

for The Defense

■ Training Newsletter of the Maricopa County Public Defender's Office ■

Volume 15, Issue 8

August 2005



The Interstate Agreement on Detainers

IADs: What's It All About?

By Marvin Davis, Defender Attorney - Vehicular

First off, what is a detainer and why in the world is it necessary to have an Interstate Compact dealing with them. A detainer, oddly enough, is not defined in the Interstate Agreement itself. However, the United States Supreme Court has defined a detainer as a “notification filed with the institution in which a prisoner is serving a sentence, advising that he is wanted to face pending criminal charges in another jurisdiction.” *U.S. v. Mauro*, 436 U.S. 340, 98 S.Ct.1834 (1978). In other words, it is a letter from out-of-state prosecuting authorities to in-state prison officials saying “don’t let this guy or gal go until we have a shot at him on our turf.” Thus, a detainer is nothing more than an “out-of-state hold” on a client. By its very nature, a detainer can transcend state boundaries and therefore an Interstate Agreement is the most efficient way to handle such multi-state issues. Now for those of you who love legal fictions you’ll be pleased to know that under the IAD, a federal detention center or prison that is geographically located within the state of Arizona, or any state for that matter, is considered out-of-state. *State v. Loera*, 165 Ariz. 543, 544, 799 P.2d 884, 885 Ariz.App.Div. 1 1990).

So an individual who is incarcerated in a federal prison in Arizona can trigger the Speedy Trial provisions (discussed below) of the IAD because technically he/she is deemed out-of-state or in another jurisdiction. *Id.*

Is the IAD Really Liberally Construed?

The main purpose of the IAD is to minimize the uncertainties that result from outstanding charges against prisoners and to prevent the obstruction of prisoner treatment and rehabilitation programs. Ariz. Rev. Stat. § 31-481, Art. I (2004). To effectuate this purpose, the Agreement provides a mechanism under Article III (a) for prisoners to request a Speedy Trial on all outstanding out-of-state criminal charges, the basis of which a detainer has been filed. Now keep in mind that the IAD is a highly technical statute and its provisions, according to the case law, must be scrupulously complied with. *Stroble v. Anderson*, 587 F.2d 830, 839 (6th Cir. 1978). It is this “scrupulous” requirement that gives me heartburn because the Agreement, on its face, states the following:



Delivering
America's Promise
of Justice for All

for The Defense

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Volume 15 Issue 8

This agreement shall be liberally construed so as to effectuate its purposes. See also *State v. Burrus*, 151 Ariz. 581, 729 P.2d 935 (Ariz.App.Div.1 1986) (finding that the purpose of the Agreement is to provide a speedy trial as well as the orderly disposition of charges).

To illustrate, Article III (a) requires that a defendant be brought to trial within 180 days after he/she sends a written request for final disposition of charges (i.e., a Speedy Trial) to both the “prosecuting officer and the appropriate court of the prosecuting officer’s jurisdiction.” At first glance this seems like a pretty straightforward requirement and this is exactly what some criminal defendants do. However, Article III (b) further indicates that the prisoner’s request must be sent to the warden or other prison officials who must then forward the prisoner’s request, along with a “Certificate of Inmate Status” to the prosecutor and the courts. What is disturbing is that county attorneys, with a straight face, have actually argued that because the defendant’s Speedy Trial request was sent directly to them instead of to the prison warden first, that the defendant’s motion to dismiss should not be granted due to his/her failure to adhere to the requirements of the statute. Go figure! If the liberally construed language means anything it must, at a very minimum, mean that a criminal defendant who sends his speedy trial request under the IAD directly to the prosecutor and the appropriate courts has met his burden.

Otherwise, the purpose of the statute is frustrated and not effectuated at all. So use this “liberally construed” language anytime there is a technical, procedural defect with your client’s request.

I recently filed a special action (jurisdiction declined) dealing with another highly technical issue regarding whether or not a federal detention facility qualified as a penal or correctional institution. The IAD statute itself, under Article III (a) requires a person to have “entered upon a term of imprisonment in a penal or correctional institution of a party state . . .” before he/she can validly request a Speedy Trial. Of course my position was that my client had entered upon a term of imprisonment at the time his federal public defender filed his request because he received credit for time served in the federal detention facility. In addition, the case law defines a penal institution as a “generic term to describe all places of confinement for those convicted of crime such as jails, prisons, and houses of correction.” *Escalanti v. Superior Court*, 165 Ariz. 385, 799 P.2d 5 (Ariz. App.Div.1 1990). Moreover, a correctional institution is defined as a “generic term describing prisons, jails, reformatories and other places of correction and detention.” *Id.* Case closed, right? Wrong! Now if you can follow the following logic you are truly talented: The county attorney actually argued that my client had not entered upon a term of imprisonment because at the time he forwarded his Speedy Trial request he was detained in a federal detention facility and had not physically entered the actual prison facility he was assigned to. The term given to my client was “pretrial detainee.” Give me a break! How a person who has already been convicted and sentenced on federal charges is deemed a “pretrial detainee” is beyond me. At any rate, the State’s position was completely illogical to me in light of the case law, but apparently it was enough to convince Judge Hotham to deny the motion to dismiss. A liberal construal was not required of Judge Hotham. An obvious, straightforward application of the IAD statute

Contents

The Interstate Agreement on Detainers	1
Liars, Prevaricators, and Frauds	3
Practice Pointer	8
Preliminary Hearing Cheat Sheet	12
Jury and Bench Trial Results	12

Continued on p.6

Liars, Prevaricators, and Frauds

A Discerning Look at Deceit

By Donna Elm, Federal Public Defender's Office

Lord, Lord, how this world is given to lying!

William Shakespeare, *Henry IV*, part I

Look around you: everywhere in our normal daily interactions are falsehoods. Most are done out of kindness ("you don't look fat at all"), puffing exaggerations to sound attractive or powerful ("I'm going to need a bigger raise than that because firms are begging me to jump ship to them"), or for social propriety when the encounter does not matter ("sorry, I already donated at work").¹ Thus we accept and indeed want a certain degree of dishonesty in our society, reserving extreme honesty for a limited number of special relationships that depend on it like parent/child, husband/wife, employer/employee, -- oh yes, and attorney and anyone he ever deals with.² Our professional proclivity for telling bald-faced truths is a little out of line with our greater society.

The culture of law is extraordinarily, one might say "deviantly," concerned with the "truth." Trials are a means to uncover the truth. Cross-examination is the burning crucible that facts are subjected to in order to expose lies. Jurors must decide which witnesses are credible as well as the relative truthfulness of parties' positions. From a practical standpoint, trial lawyers recognize that if a critical witness is caught lying, she will lose the case for them *even if the evidence remains strongly in their favor*; that is because juries and judges understand that prevarication in court is totally unacceptable, responding accordingly. War stories abound where juries are far more incensed by a perjurious witness than the underlying crime. Those testifying could be severely punished with misdemeanor or felony convictions if they lie under oath; in fact historically, the administration of the oath (with its

concomitant threat of punishment for perjury) was thought to guarantee truthfulness of the witness. Jurists and counsel are equally bound by ethics codes that hold veracity paramount.

Having embraced an idealized conception of truth, our legal subculture treats lying as a serious taboo. Hence trial lawyers realize that calling someone a "liar" is so extreme that it is tantamount to cursing: do we not refer to it as "using the L-word?" Do we not hesitate to brand someone a "liar?" Thus lying becomes the major bugaboo for the law profession. When our clients misrepresent anything, we have been conditioned to respond, as in *Clockwork Orange*, viscerally. Not immersed in our legal subculture, they fail to appreciate what we get so excited about.

Our clients and witnesses lying is the focus of this short series of articles. It happens all the time in the practice, precisely because the greater culture expects and indeed *needs* to have a certain degree of prevarication to function socially.³ Due to our Ethics Rules, we of course cannot condone it; but due to the *taboo* about lying, we are apt to over-react or mentally shift how we feel about them from "good client" to "bad client." Certainly we have all seen this shift in our legal subculture: the probation officer writing the pre-sentence report sniffs out a false representation, so the sentence recommendation goes up; the investigating police officer -- who has no hard evidence of which of four suspects did the crime -- lands with both feet on the one who he caught in a lie; or, the forensic psychologist who diagnoses the defendant a "malingerer" the moment she uncovers a false representation. We should consider moving away from that knee-jerk reaction that is part and parcel of our profession's subculture so that we can

continue productive relations with our clients and witnesses, and not overlook behaviors that may provide us with a defense or mitigation.

A. Why People Lie

None of us could live with a habitual truth teller; but, thank goodness, none of us has to.

-- Mark Twain

Recognizing that there are many natural or socialized bases for lying, we turn to particularized reasons underlying deceit. Charles Ford, Ph.D., who has studied the psychology of lying, acknowledges that there are different types of lies, different types of liars, and different situations in which lies are told.⁴ He distinguished a number of varieties of deceptions, which appear in the accompanying table.⁵

Beside these straight-forward types of deceptions, certain falsehoods could fail to qualify as "lies" at all. *Webster's* defines lying with two elements: (1) the act of stating something which is factually untrue, (2) coupled with the *mens rea* (mental state) of knowing that it is untrue when spoken. Hence when a psychotic makes false accusations, we do not consider those to be "lies." Similarly if one person knowingly lied to a second, but the second (trusting the first), repeated that information to a third, the second person did not "lie." On the other hand, one can tell a truth and yet be deceptive: the husband arriving home late for dinner can truthfully report that there had been an accident blocking the freeway causing delays -- without mentioning that the accident had been in the traffic going in the opposite direction!

Of particular interest to those working in the criminal justice system is lying that occurs for reasons *other than* trying to disentangle oneself from a criminal prosecution. Statements which are false may be based upon, for instance, a delusional thought

disorder: the crazy or brain-damaged person may be reporting a reality as she perceives it - - which is not in keeping with others' objective experience. False reports can also be offered innocently if they are based upon a defective memory process: when he did not retain a memory of an event, a witness may either sincerely believe it did not occur or may try to fill in some missing details with what he thinks is logical. Additionally, some people subconsciously or even unknowingly shade the truth as a protective response to something far worse than living with a lie: these are the classic defense mechanisms such as the battered wife explaining and eventually believing that she deserved those beatings. Furthermore, there are cultural aspects of lying: some cultures neither respect nor find any use for an objective truth, preferring to rely on subjective experiences or realities consistent with their view of the world. These issues are topics of the balance of the chapters in this series on lying. Although discussion of lying, in the realm of criminal justice, usually covers suspects who intentionally prevaricate when caught doing crimes, it will not be included in this series. Blame displacement or malingered fictions are already well-known and readily understood -- whereas many of these other potentially helpful syndromes are overlooked.

(Endnotes)

1. See Ford, C., *Lies, Lies, Lies: the Psychology of Deceit* at 1-22 (1996).
2. Note that ER 8.4(c), requiring honesty in attorneys without limiting it to in matters concerning professional conduct, expands the other ER's dealing with honesty, namely ER 3.3 (honesty to a tribunal) and ER 4.1 (honesty in statements to others regarding representation) recently to go beyond our lawyering to the rest of our lives.
3. Lockard & Paulus, eds., *Self-Deception: An Adaptive Mechanism?* (1988); and see Ford at 4-11.
4. Ford at 19.
5. Adapted from Ford at 29 and the entry on "lying" in Kapman, B., *Encyclopedia of Aberrations: A Psychiatric Handbook* at 288-300 (1953).

Type of Lie	Motive	Example
Benign & salutary	Smooth social interactions	"How are you?" "Fine."
Hysterical lies	To attract attention	Feigning: "I think I'm going to faint –"
Defensive lies	To extricate the speaker from a difficult situation	"I couldn't have taken cash from the till, because I wasn't even here."
Compensatory lies	To impress someone else	"My other car's a Ferrari."
Malicious lies	To deceive for personal gain	"You can trust me to hold your wallet while you go swimming."
Gossip	To exaggerate rumors maliciously	"Not only did he smile at her, he's been sleeping with her on the side!"
Implied lies	To mislead by partial truths	Said by a high school dropout: "I never finished college."
Love intoxication lies	To exaggerate idealistically	"She is the prettiest, sweetest, most wonderful woman I have ever met."
Pathological lies	To lie self-destructively	"No, officer, go ahead and run it: you'll see I've got no criminal record!"

and the case law would have sufficed. I guess I was asking too much.

Which Time Provisions Control?

Under the IAD, either the defendant (under Article III discussed above) or the State (under Article IV discussed below) can initiate extradition proceedings. Under Article III (a), the State has 180 days to bring a defendant to trial after prison officials forward the defendant's request to the State and to the appropriate court. However, under Article IV (a), the State has just 120 days to bring a defendant to trial. The State initiates extradition proceedings under Article IV of the IAD by simply presenting a written request for temporary custody or availability to the appropriate prison officials of the state in which the defendant is incarcerated. Ultimately, the party who files their request first controls the time parameters under the IAD. *Felix v. U.S.*, 590 A.2d 504 (D.C. App. 1991); *State v. Robbins*, 272 Kan. 158, 164-165, 32 P.3d 171, 178-179 (2001); *State v. Willoughby*, 83 Haw. 496, 503, 927 P.2d 1379, 1386 (Haw.App. 1996); *Eckard v. Commonwealth*, 20 Va.App. 619, 460 S.E.2d 242 (Va.App. 1995); *State v. Caulk*, 543 A.2d 1366, 1369 (1988); *State v. White*, 234 Kan. 340, 344-346, 673 P.2d 1106, 1109-1111 (1983); *Shewan v. State*, 396 So.2d 1133 (Fla. App. 1981); *State v. Plant*, 532 S.W.2d 900, 902 (Mo.App. 1976). If the State fails to comply with the time provisions of either Article III or IV, the court is required by statute to enter an order dismissing the charges with prejudice. Ariz. Rev. Stat. § 31-481, Art. V(c) (2004).

The State Gets Just One Bite at the Apple (No Shuffling)

Regardless of who is first to initiate speedy trial/extradition proceedings under the IAD, the State gets only one chance to bring an individual to trial in the charging jurisdiction. Ariz. Rev. Stat. § 31-481, Articles III(d) & IV(e). For example, if the State extradites a person and then subsequently returns that person to the "sending state" without bringing him/her

to trial in the "charging state," the State is barred from ever trying that defendant on those specific charges. The IAD statute specifically states that "[i]f trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment . . . the court shall enter an order dismissing [the indictment, information or complaint] with prejudice." *Id.* Obviously if the State were allowed to shuffle an individual back and forth this would create a huge obstruction to prisoner treatment & rehabilitation programs, which is contrary to IAD's purpose (see above). So if your client is appearing in an Arizona court on a detainer, you should ask him or her if this is their first time appearing on those specific charges. If not, you probably have a good basis for a motion to dismiss with prejudice. Oh and by the way, always request any and all detainer/extradition documents from the prison officials where your client is incarcerated. You never know what you might turn up!

How Do Speedy Trial Rights Under the IAD Differ From Traditional Speedy Trial Rights Under Rule 8?

First, if you can prove a violation of the defendant's speedy trial rights under the IAD, the dismissal will automatically be with prejudice whereas a dismissal with prejudice under Rule 8 will require a showing of actual prejudice. We all know how difficult (or nearly impossible) it can be to show actual prejudice under Rule 8. This is because Rule 8.6 gives the trial judge discretion to dismiss with or without prejudice. *The Judge has no discretion under the IAD.* Secondly, under the IAD, time does not automatically toll when the client is unavailable to stand trial whereas under Rule 8.4(a) time does toll. To be specific, Article VI(a) of the IAD provides that "the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as *determined by the court having jurisdiction of the matter.*" What this means is that when the defendant is unavailable to stand trial, for whatever reason, the State must get a court order tolling the running of

time. Otherwise, time continues to run and will ultimately be counted against the State. See *Stroble*, 587 F.2d at 838 (1978). Clearly, the IAD trumps Rule 8 in terms of benefits and incentives.

What happens if the Client requests a Speedy Trial but the Prosecuting Authorities have yet to file a Detainer?

Under the IAD, before it can be said that a valid speedy trial request has been made, a detainer must have already been filed by the State. This creates a situation where the State can prevent a client from requesting a speedy trial under the IAD by delaying the filing of a detainer. Put another way, a defendant's ability to request a Speedy Trial depends on whether or not the State has acted diligently in filing a detainer. I have not been able to find any Arizona cases that say prosecutorial delay in filing a detainer is a basis for dismissal of the charges on due diligence grounds. However, there is some out-of-state precedent for such an argument. In *State v. Anderson*, 121 Wash.2d at 852, 857, 865 P.2d 671, 673 (Wash. 1993) (En Banc), the Washington Supreme Court essentially found that "[t]he due diligence requirement . . . requires the State to make a diligent good faith effort to secure the presence of an accused from another jurisdiction if a mechanism is available to do so. The Washington Supreme Court held that Article IV of the IAD is such a mechanism and the State's failure to utilize it constitutes a lack of due diligence. *Id.* Consequently, the *Anderson* court held that as a consequence, the time spent by the defendant in federal prison would be counted against the State for Speedy Trial purposes. *Id.* at 121 Wash.2d at 864-865, 855 P.2d at 677-678. In Arizona, Rule 8.3(a) is intended to supplement the IAD. See Comment to Rule 8.3(a). Thus, if due diligence is a requirement under Rule 8, then it should also be impliedly incorporated into the IAD. The State of Washington has already taken this procedural step and Arizona should quickly follow suit.

Practice Pointer

Subtitle???

By Peter Kiefer, Criminal Court Administrator, Maricopa County Superior Court

Settlement conferences have proven to be an extremely effective tool in resolving certain types of cases without a trial. The Superior Court is committed to assisting the indigent defense community in arranging settlement conferences when requested. The court does want our assistance so they can help us. As always you are able to call judicial officers on your own to schedule a settlement conference date. However, the Superior Court's Case Transfer Unit (David Rosset and Stacy Davis) are available and willing to schedule settlement conferences for you. David and Stacy benefit from having the most up-to-the-minute information on judicial officer schedules. They are in the best position to place conferences at the last minute when, for example, a judge's afternoon opens up. They do ask you to follow some simple protocols:

Do completely fill out the Settlement Conference Request form, including the following items.

Double check that the case number and defendant's name is correct.

Do include the custody status so Case Transfer can coordinate in-custody cases with the Sheriff's Office inmate transport. Remember, the Sheriff needs at least one day advance notice to bring an inmate to court for a conference.

Do mention if your client needs an interpreter so the Case Transfer can schedule the conference on a judicial officer's assigned interpreter day. Each judge has a specific day designated as an interpreter day; Commissioner Nothwehr has an interpreter assigned to his division all day every Friday for settlement conferences.

Do include the plea cut off date so the settlement conference placement search can be prioritized.

Do include your name and phone number and the name and phone number of opposing counsel. Stacy and David can sometimes act fast if they get a last minute schedule opening from a judicial officer.

Do include three dates and times *both* you and opposing counsel are available for a conference.

Do check with the other side before you write those dates and times to ensure both of you are available. Checking with the other side really saves time, effort, and frustration.

Don't include suggested conference dates after the scheduled trial date (yes, even if you think you are going to get a continuance). Case Transfer will *not* schedule a conference after pending trial date is scheduled.

Do let Case Transfer know *immediately* if you schedule a conference on your own after submitting a request so Stacy and David can cancel your request and focus on other cases that still need conferences.

Don't expect Case Transfer to keep trying to place a conference after the last date on your request has passed. Case Transfer deems the request "expired" and stops looking for a conference date.

Do submit a new request if you still need a conference and Case Transfer was unable to initially place the case.

You can contact Stacy Davis at 506-3883; David Rosset 506-0231



SETTLEMENT CONFERENCE REQUEST FORM
 Criminal Court Administration
 Quad Coordinators – Fax: 602-506-1183

The requesting party of the Settlement Conference shall notify the assigned division that they are submitting the SCF request to us and that the division shall have the file ready for placement. In addition, SCF's shall not be placed without at least 24 hours of notification.

CR Numbers: (Please list all active case numbers for this Defendant)

Defendant:

In Custody? Booking #:

OCI Needed? Language:

Plea Cut-off Date:

Assigned Trial Judge:

Requesting Party:

**Has an attempt been made to set up the Settlement Conference?
 If yes, with which divisions:**

STATE: Phone:

Assistant: Phone:

DEFENSE: Phone:

Assistant: Phone:

AVAILABILITY: Please list three dates and times when **BOTH** Counsels and the Defendant are **CONFIRMED** available for a SCF.

1) Date: Time:

2) Date: Time:

3) Date: Time:

The attorneys are reminded that once a SCF request has been placed, if they should cancel it, we will not be able to provide further SCF scheduling assistance for this matter. Partially completed request forms may not be processed.

Preliminary Hearing Cheat

Due to conversion problems, this article is not included in this electronic version. If you would like to view this article, please contact the Public Defender Training Division.

Jury and Bench Trial Results

June 2005

Due to conversion problems, the Trial Results for this issue are not included in this electronic version. If you would like to view the Trial Results for this issue of *for The Defense*, please contact the Public Defender Training Division.

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