Arizona Supreme Court imposes limits on duty element in negligence cases

The Arizona Supreme Court has announced stringent limitations on the element of duty in negligence cases. It held that “duty is based on either special relationships recognized by the common law or relationships created by public policy.” And it limited the courts’ role in declaring public policies that give rise to tort duties.

In the process, it rejected the expansive view of duty espoused in the latest version of the Restatement. Quiroz v. ALCOA, Inc., No. CV-16-0248-PR (Ariz. May 11, 2018).

Ernest V. Quiroz died from mesothelioma, an asbestos-related cancer. His father had worked at the Reynolds Metal Company’s plant for 35 years. And each night after work he came home wearing asbestos-contaminated clothes.

Quiroz’s family sued Reynolds, alleging that it breached a duty to protect Quiroz from take-home asbestos. Reynolds allegedly failed to warn about the dangers of secondary asbestos and did not take adequate safety measures. The superior court granted summary judgment to Reynolds, which the court of appeals upheld, holding that it owed no legal duty to Quiroz. In an opinion by Justice Andrew Gould, the Supreme Court agreed.

For years, Arizona courts had included foreseeability in its duty analysis. “Unlike duty,” Gould wrote, “applying foreseeability to breach and causation determines whether the injury was foreseeable, and not whether the plaintiff was foreseeable.” Some cases—such as the landmark Markowitz v. Arizona Parks Board—had limited foreseeability to the breach causation questions. They “reasoned that applying foreseeability to duty required judges to make fact-specific determinations that encroached on the role of the jury.” Nevertheless, “foreseeability was widely used to determine the existence of duty, and it remained deeply embedded in the duty framework of this state.”

That ended with Gipson v. Carey, a 2007 opinion holding that the jury, not the judge, should decide “whether an injury to a particular plaintiff was foreseeable to a particular defendant” because it “necessarily involves an inquiry into the specific facts of an individual case.” Gould called Gipson “a sea change in Arizona tort law.” Now, “duty in Arizona is based on either recognized common law special relationships or relationships created by public policy.”

The primary sources of public policy-duties are state and federal statutes. “A statute reflecting public policy may create a duty when a plaintiff is within the class of persons to be protected by the statute and the harm that occurred ... is the risk that the statute sought to protect against,” Gould wrote, quoting Gipson. “[T]he statute itself creates a legal relationships between the parties giving rise to a duty.” Gould wrote that “in a country such as ours with over 300 million people, duties based on public policy are necessary to govern relationships between people who may be legal ‘strangers.’”

He recognized that public policy may also be found in the common law, but he imposed a significant limitation: “In the absence of a statute, we exercise great restraint in declaring public policy,” because generally “statements of public policy must be made by the people through the Legislature.”

“Courts unquestionably have authority to declare a public policy which already exists,” he wrote. But as a 1951 case had stated, they should not do so unless “such public policy is so thoroughly established as a state of public mind, so united and so definite and fixed that its existence is not subject to any
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This Maricopa Lawyer welcomes letters to the editors or opinion pieces for publication. Letters and opinion pieces should be typed and preferably submitted electronically. Opinion pieces are limited to 1,500 words and letters to 700 words, and the editors reserve the right to reject submissions of complaint for clarity, style and space considerations. Letters must be signed and may include signatures of members of the Association, its officers or its members. For more information, please visit maricopabar.org. The MCBA website is www.maricopabar.org. Advertising rates and information are also available at maricopalaawyer@maricopabar.org or (602) 257-4200.

MCBA PRESIDENT
Hon. Geoff Fish

Our Professional Family

The tragic events of last month have had a putting a lasting impact on our entire community. Our deepest sympathy and prayers go out to those directly affected; the victims, their families, their co-workers and others closely connected. While all such acts of violence are horrific, the recent events are especially difficult with ties to our legal and mental health communities. Though we reside in a county with a population of over four million, our legal and mental health communities remain tight knit and where almost everyone is within one degree of separation. I recognize that many of you likely know one or more of the victims. I would especially like to thank those members of our Association who immediately stepped up to organize a fundraising campaign to support the victims families.

Unfortunately, this was not the first such act of violence that has involved the legal community and will likely not be the last. Following the events, the State Bar of Arizona, the Maricopa Bar Association and the Arizona Chapter of the Association of Family and Conciliation Courts each promptly put together informational seminars dealing with these types of events and the impact they have. If you didn’t have a chance to attend any of these seminars, I would encourage you to seek out and attend any similar upcoming presentation as you will be provided critical information that can help you both in dealing with an immediate threat as well as coping with the traumatic aftermath.

As judicial officers, we are made aware all the time of the potential threats that exist simply by doing our day to day responsibilities. At the Superior Court, we are provided weekly reports by our Marshall’s Office of the various security events that have occurred and any active threats that may exist. In addition, we have been provided training and guidance in how one should act during an event. I recognize how fortunate we are to have these resources available and am thankful for those professionals whose duty it is to ensure that we and all those that visit our courts are kept safe.

At the same time, I realize that most legal and mental health professionals do not have those luxuries. While some of you may practice in buildings with on-site security, I would surmise that most don’t. Despite not wanting to believe something terrible may happen, it is important in today’s society that everyone has a plan in place should a situation occur.

Having just rotated away from a Family calendar and having practiced family law before my appointment to the bench, I am acutely aware that this area of the law is more likely to suffer from the type of incendiary that occurred. Raw emotions combined with mental health issues and the personal nature of the cases can create a scary scenario. Those that work in this area, whether they be legal or mental health professionals are on the front lines and special consideration should be given. There have been several occasions where I have had to press the red emergency button in my courtroom and I can tell you that the time between pressing the button and the arrival of deputies is extremely tense. If you find yourself in an uncomfortable situation at court, please do not hesitate in informing court staff of your request to have a deputy present during your case or even to escort you in and out of the court complex. Any proactive measures we can take reduce the chances of something bad happening.

While this has been an incredibly sad time, the outpouring of support for those affected is a testament to our community and the recognition that despite our differences and disputes, we are still one professional family.

GIVE US YOUR OPINION
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The Maricopa Lawyer is published monthly on the first of each month and mailed to members of the Maricopa County Bar Association. Please send address changes to: membership@maricopabar.org. Editorial submissions and advertising rate requests may be sent to maricopalawyer@maricopabar.org. The editors and other views expressed in the Maricopa Lawyer, are those of the Association, its officers or its members. For more information, please visit maricopabar.org. The MCBA website is www.maricopabar.org and pdf copies of past issues are available for viewing. Please send editorial submissions to Lori Katzoff at maricopalawyer@maricopabar.org. Advertising rates and information are also available at maricopalaawyer@maricopabar.org or (602) 257-4200.

THE OFFICIAL PUBLICATION OF THE MARICOPA COUNTY BAR ASSOCIATION

The mission of the MCBA is to serve its members, the legal profession, the judicial system and the public.

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2 • JUly 2018

MARICOPA LAWYER
MCBA Executive Director Report

Allister Adel

We have finally arrived! Arrived at the beginning of the new MCBA. After two years of examining what we mean to the community and what we need to be to best serve our stakeholders, we are now taking concrete steps toward the new MCBA. I am excited to announce our collaboration with Owens Harkey Strategic Communications. This outstanding team of professionals has begun their work to help us raise our profile and expand our reach in the community. OHSC knows the value we bring to Maricopa County and the legal profession and they are poised to showcase our legacy to the public as we continue to grow our membership.

Growth also means change. And in our case, growth also means narrowing the MCBA’s focus to meet the needs of legal professionals and the public at large. In the coming months, you’ll see many changes as we align our core pillars with our strategic vision. OHSC is assisting in the visioning process and we have already made changes in response to what you have told us you want from YOUR bar.

One such area is in self-care and wellness in our profession. With the support of experts, we are expanding member benefits to focus on wellness because it directly relates to our ability to competently practice law. I am proud to announce we are in the final stages of implementing a succession planning tool for members. In the unlikely but unfortunate event you are incapacitated, we will have the contact information for the person responsible for ensuring continuity of your practice. This is a confidential feature in your member profile, but the person you list will be able to determine who can triage things such as covering cases to knowing where your pass-words are stored. Look for emails soon and learn more at our conference in September where we will showcase this and other new lawyer wellness benefits for members.

Speaking of our conference, are you wondering why you haven’t heard of this before now? Well, it is technically new. In an effort to meet the needs of our members and be a more efficient business, we are combining some of our annual events into what will now be the MCBA Annual Meeting & Conference to take place on September 13 & 14, 2018. We are expanding upon the base of our wildly successful Bench Bar Conference to include another half day to focus on lawyer wellness. We converted our Hall of Fame & Awards lunch to a dinner program and added a members-only Past Presidents’ Reception prior to the dinner. It will be an outstanding event!

Finally, I hope each of you consider a leadership role within MCBA. We’ve had many recent openings for MCBA’s seat on various municipal judicial selection boards and more to come in the future. If you are interested in organizing community service projects or community events such as Law Day 2019, please contact me. We have open seats on the Board of Directors for the 2019-2021 term. Look for more information in this edition of The Maricopa Lawyer and future emails as the deadline to declare your candidacy is quickly approaching. MCBA has many other leadership opportunities, as does The Maricopa County Bar Foundation. Please email me if you’d like to learn more.

Enjoy the remainder of the (hot) summer and I look forward to seeing you in September at the Annual Meeting & Conference! Best,
Allister
aadel@maricopabar.org

We are still YOUR bar. But, we are a different, improved bar with a clear understanding of our identity, you’ve heard me speak about honoring our legacy. We continue to do that while embracing the changes ahead!

Deadline to declare candidacy in Board of Directors election is Sept. 15

The Maricopa County Bar Association (MCBA) is currently inviting members to declare their candidacy for one of five available seats on the board of directors. Each of the five positions consists of a two-year term beginning in 2019.

The terms of Hon. Julie LaFave, Amanda Reeve, Joy Isaacs, Ben Taylor and Tina Ziegler expire on December 31, 2018. An election will be held to fill their seats. A few of this group will likely run for re-election.

Board Members attend monthly meetings, liaise with one or more MCBA sections, divisions, or committees, and support the work of the association. They are expected to make every effort to attend the Annual Meeting/Hall of Fame/Bench-Bar Conference on September 13 and 14, and other membership events, as well as assist with fundraising and member recruitment. Candidates must be active members in good standing with the MCBA.

Candidates are asked to: (1) Submit a formal letter of candidacy to the Board of Directors, with the candidate’s signature, addressed to MCBA Executive Director, Allister Adel, either by email (PDF or MS Word document) to aadel@maricopabar.org; or postal mail to MCBA, 530 E. McDowell Road, Suite 107 Box 415, Phoenix, AZ 85004 no later than 5 p.m., Sept. 15, 2018. (2) Provide additional required election materials. A 200-word bio and a color jpeg photograph must be submitted to maricopabar.org no later than 5 p.m., Sept. 15, 2018. Submitted biographies that exceed 200 words may be edited by staff. Please note that a standard-form resume or curriculum vitae are not acceptable. This bio may include an optional position statement of the candidate’s vision and priorities for the MCBA. Position statements and any other campaign or election materials may not refer to other candidates or include defamatory or inappropriate language, as determined by an ad hoc Election Review Committee appointed by the President of the Association.

For complete election information, go to www.maricopabar.org for a copy of our By-laws on the Board of Directors webpage.
Do You Know What Time It Is? It’s Homeward Bound Back-to-School Drive Time

You may be asking yourself: who is Homeward Bound, who do they serve, and what is their mission? The MCBA Paralegal Division will be partnering with Homeward Bound for their Back-to-School Drive. Homeward Bound is a nonprofit based in Arizona that serves the needs of families going through homelessness. It serves over 130 homeless families every year, providing them with not just housing, but also an in-depth program that helps them get back on their own two feet. Its mission is to create pathways out of poverty for homeless families who are ready to make a change.

The MCBA Paralegal Division will collect school supplies that will be provided to the Homeward Bound children for school in the fall. Homeward Bound has provided a short list of items they are in need of (construction paper, calculators, combination locks, highlighters, and index cards, but they are happy to accept any and all donations of school supplies. We are looking for firms to participate in this endeavor. Please pass along the flyer to your co-workers, create a donation box in your office, and help collect the items. Donations of any school supplies: the Fall. Please help these children by donating any school supplies. The following are in need by Homeward Bound but they are happy to accept all donations:

- Highlighters
- Index cards
- Calculators
- Paper

This year, we are proud to partner with Homeward Bound to collect school supplies. Each year, Homeward Bound helps children to be prepared for school, providing them with clothing and school supplies. Just housing but a real pathway out of poverty — so they never become homeless again.

Each year, Homeward Bound helps children to be prepared for school, providing them with clothing and school supplies. This year, we are proud to partner with Homeward Bound to collect school supplies to fill the backpacks of the Homeward Bound children heading back to school in the fall. Please help these children by donating any school supplies. The following items are in need by Homeward Bound but they are happy to accept all donations of any school supplies:

- Construction paper
- Calculators
- Combination locks
- Highlighters
- Index cards

Please share this flyer with your co-workers and friends and encourage them to bring in their donations! Be your firm’s representative, create a box for the office, and start collecting today! Donations must be submitted by July 16th and can be dropped off at the MCBA office at the Phoenix Rotary, 501 E. Osborn, Phoenix, AZ. If delivery is an issue, please contact Andrea Marshall at amarshall@psazlaw.com to arrange pick up of the donations.

Sponsored by: Maricopa County Bar Association – Paralegal Division

A Serious Series Tip

Editing one’s own work is hard to do. Over the years, I have provided my students many tips for finding errors and ambiguities and fixing them. But my advice is generally focused on litigation documents, such as memoranda and briefs. When pressed to make a similar list of tips for statutes and contracts, I have one tip that rises to the top of that list: watch out for clarity issues in a series of words.

A series of words poses two potential ambiguities to a reader. First, the punctuation can cause ambiguity. For example, if the writer does not use a serial comma – especially if the state’s legislative drafting manual calls for a serial comma – the reader may be unclear whether the last two items in the series are separate items or a compound item. The 2017 O’Connor v. Oakhurst Dairy case from the First Circuit Court of Appeals discusses this ambiguity well (851 F.3d 69). Second, a series may contain a modifier that is unclear in its reach. The Oakhurst Dairy case touches on this issue as well.

Paralegal Division

Melinda Manchester

PARALEGAL DIVISION PRESIDENT

PARALEGAL DIVISION CALENDAR

July 11
Paralegal Division Board Meeting

July 16
Homeward Bound
Back-to-School Program Ends

Aug. 13
Paralegal Division Board Meeting
Summer TBD St Mary’s Emergency Food Packing

Sept. 10
Paralegal Division Board Meeting

Sept. 15
Deadline: Application for Student Scholarship

Nov. 9
19th Annual Paralegal Conference

Nov. 17
Light the Night Walk

Phoenix Municipal Stadium

A Serious Series Tip

Consider the following sentence:

The hair may award a grant to a current board member, a former board member, or a senior employee who meets provision 2B.

The trailing modifier of “who meets provision 2B” creates syntactic ambiguity because it is not clear whether the modifier refers to each item in the series or to just the last item. The easiest fix is to repeat the modifier with each item in the series. For more complicated sentences, though, a writer might have to rewrite the sentence. A rewrite might include creating a condition, defining a term, or making a list.

The chair may award a grant to a current board member who meets provision 2B, a former board member who meets provision 2B, or a senior employee who meets provision 2B.

The chair may award a grant to any of the following applicants who meet provision 2B: a current board member, a former board member, or a senior employee.

If an applicant meets provision 2B, the applicant is eligible for a grant. An applicant includes a current board member, a former board member, and a senior employee.

In short, making sure the modifier comes after the series is a helpful tip to avoid ambiguity.

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2018 Officers and Directors:

THANK YOU FOR MAKING A DIFFERENCE!

We’re Going Back To School

Homeward Bound

Homelessness affects thousands of children and families in Maricopa County, Arizona every year. Homeward Bound provides families with not just housing but a real pathway out of poverty — so they never become homeless again.

Each year, Homeward Bound helps children to be prepared for school, providing them with clothing and school supplies.

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LEGAL WRITING

Tamara Herrera

It’s Easy to Contribute

The court has made it easy to contribute with a convenient “pro bono” check-off form provided in your arbitration packet. For more information, go to maricopaabar.org and click on “About Us” on the top menu bar then “Maricopa County Superior Court.”

 Arbitration Fee Donations Help

Partnering with the Maricopa County Superior Court, the Maricopa County Bar Foundation (MCBF) is once again encouraging attorneys assigned to arbitration to donate the $75 fee to the Foundation’s fundraising efforts.

It’s Easy to Contribute

The court has made it easy to contribute with a convenient “pro bono” check-off box located at the bottom of the Invoice in Support of Request for Warrant, a form provided in your arbitration packet. For more information, go to maricopaabar.org and click on “About Us” on the top menu bar then “Maricopa County Bar Foundation.”

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Maricopa County Bar Association – Paralegal Division
There are many advantages to practicing in a large firm. I know; I started out in an IP Boutique—my own, which was medium sized at that time—but when I decided to concentrate on litigation, the disadvantages became readily apparent. While I concentrated on patent litigation for multi-national companies in the pharmaceutical, biotech, and medical device areas, my partners were either assisting me or doing trademark litigation. When depositions start being double and triple tracked, you see you have a problem. So I merged my boutique with a general practice firm and spent the next 17 years litigating and running the IP department.

I recall the issues and problems of solo/small firm. How long a lease shall I sign? How much space do I need? How much room for expansion shall I allow for? What do the surveys show as rates in our area?

And, unlike larger firms, with whom do I consult when I want to kick around a strategy? Fortunately, for solos and small firm attorneys, our Division offers a Mentoring Program. You can ask experienced attorneys how to deal with these issues and problems. You can bounce strategy off experienced attorneys. You can discuss your professional problems and concerns. For example: how much malpractice insurance should I take? Why do I need retainer letters? How do I define the scope of my retention? What happens when a client wants me to handle a matter beyond the scope of my initial retention? If I want to, do I need another retention letter?

Aside from our Division's Mentoring Program, I think it's important to have someone or several "someones," you can bounce things off. Get another view. In a general firm it's much easier but in a solo practice or even a small firm it is difficult. It's important to build connections. You really can't do your best for a client in a vacuum.

So, consider our Division's Mentoring Program or build your own network. But practice solely on one's own with no interaction does not generally yield the best result.

Solo Practice Attorneys and Those in Small Firms Face Special Issues and Problems Not Faced by Large Firm Attorneys

The Arizona Supreme Court authorized the expansion of the electronic search warrant program statewide for certain vehicular offenses. This expansion will greatly enhance efficiency for law enforcement agencies across Arizona while still providing appropriate judicial review of requests for warrants.

Effective August 1, the Superior Court in Maricopa County will assist law enforcement statewide by authorizing, when appropriate, electronic search warrant requests for blood, breath, urine, or other bodily substances for the following vehicular offenses:

- Driving under the influence;
- Vehicle-related homicide;
- Vehicle-related aggravated assault;
- Vehicle-related endangerment, or
- Other vehicle-related offenses.

The Arizona Governor's Office of Highway Safety collaborated with Maricopa County Superior Court and 24 Valley police departments on funding to develop an online electronic warrant project for blood draws on individuals suspected of driving under the influence. The early success of the 2012 pilot program led to another round of grant funding to allow Arizona Department of Public Safety (DPS) to expand the program to its officers across the state. The new Arizona Supreme Court's Administrative Order expands the program to all law enforcement agencies.

Search warrants and affidavits are exchanged electronically and securely between the law enforcement agencies and the Superior Court in Maricopa County. Previously, access to a fax machine was necessary to submit information for judicial review. Judicial officers review the affidavit and, if appropriate, return a search warrant through the county's 24/7 Initial Appearance Court.

“We commend Supreme Court Chief Justice Scott Bales, Superior Court Presiding Judge Janet Barton, and the former Presiding Judge Norm Davis for working on this process,” Alberto Gutier, director of the Governor's Office of Highway Safety said. “Being able to submit warrants for judicial review 24 hours a day and getting a timely response can mean the difference between safety and tragedy on our roadways.”

Transporting drivers suspected of impaired driving to a location that has a fax machine is hampered by the state's geography and many remote, rural areas. By reducing the amount of time it takes for law enforcement to obtain a warrant, public safety will be enhanced with faster, more accurate test results—and violators can be held accountable with biological evidence.

For more information about Arizona's judicial branch, visit www.azcourts.gov.
Legal Community and Compassion Fatigue

Judge Ronee F. Korbin Steiner
Superior Court of Arizona in Maricopa County

The American Counseling Association defines vicarious trauma, otherwise known as compassion fatigue, as the “cost of caring for others.” Other terms used for compassion fatigue are “secondary traumatic stress” or “secondary victimization.” While this type of trauma tends to be associated with counselors providing treatment to clients or patients, it has without question been expanded to include clergy, front-line social workers, justice system professionals, health care providers, humanitarian workers, journalists, and first responders. When helping professionals attempt to connect with their clients/victims emotionally, the symptoms of vicarious trauma can create emotional disturbance such as feelings of sadness, grief, irritability, and mood swings.

I’d be shocked to find a reader unaware of the recent events in Maricopa County involving the senseless death of six people—including well-known psychologist Dr. Steven Pitt, two family law paralegals, Laura Anderson and Veleria Sharp, psychologist Dr. Marshall Levine and Mary Simmons and Byron Thomas, Dr. Pitt, Ms. Anderson and Ms. Sharp—just doing their jobs. Dr. Levine likely in the wrong place at the wrong time, with the shooter intending to find someone else and the last two, their connection not yet having been defined but connected to the shooter nonetheless.

The fear instilled in the entire community over a short period of time by a family law litigant with a long history of mental health issues and serious issues with domestic violence is immeasurable. A relatively small number of people were involved in that case. But the reverberation has been loud and clear to many. As we all waited to understand why, to hear the words that we can. And, the best way that we can is to remember that all of the players are connected to the shooter nonetheless.

We are one hell of a legal community. While this impacted the family law community in particular, it is a quick reminder of what we all do on a daily basis—lawyers, mental health professionals, paralegals, investigators, judges, and others in the court system. We have a common interest and a common desire to do them well. But to be kind. To be supportive. To remember that all of the players need each other to make the system work well. Take care of yourselves.

3. It is important not to confuse vicarious trauma with “burnout.”
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MEMBER SPOTLIGHT
ROBERT S. REDER, BLYTHE GRACE PLLC

How long have you been a member of the MCBA?
I have been a member of the MCBA since I became a licensed Arizona attorney in 2005. Membership in the MCBA is an important part of my practice. It provides access to critical resources such as CLE, membership events, and legal publications. I believe that every practicing Arizona attorney should be a member of the MCBA.

If you hadn’t been a lawyer, what else would you be?
A geologist or horticulturist. Unfortunately my grade in freshman year chemistry derailed those dreams.

If you could be any fictional character, on TV/in books/in a movie, who would it be, and why?
The Hulk! Who doesn’t want to Hulk out and throw some cars and things every so often?

What’s the strangest job you’ve ever held?
I lived in Crete, Greece, for a semester and worked for a family that owned olive fields and goats. Tending the goats was fun, but removing thousands of olives from an olive tree—not so much.

Activities I enjoy
Gardening, working out, and snowboarding.

What I like most about living in Phoenix
I grow amazing peaches in the desert that are up there with Georgia peaches.

My favorite charity
The Girl Scouts. They do such amazing things for the young women of Arizona’s communities.

Clubs/organizations I’m involved in
Maricopa County Bar Association; The Girl Scouts; Desert Botanical Gardens.

What I do
I own a boutique law firm, Blythe Grace, PLLC.

My suggestion for new residents looking to get involved
Do the things that you love and have a passion for. If you don’t like doing something, you are unlikely to engage in it long term or derive any benefit from it.

Family
My family is my wife, Erin Reder, my 2-year-old son, Caden Reder, and my soon-to-be son, Logan Reder (due August 2018).

People who are an inspiration to me
Anyone who does the right thing, especially if the choice is a difficult one.

My advice to today’s youth
Work hard, take personal responsibility, and stop blaming society or others for your failures or problems.

ROBERT S. REDER, BLYTHE GRACE PLLC
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Public Asked for Input on Candidates for Superior Court Vacancy

The Maricopa County Commission on Trial Court Appointments is seeking public input on 15 candidates for two openings on the Superior Court in Maricopa County. The candidates are (MCBA members in bold):

• John L. Blanchard
• Scott A. Blaney
• Cassie Bray Woo
• Nicole M. Brickner
• David W. Garbarino
• David N. Horowitz
• Melissa Iyer Julian
• Joseph S. Kiefer
• Julie A. Mata
• Adele G. Ponce
• Sigmund G. Popko
• Andrew J. Russell
• Aryan D. Schwartz
• Annielaurie Van Wie
• Tracey J. Westerhausen

Their applications can be viewed online at the Commission’s website, http://azcourts.gov/jnc.

The Commission will meet to interview the candidates on July 25, 2018. The meeting will be held in room 345 of the Arizona State Courts Building, 1501 W. Washington, Phoenix, AZ 85007, starting at 8:00 a.m. The interview agenda will be posted on the Commission’s website at least 7 days prior to the meeting. Citizens may address the Commission on the day of the meeting or send written comments to jnc@courts.az.gov or to 1501 W. Washington, Suite 221, Phoenix, AZ 85007. It is not necessary to submit multiple copies of written comments, and email is preferred. Comments must be received no later than July 20 to be considered. Anonymous comments cannot be considered.

After the interviews, the Commission will recommend at least three nominees for each opening to Governor Doug Ducey, who will appoint the new judges.

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More information coming

Q&A

Ghostwriting—An Ethical Business Model Not Without Some Pitfalls for the Unwary

As with any client engagement, limited scope or not, it is imperative that the client understands the scope of your representation. This is especially salient when the representation is limited to ghostwriting. The client must understand not only the risks of proceeding pro se, but understand how the case will move forward after the limited scope engagement. Attorneys who represent clients in limited scope engagements are not required to be seers, but it would be prudent to advise the client of what possible outcomes may follow or flow from the scope of the limited engagement.

Another possible issue that has arisen from ghostwriting is opposing attorneys asking the client about being represented. If the client is not expecting these questions from opposing counsel, the client may be anxious or get defensive. However, if the attorney explains to the client at the outset of the representation that ghostwriting is ethically permissible and that the client is not duty-bound to disclose the existence of a ghostwriter or the identity of the ghostwriter to opposing counsel (unless a court inquires, in which case the client will generally be required to make these disclosures and should be advised by the attorney never to make any misrepresentation to the court).

This advice to the client may naturally lead to a discussion of other possible issues with ghostwriting such as whether or not the attorney will speak to opposing counsel as part of the representation. For example, if the client chooses to disclose to opposing counsel the identity of the ghostwriter and opposing counsel then wants to speak with the attorney, will this be included within the scope of the representation?

Unbundling of legal services including limited scope engagements and more specifically ghostwriting allows a greater number of people and entities access to legal representation that may have previously been cost-preclusive. Making sure that these clients are treated the same way as other clients—with proper advisals, engagement agreements, and the like—ensures that this new breed of legal services will not breach any of the attorney’s ethical duties.

Jessica Beckwith is an attorney with Lewis Brisbois. She is an attorney regulation and ethics attorney admitted to practice in Arizona and California. She can be reached at jessica.beckwith@lewisbrisbois.com or 213.680.3100.

CORRECTION

The Maricopa Lawyer incorrectly identified the author of the June 2018 Lawyer Liability and Ethics article, Breaking Up Is Hard To Do: When Partners Leave. The article was written by Joseph A. Brophy from Jennings Haug Cunningham. The Maricopa Lawyer regrets this error.
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From Associate Presiding Probate Judge Jay Polk, Maricopa County Superior Court

The downtown Probate/Mental Health Department will be moving from the Old Courthouse (OCH) to the East Court Building (ECB) the week of July 23. The move dates and locations are as follows:
- On July 25, 2018, Judge Klein will be moving to ECB 611.
- On July 25, 2018, Commissioner Patti Starr (moving to ECB 613) and Chris Whitten (moving to ECB 612) and Commissioner Sigmund Popko (moving to ECB 6th floor).
- Sometime of the week of July 23:
  - The Probate Clerk of Court filing counter in the OCH will be moving to the general Clerk of Court filing counter, which is located in the hallway between the Central Court Building and the West Court Building; and
  - Although most of Probate/Mental Health Court, Administration, will remain in the OCH, a probate case processing clerk will be moving to the third floor of ECB. Once this move has been completed, parties and lawyers wanting to obtain hearing dates on probate cases downtown will need to go to the third floor of ECB to obtain the hearing dates from the probate case processing clerk.

Also moving from the OCH to the ECB on July 25, 2018, will be Judges Patti Starr (moving to ECB 611) and Chris Whitten (moving to ECB 612) and Commissioner Sigmund Popko (moving to ECB 6th floor).

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Berk Law Group, P.C. is pleased to announce the addition of Dean E. Brekke as an associate attorney. Dean comes from a varied background that includes real estate planning, estate administration, litigation, and working with clients to establish long-lasting relationships. He has handled matters in Arizona trial courts and appellate courts as well as the United States District Court and Ninth Circuit Court of Appeals. He also has judicial experience having served as a Magistrate Judge in South Dakota for ten years and as a Maricopa County Judge Pro Tem. Dean has also been a presenter for continuing education seminars through the National Business Institute, primarily in the area of probate and estate administration.

Dean completed his BA degree in Mass Communications at the University of South Dakota and his Juris Doctor from USD’s School of Law. The South Dakota native worked for several years in radio, television and print media.

Free time interests for Dean include travel to Europe, photography and time with family, including four grandchildren.

Please visit the firm’s website for more information regarding its areas of practice at www.BerkLawGroup.com, or call us at (480) 607-7900.

Spencer Fane LLP is pleased to welcome Partner Michael Patterson to the Business Transactions practice group in the firm’s Phoenix office.

Patterson is an accomplished business attorney with extensive experience helping clients navigate corporate issues, mergers and acquisitions, securities, contracts, compliance, joint ventures, strategic alliances, market entry strategies and general business issues in domestic and international matters. He spent more than 10 years living and practicing law as a U.S. attorney in Latin America and regularly advises U.S. and foreign clients in connection with the establishment, structuring, and compliance of their international operations, including Canada, Mexico, Central and South America, Europe, Asia and Africa.

“Mike’s international experience will be a welcome addition to our growing office and firm. He has long been a fixture in the Phoenix and international business communities, and we are thrilled to welcome him to Spencer Fane,” said Andy Fe- derbar, Office Managing Partner for Spencer Fane in Phoenix. “We are committed to serving all of our clients in the diverse markets where they do business, and an attorney with Mike’s pedigree is essential to that mission.”

Patterson completed his undergraduate work at Arizona State and later earned his Juris Doctorate from the school’s Sandra Day O’Connor College of Law. He was recently named the Greater Phoenix “Ambassador of the Year” for 2018 by GPEC, is currently the Chair of the State Bar of Arizona’s Business Law Section, and serves on the Executive Council of the State Bar’s Securities Regulation Section and the International Section. He has previously served on the Arizona Governor’s Arizona-Mexico Commission and the Governor’s Solar Energy Advisory Task Force.

If you are an MCBA member and you’ve moved, been promoted, hired an associate, taken on a partner, or received a promotion or award, we’d like to hear from you. Talks, speeches (unless they are of national stature), CLE presentations and political announcements are not accepted. In addition, the Maricopa Lawyer will not print notices of honors determined by other publications (e.g., Super Lawyers, Best Lawyers, etc.). Notices are printed at no cost, must be submitted in writing and are subject to editing. Items printed are at the editor’s discretion.

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DO THIS, NOT THAT! Secrets Revealed Regarding the Judicial Nominating Application Submittal Phase

By Amanda A. Reeve & Paul Senseman
Public Members, Superior Court Judicial Nominating Commission-Mariapca County

Who doesn’t love the intrigue of a good mystery? For many, the answer to this question probably depends on the situation. Judicial applicants, however, are not particularly fond of mystery playing any role in the merit selection process. In an effort to provide some useful behind-the-scenes insight on Arizona’s judicial merit selection process, the next several columns of this series will reveal secrets which all applicants ought to be aware of through the various phases of the process. So, let’s pull back the curtain and take the mystery out of what a judicial applicant ought to do and ought not do in the efforts leading up to the final submittal of the application.

First and foremost, it is critical that applicants always remember to be honest and forthcoming. Discrepancies in submissions, though possibly harmless, can nevertheless create lingering doubts about a candidacy. The requirement for honesty should be completely obvious, but full and complete transparency is equally vital and can build confidence in the candidacy of an applicant even if it inspires a deeper conversation.

It is wise to keep in mind that in Arizona, the Judicial Nominating Commissions (“JNC’s”) are largely comprised of public member non-attorneys—a fact that is often completely obvious, but full and complete transparency is equally vital and can build confidence in the candidacy of an applicant even if it inspires a deeper conversation.

The JNC requires a candidate to focus their submission efforts exclusively on the judicial and legal community holds equal weight and must be considered in determining which matters to include. The more qualitative information shared throughout the application and from the applicant’s references, the better acquainted the JNC will become with the individual. The perception and impact of the applicant’s qualifications are going to represent their constituents honorably by ensuring that every person who comes before their court is giving a fair hearing in every conceivable sense.

It is one thing to have the sharpest legal mind; and quite another to have the temperament, open-mindedness, demeanor and a relatability to the public that is required to be a truly merit-worthy applicant. As The O'Connor Judicial Selection Plan published in June 2014 by Justice Sandra Day O'Connor (Ret.) and The Institute for the Advancement of the American Legal System (“IAALS”) explains, “In order to assure that the public viewpoint is well represented, a nominating commission should include a majority of non-attorney members who have a range of professional backgrounds and personal experiences. Nominating commissions must not be viewed as captive to attorney groups.” Therefore, applicants are best served to remember that it is not exclusively the legal community’s perception of the applicant that matters. The perception and impact the applicant maintains within the broader community holds weight and must be communicated and conveyed effectively to the JNC.

While the application is a vital tool in introducing the applicant to the JNC, it is certainly not the only means available. Apparently, a common misconception among applicants is the belief that it is improper to ever contact the JNC Commissioners. However, it is in fact one of the duties of JNCs to actively recruit qualified and merit-worthy applicants. The day of the application deadline is not the last day any communications may occur between the JNC and applicants until the day the applicant is no longer under consideration by the JNC. It is beneficial for the applicant to communicate with as many JNC Commissioners as possible before the application submission deadline. It is also appropriate, after the applicant is no longer under consideration by the JNC, to follow-up with JNC Commissioners for additional insight regarding the application and/or interview. It is rare that an applicant will be appointed in the first attempt, so it never hurts to grow and learn from each experience. Additionally, these interactions are opportunities for the JNC to better assess the applicant’s qualifications and merit-worthiness.

The merit selection process isn’t supposed to be mysterious. Hence, the Maricopa County Bar Association’s Bench-Bar Conference in combination with this column series will hopefully provide additional insight into Arizona’s judicial nominating process and encourage highly qualified and merit-worthy applicants to apply. Join us next month as we discuss the screening process, preparations for the interviews, and the proper use of references.

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Arizona Supreme Court
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substantial doubt." Furthermore, judges should not establish duties based on our own notions of appropriate public policy.

Gould then addressed whether a special relationship created a duty here. The plaintiffs argued that Reynolds's duty to Quiroz's father should be extended to "any member of the public, including Quiroz, who may have been exposed to secondary asbestos." Gould disagreed.

He also rejected the plaintiffs' argument that Reynolds owed "a duty of care to anyone who is injured by its risk-creating conduct" on its premises. While landowners' duties sometimes extend beyond their premises, Gould rejected the idea that "landowners owe a general duty to the public for off-premises injuries.

Nor could a duty be based on the foreseeability that harm would result from Reynolds's conduct. Gould foreclosed this argument, Gould held, notwithstanding contrary sections of the Restatement. "We generally follow the Restatement," he wrote, but not when "it conflicts with Arizona law." And "[b]ecause Gipson has changed Arizona law by removing foreseeability from the duty framework, we cannot rely on foreseeability to expand the duties of landowners.

This led to the burning question raised in Gipson. In Andrew Hurwitz's concurring opinion, he urged adoption of the Third Restatement. Under its § 7, "[a]n actor ordinarily has a duty to exercise reasonable care when the actor's conduct causes a risk of physical harm.

Gould noted that this presumed duty "relieves the plaintiff of the burden of proving duty." To avoid the presumption, the defendant would have "to show that, based on some 'countervailing principle or policy,' a no-duty rule should apply." Gould wrote that "this procedure requires courts ... to engage in a multi-factored policy analysis, considering such matters as 'general social norms of responsibility' and the 'overall social impact of imposing' a duty on a 'class of actors.'"

He found the Third Restatement's framework too broad. It "defines 'risk creation' so broadly that virtually every case falls under the presumed duty." Furthermore, its "risk creation is not confined to the specific act that causes an injury," but instead examines the defendant's entire course of conduct.

The Third Restatement "essentially gives rise to a presumed duty every time a plaintiff is injured by a defendant," Gould wrote. Simply "by alleging that a defendant caused his injury, a plaintiff necessarily asserts that defendant's conduct created a risk of physical injury." And while the Third Restatement replaces foreseeability with risk creation in determining duty, Gould was not mollified, finding it "only generates more confusion because, as a practical matter, the two concepts are so similar they are difficult to distinguish.

Gould therefore refused to adopt the § 7. "Arizona does not use risk creation to determine duty. Instead, our duty rules rely solely on special relationships and public policy.

Moreover, "we determine duty before a defendant, by his acts or omissions, places a plaintiff at risk of physical injury." Finally, Arizona law, Gould thought, does not impose a duty.

"The primary flaw in the Third Restatement's risk-creation framework is that it effectively creates a presumed duty of care owed by all people at all times," according to Gould. It "provides no fixed rights or obligations ... fails to adjust the difficult question underlying duty: to whom does a person owe a duty? It does not provide any meaningful guidance to courts and practitioners" because it does not define the parties' rights and obligations "before a plaintiff is injured.

Adopting it would be "a drastic change in Arizona law, which Gould found "both unwise and unwarranted." A limitless tort duty might deter negligent conduct and might be simpler to apply, but it would be "impractical, unmanageable, and has never been the law in this state," and "leaves little room for individual liberty and personal autonomy.

Gould agreed with Prosser & Keeton that duty "is embedded far too firmly in our law to be discarded, and no satisfactory substitute for it, by which the defendant's responsibility may be limited, has been devised." He added that "[i]n this framework, even with its flaws, has been carefully worked out by our courts for many years and provides a workable, useful approach to determining duty."

Joining Gould were Justices Robert M. Brutinel, Ann A. Scott Timmer, Clint Bolick, and John R. Lopez, IV. Dissenting were Chief Justice Scott Bales and Vice Chief Justice John Pelander.

Bales opened bluntly: "[T]he majority concludes that the employer must be immobilized from even the prospect of liability, no matter how reckless or otherwise unreasonable its conduct may have been." It believed its holding "serves to protect the employer's 'individual liberty.'" But "[o]ne would think the children had a greater right to be free from others unreasonably exposing them to risks of debilitating and life-threatening illness.

"Our tort law," he continued, "generally does not privilege those who expose others to unreasonable risks of physical injury, but instead seeks to compensate those who are harmed by such conduct.

He noted that "[i]n this Court has long recognized that a landowner owes a duty to individuals-off-premises who may be harmed by the landowner's on-premises activity." This was true whether they are "harmed by artificial conditions as of activity occurring on the landowner's premises," and whether or not the landowner had some pre-existing 'special relationship' with them other than the conduct creating the risk of harm.

"Gipson has not changed the exceptions. "[E]ven if a duty of care here must be grounded on public policy," he wrote, "that requirement is met by Arizona's longstanding common law principle that persons must act reasonably when they create risks of physical injury.

The majority, he asserted, "obscures the distinctions between duty, the standard of care, and negligence, and it unnecessarily questions whether liability may exist under various provisions of the Second Restatement." Arizona case law and the Second Restatement, he wrote, "would more appropriately be recharacterized, in light of Gipson, as reflecting that foreseeability, while not determinative of duty, may support a finding of negligence and thus liability.

Under Second Restatement § 371, a land possessor may be liable "for physical harm to others outside of the land caused by an activity carried on by him thereon which he reasonably should have known would create an unreasonable risk of physical harm." This provision is not novel, Bales wrote but "reflects a long-accepted common law rule that a landowner's duty of care extends to others off the land who are physically harmed by activity occurring on the land.

Landowners may profit from their land, Bales believed, but only within reason. "Just as Reynolds owes a duty of care to ensure that the wind does not blow asbestos dust from its factory to Quiroz's home," he wrote, "it should likewise owe a duty of care to ensure that its employees do not carry the asbestos dust there.

He also rejected the majority's fear of limitless liability. "Quiroz must still demonstrate that Reynolds breached its duty and that Reynolds realized or should have realized that second-hand exposure to asbestos via an employee's clothing involved an unreasonable risk of harm." Pelander did not join the final part of Bales's opinion, which took up Hurwitz's plea to adopt § 7 of the Third Restatement. That section, he wrote, "does not state or imply that there is always a duty owed to everyone. Its presumption is 'limited to conduct creating a risk of physical harm and is expressly subject to exceptions.'

Section 7, he contended, "reflects how this Court has long examined the existence of a legal duty. It is 'not a radical or new principle.' Bales also accused the majority of mischaracterizing the provision. Under it, 'a duty clearly does not turn on the fact that a plaintiff has suffered an injury," he wrote. And it "properly distinguishes the categorical determination of the existence of duty from case-specific findings of breach or proximate cause, which may depend on foreseeability.

"By recognizing a duty to others, § 7 protects individual liberty and personal autonomy and does not impinge on those fundamental interests as the majority argues, to be opined. It 'preserves personal autonomy by allowing for plaintiffs to be made whole when their autonomy is violated and they are physically injured by the careless conduct of others.'"

"Our established tort principles," Bales concluded, "and the goals of deterring careless behavior and compensating those injured by it, would be better served by recognizing that while we do owe a duty of care to all others at all times, we generally owe a duty to not unreasonably subject others to the risk of physical harm."
Spotlight on Volunteers

By Peggi Cornelius
VLP Programs Coordinator

Every year, thousands of Maricopa County residents who cannot afford legal counsel to address common civil law problems seek help through the law firm of Community Legal Services (CLS) and the Volunteer Lawyers Program (VLP) it co-sponsors with the Maricopa County Bar Association. Of those eligible for free assistance, many hundreds benefit from legal advice or brief assistance to resolve their concerns or empower them to undertake self-advocacy. When direct representation is needed, in addition to those represented by CLS attorneys, hundreds more cases are provided by local attorneys who engage in pro bono representation through the VLP.

VLP Director, Patricia Gerrich, Esq., and attorney Roni Tropper, Coordinator of VLP’s Children’s Law Center, are responsible for referring VLP cases to private attorneys participating in the program. Each request for assistance is screened for legal merit and potential legal remedies. Cases to be referred to private attorneys are matched with volunteers who have expertise in the area, no conflict of interest, and available time to accept a pro bono case.

The process of case referral is greatly enhanced by the behind-the-scenes efforts of VLP Law Firm Liaisons. VLP Liaisons are volunteers among volunteers who encourage and facilitate the pro bono work of colleagues in their firm. They describe a broad range of reasons why they assume and enjoy the responsibility of engaging others in accepting VLP case referrals.

A Cultural Norm – Grateful Clients

London Burns of Kutak Rock

Burns proudly speaks of the legacy of Robert Kutak and Bob Kutak, saying “Robert Kutak instilled in the firm’s culture the need for firm lawyers to regularly undertake pro bono work. Bob Kutak was a tireless proponent of legal ethics and chaired the Kutak Commission that oversaw the adoption by theABA of the Model Rules of Professional Conduct, including the original version of Rule 6.1 regarding the obligation of each lawyer to render public interest legal services.”

She says her role as the VLP Liaison “energizes my commitment to pro bono work. It provides me a reason to reach out to attorneys who are doing likewise at other law firms. It says learning differing ways liaisons encourage others to do their pro bono work makes him more effective when engaging his colleagues at Ballard Spahr.”

He notes, “Ballard Spahr has a strong commitment to pro bono, evidenced by, among other things, pro bono hour – for billable hour credit, recognition and charity donations on behalf of attorneys meeting their pro bono hour objectives, and annual award ceremonies. I routinely hear colleagues sing the praises of VLP. Whether it’s the meaningful work for the underserved they facilitate, or Pat’s friendliness, VLP has a clear impact on all of my colleagues who participate.”

Collaborative Opportunities – Bridging Practice Areas

Kyle Hirsch of Bryan Cave Leighton Paisner

A Partner in his firm, Hirsch also serves as Pro Bono Coordinator. He says his role as the VLP Liaison allows him to introduce local attorneys to cases that fit their pro bono interests. He frequently encourages senior lawyers to invite junior lawyers to participate on cases together.

He comments, “Often that cooperation occurs across practice groups when paid engagements may not provide the same type of working opportunity. Not only does this type of collaboration develop more mentoring experience, but it generates good will and a feeling of accomplishment when achieving a positive outcome for members of our community. Lawyers in our firm typically become ‘repeat customers’ of VLP cases once they accept their first engagement, and find the support they need from the helpful staff at Community Legal Services.”

The Volunteer Lawyers Program thanks the following law firms and their liaisons for their outstanding commitment to pro bono work through the VLP

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