

# for The Defense

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

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## Impeachment of the Non-Testifying Witness

By Brent Graham, Defender Attorney

Sometimes hearsay statements can be powerful evidence against an accused. The harm is multiplied because of the inability to cross-examine the declarant. However, the rules of evidence permit impeachment of certain out-of-court statements. This capability can counteract or ameliorate the harm of the uncross-examined statement.

Under Arizona Rules of Evidence, Rule 806, when a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked, may be supported by any evidence which would be admissible for those purposes if the declarant had testified as a witness. Thus, under Rule 806, statements considered impeachable include:

- hearsay statements,
- statements made by a person authorized by the party make a statement concerning the subject,
- statements by the party's agent or servant concerning a matter within the scope of the

agency or employment, or made during the existence of the relationship, or

- statements by a co-conspirator of the party during the course or in furtherance of the conspiracy.

In analyzing this issue, the practitioner must take care to distinguish what statements may be impeached by Rule 806 as opposed to those that do not fall under the rule. Any statements falling under the rule would be capable of being impeached by any of the normal means of impeachment. Thus a hearsay witness could be impeached by evidence of character or conduct under Rule 608. Under Rule 613, a non-testifying witness' statement could be impeached by a prior inconsistent statement, but only by intrinsic evidence since the witness must be afforded an opportunity to explain or deny an extrinsic inconsistent statement. And perhaps the most common method of impeachment, a declarant's hearsay statements could be



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impeached by evidence of a conviction of a crime under Rule 609. In Arizona, the state used this method to impeach a defendant's statements that he proffered under the excited utterance exception to the hearsay rule.

In *State v. Hernandez*, 191 Ariz. 553, 959 P.2d 810 (App. 1998), the court considered Rule 806 in light of an excited utterance. In *Hernandez*, the defendant moved *in limine* to admit a tape recording of the 9-1-1 call he made from his parents' home approximately 20 minutes after the murder. 191 Ariz. at 556, 959 P.2d at 813. Although the defendant did not testify at trial, the trial court permitted the state to impeach the defendant's statements on the 9-1-1 tape with his prior convictions. *Id.* On appeal, the court held that the impeachment was proper under Rule 806, which specifically permitted impeachment of a hearsay statement made by an absent declarant by any means which would be permissible had the declarant been present and testified. *Id.* at 557, 959 P.2d at 814.

Often, the state seeks to admit a defendant's inculpatory statements as admissions of a party opponent under Rule 801(d)(2)(A), but exclude the defendant's exculpatory statements as hearsay. In this case, the defendant will seek to have the entirety of the statement including defendant's exculpatory statements admitted under Evid. Rule 106.

Pursuant to Ariz. R. Evid., Rule 106, when a

<b>Contents</b>	
Impeachment of the Non-Testifying Witness . . . .	1
Shall We Stip? . . . . .	3
Co-Occurring, Dual Diagnoses . . . . .	4
Residential Substance Abuse Treatment Programs for Pregnant Women . . . . .	6
Race to Incarcerate: A Book Review . . . . .	8
Writers' Corner . . . . .	10
Jury and Bench Trial Results . . . . .	12

writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it. This is often referred to as the rule of completeness.

If the trial court agrees with the defendant that the entirety of the statement must be introduced, the state may then urge the court to permit impeachment under Rule 806. In advancing his argument, the defendant should assert that unlike *Hernandez*, he is not the proponent of the statement. The state is the proponent, but in fairness the entire statement should be considered contemporaneously. Additionally, if the state argues that the defendant's inculpatory statements are admissions, but his exculpatory statements are hearsay, the defendant should respond that attempts to distinguish between a defendant's statements deemed inculpatory versus his statements that are exculpatory create a false distinction.

In *State v. Reynolds*, 108 Ariz. 541, 544, 503 P.2d 369, 372 (1972), the defendant argued that the admission of his statements to police officers at the time of the investigation were hearsay, and violated his right to due process and his privilege against self-incrimination. With respect to the hearsay argument, our Supreme Court observed that a well-recognized exception to the hearsay rule is statements made by a party to the action whether *exculpatory* or *incriminatory*. *Id.* (Emphasis added.)

As a result, the state should not be able to introduce a defendant's inculpatory statements, and then impeach him under Rule 806 if the court finds that his entire statement, including exculpatory statements, should in fairness be admitted. Consider whether the state may open its own door to impeach a non-testifying defendant with his prior convictions simply by introducing his exculpatory statements.

*Continued on p. 11*

# Shall We Stip?

By Karen Kemper with assistance from Garrett Simpson, Defender Attorneys

Ah, sweet agreement, that is what a stipulation promises. At least that is what my dusty college dictionary says: To stipulate is defined as “to guarantee in an agreement or to form an agreement.” *The American Heritage Dictionary* 1267 (1973). An agreement can ease litigation and allow us to focus on those pesky other problems our clients present. But do we sometimes jump at the chance to agree? Let’s step back for a few moments and take a slightly different look at the temptation to stipulate.

In the early 1980’s the Harvard Negotiation Project gave rise to a best-selling book you doubtless know well titled, *Getting to Yes* by Roger Fisher and William Ury. Messrs. Fisher and Ury observe that efficient negotiation occurs where the parties think of themselves as “partners in a hardheaded, side-by-side search for a fair agreement advantageous to each.” *Ibid.* at 39 (1985). Okay, so how does this apply to us? We aren’t negotiating the current NHL labor dispute, so must we really be hardheaded? What *are* we negotiating? Years in prison, as in: Shall we stip to 15 flat? Restitution, as in: Shall we stip to a cap of \$50,000.00? Terms of probation, as in: Shall we stip to lifetime probation?

Our clients hope we score something for them with these stipulations, and later rail in PCRs that we didn’t. However, our role as hardheaded stip-negotiator may be limited to a feint offering such as, “Well, this is his/her first \_\_\_\_\_ (bloody assault, violent murder, or neonatal molest).” Pointing out our client’s foray into previously unknown territory and the unpleasant experience he has had there may be all we can do. But there are other types of stipulations that should bring out the hardheaded in all of us.

## “Shall we stip to your client’s priors?”

Although you wouldn’t fall into this trap, some of your unwary colleagues have. A stipulation and a waiver are two different creatures. Gently remind your law partners that their authority is limited: Whatever they are giving away in a stipulation better be theirs to give. Rights belong to the client. The right to a trial on the priors is the client’s right. Unless the client admits a prior, the state must prove the prior. *State v. Thomas*, 109 Ariz. 399, 400, 510 P.2d 45, 46 (1973). Hence, a client waiving a trial on the priors must go through a Q. and A. with the judge, similar to the colloquy a pleading client is put through. Rule 17.6, Ariz. R. Crim. P. If your law partner stipulates to his/her client’s priors, and a judge accepts that stipulation, your appellate lawyer has an issue. Happy as we may be to have something to write about on appeal, this type of error should not occur.

## “Shall we stip to the elements of the offense?”

Well of course they don’t actually say it this way, but this is a dead-bang winner in post-conviction practice (and no, I won’t tell you who the lawyers were.) Seriously, if the prosecutor asks you to stip to the quantity of the drug, that it was a drug, and that your client possessed the drug, I know you would utter some version of “Pound sand.” But as we know, not every practitioner does as we would do. All that need be said here is don’t do it.

## “Shall we stip. . . .”

So long as the stipulation is not a waiver in disguise, and so long as there is some *quid pro quo*, stip away, and do so with a hardheaded search for an advantageous agreement.



# Co-Occurring, Dual Diagnoses

## What is a Co-Occurring Disorder?

By Jennifer Gebhart, Mitigation Specialist

"Co-Occurring." "Dual Diagnosis." What exactly do these terms mean? Some would argue that Dual Diagnosis is not a proper term to define the topic I am about to address. Individuals do not usually have just two disorders that they are dealing with so, the term Dual Diagnosis would not be appropriate. Dual Diagnosis has also been used to describe individuals with mental illness and developmental disabilities. Dual Diagnosis and Co-Occurring are both used by mental health professionals. In this article, I will use and define the term Co-Occurring Disorders, and explain the necessity of treatment.

According to SAMSHA's (Substance Abuse and Mental Health Services Administration) consensus panel, people with co-occurring substance abuse disorders and mental disorders are:

Individuals who have at least one mental disorder as well as an alcohol or drug use disorder. While these disorders may interact differently in any one person (e.g., an episode of depression may trigger a relapse into alcohol abuse, or cocaine use may exacerbate schizophrenic symptoms), the same may be true for those individuals who may have transitory conditions such as substance-induced mood swings (CSAT, in press).<sup>1</sup>

An individual with Co-Occurring Disorders can have changes in one or both of the disorders over time. It can alter from individual to individual as well. Both disorders can vary in severity chronicity, and the degree of impairment in regards to functioning.<sup>2</sup> An individual's symptoms of Bipolar Disorder may be more severe than their addictive behavior. Their extreme mood swings may result in the use of alcohol and drugs to either alleviate depression or to maintain their mania. If

given the proper psychiatric treatment to control the mood swings, would most likely result in a discontinuation of drugs and alcohol.

Why is this of concern? More and more of these individuals are entering the criminal justice system each year. The jails and prisons end up being "treatment" for these individuals. The reason for this can be either the lack of a diagnosis of a Co-Occurring Disorder or the lack of the proper treatment program for these individuals. The attitude that seems to prevail in society and within the confines of the criminal justice system is that individuals struggling with these types of issues should be able to **request** assistance and treatment. This is not so! Mental illness and addiction can cloud, if not severely impair a person's judgment and insight to their actions. Because of that impairment many individuals that suffer from a mental illness find it difficult to advocate on their own behalf. This can mean they are unable to know where to find the services or they can not get the treatment due to all of the "red tape" that must be gone through for the necessary treatment.

For example, a client has been struggling with auditory hallucinations since adolescence. The voices lead to paranoia and depression. In order to escape from the voices, he began drinking alcohol, hoping this would quiet the voices. This did not work, but due to a lack of parental involvement in this life, he continued to suffer through adulthood. As his drinking increases and he begins abuse of illicit drugs, criminal activity results.

Despite opportunities on probation and continued arrests, the client never receives substance abuse or mental health treatment. Essentially, he is an individual suffering from

Co-Occurring Disorders. It would appear his psychiatric symptoms began first, followed by an attempt a self-medication through the use of alcohol and drugs. If he had had the benefit of a treatment program to address his needs, the likelihood of his continued involvement with the legal system would have been greatly reduced. Medication and counseling to help him cope with what is Schizophrenia would have directly impacted his substance abuse. The psychiatric medication would treat the voices, therefore, his use of alcohol and drugs would most probably cease as his substance abuse was secondary to his psychiatric illness.

A proper treatment setting and program is not only essential to their recovery, but it is vital in avoiding any further contact with the criminal justice system. The Terros Ladders Program is a day program that specifically works with this population. The program allows individuals to identify the symptoms of their illnesses and how those symptoms interact with each other. At the same time they are learning avoidance strategies to adopt a clean and sober lifestyle.

Contact information for agencies with available programs is listed in the side bar.

(Endnotes)

<sup>1</sup> United States Department of Health and Human Services. Report to Congress on the Prevention and Treatment of Co-Occurring Substance Abuse Disorders and Mental Disorders. 2002 <http://alt.samsha.gov/reports/congress2002/chap1ucod.htm>

<sup>2</sup> United States Department of Health and Human Services. Report to Congress on the Prevention and Treatment of Co-Occurring Substance Abuse Disorders and Mental Disorders. 2002 <http://alt.samsha.gov/reports/congress2002/chap1ucod.htm>



## Treatment Programs

Two agencies that have available treatment programs are Terros and New Arizona Family.

### Terros

Terros has a day program called Terros Ladders. Their contact information is:

3003 N. Central Ave Ste 200

Phoenix, AZ 85012-2914

Tel: 602-685-6000 Administration

Fax: 602-685-6002

### New Arizona Family

NAF has a residential program. Their contact information is:

New Arizona Family

4222 E. Thomas Rd Ste 150

Phoenix, AZ 85018-7621

Tel: 602-553-7300

Fax: 602-553-7303



# Residential Substance Abuse Treatment Programs for Pregnant Women

By Tammy Velting, Mitigation Specialist

Finding residential treatment for anyone can be a daunting task. However, it is even more difficult if you need a placement for a pregnant woman. There are two agencies that have programs designed to accommodate the special needs of a pregnant woman.

Center for Hope is a new residential dual diagnosis treatment program through Community Bridges. Their phone number is 480-461-1711. They have facilities for 24 women, their babies, and other children up to age 4. A placement can usually be made within a few days after the client is screened and found acceptable for the program. The women must be able to care for themselves and cannot be a threat to others and they will not accept women who have convictions for sexual offenses or a significant history of violence. In addition to dealing with the mental health and substance abuse issues during the one year program, they teach them prenatal care, life skills, and parenting skills.

New Arizona Family has a 30 bed facility for pregnant women and they will accept newborns and other children up to age 5. In order to determine eligibility, you call 602-553-7300 to make the arrangements for an intake screening. The one year program begins with 3 months of residential treatment followed by intensive outpatient treatment then aftercare. They focus on substance abuse treatment, parenting skills, and assist with housing following residential treatment.

Crossroads for Women, 602-274-0730, and Casa de Amigas, 602-265-3086, will accept pregnant women also. However, their programs are relatively short, 90 and 60 days respectively, and are not geared towards the special needs of pregnant women.





Get Out Your Calendar! Mark the Dates!

## The 3rd Annual APDA Conference



June 22-24, 2005

More information will be made available soon!



## Got the Writer's Bug?

Then, consider submitting an article for publication in  
*for The Defense.*

Articles, practice pointers and other training related  
information are welcome at anytime...So, submit your  
next article to one of our editors soon!



# Race to Incarcerate

## A Book Review

By Roumen Bezerjianov, Mitigation Specialist

**Author's Note:** All quotations and information in this article are derived from the book *Race to Incarcerate* by Marc Mauer, published in 1999 in the United States by The New Press, New York. ISBN 1-56584-429-7

Marc Mauer's *Race to Incarcerate* should be mandatory reading for every person interested in the criminal justice system. It raises important questions about how we define different types of offending behaviors and punishments, about political and legislative influences on the judicial system, and raises the awareness about the shocking and disturbing relationship between race, class and the criminal justice system—particularly the system's impact on the African-American community.

Mauer observes that “while the philosophical orientation and stated goals of the prison have fluctuated” over time, the basic concepts of “confinement and isolation” have remained central for the institutional model of the prison for over two centuries. In the early 1970's a national debate was taking place with respect to the utility of the existing criminal justice system—one camp was the “tough on crime” movement supporting the construction of more prisons and juvenile detention facilities, and the other camp sought reform in the system and noted its failures to prevent crime. Proponents of the reform movement supported a moratorium on all new prison construction and argued that alternatives to incarceration were more appropriate and just for many

offenders. Eventually, the “tough on crime” camp carried the decade (and the decades since) resulting in dramatic increase of incarceration rates between 1972 and 1997. The prison population of under 200,000 in 1972 grew to almost 1.2 million in 1997 while the jails in 1997 contained an additional 500,000 inmates awaiting trial or serving short sentences to make the combined numbers a total of 1.7 million people behind bars. Compared to other industrialized countries (whose crime rates are not significantly different from ours), the United States' rate of imprisonment is six to ten times higher per capita. Mauer also reports

that “more than half of the prisons in use today have been constructed in the last twenty years.” He explains in detail how the prison system has become a significant economic sector for many communities and provides jobs to over 600,000 employees nationwide.



Determinate (mandatory) sentencing is one of the ways by which prison and jail populations increased so dramatically. In 1973, the New York State legislature passed Rockefeller Drug Laws which called for mandatory, and harsh prison terms for various drug offenses along with limitations on plea bargaining. These laws “set the stage for new presumptive sentencing laws for drug crimes in almost every state.” In 1984, the Sentencing Reform Act was passed in Congress and the Federal Sentencing Commission was established. It developed guidelines for mandatory sentencing with a strong emphasis on

imprisonment for most offenders and little regard for any mitigating circumstances. Apparently, the purpose of determinate (mandatory) sentencing is to make sure that everyone is treated equally under the law and prevent judges from exercising unfair discretion. Discretion, however, has not been eliminated—it has only been transferred from the judge to the prosecutor (during the plea-bargaining process). Moreover, while judicial discretion is an open process, prosecutorial discretion is “behind closed doors and with little accountability.” Mauer argues that “instead of promoting all, rich and poor, to go to prison, we need to explore whether community service and treatment (white-collar sentences) may be appropriate for some low-income offenders.”

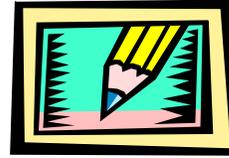
Mandatory sentencing was obviously society’s response, albeit inadequate and short-sighted, to increased crime rates and media attention. The approach has been unsuccessful because it blames only the individual and fails to take into account the family, social, and economic challenges of that individual. The unintended consequences of mandatory sentencing result in exacerbation of those challenges. As an example, 50% of all prison inmates are African-American and 17% are Hispanic—statistically three out of ten African-American males growing up today will spend time in prison. Mauer ponders how the African-American community is affected by those realities and raises the question of how society and the criminal justice system would react if these statistical predictions and realities referred to middle class Caucasian youth. He provides an example with drug addiction: middle class America recognized it as a social issue after a critical mass of its members experienced drug related problems. Consequently, high quality treatment centers were established and private insurance covered such treatment and services. Rather than initiate such social interventions in poor and minority communities, a “war on drugs” has been waged there. Treatment programs in such communities are “in short supply” and of questionable quality. As a result, the

problem is not addressed and resolved at the level of addiction but grows to become a major criminal issue. For example, while there were 581,000 arrests for drug offenses in 1980, in 1995 that number was 1,476,000 and African-Americans constitute “an increasing proportion of those arrests.” Moreover, these arrests do not reflect increasing rates of drug abuse—on the contrary, according to the available data the number of people using drugs has been declining from 14.1% in 1979 to 6.1% by 1995. The reason for the increase of arrests is the greater use of police resources and police’s targeting of low-income minority communities. Mauer explains that drug law enforcement is far more discretionary than for other offenses and it is always easier to make drug arrests in the inner city (where drugs are traded on the streets) compared to suburban areas (where the deals take place in the homes).

Mauer also points out that the criminal justice system can never be a primary crime control mechanism simply because of its reactive nature—it activates only *after* a crime has been committed. He asserts that “the criminal justice ‘funnel’ misses most crimes.” Nationally only 1/3 of all crimes are reported and even for serious crimes the reporting rate is only about 50% because many victims do not believe that the police can help them. About 1/5 of the reported crimes result in a suspect being arrested, and not all arrests lead to prosecution. For example, there were 3.9 million victimizations for violent crimes in 1994: 1.9 million were reported, 41% of the reported resulted in arrest, 18% of the arrests resulted in felony convictions, and 82% of the felony convictions were actually sentenced, which is only 3% of all the serious violent offenses originally committed. Mauer, therefore, emphasizes that society needs to become more aware of the essential importance of families, communities, churches, and other institutions in reducing crime, providing public safety, and promoting pro-social behaviors.



## Writers' Corner



### Garner's Usage Tip of the Day: **contrary**

*Editors' Note: Bryan A. Garner is a best selling legal author with more than a dozen titles to his credit, including A Dictionary of Modern Legal Usage, The Winning Brief, A Dictionary of Modern American Usage, and Legal Writing in Plain English. The following is an excerpt from Garner's "Usage Tip of the Day" e-mail service and is reprinted with his permission. You can sign up for Garner's free Usage Tip of the Day and read archived tips at [www.us.oup.com/us/apps/totd/usage](http://www.us.oup.com/us/apps/totd/usage). Garner's Modern American Usage can be purchased at bookstores or by calling the Oxford University Press at: 800-451-7556.*

### **contrary.**

#### Part A

"Contrary to" or "contrary from." "Contrary" takes the preposition "to"; "from" is no longer standard. E.g.: "The facts of a cynical European political elite, defending Mr. Arafat, are contrary to the facts on the ground." Amos Perlmutter, "Distress Signals . . . Amid Mideast Turbulence," Wash. Times, 1 Oct. 1996, at A15.

#### Part B

"On the contrary"; "to the contrary"; "quite the contrary."

"On the contrary" marks a contrast with a statement or even an entire argument just made. E.g.: "I hold neither of those views. On the contrary, I argue that biochemical systems — as well as other complex systems — were designed by an intelligent agent." Letter of Michael J. Behe, "And God Saw That It Was Good," Newsweek, 7 Oct. 1996, at 24.

"To the contrary" marks a contrast with a specific noun or noun phrase just mentioned. E.g.: "The answer is not a mystery. It is, to the contrary, quite simple and can be given quite simply." Bob Dole, "Bob Dole's Acceptance Speech," Wash. Monthly, Oct. 1996, at 20. (The contrast is with the noun mystery.)

"Quite the contrary" can do the job of either of the other two phrases. The phrase is usually either a verbless sentence or a verbless clause followed by a semicolon — e.g.:

"Don't think that if you have been had once, your luck has to change. Quite the contrary; you probably have gotten yourself on a list with others who have been defrauded and are now a prime target." Jonathan N. Axelrod, "Get Poor Quick," Pitt. Post-Gaz., 7 Oct. 1996, at B7.

"This is not to suggest that Peres sought to provoke a Lebanon crisis during March and April, though. Quite the contrary. All the evidence indicates that . . . Peres was trying to maintain calm." Jonathan Marcus, "Toward a Fragmented Policy?" Wash. Q., Autumn 1996, at 19.





***Continued from Impeachment, p. 2***

From the defense perspective, the use of Rule 806 to impeach a non-testifying witness might be most useful in the area of co-conspirator statements. While it might be difficult to acquire discovery or background about a hearsay declarant whose statements fall under Rule 803, often the defense has substantial information regarding co-conspirators. Frequently they have prior convictions that may be used to impeach when the state offers their statements. It also may be argued that all inconsistent statements made in the course of the conspiracy are intrinsic, so that they can be used to impeach the nontestifying co-conspirator without affording an opportunity for the witness to explain or deny the statement.

The ability to impeach the non-testifying witness can counter the damaging effects of hearsay statements. Rule 806 provides a means for the defense to diminish the impact of hearsay statements offered against the accused. Alternatively, when the state is using Rule 806 to impeach the defendant, careful analysis must be employed to ensure that the statement is the kind that may be impeached under the rule, and that the state is using it in a proper manner.



# Jury and Bench Trial Results

## February 2005

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

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