Does Arizona need the proposed new uniform trust code?

By Kenneth W. Reeves III

Maricopa Lawyer

For some, the words “uniform laws” evoke the image of a legislative “Attack of the Clones.” For others, it is simply an optimist’s misrepresentation of fact: even “uniform” laws are not truly uniform among the states adopting them.

Against this background, the process of adopting a new “uniform” trust law known as the Uniform Trust Code (UTC) is inching forward in Arizona. A bill to enact it will be introduced in the 2003 Legislature. The UTC has only been adopted in Kansas, and Kansas amended provisions of the uniform act in ways that could make it more attractive to its detractors in Arizona and elsewhere.

Do states really need uniform laws? There can be little question that uniform laws are valuable in situations involving business. Who, after all, could imagine interstate commerce without the Uniform Commercial Code? Such commerce-oriented laws make the outcome of commercial transactions predictable across state lines and reduce the chance that the courts of one state will treat parties from other states differently from local businesses.

In other areas of the law, the need for uniformity among the states is not as great as devotees of the uniform law idea may believe. Even very useful uniform laws may not be widely adopted. For example, the Uniform Probate Code (UPC) was recommended to the states in 1969, and has only been adopted in 18 states, including Arizona. Among the states that have adopted the UPC, indi-

Under state law, public records are presumed to be open to the public. On the other hand, citizens have privacy interests. What happens when the two butt up against each other? That is the question the Arizona Court of Appeals faced recently in A.H. Bele Corp. v. Mesa Police Department, No. 1 CA-CV 00-0200 (App. Mar. 26, 2002).

The case involved a taped 911 emergency call. A babysitter called the emergency services to report that her 16-month-old charge, Dominic, had fallen from his crib. Waiting for emergency personnel, the babysitter frantically pleaded for help and screamed that Dominic might die. Dominic’s suffering — his cries and whimpering — were audible on the tape. The babysitter was eventually prosecuted for and pleaded guilty to child abuse.

Television station KTVK-TV made a public-records request of the Mesa Police Department for a copy of the 911 tape and a transcript. When all it got was the transcript, it filed an action seeking a copy of the tape. The Superior Court ruled that the station was entitled to the tape and the police department appealed.

A divided Court of Appeals reversed, holding that the police department demonstrated that Dominic’s family’s privacy interests outweighed public disclosure. Judge Noel Fidel wrote the opinion for himself and Judge Edward C. Voss.

Fidel wrote that the purpose of the public-records law is to keep the citizenry informed about what the government is up to. In balancing the two interests, he noted that the information sought was available through alternative means — the transcript that the police department provided. The television station did not argue that having the tape would help citizens to be better informed about the goings-on of the government. It was not satisfied with the dry written transcript because it wanted the tape to present the “images of urgency” found in Dominic’s cries and the babysitter’s pleas for help.

Fidel acknowledged that “[t]he real suffer-

Ryan to be 38th Supreme Court justice

A s Arizona’s newest Supreme Court justice, Michael D. Ryan will be the only current member of the high court to have been a trial court judge.

Ryan, 56, a Republican who lives in Scottsdale, replaces former Chief Justice Thomas Zlaket, who retired in April.

In announcing her appointment, Gov. Jane Dee Hull called Ryan “a true example of dedication and commitment to public service.”

“I know his expertise and experience will benefit the people of Arizona,” she said. “I am particularly pleased to have such a fine appointment who brings 10 years of experience as a trial court judge and [eight] years of experience as a criminal prosecutor to the high court.”

Ryan was one of five candidates nominated by the Commission on Appellate Court Appointments to fill the vacancy left by Zlaket’s retirement. The other nominees were Andrew D. Hurwitz, a Democrat and a partner in Osborn Maledon who lives in Phoenix; Apache County Superior Court Judge Michael C. Nelson, a Democrat who lives in St. Johns; Division Two Court of Appeals Judge A. John Pelander III, a Republican who lives in Tucson; and Division One Court of Appeals Judge Sheldon H. Weisberg, a Republican who lives in Kingman.

Earlier this year, the commission nominated Ryan, Hurwitz and then-Court of Appeals Judge Rebecca White Berch for the vacancy created by the appointment of Frederick Martone to the U.S. District Court bench. Hull appointed Berch to that vacancy.

Ryan is Hull’s third appointment to the Supreme Court. In addition to Ryan and Berch, Hull appointed Ruth V. McGregor to the court in 1998. With Zlaket’s retirement and Ryan’s appointment, the Supreme Court now consists of four justices who live in the Phoenix metropolitan area and one — Stanley Feldman — from Tucson. The last justice from outside Arizona’s two metropolitan areas was Frank X. Gordon, who retired in 1992.

Feldman, the lone Democrat on the court, reaches the mandatory retirement age of 70 in March. The other four justices are Republicans.

In addition to his trial court experience, Ryan to be 38th Supreme Court justice

By Daniel P. Schaack

Maricopa Lawyer

In other areas of the law, the need for uniformity among the states is not as great as devotees of the uniform law idea may believe. Even very useful uniform laws may not be widely adopted. For example, the Uniform Probate Code (UPC) was recommended to the states in 1969, and has only been adopted in 18 states, including Arizona. Among the states that have adopted the UPC, indi-

911 tape can be withheld due to privacy interests

By Daniel P. Schaack

Maricopa Lawyer

Urban Lawyer
The power of group efforts

Do you know how many bar associations we have in Maricopa County? I did not, but I’m learning.* I also learn that the leaders of these associations need to communicate, work together and support each other’s projects and activities. At the Maricopa County Bar Association, we’ve attempted for many years to be inclusive and seek out the members of the minority and regional bar associations for representation on our board of directors and our important committees, such as the Continuing Legal Education Committee. These various efforts have been met with only limited success.

We understand the importance of diversity and the need for our committees and boards — and the speakers at our seminars — to reflect the community’s diverse population. Our challenge has been to figure out what we could offer to the other bar associations to attract them, not only as members, but also as partners.

Surely, if we could just sit down together, everyone would understand the power of group efforts.

That is exactly what happened on April 15, when the presidents-elect of the eight valley bar associations met for breakfast at the MCBA in the first of what we hope will be many meetings of the Presidents Council.

This officially unorganized group has no agenda other than to communicate and support each other on personal and organizational levels. The discussion was positive and exciting as we all explained some of our current projects and goals.

We discovered many opportunities to work with each other and to support others’ projects. For example, we at the MCBA are very proud of our website (www.maricopabar.org) and have discovered that we should provide as many links as possible to other bar associations’ websites to better serve our members and their varied interests. We hope that mutual links and shared advice about website development and maintenance will be one of the first accomplishments of the Presidents Council.

We also discovered a common interest among the minority bars and the MCBA: raising funds for scholarships for deserving law students. Most of the minority bars do this kind of fundraising every year. The MCBA regularly gives out awards to deserving law students.

I learned at the mid-year meeting of the American Bar Association in Philadelphia about an exciting way to use the tax-exempt status of a bar foundation, such as the Maricopa County Bar Foundation, to collect deductible scholarship monies in “mini-funds” for the various local bar associations. It may be possible to collect scholarship funds for the Arizona Asian-American Bar, Los Abogados, Hayzel B. Daniels and the Arizona Women Lawyers Association. We’re looking into this joint project, and I’ll report on its progress as we develop it.

Speaking as one member of the Presidents Council, I support its most important accomplishment: communication between local bar leaders. At a minimum, we can brainstorm projects and new ideas. And, on a personal level, we can learn to understand, respect and support each other’s organizations.

Please let me know your thoughts about the Presidents Council, and any ideas we might use to partner with and support each other.

*The answer is eight: the MCBA; the Arizona Asian-American Bar Association; Hayzel B. Daniels Bar Association; Los Abogados; Arizona Women Lawyers Association — Maricopa Chapter; East Valley Bar Association; West Valley Bar Association; and the Scottsdale Bar Association.
11 nominated for 2 Court of Appeals openings

After interviewing 11 candidates for two vacancies on Division One of the Court of Appeals, the Commission on Appellate Court Appointments has nominated all of them to Gov. Jane Dee Hull.

The two vacancies result from the appointment of former Court of Appeals Judge Rebecca White Berch to the Supreme Court and the retirement of Judge Noel Fidel.

Nominees are:
- Maricopa County Superior Court Judge David R. Cole, 50, Independent, of Peoria;
- Maricopa County Superior Court Judge Joe R. Gama, 55, Democrat, of Phoenix;
- Randall M. Howe, 38, Republican, of Phoenix, chief counsel of the criminal appeals section of the Arizona Attorney General’s Office;
- Patrick Irvine, 44, Democrat, of Phoenix, solicitor general of the attorney general’s office;
- Donn G. Kessler, 52, Democrat, of Phoenix, an Arizona Supreme Court staff attorney;
- Patricia K. Norris, 50, Democrat, of Phoenix, a partner in Lewis and Roca;
- Maricopa County Superior Court Judge Maurice Portley, 47, Democrat, of Phoenix;
- G. Murray Snow, 42, Republican, of Tempe, a partner in Osborn Maledon;
- Christina Urias, 50, Democrat, of Phoenix, a partner in DeConcini McDonald Yetwin & Lacy;
- Maricopa County Superior Court Judge Eileen S. Willrett, 41, Republican, of Phoenix; and
- Lawrence F. Winthrop, 49, Republican, of Phoenix, a partner in Doyle & Winthrop.

The commission also has begun accepting applications to fill the vacancy created by the appointment of Judge Michael D. Ryan to the Supreme Court.

Applications must be at least 30 years old; have been admitted to practice law in Arizona for the past five years; and have been a resident of Arizona for the past three years.

Applications may be obtained from the Administrative Office of the Courts, Human Resources Division, 1501 W. Washington, Suite 227, Phoenix; by calling 602-342-9311, or by sending an email request to jnc@supreme.state.az.us; or from the court’s website, www.supreme.state.az.us/hr (judicial vacancies).

The original and 16 copies must be submitted to the Human Resources Division by 3 p.m. June 11.

All applicants for the Berch and Fidel vacancies will automatically be considered for the Ryan vacancy. The commission may also use applications filed for this vacancy to nominate candidates for any additional vacancies known to it before the committee meets to select those candidates it will interview.

Margaret R. Mahoney will become the newest member of the Maricopa County Superior Court bench.

Hull appointed Mahoney, 44, an Independent, to fill the vacancy created by the retirement of Superior Court Judge John R. Sticht.

Mahoney is of counsel to Bryan Cave, practicing commercial litigation. She also has worked for the Internal Revenue Service Foreign Operations Division.

Mahoney received her law degree from Boston College. With an undergraduate major in French, Mahoney spent time studying French literature, history and art at the Sorbonne and the Louvre in France. She is married with two children.
Courtwatch...

Continued from page 1

of identity' and family autonomy than the

 Directive aspects of open government is up to “

Fidel held that the police department had overcome the presumption of openness by way of the emotional trauma Dominic’s family would suffer if the tape were released and broadcast. He pointed to the
testimony of Dominic’s mother, who protested that broadcasting the tape would interfere with her family’s healing, remind them of that painful day, and torment Dominic. Fidel and Voss held that protectable privacy interests extended beyond confidential information and data to include those present in this case.

“Indeed,” Fidel wrote, “we cannot imagine a more fundamental concern or one more directly associated with ‘the intimate aspects of identity’ and family autonomy than the desire to withhold from public display the recorded suffering of one’s child.” Judge Ann A. Scott Timmer dissented. She wrote that the police department had failed to specifically demonstrate how disclosing the tape would detrimentally affect the family’s privacy interests. Stating that the majority had acknowledged that the family did not have a privacy interest in the information on the tape — given that the information was on the transcript that was produced — Timmer chided the majority for holding that the family’s emotional interest overcame the presumption favoring disclosure. Timmer was concerned that the majority’s holding would therefore sweep too broadly. In her view, Dominic’s family’s emotional trauma was no greater than any family’s would have been.

“In light of the emergency nature of 911 calls...it is difficult to imagine a call that would not stand as a ‘painful reminder’ to any listener who was the subject of a request for assistance or related to such a person,” she wrote.

“Consequently,” Timmer wrote, “something more than a desire by a victim’s family to avoid painful reminders of a tragic day must be demonstrated before the presumption is overcome.” In her view, the presumption was not overcome in this case.

“The tape does not reveal any graphic details concerning the crime, and Mesa has not directed us to any private or confidential information on the tape that, if revealed, would subject Dominic or his family to retaliation, humiliation, public ridicule, or other substantial and irreparable harm if aired to the public.” In Timmer’s opinion, the family’s desire to avoid listening to the tape, though understandable, was insufficient to overcome the strong presumption favoring its production. She noted that “the public may inspect and copy governmental records under our open records law ‘without limitation as to the reason or reasons for which the inspection is undertaken.” She therefore felt that no balancing was necessary and the tape should have been handed over.

— Attempting to shield assets from creditors, married couples often transfer assets from the marital community to one or the other spouse. In a recent opinion, the Court of Appeals affirmed a Superior Court’s judgment thwarting a couple’s attempt to shield assets by going the other way — transferring them from the individual spouse to the community. Stair v Wright, No 1 CA-CV 01-0160 (App. April 4, 2002).

Kevin and Annette Wright signed a premarital agreement providing that their earnings and other income would remain the separate property of the spouse who produced it. After one of Kevin’s employees was hurt on the job, the Industrial Commission assessed damages and penalties against Kevin for not having workers’ compensation insurance. Before the commission could act to assess him, Kevin incorporated his business. He took all shares of stock and named himself secretary, while Annette became president and CEO. After the commission’s assessment, the couple modified their premarital agreement to provide that their earnings and income would be community property. The state released any claim against Annette and then garnished Kevin’s earnings. Arguing that Kevin’s earnings were now community property, the couple objected to the garnishment. Finding that the modified pre-

2003 Barristers Ball Beneficiary Application

In 2002, the MCBA YLD raised more than $13,500 for the Barristers Ball Silent Auction beneficiary, The Centers for Habilitation. One of the most important steps for this annual event is to pick the beneficiary that will receive the proceeds from the Silent Auction. Many organizations in the Valley could use our help. If you know of any, urge you to call us and we will forward to you or the organization an application.

To be considered a potential beneficiary of net proceeds from the Barristers Ball Silent Auction, the program or project must:

1. Have a general charitable purpose.
2. Perform a public service for the community at large.
3. Not have received any proceeds from the previous year’s Barristers Ball Silent Auction.
4. Submit a plan to the MCBA YLD Board of Directors for the use of all net proceeds from the Silent Auction at the time of the application.
5. Be able to provide at least five volunteers to assist YLD in hosting the Barristers Ball.
6. Assist YLD in recruiting Silent Auction donors.

The beneficiary and the co-sponsoring entities shall assist in the planning of the Barristers Ball and Silent Auction, including the following:

1. The designated liaison to the Barristers Ball Committee must attend all Barristers Ball meetings.
2. The beneficiary must submit a list of not less than five members from the organization, with addresses and telephone numbers, who shall be active participants in the Silent Auction Subcommittee.
3. The beneficiary must pay minimal expenses or provide in-kind services related to the Silent Auction or any other solely fund-raising aspects of the Ball.
4. The beneficiary organization and the co-sponsoring entity must assist the Silent Auction Subcommittee in soliciting items for the Silent Auction.
5. The beneficiary must designate a liaison to the Barristers Ball Committee, a liaison for Corporate Sponsor Subcommittee and a liaison for the Silent Auction Subcommittee.
6. The beneficiary will encourage their board members and other important contacts in the community to attend the Barristers Ball. In addition, at least two representatives from the beneficiary program or project will be required to attend the Ball.
7. The beneficiary shall remit the mid-year and end-of-the year report to the YLD on how proceeds were spent and the progress of the program.
8. The beneficiary agrees that it cannot have held or been a beneficiary of any auction — live, silent or otherwise — for 10 months preceding and six months following the Barristers Ball.

Call Shane Clays at 602-257-4200, ext. 111, for a copy of the application

Deadline for submitting beneficiary applications is June 21, 2002
marital agreement was a fraudulent conveyance, the Superior Court allowed the garnishment to proceed.

The Court of Appeals affirmed. The Wrights argued that there had been no transfer of property under the Uniform Fraudulent Transfer Act, both because there was no property and no transfer.

Judge Sheldon H. Weisberg’s opinion rejected the notion that there was no transfer, only a transmutation in the character of the future earnings. He noted that the UFTA defined “transfer” in very broad terms:

“…to hold that a ‘transmutation’ cannot also represent a transfer of assets,” according to Weisberg, “would eviscerate the UFTA by allowing a debtor to shelter assets of any type or value from a creditor simply by ‘giftin’ them to the community.”

Weisberg also rejected the Wrights’ argument that no transfer occurred because they were simply returning the earnings to the pre-existing presumption in community property laws: that all earnings are property of the community.

“An agreement returning a property right previously acquired is no less a transfer than the original agreement through which that right was acquired,” Weisberg wrote.

Weisberg next rejected the argument that there was no “property” in the earnings to come, only a future interest that was too speculative or ephemeral to be considered owned. He pointed out that under the broad UFTA definition, the term includes any real or personal property “whether tangible or intangible, and any interest in property, whether legal or equitable.” Thus, the drafts of the act and the courts “made it clear that both speculative and intangible property rights and interests are subject to the UFTA’s provisions.

Having determined that the amended agreement involved both property and a transfer of that property, Weisberg also agreed with the Superior Court that the transfer was fraudulent. He pointed to the following “badges of fraud”: the property was transferred to an insider; Kevin retained substantial control over the property; he had been sued and a judgment had been rendered before the transfer occurred; and the transfer occurred shortly before the state moved to collect on its judgment. “Under the circumstances,” Weisberg concluded, “we agree that the transfer was prompted by an actual intent to hinder, delay or defraud a creditor,” and therefore violated the UFTA.

Judges James B. Sulti and Cecil B. Patterson Jr. joined in Weisberg’s opinion.

Proposition 200, approved by voters in 1996, was intended to change Arizona’s drug-control policy by treating drug abuse as a medical problem best handled by treatment and education, not by incarceration, thus freeing up prison space for violent offenders. It mandates probation and treatment for the first and second offenses committed by nonviolent defendants. In a recent opinion, the Court of Appeals precluded the defendant from claiming the proposition’s beneficence. State v. Toussaint, No. 1 CA-CR 01-0418 (App. Apr. 9, 2002).

Dean Thomas Toussaint pleaded guilty to solicitation to possess narcotics. It was his second conviction for a drug offense. The court sentenced him to mandatory probation, conditioned on his reporting to drug court, completing an outpatient substance-abuse program and serving a deferred 60-day jail sentence. Six months later, the state sought to revoke Toussaint’s probation because he had not participated in the drug court program. At a hearing, Toussaint told the court he wanted to reject probation. The court agreed, terminated the probation as unsuccessful and released him from custody. The court rejected the state’s objection that the defendant to reject probation violated the UFTA.

“An agreement returning a property right previously acquired is no less a transfer than the original agreement through which that right was acquired,” Weisberg wrote.

“Under the circumstances,” Weisberg

## Commentary

**Why should judges care about postponing civil trials?**

**By Pendleton Gaines**

I was recently asked, “If the parties agree to a trial postponement, what is the court’s objection?” I interpret this to ask, “Why should judges care?”

Here are a few reasons:

- **Rule 1, Ariz. R.Civ.P.** promises litigants the “just, speedy, and inexpensive” determination of all cases.
- **Canon 3(B)(8) of the Code of Judicial Conduct, Ariz. R.Sup.Ct. Rule 81,** requires the judge to dispose of all judicial matters “promptly, efficiently and fairly.”
- **The National Center for State Courts,** Trial Court Performance Standards require our court to comply with “recognized standards of timely case processing…” Our adopted standards are the ABA Interim Guidelines, which target these disposition rates: 85 percent at 12 months, 93 percent at 18 months and 100 percent at 24 months. We have not consistently reached these standards, of course, but we are committed to try.

The average civil calendar in our county has more than 1,100 cases, with 100 more set for trial. Postponing a scheduled trial is inefficient, because the case will have then occupied two or more places on the calendar, and harmful to other litigants who are ready for trial.

One conclusion we can all draw is that a case should only be set for trial on a realistic date when the court and counsel are certain that it will be prepared and ready to proceed. Once set, the case should proceed.

Some lawyers and many judges believe that adhering to firm trial dates encourages settlements. My own view is that setting a mandatory settlement conference before assigning a trial date serves the same purpose.

None of this means that the judge cannot or should not postpone a trial for “good cause” under Rule 38.1(b), Ariz. R.Civ.P. Space here does not permit, although I wish it did, a discussion of “firm trial dates” in these days of emphasis on criminal-case processing, necessary calendar over-booking and the effectiveness of civil-case transfer. The story of our court’s leading role, since 1979, in the development of the case processing standards mentioned above has been told before. See J. Cates and R. Myers, Fast Track: Its Evolution and Future, 21 A.S.U. Law Journal 219 (1989).

**Marilyn County Superior Court Judge Pendleton Gaines is associate presiding civil judge. The views expressed in this article are his own.**

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- **Professionals & Investors**
- **Free Trade Agreement (NAFTA)**
- **Entertainers & Sports Professionals**
- **Blue/White Collar Employee Immigration Assistance**

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**Maricopa Lawyer**
Law Week provides free legal advice to about 350 people

120 volunteers make it a success

By Monica Limón-Wynn and Maxine Polomski
Special to Maricopa Lawyer

In Maricopa County, we celebrate our nation’s Law Day (May 1) with a week-long series of events known as Law Week. The Maricopa County Bar Association’s Young Lawyers’ Division celebrated Law Week 2002, with the theme “Celebrate Your Freedom: Assuring Equal Justice for All,” from April 27 to May 3.

In an effort to reach a broad spectrum of our community as a part of Law Week, lawyers in Maricopa County provided free legal advice to approximately 350 members of our community, involved more than 130 students in contests depicting the theme, and visited elementary and high school classrooms around the valley. Attorneys volunteered countless hours at these events.

At the senior law fairs, 25 volunteer lawyers provided legal assistance to more than 76 seniors at five senior centers located throughout the county. From the studios of KAET on the campus of Arizona State University, volunteer attorneys answered legal questions over the phone from citizens throughout the state. Through this phone-a-lawyer event, about 35 attorneys gave legal advice to more than 220 persons over the phone. About 13 volunteer lawyers gave free advice at community law fairs held at the Arizona Mills Mall in Tempe and Metrocenter Mall in Phoenix. More than 30 people met with attorneys one-on-one for legal consultations at these law fairs.

Finally, in our second year of the Lawyers in the Classroom program, lawyers again visited valley classrooms to talk to students about their practice area and discuss legal issues facing students.

Law Week 2002 also offered several opportunities for local grade school and high school students to express their views about the legal system and this year’s theme: “Assuring Equal Justice for All.” More than 152 seventh-, eighth- and ninth-grade students wrote answers to an essay question about whether police could detain a person based on the way he was dressed. First-, second- and third-place winners from each grade received gift certificates to a bookstore and a gold, silver or bronze medal. About 40 volunteer lawyers helped judge the essays.

The poster contest invited fourth, fifth and sixth graders to create posters illustrating “Assuring Equal Justice for All.” We received more than 82 creative, colorful posters. They were displayed at the Maricopa County Superior Court Law Library. First-, second- and third-place winners from each grade received $50 gift certificates to Michael’s and a gold, silver or bronze medal.

Student winners and their families, teachers and friends attended the Law Week 2002 awards ceremony at the Arizona State Courts Building. In the Supreme Court courtroom, Chief Justice Charles E. Jones addressed the students and congratulated them on their achievements.

More than 30 attorneys earned continuing legal education credit by attending the Law Week 2002 CLE seminar. This year’s seminar focused on the need for attorneys to provide assistance to pro bono clients, the ethical issues involved in taking on pro bono cases and the opportunities available in Maricopa County for pro bono work. The seminar featured presentations by Pat Gerrich, director of the Volunteer Lawyers Program; Charles Blanchard of Brown & Bain, who discussed pro bono opportunities with the Florence Immigration and Refugee Rights Project; Dianne Post, who represented the Arizona Coalition for Domestic Violence; and Lynda Rando, who presented information on volunteering for the Law for Kids website sponsored by the Arizona Bar Foundation.

Finally, about 70 attorneys celebrated their involvement with Law Week activities at a reception and happy hour at McCormick & Schmick’s sponsored by the State Bar of Arizona and Westlaw. The reception served as a means to thank volunteers for their time and develop ongoing relationships with attorneys who actively serve their community and bar activities.

All in all, more than 120 volunteers donated their time and energy to make these programs such a success. Because of you, many Maricopa County residents were provided with legal assistance they otherwise would not have received. A special thanks also goes to this year’s committee chairs:

➤ Publicity: Carey Pleasant
➤ Metrocenter Mall fair: Mike Campillo, Ellis, Venable & Boxen
➤ Arizona Mills fair: Bill Mulholland, Snell & Wilmer
➤ Senior center law fairs: Elizabeth Weldon, Mariscal, Weeks, McIntyre & Friedlander
➤ Essay contest: Jeff Beck, Snell & Wilmer
➤ Poster contest: Nikki Austin, Fennermore Craig
➤ Photo contest: Shirley Nagy, Snell & Wilmer
➤ Lawyers in the Classroom: Warren Stapleton, Osborn Maeldon
➤ Law Week CLE: Laura Smith, Squire, Sanders & Dempsey
➤ Law Week happy hour: Danielle Malody, Snell & Wilmer

Finally, a special thanks to the MCBA staff, especially Brenda Thomson and Shane Clays, who worked to ensure that the entire process ran efficiently and smoothly. Thanks also to Snell & Wilmer for its generous support of Law Week for the second year in a row, including Dawn Anderson of Snell & Wilmer for her artistic talents in creating the Law Week 2002 brochure and awards ceremony program, in-kind contribution of photocopying and the many hours generously donated by the firm’s attorneys. Mariscal, Weeks, McIntyre & Friedlander graciously provided the funds for the gold, silver and bronze medals awarded to student contest winners.

We already have begun planning events and activities for Law Week 2003, which we expect will be even bigger and busier than this year. Won’t you join us next year?

➤ Monica Limón-Wynn and Maxine Polomski co-chaired the Law Week 2002 Committee.
Defend Against Internet Hackers, Crackers and Other Nefarious Types

A few months ago in this column I discussed the need for law firms to be aware of the liability implications of potential loss of client information following a substantial disaster that destroys data stored in a firm’s computer system. The concern was focused on the physical destruction of the media upon which that information was stored and backed up. Now I will direct my attention to another aspect of computer security—relating to other kinds of security issues. I will talk about attacks from others outside the firm who seek to destroy data and raise havoc with your office system, sometimes just for fun. Many times, the victims are totally unaware of the damage to their system and data.

A recent report by the Computer Science and Telecommunications Board (“Cyber-security Today and Tomorrow: Pay Now or Pay Later”), National Academy Press, Washington, D.C., 2002) notes that U.S. computer systems are increasingly vulnerable to cyber attack primarily because computer users are not implementing easily available security techniques. The board (www.cstb.org) noted in that report that “from an operational standpoint, cyber security today is far worse than what...best practices can provide.”

The board made particular note of the fact that currently available technology can provide relatively simple and cost-effective levels of security well beyond that implemented in most offices. Law offices are particularly vulnerable to cyber attack from hackers, viruses and such things as Trojan horses and DOS (denial of service) attacks because the data they store is often highly sensitive client information.

In one of the most common attacks, a hacker using a variety of techniques actually enters a computer system and places a small application or program on the victim’s computer. One of the simplest and very common programs uses the victim’s contact list to send a destructive virus to each contact in the victim’s address book. These “collateral victims” end up receiving an email that appears to have been sent from the primary victim’s computer. Many computer users will assume that because the email appears to be from a known source, it is safe to open the attachment. When the attachment is opened, however, it implements a hidden program that can destroy the victim’s computer or cause the total loss of important information.

Using the above scenario as one very common example, what would your clients think if they received a destructive virus that appeared to come from your office? To put a finer point on it, ask yourself whether your potential liability depends on the fact that the destructive force came from a source that was masquerading as your computer system? I think the answer is that you have potential liability if it was reasonably possible for you to avoid an event that is increasingly common. In other words, I believe that lawyers have a professional obligation to implement adequate and easily available security on their computers and computer networks. Most of us have not done that, and I have come alarmed.

To the extent that our computer systems use the Internet, we are at great risk. Even if a firm does not have Internet connectivity, data is at risk from persons who may have access to the firm’s network inside the office itself. In other words, your in-house security depends on the trustworthiness and integrity of all who have access to your computer system, including repair persons, vendors and others who come in from the outside. If you connect to the Internet, the risk is even greater.

At the recent ABA TechShow 2002, Steve Gibson, one of the top two or three network security experts in the world, delivered the keynote address. Steve’s point was simple and direct. He said it is virtually impossible to completely protect yourself from Internet hackers and crackers but that you can reduce the risk by using fairly simple techniques and tools. You will probably be surprised to learn that your computer system is vulnerable because you have left secret backdoors open on the Internet.

Go to Steve’s web site at www.grc.com and run his “ShieldsUp” program to test the vulnerability of your computer system. I believe you will be shocked at what you find. If you use a dial-up modem to connect to the Internet, your vulnerability is somewhat reduced by the fact that you are not online all of the time. But if you have a persistent IP connection via a T1 line, a DSL line or a cable modem, you are very much at risk unless you implement basic security devices that are available immediately and at low cost.

The first thing you should do is to download a free software firewall from Zone Labs at www.zonelabs.com. The firewall is called ZoneAlarm. It is discussed in detail on Steve Gibson’s website. ZoneAlarm requires you to spend some time configuring the software to selectively allow control of various operations on your computer system. While this is not rocket science, it is something that should be done by a relatively sophisticated computing user or support person.

Other software firewalls are for sale from various vendors. I have tried most of them and for variety of reasons I totally concur with Steve Gibson’s recommendation. If you want to spend money, Zone Labs has a substantial upgrade of its free firewall product that you can buy. But the free product is very, very good and, of course, the price is right. Go to www.pcmag.com for more detailed information about firewalls.

If you have a persistent (“always on”) connection to the Internet, I suggest you consider a variety of hardware tools available from such manufacturers as LinkSys, D-Link, NetGear and others. These hardware “firewalls” serve two purposes. First, they provide a physical barrier to the Internet that, while it is not totally impervious, vastly reduces the risk from outside your network. Second, these products allow you to share your cable modem or DSL connection over your network.

These tools, called “routers,” are primarily designed as Internet distribution devices. But the built-in firewall capabilities are perhaps their most valuable characteristic. When a router is used in conjunction with a software program such as ZoneAlarm you have a high level of security. Because ZoneAlarm is free and the routers typically cost under $200, it makes very little sense to take the known risk that somebody will break into your computer system and either destroy client information or send viruses to your clients that will destroy their systems in your name. Again, you can go to www.pcmag.com for more detailed information.

If you have secured yourself from the evil-doers of the Internet you must also secure your computer system in the office. The most common method of doing that is to use a password. Passwords, however, are extremely insecure and easy to crack. Some hardware devices incorporate a localization number that is more secure than a password. There are even “biometric” devices that can provide a very high-level of internal security inside the physical office. Again, these kinds of devices are relatively inexpensive and easy to obtain. The CSTB concluded in its report:

System security is a holistic problem, in which technological, managerial, organizational, regulatory, economic and social aspects interact. Weaknesses in any of these aspects can be very damaging, since competent attackers seek out weak points in the security of a network or system.

In January, Bill Gates, chairman of Microsoft Corp., announced a critical new initiative within Microsoft called “trustworthy computing,” which marked a dramatic departure from the Microsoft tradition of emphasizing new features at the expense of security. That process will now be turned on its head and security will be emphasized above all else. It will be a long road because Microsoft has not been careful to recognize...
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**The Maricopa County Bar Association would like to thank all of those who donated to the Barristers Ball this year.**

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**Uniform Mediation Act focuses on privileges, confidentiality and mediator’s duty to disclose conflicts**

**By Elizabeth A. Winter**

**Special to Maricopa Lawyer**

Arizona lawyers are about to be confronted with a new uniform law that represents yet another leap forward in the area of mediation, which is reshaping the face of civil litigation practice.

The National Conference of Commissioners on Uniform State Laws adopted the Uniform Mediation Act (UMA) last August. The American Bar Association House of Delegates approved the UMA in February.

A primary purpose of the national conference is to promote the uniformity of state laws. A survey of state laws and case decisions showed a broad range of interpretations pertaining to confidentiality in mediation. To seek a better defined and uniform treatment of confidentiality issues in mediation, the national conference four years ago took on the task of drafting a uniform act.

The national conference works closely with the ABA to draft, approve and recommend enactment in all the states. The national conference has begun introducing the UMA in all 50 states for adoption. In January, South Carolina became the first state to consider the UMA.

While the UMA has not yet been enacted in Arizona, it is likely that it will be within a reasonable time given our state’s history of adopting uniform laws.

The UMA has 16 sections and is primarily focused on the privilege against disclosure in court or similar proceedings, confidentiality and a mediator’s duty to disclose conflicts of interest.

A key provision is section 3, which defines the UMA’s scope. The act will apply to a mediation required by statute or court or administrative agency rule or referred to mediation by a court, administrative agency or arbitrator. Significant exceptions include collective bargaining disputes, mediations conducted by a mediator also may refuse to disclose a mediation communication to a court that may rule on the dispute that is the subject of the mediation.

Section 8 creates confidentiality for mediation communications included within the scope of the act. Mediation communications are confidential to the extent agreed by the parties or provided by other state law or rule.

Section 9 requires mediators to make a reasonable inquiry to determine facts likely to affect mediator impartiality, such as a financial interest in the outcome or an existing or past relationship with any of the participants or provided by other state law or rule.

It will be necessary to reconcile any conflicts between the UMA and any existing statutes, including A.R.S. § 12-2238 and procedural rules.

A.R.S. § 12-2238(A) defines mediation as “a process in which parties who are involved in a dispute enter into one or more private negotiations to resolve the dispute.” A.R.S. § 12-2238(B) also provides for privileged communications. “Communications made, materials created for or used and acts occurring during a mediation are confidential and may not be discovered or admitted into evidence.” Under A.R.S. § 12-2238(E), the privilege is extendable to voluntary mediation prior or subsequent to the filing of a complaint with the court.

But don’t build your liability defense around Microsoft’s culpability, you have available to you today easily used and relatively inexpensive tools that can minimize your risk. It is of the essence of professional responsibility that you undertake those steps necessary to secure your system to a reasonable level.

You want to talk more about this, look for me at the Cyber Cafe at the State Bar of Arizona convention this month.

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

◆ Elizabeth A. Winter is past chair of the MCBA’s Alternative Dispute Resolution Committee.
Much of the UTC is objectionable, adding little to existing law. Arizona follows the Restatement of the Law with respect to issues not addressed by statutes or case law. The UTC is the third installment of the national conference’s recent recommendations regarding trust law, following on the heels of the Uniform Prudent Investor Act and the 1997 version of the Uniform Principal and Income Act (UPIA). The UPIA deviated from the state legislature’s tendency to enable fiduciaries to ignore specific language in existing trusts. Section 104 of that act gives trustees the ability to make adjustments between interests to compensate income beneficiaries for the effects of equity investments that provide little or no current trust accounting income.

Unlike other uniform laws that permit lawyers to draft around the provisions of the uniform act, significant provisions of the UTC would prevail over the written terms of trusts.

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## CLE FILM FEST FINALE

**Schedule Of Video Presentations ★ June 20 – 29**

**All presentations held at**

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<table>
<thead>
<tr>
<th>Day</th>
<th>Time</th>
<th>Event Description</th>
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<tr>
<td><strong>Thursday, June 20</strong></td>
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<tr>
<td>Accounting 101 For Lawyers</td>
<td>8:30 AM - 11:30 AM</td>
<td>MCBA MEMBER $45  NONMEMBER $70</td>
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<tr>
<td>Medical Evidence Made Simple: Finding It, Understanding It, Using It</td>
<td>Noon - 3 PM</td>
<td>MCBA MEMBER $45  NONMEMBER $70</td>
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<tr>
<td><strong>Friday, June 21</strong></td>
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<tr>
<td>Nuts &amp; Bolts of Personal Injury</td>
<td>9 AM - Noon</td>
<td>MCBA MEMBER $45  NONMEMBER $70</td>
</tr>
<tr>
<td>View from the Bench — Civil Court</td>
<td>12:30 PM - 3:30 PM</td>
<td>MCBA MEMBER $45  NONMEMBER $70</td>
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<td><strong>Saturday, June 22</strong></td>
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<tr>
<td>Examining Expert Witnesses</td>
<td>9 AM - Noon</td>
<td>MCBA MEMBER $45  NONMEMBER $70</td>
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<tr>
<td>Ethical Guidelines &amp; Malpractice Traps for the Estates &amp; Trusts Attorney</td>
<td>12:30 PM - 3 PM</td>
<td>MCBA MEMBER $45  NONMEMBER $70</td>
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<tr>
<td><strong>Monday, June 24</strong></td>
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<tr>
<td>Family Law: Case Law &amp; Legislative Update</td>
<td>8:30 AM - 11:30 AM</td>
<td>MCBA MEMBER $45  NONMEMBER $70</td>
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<tr>
<td>Family Court: A View From The Bench</td>
<td>Noon - 2:30 PM</td>
<td>MCBA MEMBER $45  NONMEMBER $70</td>
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<tr>
<td>Family Systems and you: Representing your clients in Mediating Estate, Probate, Family, Juvenile, Business and Elder Law Cases</td>
<td>3 Hours MCLE (3 Hours Ethics) 3 PM - 6 PM</td>
<td>MCBA MEMBER $45  NONMEMBER $70</td>
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<td><strong>Tuesday, June 25</strong></td>
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<tr>
<td>Current Developments in Estate Planning</td>
<td>8 AM - 11 AM</td>
<td>MCBA MEMBER $45  NONMEMBER $70</td>
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<tr>
<td>Interactive Ethics in Estate Planning</td>
<td>11:30 AM - 2:30 PM</td>
<td>MCBA MEMBER $45  NONMEMBER $70</td>
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<td><strong>Wednesday, June 26</strong></td>
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<tr>
<td>Depositions: Creating the In-control, Grade “A” Witness</td>
<td>8 AM - 11 AM</td>
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<tr>
<td>Examining Expert Witnesses</td>
<td>12:30 PM - 3 PM</td>
<td>MCBA MEMBER $45  NONMEMBER $70</td>
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<tr>
<td><strong>Thursday, June 27</strong></td>
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<tr>
<td>Nuts &amp; Bolts Of Personal Injury</td>
<td>8 AM - 11 AM</td>
<td>MCBA MEMBER $45  NONMEMBER $70</td>
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<tr>
<td>Effective Cross Examinations</td>
<td>11:30 AM - 2:30 PM</td>
<td>MCBA MEMBER $45  NONMEMBER $70</td>
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<tr>
<td>Filing A Special Action</td>
<td>3 PM - 5 PM</td>
<td>MCBA MEMBER $45  NONMEMBER $70</td>
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  3 Hours MCLE
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  3 Hours MCLE
  MCBA Member $85; Non-member $120
- Healthcare Providers as Expert Witnesses (#050902)
  3 Hours MCLE
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  3 Hours MCLE
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VLP volunteer started with intake clinic

Then added tenants’ issues, consumer litigation and now will be a guardian ad litem

By Peggi Cornelius Special to Maricopa Lawyer

“It’s half their legal problem and half their life story.”

That’s what Mike Christopher hears while advising tenants seeking help through the Volunteer Lawyers Program. Christopher is being honored as VLP’s Attorney of the Month for sharing his legal knowledge and for his commitment in helping others with life problems.

As an attorney at Snell & Wilmer, Christopher began participating in pro bono work at VLP through a weekly case intake clinic staffed by volunteers from his firm.

While conducting initial interviews regarding a variety of civil legal problems, Christopher became aware of a wide range of volunteer opportunities and expanded his involvement to the tenants’ rights advice clinic.

Giving tenancy legal advice, writing letters or making calls on their behalf, Christopher says he is an advocate for those whose lack of financial resources puts them on uneven ground with people who can take advantage of them.

“VLP clients are living on the edge of poverty,” he said. “Particularly in eviction cases, I often see people who are suddenly unable to pay rent because of an illness or injury which prevents them from working, or unanticipated separation from a spouse or partner who was providing income. Because the time frame for eviction is so short, what they need most is time to explore their options and relocate. I do go to court when necessary, but it’s gratifying that my intervention usually results in an agreement between the parties without a trial.”

Although Christopher’s law practice has been transactional over the last several years, he began his legal practice litigating shareholder class actions and large corporate cases and has ventured back into the world of litigation with another VLP attorney, DeShon Pullen.

Christopher and Pullen jointly represented a VLP client who had purchased a used car for a friend soon after it was purchased, the car had serious problems and could not be driven. The dealer refused to honor a state law mandated warranty and would not cancel the contract.

“Our client’s inability to speak English or read any language put him at a severe disadvantage.” Christopher said. “He understood his obligations under the contract and is an honorable person, so he continued to make payments on the debt even though the car was inoperable. Doing so made it impossible to purchase another vehicle, so he has since been trying to maintain a job and care for his dependents without transportation.

The process has been time consuming, but not without reward.

Complex discovery, including several depositions, involved donated services of reporters from Arizona Reporting Services and Lea, Sherman and Habeski. Volunteer Sergio Mosqueda provided English/Spanish translation for the many non-English speaking witnesses and the client.

Ultimately, Christopher and Pullen prevailed in an arbitration proceeding that resulted in a $37,000 judgment against the opposing party, including attorney’s fees and reimbursed costs for court reporters and translators.

After obtaining his undergraduate degree in business administration, Christopher lived and worked in Philadelphia. He hadn’t planned to become an attorney but a co-worker’s commitment to night school law studies was an example he decided to follow. He worked his way through Delaware Law School (now Widener University) with interest in law-related jobs, like interviewing people seeking bail at the Philadelphia city jail, researching and writing materials for a treatise on corporate law and working as a paralegal for a large law firm. He also clerked for a Delaware Supreme Court judge.

Christopher’s plans included moving to the southwest, but his thoughts of Austin gave way to a job lead and his first positive impressions of Arizona after a chance trip to Phoenix.

Conducting intake interviews, helping tenants and representing consumers is not all Christopher wants to do as a volunteer attorney. By using training materials supplied by VLP and helping on another pro bono case, he’s learned how to serve as a guardian ad litem for children in custody cases. Next stop: a solo assignment as a GAL.

There’s no doubt that Christopher’s generosity and curiosity are the perfect ingredients for a lifetime of community service.

Legal Brief

The Arizona Supreme Court is accepting applications from citizens who wish to volunteer to serve on Foster Care Review Boards in Maricopa County. The five-member boards review the cases of children who reside in out-of-home placements and make recommendations to Juvenile Court judges.

Of the 82 boards statewide, 38 are active in Maricopa County. Since the program was established in 1978, statistics show that fewer children are in institutions, more children are adopted and children are moved less frequently while in foster care. For more information or applications, contact the Foster Care Review Board at 602-542-9683.

THANKS!
Snell & Wilmer LLP

Barb Dawson, Dan McAuliffe, Raj Sivanathan and Heidi Staudenmaier

For planning and presenting a fantastic seminar - “Post-Enron Issues for Corporate Counsel” and for hosting a reception for attendees.

With sincere appreciation from the Maricopa County Bar Association Corporate Counsel Division.

VLP thanks attorneys who accepted recent cases

The Volunteer Lawyers Program, co-sponsored by Community Legal Services and the Maricopa County Bar Association, thanks the following 46 attorneys and firms in Maricopa County who agreed recently to assist 50 low-income clients with these civil legal needs.

Bankruptcy
Gary J. Jabur, Jabur & Wilk
Stanford E. Larch, Larch & DePima

Consumer
Thomas K. Chehal, Mohr Hackett Pederson
Blakly & Haga

Michael D. Curran, Johnston Maynard
Grant & Parker

Steven M. Friedman, Begum Lewis Marks & Wolfe
James F. Mahore, Mahore Rights Tully & Hamilton
Kerry Patterson, Quares & Brady Strisch Lang
Robert A. Resnick, Goodman Raup
Pitty Light-Walker, Quares & Brady Strisch Lang

Debt collection
J Greg Coulter, Jennings Strauss & Salmon
Franklin D. Dodge, Ryan Woodrow & Rapp
Richard N. Goldsmith, Lewis and Roca
Michael E. Newman, Halie Howard & Green
Joseph M. Parker, Gallagher & Kennedy

Family law/domestic violence
Mervyn T. Braude, Jabur & Wilk
Joseph E. Collins, Collins & Collins
Ronald B. Finkel, Behaili Harrison & Pearson

Guardians ad litem for children in Family Court
Annette T. Burns, sole practitioner
Stuart J. Gerrich, sole practitioner
Kavin M. Kasarjan, Holden Brockslam
Jeffrey L. Kastner, Community Legal Services
Donna R. Rohwer, Graham & Associates
Jennifer W. Schick, Wilson Law Offices
Hather L. Stewart, sole practitioner

Guardianship (minor children)
Linda Bars, Norris, Lischer
Judy Flanagan, sole practitioner (2 cases)
Jessica J. Fossett, Lewis and Roca
Michael A. Friedman, Trompeter Schiffman Porovitz Friedman & Hults
Suzanna Goldman, Goldman Soderquist Law Office
Dana M. Levy, MariscalWeeks McIntyre
Ronald B. Finkel, sole practitioner
Diane M. Lucas, sole practitioner
Wallace R. Nichols, sole practitioner
Sandra K. Sanders, Staples & Johnson
Christopher M. Stainer, Bennett Fairbourn
Friedman & Balint
James F. Weiss, Meyers Tuber & Meyers
Joseph Willy, sole practitioner

Guardianship (incapacitated adult)
Timothy G. Tonkin, Solomon Rehnbl & Blake

Home ownership
Richard J. Boyd, sole practitioner
David O. Capo, Snell & Wilmer
John D. (Jake) Curtis II, Burch & Cruscuelle
Mark C. Dangerfield, Gallagher & Kennedy
Michael F. Hodge, Jennings Strauss & Salmon
Richard N. Goldsmith, Lewis and Roca

Non-profit organizations
Ells M. Carter, Quares & Brady Strisch Lang (2 cases)

Social Security
Fred Friedman, Jerome Gibson Stewart
FriedmanStevenson & Engle

Tenants’ rights
J Michael Christopher, Snell & Wilmer (2 cases)

Tort defense
Mark D. Kiebler, Bass Kunz
Take a break from legal research to think about persuasion

By Jack Levine

A

though the basic and finer points of substantive and procedural law occupy most of the time and attention of trial lawyers in their quest to improve their skills, the most important ingredient to success in the courtroom — the ability to persuade — has little to do with knowledge of the law. In fact, some of our most successful trial lawyers and maintain trust. If ever seen near a law library, having mastered the basic legal issues of their case.

Of all the human qualities, the ability to persuade — to get other people to understand, accept and act on one’s ideas — is by far the most important for a trial lawyer to possess. One can be a whiz at legal research and at preparing briefs, motions and other pleadings, but if a lawyer does not possess the ability to persuade, he or she will never be successful in the courtroom and should consider turning to other areas of the practice.

Most experienced trial lawyers agree that the skillful advocate is born and not made. That certain quality — call it charisma, magnetism, glamour or appeal — is possessed by a few fortunate individuals. Those who do not have it but nevertheless wish to practice the art of trial advocacy must work all the harder to master the three indispensable principles of persuasion. To persuade you must:

➤ Provide a rational appeal;
➤ Stimulate an emotional response; and
➤ Build and maintain trust.

In other words, you must present a logical justification for the jury to believe the facts or conclusions that you are advocating; you must get the jury emotionally involved in your client’s case; and the jury must see you as honest, believable, trustworthy and knowledgeable.

One of the secrets of success in persuading a jury (or anyone) is to appeal to a person’s self-interest. Any good sales person will tell you that people will not buy a product merely because the product is useful, desirable or beneficial to them. The seller wants them to. If they buy it at all, it will be because the product is buy it at all, it will be because the product is

The law firm of
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announces that

Irv Ing Hymson, Jeffrey A. Leyton, Eddie A. Pantliati, and Loren Molever have recently completed certificated training in alternative dispute resolution, approved by the Arizona Dispute Resolution Association.

Marilee Miller Clarke was the ADR Coordinator of the local RTC consolidated office and has completed both basic and advanced ADR training.

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

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

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

Representing nursing home residents and their families in cases of neglect and abuse can have a positive impact on the quality of care given to all residents of nursing homes.

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No bright line for liability to non-clients

By Gerald F. Moore
Maricopa Lawyer

“What is this §51? The Restatement of the Law Governing Lawyers is a two-volume text consisting of 135 sections, adopted by the American Law Institute in May 1998. It addresses issues from regulation of the profession (chapter 1) to lawyer-client relationships (chapter 2) to conflicts of interest (chapter 3).

Section 4 concerns lawyer civil liability. Section 52 sets forth the standard of care as follows: “A lawyer who owes a duty of care must exercise the competence and diligence normally exercised by lawyers in similar circumstances.”

The Court of Appeals reversed based on §51 regarding duty of care to non-clients. In fact, the court intentionally did not consider the non-client appellee’s gratuitous assumption-of-duty argument.

The court rebuffed a “flood of litigation” argument by suggesting that §51 would impose a duty (and therefore potential liability) on an attorney who made the above statements.

The Court referred to the “bright line” argument by §51, but indicated that §51 would seldom apply. The court not only did not draw a bright line, but ruled that the application of the Restatement depends on facts and relationships that must be considered on a case-by-case basis.

The court seemed to limit its ruling to the assumption of a task on behalf of all the parties, suggesting that this is a rare circumstance. The court noted that in most adversarial proceedings, if no duty is expressly asserted or no duty can be found, attorneys remain free to zealously represent their clients' interests without risk of liability to a non-client.

What is this §51? The Restatement of the Law Governing Lawyers is a two-volume text consisting of 135 sections, adopted by the American Law Institute in May 1998. It addresses issues from regulation of the profession (chapter 1) to lawyer-client relationships (chapter 2) to conflicts of interest (chapter 3).

Of current interest is §4, which provides that a person not admitted to practice as a lawyer may not engage in the unauthorized practice of law, and a lawyer may not assist a person to do so. The comment states that the phrase “unauthorized practice of law” is a well-understood concept.

Chapter 4 concerns lawyer civil liability. Section 52 sets forth the standard of care as follows: “A lawyer who owes a duty of care must exercise the competence and diligence normally exercised by lawyers in similar circumstances.”

Section 50 (duty of care to a client) specifies that a lawyer owes a client the duty of care or breach of fiduciary duty was the legal cause of injury as determined under generally applicable principles of causation and damages.

The Restatement addresses several bases of civil liability, including liability in contract (§55), liability under general law as a non-lawyer would be liable to a third party (§36), breach of fiduciary duty (§49) and professional negligence (§46).

Section 51 regarding duty of care to non-clients states:

For purposes of liability under Section 48 [professional negligence], a lawyer owes a duty to use care within the meaning of Section 52 [standard of care] in each of the following circumstances:

(1) To a prospective client, as stated in Section 15;
(2) To a nonclient when and to the extent that:
   (a) the lawyer knows that a client intends or is about to enter into a transaction in which the lawyer is to exercise care within the meaning of §52 in pursuing the client’s lawful objective in matters covered by the representation.
   (b) such a duty would not significantly impair the lawyer's performance of services to the client; and
   (c) the absence of such a duty would make enforcement of those obligations to the client unlikely; and

(3) To a nonclient when and to the extent that:
   (a) the lawyer knows that a client intends or is about to enter into a transaction in which the lawyer is to exercise care within the meaning of §52 in pursuing the client’s lawful objective in matters covered by the representation.
   (b) such a duty would not significantly impair the lawyer's performance of services to the client; and
   (c) the absence of such a duty would make enforcement of those obligations to the client unlikely; and

(4) to a nonclient when and to the extent that:
   (a) the lawyer’s client is a trustee, guardian, executor, or fiduciary acting primarily to perform similar functions for the nonclient;
   (b) the lawyer knows that appropriate action by the lawyer is necessary with respect to a matter within the scope of the representation to prevent or rectify the breach of a fiduciary duty owed by the client to the nonclient, where (i) the breach is a crime or fraud or (ii) the lawyer has assisted or is assisting the breach;
   (c) the nonclient is not reasonably able to protect its rights; and

A primer on using the 24-hour depository box

By Michael K. Jeanes
Clerk of the Superior Court

In May, I reported two significant changes in our office: the closing of the night filing windows and the relocation of the downtown 24-hour filing depository box.

closing the night filing windows has increased the usage and importance of the 24-hour depository box. Therefore, for your convenience, I would like to review the instructions on how to use the box as well as clarify its location.

The box, which is available 24 hours a day, seven days a week, now is located inside the Madison Street garage next to the new security station. [See the accompanying map above.] The station is at the eastside entrance of the garage. At First Avenue. At the entrance of the garage is a brown sign that says “Employee Entrance.” Proceed through this entrance to the gate and push the call button to speak with the guard. Inform the guard you want to use the filing depository box and the guard will allow you to enter the garage. Visitor parking is available to the left (or south side) of the garage.

Here’s how to use the box:

➤ Time stamp the original document and your own copy using the time clock on the box.
➤ Attach the filing fee, if required, to the document. Use either a check or money order made payable to the Clerk of the Court. Do not deposit cash.
➤ Secure the items with a clip or rubber band.
➤ Place the package in the depository filing box slot. The slot opening is one inch.

civil, domestic relations, tax and probate filings. It cannot be used for any juvenile filings. The clerk’s office also has a 24-hour filing depository box at the Southeast Court Complex in Mesa. It is located at the main entrance, on the north side of the building.

In addition to these 24-hour boxes, we have two internal filing depository boxes, which are available during normal business hours for those customers who do not want to stand in line. One internal box is located in the mail distribution center off of the West Court Building lobby at the downtown court complex in Phoenix. The other box is in the main lobby area of the Southeast Complex in Mesa. The instructions for these boxes are the same as the downtown 24-hour filing depository box.

Thank you for your cooperation as we transition into making filing more convenient and available at any time for our customers. We are still in the process of adding additional filing boxes in the future to further improve our service. Please watch for details.
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Restatement...

Continued from page 14

(d) such a duty would not significantly impair the performance of the lawyer’s obligations to the client.

A comment to §31 notes: “[I]t is often difficult to distinguish between harm resulting from inappropriate lawyer conduct on one hand and, on the other hand, detriment to a nonclient resulting from a lawyer fulfilling the proper function of helping a client through lawful means.”

The comment also notes a hazy distinction between a “nonclient” and “opposing parties” with the following: “A lawyer representing a party in litigation has no duty of care to the opposing party under this Section, and hence no liability for lack of care, except in unusual situations such as when a litigant is provided an opinion letter from opposing counsel as part of a settlement (see Subsection (2) and Comment e hereto). Similarly, a lawyer representing a client in an arms-length business transaction does owe a duty of care to opposing non-clients, except in the exceptional circumstances described in this Section.”

Comment e to §51 provides:

When a lawyer or that lawyer’s client (with the lawyer’s acquiescence) invites a nonclient to rely on the lawyer’s opinion or other legal services, and the nonclient reasonably does so, the lawyer owes a duty to the nonclient to use care (see §52), unless the jurisdiction’s general tort law excludes liability on the ground of remoteness. Accordingly, the lawyer’s negligence with respect to the opinion or other legal services causes injury to the nonclient (see §93). The lawyer’s client typically benefits from the nonclient’s reliance, for example, when providing the opinion was called for as a condition to closing under a loan agreement, and recognition of such a claim does not conflict with the duties the lawyer properly owed to the client. Allowing the claim tends to benefit future clients in similar situations by giving non-clients reason to rely on similar invitations.

Comment e does not clearly distinguish between the nonclient and the opposing party. Kremser applies §51 to opposing parties represented by counsel. Indeed, the court observed that a client has a claim for a bright-line rule that neither side’s attorney is liable to the other party under any circumstances for negligent acts, omissions or representations.

Comment e continues with several examples of potential liability, including:

When a nonclient is invited to rely on a lawyer’s legal services, other than the lawyer’s opinion or other legal services, and the nonclient reasonably does so, the lawyer’s obligations to the client.

Another comment on §51 concerns a non-client enforcing a lawyer’s duty to a client. The subsection provides that when a lawyer knows that a client intends a lawyer’s services

— See Restatement on page 18
The divisions, sections and committees in the calendar are those of the Maricopa County Bar Association, unless noted otherwise. All events are meetings and take place at the MCBA office, 303 E. Palm Lane, Phoenix, unless noted otherwise. Other frequent venues for meetings and events include the University Club, 39 E. Monte Vista, Phoenix; Arizona State University Downtown (ASUD) Center, 502 E. Monroe, Phoenix; and the Arizona Club, 38th floor, Bank One Building, 201 N. Central, Phoenix.

1  PLD, St. Mary’s Food Bank, 31st Ave & Thomas, noon
3  YLD Domestic Violence Committee, noon
   Maricopa Lawyer editorial board, 5 p.m.
4  Early Bird Film Festival begins!
5  Family Law Section, University Club, 5:15 p.m.
6  PLD board, noon
   Alternative Dispute Resolution Committee, 4:30 p.m.
10 YLD board, noon
   Paralegal Division board, 5:30 p.m.
11 Scottsdale Bar Association lunch meeting, noon, restaurant at McCormick Ranch Golf Club, 7505 E. McCormick Parkway, Scottsdale. Speakers: Bob Melton and Jerry Porter, candidates for Scottsdale justice of the peace. Information and/or reservations: Jill Miller, 480-481-3047.

JUNE 2002

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12 MCBA executive committee, noon
   Environmental Section, noon
   Hayzel B. Daniels Bar Association, 5:30 p.m.
14 YLD Domestic Violence CLE, noon
18 Estate Planning and Probate Section executive committee, 7:30 a.m.
   International Section, noon
   Bankruptcy Section, 5 p.m.
19 Litigation Section, 7:30 a.m.
   Sole Practitioners Section, 11:30 a.m.
   Bench Bar Committee, 12:15 p.m.
   Central Courthouse conference room
   Paralegal Division, 5:30 p.m.
20 CLE Film Fest Finale Begins! See page 10 for CLE offerings and times.
   Phoenix chapter of the Federal Bar Association lunch meeting, noon, Hyatt Regency Downtown. Speaker: District Court Judge Roslyn Silver, David Rosenbaum and Scott Bales.
   Information: Kevin Bonner, 602-528-4080 or kbonner@ssd.com.
   MCBA board, 4:30 p.m.
   Summer Associate Social, 5:30 p.m.
21 Maricopa County Bar Foundation board, 7:30 a.m.
   Task Force for Recruitment and Retention of Minority Attorneys, 8:30 a.m.
25 CCD board, 4:30 p.m.
26 Arizona Women Lawyers Association lunch meeting, Arizona Club. Speaker: Janet Napolitano. Program: TBA. Plate lunch will be served at noon; the formal program begins at 12:30 p.m.
   Reservations (required): 602-863-7678 or luncheons@awla-maricopa.org by noon June 24. Information: Amy Schwartz, 602-956-4438.
   Paralegal Outreach Committee, 5:30 p.m.
27 Paralegal CLE luncheon, 11:45 a.m.
   University Club

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

Got an itch to write more than motions?

Maricopa Lawyer welcomes contributions, from news and feature articles to humor and opinion pieces, that are law-related or of special interest to the legal profession. The Maricopa Lawyer editorial board reserves the right to reject articles and to edit contributions for length or content. Contributions must be typed (double-spaced) and submitted to Maricopa Lawyer, Maricopa County Bar Association, 303 E. Palm Lane, Phoenix, 85004. A copy of the submission on computer disk would be appreciated.

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➤ For rent (property other than office space)
➤ For sale (real and personal property)

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

Upcoming Section Meetings

- The Family Law Section will be meeting on Wednesday, June 5th, 2002 at 5:15 p.m. at the University Club, 39 E. Monte Vista.
- The Environmental Section will be meeting on Wednesday, June 12th, 2002 at 12:00 p.m. at the MCBA, 303 E. Palm Lane.
- The Bankruptcy Section will be meeting on Tuesday, June 18, 2002 at 5:00 p.m. at the MCBA, 303 E. Palm Lane.

The following Section Executive Boards will meet in June:

- ESTATE PLANNING SECTION, on June 18th, at 7:30 a.m. at MCBA, 303 E. Palm Lane, Phoenix.
- INTERNATIONAL SECTION, on June 18th, at 12:00 p.m. at MCBA, 303 E. Palm Lane, Phoenix.
- LITIGATION SECTION, on June 19th at 7:30 a.m. at MCBA, 303 E. Palm Lane, Phoenix.

For information about section membership or to register for events, please contact the
CLE Department at:
phone: 602-257-4200
fax: 602-257-4522
e-mail: smontoya@mcbabar.org
-OR-
Register online @ www.maricopabar.org
James F. Henderson, who has focused on media law and civil and commercial litigation over his 50-year career, has joined Jennings, Haug & Cunningham. Hofmann, who has practiced for more than 40 years in Phoenix, is a certified specialist in injury and wrongful death litigation who practices in the areas of plaintiff’s personal injury, wrongful death, insurance coverage, bad faith, construction accidents, medical malpractice, legal malpractice and highway-defect accidents.

Kevin W. Goff has joined Lewis and Roca as of counsel. Goff (J.D. magna cum laude 1999, Boston University) is licensed to practice in Massachusetts as well as Arizona. Prior to joining Lewis and Roca, he was an associate with Squires, Sanders & Dempsey.

The New Law Firm has relocated to 2415 E. Camelback Road, Suite 700, Phoenix. Its telephone (602-255-0101) and fax (602-255-0431) remain the same.

Angela L. Polizzi and Helen R. Davis have become members of The Cavanagh Law Firm.

Leroy W. Hofmann, formerly of Hofmann, Salcito & Stevens, has joined Morrison & Hecker in Phoenix. He will head up the firm’s new media and constitutional law practice group. Prior to joining Lewis and Roca, he was an associate with Squires, Sanders & Dempsey.

The Fuller Law Office has relocated to 1814 E. Camelback Road, Suite 234, Phoenix. Its telephone (602-237-2038) and fax (602-237-2039) remain the same.

The Arizona Office of McDermott, Will & Emery has relocated to 1817 E. Camelback Road, Suite 300, Phoenix. Its telephone (602-255-6400) and fax (602-255-6401) remain the same.

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Despite overwhelming sentiment that lawyers have significant expertise and knowledge, work hard and generally meet their clients' needs, public confidence in lawyers has not improved over time due to the profession's poor handling of basic client relationships and absence of attention to communication.

These are among the findings of a new national survey conducted on behalf of the American Bar Association's Section of Litigation. "Public Perceptions of Lawyers" found that lawyers are not doing a good job of developing and maintaining good communication with their clients, that there is general misunderstanding and mistrust of lawyers' fees, and that lawyers need to police themselves more vigorously. Survey participants also said that lawyers need to communicate with the public about lawyers' public service and pro bono activities.

The survey suggests, however, that public confidence in the courts, lawyers and institutions generally have improved in the wake of Sept. 11.

For example, a representative sample in April 2001 found that only 24 percent of the public had confidence in the U.S. justice system in general. That number rose to 39 percent in January 2002. Confidence in the courts and Congress, but above the news media. This finding is consistent with past surveys. On the other hand, more than half of the respondents believe that lawyers know the law and want to serve their clients, and about three-fourths of respondents are satisfied with the quality of the service provided by their lawyer. Concern over fees, what questions to ask, how to find a lawyer and the availability of other options have kept more than half of those who could use the services of a lawyer from hiring one.


Public still ambivalent about lawyers, ABA survey shows
ATTORNEY NEEDED Criminal Defense for privately retained cases, mostly Felony. Minimum 5 years of criminal or related experience. Must be computer literate. Must be licensed and able to process own work. D.O.E. and D.O.Q. $57,500 base salary. Reimbursements to be determined. Send resume and letter explaining your qualifications and interest in the position to: Mick Rusing, Chair, Arizona’s Lawyer Representatives to the 9th Circuit, Rusing & Pope, PLLC, 1204 N. Seventh Road, Suite 210, Tucson, Arizona 85718. Applications should be received by August 1, 2002. Fee free to call Mick Rusing with any questions at (520) 259-4268.

ATTORNEY NEEDED Criminal Defense for privately retained cases, mostly Felony. Minimum 5 years of criminal or related experience. Must be computer literate. Must be licensed and able to process own work. D.O.E. and D.O.Q. $57,500 base salary. Reimbursements to be determined. Send resume and letter explaining your qualifications and interest in the position to: Mick Rusing, Chair, Arizona’s Lawyer Representatives to the 9th Circuit, Rusing & Pope, PLLC, 1204 N. Seventh Road, Suite 210, Tucson, Arizona 85718. Applications should be received by August 1, 2002. Fee free to call Mick Rusing with any questions at (520) 259-4268.

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