

for The Defense

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Maricopa County Public Defender's Office

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Changes Affecting Criminal Defense Practice Passed During the Fortieth Legislature's Second Regular Session

Although Senate Bill (S.B.) 1490 (which would have made major changes to the criminal code) was vetoed by the governor, numerous bills were enacted in the last legislative session that may affect criminal defense attorneys' practice. Over 147 separate bills were transmitted to the governor. There were, however, over 1,142 bills actually introduced in the house and senate. 142 of the bills transmitted to the governor were signed, 4 were vetoed and 1 became law without the governor's signature.

Unless there was an emergency clause contained as part of the bill, or it was enacted during one of the special sessions

within the general legislative sessions, the effective date for all legislation is September 30, 1992. That is, bills become effective on the 91st day following adjournment of the legislature. See, e.g., *Bland v. Jordan*, 79 Ariz. 384, 291 P.2d 205 (1955); see also A.R.S. Sec. 1-241 (time at which statute takes effect). Emergency clause legislation becomes effective within ten days or on the date it is approved by the governor. Generally, no statute is retroactive unless it is expressly provided for in the legislation. See A.R.S. Sec. 1-244.

The following summary is by subject, bill number and legislative chapter number:

Children: Youth Treatment and Rehabilitation

(S.B. 1016 Youth treatment; conforming changes, Chapter 273)

Amends A.R.S. Secs. 8-227, 8-230.02, 13-3708, 15-766, 15-1371, 31-222, 36-425.03, 36-518, 41-1954.01, 41-2816 and 46-141.

The amendments conform statutes to reflect the name change of the Department of Juvenile Corrections to the Department of Youth Treatment and Rehabilitation (DYTR), as well as changing statutory references of "juvenile correctional facility" to "secure care facility maintained by the DYTR." This bill also amends DYTR's contracting authority requirements.

Restitution and Fines

(S.B. 1042 Collection of court fines, Chapter 110)

Amends A.R.S. Secs. 13-603, 13-804, 13-808 and 42-133.

These emergency amendments authorize judges to defer responsibility for establishing financial payment plans for court-imposed fines or restitution to a designated court official or probation officer. And, among other provisions, it allows the defendant, state or victim to petition the court if he disagrees with how restitution is being paid.

Joint Legislative Study Committee on Appellate Defense

(S.B. 1180 Study Committee; appellate defense, Chapter 119)

This act establishes a joint legislative committee on appellate defense comprised of a 19-member study committee. It provides that the committee shall study the issues related to indigent appellate representation and shall investigate possible funding sources for a statewide office of appellate defenders. It requires the committee to submit a report to the legislature and the Chief Justice of the Arizona Supreme Court by December 31, 1992, and repeals the committee on that date.

(cont. on pg. 2)

Courts; Tribal Courts; Involuntary Commitments

(S.B. 1159 Involuntary commitments; Indian tribal courts, Chapter 260)

This legislation adds A.R.S. Sec. 12-136. It requires any court of record in Arizona to recognize and enforce an involuntary commitment order issued by an Arizona tribal court and filed with the clerk of the superior court. It requires notice to the Attorney General who shall appear as a party and respond for the state.

Further, the legislation authorizes the facility providing the involuntary treatment to make decisions on the discharge or release of a patient committed pursuant to this statute, and requires the facility to notify the tribal court that issued the involuntary commitment order ten days before discharge or release. Any necessary outpatient follow-up treatment and transportation shall be provided through an inter-governmental agreement between the tribe and the Department of Health Services.

Prisons and Secure Care Facilities; Contraband, Hearings and Records

(S.B. 1198 Prisons; secure care facilities; contraband; prisoners' records, Chapter 265)

Amends A.R.S. Secs. 13-2505, 13-3708 and 31-221.

Repeals A.R.S. Secs. 31-230 and 31-232.

This act repeals two statutes that conflict with criminal code provisions pertaining to possessing prison contraband and taking contraband into a correctional facility. It prescribes that the prohibition against promoting prison contraband applies while the prisoner is being transported or moved incident to confinement. Further, promoting prison contraband

does not apply to contraband located at the place where a person is being housed under home arrest. It further prescribes that it is a Class 5 felony for a person to introduce contraband into a secure care facility maintained by the Department of Youth Treatment and Rehabilitation.

It also provides that until September 30, 1993, a prisoner may have access to her own automated summary record file at least 30 days before she is scheduled to appear before the Board of Pardons and Paroles (BPP) for any type of hearing, except a revocation hearing. It also prohibits a prisoner's access to records other than her own. Further, the prisoner shall be assessed the total cost for making copies of her record. Beginning October 1, 1993, it prescribes that all prisoners may request a copy of their automated summary record file once a year, and allows a prisoner who is scheduled for more than one hearing before the BPP in a calendar year to access her automated summary record file before each hearing.

UNLESS THERE WAS AN EMERGENCY CLAUSE CONTAINED AS PART OF THE BILL, OR IT WAS ENACTED DURING ONE OF THE SPECIAL SESSIONS WITHIN THE GENERAL LEGISLATIVE SESSIONS, THE EFFECTIVE DATE FOR ALL LEGISLATION IS SEPTEMBER 30, 1992.

Editor's Note: --CORRECTION-- Once in awhile, we miss something. August's issue of *for The Defense* incorrectly noted that James M. Likos' client was convicted after a trial starting June 29th. The information should have read, "Trial before Judge Pro Tempore Ronald Collett ended July 06. Client found not guilty. Prosecutor B. Bayer." *For The Defense* apologizes for contributing to Mr. Likos' being maligned. It should also be noted, however, that *for The Defense* has proof that the trial results were misreported to us!

FOR THE DEFENSE

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FOR THE DEFENSE is the monthly training newsletter published by the Maricopa County Public Defender's Office, Dean Trebesch, 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.

Weapons and Explosives--Forfeitures--Incompetent Persons

(S.B. 1208 Forfeitures of weapons; incompetent persons, Chapter 19)

This act amends A.R.S. Sec. 13-3105. It requires the trial court to order the forfeiture, sale, destruction or disposal of any weapon used, displayed or unlawfully possessed during an alleged commission of an offense by a person found to be incompetent to stand trial.

(cont. on pg. 3)

Crimes and Offenses; Harassment

(S.B. 1216 Criminal harassment, Chapter 241)

This legislation adds A.R.S. Sec. 13-2921. It provides that a person may be guilty of a Class 1 misdemeanor if she communicates in a manner that harasses or threatens. Further, it provides that a person is guilty of a Class 2 misdemeanor if she communicates with another person in a public place after being asked to stop or engages in repeated acts or conduct that harasses or threatens another person. Harassment is also defined. A "reasonable person" legal standard is used that must show actual "substantial emotional distress." The act exempts otherwise lawful demonstration, assembly or picketing.

Crimes and Offenses; Domestic Violence--State of Mind; Justification

(S.B. 1263, Justification; domestic violence, Chapter 124)

This act adds A.R.S. Sec. 13-415 to create a specific justification defense for domestic violence cases. The legislation provides that the state of mind of an accused, who has been the victim of past acts of domestic violence, and claims of self-defense or defense of a third-person, shall be determined from the perspective of a "reasonable person" who has been a victim of those past acts of domestic violence.

Public Attorneys

(S.B. 1449, Public attorneys; pro bono activities, Chapter 313)

This legislation amends A.R.S. Secs. 11-403, 11-583 and 41-191. It provides that deputy county attorneys, assistant attorney generals and deputy public defenders may represent private clients in pro bono, private *civil* matters under specific circumstances. All representation must be during off-hours and the attorney cannot receive any compensation for the services. Further, the act provides that the attorney's supervisor may require the attorney to submit a prior written request to engage in pro bono work that includes a provision holding the agency harmless from any work undertaken by the attorney. The legislation also provides that public attorneys are not required to undertake pro bono activities.

Prisons and Prisoners

(H.B. 2015, Parolees; termination of supervision, Chapter 141)

This act amends A.R.S. Secs. 31-402, 31-411, 31-412 and 41-2408. It provides that when a prisoner is granted parole, she shall remain on parole unless the Board of Pardons and Parole revokes the parole, grants an absolute discharge from parole or the prisoner reaches her earned release credit date (ERCD). When a prisoner reaches her ERCD, her parole shall be terminated and the prisoner will no longer be under the authority of the board, but will be subject to revocation under Sec. 41-1604.07 (release revoked on an unexpired term).

Motor Vehicles; Traffic Offenses and Penalties

(H.B. 2020, Speeding; civil traffic violation, Chapter 84)

This legislation amends A.R.S. Secs. 22-125, 28-492, 28-702.01 and 28-702.04. The act changes the penalty for exceeding the 55 and 65 mile-per-hour speed limits from a criminal offense to a civil offense. It modifies the formula for calculating judicial productivity credits so that speeding violations which are counted in a category with misdemeanors will now be counted with other civil traffic filings.

Further, it repeals the statutory section that requires all fines and penalties to be imposed against an owner who fails to obtain automobile insurance, which conflicts with a new statutory section that allows such fines and penalties to be reduced or waived under certain circumstances.

Credit Card Fraud

(H.B. 2023, Credit card transaction record theft, Chapter 143)

This bill amends A.R.S. Secs. 13-2101 and adds Sec. 13-2109. It provides that any fraudulent presentation of credit card charges by a merchant or any solicitation of a merchant to present fraudulent credit card charges is illegal. It establishes the criminal classification of credit card transaction record theft based on the value of the theft. It allows the state to aggregate the amount of thefts to determine the classification of the offense for those thefts committed as part of a single scheme or course of conduct.

Private Investigations

(H.B. 2067, Private investigators, Chapter 148)

This act repeals and rewrites A.R.S. Title 32, Chapter 24 relating to private investigators.

It requires the director of the Department of Public Safety to administer this chapter. It establishes a Private Investigator Hearing Board, and sets forth the procedures, requirements, qualifications and fees for the process to file, investigate and respond to a complaint against an investigator, and provides the grounds for disciplinary action. It further contains a savings clause for individuals who have a valid license prior to the repeal of this chapter. The rights, duties or penalties imposed before the effective date of the act are not affected, and disciplinary actions, license suspensions or revocations also continue to be in effect.

Criminal Justice Information; Central State Repository

(H.B. 2141, Central state repository; criminal information, Chapter 247)

This act amends A.R.S. Secs. 8-105, 15-512, repeals Sec. 41-1750, and adds Sec. 41-1750. It sets forth the Department of Public Safety's (DPS) responsibility for maintaining a central state repository. It requires DPS to operate a statewide, automated, fingerprint identification system. It requires the chief officers of criminal justice agencies of the state to give the central state repository information necessary to operate the statewide, uniform, crime-reporting program, and sets forth individuals and agencies permitted to receive criminal justice information from the director.

(cont. on pg. 4)

It further provides that the director of DPS shall establish fees to cover the cost of performing certain functions. It establishes certain funds, and sets forth limitations regarding the distribution of criminal justice information obtained from the central state repository or the Arizona criminal justice information system. It also provides for methods to ensure that criminal history record information is accurately maintained and distributed.

Additionally, the act provides that certain individuals are required to report information concerning hate crimes to DPS. It specifies that any fingerprint cards submitted by federal, state and local non-criminal justice agencies are exempt from additional processing fees DPS may charge. It requires the director to establish rules regarding the protection and security of criminal justice information. It also permits a school district to release the results of a background check to another school district for employment purposes.

Crimes; Family Offenses; Protection Orders

(H.B. 2199, Domestic violence, Chapter 293)

This legislation amends A.R.S. Secs. 12-1809, 13-3601, 13-3602 and 13-3624. It requires peace officers who respond to a call involving alleged harassment or domestic violence to provide the alleged victim with written notification of the procedures and resources available to protect the victim. It prescribes that if an order of protection cannot be served within a city, justice precinct or county where the order issues, it may be served in the jurisdiction in which the defendant can be served. It also allows an officer who serves an emergency order of protection to file a certificate of service, rather than a sworn affidavit of service.

Drug Offenses; Drug-Free School Zones

(H.B. 2292, Drug-free school grounds, Chapter 196)

This act amends Sec. 13-3411. It defines "drug-free school zone" as an area within 300 feet of a school or its grounds, any public property within 1,000 feet of a school or its grounds, and a school bus and "any school bus stop."

It prescribes that a person who sells marijuana, peyote, prescription-only drugs, dangerous drugs or narcotic drugs, or uses or possesses marijuana, peyote, dangerous drugs or narcotic drugs in a drug-free school zone is guilty of the same class felony of which the person would have been guilty had the violation not occurred in the drug-free school zone; however, the minimum, maximum, and presumptive sentences shall be increased by one year. It requires the person to serve the entire sentence imposed (flat-time).

It further requires each school district to place signs at the main entrance of schools identifying the school and its grounds as "a drug-free school zone." It requires the school district to notify the county attorney of any changes in the location and boundaries of any school property. School personnel who observe illegal use, possession or sale of drugs in a drug-free school zone must report the violation to a school administrator who must in turn report the violation to a peace officer. It specifies that it is a Class 3 misdemeanor to fail to report a violation.

It also provides that school records of a student involved in an "alleged" violation of this statute shall be made available

to a peace officer and prescribes that these records are confidential. It provides civil or criminal immunity to a person who furnishes a report, information or records and to a person who participates in a judicial or administration proceeding or investigation resulting from furnishing a report, information or records unless the person acted with "malice."

Crimes; Racketeering--Forfeiture Actions and Liens

(H.B. 2457, Racketeering actions; attorneys fees, Chapter 99)

This act amends Secs. 13-2314 and 13-2314.02. It provides that if the defendant in a racketeering claim, including a forfeiture action or lien, prevails on the claim, the person may be awarded costs and reasonable attorney fees incurred defending the claim. It also provides that if a defendant shows that probable cause did not exist to support the filing of a racketeering lien or forfeiture action, and shows that the lawsuit was not grounded in fact, the court must award the person costs and reasonable attorney fees.

It further provides that in actions filed by the state or county, the award of costs and attorney fees allowed or required by this act shall be paid from the state or county anti-racketeering revolving fund.

Criminal Procedure; Appeals

(H.B. 2481, Appeals by defendant, Chapter 184)

This legislation amends A.R.S. Sec. 13-4033. It prohibits a defendant in a non-capital case from appealing a judgment or sentence entered pursuant to a plea agreement or an admission to a probation violation.

Mental Health Services; Court Ordered Evaluation; Out-Patient Treatment

(H.B. 2500, Mental Health diversion; council, Chapter 243)

This legislation amends A.R.S. Secs. 36-525, 36-540 and 36-546. It requires a peace officer to apprehend and transport a person to an evaluation agency on the advice of an admitting officer of an agency. It allows a person to be apprehended and transported by a peace officer to an in-patient treatment facility according to specific procedures.

It further provides that a patient's attorney is subject to contempt of court if specific statutory duties are not fulfilled.

The bill also establishes the Council on Offenders with Mental Impairments, provides the composition of the council, its duties and responsibilities, and requires the council to submit a written report to the Governor, President of the Senate and Speaker of the House of Representatives by December 31, 1993.

(cont. on pg. 5)

Criminal Procedure; Post-Conviction Relief

(H.B. 2534, Post-conviction relief, Chapter 358)

This legislation amends A.R.S. Secs. 13-4231, 13-4232, 13-4233, 13-4234, 13-4235, 13-4236, 13-4237, 13-4238 and 13-4239. It changes the statutes relating to post-conviction relief procedures. It provides that a person convicted of or sentenced for a criminal offense may file a claim for post-conviction relief when newly discovered evidence probably exists, and the new facts could have changed the verdict or sentence. It sets forth what constitutes newly discovered material facts, and provides that a claim for post-conviction relief in a successive or untimely petition must cite the reasons for not raising the claims in a previous petition or in a timely manner.

The bill provides that a post-conviction relief proceeding displaces, as well as incorporates, all trial court post-trial remedies. It requires, rather than allows, a writ of habeas corpus to be heard by the original court where the defendant was convicted or sentenced, and requires the court to treat the writ as a post-conviction relief petition. It amends procedures relating to filing notices of post-conviction relief, prescribes time frames and procedures for filing petitions, responses including extensions, and motions for rehearings.

Additionally, it prescribes the procedures to be used for the appointment of counsel when a claim of ineffective counsel is raised, and appointment of counsel for all other notices.

It also provides an aggrieved party the time frame, filing procedure, and contents for a petition filed with the appellate court for review of the trial court's actions. And, the bill requires notification to the victim of any action taken by the appellate court if the victim has requested notice. CJ^

Alcohol Screening

By Gary Kula

Every client convicted of DUI must undergo alcohol screening. For those clients convicted of a DUI offense which occurred prior to September 30th of this year, the court must order alcohol screening and any recommended education or treatment. For those offenses which are committed on September 30th or after, the court may require education or treatment following the alcohol screening, but it is no longer mandatory. As defense attorneys, it is important that we be fully informed about the alcohol screening process so that we can advise our clients as to what they are getting into when they go to the alcohol screening facility. This article is the first in a two-part series about the entire alcohol screening and treatment system. This month, we will deal exclusively with the alcohol screening process. In next month's newsletter, we will discuss the options which are available to your client after they complete alcohol screening.

Where Can My Client Go for Alcohol Screening?

The new DUI statute provides that a person convicted of DUI must "complete an alcohol abuse screening session by

a screening or treatment facility approved by the Division of Behavioral Health in the Department of Health Services or a County Probation Department." A.R.S. 28-692.01(A). This provision is identical to the previous statute with the exception of the provision which provides that a County Probation Department may do the alcohol screening. As of September 23, 1992, the Division of Behavioral Health in the Department of Health Services has approved 56 alcohol screening facilities throughout the State of Arizona, 19 of which, are located in Maricopa County.

Most courts use preprinted alcohol screening referral forms with a designated screening facility. The preprinted court order usually informs the client that he must report to that designated facility within seven days to schedule an appointment. From the client's perspective, this referral appears to be a court order that they must go to this one designated screening facility and no other. While the court would prefer, for record-keeping purposes, that everyone go to but one facility, the language of the statute is clear: any approved screening facility is acceptable. You should assist your client in choosing a facility which is economical and geographically convenient. You should then inform the court of your client's choice. If it is an approved facility, it is held to all the same quality and reporting requirements as the court-chosen facility. The Division of Behavioral Health in the Department of Health Services has established specific guidelines and procedures which must be followed by all alcohol screening facilities in scheduling and complete screening as well as for reporting back to courts. These regulations can be found in R9-2-108.

The Alcohol Screening Appointment

Pursuant to regulation (R9-2-108), the screening process shall include a face-to-face interview of at least 30 minutes, but no longer than three hours. Most screening facilities require a client to complete an extensive questionnaire when they first arrive at the office. Following the completion of this questionnaire, most facilities use one of four tests or assessment instruments, as they are called in the regulations, as objective evaluations of the client's propensity to abuse alcohol. The four tests used by the facilities are:

A.Driver Risk Inventory (DRI). This is a 139-item questionnaire. The first 80 questions are true or false. The remaining 59 questions are multiple choice. This is the most commonly used objective assessment instrument in that it is utilized by the Substance Abuse Program at Phoenix Municipal Court.

B.Michigan Alcoholism Screening Test (MAST). There are 25 questions to this inventory test. This test is often used in conjunction with other tests or inventory questionnaires, depending upon the facility.

C.MMPI-MAC. This is the same 580-question test which is used in a variety of contexts. In addition to the 12 scales which are normally measured by this test, this particular context uses a MacAndrews scale which is used to predict alcoholism and/or alcohol problems.

D.Mortimer-Filkins. This is a 102-question test.

A facility may also use other tests as long as they are approved by the Division of Behavioral Health prior to their implementation.

(cont. on pg. 6)

Once the client has completed the data questionnaire as well as one or more of the assessment instruments, a counselor from the facility will use the questionnaire, the test results, and any extrinsic information (including police reports if one is available) to conduct an interview of our client. At the completion of this interview, the counselor will make a determination as to whether the client is in need of Level III Education (eight hours), Level II Education (sixteen hours), or Level I Treatment, which may vary in length depending upon the severity of the problem and the needs of the client. In order to establish a standard for determining what level of education or treatment is needed, the Division of Behavioral Health in Department of Health Services has established the following criteria for determining DWI classification levels. This standard is as follows:

CRITERIA FOR DETERMINING DWI CLASSIFICATION LEVELS

LEVEL I - PROBLEM DRINKER/DRUG USER: A client who has, within five years prior to current court order for DUI screening:

- A. Exhibited one or more of the following indicators:
1. Two or more previous alcohol/drug-related arrests and/or convictions;
 2. Loss of control of alcohol/drug use;
 3. Self-admission of problem drinking/drug use;
 4. Prior diagnosis of problem drinking/drug use by a competent authority;
 5. Organic brain disease associated with alcohol/drug use;
 6. Major withdrawal symptoms including:
 - a. Alcoholic Hallucinosis (visual; auditory or tactile);
 - b. Convulsive Seizures; or
 - c. Delirium Tremens;
 7. Medically diagnosed physical complications;
 - a. Alcoholic Liver Disease;
 1. Fatty Liver
 2. Hepatitis
 3. Cirrhosis
 - b. Alcoholic Pancreatitis; or
 - c. Alcoholic Cardiomyopathy
- B. Exhibited three or more of the following indicators:
1. Screening assessment indicates problems with, or abuse of, alcohol or drugs;
 2. BAC .15 or higher;
 3. One prior alcohol/drug-related arrest and/or conviction;
 4. Attendance and/or productivity decrease at work/school;
 5. Family, peer and/or social problems associated with alcohol/drug use.
 6. Previous participation in, or contact with, substance abuse treatment and/or medical facilities for problems associated with alcohol/drug use;
 7. Blackouts associated with alcohol/drug use;
 8. Passing out associated with alcohol/drug use;
 9. Withdrawal symptoms including:
 - a. Shakes or malaise relieved by resumed drinking;
 - b. Irritability;

- c. Nausea; or
- d. Anxiety
10. Psychological dependence on alcohol/drugs;
11. Increase in consumption or change in the pattern of drinking (including change in tolerance); or
12. Personality changes associated with alcohol/drug use.

LEVEL II - POTENTIAL PROBLEM DRINKER/DRUG USER: A client who has, within five years prior to current court order for DUI screening, exhibited two of the indicators listed in Level I, Section B above.

LEVEL III - NON-PROBLEM SOCIAL DRINKER/DRUG USER: A client who has, within five years prior to current court order for DUI screening, exhibited no more than one of the indicators listed in Level I, Section B above.

The Costs of Alcohol Screening

The costs of alcohol screening varies from facility to facility. Most of the facilities which have direct referrals from a particular court charge between \$60 and \$75. In Mohave County, there is a screening facility which charges \$25. In Pima County, there is a facility which charges \$30. In Maricopa County, the least expensive screening facility charges \$35. It is important to remember that as long as the facility is approved by the division of Behavioral Health in Department of Health Services, it does not matter how much the screening costs. A screening which costs \$25 is no better or no worse in a court of law than one which costs \$75. For those clients who are responsible enough to follow through with scheduling an appointment and completing the screening process, you should assist them in seeking out the least expensive facility. Since all facilities have the same reporting requirements, the client is able to save money while the court is able to maintain accurate records.

For those who are representing indigent clients, a small change was made in the new DUI law which may benefit your client. Under the previous DUI law, the statute provided that "the reasonable costs of the screening session shall be paid by the convicted person." A.R.S. 28-692.01(A). The recently enacted DUI statute provides that "the court shall order a person who has **sufficient financial ability** to pay part or all of the reasonable costs of the screening session." A.R.S. 28-692.01(A). (Emphasis added). Whereas before the client was ordered to pay the costs of screening, the statute now allows you to request that the court make a determination as to whether your client has the financial ability to pay for the screening. This opens the door for the court to waive the cost of the screening, especially in those situations where the client is ordered to attend a facility where the screening costs \$30 or \$40 more than an alternative screening facility which does not have a direct referral relationship with the court.

As a final footnote, a copy of the approved list of statewide screening facilities is available through the training division of this office or the Arizona Department of Health Services (602-255-1127). ^

Client-Centered Representation: Empowering Excellent Representation

"Client-centered representation." What is it? It's the philosophy that underscores most, if not all, of the training goals of the Training Division of this office. It is at the core of quality representation and excellent lawyering.

Put another way. When you go to purchase a product or a service, you expect quality. When you go to your doctor, regardless of who pays, you want the best medical service possible. You don't want second best. And, you definitely want someone who will accurately diagnose the problem and aggressively treat it--no matter what it takes. You certainly don't want to hear that your case is hopeless.

You also want your doctor to care about your case. You want her to share your own concern for what happens to you. You want her to explain what is wrong with you, tell you what can be done and how it will be accomplished, and you want your doctor to stay in contact with you about your condition.

The analogy I want to make is obvious. Criminal defense lawyers also have people's lives in their hands. Our job is "treating" people's liberty. Our clients' liberty (and sometimes their very existence) is at risk each time we handle their cases. And, when someone's liberty is at stake, the only acceptable standard is QUALITY. All attorneys need to remind themselves, particularly public lawyers, that they are in the service business. Clients expect top-quality service.

The American Bar Association Standards for Criminal Justice (3d ed.) sets quality legal representation as the pre-eminent standard for us:

"The basic duty defense counsel owes to the administration of justice and as an officer of the court is to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation. The Defense Function, Standard 4-1.2(b)."

"The objective in providing counsel should be to assure quality legal representation is afforded to all persons eligible for counsel pursuant to this chapter. Providing Defense Services, Standard 5-1.1."

To achieve quality requires training. To deliver outstanding quality legal representation requires a commitment to training.

Well, what is it? Client-centered representation is more than just looking at what is happening in a case from the client's perspective. It is the recognition of a simple truth. You cannot be in this business if there is not a part of you that sets you apart from other attorneys. It may be passion. It may be idealism--a deep appreciation for the rule of law and the sanctity of the Bill of Rights. It may be the desire to

be an excellent trial lawyer. It may be the goal of obtaining experience.

Gerry Spence, has written, however, that successful trial lawyers have one thing in common:

"[T]hey strive to become whole persons who put all of themselves into their clients' cases, including a deep sense of caring, for no fortress can stave off the on-slaught of men and women who have given themselves to the cause of those who need them--God bless them all--our clients, who, through us and only us, seek that ephemeral jewel called justice."

Client-centered representation is the philosophy of delivering quality legal services and recognizing that clients want to be respected and treated with dignity. Clients hate it when their attorneys condescend to them. Clients need to be involved in their cases; they need to be consulted about what they think. They need to be thought of when we make decisions about their cases, so that the impact of those decisions can be appreciated.

Clients need to be thought of as persons and not statistics that some folks in the criminal justice system assume are just "units" for processing.

Martin Luther King, Jr. observed, during the battle for more civil rights, that "there comes a time when one must take a position that is neither safe nor politic nor popular, but [we] must do it because [our] conscience tells us . . . it is right." That's what being a defense lawyer is. It is the essence of public defending. Our clients are not popular, they have no political constituency, and there are those who would eliminate their rights and the public's by destroying the Bill of Rights.

Public defenders have to care about their clients, their work, their office, and the level of skills they bring to bear in the pursuit of excellent representation. Paraphrasing Atticus Finch, a lawyer who cared about his clients and played by Gregory Peck in *To Kill a Mockingbird*--true courage is undertaking something even though you know you'll lose. Public defenders often must demonstrate "true courage."

CJ^

**Our clients' liberty
(and sometimes their
very existence) is at risk
each time we handle
their cases.**

Practice Tips

Attorney Comments in Presentence Reports

As of September 1st, the Adult Probation Department, at the request of several judges, will attach to the presentence investigations all written comments submitted by attorneys. The change in policy is designed to eliminate the possibility of misinterpretation of attorney recommendations and comments by the presentence writer's paraphrasing of remarks.

FARE Probation

The pilot period for the "Day Fine Demonstration Project", better known as FARE probation, ended August 31, 1992. As of that date, FARE will no longer be limited to specific divisions but will be available as a sentencing option in all criminal divisions.

Homicide Cases

Practitioners handling homicide cases need to know that the Maricopa County Office of the Medical Examiner maintains a form called "Record of Receipt of Personal Property." This form is rarely included in the discovery provided by the prosecution. It is available by subpoena and contains a list of the property on the deceased. This may be important in finding out the type of clothing the deceased was wearing and whether there were weapons and/or drugs on his person.

Shock Incarceration

Practitioners should stay aware that the Shock Incarceration program is still available and may be used as a sentencing alternative for special cases. Shock incarceration is also now available for female clients. The criteria for eligibility is the same as for male clients.

Work Furlough Release Credits

Can your client earn "good time" release credits if the judge sentences her to work furlough? The answer is yes. Apparently, this policy has been revised (for The Defense has been promised a copy of the newly revised policies for work furlough when they are completed by the Maricopa County Sheriff's Office).

If the sentencing judge has not put a release date on your client's sentence, she may earn "2 for 1" on days that she is at work.

Criminal History and Presentence Investigation Reports

Tracking down and insuring that the criminal history of your client is absolutely correct is extremely important. One reason it is an important duty of defense counsel is that the

client may not know that her record bears incorrect information until she meets the parole board (assuming the erroneous history does not affect classification).

Parole boards rely on the presentence investigation ("PSI") not only for the facts of the crime (!), but as a source for determining prior record (both juvenile and adult). If the PSI erroneously lists crimes your client did not commit, the only recourse for the client at the parole board meeting is to insist that there are mistakes. That's kind of like an admonition at trial. The taint has occurred and the parole board still has the incorrect information in front of it. They will determine what weight to give to the former client's insistence that it is wrong information. The parole board may act on this incorrect information and require the inmate to serve additional time.

Drug Recognition Expert (DRE) Testimony

On May 7, 1992, the Arizona Supreme Court heard oral arguments in a special action proceeding, Dayton Johnson v. Honorable Rita Jet. The issue was whether Judge Jet had abused her discretion in finding that procedures used by drug recognition experts had met the Frye standard for admissibility. The Supreme Court rejected the application of Frye to the procedures used by drug recognition experts, and further declined jurisdiction to reconsider the actions of Judge Jet. Supreme Court Order CV91-0488-SA, May 8, 1992. According to David Darby, petitioner's counsel in the Dayton Johnson case, the implications of the Arizona Supreme Court's decision to decline jurisdiction over the Dayton Johnson case as to DRE admissibility are that the traditional rules of evidence will apply, that a Frye analysis regarding the DRE admissibility is permissible on a case-by-case basis, and that the case law of Blake and Collins still apply. As to experts in the field able to provide DRE testimony, it appears to be self-selecting -- included are trained drug recognition evaluators of law enforcement agencies and experts in disciplines cited in Blake, i.e., behavioral psychology, highway safety, and, to a lesser extent, neurology and criminalists. (From a legal memorandum by Ernesto Quesada, Group B Law Clerk.)

Victims' Rights -- Discovery

Practitioners handling cases with victims, particularly if they are relatively old cases, should keep in mind that collateral proceedings do not fall under the so-called protection of victims' rights. For example, an alleged victim may have filed an insurance claim where they have made extensive statements (sometimes in the form of depositions under oath) to insurance adjusters. All statements to the adjusters (sometimes adjusters tape-record them over the phone), can be obtained by request or subpoena, and may be a fertile source of impeachment material.

In rare cases, the alleged victim may have filed a civil action. In that case, claims, pleadings and possibly depositions may exist of "victim statements." They may be available through investigation and in some instances may even still be discoverable under Rule 15.

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Additionally, the Arizona Supreme Court, on September 23rd, denied the petition for review filed by the state in *State of Arizona v. Roper*, 113 Ariz. Adv. Rep. 35 (Filed May 18, 1992). That special action case, established that certain medical documents of an alleged victim were discoverable.

CJ^

Thoughts on Yesterday

Now that "Yesterday" has been around for a couple of months, we thought it might be worthwhile to discuss the workings behind the column and to comment on some of the items that never quite made it into the newsletter. It has been a lot of fun talking with people in the office trying to shake loose some of the memories and achievements which happened so many years ago. It's probably fair to say that most of us, with a few notable exceptions, have lived rather dull lives. Somewhere along the journey, each of us has taken a turn off the road which may have led us to the Baseball Hall of Fame or to Hollywood, or even to having our picture posted at the post office. Oftentimes, it's the wrong turns and detoured journeys that lead to the best results. If nothing else, we can all take comfort in the fact that we ended up on the side of the angels.

Now that we have that out of the way, we thought that it might be important to let you know about our standards and to clear up any questions as to what we're looking for as far as experiences and achievements. This column strives to be as accurate as possible. Unfortunately, we must rely on the memories of the contributors. Unless we have police reports or eyewitnesses to refute the information, we assume that what they are saying is truthful, accurate and not overly exaggerated. It's important to note, however, that just because someone is being truthful, does not necessarily mean that his experiences are interesting. If the most interesting item a person can come up with is that he completed law school in 2½ years, we usually take away that person's Westlaw access code and ask that he reexamine his life. Also unacceptable is the fact that someone clerked after law school: that's just plain boring. We really don't care to hear that someone was an executive editor of a law review either, unless, of course, you're Bill Foreman; then such information becomes newsworthy on account of its shock value. Along the same lines, if you've entered a contest or competition of some sort, the fact that you finished either first or last may be newsworthy. Finishing first may be a worthwhile achievement, but finishing last is a lot more fun to laugh about.

We are also very cautious about stories which sound suspicious from the get-go. We know that some people will say anything to get their name in the paper. A perfect example is Dean's alleged sighting of Elvis in his white jump suit eating at a Circle-K near his house. We all know that not even the old Elvis would go near those 2 for 99¢ hotdogs they sell there. Nice try, Dean.

We also will not print stories which we know to be correct, but are denied by the person. Bob Briney is the perfect case in point. Anyone who has been in the office for a while knows that his third car is an orange Yugo. Yet if you ask him about

it, he'll deny it. We know better. And that Bentley hood ornament he's put on it doesn't fool anyone.

Speaking of "Bob's"--in considering items, we strive to be objective in distinguishing between fact and fantasy. This includes those situations where a person's self-perception is seriously distorted. Take Bob Guzik, who insists that something should be put in the column about his striking resemblance to Sean Connery. At first, we went along with him and figured that if the room were dark enough, there might be some merit to what he was saying. The more we thought about it, however, the more we realized that we should side with reality and dismiss his fantasy as quickly and painlessly as possible.

The purpose of this article was to provide you with a glimpse of the workings behind this column. We will continue to attempt to present you with different and interesting experiences from the lives of people you see in the hallways of Luhrs. We will try to be accurate. Just this very moment, for example, we have someone at MVD checking out the rumor that Don Vert traded in his license plate 62 times until he got one with three letters in their correct alphabetical order. As always, we will strive to entertain, inform, and embellish only in those situations when it makes for better reading. ^

August Jury Trials

July 01

Charles N. Vogel: Client charged with attempted burglary (four priors). Trial before Judge Noyes ended July 06. Client found not guilty. Prosecutor J. Bernstein.

July 28

Catherine M. Hughes: Client charged with aggravated assault and misconduct involving weapons. Trial before Judge Bolton ended July 29. Client found guilty of misconduct involving weapons and disorderly conduct. Prosecutor R. Hinz.

July 30

Andrew J. DeFusco: Client charged with sexual conduct with a minor. Trial before Judge Katz ended August 06. Client found guilty. Prosecutor D. Macias.

James J. Haas: Client charged with sexual abuse. Trial before Judge Noyes ended August 03. Client found guilty. Prosecutor T. Doran.

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August 04

Wesley E. Peterson and J. Scott Halverson: Client charged with 2nd degree murder. Trial before Judge Noyes ended August 12. Client found guilty of manslaughter (dangerous). Prosecutor B. Clayton.

August 10

Thomas M. Timmer: Client charged with burglary and aggravated assault. Trial before Judge Dougherty ended August 15. Client found guilty and not guilty, respectively. Prosecutor M. Spizzirri.

August 11

Robert C. Billar: Client charged with sale of narcotic drugs. Trial before Judge Pro Tempore Sterling ended August 11. Client found not guilty. Prosecutor R. Knapp.

August 13

Larry Grant: Client charged with possession of narcotic drugs. Trial before Judge Campbell ended August 17. Client found guilty. Prosecutor B. Bayer.

Daniel G. Sheperd: Client charged with aggravated assault, theft and possession of narcotic drugs. Trial before Judge Hotham ended August 13. Client found not guilty of aggravated assault and guilty of theft and possession of narcotic drugs. Prosecutor Rodriguez.

August 14

Timothy J. Agan: Client charged with attempted murder and aggravated assault. Trial before Judge Galati ended August 19. Client found guilty of attempted murder and not guilty of aggravated assault. Prosecutor D. Baldwin.

August 17

Cecil P. Ash: Client charged with aggravated DUI. Trial before Judge Portley ended August 06. Client found guilty. Prosecutor C. Smyer.

Robert C. Billar: Client charged with robbery and forgery (two priors). Trial before Judge Dann ended August 19 with a hung jury on the forgery charge; client found guilty of lesser, included offense--misdemeanor theft. Prosecutor R. Nothwehr.

Louise Stark: Client charged with possession of narcotic drugs for sale. Trial before Judge Dougherty ended in a mistrial (state's direct) August 19. Prosecutor R. Knapp.

August 18

Daniel G. Sheperd: Client charged with aggravated DUI. Trial before Judge Noyes. Client found not guilty. Prosecutor J. Burkholder.

Stephen J. Whelihan: Client charged with aggravated DUI. Trial before Judge Brown. Client found guilty. Prosecutor Z. Manjencich.

August 20

Vonda L. Wilkins: Client charged with possession of narcotic drugs and possession of drug paraphernalia. Trial before Judge Grounds ended August 25. Client found guilty and not guilty, respectively. Prosecutor J. Martinez.

August 24

Elizabeth S. Langford: Client charged with aggravated assault of a police officer and simple assault. Trial before Judge Katz ended August 27. Client found not guilty. Prosecutor J. Beatty.

August 26

Constantino Flores: Client charged with theft (two priors). Trial before Commissioner Colosi ended August 28. Client found not guilty. Prosecutor J. Charnell.

August 27

Dan Lowrance: Client charged with aggravated DUI (with priors, while on probation). Trial before Judge Bolton ended August 28 with a judgment of acquittal. Prosecutor J. Burkholder.

August 31

Robert F. Ellig: Client charged with burglary. Trial before Judge Hilliard ended September 03. Client found guilty. Prosecutor Rodriguez.

Kimberly A. O'Connor: Client charged with sale of narcotic drugs. Trial before Judge Hertzberg ended September 02. Client found guilty. Prosecutor J. Wendell. ^

Training Calendar

If you have a training idea or program that you would like to see instituted, please feel free to pass it on to anyone in our Training Division. We are particularly interested in knowing about speakers you think could enhance the level of practice in the office. We are also interested in concepts for seminars.

The office is planning several seminars for the near future. "Protecting Our Clients With the Bill of Rights" will focus on enhancing motion practice and summarizing recent U.S. Supreme Court and Arizona cases. This presentation is scheduled for December.

"DUI 1993: New Year, New Issues" will explore issues on the cutting edge in DUI defense. This seminar is tentatively scheduled for January.

"Trial Skills: Opening, Cross, Close" will be a variation on a program instituted in our office's new attorney training. "Open, Cross, and Close" are the mainstay of a criminal practitioner's weapons for successful defense. The office will seek out experts in each area to share the secrets of "the best" at these trial skills. This seminar is scheduled for March.

"Impeachment & Exhibits" will tackle the nuts and bolts of successfully impeaching witnesses. New ideas for impeachment under the constraints of victims' rights will be a topic. Also, we will address getting in exhibits and using demonstrative evidence. This presentation should be ready by early April.

The office also is working on long-range plans to institute our own public defender trial college. While still in the initial planning stages, our goal is to host the "First Annual Maricopa County Public Defender Trial College" in late spring of 1993.

In May, the office will sponsor a seminar featuring ethics. Presently, the topic is scheduled to be "Conflicts of Interest for Criminal Law Practitioners: What's the Standard?"

Lastly, an "Affirmative Defenses: Putting on the Client's Case" seminar is in the works. This presentation will explore affirmative defenses, e.g., entrapment and self-defense.

October 09

The MCPD Office will present a state-wide sponsored seminar, "Practicing Under the Gun: Strategies for Fighting Back." Mara Siegel, Robert Guzik, Annabelle Whiting Hall, Joseph Johnson and Robert Doyle will speak on topics such as jury selection, out-of-state witnesses, development of a defense, investigations on a low budget, motions and ethics. The seminar will be held in the Supervisors Auditorium from 9:00 a.m. to 4:15 p.m.

October 21

The MCPD Office presents "Legal Issues for Support Staff" from 9:00 a.m. to 11:00 a.m. in the Training Facility. Attorneys Mara Siegel and Christopher Johns will present important legal issues for support staff, including maintaining confidentiality, serving as attorneys' agents, understanding basic legal issues, recognizing the limits on information given over the telephone, and other related issues.

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Personnel Profiles

On September 21st, Kimberly Martinez started as a legal secretary in Trial Group D. Kimberly previously worked in a similar position at the Los Angeles County District Attorney's Office. She also was employed for two years as a mail carrier/clerk with the United States Postal Service and for four years as a customer service representative with Southern California Gas Company.

As of September 28th, Patrick Sharritts will be one of our process servers. Prior to coming to our office, Patrick worked as a process server for Hawkins & Campbell where he was employed for 11 years.

BULLETIN BOARD

Subscriptions

Notice to our Subscribers: The *for The Defense* subscription year will end September 30. Those interested in having uninterrupted delivery of the newsletter should renew their subscriptions now. Subscriptions are still only \$15.00 per year, running from October 1 through September 30.

MCPD T's

T-shirts for our staff were designed recently, and a trial run of the shirts proved them to be popular items. So, we are offering the shirts again.

The T-shirts are Hanes, 100% cotton, Beefy T's. Each shirt has royal blue lettering with "Maricopa County Public Defender's Office" printed on the front left pocket area. (NOTE: there is no pocket on shirt). On the back of the shirt, *for The Defense* is printed in royal blue. The shirts are \$12.00 each and may be ordered in white or gray -- sizes S, M, L, XL and XXL.

To order, please contact Georgia Bohm before October 15. Orders must be prepaid. Any money left over from the purchase of the shirts will go into the office's "Holiday Party" fund.

Our next project may be MCPD "Decoder" Rings!

NEEDED: Clothing Items

Belts, shoes and men's slacks are needed for our Client Clothing Closet. Long-sleeved shirts always are appreciated, also. The closet continues to be a boon for our clients. Janet Blakely has done an exceptional job organizing the donated items and maintaining them for wear. Remember, any donations are tax-deductible.