**CLE Series Presents**

**Landmark Jewish Trials that Have Changed History**

By Kathleen Brieske
Maricopa Lawyer

Beginning on Thursday, Feb. 3, and continuing on the first Thursday of the month through May, the Maricopa County Bar Association will be partnering with the Anti-Defamation League to present a luncheon series on four Jewish trials which stand as benchmarks in the history of the perception of Jews in the modern world.

The Maricopa Lawyer sat down with Amy Hirshberg Lederman, who will act as speaker for the entire series. Lederman is an attorney, Jewish educator, syndicated columnist and author. She has presented at numerous conferences throughout the United States and she recently published her first book. Lederman explained the significance of each of the trials as well as the importance they hold for today’s practicing attorneys.

See *Jewish Trials* page 6

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**Court Watch**

**Trick Question? How to Be Guilty of Resisting Arrest and Escaping Custody**

By Daniel P. Schaack
Maricopa Lawyer

It sounds like a clever riddle with a nightmarish fact situation that you might get on an essay question on the bar exam: Can you simultaneously be guilty of both resisting arrest and escape? In *State v. Stroud*, No. CR-04-0234-PR (Ariz. Jan. 7, 2005), the Supreme Court overturned the Court of Appeals and held that you can. A Bisbee police officer, William Silva, saw Sudden Rio Stroud sitting in a car. Because Stroud had an outstanding felony arrest warrant, Silva ordered him to place his hands on the patrol car.

See *Court Watch* page 4

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**Presiding Judge Designee Names Her Team of Judicial Leaders**

By J.W. Brown, Maricopa Lawyer

The first step toward change in Superior Court’s judicial leadership was made in the Arizona Supreme Court’s unanimous selection of Judge Barbara Rodriguez Mundell as presiding judge designate. Additional changes are underway with her selection of her associate presiding judge and new departmental presiding judges and plans for a three-phase rotation of judges to new calendar assignments.

Early last month, Mundell announced the appointment of Judge Margaret Downie as her associate presiding judge. Mundell is changing only three of the eight departmental presiding judge assignments, leaving five judges in department leadership positions. The new appointments become effective on July 1, the same date when Mundell begins her five-year term presiding over all trial courts in Maricopa County, including Superior Court, the 23 justice courts and 23 municipal courts.

Two judges who will assume departmental presiding judge assignments include Judge Anna Baca, who will lead the Civil Department, replacing Downie, and Judge James Keppel, who will preside over the Criminal Department, replacing Judge Eddward Ballinger. Judge Karen O’Connor has already assumed her new role as probate/mental health presiding judge, replacing Mundell, who has begun working closely with Presiding Judge Colin F. Campbell to ensure a smooth transition when his five-year term concludes June 30.

Mundell is leaving five departmental presiding judges in their assignments. They include Juvenile Court Presiding Judge Emeritus Ronan, Family Court Presiding Judge Norm Davis, Tax Presiding Judge Mark Armstrong, Southeast Presiding Judge Silvia Arellano and Northwest Presiding Judge Colleen McNally.

The selection of Downie as the associate presiding judge augments the “fists” of women in leadership positions. Mundell is the first female and first Hispanic judge to be appointed as presiding judge of Superior Court. There has been a previous female associate presiding judge (Judge Rebecca Albrecht served in that role with former Presiding Judge C. Kimball Rose, who is now retired). But this is the first time that two women are serving in the two top leadership posts of the court.

Downie has served as presiding civil court judge since January 2003. Since her appointment to the bench in 1999, she has also served in family court and juvenile court. Prior to becoming a judge, she served two years as a juvenile court commissioner. Downie graduated magna cum laude from Georgetown University Law Center in 1984 and worked in private practice as a civil litigator and was disciplinary counsel and chief bar counsel with the State Bar of Arizona.

Baca, appointed to the Superior Court bench in 1994, currently is assigned to the civil department. She has also served on the criminal and family court bench. She has worked in private practice as a civil litigator and then was an enforcement manager and administrative law judge with the Equal Employment Opportunity Commission for over a decade before becoming a Superior Court judge.

Keppel spent over 18 years in criminal law, with almost all of that time with the Maricopa County Attorney’s Office. He also worked in private practice and spent three years as an assistant city attorney for Scottsdale. Since his 1996 appointment to the bench, Keppel has spent the majority of his assignment with the criminal department at the Southeast Court Facility in Mesa.

The assignments of the five departmental presiding judges remaining in their leadership positions have been short-term. In June 2004, Campbell appointed Judge Silvia Arellano as Southeast presiding judge, Armstrong as presiding tax judge and Davis as presiding family court judge. In January 2004, he appointed McNally as Northwest presiding judge and Ronan as juvenile presiding judge.

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**Discover the Mystery Waiting inside the Historic Maricopa County Courthouse!**

Attend this year’s MCBA Barristers Ball and Silent Auction to support the Justice Learning Center and Museum, an educational project housed in a restored cellblock on the top floor of the Old Courthouse. Join the many faces of Maricopa County’s legal community on Saturday, Feb. 26, at the Arizona Biltmore for an evening of fun, including an entertaining live auction hosted by Channel 3’s Olivia Fierro. For more information on the ball, contact Jennifer Raticliff at (602) 530-8191.

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In mid-January, Campbell and Mundell began finalizing a rotation plan to assign judges to civil, criminal, family, juvenile and probate/mental health calendars.

J.W. Brown is the communications director for Superior Court in Maricopa County.
Get Ready to Rock ‘N’ Roll!

As I ran—no, jogged—no, plodded—up the hill (and yes, there is a hill) in the 5000 block of East Washington Street, toward the Mill Avenue Bridge, the “little engine that could” portion of my psyche was calling it quits. In this, the tenth mile of last month’s Rock ‘N’ Roll Half Marathon, I doubted that I would be able to plow another step, much less the remaining 3.1 miles to the finish line east of Sun Devil Stadium. But I did.

Those of you who have conquered the full 26.2 miles of a marathon, the half marathon, a 10K, hiked the Grand Canyon, or even maneuvered a particularly challenging buffet line may have had similar thoughts as to how you were going to take that “one more step”. But you did.

Or perhaps in your professional life, you have also mused at how you could possibly take on one more project, or case, or work another evening or weekend. But you did.

I hesitate to stamp our membership with the “over-achiever” label or describe you as the “best and the brightest,” but you are. Your professional achievements are far more remarkable than yours truly scratching out those last 3.1 miles and finishing a half marathon in far more time than it took elite runners to complete the full marathon.

And if you saw some of the folks that blew past me on Washington Street (okay, okay, throughout the course), you would no doubt encourage me to focus on practicing law rather than devoting too much time to running.

So please join me in 2005 in something that fits our skill sets and that we can all accomplish without any change in training, diet, legal practice, or lifestyle. Take a case on a pro bono basis from the Volunteer Lawyers Program. VLP, a joint project of the Maricopa County Bar Association and Community Legal Services, facilitates vital legal assistance to people with low incomes and civil legal needs.

Whatever your area of practice, VLP needs you. The demand for pro bono legal services is staggering. The civil complexities (and sometimes abuses) of our legal system, which particularly affect our fellow citizens who cannot afford legal services, are areas where lawyers can make a huge difference.

If you think that taking a VLP case—a critical need—would throw you off stride, think again. VLP has case materials, mentor attorneys, staff guidance and even insurance.

If you just cannot take on a case of your own, then VLP needs you to conduct initial intake interviews of pro bono clients. The start line is your call to VLP at (602) 254-4714.

Unlike the marathon, no further training is required for you to apply your skills, problem solving abilities, and your privilege of a law license to advance the cause of civil justice in our community. So whether or not you Rock ‘N’ Roll, please join me this year in taking at least one case through the Volunteer Lawyers Program.

My own track record convinces me that pro bono work through VLP will be one of your most memorable professional achievements of the year and will leave you feeling a lot better than I did after 13.1 miles.

Jay will be carbo-loading at VLP’s annual awards luncheon on February 18 at the downtown Hyatt. You can also reach him at (602) 530-8407 or jaz@kenn.com.

Maricopa Lawyer is published monthly by the Maricopa County Bar Association Jay Zweig, President; Leandra Lewis, Executive Director.

Contributions of articles and letters to the editor are encouraged. All materials must be submitted by the 10th of the month to be considered for the next issue. All submissions may be edited for content, length and style. Errors will be corrected in a subsequent issue.

The MCBA does not necessarily endorse the views expressed by contributors and advertisers.

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Yes you’ve seen the articles, e-mails, and Biers. Buy your tickets now for our upcoming Barristers Ball and Silent Auction on Sat., Feb. 26, at the Arizona Biltmore Resort.

5. Cool Silent Auction Items. Along with the traditional spa packages, dinners, and golf outings, our committee has worked hard to get some showstoppers: a red leather chair, a sponsor package for the 2006 FBR Open, and a suite for the Arizona Rattlers’ final game v. San Jose Sharks. Also, women were swooning last year at the one-of-a-kind purses for sale; this year we’ll also have boutique baby clothes from Los Angeles and New York.

4. Networking. The silent auction and cocktail hour is a great time to say hi to colleagues on the other side of the aisle, to chat with some judges in a non-work setting, and to get to know folks outside your usual legal circle.

The Proverbial “Good Cause” Hits Home. This year’s beneficiary is our Justice Museum and Learning Center, a museum showcasing Arizona’s legal history in downtown Phoenix. The museum is the brainchild of our Maricopa County Superior Court, who thought we needed an educational exhibit to showcase our landmark cases (think Miranda, Winnie Ruth Judd, Gault, and Ring) inside the fabulous Old Courthouse. We should have judges and general downtown Phoenix supporters (historic homeowners who will LOVE this) lining up for tickets.

Top 5 Reasons Why Every Young Lawyer Should Come to Barristers

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2. Food and Drink. It’s the Biltmore, which means great food, and it’s a ball for goodness’ sake, so please bring your dancing shoes.

3. Moda Fina Mystery Bags. Buy a “mystery bag” for $50 (we’re only selling 150). Each contains a cubic zirconia, but what you’re really buying is the chance to win one carat diamond, one of ten sapphires, two jewelry boxes, or 40 $200 Moda Fina gift certificates. That’s one in three chance of winning and you must be present to win.

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See you there! Contact Geoff Cummings at 602-257-4200 x. 107 to buy tickets.

Advertise at www.maricopabar.org
Brown Bag Lunch Tackles Business Development within Minority Community

On Feb. 25, the Maricopa County Bar Association’s Task Force on the Recruitment and Retention of Women and Minority Lawyers will host its second brown bag lunch in a series of three. The series’ purpose is to provide a conducive environment for an informal and frank discussion of issues uniquely affecting women and minority attorneys in Maricopa County.

The second brown bag lunch will feature Ernest Calderón, who will lead a discussion on “How to Successfully Develop Business within the Minority Community.” Calderón recently opened his own law firm. Prior to that, he was a partner at Jennings, Strouss & Salmon, P.L.C. Calderón received his law degree from the University of Arizona College of Law.

The brown bag lunch will take place from noon until 1 p.m. on February 26, 2005, at the MCBA offices. There is no cost to attend. Please bring your food, drink and any questions you would like to have answered about developing business in the minority community.

YLD Offers Mock Interviews for ASU Law Students

By Jonathan S. Wallack
Special to Maricopa Lawyer

As you ride the elevator of the downtown high-rise, anxiety sets in.

What are they going to ask you? What questions will you ask? Why are you interested in the type of law practiced at this firm?

The questions mount with each passing floor. The elevator is quickly approaching its intended destination and still you have no answers. You have spent hours researching this firm and its attorneys while playing this scenario out in your mind. Yet you feel utterly unprepared.

“Ding”—the elevator bell sounds. You arrive and are about to step out of the safety of the elevator into an environment you have spent years studying and thousands of dollars to be part of—a Phoenix law firm.

You need this job. You have seen the statistics and they are not in your favor. There are 150 other law students in your third-year class, a quarter of whom have more complete resumes and more eloquent writing samples than those housed neatly in your portfolio. But your classmates are not your only competition. Approximately a thousand would-be Arizona attorneys sit for the bar each year, while program and hopes to offer similar opportunities for subsequent law school classes.

Jonathan S. Wallack is an associate at Bonnett, Fairbourn, Friedman & Balint, P.C., specializing in civil litigation and insurance defense. Jonathan is also a member of MCBA’s Young Lawyers Division’s board of directors.

Tell Us!

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: kbrieszke@mcbabar.org

Patrick Butler

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623-203-9059 patbutler@qwest.net
Stroud began to obey the order but questioned why he was being arrested. He tried to evade Silva when informed of the warrant, so the officer grabbed Stroud’s shirt collar, pushed him against the car and held him there, telling him that he was under arrest.

Stroud continued to struggle and kick, so Silva used pepper spray. The tactic backfired: some of the spray got into Silva’s eyes, and he lost his grip. Stroud broke free and ran. He was eventually nabbed by another officer.

This incident led to Stroud being charged with both resisting arrest and escape. He was convicted of both counts and sentenced to consecutive terms totaling four years. The Court of Appeals reversed the escape conviction, concluding that Stroud could not be convicted of both escape and resisting arrest. It held that Silva had never completed the arrest, so Stroud could not have escaped custody. State v. Stroud, 207 Ariz. 476, 88 P.3d 190 (App. 2004).

The Supreme Court reversed. Writing for a unanimous court, Justice Rebecca White Berch held that both convictions could stand.

**Supreme Court’s analysis**

Under A.R.S. § 13-2508(A), resisting arrest consists of attempting to or actually preventing a peace officer from making an arrest by using or threatening to use physical force, or by other means that raise a substantial risk of physical injury. Under A.R.S. § 13-2503(A)(2), a person commits escape by knowingly attempting to or actually escaping from custody arising from having been arrested for, charged with, or convicted of a felony.

Berch reasoned that the facts in Stroud’s case allowed convictions for both crimes, and decied the Court of Appeals’ attempt to reconcile the two crimes. “[N]o such reconciliation is necessary,” she wrote. “The crimes are separate, each consisting of elements that differ from those that constitute the other. . . . One is not a lesser-included offense of the other.”

In concluding that Silva had never actually arrested Stroud, the Court of Appeals had relied on other state court decisions’ definitions of “custody,” a faulty analysis according to Berch. “Arizona statutes,” she wrote citing A.R.S. §13-2501(3), “specifically define ‘custody’ as the ‘imposition of actual or constructive restraint pursuant to an on-site arrest.’” Consistent with this section, she noted that A.R.S. § 13-3881 provides that an “arrest is made by an actual restraint of the person to be arrested, or by his submission to the custody of the person making the arrest.”

Thus, to prove Stroud committed escape, the state needed to prove that he had been arrested and was in custody, that is, that he was actually restrained pursuant to an arrest. Berch and the Supreme Court determined that the facts allowed a jury to find that Stroud had indeed been arrested: “[T]he record shows that during the ongoing struggle, ‘[Officer] Silva grabbed Stroud’s shirt collar, leaned him against his car, and held him down’ while repeatedly telling ‘Stroud he was under arrest.’”

“[T]he jurors could reasonably have concluded that Silva’s actual restraint of Stroud satisfied the definition of ‘custody,’” Berch continued. “This action, coupled with the declaration to Stroud that he was under arrest, provided sufficient evidence to support a guilty verdict on the charge of second-degree escape. . . .”

Berch also chided the Court of Appeals for its reliance on the Supreme Court’s opinion in State v. Sanchez, 145 Ariz. 513, 701 P.2d 571 (1985), in holding that Silva had not actually restrained Stroud. She noted that in Sanchez, the police officer “never was closer than ten to fifteen feet from the defendant, who walked away when the officer began to walk toward him.” Consequently, Sanchez involved not actual, but constructive, restraint. “While we reaffirm the thrust of that opinion—that one cannot escape unless one has been actually restrained or arrested—we believe the Court of Appeals has unmoored the language of the opinion from its contextual anchor,” Berch wrote.

So, if after reading the facts, you wrote down that Stroud could be convicted of both resisting and escape, you may move on to the next bar exam question. Just hope that it’s not about the rule against perpetuities.

The biggest topic in criminal law for the last year has been the Supreme Court’s attack on sentencing schemes in which the judge may give convicted people longer sentences based on facts not found by the jury. A big topic in Arizona some years back was the Drug Medicalization, Prevention, and Control Act of 1996, better known as “Proposition 200.” Both were involved in a recent case in the Court of Appeals, where the court held that a provision of Prop 200 did not survive constitutional scrutiny. State v. Gomez, No. 1 CA-CR 03-1050 (Arizona App. Dec. 21, 2004).

Melissa Jean Gomez was charged with possession of small amounts of methamphetamine and marijuana. As a first-time offender, she was a potential candidate for treatment under Prop 200. Prop 200’s goal is to change the way the criminal justice system treats minor drug possession charges. It metes out punishment in a graduated sequence that precludes prison time for first- and second-time offenders unless certain statutory factors are present. If a statutory factor is present, then the defendant may be sent to prison.

One such statutory factor found in A.R.S. § 13-901.01(B) is that the defendant “has been convicted of or indicted for a violent crime.” If that is true, then the defendant is not eligible for Prop 200 probation. Because Gomez had been indicted for manslaughter ten years ago, the state alleged that she was ineligible for probation.

But Gomez was never tried for manslaughter; the state had dropped the charges because “there was no reasonable likelihood of conviction.” In her drug case, she moved to strike the state’s allegation of prior indictment, but the trial court was unimpressed with her argument. After she was convicted, it sentenced her to prison for two and a half years.

**Blakely meets Proposition 200**

Gomez found a more sympathetic ear in Division One of the Court of Appeals. Writing for a unanimous panel, Judge Lawrence F. Winthrop held that A.R.S. § 13-901.01(B)’s prison time provision for persons indicted for—but not convicted of—a previous violent offense is unconstitutional.

Winthrop relied on the Due Process Clause’s requirement of proof beyond a reasonable doubt for every element of a criminal charge. Pointing to Apprendi v. New Jersey, 530 U.S. 466 (2000), and Blakely v. Washington, 124 S. Ct. 2531 (2004), he noted that this standard applies not only to the conviction but to additional facts that may be used to increase the penalty beyond the statutory maximum allowed by the guilty verdict itself. Because Gomez was a first-time offender, Prop 200 set that statutory maximum. Winthrop noted that “the purpose of section 13-901.01(B) is to exclude violent offenders from the mandatory proba-
Back to the Future: the Comeback of Virtual Firms and the Internet

Plus ca change, plus c'est la meme chose

Pardon my French, but sometimes they are right. Last century, in a 1999 year end review, Gartner, the leading IT consultancy in the world, observed: “... Sondergaard (an expert of the times) went on to kill some myths. 'Dot-com companies will not dominate in the future, as some may think,' he said. In fact, 95 percent of strictly online companies will fail in the next 24 months, leaving room for more successful clicks-and-mortar, or hybrid, companies. That is, a company cannot survive on the Web only; the more traditional high-street office and shop are vital to success.”

Of course, Gartner was right about the pending collapse, as were many others, but they were profoundly wrong about the future of the pure Web based business model. I remember those heady days. I was involved at the time with an attempt on the part of a client to find venture capital for his business. I had lined up a venture capital firm that was very interested in his little company. They wanted details concerning the business and I asked my client for “some numbers”. In a voice dripping with disdain, he said “on the Internet we don’t need numbers.” Of course, he had no numbers because his business model was literally and figuratively based on thin air. That attitude, of course, led to the dot-com collapse from which we are just beginning to recover. It is important to remember, however, that some of those virtual companies such as Yahoo, Google, Amazon and eBay have survived and indeed generated shocking profits by focusing close attention to the “numbers” so derided by my former client.

A time to recover

It’s been a pretty tough five years, but 2005 may well mark the beginning of a dramatic recovery for virtual firms. We should remember, however, that the days of the companies that existed only in thin air ended not because their technical ideas and prowess were bad, but because their business model was profoundly flawed. Indeed, many of the ideas were brilliant and years ahead of their time. Some of those ideas are driving the new recovery. The Internet has become again a hot commodity.

One of the oldest ideas resurfacing is the notion of “thin client” computing. A thin client is a computer terminal which depends upon a server computer containing the bulk of the applications and information needed to make it function in a normal business environment. The server/client model has dominated large enterprises since the beginning of business computing 50 years ago. In the early days of personal computing, there was some effort to extend the server/client model to small businesses. That effort has been largely unsuccessful, although there are exceptions such as the Citrix remote computing technology and a few others—all of which have suffered because of their high operating costs.

However, the idea of having all applications and information on a single server may be gaining a new beginning. According to The Wall Street Journal, the use of thin client computing is undergoing a renaissance in both businesses and personal computing. The fact is, as The Journal notes, millions of us already use Web based e-mail, business and personal shopping and online photo services as well as many other processes. Long distance telephone service is increasingly done over broadband high-speed Internet instead of copper wire, and major financial institutions operate largely over the Internet. Thin client computing at the small business level cannot be far behind. Big change is also in store for businesses that exist only on the Internet.

Google-driven dreams

Many believe that change will be driven by the various efforts on the part of the guys from Google seeking to justify the company’s astronomical stock price. You can go to the Google Web site today and implement a dizzying array of programs including a truly remarkable one called Keyhole that displays aerial photographs, taken by satellite, of your house or office building. Just go to http://www.google.com/options/index.html and you’ll see what I mean. Most of the current Google services are free but they’re just the tip of the iceberg. With close attention to “the numbers”, there are profits to be made—and the emergence of Internet based enterprise is the result. There is much more on the way, including entertainment such as a full length films and music as well as innumerable business applications such as the secure storage of files and information off site. Google has realized the vision of a business based solely on the Internet, and other companies such as Amazon.com and eBay have made it clear such virtual firms can prosper. And, unlike my friend from the 1990s who deprecated “numbers”, it is the numbers—profit numbers—that drive this development.

Mitigation Specialists in Capital Cases

I n June of 2002, the landscape of death penalty trials was radically changed in Arizona and across the nation. In Ring v. Arizona, the U.S. Supreme Court held that judge sentencing was unconstitutional and that a jury must decide whether aggravating circumstances exist to determine a defendant’s eligibility for a death sentence. Since then Arizona capital defense practitioners have struggled to learn the skills and knowledge to effectively defend and present the complex issues in a capital case under the new jury sentencing system.

A capital case’s nature is an incredibly burdensome undertaking. Basically, it requires simultaneous preparation for both phases of the trial. The innocence or guilt phase must be coordinated with the “penalty phase.” The capital defense team must be immediately prepared to present mitigation if a guilty verdict is reached and the jury finds an aggravating factor.

Need for mitigation

According to the American Bar Association, the skills and expertise needed to represent a capital client require a multidisciplinary team approach. The revised 2003 ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases detail assembling a capital defense team. Guideline 4.1, for example, notes that the capital defense team should consist of “no fewer than two attorneys, an investigator, and a mitigation specialist.” The commentary to this guideline specifically notes that a mitigation specialist is part of the present day “standard of care” in capital cases.

Capital cases require an in-depth investigation to develop a reliable social history of the defendant. This is the crucial first step in finding mitigation evidence that counsel may offer during trial. According to Mary Durand, the first mitigation expert qualified by the Arizona Supreme Court, a social history also “allows counsel to rebut, defeat, or mitigate evidence offered by the prosecution as aggravation.”

Unique skills required

The investigation and collection of a social history requires skills not generally possessed by attorneys or traditional investigators. It includes the ability to analyze the client’s life history and to understand developmental experiences, mental impairments, sociocultural issues, and family patterns. The life history is multifaceted in nature and transgenerational in scope.

A mitigation specialist should possess specialized interviewing skills to elicit private and often shameful information from the client, family members, and other lay witnesses. These disclosures are critical to the defense team’s presentation of evidence. The mitigation specialists should also become involved in the capital case immediately upon counsel’s appointment. Social history investigation is incredibly time-consuming. Many agencies require months—sometimes years—complying with record requests. Additionally, social history factors prepared in mitigation are relevant to other psycho-legal issues like competency to stand trial, insanity and voluntariness of statements. Because the relationship between defense team members and the client may have a critical impact on case outcome, it is essential that team members, particularly the mitigation specialist, establish trust and maintain rapport with the client and family members.

Mitigation specialists in capital defense work generally have varied educational and professional backgrounds. Pursuant however to the ABA Guidelines, at least one defense team member must be qualified by training and experience to detect mental impairments. For this reason, if the mitigation specialist does not have the necessary background and skills, the team must include a person who does.

Amended Rules of Criminal Procedure

In addition to the ABA Guidelines, the Arizona Rules of Criminal Procedure were amended in 2002 (based on recommendations by the Capital Case Commission) to provide for a mitigation specialist’s appointment in capital cases. The criminal rules define a mitigation specialist as “a person qualified by knowledge, skill, experience, or other training as a mental health or social professional to investigate, evaluate, and present psycho-social and other mitigating evidence.” Scharlette Holdman, a nationally renowned mitigation expert explains that “a mitigation specialist acquires knowledge, experience, and skills in these areas through education, professional training, and properly supervised experience.”

However, despite recent improvements in the courts’ understanding of capital case investigation and the mitigation specialist’s role, no standards have been adopted to ensure their competence.

The competent mitigation specialist possesses knowledge and skills to conduct the social history investigation and assist counsel in determining what evidence to present during the penalty phase. It remains counsel’s duty under the ABA Guidelines to ensure that each member of the defense team is fulfilling their responsibilities.

Because “death is different,” a qualified mitigation specialist must be employed in every capital case.

Kupferberg is a capital mitigation specialist at the Maricopa County Public Defender’s Office.
Jewish Trials
continued from page 1

Maricopa Lawyers: Please give a brief summary of the featured trials.

Lederman: The Drephys Affair is a case of military espionage that mobilized the French people and fractionalized them politically, militarily, religiously and economically for more than a decade.

The Leo Frank Affair, the murder of 13-year-old Mary Phagan in Atlanta, was blamed on a hapless Yankee Jew, who was convicted and then dragged from prison by a lynching mob of 25 men.

The Rosenberg Trial was a World War II case of love, espionage, deceit and betrayal in which Julius and Ethel Rosenberg were convicted and sentenced to execution in the electric chair for conspiracy to commit espionage by stealing atomic secrets from the Los Alamos military base.

The Goldman v. Weinberger case examines the right of an Orthodox Jew to wear a yarmulke (Jewish head covering) while on duty and in uniform in the military.

ML: Based on the series’ theme, Jewish trials that have changed history, has there been a Jewish influence of the practice of law itself?

L: Undoubtedly, Jewish thinking has influenced not only the substance but the process of law as well. The Torah (Five Books of Moses), also called the Written Law, was codified in approximately 500 BCE. The rabbis, scholars and sages who interpreted and expounded upon the Biblical laws of the Torah wrote the Talmud, a compendium of legal rulings, arguments, legends, homilies and parables, that reads more like a running discussion over a period of 500 years of the best and brightest minds of the times. The Talmudic scholars engaged in a process of examining words, phrases and issues and argued amongst themselves to identify meanings and nuances, resulting in a compilation of laws which are followed to this day. The actual process is similar to the type of legal analysis most lawyers engage in today.

ML: What are the larger issues examined in the series? How do they affect lawyers today, regardless of religious or political preference?

L: By examining the role and impact of the media through primary and source material, we are able to observe the public’s developing perception of the Jew in society. The historical, political, economic and religious influences during the period in which the cases emerge will be examined to provide a greater appreciation of the interplay between history, politics and law. The series will explore cases which transcend the history of the specific act or allegation, giving rise to the types of issues that transform a case from a legal proceeding into an “affair” so powerful that they are capable of fractionalizing communities and dividing a nation.

Some of the larger issues explored in this series concern: the nature and power of anti-Semitism, the genesis of modern mass politics, freedom of the press, the impact of immigration on American society, and the nature and scope of the First Amendment’s freedom of religion clause.

As lawyers, we often become exceedingly involved with the micro issues of each case and lose sight of the greater, more global issues that envelope us. Looking at these issues will provide an opportunity to appreciate the content as well as the context.

ML: Why is it important for attorneys to attend this series?

L: Many lawyers do not have the time or inclination to reach beyond the daily demands of a legal practice to explore the issues presented in this series. It will provide them with a more far-reaching appreciation for how the work they do impacts society in ways that are not always apparent but often quite significant. It is also an opportunity to learn more about what the Anti-Defamation League does both locally and nationally.

The four-part luncheon series will be held on the first Thursday of the month in February through May: Feb. 3, March 3, April 7, and May 5, 2005. Each presentation will begin with lunch at 11:30 a.m. until noon, immediately followed by an hour-long lecture. Each individual luncheon costs $36, or a series ticket can be purchased for $130. For more information, contact Mona Fontes at (602) 257-4200 x131 or mfontes@mcbabar.org.
Chief Justice Attempts to Quiet Political Diatribe Concerning the Judiciary

By Joan Dalton
Maricopa Lawyer

n what looks like a move to ease tensions concerning any upcoming appointment and confirmation process for Bush-appointed judicial nominees, Supreme Court Chief Justice William Rehnquist made room in his 2004 Year-End Report on the Federal Judiciary to remark upon the criticism of judges, which has "in the eyes of some, taken a new turn in recent years." "But," says Rehnquist, "criticism of judges and judicial decisions is as old as our republic; an outgrowth to some extent of the tensions built into our three-branch system of government. To a significant degree these tensions are healthy in maintaining a balance of power in our government."

House Majority Leader Tom DeLay (R-Tex) might agree with the chief justice that the least democratic branch of government has become the most powerful.

Rehnquist's remarks seem geared toward heading off direct political attacks against the judiciary; some in fact spearheaded by DeLay, in the form of Congress limiting the jurisdiction of judges, judicial impeachments for what some might consider "activist" rulings, and any measures that would infringe on judicial independence. End the end, Rehnquist seems to be saying, extreme measures to impeach federal judges who issue decisions regarded by some as out of the mainstream.

But the majority leader would probably depart from Rehnquist's assessment that healthy tensions maintain a "balance of power" among the three branches, because DeLay believes that there is a substantial imbalance of power that has become rooted in the judiciary. In his essay, DeLay asserts that "over the years the federal judiciary has tipped the balance of power and become too authoritarian, exerting its will at random while frequently ignoring the will of the people." According to DeLay, "[t]he least democratic branch of government has become the most powerful."

Rehnquist's remarks seem geared toward heading off direct political attacks against the judiciary; some in fact spurred by DeLay, in the form of Congress limiting the jurisdiction of judges, judicial impeachments for what some might consider "activist" rulings, and any measures that would infringe upon judicial independence. End the end, Rehnquist seems to be saying, extreme measures in response to discordant rulings aren't needed due to the fact that "the federal judiciary [is] subject ultimately to the popular will because judges are appointed and confirmed by elected officials."
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 (ASU/D), 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.

February 2005

2 Family Law Meeting, 5:30 p.m., Fresh Start, 1130 E. McDowell Rd.

3 Four Fascinating Jewish Trials that Changed History Series
11:30 a.m. to 1 p.m., ASU Downtown
CLE: 1 hour per session
Session 1 – The Dreyfus Affair (France 1894-1906) Join us for this luncheon series on four landmark “Jewish” trials which vary widely in nature but stand as benchmarks in the history of the perception of the Jew in the modern world. All four trials examine the historical, political and religious contexts in the countries in which the trials occur.
Co-sponsored by the MCBA and the Anti-Defamation League (Arizona region).
Cost: $36.00 per session or $130 for the series of four sessions (includes gourmet sandwich lunch)

5 CLA Review Course, 9 a.m.

7 The Ethics of Sexual Encounters
12:00 p.m. to 1:00 p.m., University Club
CLE: 1 hour
Ethics? Sex? Lawyers? Judges? And Lunch? Have we got your attention yet? Join the Public Lawyers Division as it kicks off its 2005 Lunch CLE series. Get answer to questions about sex with clients, sex with opposing counsel, sex with counsel who work for the same agency/firm as opposing counsel and judges presiding over cases, when the spouse works for the agency/firm representing one of the litigants.
Cost: MCBA Public Lawyer Division member, $25.00; MCBA members, $30.00; non-member attorneys, $35.00; non-member paralegals and public lawyers, $35.00; same-day registrations/payments, $15 additional.

8 Scottsdale Bar, noon (Scottsdale Athletic Club)

YLD/ASU Mock Interview, 2 p.m. (ASU College of Law)

Child Support: An In-Depth Look at Income, Paternity and the Parenting Time Adjustment, 2:00 p.m. to 4:00 p.m., ASU Downtown
CLE: 2 hours
Join us for this in-depth look at child support including sources of income, high-income cases, adoption subsidies, social security benefits; disputing paternity pre- and post-support order and proper utilization of the Parenting Time Adjustment.
Cost: MCBA member attorneys, $50.00; member paralegals and public lawyers, $35.00; non-member attorneys, $70.00; non-member paralegals and public lawyers, $50.00; same-day registrations/payments, $15 additional.

9 MCBA Executive Committee Meeting
7:30 am.

12 CLA Review Course, 9 a.m.

14 YLD Board Meeting, noon

Paralegal Board Meeting, 5:30 p.m.

15 Banking Law Section Meeting, 5 p.m.

16 Construction Law Insurance
12:00 p.m. to 1:00 p.m., MCBA Offices
CLE: 1 hour
Cost: MCBA member attorneys, $25.00; member paralegals and public lawyers, $20.00; non-member attorneys, $35.00; non-member paralegals and public lawyers, $25.00; same-day registrations/payments, $15 additional.

The Secret of Success: Effective Strategies for Running a Small to Mid-Size Professional Firm
Session 1
9:00 a.m. to 12:20 p.m., ASU Downtown
CLE: 3 hours
Join us for this comprehensive series that will cover the effective and successful strategies for running a small to mid-size professional firm. Session 1 will provide a detailed presentation on the business decision necessary for every business, accounting practices for successful businesses and business development and marketing.
Cost: MCBA member attorneys, $75.00; member paralegals and public lawyers, $55.00; non-member attorneys, $105.00; non-member paralegals and public lawyers, $75.00; same-day registrations/payments, $15 additional.

Construction Law Meeting, noon

The Secret of Success: Effective Strategies for Running a Small to Mid-Size Professional Firm
Session 2
1:30 p.m. to 4:50 p.m., ASU Downtown
CLE: 3 hours
Join us for this comprehensive series that will cover the effective and successful strategies for running a small to mid-size professional firm. Session 2 will provide a detailed presentation on payroll and human resource compliance and practice maintenance.
Cost: MCBA member attorneys, $75.00; member paralegals and public lawyers, $55.00; non-member attorneys, $105.00; non-member paralegals and public lawyers, $75.00; same-day registrations/payments, $15 additional.

17 Estate Planning Breakfast: How to Handle Creditor Claims – By and Against an Estate
7:15 a.m. to 8:30 a.m., ASU Downtown
CLE: 1 hour
Cost: MCBA member attorneys, $30.00; Estate Planning Section member attorney, $25.00; MCBA member paralegals and public lawyers, $25.00; Estate Planning Section member paralegals and public lawyers, $20.00; non-member attorneys, $40.00; non-member paralegals and public lawyers, $30.00; same-day registrations/payments, $15 additional.

The Secret of Success: Effective Strategies for Running a Small to Mid-Size Professional Firm
Session 3
9:00 a.m. to 12:20 p.m., ASU Downtown
CLE: 3 hours including 1.5 hours of ethics
Join us for this comprehensive series that will cover the effective and successful strategies for running a small to mid-size professional firm. Session 3 will provide detailed discussion on professionalism, risk management and a panel discussion with others who use these practices on a day to day basis.
Cost: MCBA member attorneys, $75.00; member paralegals and public lawyers, $55.00; non-member attorneys, $105.00; non-member paralegals and public lawyers, $75.00; same-day registrations/payments, $15 additional.

The Secret of Success: Effective Strategies for Running a Small to Mid-Size Professional Firm
Session 4
1:30 p.m. to 4:50 p.m., ASU Downtown
CLE: 3 hours
Join us for this comprehensive series that will cover the effective and successful strategies for running a small to mid-size professional firm. Session 4 will provide detailed discussion on professionalism, risk management and a panel discussion with others who use these practices on a day to day basis.
Cost: MCBA member attorneys, $75.00; member paralegals and public lawyers, $55.00; non-member attorneys, $105.00; non-member paralegals and public lawyers, $75.00; same-day registrations/payments, $15 additional.

21 MCBA Offices Closed

22 Employment Law Section, 11:30 a.m.

Corporate Counsel Division Board Meeting, 4:30 p.m.

24 Estate Planning and Probate Trust Board Meeting, 7:30 a.m.

25 Minority/Women Task Force Brown Bag, noon

26 CLA Review Course, 9 a.m.

Barstiers Ball, 6 p.m. (Arizona Biltmore Resort and Spa)

28 Task Force on the Recruitment and Retention of Minority and Women Lawyers, noon

Appellate Update – Some Recurrent Themes in last year’s Opinions Concerning Civil Litigation
1:00 p.m. to 4:30 p.m., ASU Downtown
CLE: 3 hours
In 2004, the Arizona appellate courts handed down decisions that impact litigators of every sub-type. A panel of experienced litigators (including many of the litigators involved in the actual cases) will discuss the meaning and future impact of several 2004 decisions. 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 (ASU/D), 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.

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-mail to kbrieske@mcbar.org or mailed to: Editor, Maricopa Lawyer, Maricopa County Bar Association, 303 E. Palm Lane, Phoenix, 85004.
Michael King, a founding partner at Gammage and Burnham, has been elected to serve a two-year term on the advisory board of directors for the Southwest Business Credit Services/National Association of Credit Management of Arizona. King also became the first recipient of the Spirit of Service award, which honors his 10-plus years of volunteer service.

Southwest Business Credit Services is Arizona’s oldest and largest business credit organization specializing in the distribution of national, international and local industry credit information.

King (J.D., 1979, UA) practices law in various areas, including bankruptcy and creditor’s rights.

Paul E. Burns, of the law firm of Stetoe & Johnson, LLP, was appointed to the American Arbitration Association’s Patent Advisory Council. The council advises the association on arbitration and mediation of patent-related disputes.

The American Arbitration Association is a non-profit organization dedicated to the development and widespread use of prompt, effective and economical methods of dispute resolution.

Burns (J.D., 1984, Boston College) focuses his practice on technology and intellectual property matters, litigation and business law. He also serves as an American Arbitration Association arbitrator.

Mark Briggs, of Quarles & Brady Striech Lang LLP, was recently appointed by Governor Janet Napolitano to serve on the Council on Health, Physical Fitness and Sports.

The council’s work encourages the support of local programs, and serves as a resource to the governor on issues concerning health and physical fitness.

Briggs (J.D., 1994, U of Iowa) practice areas include corporate finance and securities, mergers and acquisitions.

David Sprentall, a partner at Snell & Wilmer, received the 2004 Spirit of Philanthropy award by the Greater Arizona Chapter of the Association of Fundraising Professionals (AFP) and the Habitat for Humanity Valley of the Sun. He was recognized for his commitment and dedication to the community at AFP’s recent Philanthropy Awards Dinner.

Habitat for Humanity Valley of the Sun provides assistance for low-income families by helping them purchase their first home with zero-interest mortgage loans.

Sprentall (J.D., 1979, Dickinson School of Law) concentrates his practice in commercial finance and real estate development finance. He is also the board chairman for the Habitat for Humanity Valley of the Sun.

Court Watch

continued from page 4

tion penalty generally applicable to at least the first two convictions for personal posses-

sion of drugs.” This provision nevertheless founded under the Constitution.

“Because the trial court imposed a sentence exceeding the ‘statutory maximum’ based on the finding that Gomez had been indicted for a violent crime,” Winthrop wrote, “that factor is subject to the Apprendi rule that the fact be found beyond a reasonable doubt.” A grand jury indictment, he noted, is issued on a finding of probable cause, not proof beyond a reasonable doubt.

“Given the lower burden of proof applied in grand jury proceedings, the mere fact of an indictment for a violent crime cannot be deemed to establish beyond a reasonable doubt that the person indicted is a violent offender.” That portion of Prop 200 therefore violates Apprendi, he held.

He also blocked any attempt the state might make to get around the Apprendi problem by arguing that Prop 200 does not require that the defendant be a violent offender but only that she had been indicted for a violent crime. The legislature may not, Winthrop held, discard the presumption of innocence. Quoting the Supreme Court, he wrote that “it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime.”

Joining Winthrop’s opinion vacating the sentence were Judge Susan A. Ehrlich and Judge Stephen M. Desens of the Cochise County Superior Court.

Editor’s note: “The Secret of Success” will replace the previously scheduled “Going Solo.”

Secret of Success

On Feb. 16, and 17, the Maricopa County Bar Association will present “The Secret of Success: Effective Strategies for Running a Small to Mid-Size Professional Service Firm”, a three-part business series. The series, aimed at small to mid-size business owners, will provide extensive information about the operational side of running a successful business, including finance and accounting; business development and marketing; human resources and payroll; and professionalism and risk management.

The series will take place at ASU Downtown. Parts one and two will take place on Friday, February 16, 2005 from 9 a.m.-12:20 p.m. and 1:30-4:35 p.m. Part three will take place on Saturday, February 17, 2005 from 9 a.m.-12:20 p.m. The cost to attend for MCBA members is $100 for the entire series and $75 per each individual session. MCBA public lawyers pay $130 for the series and $55 per individual session. Non-members pay a higher cost. For more information, contact Mona Fontes at mfontes@mcbabar.org or (602) 257-4200 ext. 131.

Have News to Share?

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

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MCBA YLD’s 2005 Barristers Ball

February 26, 2005
Arizona Biltmore Resort & Spa
Benefiting: The Justice Learning Center and Museum

Purchase a “Mystery Bag” by jeweler Moda Fina for a better than 1-in-3 chance to win: $200 gift certificates (40), jewelry boxes (2), sapphires (10), and grand prize 1-carat diamond. (Only 150 “Mystery Bags” will be sold)

Please reserve ____ bags @ $50.00 per bag. (must be present to win)

Enclosed is my check for $____.

Or

Please charge my: □ Visa □ Mastercard

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Name on C.C.: ____________________________

C.C. billing address: ____________________________

City: ____________________________ State: _______ Zip: __________

Signature: ____________________________

(Make Checks payable to: MCBA)
Professional Liability Insurance Offers Lawyers Protection

February’s featured expert is Chris Oberhaus of Bernard, Dietrich Insurance Services. Oberhaus, a licensed independent insurance agent, specializes in placing coverage for law firms, including liability insurance for professional, general, employment and directors and officers practices, as well as a complete range of property insurance. Bernard, Dietrich Insurance Services is a full-service property and casualty agency that has been providing insurance services to Arizona law firms for 12 years. Oberhaus delves into the often confusing world of professional liability insurance, explaining why it is necessary, what it covers, and what to look for when purchasing coverage.

Q Why is professional liability coverage needed?
A General liability insurance, which is included in package policies that are designed to provide coverage for a business, responds to claims for property damage and bodily injury. Wrongful acts committed by the insured in the course of his or her professional activities, however, are specifically excluded. Suits alleging malpractice have risen dramatically in both frequency and severity during the past decade, making professional liability insurance all but mandatory in order to protect assets of both the attorney and the firm.

Q What does professional liability insurance cover?
A Professional liability insurance fills the gap left by general liability insurance, providing coverage for successful claims made against the firm and/or attorney for wrongful acts committed in the course of his or her duties as an attorney, and just as importantly, legal costs for defending the insured against all such claims, whether or not they are eventually found to have merit.

Q What are the key points to consider when purchasing lawyers’ professional liability insurance?
A

• Agent selection.
  Select an agent to represent the firm who is experienced in assisting law firms in marketing their insurance coverage and evaluating the options available to them.

• Is the policy issued on a “claims-made” or “occurrence” basis?
  A claims-made policy requires that a claim be submitted during the period in which the policy is in force for coverage to apply, while an occurrence policy will provide coverage if the act leading to the claim occurs during the period the policy was in force, irrespective of when the claim is eventually filed. Most lawyers’ professional liability policies covering attorneys in Arizona today are written on a claims-made basis. However, caution must be exercised if consideration is given to moving from one method of coverage to the other in order to avoid gaps in coverage.

• What limits should be chosen?
  This is often a difficult question to answer. Ultimately, the members of the law firm have the best information on which to base the decision. Factors to consider include: the value of the cases being handled and work performed, areas of practice, claims history, local legal environment and number of attorneys to be covered. Limits are quoted as two numbers, for example, $1 million/$2 million. The first number is the maximum amount the policy will pay for any one occurrence, the second is the aggregate limit, or the total amount that will be paid in any single policy period (normally one year). Typical limits range from $1 million/$2 million to $1 million/$5 million.

  Firms engaging in riskier areas of practice, such as intellectual property or securities law, often opt for higher limits. It can be difficult to increase limits once they are established, because insurance companies are wary of the moral risk implied (“Why does the firm want higher limits? Do they know something they are not disclosing?”). Firms may therefore want to purchase the highest limits they anticipate ever needing when initiating coverage and/or switching carriers.

• How are defense costs handled?
  Defense costs can be “inside” or “outside” the limits. When defense is inside the limits, the cost of defending the insured’s claim erodes the limit of the policy, leaving less money available to pay any resulting claim if the plaintiff is successful. This aspect of coverage is often overlooked, or worse, misunderstood, which can lead to a nasty surprise in the event of a large claim. Policies with defense outside the limits are usually, but not always, more expensive than those with defense inside the limits. With defense outside the limit, the “extra” coverage available for the cost of defense can be unlimited or a set amount (often equal to the liability limit).

• Are all insurance carriers the same?
  Carriers vary by size, financial strength and whether or not they are admitted. An admitted (or “standard”) carrier files its policies and rates with the state, is more restricted in how it can price its policies, which are often less expensive. A non-admitted (excess and surplus) carrier has a great deal of flexibility in how its policies are worded and priced and can more readily accommodate firms with unusual needs and/or poor loss histories. Non-admitted carriers’ policies are frequently expensive. Insurance carriers are rated by A.M. Best. The highest rating is “A++”, with an “A” rating considered the minimum acceptable level by most purchasers.

Chris Oberhaus can be reached at 602-230-9840 or coberhaus@bdaweb.com. Bernard, Dietrich Insurance Services’ web site address is www.bdadweb.com.

Keller Rohrback, P.L.C. Is Pleased to Announce That

Stephen R. Boatwright
Has Joined the Firm as a Member

Dan Larson
Has Become of Counsel to the Firm

and

Alicia M. Corbett
Has Joined the Firm as an Associate

Mr. Boatwright, Mr. Larson and Ms. Corbett will practice in the areas of securities (representing both public and private companies), corporate and limited liability company formation, governance and transactions, mergers and acquisitions and intellectual property matters.

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Invitation for Public Comment
Judicial Reappointment

The Glendale Judicial Selection Advisory Board (JSAB) is considering the reappointment of Judge Jean Louise Baxter to a four-year term as City Judge in the Glendale City Court.

All interested parties are invited to offer comments to the JSAB regarding Judge Baxter’s judicial performance to serve another term as City Judge at the following hearing:

4:00 p.m., February 10, 2005
Glendale City Hall
5850 W. Glendale Avenue, Glendale, AZ
Room B-3

Signed, written comments received by February 9, 2005 will also be considered by the JSAB.

Send written comments to:
Karen Ewing, Chair
Judicial Selection Advisory Board
5711 W. Glendale Avenue
Glendale, AZ 85301

The Judicial Selection Advisory Board will consider public comments and other relevant factors in making a recommendation to the Glendale City Council regarding the reappointment application of Judge Baxter.

January 2005
Invitation for Public Comment
Judicial Reappointment

The Glendale Judicial Selection Advisory Board (JSAB) is considering the reappointment of Elizabeth R. Finn to a two-year term as Presiding City Judge in the Glendale City Court.

All interested parties are invited to offer comments to the JSAB regarding Judge Finn’s judicial performance to serve another term as Presiding City Judge at the following hearing:

4:00 p.m., February 10, 2005
Glendale City Hall
5850 W. Glendale Avenue, Glendale, AZ
Room B-3

Signed, written comments received by February 9, 2005 will also be considered by the JSAB.

Send written comments to:
Karen Ewing, Chair
Judicial Selection Advisory Board
5711 W. Glendale Avenue
Glendale, AZ 85301

The Judicial Selection Advisory Board will consider public comments and other relevant factors in making a recommendation to the Glendale City Council regarding the reappointment application of Judge Finn.

Computing
Power of the ‘90s

What has made this possible is the unbridled optimism of the ‘90s. During that decade, companies such as Level One Communications and Qwest laid millions of miles of fiber optic cable all over the world. Fiber optic cable is able to handle much larger amounts of digital information than copper wire and satellite distribution. Most of the capacity has been dormant since the dot-com bust, but in recent months major communications companies such as Cox Communications, Time Warner and Comcast have created networks that can deliver wonders such as on-demand movies and other consumer-oriented products. Voice over the Internet telephone service is exploding, and commerce over the Internet is growing at rapid pace. Even so, 80 to 90 percent of the fiber installed during the ‘90s is still unused and many entrepreneurs are casting a sharp eye toward that neglected resource. Now that high speed broadband access is readily available and relatively inexpensive, it can be expected that the revolution anticipated ten years ago has started up again. We can expect to see many business uses for high speed Internet connections. We will not see the end of offline home based entertainment (although the videotape is likely to go the way of the Yugo) or the end of using powerful personal computers in the business environment. What we will see is increasing integration of business and personal resources over the Internet that will in turn create a greater need for all of us to find ways to survive in “24/7” environments.

Google has just told us that it is scanning millions of books in the New York public library as well as libraries at four universities—Harvard, Stanford, Michigan and Oxford. Any digital information is now fair game for Google search technology, including offline databases, music, photos, and even upcoming video searches. This is Westlaw and Lexis on steroids. It “is the day the world changes,” says John Wilkin, a University of Michigan librarian working with Google. “It will be disruptive because some people will worry that this is the beginning of the end of libraries. But this is something we have to do to revitalize the profession and make it more meaningful.” Ah so………Plus ca change, plus c’est la meme chose.
An Identity Lost: What One Attorney Gained from Change

By Kathleen Breske
Maricopa Lawyer

Donna Killoughey Bird was drawn to law in a somewhat unique, though understandable, way. After graduating from college in the Chicago area, she taught school for five years. Her experience teaching math to junior high students propelled her to find another job, and she returned to college to get her law degree. Graduating from Arizona State University, Killoughey Bird entered a career she loved, and always has that “miserable” teaching experience to keep things in perspective.

Killoughey Bird is unique for another, more tragic reason. On September 11, 2001, she lost her husband, Gary, in the attacks on the World Trade Center. He was the “dot” on the map for Arizona, the one resident whose life was lost in that unfathomable event. For all intents and purposes, Killoughey Bird became Arizona’s “poster child.” Embraced by many people in the aftermath, she still speaks of all the support she had during that devastating period.

After losing the love of her life, Killoughey Bird was forced to re-examine her identity. Through no choice of her own, she needed to make a significant life transition to maintain inner peace. And though redefining herself came with challenges, it also brought beautiful confirmations of her faith and family and all else important in her life.

As a result of that reflection, combined with a growing urge for change after more than two decades in private practice, Killoughey Bird took a huge career leap. She still embraced her role as an attorney, but she was ready to begin a new “season of life.” Though she always considered her work a “ministry of practice,” she wanted more meaning, more drive to go after things. And this is what brought her into philanthropy work as the director of development and general counsel for LIFE TEEN, a Catholic youth ministry. Interestingly enough, this was not a position Killoughey Bird actively sought out—it more or less found her, confirming her belief that things happen for a reason.

Many people come to the point where they want to make a significant change in their lives, be it professional or personal. Killoughey Bird appreciates the rewards and challenges that come with leaving one way of life and entering another.

“Everything that went before [my job move] prepared me to be able to say yes enthusiastically and confidently. I never looked back.”

The power of emotion is very evident when Killoughey Bird speaks of her decision, as she is clearly rejuvenated by her new job. Familiar is her role of general counsel, but she also applying a new skill set as the director of development. Marketing is something Killoughey Bird has been doing for years—demonstrative of how valuable all those years of experience remain, after moving from private practice to non-profit.

What advice does she have for others who are beginning to get the itch for a change?

“Write things down—get in touch with what you want to gravitate towards by organizing your thoughts. Give yourself enough lead time to look at all those thoughts and be objective. Examine your options and step outside the box with confidence.”

Killoughey Bird herself asked for guidance from above, and she suggests listening to your intuition. And “solicit mentors.” According to Killoughey Bird, there is always a need for mentors, regardless of what your age or where you are in your career.

One thing that hasn’t changed in Killoughey Bird’s life is the Maricopa County Bar Association, which she has been a part of for the last 25 years. The first organization she joined after giving money to the state bar, MCBA remains relevant and responsive to Killoughey Bird’s career. Her favorite membership benefit? The Maricopa Lawyer, which provides her with updated news and a current feel for her legal community.

Though ten years ago she never would have pictured herself where she is now, Killoughey Bird has always embraced change. She says she has found the final chapter in her career, but she continues endlessly growing as a person. A firm believer in self-nurturing, she puts balance above all else in her life, and sets boundaries that allow for growth. Killoughey Bird has amazing relationships with her family and faith, and she is always trying to “shed her skin” to embrace new moments.

And with that attitude, in another ten years, who knows what life holds for her.
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Burch & Cracchiolo, P.A., seeks an associate with 1-2 years experience in Arizona for insurance defense litigation to include motion practice and depositions. Excellent writing ability is necessary and experience in civil rights litigation is helpful. Please e-mail resumes to ineale@bcattorneys.com.

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Federal Court fees increase

Attorney admissions fees in the federal Courts of Appeals have increased by $150, making the attorney admission fee to the bar for the 9th Circuit Court of Appeals $190. The fee increase became effective January 1, 2005. Effective February 7, 2005, civil filing fees in federal district court for the District of Arizona will increase to $250.

Arizona Supreme Court to hear Tucson Citizen appeal

The Arizona Supreme Court will review the validity of a Pima County judge’s decision to hold a trial in a lawsuit alleging that the Tucson Citizen newspaper intentionally inflicted emotional distress by printing a letter on its Op-Ed page that suggested killing Muslims at nearby mosques when American soldiers are attacked in Iraq. While Superior Court Judge Leslie Miller wrote in her May 10, 2004, order that “reasonable minds could differ in determining whether the publication of the letter rose to the level of extreme and outrageous conduct,” Citizen Publishing Company asserted in its petition for review that the fundamental First Amendment right to engage in uninhibited political debate is at stake.

Website posts federal judgeship vacancies for the 109th Congress

The Federal Judiciary website is reporting a total of 37 federal judgeship vacancies that could be filled during the 109th Congress. 13 vacancies occur in the U.S. Courts of Appeals, which have a total of 179 authorized judgeships. There are 21 vacant judgeships in the federal district courts, which have a total of 678 authorized judgeships. One out of nine authorized judgeships is vacant in the Court of International Trade. Federal judgeship vacancy information is available at: http://www.uscourts.gov/judicialvac.html.

Federal Judicial Center to report on possible impact of citing unpublished opinions

In his 2004 Year-End Report on the Federal Judiciary, Chief Justice William Rehnquist announced that the Federal Judicial Center will report next spring on the possible impact of a rule permitting the citation of unpublished opinions. “For several years, judges and lawyers have debated whether Courts of Appeals should prohibit citation to so-called unpublished opinions,” he wrote.

The Volunteer Lawyers Program thanks attorneys

The Volunteer Lawyers Program thanks the following attorneys and firms who accepted these cases to assist 35 low-income families during the past two months. Each attorney receives a certificate from the Maricopa County Bar Association for a CLE discount.

Assistance to Non-Profit Organizations:
- Robert W. Clark
  Sole Practitioner
- Denise McClain
  Quarles & Brady Streich Lang

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- Nick Rayes
  Sole Practitioner

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  Jennings Haag & Cunningham
- Robert M. Kort
  Snell & Wilmer
- James M. Maldonado
  Jennings Haag & Cunningham
- Richard C. McDugald
  Mead & Associates
- Randy Nussbaum
  Jaburg & Wilk
- Jonathan Wallack
  Bonnett Fairbourn Friedman & Balint

Employment:
- Francis Fanning
  Sole Practitioner
- Richard J. Harris
  Sole Practitioner
- James “Burr” Shields
  Sole Practitioner

Family Law/Domestic Violence:
- Dorian Eden
  Tiffany & Bosco
- Christina Hamilton
  The Cavanagh Law Firm
- Michael E. Hurley
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- Kevin A. Park
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Guardians Ad Litem for Children in Family Court:
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  Sole Practitioner
- Danielle J. Malody
  Snell & Wilmer
- Elizabeth J. Sawyer
  First National Bank of Arizona

Guardianships of Minor Children:
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  Bryan Cave
- Bryan Sander
  Swenson Storer Andres & Frazelle

Guardianships of Incapacitated Adults:
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  Sole Practitioner

Home Ownership Issues:
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  Sole Practitioner
- Katie Carly
  Sole Practitioner
- David W. Garbarino
  Mohr Hackett Pederson Blakley & Randolph
- Donald Kunz
  Kunz Plitt Hyland Demkong & Kleifield
- David J. Quimette
  Mariscal Weeks McIntyre & Friedlander
- Michael R. Scheurich
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  Moore & Benham

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  Steven J. Brown & Associates
- LaShawn Jenkins
  Quarles & Brady Streich Lang
- Steven D. Keist
  Sole Practitioner
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A Closer Look at Merit Selection
By Jack Levine
Maricopa Lawyer

The new legislative session is here. If last year’s session is any barometer for this year, we’re bound to get a spate of bills to abolish the merit selection system in favor of an electoral system.

The question is: why is there so much interest by the Legislature to abolish, or radically change merit selection?

In my opinion, there are some who believe that the discontent at the Arizona Capitol stems from a legislature’s desire to balance the powers of the three branches of government. With term limits imposed by law on the legislative and executive branches and what amounts to a life-time appointment for merit selection judges, there are probably more than a few legislators who want the judicial branch to be subject to the same political process that legislators live and die by.

Ironically, the creators of merit selection probably never anticipated that judges would hold office largely immune from the effects of the judicial retention election process. In the early years of merit selection, from 1984 to 1992, the evaluation of merit selection judges was performed solely by a polling of lawyers in Maricopa and Pima Counties. Even though lawyers in those days were normally very generous in their evaluation of judges, two judges actually received low enough scores to be defeated in the judicial retention elections. In 1992, largely because of criticism by the Legislature that the public should have more of a role in evaluating judges, the evaluation poll was expanded by constitutional amendment to include jurors and witnesses.

Moreover, instead of giving voters the unabridged numerical scores attained by judges, as was initially done, the Commission on Judicial Performance Review was established to make recommendations to the voters on whether judges “meet” or “do not meet” judicial performance standards. In what may have been the worst blunder ever made in the history of merit selection, a blue ribbon committee, headed by Justice Robert Corcoran, formulated rules to implement the Constitutional amendment and recommended that the commission, which would be evaluating judges, should include among its 34 members six judges. The judges on the commission, because of the prestige and influence of their office, would normally be expected to dominate the discussion and voting. Although there are also six attorney commission members, it would be an unusual lawyer who would be likely to oppose the views of the judges on the commission when deciding whether or not to recommend their fellow judges up for retention. It is probably for this reason that lawyers never appear at the public hearings held by the commission to offer criticism of judges who are up for retention.

Furthermore, the 18 public members of the commission are likely to defer to the opinions and votes of the lawyers and judges on which judges to retain because of the understandable perception that the lawyers and judges know far more than they do about the workings of the legal systems and judicial standards and performance. The end result of this very expensive and time consuming judicial evaluation and retention procedure is that the merit selection judges have gained almost complete control of the judicial retention process, which they are not likely to give up anytime soon.

Since 1992, when the present retention rules went into effect, not a single judge has failed to meet the standards adopted by the Commission on Judicial Performance Review. Because so few members of the electorate know much about the qualifications of the judges up for retention, voters predictably rely heavily on the recommendations of the commission and have voted overwhelmingly at every election in favor of retaining all of the judges who appear on the ballot. In one extreme example of this phenomenon, the electorate even voted to retain a judge who had been convicted of possession of marijuana only 30 days before the election.

On the other hand, one of the big advantages of electing judges is that the electorate even voted to retain a judge who had been convicted of possession of marijuana only 30 days before the election. In a traditional election, the voters can compare and evaluate the qualifications and records of competing judicial candidates. Although election campaigns were time consuming and expensive, they had the salutary effect of bringing the judicial candidates into the community where judges had the opportunity to “press the flesh” and personally interact, face-to-face, with the citizens of the community.

The one disadvantage of the elective process in earlier years was the practice of soliciting campaign contributions from lawyers, who would later appear before the judge, expecting and, often receiving, generous treatment. This is now no longer possible as a result of the requirement that campaign contributions must be publicly reported. If we were ever to go back to a system of electing judges, recusal would be required if a lawyer appeared before a judge to whose campaign he or she contributed. On the other hand, under merit selection we have still not solved the problem of judges secretly rewarding lawyers who may have assisted them politically in the merit selection process.

One of the chief advantages of the elective system was that judges were always courteous and polite to those appearing before them, particularly members of the bar. Before merit selection, if a judge developed a reputation for treating lawyers badly, he would often find that he had a long list of opponents in the next primary or general election. On the other hand, it was an unwritten rule that judges who were competent, polite and considerate would not have any opposition at election time. Lawyers who attempted to run against good judges were ostracized by the legal community with the result that good judges could look forward to a long tenure on the bench, if they so desired.

Sincerely,
Charles W. Wirken
State Bar of Arizona President

State Bar Board Opposes 9th Circuit Split

Dear Editor,

In January, Maricopa Lawyer ran a story about proposals to split the 9th Circuit Court of Appeals. I thought this would be a good time to remind all attorneys that the State Bar Board of Governors has, for years, opposed efforts to split the 9th Circuit.

On more than one occasion, the Board has passed a resolution opposing various plans to split the court and has repeatedly written to senators, congressmen and other government officials to let them know the Board’s position.

Although the debate in Congress regarding whether to maintain or split the 9th Circuit falls along party lines, the Board doesn’t see this as a partisan issue. The Board believes Arizona is well served by the 9th Circuit Court as it is currently configured. Reorganizing would do more harm than good to Arizona attorneys and the clients they represent.

Sincerely,
Charles W. Wirken
State Bar of Arizona President

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