

for The Defense

Training Newsletter of the Maricopa County Public Defender's Office

James J. Haas, Maricopa County Public Defender

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*Delivering America's
Promise of Justice for All*

for The Defense

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There's Nothing Standard About Jury Instructions

By Brent E. Graham and Terry Lovett Bublik, Attorney Supervisors

This article is a jury instruction primer whose purpose is to encourage attorneys to start creating and submitting non-standard jury instructions and to get started thinking about jury instructions early in the case. It will also give tips on how to make a good record for appeal. Jury instructions are a vital part of trial preparation and are often overlooked. Improving your skills in this area will have a positive effect on the outcome of your trials.

Early Preparation is the Key

- “Educating” the judge is crucial to a successful instruction argument.

Wage a Case-Long Campaign of Education

- Pre-trial motions.
- Trial – in openings, direct and cross-examinations, expert testimony, and closings.

Make a Proper Record

- Explain why the pattern instruction is inadequate.
- Articulate the specific legal principles, as well as facts, which are the basis for the instruction. If no domestic authority directly on point, argue by analogy or rely on authority from other jurisdictions.
- Special consideration should be given to federal constitutional principles that may apply.
- Make objections to jury instructions on the record prior to case being submitted to jury.
- Failure to raise issue at trial, i.e., failing to timely object to or request a jury instruction, waives the right to raise the issue on appeal.
- Failure to preserve issues for review, limits court to fundamental error review.

1. IT IS IMPORTANT TO MAKE THE RECORD¹

Arizona Rules of Criminal Procedure, (ARCP), Rule 21.3(a), requires the trial court to confer with counsel and inform them of its proposed action upon requests for instructions and forms of verdict prior to final argument to the jury. Counsel must ensure that this conference is on the record. Jury instructions are one of the most fertile grounds for appellate review.

ARCP, Rule 21.3(c) provides:

Waiver of Error. No party may assign as error on appeal the court's giving or failing to give any instruction or portion thereof or to the submission or the failure to submit a form of verdict unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which the party objects and the grounds of his or her objection.

Thus, the failure to comply with Rule 21.3(c) waives the issue for appeal. Consequently, it is imperative that counsel submit well-written, legally-supported jury instructions in support of the defense. See, *State v. Gendron*, 168 Ariz. 153, 154, 812 P.2d 626, 627 (1991) (“[F]ailure to raise an issue at trial, including failure to request a jury instruction, waives the right to raise the issue on appeal.”); *State v. Rivera*, 210 Ariz. 188, 193, 109 P.3d 83, 88 (2005) (By failing to object to the jury instructions actually given, defendant acquiesced to them.)

In order to make a complete appellate record whether counsel is requesting the instruction, or objecting to the instruction, counsel must:

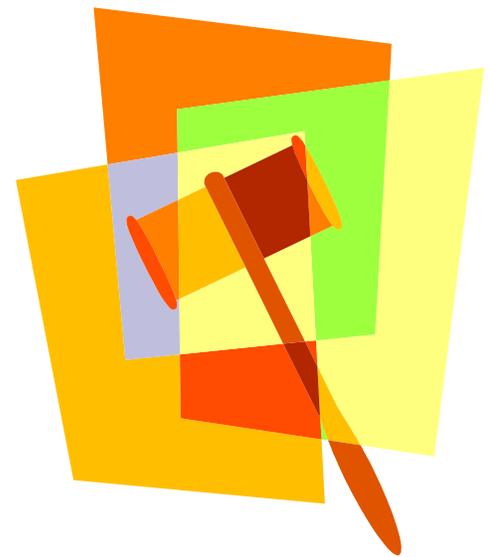
1. “State distinctly the matter to which he objects,” and
2. “Specify the grounds of his objection.”

Thus, counsel must say, for instance, that she objects to “the court’s giving instruction number 12.” Or, perhaps, “I object the court’s refusal to give instruction number 12.”

Then counsel must state specifically why she objects. In other words, she must supply the law that entitles her to receive the instruction, or the law that precludes the unwanted instruction.

Even where an objection is made, it does not preserve an issue for appeal unless it is timely and sufficiently specific. *State v. Hamilton*, 177 Ariz. 403, 408, 868 P.2d 986, 991 (App. 1993). “A general objection, such as ‘irrelevance,’ will not be sufficient to preserve the issue for appeal. Furthermore, an objection to the admission of evidence on one ground will not preserve issues relating to the admission of that evidence on other grounds.” *Id.* (citations omitted). Even constitutional objections are waived unless they are raised at trial in a timely manner. *State v. Hernandez*, 170 Ariz. 301, 306-307, 823 P.2d 1309, 1314-15 (App. 1991) (hearsay objection did not preserve issue that testimony violated Confrontation Clause).

State v. DePiano, 187 Ariz. 41, 45-46, 926 P.2d 508, 512-513 (App. 1995) vacated in part, *State v. DePiano*, 187 Ariz. 27, 926 P.2d 494 (Ariz. 1996), overruled on other grounds, *State v. Davis*, 206 Ariz. 377, 79 P.3d 64 (2003).



A. One Example of Why it is Important to Make the Record
***State v. Moody*, 208 Ariz. 424, 94 P.3d 1119 (2004)**

Moody was a capital case. One of his allegations was that the court improperly instructed the jury on the effect of intoxication. When *Moody* committed the murders in November of 1993, A.R.S. § 13-503 (1989) provided as follows:

[W]hen the actual existence of the culpable mental state of intentionally or with the intent to is a necessary element to constitute any particular species or degree of offense, the jury may take into consideration the fact that the accused was intoxicated at the time in determining the culpable mental state with which he committed the act.

Moody, 208 Ariz. At 466, 94 P.3d at 1161.

That statute was amended effective January 2, 1994, to eliminate temporary intoxication as a defense “for any criminal act or requisite state of mind.” A.R.S. § 13-503 (2001); 1993 Ariz. Sess. Laws, ch. 256, §§ 2, 3. *Id.* However, instead of instructing the jury that intoxication could be considered in determining *Moody*’s mental state at the time of the acts, the trial court instructed the jury on the later version of the statute, which disallowed intoxication as a defense. *Id.*

Although a claim that a jury instruction misstates the law is normally reviewed *de novo*, *Moody* failed to object to the instruction and therefore did not preserve this issue for appeal. *Id.* See *State v. Valles*, 162 Ariz. 1, 6, 780 P.2d 1049, 1054 (1989) (“Failure to object to a jury instruction below precludes defendant from claiming error on appeal unless the error is fundamental.”).

Moody offered two separate arguments that the error was fundamental and required reversal: (1) the instruction was erroneous because it misstated the law, and (2) the instruction violated the Ex Post Facto Clauses of the United States and Arizona Constitutions. U.S. Const. art. I, § 9; Ariz. Const. art. 2, § 25. *Moody*, at 208, At 466, 94 P.3d at 1161.

The Court agreed that the instruction given misstated the law in effect at the time *Moody* committed his crimes and therefore constituted error. The Court also agreed the change in A.R.S. § 13-503 was substantive because it deprived *Moody* of a defense that existed at the time he committed his crimes. Thus the Ex Post Facto Clauses of the United States and Arizona Constitutions required that the version of § 13-503 in effect at the time the crimes were committed be applied. *Id.*

The Court found the error in giving the incorrect jury instruction was compounded by the prosecutor, who argued the improper instruction to the jury. He stated:

just so we’re clear, temporary intoxication is not insanity. That’s not me saying that[;] you’re going to get an instruction that says this: the fact he’s using drugs and on drugs or withdrawing from drugs is not insanity.... It is not a defense and it is not insanity.

Id.

However, because *Moody* failed to object, the Court’s review was limited to fundamental error review, for which the Court can reverse only if the error was “of such dimensions” that it deprived *Moody* of a fair trial. *Id.*, at 466-467, 94 P.3d at 1161-1162. Because of the defenses asserted and the facts placed before the jury in this case, The Court did not find the error fundamental. The Court affirmed *Moody*’s convictions, but vacated and remanded the death sentences as part of the *Ring* remands.

The harm is obvious. An issue that would have gained success on appeal for the defendant and resulted in a new trial was defaulted based on nothing more than the failure to properly object and insure the proper jury instructions are given.

2. THE PURPOSE OF JURY INSTRUCTIONS

The purpose of jury instructions is to inform the jury of the applicable law in understandable terms. *Barrett v. Samaritan Health Services, Inc.*, 153 Ariz. 138, 143, 735 P.2d 460, 465 (App.1987). A set of instructions need not be faultless; however, they must not mislead the jury in any way and must give the jury an understanding of the issues. *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1100 (5th Cir.1973), *cert. denied*, 419 U.S. 869, 95 S.Ct. 127, 42 L.Ed.2d 107 (1974). “Jury instructions are, in essence, a guide to the proper verdict.” *Lay v. City of Mesa*, 168 Ariz. 552, 555, 815 P.2d 921, 924 (App.1991).

To establish juror understanding of the issues, it is not enough to find that lawyers and judges comprehend an instruction. As studies have shown, that professional comprehension equates to lay comprehension is supported neither by empirical research nor by case law. *See, e.g.*, Walter W. Steele, Jr. & Elizabeth Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C.L.Rev. 77, 99 (1988). Rather, those who craft instructions must “exert the effort to differentiate between the linguistic universe for lawyers in which the appellate opinions are couched and the linguistic universe for lay persons in which the courts’ charge should be couched....” *Id.* This approach necessarily requires judges and lawyers to inquire into the frame of reference of a lay person in order to evaluate whether a set of instructions conveys with sufficient clarity all the legal concepts necessary to permit a jury to arrive at a verdict consistent with the law. *Evans v. Pickett*, 102 Ariz. 393, 397, 430 P.2d 413, 417 (1967) (The test of the propriety of an instruction “is whether the jury would be misled as to the proper rule of law.”)

State v. Noriega, 187 Ariz. 282,284-285, 928 P.2d 706, 708-709 (App. 1996).

3. COMMON ISSUES INVOLVING JURY INSTRUCTIONS

Misstatement of the Law

If counsel objects that the court’s giving of an instruction is a misstatement of the law, counsel must also give the trial court a correct statement of the law. *State v. Whitaker*, 112 Ariz. 537, 544 P.2d 219 (1975).

Modification of an Instruction

If counsel objects to the trial court’s modification of an instruction, counsel must object to the giving of the instruction as modified. *State v. Schilleman*, 125 Ariz. 294, 609 P.2d 564 (1980) (Counsel did not state “distinctly the matter to which he object(ed) and the grounds of his objection.”)

Lesser-Included Offense Instructions

The failure of a court to give a lesser-included offense instruction is waived, unless requested by defense counsel. *State v. Tschilar*, 200 Ariz. 427, 27 P.3d 331 (App. 2001). Counsel’s request to give one lesser-included offense instruction does not preserve the issue of the trial court’s failure to give other lesser-included offense instructions. *State v. Whittle*, 156 Ariz. 405, 752 P.2d 494 (1988).

Limiting or Cautionary Instructions

Counsel must timely and specifically request a limiting or cautionary instruction, and must timely and specifically object to the trial court's refusal to give it. *State v. Sullivan*, 130 Ariz. 213, 635 P.2d 501 (1981); *State v. Landrum*, 112 Ariz. 555, 544 P.2d 664 (1976).

Additional Instructions after Jury has Retired

Generally, the latest time counsel may object to the final instructions to the jury is immediately before the jury retires. ARCP, Rule 21.3; *State v. Canaday*, 26 Ariz. App. 1, 545 P.2d 963 (1976). However, after the jury has retired, ARCP, Rule 22.3 permits additional instructions if they or any party request such. Counsel may use this rule for additional instruction after the prosecutor's arguments if, for instance, he has misstated the law and the final instructions do not controvert his argument. In such case, counsel should timely and specifically request corrective instructions.

Such instructions may be necessary where the prosecutor has misstated the fact, misstated the law, or given his personal opinion concerning the evidence.

4. THE THEORY OF DEFENSE

A defendant is entitled to an instruction on any theory of defense which is recognized by law and supported by the evidence. *State v. LaGrand*, 152 Ariz. 483, 487, 733 P.2d 1066, 1070 (1987), *cert. denied*, 484 U.S. 872, 108 S.Ct. 207, 98 L.Ed.2d 158 (1987). When a defense theory is reasonably supported by the evidence, failure to instruct as to that theory is reversible error. *State v. Celaya*, 135 Ariz. 248, 253, 660 P.2d 849, 854 (1983). We will not, however, reverse a conviction based on a trial court's ruling on a jury instruction unless we can reasonably find that the instructions, when taken as a whole, would mislead the jurors. *See State v. Schrock*, 149 Ariz. 433, 440, 719 P.2d 1049, 1056 (1986).

State v. Strayhand, 184 Ariz. 571, 587, 911 P.2d 577, 593 (App. 1995).

A defendant is entitled to instructions which precisely and specifically, rather than merely generally, point to the theory of his defense.

United States, Wolfson, 573 F.2d 216, 221 (5th Cir. 1978).

A. Your Theory of the Defense May Not Comment on the Evidence

Keep your theory of defense instruction succinct, and ensure that it is worded in terms of a legal proposition. An example follows from *State v. Miller*, where the requested instruction went too far and became a comment on the evidence:

"Miller argues that the trial court erred by failing to give his "theory of defense" instruction. [FN5] The trial court ruled that Miller's proposed instruction impermissibly commented on the evidence. We agree. *See State v. Salazar*, 173 Ariz. 399, 409, 844 P.2d 566, 576 (1992), *cert. denied*, 509 U.S. 912, 113 S.Ct. 3017, 125 L.Ed.2d 707 (1993).

FN5. Miller requested the following instruction:

Mr. Miller's position is that his knowledge about and involvement in what happened to Jennifer Geuder prior to Anthony Luna shooting her on Mount Lemmon was limited to loaning a gun to scare Jennifer Geuder and accompanying both to Mt. Lemmon.

Under this theory of defense, Mr. Miller can be held accountable, as an accomplice, only for those acts of Anthony Luna that were a natural and probable consequence of the scheme that Mr. Miller aided, i.e., scaring Jennifer Geuder with a gun. It is the theory of Mr. Miller that Mr. Luna's premeditated murder of Ms. Geuder was not a natural and probable consequence of a scheme to frighten her."

State v. Miller, 186 Ariz. 314, 323, 921 P.2d 1151, 1160 (1996).

Perhaps the attorneys in *Miller* could have obtained a theory of the defense instruction had it not been so lengthy. A better approach may have been to limit the instruction to the minimum necessary to convey the theory, such as, "Mr. Miller contends that Mr. Luna's premeditated murder of Ms. Geuder was not a natural and probable consequence of a scheme to frighten her. Miller only intended to scare Ms. Geuder, not kill her."

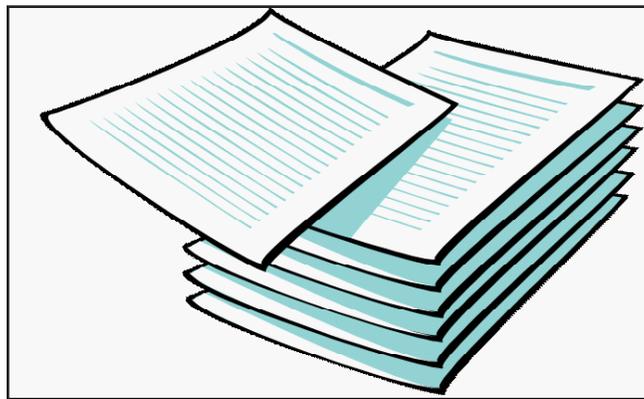
CONCLUSION

Creative, well-researched, tailored jury instructions are fundamental to building a good defense. It is imperative to develop and provide the court with the legal authority that supports your theory of the defense. This framework allows the jury to see that your argument is grounded in substantial, bona fide law as provided to them by the judge. In this way the court legitimizes your defense, and provides the opportunity for a winning trial.

These materials are part of a lecture series presented by the authors at regularly scheduled training seminars. If you would like to attend a training session, contact the Maricopa County Public Defender's Office's Training Department.

(Endnotes)

1. Some information from this portion has been taken from Minker, Fleischman, and Sipe's manual, *Making the Criminal Record on Appeal*.



AACJ Honors Maricopa County Employees

On January 25-26, 2008, Arizona Attorneys for Criminal Justice (AACJ) held its annual winter seminar in Prescott, Arizona. At its annual meeting, AACJ honored several attorneys involved in Maricopa County's Indigent Defense for their outstanding service to criminal justice. Five "Presidential Commendations" were awarded, and all five recipients work for Maricopa County. They are:

- Peter Ozanne, Assistant County Manager, for his efforts to ensure all defendants in Capital cases are appointed competent and skilled defense attorneys.
- Public Defender Tracy Friddle for her outstanding work on immigration issues, including the Proposition 100 litigation.
- Robert McWhirter, Office of the Legal Defender, for his outstanding work on immigration issues, including the Proposition 100 litigation.
- Public Defender James Leonard for his exceptional work on the Privileged Jail Visitation litigation.
- Public Defender David Kephart for his exceptional work on the Privileged Jail Visitation litigation.

In addition, Public Defender Anna Unterberger was awarded the Jack Williams Appellate Achievement Award for her numerous accomplishments in appellate advocacy.

Congratulations to all for this richly deserved recognition!



Save The Date...
2008 APDA Annual Conference
June 16-18, 2008

PD Office Presents Annual Awards and Recognizes Long-Time Employees

By Jim Haas, Public Defender

At the office awards presentation on December 12, 2007, the Bingle Dizon Commitment to Excellence Award was presented to Investigative Aide **Jim Evans**, and the Joe Shaw Award was presented to Criminal Mental Health Attorney **Fredrica Strumpf**. The office also honored Support Services Manager **Amy Thomas** and Civil Mental Health Attorney **Barbara Topf** for 25 years of excellent service.

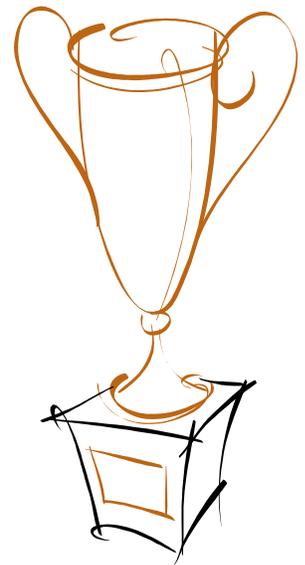
Jim Evans



The office's Commitment to Excellence Award was created many years ago. It was renamed in 2001 to honor Benita "Bingle" Dizon, who was a long-time and beloved secretary in our Appeals Division who was known for her extraordinary dedication to high quality work and our office. The recipient of this award is selected by a committee composed of attorneys and support staff representing all parts of our office. The 2007 award was given to Jim Evans in recognition of his exceptional work and upbeat, "can-do" attitude.

Jim may have set a record when he received *fifteen* nominations for the award, plus expressions of support from numerous others. This is an indication of the wide-spread impact and appreciation for Jim's work.

The nominations continually lauded Jim's remarkable attitude, calling it positive, energetic, enthusiastic, and contagious. Jim is always willing and eager to help, no matter what else is on his plate. No job is too big or too small, every job is completed in a timely manner, every task accepted with a smile.



Fredrica Strumpf



The Joe Shaw Award was created in 1995 to honor Joe, a remarkable attorney who spent 20 years in our office, starting at the age of 65. Joe was known as a true gentleman and a skilled and dedicated attorney. The Shaw Award is given each year to an attorney, selected by the same committee that chooses the Dizon Award, who best demonstrates Joe Shaw's many qualities.

Fredrica Strumpf joined our office after more than seven years of experience working with seriously mentally ill people. A few years ago, Fredrica approached me with a plan to improve our office's representation of mentally ill individuals. She offered to assist attorneys throughout the office with mentally ill clients, wherever and however they needed that assistance. It

was an enormous job, but she took it on. She worked incredibly long hours trying to be everywhere at once and to be there for all of us.

While she eventually convinced me to give her some help in the form of Cathy Whalen, a law clerk and an administrative assistant, Fredrica has continued to work tirelessly to help our most vulnerable clients.

Fredrica has conducted extensive training, not only for our office, but for treatment providers and other governmental agencies. She has mentored many attorneys and has established relationships in the community that have proven extremely valuable to our office and our clients.

Fredrica's dedication to helping our mentally ill clients is truly incredible. She has dramatically improved our representation of mentally ill individuals and has earned the respect of the justice community and beyond. She really has put our office on the cutting edge of representation of mentally ill people nationally.

Barb Topf



Barb has been a member of our Civil Mental Health Division since joining the office in July 1983. She is a recognized and respected expert in the field, and has taught at seminars and at ASU Law School. Barb is known for her skill in working with very difficult clients. She has a calm and professional demeanor that is appreciated by her peers, the court and (sometimes) even her clients. She is known for her genuine concern for our clients, her common sense approach and her sense of humor.

Barb was recognized at the presentation for her 25 years of exemplary service to our office and our clients.

Amy Thomas



Amy is an example of how one can rise through the ranks through hard work and dedication. She started in the office as a legal secretary. When her talents were recognized, she was promoted to supervisor of legal secretaries, then to supervisor of lead secretaries. She then was promoted to Support Services Manager and took over our Records Department.

No one is more committed or loyal to the office than Amy. No one knows more about the way the office manages case files or has managed them over the years. Her career has been defined by her incredible dedication to the office, her work on special projects and her success as a problem-solver. She has taken on many of the office's thorniest administrative projects, including cleaning up the Luhrs basement records storage area when mold was discovered.

Our office is one of the best public defense offices in the country, largely because of the incredible talent and dedication of these individuals, and many others. Congratulations to all who were honored.

OBJECTIONS SEMINAR

THE ARIZONA FEDERAL DEFENDER'S OFFICE AND
MARICOPA COUNTY PUBLIC DEFENDER'S OFFICE



Friday, April 18, 2008
9:00 am – 4:30 pm
(Check in begins at 8:30 am)

Downtown Justice Center
620 West Jackson
2nd Floor Training Room

- ◆ Helpful Exercises on Using Objections as Sword and Shield
- ◆ Review Evidentiary Rules
- ◆ Put Evidentiary Rules into Practice
- ◆ Interactive Lectures and Small Group Workshops

This workshop may qualify for up to 5.5 hours of CLE with 1 hour of Ethics

This seminar will follow up on the Ira Mickenberg Objections and Sentencing Advocacy Seminar. It will be a hands-on, small group, highly interactive seminar for new attorneys who want to sharpen their objection skills.

**For Registration Information, contact Celeste Cogley at
602-506-7711, ext 37569 or cogleyc@mail.maricopa.gov**

Out-of-State Felony Conviction – Allegeability in Arizona

By Brian Sloan, Defender Attorney

The ability of the prosecution to use a defendant's out-of-state felony conviction is controlled by A.R.S. §13-604(N) (previously §13-604(I)) and case law on the subject.

Steps to take to determine the allegeability of an out-of-state prior:

1. The State must turn over proof of the out-of-state felony they wish to use against the defendant. If the State does not disclose it, they should not be allowed to use it pursuant to Rule 15.1(d);
2. Once you receive the documents, determine what foreign statute the defendant was convicted under. This should be indicated in a copy of the plea agreement, or in some sort of minute entry. It is best not to rely on the State's Allegation of Historical Priors;
3. Compare the foreign statute in the year of commission to Arizona statutes in the same year.¹ You are looking to see if that foreign state's felony statute, at that time, would be any felony in Arizona, at that time. The elements of the offense are important, the name of the offense is not.
4. Compare the statutory elements. The underlying facts of the case are not to be considered.² For the foreign prior to be allegeable, the elements of the foreign statute must match every element, with "strict conformity," to any Arizona felony.³ Furthermore, the State must prove that "the fact finder in the prior case actually found beyond a reasonable doubt that the defendant had committed every element that would be required to prove the Arizona offense."⁴
5. The only exception to the "strict application of the statutes" rule, is that a court may look at the charging document solely to determine the foreign statute's specific subsection which the defendant was convicted of, in order to compare it to Arizona law.⁵
6. *Application:* If you can establish just one instance of an element being different, or just one factual scenario where the foreign statute would differ from the Arizona statute, then the foreign prior should not be allegeable in Arizona.

For example: On a drug conviction in another state, if there is one drug on the foreign state's list that is not present on the Arizona list of illegal drugs, the felony should not be allegeable.

However, it is the foreign statute that must match to an Arizona felony to be allegeable, and not necessarily the other way around. *For example:* If the foreign felony statute has all the same drugs as an Arizona felony statute, but the Arizona statute has more drugs listed, then the felony is likely allegeable. Compare the requirements of each state's statutes.

The ultimate question is whether a person convicted in a court outside Arizona would be convicted of a felony had the crime been committed inside Arizona (looking solely at the elements, not the facts). A.R.S. §13-604(N). Failure to object at trial will waive the issue.⁶

¹ *State v. Kuntz*, 209 Ariz. 276, 278 (App. 2004) (citing *State v. Decker*, 172 Ariz. 33, 34 (1992)).

² *State v. Schaaf*, 169 Ariz. 323 (1991); *State v. Crawford*, 214 Ariz. 129, 131 (2007).

³ *State v. Clough*, 171 Ariz. 217, 219-20 (App. 1992)

⁴ *State v. Heath*, 198 Ariz. 83, 84 (2000) (citing *Clough*, at 219-220).

⁵ *State v. Thompson*, 186 Ariz. 529, 532 (App. 1996).

⁶ *State v. Song*, 176 Ariz. 215, 217-18 (1993)

Due Process and the Effective Use of Interpreters

By Suzanne Sanchez, Attorney Supervisor, Juvenile Division

An accused who is unable to speak and understand English to the degree necessary to participate in his defense has the due process right to the assistance of an interpreter.¹ In order to comport with the requirements of due process, courtroom interpretation at “crucial hearings,” including sentencing, must be simultaneous.² If simultaneous interpretation does not occur, “[i]t would be as though a defendant were forced to observe the proceedings from a soundproof booth[.]”³ Consequently, simultaneous interpretation is essential to the accused’s “right to be present at every stage of a trial.”⁴

If the accused is indigent, the government must bear the cost of the interpreter.⁵ Thus, “[t]he appointment of an interpreter is a proper county expense, not to be deducted from the remuneration accorded court-appointed counsel.”⁶ The role of the interpreter is not to give an advantage to either side, but to “place the non-English speaker, as closely as is linguistically possible, in the same situation as an English speaker in a legal setting.”⁷

The Importance of a Certified Interpreter

It is a “misconception that if an individual is bilingual he can interpret[.]”⁸ “Lay persons commonly believe that anyone who is ‘good with language’ or who ‘speaks another language perfectly’ will be able to interpret accurately in legal settings. Nothing could be further from the truth.”⁹

“Bilingualism is relative rather than absolute.”¹⁰ An interpreter must “transfer all of the meaning he or she hears from the source language into the target language [.]”¹¹ “This task demands conserving the language level, style, tone, and intent of the speaker.”¹² Thus, a qualified interpreter needs to be able to understand and instantaneously interpret technical legal terms, slang, profanity, and precise connotations and grammatical structures.¹³ Moreover, simultaneous interpretation is a learned skill.¹⁴

To grasp the nature of the skill required in simultaneous interpretation, try reading the following sentence and simply repeating it in English to yourself, without looking at the text. “Well, uh, the thing is, like I told you, me and Joe and Rick had a couple, well maybe more than a couple, say four, I guess, beers apiece before the cops got there, but that was after we had had two scotch and sodas, and two, no one, or was it two, well a couple of margaritas at the bar on 5th and Folsom.”¹⁵

Furthermore, the interpreter must be able to listen and speak at the same time.¹⁶ Thus, an effective interpreter must have advanced linguistic skills and the ability to interpret simultaneously. A certified court interpreter has passed a test, indicating possession of these requisite qualifications. Use of an unqualified interpreter compromises due process.

Challenging the Unqualified Interpreter

Interpreters are presumed capable.¹⁷ It is the defense’s burden to show that an interpreter is unqualified.¹⁸ The defense may inquire about an interpreter’s qualifications.¹⁹ Rule 604, Arizona Rules of Evidence, provides that “[a]n interpreter is subject to the provision of these rules relating to qualifications as an expert and the administration of an oath or affirmation to make a true translation.” Thus, pursuant to Rule 702, the defense can inquire as to whether the interpreter is “qualified as an expert by knowledge, skill, experience, training, or education[.]”²⁰

The Need for a Second Interpreter

In appropriate situations, defense counsel should anticipate the need for a second interpreter, and request one. During court proceedings, the accused needs to be able to confer with counsel. The sharing of an interpreter interferes with, or even prevents, such consultation. For example, the sharing of an interpreter by codefendants inhibits effective communication with counsel and is reversible error.²¹

The best procedure is to use two interpreters in multi-defendant proceedings with an electronic sound system. Thus, one interpreter interprets the proceedings through a closed circuit electronic transmission system, and all the defendants listen by means of individual headphones. This procedure also ensures a uniform interpretation. The other interpreter, who should be seated at counsel table, will assist in communication between client and counsel during the proceedings.²²

In addition, the court violates the accused's right to due process when it borrows the accused's interpreter for interpretation of the testimony of witnesses.²³ Therefore, when both the accused and a codefendant or witness require an interpreter, the accused has the due process right to a second interpreter.

Additional Considerations

Most people in Maricopa County who require an interpreter speak Spanish. Without intending to cause problems, attorneys often ask for the spelling of Spanish names.

Beware of asking Spanish speakers to spell words, even their own names. Spanish is a very phonetic, regular language so Latin Americans are not routinely drilled in school in spelling aloud, as students are in this country. As a result, even highly educated Spanish speakers will have difficulty spelling aloud with ease. If they see their names written, they can readily confirm the spelling.²⁴

Beware also of ambiguous subject pronouns.²⁵ “[I]n Spanish, the possessive pronoun ‘su’ may refer to ‘your,’ ‘his,’ ‘hers,’ ‘its,’ or ‘their.’”²⁶ Questions, and resulting answers, containing ambiguous subject pronouns, can create confusion that damages credibility.²⁷ “Lawyers and interpreters cannot always foresee every linguistic trap, but the more context an interpreter has, the more avoidable these become.”²⁸

Bear in mind that cultural, as well as linguistic, differences can affect testimony. For example, “[c]oncepts of time and distance vary from culture to culture. It should not be assumed that a witness is trying to be evasive or vague when he doesn't answer questions with the same precision expected from someone in this culture.”²⁹

It also should not be assumed that a witness who repeats the question is trying to be evasive. “Spanish speakers often repeat the question before responding.”³⁰ A listener who does not realize this may assume that the speaker is trying to stall or is “exhibiting flippant or sarcastic behavior.”³¹

Interpreters can be more effective if they know what to expect. Interpreters are required to maintain confidentiality.³² Thus, it will help, not harm, your client to inform the interpreter about the nature of the case. For example,

[w]hen expert testimony is given by forensic doctors or ballistic experts, it is essential that interpreters be provided with a copy of their depositions or their reports ahead of time, if available. Interpreters are expected to handle vast vocabularies in both languages; but only a small percentage of these words spring immediately to mind. While interpreters know the most frequently used expressions in certain areas of expert testimony, they don't have every equivalent on the tip

of their tongues; for that, they need to study the subject matter ahead of time because arcane or specialized testimony remain in the “hard disk” area of the brain, not in short term memory.³³

Thus, preparing the interpreter decreases the chance of miscommunication.

Conclusion

Representation of clients who speak no English, or limited English, includes effective use of interpreters. Effective use of interpreters means insisting upon a qualified interpreter, requesting a second interpreter when appropriate, and maximizing the opportunity for accurate interpretation.

Endnotes

1. *State v. Natividad*, 111 Ariz. 191, 194, 526 P.2d 730, 733 (1974).
2. *State v. Hansen*, 146 Ariz. 226, 232, 705 P.2d 466, 472 (App. 1985).
3. *Natividad*, 111 Ariz. at 194, 526 P.2d at 733.
4. *Id.*
5. *Id.* at 193, 526 P.2d at 732.
6. *State v. Rios*, 112 Ariz. 143, 144-45, 539 P.2d 900, 901-02 (1975).
7. R. Gonzalez, V. Vasquez, & H. Mikkelson, *Fundamentals of Court Interpretation*, 155, 242 (1991).
8. Claus, *Court Interpreting: Complexities and Misunderstandings*, Alaska Justice Forum, 13(4), 1 (Winter, 2000).
9. Framer, *Through the Eyes of an Interpreter*, The Advocate, 23(3) (May 2001).
10. Claus, *supra*.
11. Gonzalez, *supra*, 155.
12. *Id.*
13. Claus, *supra*, 2.
14. *Id.*
15. *Id.*
16. *Id.*
17. *State v. Navarro*, 132 Ariz. 340, 343, 645 P.2d 1254, 1257 (App. 1982).
18. *State v. Rios*, 112 Ariz. at 144, 539 P.2d at 901.
19. *State v. Mendoza*, 181 Ariz. 472, 475, 891 P.2d 939, 942 (App. 1995).
20. *State v. Burris*, 131 Ariz. 563, 568, 643 P.2d 8, 13 (App. 1982) (quoting Rule 702, Arizona Rules of Evidence).
21. *People v. Resendes*, 210 Cal.Rptr. 609 (1985).
22. Gonzalez, *supra*, 171.
23. *People v. Aguilar*, 35 Cal.3d 785 (1984).
24. Claus, *supra*, 4.
25. Picado, *An Attorney's Primer: Working with Interpreters*, Proteus, IX, 1-2, 1 (Winter-Spring 2000).
26. *Id.*
27. *Id.*
28. *Id.*
29. Claus, *supra*, 4.
30. Gonzalez, *supra*, 242.
31. *Id.*
32. *Id.* at 475.
33. Picado, *supra*, 1.

Law Students Mentor Youth at Teen Court

By Judy Nichols, Director of Communications, Sandra Day O'Connor College of Law at Arizona State University

Cutline: Shana Einhorn, left, a third-year law student at the Sandra Day O'Connor College of Law, and Suzanne Sanchez, right, a 1991 alumna and supervising attorney in the Maricopa County Public Defender's Office, mentor high school students Abby Richardson, 17, center left, and Ashley Elliott, 18, as part of the Teen Court program, a teen diversionary program of the Maricopa County Superior Court system.



Courtroom etiquette, proper direct examination and consequences fitting the offense are all on the agenda when students at the Sandra Day O'Connor College of Law at Arizona State University mentor teens in the Maricopa County Teen Court program.

Teen Court is a diversionary program in which teens serve as prosecutors, defense attorneys, bailiffs and members of the jury to determine the proper consequence for a peer who has admitted responsibility for a violation of the law.

By listening to the offender and any witnesses that appear, the teens determine any mitigating circumstances and assign consequences that can include community service, restitution, letters of apology, peer counseling, tutoring, research papers, educational classes, skill-building classes, and jury duty.

The University Lakes arm of the program began meeting at the College of Law in November, using the College's courtroom classroom, which has a judge's bench, jury box and tables for lawyers and defendants.

Law students volunteer through the College's Pro Bono Program, which provides free law-related services to promote the public good or to those who cannot afford help. Last year, the College's law students donated 73,000 hours to the elderly, the disabled, the homeless and other programs.

Shana Einhorn, a third-year law student who plans to work in family law, recently sat across the table from Abby Richardson, 17, and Ashley Elliott, 18, both of Desert Vista High School, who served as prosecuting attorneys in an assault case. Ashley eventually hopes to take pre-law classes at ASU. Abby wants to be a cosmetic surgeon.

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Einhorn helped the students read the police account of the incident, a fight over a boy, in which one girl slapped another and dragged her by the hair across the cement.

“You should point out the difference in size,” Einhorn suggested. Then she explained the idea of hearsay, that someone told the offender that the girl was saying things about her.

She coached them on their performance in front of the judge.

“Most people talk too fast,” Einhorn cautioned them. “Speak much slower than you think you should. Even if the person on the stand is rude to you, always be polite. And stand up when you speak to the judge.”

Lee Roberts, a juvenile probation officer and Teen Court coordinator, sat on the bench.

The “defense attorneys,” two teenage boys, walked the offender through her background, the teasing she suffered in school, and her anger at hearing the other girl was spreading rumors about her.

Abby and Ashley asked her about the size difference, whether there had been other fights, and whether she had apologized.

The jury of teens decided the offender should attend an anger-management workshop, and write an essay on anger.

Suzanne Sanchez, a 1991 graduate of the College of Law and now an attorney and supervisor in the Maricopa County Public Defender’s Office, said the Teen Court program has a great success rate.

“Ninety-eight percent of the teens who come through the program, don’t have a second offense,” she said.

Sanchez said the program gives first-time offenders a taste of the court system without establishing a juvenile record.

“It’s literally a jury of their peers – other teenagers – and the consequences stop short of jail or probation,” Sanchez said. “It’s a great experience for high school students interested in law or public speaking.”

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The Sandra Day O’Connor College of Law (www.law.asu.edu) at Arizona State University was founded in 1967 and renamed for the retired U.S. Supreme Court Justice in 2006. It is the only fully accredited law school in the Phoenix area, boasts an Indian Legal Program that is arguably the best in the nation, and houses the Center for the Study of Law, Science, & Technology, the oldest, largest and by far the most comprehensive law and science center in the country. ASU is one of the premier metropolitan public research universities in the nation.
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THOSE INTERESTED IN VOLUNTEERING WITH TEEN COURT MAY CONTACT CHRIS PHILLIS OR SUZANNE SANCHEZ.

Jury and Bench Trial Results

November / December 2007

Public Defender's Office

Dates: Start - Finish	Attorney Investigator Paralegal	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
Group 1						
10/31 - 11/6	Fischer	Myers	Plicht	CR07-137098-001DT Agg. Assault, F3D	Not Guilty of Agg. Assault - Guilty of Misdemeanor Assault.	Jury
11/13 - 11/16	Farrell	Grant	Eidemanis	CR07-106992-001DT Agg. Assault, F4 (DV)	Not Guilty of Agg. Assault - Guilty of Misdemeanor Assault.	Jury
11/26	Farney Rankin	Foster	Prichard	CR07-116289-001DT Assault, M1	Not Guilty	Bench
11/26 - 11/28	Friddle Ralston	Lee	Mayer	CR07-136041-001DT Burg., 2nd Deg., F3	Guilty	Jury
10/29 - 12/13	Barraza Stewart Sikora Armstrong	Garcia	Phipps-Yo- nas Holmberg	CR06-163201-001DT Sexual Assault, F2 Kidnapping, F2 Sexual Abuse, F5 Burg, 3rd Deg., F4	Directed Verdict on Kidnapping charge; Not Guilty on all other counts.	Jury
11/27 - 12/4	Woodson Thompson Ralston Williams	Grant	Buesing	CR07-005729-001DT Agg. Assault, F3D Unlawful Imprisonment, F6D	Not Guilty	Jury
11/29 - 12/3	Dominguez Rankin Ralston	Newell	Bonaguidi	CR07-120433-001DT TOMOT, F3	Rule 20 Judgment of Acquittal	Jury
Group 2						
10/29 - 11/7	Roskosz	Gordon	Andrus	CR06-009621-001DT 8 cts. Child Molest, F2DCAC 3 cts. Sexual Conduct w/minor, F2DCAC 3 cts. Sexual Abuse, F3DCAC Att. Child Molest, F3DCAC Indecent Exposure, F6	Child Molest, Guilty 4 cts, Not Guilty 2 cts., 2 cts. dismissed during trial. Sexual Conduct w/minor, Guilty 2 cts., 1 ct. dismissed during trial. Sexual Abuse, Guilty 1 ct., Not Guilty 2 cts. Att. Child Molest, dismissed during trial. Indecent Exposure, dismissed during trial.	Jury
10/30 - 11/06	DeLaTorre Mealey	Gottsfeld	Kelly, Felcyn, Godbehere	CR06-180277-001DT 2 cts. Agg. Assault, F5 POND, F4	Guilty all counts (tried in absentia)	Jury
11/7	Scott	Mroz	Harames	CR07-137533-001DT PODD, F4	Guilty	Jury
11/19 - 11/27	Nelson Reilly	Granville	Schultz	CR07-142102-001DT Agg. Criminal Damage, F4 Poss. Of Burg. Tools, F6 Burg. 3rd Deg., F4 TOMOT, F3	Not Guilty all counts	Jury

Jury and Bench Trial Results

November / December 2007

Public Defender's Office

Dates: Start - Finish	Attorney Investigator Paralegal	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
Group 2 (Continued)						
11/19 - 11/27	Colton Reilly	Blomo	Sponsel	CR07-136011-001DT Armed Robbery, F2	Guilty of Lesser Included Of- fense, Robbery	Jury
11/26 - 11/29	Taradash	Johnson	Ondracek	CR07-005134-001DT Armed Robbery, F2D	Guilty of Lesser Included Of- fense, Robbery, F4	Jury
11/26 - 11/28	Davison Romani Clesceri Urista Del Rio	Lynch	Coates	CR06-169148-001DT Burg. 3rd Deg., F4	Not Guilty	Jury
Group 3						
11/15 - 11/20	Johnson Charlton Browne	Foster	Gilla	CR07-134283-001DT Criminal Damage, F6 Disorderly Conduct, M1	Not Guilty	Jury
11/27 - 11/30	Johnson Charlton Browne	Steinle	Cohen	CR06-139185-001DT 3 cts. Molestation of Child, F2 Att. To Commit Molestation of Child, F3	Not Guilty	Jury
12/3 - 12/6	Tyler Harrison	Heilman	Lynda Vescio	CR2007-111542-001DT TOMOT, F3N	Not Guilty	Jury
Group 4						
10/29 - 11/2	Gaziano	Abrams	Baker	CR07-112876-001SE Sexual Abuse, F3 2 cts. Molestation of Child, F2 Public Sexual Indecency, F5	Not Guilty	Jury
10/29 - 11/6	Sheperd Engineer Lenz	Contes	Strange	CR07-030370-001SE 10 cts. Sex. Exploit. of Minor, F2	Not Guilty	Jury
10/30 - 11/5	Ziamba	Sanders	Kerchenko	CR07-101777-001SE 2 cts. Child Abuse, F4	Child Abuse - Guilty Child Abuse - Not Guilty	Jury
11/7 - 11/9	Sitver	Contes	Kerchenko	CR07-122018-001SE Unlawful Imprisonment, F2 5 cts. Assault-Touch to Injure, M3 Disorderly Conduct, M1	Unlaw. Imprisonment -Guilty 3 cts. Assault-Guilty 2 cts. Assault-Not Guilty Disorderly Conduct-Guilty	Jury
11/15	Ditsworth	Arellano	Judge	CR07-126683-001SE POM, M1 PODP, M1	Guilty	Bench
11/15 - 11/20	Corbitt	Udall	Blum	CR06-007359-001SE Agg. Assault, F3	Not Guilty	Jury
11/15 - 11/26	Akins Ryon	Abrams	McGregor	CR07-030214-001SE Negligent Homicide, F4D	Guilty	Jury

Jury and Bench Trial Results

November / December 2007

Public Defender's Office

Dates: Start - Finish	Attorney Investigator Paralegal	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
Group 4 (Continued)						
11/26 - 11/28	Braaksma	Sanders	Blum	CR07-134573-001SE Burg. 2nd Deg. F3 Assault, M3	Guilty	Jury
11/26 - 11/30	Akins	Contes	Beatty	CR07-138928-001SE Crim. Damage, F6 Agg. Assault, F3D	Crim. Damage-Guilty Agg. Assault-Guilty to lesser charge, M1	Jury
11/28 - 12/11	Nurmi	Arellano	Baker	CR07-030265-001SE Sexual Assault, F2	Not Guilty	Jury
12/4 - 12/5	Lockard	Udall	Blum	CR05-125759-001SE POM, F6 PODD, F4	Guilty	Jury
12/10 - 12/12	Dehner Ditsworth Arvanitas	Abrams	Blum	CR06-116877-001SE Kidnap, F2D Agg. Assault, F3D	Kidnap - Not Guilty but Guilty on Lesser Charge of Unlawful Imprisonment Agg. Assault - Not Guilty but Guilty of Assault.	Jury
12/12 - 12/17	Peterson	Arellano	Beatty	CR06-140587-001SE Crim. Trespass, F6 Theft, F6 Assault, M2	Crim. Trespass-Guilty Theft - Not Guilty Assault-Guilty	Jury
Vehicular						
10/30 - 11/2	Taylor	Mroz	Vescio	CR07-127211-001 DT PODP, F6 Forgery, F4 PODD, F4	PODP - Guilty Forgery - Not Guilty PODD - Guilty	Jury
11/13 - 11/14	Manty	Blomo	Torgoley	CR07-107070-001 DT POND F4 PODD, F4 POM F6	POND -Dismissed PODD - Guilty POM - Dismised	Jury
11/26 - 11/28	Sloan	Passa- monte	Collins	CR07-100098-001 DT 4 cts. Agg DUI, F4	Guilty	Jury
12/3 - 12/5	Timmer	Passa- monte	McGary	CR06-124814-001 DT 2 cts. Agg DUI, F4	Guilty	Jury

Jury and Bench Trial Results

November / December 2007

Legal Defender's Office

Dates: Start - Finish	Attorney Investigator Paralegal	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
9/4 - 11/19	Schaffer Sinclair Haimovitz Teter/Baker	O'Toole	Gialketsis Hoffmeyer	CR03-020557-001 Capital Case: Murder 1st Degree, F1; Kidnap, F2	Guilty - Sentenced to Life in Prison	Jury
10/29 - 11/8	O'Neal	Verdin	Cohen	CR07-120512-001 Obscene Matl. Furnish to Minors, F4; Public Sexual Indecency, F5; Molestation of Child, F2, 3 Cts; Sexual Abuse, F5; Involve/Use Minor in Drug Offense, F2; Sexual Abuse of Child, F3	Not Guilty: Obscene Matl. Furnish to Minors; Molestation of Child, 3 Cts; Sexual Abuse of Child Hung Jury: Public Sexual Indecency; Sexual Abuse; Involve/Use Minor in Drug Offense	Jury
10/30	Ripa	Gama	AG	JD14768 Severance Trial	Severance Granted	Bench
11/7	Steltenpohl	McClennen	AG	JD15469 Severance Trial	Severance Granted	Bench
11/14 - 11/30	Nies	McClennen	V. Boswell	JD14750 Severance Trial	Severance Granted	Bench
11/28	Steltenpohl	McClennen	AG	JD14404 Severance Trial	Severance Granted	Bench
11/28 - 11/29	Carlson	Gordon	Eidemanis	CR07-143301-001 Child Abuse, F4; Assault, M3	Not Guilty	Jury
12/3 - 12/5	Pola Pulver	Hoag	AG	JD506103 Guardianship Trial	Guardianship Granted	Bench
12/3 - 12/12	Schaffer Otero Rangel	McMurdie	Harder	CR06-136722-001DT Murder 1st Degree, F1D; Endangerment, F6D; 2 Cts, Agg DUI, F4; Unlawful Flight, F5; Shoplifting, M1	Guilty	Jury
12/10 - 12/11	Carlson	Lynch	Reed	CR07-116619-001DT POND F4; POM F6	Guilty	Jury
12/17	Wilhite	McMurdie	Horn	CR07-150292-001DT POM, MI	Guilty	Bench
12/20	Garfinkel	Brodman	Tenbrook	JD15953 Dependency Trial	Dependency Found	Bench

Jury and Bench Trial Results

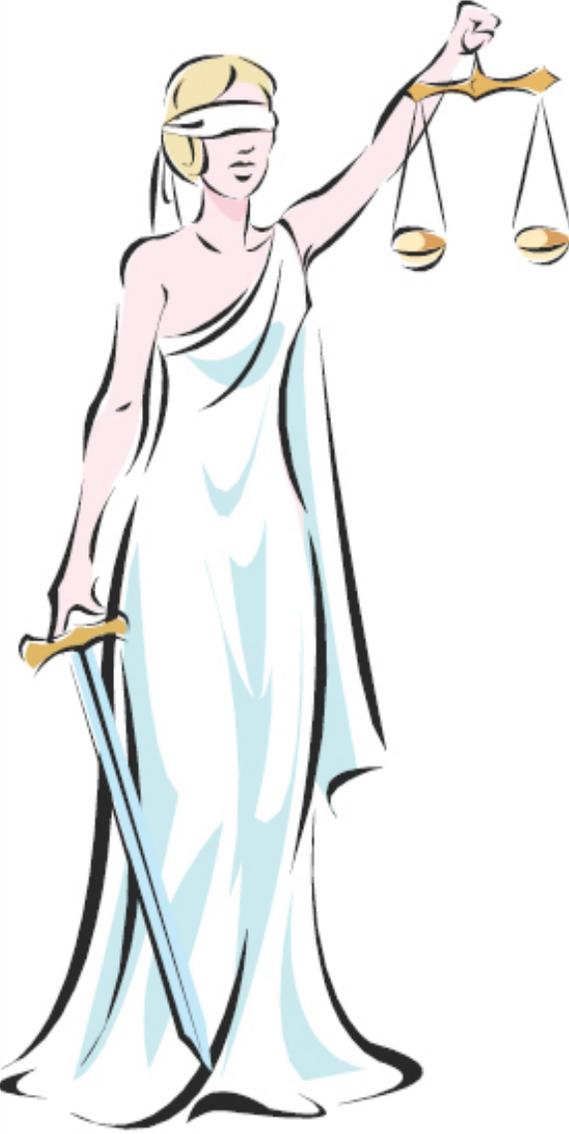
November / December 2007

Legal Advocate's Office

Dates: Start - Finish	Attorney Investigator Paralegal	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
10/31 - 11/6	Romberg	Granville		CR96-003042 Custodial Interference-F6	Guilty	Jury
10/2 - 11/30	Owsley Marrero	Brodman		JD-14432 Severance	Under Advisement	Bench
11/21	Todd Indovino	Talamante		JD-504497 Termination of Parental Rights	Termination	Bench
12/11	Lunde Canecchia	Brodman		JD-13652 Severance Trial	Severance Granted	Bench
12/6	Christian Christensen	Hoag		JD-506495 Dependency	Dependency Found	Bench
12/20	Rich Mullins	Brodman		JD-15953 Dependency	Dependency Found	Bench

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In appreciation for all they do!
From: Those who benefit from your effort.*





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for The Defense

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