Eleven Vie for Board Seats, Election Goes Paperless

Eleven valley attorneys have declared their candidacy for five open MCBA Board of Director seats. All are from Phoenix unless otherwise noted. They are:

Roberta E. Berger, Wells Fargo Bank; John D. Burnside, Bryan Cave, LLP; Paul J. Buser, Paul J. Buser Attorney & Counselor at Law, Scottsdale; Jason Castle, Mariscal Weeks McIntyre & Friedlander, PA; Christopher J. Charles, Combs Law Group, PA; Holly Davies, Lober Greenfield Polito, LLP; David Funkhouser III, Quarles & Brady, LLP; William Kastin, Snell & Wilmer, LLP; Cathy L. Knapp, Quarles & Brady, LLP; Alex Lane, Lane & Associates, PLLC, Tempe; and Comm. Benjamin E. Vatz, Maricopa County Superior Court.

More information and photos of the candidates will be published in the November Maricopa Lawyer and the same information will be available on the MCBA website by mid-October.

For the 2009 election, MCBA will be doing away with paper ballots and voting will be online.

“This is not exactly cutting edge technology,” said MCBA executive director Allen W. Kimbrough. “Many bar associations, especially bars with straightforward elections like ours, are now using online voting services. The Board agreed it’s time for MCBA to use this time and money-saving technology as well.”

Voting begins Nov. 1 at the election vendor’s website. MCBA members will receive e-mails with instructions and a password that will enable them to enter the website and cast their votes online.

Phoenix Law Recruitment

Girum Tesfaye and Justin Cooley, both 2nd year students at the Phoenix College of Law, talk with MCBA’s Karla Durazo during the bar’s recruitment visit to the campus on Aug. 26. MCBA staff brought in free pizza and water and was on hand to talk about student membership benefits. Twenty-two students joined as a result of the event. Phoenix Law is the only private law school in Arizona and the only one with both a part-time evening program and a full-time program.

Church Adherent Cannot Use Tenets to Beat Marijuana Charges

Things have not been going well in the courts for the Arizona-based Church of Cognizance, which deifies marijuana. According to a recent news article, the husband and wife team who founded the church are both in federal prison on drug charges, having failed to convince the courts that their religious beliefs protect them against prosecution.

In another recent skirmish, the Arizona Supreme Court has held that a church adherent cannot use its tenets to beat charges arising from his smoking marijuana while driving his car. State v. Hardesty, No. CR-08-0244-PR (Ariz. Sep. 8, 2009).

Danny Ray Hardesty was driving his van one night when a police officer pulled him over for driving one headlight. The officer smelled marijuana. In addition to a baggie with 14 grams of marijuana, the officer recovered a joint that Hardesty had tossed out the window. Hardesty was charged with possession of marijuana and drug paraphernalia. He moved to dismiss the charges under the FERA, Arizona’s Free Exercise of Religion Act, § 41-1493.01, arguing that marijuana use was a sacrament of the Church of Cognizance.

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An Ever Present Danger—Domestic Violence

This month is Domestic Violence Awareness Month. Domestic violence has been defined as one partner controlling the other in an intimate relationship, using physical violence, coercion, threats, intimidation, isolation and emotional, sexual or economic abuse. Even where there is no overt violence, the result of deliberately undermining a partner’s self worth, forcing isolation from friends and family, and constant criticism is a psychological toll on the victim and any children in the home.

The statistics are staggering. With nearly 25 percent of women experiencing some form of abuse during their lifetimes, domestic violence is epidemic. Although most victims are women, it is a problem that reaches men as well. We all have likely encountered or know someone who has experienced domestic violence in one form or another. As we know too well, the current economy is not robust. It has an impact on domestic violence. During the recent economic downturn, the National Domestic Violence Hotline documented a 21 percent increase in calls during various periods, which increases as times worsen. It is not surprising that economic pressure increases stress on families, and that stress can increase the occurrence of domestic violence. We all have a stake in identifying and fighting the problem.

Domestic violence has a significant impact on a community’s legal system. It is estimated that more than half of aggravated and simple assaults result from domestic violence. In some jurisdictions, nearly 40 percent of the cases in general jurisdiction courts stem from domestic violence. And, of the nearly 3.5 million crimes committed against family members, nearly half, or 49 percent, were crimes against spouses. In addition, half of the offenders in state prison for spousal abuse had killed their victims.

The Cost is Not Acceptable

No group is immune to domestic violence—the victims and their abusers come from all ages, races, religions and economic status, from the poorest areas to the elite neighborhoods.

The “hard costs” of domestic violence have continued to increase: The cost of medical care, the cost for businesses, the cost for the legal system and the cost for social service agencies together reaches billions of dollars annually. The American Institute on Domestic Violence estimates that health-related costs for direct medical and mental health care service exceed $4 billion a year. Some estimates indicate that domestic violence raises healthcare plan membership costs by $70 per member annually.

Workplace costs for domestic violence are high and mounting as well. A survey of Fortune 100 companies noted that 49 percent of corporate leaders indicated that domestic violence has a detrimental effect on their company’s productivity, while 47 percent said it negatively influenced attendance. According to the American Institute on Domestic Violence, domestic violence results in a loss of eight million days of paid work each year.

The cost to children is even more profound. It is generally accepted that children who grow up in a home where there is abuse often continue the cycle in their own lives, either as abusers or as victims.

It is readily apparent that we cannot afford domestic violence—either as individuals or as a society. The psychological costs to victims are unknowable and the economic costs to the rest of us are very high.

What Can Be Done: Resources

Because domestic violence can touch the lives of our clients and those around us, it is important to realize the resources that are available to us to assist with the problem in addition to the website listed above.

Early prevention programs can stop domestic violence before it escalates, exacting an even greater toll of victims and society. Support agencies encourage victims to reach out for help. If you are not sure if a client, a family member, a friend or co-worker is being abused, a checklist from WomensLaw.org at www.womenslaw.org/simple.php?sitemap_id=38 has questions that can help you find the answer.

The National Domestic Violence Hotline offers counseling and referrals 24 hours a day at 1 (800) 799-SAFE (7233) or 1 (800) 787-3224 (TTY). A complete list of domestic violence resources and state coalitions is available there as well.

The American Bar Association Commission on Domestic Violence has put together a series of tips as part of a training program on interviewing domestic violence clients. The interviewing tips and other hand-outs are available at www.abanet.org/domviol/trainings.html. The commission also offers Standards of Practice in civil protection order cases, which are available at www.abanet.org/domviol/docs/StandardsCommentary.pdf.

And of course, the MCBA is committed, along with bar associations across the United States, to fighting the domestic violence epidemic. The MCBA is only a phone call away.

Thank you for your continued support of the MCBA and all of its programs.

LETTER TO THE EDITOR:

Good Practice to Stretch the Truth?

I was pleased to read the article in the September 2009 issue of the Maricopa Lawyer regarding making yourself scarce in an effort to attract more clients. The article was lively, engaging and had some great points. Perhaps you will allow me, though, to provide a counter-view.

As attorneys, we are advocates for our clients and their causes. We take sides. We paint a picture that is, hopefully, most favorable to our clients. However, we are, above all else, advocates for justice. Thus, the pictures we paint are constrained by the facts before us. We do not take liberties with the facts. We all know this as our ethical duty of candor toward a court. Is that the limit of our candor?

In reading the article, I was impressed by the author’s efforts to help lawyers think like marketers and economists. The greater the scarcity of our services—the more valuable we are. What about our clients, though? Is it a good practice to stretch the truth, even a little, in the pursuit of a higher fee? I’m not suggesting that the author actually advocates lying, I’m concerned, though, if that read by a non-lawyer, the article would lead a non-lawyer to think less of our profession.

Consider examples from the article. For instance, “[i]f anyone asks whether you’re busy, don’t say, ‘Well, I’m killing time waiting for clients to walk through the door.’ People will immediately conclude your services aren’t worth much. Instead you might say, ‘I’ve never been busier.’ Or, ‘I have so many clients, I’m starting to work nights.’” Is that honest? If you are not really busy, is it really acceptable to say you are? Maybe I misunderstood her, but my

OPINION: MISCONCEPTIONS OF FORECLOSURE AND BANKRUPTCY

Anti-Deficiency Law Sneaks In and Out

By Mark A. Winnor

It was almost like a ninja. In an attempt to change our anti-deficiency laws S.B. 1271 snuck in with little notice or warning. Once revealed, the battle raged furiously to repeal the new law and then, without much attention, S.B. 1271 snuck out a back door leaving an uneasy feeling that it will return again in the future.

One thing became abundantly clear to me during the brief time S.B. 1271 captured so much attention after its passage: Arizona’s anti-deficiency statutes are misunderstood by most people that deal with them. As I taught various classes around the valley to realtors, attorneys and other professionals, and as I visited with them I became increasingly amazed at how wide-spread the confusion really is. Even members of the legislature that I visited with had misperceptions.

First of all, we have two anti-deficiency statutes, not just one. Few that I spoke to recognized this. The change to the law in August that was promptly repealed in September only dealt with one of the statutes, namely ARS 33-814(G).

In simple terms, ARS 33-814(G) provides that if: 1. the property is 2.5 acres or less; and 2. the property is a single or dual dwelling; and
E-Mail, eAppeals and eFilings

By Douglas E. Abrams

In 2007, lawyer Brian M. Puricelli won his client a $150,000 jury verdict against a Philadelphia police officer for false arrest during a street celebration following the division championship victory that put the Philadelphia Eagles in the Super Bowl two years earlier.

Shortly after entry of judgment in McKenna v. City of Philadelphia, Puricelli filed a petition seeking more than $180,000 in attorney’s fees for his work in the federal civil rights action. In a published decision reported nationally, internationally and locally, U.S. District Judge J. William Ditter, Jr. awarded fees of only $26,000 because, among other reasons for reduction, the lawyer’s request came in written submissions that the court found “slip-shod.”

‘Slip-Shod Submissions’

Judge Ditter lambasted the Puricelli fees petition for its caption, which omitted one word and misspelled another (“interests”), but that was only the beginning.

The court also quoted verbatim the petition’s opening sentence, complete with its nine misspelled words and two citation errors, quite an array before the judge’s eyes even reached the argument’s first period:

“Plaintiff’s petition for award of attorney’s fees seeks from the trial court $180,800 for fees incurred in the prosecution of this action.”

In the same paragraph, counsel misspelled the word “awarded” as “awarde” (sic) (the fee award is referred to in the margin as “awarde $50,000”) and misused the word “interest” (sic) and “interests” (sic) (the trial court awarded only interest, albeit prejudgment interest). The petition further omitted counsel’s reasonable estimate of the time reasonably required to investigate, prepare, and prosecute the case.

Ditter also referenced the petition’s “punctuation, spelling, and grammatical errors” and thus was “better but not perfect.”

In another paragraph, counsel misstated the number of days within which to respond to a motion (sic) as “within 20 days” (sic) when counsel actually had 30 days (sic) to respond to the motion. Counsel also failed to comply with the local rule requiring that the petition conform to the sample fee petition template.

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Meet Bert Binder

By Sybil Taylor Aytch

A technology enthusiast, Bert Binder has served as the electronic courtrooms administrator for the Maricopa County Superior Court system since September 2006. In this capacity, she is responsible for the design, implementation, and support of more than 170 electronic courtrooms throughout Maricopa County (Superior Courts and Justice of the Peace Courts).

In addition to managing the maintenance and operations of courtroom equipment, Bert provides training for attorneys and staff on courtroom recording systems and evidence presentation equipment, and conducts e-courtroom presentations for local groups and visitors from throughout the country.

Known for her initiative, Brian Karth, currently the Clerk of the Court for the United States Bankruptcy Court, District of Arizona, who initially hired Bert for her position at the Superior Court, confirms that “Bert hit the ground running.”

“Having previously come from the hectic and pressure packed world of courtroom presentation systems,” he continues, “Bert instinctively looked to address the needs of the litigants, jurors and judicial officers within the courtroom environment.”

Bert holds a bachelor’s degree in justice studies administration and a master’s degree in human resources management. She started her career in the legal field in 1987 as a paralegal and has been employed in both the government and private sectors, including two of the largest law firms in Arizona. She is a founding member of the Paralegal Division and served on its Board of Directors from 2002-2003, as well as on a variety of committees (including the original Arizona Paralegal Conference Committee) to help further the goals and objectives of the division.

Bert’s career in technology implementation and support began in 1998 when she became a litigation support specialist for a large law firm in Phoenix. Prior to her current position at the Superior Court, she served as president of Advanced Litigation Resources, providing trial consulting and litigation technology training services nationwide.

Since 2001, Bert has been a member of the adjunct faculty in Phoenix College’s ABA-approved Paralegal Studies Program. She initially taught the litigation technology course and currently serves as the program’s internship coordinator. Bert’s contributions to the Paralegal Studies Program have been invaluable in her role as internship coordinator, as a member of the advisory committee, and through her work on the e-court advisory board in development of Phoenix College’s e-court, a replica of a Superior Court electronic courtroom.

Scott A. Hauert, Esq., chair of the Phoenix College Legal Studies Department and director of the Paralegal Studies Program, calls Bert a “dedicated, experienced faculty member who understands both the students’ needs and what it takes to be successful in this field.”

Scott also recognizes Bert’s contributions to improving the program. “When we decided to build our own computer,” he says, “it was Bert who provided the technical expertise for planning and helped us coordinate with the vendors. Her experience during the process was invaluable.”

So, the next time you have a trial coming up in an electronic courtroom, be sure to contact Bert Binder. She is a sea of calm and professionalism during stressful times.

Sybil Taylor Aytch, a founding member and former president of the Paralegal Division, is a paralegal at Quarles & Brady, LLP, and an adjunct faculty member at Phoenix College.

Calendar of Events

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<tr>
<td>13 Tuesday</td>
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<td>20 Tuesday</td>
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<tr>
<td><strong>Topic:</strong> Difference between Large Firm, Small Firm and Corporate Paralegals</td>
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<td><strong>Time:</strong> Noon</td>
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<tr>
<td>NOVEMBER</td>
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<td>DECEMBER</td>
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All Board of Director and Conference Committee meetings are held at 5:30 pm unless otherwise specified.

All Board of Director, Conference Committee and Quarterly Division Meetings are held at the MCBA Offices unless otherwise specified.

For more information on Paralegal Events please visit our web site at www.maricopabar.org; click on the “For Paralegals” link.

Tips to Prepare for the Fast Approaching Holiday Season

I can’t believe October is upon us. With the arrival of October comes cooler temperatures (hopefully) and the fast approaching holiday season. The holiday season brings more stress to our already stressful lives. Increased levels of stress can negatively impact our mind and body so it is very important to try to minimize our daily stress levels as much as possible.

There are many books and Internet sites devoted to the subject of the physical and emotional impact of stress; how to handle stress and techniques to relieve stress. Some of the techniques I have used in the past are deep breathing, listening to calming music, exercise, and my favorite, humor.

Deep breathing helps relieve stress by getting oxygen throughout our bodies, as we are under stress we tend to take shallow breaths which restrict our oxygen intake. So, rule number one—remember to breathe.

Listen to calming music—the key word here is calming. You need to pick music that you find calming which is not necessarily the same music as your kids or parents listen to. Playing calming music even in the background can reduce our stress level. Rule number two—listen to the music of your choice. Now you can legitimately tell your kids listening to their music is bad for your health.

Exercise is perhaps one of the best techniques to cope with stress. Exercise can not only help calm you by releasing pent up frustrations, it also releases hormones which create a physical feeling of exhilaration. Rule number three—use exercise to release your frustration and feel good.

Now to my favorite stress reliever, humor. I was so happy to read that something that was already part of my everyday life was actually good for me. Laughing can actually decrease levels of stress hormones and increase the intake of oxygen (see rule one). Laughter often times gives us an emotional release and helps us to feel better and perhaps put our negative thought aside for awhile. Rule number four—Laugh, laugh and laugh some more.


Notes

Thank you to this year’s Conference Co-Chairs Andrea Bartles and Sara Neily and to their Conference Committee for all of their hard work. Our 10th Annual Conference was very successful and we are already looking forward to next year. If you are interested in serving on the 2010 Conference Committee, please contact Stacy Palmer at spalmer@wlaw.com.

Don’t miss our quarterly meeting, “The Difference Between Large Firm, Small Firm and Corporate Paralegals,” at noon on Oct. 20.

For more information on the quarterly meeting, go to www.maricopabar.org and click on the “For Paralegals” link.
Help Make the YLD Domestic Violence Necessities Drive a Success!

In October, in honor of Domestic Violence Awareness Month, the Domestic Violence Committee of the MCBA YLD organizes a Necessities Drive.

The drive gathers much needed daily goods, such as shampoo, soap, diapers, deodorant, toothpaste/toothbrushes, and feminine products, and distributes them to women and children in Phoenix-area domestic violence shelters.

The Domestic Violence Committee also provides a “Survivors Guide,” which contains basic legal information needed by survivors of domestic violence. With this project, the Domestic Violence Committee’s goal is to help victims of domestic violence make a new start.

In order to make the Necessities Drive a success, we need your help and donations! If you would like to donate any of the above listed items, please do so by bringing them to Laurie Williams at the MCBA office no later than Friday, Oct. 9. Cash donations are always accepted as well.

Lastly, the YLD thanks Alison Pulaski Carter and Richard Siever of the Mock Interview Committee for successfully coordinating 42 interviews at ASU Law! Also, the YLD extends special thanks to all the attorney volunteers that donated their time and lent their experience to the 42 students at ASU Law to enhance the students’ interview skills.

ABA Seeks Summary Judgment Against FTC Over Red Flags Rule

The American Bar Association filed a motion for summary judgment on Sept. 23 in its action seeking an injunction blocking the Federal Trade Commission from enforcing the Red Flags Rule against lawyers.

The motion asks the U.S. District Court for the District of Columbia to schedule oral argument before Oct. 23 on its motion, seeking a ruling that the FTC exceeded its authority in seeking to require lawyers to implement identity theft protection programs under legislation applying to financial institutions and lenders such as banks, finance companies and automobile dealers.

The ABA filed suit on Aug. 29 to block the FTC’s plan to begin applying the rule to lawyers Nov. 1.

In its 20-page complaint, the ABA says that applying the rule to practicing lawyers is “arbitrary, capricious and contrary to law” and that the FTC has failed to “articulate, among other things: a rational connection between the practice of law and identity theft; an explanation of how the manner in which lawyers bill their clients can be considered an extension of credit under the FACTA; or any legally supportable basis for applications of the Red Flags Rule to Lawyer Engaged in the practice of law.”

ABA President Carolyn Lamm said that Congress did not intend for lawyers to be covered under the rule, and that the FTC’s decision to apply it to lawyers intrudes on state responsibilities of regulation.

“The rule requires extensive reporting and bureaucratic compliance that would unnecessarily increase the cost of legal services,” Lamm said. “This kind of unauthorized and unjustified federal regulation of law practice threatens the independence of the profession and the lawyer’s role as client confidante and advocate.”

MCBF Grant Provides Forums for Older Domestic Violence Victims

This article is one of a series provided by agencies that received a 2009 grant from the Maricopa County Bar Foundation.

The Area Agency on Aging, Region One’s DOVES Program has received a charitable grant from the Maricopa County Bar Foundation. The grant will help provide legal forums on issues important to older victims of domestic violence as well as legal counsel to DOVES clients.

DOVES is a comprehensive program to assist victims of late-life domestic violence and elder abuse, who are 50 years of age or older. The program provides case management and advocacy, support groups, emergency housing and transitional housing for up to 18 months.

The needs of DOVES participants are extensive. Often, they come into the emergency housing program with few, if any, economic resources and with their self-confidence annihilated. Many have never worked outside the home and their abusers have convinced them that they have little societal value.

Victims of late-life domestic violence endure verbal, emotional and physical assaults enforcing the rhetoric that they are worthless. The victim’s decision to accept abuse is often times due to fear, embarrassment and isolation from family and friends.

Victims are in need of information, counseling service and legal advice as they leave their abuser and become independent. DOVES is committed to providing a safe, healthy and private environment in which to make these difficult decisions.
Law Firms Taking Steps to Embrace ‘Green’ Practices

When the law firm of Isaacson Rosenbaum, PC, began considering a move to new offices a few years ago there were plenty of options in the Denver metro area, from older, existing buildings with plenty of “character” to newer, flashier models with all the latest bells and whistles. In the end, Isaacson Rosenbaum chose the 18th floor of 1001 17th Street in downtown Denver because Miller Global Properties, LLC, took the additional step to renovate the building into a more sustainable project, which is now registered as LEED (Leadership in Energy and Environmental Design) Silver with the United States Green Building Council (USGBC).

This decision by Miller Global reflects Isaacson Rosenbaum’s own commitment to sustainability. The firm has a sustainability committee comprised of lawyers and staff whose charge is to promote “green” practices, provide policy, monitor compliance with policy and provide earth friendly activities outside of the firm. It is the goal of the committee to go beyond reduction of the use of paper within the office (which is a worthy goal given the large amount of paper that law firms go through) and slowly but surely transform the culture of the firm and get everyone on board with its “green” initiatives.

In addition to its sustainability committee, the firm also has a sustainable development practice group, which helped drive Isaacson Rosenbaum’s choice to upgrade its space. Bill Silberstein, the manager of Isaacson Rosenbaum’s Sustainable Development practice group, states, “It simply makes sense to move into a space that is environmentally friendly. Why shouldn’t we elect to move into place that is more efficient, a better place to work and a better space for our clients?”

Given current economic circumstances, the answer, as it is with all businesses, is money. Isaacson Rosenbaum had to make some hard decisions to push forward with the LEED certification process and chose products that may cost a bit more but will provide a great return in terms of lower operating costs, enhanced marketability and increased productivity. In the eyes of the firm, it is a small price to pay for an enormous long term gain.

The firm incorporated simple but effective enhancements into its tenant finish. Efficient fixtures will provide a 30 percent reduction in water usage; offices are designed to maximize exposure to natural light; daylight harvesters and task lighting will provide optimum control over lighting within offices. Zoned heating and cooling systems will offer occupants control and comfort over their work environment; energy star rated equipment will be used throughout the office; and indoor air quality will be enhanced by the use of MERV-14 air filters. Air quality will also be improved by the use of low volatile organic compound (VOCs) paints and adhesive during installation and Isaacson Rosenbaum will maintain air quality through a policy mandating the use of environmentally friendly cleaning products.

Tenant improvements throughout the space will utilize recycled, reused or rapidly renewable materials; stone flooring in the lobby, reception and secretarial stations that is sustain- able; break room and lounge countertops contain 75 percent recycled wood chips and 25 percent acryl-ic; break room and lounge millwork contains fiberboard from post-industrial wood fiber and are formaldehyde free; and all board room wall coverings are 46 percent recycled polyester. Finally, in order to ensure that systems are working efficiently within the space, Isaacson Rosenbaum will use a third party, in this case another client of the firm, EMC Engineers, Inc., to commission the project.

Isaacson Rosenbaum is literally looking forward to a bright future in its new space, which will provide a platform from which the firm can build its sustainable development practice. This move presented the firm with a unique opportunity to make the right choice and not only talk the talk, but walk the walk.

How is your firm embracing the “green” movement? Submit your firm’s sustainability practices to maricopalawyer@maricopabar.org for printing consideration in a future issue of the Maricopa Lawyer.
Legal Briefs

By Joan Dalton

Civic Teachers Become Attorneys and J urors for a Day

Civic Teachers who were in Washington, D.C. for a conference sponsored by the Center for Civics Education participated as jurors and attorneys in a freedom of speech-fair trial simulation before U.S. District Court Judge Royce C. Lamberth.

The simulation involved the case of Carey v. Musladi, 549 U.S. 70, 127 S. Ct. 649 (2006), in which the question presented is whether a murder trial defendant is deprived of his Sixth Amendment rights to an impartial jury when courtroom spectators wear buttons showing a picture of the deceased.

Participants serving as attorneys were first coached by attorneys from the Administrative Office of the U.S. Courts. Classroom teaching materials from the exercise are available at the U.S. Courts’ website: www.uscourts.gov/outreach/topics/carey/index.html.

U.S. Solicitor General Explains How Federal Participation in Petitions for W rit of Certiorari are Decided


Chief Judge Kozinski asked Kagan what factors enter into a decision by the Solicitor General’s Office to participate in Petitions for a Writ of Certiorari: “Is there a real circuit split in this case? What is the importance of the question presented?”

But Kagan went on to say that her office considers whether to participate from the lens of federal government interests as well, and from this perspective the criteria might include: “[w]hen important is it to the United States, our client, to have this case decided by the Supreme Court?” Kagan added that it might be important for any number of reasons, including:

- Whether there is a circuit split creating a lack of uniformity in how the law is applied.
- Whether an extremely important federal question might be involved resulting in a federal program being undermined.
- Whether a great deal of money might be involved resulting in great cost to the U.S. Treasury.

But overall, said Kagan: “[w]e know that the Court counts on us to take into account its own set of criteria and standards for deciding on cert petitions.”

As for briefs in opposition, Kagan relayed that “[t]here are so many to write we honestly couldn’t file ‘oppositions’ in every case in which a decision the United States has won is being pulled into question.”

She said that her office tries to make a kind of cut as to whether the Petitions for Writs of Certiorari raise serious questions; questions where the court would want to hear from the opposing party. Kagan concluded by stating that the federal government waives its opposition rights in about half of all other petitions filed and files briefs in opposition in about half of all other petitioners filed.


And: A Surprisingly Ambiguous Word

By Tamara Herrera

Ask a legal drafter which word causes many problems with interpretation, and the answer may surprise you (as it did me): “And” can cause ambiguity if not used carefully. Specifically, “and” causes ambiguity in the phrase “and/or,” and it causes ambiguity when the reader cannot tell if “and” truly means “in addition to.”

First, most legal drafters get rid of “and/or” in preventive documents, such as contracts, in order to promote certainty and clarity in duties. To illustrate the potential ambiguity, Bryan Garner turns to a common example from employment law.

Suppose an employee signs a contract that indicates she will “work overtime and/or night shifts.” On the one hand, the employer does not want to work night shifts, but she believes the contract gives her the choice between overtime and night shifts, so she signs the contract. On the other hand, the employer wants to assign the employee both overtime and night shifts, as needed. What happens when the employer first asks the employee to take a night shift? The short answer is that this scenario keeps many employment attorneys busy.

The good news is that the phrase “and/or” can easily be avoided. Half the time, this phrase really means “and,” and the other half the time, it means “or.” As a writer, the trick is to figure out which word is the proper replacement for the awkward phrase “and/or.” When in doubt, use one of the following correlative conjunction phrases in place of “and/or”:

- Either __ or __
- Both __ and __

Either or both of the following: (this phrase is for those writers who cannot make a choice between “and” and “or.”)

Second, “and” helps shorten sentences by joining ideas together and avoiding repetition, yet legal drafters know that “and” can be read two ways: as providing an additive or an alternative. Consider the following sentence:

Employees who have medical and disability insurance are eligible for the seminar.

Does the employee need to have both medical insurance and disability insurance? (additive) Or, does the employee need just one type of insurance? (alternative)

The reason these questions are hard to answer is because “and” is used both ways in modern English. This same ambiguous usage exists with the word “or.” As legal writers, we can avoid these ambiguities by using the correlative conjunction phrases mentioned above.

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**Have fun with your peers, your family and friends**

Events such as the YLD's annual Race Judicata welcome everyone to participate. Frequently, CLEs have a social component where guest are welcome: Wine tastings, baseball games, and tours. We think that's an important aspect of bar membership.

**Facilities Usage**

The MCBA will be back in its own building by the end of the year (fire destroyed the building in February and the office is currently in temporary space). Conveniently located near downtown, at 303 E. Palm Lane, the building offers meeting rooms plus convenient onsite parking. Space rental is available during regular office hours on a reservation basis.

**Grow Your Practice with LRS**

The MCBA Lawyer Referral Service (LRS) can help you bring clients in the door. MCBA members in good standing with the State Bar and who carry malpractice insurance may sign up as a panel member for just $50 per year. LRS pre-screens clients and makes the appropriate match with a panel attorney.

Potential clients pay a $35 nonrefundable free for a half-hour consultation with the selected attorney. After that, the attorney's regular rate applies if both decide to proceed.

LRS has a new logo and tagline, its own website under construction, and a Google ad campaign that starts soon. Call Linda Pena at (602) 257-4200 to sign-up and benefit from our new marketing efforts.

**Related Organizations**

**The Maricopa County Bar Foundation**

The MCBF is the charitable arm of the association. It raises funds through members who donate $15 above their dues amount each year when renewing their membership; through the Case, Huff & Associates Pro Bono Golf Classic; and various other fundraisers. Each year, the Foundation makes grants to a number of worthy law-related organizations.

**Volunteer Lawyers Program**

VLP is a joint project between the MCBA and Community Legal Services to provide legal services to the indigent in Maricopa County and to recruit attorneys for pro bono representation. Its annual awards luncheon honors the individual generosity of the legal community. It also serves as a reminder of how lawyers can make a huge difference in the lives of people who would not otherwise receive legal assistance.
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McBA Annual Meeting and Hall of Fame Induction
The exceptional lawyers and judges of Maricopa County, past and present, are honored each October. Eventually, the Hall of Fame honors plaques will be housed in the proposed Justice Learning Center and Museum at the Old Courthouse in downtown Phoenix.

Barristers Ball
The legal community’s formal gala, with a silent auction to benefit a worthy charity, is sponsored by the YLD and brings out a well-dressed crowd each March.

Pro Bono Golf Classic
Sponsored in 2009 by Case, Huff & Associates, this November out-door charity event is sponsored by the YLD and brings out a well-dressed crowd each March.

WorldPoints
Now everyday purchases can add up to rewards. The WorldPoints program lets you choose from among great rewards like cash, travel, brand-name merchandise, and gift cards for top retailers.* Use your Maricopa County Bar Association Platinum Plus® MasterCard® credit card with WorldPoints® rewards, and you’ll enjoy around-the-clock fraud protection, free additional cards for others you trust, and quick, secure online access to your account.

MCBA created the Maricopa County Bar Hall of Fame last year to honor the county’s exceptional lawyers. These plaques will hang in the MCBA’s office until their permanent home is established in the Old Courthouse in downtown Phoenix.
Arizona Gov. Jan Brewer announced the appointment of David Palmer and Pamela Frasher Gates to the Maricopa County Superior Court.

Palmer has served as a Maricopa County Court Commissioner since 2004. He graduated from the Brigham Young University Law School in 1986, and received his undergraduate degree from BYU in 1983. He worked at the Maricopa County Attorney’s Office from 1991 to 2004, and served as an associate in the law firms Perry, Piersson & Kolsrud and Shimmel, Hill, Bishop & Gruender earlier in his practice. He clerked for Judge D.L. Greer on the Arizona Court of Appeals from 1986-87.

“David has had an impressive career as a prosecutor and court commissioner,” stated Gov. Brewer. “His extensive courtroom experience and proven judicial expertise make him well qualified to be a superior court judge.”

This appointment was made to fill the vacancy created by the retirement of the Hon. Silvia Arellano.

Pam Gates is a partner with the law firm Bryan Cave, where she has worked since 1997. She worked for the law firm O’Connor Cavanagh from 1996 to 1997. She graduated from the University of Iowa College of Law in 1996 with distinction, and received her undergraduate degree from Drake University in Iowa in 1993. She is active in many community organizations, including service on the board of UMOM New Day Centers, Arizona’s largest homeless shelter for families.

“Pam is a tireless worker who has proven herself to be an outstanding attorney and advocate for her clients and causes,” stated Gov. Brewer. “Her sense of community and fairness make her well qualified to serve as a superior court judge.”

This appointment was made to fill the vacancy created by the retirement of the Honorable Thomas Dunevant III.
VLP ATTORNEY OF THE MONTH

Follow Through and Zeal Help Shari Miller Aid Low-Income Clients

By Peggi Cornelius

Shortly after joining the Volunteer Lawyers Program at the outset of 2009, attorney Shari Miller became indispensable in providing legal counsel and assistance to low income clients whose civil law problems are debt related. For her frequent participation in advice clinics, her follow through and zealous advocacy, Miller has been named the VLP’s Attorney of the Month.

As the first to graduate from the Phoenix School of Law in 2008, Miller began her career as an attorney at the Phoenix Law Group of Feldman Brown Wala Hall & Agena, PLC. Her specialty is pharmacy benefits management and health care.

“One of the benefits of my pro bono work is the opportunity to branch out into other areas of law. I’m able to learn and serve simultaneously,” said Miller.

Serving is definitely Miller’s forte. When it comes to learning, she credits another volunteer attorney, Thomas Moring of Pak and Moring, PLC, for being a mentor to her as she advises and assists VLP clients. Moring describes Miller as, “…a stellar advocate for VLP clients. I have been consistently impressed by her compassion, and drive to help others. I enjoy having her on my team as we litigate those matters that require it.”

Both Miller and Moring provide many hours of pro bono advice, while assessing the need for representation in individual cases. As Miller points out, “In many instances, follow-up after the initial consultation can be the key to simple solutions.” In some cases she has helped resolve, the simple solutions have involved contacting opposing attorneys when the self-help efforts of clients have failed, arranging for additional pro bono advice from a colleague with relevant expertise, or researching unfamiliar legal issues to answer a client’s questions at a later time.

When she encounters cases where representation is necessary, such as one in which there appeared to be grounds to set aside a judgment, Miller doesn’t hesitate to intervene. “That case was additionally compelling because the meager wages of a widow were being attached to satisfy a debt of which she was unaware,” said Miller.

A native of Minnesota, Miller recalls aspiring to be an attorney while studying for her undergraduate degree, but deciding to postpone law school in lieu of full time employment. She obtained a graduate degree in labor relations, and worked in negotiations and arbitration.

Marriage and her husband’s career path took her to Nebraska, where she was employed as a mediator in a statewide program for farm families filing for Chapter 12 bankruptcies. “That was certainly a wonderful learning experience for me, too,” said Miller. “I didn’t know my tractors from my combines!”

Her sense of humor is doubtless one of the many assets Miller brings to her work with VLP clients. Reflecting on the increase in requests for legal assistance in consumer matters, she noted that people who may not have needed or been financially eligible for VLP services a year or two ago are seeking help now.

Miller says, “They are often people whose current problems stem from sudden and prolonged unemployment or under-employment. They may be facing or have already suffered the loss of vehicles and homes. Their indebtedness mounts as late fees, accruing interest, and the cost of legal proceedings are compounded. They’re unfamiliar with collections practices, court proceedings, and their legal rights. They are naturally worried and some are ashamed or embarrassed.”

“When someone has lost everything, I think it imperative that they be treated with dignity. That is something I can offer, even if there may be no legal remedy for their troubles.”

If you would like information regarding pro bono opportunities through the Volunteer Lawyers Program, contact director Patricia Gerrich at (602) 254-4714 or pgerrich@csaz.org.

Toiletries Needed for Necessities Drive

The Young Lawyers Division’s Domestic Violence Committee is seeking much needed toiletries for its Necessities Drive to market October’s Domestic Violence Awareness Month. Items such as shampoo, soap, diapers, deodorant, toothpaste and toothbrushes, and feminine products are needed. These goods will be distributed to women and children in Phoenix-area domestic violence shelters, in addition to a “Survivors Guide” with basic legal information.

Donations are greatly appreciated and can be dropped off at the MCBA office until Friday, Oct. 9.

For more information regarding the drive, please contact Domestic Violence Committee Chair Leslie Satterlee at lsatterlee@rglaw.com.

Volunteer Lawyers Program Thanks Attorneys

The Volunteer Lawyers Program thanks the following attorneys and firms for accepting 42 cases during the past month.

VLP supports pro bono service of attorneys by screening for financial need and legal merit and provides primary malpractice coverage, donated services from support professionals, training, materials, mentors, and consultants. Each attorney receives a certificate from MCBA for a CLE discount.

For information about cases and other ways to help, please contact Pat Gerrich at VLP at (602) 254-4714 or pgerrich@csaz.org.

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THE BULLETIN BOARD

News from the legal community

The Maricopa Lawyer invites members to send news of moves, promotions, honors and special events to post in this space. Photos welcome. Send your news via e-mail to maricopalawyer@maricopabar.org.

Moves and New Hires

Phoenix-based law firm Engelman Berger has started a new ‘chapter’ with the addition of Chicago bankruptcy attorney, Patrick Clisham. Clisham brings experience representing individuals and corporate creditors and debtors through all aspects of Chapter 11 to Engelman Berger.

The national law firm of Quarles & Brady is pleased to announce that Hilary Barnes has been elected president of the board of directors for YWCA Maricopa County.

Barnes, a partner with the firm’s commercial bankruptcy, restructuring & creditors’ rights practice group, focuses her practice on creditors’ rights in bankruptcy and state court proceedings.

Among the areas needing coverage are: administrative law, SSI-SSD/Medicare law, workers’ compensation, and immigration. Spanish-speaking and West Valley attorneys are also needed.

It’s easy to join! Call Linda Peña at (602) 682-8590.

Honors, Awards and Certifications

The Arizona Pharmacy Alliance awarded Laura Carpenter the Pharmacy Appreciation Award in recognition of her significant interest and time dedication to support the advance of the profession of pharmacy in Arizona. The award was presented at the annual Arizona Pharmacy Alliance conference in Tucson. Carpenter is the principal of the Carpenter Law Firm which provides legal representation and advice to local and national pharmacies, drug distributors, and other healthcare providers in the areas of pharmacy law, drug & device distributor law, business planning, third party payor issues, risk management, corporate compliance, HIPAA and general healthcare law.

College Launches New Patent Law Clinic, Students to Learn While Assisting Inventors

By Janie Magruder

The Sandra Day O’Connor College of Law at Arizona State University has joined the ranks of a handful of law schools across the country that offer students specialized training in protecting the creative property of inventors.

The provisional Lisa Foundation Patent Law Clinic is the brainchild of prominent Chicago patent attorney Steven G. Lisa, a 1984 alumnus of the College of Law. Through Lisa’s foundation, the clinic has received $100,000.

The announcement by Dean Paul Schiff Berman brings the number of clinics at the College of Law to nine.

“As part of our initiative to create a new model for public legal education in the 21st century, we want law students to learn how to be lawyers to the entrepreneurs and innovators of tomorrow,” Berman said.

“Thus, it is with particular excitement that we launch this new clinical program.”

Lisa’s original patent program was housed several years ago at Arizona Technology Enterprises (AzTE), then was moved to the law school’s Technology Ventures Clinic, now the Technology Ventures Services Group. He also created the Lisa Fellowship program, along with a Lisa Foundation Award that annually is given to an outstanding third-year student who makes significant contributions to the college’s Center for the Study of Law, Science, & Technology.

“I was prompted to create the fellowship at the College of Law because I was rewarded with a great career and was at a point between my caseload where I could devote some time, in addition to the financial resources necessary to get programs off the ground,” Lisa said.

The three-credit clinic is an extension of the college’s Center for the Study of Law, Science, & Technology, which attracts students from around the world who want to study the intersection of science with law and policy.

Among them are clinic director Michelle Gross, a patent agent at the Tempe intellectual property law firm of Booth Udall, and a 2009 alumna of the College of Law and former Lisa Fellow. Clinic students meet weekly with Gross to reinforce the concepts they’ve learned in the course, patent licensing and enforcement. The course is taught by Lisa and Jon Kappes (class of 2006), an attorney at the Lisa firm and a Lisa Foundation Award winner.

Because of her patent agent experience within the Lisa Fellowship program, Gross was “head and shoulders above most students when they graduate,” said Kappes, and is an ideal choice for clinic director.

The students receive hands-on experience in real-world patent prosecution, licensing and litigation, and currently are working with three clients and soon will add three more. The students learn to think about patent work in the holistic way that Lisa practices it—from both the patent application and acquisition perspective and from the enforcement side, Kappes said.

“These are significant branches of patent law, and they often don’t overlap in law firms,” said Kappes, noting the end goal is to have a high-quality patent. “This is enormously beneficial for these students, because most of them will end up working in one of these two fields, and whichever direction they go, they will have gained important insights into both.”

The clinic is a plus for inventors who can’t afford obtaining a patent, a process which typically costs a minimum $10,000, and easily can escalate to $100,000; litigation charges can run into seven figures, Kappes said.

“Most of the clients don’t have the financial resources to have this work done on the outside,” Gross said. “They are asked to make a small, modest donation now, but we’re really hoping some of the companies and individuals will be financially successful and will be able to make more substantial donations in the future.”
and the rule in this case was a victory for Mr. Devore. Further, had the Defendants not timely served a copy of their Motion to Strike to paper Plaintiff’s counsel of death, some type [sic] would not have occurred. Furthermore, there have been omissions by the Defendants, thus they should not case [sic] stones.”

“If these mistakes were purposeful,” the magistrate judge concluded in Devore, “they would be brilliant.”

Puricelli’s courtroom performance in Devore impressed the court, which found that the lawyer was “well prepared, his witnesses were prepped, and his case proceeded quite artfully and smoothly.” The magistrate judge concluded, however, that Puricelli’s “complete lack of care in his written product shows disrespect for the court.”

Finding that the plaintiff’s filings were marked by an “epidemic” of misspellings interspersed in “vague, ambiguous, unintelligible, verbose and repetitive” passages, the court approved fees at a dual rate, $300 an hour for courtroom work, but only $150 an hour (a rate the court found “generous” under the circumstances) for written work. How Not to Seek an Award of Attorney’s Fees continued from page 3

**Making Sense of This Saga**

This unfortunate tale yields six lessons useful even to lawyers whose writing would not descend to lawyer Puricelli’s levels.

**Law is indeed a literary profession**

If the Devore opinion is any indication, Brian Puricelli could argue effectively in the courtroom, though his written submissions did neither him nor his client any good. Lawyering depends on spoken and written expression, and lawyers act at their peril when they give short shrift to either. When I was in law school, Professor Louis Lusky would tell his classes that “a lawyer who can stand up and speak effectively before a tribunal will never go hungry.” He did not mean to limit his advice to future litigators because, he told us, effective client representation demands versatility. Indeed, we law professors sometimes justify our classroom use of the potentially intimidating Socratic Method as a way to help train our students to communicate in public on legal issues, whether as advocates or counsel.

Writing is also central to the lawyer’s professional repertoire. In my first “Writing It Right” article, I surveyed the vast universe of writing regularly done by lawyers: “Briefs, motion papers and transactional documents dominate client representation; judges speak through written opinions; and lawyers draft legislation, administrative regulations and other government documents. Lawyers and judges write treaties, law journal articles, and continuing legal education materials. Lawyers also discuss important policy questions in magazine articles, newspaper columns and Internet postings. . . .”

Lawyers frequently write under time pressure imposed by tight, inflexible deadlines. An occasional typo in written submissions is understandable because lawyers, like other people, may strive for perfection but rarely achieve it. Despite their busy schedules, however, lawyers need to guard against overly deficient writing, even when the deficiency would likely not capture the public attention drawn by McKenna and Devore.

Careless writing can unreasonably burden the court and adversaries

In Devore, the magistrate judge reduced Puricelli’s fees award partly because the lawyer’s “lack of care caused the court, and . . . defense counsel, to expend an inordinate amount of time deciphering the arguments and responding, accordingly.” Time remains a precious commodity for courts and counsel, who cannot afford the luxury of confidently skimming over inarticulate papers sworn with rhetorical roadblocks.

In trial and appellate courts alike, advocates need to consider the professional “responsibility (and, indeed, the opportunity) to assist the court . . . by making the reading easier and more manageable.” Even outside the courtroom, however, written communication marked by proper grammar, syntax and spelling is a bare minimum expected from the men and women who practice our literary profession.

There is no substitute for careful editing

Judge Ditter found that any pre-submissions editing of the McKenna complaint by Brian Puricelli’s co-counsel was “shamefully inadequate.” The writer could have been said about any editing that might have been done on the lawyer’s other written submissions in that case and Devore.

Editing begins with the writer, whose own proofreading is essential to any document destined to reach an audience large or small. Lawyers remain ultimately responsible for their own written work, so (to quote President Harry S. Truman) the buck stops with them. Because lawyer Puricelli knew that he would sign his filings and advance them as his own, he had no basis for the understatement, shortly after the McKenna court slashed his fees request, that “sometimes I don’t proofread enough.”

At some point, however, even talented writers lose capacity to improve the draft by themselves. A strong finish depends on enlist- ing input from others who review and critique the draft for substance and style. In the Spring 2008 issue of Precedent, I advanced six basic guidelines to direct a writer’s quest for productive editing by others. “[N]o one,” I wrote, “has ever edited my work and made it worse.” With the slightest reflection, any lawyer could say the same.

Editing by others remains doubly important to lawyers who hold misgivings about the quality of their written expression, as Puricelli certainly should have held before he filed the McKenna complaint. In a law firm of any size, lawyers seeking editorial assistance may consider enlisting partners, associates, administrative assistants, or even student law clerks or interns. Each of these people has different capacities to provide substantive or stylistic support, but any could easily have improved Puricelli’s documents before he filed them.

Beware of ‘spell-check’

In an interview with The Legal Intelligencer shortly after Judge Ditter slashed his fees request, lawyer Puricelli acknowledged that he relies too heavily on spell-checking software. Dependence on spell-check actually does not appear to be the root of his problems in McKenna and Devore, however, because even relatively quick use would have caught many of the misspellings. Because other misspellings would have escaped detection, however, Puricelli’s predilection provides opportunity for cautionary words about this software, whose limitations should come as no surprise to any careful writer familiar with it.

Like so many other “labor saving” devices that affect our daily lives, spell-checking software can exact a heavy price. The software (and grammar-checking software in programs that have it) is actually quite porous. Spell-check does not detect a misspelled word when the writer inadvertently spells another word correctly (in Devore, for example, “tried” and “tired,” or “cast” and “case”).

Spell-check alerts me to problems I type. Near the end of a project, I sometimes pay closer attention to spell-check before I do my own proofreading, sometimes after. Whatever the preference, spell-check is a tool and not a crutch, useful indeed but not a short-cut or substitute for good old-fashioned proofreading. Close proofreading is hard work, but writing is itself hard work, whether an impending deadline looms, or whether the writer has greater time for reflection.

As Benjamin Franklin wrote and as sports coaches still regularly repeat to instill a work ethic in their athletes, “[t]here are no gains, without pains.” The federal judges’ acid reactions to lawyer Puricelli’s submissions also summon the admonition of eighteenth-century British author and lexicographer Samuel Johnson that “[w]hat is written without effort is in general read without pleasure.”

Cutting-and-pasting can be dangerous

Judge Ditter cited careless cutting-and-pasting grounds for reducing the McKenna fees request.

Form books can be found in most law libraries, and internal form files have long been staples in private law firms and public agencies. Like spell-checking and grammar-checking software, however, forms can be tantalizing invitations to laziness and corner-cutting. Forms that appear grammatically correct and structurally sound might win high grades in a law school drafting seminar, but in actual law practice they may carry unintended pitfalls for failing to reflect the unique circumstances the lawyer and client now confront.

On the one hand, a lawyer carefully using all or part of a form can avoid wasteful efforts to “reinvent the wheel.” The lawyer can profit from prior wisdom while saving valuable professional time, and thus presumably also unnecessary costs to clients.

Forms remain useful, however, only when the lawyer adapts them to suit the present matter. Lawyer Puricelli learned the hard way, for example, that passages quickly lifted or marked-up can inadvertently preserve former names, dates and circumstances. Opponents snicker, and the billed client feels slighted by the lawyer’s failure to recite its name or cause properly.

In hard-nosed-negotiations, inadvertence can also weaken the lawyer’s hand, and thus the client’s position, by evincing a lack of thoroughness that might lead opposing lawyers to “smell blood” and seek to take advantage. As Judge Ditter demonstrated in McKenna, carelessness can diminish the court’s confidence in the lawyer’s advocacy.

The form may also have emerged from a context quite different from today’s context, though the difference is unlikely to appear on the face of the form months or years after its deposit in the form book or internal form file.

The form, for example, may have been finalized under the law of a jurisdiction other than the one that would govern today’s proceeding, particularly where the form appears in a national form book. Even within a particular jurisdiction, the operative law may have changed in the interim. Today’s parties may also have backgrounds, needs, desires and anticipated future courses of dealings different from those that motivated the parties responsible for the form.

Forms frequently contain language and passages that emerged after negotiations, and perhaps tedious give-and-take and ultimate compromise, that reflected the relative bargaining power of the pair parties. Parroting weaker form language, for example, deserves a client that is now in the stronger position. The buyer’s counsel may have written the first draft of the form, but today’s first draft might be the seller’s responsibility.

Like spell-check, a good form is a tool and not a crutch. Forms are useful indeed, but are not short-cuts or substitutes for good old-fashioned analysis, interpretation, reasoning and negotiation based on counsel’s informed understanding of the client’s needs and circumstances today.

Electronic submissions require special care

Lawyer Puricelli told The Legal Intelligencer that, using the McKenna court’s electronic filing system, he had accidentally first filed a draft that had not been proofread. The lawyer’s dismal track record makes this explanation hard to swallow, but the explanation nonetheless presents another opportunity for cautionary words: Technology provides no excuse for abandoning the good, old-fashioned care required when lawyers mail or hand-deliver their papers to the courthouse and the other parties. It is too easy sometimes to press a key on the computer and then have “sender’s regret” once it is too late.

Conclusion: The Lawyer’s Most Valuable Asset

Shortly after Judge Ditter’s decision on his fees request, lawyer Puricelli charged that he is now “singled out” by judges and opponents because his public chastisement in Devore had attracted such attention four years earlier.

See How Not to Seek an Award page 15
To register, use the registration form on this page, go to www.maricopabar.org, or call Jennifer Deckert (602) 257-4200. Unless otherwise specified, all CLE programs will be held at the MCBA office: 2001 N. 3rd Street, Suite 204, Phoenix, AZ 85004.
Church Adherent Cannot Use Tenets to Beat Marijuana Charges

**continued from page 1**

family units that establish their own mode of worship. Hardesty's mode of worship "was to smoke and eat marijuana without limit as to time or place."

The State moved to preclude Hardesty from presenting any such evidence at trial. The trial court sided with the State, concluding that Arizona law did not recognize Hardesty's defense. The court of appeals affirmed, citing the State's compelling interest in banning marihuana possession. State v. Hardesty, 220 Ariz. 149, 204 P.3d 407 (App. 2008). Berch noted that the Arizona Legislature had enacted FERA "to protect Arizona citizens' right to exercise their religious beliefs free from undue governmental interference." Persons asserting a FERA defense must first establish that their actions were motivated by a sincerely held religious belief. If so, the defense prevails unless the government establishes that its actions are "[t]he least restrictive means of furthering [a] compelling governmental interest."

The State conceded that sincere religious beliefs underlay Hardesty consumption of marihuana, so Berch turned to whether the State had met its burden. The first issue was determining whether the judge or jury answers the question. She noted that "[c]ourts have consistently held the compelling interest/least restrictive means test as a question of law to be determined by the court and subject to de novo review." Finding no compelling reason not to do the same with FERA, she held that the issue was not one for the jury.

Berch refused Hardesty's attempt to require strict scrutiny of the State's actions. She distinguished the case on which he relied, Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993), because it involved a First Amendment challenge to a "statute that singled out and prohibited a disfavored religious practice of a particular religion by imposing a burden only on religiously motivated conduct." The Supreme Court had stated there that a law targeting religious conduct is the "precise evil that the requirement of general applicability is designed to prevent." By contrast, Berch noted, the laws under which Hardesty was being prosecuted were nondiscriminatory ones of general application, which receive more deferential review.

Having established the legal standards, Berch turned to the central question. Hardesty conceded that the State does have a compelling interest in enforcing its drug laws. He argued instead that the laws did not use the least restrictive means to reach their goals.

**continued from page 2**

primary residence for six consecutive months but S.B. 1271 didn't say that. It was ambiguous and, if it had not been repealed, would have likely lead to litigation to determine what exactly was meant by the changes.

On one hand the ambiguity in S.B. 1271 is a moot point since it was repealed. On the other hand, like the ninja, the threat of another dangerous iceberg. No wonder people are confused.

Having established the legal standards, Berch turned to the central question. Hardesty conceded that the State does have a compelling interest in enforcing its drug laws. He argued instead that the laws did not use the least restrictive means to reach their goals.

Determined this question required an examination of the specific government interests served by the laws. Berch noted that the State had posited two interests: "preventing the deleterious health effects associated with marihuana use and combating the danger to public safety and welfare that result from trafficking in marijuana." She noted a third "obvious" interest: "the public safety concern posed by unlimited use, particularly by those driving motor vehicles."

"[T]he State," Berch wrote, "must show that proposed alternatives for achieving the State's compelling interest are ineffective or impractical."

"[I]t does not," she continued, "have to show that no less restrictive way to regulate is conceivable, only that none has been proposed."

The issue was a stark one. "Hardesty claims an unlimited religious right to use marijuana whenever and where he chooses, and in whatever amounts he sees fit," Berch wrote. "In the context of this case, no means less restrictive than a ban will achieve the State's conceded interests."

Berch rejected Hardesty's reliance on exceptions granted for the religious use of peyote. While "[m]embers of the Native American Church assert only the religious right to use peyote in limited sacramental rites[,]" she noted, "Hardesty asserts the right to use marijuana whenever he pleases, including while driving."

"Given Hardesty's religious beliefs," Berch wrote, "we conclude that there is no less restrictive alternative that would serve the State's compelling public safety interests and still excuse the conduct for which Hardesty was tried and convicted." Joining her opinion were Vice Chief Justice Andrew D. Hurwitz and Justices Michael D. Ryan and W. Scott Bales. Also joining was recently retired Justice Ruth V. McGregor.

Kaufmann v. Crouchbank

Although judges have various tools available to address improper actions by attorneys who appear before them, their inherent powers are not unlimited. That is the import of an opinion by Division Two of the Arizona Court of Appeals vacating an award of attorneys' fees against a defense attorney in a criminal case.

Kaufmann v. Crouchbank, No. 2 CA-CV 2009-0031 (Ariz. App. Sept. 17, 2009). While representing a defendant in a criminal prosecution, Tucson attorney John D. Kaufmann sought an order to show cause to hold in contempt the Pima County Attorney's Office and a deputy county attorney. He alleged that after charges had been filed against his client, she had cooperated with prosecutors by providing information about other defendants. She also had given a statement that implicated another defendant in a homicide case.

Kaufmann alleged that the prosecutors had promised promises given in exchange for his client's cooperation. He also alleged that they had endangered her life by failing to warn her before disclosing to the attorney for the homicide defendant the statement she had made implicating him. Kaufmann asked that the deputy county attorney be held in contempt and that his client be awarded monetary sanctions. He also asked the court to modify her plea agreement and to award her attorneys' fees.

The prosecutors responded that Kaufmann's petition was baseless and vexatious. They asked the trial judge to sanction Kaufmann by requiring him to pay their attorneys' fees incurred in responding to the petition. The trial court agreed and awarded the State $499 in fees. Division Two took the case on special action.

Writing for the court, Judge Peter J. Eckerstrom held that the trial court had exceeded its authority in ordering Kaufmann to pay the State's attorneys' fees. He recognized that Arizona generally follows the so-called American Rule, under which each side of an action must bear its own attorneys' fees unless a contract or statute specifically provides otherwise. He noted that, in contrast with the rules of civil procedure, the rules of criminal procedure do not have any fee-shift provisions.

Eckerstrom also pointed to two statutes that allow fee shifting, A.R.S. §§ 12-349 and 12-341.01(C). Neither of them, he noted, specifically applied to criminal proceedings and one of them, § 12-349, specifically excepted criminal cases.

Instead of relying on any statute or rule, the State relied on Turning the courts' inherent powers. Eckerstrom noted that "[a]lthough a court may have the inherent authority to sanction a lawyer for litigation conduct, our supreme court has . . . suggested only limited circumstances in which those sanctions may include attorney fee awards that are otherwise unsupported by statute or rule."

He "rejected" the suggestion that a trial court possess inherent authority to shift attorney fees in a criminal case when our state's common law offers no precedent for such action and when doing so defies the "implicit intent of pertinent legislation on the same subject."

Joining Eckerstrom were Judges J. William Brammer, Jr., and Gary L. Vázquez.

Eleven Vie for Board Seats, Election Goes Paperless

continued from page 1

their votes. Members without e-mails in the MCBA database will receive a letter in the mail with the same information.

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