To E or not to E at trial? Eventually, only the rare case will not use electronics

By Don Stevens
Special to Maricopa Lawyer

About one year ago, the Maricopa County Superior Court announced the opening of four new “e-courtrooms.” Equipped with new tools to display evidence and automated recording equipment for making a record of the proceedings, these courtrooms ushered in a new generation of trial presentation methods and challenges, complete with the promise of efficient and interesting trials.

In the year that followed, the judges, staff and administrators assigned to this project have worked hard to make the reality of real trials with real lawyers match the technological promises. By any objective measure, the project is a success:

➤ There are now eight Superior Court divisions using the electronic systems for all trials and court proceedings, with more on the drawing boards.

➤ Judges assigned to the electronic divisions are increasing their use of the system for many aspects of the trial, from voir dire questioning to jury instructions.

➤ A growing percentage of lawyers feel more comfortable using the equipment to present evidence in the case. An equally growing number of lawyers feel uncomfortable not using the equipment.

➤ Witnesses have readily adapted to using the equipment to illustrate and to clarify testimony, with little or no advance training necessary.

➤ Jurors have easily embraced the new advantages of being able to see and understand the evidence as lawyers and witnesses discuss it. Because the equipment is an integral part of the courtroom, jurors have not perceived any unfair advantage to the side using the equipment. In fact, they have been more surprised when one lawyer does not use the equipment.

➤ There have been remarkably few technological “crashes,” and all were promptly addressed. Maricopa County has an excellent technical expert on staff and on call, so that any problems can be addressed immediately.

For the first time in Arizona history, two women will sit on the Arizona Supreme Court at the same time.

Arizona Court of Appeals Judge Rebecca White Berch, 47, a Republican, joins Ruth V. McGregor on the court. Gov. Jane Dee Hull, who also appointed McGregor in 1998 to the high court, named Berch to fill the vacancy created by the resignation of Frederick Martone, who became a U.S. District Court judge.

Hull will have a third appointment. In a letter dated March 13 and released publicly two days later, former Chief Justice Thomas A. Zlaket, who has served on the court for a decade, sent her his resignation, confirming long-time, rampant rumors that he would leave the court. His resignation takes effect at the end of April. He plans to return to practicing law.

His departure means that the court will have two new members within a short period of time. Chief Justice Charles E. Jones noted that the same thing occurred in 1992, when Zlaket and Martone joined the court within the same month.

“When you bring new people onto the court, you may have a change in viewpoint. I’m not suggesting that the court changes direction. We will follow the same policies and case-management directions,” Jones said. “With new people you get to see some new ideas.”

Coming...

...Going

Berch joining Supreme Court, Zlaket leaving

By Pat Sallen
Maricopa Lawyer

Prop 200 revisited: some questions answered in 2001

But does it apply to a single charge of possessing drug paraphernalia?

By Gerald F. Moore
Maricopa Lawyer

Proposition 200, codified at A.R.S. § 13-901.01, became effective Dec. 6, 1996. It requires courts to suspend sentencing and impose probation for non-violent first- and second-time drug offenders. In the February 2001 Maricopa Lawyer, I discussed the first 16 appellate cases on the subject. Subsequent opinions include the following.

The trial court, not the jury, determines whether the defendant has prior convictions that preclude application of Proposition 200. State v. Rodriguez, 205 Ariz. 160, 42 P3d 127 (App. 2001), rev. denied.

In Benal, the state argued that A.R.S. § 13-901.01 requires no notice at all. The court ruled that A.R.S. § 13-604.04 requires the state to provide notice if it intends to precede probation on the grounds that the defendant has been convicted of a violent crime. The court reasoned that pretrial notice enables the defendant to know the full range of potential punishment he faces on conviction.

The court in Benal approved of an earlier case, Belen v. Superior Court, 190 Ariz. 201, 945 P3d 1332 (App. 1997), which held that a court may reject a plea agreement requiring a sentence of probation if the defendant has prior convictions — even if the state has not alleged them.

A defendant convicted of possession of narcotics drugs in a drug-free school zone is eligible for probation under Proposition 200. State v. Payne, ___ Ariz. ___, 18 P3d 116 (App. 2001). This is so even though a conviction of possess-
The MCBA: a proud history of growth and service

By Michael D. Jones
MCBA President

While planning our 2002 board of directors retreat, our executive director, Brenda Thomson, did some research on the history of our association. As a result, the archives closet containing several dusty, beat up boxes of old files, books and ledgers that chronicle the history of our association as well as the practice of law in our community. Of course, many of you have seen the sign at our offices at 333 W. Palm Lane that proclaims that the Maricopa County Bar Association was founded in 1893 — more than 100 years ago.

The MCBA was incorporated as a non-profit professional association in 1946. Back then, it had 333 members and dues of $5 per year, or $15 if lunch was included during the monthly noon meetings. Our membership numbers have more than tripled, with new money from the county. When the county reversed a prior decision to add three judges pro tempore to assist in the management of a growing caseload. And, in 1994, the MCBA circulated initiative petitions for a constitutional amendment replacing the election of judges with a merit-selection system.

We’ve come a long, but have far yet to travel.

Budget crisis lands on trial court bench

By Colin F. Campbell
Special to Maricopa Lawyer

Although a separate branch of government, the courts are wholly dependent on the executive and legislative branches for funding. The current budget crisis engulfing both the state and Maricopa County have a direct impact on the Maricopa County Superior Court.

The state funds a substantial part of the probation departments and finances other programs like “Fill the Gap,” which funnels money to the Superior Court for criminal case processing. Maricopa County pays generally for the costs of administratively running the court, including buildings.

Maricopa County has already advised the court along with county departments that in planning a budget for fiscal year 2003, which begins July 1, the court should assume a zero-growth budget — that is, a budget based on the level of funding received in fiscal year 2002, and nothing more. This takes any raises for judicial employees off the table, and removes any hope that the court can obtain new divisions or hearing officers with new money from the county. When the economy began to fall after Sept. 11, the county reversed a prior decision to add three new divisions to the court.

The state budget outlook, as of this writing, is uncertain. State budget cutbacks in probation, department and other programs have drastically reduced the state’s ability to provide funds to the court system.

The $20 fee to the clerk will allow the court to implement its electronic document management system, in which all written documents will be scanned into a database and will become retrievable on the county intranet and, eventually, on the Internet linked to the court’s electronic docket.

The Criminal Department recently

Disciplined attorney details ethical quandary with undisclosed agreement

Editor’s note: This letter refers to the Arizona Supreme Court’s decision in In re Richard A. Alcom and Steven Feola, No. SB-01-0075-S (Jan. 9, 2002). Official citations are not yet available for the decision.

Editor:

I write regarding to your article of February 2002 entitled “Agreement that could affect a case is tried must be disclosed.” In an effort to enlighten other trial practitioners who frequently confront difficult ethical issues in litigation, I write to provide a more complete exposition of the ethical quandary I faced in this matter.

Two points are clear as a consequence of the court’s recent opinion.

Researching the applicable case law in good faith and consulting with other lawyers, both within and outside your firm, will not be viewed as a defense to ethics charges should the State Bar or a court subsequently elect to disagree with your analysis.

The fact that other attorneys, including former Superior Court judges, agree with you that the ethics issue is debatable, or that your analysis is supported by tenable legal arguments, is also no longer a defense to subsequent ethics charges.

The ethics issues confronting me as one of the defense attorneys when I evaluated the ethicality of plaintiffs’ proposed pretrial agreement were considerably more complex than appears from the court’s opinion. The Arizona case law in 1995 regarding disclosure of pretrial agreements to a trial court was murky. Even the Court of Appeals’ economic sanctions decision acknowledged that, under the case law in 1995, there was “no court for electronic document management. The increased case-management fee will allow the court to implement, among other things, its strategic plan for the family courts, including the hiring of case managers to assist judges in bringing cases to resolution. The $20 fee to the clerk will allow the court to implement its electronic document management system, in which all written documents will be scanned into a database and will become retrievable on the county intranet and, eventually, on the Internet linked to the court’s electronic docket.

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No assignment of legal malpractice claims

Even if coupled with insurance bad faith

By Daniel P. Schaack
Maricopa Lawyer

The Arizona Court of Appeals has rebuffed an attempt to allow parties to assign away their legal-malpractice claims. In *Botma v. Huser*, No. 1 CA-CV 01-0003 (Ariz. App. Feb. 5, 2002), the court held that the rule against assignment should apply even when the assigned malpractice claim is coupled with an assignment of a bad-faith claim against an insurer.

Holly Lyn Castano suffered catastrophic injuries from an automobile accident. Her mother, Patricia Himes, sued Steven Duane Botma, alleging his negligence caused Castano’s injuries. The car Botma was driving was insured by Safeway Insurance Co., with liability limits of $15,000, far below even Castano’s special damages, which exceeded $6 million.

Himes’ attorney, Charles Roush, offered to settle for the policy limits. There was a dispute over whether Safeway had accepted this offer. In any event, Himes withdrew it and sued Botma. Safeway hired Ronald Huser, local counsel for the Chicago firm of Parrillo, Weiss & O’Halloran, to represent him. The plaintiff claimed that Parrillo, Weiss & O’Halloran had an ownership interest in Safeway.

Roush later made a second offer to settle for the policy limits. Huser claimed he never received the offer. He answered the complaint and filed a counterclaim seeking to enforce the first settlement deal, which Safeway contended it had accepted. Roush denied that the offer had been accepted. He also withdrew the second settlement offer.

At Botma’s deposition, Roush suggested that Botma ought to have a different attorney represent him. He later wrote to Huser suggesting that, because of “the interrelationship between your firm and Safeway Insurance Company, and given the fact that Mr. Botma may well have a professional claim against your law firm as well as a bad faith claim against Safeway Insurance Company for any excess judgment, I again suggest that he should be provided with independent counsel who can advise him without the conflict you quite clearly have.” Huser and his firm soon withdrew, and Safeway hired new counsel for Botma.

Himes and Botma then reached a settlement agreement, coupled with a covenant not to execute. Botma also assigned to Himes any malpractice claim he had against his former attorneys and any bad-faith claim he had against Safeway. He agreed that Himes could file suit in his name against the attorneys, that she could control the litigation and that any proceeds would be assigned to her.

Himes then filed two suits, one against Safeway, the other against the attorneys. The attorneys persuaded the Superior Court to dismiss because Himes had failed to state a claim against them, on the ground that Arizona law did not allow Botma to assign to her his claim for legal malpractice.

The Court of Appeals held that even in the limited circumstances presented in the case — in which the attorneys who allegedly committed malpractice also were owners of the insurance company that allegedly acted in bad faith — the longstanding Arizona law precluding assignment of legal malpractice claims still applied. Judge E. G. Noyes Jr., noted the uniquely personal nature of the relationship between attorney and client and echoed previous cases holding that “actions arising out of such a relationship [should] not be relegated to the market place and converted to a commodity to be exploited and transferred to economic bidders.”

Himes argued for an exception to the general rule in *Damm v. Sledge* cases, in which the insured assigned to the plaintiff the defendant’s bad-faith claim against the insurer. The court declined the invitation.

Noyes acknowledged that allowing the assignment “would result in more just compensation for some individual plaintiffs, which is desirable.” But he found the counter arguments carried more weight: “[P]ermitting such assignments would cause immeasurable damage to attorney-client relationships, to the tort system, to the court system, and to the public’s sense of justice.” Allowing assignment, Himes argued, would give too much substance to the cynical belief that ‘lawyers will take any position, depending upon where the money lies, and that litigation is a mere game and not a search for truth.’”

Noyes pointed out that allowing assignment would create grave risks to lawyers representing underinsured, judgment-proof defendants because plaintiffs’ lawyers could drive a wedge between attorney and client.

“Botma was such a defendant, and Himes’ attorneys drove such a wedge between Botma and his attorneys,” Noyes wrote.

Judges Jefferson L. Lankford and James B. Sult joined Noyes.

Even though the person against whom a threat is made does not feel scared or threatened, the person making the threat still can be guilty of threatening or intimidating. The Court of Appeals reached that conclusion in *In re Ryan A.*, No. 1 CAJv 01-0003 (Ariz. App. Feb. 12, 2002).

Riding in a vehicle with other juveniles, Ryan drove past the home of his former friend, Brandon, and shouted that he would “f**king kill” him. Brandon was home at the time, but did not hear the threat. However, his mother heard it and relayed it to him. Although upset because his mother was upset, Brandon did not feel scared or threatened.

Ryan was found delinquent for threatening or intimidating, in violation of A.R.S. § 13-1201(A)(1). That statute provided that “[a] person commits threatening or intimidating if such person threatens or intimi-dates by word or conduct...[t]o cause physical injury to another person.” Ryan argued that because Brandon neither felt scared nor threatened, he could not be guilty.

Judge Daniel A Barker, writing for himself and judges Lankford and Thompson, dissented.

Barker noted that the statute’s plain language did not require that the intended victim of the threat in fact feel threatened. He reviewed *In re Kyle M.*, which held that A.R.S. § 13-1201 required a “true threat.” The government must demonstrate that the defendant “made a statement in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm or to take the life.”

This standard, Barker noted, was clearly objective. He cataloged the factors that fit the standard: “an expletive-laced threat of death was hurled toward a family home for a passing car. The threat included the name ‘Kyle’.”

— See Courtwatch on page 7
EXPERIENCE:

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Computer programming/sales
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Fraudulent computer evidence
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Missing or destroyed data recovery
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Out-sourcing
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Campbell...
Continued from page 2

decided to set probation fees, for those able to pay, at $50 per month. The statutes allow for a minimum $40 per month fee, which has been the recommended amount in presence reports for many years. Just adjusting this amount for inflation supports an increase to at least $50. With those defendants able to pay the entire cost of probation (we have had highly compensated individuals on probation) the department will seek the full cost of probation in presence reports.

Of course, access to the courts is a constitutional right that cannot be denied by the inability to pay a fee. The court continues its program for waiving or deferring fees where appropriate based on indigency, but the court intends to study other models for fee waiver or deferral. For example, Yuma County has a stricter model for waiver or deferral than other counties, and we think it may be helpful to look at that system.

Every lawyer knows that revenue requires collection. Many probationers, both adult and juvenile, finish probation with uncollected fees, fines and restitution. In the past, a court collection unit would write letters for payment and, if letters failed, turn the files over to outside bill collectors. For example, Yuma County has a stricter model for waiver or deferral than other counties, and we think it may be helpful to look at that system.

In the past, the court has not used normal creditor remedies for a simple reason: the court cannot be a collector of monies and hear objections to creditor remedies at the same time. In February, the court transferred its collections unit to the county, recognizing that post-judgment collections are more properly an executive rather than a judicial function. The county now will be able to pursue collections using the full panoply of creditor remedies.

Cutting costs

Aside from efforts to enhance revenue, the court also is diligently seeking to cut costs and more efficiently conduct judicial business.

➤ Jury expenses. The court is seeking to limit the jury expenses by attaining a jury utilization rate of 95 percent.

On the first day of jury service, the court pays jurors for their mileage to and from the courthouse. If the court summons more jurors than are actually sent to courtrooms on voir dire panels, the court has “unused” jurors that still have a cost associated with them. Over the last couple of years, the utilization rate for jurors in Maricopa County has been 80 percent or less per month, largely due to criminal cases. For example, a criminal case is set for trial, a panel of jurors is brought in and the case pleads or is dismissed on the morning of trial.

The American Bar Association recommends a 100 percent standard. The court is asking judges to conduct final pretrial management conferences in every civil and criminal case, and manage cases to avoid calling jury panels that are not used. This will directly save dollars in the court budget.

Jury target circles, which I talked about in last month’s Maricopa Lawyer, also will save money by limiting mileage.

➤ Electronic libraries. Another plan the court is looking at probably has already been accomplished by most private law firms—switching judge chamber libraries to electronic formats rather than hard books. Switching to electronic libraries can save more than $100,000 per year on supplements.

➤ Out-sourcing. Finally, where the court can “out-source” a service cheaper than providing it in-house, the court will do so. For example, the court is eliminating its in-house criminal mental-health forensics staff and moving to a contract system for prescreen evaluation of criminal defendants for competency. Out-sourcing this service will save the court money as contract providers can provide the service more economically.

Judges leave private practice for many reasons. One of them is to get away from the business side of the law: collections and running an office. Much to a judge’s chagrin, the judicial branch of government cannot run without taking into account the economics of the court system.

➤ Colin F. Campbell is Maricopa County Superior Court presiding judge.

CLE CHOICES

UPCOMING SEMINARS

Law Office Management 101:
The Non-Technology Side of Setting Up a Law Office
Thursday, April 4, 2002 1:00 - 4:30 PM
ASU Downtown Center, Mercado, Bldg. C (5th Street & Monroe)
Up to 3 hours of MCLE

Effective Cross Examinations: With or Without Depositions
Friday, April 5, 2002 1:00 - 4:30 PM
ASU Downtown Center, Mercado, Bldg. C (5th Street & Monroe)
Up to 3 hours of MCLE

Almost Everything You Need to Know to Improve Your Legal Writing
Friday, April 5, 2002 1:00 - 4:30 PM
ASU Downtown Center Mercado, Bldg. C (5th Street & Monroe)
Up to 3 hours of MCLE

Nursing Home Litigation:
Essential Discovery and Trial Tactics
Thursday, April 25, 2002 1:00 - 4:30 PM
ASU Downtown Center Mercado, Bldg. C (5th Street & Monroe)
Up to 3 hours of MCLE

Accounting 101 for Lawyers:
Understanding the Basics of Accounting and Financial Statements
Wednesday, April 10, 2002 1:00 - 4:30 PM
ASU Downtown Center Mercado, Bldg. C (5th Street & Monroe)
Up to 3 hours of MCLE

For additional information regarding CLE programs, materials or series tickets please contact the MCBA CLE Dept. at 602-257-4200
Or see our website at www.maricopabar.org

Mark your calendars NOW!
The annual Ethics in Civil Litigation:
Movie Magic 2002 with Steve Rosen
Wednesday, May 17, 2002
Can’t live if living is without Info Select and ISYS tools

By Winton Woods
Special to Maricopa Lawyer

A s the amount of information we gather continues to explode, the need for simple information-management tools becomes imperative.

Remember the Harry Nilsson song, “Can’t Live if Living is Without You”? There are two pieces of software, other than my Outlook calendaring and email program, that are absolutely critical to my office information-management system. They are both database tools, but not the ordinary variety. They are incredibly easy to use, very powerful and fast information retention and sorting tools.

**Info Select**

Info Select is one of the oldest computer information-management programs around. It started off many years ago as a DOS application known as Tornado, and it has gone through many iterations leading to the current version 6. It is a very simple program, easy to use and totally reliable.

Info Select is a “random information manager,” which means that you open a window in Info Select and save it. All of the information that you save in Info Select can be accessed in the way I have described above, but it can also be put into categories or books. Thus, if I click on a book that says “Law School,” all of the information that I have collected in the Law School book will appear on the screen. I can select from a list and find the information that I want. Go to www.miclog.com for rave reviews and more information and pricing.

Recently, I have been converting a lot of information into .pdf files. Info Select is the perfect place to store those files along with notes and websites that might be important. Info Select allows you to put all those different file types and urls into a single information box.

Info Select has a simple searching method that, for limited amounts of information, is ideal. You may, however, need a more powerful searching tool called full-text searching. Most of you are familiar with full-text searching because you have used Westlaw or Lexis. The core of that search technique is the application of Boolean algebra to the process of analyzing a set of text documents. The Westlaw-Lexis pattern is to contain huge sets of documents in increasingly broad categories of content. Thus, for example, in Westlaw the database named “allcases” contains all of the cases decided by any American court, state or federal. Any of those databases can be searched for specific terms or combinations of terms with lightning speed.

If you search for the term “consideration” in the “allcases” database, you will find a bazillion cases that contain that word. Indeed, there will be so many that they will be virtually useless unless you are able to make a more precise search. That is where Boolean theory comes into play. The application of Boolean algebra to the text-searching engine allows you to refine your search by asking for all cases in which “consideration” can be found in the same sentence as the word “nominal” or some other descriptive word that serves to limit the number of instances or “hits” in the database. Obviously “nominal consideration” is a phrase that will appear fairly commonly in American cases. If you are interested in the concept of nominal consideration that has been developed in the Arizona cases, you may seek to restrict the number of instances by choosing only the “Arizona” database and, if you are really concerned with the newest cases, you may seek to further restrict your search to cases that have come about since 1990. All of those cases are easy to do with full-text searching engines.

Wouldn’t it be nice to be able to search all of the documents and email on your computer in the same way? One of the problems, however, is that construction of effective search terms is a bit of an arcane science. People undertaking the study of Westlaw and Lexis often are stunned by the complexity of the searches constructed by their trainers. My other favorite software has the answer to that problem.

**ISYS**

That program is called ISYS, which was developed by Odyssey Development Corp., in Denver. Odyssey Development has taken into account the complexity of Westlaw and Lexis in constructing ISYS. You can create unlimited collections or databases based on information that you choose. You may take all of the documents in a single case and put them into a database entitled Jones Litigation or you may take copies of every lease agreement your office has ever created and put them into a database called Leases. You might put all of your depositions in a single database entitled Depositions or you might put the depositions in the Jones Litigation in a database called Jones Litigation Depositions. In other words, you may collect documents and store them in any category that you choose.

Once you have done that, ISYS will allow you to create a database search engine for finding the places in those documents where information is contained. Let’s say that you have put all the depositions in the Jones Litigation into a single database. You are interested in finding every instance in which a witness spoke about your client George promising to do something in 1988. To find that problem.

— See Computing on page 6

The law firm of HYMSON & GOLDSTEIN, P.C.
announces that

Irving Hyimson, Jeffrey A. Leyton, Eddie A. Pantliiat, 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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E-courtrooms...

Continued from page 1

➤ The court’s Training Division has now provided e-courtroom training and written materials to almost 500 lawyers and paralegals in Maricopa County.

➤ The State Bar of Arizona has an online continuing legal education course on the operation and use of the e-courtrooms. More online training soon will be available on the Maricopa County Superior Court website.

During this past year, at least one lawyer remarked, perhaps hopefully, that these electronic tools were nothing but fancy and expensive “toys” that would never replace traditional and time-honored methods of trial presentation. He also was sure that these “toys” would be abandoned at the first sign of fiscal crisis, making it unnecessary for him to learn how to use the system. The reality is that neither of these assumptions is true. As more and more state and federal courts include trial presentation equipment in new or refurbished courtrooms, it will be the rare case in which evidence is not presented with electronic assistance.

The board of supervisors’ vision and commitment in funding this project, as well as the courtrooms that are planned for the future, will continue to reap benefits for judges, juries, lawyers and the public. In addition to the eight divisions in the downtown Maricopa County court complex, for instance, another 30 are in the planning stages, including the four new courtrooms in the northwest regional court complex; six to 10 in the northeast metro area; two in the southeast metro area; 12 juvenile courts; two for the early dispostion court; and four at the jail for criminal proceedings. Presiding Judge Colin Campbell and Court Administrator Gordon Griller have indicated that the equipment and technology for audio- and video-recording of court proceedings will be included in all plans for renovated or newly built courtrooms.

These new developments have not required immediate and substantial changes to the rules of civil procedure or evidence. They have, however, generated a subset of ethical, evidentiary and constitutional issues for public and private sector lawyers and clients. The primary concern is to ensure that a complete and accurate record of the proceedings is available for review by the appellate courts. In the absence of a traditional paper transcript of a court reporter’s shorthand notes, the limits of third-party transcription of audio- and video-recordings of court proceedings will continue to be defined and improved. These issues are being addressed in educational programs for judges, forums at the law schools and continuing legal education programs. Several committees are working on rule changes to refine the way that the electronic record is made.

More importantly, an increasing number of lawyers have seen the power and the effectiveness that electronically assisted presentation can bring to a case. As the number of lawyers using these tools increases, so does the number of lawyers against whom it has been used. Left to their own timetable, lawyers may have been slow to incorporate new technology in the litigation practice. Suffering through a powerful and persuasive electronic presentation by the other side, however, is sure to accelerate the acceptance and use of these new tools. Electronic document exchange, Internet document repositories and electronic discovery are also increasing rapidly. The advantages and potential cost-savings of maintaining and using digital copies of documents are unmistakable, and no longer optional.

All of these factors make it almost certain that the response to the question “To E or not to E...?” is “What a silly question!”

➤ Don Stroms is a trial consultant in private practice. He has presented e-courtroom training for lawyers and staff over the past year.

Computing...

Continued from page 5

each of those instances, all you need do is to ask ISYS to generate a list of documents that contains the word "promise" that also contains the date "1988." ISYS will generate a list of every document that meets that description. You can sort those documents in variety of ways, either by file name or date, and then by a simple mouse click on an arrow go to the exact place in each document where those two words appear within 10 words of each other. When you find what you are looking for, another click will bring it up in your word processor or save it to a notebook. A number of programs will provide you with that kind of Boolean search capability, but ISYS is different because of the simplicity with which it constructs searches. ISYS has a menu-based search construction device that makes it easy for anyone to quickly construct a search.

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Courtwatch...
Continued from page 3

of an individual residing in the home. There had been a history of threats in the past. The tone was such that it frightened the family member who heard it. The police were called..."

Under these circumstances, Barker held, "[a] reasonable person could certainly conclude that the statement represented a 'true threat,' despite the fact that the intended victim did not express fear when the threat was relayed to him."

Contrary to the Court of Appeals’ opinion, the Supreme Court has held that the governor’s decision to reject a recommendation to commute a prisoner’s sentence constitutes an official act, which must be accompanied by certain formalities. Because these formalities were not met, the court held, an attempt to reject a recommended commutation of Kevin McDonald’s sentence was invalid and McDonald should be released from prison.

McDonald’s sentence was invalid and accompanied by certain formalities. Governor’s decision to reject a recommendation, the Supreme Court has held that the time, Fife Symington — had decided to vote unanimously to recommend commutation for McDonald.

In 1990, McDonald was convicted of aggravated assault with a golf club. Because he was on probation for drug and property offenses when he committed the assault, he was sentenced to life in prison, with no possibility of parole for 25 years. Deciding that some mandatory sentences were unconstitutionally harsh, the Legislature amended the laws to reduce the sentences that persons like McDonald would serve.

Because the amended laws created a disproportionality problem, the legislature enacted the Disproportionality Review Act, which allowed the Arizona Board of Executive Clemency to review the affected sentence and make a recommendation for commutation. If the board’s recommendation were unanimous, commutation would be automatic unless the governor rejected it. McDonald would serve. Governor took any action."

Feldman held that because the action fell within the governor’s exclusive power, it qualified as an official act, requiring the governor’s signature and the attestation of the governor’s office had followed.

"The method by which Governor Symington’s office handled the matter in question does not conform to minimal standards of business practice and even less to acceptable levels of governmental procedures...[H]is office failed to acknowledge receipt of the Board’s official communication, failed to establish a file, failed to procure his signature, and failed to keep any official record of his action, assuming the Governor took any action."

Feldman held that because the action fell within the governor’s exclusive power, it qualified as an official act, requiring the governor’s signature and the attestation of the secretary of state. It would be dangerous, in Feldman’s opinion, to hold otherwise.

"We do not believe," he wrote, “the courts and the citizens of this state should be faced with the necessity of judicial proceedings to determine whether acts entrusted only to the governor were actually done by the governor or with the governor’s authority.”

“It would be contrary to the very principles of good government,” he continued, “to recognize official acts of the executive when there is, as here, no record or central depository from which to determine those official acts.”

Feldman’s opinion was unanimous, joined by Chief Justice Charles E. Jones, Vice Chief Justice Ruth V. McGregor and Justice Thomas A. Zlaket. Justice Frederick Martone had already left the Supreme Court.

When the Clerk’s Office first began imaging documents several years ago, we quickly realized that we would need the legal community’s assistance and cooperation to ensure that all scanned images were as clear and legible as the paper original. In August 1998, we published a set of guidelines, derived in large part from Rule 10(d) and Rule 5(g)(2)(D), and asked that they be observed when creating and filing documents for probate cases, which is where we began piloting our imaging efforts.

As I noted in the January Maricopa Lawyer, we now have expanded the imaging of court documents to all new cases — all case types — filed on and after Jan. 2. For this reason, we are reprinting and updating these same guidelines, which are listed below. We ask that you follow these guidelines when filing documents for any case type with our office:

➤ Avoid attachments to pleadings that already exist in the court file. A copy of a previously filed document may be attached to the judge’s copy of the pleading if the party wants to draw the judge’s attention to it.
➤ Avoid using colored paper, colored printing and highlighted, colored text. We use black and white scanners. Colored text and paper may create images that are difficult or impossible to read and, in some cases, colored highlighting actually obscures the text underneath.
➤ Use only black ink for all signatures.
➤ Avoid using legal size paper (larger than 8 1/2 x 11 inches). Attachments should be reduced in size to 8 1/2 x 11 inches for filing.
➤ Avoid tabs on dividers. They do not scan. If you want to use them, use only on the copy sent to the judge.
➤ File each document separately. Do not staple multiple documents together.

Thank you for your assistance in making our transition to electronic court records a success.

Legal Brief

The address to which support payments should be sent change at the beginning of the current year. Any payments send to the previous address (P.O. Box 29309, Phoenix, 85069-9309) will be returned. The new address is Support Payments Clearinghouse, P.O. Box 32107, Phoenix, 85072-2107.

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Use your unique skills as a lawyer at Law Week

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

As lawyers, we bring to the volunteer table unique skills much needed by members of the community. Sure, we can pick fruit, serve meals, sort clothes and paint houses just as well as any other volunteer. But ask a senior citizen, someone new to this country, someone with little education, someone on a limited budget, or any member of the community and they will agree that affordable legal assistance is not as abundant as some of these other services might be.

Recognizing that the number of hours each of us has available to donate is very limited, we suggest that you share your unique and less-accessible skills with our community as a Law Week 2002 volunteer.

The theme of Law Week 2002 (April 27 to May 3), “Assuring Equal Justice For All,” truly exemplifies the spirit of Law Week. The Maricopa County Bar Association’s Young Lawyers Division celebrates Law Day (May 1) through weeklong activities designed to serve almost every part of our community, including the legal community.

Law Week 2002 events include:

➤ Phone-a-Lawyer (6 to 9 p.m., April 30 and May 1), which allows people to call volunteer lawyers at the KAET Channel 8 phone bank for free legal advice.

➤ Community law fairs (April 27), which offer members of the community a forum to consult with volunteer lawyers at Arizona Mills Mall or Metrocenter Mall.

➤ Senior law fairs (April 29 through May 3), which give our senior citizens opportunities to consult with volunteer lawyers during one-on-one sessions at five valley senior centers.

Legal Brief

Former Navajo Nation Chairman and President Peterson Zah and Patricia White, dean of the Arizona State University College of Law, will host a fundraiser for ASU’s Indian Legal Program at the Zeldin Bash Salmeri Gallery of Western American and Native American Art from 6 to 9 p.m. April 19.

The event will be held at the gallery, located at 24202 S. Basha Road, Chandler. The gallery has more than 600 pieces of art, focused in the areas of contemporary western American art, and includes oil paintings, watercolors, acrylics, pastel and charcoal drawings, pen and inks, bronze, wood and natural stone sculptures, wood-turned bowls, bas-relief, pottery, kachinas and jewelry.

Because the Bash family has underwritten the event, all proceeds will go toward Indian Legal Program student scholarships. Tickets are $100, of which $75 is tax deductible. For more information, contact Kate Rosier at 480-963-6204 or kathleen.rosier@asu.edu.

Lawyers in the Classroom, which connects lawyers with students to discuss legal issues, life as a lawyer and the impact of the law on students’ lives, is a Law Week 2002 event needing legal advice.

Law Week 2002 has enormous potential to raise awareness of all of the good things lawyers do for our community. As is obvious from the activities planned, the success of Law Week depends on the donation of time from our legal community to give free legal advice, be a teacher for a few hours, or be a judge for the children’s contests.

To volunteer, fill out the volunteer sign-up flyer included in this month’s Maricopa Lawyer. For more information, call the MCBA at 602-257-4290.

Monica Limón-Wynn and Maxine Polomski are co-chair of this year’s Law Week Committee.

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.

Dispute resolution services at forefront in May

By Joan Tobin
Special to Maricopa Lawyer

Mayors in Maricopa County cities are declaring May 1 to be Mediation Day in their communities. Focusing on the broad spectrum of dispute resolution services, speakers from the Maricopa Alternative Dispute Resolution Association (MADRA) will present information in meetings of service clubs, business groups, schools and community organizations.

The goal is to inform and educate people about options when conflict rears its ugly, expensive head.

Following the adoption of the new Rule 16(g), Arizona Rules of Civil Procedure, by the Arizona Supreme Court, interest has grown on the part of judges, lawyers and the informed public about how to implement the new rule and where to find neutrals. MADRA speakers will give an overview of the various processes used both in the courts and the community to settle lawsuits, and answer questions about the types of disputes most appropriate for any particular process. They also will provide information about the Arizona Dispute Resolution Resource Center.

The resource center was developed by the Arizona Dispute Resolution Association (ADRA, the statewide organization of neutrals) to accomplish the following goals:

➤ Provide the courts, lawyers and the public with a web-based directory of dispute resolution service providers (www.adrrc.org);

➤ Design model conflict-management systems for schools, health care organizations, businesses and governmental agencies;

➤ Guide units of government in developing collaborative problem-solving mechanisms for public policy disputes; and

➤ Assist underserved areas of the state in developing service delivery systems.

New service providers are listing their services with the resource center on a regular basis, and it is hoped that by the end of the year at least 100 providers will be available statewide. The website can be searched by provider name, county, type of service and specialty area. If you have questions about the resource center or finding a neutral, call 480-777-7562. Groups interested in having a mediation day speaker (during the months of April and May) should also contact the resource center.

Joan Tobin is director of the Arizona Dispute Resolution Resource Center.

The gallery has more than 600 pieces of art, focused in the areas of contemporary western American art, and includes oil paintings, watercolors, acrylics, pastel and charcoal drawings, pen and inks, bronze, wood and natural stone sculptures, wood-turned bowls, bas-relief, pottery, kachinas and jewelry.

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Next chapter: Tom Zlaket, sole practitioner

By Pat Salien
Maricopa Lawyer

When Thomas A. Zlaket departs from the Arizona Supreme Court at the end of April, he leaves behind a pronounced mark on the state’s legal profession.

In addition to the substantive influence of the Supreme Court opinions he has authored, Zlaket’s legacy includes the so-called Zlaket rules — the massive change in discovery rules that resulted in, among other things, disclosure statements — and his efforts as chief justice to increase professionalism among lawyers.

And he’s going to get a taste of the fruits of his labor, because his leaving the bench to go back to practicing law. As of May 1, he’ll be a sole practitioner in Tucson.

Like most other retired judges, he’ll like to do some arbitration and mediation work. Unlike most other retired judges, Zlaket, 60, also wants back in the legal trenches, as a trial and appellate lawyer.

“For me, it’s just time to move on,” he said. “I miss being a lawyer.

“Occasionally I have a pang and wonder about how much I’m going to miss this place.”

When Gov. Fife Symington appointed him in 1992, Zlaket said, he figured his new job would be a 10- or 12-year commitment. He said he never expected to become chief justice, with other more senior justices on the court at the time.

“There is some truth that once you’ve been chief justice, you’ve kind of done it all,” he said. “Once you’ve done it all, then you’ve got to make some decisions.”

“I’ve been on the court for 10 years and reversed a lot of Superior Court judges,” he said. “I’ve got to appear in front of them now, and they’re going to be tough.”

Chief Justice Charles E. Jones, who succeeded Zlaket Jan. 2 as the state’s top judicial officer, said of Zlaket’s departure: “It is a tremendous loss to the court because of his remarkable skill and his depth of understanding as a lawyer and as a judge and as human being.”

“We will miss Justice Zlaket very much. He is a wonderful human being. He has done great work in reconnecting some of the relationships with the other branches of government,” Jones said.

Zlaket’s retirement letter to Hull and Jones said it had been “a great privilege and honor to serve on the court these past 10 years.”

Arizona’s court system, Zlaket said, is “recognized around the world as modern, innovative and worthy of emulation. I have genuinely enjoyed my time in the company of these outstanding public servants, and I salute them all.”

In his Jan. 30 state-of-the-judiciary speech to the Legislature, Jones said the state’s court system during Zlaket’s term as chief justice improved its handling of criminal, child dependency and attorney discipline cases while building new juvenile detention facilities and adopting technological advancements.

“Justice Zlaket’s impact on the administration of justice in Arizona will be felt for years and for generations to come,” Jones said in his speech.

With the court’s mandatory retirement age of 70, Zlaket could have remained on the court for another decade.

He said he hasn’t decided exactly what kind of law he will practice. Before his appointment to the court, he handled plaintiff and defense personal injury as well as commercial litigation, and early in his career practiced criminal defense.

“I want to kind of let practice take me where it wants to take me. I’m a generalist and don’t want to close the door,” he said.

But, he said, “it seems to me that given my experience and background, I might be a pretty good lawyer for lawyers who need representation in front of the Disciplinary Commission or judges who need representation in front of the Commission on Judicial Conduct. Maybe even some consulting expert witness work.”

When questioned about how it might be, well, strange for opposing counsel to square off in court against the former Supreme Court chief justice, Zlaket pointed out that it’s been 10 years since he practiced law and that it would be a little weird for him, too. He recalled having a well-respected, retired judge in Tucson as opposing counsel one time. Even the judge on the case started calling the retired judge “judge.”

“I said, wait a minute. With the respect, when we get into the courtroom, there’s only going to be one judge,” Zlaket recalled. “I’m sure I will hear that speech from some lawyer.”

One thing’s for sure: he’ll have to live under the Zlaket rules.

“I’ve never practiced under the Zlaket rules. I don’t want to call them that. I’ve never practiced under the discovery rules.

“For some lawyers, the disclosure rules were not different at all from the way they always practiced. Some of the best lawyers did not play hide the ball. They always ponied up the evidence. Even under the old rules, they didn’t make a game out of it.”

“I find out as of May 1, that those lawyers who played games with the rules before 1992 are the same ones who play games now. They think that the art of lawyering is to play hide the ball. I don’t think I was ever one of those lawyers.”

He’s also looking forward to the ability to speak out on behalf of judges.

“My hands are not going to be tied in a month,” he said.

Berch’s selected significant cases, as attorney and judge

As part of their written applications, appellate judicial applicants must provide information about up to five cases they litigated or participated in as an attorney and up to five cases over which they presided or heard as a judicial or quasi-judicial officer, mediator or arbitrator.

In Rebecca White Berch’s application for the Arizona Supreme Court, she included the following cases to meet that requirement. The summaries and statements of significance about the cases are quoted from her application.

Cases litigated or participated in as an attorney

➤ Lewis v. Gray, 116 S.Ct. 2174 (1996), Berch headed the team of attorneys who represented the state in the U.S. Supreme Court.

Summary: “Imitates sued state correction officers claiming violations of their right of access to the courts.”

Significance: “The Supreme Court held that those claiming violations of constitutional rights must show actual violations of their rights, not the mere theoretical possibility of injury. The court struck down a sweeping federal injunction directing several aspects of the operation of the prison system’s law libraries.”

➤ Arizonans for Official English v. Arizona, 117 S.Ct. 1055 (1997), Berch headed the team of attorneys who represented the state in the U.S. Supreme Court.

Summary: “Plaintiff Yinger challenged Article 28 of the Arizona Constitution, the ‘Official English’ provision. I filed a ‘suggestion of mootness’ in the case in 1991. In the United States Supreme Court, the state took the position that the case was moot and that there was no live, justiciable case or controversy. The United States Supreme Court unanimously agreed.”

Significance: “The case settled important issues regarding the jurisdiction of federal courts.”

➤ Gunn v. Hodges, 2 CA-CV 94-0033 (Ariz.App., Division 2, 1994-95), Berch represented the attorney general.

Summary: “Plaintiffs challenged the state’s interpretation of the Arizona ‘campaign contribution limit’ law; the position advocated by the attorney general prevailed.”

Significance: “As a practical matter, the case settled a controversial campaign finance issue.”


Summary: “Petitioners challenged an ‘in lieu’ tax on the State Compensation Fund, claiming that it was a ‘special law,’ as that term is defined by the Arizona Constitution.”

Significance: “The case added to and clarified the law regarding special legislation.”

➤ Sears v. Hull, 192 Ariz. 86, 861 P2d 1013 (1986), Berch represented the state.

Summary: “Petitioners filed a special action against the governor, the state and the Salt River Pima-Maricopa Indian Community, claiming that the Indian Gaming Regulatory Act prohibited the governor from entering gaming compacts with tribes. The court held that the petitioners lacked standing to bring the challenge.”

Significance: “The case reaffirmed that mandamus is limited to cases in which a public official is refusing to do an act required by law; it will not lie to compel a discretionary action and is not appropriate to prohibit an official from acting. The case also reaffirmed that to gain standing, a plaintiff must allege a distinct and palpable injury. Speculation regarding harms generally suffered by a portion of the population will not suffice to confer standing.”

➤ McCloud v. Pima County, 174 Ariz. 345, 849 P2d 1378 (1992), Berch represented the Arizona State Retirement System.

Summary: “Plaintiffs challenged Arizona’s statutes allowing cost-of-living adjustments and health benefits to state retirees.”

Significance: “The case confirmed the government’s right to continue paying cost-of-
Fidel retires, so now Court of Appeals has two openings

State Court of Appeals Judge Noel Fidel has left the bench to become an Arizona State University law professor. Fidel retired from the court effective March 31. He has accepted an appointment to serve as a Merriam Distinguished Visiting Professor of Law at ASU. He begins his new position July 1.

Fidel was eligible to retire at the end of January. He spent five years as a Maricopa County Superior Court judge, serving as civil presiding judge of that court, before being appointed in 1987 to the Court of Appeals. He served a term as chief judge of the Court of Appeals. Fidel is a past chair of the Commission on Judicial Conduct. He is a past recipient of the Henry S. Stevens Award for outstanding service to the legal profession.

Applications for the vacancies created by Fidel's retirement as well as Court of Appeals Judge Rebecca White Berch's appointment to the Supreme Court were due by March 27, The Commission on Appellate Court Appointments has scheduled an April 24 meeting to review applications and select the candidates it would interview on May 9.


The Maricopa County Commission on Trial Court Appointments is scheduled to meet April 2 to review applications and select those applicants who will be interviewed April 18.

Berch cases...

Continued from page 10

Living adjustments and health insurance benefits to retirees. 

Decisions authored as a Court of Appeals judge


Summary: “This case posed the first full-scale challenge to the constitutionality of Arizona’s Sexually Violent Persons Act.”

Significance: “The case affirmed the validity of the act against the constitutional challenges raised. Review was denied by the Arizona Supreme Court.”


Summary: “Following a rollover accident in Idaho, the group of Arizona residents who were passengers in the van sued General Motors for product design defect and Phoenix Tabernacle for negligence. At issue were questions regarding whether Arizona’s seat-belt law should apply [an application of collateral estoppel].”

Significance: “The case resolved fairly technical conflict of laws and collateral estoppel questions, holding ultimately that Arizona law should be applied to govern the actions of Arizona residents on an issue of significance to Arizona.”


Summary: “Members of three political parties filed suit, seeking a declaration that Arizona statutes setting forth the procedures for selecting party representatives were unconstitutional or, if constitutional, were permissive rather than mandatory. The court held that the statutes were constitutional, served important public interests, and did not unfairly burden the parties’ First Amendment rights. Moreover the court held that the Legislature’s consistent use of the mandatory ‘shall’ revealed its intent that the statutes be construed as mandatory.”

Significance: “The opinion affirmed the Legislature’s power to enact reasonable regulations of parties, elections and ballots to reduce campaign and election fraud or disorder.”


Summary: “The court was asked to decide whether a newborn child who died from injuries inflicted while the child was in utero was a ‘person’ within the meaning of Arizona’s homicide statutes. The court held that the child was a ‘person.’”

Significance: “The case resolved an issue of first impression in the Arizona courts.”


Summary: “Taxpayers attempted to take a credit on their personal income tax returns from money they paid to a corporation, which elected S corporation status in Arizona, but retained C corporation status in Hawaii. The court affirmed the tax court’s disallowance of the credit.”

Significance: “The case reaffirmed the principle that corporations are different taxpayers from the shareholders that fund them, and shareholders are not entitled to credit against their personal income taxes in Arizona for their pro rata shares of the corporate income taxes paid in Hawaii.”

Supreme Court...

Continued from page 1

tem judge for Maricopa County Superior Court, her appointment means that Arizona’s high court still has no member who was a Superior Court judge. Martone was the last Supreme Court justice who had served as a trial court judge.

“I think we do need somebody with trial court experience,” Hull said, responding to a question at her March 13 press conference about the state’s current need for judges. “I don’t think it’s any secret that there will be another Supreme Court opening relatively quickly. I think that is pretty much all over the level of the grapevine. I would look forward to another appointment. Again, there were three extremely well qualified candidates, I picked the lady who I believe...at this time fills the part that the court desperately needs.”

Hull specifically cited what she called Berch’s “government experience.”

“I believe she well understands the differences in the three branches of government,” Hull said. “She understands who is supposed to do what, and I truly appreciate that,” Hull said.

Prior to joining the appellate court, Berch served as first assistant attorney general from 1996 to 1998. She handled policy decisions, supervised the legal work of the office’s 320 lawyers and handled appeals. Prior to joining the Attorney General’s Office, Berch was director of the legal writing program at Arizona State University College of Law from 1986 to 1995. She took a leave from ASU to serve as solicitor general from 1991 to 1994.

Berch is the co-author of a legal textbook, Introduction to Legal Method and Process,” and author of numerous articles in legal publications. She was an associate and later a partner at the firm of McGroder, Tryon, Heller, Rayes & Berch from 1979 to 1986.

Berch received her law degree in 1979 from ASU.

The court has been down one justice since Martone left the court at the end of January. But, with the appointment of Berch, it will have a full complement of justices for less than one month. Berch is scheduled to join the court April 8. Her investiture ceremony is set for 10 a.m. April 19 at the Arizona State University College of Law Great Hall.

Jone said he asked Hull to speed up the process of filling Martone’s vacancy so the court doesn’t fall behind. Hull announced her appointment of Berch six days after the commission sent up the names of its three nominees and just one day after the governor interviewed them.

Since Martone’s departure, Jones said, the court had been calling up Court of Appeals and Superior Court judges to sit on cases. Judges within the jurisdiction of Division I sit on cases arising from Division 2, and vice-versa. Jones said the court did not, however, invite anyone who applied for the Martone vacancy to sit on cases. As a result, that handicapped the court to some extent, because four of the six Division 2 Court of Appeals judges applied. As a result, he said, the court turned to more Division 2- jurisdiction Superior Court judges. Because trial court judges do not have the help of law clerks, that meant that the four remaining Supreme Court justices ended up with bigger writing caseloads, he said. ❏

Berch data

Residence: Tempe.
Party: Republican.
Activities: Founding board member, ASU’s Homeless Legal Assistance Project; member, Commission on Judicial Conduct; associate chair of the Supreme Court’s Committee on Examinations.
Resume tidbit: Miss Teenage Arizona 1972; Miss Teenage America semifinalist.
Education: Bachelor of science degree cum laude 1979, ASU; law degree 1979, ASU; master’s degree in English 1990, ASU; attended the John E. Kennedy School of Government summer program in 1997.

Family: Married to Michael Berch, an ASU law professor. Their daughter, Jessica, is an ASU junior. ❏

Prop 200...

Continued from page 1

ation of narcotic drugs in a drug-free school zone carries an additional one-year sentence and makes those convicted ineligible for probation.

Proposition 200 does not apply to the offense of promoting prison contraband.

State v. Roman, 200 Ariz. 594, 30 P3d 661 (App. 2003). The defendant argued that it did not matter where he possessed 27 milligrams of methamphetamine for Proposition 200 to apply. The Court of Appeals, in a short opinion, disagreed, ruling that the statute under which Roman was charged prohibits promoting prison contraband, not just possessing or using the contraband. The court noted in People that the area (school zone) where the drug was possessed did not matter. However, the area (the county jail) mattered in Roman.”

Two prior convictions of attempted pos- session of narcotic drugs are not equivalent to two prior convictions of possession of narcotic drugs and therefore Proposition 200 applies. State v. Osuna, 199 Ariz. 459, 18 P3d 1258 (App. 2001). The court cited Stubblefield v. Township, 197 Ariz. 382, 4 P3d 437 (App. 2000), which holds that attempted acts are punishable under Proposition 200.

In State v. Gailey, 199 Ariz. 462, 18 P3d 1261 (App. 2001), the Court of Appeals ruled that a prior conviction for conspiracy to unlawfully possess drugs is included in the total of defendant’s prior drug offenses. Therefore, a defendant previously convicted of unlawful possession of and conspiracy to possess narcotic drugs is not eligible for mandatory probation provided by Proposition 200. The court clarified that only two and not three previous convictions are necessary to — See Prop 200 on page 13

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'Hero' answers VLP call for 6 years

By Peggi Cornelius
Special to Maricopa Lawyer

Heroes can be defined as people who give of their time and talents selflessly, who make a difference in other people's lives through their accomplishments or who set the example others want to follow, then attorney Donald R. Alvarez is one of the most noteworthy heroes in the Volunteer Lawyers Program. As such, Alvarez has been named VLP's Attorney of the Month.

In 1995, the Maricopa County Bar Association launched a VLP recruitment campaign with its annual membership drive. The “1 Campaign,” as it is now known, asks MCBA member attorneys to accept one pro bono case per year from VLP. In March 1996, Alvarez was among the first to respond. He has not been without a VLP case since.

In helping VLP clients, Alvarez has focused on the rights of consumers. His representation of them has resulted in some impressive outcomes.

When asked about his experiences with VLP cases he has accepted in the past six years, Alvarez said, “It's difficult for me to recall stories about my pro bono cases, because I make no distinction between those I represent as volunteer attorney and those I represent in my private practice. I do think I've been successful with VLP cases in part because the clients have been good people with good cases. It's always an opportunity for me to refresh my memory or learn something new.”

“Consumers' rights” is a tidy category for the nature of legal issues, but it doesn't do justice to the people and the range of problems Alvarez has encountered in his work with VLP clients. In one instance, Alvarez helped a 19-year-old student obtain a dismissal of a $1,200 lawsuit for a debt the client incurred by loaning a credit card to a friend who wanted to rent a truck for one day. The friend fraudulently extended the rental period and went on a spending spree with the credit card.

Four years after Alvarez had helped a disabled veteran resolve collection harassment for a debt the client did not owe, the problem resurfaced with the sale of the same alleged debt to a second collection agency. Alvarez willingly helped the client once again.

In his most recent VLP case, Alvarez took on four separate legal actions: two involving the Registrar of Contractors, and one each with the Registrar Recovery Fund and the Maricopa County Superior Court. The clients were a couple with very modest income who had hired a contractor to add a room and make improvements to the patio area of their home. A year later, the project had not been completed and work that had been done was unsatisfactory. Investigation showed the contractor had failed to obtain necessary permits and had violated building codes. By concentrating their efforts and developing expert testimony with video evidence, Alvarez and his colleagues at Alvarez & Gilbert were able to bring about a settlement that included demolition and complete reconstruction of the clients' remodeling project before another year had passed.

Alvarez credits his partner, John T. Gilbert, for supporting his commitment to pro bono work.

Community service is an ethic instilled in Alvarez as a child observing his parents' volunteer work, as a young man belonging to a college fraternity, and as an attorney when he entered the legal profession in New York.

“I don't remember ever wanting to be anything but an attorney,” he said. “Unfortunately, human nature dictates the need for lawyers. I believe the contractor in my last VLP case took advantage of the clients because the wife did not speak English well, the husband was hospitalized and they were not very knowledgeable with respect to construction. If people always treated one another the way they should, attorneys would virtually be out of business.”

Arizona Modest Means Project seeks volunteers

The Arizona Modest Means Project needs lawyers to help enforce the legal rights of those who support themselves but who cannot afford the full cost of legal representation. The project helps those who make too much money to qualify for free legal services, but not enough to pay the full cost of representation.

The project offers assistance in the areas of domestic relations, guardianships, wills/probate, landlord/tenant and consumer issues.

The project will hold two clinics on May 4, during Law Week. One clinic will be held in central Phoenix and the other will be held at the Temple First United Methodist Church, 201 E. University, Tempe. Both clinics will run from 10 a.m. to 2 p.m. Lawyers will be asked to staff the clinic for two hours to meet with clients to evaluate their matters and provide legal advice and assistance. Where appropriate, lawyers are asked accept the cases at a reduced-fee of not more than $30 per hour. Lawyers are not expected, however, to litigate the matters or provide representation in court. Rather, assistance should be limited to advising clients on their legal rights and how to handle problems themselves, or handle matters short of litigation as appropriate.

Legal services provided through the project will qualify as pro bono hours under Ethical Rule 6.1, Rule 42, Arizona Rules of the Supreme Court.

The project is co-sponsored by the State Bar of Arizona Young Lawyers Division and the Legal Assistants of Metropolitan Phoenix. If you are interested in volunteering, please contact Teri Yeates at 602-540-7312 or teri.yeates@staff.azbar.org.
avoid the application of Proposition 200, and the defendant is charged. In State v. Estrada, 201 Ariz. 74, 31 P.3d 348 31 (App. 2001), the defendant received probation under Proposition 200 but violated the probation on two separate occasions. After the second violation, the trial judge ruled that he could not order prison on a Proposition 200 case, and terminated probation as “unsuccessful.” Here is a Hensley Proposition 200 ‘provision’ violation that had been alleged. The state appealed. The Court of Appeals, relying on Binal, ruled that because the state did not allege the violent offense, the defendant could not be sentenced to prison. The court did, however, agree with the state that the case resolved a conflict between Division One’s State v. Estrada, 197 Ariz. 383, 4 P.3d 438 (App. 2000), and Division Two’s State v. Holm, 195 Ariz. 42, 985 P.2d 327 (App. 1998), as to whether Proposition 200 applies to convictions of possession of drug paraphernalia. In disproving of Holm, the court ruled that Proposition 200 does indeed, apply to such convictions. In State v. Estrada, 201 Ariz. 34 P.3d 356 (2001), the court held that the probation eligibility provisions of Proposition 200 apply to convictions “for the possession of items of drug paraphernalia associated solely with personal use by individuals also charged or who could have been charged with simple personal possession of a controlled substance under the statute.” The court clarified the circumstances under which it ruled, saying, “We address solely the circumstance in which the defendant is, or could have been, simultaneously charged with the dual crimes of (a) personal possession or use of a controlled substance, and (b) possession of associated paraphernalia.” The court’s opinion pointed out that a person rarely possesses or uses a controlled substance without also possessing some paraphernalia, such as a container. Thus, the court reasoned that the overwhelming majority of first-time drug users would be subject to imprisonment, but would have been exonerated under Proposition 200’s mandate of probationary treatment if Proposition 200 did not apply. The opinion emphasized that the protections of Proposition 200 apply only to clearly defined individuals engaged in “personal possession or use of a controlled substance.” It does not apply to individuals engaged in the sale, production, manufacturing or transportation for sale of any controlled substance or to paraphernalia associated with those activities. What is not resolved is whether Proposition 200 applies to a single charge of possession of drug paraphernalia. The court declined to address that issue. Referring to a concurring opinion by Justice Stanley Fowkes, the court clarified the circumstances under which the Proposition 200 to include persons found exclusively in possession of paraphernalia but without the presence of illegal drugs. This argument raises the separate question whether the probation eligibility provisions can be applied to a “stand-alone” paraphernalia charge. We decline to address the question for two reasons. First, the stand-alone case is not presented in this record inasmuch as drugs were actually possessed by both Estrada and Holton. Second, and more importantly, Proposition 200, by its own terms, depends on the actual presence of drugs for an automatic qualification to expand the Proposition to cover circumstances in which drugs are not present. Further extension is necessarily a matter for the legislature.

Letter...

Continued from page 2

...ing.” In my client’s view, objections to plaintiffs’ discovery or trial evidence would only be premature if both substantive and evidentiary allegations. Right or wrong, this was a decision my client (not a court) was entitled to make.

The hearing officer found that the trial could have resulted not only in a money judgment but also in loss of my client’s medical license and potential criminal charges. In my view, and in the hearing officer’s view, the interests of my client remained adverse to those of plaintiffs, even under the agreement. The trial was not postponed in my view. As the hearing officer found, “[t]here was no assurance that the plaintiff’s counsel would in fact dismiss the case with prejudice at the close of their case.” There were serious legal questions regarding the enforceability of the agreement by the trial court if the plaintiffs declined to dismiss.

Following a two-day hearing, the hearing officer expressly found that I intended to, and did, conduct the trial in an adversarial manner....” No part of the pretrial agreement was that my client would not vigorously defend the lawsuit, and he did so.

The hearing officer found that I “fully and vigorously” cross-examined witnesses called by plaintiffs; that a nationally-recognized defense expert was called to testify; and that six of the defense witnesses testified during the trial. The opinion concludes that the trial court if the plaintiffs declined to dismiss. No part of the pretrial agreement was that my client would not vigorously defend the lawsuit, and he did so.

The opinion concludes that the hospital was still a party to the litigation as it proceed to trial. Yet, the trial judge expressly stated that “[b]y the time of trial, the hospital had been granted summary judgment, and was no longer in the case.” Indeed, the trial judge specifically stated, “On January 4, 1996, the trial began in this matter...The only remaining Defendant was James R. Bair, M.D.” If the trial judge was of the opinion that the hospital was “no longer in the case” it declined to proceed to trial. The opinion concludes that the hospital was still a party to the litigation as it proceed to trial.

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Paralegal Division sponsors Career Day for students

By Theresa A. Prater
Maricopa Lawyer

The Maricopa County Bar Association’s Paralegal Division welcomed approximately 70 paralegal students from across Arizona to its Career Day on March 9. The event was the second one sponsored by the MCBA paralegals and hosted by the Legal Studies Department of Phoenix College.

A continental breakfast was offered while registrants networked and met working paralegals who volunteered to attend the event to promote their profession. The division offered materials about the MCBA and student membership in the division, and provided an opportunity for the three other local paralegal associations, Arizona Association of Professional Paralegals, Arizona Paralegal Association and Legal Assistants of Metropolitan Phoenix, to introduce themselves and distribute information on their groups.

Division President-elect Garth Harris welcomed the participants to an exciting day of learning. Harris introduced the presidents or representatives of the three paralegal associations and Division President Sybil Taylor Aytch, each of whom provided background information on their respective organizations. Each association was allowed time to discuss its philosophy, networking and educational opportunities, offering students the opportunity to learn which organization might best suit their personal needs.

Tips on resume writing and interviewing skills, presented by Susan Morton, president of the Morton Group, and Sonja Cotton, vice president of Baltimore Legal Consultants, turned out to be a highlight of the program according to some attendees. A panel of division officers and board members discussed establishing working relationships with attorneys and others on your legal team. Martha Clements, division treasurer, discussed organizational skills. The program concluded with a presentation about the two national paralegal exams: the Certified Legal Assistant Exam, which provides the designation of “CLA” (Certified Legal Assistant) to those who pass the exam, and the Paralegal Advanced Competency Exam, which awards the designation “RP” (Registered Paralegal) to successful candidates.

Aytch said she was very pleased with the outcome of the day and the number of attendees. Career Day planning and organizing was a project of the division’s newly elected board of directors, who undertook it to demonstrate to division members the board’s willingness to promote both the paralegal profession and the MCBA. The board has scheduled the next Career Day for March 8 at Phoenix College.

Legal Brief

The Arizona State University College of Law and the Center on Wrongful Convictions at Northwestern Law School will co-sponsor a forum examining the issue of wrongful convictions. The event will be held from 8 a.m. to 5 p.m., April 25 the ASU College of Law. It is free and open to the public. Attorneys may receive up to 6.5 hours of continuing education credit. Featured speakers will include Tom Henze, a criminal law attorney at Gallagher & Kennedy, who will discuss the conviction of Max Dunaup in the 1976 Don Bolles murder case, and John Wachtel, a Wichita, Kansas, attorney who recently argued for the defendant in U.S. v. Singleton, a 10th circuit case in which a woman was convicted after a co-defendant was offered leniency in return for his testimony. Several defendants who were wrongfully convicted and subsequently freed also will speak. Box lunches will be available for $9. For further information and reservations (by April 19), call 480-965-6405.

Write a letter!

We welcome letters to the editor. Letters generally should be no more than 300 words long. Maricopa Lawyer reserves the right to edit all letters for length. Letters to the editor must be typewritten on your letterhead, signed and submitted to Editor, Maricopa Lawyer, Maricopa County Bar Association, 303 E. Palm Lane; Phoenix, 85004.
**Positions**

**Superior Court of Arizona in Maricopa County — Public Notice:** Superior Court of Arizona is soliciting responses to proposals for Judicial Merit Commission Hearing Officer, D-15. Interested Offerors are encouraged to request an RFQ packet from Polie S. Coons, Superior Court of Arizona, 125 W. Washington Avenue, Phoenix, Arizona 85003, by calling 602-506-6124 or e-mail: pcoonse@superiorcourt.maricopa.gov. Responses shall be in the prescribed format and addressed to Polie Coons, Purchasing Administrator and shall be received at the Superior Court of Arizona offices no later than 5:00 p.m. on April 23, 2002. The Court reserves the right to reject any and all bids/proposals, and to waive any informality in any proposal. For Request for Qualifications (RFQs), award will be made to the responsive/responsible Offeror whose response has been deemed most advantageous in accordance with the evaluation criteria contained in the RFO. Judicial Procurement Rules govern this notice and are incorporated by this reference.

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**Miscellaneous**

Host a French high school student for 3 weeks this summer! A cultural opportunity for families with teens to host a student from July 6—July 29 (other 3 week visits available) French students, improve their English while taking part in family life. Brenda Smith, ESFA Coordinator (602) 942-5842.

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**Classification**

**Business Section**

**Advertising Rates**

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**Calendar**

1. Young Lawyers Division Domestic Violence Committee, noon
2. Family Law Section, 5:15 p.m., University Club
3. Public Lawyers Division board of directors, noon
4. Alternative Dispute Resolution Committee, 4 p.m.
5. Young Lawyers Division board of directors, noon
6. Paralegal Division board of directors, 5:30 p.m.
8. Estate Planning Section breakfast CLE, 7:15 a.m., ASUD Environmental Law Section, noon
9. Executive Committee, noon
10. Hayzel B. Daniels Bar Association, 5:30 p.m.
11. Task Force for Recruitment and Retention of Minority Attorneys, 8:30 a.m.
12. Estate Planning & Probate Section Executive Committee, 7:30 a.m.
13. International Law Section, noon
14. Bankruptcy Law Section, 5 p.m.
15. Litigation Section, 7:30 a.m.
16. Sole Practitioners Section, 11:30 a.m.

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with the Endangered Species Act, Colorado River issues, western water law and related natural resource counseling. Pearce (J.D. 1981 with distinction, University of Arizona) is admitted to California as well as Arizona.

- Donna M. Killoughey has joined Barnes & Lassiter as a member. The firm also has changed its name to Barnes, Lassiter & Killoughey. The firm’s practice areas include complex commercial, real estate and bankruptcy litigation, as well as real estate transactions, franchise law and creditors’ rights.
- Christopher A. Coury has been named a shareholder in Ryley Carlock & Applewhite. Coury (J.D., Notre Dame) is a member of the firm’s litigation practice.
- Snell & Wilmer has created the Snell & Wilmer Action Team (SWAT), composed of experienced business attorneys on call at each of the firm’s six Western offices who are trained to handle potentially high-risk business legal issues on short notice.
- Morrison & Hecker and Simsom, Mag & Fizelle, a large Kansas City-based firm, have agreed to merge, resulting in a combined firm of 340 attorneys with offices in Phoenix, Missouri, Kansas, Kansas, Nebraska and Washington D.C.
- Nagle Law Group has added estate planning to its longstanding commercial real estate practice.
- Emily G. Burns has relocated to 305 E. Coronado Road, Suite 250, Phoenix, 85004; telephone 602-212-9000; fax 602-212-9144. She continues to practice in areas of estate planning, probate, guardianships and conservatorships.

Write a letter!
We welcome letters to the editor. Letters generally should be no more than 300 words long. Maricopa Lawyer reserves the right to edit all letters for length. Letters to the editor must be typed on your letterhead, signed and submitted to: Editor, Maricopa Lawyer, Maricopa County Bar Association, 303 E. Palm Lane, Phoenix, 85004.

The following Section Executive Boards will meet in April:
- ESTATE PLANNING SECTION, on April 16th, at 12:00 p.m. at MCBA, 303 E. Palm Lane, Phoenix.
- INTERNATIONAL SECTION, on April 16th, at 12:00 p.m. at MCBA, 303 E. Palm Lane, Phoenix.
- LITIGATION SECTION, on April 17th, 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: 602-257-4222
e-mail: smontoya@mcbabar.org
Register online at www.maricopabar.org

Upcoming Section Meetings
- The Family Law Section will be meeting on Wednesday, April 3rd, 2002 at 5:15 p.m. at the University Club, 39 E. Monte Vista.
- The Environmental Section will be meeting on Wednesday, April 10th, 2002 at 12:00 p.m. at the MCBA, 303 E. Palm Lane.
- The Sole Practitioners Section will be meeting on Wednesday, April 17th, 2002 at 5:00 p.m. at the MCBA, 303 E. Palm Lane.
- The Juvenile Practice Section will be presenting a MCLE (Speaker & Topic TBA) April 22nd, 2002 at 12:00 p.m. at the MCBA, 303 E. Palm Lane.
- Estate Planning Section will be presenting a breakfast MCLE on “Title Companies” on Wednesday, April 10th, 2002 at 7:15 a.m. at ASU Downtown, 502 E. Monteire.