of fact. Common gang membership can be considered as circumstantial evidence of a conspiracy (*In re Darrel T.* (1979) 90 Cal.App. 3d 325). One way to establish that membership is through expert testimony. California Evidence Code section 720 states a person can testify as an expert "if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert . . . to which his testimony relates." In addition, Evidence Code section 801 specifies that expert testimony in the form of an opinion is limited to that which is based on special knowledge or experience and sufficiently beyond common experience that it would assist the trier of fact.

Using these strictures for our criteria, a qualified expert can testify about such diverse things as gang membership, rivalry, common practices, terminology, street codes of conduct, or even specific and identifiable types of crimes unique to a particular gang or gang crime. Furthermore, testimony "relating to the sociology and psychology of gangs" can also be admitted (*People v. McDaniels* (1980) 107 Cal.App. 3d 898).

CASE ILLUSTRATIONS. Because expert testimony can be so important in a gang case, we will expand slightly on this area, using case examples, to illustrate the extent to which "gang" evidence can be used.

In *People v. Beyea* (1974) 38 Cal.App. 3d 176, two members of the Hells Angeles were being prosecuted for murder. Evidence of gang membership was admitted over defense counsel's objection on the issue of motive and identity. The court concluded that the evidence's probative value outweighed its prejudicial effect.

In *People v. Dominguez* (1981) 121 Cal.App. 3d 481, the Beyea holding was applied in a drive-by shooting involving the Nuestra Familia. The court allowed evidence of enmity between the Nuestra Familia and defendant's gang, holding it ". . . aided the People in rebutting the presumption of innocence and showing a reason for [the defendant's] illegal behavior."

Of course, if the charged crime is not gang related, or only tangentially related, there is no reason to put gang material into evidence, and it may well be held prejudicial (*People v. Cardenas* (1982) 31 Cal. 3d 897). However, interlinking gang evidence with the crime is a force for conviction, and explaining a witness's demeanor by way of gang affiliation can go a long way towards winning a case. (See, *People v. Moran* (1974) 39 Cal.App. 3d 398.)

SAMPLE TESTIMONY. Below is an example of gang testimony illustrating how broad the scope of the process can be. After establishing an officer's background and training and that officer's particular expertise and experience with the gangs in question, the following can take place:

Q. "Have you physically examined the defendant, John Doe?"

A. "Yes."

Q. "Did you observe any tattoos on the person of John Doe?"

A. "Yes. On his right arm."

Q. "Describe the tattoo."

A. "There is an inscription on the right forearm that says '8-tray'."

Q. "In your experience, do gang members frequently tattoo themselves?"

A. "They do."

Q. "Does the term '8-tray' have any significance to you?"

A. "It does. The 8-Trays are a gang that exists in the 83rd Street area of Los Angeles."

Q. "What is the significance of a person having that tattoo on his arm?"

A. "It signifies that the person with the tattoo is a member of the 8-Tray gang."

Q. "Have you ever heard of the Rolling 60's Gang?"

A. "Yes. They are a gang that is the rival of the 8-Tray gang."

Q. "Have you heard of war yells or shouts used in association with gang violence?"

A. "Yes."

Q. "Please explain."

A. "Gang members shout out their gang's name just before or after a drive-by shooting. It's a way of advertising. It challenges the opposing gang and also tells them to do something about their shooting. It's an invitation to further combat."

Q. "What is a drive-by shooting?"

A. [*Explanation*]

Q. [*Hypothetical(s) based on the evidence taken in this case.*]

A. [*Opinion* - A drive-by shooting between 8-Trays as the aggressor and Rolling 60's as victim is an act of gang violence, etc.]

The fact is, these cases will permit you to detail a gang's activities and further allow you to emphasize singular facts of the charges pending, using the expert to hammer home all your evidence. The opinions become the equivalent of a verdict from the witness stand. Remember, if you have an expert and know how to use that person, direct examination and cross-examination can only help your case.

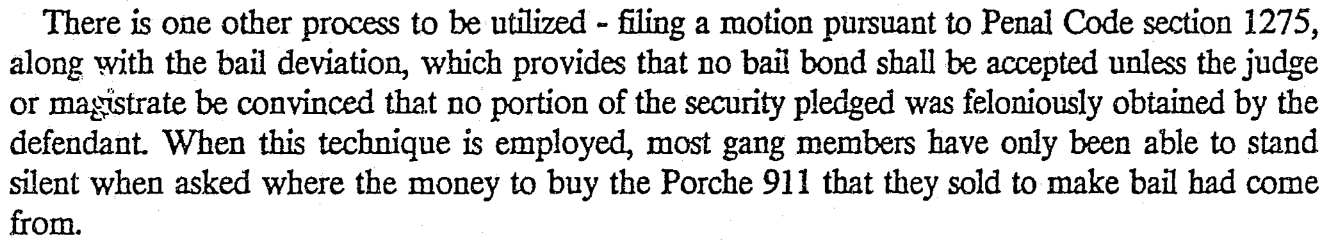
BAIL

One of the first and most important things to check when approaching a gang/homicide prosecution is the location of the defendant while in custody. His housing, if in strategic areas of the jail, may allow for the development of additional evidence by way of jail-house informants, seizure of incriminating communications with co-defendants, or by simple observation of the defendant in a social milieu which includes other members of his same gang. In addition, gang members love to scrawl graffiti in their cells proclaiming their gang loyalties. Have the jail custodians keep an eye out for it.

All this said, do not underestimate the abilities of street gang members to raise huge sums of money for bail, particularly with the current involvement of gangs in the narcotic trade. Many of the problems relating to this can be solved by preparing and arguing bail motions which utilize the 1982 bail law to the prosecution's advantage.

It is axiomatic that any defendant charged with a special circumstance offense should be held without bail. California Penal Code section 1207.5 can be utilized for that purpose. However, in other cases, early intervention of the filing deputy and/or police is essential to avoid inappropriate releases. Setting bail in a case involving a robbery and assault with a deadly weapon according to a low bail schedule might prove extremely embarrassing when you feel the defendant may attempt to flee and/or the victim may die. The solution may be to simply recategorize the offense as an attempted murder, which allows for a pre-review no-bail hold.

California Constitution article I, section 12 provides that no-bail holds can also be applied where the defendant inflicted "acts of violence on another person and the court finds, based on clear and convincing evidence, that there is a substantial likelihood the defendant's release would result in great bodily harm to others or where the court finds that the defendant has threatened another with great bodily harm and there is substantial likelihood that he would carry out the threat if released." Consider this provision in every case where gang members are involved. As a rule, gangs and gang members specialize in intimidation of survivors and witnesses. Arguing the seriousness of the offense, the defendant's prior record, with special regard to prior failures to appear, will usually provide for an extremely high bail even where bail is to be set. File an affidavit for bail deviation, along with the complaint, to ensure that all relevant information is brought to the attention of the court prior to the time that the defense attorney, acting on "information and belief," tries to get bail reduced.



There is one other process to be utilized - filing a motion pursuant to Penal Code section 1275, along with the bail deviation, which provides that no bail bond shall be accepted unless the judge or magistrate be convinced that no portion of the security pledged was feloniously obtained by the defendant. When this technique is employed, most gang members have only been able to stand silent when asked where the money to buy the Porche 911 that they sold to make bail had come from.

WITNESS PROTECTION

RELOCATING WITNESSES. Unfortunately, in the vast majority of our cases, witnesses are plucked from the same social setting as the crimes. Their identities, and those of their immediate families, are generally well known to the gang members. In those situations, careful consideration must be given to removing the witnesses from the area and relocating them in safe environs. Adolescents can, in many instances, be moved temporarily to the homes of relatives in nearby areas. School transfers can be made simply upon showing of imminent necessity. Where the entire family is in danger, relocation can be made with great haste by utilizing funds from the "California Witness Protection Program" which is administered by the Bureau of Organized Crime and Criminal Intelligence of the Califrnia Department of Justice.

Procedures in the Los Angeles area require the local police agency to advance funds for first and last month's rent and the cost of moving van rental. The witnesses are responsible for finding suitable alternative housing for themselves. Costs to the investigatory agency are then repaid from the fund.

MAINTAINING CHANNELS OF COMMUNICATION. At a very minimum, the witnesses should be provided with a phone number that will be immediately responded to on a 24-hour basis. In most instances, the mere knowledge that there is a place to call will aid in reducing witness tension. It is equally important that the witness be provided with the name of the investigating officer. If they believe that at least one responsible person cares about their safety, they will be much more likely to be available to testify.

The other side of the coin is that the officers must back up their promises. Responses to threats and taunts must be rapid and dramatic if they are to be effective in maintaining the lines of communication with the victim and witnesses. Prosecutors should not hesitate in gang cases to utilize the witness intimidation sections of California Penal Code section 136.1 to stem harassment as soon as it arises.

Harassment, however slight, can have a devastating impact. Situations such as gang members loitering in front of a witness's home can be stopped merely by placing additional patrols in the area. Such problems can also be remedied by determining if any of the offenders have probation or parole conditions prohibiting association with other gang members.

COURT INTIMIDATION BY GANG MEMBERS

We frequently encounter gangs that pack the court. A defendant will arrange for fellow gang members to appear in the spectator area for the sole purpose of intimidating the witnesses. Most witnesses will live or work in the gang area, and upon seeing the gang members roaming freely in all their gang regalia, will shift from cooperative to antagonistic. (e.g., "I never said that." "I identified what man?")

Certain procedures are available to assist you. One solution is to call your office's investigators to court. If investigators are not available, use local police or enlist additional assistance from the bailiffs. Point out potential gang members to the investigator and the judge.

At least temporarily, remove gang members from the court to the outside corridor. That can be justified because of concerns for court safety. They should be identified, frisked and asked what they are doing in the courtroom. Since our objective is to keep them permanently out of the courtroom, one of our techniques is to have an investigator use a polaroid camera and have them pose for our gang book. It is remarkable what kind of an effect this may have. Young gang members particularly get nervous and may permanently leave the area. Unfortunately, older, hardcore gang members who believe it is their duty to back up their fellow gang members may not.

All identified gang members should then be run in your computer system to see if they have another trial pending or are on parole or probation. If they are pending trial, the deputy trying that case should be notified of the facts surrounding this event. That deputy may be able to use it as a basis for a bail increase motion. It will, at the least, inform that deputy of potential gang problems in her case. If the gang member is on probation or parole, the conditions of probation or parole may include non-association with gang members. If those conditions are present, the gang members may be violated and arrested for those violations.

If you cannot keep these gang members out of court, make sure the judge is aware of potential problems. Thereafter, be quick on the trigger. If you see them flashing "signs" at the witnesses or doing anything that may be construed as threatening, either request that the judge bar the gang member from court, have the judge order the gang member arrested, or have the gang member arrested yourself for intimidation. Remember, the integrity of your case and the court processes are paramount. Truth is not the victor when gang intimidation is present.

There is another approach which may be utilized when gang members are in court and you are unable to get them removed. This approach is particularly effective when a witness has to be "Greened" (*People v. Green* (1971) 3 Cal. 3d 981). Use the witness or your police officer expert to point out their presence and/or their potential menace.

As an example, a witness in a gang case recanted prior testimony on the stand. Crip gang members were present in the audience. The color for Crip gangs is blue, and that color was predominant in their clothes, pants, shirts, shoe laces, and bandannas. The witness, whose brother had been a Crip, was asked if she know what Crips were. She said she did. She was asked if Crips were partial to a particular color. After some hesitation, the deputy extracted the admission that Crips wore blue. The deputy then went into the audience and asked the gang members, one by one, to stand and display their "blues."

The deputy went back to the witness and asked her if those people in the audience were not Crip gang members. The witness hummed and hawed - obviously not wanting to answer - and finally mumbled that she did not know.

The investigating officer knew, and so testified. The fact is, the jury "knew" as soon as they saw the witness trying not to answer the question.

DEALING WITH RECALCITRANT WITNESSES

SETTING BAIL. When witnesses inform you they no longer care for your case and intend to be somewhere other than in the courthouse at the time and date specified on their subpoena, consider more Draconian measures to redirect their attention.

Setting bail for recalcitrant witnesses is perhaps the simplest and least used procedure available to judges or magistrates. California Penal Code section 879 provides that upon proof demonstrating reason to believe that a witness will not appear and testify, the judge may order the witness to post securities in such sum as the judge may deem proper. If the witness does not comply, he may be placed in jail. (See, Penal Code section 881.) The only task is to set out the witness's statements in an affidavit, and most judges will, without any hesitation, place a heavy bail on the witness.

Equally overlooked is Penal Code section 878 which allows a magistrate at the preliminary hearing to exact from each witness a written promise that he will appear and testify or else forfeit the sum of five-hundred dollars.

For a large number of witnesses these monetary inducements will prove sufficient to ensure their presence. Two practical considerations exist, however. First, many of the witnesses that are needed in gang cases would have trouble raising five dollars, let alone five hundred. Second, some of them do not care about court orders.

BODY ATTACHMENTS. In those few cases where the witness advises that he absolutely will not come to court or proves that he will not come to court by failing to appear, the code and case law provide some relief for the prosecutor. Willful failure to appear after being served a subpoena constitutes good cause for a continuance under *Gaines v. Municipal Court* (1980) 101 Cal.App. 3d 556, 560. The court may then issue a body attachment for the defaulting witness. This body attachment should be served by your investigating officer one night before the witness is to testify. One night in custody is usually enough to ensure cooperation from a witness, and at least, their appearance in court. More than that may create a very hostile witness.

PRISON CONFINEMENT. Penal Code section 881 provides that when a witness refuses or is unable to post bail to ensure his appearance, "the magistrate must commit him to prison" until he complies. When the court issues a bench warrant pursuant to this provision, it must then incarcerate him until the preliminary hearing, but not for more than ten days on this order alone. Because of the ten-day limitation under this section, the prosecution is then entitled to have the preliminary hearing, at least as to that witness, within ten days of the arraignment of the defendant. In this way, evidence which may never have been obtained at all can be taken while the crime is still fresh and before the witness has been tampered with.

DEALING WITH INFORMANTS

Anyone who tries many gang homicides becomes familiar with the line "when you have crimes plotted in hell, you don't have angels for witnesses." At times, it is the only argument that can be made in order to persuade the jury that they should convict the defendant rather than give him a deal for helping to clear the streets of the gang member he killed.

As unsavory as many of the usual gang witnesses may be, they pale in comparison to the variety commonly labeled a "snitch" or informant. Most that we have come into contact share common traits: they usually have long prior criminal records, they tend to be chronic drug users and chronic liars, and they are currently in trouble with the law. Simply put, they are the witnesses you least want to use. Unfortunately, in any given case they may be the only source of evidence to convict a guilty defendant who makes them look good by comparison.

The worst thing about using "snitches" is that their taint tends to rub off. Instead of arguing forthrightly to the jury about the guilt of the defendant, using an informant forces the prosecutor to defend the witness and the decision to give the witness a deal. There is no worse feeling than suffering through a defense closing argument alleging that the defendant was at the scene of the crime, but that it was the "snitch" who did the shooting and the prosecutor who erred in his judgement when he gave immunity to the wrong man. For this reason we have a number of recommendations about using informants. Above all, remember the admonition: never use a "snitch" unless it is essential to the case.

As a starting point, keep in mind who you are dealing with. Most "snitches" are criminals. They have already proven, sometimes many times over, that they are willing to break the law. By definition they are immoral and many are amoral. Watch out for what they do not say. If they are co-perpetrators of the offense and yet willing to talk, they will almost invariably attempt to cast the lions share of the blame on the other party. This means the other witnesses and physical evidence may be contradicted by, or contradict, the "snitch." Accordingly, always test what they have to say against all the other known circumstances. In one recent residential robbery homicide, the co-perpetrator was amply prepared to testify against his partner. He freely admitted that they entered the house with the intent to steal and that he was genuinely remorseful for the fact that his crime partner had savagely beaten the two victims to death to avoid identification. The only problem was that other evidence showed that the two victims were beaten at about the same time, in the same room, but with two different weapons that had been seized from different sides of the room. We did not use the "snitch?"

The point is that many of these people are willing to do or say anything, including lie, if they think it will help them to gain freedom. If they feel they are not believed, they may reach into the depths of the jail and find somebody equally incredible to corroborate them. Remember, the collaborator is going to want something from you, too.

When dealing with "snitches," do not feed them information. In other words, do not unconsciously create a witness because you want and need testimony in your case-in-chief. Since the jail is a fertile feeding ground for the imagination, you may find that from the acorn of information you planted, an entire forest of newly remembered and newly fabricated information has sprouted.

Using a bad "snitch" can have a devastating impact at trial. The admonition that a jury is to distrust a witness's entire testimony if he has lied about a material fact may be complied with to the point where your entire case is disregarded. Because of this, the watchword in making informants believable witnesses is corroboration. If the informant proclaims knowledge of certain facts because he traveled with the defendant to Denver, bring in the plane tickets. Show the telephone records from the pay phone he used to call home. Obtain the Versatel records from the automated teller machine he used. While these facts do not prove that the defendant actually confessed to him, they at least prove he is not lying about surrounding events and at least had an opportunity to hear whatever the defendant had to say.

To close the credibility gap, try to prove everything independently. You may have to prove beyond a reasonable doubt that the "snitch" helped commit the offense so that the jury will believe him when he talks about the crime.

Before you make any commitments, analyze what you have to give up in order to get your evidence. It is seldom of any value to give immunity to a master criminal in order to catch a flock of little criminals. No district attorney wants to prosecute a minor player only to find out that it is at the price of letting some truly horrible person out on the street. If you must make some type of plea bargain or sentence commitment to obtain testimony, make it a measured and rational one. Total immunity should only be a last resort.

Prior to deciding whether to work out a deal with a potential witness, find out everything you can about him. Pull his prior crime and probation reports. Is he a chronic drug abuser? Will he be open to defense attack? Check if he has had a prior mental disease or defect that may affect his credibility or competency. Compare his criminal history to that of the defendant. If he is a co-perpetrator, check to see if he has prior similar offenses which indicate he was more likely to have committed the crime than the person he is testifying against. Determine whether a jury could ever believe him.

The best "snitch" is the co-perpetrator who feels truly remorseful for what he has done. At the other end of the spectrum is the professional "snitch" who finds a patsy to rat on every time he picks up a new case. Beware of the "snitch" who tells you that he does not want you to do anything for him. Somewhere down the line you may become aware of a secret agenda. Remember, all the information about this person is going to be discoverble, and it is what you do not find out that is going to come back to haunt you.

PROVING THE GANG'S GUILT

UTILIZING AIDER/ABETTOR AND CONSPIRACY PRINCIPLES. The typical gang murder might consist of three to five "homeboys" driving into rival gang territory and attacking the first rival gang member they come upon. Generally, only one attacker will shoot. Given evidence of identity, it is an easy task to prosecute the shooter. The more pressing question is, who else is legally responsible and can they also be successfully prosecuted? It is important to remember what we are dealing with. These are gang crimes, and the reality is that they are primarily committed in groups. Gangs are made up of members who are motivated to commit these crimes together. They obtain courage from community acts, and they are most dangerous when operating in that community.

Given the fact that these are group crimes, the issue for the prosecutor becomes how to establish group intent and how to have criminal liability attach to those members of the group legally responsible.

In the case of *People v. Beeman* (1984) 35 Cal. 3d 547, the California Supreme Court ruled that to prove an aider and abettor guilty of a crime, there must be proof that the defendant (1) acted with knowledge of the criminal purpose of the perpetrator, and (2) with the intent or purpose of either commiting, encouraging or facilitating the commission of the offense, and (3) by act or advice promoted, encouraged, or instigated the commission of the offense. What most prosecutors remember is that they must prove intent. What they fail to explore, however, is the precise nature of the intent that must be shown, and whether the aiders and abettors can also be tried under a theory of conspiracy. Furthermore, if intent to commit some lesser offense can be established, many prosecutor's neglect to consider if liability can be extended to find aiders and abettors guilty of a greater offense.

Reliance on conspiracy principles in order to prove aiding and abetting is specifically approved in the case of *People v. Durham* (1969) 70 Cal. 2d 171. Moreover, conspiracy aids in (1) bringing in evidence of statements (Evidence Code section 1223), (2) justifying the admissibility of evidence of gang affiliation (*People v. Manson* (1976) 61 Cal.App. 3d 102), and (3) in extending liability to the co-conspirators for acts which were intended, unintended, or actually forbidden.

By way of demonstration, one recent case tried by the Los Angeles District Attorney's Hardcore Gang Division involved a group of people who conspired together to hurt an opposing gang member because members of the opposing gang had crossed out their graffiti. In order to carry out this task, five out of six of these men took spiked sticks with them when they went on their raid. When they approached the victim, and before they could even strike him, the sixth gang member shot and killed the victim. Others in the group then beat him. Still others ran after a second victim. Reliance on conspiracy doctrines allowed all the gang members' pre-attack statements made during the course of the conspiracy to be admitted, even against members who had not been present. In order to prove the nature and depth of the relationship in the conspiracy, the gang-expert officer was allowed to parade before the jury all sorts of otherwise irrelevant but incredibly damaging information about their hatreds, patterns and practices.

With respect to the group that was tried together, all were convicted of murder including one who never even got close enough to touch the victim. This resulted despite defense counsel's argument that this defendant never wanted to shoot the victim, had actually agreed not to shoot, and did not in any way share in this specific intent at the time of the shooting. What they could not get around was the language repeated in *Beeman* that "the liability of an aider and abettor extends also to the natural and probable consequences of the acts he knowingly and intentionally aids and encourages." In fact, more recent decisions on the topic indicate that even a more lenient standard has actually been adopted.

In *People v. Croy* (1985) 41 Cal. 3d 1, 12, fn. 5, the Supreme Court stated, "[t]he requirements that the jury determine the intent with which a person tried as an aider and abettor has acted is not designed to ensure that his conduct constitutes the offense with which he is charged. His liability is vicarious. Like the conspirator whose liability is predicated on acts other than and short of those constituting the elements of the charged offense, if the acts are undertaken with the intent that the actual perpetrator's purpose be facilitated thereby, he is a principal and liable for the commission of the offense. Also like a conspirator, he is guilty not only of the offense he intended to facilitate or encourage, but also of any reasonably foreseeable offense committed by the person he aids and abets. (*People v. Beeman, supra*, 35 Cal. 3d 547, 560.)"

An instruction based on this language directs the jury's attention to the correct status of the offender and to the fact that the liability for a much higher crime than that actually intended by him attaches, so long as it was reasonably foreseeable. Given the nature of gang crimes, the intensity of intergang hatred, and the sophistication in the weaponry used, it can reasonably be argued that anything, even the most heinous murder is foreseeable. This approach has already been upheld in *People v. Luparello* (1986) 187 Cal.App. 3d 410.

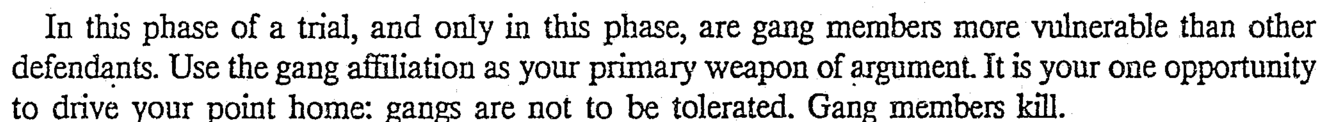
There is the other side of *Beeman* to be concerned about, however. When there is no apparent evidence of participation of a defendant in a crime, how do you prosecute? In many instances, it is not possible. If there is a drive-by shooting, you may not be able to charge as an aider and abettor the person in the back seat who appears to merely watch the shooter. Generally, if the police fail to get a statement and we cannot "turn" another gang member, we cannot file against that peripheral participant. Sometimes, however, a little ingenuity may help. In one case, the driver of the car in a "drive-by" was convicted even though his attorney contended he never knew about the intended attack before the shooting took place. The prosecutor's approach was both simple and complex.

Prior to the trial he videotaped the route the defendant driver took, following the victim's car. The prosecutor's intention in taking the jury over the videotaped route was to illustrate that the mile and a half drive was clearly a pursuit enabling the passenger to shoot the victim.

Keep *Beeman* in mind when you are filing your cases. A group crime is always hard to prove against other people than the actual wielder of the weapon. Look for the little things that may implicate them as well.

CLOSING ARGUMENT

There have been books written on closing arguments, and enough has been said about marshalling all your proven facts and tying them in with your opening statement and theory of the case. Gang cases are no different. However, do not ignore the opportunity to stress the evidence of gang participation and the group evil that gangs present to the community. Gang cases are unlike single defendant cases. The gang is a hydra-headed monster that can strike anywhere, on many more levels, than single criminals. This means that the individual gang criminal who is on trial in your case is more dangerous than a single criminal who does not belong to a gang, simply because he belongs to a criminal organization.



In this phase of a trial, and only in this phase, are gang members more vulnerable than other defendants. Use the gang affiliation as your primary weapon of argument. It is your one opportunity to drive your point home: gangs are not to be tolerated. Gang members kill.

CONCLUSION

This monograph is not intended to provide all the trial techniques to be utilized in a gang homicide. These are merely points to be considered in trying the gang case. Finally, if you do try a gang homicide, there is one further item we would suggest be utilized - your imagination and ingenuity as a trial lawyer. Just realize the milieu you are operating in and the characteristics of the people you are dealing with. If you know them, you can obtain justice.