

# for The Defense

Training Newsletter of the Maricopa County Public Defender's Office

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## The Path of the Ethical Criminal Defense Lawyer

By Christopher Johns, Training Director

There is a scene in the 1996 movie *Primal Fear* where the high-priced criminal defense lawyer, Martin Vail, is feeling sorry for himself. He's sitting at the local watering hole. An inquisitive reporter is perched next to Vail on a barstool; hoping to get a scoop on the melancholy barrister's latest high-profile case.

The storyline is that Vail has snared the sensational case of an altar boy accused of the ritualistic murder of a respected local archbishop.

Vail is in media hog-heaven, but the case is going badly. He senses that the reporter wants to know why he would represent a client that looks as guilty as sin. Vail admits to liking the media attention.

Then Vail asks the reporter, "Have you ever been to Vegas?"

"Yeah," the reporter responds.

"Why gamble with money, when you can gamble with people's lives," says Vail. "That's a joke," he adds.

"Alright I'll tell you," Vail says [why he is a criminal defense lawyer].

"I believe in the notion that people are presumed innocent until they are found guilty. I believe in that notion because I choose to believe in the basic goodness of people. I choose to believe that not all crime is committed by bad people. I try to understand that some good people do some bad things."

That soliloquy encapsulates the role of the criminal defense lawyer. Lawyering is about more than right and wrong. It is about understanding. In a sense, criminal defense lawyers are the ultimate insiders. We choose to fight within the system to defend our clients. Most choose to defend their clients ethically.

Lawyers are as much students of the human soul as of the Constitution, statutes and ethical rules. Every courtroom is a lesson in complex quirks of race, class, human nature and ethics. The courtroom is a crucible of good and evil—and ethics.

The right to a jury trial, which has been around since about 1220<sup>1</sup>, derives from "battle" or "combat."



*Delivering  
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for The Defense

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James J. Haas, Maricopa County Public Defender

Sometimes it is also referred to as “judicial duel.” Ethics, in trial practice, is more than the rules of the game. Ethics is the sum of the rules and standards by which disputes are resolved in the courtroom, and how we choose to conduct ourselves. One judge told the lawyers, “Okay, I want a clean fight. No kicking, biting or name-calling.” But the choice on how to conduct the defense is ours. What follows are some basic ethical issues that routinely confront the criminal defense lawyer:

### The Ethics of Opening Statement

Keep thee far from a false matter.  
*Ex. 23:7*

Opening statement should be confined to the issues in the case and the evidence that the lawyers intend to offer. Before either can be mentioned there should be a good faith belief that the issues and evidence are available and admissible. There must be a reasonable basis for stating the “alleged facts.” And a lawyer cannot allude to personal knowledge of the facts or state a personal opinion.<sup>2</sup>

A shorthand list prepared by Gary Stuart, author of *The Ethical Trial Lawyer* (State Bar of Arizona 1994), emphasizes the following problem areas:

\* *Appealing to the passion and prejudice of the jury*

\* *Disparaging a party or opposing counsel: Expressing a personal opinion<sup>3</sup> as to:*

- The justness of your cause
- The credibility of witnesses
- The guilt or innocence of the accused

\* *Asserting personal knowledge<sup>4</sup> of a fact*

\* *Alluding to any matter trial counsel does not reasonably believe is relevant.*

That’s the easy stuff. The hard stuff is the most common problem in opening statement: when does opening statement become argument? Most commentators agree that it is improper to argue in opening statement.<sup>5</sup>

The simple test: does counsel’s presentation *inform* the jury as to the nature and extent of evidence or does it attempt to *persuade* the jury to accept or reject the evidence? Another author notes that as a rule of thumb, ask yourself: do I have a witness that can state on the stand the facts I’m telling the jury in opening statement? If the answer is yes, the opening is proper.<sup>6</sup>

Some commentators also think it is objectionable to discuss or explain the law during opening statements.<sup>7</sup> As a practical matter some argument or brief mention of the applicable law is almost inevitable. Extended argument or a lengthy legal harangue, especially a misstatement of the law, is likely to draw an objection and a possible trip to the judge’s woodshed.

### Concerns for Direct Examination

How forcible are right words!  
*Job 6:25*

Criminal defense lawyers generally do not get an opportunity to practice direct examination. But they have to know the rules. A few words up front. Direct examination is not only bound by ethical considerations, but also by the rules of evidence. Testimony offered on direct examination must be relevant, authentic, not inadmissible hearsay, and otherwise admissible.

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Phoenix trial lawyer Gary Stuart lists six basic goals in the ethical presentation of direct testimony<sup>8</sup>:

1. Establish the foundation for pivotal exhibits.
2. Establish the credibility of the direct witnesses.
3. Introduce undisputed facts.
4. Enhance the likelihood of disputed facts.
5. Establish final argument points.
6. Attract and hold the jury's attention.

Again, Rule 3.4 is the touchstone. It is unethical to "allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence . . . ." Note also that Rule 3.5 prevents a lawyer from seeking "to influence . . . [a] juror . . . by any means prohibited by law." False evidence is, of course, prohibited by law. Rule 4.1 is also applicable to jury trials. It proscribes the making of a "false statement of material fact or law to a third person." Jurors are "third persons."<sup>9</sup>

Actually, most ethical issues involving direct examination occur outside the courtroom. They deal with preparing the witness to testify. It is axiomatic that lawyers cannot have witnesses manufacture testimony. On the other hand, it is an accepted practice of American trial lawyering to "coach" witnesses.<sup>10</sup> "Dressing the witness" up is also a common practice. Suggesting, however, that a witness wear a wedding band when she is not married, or a crucifix around her neck when she is not a Christian, "may verge on fraud."<sup>11</sup>

The most common problem for the criminal defense lawyer is the presentation of perjured testimony. As the issue relates to witnesses, it is settled. A lawyer shall not "falsify evidence [or] counsel assist a witness to testify falsely."

Rule 3.4(b). And, if a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures. Rule 3.3, Model Rules of Professional Conduct.

As for client perjury, that's beyond the scope of this brief overview. Some practicing criminal lawyers think it is an accused's Constitutional right to take the stand even if it involves perjured testimony. Whether an accused's lawyer can trump his client's right to take the stand is often an unsettled issue (since if the client represented herself she could take the stand). Monroe Freedman's, *Understanding Lawyer's Ethics* (1990) is a good initial reference source. "When Your Client Wants to Lie (How to Protect Yourself, Your Client and the Judicial System)," by David D. Dodge in the August/September 1998 *Arizona Attorney* is also excellent.

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"Virtue down the middle," said the Devil as he sat down between two lawyers.

Danish Proverb  
H.L. Mencken, *A New Dictionary of Quotations*, 1946

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## Cross Examination Ethics

How are the mighty fallen!  
E.g., 2 Sam. 1:19

More cross-examinations are suicidal than homicidal.

Emory R. Bucknes  
Francis Lewis Wellman, *Art of Cross-Examination*, 1936

Never, never, never, on cross-examination ask a witness a question you don't already know the answer to was a tenet I absorbed with my baby-food. Do it, and you'll often get an answer you don't want, an answer that might wreck your case.

Harper Lee  
*To Kill a Mockingbird*, 1960

Cross examination. Just saying it, if you are a criminal defense lawyer usually gives you a warm fuzzy the way an "E-Ticket"<sup>12</sup> at

Disneyland did when you were a kid. Cross examination is also difficult to do well and *ethically*.

Ethically? Yes, ethically. Superior advocacy does not have to be unethical or dishonest. Abraham Lincoln was no slouch when it came to lawyering. In fact, while practicing in Illinois before his presidency, many considered Lincoln one of the top lawyers in the state. His reputation as a lawyer, including a skilled courtroom advocate, rested in large part on the belief in his absolute honesty.

“Honest Abe” or “Honest Old Abe” held himself to the highest standards of truthfulness. In notes for a lecture written around 1850, Lincoln referred to the “vague popular belief that lawyers are necessarily dishonest” and warned: “Let no young man, choosing the law for a calling, for a moment yield to this popular belief. Resolve to be honest at all events; and if, in your own judgment, you cannot be an honest lawyer, resolve to be honest without being a lawyer. Choose some other occupation.”<sup>13</sup>

To give it another spin, cross-examination can take many forms. But generally, unfair or abusive behavior only loses points with a jury. Cicero’s quote that “When you have no basis for argument, abuse the plaintiff,”<sup>14</sup> isn’t the best advice.

Jurors in a jury trial are judges and are entitled to respect. In Arizona, Rule 41 of the Rules of the Supreme Court provides that among the duties of members of the bar are:

\* To employ for purposes of maintaining causes confided to him such means only as are consistent with truth, and never seek to mislead the judges by any artifice or false statement of fact or law.

\* To abstain from all offensive personality and to advance no fact prejudicial to the honor or reputation of a party or a

witness unless required by the justice of the cause with which he is charged.

Again, Rule 3.4(e), Model Rules of Professional Conduct, limits cross-examination. There must be a good faith basis for a cross-examination question supported by admissible evidence. Good faith cannot be supported by rumors, uncorroborated hearsay or pure speculation.

Criminal defense lawyers probably take it for granted, but the public and others in our profession sometimes don’t get it. A criminal defense lawyer is entitled to insist that the government prove its case. The proof must be through evidence that is persuasive beyond a reasonable doubt.

That means that witnesses not only need to be truthful, but also convincing. A criminal defense

lawyer may try to discredit a witness she knows to be truthful (whether it is wise to always do so is, of course, another matter).

Justice White,<sup>15</sup> in *United States v. Wade*,<sup>16</sup> writes an excellent guide:

[A]bsent a voluntary plea of guilty, we . . . insist that [defense counsel] defend his client whether

he is innocent or guilty. The State has the obligation to present the evidence. Defense counsel need present nothing, even if he knows what the truth is. He need not furnish any other information to help the prosecution’s case. If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course. Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State’s case in the worst possible light, regardless of what he thinks or knows to be the truth. Undoubtedly there are some limits which defense counsel must observe but more often than not, defense

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There are . . . many forms of professional misconduct that do not amount to crimes.

Benjamin N. Cardozo  
People ex rel. Karlin v. Culkin, 248  
N.Y. 465, 470 (1928)

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counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness whom he thinks is lying. In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth.<sup>17</sup>

On the other hand, a prosecutor has a public duty to avoid convicting the innocent. Consequently, truthful witnesses should not be discredited by the prosecution.<sup>18</sup>

## Closing Ethics

If you are at all like me, the words “To begin with, this case should never have come to trial . . . [it] . . . is as simple as black and white,”<sup>19</sup> is burned into your brain. Atticus goes on to argue that:

The state has not produced one iota of medical evidence to the effect that the crime Tom Robinson is charged with ever took place. It has relied instead upon the testimony of two witnesses whose evidence has not only been called into serious question on cross-examination, but has been flatly contradicted by the defendant. The defendant is not guilty, but someone in this courtroom is.<sup>20</sup>

You won’t find much, if anything, improper in Atticus Finch’s closing argument. The last sentence above is about as close as he gets to saying anything improper, but the statement is phrased in such a way as not to express a personal opinion. A lawyer in closing is entitled to argue *all reasonable* inferences from the evidence *in the record*. Conversely, it is improper for a lawyer to intentionally misstate the evidence or to mislead the jury as to the inferences it may draw.<sup>21</sup>

Rule 3.4(e) also makes it unethical to “assert personal knowledge of facts in issue . . . or state a personal opinion as to the justness of a cause,

the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.”

Likewise appeals to race, religion, ethnicity and gender are fraught with peril. A lawyer should not make arguments calculated to inflame the passions or prejudices of juries.<sup>22</sup> It is generally argued that prosecutors must adhere to a higher standard than defense lawyers in closing.

A shorthand list for closing includes:

- \* *Avoid statements of personal belief.*
- \* *Do not appeal to prejudice or bigotry.*
- \* *Do not misstate the evidence.*
- \* *Do not misstate the law.*
- \* *Do not appeal to jurors’ personal interests.*
- \* *Avoid appeals to emotion, sympathy and passion*
- \* *Do not comment on the exercise of privilege.*

Finally, there are some ethics that aren’t in the books. A few I try to keep in mind are:

- \* Reputation is everything as a lawyer and probably as a person.
- \* Never do anything that will not benefit your client.
- \* Unless you are comfortable with it on tomorrow’s front page, don’t put it in writing, especially if you are angry.
- \* Never bid against yourself.
- \* If you don’t have a reason to trust someone.

It is not hard to be an ethical lawyer, but it takes thought and care. It is much harder to give your very best to every case.

(Endnotes)

<sup>1</sup> An easy read book on the development of the jury trial is Charles Rembar's *Law of the Law, The Evolution of Our Legal System* (1980).

<sup>2</sup> John Wesley Hall, Jr., *Professional Responsibility of the Criminal Lawyer*, 2d ed. (1996).

<sup>3</sup> In fact, it is unethical for counsel to express a personal opinion or assert personal knowledge of the facts at any point during the trial. See Rule 3.4(e), Model Rules of Professional Conduct.

<sup>4</sup> *Id.*

<sup>5</sup> See, e.g., Steven Lubet, *Modern Trial Advocacy* (1993); Gary Stuart, author of *The Ethical Trial Lawyer*, notes that it is not unethical to argue in the opening statement unless the argument violates a standing order of the tribunal. Rule 3.4(c), Model Rules of Professional Conduct. In Arizona, for example, the Criminal Rules of Procedure do not specifically prohibit "argument" (Rule 19.1), while the civil rules note that opening statement shall "be confined to a concise and brief statement of the facts." Rule 39(b) (1) and (2).

<sup>6</sup> Thomas A. Mauet, *Fundamentals of Trial Techniques* (1980).

<sup>7</sup> Steven Lubet, *Modern Trial Advocacy* (1993).

<sup>8</sup> From materials by Gary Stuart presented at The Tenth Annual Arizona College of Trial Advocacy (1995).

<sup>9</sup> *Id.*

<sup>10</sup> Steven Lubet, *Modern Trial Advocacy* (1993).

<sup>11</sup> *Id.*

<sup>12</sup> An "E-Ticket" was for the Matterhorn and the other most exciting rides.

<sup>13</sup> Recounted in *Lincoln* by David Herbert Donald (1995).

<sup>14</sup> Louis Levinson, *Barlett's Unfamiliar Quotations*, 1971.

<sup>15</sup> Concurring and dissenting.

<sup>16</sup> 388 U.S. 218, 257-58, 18 L.Ed. 2d 1149, 87 S.Ct. 1926 (1967).

<sup>17</sup> *Id.* at 388 U.S. 257-58.

<sup>18</sup> See also Rule 3.8 of the Model Rules of Professional Conduct.

<sup>19</sup> Harper Lee, *To Kill A Mockingbird* (1960).

<sup>20</sup> *Id.*

<sup>21</sup> John Wesley Hall, Jr., *Professional Responsibility of the Criminal Lawyer*, §19:13, 2d ed. (1996).

<sup>22</sup> ABA Stds, *The Defense Function*, Std 4-7.7, Commentary; *The Prosecution Function*, Std 3-5.8(c) and Commentary.

# Practice Pointer - Making a Record in Sex Cases

By Anna Unterberger, Defender Attorney

In *State v. Davis*, \_\_\_ Ariz. \_\_\_, 79 P.3d 64 (2003), the Arizona Supreme Court ruled that sentencing a 20-year-old defendant to a mandatory minimum sentence of 52 years without possibility of parole, for four counts relating to having non-coerced sex with two post-pubescent teenage girls, was grossly disproportionate to the crimes and thereby constituted cruel and unusual punishment. The Court also found that the trial court's jury instructions and verdict forms, which advised the jury that the state did not have to prove, nor the jury find, the exact date an offense was committed, were in error.

A few thoughts for trial lawyers having to deal with these two holdings:

The first holding awarded Tony Davis a new trial on Count 1 because the court's jury instructions constructively amended the charge in that count by making it duplicative. That happened because, although the indictment charged a specific occurrence date, the court gave an instruction telling the jurors that they didn't have to hold the prosecutor to that date, and the victim of that count testified to two sex acts several days apart. The court then gave a verdict form that did not contain a specific date.

To make a record on this issue, you should object to the court giving an instruction that dilutes the State's burden of proving the time period charged in the indictment. You should also object to the court deleting that time period from the verdict form. Make sure that a court reporter is recording your objections. If you lose the objections at the trial level, you will have preserved the issue for appeal. A preserved issue is much easier for the appellate lawyer to argue than an unpreserved one.

The second holding was the sentencing issue. To have a chance at success under a *Davis/Bartlett*<sup>1</sup> analysis, you'll need to have a

relatively young (preferably under 24), immature defendant, preferably with no adult criminal record, sexually experienced, age 13 or older victims, and sex was that was consensual and non-violent. Begin to preserve this issue at least twenty days before trial by filing a motion to strike the allegation that the offense was a dangerous crime against children under A.R.S. §13-604.01. Argue *Davis* as your legal support, and supply the most detailed statement of facts that you can at that point. If police reports and witness interviews contain favorable information, attach the relevant portions as exhibits to your motion. Ask that the court rule on the motion before jury selection.

Filing this motion serves at least two purposes. First, if you win, the sentencing stakes are lowered if your client is convicted at trial, and the prosecutor may make a more favorable plea offer. Second, if you lose the motion, you've preserved the issue in writing for appeal, and the prosecutor may still make a favorable plea offer to avoid having the case reversed on appeal and doing a resentencing hearing.

If you lose this motion and your client is convicted, renew your motion to strike the §13-604.01 allegation, preferably in writing, and include favorable facts that came out at trial that you did not have access to pretrial; order and attach transcripts if necessary. Make sure that your argument at sentencing includes not only the constitutional argument, but also a reference to A.R.S. §13-4037(B). Because *Davis* overruled *DePiano*<sup>2</sup>, the appellate court may now use that statute to reduce your client's sentence, as long as it gives its reasons regarding the sentence being excessive. This arguably is a lesser standard for the appellate lawyer to have to argue versus the constitutional/gross disproportionality standard.

*Continued on page 13*

# Show Me Your Papers

## Part 2: Does Akins Apply to Bicycle Riders?

By Karen Boehmer, Defender Attorney

Due to the recent *Akins* case, police are now precluded from arresting non-drivers of motor vehicles for failing to produce identification pursuant to A.R.S. §28-1595(C). The subsection states:

A person other than the driver of a motor vehicle who fails or refuses to provide evidence of the person's identity to a peace officer or a duly authorized agent of a traffic enforcement agency on request, when such officer or agent has reasonable cause to believe the person has committed a violation of this title is guilty of a class 2 misdemeanor. *Id.*

The Arizona Court of Appeals in *Akins* held that the term "evidence of identity" in the statute is unconstitutionally vague because it fails to give persons notice of what type of identification is required to avoid arrest under the statute. *State v. Akins*, 206 Ariz. 113, 75 P.3d 718 (Ariz.App 2003).

This is good news for our passenger or pedestrian clients who are wrongly arrested for failing to produce identification, but what about our many bicycle riders who are stopped by the police and subsequently hauled off to jail for not producing the right kind of identification? Are bicycle riders "persons other than the driver of a motor vehicle" under subsection C, or are they "operators of motor vehicles" under subsection B, which provides:

After stopping as required by subsection A of this section, the operator of a motor vehicle who fails or refuses to exhibit the operator's driver license as required by section 28-3169 or a driver who is not licensed and who fails or refuses to provide evidence of the driver's identity on request is guilty of a class 2 misdemeanor. The evidence of identity that is presented shall contain all of the

following information:

1. The driver's full name.
2. The driver's date of birth.
3. The driver's residence address.
4. A brief physical description of the driver, including the driver's sex, weight, height and eye and hair color.
5. The driver's signature.

A.R.S. §28-1595(B).

This section leaves no room for doubt as to the identification requirement for motor vehicle drivers. The State's position would be that bicycle riders must abide by the same identification requirement as motor vehicle drivers because, under A.R.S. §28-812:

A person riding a bicycle on a roadway or on a shoulder adjoining a roadway is granted all of the rights and *is subject to all of the duties applicable to the driver of a vehicle* by this chapter and chapters 4 and 5 of this title, except special rules in this article and except provisions of this chapter and chapters 4 and 5 of this title that by their nature can have no application. §28-812 (emphasis added).

Under this statute, the State would argue that bicycle riders must show identification to police officers just as motor vehicle drivers are required to do under §28-1595(B). There is little, if any, case law to support either position, but the following provides reasons why the State's position is erroneous and must be challenged.

### ***A.R.S. §28-812 Is Not An Absolute Rule***

Although §28-812 provides that bicycle riders must abide by all the same rules as motor vehicle drivers, there is an exception where the traffic rules "by their nature have

no application.” §28-812. *See e.g. Maxwell v. Gossett*, 612 P.2d 1061, 1063, 128 Ariz 98, 100 (1980)(statute which applies same traffic laws to bicyclists as to drivers of motor vehicles does not prohibit riding of bicycle in crosswalk). §28-1595(B) has no application to bicycle riders because, although motor vehicle operators are required by law to carry state issued identification under A.R.S. §28-3151 (“[a] person shall not drive a motor vehicle or vehicle or vehicle combination on a highway without a valid driver license...”), this same requirement does not apply to bicycle riders.

### ***Safety Versus Identification***

Automobile traffic laws apply to bicycle riders for reasons involving safety, not identification. *Cf. Maxwell v. Gossett*, 612 P.2d 1061, 1063, 128 Ariz 98, 100, (1980)(discussing traffic statutes involving safety issues that apply to bicycle riders). For example, under A.R.S. 28-815(A), bicycle riders must ride on the right side of the road or with traffic. Another example is that under §28-855(B), bicycle riders must stop at stop signs. These traffic laws and others apply to bicycles as well as motor vehicles for the *sole purpose of keeping roads safe* (i.e. to prevent bicycle riders from causing accidents with motor vehicles, other bicycle riders, and pedestrians). These traffic laws and others do *not* apply to bicycles as well as motor vehicles for the purpose of identifying the driver.

Section 28-1595(B) is not applicable to bicycle riders because the statute’s focus is on identification, not safety. Section 28-1595(B) requires those operating motor vehicles to provide identification. Bicycle riders do not have to have a special permit or license to ride a bicycle. There is no age limit to those who want to ride bicycles. A bicycle salesman does not check identification before selling a bicycle. The identification requirement of a driver’s license does not and should not apply to bicycle riders.

### ***A.R.S. §28-1595(E) Ignores Bicycle Riders***

Subsection E of §28-1595 provides another important reason why the strict identification requirement for motor vehicle drivers should not extend to bicycle riders. Section 28-1595(E) provides a defense to motor vehicle drivers who do not provide the proper identification to a police officer on the road – just bring your driver’s license to court and avoid a misdemeanor conviction. That same defense does not apply to bicycle riders because not all bicycle riders have driver’s licenses. A

15-year-old on a bicycle who is arrested for failing to produce the proper identification might never be in possession of the very identification that would save him from the misdemeanor conviction. It is unthinkable that the legislators who wrote the statute would allow motor vehicle drivers, but not bicycle riders, to avoid a conviction. Therefore, the only answer is that the legislature did not mean to include people

who are not required to have a driver’s license in subsection B or they would not have provided a driver’s license as the only defense. The statute simply never intended for bicycle riders to have to follow the same rigid identification requirement as motor vehicle drivers.

### ***Lose Your License? Get A Bike.***

The obvious distinction between the intent of traffic laws for safety purposes as opposed to traffic laws for identification purposes is clearly illustrated by the fact that when a person loses his drivers license due to failing to abide by safety rules, a bicycle becomes his alternative means of transportation. This distinction cannot be overlooked. The government cannot suspend someone’s right to ride a bicycle. If a person’s right to drive has been suspended by §28-1385, the admin per se statute, can he still tool around on his 10-speed? Of course. No matter how unsafe a person’s driving is, he can always ride a bicycle...without identification. So

it logically follows that the automobile traffic laws that apply to bicycle riders clearly have different purposes from automobile traffic laws requiring motor vehicles drivers to possess licenses.

### ***Horsemen Are Motor Vehicles Operators Too***

The law considers a person riding a bicycle to be more similar to a person riding an animal, than a person driving a car. Section 28-625 states that animal riders (just like bicycle riders) must abide by the same traffic laws as drivers of motor vehicles. Notably, this statute contains the *exact same language* as §28-812. “A person riding an animal or driving an animal drawn vehicle on a roadway has all of the rights and is subject to all of the duties applicable to the driver of a vehicle...except the provisions of this chapter...that by their nature can have no application.” A.R.S. §28-625 (emphasis added). Thus, a person riding a horse is not required to possess a license to ride that animal, but he does have to abide by the basic traffic safety laws. Similarly, a person riding a bicycle down Jefferson Street is not required to possess a license to ride his bicycle, but he does have to abide by the basic traffic safety laws. Since a person making a traffic error on a horse might get stopped and cited by the police, avoiding an arrest for failing to provide identification per 28-1595(B), it naturally follows that a person making a traffic error on a bicycle would also be stopped and cited by the police, avoiding an arrest for failing to provide identification as per §28-1595(B).

### ***Rule Of Lenity***

Often, police cite your bicycle-riding client under §28-1595 alone, leaving open the question whether your client is being arrested under subsection B or C. This supports the position that the law is so vague, the police don't even know which statute to cite in regard to bicycle riders. When the law is vague as to whether your client should be considered under §28-1595(B) or (C), the rule of lenity dictates that any doubt be resolved in favor of your client.

Case law is clear that “where the statute itself is susceptible to more than one interpretation, the rule of lenity dictates that any doubt should be resolved in favor of the defendant.” *Zamora v. Superior Court In and For County of Maricopa*, 183 Ariz. 470, 472, 904 P.2d 1294, 1296 (Ariz. App. Div 1, 1995) quoting *State v. Pena*, 140 Ariz 545, 549-50, 683 P.2d 744, 748-49 (App.1983); see also *State v. Johnson*, 171 Ariz. 39, 42, 827 P.2d 1134, 1137 (App. 1992) (rule of lenity mandates that doubts be resolved in defendant's favor). Thus, your bicycle-riding client should be considered “a person other than the driver of a motor vehicle” under subsection C.

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## Arizona Advance Reports



Our regular column will return next month. Thank you for your patience!

# Practice Pointer - Improper DNA Blood Draws

In *U.S. v. Kincade*, the Ninth Circuit recently ruled that requiring all individuals accused or convicted of crimes to submit to DNA blood draws is an unconstitutional search and seizure unless the government can show that there is "individualized reasonable suspicion" to believe that the accused was involved in criminal activity related to the seizure of DNA evidence. The following motion, prepared by Kelly Smith, an attorney with the Office of the Pima County Public Defender, addresses this issue. For those, in the Maricopa County Public Defender's Office, this motion is also available on the common drive under PDFForms/Motions. A more in-depth analysis of the *Kincade* decision will be provided in a future newsletter article.

STATE OF ARIZONA,	No. CR
Plaintiff	MOTION TO STRIKE AND/OR DENY ANY
v.	ORDER FOR A DNA BLOOD DRAW
.	(Honorable )
Defendant.	(Oral Argument Requested)

The Defendant, hereby moves this court to strike any and all orders that the Defendant submit a blood sample to the probation office as a condition of probation and/or pursuant to A.R.S. §13-610, without reasonable suspicion. Any and all orders for such a draw would be in violation of the 4th Amendment of the United States Constitution, as well as Article 2, Section 8, of the Arizona State Constitution, pursuant to *United States v. Kincade*, 343 F3d 1095 (October 2, 2003). Arizona has held that Article 2, Section 8, of the Arizona State Constitution often affords even greater protection than its federal counterpart. See *State v. Bow*, 142 Ariz. 240, 489 P2d 319 (1984); *State v. Auld*, 150 Ariz. 459, 724 P2d 345 (1984).

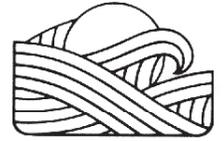
On October 2, 2003, the United States Court of Appeals for the 9th Circuit considered the 4th Amendment implications of forced blood draws of federal probationers and parolees in *United States v. Kincade*, 343 F3d 1095 (October 2, 2003). After careful analysis, the Court concluded that the compulsory extraction of blood for law enforcement purposes is authorized under the 4th Amendment "only if the search is supported by individualized reasonable suspicion." *Kincade*, *at*.

The 9th Circuit in its holding noted that other states had analyzed similar state statutes, but "[N]early all of these cases involving state statutes were decided before *Edmond* and *Ferguson*, and a number of them rely on the now repudiated *Rice*." [Referring to the United States Supreme Court cases of *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), *Ferguson v. Charleston*, 532 U.S. 67 (2001) and the 9th Circuit case of *Rice v. Oregon*, 59 F3d 1554 (9th Cir. 1995)]. *Kincade*, *at*. The court then added a footnote, referring to these cases, one of which was an Arizona State case, *In re State Court County Juvenile Auld*, 930 P2d 494, 501 (Ariz. Ct. App., 1996). Pursuant to *Kincade*, Arizona statutes requiring blood draws without individualized suspicion are unconstitutional.

Wherefore, the Defendant, respectfully requests that the court make no order and/or strike any current order compelling the Defendant to submit to a compulsory blood draw.

# Practice Pointer - Tips for Working with Low-Income Clients with Limited English Proficiency

Editor's Note: The following list is based upon a guide prepared by the Asian Pacific American Legal Center of Southern California (APALCSC) to assist agencies working with low-income clients with limited English proficiency. The information listed is intended to serve only as a general guide to understanding immigrant clients and the issues affecting their communities. It is reprinted with the permission of APALCSC.



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- 1) **Trust is the key.** A large number of immigrants and refugees have had negative experiences with authority figures either in their country or in the United States. It is likely that you will see some fear, apprehension, and nervousness on the part of the person you meet, as you probably are a person of authority in their eyes. You will need to take affirmative steps to put the person at ease to whatever extent possible. Here are some simple suggestions: (a) introduce yourself and the purpose for your meeting or discussion with as much detail as possible, (b) elaborate on the fact that you are there to help/serve him/her and that they will not “get in trouble” by seeing you or by talking with you, and (c) explain and emphasize the importance of confidentiality if applicable.
- 2) **Never make any assumptions regarding the level of sophistication or comprehension of the person you meet.** Always take time to explain legal terms and concepts and avoid using legal jargon in your explanation. Avoid using slang or street language. Remember to ascertain the level of comprehension of the person you meet or speak with by asking whether they understand and by watching his/her body language or the client's tone as they respond. Do not simply rely on his/her response to your questions. Often times, a person will not want to trouble you to explain things to him/her, again, even though they do not completely understand, or may be too afraid to ask questions. When you are in doubt, explain everything again in a different way.
- 3) **Always arrange for interpretation (when applicable).** Never expect or demand that the person provide his/her own interpreter. The friend or relative acting as an interpreter may be fluent in his/her respective language and English, but probably is not qualified to interpret or translate legal terms and concepts and will compromise the attorney-client privilege.
- 4) **Familiarize yourself with the norms and cultures of the person you meet, and never judge them using American culture and norms.** For example, some cultures deem it impolite for a person to look you in the eye. Do not read this act as evasiveness. For some cultures, negative questions (e.g. You did not take the money, did you?) cause great confusion (e.g. an affirmative response, “Yes”, to the question above truly means, “Yes, I did not take the money” as the “Yes” affirms the truth of the statement “I did not take the money”, while it would be more customary for an English speaker to respond, “No, I did not take the money”).
- 5) **Never make any assumptions based on the way the person dresses and/or accessorizes.** In some cultures, to show their respect to you as a person of authority, the person will put on his/her best outfits. Do not assume that the person is insincere about their financial situation based on the way they dress.
- 6) **Be patient and be persistent.** The person you meet may be a victim of trauma. When they

come to you and come to trust that you are there to help them, they may appear to be overly needy and may seem to expect for you to do everything for them. This may be an adverse side effect of the trauma. On the flip side, the person may not want to trouble you and may not be in contact as often as you would prefer. Do not treat this as total inaction or lack of interest.

**7) Be extremely sensitive to and try to recognize the importance of respect, honor, and courtesy in light of his/her culture.** This seems obvious but something that is perfectly “normal” in one culture (e.g. pointing with the middle finger in some Asian cultures) may be deemed offensive in another.

**8) Educate yourself about the person’s culture and language to whatever extent possible.** Please realize that the person understands that you cannot be expected to master their culture and language, and will not take offense if you cannot speak their language fluently. Every effort, however small, on your part will be greatly appreciated and will serve to establish trust. However, please avoid any expectation or assumption that the person you are working with will educate you about his/her culture.

**9) Every experience is a learning experience, and every experience is unique.** Do not be discouraged if you make some mistakes a long the way. And just because you have learned something about someone’s culture does not mean that you can apply that lesson to someone else. For example, while many Latinos can understand and speak Spanish, they may be from different countries with different morals and values. (e.g. what is true for Mexicans may not be true for Cubans.)

**10) When in doubt, ask for help.**

## Appeals Division Sweeps Awards

By Jim Haas, Public Defender

At the office holiday picnic on December 6, the Bingle Dizon Commitment to Excellence Award was presented to Lucie Herrera, and the Joe Shaw Award was presented (in absentia) to Jim Rummage. In addition, Ed McGee received a plaque recognizing his 26 years of service to the office. It was thus a clean sweep for our Appeals Division.

The Dizon Award was created in 2001 to honor Bingle, who was a longtime and beloved secretary with our office known for her extraordinary commitment to excellent work and her dedication to 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 award was given to Appeals Lead Secretary Lucie Herrera in recognition of her outstanding work and long standing devotion to our office.

*Continued on page 16*

# Jury and Bench Trial Results

## November 2003

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.

*Continued from Practice Pointer - Making a Record in Sex Cases, page 13*

**(Endnotes)**

<sup>1</sup> *State v. Bartlett*, 164 Ariz. 229, 792 P.2d 692 (1990).

<sup>2</sup> 187 Ariz. 27, 926 P.2d 494 (1996).

*Continued from Dizon and Shaw Awards, page 13*

Lucie first joined the office in 1987. After a short detour to work as Judge Mike Dann's bailiff in 1989-90, Lucie returned to the office in 1990 and has been with us ever since. She was promoted to Lead Secretary in Appeals in 1996 and won the Commitment to Excellence Award in 1998.

Lucie is known as a caring and understanding supervisor and a highly skilled and professional secretary. She is known for her exceptional knowledge of appeals procedure. She is always cheerful and a delight to work with. Her receipt of the third annual Bingle Dizon award is well deserved.

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. The recipient of the ninth annual Shaw Award is Appeals Attorney Jim Rummage.

Jim has been with our office since 1987. He has excelled as a trial lawyer, trial group supervisor, and appellate attorney. Jim is known as a meticulous researcher and writer who possesses an exceptional ability to conduct and present complex and articulate analyses of caselaw on any given issue. He has handled some very significant cases, in Arizona and the United States Supreme Court, and has made a significant impact on the law. He has impacted Arizona law on issues ranging from the appropriate method for analyzing the admissibility of Rule 404(b)'s common scheme or plan exception, to the unconstitutionality of Arizona's premeditation instruction. For over sixteen years, Jim has been a force in our office and in the legal community.

Ed McGee received a plaque recognizing his 26 years of service to the office and the legal community. Like Jim Rummage, Ed has made a significant impact on the law in Arizona. Ed is a former Joe Shaw Award winner who is known in the office for his legal knowledge and his willingness to drop everything to help other attorneys with their cases. Ed has been the "go to" guy for most of our office's attorneys for many years. His dedication to our office and our clients is unparalleled.

Congratulations, Lucie, Jim and Ed!

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## *for The Defense*

*for The Defense* is the monthly training newsletter published by the Maricopa County Public Defender's Office, James J. Haas, Public Defender. *for The Defense* is published for the use of public defenders to convey information to enhance representation of our clients. Any opinions expressed are those of the authors and not necessarily representative of the Maricopa County Public Defender's Office. Articles and training information are welcome and must be submitted to the editor by the 10th of each month.

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