Innovative Program Invites Visitors to Judge the Court

By J.W. Brown
Maricopa Lawyer

O
ver the past several months, all visitors to Superior Court’s locations across the Valley have taken advantage of an opportunity to tell court officials precisely what they think of the services, facilities and level of justice they got during their “day in court.”

As they leave—giving compliments or getting gripes off their chests—they are given a gold sticker to wear that declares “Today I Judged the Court.” Lady Justice is also on the sticker as a reminder that everyone has equal access to the timely, fair and impartial administration of justice.

What court officials have learned so far is the majority of court customers report they are being treated fairly and equally, despite race, national origin, gender, economic status or age and believe their cases are being heard by courteous, respectful and fair judges.

Not only do visitors leave with a general understanding of what happened in court and what the next steps are, if anything, they also reported being treated with respect and courtesy from court personnel and feeling safe in the courthouse. They also feel reasonable efforts are made to remove any physical and language barriers.

The project, developed by the National Center for State Courts and called CourTools, has a multi-faceted approach to improving court performance, processes and professionalism.

A recently announced grant for $41,800 from the State Justice Institute—which will be matched with court funds—assures continuation of the self-examination that will lead to necessary improvements that are identified by members of the public and users of the court’s facilities, programs, personnel, services and resources. The SJI funding allows the court to focus on diversity, cultural competency and strategic planning.

Project manager Noreen Sharp, a special deputy court administrator, said the grant enables Superior Court funding to sustain the self-examination, self-improvement initiative to assure top quality service to all individual court customers.

“We’ve already witnessed significant benefits of this initiative,” she said. “The court has reached out to the public to have them tell us what we’re doing well and what we’re not doing well. The things the public has pointed out that need to be improved are being addressed. And they’ve identified the good things we do. We will improve on those things too.”

The CourTools initiative gauges court performance in 10 key areas: fairness and access; case clearance rates; time to disposition; age of active pending cases; trial date certainty; reliability and integrity of court files; collection of monetary penalties; effective use of jurors; court employee satisfaction; and cost per case.

Court customers are the critical component for a valid evaluation of access to the court. Visitors complete anonymous and confidential surveys as they leave the courthouse. They include jurors, lawyers, individuals seeking information or documents, trial witnesses, law enforcement officers, observers, companions to friends or family members coming to the courthouse.

The visitors, asked to complete the survey, are advised: “Your responses will help the court evaluate and improve its services.”

“It is not often that a branch of government takes a critical look at itself in the absence of some controversy, crisis or threat to its independence,” said Court Administrator Marcus Reinkensmeyer. “The Judicial Branch in Maricopa County not only is willing to evaluate its performance and service, but it is also looking toward the future to strategically plan its destiny as a justice system that serves its customers with fairness, equal access, timeliness and cultural sensitivity. This is our mission, our goal.”

CourtWatch
Daniel P. Schaack

The Way of the World: Too Little Time and Not Enough Space

In January of this year, the Arizona Supreme Court affirmed the Arizona Citizens Clean Elections Commissions’ order ousting David Burnell Smith from the House of Representatives. The court has now issued its opinion explaining its reasoning. In the process, it reaffirmed authority from over half a century ago holding that under the Arizona Constitution, impeachment and recall are not the only ways to oust an elected official from office. It also waded into—and out of—a procedural quagmire concerning how an official may challenge a ruling of the Clean Elections Commission.


In 2004, Smith was elected to represent District 7 in the Arizona House of Representatives. He accepted public funding for his election campaign and therefore agreed to abide by the commission’s campaign-finance rules. See CourtWatch page 13
Charity Work: Not Only Rewarding but Fun!

O ur fourth annual MCBA Paralegal Division Coed Charity Softball Tournament was held on Saturday, May 6. We were not only hitting, catching, and chasing after balls, we were having a ball—and all for a great cause. This year’s event proceeds went to the Marilyn Benesch Scholarship Fund. Benesch was a paralegal at the law firm of Snell & Wilmer for over fifteen years, a devoted volunteer in the community, and founding member of the MCBA Paralegal Division. She passed away in 2004. The paralegals at Snell & Wilmer honor her by awarding scholarships in her name to deserving students in the various ABA-approved paralegal programs in Maricopa County to help continue their education.

This year’s teams included the defending champion, Snell & Wilmer, who each year fields an impressive line-up of many talented athletes. I’m beginning to wonder if the question “What position do you play?” comes up during an applicant’s employment interview, or whether they have tryouts. They are great and demonstrated that again this year by taking home the first place trophy. Attorney Ben Jemsek with the law firm of Rake & Catansise fielded a team of family and friends, and they brought to the game their “own talent and skills” along with a great deal of humor and took home the second place trophy. The MCBA Paralegal Division was represented by board members Karen Lyons of Snell & Wilmer, Kathy Bunch of Fennemore Craig, Scott Hauer of Phoenix College, Brent Miller of Thomson Conant, Monica Rapp of Riley Carlock & Applewhite, and my fiancé, Tim Jennings. We graciously accepted the third place trophy.

Special thanks to Brent Miller for helping to organize this year’s event and to the law firm of Thomson Conant for their generous sponsorship of the MCBA Paralegal Division team. And special thanks to Monica Rapp for capturing the sheer athleticism of our participants and the good times had by all on digital camera. These photographs, along with the team shots identifying all players, will be online soon on the MCBA Paralegal Division’s Web site. Thanks to everyone who participated in the event and showed up to watch and support the teams. The success of events like these happens because of volunteers and sponsors who are willing to give of themselves to help others. Let’s continue that tradition.

2007 Barristers Ball Seeks Beneficiary

T he Barristers Ball, held in the spring of each year, is one of the MCBA Young Lawyers Division’s premier events. The ball offers attorneys the opportunity to socialize with one another while enjoying a wonderful evening of dinner and dancing at a top-notch location. One of the most loved aspects of the ball is its silent auction. While attendees love the wonderful items and enjoy the “competition” of securing the winning bid, not all are aware that the money they spend not only gets them their sought after item but also helps a worthy organization in their community. Proceeds from the silent auction are donated to an organization in the community to further its community service involvement. As the 2007 Barristers Ball committee begins its planning, it is looking for a worthy beneficiary of the silent auction proceeds for next year.

To be considered a beneficiary of the net proceeds from the Barristers Ball’s Silent Auction, the program or project must:

1. Qualify as a charitable organization as described in Section 501(c)(3) of the Internal Revenue Code, or any successor provision.
2. Perform a public service for the community-at-large.
3. Not have received any proceeds from the previous year’s Barristers Ball Silent Auction.
4. Submit a plan to the MCBA YLD Board of Directors for the use of all net proceeds from the silent auction.
5. Provide up to five volunteers to assist YLD in hosting the Barristers Ball.
6. Assist YLD in recruiting silent auction donors.

Organizations who meet these requirements are encouraged to submit an application. Do you volunteer with an organization that might qualify as the MCBA Barristers Ball 2007 beneficiary? Are you aware of a project or program in your community that might put the silent auction proceeds to good use? If so, here’s your chance to help out. Contact Jeff Kuykendall, the MCBA Barristers Ball 2007 chair at (602) 530-8032 or JBK@knet.com to request an application for your organization or program. Applications are now available and will be accepted until July 14, 2006.

MCBA Task Force/ASU Youth Outreach Project

Participate in a speaker’s bureau to help bring Arizona’s legal community into Valley classrooms. The Youth Outreach Project is designed to get children of all ages thinking about higher education, especially in underprivileged school districts. Attorneys are needed to form a bank of names for schools. The program is very flexible as far as time is concerned. For more information and to fill out a participation form, e-mail jessica.sanchez.1@asu.edu.
MCBA Young Lawyers Division’s Law Week 2006 Was a Great Success!

Many thanks to all of the attorneys and legal professionals who volunteered their time and effort to serve the public.

Thank You to Law Week MCBA 2006 Sponsors:

Bonnett Fairbourn, Friedman & Balint, PC

A Special Thanks to Arizona Supreme Court Chief Justice Ruth McGregor and Justice Scott Bales for participating in MCBA Law Week 2006.

MCBA Selects Northwestern Mutual as Endorsed Carrier for Disability Insurance

Northwestern Mutual was chosen by the MCBA Ad-Hoc Insurance Task Force and approved by the MCBA Board of Directors as the exclusive carrier for disability insurance. The selection was in response to a RFP issued by the Maricopa County Bar Association to offer its members an endorsed program for disability insurance. The committee negotiated an exclusive agreement with Northwestern Mutual to ensure quality service at competitive rates while easing members’ burden of having to shop around for coverage. The Maricopa County Bar Association will be working directly with Michael Leed to provide these products to its members.

Northwestern Mutual is pleased to offer MCBA members a variety of disability insurance products including individual, small and large group coverage. In addition to competitive rates, members will receive personalized service as well as coverage suited for the diverse legal community.

Northwestern Mutual is offering its members group and individual plans with the following advantages.

- Guaranteed Issue Group Plans for 3 or more employees
- Up to a 10 percent discount for members
- Excellent contract language
- The highest financial ratings available from any disability insurance company.

Look for more information about this and other insurance products from the Maricopa County Bar Association. For more information you can visit www.maricopabar.org. You can also contact Amy Jean Ham, Membership Services Director, at 602-257-4200 or e-mail aham@mcbabar.org.
Arizona Attorney General Honors Reinstein

By J.W. Brown

Maricopa Lawyer

Maricopa County Superior Court Judge Ronald S. Reinstein has been named the 2006 recipient of the Arizona Attorney General’s Distinguished Service Award for Victims and Victims’ Rights.

The award honors an individual, group or organization that endeavors to assure better treatment of crime victims by exercising principles and practices of effective leadership. The honoree is also chosen because of outstanding vision, initiative, commitment, excellence, service to others, cooperation and integrity.

Reinstein accepted the award at the Victims’ Rights Week kick-off program in April.

“Leaders serve as a model and set an example for others and that’s why we can think of no better person in Arizona to receive this award than Judge Reinstein,” said Bill Hart, executive director of the Attorney General’s Office of Victim Services.

Reinstein said he is honored to receive the award because it reflects “the impact that crime victims and their families have had on me during my career.”

He has been involved in a number of victims’ rights associations including the Children’s Justice Task Force, Parents of Murdered Children and the National Center for State Courts’ Project on Victims of Crime in the Criminal Justice System. Reinstein is a consultant for the Office of Victims of Crime.

“The criminal justice system shouldn’t be just about judges, lawyers, police, probation officers and defendants. Victims in the past have been the forgotten participants in the system,” Reinstein said. “With the advent of victims’ rights, they are no longer, but more work needs to be done.”

This is the third time Reinstein has received awards of excellence from the Arizona Attorney General’s Office. In 1991, the judge received a Distinguished Service Award for Victims and Victims Rights. In 2001, he received an Award for Excellence–Outstanding Sexual Assault Judicial Professional Award.

Among the numerous other honors he has received are the State Bar of Arizona’s James A. Walsh Outstanding Judge Award and the Maricopa County Bar Association’s Henry S. Stevens Outstanding Judge Award.

Reinstein has been a member of the Superior Court bench since 1985. He served as criminal presiding judge from 1990 to 1998 and also served as associate presiding judge of the court from 1998 to 2000. As an expert on DNA evidence, he has been a speaker at a variety of legal forums around the country, as well as in Europe.
Switching Gears: From Advertising to the Law

Caroline Larsen started out in advertising and is now a labor and employment attorney at Bryan Cave—a path not often treaded.

She was born in Burbank, California and grew up in Utah. She graduated from Weber State University in Utah with a bachelor's degree in communication, with an emphasis on public relations, as well as a minor in sociology.

After college, Larsen began working for the Utah office of a national recruitment advertising and employee communications agency. She transferred to the company's Phoenix office in 1997, where she was an account executive working with a creative services team to develop campaigns and ad copy.

Switching gears

In 2000, Larsen left advertising to go to law school.

Always fascinated by the law and litigation, it wasn't until she was 25 years old that she seriously considered pursuing it as a career.

“I was at a family wedding, seeing [relatives] for the first time in years. We were all discussing how much had changed since the last time we had all been together. As we talked about careers and how some relatives ended up doing something very different than what we might have expected, I said, ‘If I had it to do over again, I might have gone to law school.’ Someone looked at me like I was crazy and said, ‘You’re 25 years old! You could still go to law school.’”

Cutting ties

It was at that moment that she no longer felt tied to advertising, and instead began to entertain the thought of completely changing paths and going back to school.

Her decision to go came in stages. First, she started researching what was required to attend law school. Then she began preparing and took the LSAT. During all of her preparation, Larsen planned to continue working at the advertising agency and go to school part-time—until she found out the College of Law at Arizona State University only offered a full-time program. Already too far in, Larsen applied for financial aid and left her position at the ad agency to begin law school at Arizona State.

Two worlds coming together

Client satisfaction is an important element of success in any industry. As an account executive at the ad agency, Larsen's primary responsibility was to help clients decide where to place advertising, assist them in setting budgets, and evaluate the effectiveness of different media.

“From the perspective of working with clients to accomplish and achieve goals, it is not that different from some aspects of my job now.”

Client relations are not the only thing that parallel her job as an attorney. “In the heart of each, they are service businesses. In both advertising and law practice, I try to manage my clients’ expectations, be responsive, and deliver the best results I can.” Larsen has also learned a lot about multi-tasking during her years in advertising, which serves her well now.

Her advertising background also lends itself to her labor and employment practice as it involved developing recruitment messages and employee communications. Practicing law also allows Larsen to see different angles of an issue or problem.

“An employee may have a sympathetic claim, however I can also understand the perspective of the employer who is trying to run a business and take care of all of its customers, employees and shareholders.”

The highs and the lows

Larsen's biggest accomplishment thus far in her career is a pretty impressive one. She had the opportunity to second chair a trial in United States District Court for the District of Arizona. The trial began the day before her one-year-anniversary of joining Bryan Cave, and not many of their cases make it all the way to trial, so Larsen cherishes the experience as incredible hands-on experience for a first-year lawyer.

Her biggest challenge is learning not to focus too much on winning. She has a results-driven mindset but is trying not to focus completely on the outcome, as it is beyond her control.

Larsen truly appreciates how steep the learning curve is for new lawyers. She came out of law school with a basic understanding of the major areas of the law, but encounters something new with each case. “The variety makes practicing law interesting, but it also makes it difficult to maintain your confidence and to recognize how much progress you are making.”

Good fortune

To maintain her success, she tries not to take anything for granted. Like many attorneys, she feels very fortunate to make a good living doing something that fulfills and challenges her every day. She also has a very supportive and understanding family that encourages her to enjoy her work, even when it means less time to spend together.

In addition to hanging out with her family, Larsen typically spends the free time she has watching movies, particularly foreign and independent films, traveling, and cooking.

Sports pass

Larsen is not your typical sports fan. She does not follow sports at all—no football, basketball or baseball—but she does love boxing. “My father watched boxing a lot when I was growing up, so I have always enjoyed watching a great fight.”

Not in the cards

Looking back ten years, a lot of the elements of Larsen's life have landed in a predictable place: being married and living in a bigger city and warmer climate. But work! “If someone had told me ten years ago that I would be an attorney now, I would have thought he was crazy.” Her view of the profession before deciding to go to law school herself was shaped by “L.A. Law” and was definitely not where she saw herself. How time changes things!

In another ten years, Larsen will definitely still be practicing in Arizona. Her passion for civil litigation and employment law in particular drives her to get better and better. She would also like to have a significant role in the community and be an active alumna of Arizona State University.

Perhaps she should also encourage more advertisers to break on through to the other side.
# Get Your Last Minute CLE at the 2006 MCBA Film Festival

## Early Bird Film Fest ~ June 5 through June 7, 2006 • MCBA Film Fest June ~ 22 through June 30, 2006

Please check your selections and include this page with your registration form.

<table>
<thead>
<tr>
<th>Date</th>
<th>Time</th>
<th>Location</th>
<th>Program Description</th>
<th>Member</th>
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<tr>
<td>Monday, June 5</td>
<td>9a – noon</td>
<td>COFCO, 668 N. 44th Street, Phoenix</td>
<td>New Bankruptcy Code (CE042706)</td>
<td>$75</td>
<td>$105</td>
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<td>Monday, June 5</td>
<td>1:30 – 3:30p</td>
<td>COFCO, 668 N. 44th Street, Phoenix</td>
<td>Executive Compensation: New Rules – High Stakes (CE041906)</td>
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<td>9a – noon</td>
<td>COFCO, 668 N. 44th Street, Phoenix</td>
<td>Covering and Taking Depositions (CE050406)</td>
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<td>COFCO, 668 N. 44th Street, Phoenix</td>
<td>Trends in Electronic Evidence (CE042606)</td>
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<td>9a – 10:30a</td>
<td>COFCO, 668 N. 44th Street, Phoenix</td>
<td>Advanced Legal Writing Workshop (CE031506)</td>
<td>$63</td>
<td>$88</td>
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<td>COFCO, 668 N. 44th Street, Phoenix</td>
<td>Computer Forensics for Attorneys (CE041406)</td>
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<td>Thursday, June 22</td>
<td>9a – noon</td>
<td>Auditorium, 3003 N. Central, Lower Level, Phoenix</td>
<td>The Secrets of Success, Part 1 (3 hours ethics)</td>
<td>$75</td>
<td>$105</td>
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<td>The Secrets of Success, Part 2 (3 hours ethics)</td>
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<td>The Secrets of Success, Part 3 (3 hours ethics)</td>
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<td>Auditorium, 3003 N. Central, Lower Level, Phoenix</td>
<td>Arizona Homeowner Associations: How to Collect Assessments and Enforce Restrictions (CE051305)</td>
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<td>Auditorium, 3003 N. Central, Lower Level, Phoenix</td>
<td>What Estate Planners Need to Know About Ethics (CE051606)</td>
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<td>Economic Loss Issues in Personal Injury (CE042106)</td>
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<tr>
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<td>Covering and Taking Depositions (CE050406)</td>
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<td>Wednesday, June 28</td>
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<td>Computer Forensics for Attorneys (CE041406)</td>
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<td>Avoiding the Five Most Common Evidentiary Problems (CE012705)</td>
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<td>Auditorium, 3003 N. Central, Lower Level, Phoenix</td>
<td>Preparation and Presentation of Motions: What do Judges Expect</td>
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### 2006 Film Festival Registration

Make sure to fill out form completely and include your selections from the previous page.

REGISTRATION: Mail registration with payment to the MCBA or phone/fax/on-line with credit card information. Full payment must be received before you will be registered. All registrations not paid in full in advance will be assessed a $15 late fee on the day of the seminar. If space is available you may register at the door, however, a $15 late fee will be assessed. If you do not register two business days in advance we cannot guarantee space or materials on the day of the seminar. CANCELLATIONS: Refunds, less a $15 fee, will be issued only if the CLE Dept receives your cancellation in writing 2 business days in advance. If you have a disability, please call ahead so we may accommodate your needs.

Name: ________________________________  
Firm: ________________________________  
Address: ________________________________  
City, State, Zip: ________________________________  
Email: ________________________________  
Phone: ________________________________  
Fax: ________________________________  
AZ Bar No: ________________________________  
Method of Payment:  
☐ Check, # __________  
☐ Visa ☐ Mastercard  
Credit Card #: ________________________________  
Expirations ________________________________  
Signature ________________________________  

Yes, I'm interested in being a moderator  
To see a complete description of these programs, log on to www.maricopabar.org

Mail registration and check to: Maricopa County Bar Association  
3003 N. Central Ave. Suite 1850 • Phoenix, AZ  85012  
or call 602-257-4200 ext. 107 • or fax 602-257-0522

Who says there’s no such thing as free CLE?  
Interested in earning free CLE? Agree to act as a moderator for one of the above film fest sessions and receive a certificate for a future CLE. Check the box on the registration form if you are interested and someone will call you with additional information.
The Worth of Child Custody Evaluations

Q What is a child custody evaluation and what does it involve?

A A child custody evaluation is a multifaceted investigation conducted by a licensed mental health professional appointed by a family law judge when parents are in dispute about legal decision-making issues and timesharing arrangements involving their children. The evaluator holds a role as the court’s expert and serves as a neutral, unbiased professional with expertise in child development, parent-child relationship dynamics, and knowledge of psychological functioning.

The evaluation process involves discussing positions and client concerns with attorneys, conducting multiple interviews of the parents and children as well as observations of them together, contacting other sources of important information, reviewing relevant documents, performing psychological testing, and sometimes visiting parent’s homes. Considering multiple sources of data are key to the process.

Child custody evaluators must know and follow extensive family law rules of civil procedure recently adopted by Arizona’s Supreme Court. Those rules are available on the court’s Web site. There also are significant guidelines provided by the American Psychological Association and the American Psychiatric Association available online. A comprehensive set of standards is currently being adopted by the Association for Family and Conciliation Courts and will soon be available online.

An evaluation can usually take 25 or more hours and results in a narrative report of the evaluator’s findings and conclusions along with detailed recommendations. It can sometimes be an aid to settlement. It is always a source of important information for the court should the matter proceed in litigation.

Q How can I locate private professionals who are qualified to do a child custody evaluation?

A Reputations and word of mouth are always quite important. Professionals who do this work usually have years of training and experience and are generally known within the legal community. As one helpful source, Maricopa County Superior Court maintains a Provider Roster on its family law Web site that can be a good starting point. Individuals on this list have met at least very minimum training requirements and many do have significant experience. Start by accessing that list and then doing more homework from there. Most potential evaluators are happy to discuss their training and experience, their rates and availability, and the types of cases with which they feel most comfortable. Ask for a current resume that will give you further information about the evaluator’s professional background.

When seeking information from a potential evaluator, ask about their participation in various relevant professional organizations. The Association of Family and Conciliation Courts is one such group considered a major connecting point for family law judges, attorneys, and mental health professionals. Ask if the potential evaluator participates in a study group during evaluation work is challenging and many established professionals find it helpful to dialogue with other evaluators about procedures and the latest in research findings. Ask if they regularly participate in, or teach, professional workshops geared for custody evaluators.

Q Are there other dispute resolution or investigation processes besides child custody evaluations?

A Absolutely! Child custody evaluations take time (often 60 to 120 days or more) and can be a significant expense depending upon the issues and the extent of the necessary fact-finding. As an alternative, parents can sometimes resolve their disputes through confidential mediation. Family Court’s Web site includes a Mediator Roster that lists private mediators with training and interest in working with family law matters.

In cases where the child-related questions in dispute are specific or limited in nature (i.e. where should the child attend school, what should be the holiday or summer schedule for timesharing), a limited scope assessment can be ordered. This allows a mental health professional to do necessary fact-finding to make recommendations regarding very specific matters in dispute. Most professionals who conduct child custody evaluations are also available for this type of assignment.

For parents who already have a parenting plan and court orders in place, but have disputes about implementing those provisions, it is sometimes helpful to appoint a Parenting Coordinator (PC). PCs are private mental health professionals or attorneys who serve as facilitators working with parents to help them resolve their differences. When agreements can’t be reached, a PC is authorized to make recommendations to the court on all matters relating to the best interests of the children except for specific recommendations regarding legal custody and timeshare allocations.

Akins can be reached at (480) 946-6828 or dr.farenakins@cox.net.
## 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, 3003 N. Central Ave. Suite 1850, Phoenix 85012, 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, Chase 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.

### JUNE 2006

<table>
<thead>
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<th>Event</th>
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<tr>
<td>3</td>
<td>CLA Review Course (TBD), 9 a.m.</td>
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<tr>
<td>5</td>
<td>MCBA Early Bird Film Fest (COFCO) Editorial Board Meeting (A), 5:15 p.m.</td>
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<tr>
<td>6</td>
<td>MCBA Early Bird Film Fest (COFCO)</td>
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<td>7</td>
<td>MCBA Early Bird Film Fest (COFCO) EPPT Family Law (Fresh Start), 5:30 p.m.</td>
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**Dealing with Adult Protective Services—Their Role and Yours**
7:15 – 8:30 a.m., ASU Downtown
1 CLE hour
Cost: EPPT Section Members $25; MCBA Atty/Prof $30; MCBA Prlgl/Pub. Atty $25. Non-Members: Atty/Prof $40; Prlgl/Pub. Atty $30

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<thead>
<tr>
<th>Date</th>
<th>Event</th>
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<tbody>
<tr>
<td>10</td>
<td>YLD (B), noon Paralegal Division (B), 5:30 p.m.</td>
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<tr>
<td>12</td>
<td>YLD Board Meeting (B), noon</td>
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<tr>
<td>13</td>
<td>Ethical Issues for Public Lawyers 11:30 a.m.–1 p.m., University Club 1 hour Ethics Cost: MCBA PLD Division Members $25; MCBA Members: $30; Non-Members: $35</td>
</tr>
<tr>
<td>14</td>
<td>MCBA EC Meeting (A), 7:30 a.m.</td>
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</tbody>
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### Same-day CLE registrations/payments, $15 additional. See page 6 for full MCBA Film Fest details

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<thead>
<tr>
<th>Date</th>
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<tr>
<td>15</td>
<td>Environmental Section Meeting (B), noon</td>
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<tr>
<td>16</td>
<td>MCBA Board Meeting (A), 4:30 p.m.</td>
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<tr>
<td>17</td>
<td>MCBF Meeting (A), 7:30 a.m.</td>
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<tr>
<td>18</td>
<td>CLA Review Course (A), 9:00 a.m.</td>
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<td>19</td>
<td>VLP Meeting (B), noon</td>
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<th>Date</th>
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<tr>
<td>20</td>
<td>MCBA Film Fest Estate/Trust/Probate (B), 7:30 a.m.</td>
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<tr>
<td>21</td>
<td>MCBA Film Fest</td>
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<tr>
<td>22</td>
<td>CLA Review Course (TBD), 9 a.m.</td>
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<td>23</td>
<td>MCBA Film Fest</td>
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<td>24</td>
<td>MCBA Film Fest</td>
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<tr>
<td>25</td>
<td>CLA Review Course (B), 9 a.m.</td>
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<tr>
<td>26</td>
<td>MCBA Film Fest Minority &amp; Women Task Force (A), noon</td>
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<tr>
<td>27</td>
<td>MCBA Film Fest</td>
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<tr>
<td>28</td>
<td>MCBA Film Fest Corporate Counsel (B) 4:30 p.m.</td>
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<tr>
<td>29</td>
<td>MCBA Film Fest Summer Social (Phoenix Corporate Center LL Conference Room), 5:30 p.m.</td>
</tr>
<tr>
<td>30</td>
<td>MCBA Film Fest</td>
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### Judicial Rotations Minimized This Season

By J.W. Brown
Maricopa Lawyer

Unlike some years, this season’s judicial rotation plan impacts only a handful of judges. But in classic fashion each new assignment creates at least one additional judicial move.

In formulating the rotations, Presiding Judge Barbara Rodriguez Mundell is making minimal changes with her departmental presiding judges.

Judge Eileen Willett leaves family court for her new assignment as presiding juvenile court judge, a position held by Judge Emmet Ronan since January 2004. He remains in a leadership role, as he takes over responsibility as the Southeast Court presiding judge. That assignment has been the responsibility of Judge Sylvia Arellano since June 2004.

Judge Thomas Dunevant has been appointed presiding tax court judge, but continues to hear a civil calendar as well.

Changes in criminal assignments include Arellano, who moves to a criminal trial calendar at the Court’s Southeast facility in Mesa. Another change in the criminal department is the rotation of Judge Raymond Lee, leaving Family Court to take Judge Gary Donahoe’s criminal calendar. Donahoe moves to Family Court to assume Willett’s calendar.

The domino effect continues as Judge Crane McClennen moves from the Southeast criminal calendar being assumed by Arellano. He goes to the Juvenile Court, Durango facility in south Phoenix, bumping Judge Kenneth Mangum from his juvenile calendar to the family court calendar that had been handled by Lee.

All rotations are planned to take effect during the Judicial Conference on June 21, 22 and 23.

Editor’s note: The rotation plan is subject to change. The information in this story was accurate when submitted for publication.

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Court Hires Family Services Expert

By J.W. Brown
Maricopa Lawyer

The Superior Court in Maricopa County recently hired Barbara Fennell as director of Conciliation Services.

Conciliation Services, which was established in 1962 by the state legislature, offers conciliation counseling for parties contemplating divorce and provides and oversees parent education programs for families involved in divorce and/or custody disputes. It also provides evaluation services to the court when parents are unable to agree upon a parenting plan. The department has mediation services available to child custody and parenting time plans for families of divorce as well as services for post-divorce or paternity actions.

Previously, Fennell worked in California as a family court services director with expertise in domestic violence, child support, mediation and self-service assistance for individuals representing themselves in family law cases.

“She brings a wealth of experience and competence to the court. I am particularly impressed with her proven commitment, dedication and focus to improving the lives of children and families in conflict,” said Presiding Family Court Judge Norman J. Davis. “She sees the big picture and how Conciliation Services can interact with other programs and court procedures in a positive way. She will be a great addition to Family Court.”

Fennell has worked for courts since 1997 after spending nine years as a civil litigation attorney. She has extensive knowledge in court operations and organizational structure, legal terminology, policies and procedures. Licensed to practice law in the State of California, she managed six research attorneys for the California court and oversaw mediation services and investigations performed in the Family Court Services Unit. She also appeared in court assisting self-represented litigants on approximately 100 cases per week.

Also in the past, Fennell was a contractor for juvenile dependency representation of parents, children and the Department of Social Services (DCSS) as appointed by the court, in addition to contracting with the State of California to represent inmates at parole hearings, and provided legal counsel for probation hearings. She taught foster parent orientation for DCSS at Hartnell College and served on the board of Friends Outside. She also worked for several high-tech corporations, including Rockwell International, developing production schedules and coordinating efforts between engineering, testing, maintenance, finance and purchasing.

“We believe this extensive background will serve her well in her role of conciliation services director, in which she will manage 50 professional staff and 25 support staff and a budget of $2.5 million,” said Family Court Administrator Mary Lou Srechel. “Family Court recently developed processes to further expedite the enforcement or modification of child support and is considering plans for an expedited specialty court for parenting time enforcement. Ms. Fennell will have oversight of these expedited processes as well.”

In her new job, she will also be interacting with state agencies and courts in matters relating to Family Law and the Conciliation Courts statewide. And Fennell will participate in a yearlong review and analysis of newly adopted Arizona Rules of Family Law Procedure.

The Conciliation Services director position has been vacant since November, when then-director Tara Van Den Bosch, moved to Washington State because of her husband’s job transfer.
Increasing the Cost of Legal Services

By Jack Levine
Maricopa Lawyer

I

f the prices we pay for goods and services in a competitive economy are normally influenced by the law of supply and demand, why are legal fees so high and why do they continue to rise despite the huge surplus of lawyers in practice today? Could it be that in some key areas the providing of legal services is not competitive and functions much like a price-fixing monopoly?

Historically, trends in legal fees have been influenced by the benchmark hourly rates charged by the large law firms. These are the firms that represent the banks, large corporations, public utilities and real estate developers. Although many of these law firms have skilled and knowledgeable lawyers, they do not always command the $400 to $500 per hour fees simply because of their lawyering skills alone. To some extent willingness of clients to pay high-end fees depends on the lawyer’s ability to influence those who are in a position to affect their client’s rights or obligations. This is euphemistically referred to as “clout” or “credibility.”

When winning is everything, the lawyer or law firm that can be depended upon to deliver can—and does command correspondingly large fees. The case where Jack Abramoff received millions of dollars in fees for his lobbying work is just one recent example of this. The huge fees derived from influence pedaling eventually have a rippling effect on other lawyers and law firms. No law firm or lawyer wants to be thought of as second-rate; and one of the key indicators of success is the hourly rate that lawyers or law firms charge their clients. Even sole practitioners are heavily influenced by the rates charged by the big law firms. When a small firm lawyer is litigating with a large firm lawyer, it is difficult for the small firm lawyer to resist charging the client as much as she knows the large firm is charging their client because the two lawyers are doing exactly the same work.

Supply and demand

The laws of economics also have no application to the size of legal fees in those instances where a law firm has created a “captive” client. This can occur when a law firm sends one of their partners with good management skills to serve as CEO for an important corporate client. Laying the groundwork for this sometimes includes placing dependable supporters of the firm on the company’s board of directors. Since many corporate clients look to their law firms for such appointments, this is normally not difficult to do.

After the law firm takes charge of its client’s business, the law firm is then in a unique position to dominate its client’s affairs with little or no ability on the client’s part to question the need for legal services or to object to excessive legal fees. In this manner, the law firm can enjoy a reliable source of premium fees for many years, with virtually no one to account to. Large publicly held corporations and public utilities with close ties to one law firm are particularly vulnerable to such practices, the cost of which is eventually passed along to the consumer in the form of higher prices for goods and services. Although such practices have been criticized by the Security and Exchange Commission which requires such tie-in arrangements to be reported in corporate filings, the ABA and the State Bar have, so far, gingerly avoided this sensitive area.

Furthermore, the law of supply and demand does not always hold true for legal services provided to governmental entities with political ties to a particular law firm. Elected officials are frequently in a position to hire outside law firms where there is a legal issue which involves a conflict of interest between governmental agencies, or in specialized areas that salaried government lawyers are not equipped to handle. This provides a good opportunity for the office holder to compensate a law firm for “services rendered” during the last political campaign or as repayment for the law firm’s efforts in raising campaign contributions from its firm members and the employees of its corporate clients.

High cost of pro bono

In order to combat the high cost of legal services, the bar—with strong and enthusiastic support from the large law firms—have enthusiastically supported pro bono programs. Under such programs, lawyers are encouraged to represent indigent clients without compensation. There is some concern, however, that even these seemingly well-intentioned programs may also be contributing to driving up the cost of legal services. First of all, the lawyer who does pro bono work may otherwise increase his or her fees for paying clients to make up the difference for any income lost thereby. Also, pro bono clients very frequently have claims against financial institutions, large corporations or public utilities who, of course, are normally represented by the large law firms which regularly bill their clients large hourly fees for defending these pro bono lawsuits. This will result in the fees of other lawyers, who also like to “keep up with the Jones,” inching up towards the $400 per hour level.

Advertising dollars

Another factor driving up the cost of legal services, which has received scant attention, is the extra expense that advertising has created for many lawyers. Ironically, the historical ban against advertising was lifted because it was hoped that routine legal services such as providing simple wills, or handling uncontested divorces, could be offered at greatly reduced fees because of the increased volume of clients that would be attracted by such advertising.

Although, initially, there were some lawyers who advertised for such routine legal matters, it wasn’t long before lawyers discovered that there was far more money to be made in advertising for personal injury cases, where the size of the fee (based on a percentage of the recovery), depends, in many cases, not so much on the efforts of the lawyer, but on the severity of the client’s injuries. To offset the competitive advantage created by advertising in attracting personal injury cases, virtually all lawyers who handle such cases are now involved in an advertising or marketing program of one kind or another. As a result, the typical lawyer’s overhead expenses have been significantly increased, and to compensate, most lawyer’s fees have gone up rather than down. At the same time, in an apparent rebuff of the U.S. Supreme Court’s raison d’etre for allowing lawyer advertising, there is an increasing trend on the part of law firms who are heavily involved in advertising for personal injury cases to reject the volume of clients with minor injuries in favor of those with more serious injuries.

In addition to denying access to the legal system to all but a few, the sky-rocketing cost of legal services may be producing some profoundly disturbing social consequences as well. With access to the courts blocked because of the inability of most people to afford lawyers, there may be many individuals resorting to self-help, including various forms of anti-social behavior, to remedy perceived wrongs against others. The marked increase in violent crime that we have been experiencing in recent years may, to some extent, reflect the fallout from our legal system’s failure to economically accommodate people with either legitimate or perceived grievances against others.

Before the cost of legal services began climbing to its present levels, a good deal of the anger and frustration of aggrieved parties were vented through our legal system. Furthermore, when people had their day in court, win or lose, it provided a sense of having participated in one of society’s most important institutions. This experience normally served to reinforce the individual’s allegiance to the body politic and to our social and moral values.

Somehow we must find a way of reducing the cost of legal services to a level where this sense of participation can again occur. This may require some fundamental changes in our legal system. At a minimum, we must simplify the complex procedural rules and even some of our substantive principles that currently make access to our courts so expensive. Does the current Thomson-West’s Arizona Rules of Court really have to be almost 1,700 pages? Equally important, we must also devise ways to prevent the manipulation of our legal system by those who look upon the law as a money-making business rather than as a profession dedicated to serving the public.

Jack Levine is a sole practitioner. He is a past chair of the State Bar’s Trial Practice Section and a past president of the Arizona Trial Lawyers Association.

Maricopa Lawyer and the MCBA do not necessarily endorse the views expressed by contributors.
Margaret A. Robertson has joined Gust Rosenfeld as an associate. Robertson (J.D., 1996, Hofstra University) focuses her practice on real estate law. She previously focused on real estate and land use representation with an emphasis on small-, women- and minority-owned businesses. She also served as counsel to the Town of Hempstead Department of Economic Development, worked as a senior auditor and financial analyst for MetLife and as budget director for Nassau County, New York.

Kevin J. Sierka has joined Norling, Kolsrud, Sifferman & Davis, P.L.C. as an equity partner. Sierka (J.D., 1995, University of Pittsburgh) will continue his practice in the areas of commercial litigation, employment law and business torts.

Patrick MacQueen and John Murphy have joined Lewis and Roca as associates. MacQueen (J.D. 2005, University of Detroit) joins the firm’s real estate and finance practice. Murphy (J.D., 2005, ASU) joins the corporate and securities practice.

James M. Torre has joined Stinson Morrison Hecker LLP as a partner in its business litigation division. Torre (J.D., 1996, Harvard Law School) brings experience in a range of complex litigation and international arbitration matters, including contract, fraud, RICO, appellate, professional liability, trade secret, insurance and reinsurance issues.

Sean Berberian and Sharon Jutila have also joined Stinson Morrison Hecker as partners. Berberian (J.D., 1999, University of California) works in the business litigation division, with a primary focus on business litigation and civil rights law. Previously, he served as associate general counsel for several affiliated private corporations, and advised them in multiple legal areas including general business, environmental, employment and real estate.

Jutila (J.D., 1998, University of Oregon) serves in the employment and labor and employee benefits division, in which she advises clients on all matters related to labor and employment law.

Zachary D. Cain has joined Quarles & Brady Streich Lang LLP as an associate in its white collar crime practice group. Cain (J.D., ASU) previously worked for the Maricopa County Public Defender’s Office and the Federal Defender’s Office in the District of Montana.

Thomas K. Irvine has joined Shughart Thomson & Kilroy, P.C. as a shareholder. Irvine (J.D., 1980, ASU) will provide local and regional clients with a broad array of comprehensive real estate representation. He has over twenty-five years of experience representing clients in all aspects of real estate, including transactions, construction, development, condemnation, land use, environmental concerns, dispute resolution, governmental powers and related issues.

Barbara Kaye Miller has become the dean of admissions at the Phoenix International School of Law. Miller (J.D., 1990, University of Iowa) has been serving as the interim dean since February. Previously, she was a consultant and vice president of LegalWatch, Inc.

The 2006 MCBA Estate Planning, Probate and Trust Section’s Judicial Reception was a great success, allowing members of the section to meet with several Maricopa County Superior Court judges and commissioners as well as mix and mingle with other attorneys in their field. More than 50 people attended the annual event, which was held at the University Club on April 20.

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CourtWatch continued from page 1

Cashed out

The commission later determined that Smith had violated the campaign-finance rules because his campaign had spent 17 percent more than allowed. By statute, a candidate who violates the rules faces sanctions ranging from fines to ouster from office. The commission determined that Smith's violation was serious enough to warrant forfeiture of office. Smith challenged its order in court, but his suit faced insurmountable obstacles, both on the merits and in procedure. The Superior Court dismissed his suit, finding that it was not timely filed, and the court of appeals affirmed.

Smith persuaded the Supreme Court to grant review, but then turned around and argued that the case could not proceed because the state constitution immunized him as a legislator, from judicial process during the legislative term. If this argument had held, Smith would have at least kept his seat during the current legislative session. In her opinion for the court, Vice Chief Justice Rebecca White Berch first turned to, and rejected, that argument.

The immunity provision at issue, Article 4, Part 2, Section 6 of the Constitution, provides that “[m]embers of the Legislature shall … not be subject to any civil process during the session of the Legislature, nor for fifteen days next before the commencement of each session.” Berch noted that this section was intended to ensure that legislators could attend the legislative session to fulfill their public duties. It was not implicated here, she explained because it was Smith who had invoked the courts’ jurisdiction.

Self-protection denied

The immunity provision would not have come into play had Smith not sought the courts’ assistance: “Had Smith not invoked the jurisdiction of the courts, the … Commission’s removal order would have become final … and Smith’s removal from office would have occurred more than fifteen days before the legislative session began.” She therefore rejected Smith’s ploy: “A legislator may not seek the court’s intercession solely for the purpose of keeping alive a case that would remove him from office then claim immunity from participating in the very case he has brought.”

Berch turned to Smith’s claim that the legislation granting the commission the power to oust an elected official was invalid because the only two methods that the state constitution recognizes are impeachment and recall. Smith augmented this argument with the claim that removal could be had only for “high crimes, misdemeanors, or malfeasance in office,” the standard expressed in the constitution’s impeachment provision.

Berch would have none of it, pointing out that the same argument had been squarely rejected over half a century ago. The constitution may limit legislative powers, she held, but “unless a power is expressly or by implication precluded, the legislature retains power to act.” In State ex rel. DeConcini v. Sullivan, 66 Ariz. 348, 188 P2d 592 (1948), the court had held that the constitution’s impeachment provision is not exclusive and does not preclude legislative enactment of other removal methods.

“If,” Berch wrote, “the constitutional means were exclusive, the legislature would be unable to enact laws allowing removal of one who had become mentally incompetent or physically unable to hold office.” The impeachment provision, she reiterated, “was intended to protect the public by making it easy to remove public officers, not to protect malfeasant public servants.”

Too little, too late

She next turned to whether Smith had properly invoked the courts’ jurisdiction. She agreed with both the Superior and Appellate Courts that Smith had blown the deadline to file his action.

On the surface, Smith’s failure to timely act seems understandable. There was a confusing array of avenues available to Smith to challenge the commission’s order, both via administrative and judicial review, with their own deadlines. Smith raised both administrative and judicial challenges, but he evidently overlooked the statute that required him to file any judicial review action within 14 days from the order he sought to appeal.

The first official act was the commission’s March 20, 2005 ruling that ordered Smith to forfeit his office. Smith appealed to an administrative law judge under the Administrative Procedures Act. The ALJ held a hearing and issued an order on August 22, 2005, agreeing with the commission that Smith had blown the March 20 order and recommending that the appeal be denied. On August 25, the commission adopted that recommendation and entered the final order that Smith must leave office. Smith did not seek judicial review within 14 days; he did not file until more than a month later.

Berch acknowledged that there was some confusion in the applicable deadline and called upon the commission to revise its form of notice “to avert possible confusion in future cases.” She nevertheless held that the statutory 14-day deadline applied and that, even if Smith was confused, this did not excuse his untimeliness because he did not act promptly even if his own interpretation of the deadlines had prevailed. She also noted that since he lost on the merits, he was not prejudiced by the procedural snag.

The Supreme Court unanimously joined Berch’s opinion affirming the Superior Court’s judgment and the Court of Appeals’ memorandum decision. Thus ended the saga of former Representative Smith’s fight with the Citizens Clean Elections Commission.

One goes to a donut shop looking for a nice gooey and perhaps a cup of coffee. One does not usually expect to also find there matters of constitutional import. But a donut shop owner recently waged a free speech battle with Mesa over the city’s limits on the amount of signage that stores may have. The city prevailed in Salib v. City of Mesa, No. 1 CA-CV 04-0436 (Ariz. App. Div. 3 May 3, 2006).

The sign’s the limit

Mesa, like other cities, limits the percentage of window space that businesses may cover with advertising signs. Mesa’s limit is 30 percent.

Edward Salib owns a Winchell’s Donuts franchise. He was cited for exceeding the 30 percent limit. He challenged the regulation as an infringement of his First Amendment rights along with his rights under the Arizona Constitution. The Superior Court rejected his challenge, so he turned to the Court of Appeals. He fared no better there.

Judge Patrick Irvine rejected the First Amendment claim and bases his opinion on precedent from the United States Supreme Court, under which the government has a limited power to restrict speech. When the speech is purely commercial, Irvine noted, the government has more regulatory leeway. A three-prong test applies. The government must have a substantial interest in the regulation. The restriction must directly and materially advance the regulation. And the regulation must be narrowly drawn.

Irvine held that Mesa’s provision met this test. He noted that there were “legitimate concerns… that many businesses in the area had 100 percent coverage of their storefront windows and that this total coverage was unattractive and detracted from the aesthetics of the city.” Irvine concluded that the court should grant reasonable deference to the city’s plain conclusion “that regulating signs directly furthers its interest in promoting aesthetics.”

Narrow-minded?

Irvine held that the city’s regulation was sufficiently narrow. “It is clear…that narrowly tailored or narrowly drawn does not mean that the least restrictive means must be used,” he wrote. “All that is required is a ‘reasonable fit’ between the intent and purpose of the regulation and the means chosen to accomplish those goals.” Thus, the fact that some cities allow more window coverage and others allow less did not invalidate the standard that Mesa chose. Having rejected the First Amendment challenge, Irvine turned to the claim under the Arizona Constitution.

Article 2, Section 6 of the Arizona Constitution states: “Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.” Irvine noted that Arizona’s free-speech provision has been held to be broader than the First Amendment, but the differences have not been delineated. However, like the First Amendment, the Arizona provision “allows for reasonable time, place and manner restrictions that affect speech.” Irvine pointed out that the test under the Arizona constitution was essentially the same as the federal test. Therefore, the decision on the federal claim mandated rejection of the state claim. Thus, the Arizona right’s broader scope was not enough to allow Salib to hang more signs in his windows.

Joining Irvine in affirming the judgment were Judges Maurice Portley and Patricia K. Norris. ■
ABA Adopts Legal Profession’s Statement of Core Principles

At its 2006 midyear meeting, the American Bar Association approved adoption of a Statement of Core Principles of the legal profession that was originally adopted by approximately 100 bar association leaders from more than 40 countries meeting in November 2005, in Paris, France. The statement reads as follows:

The legal profession throughout the world, in the interest of the public, is committed to these core principles:

1. An impartial, and independent, judiciary, without which there is no rule of law.
2. An independent legal profession, without which there is no rule of law or freedom for the people.
3. Access to justice for all people throughout the world, which is only possible with an independent legal profession and an impartial, and independent, judiciary.

And that, these core principles shall not yield to any emergency of the moment.

ABA President Michael S. Greco announced that the statement “expresses what the legal profession throughout the world stands for,” and said that “[w]e have an unprecedented opportunity to work together to unite the lawyers and bar associations of the world in a joint defense of the rule of law and common pursuit of justice for all.”

Authorized Wiretap Intercepts Increase in 2005

The Federal Judiciary is reporting that the number of court orders authorizing the interception of wire, oral, or electronic communications rose by 4 percent in 2005, with the total of approved interceptions numbering 1,773. Highlights of the wiretap report, which is available at www.uscourts.gov/library/wiretap.html, follow.

- 80 percent of the wiretap applications approved by state judges surfaced in the states of New York (391 applications), California (235 applications), New Jersey (218 applications), and Florida (72 applications).
- 91 percent of the approved federal and state wiretaps occurred on portable devices carried by individuals; three percent were for personal residences; one percent for business establishments; two percent were authorized for “other” locations, such as prisons, pay telephones in public areas, and motor vehicles; and three percent authorized a combination of wiretap locations.
- Telephone wiretaps accounted for 95 percent of the intercepts, while intercepts on devices such as digital display pagers, voice pagers, fax machines, and computer transmissions made up one percent of the intercepts. Microphones were used in one percent of the wiretaps and a combination of surveillance methods were used in three percent of the intercepts.
- Four percent more people were arrested from wiretapping in 2005 than the previous year.
- Violations of drug laws and racketeering laws were the two most frequent types of offenses pursued through wiretaps.
- Of the 4,674 people arrested due to wiretaps, 776 persons were convicted of crimes as of December 31, 2005.

The 2005 wiretap report does not include interceptions regulated by the Foreign Intelligence Surveillance Act of 1978.
Changes to Motion for Summary Judgment

The Arizona Supreme Court has adopted a petition to change Rule 56(a), 56(b), and 56(c)(1), Arizona Rules of Civil Procedure, that will also change provisions in various local rules so they are consistent with the changes to Rule 56. The adopted changes affect the timing of summary judgment motions and are effective as of June 1, 2006.

The changes to Rule 56(a) and Rule 56(b) explain parties must file any motion for summary judgment no later than 90 days before the date set for trial. One change to Rule 56(c) states a party responding to a motion for summary judgment must file that response and any accompanying affidavits within 30 days after service of the motion. The other change to Rule 56(c) explains the moving party has 15 days after service of a response to a motion for summary judgment to serve a reply memorandum and affidavits.

The State Bar Committee Note to the Amendments explains that requiring a motion for summary judgment to be filed 90 days before trial changes the practice of permitting the Superior Court to adopt local rules setting such deadlines. The note makes clear, however, that the amendments do not prohibit the Superior Court from enlarging the period for filing a summary judgment motion pursuant to Rule 6(b), Arizona Rules of Civil Procedure. Additionally, the committee note explains the amendment regarding deadlines for filing responses and replies was made to conform to the practice of the local federal courts, as well as to ensure that parties have sufficient time to brief summary judgment motions.
Current Issues in Estate Litigation

By Kevin J. Parker
Special to Maricopa Lawyer

Recent developments in Arizona have shed some light on the state of the law in the estate litigation arena. There have been recent cases of note in the areas of (1) undue influence and (2) the Arizona Vulnerable Adult Statute. Both of these are discussed below.

Undue influence

The recent case of Mullin v. Brown, 210 Ariz. 545, 115 P.3d 139 (App. 2005), appears to have drastically changed the rules relating to the presumption and rebuttal of undue influence. The historical definition of undue influence remains unchanged: a person exercises undue influence over a testator in executing a will when that person through his power over the mind of the deceased makes the latter's desires conform to his own so that the will does not conform to the wishes of the testator but to those of the person exercising the undue influence. Absent is a shifting of the burden, discussed below, the burden is on the contestant to prove by clear and convincing evidence that the will was procured by undue influence.

A presumption of undue influence arises when (i) a person who occupies a confidential relationship with the testator (ii) is active in procuring or preparing a will (iii) in which they are a principal beneficiary. Once the presumption of undue influence arises, the person accused of exerting undue influence then has the burden of proving by clear and convincing evidence that the transaction was fair and voluntary. Historically, however, the presumption was essentially meaningless if the alleged undue influencer was still alive because the presumption would disappear if the accused person denied the accusation.

The Mullin court essentially rejected this “denial” rule and held that once the presumption arose, it could be overcome only by clear and convincing evidence that the transaction was fair and voluntary. Under Mullin, the accused person’s denial would simply be one factor for the trial court to consider.

Given that a “clear and convincing” burden of proof will fall upon the loser of the presumption debate, presumption determination will often determine the end result. The new increased importance of the presumption, in turn, focuses new attention on the definition of “confidential relationship” (one element necessary to establish the presumption of undue influence). Relationships potentially giving rise to a presumption of undue influence include guardian, conservator, lawyer, doctor and religious advisor. Importantly, the Arizona courts recognize that the marital relationship is not a confidential relationship giving rise to the presumption of undue influence. Likewise, a parent-child relationship does not, in and of itself, constitute a confidential relationship as that term is used in the undue influence context.

Vulnerable Adult Statute


In the Davis case, the Arizona Court of Appeals addressed a circumstance where a caregiver, upon whom a frail 80-year-old woman in failing health was “totally dependent” for her daily needs, received “loans” from the elderly woman in question (which were then supposedly forgiven by the elderly woman), and received a quit claim deed (for no consideration) of real property owned by the woman. The court addressed whether the elderly woman was “incapacitated” or “vulnerable” within the meaning of the statutory structure. The court also addressed the “trustee duty” concept of the statute.

The court noted that simply because someone in a position of trust and confidence to an incapacitated or vulnerable adult receives some benefit from that person, does not mean that the statute was violated: “A vulnerable adult may still have the capacity to make financial decisions, deed property and transfer cash.” On that topic, the court explained that the person upon whom the “trustee duty” is imposed under the statute “must be prepared to explain how the vulnerable adult benefited from the transfer.”

In addition to the items specifically addressed by the court in Davis, certain other matters can be gleaned from the decision. For example, the court specifically pointed out that the burden of proof is a preponderance of the evidence. This would seem to eliminate the burden-shifting concept in the undue influence arena discussed above.

The Davis case involved a for-profit caregiver. The statutory history indicates that the statutory scheme arose to address financial exploitation and physical abuse of adults by for-profit caregivers and care facilities. See, e.g., Estate of McGill, 203 Ariz. 525, 528, 57 P.3d 384, 387 (2002). (“We continue to believe it clear from the text of the statute, the conditions prevalent in this state, and the sparse legislative history that the statute was intended to increase the remedies available to and for elderly people who had been harmed by their caregivers.”)

To date, the Arizona courts have not specifically focused on application of the statute, if at all, to immediate family members. As noted above, in the undue influence arena, immediate family members (spouse and parent/child) are not considered confidential relationships for the purpose of burden-shifting. It would not appear to further the purpose of the Vulnerable Adult Statute to assess treble damages against immediate family members or force immediate family members to forfeit their inheritance by imposing upon them a “trustee duty.” This is especially true given the statutory exemptions from this “trustee duty” for financial institutions, brokers and insurance agents, A.R.S. § 46-456(F). It would seem anomalous for the incapacitated or vulnerable adult’s banker, stockbroker, and insurance agent to be exempt from the “trustee duty” obligation, but subject a spouse or child to such obligation under threat of these severe sanctions.

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The members of the firm will continue to represent the victims of medical negligence, dangerous roadway design, automobile, railroad and truck collisions, air crashes and defective products. The firm’s mission is to represent seriously injured clients with sensitivity and compassion and to achieve justice on their behalf with the integrity and dignity they deserve.