Inside...
What you need to know to protect your client’s business in Arizona. See page 4.
Back to the future: war and the flu pandemic. See page 5.
Are you ready for mandatory insurance disclosure? See page 10.

Making the Call: Who’s Qualified?

By Daniel P. Schaack
Maricopa Lawyer

The scene: a professional football game. The quarterback has just thrown a receiver in the back of the end zone. If the pass is complete, they score six and win the game. The defense screams that he caught the ball out of bounds.

The referee ponders whether the receiver made the catch, but he doesn’t know. So he asks for help—not from the replay official but from another source. He asks the receiver, “Did you make a good catch?”

This scenario almost certainly wouldn’t happen in football. The thought of the referee asking one of the contestants to determine a critical issue is, at the very least, improbable.


In a case challenging the Arizona Supreme Court’s power to compel attorneys to serve as arbitrators—a case in which the court itself was the main defendant—a United States District judge asked the court whether it had

See Court Watch page 12

Ambitious Construction Schedule Set for Court Buildings

By J.W. Brown
Maricopa Lawyer

Maricopa County leaders are moving forward with a plan started over 20 years ago—to regionalize court services in the four corners of the county to better serve the community.

The first regional court facility, the Southeast site near State Route 60 and Mesa Drive in Mesa, opened in 1989. Explosive growth in Maricopa County and in the East Valley is stretching court facilities to the limit—which the Board of Supervisors addressed at its Oct. 12 meeting.

Over the next two years and beyond construction activity for new court facilities may set a record.

The largest and most costly project will add space for improved court services for the public at the Southeast court complex. The first phase of construction, projected to begin in about a year, will be for a 1,150-space parking deck. Accommodations for additional parking are the top priority because of a critical shortage already experienced daily by customers.

Enlarging the court building is included in the plan that will provide courtrooms for up to four justices of the peace. The three Mesa Justice Courts (East, West and North) currently are housed in the East Valley in rental facilities. Court officials are projecting a possible fourth Justice Court for the SE Regional Court Facility. Expanded space for Adult Probation, as well as more office area for court support services for the Justice and Superior courts and others will be built also. And, plans call for a substation for the Maricopa County Sheriff’s Office at the site, near Mesa Drive and Route 60 in Mesa.

It is expected to take a little less than three years from the start of construction to the operational launch of the estimated $46.2 million addition-expansion at Southeast.

The county-approved plan also calls for the Southwest Regional Court Facility to be in Avondale, which will fulfill the desire to have a regional court center in each corner of the county. Already, Southeast, Northeast and Northwest Regional Court Centers are busy and in operation. A 108,000 square foot building is being planned on county-owned property at Madison and Civic Center Drive in Avondale to accommodate up to five Justice Courts, Superior Court’s Early Disposition Court and Regional Court Center and a substation for the Maricopa County Sheriff’s Office. The construction budget is $21.25 million.

Construction is expected to begin early next year, with projections that the facility could open as early as summer 2007.

An addition at the Northwest Regional Court Facility in Surprise will be opening after the first of the year to accommodate four Justice of the Peace Courts. The $7 million addition reflects the desire of county and court officials to combine a variety of court services in one location for better service and improved access for court customers.

Four Superior Court courtrooms opened when the first phase of the building was finished in July 2002. The design of the second phase of construction provides for a centrally located entrance with Justice Court courtrooms to the right and Superior Court courtrooms to the left.

Construction on the addition began in October 2004.

Another building underway is the five-story, downtown Phoenix court facility that will house five justices of the peace, the Maricopa County Public Defender’s Office, Clerk of the Superior Court and court administrative offices. The $32.75 million, 232,000 square foot building at Jackson Street and 7th Avenue is slated to open for business as early as fall of 2006.

Another fall 2006 opening is anticipated at the San Tan Court Facility in Chandler, at Chicago and Delaware Streets. The $10.1 million courthouse will accommodate four Justice of the Peace courtrooms, which will include Chandler, South Mesa/Gilbert, Tempe East and Tempe West Justice Courts. Construction has just begun.

As the regional court complexes are being built and completed, Superior Court is amending the types of cases assigned to the centers. None of the new regional court centers have felony criminal cases. Southeast is the only suburban site with criminal cases. Civil and family cases are assigned to North-west and Northeast, with compatible services, including a Self Service Center.

The Court Facilities Master Plan calls for construction of a high-rise criminal justice tower in the Superior Court Complex in downtown Phoenix, on Jefferson between First and Third Avenues. All felony criminal cases would be assigned downtown, eliminating the need and cost of transporting jail inmates to court hearings, as is done now for the criminal cases at the Southeast Superior Court facility in Mesa, which is about 20 miles from the downtown complex.

A timetable for financing, designing and constructing the proposed criminal justice tower has yet to be determined.

See Retirement page 6

Two Superior Court Judges Retire

By J.W. Brown
Maricopa Lawyer

Two more Superior Court judges became the ninth and tenth judges to leave the bench in less than a year when they departed during the past month.

Judges Rebecca Albrecht and Frank Galati are taking more than 40 years judicial experience with them collectively with their departures. While Albrecht is planning a future without daily dockets, motion hearings and new pleadings, that’s not the case for Galati. He is starting a new phase of his legal career as an assistant U.S. attorney in the Phoenix office.

Albrecht is leaving the door open for new opportunities, as she noted in her resignation letter.

“It is now time for me to find new challenges and opportunities to serve,” she said, in her letter to Gov. Janet Napolitano, announcing her retirement that became effective Nov. 30. Galati’s retirement became effective Oct. 31.

A total of 51 lawyers have applied for the two vacancies. Members of the Maricopa County Commission on Trial Court Appointments screened applicants late last month and will interview their finalists this month. At
Continue to Share Change in 2006

As most of you know, or can easily guess, my term of presidency concludes at the end of this month. Therefore, this is my final column as president of the Paralegal Division.

I usually do not struggle to find ideas, observations, or insights to share with the MCBA’s paralegal members and others who may read what I write each month. So I assumed that this month’s column would be no different. In fact, I thought it would be the easiest one to write. In reality, though, this column has been the most challenging one for me.

First I tried to summarize the ways the Paralegal Division successfully followed through on many of its goals this year. I outlined all of the events we sponsored or assisted with. I jotted down all of our outreach and marketing efforts. I took note of key decisions our board of directors made. I wrote and I wrote and I wrote!

Then I realized that the maximum word count that I must comply with for this publication was thwarting the impact of my summary, so I changed my format. I wrote a touching thank you to the members and supporters who contributed to the Paralegal Division’s many successes this past year. However, the pesky maximum word count interfered again.

Finally, I decided to write a brief presidential farewell. This time the word count wasn’t what did my topic in. It was the realization that my time serving the Paralegal Division and the MCBA has not ended. Instead, I have reached a new beginning.

I will assume my role as the immediate past president of the Paralegal Division next month. In that capacity, I will continue to do my best to help the division carry out the goals set forth in our mission statement. So I will save my eulogy for another, more appropriate time, since my ties to the Paralegal Division are not being broken and my work on its behalf is not done.

I am taking a new step forward on this journey I began with the Paralegal Division back in 1999. I hope you will continue on with me!
Citation of Unpublished Opinions Rule Heads to Supreme Court

By Joan Dalton
Maricopa Lawyer

The United States Judicial Conference endorsed new federal appellate Rule 32.1 at its September meeting in Washington D.C. If ratified by the Supreme Court and left intact by Congress, the proposed rule would require federal courts to allow the citation of unpublished opinions issued after January 1, 2007. The proposed rule would not, however, require courts to cease issuing unpublished opinions or prescribe the weight, if any, that an unpublished opinion should be afforded when cited. Moreover, the proposed rule takes no position on whether refusing to treat an unpublished opinion as binding is unconstitutional.

Unpublished opinions came into practice in the 1970s, as an administrative response to circuit caseload increases. These caseload increases required a profuse amount of new opinions to be produced by an inadequate number of congressionally authorized circuit judgeships. Unpublished opinions allowed judges to expedite opinion production because these types of opinions were less developed than the published variety. In a 2004 letter to the Conference Committee on Rules of Practice and Procedure, Ninth Circuit Court of Appeals Judge Alex Kosinski revealed that “[u]npublished dispositions – unlike opinions – are often drafted entirely by law clerks and staff attorneys. There is simply no time to fine-tune the language of the disposition.”

Kosinski, who vigorously spoke out against the rule, believes that allowing the citation of unpublished opinions that are “thin on facts and written in loose, sloppy language” will invite selective citation and abuse by some practicing lawyers. “[B]ecause there are a zillion [unpublished opinions] out there—they will create a veritable amusement park for lawyers fond of playing games.” Other opponents of the rule, such as Federal Circuit Chief Judge Mayer, are of the opinion that the proposed rule “may adversely impact the administration of justice by skewing the allocation of judicial resources, delaying issuance of precedential opinions, increasing the issuance of judgments without an accompanying opinion, and harming litigants.”

Some Rule 32.1 advocates assert that, at the very least, the practice does not foster the development of a consistent body of substantive law that applies equally to all litigants. Cyrus Sanai, an attorney with Buchanan Nemer in Los Angeles, suggests that the practice of issuing unpublished opinions has “created a class of decisions which do not bind the court in any way,” and thus “provided a wide field for an appellate court to decide cases contrary to established precedent.”

Similarly, J. Lyn Entrikin Goering, associate professor at Washburn University School of Law, maintains that “nonuniform circuit rules restricting attorneys from citing [ ] unpublished opinions undermine the integrity of our judicial system by greatly diminishing the predictability of circuit court decisions.” “The resulting uncertainty,” says Goering, “is one significant cause of the increasing proliferation of federal appeals, which negates (and arguably outweighs) any benefits that may have accrued since no citation rules were originally proposed and adopted during the 1970s.”

Additionally, Goering imparts that “[l]ocal rules prohibiting or discouraging the citation of legal authority of any kind directly contradict the attorney’s duty of candor” to the court, because local rules prohibiting citation of unpublished opinions “discourage [ ] attorneys from telling the ‘whole truth’ to the court if it means citing [the court’s] own unpublished opinions.” “Why a litigant may ethically cite a Shakespearean sonnet, a nursery rhyme or even a fairy tale to a circuit panel,” chides Goering, “but not a written decision issued by another panel of the same court, is an irony that simply defies explanation.”

Today approximately 80 percent of the decisions issued by the 13 federal circuits are considered “unpublished.” Although six circuits currently discourage the citation of unpublished opinions, the Ninth U.S. Circuit Court of Appeals, along with the Second, Seventh, and Federal Circuits, outright prohibit their citation.

Have you won an award? Is your law firm involved in an interesting community project? Send information for our People in Law Column to Maricopa Lawyer, MCBA, 303 E. Palm Lane, Phoenix, AZ 85004; fax to 602-257-0522; or e-mail to kbrieske@mcbabar.org
Employee Restrictive Covenants: Protecting Your Client’s Business in Arizona
By Olivier A. Beabeau
Special to Maricopa Lawyer

While courts generally disapprove of anti-competitive behavior, they have carved out an exception whereby restraints on competition are permitted when reasonably necessary to protect an employer's business from loss caused by a former employee's use of confidential or proprietary assets. Protecting business from unfair competition promotes the public good by permitting entrepreneurs that the fruits of their labors will be protected.

Not to compete vs. anti-piracy
Employee restrictive covenants typically fall into one of two categories: non-solicitation (or anti-piracy) or covenants not to compete.

Covenants not to compete prohibit competition within a certain geographic area for a designated period of time. Anti-piracy or non-solicitation agreements prohibit former employees from soliciting customers with whom the employer had contact during employment. Anti-piracy agreements have traditionally been viewed as less restrictive on employees and market forces than covenants not to compete, and hence are ordinarily more likely to be upheld. Hild, Rigel and Hamilton Co. v. McKinney, 190 Ariz. 213, 216 946 P.2d 464, 467 (App.1997).

Enforceability in general
In Arizona, a restrictive covenant's enforceability depends upon its reasonableness. The court's determination is based on the factual findings in the particular case.

The Arizona Supreme Court has held that employment itself is adequate consideration to support a restrictive covenant. Maitson v. Johnston, 152 Ariz. 109, 730 P.2d 286 (1986).

Restrictive covenants must also be ancillary to the employment agreement. Including them within the agreement will generally satisfy this requirement. Lassen v. Benton, 86 Ariz. 323, 346 P.2d 137 (1959).

In addition, it is important to note that employee restrictive covenants are distinguished from those bargained for in conjunction with a sale of a business. In the case of the latter, a restrictive covenant is often treated as part of the assets purchased and for this reason is viewed differently by the courts.

Geographic and temporal scope
The duration and geographic scope of a restraint must bear a relationship to the legitimate business interests to be protected. They must not be arbitrary.

A court will assess the nexus between the scope of the covenant, the duties performed by the employee while with the company, and the geographic reach of his or her position. Bed Mart v. Kelley, 202 Ariz. 370, 45 P.3d 1219 (App. 2002).

Specifically, the courts will look to the time necessary for the employer to hire and train a new employee to perform the role of the former employee. Bryanland v. Northby, 160 Ariz. 213, 217, 772 P.2d 36, 40 (App.1989).

There is no litmus test regarding the reasonableness of geographic and temporal scope. The determination depends on the nature of the business involved. See Amex v. Masari, 150 Ariz. 510, 724 P.2d 596 (App. 1986).

Arizona courts are generally reluctant to enforce restrictive covenants with geographic limitations that altogether prohibit an individual from working in a given line of business. Gann v. Morris, 122 Ariz. 517, 519, 596 P.2d 43, 44 (App.1979).

It is also important to consider that the Arizona courts follow the "blue-pencil rule" of the Restatement of Contracts. A court can eliminate unreasonable provisions to the extent they are grammatically severable and do not render the contract unenforceable, but will not reinterpret or re-write a restrictive covenant to make it reasonable. Valley Medical Specialists v. Farber, 194 Ariz. 363, 372, 982 P.2d 1277, 1286 (1999).

Reasonability of covenants not to compete
A covenant not to compete will be enforced if the restraint is no greater than necessary to protect the employer's legitimate interest; and that interest is not outweighed by the hardship to the employee and public policy considerations. Id., at 369.

The court will weigh factors such as: recruitment costs and/or training efforts; good faith execution of the agreement; the employee's access to trade secrets or proprietary information; scarcity of resources or access in the particular market; and public policy considerations (e.g., the public's interest in selecting doctors of their choice). It will also consider whether the employee resigned voluntarily or was terminated, whether the employee was the exclusive customer contact and whether the employee learned the trade from the employer.

Reasonability of anti-piracy agreements
Anti-piracy agreements are designed to prevent former employees from using information learned or assets gained during employment to divert customers from the employer. Alpha Tax Services v. Stuart, 158 Ariz. 169, 171, 761 P.2d 1073, 1075 (1988). Because the restriction imposed by an anti-piracy agreement is designed to prevent a former employee from "stealing" company assets rather than from competing per se, it is distinguished from a covenant not to compete.

However, the standard of reasonableness applied to both anti-piracy agreements and covenants not to compete is similar. That is, anti-piracy agreements are enforceable if the employer has a protectible interest and the restriction is: (i) reasonably related to that interest; (ii) reasonably related in time and place; and (iii) imposes no undue hardship on the employee. See Kemper v. Cox & Associates, Inc., 434 So.2d 1380 (Ala. 1983) cited in Olliver/Pitzer v. Daniels, 148 Ariz. 530, 715 P.2d 1218 (1986).

Additional considerations
Trade secrets or intellectual property interests are not prerequisites to enforceable restrictive covenants. Customer contacts have come to be recognized as protectible business interests in certain industries, such as where a business relies on sales representatives to establish and maintain customer relationships. See Dewurting v. City Baking Co., 155 Md. 260, 141 A. 542 (1928) cited in Titus v. Superior Court, 91 Ariz. 18, 368 P.2d 874 (1962).

Some practitioners incorporate alternate and severable durations and geographic limitations into restrictive covenants in an attempt to manipulate the blue pencil test. The Arizona Supreme Court has not yet prohibited this practice, but has acknowledged its criticism by scholars and potential inter-terrorem effect on employees. Valley Medical Specialists,194 Ariz. at 372; see also Amex,150 Ariz. at 519, n.6. (A covenant designed other than in good faith is subject to attack on that basis alone.)

See Covenants page 6
November’s news was filled with stories of the war and the flu. Maricopa County’s legal community was actively supporting the largest charitable fundraising effort in history. Thanksgiving 1918 would be a bittersweet celebration of the grateful survivors and their memories of the beautiful places and brave friends and relatives who had been lost.

It’s over, over there

The Great War, the War to End All Wars, ended on November 11, 1918, with the signing of an armistice that amounted to an absolute victory for the U.S. and its allies. Reporters recounted the dramatic cessation of artillery and gunfire at one minute before eleven that morning. The abrupt silence was almost immediately filled with cheers from the victorious doughboys as they climbed out of their trenches, and answered with equally enthusiastic shouting from the Germans. The enemies of just moments before met in the largest charitable fundraising effort in history.

The Associated Press wire service delivered the news of the signing of the armistice to the offices of the Arizona Republican at 12:45 a.m. Within two minutes, the big fire whistle at the city water works was giving the pre-arranged signal that war had ended and the 1,500 or so Maricopa County soldiers would soon be headed for home. The signal was picked up by the whistle at the gas plant, passed on to the cotton gin, and screamed out by every locomotive in the Santa Fe Railroad roundhouse.

Church bells rang, celebratory gun shots rang out, and the streets of Phoenix filled with yelling and cheering throngs. A spontaneous mile-long parade of automobiles carrying bells and drums made its way through the streets of Maricopa County, we are working to define what areas are impacted by the new rules, and how we will prepare for the January 1 implementation date. We believe it is important to let the local bar know what changes our office will have to make. Communication will help us to work together and enable the new rules to function efficiently in the courts.

The following descriptions summarize areas of the new rules that will change how we do business in the Clerk’s Office. Many changes may influence the way you practice, or help to explain differences from current practice.

Rule 43(G): Sensitive data. Before filing, sensitive data must be omitted or otherwise redacted from any filing, unless specifically requested by the court. Sensitive data requested by the court must be on a sensitive data form, which the clerk will maintain as a confidential record. In further pleadings, any reference to sensitive data will be made by item number, and not the actual data, to keep sensitive data out of the public record. This rule does not apply to orders, decrees, or UIFSA petitions. Orders of Assignment shall contain sensitive data, but are closed to the general public. In Maricopa County, the Clerk’s Office maintains electronic images of documents, and this rule will allow the paper version of the sensitive data form to be destroyed. This is a significant change, attorneys and unrepresented parties must closely monitor their documents prior to filing to ensure sensitive data is not inadvertently entered into the public record. It should be noted that the Clerk’s Office does not have the resources to inspect every page of every filing to ensure compliance. The Clerk’s Office does not intend to reject documents based on this rule, as the rule allows parties to request that a document containing sensitive data be sealed or removed from the file. A sensitive data form will be included with all Self-Service Center packets distributed by the Trial Courts.

Rule 9(B): Limited-scope representation. The new rules make it easier for litigants to employ counsel for limited issues. For example, a party may choose to initiate their case, but employ counsel for child support determination only. For each incident of appearing on behalf of a party, counsel must follow the standard procedures to file an appearance and file a notice of withdrawal, with or without consent, at the end of the agreed-upon representation. Substitution of counsel requirements still apply to limited-scope representation. The Clerk’s Office anticipates attorneys will appear and withdraw more often than current practice. In Maricopa County, this means Judicial Assistants will more frequently update counsel records in the court system. The Clerk’s Office will handle more appearance fees and paperwork. In some counties, the clerks will handle all aspects of changes of counsel. For example, in the course of a dissolution proceeding, a litigant may proceed through numerous proceedings pro se, but employ three separate attorneys for three separate legal issues over the course of several months. This arrangement will be available to the 30,000 new family court cases filed annually in Maricopa County, in addition to the existing family court cases.

The new rules of procedure define this provision as experimental, and this rule expires three years after implementation, unless extended.

Rule 7: Protected addresses. The Clerk’s Office anticipates more requests for protected addresses, based on the filing party’s reasonable belief that physical or emotional harm may result to the parent or child if the address is not protected. Additional protected addresses will increase the volume of mail the clerk sends and the time required to prepare notices. Parties with protected addresses must be served by first-class mail by the Clerk’s Office, which maintains the address as a confidential record. An Administrative Order can establish service costs to be reimbursed to the clerk.

Rules 14 and 91(T): Sworn verification vs. unsworn declaration. Current rule 80(i) defines the use of the unsworn declaration. Parties and attorneys will need to determine which document is appropriate for their situation to ensure the filing is on the intended trajectory.

Rule 43(C): Service with clerk if party address is unknown. This rule is similar to current Rule 5(C). When service is required and the party’s address is unknown, this rule allows service to be made by leaving the documents with the clerk. Under the current rule, the clerk takes no further action regarding documents served in this manner, and documents are placed in the file. Our office is clarifying if the new rules intended a change to this process.

Rule 43(D)(5): Public access. If established by the presiding judge (Administrative Order), or local rule, this rule will apply to pleadings filed pursuant to Rule 24 (family court pleadings) and to petitions for an Order of Protection or Injunction Against Harassment. All related documents will be unavailable to the general public for 45 days from the filing of the petition, or until the affidavit of service is filed, whichever occurs first. Exceptions include parties to the case, their attorneys, judicial officers and court staff, who need access to the documents. The Clerk’s Office and Court Administration will implement technological safeguards to ensure information is unavailable to the general public until per-
Why Word Choice Matters

Following are two of the more popular questions I am asked, especially by new legal writers who are surprised by the number of specific word edits a senior attorney will make on their documents:

- Does word choice really matter when I’m writing a legal document?
- And if it does, how am I supposed to know which word to choose?

My answer to the first question is always, “Of course it matters, and there are many cases litigated over word choice to prove it.” The classic example that I give is the Arkansas Supreme Court decision in LeFeavre v. Pennington, 230 S.W.2d 46, 47 (Ark. 1950). In this case, twenty two nieces and nephews of a decedent asked the Arkansas Supreme Court to interpret a provision in a will. This provision read “The Bal. to be divided equally between all of our nieces and nephews on the wife’s side and my niece, Nathalee Pennington.” The group of nieces and nephews read this provision to mean that the entire balance would be divided into 23 pieces (one piece each for the 22 nieces and nephews on the wife’s side and one piece for Nathalee Pennington). The court disagreed with this reading. Instead, the court focused on the meaning of the word “between” in the provision, along with the decedent’s intent, and held that this word required the court to divide the balance into two equal pieces: one piece given to the group of 22 nieces and nephews on the wife’s side and one piece given to Nathalee Pennington. If the decedent’s intent had been to divide the balance into 23 equal pieces, the proper word choice would have been “among.” According to various legal writing reference manuals, the word “between” is used to indicate a one-to-one relationship of two options (even if each option contains more than one sub-part); the word “among” is used to indicate a collective relationship of more than two options.

As for the second question, I always suggest that legal writers get a good legal writing reference manual and consult it often during the drafting process. Among the many choices of legal writing reference manuals, there are two manuals that stand out in their treatment of how to make word choices in writing: Legal Writing: Getting it Right and Getting it Written (Fourth Edition) by Mary Barnard Ray and Jill Ramsfield and The Redbook, a Manual on Style by Bryan Garner. When a legal writer is faced with the common problem of choosing between words such as “that or which,” “since or because,” or “can or may,” consulting a manual ensures that the writer makes good word choices.

Lecture Series Partner Students with Judges

By Paul Atkinson
Special to Maricopa Lawyer

About 200 first year law students watched oral arguments in two Maricopa County Superior Court civil hearings held at the ASU College of Law Great Hall on October 24. Judges Peter Reinstein and Janet Barton agreed to hold hearings at the law school with the consent of attorneys trying the cases.

“Probably, for most of these students they have not seen a hearing on any sort of motion of an actual case,” said attorney David Bell. So, the ability I think to see two cases argued will greatly enhance their understanding of their reading of case law and what they’re writing about in classes.

The event was part of the “Dean’s Seminar on the Study and Practice of Law,” a series of lectures and interactions with attorneys and judges that first year law students are required to attend as part of the first year curriculum. “It’s an attempt to give some professional and real world context to legal education, which otherwise could be fairly abstract in the first year,” said Noel Fidel, associate dean and former superior and appellate judge.

“We talk a lot about it and we read about the law for hours, but to actually get a chance to see the attorneys in action making their arguments, to get a feel for how persuasive they are or not and how the legal issues come out—it was great,” said first year law student Jonathan Batcheler.

Paul Atkinson is the assistant director of public affairs at Arizona State University’s College of Law.

Covenants

Special considerations apply when a company seeks to have an existing employee execute a new and/or modified restrictive covenant. Ensuring that the employee has been paid through the term of his or her former agreement prior to execution of the new agreement will mitigate claims of fraud or coercion.

Basic tips

Restrictive covenants are useful tools to protect legitimate business interests, but the courts will closely evaluate them prior to their enforcement. In drafting a restrictive covenant: (1) identify the legitimate business interest to be protected; (2) ascertain a reasonable time period and geographic scope that operates to protect that interest based on the characteristics of the business or industry; (3) include separate non-competition and anti-piracy provisions along with a severability clause; (4) clearly define which activities constitute breach and limit them to duties performed during employment; and (5) have the employee read and initial each page and return the fully executed agreement.

Taking these steps and remaining cog-nizant of the applicable Arizona case law will minimize exposure to litigation challenging the enforceability of a restrictive covenant, and maximize the opportunity to protect your client’s business and its growth against unfair competition from departing employees.

Olivier A. Beaubou is a commercial litigation attorney with the Phoenix law firm of Gallwitz & Hunter, P.C.

Write a Letter!

We welcome letters to the editor. Letters generally should be no more than 300 words long. Maricopa Lawyer reserves the right to edit all letters for length. Letters to the editor can be e-mailed to krbieske@mcbarbar.org or mailed to: Editor, Maricopa Lawyer, Maricopa County Bar Association, 303 E. Palm Lane, Phoenix, AZ 85004.

Retirements

least three nominees for each vacancy will be recommended to the governor, who will appoint the two new judges.

Albrecht has been a dedicated member of the Maricopa County Bar Association, and served as its first female president for the 1990-91 term. She has remained involved, serving on the board of directors.

During her nearly 21 years as a judge she served in a number of areas of law and leadership. Almost half of her tenure was spent on a civil calendar, including the past four years in the Criminal Department. She’s also served on Juvenile Court, Family Court and Criminal Court assignments.

A highlight of her career was during her assignment as presiding judge of the Domestic Relations Department (now called Family Court). Starting in 1990, she spearheaded a study of services provided to members of the public representing themselves in family law cases. A need was found and fulfilled by the creation of the Self-Service Center, which just celebrated its ten year anniversary on Oct. 5.

In 1992, she became the first woman to be selected to serve as Superior Court’s associate presiding judge. She was selected and appointed by then-Presiding Judge C. Kimball Rose and served in this capacity through June 30, 1995.

Upon retirement, Galati returned to his “prosecutorial” roots. His entire legal career, starting as soon as he graduated from University of Arizona law school, was spent prosecuting criminal cases. He started as an assistant attorney general, working in the criminal division in 1973. After three years, he became a deputy county attorney in Maricopa County. Five years later, he returned to the Attorney General’s Office, specializing in tax and financial fraud cases.

In 1984, Galati became a Superior Court commissioner and a year later was appointed as a Superior Court judge. He enjoyed a reputation as an outstanding criminal law expert and presided over a number of high profile cases during his tenure. He served as chairman and vice-chairman of the State Bar Criminal Justice Section and was a former bar counsel for the State Bar.
Creating Admissible Computer Generated Exhibits

To help you accurately create admissible computer generated exhibits, proper knowledge of the following is imperative.

• Jurisdiction. The litigation team must be familiar with the applicable rules of evidence and procedure for the jurisdiction in which the case is being tried. Knowledge of the evidentiary disclosure deadlines is also essential.

• Expectations and case knowledge. Information must be correct. Attorneys, TNC, and expert(s) must all discuss the goal of the CGE as well as potential caveats in presenting information too strongly. If demonstrative evidence is deemed ‘inflaming’ to a jury, the evidence may not be accepted into evidence. Federal Rules of Evidence prohibit the admissibility of such CGEs if the ability to furnish evidence or proof is outweighed by the possibility of unfair prejudice, or there is potential for confusing or misleading the jury, or the CGE is a waste of time (Garland, 1993).

It is recommended that medical records be reviewed instead of reading a paraphrased chronology. Paraphrasing can alter the true meaning and can effect the veracity of the illustration.

A written statement of CGE work to be completed is prudent so the TNC and attorney are in agreement with what the CGE should depict. An attorney may be expecting a Disney/Pixar quality CGE and may be disappointed if the graphic is two dimensional. Alternatively, the attorney may want a simpler, more economical illustration i.e. a before and after graphic, or black and white line drawing.

• Budget establishment. Discussion must occur between the TNC, expert and attorney so everyone is aware of what they can and cannot reasonably expect from a CGE within a given budget (or time frame).

• Jury, litigant, and court location considerations. The TNC should be aware of the demographics of the jury and both litigants. The CGE must educate the jury based on their background including age, language, educational level and financial status. Is there clearly a wealthy litigant who can afford the high tech CGE and high profile attorney? Is there an indigent litigant who cannot afford the expensive CGE or attorney? Be cautious as some jurors may feel undervalued and not in control.

Q Are there different types of evidence?

A Yes. One type is ‘real’ tangible evidence which may include the actual foreign object left in a patient post-operatively, or unaltered photographs or medical records. Secondly, there is ‘demonstrative’ or illustrative evidence.

Demonstrative evidence has many purposes including; aiding in the jury’s understanding, interest and recall of what may be otherwise considered abstract, boring, or a complex sequence of events or facts. It may also add to the credibility of both the expert witness and attorney(s), keep arguments focused and enhance the believability and persuasiveness of the attorney’s argument(s).

In many jurisdictions, demonstrative illustrations are not admitted into evidence nor sent back to the jury room for deliberations. To prevent this, the attorney should inform the jury that they have a right to request that all exhibits be sent to the jury room. Determining jurisdiction evidentiary rules as well as demonstrative evidence preferences of the presiding judge are paramount considerations before deciding how to best present the case. Exhibit numbers are important in both types of evidence.

Q Who is qualified to make computer generated exhibits?

A The Technical Legal Nurse Consultant (TNC) is often requested to prepare ‘Computer Generated Exhibits’ [CGE] (Galves, 2000). This includes timelines, chronological excerpts from medical records, illustrations, charts, models, animations or PowerPoint slides.

TNCs have a strong knowledge in the operation of software, hardware and projection equipment. Rapid troubleshooting of the above may become necessary during a trial or settlement venue. Inability to troubleshoot the devices (or have a back up plan should a device completely fail), may result in the optimum effect and show the litigation team as being unprepared and not in control.

Q What critical factors should be analyzed when making exhibits?

A

Using a Collateral Assignment to Secure Spousal and Child Support

By Allison Quattrocchi and John Pope

L arry and Helen are getting a divorce. Larry will be paying spousal support for 10 years and child support for their three young children. All the issues have been settled except how to secure the spousal and child support. The simplest approach would be for Larry to continue to own a policy on his life for an agreed upon amount that would cover the obligation, and for Larry to pay the premium and to name Helen as the beneficiary. True, since Larry would be the owner, Helen and her attorney might worry that Larry could change the beneficiary, and Helen might never know if he failed to make the premiums. If this arrangement were required by the court order, redress for both of these mishaps might be a court action—but that may be like closing the barn door after the horse is out.

Making Helen the owner of the life insurance policy might protect her, but Larry may not be happy with the fact that she could then keep the policy on him for the rest of her life. The solution might be for the court order to require her to transfer ownership to Larry at a certain time. If she were not to comply, redress would be a court action. Larry also might worry about whether Helen will manage the proceeds for the benefit of the children. Both Larry and Helen may be confused about what the face value should be to cover all of the obligations and whether the obligation to maintain a certain amount of life insurance should change as the support obligation diminishes and the children get older. If Larry wants to be able to change the amount of life insurance he must keep in place, Larry would have to remain the owner.

Lots of concerns can stir the pot. Many clients do not worry about these issues; others worry a lot.

Problem solver

A collateral assignment can often offer a way in which to be able to satisfy these concerns. A collateral assignment form can be provided by the insurance company or agent. Using the form, the insured owner of the policy names anyone he or she likes as the primary beneficiary and assigns the policy to the other spouse. When a collateral assignment is in place, the insurer will pay the financial obligations set forth in the legal agreement. The owner cannot change the assignment of the policy.

There are other benefits to the collateral assignment.

After the collateral assignment is no longer in force (that is, all obligations it was to secure have been paid), the assignee would release the assignment in writing, giving the owner free title to the policy.

The assignee will be informed immediately by the insurance company if the insured breaches the agreement to pay the premiums. The assignee can then make the premium payments as long as necessary so the policy will be sure to stay in effect.

The legal agreement can provide a formula agreed upon by the parties for calculating a lump-sum payout in the event of the death of the insured. This is especially helpful in the case of a lifetime spousal support award or to ensure a sum for the children that would go beyond the specific obligations set forth in the legal agreement.

Example of a collateral assignment

John is to pay Susan $1000 per month spousal support for eight years and $500 per month child support for their minor child, who is six years old. John, the owner of the policy, names a trust for the child as the primary beneficiary, and assigns the policy by collateral assignment to Susan. If John were to die before his obligations for spousal or child support are fulfilled, the insurance company would continue to pay the remainder of the obligations under the legal agreement. The balance of the proceeds would be paid into the trust for the child. As a practical matter, the insurance company would probably seek to pay out a lump sum to the child and Susan for the legal obligations by calculating the present value of the remaining obligations.

The surviving spouse and the insurance company may agree on a formula for a lump-sum payment for the remaining legal obligations, or John and Susan may have included in their legal agreement a formula for calculating a lump-sum payment. The latter is a better approach because John and Susan can design their own formula that can specifically provide for other contributions such as the access adjustment for John’s portion of child support, or other costs that may be variable, such as uninsured medical and extraordinary expenses for the child. Alternatively, since John has named a trust for the child as the primary beneficiary, these expenses could be provided for in the trust instructions.

Allison Quattrocchi, founder of the Family Mediation Center, is an attorney and divorce mediator. John Pope, CIFE, is a life insurance specialist at John Pope Insurance Agency, Inc. For additional information about life insurance and divorce, see “Divorce and Life Insurance,” co-written by Quattrocchi and Pope.

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**MCBA Calendar**

This calendar includes CLE seminars presented by MCBA as well as MCBA meetings, luncheons, and events and those of other voluntary bar associations and law-related organizations. The divisions, sections and committees listed here are those of the MCBA, unless noted otherwise. Everything takes place at the MCBA office, 303 E. Palm Lane, Phoenix, unless noted otherwise. Other frequent venues include the University Club, 39 E. Monte Vista, Phoenix, Arizona State University Downtown (ASUD), 502 E. Monroe, Phoenix, and the Arizona Club, 38th floor, Bank One building, 201 N. Central Ave., Phoenix. For more information about MCBA events or to register for any of the MCBA seminars, contact the MCBA at 602-257-4200 or visit www.maricopabar.org.

### December 2005

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<td>De-Mystifying Intellectual Property</td>
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<td>Construction Law Section, noon</td>
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<td>Environmental Law Section Annual Meeting, (Sam’s Cafe @ Arizona Center), 5:30 p.m.</td>
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<td>5</td>
<td>Maricopa Lawyer Editorial Board, 5:15 p.m.</td>
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<td>7</td>
<td>Current Initiatives of the Arizona Department of Environmental Quality 5:30-6:30 p.m. (Social Reception from 5-5:30, including hors d’oeuvres), Bryan Cave LLP, Two North Central Ave Ste. 2200 Phoenix CLE Credit: 1 hour Join ADEQ Director Stephen Owens as he discusses: current agency initiatives, work being accomplished by the agency’s standing divisions and programs, and challenges faced since assuming responsibility of the agency in 2003. Cost: MCBA Environmental Section members, $20; MCBA members, $25; non-members: $35</td>
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<td>YLD Board (A), noon Paralegal Board (A), 5:30 p.m. Employment Law Board (C), 11:30 a.m. VLP Advisory Committee (A), noon Public Lawyers Board (B), noon Scottsdale Bar (Scottsdale Athletic Club), noon Barristers Ball Meeting, (Gallagher and Kennedy), 6 p.m.</td>
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<td>MCBA Executive Committee (A), 7:30 a.m. Environmental Board (A), noon Hayzel B. Daniels Bar (B), 6 p.m.</td>
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<td>Personal Injury/Neg Section (A), noon MCBA Board (A), 4:30 p.m.</td>
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<td>MCBF, 7:30 a.m.</td>
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<td>16</td>
<td>Paralegal Division Quarterly Meeting (A&amp;B), 5:30 p.m. Estate Planning/Probate Board Meeting, 7:30 a.m. Criminal Law Discussion Group (Change of Venue Cafe), noon</td>
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Twists and turns

Ten years ago, Spelliri never thought she would be a transactional lawyer. “I always thought I would be a litigator because I enjoy rising to the occasion in confrontational situations. I didn’t realize a transactional attorney can be in those situations every day.”

Getting involved

Community service is important to Spelliri, who is the director of Valle del Sol, Inc. and New Arizona Family, Inc., each nonprofit corporations that serve the underprivileged in the behavioral health fields.

She is also a member of the Phoenix Commission on Housing, working to sustain quality affordable housing opportunities in the City of Phoenix.

Spelliri is equally as active in the legal community, belonging to the Maricopa County Bar Association, Los Abogados, the State Bar of Arizona, the Hispanic National Bar Association, the American Bar Association and the National Association of Bond Lawyers.

She credits MCBA for keeping her abreast of news and information affecting lawyers practicing in Maricopa County.

Balancing act

Spelliri’s family balances work life, and she is kept busy with her husband and two children. As does her aspiration to be a concert pianist someday.

Sights set high

Providing excellent legal representation to clients drives Spelliri most in her career, and she credits her success to always trusting her instincts.

“They have given me this far and are usually correct.”

That, “and persistence and being a slave to excellence.”

Always aiming higher, in five years, Spelliri is aiming to be a partner at Lewis and Roca LLP.

And in ten?

“I aspire to be a managing partner of Lewis and Roca LLP.”

Before attending law school, Maria Spelliri worked on public policy issues at the California State Capitol as an assembly fellow and a legislative aide. Her duties often included reviewing existing statutes and the proposed legislative changes from a policy perspective. Spelliri found the legal implications very interesting, confirming her lifelong vision of becoming an attorney and practicing law.

After receiving her law degree as well as a master of business administration from Boston University in 1997, Spelliri made Phoenix her home and began her legal profession at Lewis and Roca LLP as a public finance attorney, specializing in the issuance of tax-exempt bonds.

The projects financed with tax-exempt bonds interest Spelliri a great deal, varying across a wide array: museums, government buildings, nonprofit facilities, schools, affordable housing projects and manufacturing facilities.

“Being able to drive throughout Maricopa County and in other areas of the State and to see completed buildings and facilities I helped finance gives me a wonderful sense of accomplishment.”

Double-edged sword

One of Spelliri’s greatest career accomplishments is also something she deems a failure: being only one of a few Hispanic female attorneys that has been made partner, particularly in the finance area.

“Being a minority female attorney in the world of public finance has been challenging and well worth the effort.

“There are too few women in the transactional world. There should be a lot more and hopefully will.”

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Perkins Coie Brown & Bain is pleased to announce that Lee Stein has rejoined the firm as a partner in our national litigation group. Lee’s practice will continue to emphasize White Collar Criminal Defense, Government Relations, and Governmental and Internal Investigations.

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■ Aaron C. Schepler, an associate at Greenberg Traurig, has been selected to join the Men’s Board of the Fresh Start Women’s Foundation. The Men’s Board supports the Fresh Start Women’s Foundation by focusing on fundraising. The Foundation, established in 1992, is dedicated to supporting women in need, seeking self-sufficiency and provides services such as employment resources, information/referral resources, legal assistance, mentoring, a speciality library and workshops.

Schepler (J.D., 1999, ASU) focuses on commercial litigation.
Old Dog vs. New Trick

Dear Editor,

When I began practicing law in 1974, we used carbon paper to produce copies and the court reporters used short hand. Thirty-one years later, I am doing electronic filing with the Superior Court and have started using electronic digital recording for a large number of my depositions. Some of my colleagues have been reluctant to use this efficient and reliable system to preserve testimony in depositions. I want to explain why you ought to give it a try.

Digital recording is presently being used in federal and state court houses and administrative hearing rooms around the United States as well as in more than 30 countries. As you know, several of our Superior Court courtrooms are E–Courtrooms, which have been successfully using digital recording devices, in lieu of court reporters, for several years. The system that we use at our office has four synchronized channels, which is more sensitive than the E–Courtroom system. Each person in the room has his own highly sensitive digital microphone. The entire proceeding is recorded on both a CD and a computer hard drive.

The process begins by testing the system and all microphones. The deponent is then sworn in by a notary public, and the questioning begins. At the conclusion of the deposition, each attorney of record receives a copy of a CD labeled with the name and case number before they leave our office. Here’s the best part, there is no charge for the CD. The deponent has 30 days to review the CD and make any corrections or changes on a form supplied to the deponent.

Obviously, the cost savings is huge to both sides. The average cost for a standard court reporter deposition transcript in our office is around $350. The CD costs you nothing and costs our office a few dollars. Our recording system can be used by all parties in litigation with our office, so the savings are not confined to just the defense. Since the majority of civil litigation cases filed in Maricopa County settle before trial, deposition transcripts generally end up sitting in ever expanding file folders and then sent off to storage without being reviewed.

The disc can be played on the standard CD system of your computer and can even be converted to be played on an ordinary CD player. If either side decides he wants a transcript, the ordering party notifies all parties that a transcript has been ordered. Upon request, the ordering party provides the other parties with a copy of the transcript at their proportional share of the transcript cost. The CD can be transcribed by a trained transcriptionist who then certifies to its accuracy. Though ordering a transcript cuts down the potential savings, it is still approximately half of the traditional charges.

The CD can be played in hearings and in trial for impeachment or other permissible purposes under our rules of procedure.

What are some other advantages? You can play back testimony during the deposition with a simple click of a mouse. You have instant and direct access to the deposition and your storage and archival costs are dramatically lowered. The ability to store over 22 hours of deposition testimony onto one CD really cuts down on file space and archiving backs.

As we all strive to make our practices more cost efficient and the cost of legal services more affordable, we cannot ignore new technology just like we cannot ignore the E–Courtroom or eFiling in the Superior Court. So, even though I miss the smell of carbon paper, old law books, and steno pads, I have had to change with the times and digital recording depositions are a bright part of the future.

Sincerely,
Joseph S. Kelly Jr., Esq.
Corporate Law Department of State Farm Insurance

The opinions expressed in this letter are solely those of the author.
- Danny Sims, Tom Stack, Caroline Tweeton and Rhett Billingsley have joined Ryley, Carlock & Applewhite as associates.
- Sims (J.D., 2005, UA) practices in the firm’s natural resources and litigation group.
- Stack (J.D., 2005, UA) practices in the litigation group.
- Tweeton (J.D., 2005, University of California) joins the firm’s real estate and lending practice group.
- Billingsley (J.D., 2005, ASU) joins the natural resources practice group.

- Henry G. Watkins is the new executive director of the Arizona Center for Disability Law.
- Watkins (J.D., 1974, ASU) has worked in private practice in Phoenix and for the federal government in Washington, D.C. He served as a special assistant and immigration judge for the U.S. Department of Justice and assistant general counsel for the U.S. Office of Personnel Management.

- Todd S. Karchner, William D. Sawkiw, and Stephen D. Benedetto have joined Fennemore Craig as associates in its litigation section.
- Karchner (J.D., 2002, UA) focuses his practice on business and personal injury torts, commercial litigation and products liability.
- Sawkiw (J.D., 2002, Brigham Young University) concentrates his practice on commercial litigation.
- Benedetto (J.D., 2003, ASU) focuses his practice on business and personal injury litigation.

- Kevin Minchey has joined Meagher & Geer in its insurance coverage practice group.
- Minchey (J.D., 2002, Thomas Jefferson School of Law) previously worked as a litigation associate in Nashville.

- Johnny J. Sorenson recently opened The Sorenson Law Firm, LLC.
- Sorenson (J.D., ASU 1995) focuses his practice on civil and business litigation, construction law, and catastrophic personal injury. Sorenson serves on MCBA personal injury and negligence and construction law section boards.

- Paul M. Gales joined the Phoenix Law Group of Feldman Brown Wala Hall and Agena, PLC as a partner.
- Gales (J.D., 1982, Notre Dame University) continues his outside general counsel, corporate transactions and securities regulations practice. Previously, he was a partner at Squire, Sanders & Dempsey, LLP.

- Timothy E. Clements II and Kelley L. Cathie have joined Titus, Brueckner & Berry, PC.
- Clements (J.D., 2004, ASU) focuses his practice on real estate and corporate law.

- Melissa Even, Sherry Leckrone and Russell Yurk have joined Jones, Skelton & Hochuli, PLC.
- Even (J.D., 1999, Northeastern University) concentrates her practice on employment law.
- Leckrone (J.D., 1990, IIT Chicago-Kent) concentrates her practice on employment law.
- Yurk (J.D., 1998, ASU) concentrates his practice on general civil litigation, wrongful death and personal injury defense, and insurance coverage and fraud.

- Daniel Dye, an adjunct instructor at Phoenix International School of Law, became a full time lawyering process instructor at the college.
- Dye (J.D., 2003, University of Kansas) worked for Snell & Wilmer and Long Technical College prior to joining Phoenix Law.

- Jodi Weisberg joined Phoenix International School of Law as communications manager.
- Weisberg (J.D., 1992, UA) worked as an attorney in the mental health field for 12 years before becoming bureau chief of the Arizona Journal. She has also worked as director of communications for the ASU College of Law and as legal program director for Fresh Start Women’s Foundation.

- C. Adam Buck, Rafael Tirado-Ramos, Douglas G. Edmunds and Sonya E. Underwood have joined Winsor Law Firm, PLC as junior partners.
- Buck (J.D. 2000, University of Tulsa College of Law) practices real estate law, litigation & transactional work.
- Tirado-Ramos (J.D., 2002, Universidad de Monterrey) practices immigration law, international law, international trade law, foreign investment and investment in Mexico.
- Edmunds (J.D. 2005, Franklin Pierce Law Center) practices estate planning, tax law and business law.
- Underwood (J.D. 2000, Georgetown University Law Center) practices civil litigation as well as family, criminal, personal injury and bankruptcy law.

Clerk’s Corner
continued from page 5

The new rules require that Petitions for Conciliation be filed with the Clerk’s Office. However, a petition for conciliation to preserve the marriage, before an initial complaint has been filed, will have no casefile in which to place the petition. In Maricopa County, local rule 6.11 allows these petitions be filed directly with the conciliation court. It should be noted that other counties may not have a conciliation court.

Rule 68(A)(1): Petition to Modify Child Custody. The filing party must file a Notice of Filing Petition for Modification of Change of Custody. After filing, the clerk will issue the Petition, which the party will be required to serve. This is a new requirement of the Clerk’s Office. Our office will file and retain the original notice and conform a copy for service, which we anticipate will increase processing time to accommodate the issuance.

The new Arizona Rules of Family Law Procedure impact all agencies, practitioners, and participants in family court systems throughout Arizona. We hope this brief overview of several actions being taken by the Clerk’s Office will help communicate these changes. Although there is significant work to prepare us for the new rules, our office remains committed toward providing quality customer service to all our customers.
Court Watch
continued from page 1

the power to promulgate its own rule.

The unusual situation resulted in another oddity. Along with its 23-page opinion, the Supreme Court published a 23-page order holding that the sitting justices need not "disqualify themselves from deciding the issue.

Self-deciding fate

When Mark Scheehle, a Fountain Hills attorney, was appointed as an arbitrator, he refused to serve, and the Superior Court fined him $900. He filed a 1983 action in the district court against the Superior Court judge who fined him, the rest of the judges of the Superior Court, and the justices of the Supreme Court. He asserted violations of his federal constitutional rights and made pendent state law claims.

The action has become an odyssey of sorts. The district judge at first granted summary judgment to the defendants on the federal claims and declined to consider the state claims. Scheehle appealed. At first, the Ninth Circuit affirmed. Scheehle v. Justices of the Supreme Court, 257 F.3d 1082 (9th Cir. 2001). It later withdrew that opinion and certified a question to the Arizona Supreme Court, asking whether A.R.S. § 12-133 imposed on attorneys compulsory service as arbitrators. Scheehle v. Justices of the Supreme Court, 269 F.3d 1127 (9th Cir. 2003).

The justices all recused themselves, and the question was answered by four judges from the Court of Appeals and one judge from the Court of Appeals and one judge from the Superior Court. They imposed on attorneys compulsory service as arbitrators.

Rule of necessity

Chief Justice Charles E. Jones recused himself. Court of Appeals Judge G. Murray Snow sat in his place and authored both the order and the opinion. In the order, he rejected Scheehle’s contention that the sitting justices should not decide the matter.

He turned first to Judicial Canon 3(E)(1)(d)(i), which requires disqualification if the judge “is a party to the proceeding.” While on its face, he noted “this rule should have required the justices to disqualify themselves, Snow applied an exception, the rule of necessity. The rule of necessity "prevails[i] over disqualification standards when it is not possible to convene a body of judges who are not subject to the disqualification standards," he wrote. “If we are to recuse ourselves simply because we have been sued by the applicant, then who is left to decide this case?" He noted that none of the sitting justices had a personal stake in the outcome, which might require each to decide whether to recuse her- or himself.

Disqualification was not practicable, Snow found. “[E]ven assuming the merit of Mr. Scheehle’s objection, if any Arizona court would be incapable of answering the certified question without bias, it would not be possible, by appointing temporary replacements on this Court, to cure the basis of his objection.”

Disqualifying the justices in that circumstance, he held, “would be an abdication of duty by those who are constitutionally designated to perform such functions.” Furthermore, allowing a litigant to disqualify the justices by simply naming them as defendants “would be to put the weapon of disqualification in the hands of the most unscrupulous.” A similar rationale disposed of Scheehle’s argument that disqualification was mandated by the fact that he had filed complaints of judicial misconduct against the justices concerning this case.

Snow also rejected Scheehle’s argument that the bias and prejudice of the justices were evident from the previous rounds of litigation. He noted that the chief justice had been the one who had coordinated their defense with the Attorney General’s Office (and had therefore recused himself). None of the other justices even knew what the attorney general had argued on their behalf.

Finally, the fact that all the justices had recused themselves in the previous go-round had no impact on whether the current justices had to do so now. “Each justice recused on his or her own motion, Snow wrote. “We have no record of their reasons for recusal… We do not now question the decision of each of these members of this Court at that time to recuse themselves. Nor are we bound by that decision.”

Duty of law

With the disqualification motion out of the way, Snow turned to the merits of the district court’s query. The question arose because Civil Rule 73 and its predecessor compel attorneys to serve as arbitrators while regulating. —A.R.S. § 12-133—estabhshes a voluntary list of attorney–arbitrators.

Scheehle argued that the statute trumped the rule, but Snow held that the two could peacefully coexist. He rejected the contention that the statute limited the Superior Court to choosing only from its list of volunteer attorneys. "Nowhere does the statute say so," he noted, "the plain text of the statute vests in the Superior Court the authority, without limit, to select each arbitrator.”

The Legislature had evidently acceded in this view of A.R.S. § 12-133. Knowing that the courts had established mandatory service, it had amended the statute several times, but it never changed the language to limit the courts to appointing only volunteers as arbitrators.

In any event, Snow held, the Supreme Court did not need the Legislature’s blessing to require mandatory service. He pointed out that the Arizona Constitution gives “this Court… exclusive authority over the regulation of attorneys,” which “enables this Court to supervise judicial officers, including attorneys.” He noted that attorneys have long been considered officers of the court, which invests them “with significant rights and responsibilities.”

Quoting the United States Supreme Court, he amplified: “As an officer of the court, a member of the bar enjoys singular powers that others do not possess; by virtue of admission, members of the bar share a kind of monopoly granted only to lawyers. Admission creates a license not only to advise and counsel clients but to appear in court and try cases; as an officer of the court, a lawyer can cause persons to drop their private affairs and be called as witnesses in court, and for depositions and other pretrial processes that, while subject to the ultimate control of the court, may be conducted outside courtrooms.”

Along with this power come responsibilities to the profession. “[T]he state may exact a reasonable consideration from those who are engaged in a profession it regulates,” he continued, which “need not be exclusively monetary, but can also be in the form of limited service to the bench, bar, or community.” Stressing that Rule 73 provides for limited conscription of attorneys into service as arbitrators, Snow concluded that “the court has authority to require a lawyer’s services, even on a pro bono basis, to assist in the administration of justice.”

Thus, in answer to the district court’s question, Snow held that “[i]t has constitutional authority to require active members of the state bar to serve as arbitrators pursuant to Arizona Rules of Civil Procedure 73. Further, A.R.S. § 12-133 does not restrict this Court’s authority to promulgate that rule.”

Joining Snow in both the opinion and order were Chief Justice Ruth V. McGregor, Vice Chief Justice Rebecca White Berch, and Justices Michael D. Ryan and Andrew D. Hurwitz.

It seems that the receiver caught the ball in bounds, after all. ■

ADEF Director to Review Agency’s Current Initiatives

On December 7, ADEF Director Steve Owens will present an MCBA CLE seminar on the current initiatives of the Arizona Department of Environmental Quality. Join Owens as he discusses current agency initiatives; work being accomplished by agency’s standing divisions and programs; special projects and challenges faced since assuming responsibility of the agency in 2003. Prior to being appointed ADEF director by Governor Janet Napolitano in January 2003, Owens practiced environmental law in Phoenix for 14 years.

The seminar will take place from 5:30 to 6:30 p.m. on Wednesday, December 7, 2005, at Bryan Cave LLP, Two North Central Avenue, Suite 2200, in Phoenix. A social reception will precede the event from 5 until 5:30 p.m. Hors d’oeuvres will be provided.

The cost to attend is $20 for MCBA Environmental Section members, $25 for all other MCBA members, and $35 for non-members.

For more information and to register, contact Andrew Vera at (602) 257-4200 x138 or avera@mcbabar.org ■
ASSOCIATES: REAL ESTATE; ENVIRONMENTAL AND NATURAL RESOURCES.

Gallagher & Kennedy has an immediate opening for an Environmental and Natural Resources associate with a minimum of 2-3 years experience representing companies in environmental regulatory and administrative issues. Demonstrated skill in federal, state and local environmental law is required. The qualified candidate must have an outstanding academic record, as well as superior communication and writing skills. The firm is also seeking a highly-motivated transactional attorney with at least 2 to 4 years experience in a law firm environment to join our team-oriented Real Estate Department. The qualified candidate will immediately participate in sophisticated real estate and finance transactions. This excellent opportunity will provide significant client contact. The candidate should expect to assist with the expansion of existing client relationships and development of new clients in the real estate area. Prior real estate experience and excellent academic credentials are preferred. Please forward your resume to: Amanda Powell, Attorney Recruitment Coordinator, Gallagher & Kennedy, P.A., 2575 East Camelback Road, Phoenix, Arizona 85016.

ATTORNEY GENERAL’S OFFICE: The Child Support Section has an opening for a Unit Chief Counsel attorney position in its Glendale Office. This position is responsible for supervising the operations of the Child Support Section. To apply for this position, please forward a cover letter referencing announcement #A05-32 and resume to: Sharon Sergent, Chairperson/Hiring Committee, c/o Human Resources, Office of the Attorney General, 1275 W. Washington, Phoenix, AZ 85007, 602-542-8000 FAX Attorney.recruiting@azag.gov Email, http://www.azag.gov Website. EOE.

COMMUNITY LEGAL SERVICES is hiring staff attorneys in its Kingman, Yuma, and Phoenix offices. CLS is also seeking a Managing Attorney (5+ years legal experience) in its Kingman office. For more information please contact: CLS Hiring Committee, 602/258-3434 ext 2230 or send resume to PO Box 21538 Phoenix, AZ 85016-1538.

Majority required for Ninth Circuit to sit en banc

Effective January 1, 2006, the Ninth Circuit Court of Appeals will require a majority of the circuit’s 28 active judges to sit for en banc courts. Currently, 11 judges sit on en banc courts, but an amended circuit rule will require 15. According to Chief Judge Mary Schroeder, the move is in response to criticism that the court “should have a majority of our active judges sit on each en banc.”

That criticism could have come from the United States Congress. On March 2, 2005, Rep. Michael Simpson [R-ID] introduced H.R. 1064, which would remove the authority of the Ninth Circuit to sit en banc with fewer than all circuit judges in regular active service. Congress presently authorizes circuits with more than 15 judges to convene limited en banc courts that consist of fewer than all of its active judges.

Congressional effort to split Ninth Circuit continues

October brought two new congressional bills aimed at splitting the Ninth Circuit Court of Appeals. On October 20, 2005, House Judiciary chair James F. Sensenbrenner [R-WI] introduced the Federal Judgeship and Administrative Efficiency Act of 2005 (H.R. 4093), a measure that would provide additional federal circuit and district judgeships and split the existing Ninth Circuit into two new ones.


On October 26, 2005, the Senate Judiciary Committee’s Subcommittee on Administrative Oversight and the Courts held a hearing titled “Revisiting Proposals to Split the Ninth Circuit: An inevitable Solution to a Growing Problem.” Although conceptually broad, discussion at the hearing was centered on the Senate’s latest measure to split the circuit, Senate Bill 1845. In terms of the split, the states fenced off in the two new circuits by S. 1845 mirror those states as they are divided up in H.R. 4093.

Senator Patrick Leahy [D-VT] testified that estimates for “start-up expenses alone could cost as much as $95,855,172, with recurring costs ranging from $13,140,049 to $15,914,180.” Senator Jon Kyl [R-AZ] disputed those figures because a large portion of the estimate reflected the costs of building new courthouses. Kyl maintained that new courthouses are not necessary, and suggested that a circuit court could be accommodated in Phoenix at the old United States District Courthouse at 230 West First Avenue, or at the new Sandra Day O’Connor Federal Courthouse at 401 West Washington.

Arizona District Court ends billing arrangements with law firms

The U.S. District Court for the District of Arizona has ceased maintaining accounts receivable for law firms as a means of billing for copies of court records and documents. The convenience of Electronic Case Filing (ECF) and PACER billing services, as well as local staffing constraints, are cited as reasons for the discontinuance. Although copies and other services will continue to be provided upon request, the appropriate fee must be tendered at the time the service is provided.

Senate Judiciary Committee considers cameras in the courtroom

The United States Senate Committee on the Judiciary convened a hearing on November 9, 2005, to consider whether television cameras should be allowed in federal courthouses. Six witnesses testified in support of a measure to allow cameras in the courtroom, while one witness, U.S. District Court Judge for the Eastern District of Pennsylvania, Jan E. Dubois testified that at the trial level, “the disadvantages of cameras in the courtroom far outweigh[ed] the advantages.”

Dubois told the Senate that judges from her jurisdiction who had participated in a pilot project allowing cameras in courtrooms reported that to some extent: cameras made witnesses more nervous; made witnesses less willing to appear in court; distracted witnesses; and violated witnesses’ privacy.

The Ninth Circuit also participated in the pilot project. Although Ninth Circuit Judge Diarmuid O’Scannlain reported favorably on his experience with the Ninth Circuit pilot project, he also testified on behalf of the federal Judicial Conference. O’Scannlain, like Dubois, reported that the Conference strongly opposes camera coverage in federal trial courts because reports found that cameras negatively impact the trial process and in some instances could affect the dynamics of the trial process so much that it would impair citizens’ ability to receive a fair trial. The Judicial Conference also viewed as a negative the threat of camera coverage being used as a trial tactic, and the security and privacy concerns created by camera coverage.

Have something newsworthy to share?

Have you changed employment? Has your law firm named new partners? Send information for our Legal Moves column to: Maricopa Lawyer, 303 E. Palm Lane, Phoenix, AZ 85004; fax to 602-257-0522; or e-mail to: kbrieske@mcbabar.org

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In a short but contentious meeting, the bar determined that every lawyer would be required to do full duty (one day, 8 a.m. to 5 p.m.) in completing their entrance questionnaires. After seven days of training, he was discharged and sent home.

L.t. James Highly, of the air corps, and son of the former owner of the Republican newspaper, was killed in action in the final days of the war in France.

Future Pinal County lawyer and statesman Earnest W. McFarland served as a second class seaman in the war. McFarland, a future Arizona senator and Arizona Supreme Court justice, is credited as being the “Father of the GI Bill.” His frustrations as a veteran of World War I in Arizona and his concern for fellow veterans neglected by broken Congressional promises motivated him to push in the Senate for passage in the 1940s of the Veteran’s Benefits Program. His leadership and energy on this historic legislation later resulted in the largest housing and education booms in the country’s history. McFarland’s bill has been a model for all subsequent veteran benefits and has provided the incentives that underpin today’s all-volunteer military.

Arizona’s most famous warrior was air ace Frank Luke of Phoenix. Luke was recognized at the age of 21 as one of the best known and most feared American aviators. Luke’s plane disappeared in France on the night of September 27, 1918, just two weeks before the end of the fighting. Although it was hoped for several weeks that Luke had been captured, the Red Cross notified his family shortly before Thanksgiving that he had been killed. Luke had been a soft-spoken student at Phoenix High School before joining the air corps. Of the 1.7 million men-at-arms mustered by the U.S. in the two years at war, over 56,000 were killed and American casualties (including wounded and MIA) totaled over 230,000.

The home front

A few weeks prior to the signing of the armistice, local bar association members met to determine a strategy for dealing with attorney “slackers.” Some attorneys had refused to perform service mandated by the Maricopa County Bar Association to act as legal advisors to the new round of 10,728 Arizona draftees in completing their entrance questionnaires. In a short but contentious meeting, the bar determined that every lawyer would be required to do full duty (one day, 8 a.m. to 5 p.m.), no excuses and no substitution by clerks. Any lawyer failing to respond to the call was to be judged “as a soldier failing in his duty.” Attorney assignments were published in the local papers.

In the days immediately following the armistice, Maricopa County lawyers and other notable citizens mobilized for the largest charitable effort the county had ever attempted. The troops in Europe needed to be cared for until demobilization, so Congress called for the country to raise $170.5 million by November 20. Arizona was asked to contribute $306,000 to the United War Work Campaign, and Maricopa County’s goal was $60,000. The Campaign was coordinated by the YMCA, YWCA, Knights of Columbus, Salvation Army, Jewish Welfare Board, American Library Association, and War Camp Community Services. Maricopa County, always generous in times of need, exceeded all expectations and collected over $93,000 for the cause in nine days.

Spanish flu

This massive charitable effort was even more impressive in light of the fact that it occurred in the midst of a crippling national influenza pandemic. Deaths nationally from the flu during September and October of 1918 were more than double the total death toll for the American Expeditionary Forces for the duration of the war. As of November 9, over 82,000 Americans had been killed by the disease. Eventually, 675,000 Americans and over 20 million worldwide would die.

The family of Attorney General Wiley E. Jones was decimated by the epidemic. His wife and daughter-in-law were lost to the disease within five days of one another. Local attorney B.E. Marks was home with the flu for three weeks, but made it back to his office just before Thanksgiving.

As of late November, Phoenix became a city of masked phantoms. With over 558 local cases of the Spanish flu reported on the Tuesday before Thanksgiving, the Health Department ordered anyone appearing in a public or semi-public place, including court, to wear an influenza mask. Failure to comply with the regulation was punishable by a fine of up to $100 and up to thirty days in jail. The masks were to be worn at all times outside one’s own home.

On the day before Thanksgiving, three citizens were arrested and convicted for spitting in public, in violation of the special health ordinances. These scofflaws were required to pay a $1 fine or spend four days in jail. Three paid the fine. Presumably, the mask regulation was temporarily suspended in court for purposes of identifying the criminal spitting defendants in trial.

Thanksgiving dinner

In spite of the end of the war and the suffering brought on by the flu epidemic, food-related restrictions were still in place as the community moved toward Thanksgiving.

The food administration, noting that “the consumption of sandwiches, cakes, and sugar, which usually accompany afternoon teas, is an unnecessary waste of foodstuffs,” requested that late evening meals and afternoon teas be discontinued. Social gatherings with refreshments were to be limited to one of the three regular meals.

After a hearing before the county food administrator, local soft drink bottler Standard Bottling was denied sugar for much of November after being accused of over-sweetening its sodas in October.

Between concerns over domestic food shortages, looming international famines and the influenza-focused sanitation concerns, Thanksgiving dinner took on a simpler tone for many local families. Creamed sweetbreads and bean loaf or Irish Turkey (boned ham) and tomatoes stuffed with hominy replaced the traditional turkey and dressing. Apple sauce or citrus fruit cups substituted for cranberry sauce and mince pie. Delicious meals were prepared from all-Arizona products.

If a grateful barrister hungered for a more traditional meal, a dollar fifty would still buy a turkey dinner at the American Café at 33 North Central Ave. The Commercial Café, two blocks south, advertised its upscale holiday menu, but emphasized that it was equipped with “all modern, sanitary machinery and appurtenances” for cooking and for cleansing of tableware – all dishes were thoroughly sterilized.

Nearly everyone in town had lost friends or relatives to the war or the pandemic during the previous year. Those well enough to have Thanksgiving dinner in 1918 had much to be grateful for – world peace, health, survival. But Thanksgiving that year, more than in some years, was also a memorial to people, places and innocent times that were forever lost.
Holiday Parties: Don’t Let Bad Decisions Spoil the Season

By Troy Foster
Special to Maricopa Lawyer

The holiday season is upon us and with it comes the smell of fresh cookies in the break room, the chatter of co-workers discussing gift ideas and the annual office holiday gathering. Planning the office holiday gathering is not as easy as renting a Santa suit and choosing a brand of eggnog. In fact, having Santa and eggnog at your office party could put your company in legal trouble. While these parties may also serve as a morale builder and a great motivator, they can create risks for an employer.

Why you don’t want an office christmas party

Chances are not all of your employees celebrate Christmas. Employees may observe, for example, Kwanzaa or Hanukkah, or they may not celebrate any holidays at all. In order to respect the religious freedoms of your employees and their guests, it’s best to refer to such celebrations as “holiday” or “winter” parties.

How to drink responsibly

Deciding what to call your party is a relatively mild concern compared to liabilities associated with serving alcohol. Eighty-three percent of businesses host a holiday party for their employees; 53 percent of these businesses served soft and hard alcoholic beverages. Under liquor laws, if a person is served alcoholic drinks at a company party on the premises and then injures himself or herself or someone else in an accident, the company could be held liable if the drinks contributed to their intoxication. To avoid legal trouble, when planning holiday celebrations you should:

- Consider whether a holiday party is an appropriate fit for the business; consider an alternative event such as a live theater night.
- Provide transportation or designated drivers for partygoers; take away keys, if any doubt.
- Limit the number of drinks or the length of time when alcohol is served.
- Provide alternative, non-alcoholic beverages.
- Investigate obtaining insurance coverage such as liquor law liability insurance to cover the event or hold the party in a licensed establishment such as a restaurant, bar, or other venue whose liquor law liability insurance may cover the event. Check with the establishment about their insurance coverage, and get their response in writing.
- Remind employees in the invitation and post a sign at the event that drinking and driving don’t mix.
- Ensure that alcohol is not served at any time to anyone under the legal drinking age (21 years).

How to handle harassment issues

Harassment is often a problem associated with alcohol consumption. Approximately one-third of employers report some form of employee misconduct at holiday parties, including excessive drinking, fighting and sexual advances. This misconduct may lead to employer liability in the form of harassment.

The United States Supreme Court and the Equal Employment Opportunity Commission have recognized that sexual harassment occurs in two ways: “harassment that involves the conditioning of concrete employment benefits on sexual favors, and harassment that, while not affecting economic benefits, creates a hostile or offensive working environment.” Examples of conduct that a reasonable person might find hostile or abusive include:

- Repeated offensive sexual flirtations, advances, or propositions.
- Continued or repeated verbal abuse or innuendo of a sexual nature.
- Uninvited physical contact such as touching, hugging, patting or pinching.
- Display of sexually suggestive objects or pictures.
- Jokes or remarks of a sexual nature in front of people who find them offensive.
- Prolonged staring or leering at a person.
- Making obscene gestures or suggestive or insulting sounds.

Supervisors should be alert to intervene if any such activities occur at the holiday gathering, and they should report any incident in accordance with normal harassment policy and procedures.

How to limit holiday party liability

Before your holiday party, you may also want to consider: reviewing your insurance policies for alcohol-related exclusions; emphasizing to employees your policies prohibiting drug and alcohol abuse, harassment, fighting, weapons, and other misconduct; and educating supervisors and employees regarding the procedures for reporting and responding to this misconduct.

- Check the insurance coverage of anyone hired for the party.
- If you hire caterers, servers, bartenders or anyone else to provide and serve drinks, check to see if they carry liability insurance that would cover any potential liability exposure for your business from the event.
- Consult with an attorney If your company plans to host a holiday party, it may not be possible to eliminate the risk of employer liability. However, employers who plan appropriately can minimize risk and allow everyone to enjoy the celebration.

Troy Foster is a partner in the Labor and Employment section at Lewis and Roca, where he focuses his practice on the defense of employers in Title VII, ADEA, ADA, and similar claims.

In Memoriam

Darrow K. Soll

1966 - 2005

In Memory of our Friend and Partner