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2013 SIGNIFICANT PROSECUTION CASES

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TEN RECENT ARIZONA CASES: A PROSECUTOR'S PERSPECTIVE

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1. ***State v. Payne***, 233 Ariz. 484 (2013)
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10. ***In re Aubuchon*, 233 Ariz. 62 (2013) & *In re Alexander*, 232 Ariz. 1 (2013)**
    a. ERs 3.8 & 3.1: Don't prosecute without PC/Don't assert frivolous claims!

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[1] The case interpretations, analysis, and opinions expressed in these materials and in the related presentation are the views of the author alone and do not represent the views of the Coconino County Attorney's Office or APAAC.

State v. Payne, 233 Ariz. 484 (2013)

Facts: Payne and his girlfriend, Reina, starved & abused Payne's children ages 3 and 4 until they died. Payne left the children with Reina while he worked and sold heroin. Eventually, the children were kept in a closet permanently, and Payne stopped feeding them. After one child died, he left her body in the closet with the other child, who died about a week later. He then put the bodies in a box in a storage unit. Staff became concerned about the odor and eventually called police. Police located Payne and Reina at a motel. Payne refused to go to the station for questioning without his attorney. Police arrested him on an unrelated warrant. At the station, Payne confessed. Reina pled guilty to 2 counts of 2nd degree murder in exchange for agreeing to testify. Payne was found guilty at trial of two counts of first degree murder and was sentenced to death.

Issues Raised: On appeal, Defendant raised issues including: jury selection, denial of motion to change venue, admission of post-arrest statements, ***suppression of Reina's threats***, ***admission of evidence of heroin sales***, *mens rea* and sufficiency of evidence for child abuse, duplicitous child abuse counts, sufficiency of evidence (premeditation), prosecutorial misconduct, and capital sentencing issues.

Exclusion of Reina's Threats (Rule 801(d)): The trial court prevented Payne from presenting the testimony of witness Debra Reyes, who sold heroin with Payne and overheard phone calls between Reina and Payne in which Reina screamed at Payne and threatened to kill the children (including: "You got to shut these f'ing kids up or I'm going to f'ing kill them."). The State had moved to preclude the statements on hearsay grounds and because they would open the door to testimony Reina wanted to help the kids but feared reprisals from Payne (acts of prior domestic abuse had previously been precluded on Payne's motion).

HELD: Reina's threats were not present sense impressions or excited utterances. They were, however, prior inconsistent statements under Rule 801(d)(1)(A). Still, the trial court did not abuse its discretion by precluding the threats, because under Rule 403, they raised collateral issues (Reina's intent to harm the children and Payne's past abuse of Reina). Moreover: (1) evidence at trial showed Reina's exasperation with the children (including Reina's testimony that she often called Payne to yell about the children and Reyes' testimony about witnessing similar frustrations); (2) the jury knew Reina was incarcerated for involvement in the murders, thus such evidence was cumulative, & (3) there was ample other evidence of Payne abusing and premeditatedly murdering the children.

Admission of Payne's Heroin Sales (Rule 404(b)): The trial court permitted the State to present evidence that Payne sold heroin. The court found the nature of Payne's job

required him to be away for long hours, motivating him to lock the children in the closet to appease Reina. In other words, the work/long hours were probative of motive. The court attempted to minimize prejudice by admonishing the State "to limit the number of times…the issue was brought up, and not use racy words."

HELD: The trial court did not abuse its discretion. The evidence was relevant to the State's theory that he locked the children in the closet so he could stay away from home for long periods. The jury heard evidence of Gonzales and Payne using heroin, which marginalized the prejudicial effect of evidence he was out selling it. In a footnote: "Prosecutors and courts should tread carefully in areas that may affect the fairness of a criminal trial….the issue is close."

***State v. Joe*, 316 P.3d 615 (App. 2014)**

Facts: Joe went to 17 year-old victim's home looking for her mother, who he was dating. Joe was drunk and the victim and her sister told him to leave, pushed him out, and locked the door. The victim later left to walk to her friend's house. Joe approached her, punched her in the face (breaking her nose). He pulled her into an alley by her hair, then sexually assaulted her both anally and vaginally. He also strangled and bit her. Joe's DNA was found on a bite mark on her arm and on a vaginal swab. The victim's DNA was found on Joe's underwear.

At trial, on direct exam, when asked about the sexual assault, the victim repeatedly responded "I don't remember." The State asked: "You don't remember or you would rather not say?" The victim repeatedly answered: "I would rather not say." The State then referenced her detailed statement to police from the night of the incident. Joe objected on hearsay and Confrontation Clause grounds. The trail court admitted the statements as prior inconsistent statements (non-hearsay).

Issue: Joe argued on appeal that the V's testimony was not inconsistent with her prior statements to police as required by 801(d)(1)(A).

HELD: The Court looked to the "analogous situation where a witness claims an inability to recall." If the loss of memory is genuine, the prior statement is not inconsistent under the rule. If the loss is feigned, then the prior statement is inconsistent. This case did not involve feigned memory loss (the victim admitted she "would rather not say"). However, inconsistent statements do not need to be diametrically opposed. Inconsistency can be found in evasive answers, silence, changes in positions, or purported change in memory. It is determined not by individual words or phrases alone but the "whole impression" of what was said. *See State v. Hines,* 130 Ariz. 68, 71 (1981). The trial court has considerable discretion in this analysis.

The victim's testimony she "would rather not say" differed from, and was inconsistent with, her detailed description to police. Thus, the trial court did not abuse its discretion in allowing impeachment with the prior statements.

***State v. Yonkman*, 231 Ariz. 496 (2013)(*Yonkman II*)**

Facts: Yonkman's wife called police to report his molestation of her daughter. When approached for questioning at his residence, Yonkman requested counsel. "A few days later," Yonkman's wife called Detective Rivera to say her daughter recanted. Rivera told her Yonkman could come in to take a polygraph "if he wanted to" so Rivera could close the investigation. He did not ask her to relay the message, but a few hours later Yonkman called Rivera to schedule the polygraph. During this call, Rivera told Yonkman he would not be under arrest and could leave at any time. Yonkman came in for the scheduled polygraph, was *Mirandized*, waived, and confessed.

At trial, the court admitted the confession, finding Yonkman reinitiated contact and his statements were voluntary. In *Yonkman I,* the Court of Appeals reversed, finding Rivera had induced Yonkman's contact with police in violation of *Edwards*.

Issue: In *Yonkman* II, the Arizona Supreme Court assumed, without deciding, that Yonkman's first invocation at his residence was effective and that he was in custody then and during his police interview. Because his confession occurred within 14 days of his invocation of the right to counsel, the AZ Supreme Court analyzed whether the police initiated the contact.

HELD: There is no Constitutional protection against friends or family members convincing a suspect to talk with police. Police did not contact Yonkman after his initial (assumed) invocation. Rather, his wife contacted Rivera to report the recantation. Rivera did not ask to speak with Yonkman and did not suggest to her that Yonkman should call him. Thus, the call was not coercive. Yonkman then initiated contact with Rivera to schedule the polygraph. "Neither the purpose nor the policy rationales of *Edwards* would be advanced by suppressing Yonkman's confession."

Yonkman I was vacated. In *Yonkman II*, the Supreme Court remanded the case for determination of whether Yonkman's *Miranda* waiver was involuntary, whether Yonkman's wife was acting as an agent of the state, whether Yonkman's previous acquittal on charges relating to prior bad acts should have been admitted (after evidence of the prior bad acts themselves was admitted), and whether prior consistent statements were improperly admitted. *See Yonkman III.*

***State v. Yonkman*, 233 Ariz. 369 (App. 2013)(*Yonkman III*)**

Facts: Yonkman's wife, Kelly, called police to report his molestation of her daughter. The victim provided a forensic interview and repeated the allegations. When approached for questioning at his residence, Yonkman requested counsel. "A few days later," Kelly called Detective Rivera to tell him her daughter had recanted. Rivera told her Yonkman could come in to take a polygraph "if he wanted to" so Rivera could close the investigation. He did not ask her to relay the message, but a few hours later Yonkman called Rivera to schedule the polygraph. During this call, Rivera told Yonkman he would not be under arrest and could leave at any time. Yonkman came in for the scheduled polygraph, was *Mirandized*, waived, and confessed.

At trial, the court admitted the confession, finding Yonkman reinitiated contact and his statements were voluntary. The trial court also permitted the State to present testimony of two of the victim's friends who had been molested by him at sleepovers, but the trial court refused to allow Yonkman to present evidence he had been acquitted of charges stemming from these allegations.

In *Yonkman I,* the Court of Appeals reversed, finding Rivera had induced Yonkman's contact with police in violation of *Edwards*.

Issues: In *Yonkman II*, the AZ Supreme Court vacated *Yonkman I*, finding Yonkman re-initiated contact with police, but remanded to the Court of Appeals for determination of:

(1) whether the *Miranda* waiver was involuntary and whether Kelly had acted as a state agent;

(2) whether trial court erred in admitting prior bad acts for which Yonkman had been acquitted and/or by precluding evidence of acquittal, and

(3) whether prior consistent statements had been admitted improperly.

HELD: As to (1), the *Miranda* waiver was valid. The Court of Appeals wondered aloud why the Supremes asked them to consider agency, since the Supremes already determined that Yonkman, not the police, initiated the contact. But mindful of their place in the judicial hierarchy, they dutifully considered agency. The court looked to Kelly's purpose or motive and whether there was any reward, order, or coercion directed toward Kelly by the State. There was none, thus no agency.

As to issue (2), the Court of Appeals determined the trial court did not abuse its discretion in admitting other-act evidence for which Yonkman had been acquitted. Such evidence may be admitted if the trial court finds by clear and convincing evidence that

the defendant committed the act. *State v. Little,* 87 Ariz. 295 (1960), precluded acquitted acts, but the court did not find it controlling. First, because that decision does not apply to the subsequently-adopted "clear and convincing" standard now applicable to other-act evidence. Second, because the Double Jeopardy and Due Process clauses do not categorically bar acquitted- conduct evidence when the evidence is governed by a lesser standard than proof beyond a reasonable doubt. *Dowling v. United States,* 493 U.S. 342 (1990). The court noted that the AZ Supreme Court has, in *dicta*, mentioned that *Dowling* reopened the question of admitting acquitted conduct. *State v. Terrazas,* 189 Ariz. 580 (1997). The court also noted that a majority of other states allow evidence of acquitted conduct.

The court separately addressed whether Yonkman should have been able to rebut such evidence with evidence of the acquittal itself. The court noted that the other division of the Court of Appeals held in *State v. Davis,* 127 Ariz. 285 (App. 1980), that "the better rule allows proof of an acquittal to weaken and rebut the prosecution's evidence of the other crime." The court did not disregard *Davis*, but read it to require a case-by-case analysis by the trial court. The court rejected the State's argument that acquittal evidence should never be admitted. Rather, the better rule is that such evidence be admitted if the jury has likely learned the defendant was tried for the prior act and may speculate about the defendant's guilt in that trial.

The court went on to note that "*Davis* reflects the reality that when evidence of acquitted conduct is presented, the fact of the acquittal often becomes admissible under these rules." The court noted that the trial court attempted to prevent the jury from learning about the prior trial, but the jury still learned about previous reports to police, statements taken by police, transcripts, testimony, etc. It was thus an abuse of discretion to preclude evidence of the acquittals. However, the error was harmless because Yonkman had confessed, thus corroborating the victim's claims.

On issue (3), the trial court erred in permitting testimony about the victim's prior consistent statements to a forensic interviewer and to her mother), given no claim of recent fabrication. This error was also harmless because Yonkman confessed.

***State v. Miller*, 316 P.3d 1219 (2013)**

Facts: In 2005, Miller's home burned. His employee, Steven Duffy, admitted that he and Miller set the fire. Duffy and his girlfriend, Tammy Lovell, cooperated with the police in the arson investigation, and Miller was indicted for arson and fraud. Miller tried to recruit various men to kill Duffy, Lovell, and their family. Three months after the arson, the family (5 victims) were found shot to death in their home. Miller was found guilty of five counts of first degree murder, as well as other counts, and sentenced to death.

Issues: On appeal, Miller raised claims relating to: speedy trial, due process (ability of defense counsel to prepare following removal of lead counsel), consolidation of murder and solicitation charges, ***admission of victim's recorded statements***, denial of mistrial following reference to Miller's prior conviction, admission of firearm/toolmark testimony under *Frye*, insufficient evidence of solicitation, and capital/sentencing issues.

HELD: As to admission of the victim's recorded statements, Miller argued the trial court erred in admitting Duffy and Lovell's recorded statements on hearsay and confrontation grounds. He also claimed Lovell's statements included inadmissible character evidence. Because Miller did not object at trial, the Court reviewed for fundamental error.

The Court held the prior statements were admissible under the forfeiture by wrongdoing exception to the hearsay rule, "which permits admission of statements 'offered against a party that has engaged … in wrongdoing that … procure[d] the unavailability of the declarant as a witness.'" Quoting ARE 804(b)(6). The court summarily rejected the argument that the exception applies only in the trial for which the defendant silenced the witness (the arson case).

As to Lovell's recorded statements, certain of them contained highly prejudicial references to other acts. For example, she told police he burned down a different house, buried bodies in the desert, and beat black people because he was racist. These statements had no permissible purpose under Rule 404(b) and should not have been admitted. The Court found no fundamental error because the State did not emphasize the statements in closing argument, their prejudicial impact was limited by an "other act" instruction, and there was strong evidence of guilt supporting Miller's conviction.

***State v. Franklin*, 232 Ariz. 556 (App. 2013)**

Facts: Franklin beat up the female victim. She went to the hospital and provided a recorded interview to police. The victim became uncooperative, so the State reviewed Franklin's jail calls. Franklin tried to call the victim 109 times and spoke to her 58 times in a little more than a month. The State moved for a forfeiture by wrongdoing hearing. When the victim failed to show for the first day of trial, a warrant was issued. When she no-showed on day 2, the court held the hearing. The court admitted the victim's interview statements, finding by a preponderance of the evidence that Franklin had engaged in "'chicanery,' reflective of the 'abhorrent behavior which strikes at the heart of the system of justice itself.'"

Issue: Did admission of the victim's statements under ARE 804(b)(6) violate Franklin's 6th Amendment right to confrontation?

HELD: The forfeiture by wrongdoing doctrine is a common law exception to the constitutional right of confrontation. Citing *Giles v. California,* 554 U.S. 353 (2008). ARE 804(b)(6) involves 4 factors:

(1) Witness unavailability: The victim was unavailable because she failed to attend trial despite a subpoena and a warrant.

(2) Wrongdoing: A criminal act is not required, but witness tampering is a classic form of wrongdoing. While Franklin did not directly tell the victim to drop the charges, he made frequent suggestive statements "to the person who was to actually carry out the action" [the victim] and discussed the potential outcome [charges dropped/victim would not "get in trouble" or would "just" get a misdemeanor warrant and "like a $200 fine"]. The statements "amounted to influential and controlling conduct designed to persuade Victim not to appear at trial...." "In the end, regardless of whether the discussions were moments of encouragement, control, collusion, or chicanery, we agree with the trial court that all of these exchanges had the overall objective of inducing victim to avoid testifying at trial."

(3) Engaged or acquiesced: The court spends a couple paragraphs on this, but the wrongdoing was Franklin's own, in his 50+ calls to the victim, so there isn't really any separate inquiry on this factor in this instance.

(4) Intended to, and did, procure unavailability: Because the tampering occurred at approximately the same time that the unwillingness to participate arose, the trial court could properly infer that the tampering procured the unavailability.

***State v. Buot*, 232 Ariz. 432 (App. 2013)**

Facts: Buot drove his SUV down a city street, then swerved into oncoming traffic and killed the driver of a sedan. His wife testified that just before the crash, Buot was arguing with her on his cell phone, became enraged, and screamed that he was going to drive his car into oncoming traffic. He later admitted to his wife and her friend that he had intentionally swerved into traffic. Defendant was charged with second degree murder.

At trial, Buot sought to call Dr. Jack Potts (a psychiatrist) to testify that Buot had intermittent explosive disorder, which caused him to react reflexively. He therefore lacked the requisite mental for 2nd degree murder. The trial court ruled Potts could testify about Buot's "behavioral tendencies or character traits that bear on" his intent, but not mental diseases or conditions relating to his capacity to form that intent. Further, the trial court ruled Potts could testify about his own observations but not the observations of other experts.

Issues: (1) Did the court err in admitting testimony that Buot had previously said he intended to kill himself by driving into oncoming traffic? [Answer: Of course not.] (2) Did the trial court violate Buot's due process rights by permitting his mental health expert to testify only about Buot's conduct which the expert had himself observed?

HELD: As to (2), the court reasoned as follows: Arizona *does not* allow a diminished capacity defense short of insanity. Citing *State v. Mott,* 187 Ariz. 536 (1997). Arizona *does* permit evidence of a character trait for impulsivity to rebut premeditation in first degree murder cases. Citing *State v. Christensen,* 129 Ariz. 32 (1981). Per the U.S. Supreme Court, "observation evidence," which it defined to include "the defendant's tendency to think in a certain way and his behavioral characteristics" is not limited by *Mott.* Citing *Clark v. Arizona,* 548 U.S. 735 (2006).

In *Buot*, the court recognized that "[t]he distinction the Supreme Court drew between 'observation evidence' and other mental-health evidence is not immediately apparent in *Mott* (or any other Arizona case authority)." Although it recognized the confusion surrounding this term, the *Buot* court did not reach the meaning of "observation evidence." Because the *Christensen* exception only applies to premeditation, Arizona does not permit evidence of a character trait for impulsivity in second-degree murder cases. Arizona's insanity statute can, as it does, specify that impulse control disorders do not sustain a finding of insanity.

***State v. Boyston*, 231 Ariz. 539 (2013)**

Facts: In 2004, Boyston was living with his cousin, Shante, and alternately his grandmother, Mary. He argued with Shante and another cousin, Tonisha, about his living situation and made threatening statements to them. Later, he argued with someone on the phone, demanded his girlfriend take him to meet the caller, and when she refused, shot her repeatedly. He then jogged to his grandmother's and shot three people, killing two of them (including his grandmother). He later returned and fatally stabbed a family friend. He was convicted of three counts of first degree murder at trial, as well as other charges, and sentenced to death.

Issues: Boyston raised numerous issues including: mental retardation, exclusion of jurors for cause, ***precluding evidence of intoxication to rebut premeditation***, sufficiency of evidence (premeditation), absence of manslaughter instruction, refusal to instruct on ineligibility for parole, and capital sentencing issues.

Precluding evidence of intoxication to rebut premeditation: Boyston claimed the trial court erred by not allowing him to present evidence of his PCP intoxication at the time of the murders to rebut evidence of premeditation. Boyston claimed ARS §13-503 does not apply to premeditation or, if it does, it is unconstitutional.

HELD: Premeditation is a mental state, and therefore §13-503 precludes evidence of voluntary intoxication when considering premeditation. *Christensen* is inapposite because it applies to "character-trait testimony that the defendant reacted impulsively to stress" to rebut premeditation. No such character trait is at issue. Likewise, the court rejected due process, equal protection, and Eighth Amendment claims.

***State v. Buccheri-Bianca*, 312 P.3d 123 (App. 2013)**

Facts: Buccheri-Bianca lived in an apartment building near a family with minor children. He was in his late 80's and had broken his leg. The family would help him, and in return he molested their children. One victim ultimately reported the molestation to her school counselor, and Buccheri-Bianca was convicted at trial.

Issue: ***Buccheri-Bianca claimed the trial court erred in precluding evidence that one victim had applied for a U-Visa (providing temporary authorization for a noncitizen victim of certain crimes). He claimed the U-Visa provided the victim with a motive to fabricate***. He also raised issues of prosecutorial misconduct (no motive for victims to lie), amendment of indictment during trial (deleted references to locations within the apartment as to certain counts), denial of motion to preclude testimony of Wendy Dutton (ARE 702), failure to admit the entirety of a recorded jail conversation (ARE 106), and sufficiency of the evidence.

HELD: As to the first issue, the trial court did not abuse its discretion in precluding the evidence of the victim's immigration status. Nothing in the record showed that the victim or her family knew about U-Visas when the incident was reported at school. Moreover, the victim did not obtain support from the State for her application until almost a year after the initial allegation. The great length of time between the reporting and the filing of the application supported the trial court's conclusion that the possibility of obtaining a U-Visa was not relevant to her accusation.

Also, no evidence in the record showed the victim or her family had unauthorized status, and unauthorized status is not required for a U-Visa application. Even if there was some evidence the victims were unauthorized, and even if such evidence did have some probative value, the trial court could conclude any probative value would have been outweighed by the risk of unfair prejudice stemming from a mini-trial on immigration status.

***In re Aubuchon*, 233 Ariz. 62 (2013)**

Facts/Issues: Aubuchon appealed her disbarment. Aubuchon was admitted to the bar in 1990, joined MCAO in 1996, and was promoted to chief of the pretrial division by Andrew Thomas in 2004. Her most serious misconduct was violating ER 3.8(a) by "prosecuting a charge that the prosecutor knows is not supported by probable cause" and violating ER 8.4(d) by "engag[ing] in conduct that is prejudicial to the administration of justice."

These charges arose out of the following actions:

(1) Indictment in 2008 of Maricopa County Board of Supervisors Chairman Don Stapley on 118 criminal violations relating to financial disclosures. When the case was assigned to Judge Kenneth Fields, Aubuchon moved for his recusal and sought to interview him and other judges to support her motion. Judge Fields eventually dismissed 51 of the misdemeanor charges as lacking merit. Subsequent State's counsel conceded that 44 of the misdemeanor charges were barred by the statute of limitations. The Hearing Panel found Aubuchon violated ER 8.4(d) both by obtaining the 44 indictments knowing the SOL had run, and by seeking to interview judges.

(2) A RICO lawsuit on behalf of Andrew Thomas and Sheriff Joe Arpaio, which Aubuchon filed against the Board of Supervisors, certain judges, and others, alleging bribery, extortion, and a conspiracy to hinder investigation and prosecution of elected officials, county employees and their attorneys about funding and construction of a court tower in Maricopa County. Because of Aubuchon's potential conflict of interest, this case was re-assigned to Rachel Alexander within days of Aubuchon filing the lawsuit.

(3) Judge Donahoe was named as presiding judge of the Maricopa County Superior Court's criminal division in 2009. A day later, Aubuchon filed the civil RICO complaint against Donahoe and others. Judge Donahoe scheduled a hearing on motions concerning MCAO's authority to pursue grand jury investigation of alleged acts of county corruption. That morning, Aubuchon filed a criminal complaint against Judge Donahoe charging him with hindering, obstructing, and bribing. She moved for him to recuse himself from the hearing on the grand jury matters, which he did.

HELD:

(1) As to Aubuchon's claim she did not know the SOL had run on the 44 misdemeanors, ER 8.4(d) only requires a negligent mental state. Also, the record supported the determination Aubuchon knew SOL had run.

As to interviews of the judges, Aubuchon prejudiced the administration of justice by seeking to ascertain the judges' thought processes and intimidate them. It is improper to probe the mental processes engaged in by judges. This applies to administrative and procedural decisions as well.

(2) Regarding the RICO lawsuit, Aubuchon prejudiced the interests of justice by filing the complaint against judges who were absolutely immune from a civil damages lawsuit based on their judicial acts.

(3) As to Aubuchon's criminal complaint against Judge Donahoe, she violated ER3.8(a) and 8.4(d), by knowingly filing the complaint without probable cause and for the purpose of avoiding the hearing on the grand jury matters and compelling Judge Donahoe's recusal. The probable cause statement filed with the complaint did not support the charges. Thomas directed Aubuchon to file the complaint the day before she did so, which meant there had been no MCAO or MCSO investigation. Aubuchon told officers "they would have time to put the case together" after the complaint was filed. Also, several MCAO lawyers and MCSO officers read the complaint and refused to sign or file it. YCA Sheila Polk testified even if the allegations in the probable cause statement were true, they did not constitute probable cause. And Thomas and Hendershott's testimony there was probable cause were merely subjective opinions expressed by interested individuals, which did not overcome the evidence showing a lack of probable cause.

Because these violations alone justified the sanction of disbarment, the other findings were only addressed summarily. In upholding the sanction of disbarment, the court noted: "[W]e consider those particular violations [ER 3.8(a) and 8.4(d) the most egregious in light of the public trust placed in prosecutors to wield their considerable power fairly and for the public good."

***In re Alexander*, 232 Ariz. 1 (2013)**

Facts: Alexander was admitted to the bar in 2000 and met Andrew Thomas in 2004 when he was campaigning for Maricopa County Attorney. After he was elected, Alexander became a DCA and his special assistant. She did not directly handle cases and performed non-legal tasks. In 2009, Lisa Aubuchon filed the civil RICO lawsuit described in *In Re Aubuchon.* Days after the lawsuit was filed, Thomas assigned Alexander to the case because Aubuchon had a potential conflict of interest. Alexander had no prior trial experience and minimal knowledge of RICO. Alexander worked under MCAO's RICO expert, Peter Spaw, although only Alexander appeared as counsel of record in the case.

About 4 months after the RICO complaint was filed, in March 2010, Alexander filed a notice voluntarily dismissing the complaint. Also in March 2010, independent bar counsel was appointed to investigate allegations of misconduct against Thomas and other MCAO lawyers. Bar counsel ultimately submitted a report to a probably cause panelist, who found probable cause for counsel to file a formal complaint against Thomas, Aubuchon, and Alexander. That complaint was filed in February 2011. Following the evidentiary hearing, the hearing panel found all charges against Alexander proven, and suspended her from the practice of law for six month and one day.

Issues & Holding:

(1) Alexander violated ER 3.1, which prohibits a lawyer from bringing or defending a proceeding or asserting issues therein "unless there is a good faith basis in law and fact for doing so that is not frivolous, which may include a good faith and nonfrivolous argument for an extension, modification or reversal of existing law." The complaint was legally and factually deficient, and she failed to sufficiently investigate the validity of the RICO allegations.

An objective standard determines whether a legal proceeding is frivolous. A subjective standard determines whether the lawyer acted in good faith. Alexander conceded the lawsuit was frivolous but claimed to have acted in good faith by relying on more experienced MCAO lawyers. The involvement of other lawyers did not relieve her of the obligation to ensure the lawsuit was supported in law and fact. Another lawyer's supervision does not reduce one's ER 3.1 responsibilities, although under ER 5.2(a), a lawyer does not commit professional misconduct "if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty."

Here, the evidence revealed Alexander was well aware the complaint was deficient, including Spaw's e-mails revealing his own "deep and profound concern about the viability of [the RICO] action." At the hearing, Alexander failed to describe evidence supporting, for example, the allegation that defendants conspired to commit bribery, vaguely repeating that "hundreds of documents" or other prosecutors' "statements"

supported the allegations. Alexander knew the complaint was frivolous, yet opposed its dismissal. She cannot escape responsibility for her misconduct by blaming Spaw because she knew of the complaint's frivolous nature.

(2) ER 4.4(a) [Respect for rights of others]: The court rejected the hearing panel's finding that Alexander pursued the lawsuit as political payback for Thomas.

(3) ER 1.1 [Competence]: Although a lawyer's negligence is not necessarily a violation of ER 1.1, Alexander's limited experience and insufficient preparation led to a violation of ER 1.1.

(4) ER 1.7 [Conflict of interest: current clients]: The court upheld the panel's finding that Alexander violated ER1.7 by suing the Board while her office served as the Board's lawyer.

(5) ER 3.4(c) [Fairness to opposing party and counsel]: The panel found Alexander violated 3.4(c) by basing the RICO lawsuit in part on allegations that some defendants had initiated bar complaints against Thomas and other MCAO lawyers, even though Rule 48(l) prohibits civil lawsuits against bar complainants. However, Rule 48(l) is only violated if Alexander had actual knowledge of Rule 48(l)'s prohibition on suits against bar complainants. Because there was no evidence of such knowledge, the court rejected this finding.

(6) ER 8.4(d) [Misconduct]: Alexander engaged in conduct prejudicial to the administration of justice by pursuing the RICO action to retaliate against named judges. The required mental state is negligence. Therefore, her motives were immaterial.

(7) Former Rule 53 [Failure to cooperate, now Rule 54(d)]: Alexander did not contest her filings with the State bar were meritless, frivolous, and dilatory and designed to delay, obstruct, and burden the investigation. Rather, she claimed she relied on her counsel to respond to the investigation letter. However, she permitted her lawyers to file such documents and was therefore properly disciplined under former Rule 53.

(8) SANCTION: The presumptive sanction of suspension was warranted, but not suspension for six months and one day. The six month suspension, with its less rigorous reinstatement process, adequately protected the public by deterring such conduct.