

for The Defense

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Settlement Conferences

What You Don't Know About Settlement Conferences Could Hurt Your Client

By Tennie Martin, Defender Attorney, Appeals Division

As a starting point, three different rules discuss negotiations or settlements. One rule is a rule of criminal procedure, Rule 17.4, and the other two are rules of evidence, Rule 408 and Rule 410. The interpretation of these rules is what is interesting. Did you know that what you and your client tell the court and the prosecutor in the settlement conference about your client or your client's case may be able to be used against your client at trial? Additionally, did you know that it may not matter if the trial court misadvises your client about the plea offer or the consequences your client faces at trial and, based on the trial court's misinformation, your client decides to turn down the plea and go to trial?

Ariz. R. Crim. P. Rule 17.4(a), Plea Negotiations, states:

The parties may negotiate concerning, and reach an agreement on, any aspect of the case. At the request of either party, or sua sponte, the court may, in its sole discretion, participate in settlement discussions by directing counsel having the authority to settle to participate in a

good faith discussion with the court regarding a non-trial or non-jury trial resolution which conforms to the interests of justice. Before such discussions take place, the prosecutor shall afford the victim an opportunity to confer with the prosecutor concerning a non-trial or non-jury trial resolution, if they have not already conferred, and shall inform the court and counsel of any statement of position by the victim. If the defendant is to be present at any such settlement discussions, the victim shall also be afforded the opportunity to be present and to state his or her position with respect to a non-trial or non-jury trial settlement. The trial judge shall only participate in settlement discussions with the consent of the parties. In all other cases, the discussions shall be before another judge or a settlement division. If settlement discussions do not result in an agreement, the case shall be returned to the trial judge.

Ariz. R. Crim. P. Rule 17.4(f), Disclosure and Confidentiality, states:



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When a plea agreement or any term thereof is accepted, the agreement or such term shall become part of the record. However, if no agreement is reached, or if the agreement is revoked, rejected by the court, or withdrawn or if the judgment is later vacated or reversed, neither the plea discussion nor any resulting agreement, plea or judgment, nor statements made at a hearing on the plea, shall be admissible against the defendant in any criminal or civil action or administrative proceeding.

Ariz. R. Evid. Rule 408, Compromise and Offers to Compromise, states:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention

of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

In interpreting Ariz. R. Evid. Rule 408, the Arizona Supreme Court, in a civil case noted that "Rule 408 encourages candid compromise negotiations, public policy dictates that evidence obtained in the course of compromise negotiations should be available for impeachment purposes." *Hernandez v. State*, 203 Ariz. 196, 200, 52 P.3d 765, 769 (2002) (Compare, *State v. Vargas*, 127 Ariz. 59, 61, 618 P.2d 229, 231 (1980) (Cannot use plea discussions for impeachment purposes in a criminal case).

Ariz. R. Evid. Rule 410, Offer to Plead Guilty; Nolo Contendere; Withdrawn Plea of Guilty, states:

Except as otherwise provided by applicable Act of Congress, Arizona statute, or the Arizona Rules of Criminal Procedure, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere or no contest, or an offer to plead guilty, nolo contendere or no contest to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers is not admissible against the person who made the plea or offer in any civil or criminal action or administrative proceeding.

What Happens in a Settlement Conference Does Not Necessarily Stay in a Settlement Conference (A.K.A. Loose Lips Sink Ships).

In a recent case, during a settlement conference held several months after the case started, the client claimed that the two police officers in his case were falsifying information against him. The client complained that he was repeatedly harassed by the two officers and that he had called 911 the day before he was arrested by the officers to report that they were harassing him. The client also complained that he had early and repeatedly asked his defense counsel to obtain the 911 call as he knew the 911 tapes were only maintained for a certain period of time. His counsel responded that she had just recently tried to subpoena the 911 tape but was advised

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Simplified Concepts of Computer Forensics

By Dusty Sain, Defender Investigator

As we all realize, computers surround us and are a large part of our everyday life. We use them for record keeping, to help our cars run better, to surf the internet, and many other things. Computers are benign objects that without human intervention would hurt no one. They make our lives simpler, communication easier, and without them the world would not be the same.

With that said, the benign nature of a computer can be perverted by some to commit crimes. I'm sure that many of you have been assigned cases that involve the use of a computer in the commission of the crime. I am also sure that most if not all of you groan when you first look at the file and wonder to yourself, "what's all this stuff about computer forensics?"

I recently had the opportunity to attend a training class that gave an overview of computer forensics and I would like to share some of this information.

1. Do things go away when I erase them from my computer?

No. Your computer hard drive saves things in a random pattern on the magnetic plate of the drive. When you "erase" something from your hard drive, it doesn't go away. The only thing that happens is that your computer changes part of the file so it knows that space can be used for something else. The file remains intact until it is "overwritten" by some other file. Even after it is overwritten, a portion of the file could remain and be viewed by a forensic examiner. The only sure way to get rid of data on a hard drive is to remove the drive from the computer and physically destroy it. Even drives that have been left exposed to the elements for years can be opened and data found.

2. What about the computer programs that claim to erase things from your system?

Most of these programs are not effective. Some will alter the files on your computer and make them harder to find, but none will remove all of the data from the hard drive. These programs will also leave tracks on the system that will show that someone attempted to remove files from the computer.

3. I've heard of a program called ENCASE that is used by law enforcement to investigate computer crime. What is it?

ENCASE is a computer program made by Guidance Software. It is the gold standard in computer forensics and is normally the program you will see being used on your cases. The version used by law enforcement is called the Field Intelligence Model and is only sold to law enforcement.

ENCASE allows the investigator to have a window into the hard drive of a computer without altering the data in ***any way***. ENCASE also keeps detailed records of how the exam was made on the computer and the results. These documents should be requested as part of discovery. (See below)

4. Can't the evidence be altered as part of the examination?

It shouldn't be if the examiner did the exam properly. The first rule of any exam is the examiner never works on the original drive, only a copy. This copy should be made with the use of a "write blocker" that goes between the original drive and the drive used to make the copy. The write blocker prevents data from flowing to the original drive and altering it in anyway.

5. How do I know that the information on the original drive is the same thing that the examiner looked at during his exam?

Every file or collection of files has a unique fingerprint called a “hash value.” This produces a 32 digit number that is always the same, provided the file has not been altered in any way. At the beginning of the exam, the examiner will calculate a hash value of the original drive and compare it to the value of the copied drive. If the number matches, the copy is an EXACT DUPLICATE of the original. Hash values are an accepted concept in court cases.

6. What should I be requesting on computer forensic cases from the county attorney?

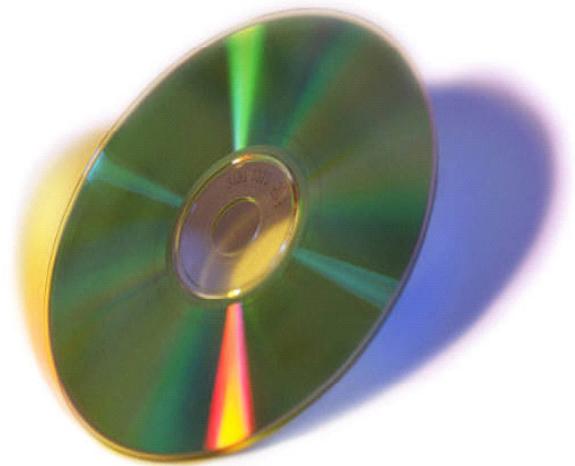
Due to the unique nature of computer crime, the items we request will be very different than a normal case. Below is a brief list of the minimum items you should be requesting.

- What are the credentials of the person who did the exam? Are they EnCase certified?
- What protocol was used to collect the computer evidence? Ask for a copy of the written protocol used by the agency in computer evidence collection. If computer evidence is not collected correctly, it is tainted.
- A copy of the EnCase report. This will show a list of all the items flagged during the exam.
- The EnCase case and evidence files. This file is important if you plan to have your own expert review what was done. The file is a complete EnCase examination file and allows your expert to review the logs, the evidence, everything.
- The EnCase logs. (Only if you don't have the above items).
- Chain of custody logs. To show where the original hard drive and the imaged hard drive have been at all times.
- Hash validation. This document will show that the value of the original drive is the same as the imaged drive.

- Onsite triage logs. This will show who was at the location when the original drive was collected, that it was collected correctly, imaged correctly, and the correct BIOS* date was recorded.
- Clean media evidence. This shows that the drive used to image the original drive was itself clean of all data prior to being used.

*BIOS is the part of your computer that records the time and date. This time and date is used on every file when it is made, saved, or altered. Since time is often an issue used to prove your client had access to the computer, this can be very important.

Computer forensic exams are very complex and require a high degree of training and experience to perform. If you have doubts about any of the information you receive in discovery, you should confer with a certified expert. A quick overview of the case will generally take an expert at least five hours and cost a minimum of three hundred dollars an hour. There can also be a cost for computer time used to search for evidence. ✦



Practice Pointer

The Top 10 Things You Need to Know in a Trial Group at the Public Defender's Office

By Larry Blieden, Trial Group Supervisor

Top 10



10. Start discovery early by sending letters to material, non-victim witnesses requesting an interview with built in language that provides for a motion for deposition if there is no response to the letter.
9. Identify motions to sever offenses as early as possible and prepare a statement of facts to be part of a motion that can be filed at a later date.
8. Tickle plea expiration dates on your electronic calendars.
7. Get into a routine with your secretary whereby grand jury and preliminary transcripts are acquired as soon as possible. File motions to extend time limits for filing motions to remand when acquiring a transcript proves difficult. Tickle deadlines for filing motions to remand.
6. Use videoconferencing whenever practicable.
5. Know the latest County Attorney plea policies inside and out.
4. Take advantage of the wealth of knowledge in our office -- establish relationships with the more experienced attorneys in your trial group. Go see the attorneys in Appeals — they love to talk to trial attorneys and are a tremendous resource.
3. But don't abuse the wealth of knowledge in our office -- review the applicable rules, statutes and annotations available in Westlaw before you frame the question you want to ask a more experienced attorney.
2. Maximize the effectiveness of settlement conferences by filing a Settlement Conference Memorandum beforehand and scheduling a judge who has the mediation strengths that best fit the needs of your case.

And the top thing you need to know:

1. Treat your clients like you would like to be treated.

Liars, Prevaricators, and Frauds

A Discerning Look at Deceit

By Donna Elm, Federal Public Defender's Office, and James E. Coxworth

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PART 5: Cultural Issues Related to Lying

It is around notions of truth and intentionality that we, immersed in foreign cultures, are most likely to "feel different."

— Alessandro Duranti¹

We claim that trials are a means of ascertaining the "truth." As discussed in the earlier chapters, however, what is "true" varies depending on the speaker's mental health, memory, brain damage, and needs or emotional state. But what is "true" also depends upon the witness's culture. Different peoples have different understandings of what "truth" is.² Hence, the way people from different cultures experience and communicate "truth" may not correspond with our concept of "truth."

Western civilization relies upon the premise that truth exists as an objective reality.³ Thus we seek it through objective means, like our popular forensic testing. "Anglo-American common law has developed elaborate techniques by which we imagine ourselves to be extremely good at assessing facts, our use of scientific techniques being one manifestation of this cultural emphasis."⁴ Moreover, we try to limit evidence used in trials to matters that can be objectively verified; hence we bar "speculation," require "foundation," and rely on the "best evidence" rule. But that construct only works when dealing with witnesses whose culture perceives "truth" the same as we do.

Cultures that do not Recognize Objective "Truth"

How we assess believability, and how that squares with evidentiary assumptions about character or credibility, touches the law precisely where it and culture intersect.

— Lawrence Rosen⁵

This view of objective "truth" is not, however, shared by all cultures. For many, truth is a subjective matter: it lies in how a witness experiences an incident rather than a detached scientific precept of what occurred.

One author got her first real insight into the cultural relativity of "truth" in a gun-pointing case where all witnesses, victims, and the defendant were Mexican nationals from a rural native Indian community. Instead of objectively narrating that the defendant had been target shooting at bottles and then swung the gun toward them, the victims testified to their understanding of this frightening situation by describing how threatened they felt. Their cultural concept of "truth" was explicitly subjective, so testifying about the "truth" meant telling how they had experienced the incident. Thus they tried to convey how scared they were by providing details suitable to that level of fear. As a result, during the course of the trial, their testimony "grew" from having a gun pointed their way – to the defendant angrily pointing it at them – to threats to shoot them – to shooting at them and having to run for their lives! They were not consciously lying. When asked to tell the "truth, whole truth, and nothing but the truth," they explained the "truth" as their society understands it, rather than how our legal culture understands it.

Admittedly, this sort of amplification of the story happens with most people to a small degree: their memory of an event can be colored by their emotional reaction to it. Hence when a vulnerable woman feels threatened, she is likely to remember the experience as worse than it was, just as when a macho man is threatened he is more likely to describe it as milder than it was. But that is different from what happens when a whole society defines "truth" as personal and experiential, rather than as an objective reality.

Another example shows how easily this objective/subjective distinction can be missed. A colleague was defending an assault case arising on the Navajo Reservation. During a hearing, the victim advocate informed the court that there had been an attempt made to intimidate the victims, presumably by the defendant's family. Reportedly, a man came to their home and confronted them in a threatening manner. Trying to "get to the bottom of this," the defense attorney investigated it further. She learned that the report came from an 88-year-old mother of the victim. Being of an earlier generation, the elder had not been highly assimilated into the mainstream American culture like younger Navajos now. The old woman explained the encounter: a man who looked like the defendant had come into their doorway. He was wearing camouflage (suggestive of war or aggression). He stood there, but did not say or do anything. This made her feel wary about him. After a while, he "flew out the window."

It was not until this final piece of evidence was provided that it became apparent that this account was not an objective one. Indeed, when pressed, the old woman confirmed that this occurrence was "like a dream," and the incident had taken place at night. Traditional Navajos consider the spirit realm every bit as much a valid reality as the physical realm. A person travels in the spirit realm when asleep, and dreams are what he or she experiences during those travels. Others can visit the sleeper during dreams. Their visits are considered "real" by that person – albeit occurring in a spiritual realm. This witness intimidation incident occurred in the old woman's dreams; but from her cultural perspective, it was just as much a real (and threatening) visit from an outsider as if the man had actually dropped by. Hence she reported that the defendant's family was sending someone to intimidate her family.

It is not that the Navajo have no appreciation of "objective" reality; it is that they appreciate several layers of reality in their worldview. The old woman was offering what – in her culture – was a "truthful" account of what had happened. It was not, however, an objective rendition of physical occurrences. Query what the court might have

done to the defendant if this distinction between what the elder Navajo woman saw as a "truthful" occurrence and an objective truth had not been uncovered?

Cultures that do not Loathe Lies

I fail to comprehend your indignation, sir. I have simply made the logical deduction that you are a liar.

— Spock, Star Trek (1966)

The legal subculture, and indeed our greater American culture, abhors dishonesty. The L-word is emotionally charged for us. It is taboo to lie under oath, and we have come to regard calling someone a "liar" as fighting words. Spock, who did not understand this aspect of our culture, therefore blundered by applying the L-word to a simple situation of inconsistent stories. That is not necessarily the case in other cultures, which do not place such a high premium on truthfulness. Consequently, those persons testifying in a trial in our system may not share with us the same culture-based reverence for an objective truth.

Witnesses from these cultures may "lie" simply because their society does not value objective truth. An American teacher at the Kuwait University ran up against this cultural conflict in honesty. Some students who were barely conversant in English turned in eloquent homework that they could not possibly have written. When he confronted them with accusations of plagiarism, they responded with exasperation, since they were simply trying to make him happy by turning in beautiful work. They were not ignorant of the school's honor code; rather in their culture, the ideal of honesty was far less valued than the pragmatism of producing a meritorious commodity.⁶ From their viewpoint, these students were paying a higher respect to their teacher than if they had turned in their own imperfect written product. Consequently if they were called to testify, they may well have sought to please the attorney who subpoenaed them by weaving the perfect testimony – regardless of its accuracy. In other words, witnesses told to speak the truth (what our legal culture considers

most important) may well seek to fulfill that mandate by reference to what is most important in their culture.

Lying is not taboo in many other societies. For instance, American personnel have been confused by Iranians who say “no problem” when asked for a favor, but do not follow through. For Iranians, refusing a request constitutes a grave social sin; because their culture values politeness over truthfulness, they consent to requests knowing they would not fulfill them. Hence their value of truth is subverted to more pressing social norms. Furthermore, Chinese culture values social responsibility more than truthfulness. Hence “truth” does not matter as much as acting in a socially responsible manner.⁷ In light of these societal devaluations of “truth,” can the mere act of taking an oath overcome that?

Cultures that do not Value Non-Members

*Together we'll stay hidden away from
Armageddon, and stick it to the man!*

—Billy Joe Armstrong (“Mechanical Man”)

Many societies value “truth” but do so contextually: they value being truthful with other members of their community, but not necessarily with outsiders. For example, Lapps make a game of deceiving foreigners. “Lying, bluff, secrecy, and espionage are all coordinated into their dealings” with strangers. It is so much a part of their culture, that just deceiving is not enough, deceit should be done with panache – humorous and entertaining. Particular delight is taken in deceiving those who are in a power position over them, but who are not part of their culture.⁸ Lapps involved in legal proceedings at home could be expected to testify truthfully, but if they were summoned to an American tribunal, the game might well be on! Bear in mind that deceit is especially likely when interacting with foreign persons who exercise power over them – which is precisely the scenario if our courts were to subpoena a Lapp to testify.

The same cultural bias against being honest with outsiders occurs in Indian society. In Bisipara,

India, a government-appointed secretary of the local cooperative had made appropriate governmental loans to some farmers, then absconded with a large portion of the fund.⁹ When government officials came to investigate the subsequent collapse of the cooperative, they found that the records of loans made to villagers had been “lost.” In that small enclave, everyone knew each others’ business, so officials questioned the villagers about who had received loans. They were routinely told: “Who knows? Someone must owe money. But I never had a loan and I personally do not know anyone who did.”¹⁰ The Bisipara villagers rationalized their flagrant dishonesty:

All outsiders, officials and others, are beyond the pale of the villagers’ moral community and are therefore dangerous; by the same reasoning, one has the right to deceive and exploit them, given the opportunity to do so with impunity.¹¹

An anthropologist observing this exchange explained that because the villagers belonged to a different moral community from the government officials, they may not feel obliged to refrain from deception.¹² The Bisiparans also justified that they were free to lie because the government lies to them.¹³ As in the Lapp example, if American courts subpoenaed a Bisiparan to testify (perhaps before a grand jury investigating the disappearance of government loan funds), he could be expected to continue his culturally-ingrained dishonesty with outsiders.

This is not just a theoretical construct. In a reservation sex offense case one author tried, the female victim had told a number of varying stories of the assault. It was learned during investigation that a young Apache man had told his friends about some of her wild claims. The author finally tracked him down through the help of some townfolk. With them present, the young man confirmed the victim’s mercurial assertions. He was, of course, subpoenaed to trial to testify about her “prior inconsistent statements.” But in our foreign forum, and under an oath to tell the truth “so help you God,” he boldfaced testified that she had never made any such statements to him; moreover, he denied having told the author

that the victim had made those statements! He smiled slyly at other Apaches attending the trial, and slipped off the witness stand, pocketing his federal per diem – delighting in “sticking it to the man!”

Cultures that Use Trials to Heal Social Rifts

The American legal culture presumes that it is desirable to gather as much relevant evidence as possible to decide a dispute; in addition, it assumes that evidence is necessary to that decision, and that “truth” will emerge from the “crucible of cross-examination”¹⁴ of evidence. The search is for what actually happened, which is then judged against the unremitting law to yield a decision – let the chips fall where they may.¹⁵ These are, of course, culturally informed procedures based on subjective views that other cultures might not share. Indeed, many societies use the legal forum not to find the truth but to heal social rifts, regardless of the truth; the Chinese example above adheres to this principle. Similarly, North African Muslims use the court system to “get people back into working relationships – contentious as they may be – rather than to solve matters in some way that ignores future ties.”¹⁶ It is important to understand how these legal systems function, because persons from these societies participating in our trials may be trying to accomplish a different goal than merely finding the “truth” of what had occurred.

In an Indonesian example, a calf belonging to a prominent community leader was found among a herd of a respected teacher. All knew that it in fact belonged to the community leader, as it bore the unmistakable ear notches that identified his herd. To complicate matters, a person possessing someone else’s livestock would automatically be considered a thief. This made it impossible for the teacher to return the calf, since he would thereby admit that the calf belonged to someone else. As a consequence, when the leader sent his son to retrieve his calf, the teacher turned him away, having to claim the calf falsely as his own in order to protect his status. The judge had to forge a solution that would protect both men’s social status and correct the social catastrophe this problem was bringing about! Adhering to

their social conventions, the calf was returned to the community leader’s family by contriving a dowry payment, thus placating the leader without implicating the teacher.¹⁷

Note that if this case had been handled in the American legal system, these players may not follow our rules and testify “truthfully.” Instead they would probably say and do what they needed to say and do to heal the conflict – since that is what they understand to be the ultimate goal of the legal system.

Another Indonesian example points to how far from truth-finding other legal systems may go. When a Duo Dongga youth learned that his aunt had gossiped about him seeing a woman (who was spoken for), he angrily confronted the elder relative, brandishing a knife. The Duo Dongga revere women, and aggression against them, even in the form of verbal exchanges, is unheard-of. This confrontation was thus a grave social sin. Although he never laid a hand on his aunt, the woman tore her shirt and covered her face with a medicinal paste used to treat bruises, claiming battery. Witnesses all knew that this evidence was completely false, but accepted it to impress upon the young man and others “the gravity of his offense and to underline the values he had transgressed.”¹⁸

The youth admitted he had erred in yelling at her, but truthfully denied beating her. This, as well as his protests that he had been provoked by the aunt’s gossip, was unsatisfactory to the elders who berated him. Eventually he was reduced to complete submission. The anthropologist observing this process noted that it had “virtually nothing to do with guilt or innocence,” which would be unnecessary and undesirable for the Duo Dongga; they were “simply unwilling to let phenomenal guilt or innocence get in the way of doing justice.”¹⁹ The real crime was not assault but disregard of the respect that a nephew owes his aunt. The truth they sought to reinforce was the nature of that relationship, not an objective replication of events.²⁰ The anthropologist concluded that the false evidence offered by the aunt, then, represented “a simple case of letting the evidence fit the crime.”²¹

This example ties together several threads already discussed. First, the “truth” sought in a legal proceeding means something different to, for instance, a Duo Donggo than to us. Second, the victim portrayed how she experienced the assault (she was frightened and felt attacked, even if he had never laid a hand on her); hence her testimony exaggerated the event to be consistent with how she felt about being attacked (c.f., the Mexican Indian example, above). Third, the justice system was used to correct a social conflict, not find truth. Fourth, although the goal of our legal system is to “skeletonize” the evidence, narrowing the issues and facts relevant to them, the goal of this culture’s legal system was “flesh out” the evidence by supplementing (fabricating) existing evidence.²² Given these cultural principles, would we be at all surprised if a Duo Donggo member, hailed into our court system, testified about something that was not objectively accurate?

Cultures that use Trials to Confirm their World Views

At the end of the 18th century, many Egyptian children believed the pyramids had been built by the English or French; at the end of the 20th century, many Japanese children believed the Russians had dropped the bomb on Hiroshima. In 1965, the people of Santo Domingo resisted an invasion of 42,000 Marines for 132 nights; what will Dominican children believe in the years to come?

— Eduardo Galeano²³

Just as some societies use the legal system to heal rends in the social fabric, they also use it to confirm their worldviews. When this occurs, objective “truth” will have to yield to the group’s understanding of their world. We know that different peoples’ accounts of who and what they are may be based on myth and their rendition of history. Such histories are often skewed – as exemplified in the quote above.

When a legal system is used to reinforce a group’s worldview, objective truth will play little or no role. For instance in the mid-1900’s, a young ZuZi man was accused of witchcraft after he touched a girl

who later suffered seizures and withdrawal. The ZuZi traditionally execute witches, so he denied the charge. Due to previous executions, the government was trying to suppress ZuZi beliefs in witchcraft – a part of their culture that the ZuZi staunchly defended. The young man was eventually coerced into confessing to witchcraft, spinning an elaborate account identifying other witches and detailing their dark practices. His confession served the social purpose of confirming that witchcraft existed and was dangerous, hence supporting the ZuZi worldview. Consequently and paradoxically, the ZuZi did not execute him, but let him live.²⁴

The ZuZi legal system was used to force an individual to lie – that he was guilty and a witch – to support a “truth” of how the ZuZi perceived their world. Again, different cultures may seek different “truths” than we seek in our justice system. That said, witnesses from different cultures may testify in our courts in ways that reinforce their society’s worldview, rather than the “whole truth and nothing but the truth.”

CONCLUSION

The American criminal justice system condemns lying which it treats as a grievous sin – a taboo if you will. But our knee-jerk scornful reaction to falsehood is both abnormal (compared to the prevalence and social utility of lying) and heavy-handed (because a vast number of misrepresentations are innocently offered). This series has been devoted to exploring why witnesses and defendants in criminal cases may say things that are not true, but they are not technically “lying” either. Although their testimony is inaccurate, they honestly believe it answers the inquiry; for instance, they may not have perceived or remembered an event accurately due to brain damage, retardation, extreme youth or old age, a mental illness, compulsions beyond their control (or even awareness), or culture.

This final discussion of the impact of culture on a witness is a little more disquieting than the earlier chapters. We learn that our basic premise that trial (to find the “truth” of what

happened) is not shared by a number of cultures throughout the world. Indeed, objective truth itself may well play very little role in resolving conflicts in these societies. We also see that deliberate misrepresentations in those cultures' legal systems not only are not reviled, but are sometimes encouraged. Because of these cultural issues, we may not get objectively "truthful" testimony from witnesses from different cultural backgrounds.

Society has always seemed to demand a little more from human beings than it will get in practice.

— George Orwell

We may be more ready to overlook false testimony by the brain damaged or mentally ill than by perfectly intact people who were simply taught differently in their society. The point of this final article is that that could be a mistake. When we speak of "truth," our witnesses may understand that to mean something other than what we had intended. There can be a language barrier, and they may respond with what is "truth" is in their culture as sought by their legal system. Far greater care should be given to preparing witnesses from other cultures to understand our goals and what "truth" we seek. At the same time, we should be more tolerant of the culturally-foreign witness who is trying to be helpful but may not understand our system of justice.

Finally – and concededly, this is well beyond the scope of this series – reference to how other cultures resolve conflicts through their legal systems offers a critique of the American "objective truth – and let the chips fall where they may" orientation to justice. Perhaps our jurisprudence would benefit from some of the innovations of other cultures where resolution occurs without having one clear loser, incorporating their ideas into our broadening field of arbitration and mediation to reach social "truth" as opposed to objective, factual "truths."

I am indebted to anthropologist James E. Coxworth for his research for and writing of this final chapter of the series.

(Endnotes)

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12. Id.
13. Id. at 66.
14. *Crawford v. Washington*, 541 U.S. 36, 61 (2004).
15. P. Just, "Let the Evidence Fit the Crime: Evidence, Law, and Sociological Truth among the Duo Donggo," 13 *American Ethnologist* 43, 45 (February 1986).
16. Id.
17. Just at 49.
18. Id. at 52-53.
19. Id. at 54.
20. Id. at 55.
21. Id. at 56.
22. Id. at 44.
23. E. Galeano, *Upside Down: A Primer for the Looking Glass World* (2000).
24. J. Siegel, "The Truth of Sorcery," 18 *Cultural Anthropology* 135, 135-36 (May 2003).



Continued from Settlement Conferences p. 2

that the police could not find anything on or around the dates she had requested. The client complained to the court that the police showed no record of the 911 call because his counsel had failed to request the tape within the time frame that 911 tapes are maintained by the police. No settlement resulted and the client went to trial.

At trial, with different counsel, the client, in response to the prosecutor's question, testified that the police officers had been harassing him the day before and that he had called 911 to report their actions. The prosecutor then asked if the client's previous attorney had checked to see if there was a 911 call. When the client responded that his previous attorney had checked, the prosecutor stated: "And there was no record of that 911 call, was there?" Appellant attempted to explain but the prosecutor cut him off and asked: "Yes or no, sir? Your previous attorney did not find a record of that 911 call, did she?" Appellant responded: "They said there wasn't no record shown." Trial counsel did not redirect on this issue because she had not been the attorney at the settlement conference and was not aware of where the information was coming from.

In a memorandum decision, the Arizona Court of Appeals held no violations of the rules of criminal procedure or rules of evidence occurred when the prosecutor asked about the 911 records. The Arizona Court of Appeals found that the "evidence elicited by the prosecutor was not evidence of plea negotiations or of statements made in connection with them." The court of appeals finished: "Rather, the prosecutor asked Defendant to state in court his knowledge of whether a 911 record had been found. The mere fact that the prosecutor may have learned about the tape's non-existence at the settlement conference did not preclude questions about the absence of the record. The State's questions made no reference to either a settlement conference or to plea negotiations, which might have been prejudicial." The Arizona Supreme Court declined a Petition for Review in this case.

The concerning part of this memorandum decision is that it seems to turn on the "mere fact" that the prosecutor did not mention the words

"settlement conference" or "plea negotiations" during his cross-examination of the client. Contrary to Ariz. R. Crim. P. Rule 17.4(f), that requires if a plea does not result "neither the plea discussion nor any resulting agreement, plea or judgment, nor statements made at a hearing on the plea, shall be admissible against the defendant in any criminal or civil action or administrative proceeding," in this case, the court of appeals decided a prosecutor could use information or statements made at a settlement conference as long as the words settlement or plea were not mentioned. ¹

Because what you say at a settlement conference could potentially be used against your client at trial, the court of appeals interpretation of the rules should cause trial lawyers to very carefully consider the content of any information that they divulge to both the court and the prosecutor during settlement conferences. Additionally, lawyers should advise their clients that anything they say during a settlement conference has the potential to be used against them at trial. At a minimum, if you or your client are going to disclose any information about your client or his case at the settlement conference, you should get an on the record agreement from the State and the Court that what is said in the settlement conference stays in the settlement conference and cannot be used in any fashion against your client.

Additionally, the decision in this case raises the question as to whether or not if a trial lawyer learns something from a prosecutor during a settlement conference that is helpful, such as an admission that the police did not do the best job or the case is not that strong, can trial counsel use that information at trial to question witnesses as long as counsel does not use the words settlement conference or plea negotiations? Be careful!

Finally, if the prosecutor does try to use information learned at a settlement conference against your client at trial, **OBJECT!**

Why Bother With a Settlement Conference When it Does Not Matter Whether or Not the Settlement Court Correctly Advises Your Client as to His Options?

Donna Elm - Recipient of State Bar Award

The Maricopa County Public Defender's Office extends its heartfelt congratulations to Donna Elm, this year's recipient of the State Bar's Tom Karas Criminal Justice Award. This award, established in 2004, is bestowed upon "a criminal law practitioner who during his or her career has worked tirelessly to advance the principles of criminal justice by representing clients or the public with integrity, fairness, tenacity, creativity, brilliance and above all professionalism."

Donna Elm's myriad of accomplishments and dedicated work on behalf of the indigent defense community makes her a very worthy recipient of this honor. During her twelve years with the Maricopa County Public Defender's Office (1990 through 2002), Donna's devotion to promoting excellence in all facets of criminal justice was apparent to all with whom she worked. In addition to participating in over fifty jury trials (including capital), she became a mentor and leader. In 1996, she was promoted to Trial Group D Supervisor and four years later to the office's Chief Trial Deputy. In 2002, Donna switched her practice to the Federal Public Defender's office in Phoenix, where she continues to focus on trial work. Donna has been very involved in Arizona Attorneys for Criminal Justice, being on their Board since 1994, serving as Secretary, Vice-President, and last year's President; helping the defense bar organize and develop strategically to take a more active positive role in the justice system has been one of her goals. From 1999 through 2006, Donna was deeply engaged in judicial nominations on the Maricopa County Trial Court Commission, eventually participating in selection of almost half the Superior Court bench. She continues to be actively involved in our Office's training program and has taught throughout the country on a number of issues from trial practice to professionalism. Donna publishes extensively, locally and nationally, on matters of interest to the criminal practice and continues to be a frequent contributor to this publication, as evidenced by her excellent article in this month's edition.

Congratulations, Donna! We'll put a card in the Group D spittoon to mark your latest "win"!

In another recent case, the defendant faced a sentence of between 5 years and 15 years in prison if he went to trial and lost. The plea agreements called for probation with one year flat jail time. The settlement conference judge incorrectly told the defendant that the plea offer was that he would be sentenced to a presumptive term of 7.5 years in prison and that if he lost at trial the presumptive term he faced in prison was 7.5 years. Neither the trial lawyer nor the prosecutor bothered to correct the misinformation the settlement court judge conveyed to the defendant. Based on the misinformation provided by the court, that the plea offer prison term was essentially the presumptive prison term he faced if he lost at trial, the defendant decided to roll the dice and go to trial. At sentencing, the defendant was sentenced to 5 years in prison.

Despite noting the "vagueness and uncertainty in the settlement conference judge's description of the plea offer," in a Memorandum Decision, the Arizona Court of Appeals held that it was not fundamental error because a defendant "has no right to a plea offer."

Moral of the story, please make sure that the settlement judge adequately and correctly advises your client as to his choices. Your client should be advised exactly what the plea offer is and exactly what consequences he faces if he loses at trial. If you think the settlement court judge or the prosecutor misstates something to your client, clear it up on the record.

(Endnotes)

¹ The decision in this case is also curious in light of the decision in *State v. Vargas*, 127 Ariz. 59, 61, 618 P.2d 229, 231 (1980) that held: "To permit the use of plea discussions for impeachment would have a strong chilling effect on plea negotiations. Additionally, the use of statements made in the expectation of a plea agreement raises serious fifth amendment problems of voluntariness which the rules obviously meant to avoid. We hold, therefore, that the trial court erred in permitting the state to impeach defendant's testimony by means of the document he signed during plea negotiations."



Congratulations to Law Clerk Mikel Steinfeld

ASU Law Students Win National ABA Mediation Competition

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Mikel Steinfeld and Kristine Reich

The Sandra Day O'Connor College of Law team of Kristine Reich, a first-year law student, and Mikel Steinfeld, a third-year law student, captured the National Championship in the American Bar Association's Representation in Mediation Competition, held in Atlanta last week.

"It's an honor," said Steinfeld, who had been on a seven-year quest for a national championship since joining the debate team at Northern Arizona University as an undergraduate. He had placed fourth nationally in debate competitions and had

finished second in the mediation competition as a first-year law student.

The students said they were a complementary team, with Reich crediting Steinfeld's commanding presence and voice in combination with her active listening skills, and Steinfeld noting Reich's ability to counteract his "hot-headedness" with her calm demeanor.

Both credited their coach, Art Hinshaw, Director of the Lodestar Dispute Resolution program, for his insight into mediation and his astute teaching skills.

"He's the guru, the Zen master," Reich said. "He's just very proficient at this. He has an ability to make you reflect on the interests of our party and speculate on the interests of the other party. It's just amazing."

Hinshaw organized practice sessions with law professors Bob Dauber, Tamara Herrera, Amy Langenfeld, and Zig Popko. Law students Kirk Howell and Kristin Kaleo, who made up the College's second team in the competition, also assisted Reich and Steinfeld in preparation for the finals.

Adjunct Professor Bruce Meyerson accompanied the team to Atlanta as their coach after Hinshaw broke his leg and was unable to travel.

"The last thing I said to Mikel and Kristine before they left for the competition is that they had what it takes to win the championship," Hinshaw said. "They gelled as teammates in the regional competition when they started to implicitly trust each other, and teamwork is such an important aspect of this competition."

Hinshaw praised the team's skills.

"Mikel understands this competition better than any single person I've ever met, and I've coached a previous national championship team," Hinshaw said. "Kristine's isn't your typical first year law student. Her professional experience before law school honed instincts that she was able to draw on for this competition and taught her how to

be composed in difficult situations. She couldn't have been better prepared to succeed."

The national round of the competition consists of four rounds where teams are given information about hypothetical cases. Team members alternate being the client and the lawyer. They are each given general information, then given some confidential information. One team serves as the defendant, the other as the plaintiff.

Teams are judged by a three-lawyer panel on their ability to advocate their own client's position, properly question those involved to learn their positions and interests, and use their creativity to mediate a resolution. In the semi-final and final rounds, they were given the problems shortly after learning they had advanced to those rounds.

After a 75 minute round, they have a 10 minute self-reflection period, where they talk about what they did well, what they could have done better, and how well they served their client's interests. The self-reflection is also judged.

In the semi-final round, Reich and Steinfeld defeated a team from Washington University in St. Louis, Mo. In the finals, they defeated a team from American University from Washington, D.C.

Judges praised Reich and Steinfeld on their preparation, negotiation prowess, active listening, teamwork and advocacy for their client.

"You have to be an advocate without being adversarial," Reich said. "But you don't want to be too accommodating, either. It's very difficult to strike the right balance. In one of the early rounds, one judge said we were too accommodating, and Mikel and I just looked at each other. We'd never been called that before. We're not roll-overs."

Reich, who has a master's degree in social work, and was director of training for the Arizona's Child Protective Services before coming to law school, will work this summer in the child protection division of the Arizona Attorney General's Office.

She called the competition an invaluable experience.

"In four rounds, with three judges each time, you get feedback from 12 attorneys proficient in this field," she said. "And with no script, you're talking for an hour and 15 minutes, which helps build your oral advocacy skills."

Reich said that, after the final round, she was content.

"I felt that, whether we won or lost, we did so well, and I learned so much, that it was OK.," she said. "But one of Mike's goals was winning."

For Steinfeld, second was not an option.

"I had some weird, innate desire to win a national championship," Steinfeld said. "I've been chasing one for seven years. It's one of those things that has been so elusive.

"So when we won, it was an awkward mix of excitement and relief."

He attributed victory to mastering the "Three C's:" control, creativity, and communication.

"If you can control the momentum ... if your creativity is better than the other team ... if your communication with your partner is better than the other team ... you're going to win," he said.

Steinfeld will join the Maricopa County Public Defender's Office after graduating in May.

ASU's advocacy teams are traditionally competitive on the national level, and have won three prior national championships in the ABA's Negotiation Competition (1989 and 1993) and the National Native American Law Students Association Moot Court Competition (2002). 



Jury and Bench Trial Results

March 2006

Public Defender's Office

Dates: Start - Finish	Attorney Investigator <i>Paralegal</i>	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
Group A						
3/13 - 3/14	Griffin <i>Curtis</i>	Udall	Vaitkus	CR05-111917-001DT TOMOT, F3	Guilty	Jury
3/14 - 3/16	Fischer	Burke	Garrow	CR05-130094-001DT 3 cts. Aggravated Assault, F3D 2 cts. Criminal Damage, F5	Not Guilty 1 ct. Agg. Aslt.; Directed Verdict 1 ct. Agg. Aslt.; Guilty 1 ct. Agg. Aslt.; Guilty 2 cts. Criminal Damage - Tried in absentia.	Jury
Group B						
3/6	Nelson Clesceri <i>Landau</i>	Ryan	Silvester	CR05-126074-001DT Agg. Assault, F6 Resisting Arrest, F6	DV Resisting Arrest NG-Not Guilty	Bench
3/28	Miller <i>Landau</i>	Klein	Zabor	CR05-011161-001DT Agg. Assault, M1	Not Guilty	Bench
3/23 - 3/24	Jakobe <i>Landau</i>	Cole	Silvester	CR05-120019-001DT PODD, F2 PODP, F6 POM, F6	PODD-NG PODP-NG POM-Guilty	Jury
Group C						
2/27 - 3/22	Crocker Jones Arvanitas <i>Gavin</i>	Talamante	Eliason	CR04-038531-001SE Murder 1st Degree, F1D Theft Means Trans., F3	Guilty	Jury
3/7 - 3/9	Houck Beatty	Dairman	Harbulot	CR05-030710-001SE Burglary 2nd Degree, F3	Not Guilty	Jury
3/21 - 3/23	Whitfield Thomas	McClennen	Blum	CR05-034521-001SE Agg. Assault, F6	Not Guilty	Jury
3/22 - 3/27	Engineer	Dairman	Harbulot	CR05-134848-001SE Crim Trespass 1st Degree, F6	Guilty	Jury

Jury and Bench Trial Results

March 2006

Public Defender's Office

Dates: Start - Finish	Attorney Investigator <i>Paralegal</i>	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
Group C Continued						
3/27 - 3/29	Jones	Udall	Starkovich	CR05-119912-001SE POM, F6 Resist Arrest, F6	POM - Guilty Resist Arrest - Not Guilty	Jury
3/28 - 3/30	Dehner	McClennen	Schneider	CR04-043322-001SE PODD, F4 PODP, F6	PODD - Guilty PODP - Not Guilty	Jury
Group D						
3/6 - 3/8	Strumpf Souther	Nothwehr	Stuebner	CR05-137301-001DT Resisting Arrest, F6	Guilty	Jury
3/13 - 3/14	Cain	Lynch	DuVall	CR05-120943-001DT Forgery, F4	Guilty in absentia	Jury
3/13 - 3/15	Knost	Hauser	Sherman	CR05-009931-002DT Burglary 2nd Degree, F3	Guilty	Jury
3/21 - 3/22	Washington	Steinle	Sherman	CR05-010056-001DT Armed Robbery, F2	Not Guilty	Jury
3/22 - 3/27	Knost	French	Fuller	CR05-011662-001DT Agg. Assault, F3D	Guilty	Jury
3/27 - 3/30	Whalen Vincent O'Farrell Jaichner Erwin	Trujillo	Kittredge	CR05-113431-001DT Child Molest, F2D, Attempted Child Molest, F3D	Not Guilty	Jury
3/29 - 3/30	Cain Jaichner	Steinle	Rassas	CR04-126399-001DT POND, F4, PODP, F6	Guilty	Jury
Group E						
3/6 - 3/27	Roskosz	Blakey	Wicht	CR05-124369-001DT Drive by Shooting, F2D 5 cts. Agg. Assault, F3D	Hung Jury (10-2 Indict)	Jury
3/8	Tomlinson	Cunanan	Kelley	CR05-134563-001DT Resisting Arrest, M1 Disorderly Conduct, M1	Guilty Dismissed	Bench
3/15 - 3/16	Colon	Gottsfeld	Orto	CR05-116718-001DT POND, F4	Mistrial on 2nd day of trial	Jury

Jury and Bench Trial Results

March 2006

Public Defender's Office

Dates: Start - Finish	Attorney Investigator <i>Paralegal</i>	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
Vehicular						
3/9 - 3/14	Mais	Anderson	Cotter	CR05-032668-001DT 2 cts. Agg. DUI, F4	Guilty on 1 cnt. Hung Jury on 2 cnt.	Jury
3/15 - 3/17	Timmer	Nothwehr	Minnaugh	CR04-043579-001DT 2 cts. Agg. DUI, F4	Guilty	Jury
3/21 - 3/23	Mais	Nothwehr	Harder	CR05-132987-001DT 2 cts. Agg. DUI, F4	2 Guilty	Jury
3/27 - 3/28	Iniguez	Nothwehr	Adel	CR05-032908-001DT 2 cts. Agg. DUI, F4	Guilty	Jury
3/29 - 3/30	Conter	Anderson	Hale	CR05-005841-001DT 2 cts. Agg. DUI, F4	Guilty	Jury
Homicide						
1/17 - 3/2	Stazzone Bevilacqua Klosinski Berry	McClennem	Gallagher	CR2002-093045 4 cts. Child/Vulnerable Adult Abuse, F2N 3 cts. Child/Vulnerable Adult Abuse, F4N 1 ct. Murder 1st Degreee, F1N	Phase I: Guilty All Counts Phase II: Jury did not find case appropriate for death penalty	Jury

Legal Defender's Office

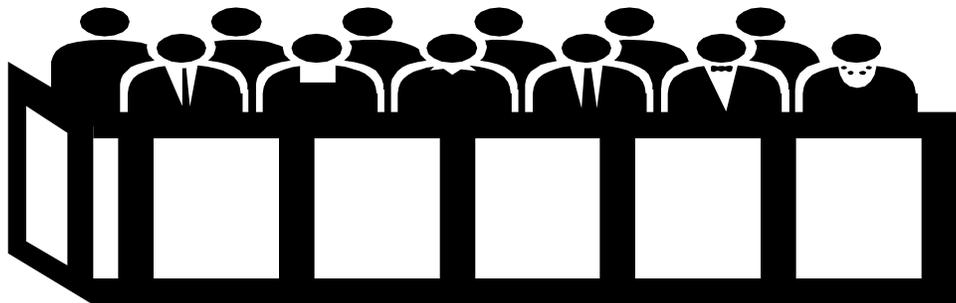
Dates: Start - Finish	Attorney Investigator <i>Paralegal</i>	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
3/22-3/23	Joanne Cuccia Brian Abernethy	Udall	Hazard	CR2005-136358-002 Theft of Mns of Trnspt, F4	Guilty	Jury

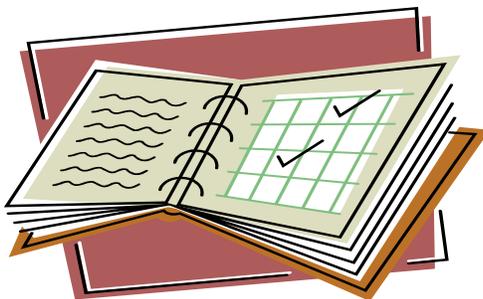
Jury and Bench Trial Results

March 2006

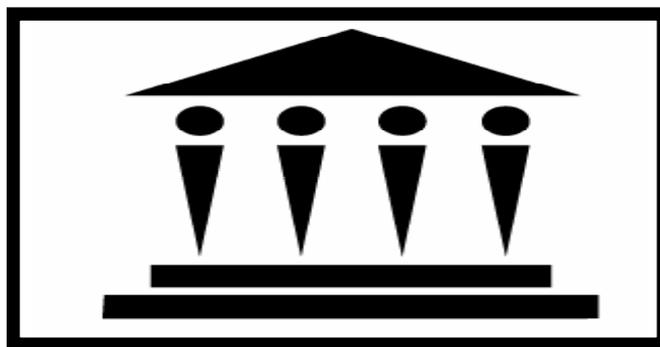
Legal Advocate's Office

Dates: Start - Finish	Attorney Investigator <i>Paralegal</i>	Judge	Prosecutor	CR# and Charges(s)	Result	Bench or Jury Trial
2/27 to 3/7	Logan	Gama		CR2005-121057-001-DT; POND/Sale-F2; POND/Sale-F2; PODD/Sale-F-2; PODP (3 cts)-F6; MIW-F4	Guilty on POND/Sale; POND; PODD; PODP (3 cts); MIW (Hung)	Jury
3/1 to 3/6	Gray	Akers		CR2005-123615-001-DT; POM For Sale Over Threshold-2F; PODP-F6; MIW-F4	Guilty on Cts 1 and 3; NG on Ct. 2	Jury
3/7 to 3/24	Glow Mullavey Stearns	Trujillo		CR2005-107849-001-DT; 1st Deg. Murder-F1; Agg. Asst.-F3; Armed Robbery-F2; Burglary-F3	Guilty	Jury
3/13 to 3/15	Primack	French		CR2005-108550-001-DT; Agg. Asst. Dang.-F3; Att. Armed Robbery-F3	Guilty	Jury
3/14 to 3/21	Burns	Rayes		CR2005-126263-001-DT; Theft MOT-F3; CR2005-126794-001-DT; Armed Rob-F2; Agg. Asst-F3	Guilty	Jury
3/16 to 3/21	Everett	Steinle		CR2005-005611-001-DT; PODP-F4	Hung	Jury





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