

for The Defense

Volume 6, Issue 9 ~ ~ September 1996

The Training Newsletter for the Maricopa County Public Defender's Office ~ Dean Trebesch, Maricopa County Public Defender

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If a jury submitted this question a few centuries ago, the jurors would have been dismayed to learn that they would remain in deliberations "without meat, drink, or candle" until a unanimous verdict was reached.¹ One can only imagine the coercive tactics the holdout juror would be subjected to by eleven angry--not to mention hungry and thirsty--men eager for a verdict. Times have changed a bit--or have they?

While juries today will not be denied food, water or sleep in order to force a verdict, coercion can still find its way into the jury room. There is one particular situation that creates a coercive environment: When a jury claims to be deadlocked, discloses its numerical division, and thus reveals that a holdout or two are preventing a unanimous verdict.²

As recently as 1994 the Arizona Supreme Court recognized that when the numerical division of a deadlocked jury becomes known to the judge, a coercive situation arises when the division is substantial:

'[F]rom a pragmatic standpoint, when such a division is announced and eleven [here, seven] pairs of eyes turn to look at the single holdout, it is impossible to conclude that the juror was not subjected to pressure. . . .'³

What should defense counsel do when a jury claims it is deadlocked yet in the same breath reveals it is one or two votes shy of a unanimous verdict of guilty?

Obviously, the first order of business is to move for a mistrial. If the court denies the motion and decides to have the jury deliberate further, then counsel needs to do whatever is possible to keep the minority from caving in.

To do this, request that when the court instructs the jury to deliberate further, the court give the following cautionary instruction:

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Odd Man Out: When Juries Reveal That Someone Is Holding Out For Acquittal

by Lawrence S. Matthew
Deputy Public Defender--Appeals Division

*We are deadlocked--eleven votes for
guilty, one vote for not guilty.
What do we do now?*

----A note from the jury.

No member of this jury should surrender his or her honest convictions for the sake of reaching a unanimous verdict.

You may now return to the jury room to consider the instructions I have just given you.

The second paragraph of this instruction is listed solely to stress my belief that it is best to have the cautionary instruction read last. I think it is best to have the last words spoken be the ones that reinforce the minority's obligation not to capitulate to the sheer weight of numbers against them.

As authority for this instruction, counsel can direct the court to the following statement of the Arizona Supreme Court:

[W]henever further deliberations are ordered, it would be sound practice to remind the jurors that they are not to surrender their honest convictions for the purpose of reaching a verdict. . . .⁴

This language comes from a case where the numerical division of the jury became known to the judge and further deliberations were ordered.

If more reasons are needed to convince the judge to

While juries today will not be denied food, water or sleep in order to force a verdict, coercion can still find its way into the jury room.

give the instruction, counsel can point out that if the jury returns a guilty verdict soon after being sent back to deliberate, a primary focus of a "coerced verdict" argument on appeal will be the judge's failure to give the requested instruction.⁵

Finally, counsel should be aware that the Arizona Supreme Court recently promulgated a new rule⁶ specifically designed for unlocking deadlocked criminal juries. The rule is aptly titled: "Assisting Jurors At Impasse."⁷ The rule reads as follows:

If the jury advises the court that it has reached an impasse in its deliberations, the court may, in the presence of counsel, inquire of the jurors to determine whether and how court and counsel can assist them in their deliberative process. After receiving the jurors' response, if any, the judge may direct that further proceedings occur as appropriate.⁸

To accomplish what is set out in the rule, a suggested instruction is contained in the comment to the rule.⁹ Regardless of whether the instruction from the comment is given or not, when faced with a small number of jurors holding out for acquittal, **always** request that the court give the cautionary instruction advising the jurors not to surrender their honest convictions merely for the purpose of reaching unanimous agreement.

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Editor: Russ Born

Assistant Editors: Georgja Bohm
Jim Haas
Ellen Kirschbaum
Sherry Pape

Office: 11 West Jefferson, Suite 5
Phoenix, Arizona 85003
(602) 506-8200

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

1. W. Blackstone, *Commentaries* 375.

2. Usually, disclosure is inadvertent. Judges are strongly discouraged from inquiring about the numerical division of the jury. See, *State v. Roberts*, 131 Ariz. 513, 642 P.2d 858 (1982) (Arizona Supreme Court condemns the practice of judicial inquiry into the numerical division of the jury).

3. *State v. Lautzenheiser*, 180 Ariz. 7, 10, 881 P.2d 339, 342 (1994), quoting, *State v. Roberts*, 131 Ariz. 513, 517, 642 P.2d 858, 862 (1982) (Feldman, J., dissenting).

4. *State v. McCutcheon*, 162 Ariz. 54, 60, 781 P.2d 31, 37 (1989), quoting, *State v. Roberts*, 131 Ariz. 513, 517-18, 642 P.2d 858, 862-63 (1982).

5. *State v. Lautzenheiser*, 180 Ariz. 7, 10, 881 P.2d 889, 892 (1994) (Whether or not a cautionary instruction is given is one of the circumstances to be considered in determining whether a verdict is coerced).

6. Rule 22.4, Arizona Rules of Criminal Procedure.

(cont. on pg. 3) 

7. *Id.*

8. *Id.*

9. The suggested instruction reads as follows:

This instruction is offered to help your deliberations, not to force you to reach a verdict. You may wish to identify areas of agreement and areas of disagreement. You may then wish to discuss the law and the evidence as they relate to the areas of disagreement.

If you still have disagreement, you may wish to identify for the court and counsel which issues or questions of law or fact you would like counsel or court to assist you with. If you elect this option, please list in writing the issues where further assistance might help bring about a verdict.

I do not wish or intend to force a verdict. We are merely trying to be responsive to your apparent need for help. If it is reasonably probable that you could reach a verdict as a result of this procedure, it would be wise to give it a try.

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WE ARE THE CHAMPIONS MY FRIEND: The Vision and Goals of the New Training Director

by Russ Born
Training Director

Way back in 1978, after graduating from Loyola Law School and joining the Cook County Public Defender's Office in Chicago, I was more than a little naive about the criminal justice system. Especially the real roles played by prosecutors, police, judges and criminal defense attorneys.

Now, after having spent my entire career as a public defender (except for a short stint as a prosecutor), the naiveté has worn off. But the one thing that has not changed and has actually grown stronger over the years is my belief that public defenders, as well as other criminal defense attorneys, are champions in the true sense of the word.

This is especially true in today's climate. The very people who are to be the protectors and guardians of our constitutional rights stretch to find "good faith" exceptions for violations of those same precious rights. Exceptions founded upon the "good faith belief" of some,

who are so hardened or jaded, that they no longer believe in the system and so constantly try to dilute the very rights they were sworn to protect.

These indeed are difficult times to be a criminal defense attorney. If you don't play by the rules it may cost your client his liberty, and you, your license.¹ Yet, when others violate the rules, courts will bend over backwards to find "harmless error"² or decide that a particular rule does not mean what it clearly says!³ This is a time when a defense attorney must object precisely and exactly, otherwise a court will claim the attorney waived the error. It is a tough time to be a champion.

Whenever I am conducting a trial, it is a standing joke with my friends to have someone ask me what I am doing. My automatic reply is always "I am on trial." Someone who is not familiar with this reply will say "you mean you are in trial?" At that point a friend interjects with "No! Russ is on trial. It's a Chicago expression." Chicago expression or not, the truth of the matter is that every time a criminal defense attorney goes to trial, that attorney is "on trial."

Every move, every word, every expression a defense attorney makes is noticed, analyzed and evaluated by everyone in the courtroom from the jury on down to the judge. As is the nature of our practice, we are often granted the luxury of being scrutinized a second time at the appellate level. Once again, you, the trial attorney, are "on trial." Your performance or non-performance, as the case may be, is judged in a sterile environment where the goal is to preserve the status quo. In those cases where there are good reasons to upset it, hopefully you, as a trial lawyer, have provided the appellate lawyers with the tools to get the job done.

Providing lawyers with the tools and knowledge to remain or become champions is what training is all about. The goals of training are not just geared towards trial advocacy, but all aspects of being a good ethical criminal defense attorney.

Training must span all levels of the spectrum, helping to keep the experienced attorneys on top and providing opportunities for newer lawyers to develop their skills, confidence and expertise to become respected advocates. *It's not so much about winning, as it is about training champions.*

Since I assumed the job of training director in June of this year, we have already conducted two training sessions for new attorneys. During both three-week sessions, we had *fifty* different people involved in the training process. Attorneys from the office volunteered their time to research and teach topics such as Batson, remand motions, speedy trial, 404B, search and seizure,

...the truth of the matter is that every time a criminal defense attorney goes to trial, that attorney is "on trial."

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making a record, etc. Probation, Pre-trial Services Agency, the Maricopa County Jail, Glendale Justice Court and Co-Jet have all participated in the new attorney training. Judging from our evaluation forms and other feedback, our training was well received.

Now the challenge is to provide the four or five statewide seminars required by the Supreme Court and at the same time address issues of concern to lawyers at all levels of expertise. We already have some topics in mind. On December 6th we will sponsor a seminar on Juvenile Sex Offenders. Thanks to Richard Kaplan, most of the preliminary work is done. Other seminar topics under consideration are an Arizona Death Penalty seminar in January of 1997, a Jury Selection and Issue seminar, our annual DUI seminar, a Search and Seizure seminar, and a Juvenile Dependency seminar. There will also be some shorter half-day seminars on current issues.

Our goal is to provide attorneys with relevant, timely seminars. In order to do that, we need to know what topics you want to see addressed.

A successful training program is judged by how effectively it serves the needs of all attorneys in the office and the defense community. Your ideas, thoughts and suggestions are welcomed.

¹*State v. Killean*, 185 Ariz. 270, 915 P.2d 1225 (1996)

²*State v. Paxton*, 216 A.A.R. 86 (1996); *State v. Towery*, 220 A.A.R. 3 (1996)

³*State v. Lee*, 217 A.A.R. 3, 917 P.2d 692 (1996)

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Juvenile Court Files and Confidentiality

by Karen Caraway
Deputy Public Defender--Juvenile Division

Rule 19.1, Rules of Procedure for the Juvenile Court, applies in all cases in which petitions or motions for transfer are filed on or after June 1, 1996. This rule replaces the "experimental" rule that went into effect October 25, 1994, and no longer contains language limiting the availability of the legal file.

The rule says that juvenile legal files "shall be open to inspection by the public without order of the court," although portions may be withheld upon a finding of "a clear public interest in confidentiality or the welfare of the victim" There is, however, no mechanism in place providing for notice to the juvenile, defense counsel or the victim that a request is being made to inspect the file. The burden is apparently on the parties to predict such requests. The legal file consists of "pleadings, motions, minute entries, orders or official correspondence to or from the court . . . and such other documents as the court, in its discretion, may deem necessary or advisable to include in the legal file."

The juvenile's social file remains confidential and is withheld from public inspection except on order of the court.

The social file, most commonly referred to as the "red file" in Juvenile Court because of the color of the file folder, contains social records including "diagnostic evaluations, psychiatric and psychological reports, medical reports, social studies, predisposition reports, probation supervision histories or any other records maintained as the work product of juvenile probation officers and staff for use by the Court in formulating and implementing a rehabilitation plan for the juvenile and his or her family."

When a juvenile is transferred to the adult court system from Juvenile Court, our office file is forwarded to the assigned trial group. This file is a compilation of legal and social file information, plus our own work product. The social file information remains confidential unless opened by court order or an express waiver by our client. If you, as a trial group attorney, have any questions as to what is legal file material and what is social file material, or the appropriate use of each, please do not hesitate to contact us for assistance.

(cont. on pg. 5) 

It has been reported to us at Juvenile Court that transfer summaries and psychological evaluations of the transferred client are often attached to the presentence feedback, the program is well-received. report by the Adult Probation Department. Unless the Court has ordered that those reports are no longer confidential, such attachment appears to be a violation of the rule. Defense counsel may seek to redact or seal the information, or perhaps the reports should be handled in a similar fashion as the defendant's criminal history, remaining confidential and not part of the public record.

We are often contacted by "downtown" attorneys and asked, "Can I get this juvenile file?" The answer is, "It depends."

◆ If the client is our adult client now, and was our juvenile client then, the file is accessible. If the client is ours now, but was not our juvenile client, some information is accessible.

◆ If you seek information regarding a victim or witness who has a juvenile file, but was not represented by our office, then the answer is, "No." We have no access to that file, except that the legal file regarding petitions dated after June 1, 1996 is available to anyone. The social file is confidential.

◆ If you seek information regarding a victim or witness who has a juvenile file and was, or is, our client, then we do have access to that file. A review of the file may then result in your knowledge of confidential information requiring that you file a Motion to Withdraw from your current case because of a conflict of interest. Of course, confidential information remains confidential and the motion should not include the juvenile's name, case number, petition date(s) or the information itself, but merely state that "there is confidential information" regarding a "witness" in the case which requires our withdrawal. This view is supported by the recent opinion in consolidated special actions 1CA-SA 96-0102 and 1CA-SA 96-0118 filed by Christopher Johns, Diane Enos and Chelli Wallace of this office.

◆ If you seek information regarding a victim or witness who has a juvenile file and has been represented by our office, but was most recently represented by OCAC (the Office of Court-Appointed Counsel is appointed on conflict cases), then we have access to the file, but may have a conflict of interest such that we should not exercise that access. Such situations would be evaluated on a case-by-case basis.

Many of these ethical issues are fairly clear if we simply remember that the juvenile divisions and the trial groups are all one office. Our clients are your clients, too. Ω

Back To The Future: Arizona Supreme Court Changes Lesser- Included Instruction

by **Russ Born**
Training Director

Recently the Arizona Supreme Court reaffirmed its faith in the jury process. Acknowledging the integrity and intelligence of jurors, the court abandoned the current lesser-included instruction, which required jurors to reach a unanimous not guilty verdict on the greater charge before considering the lesser.

We are often contacted by "downtown " attorneys and asked, "Can I get this juvenile file?" The answer is "It depends."

In State v. LeBlanc, 224 A.A.R. 47 (1996), the court rejected the unanimous verdict language, considering it an attempt to "micromanage the deliberations and discussions" of the jurors. After a logical and thorough discussion of the issues, the court concluded that a "reasonable efforts" lesser-included instruction would better serve the ends of justice.

Although attorneys and judges may think this is a drastic change, it is not a radical departure from the past. As the opinion points out, the "reasonable efforts" procedure was the law in Arizona prior to 1984. The opinion also points out that this is a procedural change and therefore its application is prospective. Although courts are instructed to start using the "reasonable efforts" instruction no later than January 1, 1997, defense counsel should start requesting it immediately.

The lone dissent by Justice Martone acknowledges a wide divergence of opinion on the "reasonable efforts" language versus the "unanimous verdict" language. The dissent notes that of the courts that have addressed the issue, a majority of them have approved the "acquittal first" approach.

This is factually correct if you limit the criteria to states that have "addressed the issue" i.e. have an

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appellate opinion on the issue.

However, a majority of all the states use a reasonable efforts type approach or some hybrid thereof.

Arkansas¹, Alabama², and the 9th Circuit³ use a lesser-included instruction which tells the jury they can consider the lesser-included offense if they have a reasonable doubt as to guilt on the greater. The District of Columbia, Florida, Illinois, Indiana, Iowa, Kentucky, Maine, Massachusetts and Minnesota use a hybrid of the reasonable effort approach. Minnesota in its comments section specifically warns against using the "unanimous verdict" language when instructing the jury on lesser-included.⁴ This brings us to the question of how should the instruction read?

Obviously, if an instruction is easier to understand, fewer questions will be generated concerning its interpretation. This is where the "reasonable efforts" language excels. Every jury is capable of determining for themselves whether or not they have used "reasonable efforts" to reach a verdict. "Reasonable efforts" is an easily understood concept and is fluid enough to fit the needs of every jury. Incorporating the reasonable efforts language as part of the instruction creates a simple concise lesser-included instruction.

The crime of aggravated assault includes the less serious crime of disorderly conduct. You may find the defendant guilty of the less serious crime of disorderly conduct if after reasonable efforts, you cannot reach a verdict on the greater charge.

Most criminal defense attorneys would agree that the "unanimous verdict" language has been a constant source of hung juries. It will be interesting to see if the new instruction produces fewer hung juries in 1997.

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¹Arkansas, A.M.I. Crim. 301, 302

²Alabama, A.P.J.I. 1.5

³9th Cir. Crim. Jury Instr. 8:03A 1995 3.13

⁴Minnesota, CRIM. J.I.C. 3.20

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An Appealing Myth:

The truth about transcripts, the record and other trial phenomena up close and personal

by Christopher Johns

Deputy Public Defender--Appeals Division

My tongue is the pen of a ready writer.

Psalms 45:1

[Appeal:] *In law, to put the dice into the box for another throw.*

-Ambrose Bierce

The Devil's Dictionary

I don't often write in the first person, but it's necessary for this piece. This is personal. I'm already getting testy about the "RECORD" and I've read less than a dozen trials (from in and outside our Office). My hat's

off to my appellate brothers and sisters who have been doing this a lot longer. They've learned to jettison control and cultivate stoicism. I finally understand what they've been preaching all these years. Amen and hallelujah.

I suppose, however, my misconceptions about our appeals section and the efficacy of record making were inevitable. From my first day in the Office in March 1988, "the record" has been the trial lawyer's shibboleth: "Make your record." Don't forget to "protect the record." Judge, "I just want to make a record." "For the record I'm objecting to being thrown out of the courtroom." And, "Can we have the court reporter to make a record?"

Somewhere on the elevator to the courtroom, however, the lawyer culture that extols the record gets lost. If it's the trial lawyer gospel, the congregation isn't going to be saved. Although the magic words themselves aren't needed, you'd be surprised how infrequently a useful appellate record gets made. For the record, "for the record" itself is usually a meaningless phrase, more semantic fog than tool, for conjuring up Merlin's sword for appeal. What's important is the word "objection" and a short, concise basis for it.

When I started as a criminal trial lawyer in Group C, the Office's then smaller appellate section resided on the tenth floor. Ivory tower jokes about the appeals section permeated the trial groups like racist jokes at a Klan meeting. Who were those people? Burnt-out trial mavens? Erudite wanna-be judges? The toniest public defenders? There was an air of elitism about

(cont. on pg. 7) 

lawyers smart enough to be knighted to read transcripts all day and write 10,000 word appeals to save clients in courts of last resort. Hey, it looked easy.

It was rumored that appeals was a cushy job where they gave you a humongous office and law books to do your job. They even had their own library where cases like *Miranda*, *Boykin*, *Pearce*, and *Edwards* were tattered, yellow from time's ravages, not to mention dog-eared from use.

Oh yes, these were lawyers who actually had time to Shepardize cases. You could almost hear Mozart in the background and see Mont Blanc fountain pens hammering out histrionic John Hancocks. Cafe latte anyone? Nirvana. In "Arizona" terminology it was like hound dogs in the Hormel meat house.

Years later the appellate gurus were even the first to get computerized research and then computers. Imagine. If nothing else, it attested to their importance in the Office hierarchy. Their mission: like all lawyers--first do no harm and then save the client.

Many appellate lawyers also seemed older, Solomonesque, or at least Kafkaesque. Some like Adams, McGee, Prato, and Rummage had been supervisors in the trial trenches. They had survived trench warfare to mold *the law!*

Back then too, appellate lawyers (the actual culprits were unknown to trial grunts) published the mercurial *Unreal*, precursor to the present *for the Defense*. *Unreal* wittily memorialized appellate opinions and other nuances for the trial challenged. A cross between *Modern Maturity* and *Mad Magazine*, it made for interesting, even revelatory reading. You could sense a clandestine, crafty glee in its pages reminiscent of an underground school newspaper.

The point, of course, self-serving although it may seem, like most phases of lawyering, doing a good job as an appellate attorney is no less challenging or difficult than any other aspect of our profession. Each phase and aspect of lawyering has its own pluses and minuses--and stereotypes. I've quickly learned that doing an appeal is hard. Much harder than I thought it would be and with far less in return than trial lawyering. So it goes. Enough about the anointed ones.

Street angel, house devil

Juggling a caseload that seems to reproduce like amoebae in a dank pond as a trial lawyer isn't easy either. Since I've never stopped trying cases, at least until now, I always felt I was in touch with the daily frustrations of trial lawyers: justice court, getting into the jail, no interpreter, fighting for discovery, antagonistic clients, getting a good night's sleep, and obstreperous county attorneys to name but a few occupational hazards.

Overall, however, if you love the courtroom there is something so energizing about trying cases that many people get addicted. It's idiosyncratic, invigorating, and a gamble. The stakes are always high. And, compared to some forms of lawyering, it has a great deal of autonomy in theory and practice.

There are few areas of law, for example, where the decisions by the client are so limited and those of the lawyer so great. There are few rules and endless opportunities for creativity. The skilled trial lawyer is part buccaneer, peacemaker, visionary, parent, philosopher, poet, and thespian who must constantly shift from being pugnacious to generous. She must be honest but able to walk an ethical line because crime and punishment often are shades of grey and not black or white.

The difference between trial and appellate work is that appellate lawyering is like shucking oysters for a pearl. If the trial lawyer hasn't deposited a grain of sand for the appellate lawyer, no pearl is ever going to magically appear.

But the very best trial lawyers never lose sight of the big picture: win the trial. Plan B: do everything absolutely possible so that if I lose the trial the client's appellate lawyer can salvage the client's life or liberty on appeal. Bottom line: the best trial lawyers really do go to trial not only prepared, but with an appeal ensconced in their brain throughout *every* trial phase.

Like shucking oysters for a pearl

The difference between trial and appellate work is that appellate lawyering is like shucking oysters for a pearl. If the trial lawyer hasn't deposited a grain of sand for the appellate lawyer, no pearl is ever going to magically appear. That's why real trial lawyers are supposed to throw sand in the government's face. The appellate lawyer can't make a record for you. You may have the greatest issue in the world, but if you don't

The days of sandbagging are over. The die is cast long object, it probably isn't going anywhere but into

(cont. on pg. 8) 

the trash before I or any more competent appellate lawyer gets the case.

Literally, you can read thousands of pages of minute entries, motions, and most importantly trial transcripts and find nothing. Worse, to the former trial lawyer, it's like shadow boxing or watching *Friday the 13th Number 200,000*. Get out. No. Don't go in that room. No. Don't open that door! Why would you stay in a darkened house, alone, during a hurricane- force thunderstorm, knowing that your next-door neighbor was slashed to death by Freddie? Ouch. I could have told you that would happen. No, don't let them see you bleed. Object! How could you let the prosecutor say that? Hello. Is anybody home? Wake up. Hey you. Wake up. Have you ever heard of the CONSTITUTION?

You get the picture. Second-guessing. Monday morning quarterbacking.

Keep in mind

So. So what. So, with that off my chest, here are a few thoughts. I'm not going to pepper my discussion with law. If you want the law, Ed McGee, our own appellate cross between Pablo Neruda and Nietzsche (this is written for Ed with the highest respect and regard for his outstanding intellect and decency), assembled materials (as well as several other appellate lawyers) for our recent appellate seminar that includes many legal references to the same subjects. Frankly, they are excellent and I could never improve on them.

The opinions I'm expressing below are some salient factors or "bullets" to think about for possibly improving your craft (*see the accompanying chart on Page 7, included as part of the article*).

Law anticipation

Elementary. Sure, it's impossible to "know" the law. But surprisingly, more than a few judges and lawyers are completely flying blind. And I'm not talking esoteric stuff, but what the actual state of the law is for the charge to be tried.

This may come as a shock to some judges and lawyers, but the State Bar's Recommended Jury Instructions assembled by Division One Court of Appeals' Judge Rudy Gerber was published about seven years ago. There have been more than a few changes since then, although some judges continue to use outdated instructions. Even though an update is coming out soon on the instructions, it will literally be out of date on the day it's published.

Recommended in this case means exactly that. The RAJI's *are not* sanctioned by the supreme court. The court is free to agree or disagree with them. Although immensely helpful, the RAJI'S *may not be the law on the day your client goes to trial*.

Anticipating the law, of course, goes to more than jury instructions. Many appellate issues may only be preserved if you know some of the finer details or can anticipate where the courts are going. That's why the advance sheets are critical to review.

Lawyer conducted voir dire

I know the rules are new, but I've already reviewed trials after the rule's effective date where the trial court specifically asked counsel if they wanted voir dire and the answer was "no." Bluntly, in my humble opinion, lawyer-conducted voir dire in a criminal case is the single greatest tool for our client's advocacy since they stopped dragging the accused in chains and striped prison suits into the courtroom before the jury. Forget about extracting promises or even educating jurors about the case. The point is finding fair and unprejudiced jurors.

Put another way, how can an advocate possibly rationalize not trying to determine whether the fact finders are fair and impartial. I'd like to hear the reason at the Rule 32 hearing. "Well, I didn't really want to know if any jurors hated blacks even though my client was an African-American." Petition granted.

Batson is not dead

Despite recent dilution of *Batson*, it's not dead. A couple aspects of *Batson* litigation seemed to be overlooked. First, there is a good argument that Arizona's case law is more expansive than *Batson*. Every trial notebook should have a copy of our Arizona Supreme Court's decision in *State v. Cruz*. Why? Because *Cruz* is based on Sixth and Fourteen Amendment grounds. *Batson* is predicated on the Fourteenth Amendment alone. Arizona is free to provide more expansive protection for its residents.

Plus, although our client's interests are paramount, inherent in *Batson* litigation is the notion that each side is an independent attorney general for purposes of jury selection. In other words, you represent a juror's right to serve--particularly if that juror is one who has traditionally been excluded. That will probably inure to your client's benefit.

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Bench conferences

This is like beating National Velvet, Black Beauty, Trigger, and Mr. Ed--very dead horses. Unless you're asking to use the ladies' room, bench conferences should be on the record. Even then, permission to go to the rest room might need to be on the record if the judge denies your request. If it's important enough to stop the trial, the court reporter needs to be there. Period.

In the last six weeks alone I've read "and a discussion was held off the record" more times than Michael Jordan has fans. Most of the time they are indeed right at a sensitive or crucial point in the trial. The point where the appellate lawyer may have had an issue for your client on appeal. The law is in your favor for a contemporaneous record. Use it. If the court denies you the right to make a record, it is denying your client effective assistance of counsel under the Arizona and U.S. Constitutions.

Objections

In my opinion, politically incorrect or not, it is an old wives' tale that you can object too much. Jurors expect it. It's like going to a ball game where no one ever gets a hit. Barry Scheck objected 62 times during Marcia Clark's closing. He didn't lose.

Remember Brendon Sullivan of "I'm not a potted plant" fame at the congressional hearings. It's more important than ever not to have moss on your shoes. Yes, you can lodge objections to the judge's questions. If jurors ask questions, a record needs to be made of your objection, too.

Pet peeves

Strike that

Like everything in this article, this is opinion only. Maybe it's not even important. On the other hand, perhaps it's the kind of nuance that makes lawyers aware of the record. Example: This is what "strike that" looks like in the record:

MR. LAWYER: Now, Mr. Goofy, you say Officer Wurfel never--strike that.

In other words, court reporters don't strike that. It's lawyer talk that's foreign to your jury. Be human. If you have to use big jargon maybe "let me rephrase that" is for you. Maybe "excuse me" or simply saying that you need to ask the question in a better fashion might be more human to jurors.

Complete sentences

Lawyers are wordsmiths. Complete or nearly complete sentences are preferred.

MR. LAWYER: Judge, what I mean, ah, is that, you know, the court should follow that case I talked about, but if not. . . .

Huh? What case? If you are going to cite cases, especially if you have a case that stands for the proposition that should have made you win a ruling, make sure you have the correct case and citation.

Estimations

MR. LAWYER: Is this the gun he had?

WITNESS: Yes.

MR. LAWYER: How far away were you?

WITNESS: From about me to you.

MR. LAWYER: So, you were pretty close? You get the picture?

Ideas for improving the record and the case

The portable trial notebook

There are really two types of trial notebooks. One consists of the stuff you assemble for a particular trial. It includes your opening, closing, cross, direct, departmental reports, interview transcripts, etc.

The trial notebook that needs to be created "for the record" is different. This notebook goes with you to every trial (I've been working on improving my "generic" notebook as I call it for years [unfortunately, a recent move has rendered it missing in action]). In it are sections on voir dire, jury selection, offers of proof, special and re-occurring hearsay issues (which I'm terrible at), Fifth Amendment issues, closing, etc.

The notebook has cases and rules in it that support typical defense issues. If a *Batson* issue arises I have a short outline with the elements and the *Arizona* and *federal* cases (it's essential to state independent state grounds and to federalize claims [for habeas purposes]). Keeping a generic trial notebook can help create a record as well as win the point at that moment.

Consciously use storytelling & emotion

One of the many things you start to notice after reading appeals is that communication is everything. There are a million ways to communicate as long as it is effective. Passionless, plain, factual recitations to jurors

(cont. on pg. 10) 

who are used to a sound-bite culture and television lawyers who can deliver a cogent opening or closing in just a few minutes are now the norm.

The underlying mantra of such communication is theory of the case. It's crucial. The ability to convert the issues into universal human truths, frailties, desires, and emotions. No matter how hopeless a case may seem, most have a theory somewhere that can be tapped into.

Another way of looking at your case theory is through the art of storytelling. There's even a magazine now called *Storytelling*. I know I've never been able to tell a joke. But I can tell a story and with practice (obviously) anyone can. Unfolding the case from a story format, with point of view and painted pictures, is crucial because it is the best way to infuse emotion into a trial. The use of emotion may be the difference between winning and losing. As Andrea Lyon (a master of using emotion in trials) says, "Your job is to give the jurors permission to find your client not guilty."

Maybe I'm a frustrated Spielberg, Sayles or Mamet, but it helps me to envision openings and closings as a movie or play that I get to script beforehand. That allows me to think about the stage directions and the emotions I want to try to tap into. I ask myself, *how do I want the jurors to feel after my opening or closing?*

Prepare jury instructions far enough in advance to have them reviewed by other defense lawyers

Everyone says there isn't enough time for our jobs. But jury instructions are so important to the trial itself that they warrant special prominence in preparation. Personally, I like to start preparing them first when I receive or determine a case is going to trial. I especially like to look at the federal and other state instructions and compare them to Arizona's.

While I'm doing research on the case, I keep a special file for instructions. After all, it is the instruction as much as the statutory charge(s) that dictate the case--theory--defenses--the emotion and so on.

Preparation in advance may also allow the trial attorney time to have team members or even the appellate lawyer of the day to look at what you have and note issues or incorrect statements of law that may be potential appellate issues.

Object to Allen charges

When it comes to re-instructing the jury, make a record. Frequently, when juries are deadlocked, judges, understandably eager to obtain a verdict, improperly re-

instruct juries (approved of in the 1896 case of *Allen v. U.S.*). Defense counsel should almost always object to an *Allen* charge. The issue is whether the judge's instruction is coercive and denies the client of an independent jury.

Final thoughts

It's been said that appellate practice often requires a keen grasp of legal technicalities (whew, I'm in trouble). Great trial attorneys are said to have an uncommon sense about human nature. Perhaps there is some truth to the stereotypes. For the client, however, the best lawyer for trial and appeal has cultivated both skills.

An anonymous story sums it up: Once a lawyer was arguing a case before three lord justices in the court of appeal, dealing with an elementary point of law at inordinate length. Finally, the master of the rolls, who was presiding, intervened, "Really," he protested, "do give this court credit for some intelligence." Quick as a flash came the reply, "That is the mistake I made in the court below, my lord."

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Making the Record for a Criminal Case

PRETRIAL	TRIAL	POST-TRIAL
<p>* PLEADINGS</p> <p><i>file Notice of Defenses</i></p> <p>* MOTIONS</p> <p><i>court reporter present</i></p> <p><i>record of all rulings</i></p> <p><i>request for reason or rationale for court ruling</i></p> <p><i>objection clearly stated</i></p> <p><i>supporting memoranda filed</i></p> <p><i>offers of proof</i></p> <p><i>review minute entries & orders for accuracy</i></p>	<p>* OBJECTIONS</p> <p><i>timely, specific to questions, answers, jurors, judge, opening, closing</i></p> <p>* ANTICIPATION</p> <p><i>subpoena & voir dire jurors, witnesses, discovery motions, sanctions on record</i></p> <p>* CURATIVE</p> <p><i>move to strike answers</i></p> <p><i>request curative instructions yourself</i></p> <p><i>request reconsideration prejudicial rulings</i></p> <p>* OFFERS OF PROOF</p> <p><i>what expert would say, support with memo</i></p> <p>* INSTRUCTIONS</p> <p><i>request/draft own</i></p> <p><i>make complete record; object to <u>Allen</u> charges</i></p>	<p>* MOTIONS</p> <p><i>new trial on basis</i></p> <p><i>-juror misconduct</i></p> <p><i>-prosecutor misconduct</i></p> <p><i>-investigation</i></p> <p><i>-new evidence</i></p> <p>* OTHER</p> <p><i>-stay sentence execution</i></p> <p><i>-special action relief unusual case</i></p> <p>* CLIENT</p> <p><i>explain appeal consequences</i></p> <p><i>file timely notice of appeal</i></p> <p>* NEW COUNSEL</p> <p><i>document appeal issues</i></p>

Prepared by Christopher Johns 1996

AUGUST, 1996
Jury & Bench Trials--Office of the Legal Defender

Dates: Start/Finish	Attorney	Invstgr.	Judge	Prosecutor	CR# and Charge(s)	Class F/M	Dang.	Priors	On Prbtn./ Parole	Result (w/ hung jury, # of votes for not guilty / guilty)	Bench or Jury Trial
August 1-19	Scott Allen	Soto	Araneta	Martinez	CR95-92466(b) Murder I	F1				Guilty, Murder 2d degree	Jury

AUGUST, 1996
Jury & Bench Trials--Group A

Dates: Start/Finish	Attorney	Invstgr.	Judge	Prosecutor	CR# and Charge(s)	Class F/M	Dang.	Priors	On Prbtn./ Parole	Result (w/ hung jury, # of votes for not guilty / guilty)	Bench or Jury Trial
August 1-2	Jerry Hernandez		Dunevant	Garner	CR96-03559 Aggravated Assault	F6				Not Guilty	Jury
August 2-2	Cary Lackey		Barclay	Gorman	MCR95-02635 Interfering with Judicial Proceedings	M1		✓	Prbtn.	Not Guilty	Bench
August 6-6	Jerry Hernandez	N. Jones	Yarnell	Amato	CR96-00997 Failure to Register as a Sex Offender	F6				Not Guilty	Bench
August 6-6	Peg Green		Dunevant	Clarke	CR96-03308 2 cts. False Imprisonment 1 ct. Threatening and Intimidating	F6 M1				Not Guilty	Jury
August 15-19	Peg Green		Campbell	Sorrentino	CR95-11229 Possession of Dangerous Drugs	F4				Not Guilty	Jury
August 26-28	Patricia Ramirez		Yarnell	Hicks	CR96-04449 Sale of Crack	F2		2	✓	Guilty	Jury
August 26-30	Kristen Curry		Mangum	Lawritson	CR95-10057 Aggravated DUI	F4				Hung (6 guilty/2 not guilty)	Jury

August, 1996 Jury & Bench Trials--Group B

Dates: Start/Finish	Attorney	Invstgr.	Judge	Prosecutor	CR# and Charge(s)	Class F/M	Dang.	Priors	On Prbn./ Parole	Result (w/ hung jury, # of votes for not guilty / guilty)	Bench or Jury Trial
August 5 - August 8	Tim Agan Kamin (co- counsel)		McDougall	Kane	CR95-09114 Stalking Harrasment	F5 Misd.				Not Guilty Guilty	Jury
August 6 - August 14	Colleen McNally Navidad (co- counsel)	R. Corbett	Campbell	Charnell	CR96-00410 Burglary 2nd degree	F3	✓			Hung jury (8-4)	Jury
August 14 - August 15	John Taradash		Ryan	Dion	CR95-07704 Sell Crack Cocaine	F2		✓		Guilty	Jury
August 13 - August 14	L. Grant		Martin	Blake	CR95-00514 Theft	F3				Guilty	Jury
August 16 - August 22	Peggy LeMoine	P. Kasieta	Schafer	Mesh	CR96-034185 Resist Arrest	F6		✓	✓	Guilty	Jury
August 20 - August 28	Colleen McNally	D. Ames	Arellano	Kelly	CR96-01228 Aggravated Assault	F3	✓			Guilty of Lesser included: Assault, class 2 Misd.	Jury

**AUGUST, 1996
Jury & Bench Trials--Group C**

Dates: Start/Finish	Attorney	Invstgr.	Judge	Prosecutor	CR# and Charge(s)	Class F/M	Dang.	Priors	On Prbtn./ Parole	Result (w/ hung jury, # of votes for not guilty / guilty)	Bench or Jury Trial
July 24-29	Frank Sanchez and James Leonard	L. Clesceri	Hendrix	Gann	CR95-93549 Agg DUI	F4				Guilty	Jury
July 29- August 8	James Leonard	M. Breen	Hendrix	Puchek	CR96-91093 Agg. Aslt on Police Ofc. Threatening & Intimidating Criminal Trespass	F5 M1 M1		1	✓	Not Guilty of Agg. Assault and Threat. & Intim. Guilty of Crim. Trespass	Jury
August 1-19	Ray Schumacher	G. Beatty	Araneta	Martinez	CR95-92466 Murder	F1	✓			Not Guilty Murder 1; Not Guilty 2nd Deg. Murder; Guilty Manslaughter	Jury
August 16-16	Diana Squires		Johnson E. Mesa Justice Court	Baker	TR95-6298CR DUI	M1				Not Guilty	Jury
August 21-28	Paul Ramos	G. Beatty	Scott	McIlroy	CR96-90905 2 cts. Kidnapping 1 Ct. Agg. Assault 1 Ct. Armed Robbery	F2 F3 F2	✓ ✓ ✓			Mistrial--juror problems	Jury
August 23-24	Ron Rosier and Paul Ramos		Ore Tempe Justice Court	Gingold	TR96-00124 DUI	M1				Not Guilty	Jury

AUGUST, 1996 Jury & Bench Trials--Group D

Dates: Start/Finish	Attorney	Invstgr.	Judge	Prosecutor	CR# and Charge(s)	Class F/M	Dang.	Priors	On Prbn./ Parole	Result (w/ hung jury, # of votes for not guilty / guilty)	Bench or Jury Trial
July 15-18	Nancy Hines Bob Billar	Barwick	Gerst	Morden	CR-95-10162 1Ct Burglary	F4				Guilty	Jury
July 1-3	Marci Hoff	Velasquez	D'Angelo	Myers	CR-96-03300 1Ct Theft	F6		✓		Guilty - Unauthorized Use Lesser Included of Theft	Jury
August 5-6	Gary Bevilacqua		Gerber	Taylor	CR-96-12223 Possession of Cocaine	F4		✓		Not Guilty	Jury
August 9	Gary Bevilacqua	Barwick	Rogers	Taylor	CR-95-12243 1Ct Possession Narcotic F/Sale, 1Ct Transportation of Narcotic Drug, 1Ct Possession of Narcotic Drug, 1Ct Possession of Drug Paraphernalia, 1Ct Escape	F2 F2 F4				Not Guilty Not Guilty Directed Verdict Guilty Not Guilty	Jury
August 14-14	Dee Nickerson		Cates	Barrett	CR-96-04992 1Ct Armed Robbery	F2		✓	✓	Plead (after jury selection) to F6N Disorderly Conduct (With No Priors/No Agreements)	Jury
August 14-14	Mimi Allen		MacBeth	Holtry	TR-96-02749 Driving on Suspended License					Not Guilty	Bench
August 19-21	Daniel Carrion		Rogers	Davis	CR-96-011239 2Cts, Agg DUI	F4 Both Cts.				Guilty Both Counts	Jury
August 19-23	Jerald Schreck	S. Bradley	Gerst	Gialketsis	CR-96-03568 2Cts Aggravated Assault	F3	✓			Guilty 1Ct Aggravated Assault Not Guilty 1Ct Aggravated Assault	Jury

Editor's Note: July-August Trial Results

Regular readers of *for The Defense* know that we do not usually comment on trial results. We present the results and let them speak for themselves, win, lose or draw. However, the results of the last two months are too remarkable to go without, well, some kind of remark.

We generally "win" 30 to 40% of our trials, counting not guilty verdicts, hung juries, and substantially lesser-included offense convictions as "wins". That is a remarkably high win rate for any criminal defense firm. However, in July and August, our win rate jumped to nearly 62%! During that time period, our attorneys conducted 55 trials, 51 of which were jury trials. The results were as follows: 20 not guilty verdicts; 7 hung juries; 6 convictions for lesser-included *misdemeanors*; and one manslaughter conviction in a first degree murder case. Only 21 cases resulted in guilty-as-charged verdicts, and many of them included not guilty verdicts on some counts.

These results speak volumes about our attorneys and support staff. Our office continues to provide exceptional representation to our clients, and to obtain extraordinary results, even under the most difficult of circumstances.

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Filling The Shoes

by Dean Trebesch
Public Defender

Several months ago, Georgia Bohm, our long time "training guru" informed us that she was admitted to law school. She since has joined A.S.U.'s ranks as an industrious, albeit stressed, law student. We all knew that it would be difficult to fill Georgia's shoes, but I am delighted to say that our recruitment process was a success.

On September 9, our new Training Administrator, Ellen Kirschbaum, began what we expect will be a long and mutually beneficial career with this office. Ms. Kirschbaum holds a B.S. in Business Administration from A.S.U. and brings to her new position many years of County and criminal justice experience. For some, her face may be familiar. She spent the past nine years employed in the Sheriff's Office. As their Inmate Services Manager, Ellen spent

untold hours working to provide special services to inmates, many of whom were our clients. She was responsible for developing and directing Inmate Programs, including Religious Services, the Inmate Library, substance abuse and vocational programs, and the Hearing Officer and Jail Volunteer Units. Prior to her work at the Sheriff's Office, Ellen was employed for nine years in the County Attorney's Office working in Administration and Child Support Enforcement.

Ellen is active in the community serving as a member of the Cactus Pine Girl Scout Board of Directors, the Phoenix Police Disciplinary Review and Use of Force Boards and Soroptimist Intl. of Phoenix. She is also a graduate of the Valley Leadership program.

Ellen's diligence and fortitude have gained her much respect among members of the criminal justice system as well as in the community. She has a thorough understanding of our clients' needs and the intricacies of training programs. She established and directed the first comprehensive training program for jail volunteers. She views training as the "cornerstone for morale, employee performance and success."

Over the next few weeks, Ellen will be familiarizing herself with our staff and our office. She also will be seeking your input, ideas and suggestions. Please extend a warm welcome to Ellen and help facilitate her transition into our office.

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(cont. on pg. 17) ☞

Bulletin Board

◆ New Support Staff:

Christine Bono is the new Records Clerk at SEF Juvenile. Christine moved to Phoenix from Michigan where she worked for the State Department of Social Services.

Charles Brokschmidt has accepted our key automation position of Project Manager/LAN Administrator. He will be joining the office on October 7 and will manage the development of our new automation system. Chuck has more than 10 years of experience in the automation arena. He completed a Computer Programming Specialist program at Arizona Tech in 1982 and has attended both Phoenix College and Arizona State University. Before joining our ranks, Chuck was the Lead System Administrator with Maricopa County Flood Control District. He has an extensive knowledge of various hardware, operating systems, and PC software.

Chuck brings a number of other special qualifications that will ease his transition into this office and help make him a tremendous asset to the organization. He brings with him prior experience in systems administration using Digital equipment and a DEC VAX/VMS operating system. Additionally, unlike other qualified applicants, Chuck has some knowledge of the criminal justice system having previously been employed as Systems Programmer for Maricopa County Law Enforcement Information Systems and Law Enforcement Technical Systems Specialist with the Maricopa County Sheriff's Office. He has several years of experience with the LEGIS computer network system.

Crecia Mathalia began work as Legal Secretary for Appeals. Ms. Mathalia holds an AA degree from Phoenix College. Prior to coming to the office, she worked at the Law Office of Jerold Kaplan.

Moves/Changes:

Carol Miller from the Office of Court-Appointed Counsel recently returned to our office as a Client Services Assistant at the Durango Juvenile Division. Prior to her appointment at OCAC, she was employed for a number of years in our downtown Records Division.

Marguerite (Peggy) Kirby, who previously worked in a temporary capacity, recently became a full-time employee. She is a word processor who transcribes many of our interview tapes. Peggy telecommutes from Morristown.

