

Will new ethics rules change the way you practice?
Jay Mann and James Hartt take a closer look at the new Rules of Professional Conduct and how they will impact the daily practice of law. **Page 4.**

Judiciary Committee bills may get hearings in April

By Joan Dalton
Maricopa Lawyer

Several bills and concurrent resolutions that may impact this state's legal community will likely be heard by Arizona's bicameral legislature in April. A synopsis of some of the measures awaiting hearings in the House and Senate Judiciary Committees follows:

► Justice of the Peace Tempore Qualifications: SB 1076; HB 2375; SCR 1009.

Three measures resulting from an administrative order issued by the chief justice of the Arizona Supreme Court concern justice of the peace *pro tempore* qualifications. In June 2002, the chief justice issued an administrative order requiring persons applying for judge *pro tempore* offices to qualify in conformance with the provisions of Article 6, Section 22 of Arizona's Constitution.

Article 6, Section 22 requires judges in courts inferior to the superior court and having jurisdiction in civil cases of one thousand dollars or more to be at least thirty years old, of good moral character, an Arizona resident for five years preceding taking office, and admitted to practice law in Arizona. Although Arizona Constitutional Article 6 section 31 allows the Legislature to provide for the appointment of judges *pro tempore*, it must do so in accordance with the qualifications enumerated in Arizona constitutional Article 6, Section 22.

Constitutional provisions for justices of the peace, on the other hand, reside in Article 6, Section 32, which grants the Legislature jurisdiction in matters concerning the number of justices of the peace, the terms of office of justices of the peace, as well as the

— See **Legislation** on page 8

APRIL 2004
INSIDE

Know your judge

Judicial profiles are now online through the Superior Court's Web site. **Page 3.**

Discipline run amuck?

Attorney Jack Levine explains why he thinks the wrong lawyers are being disciplined. **Page 11**

Superior Court will not issue security bypass cards pending policy review

By J. W. Brown
Maricopa Lawyer

Heightened concern over court security has prompted Maricopa County Superior Court Presiding Judge Colin Campbell to halt any new security bypass cards for use at all superior court and justice court locations.

Campbell's decision, detailed in an admin-

istrative order, calls for the reevaluation of the court's entire security bypass policy. During the review, bypass cards that expire will not be renewed.

Currently, judges, court employees, attorneys, law enforcement officers and members of the media are among 5,330 individuals who have security bypass cards that allow them to enter court facilities without passing through metal detectors.

"The safety of court customers, jurors, witnesses, litigants, visiting students, court employees and everyone who enters a court facility is the reason for the re-evaluation of the security by pass policy," Campbell said. "Security and safety in our courts are of paramount concern."

Last year over 46,000 weapons and potential weapons were detected during security screening at court entrances. In all, security staff found 18,968 knives, 11 firearms and 23,448 potential weapons, including martial arts devices, box cutters, bullets, mace, razor blades and tear gas.

"Our heightened concern over court security comes, in part, from our attendance of a disaster preparedness seminar in Washington, D.C.," said Trial Courts Administrator Marcus Reinkensmeyer. "There, we learned that other urban trial courts are implementing increasingly stringent security policies."

"Some courts are now screening all court employees, attorneys and other government officials in an effort to prevent workplace violence and acts of terrorism," Reinkensmeyer added. "Such a policy for our courts would require additional screening stations or a system of random screening for employees and government officials. We will conduct a cost analysis to determine how proposed security upgrades will impact our budget."

Campbell will work with judges, court officials, court committees and representatives of the state and county bar associations to analyze all new security policies before they are implemented.

"The security analysis will determine the extent to which the court must go to make our court facilities as safe as possible," he said. ■



O'Connor presides again at Old Courthouse

U.S. Supreme Court Justice Sandra Day O'Connor (right), along with Arizona Supreme Court Chief Justice Charles Jones (left) and Maricopa County Superior Court Presiding Judge Colin Campbell, welcomed attendees at a February ceremony to commemorate the opening of a museum in the historic Old Courthouse in Phoenix. See story on page 10.

PHOTO COURTESY OF DAMIAN ARCS

Division Two rules harasser may not hide behind free speech protection

Trial court also reversed for taking verdict without defendant present

By Daniel P. Schaack
Maricopa Lawyer

"I have a constitutional right to harass my ex-girlfriend."

That, in essence, is what Lawrence Brown Jr. recently argued to Division Two of the Arizona Court of Appeals in challenging his conviction under the aggravated-harassment statute, A.R.S. § 13-2921.01. The court rejected his First Amendment challenge. *State v. Brown*, No. 2 CA-CR 2003-0001 (Ariz. App. Feb. 17, 2004).

After dating him for a year and a half, Brown's girlfriend called off the relationship. But Brown wouldn't stay away from her so she went to

court and obtained an injunction against harassment. Undeterred, Brown continued to call her on her home and cell phones. She eventually called the police.

The state charged him with aggravated harassment. After the jury convicted him, the court sentenced Brown to two and a half years in prison. He appealed, arguing that the charge and conviction violated his First Amendment free-speech rights.

Judge John Pelander turned a deaf ear toward Brown's argument that the law regulates speech based on its content. He held that the anti-harassment law did not regulate speech so much as it regulated conduct. Quoting the Fourth Circuit, he wrote: "Prohibiting harassment is

— See **Courtwatch** on page 11

**COURT
WATCH**

COLUMNS



Jerome
ELWELL
MCBA PRESIDENT

Building a successful paralegal career

The Arizona Supreme Court has defined a legal assistant/paralegal as a person qualified by education and training who performs substantive legal work requiring a sufficient knowledge of and expertise in legal concepts and procedures, who is supervised by an active member of the State Bar of Arizona, and for whom an active member of the state bar is responsible.

Practically speaking, a paralegal is a flexible individual with the ability to adapt to ever changing events, conditions and people. Key skills include the ability to express oneself clearly and concisely, both verbally and in writing, efficiency, organization and sufficient supervisory skills to delegate duties. Must-haves also include the ability to get along well with others, the ability to be technically astute, the ability to conduct witness interviews well, the ability to conduct legal and factual research and the ability to review and revise the monthly proformas, all of which require keeping a good attitude and being a full-time miracle worker.

What defines successful? Is it prosperity or achievement of something desired, intended or attempted? I prefer to define it as peace of mind or confidence or knowing how to get the job done. Another definition: A successful paralegal does not need to know all the answers but needs to know where to go to find the answers.

Our work days are filled with internal and external networking contacts. Internal contacts are attorneys, paralegal peers, secretaries, project clerks, filing clerks and firm support staff. External networking contacts are clients, opposing counsel, court staff, vendors and other paralegals. One of the best ways to build an external network is to get involved in an outside paralegal organization.

Joining a professional association presents a wealth of opportunities to expand your network. This can be especially helpful to those just starting in the profession and for parale-

Time to spread the word about the value of membership

In keeping with membership goals established at the beginning of the year, the 2004 board of directors is now organized into committees and focusing on specific steps we can take toward our goal of a revitalized membership.

As we work to enhance benefits and services for members, we are reminded that as much as we'd like to think if only we work hard enough we will reach our goals, we do not actually have the power to determine the value of

membership in the MCBA. That power ultimately lies with members themselves.

If you read Stan Watts' History & Hearsay column last month, you know that it was in June, 1914, that 50 Maricopa County attorneys — nearly all of the attorneys then practicing in the county — joined together to create the MCBA with the purpose of assisting each other in developing successful legal careers. I can imagine how those attorneys must have talked about it for weeks, or even months in advance. I can imagine them discussing it with their colleagues in offices and in courtrooms and at social functions, listing the reasons why they should make the effort.

Although I do not know the personal motivations of the attorneys who showed up at that first meeting on that first night, I am fairly certain that they did not miss dinner with their families and spend hours hammering out by-laws for completely altruistic reasons. I believe they went to such trouble because they knew they would gain a number of important benefits in return — contacts,

referrals, access to knowledge and increased influence, to name a few.

Fortunately, the ability of Maricopa County attorneys to gain benefit from joining together in professional association still exists with the MCBA. But as those original 50 attorneys knew, we reap those benefits only when we make a commitment to take personal ownership of the organization. I now am asking you to join me in following their example.

If you have not already done so, please send in your membership application. And just as important, consider talking with your colleagues about membership in the MCBA and what they might gain. As you run across them in offices and in courtrooms and at social functions, take a few minutes to list the reasons why it's worth the effort to be part of a professional organization.

But don't do it for altruistic reasons. Do it because you know that each member that joins the MCBA is another resource that benefits you. ■



Clare
PENDLETON
PARALEGAL DIV.
PRESIDENT

gal students, thirsty for the interaction with experienced paralegals. The MCBA Paralegal Division supports entry level paralegal members and student members with a mentor program which pairs an experienced paralegal with a student member or a recent graduate member.

On Saturday, April 3, 2004 at Phoenix College, the MCBA Paralegal Division is sponsoring a Paralegal Career Day. This program is a unique opportunity for paralegal students, recent graduates and the public to learn about the paralegal profession. Practicing paralegals can gain new skills and learn about new practice areas. This year's topics include (1) Career Development and Placement; (2) Alternative Career Options for Paralegals; (3) The Attorney-Paralegal Team; (4) Developing Effective Organizational Skills; and, (5) PACE and the CLA Exams.

For the experienced paralegal, the MCBA Paralegal Division provides support for its members by conducting continuing legal education and provides information on the advancement of the profession as well as updates on current trends. Even seasoned, successful paralegals benefit from networking and insight from their peers on shared experiences and resources.

The MCBA Paralegal Division supports the paralegal community with a comprehensive web site at www.maricopaparalegals.org. Please visit the Web site and check out the links. For more information about networking, membership, the Paralegal Career Day and the 2004 Arizona Paralegal Conference, please contact me at cpendleton@rlaw.com or Sonya Bryant at the MCBA (602) 257-4200. ■

Barrister's Ball getting bigger and better

If you attended the YLD's Barrister's Ball on Saturday, March 13, then you know that the event just keeps bigger and better. We know we had great time, and thanks to the tireless efforts of the Barrister's Ball Committee, we raised thousands of dollars for Home Base Youth Services.

The ball has seen a steady increase in both attendance and the dollar value of auction items since Sept. 11, 2001. And this is despite the fact that this year's ball landed on the Saturday between two spring break weeks. Although the numbers are still being calculated, I understand we had approximately 320 guests. I also understand that more than \$30,000 worth of items were donated to the silent auction and raffle.



Andrew
EVERROAD
MCBA/YLD
PRESIDENT

This year's upswing was also marked by some changes and novel additions to the ball. Melanie Hansen and Jennifer Ratcliff, co-chairs of the Ball Committee, were able to change the venue to the beautiful Arizona Biltmore. During the silent auction, guests were able to shop at two staffed booths and purchase handcrafted jewelry, purses and bags, with a percentage of the sales benefiting the ball. After the tasty filet and shrimp dinner, we enjoyed the music of a swing band complete with professional swing dancers. Those who were unable to attend missed the sight of dozens of couples on the dance floor, desperately trying to follow along with the group swing lessons.

I am encouraged by the success of the ball, and I look forward to planning next year's ball. I would like to thank Melanie, Jennifer, Julie LaFave, Shane Clays, Jessica Fotinos, Kara Ricupero, Jennifer Green, Maxine Becker, and all the volunteers from the MCBA who gave so much of their time and energy this year to helping yet another worthy cause. ■

Write a letter!

We welcome letters to the editor. Letters generally should be no more than 300 words long. *Maricopa Lawyer* reserves the right to edit all letters for length. Letters to the editor can be e-mailed to maricopalawyer@mcbabar.org or mailed to: Editor, *Maricopa Lawyer*, Maricopa County Bar Association, 303 E. Palm Lane, Phoenix, 85004.



303 E. Palm Lane
Phoenix, AZ 85004
602-257-4200 • 602 257-0522 (fax)
www.maricopabar.org

Subscriptions: \$36 yearly

© 2004 Maricopa County Bar Association

Maricopa Lawyer is published monthly by the Maricopa County Bar Association (Jerome K. Elwell, president; Leandra Lewis, executive director).

Contributions of articles and letters to the editor are encouraged. All materials must be submitted by the 10th of the month to be considered for the next issue. All submissions may be edited for content, length and style.

Errors will be corrected in a subsequent issue.

The MCBA does not necessarily endorse the views expressed by contributors and advertisers. The editorial policy is available upon request.

Editorial board

Chair: Ken Reeves

Members: Tom Asimou, Sybil Taylor Aytch, Sonya Brant, J. W. Brown, Brian Cieniawski, Joan Dalton, Jane Evans, Cari Gerchick, Dan Kaplan, Jack Levine, Daniel P. Schaack, Stan Watts and Terri Zimmerman.

Editorial content

Managing Editor: Teena Booth
480-785-5222
602-257-0522 (fax)
maricopalawyer@mcbabar.org

Advertising

Display advertising: Sonya Brant
602-257-4200 ext. 128
602-257-0522 (fax)
sbrant@mcbabar.org

Classified advertisements: MCBA
602-257-4200
602-257-0522 (fax)

Layout/Design/Production

Marty Marsh Graphics & Design
P.O. Box 3355, Idyllwild, CA 92549
909-659-3493 • 909-659-3514 (fax)
marty@martymarsh.com

Judicial profiles provide insight into judges' courtroom preferences

By Gary E. Donahoe
Special to Maricopa Lawyer

Want to know about the judge before whom you will be appearing? Check out the Maricopa County Superior Court Web site. In addition to the standard biographical information, there is a new feature on the judge information page called "Judicial Profile."

Over the past year, the MCBA Bench Bar Committee, headed in 2003 by Todd Julian, developed the judicial profile format. The committee's goal was to provide an easy way for Maricopa County Superior Court judges to alert attorneys appearing in their courtrooms of their practice and procedure preferences. Through the cooperation of the court's Judicial Information Services department, the end product can be seen on the Superior Court's website at:

<http://www.superiorcourt.maricopa.gov/judicialbios/judicialList.asp?title=1>

Initially, only three judges posted their profile. However, after being pestered for a week about posting a profile with everything from a rhyme to a fable entitled "How to Make a Black Robe More Transparent," over 20 judges have posted profiles and more have promised to do so.

Once on the Web site, a click on the highlighted profile brings up comments from the judge about his or her practice and courtroom "dos and don'ts." For example, Judge Margaret Downie gives this advice regarding motions for reconsideration:

Motions for reconsideration rarely succeed. If I was too dumb to get it 'right' the first time, chances are I'm no smarter now. If you do request reconsideration, do not simply rehash your previously unsuccessful arguments.

Or this about courtroom etiquette from Downie:

While the court personally believes that it is rude to sit when speaking during trial, counsel may act according to personal preference. It helps if you stand

when objecting, as it signals the witness, opposing counsel, and me that you are about to state something brilliant. It is also more visually interesting to the jury and tends to awaken anyone sleeping in the courtroom.

Some of the profiles are pithier than others, yet still chock full of helpful information. For example, Judge Pam Franks gives some sage advice regarding opening statements and closing arguments in juvenile proceedings:

Attorneys normally waive opening statements when trying matters to the court. Sometimes this is a mistake. Don't assume I know what is going on. A brief opening statement that tells me what the issue in dispute really is or gives me an overview of what you hope to prove is sometimes very helpful. Don't forget the benefit of closing argument. Don't argue with hostile witnesses. Once something is in evidence, leave it alone and argue it to me in your closing. You can make the point much better than the witness can.

These are just some of the gems you will find in the judicial profiles. The MCBA Bench Bar Committee and the court hope the profiles prove valuable to both the bar and *pro se* litigants. Take a look at them. Please send me your comments and I will pass them on to all the judges. Your positive comments will be helpful in encouraging more judges to post a profile.

► Maricopa County Superior Court Judge Gary Donahoe has served on the superior court bench as a judge since 2000, and as a commissioner since 1989. He currently chairs the MCBA Bench Bar Committee. ■

MARICOPA LAWYER
CLASSIFIED ADS
ARE NOW ONLINE... VISIT
www.maricopabar.org/classifieds

Management expert hired for trial courts administration

By J. W. Brown
Maricopa Lawyer

Reorganization and restructuring of the administration of Maricopa County's trial courts continues with the appointment of Betty J. Adams, a 29-year management professional, to serve in the newly-created position of administrative services director.

"This position is a crucial component in reconfiguring court administration for trial courts in Maricopa County," said Trial Courts Administrator Marcus Reinkensmeyer. "Betty Adams brings invaluable experience to our management team, providing a wide spectrum of expertise for this unique position. And she has an unwavering dedication to serving the public."

Adams oversees human resources, training, budget, finance, payroll, procurement, supplies, security and collections for justice and superior courts and the adult probation and juvenile probation departments.

"I'm honored to be given this opportunity to assist with streamlining the administrative services of the courts and the probation departments," Adams said. "I look forward to sharing my experience and exploring innovative methods of saving taxpayer dollars."

Immediately before her appointment,

Adams served as a special assistant to County Administrative Officer David Smith. In that capacity, she spent nearly four years moving to assignments that utilized her unique skills of developing business and financial plans, executing new projects, managing departments and implementing new management strategies.

Adams is a graduate of the University of Illinois at Springfield with a bachelor's degree in management and a master's degree in management information systems. Between 1974 and 1990, she worked at Southern Illinois University Medical School in a progression of positions including clinic manager, business manager of computing services and assistant to the associate dean for administration and planning.

She came to Maricopa County in 1991, serving as manager of the Department of Transportation Administration Division and the Department of Public Health Administrative Services. She was the administrator of the Medical Examiners Office. She also worked as a budget analyst. During a one-year departure from county work, Adams worked for the City of Chandler as Assistant Management Services Director.

► J.W. Brown is communications director for trial courts in Maricopa County. ■

Lewis and Roca LLP

is pleased to announce that

Linda M. Mitchell

has joined the firm as Of Counsel

Linda has joined Lewis and Roca's Real Estate Practice Group. She will concentrate her practice on real estate transactions and debt and equity financing transactions. Prior to joining Lewis and Roca, Linda was Vice President and General Counsel for America West Airlines. Linda is a member of the State Bars of Arizona and Illinois.

Linda received her B.A. from St. Lawrence University, her M.B.A. from Lake Forest Graduate School of Management and her J.D. from Harvard Law School.

LEWIS
AND
ROCA
LLP
LAWYERS

40 North Central Avenue
Phoenix, AZ 85004
www.lewisandroca.com

Declared Certifiable.

With five Arizona Bar Certified Injury and Wrongful Death trial specialists, our *av rated* law firm can help you win your personal injury, medical malpractice or products liability cases.

And, as always, we will pay you a referral fee in compliance with E.R. 1.5. Together, we can serve your clients' interests and yours.

Let us be your no-overhead litigation department.

For complete information, call Steve Leshner in Phoenix at 602•252-8888



Van
O'STEEN
Van O'Steen and Partners
Referral Litigation Unit



**The Law Firm With
Its Heart In
NEVADA...
and a pulse in
ARIZONA**

HUTCHISON & STEFFEN
ATTORNEYS

A FULL-SERVICE LAW FIRM

LAKES BUSINESS PARK
8831 WEST SAHARA AVENUE
LAS VEGAS, NV 89117
CONTACT MADDY AT 702.385.2500
HSNV.LAW.COM

©2004 HUTCHISON & STEFFEN

New ethics rules provide solid guidelines for better serving clients and community

By Jay M. Mann & James D. Hartt
Special to Maricopa Lawyer

In what Arizona Supreme Court Chief Justice Charles E. Jones characterized as "a historic and significant change," the concept of "zealous" representation was eliminated from the preamble of the Rules of Professional Conduct. According to Jones, lawyers have tended to misinterpret the terms "zeal" or "zealously" in the rules to rationalize "unprofessional, intemperate and uncivil conduct while engaging in the practice of law." In a clear attempt to correct this misinterpretation, the rules revisers went one step further, and added to paragraph [1] of the preamble: "Whether or not engaging in the practice of law, lawyers should conduct themselves honorably."

The decision to remove the term "zealous" from the preamble was particularly daring considering that Arizona is the first state in the nation to make this change. However, according to Justice Ruth McGregor, other states are likely to follow Arizona's lead. The American Bar Association and a number of state supreme courts have expressed an interest in similarly altering their respective preambles, clearly signifying that Arizona is not alone in its battle against less than honorable attorney conduct. Whether our own definitional change will actually dissuade certain Arizona attorneys from acting less than honorably remains to be seen.

Interestingly, the Merriam-Webster dictionary defines the word "zeal" as: "eagerness and ardent interest in pursuit of something." That same dictionary definition offers the word "passion" as a synonym to "zeal". Clearly then, the ethics rules revisers did not intend to prohibit attorneys from acting zealously in the truest sense of the word. Nor did they intend Arizona's lawyers to refrain from being passionate advocates on their clients' behalf. In fact, the ethics rule revisers would almost certainly encourage Arizona's attorneys to remain "eagerly and ardently interested in pursuit" of their clients' interests. For example, the comment to Rule 3.3 (regarding an attorney's duty to candor) provides: "A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force." The change to the preamble was undoubtedly a reaction to the rampant misinterpretation of the word "zeal" and the license that some ill-advised attorneys perceived that word granted them to act belligerently.

In any event, attorneys should be mindful of Arizona's evident interest in cracking down on poor attorney behavior.

Advising clients on fees and scope of representation

Rule 1.5 (b) now requires attorneys to advise clients in writing about "the scope of representation and the basis or rate of the fee and expenses for which the client will be responsible." At first glance, this requirement may seem to be nothing more than another chore in a sea of ethical obligations. But attorneys, especially civil litigation practitioners, are well advised to obey this particular rule, if for no other reason than to limit malpractice exposure.

According to one Web site offering statistics on attorney-malpractice, of the 35,000 legal malpractice claims initiated against lawyers with malpractice insurance, 12,000 claimants successfully recovered money against a lawyer, with 1,900 receiving over \$100,000 in damages. Among the most common reasons for finding malpractice liability was attorney failure to obey client instructions, failure to obtain client consent, as well as improper withdrawal. And while many of these malpractice claims were doubtless meritorious, it is safe to assume that many of those malpractice claims could have been

avoided if attorneys simply spelled out to the clients the scope of their various obligations and, more importantly, their lack of obligation under certain circumstances.

Appropriately, Rule 1.5 (b) does not apply to certain relationships that attorneys may have with long-held clientele. Comment [2] to the rule recognizes that certain "regularly-represented" clients who may already possess "an understanding concerning the basis or rate of the fee" need not be notified in writing of the scope of representation about which they are sufficiently familiar. However, the comment instructs that such written notification is required if the scope of representation "changes in a material way."

Some attorneys may perceive Rule 1.5(b) as tantamount to handholding on the part of the revisers. But to the extent this rule forces attorneys to spell out the scope of representation under circumstances where attorneys might otherwise neglect to do so, it will, in all likelihood, have the net effect of reducing malpractice claims against Arizona attorneys. As comment [2] provides: "A written statement concerning the terms of the engagement reduces the possibility of misunderstanding." This rule should thus be welcomed as solid malpractice-prevention advice.

Permissive disclosure of confidential information

Rule 1.6 previously required disclosure by an attorney of a client's intention to commit a homicide or to inflict substantial bodily harm. This provision has been preserved in the new rule, but now certain types of permissive disclosures have been added. First, the lawyer may disclose information "to prevent a client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services." Also, under a related new provision, the lawyer may disclose information "to mitigate or rectify substantial financial injury . . ." that may or has occurred. Finally, the lawyer may "reveal the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime." Note, however, the preamble to the rules make clear that a lawyer may not be disciplined for failing to make a permissive disclosure about his client.

— See *Ethics* on page 12

ARE YOU MISSING NURSING HOME NEGLECT & ABUSE CASES?

Nursing home residents are neglected and abused more often than we think. Poor outcomes in the care of the elderly may be a signal of neglect or abuse. However, the investigation and analysis of liability are complex and labor intensive.

In order to maximize recovery, an attorney must possess a working knowledge of federal and state regulations governing nursing homes, as well as an understanding of industry practice (both clinical and fiscal).

Representing nursing home residents and their families in cases

of neglect and abuse can have a positive impact on the quality of care given to all residents of nursing homes.

Our **Nursing Home Litigation Division** is available for association with referring counsel. We promptly pay referral fees in compliance with E.R. 1.5.

For additional information call or write:

Martin J. Solomon
Solomon, Relihan & Blake, P.C.
1951 W. Camelback Road, Suite 110
Phoenix, Arizona 85015
(602) 242-2000

ARBITRATION SERVICES

(Neutral, Sole or Party Arbitrator)

Edward C. Rapp
Superior Court Judge - Retired

20 Years - Superior Court
8 years - Civil Division



Please Call: 602-957-3467 or 602-956-7042

P.O. Box 32596
Phoenix, Arizona 85064-2596

Wireless networking performs miracles in home and office

I have become a big fan of wireless networks. To walk up to a wireless node, pull out your laptop and log on to the Internet without plugging into anything is wonderful. The wireless network nodes are becoming ubiquitous — coming soon to a home or office near you! They already are in airports, hotels and Starbucks around the world. Newspapers and magazines are full of advertisements and the prices are dropping rapidly.

After experiencing the positive results of the wireless systems in both of the Arizona law colleges, I installed a system in my own office a few months ago. The newest update to the 802.11 standard, 802.11g (known as the G standard), features major speed gains. 802.11g offers up to 54 Mbps, as opposed to 11 Mbps for 801.11b (known as the B standard). There is an even faster standard known as Extreme G but I have found the standard G format to be just fine and very fast. The new G standard routers (the devices that connect to the Internet and send the signal out wirelessly) are backward compatible with the older 802.11b standards. My router is hooked up directly to my cable modem and thus to the Internet. I can browse, do research and read newspapers anywhere in my house, even while watching a ball game. A small miracle, I say!

The wireless router acts as the interface between your network and the Internet so that if you have a high-speed connection, all of the computers on the network can share it. I have had some cautionary comments about wireless systems in the past for security reasons but now, implementing decent security is relatively easy.

For example, the two law colleges restrict access to specified computers through use of a unique number assigned to each wireless card. Every wireless computer interface has what is called a MAC (Media Access Control) number that is unique to that particular wireless network access device and has been factory-assigned. It cannot be easily changed. This MAC number or address is used by the interface to announce itself to the network and to pass information back and forth between the machine and the network. Since each card or device has a unique MAC



address, the address can be used to permit or deny users access to the wireless network, much like the way you may screen phone calls using caller ID. All other addresses are denied entry unless you specifically list them.

This process provides pretty solid security and works fine for a small network such as you would have at home or in the office of a small to medium size firm. While MAC numbers can be discovered through a random number generator or other kinds of "cracking" technique, it would be very difficult to do so. A more likely risk is that someone could steal the card from the access device and use that number. I have a wireless access device that plugs into the USB port of my laptop. It is thumb size and would be easy to pick up and walk away with. The thief would then have access to the network and be able to use it under my name. It is therefore critical that all of the accepted MAC addresses be contained in a secure database and that the cards and devices be controlled.

There are a number of other more complicated ways of securing your network that you can implement, depending upon your need for security, your assessment of the risk of having the network breached and the consequences that would follow. Hewlett Packard has put up a good summary of those choices that you might want to discuss with your tech person. See <http://tinyurl.com/3yk4m>.

Actual installation of a small wireless network is very simple. The network control (called the wireless router) is first connected to a computer with a hard wire. Using that temporary hardware, the computer accesses the chip in the router and sets up the router. It is simplicity itself if you are willing to follow the instructions. Make sure that you change the password to the router at the first

setup because the usual default password (admin) is well known to hackers and crackers. Once you have set up the router, you need to enable the network computers with access devices, which, as we have said, have unique MAC addresses.

When you buy your network gear, do not be tempted to save a few bucks by buying some unknown brand. Prices are so low now that you can choose Linksys, Netgear or D-Link devices. Spend the extra money to get 802.11g devices. You should be able to set up a basic network with three access points for under \$150. Each additional access device will cost around \$20. Don't be tempted to buy the now very inexpensive, and much slower, 802.11b equipment.

That's it! I was astounded at how easy it was to set up my home network. The directions for my Linksys router were simple and clear. The necessary software was easy and intuitive. The only hitch I had was that I thought I was smart enough to skip a couple of steps. That was a mistake. I had to go back to square one and start again. The whole process took about 15 minutes and I was instantly and wirelessly connected to the Internet and to the other computers in my office and home. A small miracle indeed, but a miracle for sure!

► *Winton Woods is a lawyer, professor at the University of Arizona College of Law and director of the college's Courtroom of the Future project. He also serves as general counsel to Lex Solutio Corp. and as an electronic-litigation consultant. He welcomes questions and comments by e-mail at wintonwoods@mail.com or by phone at 520-881-6118. Visit him at www.wintonwoods.com or www.digitaltrial.net.*

Computer Litigation Expert/Consultant

AREAS OF LAW:

- Computer system non-performance
- Intellectual property
- Fraudulent computer evidence
- Missing or destroyed data recovery
- Internet

CAPABILITIES:

- Case evaluation/opinions
- Pre-trial strategy
- Courtroom testimony

EXPERIENCE:

- Computer programming/sales
- Computer/internet consulting
- Expert witness (over 90 cases)

CREDITS:

- Certified Management Consultant
- Professional speaker
- Published author

INDEPENDENT: Not affiliated with any computer company

CALL:
Brooks Hilliard,
principal
602 264-9263



E-MAIL:
BHilliard@ComputerExpertWitness.com

BUSINESS **A**UTOMATION
Business Automation Associates, Inc.
Phoenix, Arizona

www.ComputerExpertWitness.com

DON'T PLAY AROUND WHEN IT COMES TO IMMIGRATION LAW



HIRSON WEXLER PERL ATTORNEYS AT LAW

HirsonWexlerPerl is a full service immigration law firm dedicated to your immigration legal needs. Our firm represents employers, corporations and individuals and handles all immigration cases including intra-company transfers, H-1B professionals, investors and family related petitions. We can help you and your clients work through the extensive red tape surrounding immigration cases.

- Labor Certifications
- Consular Processing
- Employer Sanctions (I-9)
- Family Related Petitions
- Outbound visa capability
- Design Corporate Immigration Policies
- Temporary Work Visas
- Intra-company Transfers
- Professionals & Investors
- Free Trade Agreement (NAFTA)
- Entertainers & Sports Professionals
- Blue/White Collar Employee Immigration Assistance
- Immigration Related Due Diligence in Mergers & Acquisitions & Corporate Restructuring

HIRSON WEXLER PERL ATTORNEYS AT LAW

AV Rated

For more information
phone: 602-266-4700
fax: 602-265-8108
email: hiron-az@hiron.com

www.hiron.com
also in Newport Beach, Los Angeles and San Diego, CA • Las Vegas, NV • New York, NY • Wilton, CT • Toronto, Canada

Never A Set-up Fee. Never An Administrative Fee.

Unlike most other mediation, arbitration and settlement conference services, we **never** charge a set-up or administrative fee. You pay only for the time actually spent on your case by one of our expert facilitators, and these very reasonable costs typically are shared by both parties.

Out-of-Court Arbitration Mediation Settlement RESOLUTIONS

3605 North Seventh Avenue Suite One
Phoenix, Arizona 85013-3638
602-285-5558
FAX 602-285-5562



Domestic Relations • Personal Injury • Wrongful Death • Malpractice • Products Liability • Labor • Employment • Discrimination • Civil Rights

Brown & Bain establishes \$300,000 ASU Law Scholarship

Brown & Bain, one of Phoenix's leading law firms, has established the C. Randall Bain Scholarship at the College of Law at Arizona State University. The gift honors Randy Bain on the occasion of his 70th birthday. The firm has set a \$300,000 goal for the scholarship and its current partners have contributed over half of the amount and pledged to raise the balance. The scholarship will be awarded on the basis of academic accomplishment and need.

Joseph Mais, Managing Director of Brown & Bain, said the firm's gift is focused on academic scholarship because "Randy has always excelled as a scholar, a teacher and a mentor. I can think of no better way to recognize his contributions to the firm and to the legal community than this scholarship fund at the College of Law."

Dean Patricia White praised the firm for its generosity and leadership.

"Brown & Bain is setting the standard for all members of our profession by providing financial incentives for academic and intellectual excellence for the next generation of lawyers," White said. "We are honored to have Randy Bain's name permanently associated with the ASU College of Law."

Bain grew up in Greeley, Colorado, earned his undergraduate degree from Yale University and his law degree from Yale Law School. He began his professional association with Jack Brown in 1960. Now in his

44th year of practice, Bain has concentrated his career on intellectual property litigation at both the trial and appellate levels with emphasis on patent and trade secret litigation principally for companies in the semiconductor and computer software industries. In 1998, he argued a patent law case of first impression before the U.S. Supreme Court.

Bain has also been active in many law-related and community organizations. He served as an adjunct professor at the College of Law and has been a member of the American Law Institute since 1991. He served as co-chairman of the Fee Arbitration Committee of the State Bar of Arizona, the board of directors of the Arizona Capital Representation Project, and the co-president of the Lorna Lockwood Inn of Court. He also serves as judge *pro tempore* of the Arizona Court of Appeals.

Bain expressed his appreciation for the gift: "I have been so lucky in being able to work with the quality of people who have comprised Brown & Bain over the years. The idea for this scholarship, and the quick generosity of the firm and its members in funding the scholarship, typify that quality. As a former scholarship student, I'm very pleased to have my name associated with this means of helping students at a law school that I very much respect and admire." ■



Attorney Brenda Warneka signed her recently published book, *The Simple Touch of Fate*, at an appearance at the Author's Café in Scottsdale.

Scottsdale attorney moonlights as editor of anthology on fate

By Teena Booth
Maricopa Lawyer

Attorney Brenda Warneka has practiced family and business law in Scottsdale since 1983, but this year she added the role of editor to her resume with the publication of the anthology *The Simple Touch of Fate* through iUniverse. The book features 52 true stories written by people from all over the world describing unusual fateful encounters and incidents.

Warneka became involved in the project four years ago when the book's co-editor, Chicago-based writer Arlene Uslander, placed an ad on a writer's Web site soliciting stories about personal brushes with fate. Warneka submitted a story about her husband's fateful escape from death in August, 1987, when the Phoenix-bound Northwest Flight 255 he was supposed to be on crashed on take-off from Detroit.

Over the next year, Uslander repeatedly invited Warneka to help edit the anthology.

"As much as the subject interested me, I was too busy with my law practice to accept Arlene's offer right away," Warneka said. "But

the chance to explore the question of whether life-changing events happen randomly or whether there are directed by fate eventually made me agree to take on the job."

Warneka acknowledges that editing a book on such an abstract and amorphous subject is an interesting contradiction for an attorney who normally deals with hard facts and logic.

"Like most attorneys, I do have another side to me," she said. "I have always painted and played piano. As I got more involved with the book, I found I liked the mental relaxation of getting away from the law and looking at life in a different way."

In their book, Warneka and Uslander do not draw firm conclusions about whether fate is indeed a real force at work in our lives, allowing the reader to draw his or her own conclusions from the stories presented. Yet Warneka says she now is more intrigued than ever with the question, does fate exist?

"After reading the hundreds of submissions we received, I was fascinated to realize how many elements must synchronize in order to make what we call fate happen," she said. "And from the response we have received from readers, a lot of people are fascinated by the same question."

The Simple Touch of Fate is currently in stock at the Author's Café, 4014 N. Goldwater Blvd., Suite 104, in Scottsdale. It can be ordered by calling toll free 1-877-288-4737 (#3) or on the Web at Amazon.com or through local book stores. ■

"Congratulations to lawyers who volunteer, for helping to make real the notion of equal justice under the law."

Justice Sandra Day O'Connor, Keynote Speaker

*The Volunteer Lawyers Program
thanks these sponsors for their generosity
in making the "For Love of Justice"
Pro Bono Awards Ceremony
February 10, 2004
a celebration to remember.*

RECEPTION SPONSOR

Maricopa County Bar Association

FELLOW SPONSORS

Steptoe & Johnson L.L.P.
Fennemore Craig P.C.

PARTNER SPONSORS

ASU College of Law
Bryan Cave L.L.P.
Lewin and Roca L.L.P.
Roush McCracken Guerrero Miller & Ortega P.C.
Warner Angle Hallam Jackson & Formanek P.L.C.

FRIEND SPONSORS

George Lyons L.L.C.
Gust Rosenfeld P.L.C.

Licensed
Psychologist & Attorney
Over 23 Years Clinical Experience
and 1000+ Forensic Examinations Conducted

- Child-Custody Evaluations
- Psychological Evaluations
- Family Court Advisor
- Preliminary Screenings
- Consultation / Expert Witness

Faren R. Akins, Ph.D., J.D.
480-946-6828
dr.farenakins@cox.net

Tell us!

Have you changed employment?
Has your law firm named new partners?
Send information for our Legal Moves
column to *Maricopa Lawyer*,
MCBA, 303 E. Palm Lane, Phoenix, AZ
85004; fax to 602-257-0522; or
email to: maricopalawyer@mcbabar.org.

APRIL 2004

April 1

- Construction Law Section, noon

April 2

- *Owner Beware! Surety Defenses that Win and How to Satisfy DBE Requirements* 2:00 to 4:30 p.m., ASUD

This seminar will cover recent developments in surety law, federal, state and local requirements of contracting with Disadvantaged Business Enterprises (DBE's) and how to become a certified DBE.

Cost: MCBA member attorneys, \$50; member paralegals and public lawyers, \$35; non-member attorneys, \$70; non-member paralegals and public lawyers, \$50; same-day registrations/payments, \$15 additional.
CLE: 2 hours

April 3

- Paralegal Career Day, 8:30 a.m. to 1:30 p.m., Phoenix College, 1202 W. Thomas Rd., Phoenix

April 5

- *Maricopa Lawyer* editorial board, 5:15 p.m.

April 7

- *My Drywall is Cracked — Do I need an Attorney? (Part 3 of a 3 part Construction Law Series)* 2:30 to 4:30 p.m., ASUD

This basic to intermediate level seminar will take a critical look at the various causes of building movement with a focus on soil and foundation movement, framing inadequacies and other potential causes. The presentation will include an introduction to basic structural engineering principals.

Cost: MCBA member attorneys, \$50; member paralegals and public lawyers, \$35; non-member attorneys, \$70; non-member paralegals and public lawyers, \$50; same-day registrations/payments, \$15 additional.
CLE: 2 hours

- Family/Juvenile Law Section, 5:15 p.m. ASUD

April 8

- Personal Injury/Negligence Section, noon

April 12

- Young Lawyers Division board, noon
- Task Force on Recruitment and Retention of Women and Minority Lawyers, noon

April 13

- VLP Advisory Committee, noon
- Paralegal Division board, 5:30 p.m.
- Hayzel B. Daniels Bar Association, 5:30 p.m.

April 14

- MCBA executive committee, 7:30 a.m.
- Environmental Law Section, noon

April 15

- *How to Exit Your Business in Style* 11:30 a.m. to 1:30 p.m., ASUD

There may be a number of reasons why your client has gone into business: independence, financial security, the pursuit of a dream. But have you or your client thought about how to get out of the business? Exit planning involves setting goals and determining the best way to achieve those goals. Whether your clients' successor will be their children, a key employee or an outside buyer, this seminar will help you show your clients how best to maximize their financial return and minimize their tax liability when transferring a business.

Cost: MCBA member attorneys, \$50; member paralegals and public lawyers, \$35; non-member attorneys, \$70; non-member paralegals and public lawyers, \$50; same-day registrations/payments, \$15 additional.
CLE: 2 hours

- Public Lawyers Division board, noon

- MCBA board of directors, 4:30 p.m.

April 16

- Maricopa County Bar Foundation board of trustees, 7:30 a.m.

- *The State Bar of Arizona Course on Professionalism*

12:30 to 5:00 p.m., ASUD
Please join the MCBA as we offer the State Bar required Professionalism program. It's one more opportunity to complete this requirement before the CLE deadline falls on June 30.

Cost: MCBA member attorneys, \$90; member public lawyers, \$75; non-member attorneys, \$90; non-member paralegals and public lawyers, \$75; same-day registrations/payments, \$15 additional.
CLE: 4.25 hours ethics

April 19

- YLD Domestic Violence Committee, noon.

April 20

- Corporate Counsel Division board, 4:30 p.m.
- Bankruptcy Section, 5:00 p.m.

April 21

- Litigation Section, 7:30 a.m.
- Bench Bar Committee, 12:15 p.m., Central Courthouse

April 22

- Estate Planning, Probate & Trust Section, 7:30 a.m.

MCBA CALENDAR

This calendar includes all CLE seminars presented by MCBA as well as MCBA meetings, luncheons and events and those of other voluntary bar associations and law-related organizations. The divisions, sections and committees listed here are those of the MCBA, unless noted otherwise. Everything takes place at the MCBA office, 303 E. Palm Lane, Phoenix, unless noted otherwise. Other frequent venues include the University Club, 39 E. Monte Vista, Phoenix; Arizona State University Downtown (ASUD), 502 E. Monroe, Phoenix; and the Arizona Club, 38th floor, Bank One Building, 201 N. Central, Phoenix. For information about MCBA events or to register for any of the

APR. 2004

S	M	T	W	T	F	S
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	

MCBA seminars, contact the MCBA at 602-257-4200 or visit www.maricopabar.org.

April 28

- Criminal Law Section, 7:30 a.m.

- *Are You Managing Your Stress?* 1:00 to 4:30 p.m., ASUD

This workshop provides effective tools for permanently changing your reaction to stress and the way you deal with difficult situations. Prior attendees have commented, "Every attorney should attend this program."

Cost: MCBA member attorneys, \$75; member paralegals and public lawyers, \$55; non-member attorneys, \$105; non-member paralegals and public lawyers, \$75; same-day registrations/payments, \$15 additional.
CLE: 3 hours

April 29

- Estate Planning, Probate and Trust Section Judicial Reception, 5:15 p.m., University Club

April 30

- *The Nuts & Bolts of Qualified Domestic Relations Orders*

12:30 to 2:30 p.m., ASUD
Topics will include QDROs defined, decree drafting tips, discovery and disclosure issues, separate interest and case law review.

Cost: MCBA member attorneys, \$50; member paralegals and public lawyers, \$35; non-member attorneys, \$70; non-member paralegals and public lawyers, \$50; same-day registrations/payments, \$15 additional.
CLE: 2 hours

- *I'm Powerful, Credible, and Trustworthy! Nonverbal Communication*

1:00 to 4:30 p.m., ASUD
Do your words convey the same meaning as your actions and facial expressions?

Find out in this basic seminar on non-verbal communication. If you are a lawyer who routinely tries court cases, then you don't want to miss this workshop miss.

Cost: MCBA member attorneys, \$75; member paralegals and public lawyers, \$55; non-member attorneys, \$105; non-member paralegals and public lawyers, \$75; same-day registrations/payments, \$15 additional.
CLE: 3 hours

April 23

- Corporate Counsel Division CLE luncheon, 11:45 a.m. to 1 p.m., University Club

- *Involuntary Bankruptcy: A Rational Option?*

1:00 to 4:30 p.m., ASUD
A debtor has engaged in fraudulent transfers, made preferential payments to benefit its principals, and engaged in exemption planning while not bothering to pay its creditors. Among the options available to creditors to preserve the debtor's assets for the benefit of all creditors is an involuntary bankruptcy filing. Involuntary bankruptcy is a drastic remedy that should only be pursued after considering all options and the possible ramifications.
Cost: MCBA member attorneys, \$75; member paralegals and public lawyers, \$55; non-member attorneys, \$105; non-member paralegals and public lawyers, \$75; same-day registrations/payments, \$15 additional.
CLE: 3 hours

April 26

- Employment Law Section, 11:30 a.m.

Maricopa County rich with opportunities for employment law attorneys

By Kathleen Brieske
Maricopa Lawyer

Whether they are protecting the defendant or the plaintiff in disputes, employment lawyers need to effectively manage their careers to remain proficient and profitable. *Maricopa Lawyer* asked Larry Rosenfeld, on the defense side, and Terry Hall, on the plaintiff side, for their advice on making a successful career in employment law in Maricopa County.

Rosenfeld, who has been practicing law for almost 30 years, is a shareholder and co-chair of the labor and employment practice group of Greenberg Traurig in Phoenix. An accomplished speaker and author, he most recently taught a seminar highlighting common workplace issues. Rosenfeld is a long-standing member of the Maricopa County Bar Association and donates a generous portion of his time doing pro bono work for VLP.

Hall currently has his own private practice in Phoenix and has been practicing law for the last 30 years. He defends employees and small companies on issues such as civil rights, ADA and FMLA. An active member of the MCBA, he devotes an abundant amount of time to working with clients obtained through the MCBA's Lawyer Referral Service (LRS) program.

ML: *Is employment law affected by the recent upswing in the job market?*

Rosenfeld: From my experience, when the job market is on the rise, there tends to be less wrongful termination complaints. People seem to bounce back faster in a good economy because they are able to find an equal, if not better, paying job. If the economy is suffering, there is a greater inclination to say a job loss is causing distress because finding new employment is more difficult. In a booming job market, employment lawyers [on the defendant side] need to focus on the internal make-up of start-up companies and those in a growth phase. These companies should take the time to do an employment law audit to ensure a correct infrastructure is in place, including a solid human resources department and well-written company policies.

Hall: Overall, I feel there is no direct impact one way or the other when looking at the relationship between the demand for employment law and job market fluctuation. However, one exception exists when large corporations lessen their workforce, more former employees come to [plaintiff lawyers] with wrongful termination complaints. Whether the job market is weak or strong, there will always be employment disputes.

ML: *How can employment lawyers from the defendant and the plaintiff side form beneficial working relationships?*

Rosenfeld: Stay visible to the other side by respecting their position and ability. Don't

overvalue a case but do present it in a way that leaves a lasting impression. Pay attention to what you tend to look for when providing clients with lawyer referrals [from the other side] and make sure you yourself match up.

Hall: Form relationships by being active in the employment law section of bar associations. Recognize professionalism and good working relationships in the court setting. Value reasoning. If the lawyer gives sound advice to their clients, don't let it go unnoticed when there is a need to provide referrals for lawyers [on the other side].

ML: *What are the most valuable tools employment lawyers can use to build careers here in Maricopa County?*

Rosenfeld: Join organizations that interface with businesses in Phoenix, such as the Chamber of Commerce. Be an active member of bar associations, both statewide and local. Focus also on writing and teaching, especially in a trade group setting. Giving seminars is a great way to gain new clients and keep existing ones.

Hall: Communicating and networking with other employment lawyers is crucial when you are a sole practitioner or part of a small firm. Bar associations, specifically those with sections that focus on employment law, are invaluable for managing a successful career in employment law, as are continuing legal education credits.

ML: *How has your MCBA membership benefited you?*

Rosenfeld: Belonging to the MCBA is vital to expanding employment law opportunities. CLE seminars and attorney networking are big benefits. Don't just participate in activities in the employment law section—broaden your horizon to include other practices. Opportunities may arise where other practices need employment law advice and the visibility you gain while networking with other practice groups will then pay off.

Hall: The MCBA offers a variety of ways to stay current with employment law issues: an employment law section, CLE seminars and the LRS program. Particularly, the LRS program is a great way for plaintiff lawyers to increase their client base. Volunteering 30 minutes of time answering questions has the potential to lead to a solid base of new clients.

Employment law attorneys interested in receiving client referrals from LRS may join the panel by calling LRS Director Margarita Flores at (602) 257-4200 ext. 121 or by downloading an application from the MCBA Web site at www.maricopabar.org. ■

PEOPLE IN LAW



Calderón



Copple



Samuels



Stookey

■ Robert Copple, of counsel with Lewis and Roca, has been appointed to the Center for Public Resources Institute's Panel of Neutrals. Participation on the panel is by invitation only. The institute, founded in 1979 as a multinational resource for avoidance, management and resolution of disputes, has appointed more than 700 neutrals with specialization in over 30 practice areas and industries. Copple practices intellectual property and environmental law.

■ John Stookey, a partner at Osborn Maledon, is the new president-elect of the 450-member Arizona Attorneys for Criminal Justice. Stookey, who also holds a Ph.D. in political science, practices in the areas of white collar defense and capital litigation.

■ Lewis and Roca partner Bruce Samuels has been named to the board of directors for Parents Anonymous of Arizona, a non-profit agency created to strengthen families and prevent child abuse and neglect.

■ Jennings Strouss & Salmon attorney Ernest Calderón has been elected president of the Grand Canyon Council, Boy Scouts of America, the eighth largest council in the nation. Calderón, who received his Eagle Scout rank in 1971, was previously a cubmaster of the Jude Parish pack. ■

Legislative...

Continued from page 1

jurisdiction, powers and duties of justice of the peace courts. Arizona law setting forth the qualifications for justices of the peace *pro tempore* resides at Arizona Revised Statutes § 22-122. Section 22-122 requires a justice of the peace *pro tempore* to be of good moral character, a qualified elector and a resident of this state for not less than one year before his appointment.

House Bill 2375 and Senate Bill 1076 are duplicate measures that would amend A.R.S. § 22-122 to specifically allow the appointment of a justice of the peace *pro tempore* who is not admitted to practice law in Arizona. Additionally, these bills contain conditional enactment clauses requiring amendment to Arizona's Constitution. Senate Concurrent Resolution 1009 is the vehicle that, after passage by popular vote at the next general election, would amend Arizona Constitutional Article 6, Section 31, and exempt justices of the peace *pro tempore* from being members of the State Bar of Arizona.

As of the writing of this article, SB 1076 had passed through the Senate, and was transmitted to the House of Representatives where it passed without amendment in the House Judiciary Committee on March 11, 2004. Similarly, HB 2375 made its way through the House and was transmitted to the Senate where it awaits hearing in the Senate Judiciary Committee.

► Jury Duty — The Lengthy Trial Fund: HB 2609

House Bill 2609 is an emergency measure that amends A.R.S. §§ 21-202, -222, and -336 relating to juries, by providing compensation of 40 dollars per day to unemployed jurors who serve on trials lasting more than ten days. Additionally, HB 2609 permits jury duty postponements to prospective jurors who have not previously had two postponements, and allows the jury commissioner to determine the length of time for the postponement.

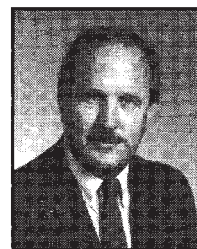
HB 2609 was transmitted to the House of Representatives on March 9, 2004, where it awaits hearings in the Appropriations and Judiciary Committees.

► Merit Selection: SCR 1034

Senate Concurrent Resolution 1034 would refer a constitutional amendment to voters that would increase a county's threshold population index used in determining whether judicial merit selection is required in any particular county. The Senate Fact Sheet for SCR 1034 indicates that Pinal and Yavapai counties are approaching the 250,000 person population threshold. The amendment would increase a county's population requirement from 250,000 to 450,000 people.

SCR 1034 has made its way through the Senate and awaits action in the House Judiciary Committee. If approved, SCR 1034 would be submitted for a popular vote at the next general election.

The target date for this session's adjournment is April 24, 2004. ■



Representing
Major Markets - Worldwide

George King . . .

Our law firm specialist

Give him a call for assistance with:

- professional liability
- property insurance
- general liability
- umbrella coverage
- employee benefits
- personal insurance

Over 300 lawyers insured with us

Serving the Valley since 1957

602-956-7800 • Out of Arizona 1-800-352-8808 • Fax # 602-381-2699



SCHAEFER • SMITH • ANKENY
INSURANCE AGENCY

Classifieds

Maricopa Lawyer Classifieds now online. Visit www.maricopabar.org/classifieds

POSITIONS

ATTORNEY — GLENDALE CITY COURT PUBLIC DEFENDER. Must be AZ State Bar licensed in good standing with significant experience in criminal misdemeanor defense law. Annual Salary \$42,000. Applicants interested in submitting a proposal must download the solicitation at www.glendaleaz.com/purchasing. Select "Bid Opportunities" and "Public Defender." Additional questions may be referred to 623-930-2439. The solicitation due date is April 27, 2004 at 2:00 PM MST.

ATTORNEY

AV rated law firm seeks associate attorney with Real Estate/Transaction experience. Applicants must have excellent academic credentials and strong writing skills. Minimum one to three years experience. For immediate consideration send resume to:

**Firm Administrator
Warner Angle Hallam Jackson &
Formanek PLC
3550 N. Central Ave., Suite 1500
Phoenix, AZ 85012**

**Fax: (602) 234-0419
Email: yam@warnerangle.com**



ENTRY LEVEL CORPORATE ATTORNEY

Swift Transportation Legal Department has an immediate opportunity available for an attorney to provide support on a variety of legal issues to all levels within our organization.

Primary focus of this position includes employment law & litigation management. This position may also require involvement in contracts, general liability insurance, corporate finance, employee benefits, transportation law, commercial law and environmental law.

Job Requirements: Juris Doctor from accredited law school, 0 to 3 years of legal experience. Excellent oral and written communication skills with demonstrated ability to work independently.

(eoe-m/f) Swift Offers A Competitive Compensation Package Including: Medical, Life Insurance, 401(k) Retirement, And Stock Purchase Plan.

Please Fax Or E-mail
Resume/Salary Expectations To:

**Linda Kerbs
Fax: 877-877-9389
E-mail:
linda_kerbs@swifttrans.com**

DISABILITY RIGHTS/MANAGING ATTORNEY/PHOENIX for public interest non-profit law firm. Admitted to practice law in Arizona with 7 or more years experience. Demonstrated experience/interest in disability-related advocacy, civil rights law, and litigation-related practice. Send resume and letter of interest to: E.D., Arizona Center for Disability Law, 3839 N. 3RD St., Suite #209, Phoenix, AZ 85012 EOE.

GREENBERG TRAUIG, LLP - the largest national or international law firm with offices in Arizona continues to grow. Our expanding needs include an ASSOCIATE LEVEL CORPORATE/SECURITIES ATTORNEY, A SENIOR LEVEL ESTATE PLANNING ATTORNEY, AND AN ASSOCIATE LEVEL ATTORNEY FOR FRANCHISE OR DISTRIBUTION-RELATED LITIGATION. Excellent academic credentials and Arizona Bar membership required. Please reply in confidence to Paulette Bateman, Office Administrator, Greenberg Traurig, LLP, 2375 E. Camelback Rd., Ste. 700, Phoenix, AZ 85016 or to batemanp@gtlaw.com

HOLM WRIGHT HYDE & HAYS, an AV rated law firm, seeks an attorney with 2-5 years experience, preferably in construction defect and commercial litigation. Excellent academic credentials, writing and analytical skills required. Send resume, transcripts & writing sample to Mat Wright regular mail at: Holm Wright Hyde & Hays PLC, 10429 S. 51st Street, Ste. 285, Phoenix 85044 or email mwright@holmwright.com.

INSURANCE DEFENSE ASSOCIATES — AV rated medium sized law firm is seeking two additional associate attorneys with one to four years experience for its growing insurance coverage, insurance defense and products liability practice areas. Superior academic background and writing skills are required. One to three years experience in coverage work a plus. The candidate must be confident, self motivated and have strong attention to detail. Please send a resume and a writing sample to Bess Kunz, attention: William M. Demlong, 3838 North Central, Suite 1500, Phoenix, Arizona 85012 or email inquiries to wmd@besskunz.com.

PARALEGAL — Personal Injury firm seeks paralegal with 5+ years litigation experience. Fax resume to Brandon Peters 407-425-8171.

SMALL PARADISE VALLEY FIRM IS SEEKING ASSOCIATE FOR CIVIL LITIGATION POSITION. Must have a minimum of 3 years litigation experience, excellent academic background and strong writing skills. Benefits include medical and dental coverage, 401k and profit sharing plan, covered parking, class "A" office space on golf course near Tatum/Shea. Fax resume to 602-953-3621.

OFFICE SPACE

CLASS-A EXECUTIVE SUITES central/airport location. Full support services, T-1 internet, garage parking, gym, free conference rooms. Flexible lease terms. Call Patty, 602-244-8600.

GRAND OPENING IN NORTH SCOTTSDALE. Class "A" Mirage Executive Suites include phones, fax, copies, receptionist, kitchen, mail and more. Beautiful Tuscan interior with large conference room, business support center and covered parking. Also available, conference room and furnished offices/\$10.00 per hour. 10575 N. 114th St., Suite 103, Scottsdale 480-344-7700. www.mirage-suites.com

To place a
classified ad, call
the MCBA, 602-257-4200

INDIVIDUAL OFFICES FOR RENT. Country Club/University. Shared common areas with use of receptionist, conference room, fax and copy machine. Rodgerslawaz@aol.com or 480-833-6100.

OFFICE SPACE AVAILABLE located in beautiful Class "A" building with many amenities. If interested, please call 602-230-2212.

ONE OFFICE AVAILABLE IN LAW OFFICE AT 44th ST. & THOMAS Park-like setting. Use of conference room, library, receptionist, copier, fax, and secretarial stations. Includes racquetball courts and exercise facilities. Call Terri at 602-952-8500.

PRESTIGIOUS SPACE AT REASONABLE RATES Class "A" building in great Scottsdale location. One larger office (17 x 12), two smaller offices (12 x 9) available in beautiful law suite. All amenities. Staff space available. Call Michele at 480-348-9999.

SHARED OFFICE SPACE — POTENTIAL "OF COUNSEL" RELATIONSHIP with international law firm. Beautiful law suite. Small firm practicing primarily in the areas of international transactions throughout the globe, with an emphasis upon international real estate investments, resort properties and time-sharing condominiums. Offices in Mexico and other countries for 26 years and Bali, Indonesia office opened in 1996. Seeking "Of Counsel" in various areas of support to our international law practice. Also separate suite sublease for 2 attorneys. Call 602-263-9111.

THOMAS AT 7th AVENUE, PHOENIX, EXECUTIVE LAW SUITES. No move in cost and free rent incentives. Completely remodeled from \$195 to \$550 per month, receptionist, 6 conference rooms, state-of-the-art telephones, fax and photocopiers, library, covered parking, employees lounge and more. Call 602-277-4441, ext. 242.

FOR RENT

ASPEN/SNOWMASS VACATION HOME. 5/6 br, ski out/in, hike, fish, bike in cool Rocky Mtn. summer. Reasonable rates. mike.ford@dcranch.com.

ORLANDO/DISNEYWORLD: 2 BEDROOM VERY NICE CONDO with all amenities for rent from 6/4-6/11. Close to all attractions. Rate reasonable. Email jsulliva@fclaw.com for more details.

SERVICES

BAXTER ENGINEERING: Expert Witness, Mechanical Products and Equipment, Accident Reconstruction. Gene K. Baxter, Ph. D., P.E. 480-832-7744.

MICHAEL L. KEITH — CONSTRUCTION SERVICES, INC. Construction Investigation Expert services, inspections, cost of repair. When a home inspector just isn't enough! Has someone been taken advantage of? Construction defects? Work incomplete? Do you have water or mold problems? If answer is yes, then you need our services "Special program for qualified seniors" Licensed ROC 106235 * Bonded * Insured WWW.EXPERTSAZ.COM 0-602-843-8888, M-602-541-6945, F-602-547-2397.

PER DIEM ATTORNEY Meticulous, experienced attorney. Appellate and trial briefs, research. Excellent writing skills. Former N.J. appellate clerk. 623-266-4076.

TAX PROBLEMS — Collections — Solutions — Offers — Doug Gray, E.A., still in the game! xxxIRS, 480-941-2510.

The West Maricopa County Bar Association

welcomes

Pamela Treadwell-Rubin
President, State Bar of Arizona



Treadwell-Rubin will speak at the association's April 8 meeting at the Grand Inn Hotel, 8955 NW Grand Avenue, Peoria. Lunch begins at noon and the cost is \$20. RSVP to Yvonne at (623) 932-0430.

Security Negligence Issues

Forensic Consultant • Expert Witness



Board Certified In Security Management

- Crime Prevention Theory
- Security Standards/Practices
- Crime Foreseeability
- Workplace Violence
- Security Adequacy
- Building & Site Design
- Security Officer Conduct
- Negligent Failure to Plan

Providing expert assistance with case evaluation, investigation, preparation, discovery and testimony.

Offices in Ventura, CA & Las Vegas, NV
AZ Lic. 0310015 • NV Lic. PI 852PP 852A • CA Lic. PI 6477/PPO 10770

Robert A. Gardner, CPP
800-327-3585

cpp@crimewise.com • www.crimewise.com



THE MORTON GROUP

TAKE
THE
RIGHT
STEP

THE
LEGAL
PLACEMENT
FIRM

5151 North 16th Street
Suite 234
Phoenix, Arizona 85016

602.279.5662

fax: 602.279.6215

legaljobs@mortongrp.com
www.mortongrp.com

LEGAL MOVES

■ Ruth Graham Kern and Sharon J. Oscar have joined Fennemore Craig's real estate practice as of counsel. Kern (J.D. 1978, Oklahoma City University) was previously an attorney with Cyprus Amax Minerals Company and Santa Fe Pacific Gold Corporation, where she handled labor and employment issues, land and water law, environmental issues and transportation and power. Oscar (J.D. 1975, Ohio Northern University) is a certified real estate specialist with extensive experience in commercial real estate law, including sales and acquisitions and retail and office leasing.

■ Matthew M. Holman has joined Quarles & Brady Streich Lang's corporate services/public finance group. Prior to joining the firm, Holman (J.D., ASU) focused his practice on broad corporate markets and represented issuers and underwriters in connection with public and private offerings of debt and equity securities. He also served as bond counsel, issuer's counsel and underwriter's counsel in connection with the issuance of taxable and tax-exempt bonds.

■ Keith Olbricht has joined Burch & Cracchiolo as an associate. He will concentrate his practice on commercial litigation.

■ Charles R. Cohen, former director of insurance for Arizona, has joined Ridenour Hienton Harper Kelhoffer Lewis & Garth as of counsel. He will concentrate his practice



Cohen



Holman

on insurance and financial services business and regulation, government operations and affairs, administrative law and captive insurance and alternative risk and transfer programs.

■ Gallagher & Kennedy has added two new associates. Jeffrey A. Deines (J.D., 2001, Loyola University) will focus his practice on bankruptcy law and creditor's rights. William C.B. Underwood (J.D. 1997, Indiana University) will concentrate his practice in the area of environmental law with an emphasis on air quality.

■ Linda M. Mitchell has joined Lewis and Roca as of counsel and will practice with the firm's real estate group. Prior to joining the firm, Mitchell (J.D., Harvard University) served as chief legal officer at America West Airlines.

■ Perry L. Goorman has joined the Washington, D.C.-based firm of Krupin O'Brien as of counsel and head of the firm's Phoenix office. Krupin O'Brien is a management-side labor, employment and immigration law firm.

■ Fennemore Craig has added six new associates. Scott Freeman joins the firm's business and personal injury torts practice group along with Christa Torralba. Freeman (J.D. 1994, ASU) will focus on product liability, commercial litigation and construction litigation, as well as aviation and personal injury defense. Torralba (J.D. 1999, Tulane University) will focus on medical negligence, health care and hospital law. Laura Lo Bianco and Daron Garey (J.D. 2003, University of Missouri) have joined the firm's business and finance practice. Lo Bianco (J.D. 1996, Santa Clara University) previously practiced with Brown & Brain. Blaine Rice (J.D. 2000, UA), formerly with Kutak Rock, has joined the firm's real estate practice, focusing on commercial real estate finance, and Dax Watson (J.D. 1999, ASU) has joined the firm's commercial litigation practice. ■



Mitchell

O'Connor presides again at Old Courthouse

By J. W. Brown
Maricopa Lawyer

U.S. Supreme Court Justice Sandra Day O'Connor was the honored guest at the February 12 kick-off event for a museum and learning center being created in the historic Maricopa County Old Courthouse in downtown Phoenix.

O'Connor served on the Superior Court bench in Maricopa County between 1975 and 1979. Her visit was particularly special because her courtroom was located in the Old Courthouse, making the visit a true homecoming.

"It's marvelous! This is a model for other centers in cities in the United States to introduce students to the third branch of government," O'Connor said of the planned museum and learning center. She said it is crucial for citizens to understand the basic concepts of law if they are to understand not only the judicial branch but also the legislative and executive branches of American government.

The top floor of the building, at 125 W. Washington, Phoenix, will include displays of important court cases and decisions over the years. The building, which opened in 1929, boasted a jail cellblock on the top floor. A part of that old cellblock, which has been restored, will be incorporated with multi-media displays of the justice system.

Some of the most famous cases and events in Arizonan legal history will be

explained as well as the roles of law enforcement agents, lawyers, courts, and corrections, from Arizona's wild west past through the present.

Chief Justice of the Supreme Court of Arizona Charles E. Jones, Presiding Judge Colin F. Campbell and Maricopa County Supervisor Don Stapley also were joined by many other special guests, who included several business leaders, public officials, prominent lawyers and judges.

"There's a dream in this building — A dream of how to educate our children," Campbell said

The Maricopa County Board of Supervisors provided \$5 million for this capital project that also includes the newly renovated 4th and 5th floors of the Old Courthouse.

The American Bar Association's Museum of Law in Chicago is providing its expertise in creating a high quality attraction for visitors of any age interested in the history of Arizona's law and justice.

When completed, the museum will be a key element of student tours with the Trial Courts of Arizona in Maricopa County, Phoenix Municipal Court and the United States District Court. Tours will include visits to courtrooms to observe proceedings, a visit to the museum and presentations by members of the State Bar in the ceremonial courtroom at the Sandra Day O'Connor federal courthouse, three blocks from the museum. ■

ProConsul, Inc. SM
Right Expert Right Answer!

12,000 Medical & Technical Experts

- Nationwide Service
- Free Resumé Binder
- Rigorous Standards
- Fast Inspections
- Customized Searches
- Our Service is a Cut Above

We are listed and recommended by the AM Best Co.

1 (888) 9-EXPERT

(602) 279-2422 Fax (602) 604-9294
1714 E. Bethany Home Road
Phoenix, Arizona 85016
E-mail: experts@expertinfo.com

www.ExpertInfo.com

Young Lawyers Division seeks Law Week volunteers

Festivities to celebrate Brown anniversary

By Kathleen Brieske
Maricopa Lawyer

The MCBA Young Lawyers Division (YLD) annual observance of Law Week runs May 1 through May 7 and will celebrate the 50th anniversary of the U.S. Supreme Court's ruling in *Brown v. Board of Education*. By commemorating the court's *Brown* decision, the YLD hopes to illustrate the meaning of equality in a democracy as well as the role of law, advocates and courts in establishing and protecting citizens' rights.

Among the many events scheduled for Law Week are the Free Legal Advice Law Fair and Phone-A-Lawyer. Both events allow the public to consult with attorneys and receive legal advice at no charge. There also is an opportunity to earn CLE credits at a special forum combined with a happy hour. The Law Week CLE Forum will present alternative perspectives on the legal aspects that are intertwined with the current debate over gay marriage.

Finally, an awards ceremony will be held at the Court of Appeals to honor the winners of an essay contest based on this year's Law Week theme, "To Win Equality by Law." The contest is open to local seventh through ninth graders.

Lawyers are still needed to volunteer a few hours of their time to make each of these events a success.

"Law Week is celebrated all over the nation, and we would like to make a strong Law Week showing in Maricopa County as well," said Law Week Committee Chair, Maxine Becker. "This is a great chance for attorneys to interact with the public and help people begin to solve a legal problem."

Becker added that donating a few volunteer hours can have far-reaching effects.

"We know from some of the problems brought to us last year at the legal advice events that there is a potential to have a real impact on someone's life," Becker said. "Plus, attorney participation goes a long way toward building a better public image for the legal profession."

Interested parties should contact Maxine Becker at maxine.becker@mwmf.com ■

ERISA DISABILITY CLAIMS

(602) 264-6400

RICHARD M. WAUGH, LTD
1612 E. Montebello Avenue
Phoenix, Arizona 85016

Fax 602-264-4755

e-mail richard.waugh@azbar.org

Court-Appointed Receiver Real Estate Consultant Property Manager Expert Witness



Richard K. Olsen
Designated Broker

602-216-6600

Blue Chip Asset Management, Inc.
www.bluechip-az.com

COMMENTARY

Lawyer discipline system needs overhaul

By Jack Levine
Maricopa Lawyer

Despite numerous changes in the leadership of the State Bar over the years, the disciplinary culture at the State Bar seems to be immutable. Several months ago, while reading the section of *Arizona Attorney* dealing with lawyer discipline, I thought at first that I had stumbled upon a mini bar directory. Based on the ever increasing numbers featured in the euphemistically entitled "Lawyer Regulation" page each month and the summaries of alleged offenses, the State Bar apparently is a place where "good deeds rarely go unpunished." Furthermore, despite lip service given to embracing the concept of diversionary programs for minor or unintentional infractions, too many inconsequential offenses continue to be treated as "Murder One."

Currently, over \$2.5 million a year is spent on the State Bar's disciplinary system, which frequently appears to take delight in pursuing sole practitioners for trivial or, in some cases, nonexistent violations. Regrettably, it has evolved over the years into a system in which lawyers are routinely presumed guilty until proven innocent beyond a reasonable doubt.

In contrast, scant attention has been paid to those privileged lawyers who have profited handsomely from their clients' fraudulent real estate schemes, or to lawyers serving on urban re-development committees who pass

confidential site selection information to their law partners, permitting them to snatch up the selected land at bargain prices and later reselling it to the re-development authority at a substantial profit. Also overlooked have been attorneys in firms which have taken control of the governing boards of our public utilities through the election of firm members or their relatives, while the firm provides unmonitored legal services to the public utility at fees that no one questions.

Another area that has proven to be of little concern to the State Bar is those law firms which give large campaign contributions collected from firm members to political candidates and, in return, receive favorable treatment before boards and commissions in zoning and tax assessment matters or lucrative legal service contracts from public entities at exorbitant non-competitive rates.

These and other conflict of interest schemes by well connected lawyers cost the public many millions of dollars a year and stand in stark contrast to those lawyers who are hounded by our disciplinary system should they become amorously attracted to a client, or fail to return phone calls or allow their trust account to become temporarily overdrawn.

The Rules of Professional Conduct have been continually expanded to proscribe conduct that, at one time, was not considered to be unethical. Recently, the Arizona Supreme Court, at the request of the State Bar, enacted a

host of additional changes which, according to the State Bar, represents the most comprehensive change in our ethical rules since their adoption in 1985. Our previous Rules of Professional Conduct required 56 pages. The new rules, which became effective on Dec. 1, 2003, ramble on for 112 pages. In earlier times, when lawyers were far more respected by the public than they are now, there were no disciplinary rules. Only one basic principle governed a lawyer's conduct in all matters and it had served the profession well for hundreds of years: "A lawyer shall at all times avoid impropriety or the appearance of impropriety."

Today, we have 13 lawyers working full time in the disciplinary section at the State Bar. Despite the considerable resources devoted to lawyer discipline and page after page of detailed Rules of Professional Conduct, each month dozens of lawyers accused of ethical violations are hauled before disciplinary committees. Recently, one lawyer spent over \$250,000 in legal fees to defend herself and her reputation against charges that were ultimately determined to be groundless. Is the large amount of resources presently being devoted by the State Bar to disciplinary matters necessary because so many Arizona lawyers have lost their ethical compass? Or is it simply a matter of bureaucratic "make work" in order to justify their ever increasing salaries and budgetary demands?

Up until the 1970s, the State Bar staff consisted of an executive director, one attorney,

two secretaries and two part-time investigators. The board of governors heard and decided all disciplinary matters which were handled by volunteer bar counsel. The entire disciplinary budget at that time was less than \$100,000. In those simpler times only significant, intentional breaches of ethics were deemed worthy of prosecution. However, lesser violations did not go unpunished. Eventually, the lawyer's conduct would become known to others in the legal community and the lawyer's reputation would suffer.

We desperately need simplification of our ethical rules and a change in the culture at the State Bar. Instead of creating sacrificial lambs to appease the "lawyer bashing" public or giving in to the bureaucracy inspired need to demonstrate perceived ethical wrongdoing for purposes of promoting job security, we should follow the rule of reason. We need to return control of lawyer discipline to the membership where it properly belongs. Members could serve as bar counsel on a volunteer basis, receiving CLE ethics credit for such service. With greater participation by the membership, we would hopefully be able to restore some much needed sanity to the system.

► Jack Levine is a sole practitioner who concentrates his practice in the areas of personal injury, employment and family law. He is a past chair of the State Bar's Trial Practice Section and a past president of the Arizona Trial Lawyer's Association. ■

Courtwatch...

Continued from page 1

not prohibiting speech, because harassment is not . . . protected speech. Harassment is not communication, although it may take the form of speech."

Pelander acknowledged that § 13-2921.01 regulates speech "in a broad sense." He nevertheless rejected Brown's argument that the statute regulates protected speech because "criminal liability under the statute is based on the 'manner' in which certain communication is conveyed and the underlying purpose for the communication."

"This is made clear," he continued, "by the statute's requirement that the communication must have been made with the specific 'intent to harass.'" He also noted the fact that the statute has both subjective and objective components, requiring "the harassing conduct to be focused on 'a specific person' and of a type that not only 'in fact seriously alarms, annoys or harasses [that] person' but also 'would cause a reasonable person' to be seriously alarmed, annoyed or harassed."

"Because the statute only criminalizes communications made with a specific, deliberate purpose, the statute does not apply to pure First Amendment speech and instead regulates, at most, a blend of speech and conduct," Pelander concluded. He noted that the U.S. Supreme Court has held that "the government has a freer hand in regulating expressive conduct than it has in restricting the written or spoken word."

To determine whether conduct is sufficiently imbued with speech requires the court to determine whether the conduct was intended to convey a particularized message that would be understood by those who viewed it. Pelander found those requirements lacking in Brown's case: "Brown's repeated entreaties . . . that they resume their relationship do not contain any such particularized political or social message warranting First Amendment protection."

"Furthermore," he continued, "in light of the injunction against harassment . . . and his admitted violation of the injunction, he cannot seriously argue that his unwanted calls to her actually conveyed any particularized message of the type the First Amendment protects."

Joining Pelander in affirming Brown's conviction were Judges Philip G. Espinosa and Peter J. Eckerstrom.

A criminal defendant has a constitutional right to attend his own trial. But what happens if the judge takes the jury's verdict outside the defendant's presence? Is that enough of a violation to warrant the reversal of a conviction? According to a split panel of Division One of the Court of Appeals, the violation does warrant reversal. *State v. Whitley*, No. 1 CA-CR 02-0823 (Ariz. App. Feb. 24, 2004).

Eric Glynn Whitley was charged with auto theft. After the close of evidence, at approximately 2:30 in the afternoon, the jury retired for deliberations. Whitley left the courthouse but left a telephone number with his attorney, saying he could be back in

15 minutes. The jury announced it had a verdict a half hour later.

After defense counsel unsuccessfully tried reaching the defendant for 30 minutes, the trial judge decided that the proceedings would not wait and that the verdict would be taken in the defendant's absence. Over an objection, the court took the verdict. The jurors were polled, and each confirmed the guilty verdict.

Judge William F. Garbarino held that taking the verdict in the defendant's absence amounted to a violation of his Sixth and Fourteenth Amendment rights and required a new trial, a right codified in Criminal Procedure Rule 19.2. He first held that the circumstances did not amount to a voluntary waiver. "There is nothing in the record," Garbarino wrote, "to indicate that the defendant received notice that the jury had reached a verdict or that the court was ready to proceed. Without this information, the defendant could not voluntarily waive his right to attend by true freedom of choice."

The state argued that the violation could be ignored as harmless error. This argument produced three different opinions from the three-member panel.

Garbarino wrote that although he agreed that most trial errors are subject to the harmless-error analysis, "this is a case in which I cannot envision a circumstance when the error would not be harmless," because "I cannot perceive that our supreme court would promulgate and effectuate a rule that contains no remedy."

Garbarino first chastised the trial court for its impatience. "The violations of Rule 19.2

and the defendant's Sixth and Fourteenth Amendment rights were not justified by a delay of less than one hour. The verdict was read one hour after the court recessed for jury deliberations, and, at most, thirty minutes after the court first attempted to contact the defendant. . . . Counsel also avowed that the defendant would return at 4:30 p.m., which was less than one hour from the time the verdict was read," Garbarino wrote. "Even with this avowal," he continued, "the trial court allowed the verdict to be read in the absence of the defendant."

Judge Donn Kessler concurred in the judgment. He agreed that the error was not harmless, noting that other courts had reached this conclusion "because of the possible psychological impact of the defendant's presence when jurors must announce their verdict."

But Kessler also opined that taking the verdict without the defendant amounted to structural error. "Given both the symbolic nature of the jury returning its verdict in the presence of the defendant and the possible effect of the defendant's presence on any juror's right to question or change that juror's vote," he wrote, "erroneously returning a verdict in absentia undermines the public's confidence in the fairness of the process."

Judge Sheldon H. Weisberg dissented, believing that the error was harmless. "Because there was neither prejudice to defendant nor unfairness in the trial process, I would . . . conclude that the subject error was trial error," he wrote. "Having concluded that such trial error was harmless, I would affirm the conviction." ■

Ethics...

Continued from page 4

Important conflict-related changes

Prior conflict-related ethics rules required the client to reimburse the attorney for all litigation costs and expenses regardless of the outcome of the case. Rule 1.8 (e) now gives Arizona attorneys the ability to condition the client's repayment of litigation costs and expenses on the outcome. While attorneys are still forbidden from subsidizing clients for such items as living expenses as doing so would encourage frivolous lawsuits as well as to create incentives for attorneys to put too much at stake on individual cases, the revisers determined that these same hazards did not justify prohibiting attorneys from lending court costs and litigation expenses to clients since such advances are "virtually indistinguishable from contingent fees and help ensure access to the courts."

Attorneys offering contingent fee arrangements will undoubtedly welcome this rule change as a means of attracting additional business. On balance, potential clients who have less to lose (i.e. litigation costs and expenses) are more likely to resort to litigation as a means of resolving their dispute.

Another important change is the imputation principle of new Rule 1.10. The rule preserves its fundamental concept that for lawyers associated in a firm, a conflict of interest for any one of them practicing alone is imputed to all lawyers in the firm. But the drafters recognized the reality of lawyers leaving firms and joining other firms much more frequently today than in the past. Accordingly, an exception to the general imputation rule was made for a lawyer who becomes newly associated with a firm, but whose prior firm was involved in a matter that would constitute a conflict of interest for the new firm. Although the lawyer is disqualified under E.R. 1.9, the other lawyers in the new firm are not disqualified from handling the case if (1) the disqualified lawyer did not have a substantial role in the matter; (2) the disqualified lawyer is screened from any participation in the matter and receives no fee therefrom; and (3) written notice is promptly given to any affected former client.

The term "screened" is defined in E.R. 1.0 as "the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or

other law." Thus, with proper screening, mobility within the legal profession is permitted while still preserving conflict of interest rules against the disqualified lawyer.

Use caution when advising prospective clients

Lawyers are now prohibited from using or revealing information discovered through discussions with prospective clients, except for the rare circumstances described in other Rules 1.6 and 1.9 with respect to confidential information learned from current and former clients. A prospective client is defined as "a person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter." Lawyers are now prohibited from representing clients with "interests materially adverse to those of a prospective client in the same or substantially related matter" if the lawyer obtained facts "that could be significantly harmful to that person."

A lawyer may avoid the rule's prohibition from representation if both the affected client and the prospective client give their informed consent to the lawyer's representation. Furthermore, a law firm wishing to represent the affected client may avoid imputation in the same manner discussed above with regard to lawyers changing firms — by screening the disqualified lawyer from any participation in the matter, by not giving the disqualified lawyer any part of the fee from the matter, and by giving written notice promptly to the prospective client."

Many attorneys might logically assume that the duty of competence is lessened with respect to advice given to a prospective client. Yet judging by the final comment to this rule, that assumption is false. The comment provides: "For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see ER 1.1." ER 1.1, which outlines an attorney's duty of competence, does not qualify that duty as it pertains to advice given to prospective clients. Thus, attorneys should be just as cautious when giving legal advice to prospective clients as they are when advising retained clients.

Duty to explain role as third-party neutral to unrepresented parties

Rule 2.4 is testament to the increasing role that alternative dispute resolution (ADR) plays in our justice system. In devising this new rule, the revisers sought to protect unrepresented parties from the false impression they might otherwise be under, that a third-party neutral (such as mediator, arbitrator, etc.) also is their advocate. The Rule is relatively straightforward, and provides in perti-

nent part as to unrepresented parties: "the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client."

Lawyer-neutrals should be wary of unrepresented parties who appear to be particularly unfamiliar with ADR, and of the various roles of the participants. As one of the comments to the Rule warns: "For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege."

Duty of candor to courts includes duty to correct the record

Revised Rule 3.3 now unambiguously requires Arizona attorneys to "correct a false statement of material fact or law previously made to the tribunal by the lawyer." Moreover, the attorney must now affirmatively act to correct materially false statements he knows to have been made by his client or witness. While the rule implies that such corrective measures will not always include disclosure to the tribunal, in most instances disclosure will be required. Comment [1] to the rule stresses that the duty of candor not only applies to courtroom, but to depositions as well.

So what is an attorney to do if he believes that certain ethics rules simultaneously require him to disclose information, but other ethics rules require him not to disclose that same information? The revised rules are more helpful to attorneys caught in this bind. For example, Rule 1.6 (d) (5) now limits a lawyer's duty not to reveal information relating to the representation "to the extent the lawyer reasonably believes necessary to comply with other law or a final order of a court or tribunal of competent jurisdiction directing the lawyer to disclose such information." Further, comment [9] to revised Rule 1.6 appears to concede that the duty of candor, including the duty not to present false evidence, trumps a lawyer's duty not to disclose confidential information.

As the duty of candor now supersedes the duty not to reveal information relating to the representation, one must ask whether this will compromise the attorney's relationship with the client — a relationship built on trust and loyalty. In appropriate circumstances an attorney should certainly advise his client of his duty of candor prior to receiving confidential information from the client.

Communicating with unrepresented persons

Finally, Rule 4.3 has clarified that an attorney must refrain from giving legal advice to unrepresented parties when the lawyer "knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client." Lest one attempt to assert willful ignorance as an excuse for having improperly contacted an unrepresented person, the comment warns that in case of doubt, "a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person."

Duty to play fair

The revisers added a new subsection to Rule 4.4 concerning the duties of a lawyer who receives a document that he knows, or should know, was inadvertently sent to his attention. This new portion of the rule requires lawyers who face this situation to "promptly notify the sender and preserve the status quo for a reasonable period of time in order to permit the sender to take protective measures." To avoid temptation to peruse the first draft of a confidential document that opposing counsel has just mistakenly faxed, the comment instructs, in pertinent part: "this rule requires the lawyer to stop reading the document" and "to make no use of the document." Neither the rule nor the comments go so far as to require the lawyer to return a mistakenly sent document to its sender (according to the comment, return of the document is a matter of law beyond the scope of the rules). Nonetheless, as difficult as it might be, attorneys must not give in to temptation to read the document under these circumstances — in almost all cases, the document should be returned, unread, to its sender.

New rules a worthy effort

The new rules represent a substantial and worthy effort by the State Bar of Arizona to increase the professionalism of lawyers while making the ethical rules more applicable to modern law practice. New rules as to lawyers changing firms and lawyers operating ancillary businesses are simply a reflection of what is happening today in the legal profession. On the other hand, new rules as to candor to courts, disclosures and fairness to opposing counsel are indicative of the State Bar's view that conduct of lawyers needs to be upgraded. Perhaps most indicative of this latter point is the drafters' decision to remove the concept of zealous representation from the preamble. As earlier explained, there is nothing in the definition of the word "zealous" that would encourage unprofessional conduct. Yet the concept of zealous representation has been frequently used by unscrupulous lawyers to excuse less than honorable conduct.

It is submitted that rule drafting is an important step, but new rules alone will not cause dishonorable lawyers to change their ways. Furthermore, disciplinary action by the State Bar is an extreme action, and so (in this author's view) should be used for extreme abuses of the Rules of Professional Conduct.

The real key to improved professionalism lies with the judiciary. Too often, judges are either too tolerant of unprofessional attorney behavior or too willing to place the blame on the opposing attorneys for not cooperating with each other. The result is that, too often, unprofessional behavior by counsel in litigation (for example, lack of full and timely disclosure) is not punished. In such cases, counsel is actually rewarded with a litigation advantage for unprofessional behavior. When a judge is willing to make the effort to learn which attorney is really at fault and takes action accordingly, the unprofessional conduct in that case will end because it results in a litigation disadvantage. Hopefully, judges will do their part — together with the State Bar and drafters of the new rules — to achieve true improvement in the professionalism of lawyers.

► Phoenix attorneys Jay M. Mann and James D. Hartt practice with the law firm of Mann, Berens & Wisner. ■



BOND INVESTIGATIONS

- Legal Investigations
- Depositions Present Services
- Document Retrieval
- Background Checks
- Child Custody Disputes
- Criminal Investigations
- Threat Investigations
- Asset Location

(888)-963-BOND

Main (480)-513-6586
 Fax (480)-513-6593
 info@bondinvestigations.com
 www.bondinvestigations.com

BAR DISCIPLINE DEFENSE

Bar Complaints	Disability Proceedings
Reinstatements	Ethics Consultation

Ralph Adams

10 years State Bar experience:

State Bar of Arizona,
Former Senior Bar Counsel
Utah State Bar,
Former Senior Staff Counsel

Initial consultation:
No charge
At your office

602-799-1353
radamslaw@msn.com

MARICOPA LAWYER
CLASSIFIED ADS
ARE NOW ONLINE... VISIT
www.maricopabar.org/classifieds