Case Huff & Associates, Inc. was the 2013 Barrister’s Ball Platinum Sponsor. Shown with Faith and Tim Huff (right) are Richard Siever and Julie LaFave.

Find more Ball photos on page 8.

### Barristers Ball 2013

**From Gideon to Miranda**

**By Paul G. Ulrich**


Part One of this article in the March issue described events leading to *Gideon*. This part shows how *Gideon* led to *Miranda*.

**From Gideon to Escobedo and beyond**

*Gideon* held only that a right to appointed counsel for indigent defendants existed in state-court noncapital felony trials. The question then became how soon that right attached.

*Hamilton v. Alabama*, 368 U.S. 52, 54 (1961), had held a capital defendant had the right to counsel at his arraignment, since it was a “critical stage” in a criminal proceeding. *White v. Maryland*, 373 U.S. 59, 60 (1963), also held such a defendant equally had the right to counsel at a preliminary hearing. *Haynes v. Washington*, 373 U.S. 503, 516-17 (1963), then held failure to advise a suspect of his rights violated the Sixth Amendment. *Miranda* has been described as the “highwater mark” in the development of an adversarial system of criminal justice.

*Miranda* prohibited officers from entering into an agreement to suppress any confession given by a defendant who had been denied counsel. *Fisher*, 373 U.S. 503, 516-17 (1963), then held failure to advise a defendant of his right to counsel violated the Sixth Amendment. *Fisher* was the high point of this line of cases. *Fisher* held that the right to counsel includes the right to have the presence of counsel at the time of interrogation.

**Arizona not all wrong, but state’s obvious intent undermines its case**

In the latest episode of the S.B. 1070 saga, the Ninth Circuit has affirmed a preliminary injunction barring enforcement of provisions aimed at curtailing day laborers from blocking traffic while soliciting work from drivers in the street. The court held that the provisions likely interfered with free-speech rights. *Valle del Sol, Inc. v. Arizona*, No. 12-15688 (9th Cir. Mar. 4, 2013).

Arizona’s comprehensive immigration-reform bill, S.B. 1070, includes a couple of provisions aimed at day laborers. One makes it illegal for a person to seek day labor from occupants of vehicles if the interaction blocks traffic. The other makes it illegal for the vehicle occupant to solicit or hire a day laborer in the same circumstances.

A coalition of organizations and individuals sued to have S.B. 1070 declared unconstitutional. They sought a preliminary injunction, arguing that the day-labor provisions violate the First Amendment. The district court enjoined their enforcement, and the Ninth Circuit affirmed.

Arizona conceded that the provisions at issue restrict the free-speech rights of those involved, but argued that the intrusion was warranted. The provisions, it argued, “are permissible because it is illegal to block traffic and because day labor solicitation presents unique traffic safety concerns that justify special treatment of such speech when it blocks traffic.”

Writing for the court, Judge Raymond C. Fisher acknowledged that Arizona “has a significant interest in protecting the safe and orderly flow of traffic on its streets.” And “the roadside solicitation of labor may create dangerous traffic conditions.” Nevertheless, “Regulations that inhibit speech must comport with the requirements of the First Amendment.” The court therefore had to weigh the restrictions’ benefits against their burden on protected speech. The case involved commercial speech, not core speech, Fisher held: “[T]he primary purpose of the communication is to advertise a laborer’s availability for work and to negotiate the terms of such work.”

Fisher ruled that the day-labor provisions are content-based restrictions. “[T]he day labor provisions target one type of speech—day labor solicitation that impedes traffic—but say nothing about other types of roadside solicitation and nonsolicitation speech.” “They are,” he wrote, “classic examples of content-based restrictions.”

The district court had determined that the day-labor provisions were aimed at suppressing speech. Fisher agreed: “Significantly,” he wrote, “the purposes clause introducing S.B. 1070 describes it as an immigration bill, not a traffic safety bill.” That clause stated that the bill was intended “to make attrition through normal processes of naturalization and nonsolicitation speech.”

“Arizona not all wrong, but state’s obvious intent undermines its case.”

**See From Gideon to Miranda** page 14

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**CourtWatch**

**Daniel P. Schack**

Arizona not all wrong, but state’s obvious intent undermines its case

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“Arizona not all wrong, but state’s obvious intent undermines its case.”

**See Arizona not all wrong** page 15
Summing up the Barristers Ball… IT ROCKED!

In case you were doing anything other than attending the annual MCBA Barristers Ball on March 9, you really missed out. And, yes, I am way late on getting my article in this month, but I digress.

This year's Barristers Ball was held at the fabulous Westin Kierland Resort in Scottsdale. A few of us arrived a bit early to take in the famed bagpipes at 6 p.m. While this spectacle usually takes place on the 18th green of the resort golf course, some unusually inclement weather brought Michael McClanathan, a bagpiper with 40 years of experience, into the main lobby. After a quick pint of Piper's Ale from the lobby bar tavern, we were off to the main event.

Once again, our Young Lawyers Division took out all the stops and had a fantastic array of silent auction items available for bid. Attendees had the opportunity to bid on sports suites, art work, vacation offerings, jewelry, and other bounty. Surprisingly, or not, the Funkhousers went home with a few items, as usual.

We then migrated into the main ballroom where, for the first time in years, and possibly ever (our archives could use some work), we were treated to a live band – the Upper Eastside Big Band. Not only was the band live, but most of the members were practicing attorneys. Dinner was delicious, the wine pairings were splendid, and the company was wonderful.

Next up: A welcome by YLD president, Melinda Soma, and yours truly, Melinda and I then drew the winners of the three $500 raffle prizes. After getting a tingling feeling from my “sixth sense,” I let Melinda pick the second winner. Hello, lucky ticket holder number 55238! Another actual number altered for identity purposes — Alicia Funkhouser! Thank goodness I didn’t pick that ticket or things would have been well, well, awkward!

After that, the band struck up again, and the dance floor filled up. And then, another new twist on the Barristers Ball this year – casino games! It was as if we were magically transported from Scottsdale to Monte Carlo. Rumor has it, a certain current president of the MCBA had a HOT roll at the craps table. Rumor also has it, this same current president of the MCBA may have “overspent” his time at the same craps table. For anyone that could not squeeze into the table, my apologies. But, it was all in good fun.

All in all, I think I can easily say it was the best Barristers Ball I have ever attended. If nothing else, it raises the bar for next year. I hope that if you were not able to join us this year, you will next year.

The first quarter of 2013 may already be at an end, but there is still an exciting year ahead at the MCBA. Be on the lookout for future membership luncheons, exciting CLEs, meetings of sections, divisions and committees, and of course, our Annual Luncheon and Hall of Fame awards ceremony on October 30, 2013. ■

ASU’s Sandra Day O’Connor College of Law to launch teaching law firm in Summer 2013

By Janie Magruder

Arizona State University has approved the summer 2013 launch of the ASU Alumni Law Group, a teaching law firm that will hire and mentor recent graduates of the Sandra Day O’Connor College of Law.

The Law Group, a stand-alone, nonprofit firm, is modeled after a teaching hospital, a full-service, fee-based institution that will prepare new and recent graduates to move from the classroom to practice. It will provide legal services to a wide variety of clients, focusing on those who cannot afford to pay current market rates and using graduates supervised by experienced attorneys to deliver those services.

Dean Douglas Sylvester said the College of Law saw a need to further its educational mission, and is taking action.

“There is no question that law schools need to rethink their role in preparing students for legal careers,” Sylvester said. “In a market where many are calling for systemic legal reform, we at ASU are not waiting for others to change — we are changing how we educate and mentor lawyers right now, and are doing so in a way that makes sense for our graduates and for Arizona.”

The firm will be comprised of four to five litigation and transactional practice groups, with five recent College of Law graduates serving as associates in each, for terms of up to three years. The groups will each be overseen by experienced supervising attorneys whose connections to the legal community run deep, and who are dedicated to training new lawyers.

In addition to providing on-the-job training, the firm will provide formal training to junior lawyers on substantive areas of law, essential skills, and client development and retention. The firm will hire about 10 ASU law graduates per year for a total of 30 associates at any one time.

“The ASU Alumni Law Group represents the next stage in the evolution of legal education,” Sylvester said. “This firm will bridge the gap between law school and practice by providing graduates with real-world training in a supportive teaching environment. Associates who go through this program will be well positioned to compete for a wide variety of legal jobs.”

The initiative is being embraced by the Arizona legal community. “The ASU Law Group will provide valuable training and mentoring for new lawyers, while also fulfilling a need for affordable legal services in the community,” said J. Scott Rhodes, managing attorney at Jennings Strouss in Phoenix. “I anticipate that many successful legal careers will start with a stint at the ASU Alumni Law Group.”

The firm intends to partner with other units at ASU, including SkySong, the ASU Scottsdale Innovation Center, to help new and emerging companies grow and spur economic activity at home, and the ASU Lode-Star Center for Philanthropy & Nonprofit Innovation, to provide low-cost, high-quality legal services to nonprofit organizations that will help them serve Arizonans more effectively.

In addition, the ASU Alumni Law Group will work with designated client groups, such as veterans and the Hispanic community. ■

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State bar improves website discipline reporting—but some concerns remain

By Karen Clark and Ralph Adams

For the past two years, the State Bar of Arizona has been considering modifying the information on its website about the history of lawyers’ interactions with the discipline system. After spending two years considering the Discipline on the Web issue, the state bar’s board of governors just adopted a new DOTW policy at its meeting on Feb. 22, 2013.

Every Arizona licensed lawyer should know what the new changes mean, as they will affect anyone who ever receives a bar charge. The bar’s decision about what to put on its website is guided by a new Arizona Supreme Court rule that took effect January 2011. With the rule changes that gave us our new lawyer discipline system, the court—for the first time—established a rule that information the state bar is required to publish on its website.  

New policy re: “Find a Lawyer” profiles on the state bar website

Category One: Lawyers with no public records. A lawyer in this category has no public dismissals, diversions, informal sanctions, or formal sanctions. Currently, this lawyer’s profile indicates “History/Discipline: This lawyer has no activity” with a disclaimer advising the viewer that the website does not display all information and to contact the state bar if they want additional information on the lawyer’s history. REVISED TO: The lawyer’s profile will indicate “Discipline: None” and no disclaimer will follow the lawyer’s profile.

Category Two: Lawyers who have public dismissals. Rule 70, Ariz. R. Sup Ct, provides that a dismissal is public for six months following notification of dismissal. After six months dismissals become confidential. A lawyer in this category has a public dismissal(s) but no informal sanctions or formal sanctions. Currently, this lawyer’s profile indicates “History/Discipline: This lawyer has no activity” with a disclaimer advising the viewer that the website does not display all information and to contact the state bar if they want additional information on the lawyer’s history. REVISED TO: The lawyer’s profile will indicate “Discipline: None” and no disclaimer will follow the lawyer’s profile.

Category Three: Lawyers who have informal sanctions that are not published on the website (admonition—formerly informal reprimand), or have a pending probable cause order or pending formal proceedings. Currently, this lawyer’s profile indicates “History/Discipline: This lawyer has no activity” with a disclaimer advising the viewer that the website does not display all information and to contact the state bar if they want additional information on the lawyer’s history. REVISED TO: The lawyer’s profile will indicate “Discipline: None” followed by a disclaimer that states: “Please contact the State Bar of Arizona for any available information by calling 602-340-7384 or use the lawyer history form. This website does not display all lawyer sanctions such as admonitions/informal reprimands, or any pending formal proceedings.”

Category Four: Lawyers who have published sanctions pursuant to Rule 49, Ariz. R. Sup. Ct. Currently, this lawyer has a profile that indicates “History/Discipline: This lawyer has no activity” with a disclaimer advising the viewer that the website does not display all information and to contact the state bar if they want additional information on this lawyer’s history. REVISED TO: This lawyer’s profile will indicate “Discipline: None” followed by a disclaimer advising the viewer that the website does not display all information and to contact the state bar if they want additional information on the lawyer’s history. The disclaimer advises the viewer that the website does not display all discipline actions and provides the state bar’s contact information to obtain more about the lawyer’s discipline history. The disclaimer is the same regardless of whether the lawyer has any public records. The state bar’s Discipline Oversight Committee—which unanimously recommended the new policy to the board—asserts that it: (1) does nothing more than modify the disclaimer to fit the actual history of the lawyer; (2) doesn’t add or change the discipline information currently made available via the website; and (3) doesn’t change what it publishes—which is only that required pursuant to Rule 49(a)(2)(C).

The state bar’s new DOTW policy is significantly different from the first one it proposed back in May 2011. In a previous opinion piece for the Maricopa Lawyer, we offered a critique of that proposal, as well as a later version, which we found problematic in several respects.

Among the most concerning was that it would have meant informing about lawyers with pending probable cause orders, unsubstantiated formal complaints filed by bar counsel, and other objectionable information would have been readily accessible under “Find a Lawyer.”

Under the state bar’s first proposal, these items would have auto-populated right under the lawyer’s profile. Our firm wrote a letter to the leaders of more than 75 lawyer organizations identifying these concerns—as well as the fact that the state bar was set to vote on the matter without soliciting input from its members.

The good news is that the state bar was willing to listen. After hearing from us and another respondent’s counsel—who represent lawyers in bar discipline matters—the board agreed to solicit input from its members concerning its proposal.

It sent out a public notice on e-legal and then held a June 2012 Town Hall Meeting at the bar office in which we and other interested parties participated. As a result of these efforts the state bar significantly revised its proposal.

As you can see on the sidebar, now neither probable cause orders nor unsubstantiated allegations about a lawyer contained in an unadjudicated formal complaint will auto-populate under the lawyer’s listing on the website.

See State bar improves page 13

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To bark or to bite?

The dilemma

Or, is the question more aptly posed as “when to stop barking and start biting?”

In stating these questions, I do not refer to what comes naturally to those creatures of the canine species. Rather, I refer to the quandary that most young lawyers face when they begin practice and are confronted with their first heated adversarial conflict.

It goes without saying that conflict, in one form or another, is at the heart of what lawyers try to resolve every day. And the representation of opposing parties requires us to be inherent adversaries. However, at times, the conflict can be very heated and may be due to an opposing attorney who is unnecessarily difficult, litigious or is testing the young lawyer’s fortitude by repeated ad hominem attacks.

Alternatively, the conflict may legitimately relate to case law, a procedural rule, or an error. The issue of how to handle a heated conflict is obviously not unique to young lawyers, but it is faced by experienced lawyers frequently and likely, I imagine, with a lot less angst.

The resolution

In answer to the questions posed above, I have found that what best suits my style of conflict resolution is to do neither most of the time. When I started practice, I realized very quickly that if I received an inflammatory motion, pleading, letter or telephone call, the key to doing the best job for my client was to not immediately react.

Granted, at the time, if a cartoonist had depicted some of my reactions to inciting correspondence, telephone calls, etc., the sketch would have shown me sitting behind my desk with my hair standing on end and the ceiling above my office gone.

Luckily, I never did memorialize certain choice words that came to mind, or picked up the telephone in the heat of the moment because I had the good sense to seek a second opinion or vent to colleagues. Through experience, mentorship, and communicating with colleagues, I learned several things that have been extremely beneficial to my practice and, I believe, my clients.

Tips for reaching resolution

The tips that have been helpful to me early in my practice in trying to avoid the need to bark or bite are as follows:

Assess the source of the conflict. Is it a legitimate legal issue or posturing? If it is posturing, try to redirect the topic back to the underlying legal issues. If that is unsuccessful, memorialize the issue in concise written correspondence that informs the opposing party of what the next course of action is, including court intervention.

Be sure to cover all your bases. If opposing counsel is heated, be sure to listen. Furthermore, do not be defensive. Instead, review the file, pleadings and correspondence record to ensure there is nothing else productive that could be implemented to avoid continuing conflict or that could resolve the present issue.

Do not shoot from the hip and react immediately. There could be an innocent explanation for perceived bad behavior by the opposing party or counsel.

Realize that the case is not about you or your ego. It is about getting the best resolution for your client. If it is unproductive and arguably unethical to engage in a letter writing campaign that has more to do with one-upmanship than pushing the client’s case along to a positive result.

Go out into the legal community, join a professional organization (like the MCBA) and volunteer. It is difficult to demonize your adversary and makes it more likely that you will not get bogged down in posturing when you have volunteered alongside that person and know about their personal interests and family.

The foregoing is a non-exhaustive list that has worked well for me. Every individual has their own style of conflict resolution, but it is important as an attorney and advocate to identify your style early on and ensure that it is meeting your client’s goals.

Following the above tips and conferring with colleagues, I believe, will help a young lawyer stay out of the dog house with both clients and the court.

Untangling website citations

I get frustrated by citations to websites in legal documents for several reasons. First, website citation formats vary widely— even within the same document— which makes the sources difficult to find. I especially struggle to find blog posts and comments because many writers give only general information on where to look.

Second, many website citations no longer work, which causes the reader to question the information’s currency. Finally, the number and length of website citations can make a document hard to read, especially when a long website citation forces a line break.

Fortunately, the 19th edition of Bluebook addresses these concerns in both Rules B10.1 and 18.2.

If the website source being cited is an exact or official copy of a print source, like a case or statute, then the writer does not need to include a website citation. The writer can just cite to the source as a print source. If the print source is hard to find, however, then the writer should include the website citation. Following is the formula for what to include in a website citation.

1. Author’s name, if one, followed by a comma.
2. Title of the specific webpage, if one, underlined and followed by a comma.
3. Title of the main page of the website;
4. Date and time (if one is provided and if the website is updated several times per day), provided inside a parenthesis; and
5. The URL.

The following example is from Rule 10.1.1.


One common issue a writer may encounter is when a website does not include a date. In this instance, include the date the website was “last modified” or “last updated.” As a last resort, use the date the page was “last visited” in order to indicate currency. If possible, always give the month, day, and year.

Finally, website citations can use the short form citation if the writer has provided the full citation mentioned above. A writer also has the option to provide a parallel citation to a website after the print source citation if this information will help the reader access the source. After the print source citation, introduce the website with the underlined explanatory phrase “available at” and then provide the URL.

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Are you working hard or hardly working?

I know what you're thinking…how could I even ask a question like that? Seriously, in this market, everyone is working hard. With companies doing more with less, we don't have a choice but to work harder. This must mean our work ethic is at all-time high, right? Not necessarily.

According to Webster’s Dictionary, the definition of work ethic is a belief in work as a moral good. And once I find the definition for that definition, I will let you know. Until then, let’s focus on what work ethic looks like.

We all spend time at work shopping online, checking Facebook or reading up on the Josh Arias case. It’s natural to detox for a few minutes during the day. The time you spend detouring, aka slacking, for a few minutes during the day. The time you spend detouring, aka slacking off, doesn’t define you as an employee or your work ethic. It’s what you do during off, doesn’t define you as an employee or your work ethic. It’s what you do during during off, doesn’t define you as an employee or your work ethic.

So why wouldn’t we do what we can to help a co-worker? If you want to see my head spin around and green pea soup fly out of my mouth, say that within earshot of me when you decide it’s not important for you, even though you know the answer to the question or have the ability to help the person, even though it may be out of the scope of your daily job duties, what would possess you to blow off a co-worker?

Let’s face it, we spend more time with our work family than we do our real family. So why wouldn’t we do what we can to help each other out? (A) Fear of responsibility, (B) laziness, (C) lack of regard for the overall vision of the company you work for, or (D) all of the above? Answer? (D) AND poor work ethic. If someone needs help and you have the answers, step out of your comfort zone and help them!

When you are assigned a task, your boss typically has a specific end result they are looking for. They may ask you to research the migration patterns of South African dung beetles. As a good employee, you start researching the migration patterns of South African dung beetles. A great employee goes an extra step and also looks into the migration patterns of Australian dung beetles.

This shows your boss that you can take the initiative and you’re not afraid to speak up when you think you have something of value to offer. Don’t be afraid to build on an idea or thought pattern of your boss. Your boss hired you for your support and to make him or her look good, take the extra step.

Another workplace pet peeve of mine is inefficiency. For most of us, the reason we do a task a certain way is because that’s how it’s been done for the last umpteen years. How much time could you cut out of your daily job if you could out a step or two and still come up with the end result.

In Clapper v. Amnesty International, these individuals argued that it was likely that their sensitive international communications with people believed to be under surveillance and burdensome measures required to protect the confidentiality of these communications (such as traveling long distances to speak to individuals believed to be under surveillance) met Article III standing requirements.

The Second Circuit Court of Appeals agreed, reasoning that there was an “objectively reasonable likelihood” that their communications with foreign individuals would be intercepted pursuant to the Foreign Intelligence Surveillance Act in the future. The Supreme Court reversed, holding that the parties’ must demonstrate not an “objectively reasonable likelihood” that their communication will be intercepted, but instead must demonstrate a “threatened injury” arising out of the Foreign Intelligence Surveillance Act.

Full opinion can be found at http://www.supremecourt.gov/opinions/12pdf/11-1025_lhj.pdf

Ninth circuit seeks to fill two bankruptcy judgeships for the District of Arizona

The Ninth circuit is accepting applications through April 25 for two bankruptcy judgeships in the District of Arizona in Phoenix. Applications will be screened by a local Merit Screening Committee.

A small group of these applicants will then be interviewed by a committee of circuit judges. The process is expected to take approximately 10 months, with new judges expected to take the bench in March and April 2014. New judges would serve a 14-year term with possible renewal appointment. The current salary is $160,080 per year.

For more information on how to apply, visit https://judgeship.ca9.uscourts.gov/index.php/arizona-vacancies-2013-1

Megan Pollnow is a member of the Maricopa Lawyer Editorial Board and an associate at Asimou & Associates.

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Presiding Judge Norman Davis has appointed Utiki Spurling as a Superior Court Commissioner to replace Mina Mendez.

“Comr. Spurling comes to Superior Court with a depth of criminal law knowledge and she has some private civil practice experience. She comes highly recommended from a wide range of sources,” Judge Davis said.

Spurling, a native of Southern California, served two stints spanning more than a decade in the Maricopa County Public Defender’s Office. As a public defender, she served various roles, including training new lawyers in RCC and working as a member of the trial group.

In between employment at the Maricopa County Public Defender’s Office, Comr. Spurling moved to Pennsylvania and worked as a civil litigator for two law firms.

Comr. Spurling graduated from Arizona State University with a BA in political science and she received her JD from the ASU College of Law in 2001.
A taxing season—Arizona and the federal income tax

HISTORY & HEARSAY
Stan Watts

Spring 1912 was a season of firsts in Arizona. The progressive fire that had swept the territory and shaped the new state's constitution and nearly consumed the territory's chances for statehood had to be controlled to forge a new government. Local lawyers were introduced to the federal bar, hobnobbed with the brand new legislature, and a few found themselves personally responsible for funding the rapidly expanding federal government.

Opening a bar
At around ten o'clock on the first Monday morning of March, the local bar and guests made their way through a crisp clear Phoenix morning to the stuffy courtroom on the second floor of the cramped old courthouse that had served Maricopa County for 28 years. Ninth Circuit Judge William W. Morrow, lodging at the Hotel Adams, had traveled with his wife and secretary from San Francisco to establish the U.S. District Court for the new District of Arizona. Before a full courtroom of more than 50 distinguished barristers, the judge uttered the magic words organizing the court and proceeded to appoint officers, admit attorneys and proceed for rules.

A five-member rules committee, including former territorial supreme court justices, a territorial governor, the U.S. attorney and the state attorney general, was appointed and Judge Morrow provided the new committee with a copy of the Court Rules for the Northern District of California. The judge also appointed interim court officers, including the U.S. attorney, the court clerk, the U.S. marshals, and bailiffs, pending confirmation by the President and appointment of a federal judge for the district.

Commissioners, including Phoenix Justice of the Peace C.W. Johnston, were named, as were bankruptcy referees.

Orders were entered to provide for case files, records and cash held by the Territorial Court to be transferred to the new clerk. Joseph E. Morrison, the new U.S. attorney was the sworn in, and for a moment was the only person in the courtroom.

Political priorities
A few weeks later, on March 18, at 11:00 a.m., the new state legislature was called to order for its inaugural session. After a few days of organizational matters, the people's business began to be considered.

Senate Bill No. 1 of that first session addressed a bit of unfinished constitutional business. The senators were each provided with a photographic reproduction of Section 1 of Article 8 of the constitution originally approved by the territorial electorate.

This provision for recall of judges had drawn the wrath of President Taft and resulted in his rejection of the original constitutional constitution. Only after Arizonans obsti- nately voted to remove the offensive provision from their constitution were they granted the long sought privilege of statehood.

The press reported that when H.R. Wood introduced Senate Bill No. 1 to reinstate judicial recall in the constitution, “it is certain what the senator said will never be placed by the President’s friends on his tombstone.” Arizonaans approved this legislatively referred amendment a few months later.

Senate Bill No. 2 was aimed at giving women the right to vote. The legislature’s failure to approve this bill resulted in a successful petition drive that became the state’s first citizen-initiated constitutional amendment in the fall election. Senate Joint Resolution No. 1 called for ratification of the Sixteenth Amendment to the U.S. Constitution. And Senate Joint Resolution No. 2 requested Congress to pass a law submitting to the states an amendment for the popular election of U.S. Senators. House Bill No. 1 and House Joint Resolution No. 1 mirrored the Senate’s. Clearly, judicial recall and taxes were top priorities that first week.

A dubious anniversary
Viewed from its 100th anniversary, the approval of the Sixteenth Amendment — the amendment allowing the federal government to impose an income tax — may have been the classic example of legislative unintended consequences.

In the first decade of the twentieth century, the federal government was funded primarily by tariffs and excise taxes — together accounting for over 90% of the federal budget’s revenue. Imports were taxed at rates in excess of 25% and excise taxes on alcohol, tobacco, sugar and other items were passed along to consumers. These revenue policies were intended to raise revenue while protecting domestic production and target- ing perceived vices and luxuries.

As the progressive policies of presidents Theodore Roosevelt and William H. Taft began to increase the size and scope of the federal government and the military, these traditional sources of revenue became inadequate. In April of 1909, the Senate was looking for a way to address an anticipated $100 million deficit in the federal budget.

Conservative Republicans wanted to establish a tax on food and other necessities, while Democrats and Progressive Republicans favored taxes on income, inheritances and dividends. Earlier efforts to establish an income tax had been rejected by the Supreme Court as unconstitutional.

By July 1909, the Sixteenth Amendment to the Constitution, authorized the collection of “income taxes from whatever sources derived,” was approved by Congress and submitted to the states for ratification. President Taft envisioned a 2% tax on corporations and promised that although the amendment authorized taxation of individual incomes, such a tax would only be used “in time of need” as a last resort.

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Phoenix School of Law moves to new academic term structure

Phoenix School of Law (PSL) will be expanding its schedule from two academic terms to three academic terms beginning in the fall of 2013. The academic terms will start in the fall, spring and summer. Students have the option of attending either two or three terms during the academic year.

The new structure offers significant advantages to students and is responsive to challenges currently facing legal education and the legal industry. Advantages include:

Required courses offered every term: New students will have the option of beginning their legal studies in January, May or September. Required courses will be offered in each term so students have the option in the third term of continuing classes, participating in experiential learning opportunities, or taking time off.

Increased course availability for fall-time/evening students: PSL offers the only part-time program for law students in the state of Arizona. The addition of required courses, additional electives, and increased experiential learning opportunities in each term expands the variety of courses available for part-time students.

Accelerated JD degree: Students can choose to attend classes for all three terms and graduate in two years resulting in reducing their overall debt and accelerating their legal careers.

Increased Opportunities: Students will have a greater opportunity and flexibility to participate in experiential learning opportunities. The longer summer term of 12 weeks will allow students to gain more practical experience and additional academic credit.

Year-round options for gaining work experience: The flexible scheduling option provides the opportunity for full time work experience at any time of the year, which is optimal for both the student and legal employers.


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Happy Anniversary!
Barristers Ball 2013
An elegant evening to benefit the Maricopa County Bar Foundation
March 9 • Westin Kierland Resort & Spa, Scottsdale

Aaron Nash and his spouse Michelle check out the offerings at the silent auction.

MCBA staffer Bree Boehlke (left) laughs at Alex Lane’s and Brent Kleinman’s mugging after Lane purchased a raffle ticket. Kleinman was the chair of this year’s Ball.

Chatting before dinner are two past presidents and their wives. From left are Nancy and William Haug and Jerry and Dora Angle.

William Hicks, his spouse, Hon. Bethany Hicks and Comr. Keelan Bodow during the silent auction.

Past president Kevin Quigley and his wife Julie enjoy the evening.

Melina Sloma, president of the Young Lawyers Division, which produces the annual Ball, congratulates one of the winners of the raffle drawing as Brent Kleinman watches.

The casino games were a great hit. This couple is getting a kick out of the twenty-one table. Other casino games were roulette and craps.

Live at the Barristers Ball, the Upper Eastside Big Band played danceable music for everyone’s pleasure.

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Roshka DeWulf & Patten is pleased to announce Maura Quigley has joined the firm as an associate.

Ms. Quigley will focus her practice in the areas of securities litigation, arbitration and mediation, and complex business litigation. She earned her Juris Doctorate from the University of Arizona James E. Rogers College of Law.

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Investigate the claim. And other consultants may be needed to and the sooner you know it, the better position you'll be in to settle or effectively try your case. Depending on the case, experts and other consultants may be needed to investigate the claim.

Investigation
Because "the devil is often in the details", it is important to conduct a thorough investigation of your case. This means you must obtain and review all the key documents, which often include insurance policies (liability, UM/UM, MedPay, health), police, fire, and EMT records, medical and billing records, and employment records (if lost earnings are at issue). The assistance of a private investigator can often be of use to discovery among other things a defendant's assets and liabilities, as well as civil and criminal backdrops. The more you know and the sooner you know it, the better position you will be in to settle or effectively try your case. Depending on the case, experts and other consultants may be needed to investigate the claim.
Wednesday = April 3
11:30 A.M. - 1 P.M. (Lunch included)
Fee Sharing Considerations in Bankruptcy—Section Annual Meeting
Bankruptcy Law Section Meeting and Ethics CLE
Sponsored by: the MCBA
1.0 hour of professional responsibility.
Annual Meeting: 11:30 a.m. - Noon (lunch provided)
Program: Noon - 1:00 p.m.
This one-hour CLE will examine § 504 and various types of fee sharing arrangements in the modern bankruptcy world. The prohibition against fee sharing, the ethical implications of such arrangements, the application of certain safe harbor provisions and various types of fee sharing arrangements encountered in a modern bankruptcy world.
Speaker: Edward K. Bernatavicious
Cost: • MCBA members: $62.50
• Bankruptcy Law Section members: $55
• MCBA Paralegal & Public Lawyer Division members: $40
• MCBA Student members: $10
• Non-members: $102.50

Thursday = April 4
7:30 - 9 A.M. (Breakfast included)
ADEQ Goes “Lean”—Process Improvements Mean Change for the Regulated Community
Sponsored by: the MCBA Environmental & Natural Resources Law Section.
1.5 hours
The Arizona Department of Environmental Quality (“ADEQ”) is implementing Lean management techniques in its permitting programs. Lean is a system of principles and tools often associated with success in the private sector that focuses on increasing value by reducing waste. The two pillars of Lean are continuous improvement and respect for people and the regulated community. ADEQ's strategy includes:
• APP Process Improvement
• Title V Process Improvement
• WQARF Process Improvement
• Waste Programs Process Improvement
• Compliance & Enforcement Process Improvement
The panel for this CLE consists of ADEQ leadership that is implementing the Lean management techniques. The panel will discuss ADEQ's efforts to implement Lean, impacts on the regulated community, lessons learned to date, and future plans for the strategy.
Presenters: Eric Massey, Division Director, Arizona Department of Environmental Quality Air Quality
Laura Malone, Division Director, Arizona Department of Environmental Quality Waste Programs
Cost: • MCBA members: $62.50
• MCBA Environmental & Natural Resources Law Section members: $55
• MCBA Paralegal & Public Lawyer Division members: $40
• MCBA Student members: $10
• Non-members: $102.50
• Consultant (no CLE credit): $20.00

Thursday = May 16
7:30 - 9 A.M. (Breakfast included)
Lawyers Serving on Nonprofit Boards: Some Special Considerations
1.5 hours, including .5 hour of professional responsibility
This program is especially for lawyers who serve on nonprofit boards or are considering such service. Within a general discussion of directors' responsibilities, presenter John Dacey will address special considerations arising out of one's status as a lawyer (e.g., service on the board of a client).
Presenters: John Dacey, Gammage & Burnharm, PLC
Cost: • MCBA members: $62.50
• MCBA Paralegal & Public Lawyer Division members: $40
• MCBA Student members: $10
• Non-members: $102.50

Wednesday = May 29
12 - 1:30 P.M. (Lunch included)
MCBA Annual Update on Ethics with Gary Stuart
1.5 hour(s) of professional responsibility.
What to expect:
• A brief summary of the latest and greatest Ethics Opinions from the State Bar of Arizona Committee on Professional Responsibility—What's hot and what's not.
• A brief summary of the most important disciplinary actions by the Presiding Disciplinary Judge of the Supreme Court of Arizona—Who's out and why.
• A review of the five most important things you should do if you get a phone call from the Arizona State Bar Disciplinary Department—Why you actually want to get that phone call.
• A review of the three most important things you should NOT do after getting that phone call from the Arizona State Bar Disciplinary Department—When to cry uncle.
• A review of the basics on how to avoid ever getting a phone call from the Arizona Disciplinary Department—Ethical sunscreen can keep you from getting burned.
• Q & A—a wide open discussion about ethics, discipline, safe practice, and the greening of ethical systems in your office.
• Free lunch—maybe cookies—maybe healthy—but certainly ethical.
Presenters: Gary Stuart, Gary L. Stuart, P.C.
Cost: • MCBA members: $62.50
• MCBA Paralegal & Public Lawyer Division members: $40
• MCBA Student members: $10
• Non-members: $102.50

In celebration of Law Day for 2013 the MCBA Young Lawyers Division presents
...And Justice for All?
Civil Rights in Phoenix Yesterday, Today, and Tomorrow
Wednesday, May 1, 2013
4:30 to 6:00 P.M.
MCBA Conference Center
Panelists
George Brooks, Ph.D.,
William M. Hardin
Osborn Mal dolon, P.A.
Daniel R. Ortega, Jr.
Ortega Law Firm, P.C.
Moderator
Lawrence A. Robinson, Professor
Phoenix School of Law
Please join the MCBA and this distinguished panel for a review of the history of the Phoenix community’s relationships with its African-American, Latino, and LGBT residents (and other minority groups), an assessment of where we are now in the process of achieving justice for all, and some predictions as to where we are headed in the future.
A complimentary reception will follow the program.
CLE Credit: .5 hours
Cost: • MCBA member: $62.50
• Non-member lawyer: $102.50
• Students: $10
• General public: $40
BOOK REVIEW

‘Business and Commercial Litigation in Federal Courts’ hits the mark

Reviewed by C. Bradley Vynalek

The truth is that there are very few stand-alone references for business litigators that are go-to resources for the federal courts on substantive legal issues and practice strategies. Of course, there are several foundational treatise-type volumes. When I asked to review the American Bar Association Section of Litigation’s BCLFC (Business and Commercial Litigation in Federal Courts) treatise, I was eager to find a series to supplement my practice. And I found it!

This third edition of the BCLFC is extraordinary. The authors are current or former practitioners who are specialists in the field about which they offer their comments. Some have literally been leaders in their subject matters for decades. Others include former solicitors general, judges, and mandatory partners of firms. And since they are practitioners or long-time jurists who see issues in the trenches of court, the practical insight offered for each of the topics is spot on and illuminating as a refresher or as an introduction to a new area of litigation.

The issues areas of litigation are organized very thoughtfully by subject matter. For instance, and consistent with all other chapters, Chapter 107, which focuses on commercial defamation and disparagement, offers everything from common scenarios to strategic considerations to practice aids. The authors provide tactical recommendations for those contemplating or actually bringing or defending a defamation claim. The overview section provides a nice return to the days of Con Law in law school while providing a strong policy explanation refresher.

Likewise, the breakdown in the chapter of litigants by category—company vs. media, company vs. individual, and company vs. company—provide a wonderful framework and suitable illustration for framing claims. The illustrative pleadings section provides great food-for-thought suggestions for pleading claims.

Each chapter (like the one on commercial defamation and disparagement) provides an in-depth background of key terms, information and tips. In sum, it is wonderful to have a resource that weaves all of the substance together with the strategic considerations into a series.

As it turns out, BCLFC has been published in three editions. I did not interact with the prior editions but am glad that I now have a set to call my own. BCLFC will become a tabbed and highlighted permanent part of my go-to collection of most helpful resources.

C. Bradley Vynalek is a partner in Quarles & Brady’s Commercial Litigation Group in Arizona. He represents financial institutions in all aspects of litigation and assists clients in numerous industries as outside counsel on risk, exposure, and strategy related to disputes. He is a 1999 graduate of the University of Arizona James E. Rogers College of Law.

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Volunteer Lawyers Program Thanks Attorneys

The Volunteer Lawyers Program thanks the following attorneys and firms for agreeing to accept 26 referrals from VLP to help low-income families. VLP supports pro bono service of attorneys by screening for financial need and legal merit and provides primary malpractice coverage, donated services from professionals, training, materials, mentors, and consultants. Each attorney receives a certificate from MCBA for a CLE discount. For information about ways to help, please contact Pat Gerrich at VLP at 623-254-4714 or pgerrich@clsaz.org.

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Lawyers and paralegals who speak Spanish are needed to assist low-income families.

**pro bono spotlight on current need**

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Law Office of Nathaniel P. Nickele
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State bar improves website discipline reporting

continued from page 3

Instead, the disclaimer for the lawyer advises the website user to contact the state bar for more information, which is then provided by bar staff via email.

This is a welcome change. Furthermore, the new policy is also better as it concerns lawyers who have never had a bar charge; or whose charges were dismissed. As to such lawyers, the disclaimer will now read: “Discipline – None.” That is both more accurate and clear to website users, as well as eminently more fair and useful to the lawyer.

The Supreme Court’s rule, should be further modified concerning both of these issues. Nonetheless, we see this new policy as an improvement over the original proposal. We’re grateful to the state bar for being willing to listen to the concerns that were raised and for changing its policy to incorporate many of them.

As Louis L’Amour said, “The only thing that never changes is that everything changes.” We are certain that what the state bar chooses to publish on its website about Arizona lawyers will be ever-evolving. We will continue to monitor this issue, and look forward to continued dialogue with state bar leadership.

If you would like more information about the state bar’s new DOTW policy, or want to let us know what you think, please feel free to contact us.

Volunteer Lawyers Program Thanks Attorneys

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VLP ATTORNEY OF THE MONTH
Bankruptcy volunteer credits ‘middle child syndrome’, paralegal spouse

By Peggi Cornelius, VLP Programs Coordinator

“As the middle child among five siblings, I had to negotiate my way into keeping my stuff, as well as keeping the peace.” In describing his childhood years, attorney James Webster was also describing the making of a lawyer, especially one like himself, whose practice involves asset protection through bankruptcy and estate planning.

For his outstanding pro bono work on behalf of low-income clients needing a fresh start, Webster has been named “Attorney of the Month” by the Volunteer Lawyers Program (VLP). At the outset of 2012, Webster learned of VLP’s “Friend of the Court” program from a colleague who was participating in U.S. Bankruptcy Court proceedings involving pro se litigants. “I jumped at the chance to be a part of it,” Webster said. “Because bankruptcy is a scary process for pro se debtors, many of them report losing sleep and having jitters before a reaffirmation hearing.”

As volunteer attorneys, we’re there to briefly familiarize ourselves with the status of individual cases, give the pro se litigants an idea of what to expect, and appear as a friend of the court during the hearings. It’s rewarding to see stress and anxiety drift away from the litigants’ faces before we enter the courtroom.”

The “Friend of the Court” program also provides opportunities for volunteer law students to be mentored by experienced bankruptcy attorneys. Webster says he enjoys having the students’ assistance and perspective.

“It’s great to observe their learning process.” In addition, he comments on the unique opportunity the program gives him to learn, as well. “I’ve been able to meet and converse with my peers, and some of the judges, too. It’s been very helpful to my practice, and I’ve changed some of my policies based upon my experiences at these hearings.”

In addition to his volunteer work as a friend of the court at pro se reaffirmation hearings, Webster has been very generous in agreeing to represent VLP clients referred to him for Chapter 7 bankruptcy. He has accepted five pro bono cases in less than a year.

“By the time I see most VLP clients, they have been beaten up by themselves and creditors alike,” he said. “When debtors are pushed into bankruptcy, it takes a toll. With proper direction and cessation of garnishment, families have the tools to get back on track, both financially and emotionally.”

As for his family, Webster credits his wife, who is the managing paralegal in his solo law practice, for her “big role” in helping his clients. “The woman of my dreams,” as he affectionately refers to her, is his partner in life, with little separation between personal and professional endeavors. Being the parents of three children between the ages of six and sixteen, Webster and his wife juggle school and work schedules with many family activities.

Like so many of the VLP attorneys who give of their knowledge, time, and compassion with no expectation of compensation, Webster is compelled by the awareness that litigants who cannot afford to pay for advice or representation might otherwise have no access to an attorney.

He comments only not on the importance of the professional counsel he can offer, but also notes: “I am able to provide perspective and make people smile. Bankruptcy is not the end of their life; it is the beginning of something new.”

Many Thanks to Our 2013 100% Club Members

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From Gideon to Miranda
continued from page 1

to tell a defendant under interrogation that he would have to be represented by counsel was a relevant factor in deciding whether his confession was voluntary.

After Arthur Goldberg replaced Justice Felix Frankfurter in 1962, the U.S. Supreme Court had a reliably liberal five-against-maj ority. That majority continued when Abe Fortas, who had argued *Gideon*, replaced Justice Goldberg in 1965. Lucas A. Powe, Jr., The Warren Court and American Politics 209, 212 (2006). While the Court had been divided on *Escohebo v. Illinois*, 378 U.S. 478 (1964), and *Miranda*, Justice Goldberg's 5-4 majority opinion in *Escohebo* held a suspect was denied his Sixth Amendment right to counsel where a criminal investigation had focused on him. Escohebo had been taken into custody, had requested and been denied an opportunity to consult with a lawyer who also was trying to see him, and the police had not effectively warned him of his absolute constitutional right to remain silent. Accordingly, the Court held that statement obtained by the police could be used against him. *Escohebo*'s rationale was that, "under those circumstances," interrogation was as surely a critical stage as the arraignment in *Hamilton* or the preliminary hearing in *White* since then "may be as irretrievably lost if not then and there asserted." What happened then also "could certainly affect the entire trial." Many lower appellate court decisions thereafter disagreed on whether an accused must request a lawyer before police had to warn him of his rights, or whether counsel instead had to be provided although not requested. L.F. Baker, MIRANDA: CRIME, LAW AND POLICY 50, 56 (1988). How *Escohebo* should be interpreted thus presented a timely, important issue the Court needed to resolve. However, it instead simply held the confession cases reaching it. By November 1965, about 150 such petitions remained undecided.

Miranda's background
Emerson Miranda's contribution to constitutional law was as accidental and inevitable as Gideon's. Miranda, then 22, had an eighth-grade education, a prison record and an undesirable Army discharge. Phoenix police suspected Miranda of a kidnap-ramp, based on the victim's general description and a partial license plate number they traced to an old Packard registered to Twila Hoffman, Miranda's common-law wife. Miranda was taken into custody at his Mesa home on March 13, 1963, five days before *Gideon* was decided.

Miranda was immediately interrogated at the Phoenix police station for about two hours concerning the alleged kidnap-ramp and two unrelated robberies, and placed in a line-up for two victims to see him. Neither could then positively identify Miranda. However, Officer Carroll Cooley told him they had. Miranda then confessed to all three crimes.

Miranda also verbally identified the two victims in their presence before they positively identified him. He was told his confessions could be used against him. However, he was never advised concerning his right to counsel and to remain silent. Miranda was convicted in the kidnap-rape case after a one-day jury trial. Judge Yale McFate appointed Alvin Moore, a solo lawyer who accepted assignments in indigent cases, to represent him. Cooley then confirmed he had not advised Miranda he was entitled to an attorney's services before Miranda made a statement.

Moore objected to admitting Miranda's kidnap-rape confessions because "the Supreme Court of the United States says a man is entitled to an attorney at the time of his arrest." That objection was then inadmissible. Judge McFate overruled it. Moore did not object because the confessions were involuntary or request a voluntariness hearing.

The Arizona Supreme Court affirmed Miranda's kidnap-rangle conviction on April 22, 1965. In doing so, it distinguished *Escohebo* because Escobedo had requested a lawyer and Miranda had not. It also held Miranda's confession that argument. Miranda's petition was filed on July 16, 1965. As had Gideon's petition, it arrived at exactly the right time. That summer, Chief Justice Warren had told his law clerks, "I think we are going to end up taking an *Escohebo* case this year." In September 1965, his chambers began compiling lists and distributing memos to the other justices concerning pending cases involving *Escohebo* issues.

On November 22, 1965, the Court considered the pending 150 confession cases. It granted review in four cases involving five defendants convicted based on their confessions, including Miranda. It also chose Miranda as the lead case. Based on the *cerito* petition and record, Miranda was then entirely a Sixth Amendment case.

Miranda's merits brief and oral argument
Miranda's merits brief argued the same Sixth Amendment right to counsel issue stated in the petition, but in more detail. Frank was argued, "the only person that can adequately advise Ernest Miranda is a lawyer. In response to questions by Justice Fortas, assistant attorney general Gary Nelson conceded for the State it was "arguable" Miranda was entitled to a warning before he made any confession. Fortas then asked his colleagues if they argued that an "extreme position" were adopted that a suspect must have access to counsel during interrogation or intelligently waive counsel, "a serious problem in the enforcement of our criminal law will occur. ... Whether he is going to end up taking an *Escohebo* case this year." In September 1965, his chambers began compiling lists and distributing memos to the other justices concerning pending cases involving *Escohebo* issues.

The Miranda decision
The Court decided *Miranda* 5-4 in all defendants’ favor on June 13, 1966. However, it did not extend the Sixth Amendment right to counsel to interrogations, as Miranda's brief had argued. It instead was based primarily on the Fifth Amendment. Although Justice Fortas provided the decisive fifth vote, he later said Miranda was "entirely Warren's." Justice Stewart, the Warren Court's "most controversial criminal procedure hands down." For the public, Miranda's merits brief argued the Six Amendment right to counsel was "the unfairness of Miranda's confession, that the only person that can adequately advise Ernest Miranda is a lawyer. In response to questions by Justice Fortas, assistant attorney general Gary Nelson conceded for the State it was "arguable" Miranda was entitled to a warning before he made any confession. Fortas then asked his colleagues if they argued that an "extreme position" were adopted that a suspect must have access to counsel during interrogation or intelligently waive counsel, "a serious problem in the enforcement of our criminal law will occur. ... Whether he is going to end up taking an *Escohebo* case this year." In September 1965, his chambers began compiling lists and distributing memos to the other justices concerning pending cases involving *Escohebo* issues.

The Miranda decision
The Court decided *Miranda* 5-4 in all defendants’ favor on June 13, 1966. However, it did not extend the Sixth Amendment right to counsel to interrogations, as Miranda's brief had argued. It instead was based primarily on the Fifth Amendment. Although Justice Fortas provided the decisive fifth vote, he later said Miranda was “entirely Warren’s.”

Chief Justice Warren's majority opinion acknowledged, "we might not find the defendants’ statements have been involuntary in traditional terms." Rather than reviewing their individual records, it instead relied on the ACLU brief to hold more generally that "the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals." Accordingly, before criminal suspects can be subjected to custodial interrogation, they must be warned concerning their Fifth and Sixth Amendment rights.

The opinion also acknowledged counsel are required to protect suspects' Fifth Amendment privilege against self-incrimination. However, it rejected the "suggestion" each police station must have a "station house lawyer" to advise prisoners concerning their rights. That "suggestion" was at the core of Miranda's Sixth Amendment argument.

The opinion instead held the police must give the required warnings, without explaining how doing so would instantly neutralize the presumed prior coercive interrogation atmosphere for suspects who might not then fully appreciate the value of having a lawyer advise them to remain silent. It also did not discuss whether investigators made a "cease and desist" requiring counsel be present, regardless of whether suspects made any such request, as Miranda had argued.

The opinion also refused to prohibit freely and voluntarily given statements. It instead stated, “Voluntary statements remain a proper element in law enforcement” and “are not barred by the Fifth Amendment.” It also required trial courts to make the prosecution sustain a “foolproof” showing any confessions made without counsel were based on intelligent, voluntary waivers.

However, experience since Miranda has shown suspects rarely cut off questioning or ask for a lawyer, any resulting confessions become inadmissible, and the warnings “minimize the scrutiny courts give police interrogation practices following the waiver.” See From Gideon to Miranda page 15

"... experience since Miranda has shown suspects rarely cut off questioning or ask for a lawyer, any resulting confessions become admissible, and the warnings “minimize the scrutiny courts give police interrogation practices following the waiver.”"
From Gideon to Miranda continued from page 14

“On balance, the four Central Hudson factors supported the district court’s decision to grant the preliminary injunction. “[T]he day labor provisions restrict more speech than necessary to serve Arizona’s interest in traffic safety,” Fisher wrote."

Fisher noted, had traditionally looked only at the content. Under this approach, he noted as an example, “the government may prohibit all outdoor fires, but it may not specifically prohibit flag burning.” He stated that “Arizona may prohibit pedestrians and motorists from blocking traffic, and it has done so.” But he held that the Fisher majority does not allow it to “use a content-based law to target individuals for lighter or harsher punishment because of the message they convey while they violate an unrelated traffic law.”

The second Central Hudson factor—whether the speech-based regulations is one in which the State has a substantial interest—went Arizona’s way. “Promoting traffic safety,” Fisher wrote, “is undeniably a substantial government interest” and so take longer than other types of in-street solicitation.”

Fisher seemed underwhelmed. “Whether this statute is admissible, accurate or generally applicable is far from clear,” he wrote. Nevertheless, the testimony was just enough to satisfy this factor: “[A]t this stage of the proceedings we must accept it as an asserted fact that might justify harsher sanctions than for other roadside speech that blocks traffic.”

The last Central Hudson factor asks whether the provision at issue more speech than necessary to achieve the government’s goal. It requires the government to use narrowly tailored means of achieving its desired

provisions restrict more speech than necessary to serve Arizona’s interest in traffic safety.” Fisher wrote.

Joining his opinion were Judges Richard C. Tallman and Consuelo M. Callahan.

... Double jeopardy stops state from retrial after defendant-induced error

I'm no criminal lawyer, so what I'm about to write may seem naïve to those who practice in that area. I had thought that while the Double Jeopardy Clause prevents the government from trying a person multiple times for the same crime, it nonetheless guarantees the government at least one fair chance. I was wrong, as the Supreme Court recently demonstrated in Escobar v. Michigan, No. 11-1327 (U.S. Feb. 20, 2013).

In Escobar, the defendant in an arson case persuaded the judge to take the case from the jury and rule as a matter of law that the government had not proven that the building that had been torched was unoccupied element of its case. The state court of appeals later ruled that the lack of occupancy was not an element of the crime charged and the case should have gone to the jury. But even though the defendant had induced the judge into committing this error, the State could not retry him. Justice Sonia Sotomayor, in an opinion jointed by seven other Justices, ruled that the trial judge's ruling constituted an acquittal for double jeopardy purposes.

Justice Samuel Alito dissented, arguing that the ruling was inconsistent with the Double Jeopardy Clause’s purpose and that the trial judge’s action did not constitute an acquittal. He noted that the common-law principles on which the Double Jeopardy Clause is based “applied only to charges on which a jury had rendered a verdict” thus, there was no reason to conclude that “a defendant is acquitted for double jeopardy purposes whenever a judge issues a preverdict ruling that the prosecution has failed to prove a nonexistent ‘element’ of the charged offense.”

He opined that the Double Jeopardy Clause was not served by the Court’s ruling: “The prosecution would not be afforded a second opportunity to persuade the factfinder that its evidence satisfies the actual elements of the offense, he continued. “Instead, he wrote, “because the trial judge’s ruling in the first trial was not based on an actual element of the charged offense, retrial would simply give the prosecution one fair opportunity to prove its case.”

“... This case hardly presents the specter of an all-powerful state relentlessly pursuing a defendant who had either been found not guilty or who had at least insisted on having the issue of guilt submitted to the first tier of fact,” he wrote. “Instead, defense counsel fooled the judge into committing an error that provided his client with an undeserved benefit.”

The Double Jeopardy Clause, he concluded, should therefore not apply in these circumstances.
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