‘Life should be a circus’

Magician, lawyer
Bob Bluemle plans to clown around in retirement

By Terri Zimmerman
Maricopa Lawyer

Harry Potter might be envious of one magical Valley lawyer’s plans for the new year.

Robert L. Bluemle, a veteran Phoenix lawyer, is trading in his vested raiment as an attorney for a wizard’s robe and the Valley’s hot summers for the East Coast cold winters as he returns to a magical life, not in Hogwarts but in Vermont.

Bluemle is a formidable individual who has been the leader and driving force in the numerous and distinct activities in which he has been involved, ranging from being a performing magician to heading a winery to practicing law.

This month, Bluemle, who retired from practicing law last year, will move to Vermont to be closer to his 3-year-old grandson and his two daughters. He already has been named to the faculty of the Flynn Center for the Performing Arts, where he will teach magic to 10- to 15-year-olds. He will resume his career in performing magic and mentalism, playing a street organ and demonstrating his flea circus, “Jason and the Golden Fleas,” in which he, dressed as a ringmaster, will preside over his fleas, who walk a tightrope holding an umbrella, fly on the trapeze, are shot from a cannon and sign autographs.

When asked why he was adopting such a radical change in lifestyle, Bluemle said, “Because life should be a circus and it is time for me to clown around before I take my final bow.”

Admitted to the bar in 1959, Bluemle is almost a native Arizonan, having attended Kenilworth Elementary and North Phoenix High schools before receiving a bachelor’s degree, with distinction, and an MBA from Indiana University and his law degree from the University of Michigan.

The magic bug bit Bluemle when he was 10. By the time he was in high school he was touring as a comedy magician with a mentalist and ventriloquist and later as a magician’s assistant with Dr. Dracula’s Den of Living Nightmares, a spook show of the late 1940s.

Bluemle paid his college expenses by performing magic shows. He performed on several tours of the Southwest with other entertainers and then on a collegiate U.S.O. tour of Korea and the Far East with one other man and 27 women. It was, he professed, “the best summer of my life.”

He then served as an attorney and financial analyst with the U.S. Securities and Exchange Commission in Washington, D.C., marched in the inaugural parade of President John F. Kennedy, married an actress he met in New York City and temporarily put aside his magic wand.

He returned to Phoenix in 1961 and practiced law for 40 years. During that time he served for 18 years as chairman of the State Bar of Arizona’s Committee on Securities Regulation and was the founding chairman of the State Bar’s Securities Law Section. He also served as president of the Scottsdale Bar Association and as Arizona head of Furth, Fahrner and Bluemle, a national law firm based in San Francisco.

Along the way, he was president of Chalk Hill Winery in Sonoma County, Calif., for 10 years and hosted a cable television talk show, “Law Talk,” for five years. He hosted his own television show in the early 1950s on KPHO-TV (Channel 5), was a film critic for Phoenix Magazine for three years and produced a successful play in the Bay area.

At some point, magic again infiltrated his life. He found time to travel to more than 100 countries, performing magic in each as Premeditation without actual reflection makes illusory benchmark

By Daniel P. Schaack
Maricopa Lawyer

Premeditation, first-degree murder requires premeditation: “A person commits first degree murder if ...[i]ntending or knowing that the person’s conduct will cause death, the person causes the death of another with premeditation.”

A.R.S. § 13-1101(A)(1). By statute, premeditation “means that the defendant acts with either the intention or the knowledge that he will kill another human being, when such intention or knowledge precedes the killing by any length of time to permit reflection.” A.R.S. § 13-1101(A).

Although the statutory definition does not, by its own terms, require actual reflection, that requirement has been imported by judicial gloss. In State v. Kepa, 146 Ariz. 446, 708 P.2d 1213 (1985), the Supreme Court held that first-degree murder required that the defendant have formed a plan to kill the victim after “deliberation and reflection.”

It reiterated this holding in State v. Schwarz, 176 Ariz. 46, 859 P.2d 156 (1993), when it noted that “[i]n addition to intention or knowledge, premeditation requires reflection.” A.R.S. § 13-1101(A).

The search is expected to begin soon for a new member of the Arizona Supreme Court as Justice Frederick J. Martone moves down the street to the federal courthouse.

The U.S. Senate confirmed Martone Dec. 14 to replace U.S. District Court Judge Roger Strand, who is retiring.

The Court of Appeals echoed this sentiment in State v. Ramirez, 190 Ariz. 65, 945 P.2d 376 (App. 1997), when it reversed a conviction because a jury instruction failed to specify actual reflection must occur.

The Legislature subsequently acted to overrule Ramirez. In 1998 it amended A.R.S. § 13-1101(1) to specifically provide that “[p]roof of actual reflection is not required ...” Thus the quandary: to get a conviction for first-degree murder under A.R.S. § 13-1101(A)(1), the state must prove “premeditation” but not “reflection.”

Larry Thompson brought this situation to the fore when he was indicted for first-degree murder after he shot and killed his estranged wife. He admitted the killing but claimed that it was not premeditated so he was guilty only of manslaughter or, at worst, second-degree murder. The jury convicted him of first-degree murder, and he was sentenced to life imprisonment.

On appeal, Thompson argued that by removing the need to prove actual reflection, the Legislature had obliterated any distinction between first- and second-degree murder and that the first-degree murder statute was vague and therefore violated the due process of a majority of the court agreed.

Judge James B. Sult, joined by Judge Cecil B. Patterson Jr., held that the Legislature, by amending A.R.S. § 13-1101(1) as it did, removed actual reflection from the elements of first-degree murder. “[T]he Legislature could not have intended to permit conviction of first-degree murder without proof of premeditation,” Sult held.

Martone exchanges state’s high court for federal trial bench

By late December, it was unknown when Martone would leave the Supreme Court and take his new federal position. The Arizona Commission on Appellate Court Appointments cannot solicit applicants to replace him until he gives Gov. Jane Dee Hull his resignation.

Martone, 58, was appointed to the Supreme Court in February 1992 by former Gov. Fife Symington. He previously had served for seven years on the Maricopa
New year (whew!), new board members, new staff and...more volunteers?

By Mike Jones
MCBA President

Happy New Year, everyone! I’m sure you will join with me in wishing that 2002 is a better year than 2001. In 2001 we all were faced with unprecedented challenges to our economy, national security and peace of mind. In these difficult times, it is more important than ever to support, protect and preserve our system of justice.

The Maricopa County Bar Association is pleased to welcome four new members to our board of directors:

➤ Leslie Davis, a sole practitioner, will wear multiple hats this year as she not only joins the board but also continues to chair the Family Law Section for the third year.

➤ Jay Zweig of Gallagher & Kennedy is new to the board but has volunteered at the MCBA for many years. Jay was a founding member of the Litigation Section and last year’s chair of that section.

➤ Bryan Cave joins us this year with new ideas and an excellent track record in civic service. He has been a leader in the Asian American Bar Association and donated many pro bono hours to Community Legal Services and the Florence Immigration Project, to name just a few.

➤ We also are pleased to have my Superior Court colleague, Judge Louis Araneta, join the board. He has been a member of the bench since 1989 and brings a wealth of experience in all areas of the law. We hope to continue our civic and educational programs with the bench and bar, and learn from his insights.

Finally, we are pleased to have Terri Zimmerman returning. Terri is the only incumbent who was re-elected, and she has been an active member of the board for two terms. She also has been an active member of the Maricopa Lawyer editorial board for more than a decade. No doubt you’ve seen her photographs, which appear regularly in this publication. Terri is back by popular demand.

We are having a ball...the Barristers Ball, that is! On Feb. 9 we host our ninth Barristers Ball and Silent Auction at the Camelback Inn Resort. This year’s beneficiary is The Center for Habilitation, which works to help empower Arizonans with disabilities. The ball is a wonderful and fun black tie dinner and dance (with a live band) that you don’t want to miss. The theme this year is Mardi Gras. The auction always includes Supreme Court Chief Justice Nelle King and weekend getaways at prices that are a bargain. Tickets are $100 per person or $1,000 per table. The Young Lawyers Division is working hard to find sponsors and auction donations. If you would like more information about the ball, becoming a sponsor or donating items, please contact Shane Clays, MCBA YLD director, at 602-257-4200, ext. 111. Come on out and have a ball and help raise funds for a good cause at the same time.

The MCBA is pleased to welcome several new members to the bench. On Jan. 30, the Maricopa County Superior Court welcomed new members to the bench. On Jan. 30, the Maricopa County Superior Court welcomed new members to the bench. On Jan. 30, the Maricopa County Superior Court welcomed new members to the bench. On Jan. 30, the Maricopa County Superior Court welcomed new members to the bench. On Jan. 30, the Maricopa County Superior Court welcomed new members to the bench. The bench was sworn in by the Honorable David Arrow and the Honorable Terri Zimmerman.

We look forward to working with you all this year. I look forward to working with you all this year. I look forward to working with you all this year. I look forward to working with you all this year. I look forward to working with you all this year. I look forward to working with you all this year. I look forward to working with you all this year. I look forward to working with you all this year. I look forward to working with you all this year. I look forward to working with you all this year.
Martone...  
Continued from page 1

County Superior Court bench. Prior to becoming a judge, he was a partner with Jennings, Strouss & Salmon, where he practiced Indian and water law, federal civil rights litigation, copyright and trademark law, and commercial and appellate litigation.

Martone earned his law degree in 1972 from the University of Notre Dame and an L.M. in 1973 from Harvard University.

Hull has selected a civil lawyer in private practice and a criminal-defense attorney to fill two vacancies on the Maricopa County Superior Court bench.

A. Craig Blakley II and Connie C. Contes fill vacancies created by the retirement last fall of judges Donald Daughton and David Roberts.

Blakley, who focuses on civil litigation, including medical-malpractice defense, currently is associated with Olson, Jantsch, Bakker and Blakley. In making the appointment, Hull lauded Blakley’s “extensive trial experience.”

Blakley received his law degree from California Western School of Law.

He is a member of the Phoenix Association of Defense Counsel and has participated in Arizona Town Halls addressing education and health care. He also serves as a mediator in Phoenix’s Community Mediation Program and as chairman of Paradise Valley’s Personnel Appeals Board.

Blakley, 50, an Independent, is married and has two children.

Contes currently serves in the Maricopa County Office of the Legal Defender, where she handles juvenile cases. She also is a judge pro tem for the Gilbert Municipal Court. Hull cited Contes’s background in private practice and service in the Legal Defender’s Office as assets.

Contes received her law degree from the University of California at Los Angeles. She is involved in the Volunteer Lawyers Program and has been a volunteer for the Courthouse Experience.

Contes, 42, a Republican, is married and has six children.

The Maricopa County Commission on Trial Court Appointments has recommended five candidates to Hull to fill the newly created Division 91:

➤ Harriet E. Chavez, 48, Democrat, of Phoenix, a Superior Court commissioner;
➤ Gerald R. Grant, 48, Democrat, of Phoenix, chief of the county attorney's criminal appeals bureau;
➤ Margaret R. Mahoney, 44, Independent, of Phoenix, of counsel to Bryan Cave;
➤ Linda H. Miles, 45, Democrat, of Scottsdale, a Superior Court commissioner; and
➤ Robert J. Weber, 57, Republican, of Mesa, a sole practitioner.

In addition to those five, the commission also on Dec. 17 interviewed Helene F. Abrams, Arthur C. Attonia, Dawn R. Gabel, Larry Grant, Burt A. Jorgensen, Nancy K. Lewis, Rosa P. Mroz and Leah Pallin-Hill.

Blakley is a member of the Phoenix Bar Association, the Arizona Trial Lawyers Association, the Maricopa County Bar Association, and the State Bar of Arizona.

Contes is a member of the Maricopa County Bar Association, the Arizona Bar Association, the Women's Bar Association, the Arizona Law Review Association and the International Association of Juvenile Court Judges.

Both judges also are members of the American Bar Association, the National Bar Association, the Arizona Women’s Lawyer Association, the State Bar of Arizona and the American Judicature Society.

Legal Brief

E. Norman Veasey, chief justice of the Delaware Supreme Court, will deliver the first annual Kuwait Foundation Lecture on Business Law in the 21st Century at 4 p.m., Jan. 17, at the Arizona State University College of Law, room 105. His topic will be “Current Developments in Corporate Law.” The lecture is free and open to the public. Veasey also is chair of the American Bar Association’s Ethics 2000 Committee, which has proposed dramatic revisions to the Model Rules of Professional Responsibility. He will give another talk, “Amending the Model Rules: Action and Reaction in the Struggle to Define Professional Conduct and Ethical Values,” from noon to 1:30 p.m. Jan. 18 in the law college’s faculty center. The second speech is free and open to members of the bar. Because lunch will be provided, anyone wishing to attend must make a reservation by Jan. 14 with Amanda Breaux, 480-965-6405.

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Pro bono work means most to VLP honoree

By Peggi Cornelius
Special to Maricopa Lawyer

If a pro bono poster person were chosen to advance the cause of equal justice for all, attorney Benjamin R. Norris could easily qualify. His success in helping those less fortunate, his commitment to community service and his ability to inspire others to volunteer make Norris an invaluable member of the Volunteer Lawyers Program. Since he completed his first VLP case in 2000, there was never any question of whether Norris would be honored as VLP’s Attorney of the Month—it was only a matter of when.

Even with a court order, it can be difficult for a consumer to remedy an unfair business transaction without legal help. Norris’s first VLP client learned that when he obtained a judgment against a mechanic who had not only failed to repair his vehicle, but had damaged it. Although the client had been resourceful in obtaining a judgment against the offending mechanic, he had not been able to collect the judgment. Ultimately, he sought help at VLP. Norris succeeded in collecting more than $1,000 in damages.

“It felt good when we collected from an opposing party who should have paid, but there was also a more intangible benefit to the client in this case,” Norris said. “The car involved belonged to the client’s sister. In their Vietnamese culture, the client was disgraced by the trouble his sister had endured as a result of his attempt to have her car repaired. Resolving the problem restored harmony in their family relationship.”

VLP clients often are consumers burdened by situations that deprive them of transportation and saved or borrowed money they cannot readily replace with new income. In another of Norris’s VLP cases, the client had been working for the owner of a transmission repair shop, from whom he was also purchasing a car over time. Although the car payments were current when the employment relationship deteriorated, the employer took the car from the client. Norris successfully obtained compensation for the wrongfully seized vehicle.

Sometimes, consumers lose belongings, like the family who hired a moving company to relocate them from Illinois to Arizona. On arrival, the clients found themselves disputing the amount due the moving company, while delivery of their furnishings was denied and storage fees mounted. With Norris as their advocate, the debt was reduced to an amount they could pay and their belongings were delivered. Norris says this case hinged on a technicality, however. His advice to those hiring moving companies is to obtain a binding estimate before the move.

Norris grew up outside New York City and obtained his undergraduate degree in political science at Yale. He graduated from Northwestern University School of Law in Chicago. The first years of his law practice included working for the U.S. Justice Department, but eventually he changed direction professionally and geographically. Now, Norris specializes in commercial and bankruptcy litigation at Quarles and Brady Streich Lang.

“The firm is very supportive of pro bono work. In fact, our compensation system provides significant credit for pro bono hours,” he said.

No one has more persuasive reasons for participating in VLP than does Norris.

“Providing access to justice for those who can’t afford to pay or whose cases are not lucrative is what it’s all about. I’ve engaged in other community service, such as volunteer work with the Nature Conservancy, but I think I can contribute the most to the community by sharing my skills as an attorney. After all, people from all walks of life can give their time to an organization like the Nature Conservancy, but only an attorney can provide free legal advice or representation.”

Maricopa County Bar Association
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not constitutionally retain actual reflection as an element of premeditation yet relieve the state of the burden of proving it,” he wrote. He concluded that the Legislature intended “to ensure that premeditation was defined solely as the passage of a period of time.”

Because the plain meaning of the word “reflection” requires a “somewhat complicated and involved thought process” and “careful consideration,” Sult interpreted the statute to require the jury to find “a time period sufficient to encompass a complex thought process.” Thus, on its face, the statute provides a sufficient standard to adequately distinguish between first- and second-degree murder. If he had been writing on a clean slate, Sult would have upheld the statute against the vagueness challenge.

But the statute’s vagueness could not be decided on this interpretation because the Supreme Court had previously departed from its plain language. In State v. Hutten, 143 Ariz. 386, 694 P2d 216 (1985), the Supreme Court had held that the Legislature intended the statute to require the jury to find “a time period sufficient to encompass a complex thought process.” Thus, on its face, the statute provides a sufficient standard to adequately distinguish between first- and second-degree murder. If he had been writing on a clean slate, Sult would have upheld the statute against the vagueness challenge.

The newly amended statute relieves the state from having to prove actual reflection. Sult stated that the issue facing the court was whether a jury can adequately determine if the state has proved premeditation using a standard “that does not implicate careful consideration, or meditation, or study, but [which] occurs as quickly as the human mind can think successive thoughts.” He concluded that the statute is not vague.

Sult noted that “the seminal event” in any intentional killing or murder “is the formation of the intention to kill.” If premeditation occurs between the formation of this intent and the actual act, then the crime is first-degree murder. If there is no premeditation, the murder is in the second degree.

Getting rid of the need to prove actual reflection, the murder is in the second degree. If there is no premeditation, the crime is first-degree murder. If there is no premeditation “intentional killing or murder ‘is the formation of the intention to kill’ and, in State v. Kops, it had held that premeditation can be ‘as instantaneous as the time it takes to make successive thoughts to kill’” and, in State v. Kops, it had held that premeditation can be “as instantaneous as successive thoughts of the mind.”

Sult therefore concluded that statute and its judicial interpretation created “a standardless vacuum in which determinations of degrees of guilt can only be decided arbitrarily.” This made A.R.S. § 13-1101(1) unconstitutionally vague.

Thompson’s victory on his constitutional challenge turned out to be quite hollow for him, as any error was harmless. His jury was not instructed on the instantaneous-as-successive-thoughts concept, and a great deal of evidence established that he did indeed premeditate.

Judge Susan A. Ehrlich concurred in the result only. She disagreed with the majority’s conclusion that premeditation had been written out of the statute.

Ehrlich noted that the statute says that the defendant’s intent and knowledge must precede the murder by a length of time sufficient to permit reflection. “Thus,” she wrote, “‘premeditation’ is a period of time during which the mind actually considers the performance of an act, the formation of an intention or determination to kill, which results in the death of another.”

While the passage of time may suggest reflection, she wrote, “premeditation relates to mental process, not necessarily readily susceptible to ‘proof of actual reflection.’” Thus, although there may be no evidence of the defendant’s expressions of contemplation or overt evidence of planning activity or other facts indicating the killer’s design to take the victim’s life, “there nonetheless might be evidence regarding the nature or manner of the death sufficient to demonstrate an intent to kill according to a preconceived design.”

Ehrlich reasoned that “[t]he true test is not the duration of time but ... the extent of the reflection.” A cold and calculated decision to kill can occur in a brief period of time, she wrote, and if there is time for the mind to consider the act and then determine to do it, this is sufficient.

**Winning doesn’t mean cash in pocket**

Can you win a case and still be considered the loser? In McEvoy v. Aerotek Inc., No. 1 CA-CV 004321 (App. Nov. 20, 2001), the Court of Appeals determined that the plaintiff was entitled to costs as the successful party even though the jury’s verdict in her favor entitled her to no money from the defendant.

Sheila McEvoy was injured in an automobile accident due to the negligence of the defendant’s driver. McEvoy sued both Dale and Aerotek. She settled with Dale for $100,000, paid from his personal automobile policy. Believing her damages to be greater than that, she went to trial against Aerotek. The jury found in her favor but awarded total damages of only $75,000. Despite recovering nothing from Aerotek, McEvoy sought and was awarded costs as the successful party under A.R.S. § 12-341, because the verdict was in her favor. Aerotek appealed.

The Court of Appeals affirmed. In an opinion by Patterson, the court rejected Aerotek’s argument that McEvoy was not entitled to costs unless her trial victory actually put cash in her pocket.

Patterson noted that the successful party is the one who wins the lawsuit, which the trial court determines from the totality of the circumstances. A party still may win even if she does not get everything she asked for, Patterson noted. He further noted that, “at the time McEvoy pursued her suit, damages had not been assessed, and the record does not reflect that Aerotek had accepted responsibility for its part in McEvoy’s injury.”

Patterson found that the defendant’s verdict was a setoff and did not preclude her from being considered the victor. He agreed with other courts that have held that “a plaintiff is the prevailing party when a jury reaches a verdict in favor of the plaintiff and awards damages, even if the entire amount of damages awarded is offset by a prior settlement.”

Joining in Sult’s holding were Judges Noel Field and Rebecca White Berch. Berch

— See Courtwatch on page 7
An emphasis on empathy? 

By Robert L. Gottfried
Special to Maricopa Lawyer

W hen should a court supply contract terms not expressly negotiated by the parties? Should the death penalty be abolished in this country?

These are two widely disparate dilemmas of law and public policy, one mundane but essential to the life and limb of the citizen, the other central to abortion, the most soul-searching and contentious legal and moral issue of our day.

Nonetheless, how does one arrive at an answer to either question? There are multiple legal approaches, some long-standing and others in the making. For example, the common scenario of an incomplete contract exists in the marketplace because it is difficult and costly to resolve all matters within the four corners of a contract, especially those which are long-term. So when should a court supply terms not expressly negotiated by the parties?

Familiar approaches to any legal dilemma include classical literal theory (a classic misnomer because all problems must be resolved from the four corners of the contract, as described by Williston in his text on contracts) and noetical theory (as espoused by Corbin in which courts must interpret, fill gaps and in doing so admit extrinsic evidence that is not part of the contract parties actually intended to make and to not establish another meaning or intention).1

More recent methods of solving the contract gap are relational theory (the complex contractual relationship makes it inevitable that adjustments be made in the contract and this is accomplished by reference to the “entire relation” between the parties);2 fairness theory (the focus is on bargaining impediments caused by differences in bargaining position that might justify a court refusing to enforce all or part of a contract);3 and the law and economics approach (summarized in the writings of Seventh Circuit Judge Richard A. Posner, in which contract formation and gap-filling by courts should achieve efficiency goals and maximize social welfare gains, and economic analysis is used to discern a methodology for such efficiency).4

While the foregoing theories, especially law and economics, could conceivably be used to provide answers to whatever a particular state or this country should abolish the death penalty, it may make sense to analyze this weighty issue using the following additional approaches. Interestingly, these so-called “skeptical” legal movements (which include law and economics) have been traced in the views of Justice Oliver Wendell Holmes Jr., whose book The Common Law is considered by Posner as “the best book on law ever written by an American.”5 All such views argue that judges do not merely find facts or apply legal principles in a completely accurate and unbiased fashion. It has been stated of Holmes, who was wounded in three different wars (Civil War, World War I and the Vietnam War (and the abolitionist movement that he felt provoked it) “took from him every vestige of a faith in fixed principles for whose sake we might feel duty-bound to get ourselves killed.”6 He espoused pragmatism,7 and his goal as a judge was to think clearly and make decisions (often to be the victim of large and dangerous certainties).8

The death-penalty problem is amenable to the following viewpoints, which we judges and lawyers would perhaps rarely apply in the day-to-day trenches (as opposed to what is current in academia, where law schools are not meant as a criticism of either of us but to point out and even decry the fact that intellectual movements going on in universities rarely touch most of our lives). With the caveat that most contributors to these views would strenuously resist defining themselves, especially in the abbreviated descriptions that follow, we could examine the death-penalty issue from the viewpoint of critical legal theory (“the focus of its critique is to demonstrate that behind its façade of political neutrality and pretense to objective even-handedness, both the doctrinal content of American law” and its presumptions “constitute a criticism of us both to point out and preserve the privileged positions of the powerful, the male, the wealthy and members of racial and ethnic majorities”);9 relational feminism (women as a class are unfairly dominated by men and the differences between men and women have been constructed “to contribute to the oppression of women”);10 and critical race theory (a jurisprudence that accounts for the role of racism in American law and works toward the elimination of racism as part of a larger goal of eliminating all forms of subordination).11 So-called “outsider scholar” encompasses critical race theory, radical feminist theory and gay legal studies.

Nor would it be proper to leave out of this discussion Supreme Court Justice Antonin Scalia’s textualism, which is his belief that the “words of the constitution have a range of meaning that is both limited and discernible” and that going “beyond the words of the text and what they can mean is to violate good constitutional reasoning.”12 (The skeptical schools of thought referred to in this short article, as well as by other critics of textualism, would argue to the contrary — that there is no completely objective or historical way to interpret a text because the context in which the words were used will always influence the reading of it.)

Are you ready for this? Add another movement — law and emotion. In what may become a seminal review in this field, Laura E. Little13 has critically reviewed The Passions of Law,14 a collection of 14 essays edited by Susan A. Bandes. The distinguished Posner has contributed an essay on the collection, “Emotion versus Emotionalism in Law,” in which he “acknowledges the inevitable and salutory results of emotion intersecting with law” while insisting “that the ideal of the dispassionate principle-decision maker mandates close policing of the connection between law and emotion.”

Our Arizona State University Professor Jellrie G. Murphy,15 who is at the forefront of law and emotion theory and has lectured to both local and national bench and bar about the merits of “forgiveness” as described by Kant and others, also has offered an essay. In it, he cautions that our own failings as human beings should rule us toward considering retribution for crime, to “act with caution, regret, humility and with a vivid realization that we are involved in a fallible and finite human institution”; that

Notes


5. supra n. 1 at 1290, discussing, among others, the work of David Charney, Nonegal Sanctions in Commercial Relationships, 104 Harv. L. Rev. 375, 386-89 (1990), and Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev.1685, 1777 (1976).


7. supra n. 7, discussing, among others, the work of David Charney, Nonegal Sanctions in Commercial Relationships, 104 Harv. L. Rev. 375, 386-89 (1990), and Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev.1685, 1777 (1976).


11. supra n. 12 at 127; see also Peter A. French, The Virtues of Vengeance (University Press of Kansas 2001) (vengeance is essential for morality and justice), and also Supra Symposia, The Role of Vengeance in the Law, 27 Fordham Urb. L. J. 1351 (2000).

12. supra n. 9 at 987.

13. supra n. 9 at 987.


15. supra n. 9 at 989. 995. There are pitfalls in cognition itself that can cause a variety of decision-making errors, as recently discussed in a study used by 167 federal magistrate judges as participants. See Chris Guthrie, Jeffrey J. Rachlinski and Andrew J. Martin “We Keep: The Ethics of Fiction (1998); and Posner’s contribution. Two journals devoted to law and literature themes are the Yale Journal of Law and the Humanities and Cardozo Studies in Law and Literature.

16. supra n. 19 at 974, 979.

17. supra n. 19 at 975.

18. supra n. 19 at 981.

19. supra n. 19 at 976.

20. supra n. 9 at 980.
we often forget “that nothing but iniquity and madness awaits us if we let ourselves think that, in punishing, we are involved in some cosmic drama of good and evil — that, like the Blues Brothers, we are on a mission from God.” (Do you know of any philosopher who writes as simply, beautifully and humorously?)

Contrasted to this view is the article, also in the anthology, by Robert C. Solomon entitled “Justice v. Vengeance: On Law and the Satisfaction of Emotion,” in which he argues that emotion actually improves law and decision-making because emotion acting with cognition leads to a “true” perception of an issue and in this “true” bond between the law and the subject. Many of the contributors to Passion explore these intersections of law, culture and society. Little devotes a number of pages to the view that “we stand to learn much about law” as research in law and emotion continues so that “perhaps one day we may be able to empirically test the emotion studies.” She devotes many pages to the specific areas of the law to which law and emotion studies can contribute. The essays themselves discuss such phenomena as cowardice crimes, hate crimes, judicial candor and disclosure, forgiveness, shame, revenge, disgust, remorse, love, fear, justice, mass violence, human rights atrocities, authority, emotionalism, anger, restoring victims, victim impact statements, punishment, popular culture, the human body, distaste, danger, responsibility, the consciousness of judges, retribution and the “Clayton Moral Philosophy” of Jesus Christ.

As noted by Little, we have had interdisciplinary scholarships and research in areas such as law and psychology, law and psychiatry, law and philosophy, law and biology and law and history as well as contributions by those working in neuroscience or psycho-opharmacology. As one contributor asked: “What law and emotion studies have to offer and how this new scholarship would differ from any other legal-theory movement.” Unfortunately, these questions cannot be answered in the remaining lines of this article, not only because you have probably had enough about legal theories to this point, but mainly because it is beyond my expertise and enjoyment. Yes, I know, the worst law school classes (only grudgingly beneficial) for most of us were those staffed by professors who threw out loads of questions and never answered them. At my law school some 40 years ago, there was Happy Harrop and his question hour. (Just by professors who threw out loads of questions and never answered them.)

In his review of Passion, Little finds that one reason given for the resurgence of studies of emotion and its impact on rationality is the popular and undoubtedly correct view that knowledge does not come solely from pure rationality (even Posner would agree). Yet the law’s traditional view is that when emotion and reason are in conflict, reason must temporarily be in abeyance. In her discussion of the concept of cognition, which she defines as “the action or faculty of knowing,” Little advises that, like emotion, cognition has no common definition.

Law and emotion scholars also debate the role of cognition theories in improving legal process. In discussing retribution, one of the contributors to Passion argues that “one purpose of law is to rationalize and satisfy the most powerful social passions.” Those in the field appear to agree nevertheless (consistent with the law and literature movement) that emotion actually improves law and decision-making because emotion acting with cognition leads to a “true” perception of an issue and this in turn produces a more accurate moral and fairer legal decisions.

The law — the left side of the “and” — also needs further development, according to Little in her 26-page review of Passion, especially of the extent to which “how law fully permeates society” and of the “emotional bond between the law and the subject.” Many of the contributors to Passion explore these intersections of law, culture and society. Little devotes a number of pages to the view that “we stand to learn much about law” as research in law and emotion continues so that “perhaps one day we may be able to empirically test the emotion studies.” She devotes many pages to the specific areas of the law to which law and emotion studies can contribute. The essays themselves discuss such phenomena as cowardice crimes, hate crimes, judicial candor and disclosure, forgiveness, shame, revenge, disgust, remorse, love, fear, justice, mass violence, human rights atrocities, authority, emotionalism, anger, restoring victims, victim impact statements, punishment, popular culture, the human body, distaste, danger, responsibility, the consciousness of judges, retribution and the “Clayton Moral Philosophy” of Jesus Christ.

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MSN DSL: Bad service, bad deal

By Winton Woods
Special to Maricopa Lawyer

B y the end of the 20th century, telecommunications companies had laid millions of miles of fiber-optic cable around the country. Today, 95 percent of that capacity remains unused and is referred to as “dark” fiber.

Why is so much unused? There are a number of reasons, but the most significant one is that the data pipeline from your home or office to the Internet often is too small to allow for the transfer of large data files such as video or multi-page documents and graphics. [Think of the entire fan population for the World Series entering Bank One Ballpark through a single turnstile.] This is known as the “last-mile” problem. Many view the last-mile problem as the principle obstacle to a truly revolutionary telecommunications future.

Until recently, those of us fortunate enough to live in Arizona had a variety of choices. We were one of the first areas in the country to have DSL capabilities through US West. The cable companies provided access to the Internet over their systems. Sprint provided wireless access via our rooftop antenna, and several companies began to offer access via satellite.

Only a year ago I was able to proclaim that Arizona lawyers who needed to overcome the last-mile problem could use one of several available solutions. I was decidedly optimistic about the coming of ubiquitous broadband capacity in Arizona and the end of the last-mile problem.

Today I am decidedly pessimistic about those possibilities for several reasons.

First, Sprint apparently has abandoned the expansion of its wireless network pending the development of new technologies. When, if ever, that new technology will come back online is unknown. Second, we hoped that we could access the Internet via satellite with the same success we have with television. But access via the DirecPC network has turned out to be problematic. I have tried satellite access and at the moment I cannot recommend it as a solution in the office context. It is too slow and too unstable to rely on as an office communication tool. Third, many of the cable providers do not yet provide access for businesses, thus limiting that option to home offices.

All of those things were bothersome but not critical because a large proportion of the law offices in the state had access to the DSL service provided by Qwest Communications. I wrote less than a year ago about how wonderful the Qwest service had become. Its “ride the light” advertising campaign was both a joy and a promise of a high-speed digital future. Then Qwest entered into a relationship with Microsoft that has effectively destroyed the utility of its DSL service.

The big Qwest megalith pipes still exist, but the primary way of accessing those pipes now has become the Microsoft network. MSN is a very small pipe that severely limits the size of files you can send through the Qwest DSL lines. MSN is the single turnstile at BOB. You cannot ride the light on MSN.

Over the last month I have had some pretty unbelievable interactions with MSN. If you have Qwest DSL service, you will soon be forced to switch over to MSN or find another Internet service provider (ISP). Qwest is abandoning its role as an ISP and turning all of its customers over to MSN. If you have alternative sources of access to the Internet, now is the time to explore them and put something in place before you get switched over. You will not like MSN unless you have exceedingly modest expectations for using the Internet.

My experience with MSN started about a month ago when I received email from Qwest telling me that by the first of next year I would have to access its DSL lines through MSN. I thought that I had some obligation to you, my readers, to explore the transition earlier rather than later and so I went to the Qwest transition service to get my new MSN service. It did not take long and I liked the fact that I could get dial-up service all over the country through MSN. I was excited about the possibilities but totally unprepared for what happened next.

I had anticipated that the joining of the Qwest DSL capability with MSN was a marriage made in heaven. After all, Bill Gates has spent an enormous amount of time, energy and money over the last year touting Microsoft’s Internet strategy. Because MSN is a key element in that strategy, I expected a first-class service. I also knew that MSN was in a fight to the death with AOL for the consumer space and has been making major gains in the last few months. That competition, I thought, would cause Microsoft to provide a better service than AOL.

I was wrong on all counts. The MSN service is shoddy, its people are rude and the fundamental design of the system is incompatible with the effective use of broadband in the office. MSN is a low-level consumer exploitation tool designed for simple email and chat, not a professional tool for document transfer and other Internet needs.

My first MSN experience came when my DSL service went down two days after the switch. I waited a while thinking there might be some start-up problems but after a few days working on a 56K modem I decided...

LAW OFFICE COMPUTING

The Phoenix Municipal Court is accepting applications for the position of Municipal Court Hearing Officer.

SALARY: $65,205 annually

DUTIES: A Municipal Court Hearing Officer is responsible for the hearing and adjudication of civil traffic and other city code civil violation cases. This appointment is for a two (2) year period, renewable by the Chief Presiding Judge.

EXPERIENCE: Qualified applicants will possess either (1) a Juris doctor or equivalent law degree, OR (2) a bachelor’s degree with at least three years of experience in the area of traffic law. It is highly preferred that applicants possess a law degree, and be admitted to the Arizona State Bar. Applicants should also have experience in and knowledge of Rules of Procedure in Civil Traffic Violation Cases, traffic laws and City ordinances, Local Rules of Practice and Procedure of the Phoenix Municipal Court for Civil Cases, courtroom procedures and Rules of Evidence.

ADDITIONAL REQUIREMENT: Applicants must be 21 years of age and be of good moral character. Successful completion of a course for certification to act as a Hearing Officer will be required following hire.

HOW TO APPLY: Applications are available at the Office of Chief Presiding Judge B. Robert Dorfman, 300 West Washington Street, 9th Floor, Phoenix, Arizona 85003, 602-262-1608 or through the Phoenix Municipal Court’s web site: phoenix.gov/COURT.

Applications must be received no later than 5:00 p.m., January 18, 2002.

Successful applicants will be required to take and pass a drug test and employment will be contingent upon successful completion of any required drug test and consideration of background, references, and other job-related selection information.

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friemanjf@aol.com
ed to call MSN support and get back on my broadband connection. I was totally unprepared for technical support people who were basically untrained in the technology they were supporting. They only could tell me that there were some "issues" with the Tucson servers. Over the course of the next few days, my DSL service was up and down — and much more down than up.

Moreover, I found that I could not send ordinary documents and files using the new service. During one of my many conversations with MSN support, I finally learned that MSN did not allow files larger than one megalobyte. That's OK, I thought, because I can use my office server at the university to send larger files. I then found that MSN would not allow me to access the university server to send files. When I called MSN technical support to find out why that was so, I was given a bunch of techno mumbo jumbo that was either the product of ignorance or of design.

I subsequently discovered that the inability to access my university server for the purpose of sending large files is not a glitch but an apparently intentional decision by MSN to preserve its own bandwidth at the expense of its customers, thus creating more profit for MSN. When I suggested to my MSN support person that the failure to disclose such a restriction had some legal implications for the recent lawsuit brought by the Arizona attorney general, I was told that the fact that I had mentioned legal action required her to terminate the call. She then hung up on me.

The next morning, I called my local cable company and arranged for the installation of the AT&T cable service. A week later, a very nice young man arrived at my house with the cable modem. In less than an hour he was up and running. It is 10 times as fast as my old DSL service and costs a little bit less. I can access my university server with ease.

The only problem is that Excite@Home, which is in bankruptcy and is scheduled to cease operations within the next few months, provides the @Home service. I love it and I hope it lasts for more than three months!

Why consider mediating your case?

Because alternative dispute resolution was not taught in law schools until the past 10 years, many attorneys wonder about considering mediation and the benefits of ADR.

The classic reasons to consider mediating a lawsuit are:

- Quicker resolution. The settlement rate for commercial mediation is more than 80 percent. Most cases can be scheduled within 30 days.
- Confidentiality. Sessions and agreements are private.
- More flexible remedies. The judicial process focuses on damages. Mediation focuses on creative solutions to underlying interests.
- Reduced litigation fees. Law firms find that mediation is cost effective because it settles the right cases and frees up time to focus on major litigation. Of course, clients appreciate settlements with lower costs.
- Continued relationships. The adversarial system discounts the value of relationships. Mediation, if desired, can focus on relationships.
- Certainty. Mediation avoids the uncertainty of trial process and appeals. Agreements are binding contracts.

The Maricopa County Bar Association's Alternative Dispute Resolution Committee meets at 9 p.m. on the first Thursday of each month. The committee chair is Troy Dodge of Ryan, Woodrow and Rapp. To join the committee or inquire about continuing legal education, contact Sandra Montoya at 602-257-4200, ext. 131, or smontoya@mcbar.org.

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Clerk begins year with technology news

By Michael K. Jeanes
Clerk of the Superior Court

The Maricopa County Superior Court Clerk's Office is entering the new year with some technological advancements in our Electronic Document Management System (EDMS), the Minute Entry Electronic Distribution System (MEEDS) and our “For the Record” project.

EDMS is our office’s most significant technology project. EDMS is an electronic document-management system that, among other things, eventually will turn the office into a paperless environment. It will allow us to electronically capture, route and store all documents that we receive.

This month, we took a major step in making EDMS become a reality. We began experimenting with the paper documents that come to our office for filing. This is now being done with all case types we receive: criminal, civil, Family Court and juvenile. We already were scanning in the probate, mental health and Family Court and juvenile. We already were scanning the probate, mental health and tax filings to test the scanning technology.

As we implement more aspects of EDMS, having the documents in an electronic format will enable us to quickly route them throughout the courthouse for further processing and allow simultaneous access to the same document by multiple users. It also will significantly increase the efficiency and speed of our service.

Our office receives more than 6.5 million pieces of paper per year. In fact, you may remember that we just moved into a new 113,060 square-foot customer-service facility at 601 W. Jackson to accommodate the ever-increasing number of records we receive. Now that we have the technological capability to convert paper documents into an electronic format, we are going to save a tremendous amount of space as the court gradually moves away from paper.

Another benefit of EDMS will be the ability to electronically file documents, which also will reduce paper, save space and provide an important service to the legal community.

The second technological development involves MEEDS, which is the program we designed to automate the entire minute-entry process. This automation includes printing, sorting and distributing the minute entries from the court division to the parties, court dockets, the website and — thanks to the new pilot program we just implemented — law firms. By doing this, we are saving considerable time, printing costs and paper, as well as providing better service to the legal community who receive the minute entries in a more efficient manner. Details on how to enroll in this program will be forthcoming as the project expands.

Please note that most minute entries for newer cases can be accessed at anytime via our website. Go to www.clerkofcourt.maricopa.gov and click on “Minute Entries,” then enter the case number. Most criminal minute entries are available from January 2000; most probate minute entries from December 2000; most civil and tax minute entries since April; and most Family Court minute entries since May.

The final item relating to new technology in our office is our “For the Record” project, which is a digital recording software program being used by our Juvenile Court courtroom clerks and some criminal division clerks. The new software provides better clarity than an audiotape and eliminates background noise. In addition, it is more efficient because courtroom clerks can simply note a time that an event occurs in court and then go directly to that time on the recording when they are preparing the minute entry. This serves as a note-taking alternative for courtroom clerks without shorthand skills.

We plan to expand this program to all courtroom clerks.

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## ARE YOU MISSING NURSING HOME NEGLECT & ABUSE CASES?

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.

Our Nursing Home Litigation Division is available for association with referring counsel. We promptly pay referral fees in compliance with E.R. 1.5.

For additional information call or write:
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Classifieds

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MCBA SECTION STUFF

The following Section Executive Board
will meet in January:

- BANKRUPTCY SECTIONS on
January 14th, 6:30 p.m. at the
University Club, 85 E. Monte Vista
Phoenix

- ESTATE PLANNING SECTION on
January 15th, at 6:30 at the MCBA, 325 E.
Central Ave., Phoenix

- INTERNET LAW SECTION on
January 12th, at 6:30 at CMLA, 510 W.
Central Ave., Phoenix

- MCBA YOUNG ATTORNEYS on
January 9th, 6:30 p.m. at the MCBA, 325 E.
Central Ave., Phoenix

For information about the Section’s
organization, membership or events, please contact
the Clerk at (602) 277-4000 or
Email mcba@azbar.org
Kelly A. Brown has become associated with Jaburg & Wilk.

Shawn E. Nelson and Juan F. Moreno have joined Robbins & Green as associates. Nelson, a 1996 graduate of the University of Arizona College of Law, will practice commercial litigation. Moreno will handle commercial transactions, including cross-border related transactions. He is licensed to practice in Mexico as well as Arizona and received law degrees from UA and the Instituto Tecnologico y de Estudios Superiores de Monterrey in Mexico. He also holds a master’s degree in international trade.

Scott A. Erickson has become a shareholder and director of Bonnett, Fairbourn, Friedman & Balint, Erickson, a 1993 law graduate of the University of Texas, specializes in estate planning, probate and trust law. The firm also has added 11 new associates to its Phoenix office. Edward O. Comitz, a 1993 University of Puget Sound law graduate, will concentrate on complex commercial litigation. Practicing class-action litigation will be Kathryn A. Jann, a 1988 Creighton University law graduate and Colleen M. Auer, a 1990 University of Southern California law graduate. Michael F. Beethe, a 1997 law graduate of the University of Missouri—Kansas City, will concentrate on construction litigation and insurance law.

Christopher D. Stickland, a 2000 law graduate of Michigan State University—Detroib, and Jonathan S. Wallack, who graduated with honors last year from ASU, will focus on tort law. Ronitha Maharaj, a 1999 graduate of Michigan State University—Central, will focus on tort and employment law. Misty Leslie, a 1999 Creighton law graduate, will emphasize employment law and class-action litigation. Brigham A. Cluff, who graduated last year from ASU, joins the firm’s real estate and transactions practice. The firm also has opened an office in Durango, Colorado, to be staffed primarily by one of the firm’s founding partners, Jerry C. Bonnett.

Merton E. Marks has opened an office in Scottsdale as an arbitrator and mediator. He previously was a partner in Lewis and Roca for 27 years, representing clients in insurance, product liability and commercial litigation, arbitrations and mediations. His office is at 8655 E. Via de Ventura, Suite G-223, Scottsdale, 85250-3363; telephone, 480-346-1055; fax, 480-346-1056; email, memarkspc@hotmail.com.

Linda D. Weaver, whose practice focuses on healthcare and commercial litigation, has joined Osborn Maledon. Weaver formerly was executive vice president and chief clinical officer of Magellan Behavioral Health, which covered 70 million insured persons in the U.S. and Canada. Weaver attended law school while she worked for Magellan, graduating last year from Georgetown University Law Center.

The State Bar of Arizona is restructuring its top legal positions, creating once again a chief counsel position and establishing, for the first time, a full-time general counsel position. Executive Director Cynthia Zwick has appointed Allen B. Shayo as general counsel. As assistant executive director—legal, Shayo has been responsible for overseeing both the lawyer regulation system as well as serving as general counsel. Shayo’s duties will include representing the State Bar and its board in all legal matters. The State Bar is hiring to fill the chief counsel position.

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