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A Bountiful Spirit

The MCBA Paralegal Division honors the memory of Marilyn Benesch with a scholarship fund. **Page 11.**

Scandals leave lasting impact on corporations

By Kathleen Brieske
Maricopa Lawyer

Ever since Enron Corporation and its auditor, Arthur Anderson Inc., were caught performing and covering up illegal accounting practices in 2002, America has watched large corporate scandals go from a what-if hot topic to a frightening expectation. The avalanche of corporations gone corrupt came at an amazing speed and the lasting consequences followed right behind. *Maricopa Lawyer* interviewed Arizona Corporation Commission Chairman Marc Spitzer and Gallagher & Kennedy attorney Steven Lawrence to get their take on the impact of this disturbing trend. Both will serve as faculty for an upcoming MCBA CLE on this topic.

Maricopa Lawyer: In recent years, many financial scandals have rocked the corporate world. From Enron to Tyco, Adelphia Communications to WorldCom, corporate responsibility has begun to seem a thing of the past. What seems to be the explanation for all this turmoil?

Steven Lawrence: Of course greed is the easy answer, but if you look a bit deeper, I think you will find a more complex answer. There really was a perfect storm of causes for the debacle in corporate America. For example, in the run-up of the value of many Internet-related stocks, the valuations masked many fundamental problems. The moral decay of society certainly has an impact. Executive incentives were in place to encourage a short-term perspective, rather than a long-term approach. Wall Street expectations were skewed toward short-term issues. Auditing firms were too closely tied to their audit clients. Finally, our educational systems lacked focus on instruction.

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INSIDE

Client troubles?

Mark Winsor offers insight on how to give problem clients the pink slip. **Page 7.**

Islamic law

Take a closer look at the person-centric legal system of Muslim countries. **Page 15.**

Jury system changes may impact trials

By Bob James
Special to Maricopa Lawyer

Recent decisions by the Arizona Legislature and the Maricopa County Trial Courts have changed many parts of the jury system and may affect your next jury selection.

As changes in the law are being implemented, many facets of jury service are changing as

well. At the same time, Maricopa County Superior Court has implemented a court docket to hold accountable those summoned jurors who failed to appear when ordered.

In the 2003 regular Arizona legislative session, House Bill 2520 was introduced as a comprehensive package to address many parts of the jury system in Arizona. It focused on ways to improve the jury experience for citizens, decrease the hardship of jury service and ensure greater participation.

The greatest concern expressed by prospective jurors upon receiving a jury summons is the amount of time they will be required to put their life on hold while serving as a juror. In many courts throughout the United States, the concern is valid because the length of service can be months.

One part of the new Arizona law codifies the “one-day, one-trial” requirement, which

— See **Jury** on page 5

Can you picture yourself in this car?



PHOTO COURTESY OF KUFLIK PHOTOGRAPHY

Maricopa County Bar Foundation trustee Don Alvarez and Tom Jones of Tom Jones Ford pose with the Ford Mustang offered at the hole-in-one contest in last year's Pro Bono Golf Classic. This year, two cars will be up for grabs at the 2004 Wells Fargo Pro Bono Golf Classic, sponsored by the foundation for the benefit of VLP. If you haven't challenged your colleagues to a round of golf at the Westin Kierland Resort on Sept. 18, please turn to page 12 to find out how you can join the fun.

Split Ninth Circuit rules Arpaio violated inmates' rights with Web broadcasts

By Daniel P. Schaack
Maricopa Lawyer

In July 2000, Maricopa County Sheriff Joe Arpaio opened up one of his jails to the curious eyes of the world: he installed cameras in the Madison Street Jail and streamed live video to a Web site accessible to the public. A group of inmates sued and persuaded a federal judge that this violated their constitutional rights. A divided panel of the Ninth Circuit Court of Appeals has now agreed and has upheld a preliminary injunction against the use of the webcams. *Demery v. Arpaio*, No.03-015698 (9th Cir. Aug. 6, 2004).

When Arpaio announced that he had installed the cameras, he proclaimed that “[w]hen . . . johns are arrested, they can wave to their wives on the camera.” He said he installed the cameras because they gave the public insight into what went on in the jail. He also claimed that they would a deter crime:

“We hope that the only visit people make to our jail is a virtual visit.”

The cameras were placed in the Madison Street Jail in Phoenix, which houses only pre-trial detainees. They were placed near existing closed-circuit security cameras, in places not normally open to the public, including the men's holding cell, a pre-intake area, the intake search area, and the women's holding area. For a time, this last camera captured images of the toilet and surrounding area, but it was moved to view the hallway outside the holding cells.

Images from the cameras were originally streamed to the sheriff's Web site, but the number of visitors quickly overwhelmed the site's capacity. So Arpaio arranged with a site called Crime.com to host the images. Crime.com jazzed things up a bit. One caption informed visitors: “If you find yourself sitting on this bunk, you probably have been arrested for drunk and disorderly behavior, drug possession, spousal abuse, or prostitution. Most

COURT WATCH

people inside the Madison Street Jail are facing misdemeanor charges but deputies see their fair share of murderers as well.”

In its first few days, Crime.com got six million hits. Viewers came from as far away as Sweden, Britain, and Germany. But like the sheriff's site, Crime.com was overwhelmed with visitors. The Web site shut down after the suit was filed but before the district court issued its injunction, although the reasons were not entirely clear.

Twenty-four former inmates of the Madison Street Jail sued the sheriff in state court. The sheriff removed the case to the federal district court. Holding that the operation

— See **Courtwatch** on page 6

COLUMNS

The benefits of your MCBA membership are growing

It has been said many times before that our members are the reason the Maricopa County Bar Association has been continuously successful—never is that more true than this year. The MCBA's ongoing goal of developing membership value is gaining momentum through a number of new strategies and benefits, genuinely making this an organization centered around its members.

We launched our first new membership program this month, a program that highlights the importance member law firms hold for this organization. The "100 Percent Club" recognizes those law firms who have reached full attorney membership in the MCBA. In the newly created program, firms with 20 or more lawyers are acknowledged for their 100 percent attorney membership in the MCBA through a certificate and public recognition. They also receive special membership benefits, including special CLE materials for their law libraries, exclusive advertising rates in *Maricopa Lawyer* and invitations to 100 Percent Club members-only events. We hope these benefits will serve to thank the firms for their commitment to the MCBA.



**Jerome
ELWELL**
MCBA PRESIDENT

Already, *nine* firms have reached this goal, including my own firm. Warner Angle Hallam Jackson & Formanek (with 100 percent attorney and paralegal membership); Jennings, Haug & Cunningham; Ryley Carlock & Applewhite; Burch & Cracchiolo; Perkins Coie Brown & Bain; Osborn Maledon; Robbins & Green; Bonnett Fairbourn Friedman & Balint and Stinson Morrison Hecker have all shown their dedication and

support of the MCBA by making it a priority to have full membership in the organization.

As president of the board of directors, I have long been convinced of the importance of supporting this organization. And as a member of a firm that has full attorney participation in the MCBA, I value a program that recognizes this. It sets a great standard for other law firms.

In addition to the 100 Percent Club, other membership programs and benefits are on the way, to be unveiled from now through the start of 2005. Many MCBA members-only events will be taking place, the first of which is a reception immediately prior to the Maricopa County Attorney Debate on Sept. 2, at the Wells Fargo Conference Center. The MCBA organized the debate and the reception with the help of many sponsors: Wells Fargo, the Arizona Bankers Association, Nationwide Insurance, Lewis and Roca and Koeller, Nebeker, Carlson & Haluck. The pre-debate reception is an exclusive opportunity to bring MCBA members together with Arizona Bankers Association members, the county attorney candidates, the debate questioners and moderator José Cárdenas, host of *Horizonte* on KAET-Channel 8.

On another front, CLE transcripts have been created and distributed to members in the last few weeks. As you likely already

know, the State Bar of Arizona now requires that practicing attorneys submit a list of all the CLEs they have taken for this past year. Our membership director has created transcripts for our members who have taken CLEs through the MCBA, listing the title of each seminar as well as credits earned. This means that if you take all your required credit hours through the MCBA, your transcript is complete and sent to you with no effort on your part!

MCBA members will soon have the opportunity to receive special rates on a wide variety of dining, entertainment and professional services with the use of a membership card. Cutting-edge CLEs, a business management practice program and a leadership workshop will all be offered to members at discounted prices. *Maricopa Lawyer* also is becoming an exclusive benefit for members. This is your newspaper, and we plan to feature more articles highlighting our members' contributions to the MCBA, the legal profession and the community.

As many new goals are being developed and benefits implemented on an ongoing basis, I encourage each of you to offer suggestions and ideas about what you need from us. Never before has so much emphasis been put on satisfying membership needs, and the MCBA is stopping at nothing to make this a premier organization for membership benefits. ■

Department of Labor says paralegals are non-exempt

The Department of Labor (DOL) currently considers paralegals as non-exempt employees who should be paid overtime. This position is consistent with the prior DOL opinion letter dated February 19, 1998. In March 2003, the DOL released proposed rule changes to the Fair Labor Standards Act of 1938 (FLSA) for public comment. The National Federation of Paralegal Associations submitted comments. The National Association of Legal Assistants did not. Most statewide associations did not submit comments. Thus, final DOL regulations were released without input from the majority of paralegals.

Paralegals generally do not qualify as exempt learned professionals because an advanced specialized academic degree is not a standard prerequisite for entry into the field. Although many paralegals possess general four-year advanced degrees, most specialized paralegal programs are two-year associate degree programs from a community college or equivalent institution. Under the learned professional exemption the key phrase seems to be "prerequisite for entry into the field." Until the paralegal profession universally requires a specialized academic degree as a



**Clare
PENDLETON**
PARALEGAL DIV.
PRESIDENT

standard prerequisite for entry into the field, it appears paralegals do not fall under the learned professional exemption. However, the learned professional exemption is available for a paralegal who possesses an advanced specialized degree in another professional field and applies that specialized knowledge in the performance of his or her duties.

Degrees aside, the DOL in Section 541.301(d) added the phrase "and performs substantially the same work" to the final regulation. In today's workplace, employees obtain advanced knowledge through a combination of work experience and formal instruction. Paralegals who attain their advanced knowledge through a non-traditional path, and possess the same knowledge level and perform the same work as the traditionally degreed

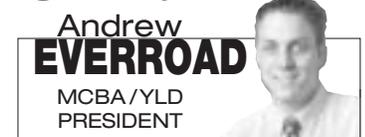
— See *Pendleton* on page 15

Calling all young lawyers . . .

A few months ago I wrote an article about how increased communication can help us better manage our cases. I also believe some increased communication between the YLD board and division members will help the board better manage the YLD, and at the same time, increase your awareness of the benefits and opportunities you have as members.

I recently came to realize that many lawyers are unaware of who makes up the YLD. As stated on the MCBA Web site, the YLD is "an active, service oriented group of young lawyers who are either 36 years of age or younger, or have been in practice for five years or less (whichever occurs last)." According to our records, we have 877 members. Yet, as with many organizations, only a small percentage of our members are involved with the division's activities and take advantage of its opportunities. In an attempt to change the status quo, I hope to increase our communication.

Beginning in mid-September, please look for a monthly email from me updating you on



**Andrew
EVERROAD**
MCBA/YLD
PRESIDENT

the month's board meeting and any upcoming YLD events, including CLEs, community service projects and social events. In response, I hope to receive questions or concerns from you along with input regarding ways to increase involvement and otherwise better the YLD. In the meantime, please feel free to email me at aeverroad@bffb.com.

You can also visit the Web site at www.maricopabar.org, hit the Young Lawyers link on the left side of the home page, and check out some of the programs/committees we have. If any programs interest you, please contact me or email Geoff Cummings at gcummings@mcababar.org. I look forward to better communication. ■



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Errors will be corrected in a subsequent issue. The MCBA does not necessarily endorse the views expressed by contributors and advertisers.

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Calderón opens new Phoenix law firm

By **Cari Gerchick**
Maricopa Lawyer

Inevitably, any encounter with Ernie Calderón is unforgettable. You are consumed by his energetic presence, his enthusiastic handshake and his remarkable passion for life. His attention is always on the person or project before him, even though he always has a great deal to keep him busy.

Though he never loses his focus, Calderón is pulled in many different directions. First and foremost, he is a husband and father. He is a deeply spiritual man. He is dedicated to his clients and the law. And he never forgets his friends. The common thread in Calderón's life is the continuing importance of education. Gov. Janet Napolitano recently appointed him to the Arizona Board of Regents, the body that governs the Arizona public university system. His desire to take on new challenges is driven by his belief that to undertake the service that we are all obligated to do — service to one's family, faith, friends, community and clients — we must continue to grow past our comfort zones. That is the reason that he is charting a new course in his life by opening his own law firm — Calderón Law Offices.

It is quite a change to move from Calderón's home for the past 14 years: the Phoenix law firm of Jennings, Strouss & Salmon. At Jennings, he saw firsthand how to act with a sense of duty and respect toward all involved in the practice of law. Calderón says he is grateful for his time at Jennings and will miss the folks there a great deal.

While at Jennings, he practiced in the area of employment law. He also gained experience in procurement law, construction litigation, education law, health care matters, administrative law, as well as general business matters. His new practice also will focus on professional responsibility and discipline issues.

His training in the field of lawyer discipline is grounded in the many years of service to the State Bar of Arizona. Prior to becoming president of the State Bar in 2002, Calderón served as a State Bar "Probable Cause" panelist for 18 months. During that time, he saw all aspects of the discipline process from complaint, to investigation, to hearing, to adjudication and appeal. He also was active at the leadership level when the State Bar overhauled the disciplinary system to speed up the administrative process. This experience has given him the tools his clients will need

for effective representation in this area, and he is looking forward to this new challenge.

With his new office, Calderón says has an opportunity to find a balance between what have become polar opposites in today's legal world — business v. humanity. He intends his firm to be a hardworking place driven by fun, creative, well-rounded and focused individuals. He believes the result will be happier clients.



Calderón

Calderón knew from an early age that although he wasn't entirely sure what attorneys did, he knew they helped people and he wanted to help people. Early influences in his childhood home of Morenci, Arizona, included two former Greenlee County judges, the late Porter Murray and the retired Lloyd Fernandez.

Calderón attended Northern Arizona University, where he was student body president and Truman Scholar. In 1979, he graduated with a bachelor's degree in political science. He then attended the College of Law at the University of Arizona, where he was president of the Student Bar Association. After graduation, he clerked for Senior U.S. District Judge Walter E. Craig. Next, he was the director of legal affairs for Blue Cross/Blue Shield of Arizona and a litigation attorney for Arizona Public Service Company.

His record of service to the bar and general community are legendary. To name just a few of his legal community activities, he has either served in leadership or chaired efforts for the State Bar of Arizona, Los Abogados and St. Thomas More Society. He currently is a delegate for Arizona to the American Bar Association.

As with all things, Calderón is dedicated to the civic community as well. He has served on the boards of the following organizations: Valley Leadership, Central Arizona Shelter Services, American Diabetes Association, Maricopa County Hospital and Health System, Community Council, Volunteer Center of Maricopa and the Roman Catholic Church of the Diocese of Phoenix. He is currently president of the Grand Canyon Council, Boy Scouts of America, and chairman of the Maricopa Association of Governments (MAG) Continuum of Care to End Homelessness.

Calderón is not a little guy; he is a big man with a big heart, an active mind and the knowledge that we all can make a difference in the world around us. What is different about Calderón is that he backs up that knowledge with action. No matter where he goes or what he does with his career, he will inevitably help the little guy and gal get what they deserve. His proudest legal victory is a 1992 case that forced a Flagstaff employer to reinstate the medical coverage of a woman suffering from leukemia. Many more such victories and happy clients are sure to follow.

Calderón can be reached at calderon@azlex.com and 602-265-0004. ■

Legal Brief

Ninth Circuit oral arguments now available on Web

Cases argued before the Ninth Circuit Court of Appeals since January 2004 are now available as audio recordings at the Ninth Circuit's Web site: <http://www.ca9.uscourts.gov/>. For arguments pending before the court, new audio files will be available the day following oral argument and will remain available for three months after their posting. ■



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Scandals...

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tion on ethical behavior.

Chairman Marc Spitzer: Recent corporate scandals are not unprecedented. There have been periods in American history when the collective business conscience surrendered to excess. The clearest analogy to "the Bubble" was "the Gilded Age" at the turn of the twentieth century, vividly chronicled by Upton Sinclair.

In corporate misconduct cases, business operations were intellectually divorced from business ethics. The question of why this happened during the late 1990s is a difficult question. Clearly our political culture tolerated, at the very top, improper conduct as long

as the results were good ("It's the economy, stupid"). Too many executives took their cue from the politicians and decided that it was permissible to "make the numbers" any way possible, particularly if no one was looking and the fraud was unlikely to be discovered. And remember that during the 1990s politicians in both parties openly undermined IRS and SEC corporate watchdogs.

Maricopa Lawyer: Obviously public confidence has been destroyed with scandal after scandal, particularly in the case of shareholders who invested in the companies. Assuming corporate responsibility gets — and remains — on track, how can trust be restored in corporate America?

Lawrence: The pendulum has clearly swung away from a "hands-off" approach toward stronger controls on corporate boards. Sarbanes-Oxley is here to stay and its corresponding impact on the public markets does not appear to be going away any time soon. Reform bills and listing requirements on the New York Stock Exchange are only ancillary vehicles to restore trust. Trust will only be restored when corporate America proves to the investing public that successful companies are the ones with the greatest integrity. When corporate America's word can be trusted and performance corresponds, the investing public will return trust.

Spitzer: I have found on Main Street serious distrust of Wall Street. It is shameful that many Americans decry the American capital markets, the envy of the world, as a rigged casino. I do not believe new laws are the palliative. The solution is threefold. First, time is a healer, and the Bubble needs to be seen, like the Gilded Age, as an aberrational event, though subject to repetition without adequate vigilance. Second, regulatory agencies need adequate funding and support to enforce the

existing laws. Interestingly, the same members of Congress that hounded the IRS and SEC during the Bubble are now demanding prosecution of accounting fraud and tax shelter cases. These new Capitol Hill wishes should be granted. Finally, corporate America, and most significantly the securities industry, need to inspire the trust and confidence of the American people. The standard corporate-speak press releases too often issued, "we neither confirm nor deny," "we are cooperating fully with authorities" and "we admit no wrongdoing," need to be deposited into the PR trashcan. Mistakes, errors, and yes, crimes happen. The securities industry needs to admit its past mistakes, accept responsibility, fix the problems and then seek restored trust. Some companies have already accomplished this, others have not.

Maricopa Lawyer: Why have criminal corporations been difficult to find guilty? Is new business regulation more effective than past regulation? What are the difficulties that come into play when deciding whether an accounting practice is legal? Has new regulation made that fine line clearer?

Lawrence: Any corporate criminal case is a difficult case. The concept of proving that a group of people set out to take a certain action is subject to multiple interpretations at practically every step along the way. The government's role, particularly the SEC and the Attorney General in the State of New York, along with our own Attorney General and Corporations Commission, has been to ferret out corporate fraud and prosecute potential violators.

Some have argued that the Sarbanes-Oxley Act is too broad and creates too many burdens on public companies. The act has certainly changed the climate in corporate America. The notion of having CEOs and CFOs sign certifications has increased efforts to assure that financial statements accurately reflect a company's performance.

Regarding accounting procedures, the difficulty is in the nature of the standards. The procedures are not codified for every circumstance. Naturally, there is interpretation and analysis that is required for each set of facts. This has led to extremely aggressive (and even criminal) analysis of the accounting standards.

The SEC and the Financial Accounting Standards Board have worked to narrow the gaps of interpretation. However, there is much work left to be done.

Spitzer: White collar crimes often are difficult to explain to jurors. Unlike street crime, there is no smoking gun nor bleeding victim and the issues often are far from clear cut. And the laws often are vague. I do believe the

recent wave of criminal prosecutions will deter future misconduct, and that appropriate criminal cases are necessary given the limited "sting" of the typical civil sanction.

Maricopa Lawyer: How has Arizona been affected by the scandals? Has legislation here changed to reflect the on-goings? Have corporations headquartered in Arizona taken special measures to ensure their fate is not similar to those who have fallen from the public's grace? With so few corporate headquarters remaining in Arizona, have these scandals done more harm or more good in bringing business back here, or has it made no difference?

Lawrence: I will let Commissioner Spitzer speak to the regulatory effect on Arizona. From an outside lawyer's perspective the impact has been significant. A number of companies have taken themselves out of the public markets. Fewer companies perceive going public a viable strategy. Those public companies that we deal with spend a significant amount of time and money to ensure that their internal controls and compliance efforts are sufficient to comply with the new regulatory standards.

Regulation alone has not necessarily affected Arizona more so than any other location. What differentiates Arizona from say, California or Colorado, is that the availability of funds for capital formation is simply not present here. As a result, when start-up companies reach a certain plateau, they often will look outside of Arizona. Governor Napolitano has worked hard to solve this problem. Upon the recommendation of the Governor's Council on Innovation and Technology, Napolitano introduced three bi-partisan bills in last year's Legislature aimed at creating an infrastructure for capital formation here in Arizona. These bills will be before the Legislature again in the upcoming session and I will be working hard, along with the other members of the Arizona Technology Council's Public Policy Committee, to ensure that the bills are enacted into law.

Spitzer: As you point out, Arizona has a dearth of corporate headquarters, and for better or worse that is not likely to change. One interesting facet of the current malaise is greater interest in private equity. No Sarbanes-Oxley, no demands to fire workers and reduce investment from distant quarter-to-quarter fund managers, no frivolous shareholder derivative suits, no quarterly earning conference calls, no twenty-something MBA analysts dictating management decisions to chief executives. Going private can be quite appealing. As a business model, private equity may be good for Arizona. Currently, the public markets' short-term orientation

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Jury...

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means a prospective juror only has to come to court for jury service for one day if not selected to participate in a trial. And if the juror is selected for a specific trial, then their service ends at the end of that trial. This part of the new law takes effect in all courts of Arizona on Jan. 1, 2005. See A.R.S. 21-336.01 for more details.

But what about a citizen who is called to serve and selected for a trial that may last weeks or longer? Another change in the law addresses the anxiety that may occur in this situation. Jurors who are assigned to a trial that lasts longer than 10 court business days, and who will lose money from their employer or as a result of being self-employed, may be able to recover a significant part of that money thanks to the Arizona Lengthy Trial Fund.

The fund, created by A.R.S. 21-222, is financed by an add-on to some civil filing fees that will allow courts to pay jurors as much as \$300 each day of their jury service after the tenth day to compensate for identified losses. Even retired and unemployed jurors can receive \$40 each day starting with the fourth day of their service. Jurors in those situations will be given forms to complete so jury commissioners can determine if they are eligible for monies from the fund, and if so, how much.

But with the addition of these enhancements, there are also changes designed to ensure that more people participate, and increase the consequences if they choose not to obey a jury summons.

"I was told that if I write on my summons that I'm prejudiced, I would get excused."

This statement was made by a juror held in contempt in Maricopa County for not appearing for his jury service.

The legislature's rewrite of the excuse statute, A.R.S. 21-202, delineates the specific situations under which a prospective juror can be excused, and expressly states the amount and substance of documentation that must be submitted for an excuse to be granted prior to appearing in court.

Although some of the new requirements reflect previous policies of some trial courts, many legislated changes create a significantly higher burden for those wishing to be excused. Since the law became effective on Jan. 1 of this year, the Office of the Jury

Commissioner has seen fewer requests for excuse, and is granting fewer than before.

So if it's harder to be excused from jury service, what about when schedule conflicts arise? There is a law now that defines parameters for postponement, which was another part of jury management that was previously at the discretion of local courts. A.R.S. 21-336 allows prospective jurors to receive up to two postponements from their initial summons without having to explain why. But after that, an additional postponement can only be granted in extreme emergency situations, and only if that emergency was not known by the juror when he or she asked for the first postponement.

And for those who still don't think they should treat a jury summons with the same gravity as any other court order, the cost of that mistake just went up. A.R.S. 21-334 was amended to increase the maximum financial penalty for being held in contempt for failing to appear for jury service from \$100 to \$500. But that only occurs if courts decide to invoke that remedy.

Since November 2003, the Maricopa County Superior Court has held jurors accountable under that statute. Each month, jurors who have been summoned twice for jury service and have failed to appear, even though they were not excused or disqualified, are served with an Order to Show Cause which requires their appearance in court to explain why they should not be held in contempt. To date, more than 130 summoned jurors have been found in contempt, fined and ordered to appear for jury service.

Since this monthly contempt calendar was created, twice as many summoned jurors are complying with their summons. This has allowed the jury office to scale back the number of summonses that need to be generated. So now, more than 50,000 people each year in Maricopa County will not get a jury summons thanks to those results.

Jury service is considered by many to be one of the most empowering activities we do as citizens of this country. The next time you see a jury summons for you, one of your employees, or someone you know — or are in a courtroom with a filled jury box — it reflects the recent changes in the law and court policy that went into that summons, and their effects on this most democratic of our justice system processes.

► *Bob James is director of Jury Services and Public Access at Maricopa County Superior Court.* ■

Public lawyers needed to help with Ronald McDonald House Project

The Maricopa County Bar Association's Public Lawyers Division is embarking on its annual Ronald McDonald House project on Oct. 2, by preparing and serving a dinner for the guests of the house.

The planned dinner includes a menu of barbecued chicken, cole slaw, potato salad, fruit salad, peach cobbler, rolls, tortillas and drinks. The meal is intended to feed 30 people, and volunteers are needed to prepare the meal and/or serve the food that night. Volunteer cooks will be responsible for making and freezing food ahead to be brought to the House and warmed in the oven on the night of the dinner. Volunteer servers will meet at the House to assist in the service and clean up.

Ronald McDonald Houses exist nationwide to provide a "home-away-from-home" for families of seriously ill children receiving medical treatment at local hospitals. As an affordable and comfortable alternative to hotels and hospital waiting rooms, Ronald McDonald Houses allow family members to sleep, eat, relax and relate to other families in comparable situations. In return for this haven, families are asked to make a donation ranging from \$5 to \$20 per day; however, if unable to, they can stay for free.

Public Lawyers Division Chair Jack Hudock explains the value attorneys receive from participating: "As a way to give back to the community, the project allows attorneys to bring comfort to people who are going through a difficult time."

Attorneys interested in volunteering their time for this project either as a cook or a server can contact Public Lawyer Division Liaison Rochele Parker at (602) 257-4200 ext. 137. ■

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Invitation for Public Comment Judicial Reappointment

The Glendale Judicial Selection Advisory Board (JSAB) is considering the reappointment of Judge John D. Burkholder to a four-year term as City Judge in the Glendale City Court.

All interested parties are invited to offer comments to the JSAB regarding Judge Burkholder's judicial performance to serve another term as City Judge at the following hearing:

5 p.m., September 15, 2004
Glendale City Hall
5850 W. Glendale Avenue, Glendale, AZ
Room B-3

Signed, written comments received by September 14, 2004 will also be considered by the JSAB.

Send comments to:
Judge Colleen McNally, Chair
Judicial Selection Advisory Board
5711 W. Glendale Avenue
Glendale, AZ 85301

The Judicial Selection Advisory Board will consider public comments and other relevant factors in making a recommendation to the Glendale City Council regarding the reappointment application of Judge Burkholder.

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Courtwatch...

Continued from page 1

was essentially unconstitutional punishment of pretrial detainees who had not been convicted of any crime, the district judge preliminarily enjoined the operation of the cameras. Arpaio appealed.

Two problems faced the Ninth Circuit before it could decide the case: there were no longer any images from the jailcams being streamed over the Internet, and all of the plaintiffs had left the Madison Street Jail. Neither side questioned whether these facts left the court without a live case or controversy, apparently wanting the court to decide the merits. The court obliged.

The court first agreed with the parties that the fact that the cameras were not currently operating did not moot the case. This was because Arpaio had made it clear that he intended to find another host for the jailcam images. Judge Richard A. Paez, writing for himself and Judge Marsha S. Berzon, held that a claim is not moot "if there is a likelihood of recurrence." "Once a defendant has engaged in

conduct the plaintiff contends is unlawful and the courts have devoted resources to determining the dispute, there is Article III jurisdiction to decide the case as long as 'the parties [do not] plainly lack a continuing interest,'" he wrote, quoting the Supreme Court.

Slightly more troubling was the fact that the plaintiffs had all left the Madison Street Jail. Paez resolved this conundrum by holding that "this controversy falls squarely within the capable-of-repetition-yet-evading-review branch of the mootness doctrine." He explained that this applies when "the duration of the challenged action is too short to be litigated prior to cessation," and "there is a 'reasonable expectation' that the same parties will be subjected to the same offending conduct."

The first prong was easily satisfied. Because the Madison Street Jail houses only pretrial detainees, most of its inmates would be either out of the system or in post-conviction detention centers before the district court could decide their constitutional claim.

Paez also found that the plaintiffs satisfied the second prong — the likelihood that the same parties would suffer the offending conduct. He found "compelling evidence" that at

least some of the plaintiffs, if released, would be reincarcerated in the Madison Street Jail. Plaintiff Benny Berryman had been detained at Madison Street twenty different times between February 1997 and June 2002.

Turning to the merits, Paez held that the district court had applied the proper legal standard. In *Bell v. Wolfish*, 441 U.S. 520 (1979), the United States Supreme Court held that "under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt." The district judge, Paez held, had properly identified and applied *Bell's* test for identifying unconstitutional punishment at the pretrial stage. An action is punishment if it is expressly intended as such. Alternatively, the court must ask whether there is another purpose for the action, and whether it appears excessive with regard to that alternative purpose.

Paez agreed with the district judge's application of the law to the facts. He first agreed that streaming the jail images to the Web constituted punishment: "Plaintiffs were certainly harmed by Sheriff Arpaio's actions. Having every moment of one's daily activities exposed to general and world-wide scrutiny would make anyone uncomfortable. Exposure to millions of complete strangers, not to mention friends, loved ones, co-workers and employers, as one is booked, fingerprinted, and generally processed as an arrestee, and as one sits, stands, or lies in a holding cell, constitutes a level of humiliation that almost anyone would regard as profoundly undesirable and strive to avoid."

Paez rejected the alternative purposes that Arpaio offered. He first dismissed the contention that the webcams helped provide security. "[B]ecause the webcams were placed so close to the closed-circuit cameras, they did not even serve to increase the area of the jail that was subject to video surveillance." Furthermore, "because the Sheriff's deputies were presumably already monitoring the images captured by the closed-circuit video cameras, there was no added benefit to publishing the images on the internet."

He also rejected Arpaio's contention that the webcams deterred crime. "To be sure," he wrote, "as a general matter, deterrence of crime through a variety of means is a legitimate governmental objective. But, as the Supreme Court and this court have recognized, where an individual is incarcerated before trial but has not been convicted of any crime, imposing adverse conditions during his detention as a means of deterring crimes is not permissible."

"Such exploitation of pretrial detainees is not appropriate to assure the detainees' presence at trial or to maintain the security and order of the detention facility and otherwise manage the detention facility," he wrote. "Thus, Sheriff Arpaio cannot point to deterrence, general or specific, as a legitimate government interest that justifies the installation of webcams in the Madison Street Jail."

Paez also rejected Arpaio's argument that the interest in having the pretrial detention centers open to the public justified the webcams. "We have given prison officials wide latitude in administering pretrial detention facilities, in guaranteeing detainees' attendance at trial, and in promoting prison safety," he noted. "But we fail to see how turning pretrial detainees into the unwilling objects of the latest reality show serves any of these legitimate goals."

Judge Carlos T. Bea dissented not only from the majority's decision on the merits, but also from its decision to hear the merits: "Perhaps in an effort to express their repug-

nance for the Madison Street Jail webcast policy, the majority substitute conjecture for analysis of the mootness issue." He rejected the idea "that any self-ascribed propensity of Plaintiffs towards future arrest and detention — whether through their own malfeasance or simple bad luck—is legally sufficient to clothe Plaintiffs with the required standing."

Bea rejected the holding that the webcasts inflicted unconstitutional punishment. "The relevant inquiry is whether jail policies are reasonably related to legitimate penological interests," he wrote, and accused the majority of giving "needlessly short shrift to the governmental objectives proffered by Sheriff Arpaio."

Bea asked and answered several questions that, he believed, showed that the webcasts were justified. "Is it rational to believe that broadcasting pictures of detention installations will deter viewers from conduct that may land them there?" He answered by comparing the webcasts to photographs of crashes that result from speeding, which traffic school attendees are required to view. "Any traffic school attendee who is required to view [those photographs] can attest that the consequences of actions are displayed to deter certain behavior." He concluded that "[t]he rational relationship between prison views and deterrence of criminal behavior is similarly clear."

To the question, "do webcasts provide transparency to governmental operation of the facility?" he responded, "clearly so." Although there are other methods of opening the jails to the light of public scrutiny, "the choice . . . is surely a matter of degree, left to the discretion of an elected official, restrained only by notions of whether choice of the larger number of viewers makes the measure 'excessive' under *Bell*."

Turning to an argument that the majority did not address, Bea sympathized with Arpaio's contention that the webcams could deter the filing of frivolous lawsuits by inmates. Acknowledging that the presence of closed-circuit security cameras militated against this argument, he nonetheless concluded that "the webcasts may reach more potentially frivolous litigants than would the knowledge that the jails had security cameras in place."

Bea also likened the webcasts to the "the now ubiquitous-on-TV 'perp walk'—the conspicuous exhibition of coiffed, suited, corporate criminal suspects, usually handcuffed, as they are brought to the courthouse or police station before charging, much less conviction."

"Perp walks and their attendant shaming do not constitute constitutionally impermissible pre-conviction punishment for the same reasons webcasts do not," Bea wrote. "Whatever the consequence of an arrestee's being displayed to the world, against his will, in handcuffs, and in a posture connoting guilt, perp walks promote many of the same governmental purposes put forward here by Sheriff Arpaio." He quoted a Second Circuit case: "[P]erp walks also serve the more serious purpose of educating the public about law enforcement efforts. The image of the accused being led away to contend with the justice system powerfully communicates government efforts to thwart the criminal element, and it may deter others from attempting similar crimes."

"Sheriff Arpaio's methods to achieve his purposes of public deterrence and governmental transparency may not suit the fine sensibilities of some group advocates and jurists," Bea concluded. "But absent a violation of the constitutional rights of Plaintiffs—and I see none — such differences of opinion must be vindicated, if at all, in the ballot box, not in the courtroom." ■

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Adding details to a legal brief can help win verdict

By Dr. Kendra H. Gaines
Special to Maricopa Lawyer

What is a legal brief if not a persuasive document? It is intended to present the facts of a given case, certainly. But how to present those facts in such a way that a reader is swayed — consciously or unconsciously — to agree with the writer's point of view? If you cannot fall back on emotional appeals, nor leave out problematic points that must be acknowledged, then what *can* you do?

Some time ago, I worked with an adult student who was struggling to learn the art of rhetorical analysis. Rather than simply doing what the term suggests — analyzing the characteristics of a particular writer's mode of expression — my student fell into the old trap of agreeing or disagreeing with the argument. We had been working on this difficulty over several meetings when she appeared one day, waving an article from a weekly news magazine.

"It's not an editorial," she explained. "It's a straight news article. But for some reason I find myself incredibly angry at the guy mentioned in the article. I hate him! But I can't figure out why. Could we do an analysis?"

I read the short article she handed me and, amazingly, I felt a similar surge of anger. The article was straightforward enough; it concerned a Native American man caught with illegal eagle feathers. He had been arrested and was being held in jail to await trial. Why on earth were my student and I reacting as if he'd already been found guilty?

The answer, as we found through our analysis, lay in the writer's choice of information to include along with the bare factual bones of the case. For example, we were told that the man in question was "overweight" and that he "wore a ragged T-shirt" that barely covered his belly. He was driving a truck that he "frequently borrowed" from an acquaintance. For a very long time he had been "unemployed" and he no longer actively looked for work. He owed his acquaintance money. The bloody feathers were found inadvertently glued to the floor of the truck with their own dried blood. The man "seemed oblivious" to these damning features.

Add it up: he's fat and lazy, he borrows a truck and money from people without intention of paying anything back, he refuses to work and he's a slob. He doesn't even care that there are bloody feathers in the truck. What a bum! And to think this bum is out there slaughtering our noble symbol of America, the bald eagle, just to make a few bucks off the feathers. Outrageous!

But wait — consider only the facts without all those extraneous details. He's a man driving a legitimately borrowed truck, and in the truck are several bloody eagle feathers. No one knows how the feathers got there or who is responsible. The man is currently in jail, pending trial. That is all there is to the case.

So why add all the other material? Why, indeed. Perhaps the writer was slyly and cleverly conveying his opinion on the topic in the only way available to a news reporter. But speculation is unimportant here. What is important is that the inclusion of these key details served to prejudice us against the man. Had either one of us been a judge, we would have been hard pressed to clear these details from our eyes as we attempted to assess the case.

It cannot be said enough that a legal brief is ultimately a story. As in all stories, readers perceive the characters and events in whatever way a skilful writer wants them to be perceived. Try to think through the facts of your case to determine which details you need to

emphasize, and which should be minimized. To convey details, writers depend on the tools of the writing trade, namely verbs, adverbs and adjectives. Consider a simple example: the accused made a telephone call on July 2 at 2:27pm. But just how did he look when he made it? Did he clutch the phone to his ear with a trembling hand, whispering hoarsely into the receiver? Or was he wandering idly back and forth, a hand in his pocket, smiling? And that other person who just left — didn't you

mention that he left at 2:26 p.m.? In that case, why the haste to make a phone call? It seems the accused called "immediately" or "hastily," giving rise to suspicions on the part of your reader that he was nervous about something.

No, I'm not telling you to dive into the creative writing business. You do need to stick to the facts of your case. But try to think descriptively, using details to paint pictures in your reader's mind. Readers can only go by the information you provide for them. So make that

information work for you. You are obligated to include the facts of the case, but nothing says that is all you must include. Remember the eagle feathers and our surge of unfounded anger at an untried suspect. Then, think *details!*

► Dr. Kendra Gaines is a professional writing consultant available to help lawyers with their writing skills and questions. Gaines can be contacted by email at kgaines@email.arizona.edu or by telephone at (520) 326-6199. ■

How to give unwanted clients the pink slip

By Marc A. Winsor
Maricopa Lawyer

It looked like a good case. On the surface, the evidence and law presented a winnable case with relatively large damages. Since I was a new attorney, I ran it past two seasoned attorneys whose judgment I trusted before I entered into a fee agreement with my new clients.

The case got underway. But the more I investigated the facts, the more my seemingly good case turned into my worst nightmare. My clients, it turned out, were having schizophrenic delusions. Some of the claims were real and deserving; however, other claims were clearly fabricated and it became apparent that my clients' mental state could endanger their valid claims. Their delusions also caused me to worry about fabricated claims of malpractice. I needed out. But as a new attorney I did not know how to make it go away.

This experience, and many others that followed, helped me develop a necessary skill: terminating a relationship with a client while avoiding a malpractice claim. I do not pretend to have all of the answers and some of my suggestions have been borrowed from attorneys with more experience than I have. Nevertheless, I hope some of these suggestions interest you and can be of help to you should you need to extricate yourself from a difficult situation.

The starting point is to do a better job of screening your clients. There is a lot to be said about the slogan "just say no." More than one wise attorney has given me a lecture about avoiding bad cases and bad clients. It sounds so easy. In reality, it is harder than one might think. Being aware of the difficulty may prompt a short visit with another attorney for a second opinion before taking a red-flag case.

The following list of red flags merely scratches the surface: (By the way, I realize I am mimicking a well known redneck comedian)

► If a potential client complains about his last three attorneys, but assures you that the bar complaints will take care of them, it just might be a red flag.

► If the client looks you in the eye and says, "Here is a little to pay for filing the case and I will get the rest of your fee later," it just might be a red flag.

► If midway through your initial interview the client's personality causes interior eye rolling, it just might be a red flag.

► If every possible thing that could go wrong with your client's life just happened in the past three weeks, it just might be a red flag.

► If midway during the client's story you begin to wonder how something so far fetched could ever happen, it just might be a red flag.

► If the client plops on your table a year and a half of research on soft tissue injuries he

gathered, covering both the law and medical evidence, it just might be a red flag.

► If the client boasts about the incredible job he has done representing himself, and explains that preparing for the hearing scheduled for next week would therefore be easy, it just might be a red flag.

► If the client exclaims with apparent vengeance that he will pay whatever it takes for justice, even though damages are relatively small, it just might be a red flag.

Sometimes, no matter how hard I try, I get a rude awakening in the middle of a case that tells me it is best to part company with the client. Sometimes, it is because the case is not worth what we first thought it would be worth. (I certainly can't be the only attorney whose client utters damaging testimony during a deposition, revealing facts that the client, for whatever reason, thought best to keep a secret until then.) At other times, a client may stop paying your bills or their objectives in the case undermine your moral ground or common sense. Or, for myriad reasons, the time may come when it is just best for everyone involved to terminate representation.

Although I do not intend to offer an opinion on the Rules of Professional Responsibility, I highly recommend approaching your decision to terminate a client relationship with the ethical implications in clear view. I have found it helpful to discuss it with another attorney. Some firms, including mine, have appointed an attorney to oversee ethical issues. Every attorney has access to competent advice through the State Bar's ethics hotline at (602)-340-7284. Terminating representation can be delicate and help is available for those who seek it.

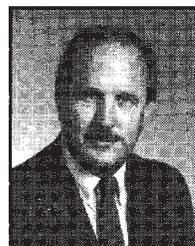
The next suggestion is to be professional and more than fair in parting. There may already be tension and bad feelings. Aggressive collection actions or perceived

unfairness can lead to having still more time consumed defending your representation to another attorney or the State Bar. It is usually better to bend over backwards to do everything reasonably possible to lessen the client's perception that they have become the victim of a villainous attorney. This may mean walking away from past due fees. It also may require spending additional time beyond the ethical requirements assisting and ensuring a smooth transition in the case during your withdrawal. In my view, it is money and time well spent.

Most of the time, open and honest communication creates an environment that allows the attorney to withdraw with minimal challenges. I try to remain friendly and courteous even when the client reacts to my withdrawal with unjustified personal attacks on my character or abilities. Luckily, that hasn't happened very often. In almost every case, open, friendly and courteous communication calmed emotions and paved the way for an orderly, professional withdrawal.

Finally, expect the best but prepare for the worst. Document the file with notes and correspondence explaining the reasons for withdrawal and your actions to minimize prejudice to your client. I have had only one attorney contact me regarding a past client relationship I had terminated. I received a letter from the attorney and read with amazement the false accusations and unrealistic demands. I was grateful for a detailed file. It took only a single letter in response for the matter to be resolved.

After my first year of practice I decided to "clean house" in order to increase the quality of my clientele. Determining which clients to pink slip, and going through the process of withdrawal, was quite the learning experience. Some clients were harder than others to walk away from. But in the end, it was worth it. ■



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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

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	26	27	28	29	30		

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

SEPTEMBER 2004

September 1

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

September 2

- Construction Law Section, noon
- Maricopa County Attorney debate, 7 p.m., Wells Fargo Conference Center, 100 West Washington (Members Only Reception, 5 p.m., Wells Fargo Museum)

September 6

- Labor Day, MCBA office closed

September 8

- MBCA Executive Committee, 7:30 a.m.
- Environmental Section, noon

September 9

- Personal Injury/Negligence Section, noon
- Paralegal Conference Committee, 5:30 p.m.

September 10

- Understanding the New Mold Remediation Standards*
1:00 to 4:30 p.m., ASUD
This unique seminar will take you from proper microbial claims handling through actual field investigation and testing. Topics will include microbial fundamentals, the proper way to gather information, the mold remediation protocols, testing methods and equipment, chain of custody and testing strategies.
Cost: MCBA member attorneys, \$75; member paralegals and public lawyers, \$55; non-member attorneys, \$105; non-member paralegals and public lawyers, \$75; same-day registrations/payments, \$15 additional.
CLE: 3 hours

September 13

- Young Lawyers Division, noon
- Maricopa Lawyer editorial board, 5:15 p.m.
- Paralegal Division Board, 5:30 p.m.

September 14

- Estate Planning Legislative Update 2004 Breakfast*
7:15 to 8:30 a.m., ASUD
The Estate Planning, Probate and Trust Section invites you to join the discussion and get the latest information on new 2004 legislation.
Cost: MCBA member attorneys, \$25; member paralegals and public lawyers, \$15; non-member attorneys, \$40; non-member paralegals and public lawyers, \$30; same-day registrations/payments, \$15 additional. Price includes continental breakfast.
CLE: 1 hour

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

September 15

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

September 16

- Public Lawyers Division, noon
- Corporate America – What Happened?*
2:00 to 4:00 p.m., ASUD
Scandal first crippled Enron, then Adelphia, then Worldcom, then Martha Stewart. Shareholder's and public confidence has been destroyed by these scandals.
How has this affected Arizona? Get an in-depth analysis of the current status of the recent Wall Street scandals by joining us at this informative seminar.
Cost: MCBA member attorneys, \$50; member paralegals and public lawyers, \$35; non-member attorneys, \$70; non-member paralegals and public lawyers, \$50; same-day registrations/payments, \$15 additional.
CLE: 2 hours

September 17

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

September 20

- Personal Injury Section CLE Luncheon, 11:30 a.m., ASU Downtown
- YLD Domestic Violence committee, noon

September 21

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

September 22

- Criminal Law Section, 7:30 a.m.
- Sole Practitioner Section, 11:30 a.m.

September 23

- Estate Planning, Probate & Trust Section, 7:30 a.m.
- Technology Section, 8 a.m.
- MCBA board of directors, 4:30 p.m.

- Cyberterrorism: Fact or Exaggerated Fiction?*
8:30 a.m. to 12:00 p.m., ASUD
Join us as we discuss whether cyberterrorism is a real threat or if it is simply another "blown out of proportion" publicity scare. Learn what type of legislation and law enforcement tools are in force to fight this type of behavior.

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

- Paralegal Division Brown Bag Lunch, noon

Effective Non-Deposition Discovery Methods and Practices

1:00 to 4:30 p.m., ASUD
Litigation attorneys tend to rely heavily on depositions during the discovery phase of litigation. This program will demonstrate the important role of non-deposition discovery methods in support of case dispositive methods, in preparation for trial and in setting up the case for settlement negotiations. Topics will include disclosure statements, interrogatories, requests for productions and requests for admissions. Motions to compel, motions for protective orders and motions for sanctions also will be covered.
Cost: MCBA member attorneys, \$75; member paralegals and public lawyers, \$55; non-member attorneys, \$105; non-member paralegals and public lawyers, \$75; same-day registrations/payments, \$15 additional.
CLE: 3 hours

- Paralegal Division Conference Committee, 5:30 p.m.

September 24

- The Essentials of Commercial Leases*
Corporate Counsel Division Lunch CLE 11:45 a.m. to 1 p.m., University Club
Join us as we discuss essential items to consider when doing commercial leases.
Cost: CCD members, \$22.50; non-members, \$32.50 (price includes lunch)
CLE: 1 hour

September 27

- Task Force for the Recruitment and Retention of Minority and Women Lawyers, noon

September 28

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

September 29

- What the Private Bar Needs To Know About the IV-D Child Support Program*
1:00 to 4:00 p.m., ASUD
What is Arizona's IV-D program? Why do they do things the way they do? What are the benefits of the program to attorneys and their clients? What are the methods to get case and payment information? This seminar will cover the history and the federal mandates that drive the program, who the program serves, reasons why your client might want an IV-D case and ATLAS basics.
Cost: MCBA member attorneys, \$65; member paralegals and public lawyers, \$50; non-member attorneys, \$90; non-member paralegals and public lawyers, \$65; same-day registrations/payments, \$15 additional.
CLE: 2.5 hours

September 30

- Estate Planning, Probate & Trust Section CLE Luncheon, 11 a.m., ASUD

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Paralegal Division creates scholarship in memory of Marilyn Benesch

By Sybil Taylor Aytch
Maricopa Lawyer

On March 7, 2004, Marilyn Benesch, a paralegal at Snell & Wilmer and a founding member of the MCBA Paralegal Division, unexpectedly passed away. Her loss has left a tremendous void, but those who knew and loved her continue to honor her memory.



Benesch

Benesch was born on August 3, 1942 in Orange County, California. She majored in Business Administration at Arizona State University and was a graduate of the American Institute for Paralegal Studies. Prior to joining Snell & Wilmer's international law practice in 1989, she worked as an import account executive and in the banking industry.

In October 1998, when a group of paralegals met at the MCBA to discuss developing a formal Paralegal Committee, Benesch was one of those in attendance. Her work on behalf of this committee played a part in its eventual elevation to division status at the MCBA.

In addition to her work, Benesch was a great proponent of volunteerism and community service. She was very active in the March of Dimes, the Volunteer Lawyers Program, Homeward Bound, and the annual Snell & Wilmer paralegal retreats. Her other interests included reading, swimming, travel and sports. She frequently ran in marathons for Team in Training on behalf of the Leukemia Society.

As a way to honor Benesch's memory and accomplishments, the paralegals at Snell & Wilmer contacted the Paralegal Division about establishing a scholarship for paralegal students in her name. The division was honored to have been approached for such a worthy endeavor. At Snell & Wilmer's annual paralegal retreat in June, 42 individuals walked to Tempe Town Lake as a kick-off fund raiser for the Marilyn Benesch Scholarship Fund. The first scholarship is scheduled to be awarded at the Arizona Paralegal Conference on Nov. 8, 2004, which has been proclaimed "Paralegal Day" in Arizona by Gov. Janet Napolitano. The paralegals at Snell & Wilmer are finalizing the criteria for the scholarship and it will contain a strong community volunteering and/or mentoring requirement.

Carolyn Marshall, a former Snell & Wilmer paralegal and founder of the original Paralegal Committee, will be presenting the Marilyn Benesch Scholarship at the Conference. She remembers Benesch fondly.

"When I remember Marilyn, I will remember the sparkle in her eye, her kind smile, her easy laugh," Marshall said. "And I will remember the subtle lessons I learned from her: love your work and your family, explore the world, support your community, ignore barriers, share your life with others, act on your beliefs and believe in yourself."

Benesch is missed by her friends and colleagues in the legal community, particularly by her Snell & Wilmer family. Craig Williams, a partner at the firm, remembered her as "a true friend and great paralegal. She provided excellent service to our clients, firm and the community for over 15 years. She made a difference in our firm and she touched many people with her positive attitude and willingness to help others."

"We are thankful that we got to know her, and we know that she's up there urging us on," said Linda Saperstein, her friend and secretary. "It's funny; I was the one who had earned a private pilot's license, but she was really the one who knew how to fly."

Meredith Larabee, director of legal assistants at Snell & Wilmer, described Benesch as "a go-to person when we needed an objective opinion about something that might impact the paralegals. Her warmth and humor were a comfort to everyone who knew her. Most of all, I remember Marilyn's dedication to the paralegal profession."

Peggy McMahon, Benesch's close friend and coworker, and one of the Snell & Wilmer paralegals who spearheaded the establishment of the memorial scholarship, called her "a shining example of how to live a balanced life...[She was] smart and sassy, bold and graceful. She laughed easily and often. Her confidence in herself and others made so many things possible. She was, and will always be, simply awesome."

Among those who miss her most are her beloved children, her daughter, Stacey, her son, Scott, and her granddaughter, Shaeli. She was extremely proud of Scott's accomplishments in the field of international management and of Stacey's position as a coach for master swimmers. They, along with many others, were proud to know her.

Contributions to the Marilyn Benesch Scholarship Fund can be sent to the Maricopa County Bar Foundation, 303 East Palm Lane, Phoenix, AZ 85004. Checks should be made payable to the foundation with the Marilyn Benesch Scholarship Fund referenced in the memo portion. ■

Maricopa County Attorney debate highly anticipated

By Kathleen Brieske
Maricopa Lawyer

The Maricopa County Bar Association and its Criminal Law Section have added many sponsors for the upcoming county attorney debate and VIP reception on Thursday, Sept. 2, at the Wells Fargo Conference Center. The list of participating sponsors includes: Wells Fargo, the Arizona Bankers Association, Nationwide Insurance, Lewis & Roca and Koeller Nebeker Carlson & Haluck. Wells Fargo is sponsoring both the debate and reception venues, while Lewis & Roca and Koeller, Nebeker, Carlson & Haluck are covering the remaining cost of the debate.

The MCBA is partnering with the Arizona Bankers Association for the VIP Reception. Nationwide Insurance is MCBA's Affinity Sponsor for this event. The members-only event will be held prior to the debate from 5 to 7 p.m. at the Wells Fargo Museum, directly across from the debate conference room. Attendees

will have the opportunity to talk with the county attorney candidates as well as the debate moderator and questioners.

The debate itself, which is free and open to the public, will take place at 7 p.m. at the Wells Fargo Conference Center, 100 West Washington Street, in downtown Phoenix. All candidates with the exception of Andrew Thomas will be present. José Cárdenas, host of *Horizonte*, will serve as moderator of the event, and the questioners include Mike Sunnucks of the Business Journal, Chip Scutari of the Arizona Republic, attorney Jo Ana Saint-George of Bowman and Brooke and attorney Barry Mitchell of Gallagher & Kennedy. The Arizona Bankers Association also will be providing questions. As the debate is expected to last for an hour or so, the audience will have the opportunity to ask questions as time permits.

Editor's note: The debate was originally scheduled to be held at the Board of Supervisors Auditorium (August Maricopa Lawyer). If you plan to attend, please make note of the change of venue. ■

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Local attorneys prepare to tee off for Wells Fargo 2004 Pro Bono Golf Classic

By Teena Booth
Maricopa Lawyer

For the past two decades, Maricopa County attorneys have been meeting once a year to challenge each other outside a courtroom at the Maricopa County Bar Foundation's annual charity golf tournament.

"I have vivid memories of past year's tournaments," said Quarles & Brady attorney Booker Evans, a co-chair of this year's tournament committee. "I especially remember the year I almost sank a hole in one and won a car. The ball rolled around the rim of the hole and I could see myself sitting in that car... then the ball just eased off to the side and ended up an inch away from the hole. That's not something I'll ever forget!"

This year, more memories will be made at the Wells Fargo 2004 Pro Bono Golf Classic, scheduled for Sept. 18 at the Westin Kierland Resort in Phoenix. As in the last several years, the beneficiary of the event is the Volunteer Lawyers Program.

"This is definitely an important fundraiser for VLP, with a big impact on our ability to serve the legal needs of the community," said VLP Director Pat Gerrich. "We would put a lot of effort into it just for that reason. But to be honest, we love working with the foundation to put together this event because it's just so much fun."

Attorneys and others in the legal community who would enjoy a round of golf on one of the most beautiful courses in the Valley of the Sun have the perfect excuse to for a morning of golf with colleagues. And as Evans noted, a lot of friendly rivalry and good-natured ribbing can rise up between members of different firms.

"Lawyers are competitors," said Evans with a laugh. "We don't even have to issue a challenge. The players tend to take care of that themselves."

Nonetheless, the tournament will offer prizes for players that stand out, whether the Most Stylish Foursome or the Longest Putt or Most Time Spent in the Sand. And of course, there is the Hole-In-One contest, which could win a lucky golfer a two-year lease to a new car.

Of course, getting a hole in one might be a long shot, but plenty of other raffle items come with better odds of winning. Golf clubs, Diamondbacks tickets, Suns tickets,



2003 Pro Bono Golf Classic winning golfers (from left) Keith Goljan, Jeff Myerson, T.J. Ryan and Stefan Wikstrom, played for the team sponsored by DupLEX Legal Duplication Solutions.

restaurant gift certificates and other special gifts and prizes will be given away at the tournament.

"Most players will walk away with something along with bragging rights," said R.J. Suzuki, a deputy county attorney who also co-chairs the tournament. "Plus, they'll be served a great breakfast and lunch. I played last year and I can't think of a better way to

support a good cause and feel like you got more out of it than you put in."

Golfers may register up until the day before the event. If you haven't signed up yet, grab a few friends or colleagues and join in this longstanding Maricopa County legal tradition. For details and registration, download a form from the foundation's Web site at www.maricopabar.org/foundation. ■

Trial attorney dedicated to sharing knowledge

By Kathleen Brieske
Maricopa Lawyer

If you want to learn as much as you can from a continuing legal education seminar while being entertained at the same time, don't miss the opportunity to attend a class taught by attorney Larry Cohen. With 12 years experience teaching 40 to 80 seminars per year, along with 18 years of practice experience, Cohen has created a formula to make sure participants not only walk away with a better understanding of the specific legal topic, but also with an improved ability to apply that knowledge. And he keeps no secrets about what he thinks will help attorneys who attend his programs — he tries to teach them as many practical applications as he can.



Cohen

Born in Boston, Cohen earned a Bachelor of Arts degree in political science from the University of Massachusetts-Amherst. He then went on to earn both a masters and doctorate degree from Syracuse University before attending law school at Northwestern University in Illinois. He currently is working on a post-doctorate degree in neuropsychology from the Fielding Institute.

Cohen heads his own firm where he focuses on litigation and trial work, primarily personal injury and medical malpractice. Practicing law is Cohen's fourth career —

MCBA MEMBER PROFILE

prior to becoming an attorney, he served in the military, was on the political science, criminal justice and survey research faculties at the University of Illinois, Chicago, and then did applied research for a think tank in Washington, D.C.

After realizing how much he really wanted to help people deal with their everyday troubles, he began to practice law. In doing so, he has carved a fulfilling niche for himself. In addition to speaking, he consults nationally in brain injury and emotional damages cases and is an avid contributor to journals and books. Cohen also serves as adjunct faculty for two universities (including ASU College of Law), is a settlement judge for the Nevada Supreme Court and a pro tem judge in several departments at Maricopa County Superior Court. He also is on the board of directors of a diploma-granting organization in neuropsychology and serves on the editorial board of a peer review journal, among many other things.

When asked what being a lawyer means to him, it is clear Cohen has as much of a passion for teaching as well as for helping others. As he put it, "have program, will travel."

"Anything I can do to help other attorneys understand and improve the practice of law, I will do," Cohen said. He realizes that attorneys who attend his seminars come to learn things that will happen in everyday practice

— See Cohen on page 13

LEGAL MOVES

■ Thomas W. Rouse has joined Ryley Carlock & Applewhite's commercial and real estate practice group as a shareholder. Rouse (J.D. 1974, Washington College of Law) has 20 years experience in representing lenders in general business loans and both commercial and residential real estate transactions.



Rouse

■ Richard Brumbaugh has joined the law firm of Burch & Cracchiolo as an associate. Brumbaugh (J.D., St. Louis University) will practice in a number of areas, with an emphasis on commercial litigation and family law. ■

PEOPLE IN LAW



Halaby



Irwin

■ Snell & Wilmer partner Andrew Halaby has been elected to the board of directors of Big Brothers/Big Sisters of Central Arizona, an organization that fosters positive friendships through every day experiences for local children and volunteers.



Roos

■ Bryan Cave partner Steven A. Hirsch has been elected president of the board of directors of the Wildlife For Tomorrow Foundation, the charitable arm of the Arizona Game and Fish Department. The foundation supports the protection, enhancement and enjoyment of Arizona wildlife. Hirsch is an avid outdoorsman and conservation advocate.

■ Gov. Janet Napolitano has reappointed Robert Roos, a partner with Lewis and Roca, to another three-year term on the Arizona Board of Technical Registration. The 15-member board has served as a regulatory agency to six design and technical professions, including architecture, assaying, engineering, geology, landscape architecture and land surveying. The board also certifies remediation specialists. Roos practices with Lewis and Roca's construction litigation and environmental law groups.

■ Paul E. Burns, an intellectual property attorney with Steptoe & Johnson, has been appointed as chair of the Arizona Chapter Licensing Executives Society, a professional society of 5,000 members engaged in transfer use, development, marketing and intellectual property.

■ Bryan Cave partner R. Neil Irwin has been appointed by Phoenix Mayor Phil Gordon to the board of directors of the Greater Phoenix Economic Council. Since moving to Phoenix in 1971, Irwin has practiced law in all facets of the business area, with special emphasis in finance and real estate. ■

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Cohen...

Continued from page 12

so he tries to teach concepts that are easily applicable.

Cohen also knows that education has to be entertaining. Proactive in encouraging people to participate, he always makes it a point to answer questions as they come up within the seminar, no matter when they are asked. Time and experience have shown Cohen which questions are often asked and what attorneys will find interesting. He uses that to keep the audience engaged and things rolling during his seminars.

Cohen's biggest piece of advice to those attorneys who are just starting to teach CLE seminars is to "suspend their own egos and focus on the people who have come to listen... The key to a good presentation is realizing the seminar is for the audience, not the speaker."

Presenting CLE seminars provides Cohen his own opportunity to learn and stay current on all types of matters. He says teaching keeps him up to date with new developments in the law.

Though he speaks nationally many times a year, Cohen truly values the opportunity to teach programs at the Maricopa County Bar Association. He especially likes to work with other MCBA members in coming up with new topic ideas. In keeping with his belief that continuing legal education has to meet members' needs and goals, the MCBA allows him to choose and present more specialized topics. Cohen appreciates being able to present narrow topics that go into more depth than what he teaches on a national level.

The MCBA also gives Cohen the chance to experience a camaraderie that he misses working in his own firm. He has worked at larger firms in the past where he was able to exchange ideas with colleagues on a more regular basis. Being active in the MCBA and its CLE programs gives him that opportunity to interact with other attorneys.

"It is that opportunity for interaction that will always set live CLE apart and above all other forms of continuing education," Cohen said.

Cohen's respect for teaching is best described in an old Chinese proverb he mentioned as a passing remark: "Give me a fish and I will eat today. Teach me to fish and I will eat for a lifetime."

Cohen will be presenting an MCBA CLE seminar on *Effective Non-Deposition Discovery Methods and Practices* on Thursday, September 23, 2004 from 1-4:30 pm. The seminar will take place at ASU Downtown. For details and registration, visit the MCBA Web site at www.maricopabar.org or contact Geoff Cummings at (602) 257-4200 ext. 107 or gcummings@mcbsbar.org. ■

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Ninth Circuit okays public shaming

By Joan Dalton
Maricopa Lawyer

Last month, a Ninth Circuit panel in a 2-1 decision affirmed a federal district court's imposition of a sentence that involved public shaming in lieu of a longer prison sentence. *United States v. Gementera*, No. 03-10103 (9th Cir. Aug. 9, 2004) (Hawkins, J. dissenting). The sentence required, as part of a broader sentence, that convicted mail thief Shawn Gementera parade outside a local post office for eight hours while wearing a sandwich board that read: "I stole mail. This is my punishment."

Although the Sentencing Reform Act affords federal district courts broad discretion in fashioning appropriate conditions of supervised release, that discretion is not boundless. The exercise of discretion must: (1) be reasonably related to the nature and circumstances of the offense and the history and characteristics of the defendant; (2) involve no greater deprivation of liberty than is reasonably necessary to deter criminal conduct; (3) protect the public from further crimes of the defendant; and (4) provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

In the course of deciding whether the district court's discretion was reasonably related to a legitimate statutory purpose, the Ninth Circuit majority set out to determine first whether the sentencing judge imposed the conditions for permissible purposes, and then to determine whether the sentence conditions were reasonably related to those purposes. Although Gementera argued that the sandwich board condition was imposed for the impermissible purpose of humiliation (at the first sentencing hearing the district court judge remarked: "[H]e needs to understand the disapproval that society has for this type of conduct, and that's the idea behind the humiliation"), the majority was satisfied that the totality of the district court's stated rationale was aligned with the permissible statutory objectives of rehabilitation, deterrence, and the protection of the public.

The majority acknowledged that "much uncertainty exists as to how rehabilitation is

best accomplished," and pointed to soaring recidivism rates as illustration of "[t]he cost to humanity of our ignorance in these matters." Yet a deferential standard of review did not require that the district court consider scientific evidence concerning the negative effects of public shaming, the Court said.

In holding that the condition imposed upon Gementera reasonably related to the legitimate statutory objective of rehabilitation, the majority commented that:

[W]e are careful not to articulate a principle broader than that presented by the facts of this case. With care and specificity, the district court outlined a

sensible logic underlying its conclusion that a set of conditions, including the signboard provision, but also including reintegrative provisions, would better promote this defendant's rehabilitation and amendment of life than would a lengthier term of incarceration.

In his dissent, Judge Hawkins remarked that the lack of federal authority concerning sentences involving public shaming might perhaps indicate that public shame sentences "have no place in the majesty of an Article III courtroom."

"When the district court initially imposed the sandwich board condition, wrote Hawkins, "the judge explained that Gementera should have to suffer the humiliation of having to stand and be labeled in front of people coming and going from a post office as somebody who has stolen mail."

Hawkins also did not buy in to the majority's conclusion that the sandwich board condition was reasonable because it was "coupled

with more socially useful provisions." "[T]he majority cites to no provision in the Sentencing Reform Act and to no case law indicating that conditions on supervised release should be reviewed as a set and not individually, or that humiliation somehow ceases to be humiliation when combined with other punishment," wrote Hawkins.

Hawkins concluded by stating that while he believes the district court should be reversed because the sandwich board condition violates the Sentencing Reform Act, he also believes that public shame sentences are simply bad policy.

A fair measure of a civilized society is how its institutions behave in the space between what it may have the power to do and what it should do. . . .

To affirm the imposition of such punishments recalls a time in our history when pillories and stocks were the order of the day.

Gementera's attorney has vowed to appeal. ■

Using a payroll company helps firms become more profitable

ASK THE EXPERT

When a small to mid-sized firm grows by adding new employees, payroll challenges often follow. The featured expert this month is David Bass, a district sales manager for Paychex Inc., a leading national provider of payroll, human resources and benefits outsourcing solutions for small-to medium-sized businesses. The company offers comprehensive payroll services, including payroll processing, payroll tax administration, and employee pay services, including direct deposit and check signing.

Bass explains the importance of categorizing new hires as well as all what to ask when looking for an outside payroll provider. He outlines what needs to recognize and which options to research that will allow your company to benefit from a payroll company.

As I begin to hire employees for my business, is it solely my decision to categorize new hires as "employee" or independent contractor?

Small businesses often do not understand the ramifications of incorrectly categorizing workers as either employees or independent contractors. To clarify this issue, the IRS provides guidelines that assist businesses in properly classifying workers.

Identifying workers as either employees or

independent contractors depends upon the extent to which the person receiving the services has the right to direct and control the service provider. To help determine the degree of control and direction, the IRS uses categories of evidence based on behavioral control, financial control, and the relationship between the parties. In general, the greater the degree of control, the more likely it is that an individual is an employee.

For an independent contractor, an employer is not responsible for providing a pension, group health, workers' compensation, or social security and unemployment insurance taxes. In most cases, only Form 1099-MISC must be completed at the end of the tax year. On the other hand, an employer classifying a worker as an employee has multiple liabilities such as satisfying federal, state, and local obligations, filing numerous tax returns throughout the year and providing benefits.

Misclassifying an employee as an independent contractor may result in penalties and interest double the amount that the business would ordinarily pay. The exposure for unintentional misclassification of an employee is serious, but not as serious as the risk for an intentional misclassification. To reduce the risk, seek professional advice or ask your accountant.

I am considering outsourcing as an option to handle my payroll. What should I look for in a payroll provider?

Productivity and profitability are the keys to a successful business. Business owners are increasingly looking to outside help to improve these bottom line results, including turning to payroll processing services for assistance.

Payroll preparation involves more than just payroll checks. It includes the year-round preparation of federal, state, and local tax returns and deposits; up-to-date recordkeeping; and ever-changing tax laws — all of which take time and energy that might be bet-

ter spent elsewhere in the company, especially for a small business that uses manual or in-house computer payroll processing.

Most business owners understand how much work is required to take care of payroll preparation, employment taxes, and record-keeping. Outsourcing your payroll keeps you in control of your payroll without the headaches. With some savvy shopping, you can find a payroll company that best fits your needs.

Here's a checklist of questions to keep in mind when shopping for a payroll service provider:

Company Integrity

- ▶ How long has the payroll service provider been in business?
- ▶ Do any trade associations endorse the payroll provider?
- ▶ Do any local CPA firms recommend the payroll provider?
- ▶ Does the payroll service provider publish a price list for its services?
- ▶ Will the payroll service provider guarantee its accuracy and timeliness?

Basic Payroll Service

- ▶ What does the basic payroll service include?
- ▶ What payroll reports are included?
- ▶ Is my payroll information kept confidential?
- ▶ Does the payroll service provider offer federal, state, and local tax filing?
- ▶ If a penalty is assessed, who pays the penalty and any interest?

Methods of Reporting Payroll and Receiving Payroll

- ▶ What are my options for reporting payroll data to the payroll service provider?
- ▶ Do the options include reporting by phone, fax, personal computer, and the Internet?
- ▶ Can payroll be reported 24 hours a day?
- ▶ Will I be assigned a specific person to service my account, or will I talk with a different person each time?
- ▶ How is my payroll delivered to me?
- ▶ If I have it delivered, what is the cost?
- ▶ Can my payroll be sent via the Internet?

— See *Expert* on page 16

ACCEPTING APPLICATIONS FOR LAWYER REPRESENTATIVES TO THE 9TH CIRCUIT JUDICIAL CONFERENCE

Each year, the judges of the United States District Court for the District of Arizona select lawyers with federal court experience to serve as representatives to the 9th Circuit Judicial Conference. Arizona's Lawyer Representatives are expected to attend the annual Judicial Conference and to meet periodically with Arizona's District Court judges, Bankruptcy Court judges, and Magistrate judges to discuss potential improvements to court operations and procedures. In addition, the Lawyer Representatives help organize the annual Arizona District Conference for federal judges and practitioners. Lawyer Representatives serve a three-year term.

If you are interested in serving as one of Arizona's Lawyer Representatives, please send a resume and letter explaining your qualifications and interest in the position to:

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OPINION

Maricopa Lawyer and the MCBA do not necessarily endorse the views expressed by contributors

Understanding Islamic law may help narrow divide between cultures

By N. Mark Kramoltz
Special to Maricopa Lawyer

Current events in the Middle East have brought Islam and its legal system to the often disapproving and puzzled attention of Western legal observers. The popular media presents images of chaos and forms of physical discipline such as stoning. The impression given is that the judicial process is simplistic, ineffective and arbitrary. Under closer scrutiny however, the Islamic legal system contains the elements necessary for it to be logical and fair.

I have two purposes here, one analytic, the other prophetic. Although I cannot claim that Islamic law has any particular connection to an attorney's daily practice in Arizona, we are empowered by learning about the legal system (or more importantly for this article, the basis of and influences on that system) of a society and culture we are currently at odds with. In addition, I propose that a movement within Islam may itself result in moderation of the unpleasant aspects of that religion and its legal mechanisms.

The basis of Islamic law

The five important tenants of Islam (religion, life, intellect, offspring and property), are protected by Islamic law through worldly punishment in addition to that in the hereafter. Islam has adopted two courses for the preservation of these five indispensables: the first is through cultivating religious consciousness in the human soul and the awakening of human awareness through moral education; the second is by inflicting deterrent punishment, which is the basis of the Islamic criminal system.

Pendleton...

Continued from page 2

paralegals, should be classified and paid in the same manner as traditional paralegals. Equal treatment for degreed and non-degreed employees who perform the same work is common in employment law today.

An answer in obtaining an exempt DOL status may be state certification. Section 514.304 regarding the practice of law and medicine states: "Any employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and is actually engaged in the practice thereof." California, Florida, Louisiana and Texas have implemented paralegal certifications. If the day arrives when paralegals are uniformly regulated, by licensure or certification, it could serve as the foothold needed for a DOL exemption. State certification is a complicated topic that is one to watch.

For more information about the Paralegal Division contact Clare Pendleton at pendleton@maricopaparalegals.org or Kim Carolan at the MCBA at kcarolan@mcbar.org or (602) 257-4200, ext. 138. ■

This treatment is prescribed by the body of laws known as *Shari'a*. *Shari'a* means the path to follow God's Law. The mating of law to religious doctrine is the basis of Islam; there is no separation of church and state. The religion of Islam and the government are one, and Islamic law is controlled, ruled and regulated by the Islamic religion.

Shari'a law has several sources from which to draw its guiding principles. It does not rely upon one source for its broad knowledge base. The first and primary element of *Shari'a* Law is the *Quran*. It is the final arbitrator and there is no other appeal.

In the Islamic criminal system, transgressions can be broken down into three major categories: 1) Had crimes; 2) Tazir crimes; and 3) Qesas crimes. Had crimes are the most serious, and Tazir crimes are the least serious. A rough analogy is that Had crimes are like felonies, and Tazir crimes are similar to misdemeanors. Qesas crimes are those which afford the victim a right to seek retribution and retaliation. The exact punishment for each Qesas crime is set forth in the *Quran*.

Although the Islamic legal system grounds its ultimate legitimacy in religious doctrine, it has not imploded under the weight of rigidity and intolerance. Clearly there must be some concealed equilibrium in Islamic religious life and law, a balance between rigidity and flexibility, that can explain its longevity and popularity.

A person-centric legal system

The Islamic legal process pays more attention to the person who makes assertions than to the "facts" that might be found. In this system, it is the person who makes things believable, not the other way around. Thus, court notaries are used as "reliable witnesses" who certify that they have heard what others have stated to be so; documents are treated as if they were oral statements, the believability of the maker rather than the form of the document being crucial; and court appointed experts determine many facts on the bases of their knowledge of the locale and the circumstances of the parties.

Therefore, where in the West the legal system focuses largely on the discernment and evaluation of "facts," in Islamic law the emphasis is on the assessment of persons — the set of connections, the customs used to form them, and the consequences that actions have within structure of the negotiated obligations by which any person operates. This is a commonsense approach, free of the illogical exclusionary rules of our system, such as the inadmissibility of prior convictions and past misdeeds.

As a result, both Islamic and Western common law systems possess a kind of legal relativity, a sense that the categories of the law must flex decisions at any given moment, while understanding that the cultural categories on which their techniques and legitimacy reside may be subject to variation.

The Sufi experience

One such cultural variation came to my attention by way of an Arabian horse, specifically the writings and religious practices of the namesake of my sister's childhood steed, Omar Khayyam.

Omar Khayyam (1040-1131 or 1023-1123) was a mathematician and minor poet who became known to Western audiences in the Victorian era through his poetic masterpiece, the *Rubaiyat*, which commences: "Awake! for morning in the bowl of night, has flung the stone that puts the stars to flight." The frequent allusions to women and wine in translations of his work made it popular in that conservative time. What was missing then was the realization that his phrasing was a highly evolved symbolic language used to present, and represent, Sufi experience.

Sufism is a term generally applied to mystical currents in Islam. Contrary to the perception that Islam is only preoccupied with punishment, love is the central concept of Sufism. While religious authority sought to establish the rules of society through the *Shari'a*, Sufism offered an inner way, and a form of devotion that took into account the spiritual freedom of the individual.

The origin of Sufism can be traced to the 8th century, when Rabia of Basra (d. 801) introduced the concept of pure love of God: one should act without hope for paradise or fear of hell, only out of love. The Sufis invented new forms to convey this love, especially through poetry like the *Rubaiyat*. In addition to poetry, Sufis embraced music, which could lead to a frenetic whirling dance (the "whirling dervishes"), although music and dance were frowned upon by the orthodoxy. In addition, the Sufis' claim to knowledge of God through means other than those put forward by conventional theology has resulted in persecution. Mansur al-Hallaj's most famous ecstatic utterance "I am the Truth," led to his martyrdom.

Got an itch to write more than motions?

Maricopa Lawyer welcomes contributions, from news and feature articles to humor and opinion pieces, that are law-related or of special interest to the legal profession.

For example, consider writing an editorial about a current legal issue that piques your interest, or a feature article about an interesting lawyer or judge.

The *Maricopa Lawyer* editorial board reserves the right to reject articles and to edit contributions for length or content. Submit articles to Editor, *Maricopa Lawyer*, Maricopa County Bar Association, 303 E. Palm Lane, Phoenix, 85004 or e-mail submissions to tbooth4@cox.net

Even if you don't want to write the article, the editorial board welcomes story ideas as well as information for our Legal Moves and People in Law columns. ■

The influence of Sufi thought on Islam

Although religious mysticism is a concept found worldwide, Sufism was especially influential upon Islam. As stated by Jason Elliot in his book of exploration of the region, *An Unexpected Light*:

The universal impulse toward mysticism has appeared in every era and under the banner of every religion, but seldom has a mystical tradition been expressed in such a creative variety of forms, or found its way so extensively into culture and society, as Sufism in the Islamic world.

Eventually, Sufism brought a spirit of free thinking into the Islamic world. Although the overt impact of Sufism upon Islamic law is more difficult to discern, the gradual tolerance of Sufi irreligious skepticism illustrates that the *Shari'a* has not been always uniformly applied.

The influence of Sufi thought may best be revealed by Islam's recommendation of moderation and balance in everything. Sufi doctrine has also resisted the exclusive claims of militant Islam by remaining true to the universalism of the *Quran*, the original revelations from Allah to Mohammad. This includes tolerance and acceptance of other religions, including Judaism. Thus, a deep current of moderation exists in Islam law and society, albeit a flow that appears to be presently submerged.

Although the idealism of Omar Khayyam may currently be out of favor, changes will occur in the Muslim world as the result of exposure to the ideas of the West. This evolution should result in a new openness, and permit a new flowering of Sufi thought to emerge. The liberalizing influence of Sufism may then prove to be the basis for the moderation of the extremes of Islam, its law and the *Shari'a*.

► N. Mark Kramoltz is a student of Middle East history and archeology, an attorney specializing in real estate, and an active residential real estate broker. He can be reached at 480-675-0112. ■

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Scandals...

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tation is arguably inconsistent with the long-term well-being of Arizona's economy.

Maricopa Lawyer: What role, if any, did the dot com industry play in the moral demise of corporate America? Can a direct correlation be made, or was it inevitable for these scandals to occur? Did the explosion of the number and success of dot com companies and/or the rapid demise of these same companies allow for there

to be a lack of overall corporate responsibility?

Lawrence: There is certainly no question that the dot com industry was opportunistic in the late '90s and the resulting hysteria affected corporate America. However, a recent Harvard Business Review study found that a greater loss of shareholder wealth can be attributed to poor acquisitions than to the demise of the dot com industry. It was not inevitable that the scandals would occur — as discussed above, it was perhaps a “perfect storm” of issues that created the environment.

Spitzer: Economist Schumpeter described

capitalism's creative destruction. Sadly, most new businesses fail, but the continuing struggle of countless entrepreneurs reflects the beauty of capitalism, particularly in America. In the twentieth century there were tens of thousands of technology companies, but only a handful emerged as Motorola, IBM or Microsoft. But like the famous Tulip Bubble in the 17th Century, the “next great thing” unraveled ironically because too much money came too quickly. The failure of most of the dot coms is not an indictment of our economic system. How the financial community and technology innovators respond to the Bubble's collapse will be the next story.

Maricopa Lawyer: How will the upcoming presidential election, along with possibility of a new president, affect corporate America? Will there be pressure to review and introduce new enforcements to prevent future scandals from occurring? Do you think there will be more scrutiny by both parties on past scandals and how they were handled?

Lawrence: The presidential election will certainly have an impact on corporate America. The ultimate question is whether the electorate believes that a market economy can be self-regulated or whether further government intervention is required. It is difficult to argue at this point that no governmental intervention was required after the fall of the market. However, the question that the election presents is whether further regulation is needed. Those that believe that further regulation is required will put pressure on the candidates to present such legislation. Because of the weight of other issues that are before the presidential candidates, it appears that corporate governance issues have

taken a back-burner position to issues such as health care, the economy and the war in Iraq.

Spitzer: It is my hope that decisions such as dealing with corporate misconduct and preserving the integrity of our capital markets not be politicized. Business regulation needs to be firm, fast and fair. There are important legal issues in need of clarification. Many arise from the complex world of tax and accounting. These technical matters are not well addressed in a political environment. Congress needs to work with state and federal regulators to craft laws that are understandable, and then empower regulators to enforce those laws.

The Corporate America Scandals: What Happened? seminar will be held from 2-4 p.m. on Thursday, September 16, at the ASU Downtown Center in Phoenix. The MCBA member cost to attend is \$50 for attorneys and professionals and \$35 for paralegals and public lawyers. The self-study package for members is \$50. The non-member cost to attend is \$70 for attorneys and professionals and \$50 for paralegals and public lawyers. The self-study materials for non-members is \$70. Two CLE credits may be earned at this seminar. To register, visit the MCBA Web site at www.maricopabar.org or contact Geoff Cummings at (602) 257-4200 ext. 107. ■

Quarles & Brady attorney 'surprised' by rewards of pro bono work

By Philip Zerbe
Special to Maricopa Lawyer

Attorney Lori L. Winkelman was the final hope for a gentleman wedged in a swamp of financial quicksand. She is being recognized as the Attorney of the Month by the Volunteer Lawyers Program for her diligence with a case to which she devoted approximately 200 hours during the last two years.

A bankruptcy attorney with Quarles & Brady Streich Lang, Winkelman was conducting intake interviews at the VLP when a client described how, in financial desperation, he had fallen prey to false and misleading information and signed over the deed to his house to a company that promised to help save his home from foreclosure. However, the arrangement faltered when the mortgage holder assumed a second mortgage and declared bankruptcy shortly thereafter. The client sought help from VLP when he was notified that the first mortgage was in default and he would need to pay over \$20,000 to prevent the loss of his home.

At the outset, Winkelman feared there may not be a legal remedy. The negotiations were arduous, but the playing field changed when the principal of the company filed bankruptcy. Under this new jurisdiction, the company was more open to negotiate with Winkelman and her client.

“It was a very stressful case,” Winkelman said. “My client is a good, honest, hard-working man who ended up in a bad situa-



Winkelman

tion because of dishonest people. You start off thinking it should be relatively easy because your client is clearly in the right, but you keep running into roadblocks. I just wanted him to be relieved of his worry.”

In the end, the demand for payment was dropped and the deed was signed back to the victim.

Originally from Brookings, South Dakota, Winkelman had a degree in commercial economics but decided law was more “interesting and challenging.” She became a paralegal and worked at Streich Lang while attending law school. She graduated from Arizona State University law school in 2001 and is still with the firm, now known as Quarles & Brady Streich Lang.

Winkelman said in many cases victims would not be able to assert their legal rights without the VLP. She says volunteering is important to both the community and to the volunteer.

“Although we all get busy in our lives, it is important to help out in the community,” she said. “It's surprising how rewarding it can be.”

► *Phil Zerbe is a paralegal member of the MCBA and VLP. If you or members of your firm would like to know more about pro bono opportunities through VLP, contact director Patricia Gerrich at 602-258-3434, ext. 2630. ■*

Expert...

Continued from page 14

► Can I pick up my payroll?

Employee Pay Options

► What employee pay options are available through the payroll service?

► Are services such as direct deposit, check signing and debit care available?

Additional Services

► Is general ledger reporting to my accounting software available? If so, with which accounting packages is it compatible?

► Does the payroll service provider offer human resource services such as retirement plans, section 125 plans, worker's compensation insurance, or health benefits?

Researching the answers to these questions can help to identify a payroll provider who makes running a profitable, productive business easier.

► David Bass can be reached at 602-263-7172 or via email at dbass@paychex.com. Paychex's Web site is www.paychex.com. ■

Superior Court seeking Courthouse Experience volunteers

For attorneys who are looking to make a difference with today's young people, the Maricopa County Superior Court is offering a unique opportunity. For the past 14 years, the MCBA and the court have partnered to give more than 72,000 county students the opportunity to experience the legal system firsthand.

The Courthouse Experience programs match volunteer attorneys with students grades 6-12. The attorney serves as expert in the legal system and guides tours through the courthouse.

Attorneys are needed immediately for the 2004-2005 school year. If you would like to be part of the program, contact the Courthouse Experience Program Coordinator at 602-506-3206 or by email at philipsk@superior-court.maricopa.gov. ■

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IS PLEASED TO ANNOUNCE THAT

John M. Matter

HAS JOINED THE FIRM AS AN ASSOCIATE

Mr. Matter will concentrate on the firm's personal injury, wrongful death and medical negligence practice.

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Fromm Smith & Gadow, P.C. is pleased to announce that

Lindsay E. Benjamin

has joined the firm as an associate.

Lindsay, a 2003 graduate of Thomas Jefferson School of Law, will focus her practice on family law.



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The announcement published in the July issue of "Maricopa Lawyer" erroneously failed to identify which members of our firm are certified specialists in family law.