



Help Briyanna

The Hayzel B. Daniels Bar Association is heading an effort to send a deserving sixth-grader to a young leaders conference in Washington, D.C. **Page 10.**

Serving community important to MCBA leader

By **Cari Gerchick**
Maricopa Lawyer

Author Joyce Carol Oates once said, "In love there are things—bodies and words." New Maricopa County Bar Association President Yvonne Hunter lives this statement. Her life has been focused on using bodies, words and love to make a difference in the world around her.

Hunter was exposed to a number of different cultures and perspectives as she traveled in the United States and Europe with her family during her childhood. Her father was in the Air Force and eventually retired in Las Vegas, Nevada.

Her first career plan did not include being an attorney. She started playing piano when she was six years old and during college — she attended the University of Nevada-Las Vegas — her goal was to play piano in an orchestra. Fortunately for the legal community, there aren't many pianos in orchestras, so she turned her attention to law school.

Hunter wanted to attend law school because it is a useful education and she could continue to learn how to use words to help people. Her desire to be an attorney brought her to Arizona in 1977. At that time, Nevada didn't have a law school, so she moved to Phoenix to live with her younger sister, who was attending Arizona State University.

Hunter entered the ASU law college in 1981. During law school, she participated in various activities and externship programs. Her favorite part of law school was the ASU Law Follies, a show staged by law students that made light of law school occurrences and personalities.

After graduating from law school in 1984, Hunter's first job as an attorney was as a deputy Maricopa County attorney.

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Now you don't have any excuses for not backing up your computers every day. **Page 5.**

'We are all in this together' Governor asks for help while MCBA honors members' service

By **Pat Sallen**
Maricopa Lawyer

AS THE MARICOPA COUNTY BAR Association honored members for their service, Gov. Janet Napolitano challenged the more than 220 lawyers and judges who attended the MCBA's annual meeting "to think what you can do to build a better Arizona."

In remarks that focused on the state's immediate budget troubles but also advocated taking a long-term view of solutions, Napolitano urged the audience to become involved.

"We have our challenge, but our challenge is also our opportunity because we can do what we want," she said. "We can be a shining example for other states of how to take a crisis and turn it into a future."

"I can't do it by myself. I'm just the governor. I need the Legislature, I need the people in this room, I need the citizens of Arizona to be engaged and to recognize what I said at the inaugural: we are all in this together."

The state will have a \$310 million deficit for the current fiscal year, and a projected \$1 billion deficit for next year, Napolitano said,

due to a decline in revenue and a "dramatic increase" in spending.

"We have the same revenue now as in

1999. But now, we have a half a million more people. One hundred thousand-plus more

— See **Annual** on page 11



Patricia Gerrich (left) receives the Robert R. Mills Member of the Year from MCBA Executive Director Brenda Thomson and 2002 President Michael D. Jones. Jones said Gerrich, executive director of the Volunteer Lawyers Program, "kindly but very forcefully puts pressure on all of us to be involved in VLP."

Do the new UPL rules provide checks and balances?

By **Joan Dalton**
Maricopa Lawyer

The Arizona Supreme Court has approved extensive rule changes that extend its jurisdiction and regulatory authority and define the practice of law and the unauthorized practice of law.

In an order issued Jan. 15, the court amended Supreme Court Rule 31 and added Rules 32 and 75 through 80. The order is the result of a rule-change petition filed by the State Bar of Arizona in April.

The changes:

- ▶ Extend the court's jurisdiction and regulatory authority to "all persons providing legal services to the public, regardless of whether they are lawyers or non-lawyers." (Rules 31(a)(1); 75; 31(c)(23); Ariz. Code of Judicial Admin. Pt. 7, ch. 2, § 7-208(C));

- ▶ Define the "practice of law" and the "unauthorized practice of law" (Rules 31(a)(2)(A),(B));

- ▶ Vest prosecutorial authority in the State Bar for non-lawyers other than document preparers (Rule 7(b));

- ▶ Provide a regulatory scheme for document preparers under the court's oversight (Ariz. Code of Judicial Admin. Pt. 7, ch. 2, § 7-208);

- ▶ Structure civil injunctive remedies and proceedings for the unauthorized practice of law in the Superior Court (Rules 75-79);

Practice of law defined

Under new Supreme Court Rule 31(a)(2)(A), the practice of law means providing legal advice or services to or for another by:

- (1) preparing any document in any medium intended to affect or secure legal rights for a specific person or entity;

- (2) preparing or expressing legal opinions;

- (3) representing another in a judicial, quasi-judicial or administrative proceeding, or other formal dispute resolution process such as arbitration and mediation;

- (4) preparing any document through any medium for filing in any court, administrative agency or tribunal for a specific person or entity; or

- (5) negotiating legal rights or responsibility for a specific person or entity.

- ▶ Ban designations intended to induce others to think an individual is authorized to practice law (Rule 31(a)(2)(B)(2));

- ▶ Define "legal assistant" and "mediator" (Rules 31(a)(C) and (D)); and

- ▶ Categorize additional activities as the "practice of law" while exempting those activities from unauthorized practice (Rules 75-79).

The rules exempt nonlawyer assistants who act under the supervision of a lawyer in compliance with Ethical Rule 5.3.

The new and amended rules take effect July 1.

A press release issued to announce the court's actions said the modifications "simultaneously provide greater consumer access to legal services, accountability and protection for those who seek document assistance or legal information from persons not trained or admitted to practice law in Arizona."

The Supreme Court's order arrives despite questions as to whether Arizona's constitution provides the court with authority over non-lawyers. See J. Rose, Comment on Supreme Court Petition, No. R-02-0017 (filed Sept. 20) ("[T]here is significant doubt regarding the power of the Arizona Supreme Court over conduct and activities not occurring in an adjudicatory forum.") Similarly, the new regu-

— See **UPL** on page 4

COMMENTARY

Successfully navigating turbulent times

Extraordinary times call for extraordinary measures, and these are certainly extraordinary times. The economic stresses in the community have impacted many volunteer organizations.

The Maricopa County Bar Association also has faced fiscal challenges, but we have successfully reallocated resources to meet these challenges to ensure sustained services for our members.

We owe much of our success to you. You have found value in joining the MCBA. Through the work and leadership of Maricopa County Superior Court Judge Michael Jones (the MCBA's immediate past president), the board of directors and especially the staff, we have increased our membership roster. We also have been able to provide unparalleled service to MCBA members



Yvonne R.
HUNTER
MCBA
PRESIDENT

and ensure continued services.

We will continue to work with the Maricopa County Bar Foundation this year to launch a major capital campaign, and to celebrate the foundation's 20th anniversary. Many local non-profit organizations have benefited from your generosity in supporting the foundation. We plan to feature many of these recipients in future issues of *Maricopa Lawyer* so you can see the good work your donations have fostered. We want to find ways to con-

tinue this tradition of supporting the Maricopa County community.

I welcome your comments and suggestions during my term as president. You can reach me by email at yvonne.hunter@pinnaclwest.com or at 602-250-4520. On behalf of the board of directors, we are committed to the success of the MCBA. I hope you are able to support the board in making MCBA one of

the most successful volunteer bar association's in the country.

Annual award luncheon

Special thanks to all of you who attended the MCBA's annual awards luncheon on Jan. 21. More than 200 MCBA members and award winners attended the event at the Hyatt

— See **President** on page 15

YLD delivering tolerance message to school children

As part of the Young Lawyers Division's ongoing commitment to improving our community, we are continuing our work with children. One of our programs aimed at working with children is Tolerance Through Education, which teaches children to have empathy for others.

The American Bar Association's Young Lawyers Division developed this program last year as an intervention tool in light of all too numerous incidents of violence at schools. This year, MCBA YLD members are visiting elementary schools throughout Maricopa



Lori A.
HIGUERA
MCBA/YLD
PRESIDENT

County as part of our commitment to the community and its youth.

On Jan. 17, two YLD members, James Shinn, a commercial litigation attorney at Fennemore Craig, and Mayan Tahan, an attorney with the Arizona Attorney General's Office, spent the morning with fourth graders at Sheeley Elementary School in the Tolleson Elementary School District, discussing tolerance and belonging. The one-hour session was one of three lessons that Shinn and Tahan will deliver to Sheeley fourth graders this year.

From all reports, the first session made a remarkable impression on the students, who found the interaction with young lawyers and the opportunity to learn about the importance of tolerance for people's differences extremely rewarding.

To learn more about the YLD's Tolerance Through Education program or the many other programs sponsored by YLD, contact Shane Clays at 602-257-4200. ■

*It is not what we give but what we share,
for the gift without the giver is bare.*

— Unknown

January was National Mentoring Month, a time to think about taking a few minutes out of our busy schedules to provide insight and positive words of wisdom to others, be it a child, a relative, a friend, an acquaintance, a business associate or possibly even a stranger. We shouldn't think about mentoring only during National Mentoring Month.

I vividly recall many times how, when I was on my own and a long way from home, some encouragement from a person I never met brightened my day. A number of years ago, I decided to spend some time sailing around the world. At least, I started off sailing around the world, then changed my mind, and ended up doing it anyway. I didn't have any fancy electronic equipment, such as a



Garth
HARRIS
PARALEGAL DIV.
PRESIDENT

global positioning system. I had to use the old fashioned sextant. The problem was I wasn't very good with one, especially when trying to use it while underway. I knew how to use it, but in six-foot seas from a rolling, bouncing deck, I had a lot of issues.

During one of those very frustrating moments when I was ready to throw the sextant overboard, I responded to a radio call from John Gieshman, a ham radio operator out of Sydney, Australia. It didn't take long for him to sense my frustrations. Being an ex-seadog himself, he relayed some of his old seafaring stories and, after a couple of laughs, he talked me through my next several sights. He was a voice of calming influence. I could always count on John to call me and regale me with some interesting and entertaining stories of his life on and around the sea. I learned a lot from his stories and sea experiences.

I never met John. His funeral occurred a couple of weeks before I got to Sydney, but I did meet his wife. She told me how much he enjoyed reaching out to people like me and reliving his past through our present. I was one of dozens with whom John maintained a radio relationship around the world each day.

While I wouldn't say that John was my mentor, I won't say that he wasn't. John made me feel good about my decision to sail around the world. His voice offered encouragement and, occasionally, advice. That encouragement often came when I needed it most. Isn't providing encouragement and advice what a mentor really does?

— See **Harris** on page 15

Corrections

An article in last month's *Maricopa Lawyer* about *Estate of Helen H. Ladewig v. Arizona Dep't of Revenue* inaccurately reported that the merits of the case were never ruled on. After the case made its way through the administrative process and returned to court, the trial judge held that taxing dividends of foreign corporations but not local corporations violated the U.S. Constitution's Commerce Clause. The state Revenue Department did not challenge or appeal that ruling.

The headline on a page 1 article in last month's *Maricopa Lawyer* about the effect of state budget cuts on the Maricopa County Superior Court contained a typographical error. The headline should have read, "Probation will be a 'scarce resource' due to budget cuts." ■

Legal Brief

■ Columbia University President Lee C. Bollinger, a former president of the University of Michigan, will deliver the annual Willard H. Pedrick Lecture at 6:30 p.m. Feb. 4 in the ASU College of Law's Great Hall. Bollinger's lecture is titled "Issues in Higher Education." As president of Michigan, Bollinger became the named defendant in two affirmative action cases currently being considered by the U.S. Supreme Court. The Pedrick lecture honors the late Willard Pedrick, founding dean of the ASU law college. The lecture is free and open to the public and will be followed by a reception.



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Errors will be corrected in a subsequent issue.

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4 nominated to replace Feldman

Two attorneys and two judges have been nominated to fill the Arizona Supreme Court vacancy created by the retirement of Justice Stanley Feldman.

After conducting interviews on Jan. 17, the Arizona Commission on Appellate Court Appointments nominated:

■ W. Scott Bales, 46, Lewis and Roca, Phoenix, a Democrat;

■ Maricopa County Superior Court Judge David R. Cole, 51, Peoria, an Independent;

■ Andrew D. Hurwitz, 55, Osborn Maledon, Phoenix, a Democrat; and

■ Arizona Court of Appeals Judge A. John Pelander III, 51, Tucson, a Republican.

Gov. Janet Napolitano was scheduled to interview the candidates on Jan. 23 and 24 and said at the Maricopa County Bar Association's annual meeting on Jan. 21 that she expected to make her selection during the week of Jan. 27.

Bales and Hurwitz both have ties to Napolitano. Bales served as Napolitano's solicitor general during much of Napolitano's tenure as state attorney general, and Hurwitz served as co-chair of her gubernatorial transition committee.



Bales



Cole



Hurwitz



Pelander

In addition to Bales, Cole, Hurwitz and Pelander, the nominating commission also interviewed two Tucson private practitioners, Barry M. Corey of Corey and Kime and Gregory J. Kuykendall, a sole practitioner, both of whom are Democrats. Feldman, a Tusconan,

was the only member of the Supreme Court from outside of Maricopa County.

Hurwitz and Pelander also applied last year for both of the Supreme Court vacancies ultimately filled by then-Court of Appeals judges Rebecca White Berch and Michael D. Ryan.

For the first vacancy, created by the resignation of Justice Frederick Martone, Hurwitz ended up on the list of nominees, along with Berch and Ryan. Gov. Jane Dee Hull chose Berch to fill the vacancy. A few months later, for the vacancy created by the retirement of Justice Thomas Zlaket, Hurwitz and Pelander both ended up on the short list of five nominees, along with Ryan and two others who did not apply for the Feldman opening. Hull appointed Ryan.

With 11 original applicants, the Feldman vacancy attracted the smallest pool of applicants. For the Martone vacancy, 19 lawyers and judges submitted applications. For the subsequent Zlaket vacancy, 15 lawyers and judges applied.

The Maricopa County Commission on Trial Court Appointments accepted applications through Jan. 27 for two vacancies on the trial court bench resulting from the resignation of Judge Robert Myers and the retirement of Judge Alan Kamin. Myers resigned from the bench to become Attorney General Terry Goddard's chief deputy.

By press time, the commission had not scheduled its meetings at which it would review applications and select applicants to interview. ■

Looking for CLE? We've got it!

The Maricopa County Bar Association provides affordable, convenient and relevant continuing legal education seminars. February seminars are:

- Feb. 7: The Nuts & Bolts of Criminal Law
- Feb. 13: Effective Settlement Conferences in Divorce Cases
- Feb. 19: Innocent Spouse Provisions: A Practical Guide for Family and Tax Law Practitioners
- Feb. 20: Bankruptcy & Divorce
- Feb. 21: Leaders of Litigation, Part 1: Initial Intake, Interviews and Investigations
- Feb. 26: The Ins & Outs of the Landlord and Tenant Act
- Feb. 27: Strategy and Current Trends in Commercial, Tort and Insurance Arbitration and Mediation
- Feb. 28: Leaders of Litigation, Part 2: Discovery & Deposition

For all the specifics — time, place, price and information about the content — see Maricopa Lawyer's calendar, page 9. ■

Courtesy and the criminal continuance panel

By Sherry Bell
Special to Maricopa Lawyer

COMMENTARY

When did professional courtesy die? Many think it expired with the advent of the so-called "continuance panel" in Maricopa County criminal cases.

This panel was instituted following a mandate by the Arizona Supreme Court to move criminal cases at a faster pace. The Supreme Court touted a study showing that cases in Detroit and other major cities were being handled in a more expedient fashion than cases here. Then-Justice Thomas Zlaket claimed the panel was started to prevent criminal defendants from languishing in jail, even though it also applies to out-of-custody defendants.

In any case, Maricopa County Superior

Court Judge Colin Campbell initiated the continuance panel with the unanimous consent of the judges who were on the criminal bench in June 2000. According to Judge Eddward Ballinger, the panel's dual goals were to achieve uniform results and to rid individual judges of the burden of deciding continuances.

Informal court statistics reveal that about 80 percent to 90 percent of requested continuances are granted. Most of the parties stipulate to the necessity of these continuances.

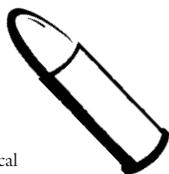
Even with a high rate of continuances granted, however, the uncertainty created by the new system makes scheduling far more difficult for most attorneys and imposes unnecessary and unwelcome additional strain

— See *Continuance* on page 12

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UPL...

Continued from page 1

latory structure appears inconsistent with the checks and balances afforded legal consumers in other states.

Authority over nonlawyers

An Associated Press news article reported that the Supreme Court attributes its authority for these rule changes to its "inherent regulatory powers over all persons providing legal services to the public." Paul Davenport, "Supreme Court OKs credential system for non-lawyers," Associated Press, Jan. 16. But while it might seem that the court's authority to

define the practice of law issues from its inherent power, jurisdiction over non-lawyers in nonadjudicatory forums is not within the traditional inherent judicial power to control access to the courts. J. Rose, *Unauthorized Practice of Law in Arizona: A Legal and Political Problem that Won't Go Away*, 34 Ariz. St. L.J. 585, 605, 606 (Summer 2002).

More likely, the court needs some independent legal basis for asserting its power over non-lawyers. *Id.* at 608.

If the Court claims that its inherent power extends to prohibiting non-lawyers from ["practicing law"] without any other statutory basis, it would seem that it is trying to create an offense by judicial fiat. . . . Although the use of injunctive power does not formally create a crime, this use of judicial power approaches a de facto attempt to resuscitate the [repealed] criminal [unauthorized practice] statute. Violation of the injunction may be punished as contempt . . . and the violator risks imprisonment without a jury trial.

Id. at 608-09.

On the other hand, article IV, pt. 1, § 1 of Arizona's constitution vests the legislative authority of the state in a bicameral legislature.

The reference to "legislative authority" incorporates the general principle, common to all state constitutions, that the state legislature has inherent power to act, so that the constitution is principally concerned with limitations on legislative power....

From its earliest post-statehood decisions, the Supreme Court has consistently recognized that the legislature has "all power not expressly denied it or given to some other branch of government," and therefore "the public policy of the state is entirely in the hands of the legislature, except as restrained by the Constitution."

John D. Leshy, *The Arizona State Constitution* 92 (G. Alan Tarr, ed., Greenwood Press (1993) (internal citations omitted). Accordingly, elected state representatives possess the constitutional grant of authority to make law.

Because unauthorized practice provisions regulate the conduct of nonlawyers, nearly all states' UPL provisions exist in statute. See www.crossingthebar.com/upl.htm. Moreover, public policy determinations concerning the unauthorized practice of law should not lie exclusively with the judicial branch of government because the interests of organized bars and their members are distinct from those of the public. While the organized bars' interest in unauthorized practice typically rests with whether the work performed by non-lawyers requires legal skills, the public's interest is focused on an accessible and affordable legal service delivery system.

Public accountability

Other states' approaches to unauthorized practice consider the public's interest in legal service delivery. The Texas State Bar is distinct among regulatory entities in that state because while it is subject to oversight by the Texas Supreme Court, it also must submit to sunset review audits by the Texas Legislature. J. Sirman, *Commission Takes a Close Look at the Bar*, 65 Tex. B.J. 500 (June 2002). During public hearings held in the sunset review process, legal consumers, attorneys and legal services program directors may testify as to their concerns with the programs administered by the State Bar. See *id.* At an April 24 public hearing, State Bar Sunset Committee Chair Gib Walton remarked, "I think every time the Bar has gone through sunset it has improved and it makes an agency look at itself and how it is doing. It has made the Bar a stronger, more efficient bar over the years." *Id.*

Although much is said about the repeal of this state's general unauthorized practice of law statute, little credit is given the Arizona

Legislature for its actions in response to the circumstances leading to that repeal. During the late 1970s, the Arizona Legislature had become increasingly concerned with the efficacy of Arizona's state government programs and created sunset laws to ensure the responsiveness of those programs to the developing needs of the public. A.R.S. § 41-2951(A). When the State Bar refused to submit to its scheduled audit during the 1984 sunset cycle, the legislature allowed the unauthorized practice of law statute to sunset on July 1, 1985. J. Rose, *Unauthorized Practice of Law in Arizona: A Legal and Political Problem that Won't Go Away* at 590. It would appear, then, that Arizona's Legislature sought to protect Arizonans from public policy that did not provide public accountability.

The developing needs of the public in the area of legal service delivery also were of prime importance for Utah's 2001 Legislature. Recognizing that the unmet need for legal services in Utah "adversely impacts the health, safety, and welfare of Utah's citizens," the Utah Legislature charged the judiciary with studying legal service delivery issues and suggesting changes. See Enrolled H.B. 2003, 2001 Leg., 2d Spec. Sess. (effective Oct. 11, 2001).

In contrast, the Supreme Court's recent amendments do not seem to incorporate checks and balances into the legal service delivery system it has created. When the new rules become effective, the regulatory board for document preparers will join the State Bar in providing no public accountability for the regulatory programs they administer.

The State Bar has played the primary role in creating the law of unauthorized practice. J. Rose, *Unauthorized Practice of Law in Arizona: A Legal and Political Problem that Won't Go Away* at 609.

It is the actions of the organized profession and of individual lawyers that have produced the court decisions and rules Moreover, it is the Court, composed of lawyers, that makes the ultimate determination. As a result, the law is less likely to represent the public interest.

Id. The ultimate question is who controls legal service delivery in Arizona — the Supreme Court or the Legislature? For now, the Supreme Court appears to say that it does. But in the absence of checks and balances in the Supreme Court's rule changes, it would seem that the new rules on unauthorized practice benefit the legal profession more than the public. ■

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MCBA, 602-257-4200

Legal Brief

■ Maricopa County Superior Court now is charging a \$20 fee for each copy of a court proceeding digitally recorded and provided on compact disc or videotape. The fee is due when the CD or videotape is picked up. Cash and in-state checks will be accepted for payment. Blank, unused CDs and videotapes will not be accepted in lieu of payment. CDs and videotapes of proceedings must be picked up at the court's Self Service Center, East Court Building, first floor. Copies of court proceedings recorded at the court's Southeast Facility in Mesa and at the court's Northwest Facility in Surprise may be picked up — and fees paid — at the self-service centers at those locations. For more information, contact Ken Crenshaw, administrator, Electronic Records Services, 602-506-7100 or krensha@superiorcourt.maricopa.gov. ■

NORLING, KOLSRUD, SIFFERMAN & DAVIS, P.L.C.

extends its congratulations and its fond farewell to

RICHARD R. HUBBARD

as he begins his service to the State of Arizona
as Deputy State Land Commissioner

The firm also wishes to announce that

RYAN J. LORENZ

has been admitted to practice law in the State of Nevada
Mr. Lorenz, a graduate of Creighton University School of Law
has been licensed as an attorney in the State of Arizona since 1999



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As we move toward a world in which almost all of the information in our law offices is contained only in electronic form, regular and careful electronic backup becomes both an ethical mandate and a potential malpractice concern. When I last wrote on this topic a few years ago, the choices were confusing. Now, I believe, you can develop a backup protocol that is cheap, virtually automatic and easy to do.

There are two basic backup goals. The first, which I will talk about in more detail later, deals with the physical preservation of data itself. The second deals with the preservation of your computer system configuration and the ability to restore it to a functioning state in the event of disaster without having to reinstall all of your applications.

Disaster may result from your hard drive crashing due to an uncontrolled power surge or simple component failure. A virus or hacker who has broken into your system for fun also can wreak havoc. Disaster occurs on a regular basis with all computers and unless you are prepared, it can be devastating. One thing is sure: if you use computers, you will some day experience disaster.

If you have a very simple computer system, it may be enough to just plan to reinstall Windows and your basic applications that are necessary to access your data files. Few of us have such a simple system, however. Even if you have all of your original software disks easily available, it may take hours or even days to rebuild your system from a big time crash.

One solution is to create a mirror image of your system using a product such as Symantec's Ghost imaging software or PowerQuest's DriveCopy program. Both programs will create an exact duplicate of each of your hard drives that can be transferred to a new hard drive with ease. Both products are relatively inexpensive and easy to use protection against computer disaster.

An image of your drive or drives, however, simply freezes your system at a particular

point in time. If you take the image every Monday you'll be up-to-date as of the last Monday. If your office was active during the preceding week, relying on a weekly image as your only backup solution means you will lose a week's worth of work. That is an intolerable risk for most of us. As a result, you must supplement the drive image process with what are called "incremental" or daily data backups. For that reason, the imaging procedure (which is very time consuming) is often avoided as a regular backup procedure.

The bottom line is that you must back up your data every day. For that back up I strongly recommend that you buy a product called GoBack to supplement your drive imaging or other backup procedure. GoBack allows you to recover from a Windows crash by restoring the entire system to the state it was in at any point up to three days before. If you get a virus, you can go back to yesterday before the virus came. If you install a product that locks up your system, you simply reboot and go back to the prior configuration when you see the GoBack screen.

A warning: If you use Ghost or DriveCopy to image your drive, a conflict will result between the imaging tool and GoBack. The procedures for resolving the conflict are spelled out in the documentation for both programs.

Windows XP has a similar utility called System Restore, which can be accessed from System Tools menu under Accessories on the Start menu. But because System Restore runs under Windows, it won't work if your problem is that Windows has crashed. GoBack, however, can be launched before Windows so it is a great workaround for almost any kind of computer crash other than a failed hard drive. GoBack will save your bacon even under those circumstances.

I recommend you have GoBack on your system in all events. Make sure, however, you

get the upgrade from the Roxio site that allows GoBack to work with Windows XP. Frankly, I believe that GoBack is the keystone to my data security system. It costs \$29 direct from Roxio at www.roxio.com. I have used it often.

Most of you have moved to Windows 2000 or Windows XP, where the built-in backup tool is very powerful. The Windows Backup utility contains many new options, allowing users to back up selected volumes or folders to tape or to the hard drive. Scheduling is built directly into Windows Backup. You also can choose to back up your Windows operating system configuration by checking a box, which you should always do. You can add an uninterruptible power supply for power protection by following a wizard.

If you have not yet moved to Win2K or XP, then I recommend Veritas' Backup MyPC product line, which won the PC Magazine Editor's Choice award last year (www.veritas.com). It is widely used and compatible with Windows. In fact, the regular Windows backup utility is in part licensed from Veritas.

Even if you have Win2K or XP, you may want a more robust utility. If that is the case, the Veritas product line is extensive and ranges from very cheap to very expensive. In other words, you have a lot of choice on the software side. But remember: the only way to avoid having to reinstall all of your software is to do a complete back up of both your system configuration and your applications.

The larger question is the hardware side of the backup process. Here you have many options and many vendors. Those systems are generally expensive and not easy to use, so it can be easy to put off the backup procedure. That is very dangerous.

By far the best and easiest procedure is to

back up directly to another physical hard drive. It is much faster and the physical drive can be taken away from the office or locked in a safe for extra security.

Western Digital 80 GB Firewire and USB2 external hard drives have dropped below \$200 (www.westerndigital.com) and provide a perfect vehicle for regular backup. They are very reliable and easy to install and use.

The other alternative, which I use, is to backup to a removable IDE internal hard drive that also is taken off-site every night. Western Digital 80 GB internal hard drives are available for under \$100. A removable drive tray costs \$15 and is easy to install and use.

Use the external or removable hard drive with Ghost or DriveCopy and you have a bootable, complete hard drive copy of your system in case of a total system failure. I wish I could discipline myself to do that every week or so, but the ease of a fully automatic back up keeps me from doing what I know I should do!

Roxio's GoBack, a Windows backup utility, a removable or external hard drive and a couple of hundred bucks give you all the protection that you need at a very affordable price. It is also very easy.

No more excuses, please! Now remember to back up and floss every day!

► *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 email at wintonwoods@gmail.com or by phone at 520-881-6118. Visit him at www.wintonwoods.com or www.digitaltrial.net.*

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Opinions expound on fees as litigation cost

By Daniel Schaack
Maricopa Lawyer

Division One of the Arizona Court of Appeals recently produced two opinions dealing with the recovery of attorneys' fees as a litigation cost.

In *Moedt v. General Motors Corp.*, No. 1 CA-CV 02-0038 (App. Dec. 24, 2002), Judge Susan A. Ehrlich held that the Superior Court has the authority to award fees in an act under Arizona's so-called "Lemon Law," the Motor Vehicles Warranties Act, A.R.S. §§ 44-1261 to -1267, even if the action is settled without direct judicial involvement.

The Lemon Law allows attorneys' fees to "a consumer [who] prevails in an action under this article." Ehrlich held that the consumer need not recover a judgment to qualify. "Given that definition of 'action' and its focus on a simple 'lawful demand for a legal right,' a complaint filed in superior court qualifies and a party's successful settlement of litigation constitutes 'prevailing' in an 'action,'" she wrote.

She footnoted *Buckhamon Board & Care Home Inc. v. West Virginia Dept. of Health & Human Resources*, 532 U.S. 598 (2001), in which the U.S. Supreme Court held that the prevailing-party requirement in numerous federal statutes requires the court to have placed its imprimatur on the party's recovery.

Judges William F. Garbarino and Jon W.

COURT WATCH

Thompson joined her opinion.

In *Robert E. Mann Construction Co. v. Liebert Corp.*, No. 1 CA-CV 01-0212 (App. Jan. 9, 2003), a Thompson opinion held that a Superior Court awarding attorneys' fees after remand from the Court of Appeals may not allow fees the successful party expended in the appeal when that party had failed to timely request fees from the appellate court. Thompson held that allowing such an award would emasculate Arizona Rule of Civil Appellate Procedure 21(c)'s deadline for requesting costs and fees on appeal.

Thompson also held that the failure to request fees under appellate Rule 21(c) on appeal precludes a party, after remand, from seeking trial court fees.

"It is fair to require parties to request fees earlier in the litigation process so that both sides may accurately assess the risks and benefits of litigating versus settling," he wrote. "In this way, the opportunity for out of court settlement may be enhanced."

In so holding, Thompson disapproved of contrary language in *Stika v. Albion*, 150 Ariz. 521, 724 P.2d 607 (App. 1986). Judges

Jefferson L. Lankford and Daniel A. Barker joined in the opinion.

Division Two of the Court of Appeals recently issued two opinions dealing with legal malpractice, one dealing with who may sue for alleged malpractice and the other with when the cause of action accrues for statute-of-limitations purposes.

When the attorney for an estate's administrator — who has been required to secure her performance with a bond — commits malpractice that leads to liability on the bond, the administrator's surety does not acquire a cause of action against the attorney. So held the court in *Capitol Indemnity Corp. v. Fleming*, No. 2 CA-CV 2001-0114 (App. Dec. 10, 2002), rejecting arguments that the surety not only had a direct cause of action but also acquired the right through equitable subrogation.

The Pima County Superior Court appointed Anita Heller as administrator of the estate of Pearl Bennett, an incapacitated person. It required Heller to post a \$345,000 bond, which Capitol Indemnity supplied. Heller hired Robert Fleming to advise her as to her administrator's duties and to help prepare and file annual accountings. Over a two-year period, Heller misappropriated more than \$235,000, paying the money to her children in the form of gifts and loans. Although aware of Heller's actions, Fleming never alerted her or the court of their illegality.

Heller was indicted for her actions, and the court ordered her to pay restitution. Heller was able to come up with only \$45,000, so Capitol was stuck with the remaining \$190,000. It then sued Fleming for legal malpractice. The Superior Court granted the attorney's motion to dismiss.

In an opinion by Judge M. Jan Floréz, the appellate court first rejected Capitol's argument that it had a direct cause of action against Fleming. The issue centered on two earlier appellate cases that had extended legal-malpractice duties beyond the narrow attorney-client relationship.

Fickett v. Superior Court, 27 Ariz. App. 793, 558 P.2d 988 (1976), held that an attorney for the conservator of an incompetent ward's estate assumes a duty to the ward. Similarly, *In re Estate of Shano*, 177 Ariz. 550, 869 P.2d 1203 (App. 1993), held that the attorney for the special administrator of a decedent's estate owes a duty to the estate's beneficiary.

Floréz refused to extend *Fickett* or *Shano* to Fleming's case.

"Neither *Fickett* nor *Shano* ... suggests that Fleming owed a duty to a person other than his client and the protected person, the intended beneficiary of his representation," she wrote.

She noted that no Arizona case had ever held that a conservator's attorney owes a duty to the conservator's surety.

Floréz next considered Capitol's argument that equitable subrogation allowed it a right of action against Fleming. Under A.R.S. § 12-1643(A), the surety's payment on the bond does not discharge the debt but rather assigns to the surety the beneficiary's cause of action against the administrator.

Floréz rejected Capitol's position: "[T]hat Capitol is entitled to be assigned Bennett's right to collect from Heller does not," she wrote, "means that Capitol is also entitled to be subrogated to Bennett's right to sue Fleming directly for legal malpractice."

Although acknowledging their differences, Floréz likened equitable subrogation to assignment. Just as legal-malpractice

claims may not be assigned, she held, so they are not subject to equitable subrogation. She grounded her holding on public-policy considerations.

"Assignability would encourage commercialization of claims, and would force attorneys to defend themselves against persons to whom no duty was ever owed," she wrote, quoting a California case. "Moreover, the legal profession is debased by such commercialization, because it could (1) encourage unjustified lawsuits; (2) generate increased malpractice lawsuits, burdening the profession, the court system and (to the extent malpractice premiums would inevitably rise and be passed to the consumers) the public; and (3) promote champerty."

Holding otherwise might injuriously affect public access to legal services. Still quoting the California case, Floréz noted that "the ever present threat of assignment by irresponsible clients (seeking quick financial gain) could cause lawyers to evaluate more selectively the desirability of representing a particular client." She affirmed the judgment dismissing the legal-malpractice claim.

Judges J. William Brammer Jr. and Joseph W. Howard joined Floréz's opinion.

Two days after delivering *Capitol Indemnity*, Division Two again addressed legal malpractice, this time facing the statute of limitations. *Althaus v. Cornelio (Penn-America Ins. Co.)*, No. 2 CA-SA 2002-0107 (App. Dec. 12, 2002). The court had to decide whether an insurer's cause of action for a trial attorney's malpractice accrued when the party knew of it or when its damages were set in stone by the execution of a non-contingent settlement agreement. In the end, the court punted.

Peter and Rita Wolfe sued the Pena Blanca Lake Resort Inc. for the wrongful death of their son. Penn-America Insurance Co. insured the resort. Attorney Thomas R. Althaus originally represented the resort. On May 12, 1999, a jury awarded the Wolfes approximately \$6.5 million. Penn-America hired new attorneys, and on June 3, they met with attorneys for the plaintiffs in an effort to settle. The verdict had not yet been reduced to judgment.

On June 4, counsel for the parties informed the trial judge that they "ha[d] reached a stipulation as to settlement terms" which they would file with the court after it was approved by the court in Pena Blanca's bankruptcy.

The Wolfes' attorneys had signed a handwritten note from the June 3 meeting, stating that the settlement was subject to both a confidentiality agreement and approval of bankruptcy court. Two internal memoranda penned by Penn-America personnel in early June acknowledged that the parties had settled the case for an agreed \$1.3 million for each plaintiff, contingent upon approval by the Bankruptcy Court and pertinent releases. Penn-America acknowledged that "the conditional settlement was reached, rather than litigate and file post-trial motions, because in balance, it made the most sense to Penn-America."

Following the June 3 meeting, the attorneys negotiated, drafted and ultimately agreed on a settlement agreement and release, which the Wolfes and their attorneys executed on June 11. Like the handwritten note, the settlement agreement stated that it was subject to and contingent on the approval and final order of the Bankruptcy Court. The agreement also was contingent on Pena

— See *Courtwatch* on page 10

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Validity of marriage

A marriage that was invalid as performed in Mexico was valid in Arizona because our state solemnization provision requires only a good faith belief that someone in authority performed the marriage. *Donlann v. Macgurn*, 203 Ariz. 380, 55 P.3d 74 (App. 2002), *pet. rev. filed*.

Child custody and visitation

In a custody proceeding, a party must object to a trial court's failure to make appropriate findings pursuant to A.R.S. § 25-403, or the issue is waived on appeal. *Banales v. Smith*, 200 Ariz. 419, 26 P.3d 1190 (App. 2001), *rev. den.* (2002).

Where the decree prohibited the mother from certain actions related to the use of alcohol and drugs, and she was convicted of marijuana use, the trial court erred in denying the father's request for a change of custody without making the findings required by A.R.S. § 25-403. *In re Marriage of Diezsi*, 201 Ariz. 524, 38 P.3d 1189 (App. 2002).

Sanctions against a custodial parent pursuant to A.R.S. § 25-408(D) for moving children out of state without giving the other parent the required statutory notice are discretionary. *Woodworth v. Woodworth*, 202 Ariz. 179, 42 P.3d 610 (App. 2002).

The Juvenile Court could not deny an incarcerated father visitation rights with his infant daughter without evidence that it was not in her best interest to be taken to the jail for visitation. *Michael M. v. Ariz. Dep't of Economic Sec.*, 202 Ariz. 198, 42 P.3d 1163 (App. 2002).

Oklahoma was the "home state" with initial jurisdiction in custody proceedings under the UCCJEA because the child lived there "within six months" of the commencement of the proceedings, even though it was not the child's home for six consecutive months immediately preceding the initiation of the action. *Welch-Doden v. Roberts*, 202 Ariz. 201, 42 P.3d 1166 (App. 2002).

A.R.S. § 25-415 required findings that prevented the court from awarding an adoptive mother and her former domestic partner joint custody of the child. *Thomas v. Thomas*, 203 Ariz. 34, 49 P.3d 306 (App. 2002), *rev. den.*

Child support

The Arizona Industrial Commission was required to pay 100 percent of an incarcerated father's workers' compensation benefits to the mother pursuant to an order of assignment for child support. A.R.S. § 33-1131(C), which exempts 50 percent of a debtor's disposable earnings from an order of attachment, applies only to earned income. *Hanley v. Industrial Comm'n*, 200 Ariz. 32, 21 P.3d 850 (App. 2001), *rev. den.*

Vested stock options are gross income for calculating child support. The valuation of

the options is at the trial court's discretion. *In re Marriage of Robinson*, 201 Ariz. 328, 35 P.3d 89 (App. 2001).

The state's petition for a judgment for child-support arrearages was time barred because it was filed three years and five days after an only child graduated from high school, and was emancipated. The state argued it had until three years from the end of the month in which the child graduated. *State v. Huskie*, 202 Ariz. 283, 44 P.3d 161 (App. 2002), *rev. den.*

The trial court erred in attributing additional income to a father based on the 80-hour workweek he once worked, although the term "full-time employment" in the Arizona Child Support Guidelines could encompass more than a 40-hour workweek. In addition, the federal tax exemption for minor children should be allocated according to the percentage of support provided by each parent. *McNutt v. McNutt*, 203 Ariz. 28, 49 P.3d 300 (App. 2002).

The father could not credit a share of the adoption assistance subsidy against his child-support obligation. In addition, the trial court has an obligation to allocate the child-dependency exemption pursuant to the Arizona Child Support Guidelines. *Hamblen v. Hamblen*, 203 Ariz. 342, 54 P.3d 371 (App. 2002), *pet. rev. filed*.

Grandparent visitation rights

Arizona's Grandparents' Visitation Rights Statute, A.R.S. § 25-409, was distinguished from the Washington statute at issue in *Troxel v. Granville*, 120 U.S. 2054 (2000), and found to be constitutional. It also does not impermissibly distinguish between two-parent and stepparent adoptions by excepting the latter from visitation termination upon the child's adoption. *Jackson v. Tangreen*, 199 Ariz. 306, 18 P.3d 100 (App. 2001), *rev. den., cert. den.*

A.R.S. § 25-409 was again found to be constitutional under *Troxel* as long as the trial court applied a rebuttable presumption that a "fit" parent acted in the child's best interests with regard to grandparent visitation, and gave significant weight to the parent's voluntary agreement to allow some visitation. However, such visitation was not at the sole discretion of the parent, and should be determined after an evidentiary hearing. *McGovern v. McGovern*, 201 Ariz. 172, 33 P.3d 506 (App. 2001), *rev. den.* (2002), *cert. den.* (2002). [See "Grandparents' hollow victory in visitation wars," p.11, January 2003 *Maricopa Lawyer*.]

Marital community's obligation to creditors

A judgment from a non-community-property state may be domesticated in Arizona and collected against the community as long as the debt would have been a community obligation if incurred in Arizona and the non-defendant spouse has an opportunity to challenge the community status of the debt in the domestication proceedings. *Alberta Secs. Comm'n v. Ryckman*, 200 Ariz. 540, 30 P.3d 121 (App. 2001).

A married couple's modification of a pre-marital agreement to change the husband's earnings from separate property to community property so he could protect his future earnings from a creditor was a transfer under the Uniform Fraudulent Transfer Act, A.R.S. § 44-1001. An order of continuing lien against the husband's earnings was affirmed. *State v. Wright*, 202 Ariz. 255, 43 P.3d 203 (App. 2002).

Post-death issues

The trial court could not remove a personal representative and approve a family settlement agreement that disregarded the will where the settlement agreement was not a valid compromise of a good faith contest or controversy under A.R.S. § 14-3951. *In re Estate of Ward*, 200 Ariz. 113, 23 P.3d 108 (App. 2001), *rev. den.*

An ex-husband's obligation, under a 1997 stipulated post-decree modification, to pay non-modifiable spousal maintenance for six years terminated under A.R.S. § 25-327(B) when the recipient spouse died in 2000. The order was not sufficiently explicit to require the former husband to pay spousal maintenance to his ex-wife's estate. *Diefenbach v. Holmberg*, 200 Ariz. 415, 26 P.3d 1186 (App. 2001).

A deceased ex-wife made a valid testamentary gift to her parents of her interest in her ex-husband's retirement benefits in the Arizona Public Safety Personnel Retirement System. *Snyder v. Tucson Police Pub. Safety Personnel Ret. Sys. Bd.*, 201 Ariz. 137, 32 P.3d 420 (App. 2001), *rev. den.* (2002).

Pursuant to her role as a statutory trustee under A.R.S. § 12-612(A), a widow could not settle a wrongful-death case involving her late husband without the consent of, or notice to, his six adult children from a prior marriage. *Wilmot v. Wilmot*, ___ Ariz. ___, 389 Ariz. Adv. Rep. 27, 58 P.3d 507 (2002).

The decedent's estate and children may have a cause of action against medical providers under the adult protective care statute where the decedent died of complications of cancer in a mental health facility. *Estate of McGill v. Albrecht*, ___ Ariz. ___, 386 Ariz. Adv. Rep. 13, 57 P.3d 384 (2002).

Dependency cases

The Interstate Compact on the Placement of Children, A.R.S. § 8-548 *et seq.*, applies to the placement of a child with an out-of-state non-custodial parent. *State Dept of Economic Sec. v. Leonardo*, 200 Ariz. 74, 22 P.3d 513 (App. 2001).

Arizona continued to have jurisdiction in a dependency proceeding after the petitioning parents relocated out of state, but the alleged dependent child remained in Arizona. *David S. v. Audilio S.*, 201 Ariz. 134, 32 P.3d 417 (App. 2001).

Termination of parental rights

The state was allowed to serve the mother's attorney with a petition for termination of the mother's parental rights if the mother could not be found other than when she was in jail for prostitution. *Mara M. v. Arizona Dep't of Economic Sec.*, 201 Ariz. 503, 38 P.3d 41 (App. 2002).

Parents have no constitutional right to refuse to participate in social services intended to reunite them with their child when there was no evidence that such services would result in self-incrimination. *Minh T. v. Arizona Dep't of Economic Sec.*, 202 Ariz. 76, 41 P.3d 614 (App. 2002).

The entire period of an incarcerated parent's absence from home is relevant in the termination of parental rights, not just the time remaining on his prison sentence at the time of the severance proceedings. *Jesus M. v. Arizona Dep't of Economic Sec.*, 203 Ariz. 278, 53 P.3d 203 (2002).

Unauthorized practice of law

A non-lawyer mother acting as guardian
— See *Family* on page 8

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Court holds first civil settlement marathon

By **Emelda Dailey**
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Civil court settlement conference program

The Civil Court Department and ADR office thank all Civil Court judges pro tem who volunteered for ADR's first civil settlement conference marathon, held Jan. 9 and 10.

Of 20 cases scheduled for settlement conferences, 13 actually proceeded, as two had settled prior to the settlement conference and five were continued.

Justice Court mediation program

ADR's Justice Court mediation program

Legal Brief

■ The Superior Court Clerk's Office Customer Service Center has begun accepting Visa and MasterCard credit cards as payment for copies of court records (50 cents per page), marriage licenses (\$50) and the clerk's portion of the passport fee (\$30). Later this year, all filing counters will begin accepting credit cards. ■

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also is flourishing. To increase our number of volunteers, we have scheduled the 40-hour basic mediator training for this month and April.

The February training will be held 8:30 a.m. to 5 p.m. Feb. 10, 14, 21, 24 and 28 at a location to be announced in Mesa.

The April training will be held 8:30 a.m. to 5 p.m. April 3, 4, 5, 7 and 8 at a location to be announced in central Phoenix.

The training is free, but participants must commit to conducting 16 mediations in the ADR Justice Court mediation program over the next 12 months. The standard market price for this training is about \$800. Looking at it another way, this free training is equivalent to being paid \$50 per mediation for the required 16 mediations. That's not a bad deal! Please contact Clark Leuthold, Justice Court programs manager, at 602-506-3956 for more information.

► *Emelda Dailey is ADR programs manager for Maricopa County Superior Court.*

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Family...

Continued from page 7

ad litem for her minor son, pursuant to Ariz.R.Civ.P. 17(g), engaged in the unauthorized practice of law when she attempted to represent him in court in his personal injury action. *Byers-Watts v. Parker*, 199 Ariz. 466, 18 P3d 1265 (App. 2001), *rev. den.*

A non-lawyer son engaged in the unauthorized practice of law when he participated in court proceedings, asking questions and making arguments on behalf of his mother, who spoke little English and did not hear well. *Encinas v. Mangum*, ___Ariz. ___, 365 Ariz. Adv. Rep. 39, 38 P3d 1187 (App. 2002), *rev. den.*

Torts

Summary judgment was upheld against a personal representative who filed a wrongful-death case against Child Protective Services over the death of a child. The only authorized beneficiary under A.R.S. § 12-612(A) was the child's mother, who had been convicted of criminal negligence in the child's death. Her conviction did not disqualify her from collecting wrongful-death damages under A.R.S. § 14-2803. *Carrasco v. State*, 199 Ariz. 494, 19 P3d 635 (App. 2001), *pet. rev. dismissed per stipulation.*

Both a court-appointed guardian ad litem and an attorney to whom he delegated guardianship duties and who appeared in court and made recommendations accepted by the court had absolute judicial immunity in a suit by the child's mother. *Widoff v. Wiens*, 202 Ariz. 383, 45 P3d 1232 (App. 2002).

A sexually abused foster child was barred from bringing a subsequent action against the state after receiving damages for the same injury in a lawsuit against her foster family. The state

should have been joined in the first proceeding. *West v. State*, ___Ariz. ___, 384 Ariz. Adv. Rep. 3, 58 P3d 28 (App. 2002), *pet. rev. filed.*

Criminal court cases

An exception to the marital privilege allowed a wife to testify against her husband because their children were riding with him in his vehicle while he was under the influence of alcohol. This conduct constituted endangerment, a form of child abuse. *State v. Herrera*, 203 Ariz. 131, 51 P3d 353 (App. 2002).

In the Jeanne Tovrea murder case, the defendant's ex-wife was allowed to testify against him because the "anti-marital fact privilege" did not apply because the couple was divorced and the "marital communications privilege" did not prevent her from testifying about communications with third parties or non-communicative acts. Additionally, the defendant waived the latter privilege by denying any conversations with his wife regarding the murder. *State v. Harrod*, 200 Ariz. 309, 26 P3d 492 (2001).

The defense of necessity under A.R.S. § 13-417 did not apply to a woman who was charged with DUI after she was allegedly assaulted by her husband and then drove away from home in fear that he would return. *State v. Fell*, 203 Ariz. 186, 52 P3d 218 (2002).

A recording by a mother of a sexually explicit telephone call between the defendant and her minor daughter without either's consent was admissible in evidence. It did not violate A.R.S. § 13-3005 or 18 U.S.C. § 2511 because the mother could vicariously consent to the recording on behalf of the child. *State v. Morrison*, ___ Ariz. ___, 385 Ariz. Adv. Rep. 3, 56 P3d 63 (App. 2002), *pet. rev. filed.*

► *Brenda K. Warneka practices family law with the Law Offices of Cox Warneka Redmon in Scottsdale.*

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FEBRUARY

- February 1**
 - Barristers Ball, 5:30 p.m., Marriott's Camelback Inn, Scottsdale
- February 3**
 - YLD Domestic Violence Committee, noon
 - Maricopa Lawyer editorial board, 5 p.m.
- February 5**
 - Family Law Section, 5:15 p.m., University Club
- February 6**
 - ADR Committee, 5:15 p.m., Starbucks, 2375 E. Camelback Road, Phoenix

February 7

The Nuts & Bolts of Criminal Law
1:30 p.m. to 3:30 p.m., ASUD
This program is designed to teach attorneys who do not practice criminal law how to respond and assist a client during the initial stages of a criminal investigation and prosecution. Topics include initial help for the client who is unexpectedly arrested, including locating the client in custody, the initial appearance, obtaining pretrial release and posting a bond; how the business client should respond to criminal investigations, including grand jury subpoenas and search warrants; responding to a whistleblower's report of criminal activity in a business; and advising the victim of a crime about rights and restitution.
Cost: Member attorneys, \$50; member paralegals and public attorneys, \$35; member self study, \$50; non-member attorney, \$70; non-member paralegals and public attorneys, \$50; non-member self study, \$70; same day registration, \$15 additional CLE: 2 hours

- February 12**
 - International Law Section, noon
 - Environmental Law Section, noon
 - Hayzel B. Daniels Bar Association, 5:30 p.m.
- February 13**
 - Lawyer Referral Service Marketing Committee, noon
 - West Valley Bar Association lunch meeting, noon, conference room at Glen Harbor, the Glendale municipal airport, 6801 N. Glen Harbor Blvd. Program: ERISA plans, beneficiary designations and compliance with federal law. Speaker: William J. Kluwin. Cost: WMCBA members, \$15; non-members, \$20. Reservations/meal orders (required): David Brnilovich, dbr@jss-law.com, or Patty, 623-878-2222.

Effective Settlement Conferences in Divorce Cases
12:30 p.m. to 2:30 p.m., ASUD
Practical and useful approaches to preparing and participating in a settlement conference. Learn from an experienced panel of settlement conference facilitators how to effectively prepare your client, present your case and resolve disputes.
Cost: Member attorneys, \$50; member paralegals and public attorneys, \$35; member self study, \$50; non-member attorney, \$70; non-member paralegals and public attorneys, \$50; non-member self study, \$70; same-day registration, \$15 additional CLE: 2 hours

- February 14**
 - VLP annual luncheon, 11:45 a.m., Hyatt Regency Downtown
- February 17**
 - MCBA closed for Presidents' Day
- February 18**
 - Estate Planning & Probate Section Executive Committee, 7:30 a.m.
 - Bankruptcy Law Section, 5 p.m.
- February 19**
 - Litigation Section, 7:30 a.m.
 - Sole Practitioners Section, 11:30 a.m.
 - Bench Bar Committee, 12:15 p.m., Central Court Building, fourth floor conference room

Innocent Spouse Provisions: A Practical Guide for Family and Tax Law Practitioners
1 p.m. to 4:30 p.m., ASUD
Designed to provide practical information and guidance on obtaining relief from joint tax liabilities under the 1998 revisions to the innocent spouse provisions from the perspective of a former IRS senior attorney and a practicing tax attorney. Topics include a review and discussion of joint tax liability statutes; impact of newly issued regulations; unique issues faced by spouses in community property states; rights of the non-requesting spouse; and corollary relief from Arizona state income taxes.
Cost: Member attorneys, \$75; member paralegals and public attorneys, \$55; member self-study, \$75; non-member attorney, \$105; non-member paralegals and public attorneys, \$75; non-member self-study, \$105; same day registration, \$15 additional CLE: 3 hours

- February 20**
 - Public Lawyers Division board, noon
- February 28**
 - Bankruptcy & Divorce
1 p.m. to 4:30 p.m., ASUD
Practical advice on recognizing bankruptcy problems when litigating and negotiating divorce issues. Topics include the interplay between bankruptcy and divorce; automatic stay and divorce litigation; dischargeability of marital-related debts; drafting property settlement agreements with an eye toward possible bankruptcy; divorce as a fraudulent conveyance; conflicts of interest; and attorney's fees.
Cost: Member attorneys, \$75; member paralegals and public attorneys, \$55; member self study, \$75; non-member attorney, \$105; non-member paralegals and public attorneys, \$75; non-member self study, \$105; same-day registration, \$15 additional CLE: 3 hours (1 hour ethics)

- MCBA board of directors, 4:30 p.m.
- February 21**
 - Maricopa County Bar Foundation board of trustees, 7:30 a.m.
 - Task Force for Recruitment and Retention of Minority Attorneys, 8:30 a.m.
- Leaders of Litigation, Part 1: Initial Intake, Interviews and Investigations**
1:30 p.m. to 5 p.m., Phoenix Public Library Auditorium
First of a six-part series. An updated version of the popular 1996 series, "Legends of Litigation." Leading litigators will share their knowledge, insight and experience. Watch your mail for information spotlighting the

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

FEB. 2003	S	M	T	W	T	F	S
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exceptional faculty for each of these excellent programs.
Cost: Member attorneys, \$75; member paralegals and public attorneys, \$55; member self study, \$75; non-member attorney, \$105; non-member paralegals and public attorneys, \$75; non-member self study, \$105; same-day registration, \$15 additional CLE: 3 hours

- February 25**
 - Corporate Counsel Division board, 4:30 p.m.

- February 26**
 - Arizona Women Lawyers Association lunch meeting, noon, Arizona Club. Speaker and program to be announced. Program begins at 12:30 p.m. Cost: AWLA members, \$15; non-members, \$20. Reservations (required): 602-863-7678 or luncheons@awla-maricopa.org by noon Feb. 24. Information: Amy Schwartz, 602-956-4438.

The Ins & Outs of the Landlord and Tenant Act
1 p.m. to 4:30 p.m., ASUD
A basic-to-intermediate program that will review and discuss the Arizona Residential Landlord and Tenant Act. Topics include terms and conditions of the rental agreement; landlord's obligations and tenant's rights; instituting and litigating a forcible/special detainer; prohibited conduct of the landlord; and ethical obligations of the attorney in landlord-tenant disputes.
Cost: Member attorneys, \$75; member paralegals and public attorneys, \$55; member self study, \$75; non-member attorney, \$105; non-member paralegals and public attorneys, \$75; non-member self study, \$105; same-day registration, \$15 additional CLE: 3 hours

- February 27**
 - Technology Section, 8 a.m.
 - Los Abogados, noon, Crowne Plaza
- Strategy and Current Trends in Commercial, Tort and Insurance Arbitration and Mediation**
1 p.m. to 4:30 p.m., ASUD
An intermediate-to-advanced program designed to provide useful and practical information about the practice and preparation required for effective ADR, mediation and arbitration. Topics include Arizona and federal statutes requiring or

involving ADR; strategies in mediation preparation; what to look for in a mediator; helpful behaviors and strategies for counsel and clients; increased use of arbitration; binding arbitration in consumer, employment and commercial agreements; effect of provisions on class actions and punitive damages; and the effect of Arizona Arbitration Act and the Federal Arbitration Act.
Cost: Member attorneys, \$75; member paralegals and public attorneys, \$55; member self study, \$75; non-member attorney, \$105; non-member paralegals and public attorneys, \$75; non-member self study, \$105; same-day registration, \$15 additional CLE: 3 hours

- February 28**
 - IP Crimes and Corporate Compliance
Corporate Counsel Division lunch CLE
11:45 a.m. to 1 p.m., University Club
Speakers: Ray Harris, Jamie Burgess

and Richard S. Post, Fennemore Craig
Cost: CCD members, \$22.50; non-member attorneys, \$32.50
CLE: 1 hour

Leaders of Litigation, Part 2: Discovery & Deposition
1:30 p.m. to 5 p.m., Phoenix Public Library Auditorium
Second of a six-part series. An updated version of the popular 1996 series, "Legends of Litigation." Leading litigators will share their knowledge, insight and experience. Watch your mail for information spotlighting the exceptional faculty for each of these excellent programs.
Cost: Member attorneys, \$75; member paralegals and public attorneys, \$55; member self study, \$75; non-member attorney, \$105; non-member paralegals and public attorneys, \$75; non-member self study, \$105; same-day registration, \$15 additional CLE: 3 hours

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Help send a future leader to Washington

By Carrie N. Klein
MCBA Staff

Briyanna Cheatham is a vivacious, intelligent and gifted sixth-grader at Future Development Charter Elementary School. Based on her academic excellence and leadership potential, she has been selected to participate in the Junior National Young Leaders Conference (JrNYLC) in March in Washington, D.C. But she needs your help to get her there.



Briyanna Cheatham

Briyanna is a member of the Hayzel B. Daniels Bar Association's adopted family. HBDDBA is leading the effort to raise the \$1,500 program fee, and also needs additional donations to cover the cost of Briyanna's airfare (mileage can be donated!)

and so Briyanna can comply with the JrNYLC's dress code.

Briyanna, who hopes to practice law when she grows up, is "very excited [about this] once in a lifetime opportunity" and "can't wait" to go. At the program, she will meet other students who, like her, are at the top of their classes. She also will visit Congress, whose members all sit on the JrNYLC honorary board.

JrNYLC's purpose is to educate, inspire and motivate junior high students, giving them the confidence and leadership skills to take them through high school and beyond. By using Washington as their classroom, students learn about the virtues of leadership, citizenship and democracy.

How can you help Briyanna? Contact HBDDBA President Patrick Mixon at pmixon@swlaw.com or 602-382-6274 for more information, or send donations to the Hayzel B. Daniels Bar Association, 303 East Palm Lane, Phoenix, AZ 85004. ■

Courtwatch...

Continued from page 6

Blanca and its trustee in bankruptcy releasing Penn-America from any bad-faith claims.

The Bankruptcy Court approved the settlement on July 9, 1999. On Aug. 20, 1999, the underlying wrongful-death action was dismissed with prejudice. Penn-America filed a malpractice action against Althaus and his firm on June 7, 2001. (The opinion does not reveal what the alleged malpractice was.)

Althaus and the firm moved for summary judgment based on the statute of limitations. They argued that any cause of action had accrued by June 3, 1999, when the settlement was agreed to and the Wolfes' attorneys had signed the handwritten note.

The Superior Court found that "Penn-America knew or should have known of Mr. Althaus' claimed malpractice on or before June 3, 1999." But, relying on the final-judgment rule, it held that the cause of action did not accrue until June 11, 1999, at the earliest, when "an enforceable Settlement Agreement, without contingencies," had been signed. It therefore denied the motion for summary judgment and instead granted Penn-America's cross-motion, precluding Althaus from raising the defense at trial.

Althaus took the ruling up on special action, contending that the final-judgment rule "should have no application after a settlement or where there is evidence that the plaintiff has waived the right to appeal." Under the final-judgment rule, the cause of action for legal malpractice arising in litigation accrues when the plaintiff "knew or should reasonably have known of the malpractice and when the plaintiff's damages are certain and not contingent upon the outcome of an appeal."

Judge John Pelander agreed in general with the premise, but noted that "its application here is complicated by the settlement conditions in the Wolfes' wrongful death case and Pena Blanca's bankruptcy proceeding."

Pelander wrote that the rule does not apply "because Penn-America's damages, ... were not contingent on the outcome of an appeal. "Rather," he wrote, "by settling the underlying wrongful death action, Penn-America avoided the entry of judgment in that action and obviated the need for any appeal."

"Moreover," he continued, "a trier of fact could find that Penn-America's damages were 'certain' as of June 3, when it arguably reached a binding and enforceable settlement with the Wolfes."

Pelander noted that in cases not involving settlement, it generally "is only when the litigation is terminated and the client's rights are

'fixed' that it can safely be said that the lawyer's misdeeds resulted in injury to the client."

"In our view," he continued, "the dispositive issue is whether, more than two years before Penn-America filed its malpractice action against Althaus, Penn-America and the Wolfes had reached a binding, enforceable settlement in the wrongful death case, notwithstanding the need to formalize and finalize the settlement."

He disagreed with the Superior Court's conclusion that the contingencies in the settlement agreement as a matter of law established that approval was a contingency. He held that a jury could, but was not required to, find that the parties had reached such a binding and enforceable agreement on June 3, 1999.

"Although bankruptcy court approval clearly was required to trigger the settlement parties' obligations to perform," Pelander concluded, a jury "could find that the parties had reached a binding, enforceable settlement on June 3, with performance delayed until bankruptcy court approval."

"And, if such approval were not obtained, the agreement would not necessarily lack binding and enforceable effect in the first instance." A jury could find that the acts of the attorneys after June 3, "including their execution of the settlement and release agreement, the procurement of bankruptcy court approval, and the dismissal with prejudice of the wrongful death action, demonstrated their understanding and intent that they had reached a binding, enforceable settlement on that date."

Consequently, Pelander held, summary judgment was inappropriate for either side. Along with Judges Philip G. Espinosa and William E. Druke, he reversed, holding that Althaus should be allowed to present his statute-of-limitations defense to the jury.

Sammy "the Bull" Gravano's legal troubles connected with his involvement in an ecstasy-selling ring did not end with his criminal conviction. After he was arrested, the state brought forfeiture proceedings under the Arizona racketeering statute (RICO), seeking to deprive him of numerous assets, including money, guns, jewelry, cellular phones and a motor vehicle. But the state's reach did not end with such tangible items: it also sought Gravano's share of profits from the sales of a book about his former criminal life as a mobster in New York.

Gravano, previously a member of the Gambino crime family, was involved in racketeering, murder and extortion. In 1991, he pleaded guilty to one count of having violated the federal Racketeering Influenced and Corrupt Organizations Act. He cooperated with federal authorities in prosecuting other mobsters. In exchange, he was sentenced to a five-year prison term and placed in the federal witness-protection program, ending up in Arizona.

Gravano collaborated with noted crime writer Peter Maas, who wrote a 1997 book called *Underboss: Sammy the Bull Gravano's Story of Life in the Mafia*. His cooperation had given Gravano rights to proceeds from the book, and Arizona sought forfeiture of those proceeds as well. The Superior Court granted the state's petition, and Gravano asked the Court of Appeals to invalidate the forfeiture, claiming both that it violated his First Amendment rights and that his right to proceeds from the book's sales did not have the necessary connection to criminal activity to be forfeitable. The appellate court rejected both arguments. *State v. Gravano*, No. CV 02-0025 (App. Dec. 24, 2000).

Writing for a unanimous panel, Judge

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Small Office Tech Support

Annual...

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children in schools. Five thousand more inmates in prison.

"It is not enough to say, 'Cut spending. Governor, just cut spending.' Well, I say to those people, which children do you want not to go to school? Which patients do you want not to give AHCCCS care, the great bulk of which goes to the care of the elderly? Which prisoners do you want me to let out of prison?"

Napolitano earned spontaneous applause when she said she would not "balance the budget on the backs of education. We need to keep investing in our schools."

She noted that Arizona would celebrate its centennial in eight years.

"We ought to be thinking every day: what do we want the state to look like when it's 100 years old and how much better it can be if we act smart now, if we take firm, decisive action and we always keep in mind not to sacrifice the long term for the short."

Napolitano's remarked capped a program honoring 14 individuals and one law firm for their service. The MCBA's 2002 president, Maricopa County Superior Court Judge Michael D. Jones, presided over the Jan. 21 ceremonies. Award winners were:

► **Henry S. Stevens Judge of the Year:** Maricopa County Superior Court Judge Mark W. Armstrong

Jones lauded Armstrong, now in his second term as Family Court presiding judge, for expanding programs and services, many of which he either created or shepherded, including the integrated Family Court concept of one family, one judge team approach; establishing the Family Drug Treatment Court and Family Violence Prevention Center; adding a specially trained hearing officer to focus on domestic-violence issues; creating the position of Family Court navigator; and establishing the Family Court Advisory Council, a committee of citizens, lawyers and judges who provide a public forum for citizens and litigants.

► **Robert R. Mills Member of the Year:** Patricia J. Gerrich

The Mills award is given, Jones said, "to a lawyer whose service is above and beyond the normal realm of volunteer contribution." Gerrich has been director of the Volunteer Lawyers Program of Community Legal Services for 7½ years. Jones lauded Gerrich for being "innovative in developing new programs that have been models for encouraging volunteer participation," including the Children's Law Center, the Family Legal Assistance Project and the HIV/AIDS Law Project.

"She kindly but very forcefully puts pressure on all of us to be involved in VLP," Jones said.

► **Kenneth E. Freedman Award for Excellence in CLE:** Lesley C. Davis

Jones cited Davis for her work as chair for the past three years of the Family Law Section. Under her leadership, he said, the Family Law Section has put on more CLE seminars than any other MCBA section.

► **ASU Student of the Year:** Diane Targovnik

Targovnik, now an associate with Burch & Cracchiolo, spent more than 200 hours on community activities during law school, including coordinating a battered women's telephone hotline, preparing a manual for the Downtown Neighborhood Learning Center and organizing the Ak-Chin Tribal Youth Court. She received a plaque and a check for \$1,500.

► **ASU Professor of the Year:** Gary Marchant

"It is usually said that a professor's duties fall into three categories: teaching, research and service," Jones said. "Few excel at everything. Gary Marchant is among those few." Jones lauded Marchant for his scholarship and "cutting-edge scientific work on important issues of legal policy." Marchant also is executive director of the law college's Center for the Study of Law, Science and Technology. He received a plaque and a check for \$500.

► **Special Award for Outstanding Community Service:** Quarles & Brady Streich Lang

"We have always known that lawyers are some of the best leaders in our community, but we have not always celebrated their efforts in shaping the community with regard to efforts that do not involve the law," Jones said. "It's time to change that, and with good reason: Quarles & Brady Streich Lang. The firm's relationship with the Capitol School is

► **President's Choice Award:** Brenda Thomson

Jones gave a special award to MCBA Executive Director Brenda Thomson, noting her "hands on" approach and citing her for dedication to the organization.

He also lauded her for possibly saving the organization from budget disaster.

"But for her extraordinary efforts in dealing with an impending shortfall and making drastic cuts, we wouldn't be here today," Jones said. "How much did she cut and save during 2002? She saved \$147,736."

► **MCBA division awards, recognizing outgoing presidents and special honorees**

Jones presented awards to the presidents of the Public Lawyers, Corporate Counsel and Paralegal division presidents — Suzanne Harward, Leo Miller and Sybil Taylor Aytch — for their service in guiding their divisions in 2002.

Maricopa County Superior Court Judge Eileen Willett received the Distinguished

dren in domestic-violence shelters.

Thomson gave the MCBA's "Star at the Bar" award to Andrea R. Mallory, a Lawyer Referral Service interviewer, for her customer service abilities, dependability, teamwork, loyalty and sense of humor. Mallory received a plaque, a check for \$100 and a paid day off.

Yvonne R. Hunter, the MCBA's 2003 president, presented Jones with a Kachina doll for his 10 years of involvement with the MBA. ■

DOING GOOD

■ The employees of Renaud, Cook & Drury have donated more than \$1,100 to downtown Phoenix's Andre House of Hospitality in support of the poor and homeless. They raised the money from the sale of a staff-created cookbook as well as from wreaths hand-crafted by staffers, raffled off at the firm's holiday party. The cookbook included more than 160 employee family recipes and was printed with a donation from IKON Office Solutions. In addition to the money, staffers donated the equivalent of a small truckload of clothing, blankets, jackets and laundry supplies. Andre House is a non-profit organization, sponsored by the Priests and Brothers of Holy Cross from the University of Notre Dame, that serves the poor and homeless by offering basic services as well as educational and volunteer experiences for all those interested in improving their lives. ■



Booker Evans accepted the MCBA's special award for outstanding community service on behalf of his law firm, Quarles & Brady Streich Lang, which for 10 years has worked with the Capitol Elementary School. Capitol's principal, Cora Garrido, attended the MCBA's luncheon with Evans.

a true partnership, and the highest example of community service."

For the past 10 years, the firm has worked with the school, which is in an economically disadvantaged neighborhood in south Phoenix. The firm wants to help the children improve academic performance, encourage them to continue their education, enrich their lives and enhance the school curriculum.

One of the ways the firm is involved is through its Homeroom Parent Program. According to the firm, more than 60 attorneys, paralegals, secretaries and administrative staff volunteer to serve as homeroom parents. They plan four parties each year for the school's 20 homeroom classes. Many visit their class at other times throughout the year to help chaperone field trips, read to the children or participate in classroom activities as requested by the teacher.

The firm also recently presented Capitol School with an educational music program featuring more than 20 Phoenix Symphony musicians.

Booker Evans accepted the award on the firm's behalf.

"Of all the things we do as a firm," he said, "this is the very best thing we do. The most enjoyable, the most meaningful."

Public Lawyer Award, honoring her for her community service in organizations such as the St. Thomas Moore Society, Andre House and the Soroptomists Club.

As a Public Lawyers Division member, Jones said, Willett "has been a very visible and active member, rolling up her sleeves and participating in the community service projects as well as teaching an ethics seminar."

Theresa Prater received a special recognition from the Paralegal Division for serving as the division's liaison on the *Maricopa Lawyer* editorial board for nearly three years.

"She has made sure that the Paralegal Division's accomplishments are known both inside and outside the state of Arizona," Jones said.

Lori Higuera, current president of the Young Lawyers Division, gave an award to Susan Wissink, the YLD's 2002 president, for instituting Tolerance Through Education, a program in which lawyers talk to elementary school students, and for her work coordinating disaster relief efforts for the American Bar Association.

Higuera also honored Will B. Pottersveld as YLD's outstanding volunteer for his work chairing YLD's Domestic Violence Committee, which in 2002 not only sponsored the annual Necessities Drive but also organized a back-to-school drive to collect school supplies for chil-

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Continuance...

Continued from page 3

on lawyers who already contend daily with high job-related stress.

Whether the statistics on continuances show that the panel is succeeding in its goal is debatable, but what is not in doubt is that there have been genuine problems with the manner in which attorneys are treated during panel hearings. Many attorneys from the criminal defense and prosecution bar have reported being treated rudely and like children, and having judges unreasonably berate them.

My colleague, James Hankey, related an incident in which he requested a one-day continuance so he could attend an accredited DUI seminar. The prosecutor also wanted to attend the seminar and stipulated that the matter should be postponed. Nonetheless, the court chose to yell at counsel and act as though the request was less than honorable.

I faced a different but equally discourteous judge when requesting a two-week continuance of a difficult child-abuse case in which a conviction would require my client to serve a lengthy prison term. I had recently undergone major surgery and had previously warned the court that I might need a continuance because the trial was scheduled for only three weeks after my operation. The court denied the continuance on the basis that I should have been recovered by the trial. Ultimately, the judge granted the motion after I filed a motion for reconsideration. I was treated unkindly and like a child, even though the prosecutor had not objected to the continuance.

Ballinger acknowledges that he has heard horror stories but says he has no personal knowledge of any instances where discourtesy was shown to the parties.

"Criminal attorneys work like dogs and deference should be shown to the parties when they can document the need for a continuance," he said.

Apparently the attorneys are not shown equal professionalism by all members of the panel, as illustrated by a complaint filed by many criminal bar members against a particular judge who routinely denied all continuances. I attempted to contact individuals connected with that situation, but found they all had been instructed not to discuss the matter with anyone.

Many judges with whom I have spoken about the county's "rocket docket" informally admit that they don't agree with the need for the continuance panel and claim to abhor the lack of autonomy that now is their lot. Each of them chose, however, not to publicly com-

— See **Continuance** on page 15

VLP to honor volunteers on Valentine's Day

The Volunteer Lawyers Program will hold its annual For Love of Justice awards lunch Feb. 14 at the Hyatt Hotel in downtown Phoenix to honor and thank attorneys and others who donated services in 2002 to help low-income clients get access to justice.

Susan Lagerman, VLP Advisory Committee co-chair, said VLP appreciates all of the volunteer assistance provided by attorneys, firms, support businesses and other individuals and organizations that work with VLP to help low-income clients. Firms to be honored for their pro bono service include Snell & Wilmer, sustaining excellence; Quarles & Brady Streich Lang, large firm of the year; Mohr Hackett Pederson Blakley & Randolph, medium firm of the year; and Engelman Berger, small firm of the year.

VLP's Children's Law Center will honor four attorneys for their exceptional pro bono service to children: Joseph Boyle, guardianship mentor; Brooks Holcomb and Debra Runbeck, volunteer guardians ad litem; and Jeffrey Pollitt for his service through Free Advice Clinics for Teens. Quarles & Brady Streich Lang will be recognized as firm of the year for children's services.

A number of attorneys will be honored for their exceptional service to victims of domestic violence and other low-income clients with family law needs. Honorees include Harry Friedlander, family law attorney of the year; Alena Cantor and Irwin Harris, emeritus attorneys of the year; Glenn Davis, family law representation; Diana Calais, Frederick Jones and William Wingard for family law advice and brief assistance; and Rich Peters and Janet Feeley, recipients of the Joseph W. Mahowald Memorial Award for exceptional assistance to unrepresented family law litigants through the Family Lawyers Assistance Project.

Michael Christopher of Snell & Wilmer will be honored as the VLP attorney of the year, selected from the attorneys who were named as volunteers of the month during 2002. Christopher has provided regular advice to low-income tenants and outstanding representation, including a complex consumer case that went to trial and resulted in a tremendous victory. DeShon Pullen will be recognized as sole practitioner of the year for outstanding pro bono service advising and representing VLP clients. Denise Quinterri of Quarles & Brady Streich Lang will receive the new attor-

ney of the year award for her pro bono representation of VLP clients and assistance recruiting other new and young associates. Volunteers Thomas Joseph Davis, Kerstin LeMaire, Katherine McLeod and Harry Stone will be recognized for helping low-income tenants with legal problems related to housing. Nick Rayes and Timothy Barnes will be honored for excellence in representing consumers and Nancy Tribbensee will receive the public attorney of the year award.

Attorneys to be recognized for exceptional leadership and service to VLP during the past year are Patrick X. Fowler, Snell & Wilmer; John C. Hendricks, Stinson Morrison Hecker; and Brenda Thomson, executive director of the Maricopa County Bar Association.

A new pro bono award will be given this year in memory of long-time volunteer attorney, the late John P. Frank. Joseph Kremer of Hopkins & Kremer will receive the John P. Frank Advocate for Justice Award.

Other volunteers to be recognized include Patty Felts, public awareness; Konnie Young, law student pro bono award; Tamarha Everett, paralegal of the year; Eric Moore, HIV/AIDS Law Project volunteer of the year; and David Hilton, volunteer of the day. Businesses to be recognized include Pamela Griffin and Griffin & Associates, court reporting, and Kathy Hansen, certified court interpreter. Phillips & Associates will be honored for advising and providing pro bono representation to low-income families with bankruptcy needs. The MCBA Paralegal Division will receive the paralegal recruitment award. Volunteers who provided 100 or more hours of service to VLP also will be recognized.

The William E. Morris Institute for Justice will receive the MCBA Hon. Frank X. Gordon Jr. Traveling Pro Bono Award, named in honor of the former Arizona Supreme Court chief justice. The institute, founded in 1996, provides administrative, legislative advocacy and impact litigation to address major issues that affect people with low incomes.

Awards will be presented by Gordon, Arizona Court of Appeals Judge Ann Scott Timmer and Maricopa County Superior Court Judge Mark Armstrong, presiding Family Court judge. *Arizona Republic* columnist Laurie Roberts will deliver the keynote message.

For more information about VLP or this event, call 602-258-3434, ext. 284. ■

VLP thanks attorneys who accepted cases

The Volunteer Lawyers Program, co-sponsored by Community Legal Services and the Maricopa County Bar Association, thanks the following 39 attorneys and firms in Maricopa County who agreed recently to assist low-income clients with these civil legal needs. Each volunteer attorney receives a discount CLE certificate from the MCBA.

Bankruptcy

Robert D. Beuler, Phillips & Associates
Jeffrey L. Phillips, Phillips & Associates

Consumer

Frank W. Busch III, Snell & Wilmer
George J. Coleman III, Snell & Wilmer
Daniel E. Durchslag, New Vision International

John J. Egbert, Jennings Strouss & Salmon
Stacy Y. Hannert, Quarles & Brady Streich Lang

Cindy L. Padilla, Ely Bettini Ulman & Rosenblatt

John Sandweg, Quarles & Brady Streich Lang
Heidi M. Staudenmaier, Snell & Wilmer
William Charles Thomson, Gallagher & Kennedy

Family law/domestic violence

Stacy D. Click, ASU College of Law
Harry P. Friedlander, Gibson Matheson Lallis & Friedlander

Guardians ad litem for children in

Family Court
Emily H. Mann, Quarles & Brady Streich Lang
Monica Laurell Miller, Quarles & Brady Streich Lang

James P. Mueller, Mueller & Drury

Guardianships (minor children)

Sandra J. Creta, Quarles & Brady Streich Lang
Otilia M. Diaz, sole practitioner
Michael C. Ford, Bryan Cave
Nicole France, Quarles & Brady Streich Lang
Deanna Rae Rader, Quarles & Brady Streich Lang

Jennifer C. Ryan-Touhill, Touhill Law Firm

Guardianships (incapacitated adults)

Charles M. Dyer, Dyer & Ferris
Marc A. Ventura, sole practitioner

Home ownership

P. Bruce Converse, Mariscal Weeks McIntyre & Friedlander

Jonathan A. Coury, Quarles & Brady Streich Lang

Jake D. Curtis II, Burch & Cracciolo

William M. Hardin, Osborn Maledon

Will B. Pottersveld, Quarles & Brady Streich Lang

Nick Rayes, sole practitioner

James B. Rolle III, sole practitioner

Edward Salanga, Quarles & Brady Streich Lang

Richard B. Stagg, Snell & Wilmer

Thomas N. Swift II, sole practitioner

Michael W. Wright, Mohr Hackett Pederson

Blakley & Randolph

Andre J. Zenda, sole practitioner

Tenants' rights

Bruce F. Demaree, sole practitioner

Phillip J. Shea, Snell & Wilmer

Other issues

J. Stanley Edwards, sole practitioner

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The early bird gets...travel

Wendy Neal of Snell & Wilmer won a \$500 gift certificate to America West Airlines as the winner of the MCBA's early renewal contest. Neal's name was drawn at random from among nearly 1,500 MCBA members who renewed their membership by Nov. 15. ■



Courtwatch...

Continued from page 10

Lawrence F. Winthrop held that the proceeds from the book were forfeitable as the proceeds of qualifying criminal activity.

"The racketeering conduct relevant to the forfeiture complaint includes the acts of murder and extortion that Gravano admitted as part of his 1991 plea agreement," he wrote. Murder and extortion are acts that constitute racketeering under the Arizona statute, which allows forfeiture of all proceeds traceable to a racketeering offense.

Winthrop also disposed of the constitutional argument. He first rejected Gravano's contention based on the First Amendment requirement of content-neutral laws.

Gravano contended that the state was motivated to seek forfeiture because it disapproved of the book's content. He relied on *Simon & Schuster Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105 (1991), in which the U.S. Supreme Court invalidated New York's "Son of Sam" law. That law sought to prevent criminals from financially benefiting from their crimes.

Winthrop held that, unlike the Son of Sam law, Arizona's RICO act was content neutral.

"If a regulation serves purposes unrelated to the content of the expression, it is neutral, even if it incidentally affects some speakers or messages but not others," he wrote. "Whether a statute's burden on expression is content-based turns on its primary purposes rather than its incidental effects."

He held that Arizona's RICO forfeiture statutes are speech- and content-neutral. They "contain no reference to the content of speech or expressive materials." Furthermore, their purposes "apparently include removing the economic incentive to engage in racketeering, reducing the financial ability of racketeers to continue to engage in crime, preventing unfair business competition by persons with access to crime proceeds, compensating victims of racketeering, and reimbursing the State for the costs of prosecution."

He also agreed with the state's contention that "when forfeiture of book proceeds is sought, the causal connection between racketeering conduct and the proceeds is present if the commercial value of the book contract is substantially the result of racketeering."

"In other words," he wrote, "a causal connection exists if the storyteller's notoriety from racketeering is what makes the story marketable."

The same is not true if the crimes

described in the narrative do not constitute racketeering or "or do not enhance the story's or the storyteller's commercial value," Winthrop held.

"Thus," he continued, "whether proceeds of an expressive work are forfeitable under the statutory scheme does not depend on the content of the work, and the *Underboss* royalties owed to Gravano may be subject to forfeiture regardless of the message conveyed in the book if a causal connection between racketeering and the proceeds exists."

He accordingly held that the forfeiture statutes were applied to Gravano in a content-neutral way.

Winthrop also held that the state had a compelling interest in forfeiting the proceeds of Gravano's crimes, rejecting his contention that the interest was attenuated because the criminal activity did not occur in Arizona and did not involve Arizona victims. He opined that "Arizona has a compelling interest in assisting out-of-state racketeering victims when the person who victimized them has become an Arizona resident." Moreover, "the State has a compelling interest in reducing the economic power of criminals and criminal enterprises that come into Arizona, regardless of where their racketeering proceeds originated."

"The effectiveness of forfeiture laws in addressing racketeering crimes would be greatly diminished," Winthrop wrote, "if all that a person had to do to escape forfeiture would be to take such proceeds from the state in which the crime was committed to another state."

Judges Philip Hall and Edward C. Voss joined in Winthrop's opinion. ■

Hunter...

Continued from page 1

ney, handling felony prosecutions. After about two years, she joined the Salt River Project, where she had worked during law school, as a general practice in-house attorney.

After five years, Hunter joined the Arizona Attorney General's Office. She was originally assigned to handle a special investigation of CPA firms that had helped Charles Keating build his empire. After obtaining one of the largest settlements pertaining to a CPA firm's license to practice in Arizona, she joined the Environmental Enforcement Section to represent the Arizona Department of Environmental Quality.

Hunter had a very challenging experience representing ADEQ in civil actions and administrative proceedings against violators of the Arizona environmental statutes and rules. She also defended various water and air permits issued by ADEQ and challenged by interest groups. Her duties included tracking legislation for ADEQ and providing technical advice on proposed legislation and issues of concern.

Hunter returned to the private sector in December 1998 when she joined Arizona Public Service as a public affairs representative. In her current position, she provides support in the public affairs office working on environmental, growth, construction and other miscellaneous issues on behalf of Pinnacle West Capital Corp., the parent company of APS.

On a personal note, along with her parents' influence, Hunter has benefited from knowing many people in the legal community. She counts as mentors and friends Maricopa County Superior Court Judge Thomas Dunevant, Roxanna Bacon, Hugo Zettler and Arizona Court of Appeals Judge Cecil Patterson Jr. From them, she said, she has learned two important things: to be honest and to treat everyone with dignity and respect. She lives these beliefs and incorporates them into her professional, personal and community life.

Her commitment to community is remarkable. She has been chair of the Salvation Army advisory board, is a member of the Phoenix Police Department's Use of Force Board and Disciplinary Review Board, and is involved with the Phoenix Library Foundation, the Greater Phoenix Urban League and the Greater Phoenix Black Chamber of Commerce.

Hunter feels very fortunate to have been blessed with a good education and financial security as well as with a job that helps lend her skills to community interests. Because the economic struggles our community and state are facing

as so overwhelming, she feels that the community is a great place to redirect our energies.

Hunter has incorporated this belief into her term as MCBA president. She will help to encourage people to find projects that are important to them and aligned with their personal goals and interests. She also hopes she can encourage the legal community to offer their professional skills to the nonprofit community.

She would like to take the MCBA out to all areas of the county and find additional ways to serve attorneys in Maricopa County.

In her spare time, she enjoys movies that "make you think." She also likes to read. Some of her favorite authors include W.E.B. DuBois, Charles Dickens and Andrew Vachss. She and her husband, Duncan Horton, a computer programmer for the Arizona National Guard, also like to go to the ocean. ■

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LEGAL MOVES

■ Arizona Attorney General Terry Goddard has appointed **James Walsh** as special counsel to do antitrust and multi-state work and **Cecilia Esquer** as chief counsel of the office's Public Advocacy Division.

■ ASU law Professor **Dennis Karjala** has been named to the Jack Brown Endowed Chair at the law college. Karjala, who has been a law college faculty member since 1978, is an expert in computer law and copyright. The late Jack Brown was a founder of Brown and Bain and a nationally known attorney in the high-tech litigation field.

■ Political and legal philosopher **James Nickel**, formerly of the University of Colorado at Boulder, has joined the ASU law faculty.

■ Fennemore Craig has promoted the following attorneys as shareholders: **Amy Abdo**, labor and employment, professional liability and business litigation; **Janna B. Day**, government relations; **Barney M. Holtzman**, labor and employment law, workers' compensation, professional liability and commercial litigation; **Paul A. Krulisky**, corporate and securities law; **Sal J. Rivera**, tort, commercial and employment litigation and land use regulation and litigation; and **Susan Wissink**, general corporate, securities, and mergers and acquisitions law. All practice in the firm's Phoenix office except for Holtzman, who practices in the Tucson office.

■ Gallagher & Kennedy has elected **Steven T. Lawrence** as a shareholder. Lawrence (J.D. with distinction, 1994, University of the Pacific; MBA 2001, ASU) practices corporate law, mergers and acquisitions and intellectual property.

■ Jennings, Strouss & Salmon has added three associates. **Josef Bobek** (J.D. 2002, Pepperdine University) practices commercial litigation and construction law. **Stanton E. Johnson** (J.D. 2002, University of Utah) practices corporate law. **Darryl T. Landahl** (J.D. 2002, ASU) practices commercial litigation and construction law.

■ **Jennings, Strouss & Salmon** has elected four new members (partners). **J. Greg Coulter** (J.D. 1994, Oklahoma City University; LL.M. 1995, University of San Diego) practices labor and employment law and commercial law and tort litigation. **Susan I. McLellan** (J.D. 1989, California Western) practices medical and dental malpractice defense and products liability litigation. Before law school she was a registered nurse with clinical experience in medical-surgical intensive care. **Jimmie W. Pursell** (J.D. 1996, University of Tulsa; LL.M. 1999, Yale) practices commercial, intellectual property and First Amendment litigation and Internet law. Before law school he was a Mississippi police officer. **Matthew F. Winter** (J.D. 1991, ASU) practices medical malpractice defense, insurance defense and personal injury litigation.

■ **David Weinzweig** and **Joni Chambers** have joined Lewis and Roca. Weinzweig (J.D. 1997, ASU) joins the firm's commercial litigation practice group as an associate and will focus his practice primarily on antitrust litigation. Prior to joining the firm, he was an assistant Arizona attorney general in the antitrust unit. **Chambers** (J.D. 1990, University of South Dakota) joins the firm's labor and employment practice group as of counsel. Prior to joining the firm, she was an assistant Phoenix city attorney concentrating on wrongful termination, harassment and discrimination claims.

■ **Michael J. Brophy** is the new managing shareholder of Ryley Carlock & Applewhite. He succeeds **William P. Connealy**, who has been the managing shareholder for the past five years. Brophy, with the firm since 1977, practices environmental and natural resources law.

■ **Steptoe & Johnson** has promoted four in the firm's Arizona office: **Steven D. Wheelless** to partner; **Jeffrey A. Sandquist** to of counsel; and **Jon Neumann** and **Andrew J. Sweet** to special counsel. Wheelless (J.D. 1994, George Washington University) is a member of the firm's labor and employment law practice group. Sandquist (J.D. 1994, UA) is a member of the firm's government relations practice, working principally in the area of administrative law. Sweet (J.D. 1992, UCLA) is a member of the firm's labor and employment practice group. Neumann (J.D. University of Texas) is a member of the insurance bad faith and civil litigation practice groups.

■ **Ryley Carlock & Applewhite** has elected **Phillip P. Guttilla** and **Frederick C. Miner** shareholders. Guttilla practices business, taxation and securities law. Miner practices employment law.

■ **Ryley Carlock & Applewhite** has added **Kara A. Ricupero** and **J. Douglas Wiley** as associates. Ricupero (J.D. 2000, ASU) practices in the firm's litigation practice group. Wiley (J.D. 1996, Vanderbilt) joins the firm's corporate practice group with a focus on estate planning.

■ **Stephen Hart** has returned to Burch & Cracchiolo after several years as state Department of Gaming director. In addition to



Abdo



Day



Bobek



Guttilla



Krulisky



Miner



Brophy



Haws



Landahl



Pursell



Weinzweig



Chambers



Holtzman



Lawrence



Rivera



Winter



Coulter



Johnson



McLellan



Stanton



Wissink

PEOPLE IN LAW

■ **Bahar Schippel**, an attorney with Snell & Wilmer's general federal tax group, has been elected as a trustee of the Arizona Opera board.



Schippel

■ **Mark Harrison** is the 2003 recipient of the Peggy Goldwater Award from Planned Parenthood of Central and Northern Arizona. The award is named in honor of PPCNA's co-founder, Peggy Goldwater, and is presented each year to an individual who "demonstrates an unbending commitment to protect reproductive freedoms and promote family planning services for all persons," according to PPCNA. Harrison served on PPCNA's board of directors from 1993 to 1996 and chair in 1995. The award will be presented at the organization's annual CHOICE Affair April 5. ■

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President...

Continued from page 2

Regency Downtown.

The luncheon highlight included the recognition of true MCBA leaders, followed by inspiring remarks from Gov. Janet Napolitano. Napolitano has been an active member of the MCBA for many years, and has always made community service a priority throughout her career. We wish her much success in the challenging year ahead.

VLP For Love of Justice luncheon

Please come out for VLP's annual For Love of Justice luncheon on Valentine's Day (Feb. 14) to honor those who have done extraordinary pro bono service during the past year.

The award winners are too numerous to list here, but include Michael Christopher, attorney of the year, and Harry Friedlander, family law advocate of the year. VLP's Children's Law Center will honor attorneys and firms for their exceptional pro bono service to children, including Joseph Boyle, Brooks Holcomb and Debra Runbeck. These are just a few of the outstanding volunteers who will be honored. Please join us Feb. 14, to support those who have shown true leadership in the community. [For more information, please turn to page 12.]

And, finally...

I want to give a shameless plug to the Young Lawyers Division, the community service arm of the MCBA. Our future is in our youth. Let's encourage YLD's work in the community. I will tell you more about the YLD and its goals in future messages. ■

Harris...

Continued from page 2

Today's paralegal market is becoming highly competitive. Paralegal students preparing to enter the job market, and even those who are making a change in their employment, can benefit from encouragement and occasional advice. Take a few minutes and provide someone with some encouragement. I promise you, the rewards will come back. It did for me. I completed my circumnavigation, and I have John and many others like him to thank.

Few things in the world are more powerful than a positive push. A smile. A word of optimism and hope. A "you can do it" when things are tough.

— Richard M. DeVos

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Continuance...

Continued from page 12

ment on the issue for fear they would receive an unpleasant job assignment in the future.

Judge Robert Gottsfeld, however, said, "I agree with the decision to implement the continuance panel provided the members treat attorneys with courtesy and professionalism. If discourtesy is displayed by a particular panel member, he or she should be replaced."

The State Bar of Arizona requires all attorneys to attend a course on professional courtesy. During the course, Zaklet bemoans the fact that the profession has degenerated to a level at which attorneys are rude and abrupt with one another. Members of the bar should rectify this situation without the need for judicial intervention, and the required course points to standards we all are told we should strive to achieve.

The judiciary needs to set an example by treating attorneys as contemporaries, equals and professionals, without discourtesy and rudeness. Morale in the criminal trial bar is approaching an all-time low. How much more must morale sink before this Star Chamber is disbanded and continuance decisions are returned to the individual judges, who are in the best position to decide such questions in the first place?

► Sherry Bell of Florence & Bell has practiced criminal defense for more than 20 years. ■

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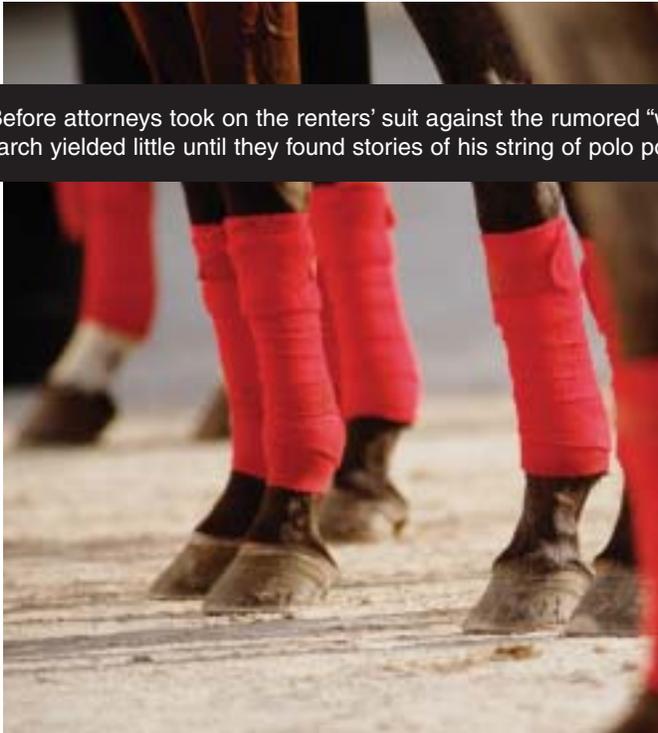
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