In the 2010 election, Arizona voters were asked to decide whether to enact an amendment to the state constitution designed to thwart a provision of the then-recently enacted Affordable Care Act, or Obamacare. The proposed Arizona amendment, called the Health Care Freedom Act, would exempt Arizonans from the Affordable Care Act's so-called "individual mandate," a provision requiring Americans to purchase health insurance.

The opposing camp argued strenuously that the proposed amendment was doomed from the start, destined to be held pre-empted by federal law. Turns out they were right. In a lawsuit filed against various federal officials, including President Barack Obama, the Ninth Circuit made short work of the plaintiffs' argument that the Arizona provision survives federal pre-emption. Coons v. Lew, No. 13-15324 (9th Cir. Sept. 2, 2014).

"The Affordable Care Act presents a classic case of pre-emption by implication because the Arizona Act 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" so wrote Judge Susan P. Graber, quoting the Supreme Court. Graber noted that the Supreme Court upheld — as a permissible tax — the Affordable Care Act's provision requiring Americans to buy health insurance or pay a fine when they file their income tax returns. "The Arizona Act," she noted, "provides that its citizens may forego minimum health insurance coverage and abstain from paying any penalties." And that, she wrote, "is exactly what the individual mandate requires."

According to Graber, the Arizona provision "thereby stands as an obstacle to Congress' objective to expand minimum essential health coverage nationwide through the individual mandate … and is, therefore, pre-empted under the Supremacy Clause" of the United States Constitution.

By Daniel P. Schaack

Joining in Graber's opinion were Circuit Judges Mary M. Schroeder and Jay S. Bybee.

Breaking and entering of a different kind


Elizabeth Lee Ann Gill, who was on probation for a felony conviction, worked delivering newspapers. When her probation officer discovered that she had in her possession letters and checks addressed to people on her paper route, Gill admitted that she had taken them from their mailboxes.

She was charged with aggravated identity theft, theft of property and burglary. She agreed to plead guilty to burglary of a nonresidential structure. But the trial judge rejected the plea deal, concluding that a mailbox was
A recap of the Centennial Dinner

The MCBA Centennial Dinner & Hall of Fame Induction was an absolute success! For many attendees, the evening started with the cocktail hour. But for a small group comprising of the Centennial Dinner committee, the evening started earlier this year in a conference room at the MCBA office. Led by co-chairs Jen Green and Steve Firshein, the committee included, among others, Stan Watts — this year’s recipient of the Robert R. Mills Member of the Year Award — who dedicated countless hours organizing the historic materials which will be displayed at the Justice Museum and Learning Center Foundation. Those materials will forever serve as a reminder of the MCBA’s accomplishments over the past 100 years.

The MCBA’s slogan has long been “Where the legal community connects.” And the cocktail hour proved that to be true in every respect. Law students, judges, paralegals and attorneys from law firms of all sizes, together with their friends and family members, gathered with two simple goals in mind: to enjoy each other’s company and to celebrate the MCBA.

Before we knew it, we were ushered to our seats, dinner was served and the program began. To start things off, the members present at the dinner unanimously approved a resolution which I hope will further the MCBA’s success for the next 100 years!

Afterward, the Maricopa County Bar Foundation — the MCBA’s charitable arm — awarded the Justice Michael D. Ryan Diversity Scholarships to three outstanding students. It’s worth repeating that the MCBF is a strong supporter of many justice-related public service programs including the Probate Legal Assistance Program (assisting low-income families following the death of a loved one) and Legal Assistance to Women & Shelters (providing free legal clinics to women at homeless and domestic violence shelters). The MCBF recently launched its “i-give” program and I encourage you to find out more about that endeavor.

And, of course, there was the Hall of Fame Induction Ceremony. I’m going to refrain from singling out any individual inductee or acceptance speech because they were all excellent. I can proudly assure every member of the MCBA that the Hall of Fame’s goals — to honor remarkable individuals in our local community who have made extraordinary contributions to the law and justice — are being flawlessly maintained and I’d like to offer my sincere appreciation to the members of the Hall of Fame committee for their continued service.

Finally, a celebration of this magnitude wouldn’t be a party without a champagne toast to usher in our next century of service. We could not be more thankful to our dear friends and long-time supporters at ISI, Insurance Specialists, Inc. for providing the MCBA-engraved champagne flutes in our parting gift bags. As a volunteer bar association, we value our community partners and your assistance helped us take it to the next level. Thank you.

And before we knew it, the evening was over.

I highly recommend that you make time to join us for next year’s Annual Meeting and Hall of Fame Induction Ceremony. Like any bar association, our success and effectiveness in the legal community is only as strong as our membership. And in the aftermath of our Centennial Dinner, I think it’s fair to say that we are a very successful bar association.

Please remember, it’s not just a matter of supporting the MCBA; it’s about the MCBA supporting you! I continue to encourage each of you to get more out of the MCBA than what you put into it. And if you need something that the MCBA can assist with, please let us know. As always, we want your input, welcome your insight and hope to hear from you. Please email your thoughts and comments to Executive Director Allen Kimbrough at akimbrough@maricopabar.org.

Until next month!
In 1989, the Arizona Supreme Court adopted the rules for Mandatory Continuing Legal Education (MCLE) at Rule 45, Ariz. R. Sup. Ct. Subsection (a)(1) says: “Every active member of the bar, not exempted, shall complete a minimum of fifteen hours of continuing legal education activity in each educational year.” Nowhere in those rules does it say what constitutes “continuing legal education.” Nor does it say that the State Bar shall have authority to determine what constitutes “continuing legal education.” Under the current rules, attorneys are empowered to review the MCLE requirements and make their own determination as to what does (and does not) qualify as “continuing legal education.” This system has worked since 1989, and I’m not aware of any reason why it should not continue. Had the Supreme Court intended the State Bar to approve CLE offerings, it would have said so, just like it did for the mandatory course on professionalism (which, as stated in Rule 45(a)(3), must be approved by the State Bar). The rules do not indicate (or even suggest) that the State Bar has authority to pre-approve and thereby define what constitutes “continuing legal education,” nor should the State Bar define what constitutes CLE.

2. Pre-approval of CLEs would decrease the quality and diversity of CLE offerings

I am a strong believer in the free market system. When you start consolidating markets and creating monopolies, then you undoubtedly begin losing quality. Competition leads to innovation and new ways of thinking. This is especially true for CLEs. The current system allows attorneys to explore a variety of CLE opportunities offered by numerous providers and even host their own CLEs at other law firms or in-house. These types of CLEs often lead to greater participation (and I would say higher learning) than more formal CLEs where attendees rarely participate. Furthermore, the current system allows lawyers with extremely diverse specialties and sub-specialties within the law to select CLE offerings that are best suited to their individual practices and interests.

The State Bar’s proposal to require pre-approval of CLE providers would immediately decrease the number of available CLEs. The current system, which allows for almost limitless competition, encourages attorneys to create and discover the best CLEs for their practices. It would be impossible to conduct pre-approved CLEs on every topic relevant to the widely diverse group of attorneys and practice areas in Arizona.

Pre-approval will also lead to higher CLE costs. The CLE Task Force recommends that an annual fee be imposed on certain CLE providers, but the amount of the fee is not recommended. The report references other organizations that charge anywhere from $100 to $500 for CLE certification. Those additional fees would almost certainly be passed on to attorneys, as the consumer.

For these reasons, I am opposed to the CLE Task Force’s recommendation to require pre-approval of CLE. This proposal would effectively allow the State Bar to determine what constitutes “continuing legal education” and would lead to fewer CLE opportunities in an ever-evolving and highly diverse legal field.
Beware of the trend of scare quotes

October is the perfect month to address all things spooky, and the spookiest grammar issue I know is the use of scare quotes. Brian Garner and most legal writing commentators and teachers alike agree: legal writers should not use scare quotes. Despite this advice, I have recently seen scare quotes in legal documents. This trend is disturbing.

Generally, a writer uses scare quotes around words or phrases in order to cast skepticism about what is said. A writer may also use scare quotes to distance herself from what she is writing. Consider the following examples:

The two sides have achieved “equality.”

“Notification laws” are in place to warn consumers.

The bottom line is that scare quotes are truly scary because the writer cannot control how the reader will interpret the intended message. Writer, beware!

Mistake No. 4 – Joint Representations (Part 1)

This month’s article is the first of a two-part series that focuses on one of the most misunderstood concepts in ethics — the representation of multiple clients in the same matter. Lawyers often are asked to jointly represent co-defendants. Common examples include employer/employee, husband/wife and co-workers.

There are obvious advantages to having one lawyer represent multiple parties. A joint representation will almost always significantly reduce legal costs, increase party solidarity, ease communications and present a united front. Joint representation also promotes a culture of cooperation between the jointly represented parties. Given these advantages, it is understandable why joint representations are so common.

However, before agreeing to represent multiple clients, lawyers must be sure that they and their clients understand the ramifications of a joint representation. In an article of this size, it is impossible to cover all of the issues that arise in a joint representation. However, here are a few steps that will help you to properly analyze joint representations in most situations.

Step 1: Consider potential conflicts of interest

Lawyers first must evaluate whether a conflict exists between the multiple clients by assessing the claims brought against co-defendants and their potential defenses. For example, assume that you are asked to represent an employee who may be liable for certain acts of its agent and employee. A conflict between the employer and employee is unlikely unless there is a question regarding whether the employee was acting within the course and scope of employment. However, in a situation with claims against two medical providers, professional concerns might necessitate separate representation even when one employer is ultimately responsible for any judgment. It is always important to analyze the particular facts and circumstances in each individual case.

I often suggest that lawyers ask themselves, “Would I make any different arguments or take any different position for Defendant X if I only represented Defendant X?” You must answer that question honestly. If you would defend a case differently if you only represented one of the multiple defendants then you likely have a conflict of interest. When considering this question, think about potential defenses, cross claims, discovery and settlement positions. Certain conflicts of interest are unwavering, such as when clients have claims against each other in the same matter, or it is otherwise precluded by law.

For unwavering conflicts of interest, a joint representation is permissible only if: (1) the lawyer reasonably believes that he or she can represent the interests of both clients without adversely affecting the other; and (2) all jointly represented clients give informed consent.

Come walk, run or stroll your way through the tenth annual Race Judicata 5K, 1-mile walk and Kids’ Dash. Proceeds benefit the Young Lawyers Division and survivors of domestic violence.

WHEN & WHERE

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Check-in and registration begins at 7 a.m. 5K race begins at 8 a.m. The 1-mile walk starts at 8:10 a.m. and the Kids’ Dash begins immediately after the 5K race.

ENTRY FEES

EARLY BIRD REGISTRATION: $27 • SLEEP-IN (DONATION ONLY): $32

LATE REGISTRATION (AFTER SEPT. 23, 2014): $32

Every paid entrant receives a Race Judicata T-shirt, and free food and drink after the race. Kids will enjoy the Kids’ Dash, fun children’s activities & music. Please also bring a new toothbrush or tube of toothpaste for donation to local domestic violence shelters.

Visit active.com for more info or to register.
Do monopolies bother with customer service?

If you want to file a document in superior court you have to go through the clerk's office. You can electronically file, use filing boxes located inside and outside of the clerk's offices, or you can file in person; but one way or another, your document must go through the clerk's office. We are the only game in town that can provide this service and have been doing it for over 100 years — not because people recommend our service to others, but because there is no other choice.

National Customer Service Week is celebrated in October. Although the clerk's office functions as a monopoly, customer service is a choice. When people have to use the clerk's office, it is to everyone's advantage that they look forward to the experience. The one-time customers, who find themselves in a probate or juvenile case, or any other case type, should have an experience where they are treated with respect and a knowledgeable professional meets their needs. Regulars, including process servers, runners, paralegals and sole practitioners, can look forward to their daily or near-daily trips to the file counters where they will see a friendly, familiar face.

One way the clerk's office is different from private industry is the mandates related to our services. No one from front-line staff to supervisors to the Clerk himself is empowered to haggle over the cost of making copies, reducing filing fees, or offering bulk discounts and sales promotions. Some fees can be deferred or waived, but they are non-negotiable, although that hasn't stopped people from trying from time to time.

You can't easily walk away from the clerk's office's function as a service provider. If you have a complaint, please complain effectively. The office would much rather know early about something that can be improved. Some issues, like filing fees, are beyond the office's control; however, others, such as the Electronic Court Record, were created to make records access easier and more affordable for customers, taxpayers and the clerk's office.

Harvey Mackay, a businessman with ties to the Valley and a worldwide reputation for customer service and leadership, recommends several steps for voicing customer complaints. Those steps are adapted to the clerk's context in this article:

- **Determine the solution you want.** Be specific with the problem you're having and suggest a better alternative, including any authorities that support your request. Including dates, locations, case numbers and other specifics helps — and may be required for the office to review and respond.

- **Start in the right place.** The clerk's office is fortunate to be staffed by professionals with decades of knowledge in the work they do. Answers can often be provided in detail at the first point of contact. The clerk's office main telephone number is 602-372-5375 (37-CLERK). The contact email is COC-CustomerRelations@mail.maricopa.gov. This inbox is monitored by staff who direct questions and comments to the right person in the right department with the authority to address your issues.

- **Control your emotions.** You can assume that the person making a complaint and the person receiving it are good people doing the best they can and that they really want a quick and reasonable resolution. Mutual respect is effective for quickly solving problems.

- **Keep records.** This one seems obvious for the custodian of records but should be a regular practice for everyone. Keep track of whom you talked to, what department they were in (the court and clerk are separate agencies), what number you called, the dates of your contacts and any other relevant information. Also, keep in mind that your interactions with the clerk's office could be public records. Obscenities are not common, but a surprisingly high number of emails the office receives that contain obscenities are sent from individuals' workplaces. The signature lines of those emails often include the business's mission statement or motto that completely contradicts the tone and content of their email.

- **Let us know what we are doing well.** There are always internal and external influences on the clerk's operations and we want to keep doing what works while improving where we can. Customer compliments are acknowledged internally to keep staff encouraged to provide the highest quality customer service, to identify those in the office who do this well and to highlight the customers who are actively engaged in helping the clerk's office improve. Customer feedback can sometimes translate to major change. Armed with documentable demand for a service, the office can get support for improvements from the court, the County Board of Supervisors, the legislature and other stakeholders.

Customer service transcends bureaucracy and monopolies. Good customer service translates directly into more efficient work and greater satisfaction from people on both sides of the counter. We can't fix what we don't know is broken and with your input we can make great what is currently good. Yes, you have to use the clerk's office, and our goal is that you will look forward to it.

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Adapted with permission from nationally syndicated columnist Harvey Mackay.

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Make room for one more partner at your firm.

$78 million in specialty escrows referred by leading law firms last year.

When leading law firms in Arizona need to move fast, they call on a strategic partner who share their firm's passion for performance. A partner that has worked with them for years and is able to turn on a dime.

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I object! Tips for dealing with difficult counsel

Teague R. Lashnits

We’ve all been there. You see the complaint come across your desk, you glance at the caption and your reaction is some variation on “Oh great, not that [insert colorful, unflattering description of your worst case scenario here] again.” Every litigator has come across opposing counsel whose personality all but guarantees the case will be an unpleasant one. Anyone who hasn’t had such an experience should consider yourself lucky. Also consider it only a matter of time until you do. Here are some helpful tips that can be used to disarm some of those routinely abrasive and even abusive attorneys.

1. Communicate in real time whenever possible

Interpersonal relationships have suffered as a result of our increasingly technologically driven society. Whereas previous generations of lawyers had no choice but to rely upon the telephone, and even face-to-face meetings, as the primary methods of communication, nowadays email is clearly the preferred medium. Of course it is; it’s easy. But the fact that tone and context can easily be misconstrued in an email, adding additional strain to an already potentially tenuous relationship, especially if the relationship involves a conflict-prone personality. When dealing with a high-conflict personality, try picking up the phone rather than relying upon email. Not only does this eliminate the possibility of him or she misinterpreting your tone or context, but it also allows you to begin to build a more collegial relationship based upon civility and mutual respect. If you’re really brave, suggest an informal in-person meeting at the outset of the case. Remember, because there is no immediate, real-time reaction, it is far easier for an abrasive personality to be rude in an email than in a real-time telephone or in-person conversation.

2. Don’t take their personal attacks to heart

For whatever reason, difficult attorneys are more times than not difficult in all aspects of their lives, whether it is dealing with the grocery store clerk, the server at the restaurant, dealing with their family members or any other every day encounter. The problem lies with the person doing the attacking, not with the people routinely being attacked. Typically this type of negativity is so engrained in the person’s personality that they are totally unaware of the negative effects of their behavior. If you encounter an attorney who is routinely creating a pattern of conflict, it is important not to take the personal attacks of an attorney personally. If you do take it personally, you may find yourself questioning your abilities or even blaming yourself. It is important to remember that attorneys who have a reputation for being difficult or unlikable are that way for a reason. It’s not you; it’s them.

3. Kill them with kindness

Even for high-conflict people, it is harder for a person to be rude or abrasive to someone who is always chipper and kind. Conflict-prone attorneys thrive on the argument and seek out battles where they don’t need to exist. Though it is perhaps the most difficult thing to do, turning the other cheek when confronted with an angry, abrasive lawyer is one of the best ways to neutralize their patent conflict-prone conflict. Though I’m not sure why anyone would want to catch flies, you can always catch more with honey than with vinegar.

4. Remember when it’s time to disengage

For dealing with high-conflict attorneys, it is important to remember that they create conflict as part of their personality. The best way to disarm a high-conflict attorney is to disen

5. Five keys to happy and productive employees

Everyone wants productive employees. What many employers and bosses forget is that the best way to have productive employees is to have happy employees. An employee who is happy will want to be more productive and will want to help the company. I first realized this when I was working as a dishwasher in high school and college. When I had a boss that treated me like poorly, I would work at a very leisurely pace. This boss once threw a pan at my head while yelling at me. Why would I work extra hard for someone launching pans at me? My next restaurant boss treated me well. He paid me well and made the job as enjoyable for me as he could. I wanted to reward him by doing excellent work. I worked my butt off for him. There is no secret formula for happy and productive employees, but the following five keys will go a long way.

1) Hire the right people

An employee who may be the perfect fit at one company could be a terrible fit at another company. When considering an employee, check to see if their personality will fit with your personality and the culture of the company. If your office is laid back and casual, does it make sense to hire someone who is not? To see how well your personality will fit with the employee, consider doing something other than a traditional interview at an office. Consider taking the perspective employee out to lunch or coffee. The conversation you will have outside the office will be less awkward and less formal and will tell you a lot more about them.

2) Reward good work

I grew up in the former USSR. One of the many reasons that country failed is that there was no incentive for anyone to outwork anyone else. If you did good work, you still got paid the same as the person doing terrible work. The same concept applies to your staff. If one associate does half the work of another associate but the two receive identical pay, what message does that send to both of them? Money is always a great incentive but don’t be cheap to be creative. Consider rewarding someone with more vacation time or more time off. How you reward hard working employees is not important. What is important is that you reward hard work. Everyone wants to feel appreciated. If you more than reward good work, the more productive your employees will be.

3) Stick up for your employees

I was once meeting with an attorney in their office while an angry client was yelling at their receptionist. Much to my surprise, the attorney did nothing. I remember thinking what a terrible message this sent to the receptionist. The message was, I’m here but I am not going to help. If someone were ever yelling at my assistant, I would step in for two reasons. The first is that your employees need to know that you have their back and will stand up for them. If your employees know this, they will work harder for you. No one wants to work for someone who allows or her to be mistreated or humiliated. The second reason I would step in is that clients need to know they can’t talk down to anyone in my office.

Another part of sticking up for your employees is not throwing them under the bus. I have seen countless attorneys blame their support staff when something was clearly their own fault, such as, “I missed the filing deadline because my assistant forgot to calendar it.” If you blame people below you for things that are not their fault they will grow to resent you. The more that resentment festers, the worse their work product will become.

4) Make your expectations known

From the first day your employee is at work, you need to make your expectations clear. If you do not want your employee to be late, you need to make that clear to them on the first day they are late. If you let them come in late for three months and on the fourth month start telling them to come in on time, they are not likely to take you seriously.

If your employee is coming from a different firm or company, they may be used to doing things differently. No matter the issue, explain how you want things done. Some of the things may be minor and some will be important but they all need to get done in the correct manner.

Be patient when training a new employee. That being said, there is a point when an employee may not be learning fast enough, or at all. There is a difference between being patient and being too patient. Remember that the employee is there to make your life easier and/or make you money. Spending all day fixing their mistakes or doing work they should be doing, it may be time to part ways.

5) Be the type of boss you would want to have

As discussed, happy employees are productive employees. I know attorneys who have employees who brag about how well their boss takes care of them. This is what you want from your employees. A good boss is supportive, understanding and clear with instructions. If you are the type of boss who employees like working for, they will do better work.

Think of yourself as a quarterback. If your players like you, they will play harder and you will be a better team. If you are lousy boss and don’t treat your employees with respect, their effort level will show. Watch any professional sporting event post-game interview. A good team leader will always thank the team for their effort. Adopt the same style. Treat your employees well and they will return the favor ten-fold.

Alexander Y. Benikov is a criminal and DUI defense attorney at the Law Office of Alexander Y. Benikov.
Before filing suit: Dispute resolution through the Purchaser Dwelling Act

Compliance with the Purchaser Dwelling Act (PDA) is the starting point for any home purchaser wishing to file suit against her home seller for construction defects. Residential construction defect lawsuits or “dwelling actions” differ from most civil suits in that the parties must engage in a statutorily-prescribed alternative dispute resolution process before a lawsuit may be filed.

Skipping the requirements of the PDA can result in one’s lawsuit being dismissed, while good-faith compliance with the PDA can aid a home purchaser and home seller alike by facilitating a settlement short of litigation.

The Purchaser Dwelling Act, found at A.R.S. § 12-1361 et seq., outlines steps that must be taken by a residential purchaser before filing a dwelling action. A purchaser must, at least 90 days before filing suit, give written notice by certified mail to the seller “specifying in reasonable detail the basis of the alleged defects.” A.R.S. § 12-1363(A).

Similarly, whereas A.R.S. § 12-341.01(A) provides that in any contested dwelling action, “the court shall award the successful party reasonable attorney fees to the successful party and expert fees under A.R.S. § 12-1364. While taxable costs are normally awardable to the prevailing party pursuant to A.R.S. § 12-341, expert witness fees are normally not awardable absent some agreement, and the threat of paying the other party’s expert witness fees provides a significant incentive for the parties to settle. Expert witness fees can be costly in dwelling actions, particularly where numerous types of defects are involved. Similarly, whereas A.R.S. § 12-341.01(A) provides merely that a court “may” award the successful party reasonable attorney fees, the PDA makes an award of reasonable attorneys’ fees to the successful party mandatory. As a practical matter, because sellers may be more financially able to bear an adverse award of attorney and expert fees than the average purchaser, the PDA’s fee-shifting provision may apply greater settlement pressure on purchasers than sellers.

The PDA is not perfect. For example, it does not address the assertion of claims by a general contractor against its subcontractors, as in a third-party complaint. Also, such terms as “reasonable detail” and “fair and representative sample” are inherently subjective, and determining whether these standards have been met will often require a judicial determination.

Given the subjective nature of these terms, the PDA is of limited benefit where the parties have no real desire to settle, as is the case when an owner has already incurred substantial attorney fees and expert fees and desires to move forward to become the “successful party” in a “contested dwelling action” so as to trigger an award of attorney and expert fees under A.R.S. § 12-1364. Despite its shortcomings, the PDA is a useful tool in facilitating clear communication between a purchaser and seller early in a dispute, enhancing the possibility of achieving settlement before their dispute balloons into potentially costly litigation.

Bradley J. Johnston is a senior member and director of The Cavanagh Law Firm, P.A. His practice includes representation of developers, contractors and property owners in construction-related litigation.
I wanted the MCBA to have its own achievement. Thus, the First 100 Women and Minorities Dinner was born.

Although the legal profession continues to be dominated by white males, women and minorities have made extensive strides in breaking down the barriers and becoming well-respected lawyers and bar leaders in recent decades. Today’s accomplishments, however, would not be possible without Rosa Parks and others who were unafraid to blaze their own trail. The First 100 Women and Minorities Dinner, sponsored by the MCBA and co-sponsored by the State Bar of Arizona, was designed to recognize the first 100 Arizona women and minority lawyers who made significant contributions to the legal profession and were pioneers in the Arizona legal community. The landmark dinner event occurred in October of 2000. We were fortunate to have then U.S. Supreme Court Justice Sandra Day O’Connor — who was certainly among the First 100 — as our keynote speaker.

With the new millennium looming in 1999, it seemed appropriate to celebrate our past and honor those pioneering lawyers who were major contributors to the Arizona legal community. We selected a steering committee, headed by co-chairs then Court of Appeals Judge Michael Ryan and attorney Jo Ellen McBride. The steering committee undertook the enormous effort of seeking nominations for the individuals to be included in the First 100. And, once those nominations were received, each nomination had to be reviewed and evaluated carefully before making a final decision on who would be included in the First 100. Believe me, it was not an easy process. There were so many qualified and amazing individuals deserving of the recognition — it was very difficult determining the ultimate “cut” of the 100 honorees.

The event was a huge success with a sellout crowd. Justice O’Connor was her usual humble and inspiring self as the keynote speaker and did a fabulous job in recognizing the import of the event. I still cherish a photo of Justice O’Connor and me from the event that is displayed prominently in my office.

Six file for seats on MCBA board

voters are all attorneys currently licensed to practice in Arizona and who are members in good standing with both the MCBA and the State Bar.

The Board election will again be held electronically with members receiving voting information by email. Within the email, voters will find a link to the voting website and their individual user names and passwords. Voting is very simple – just follow the instructions in the email!

Full biographical information and photographs of the candidates will appear in the November 2014 issue of Maricopa Lawyer.

A Small Donation Makes a Big Difference

Arbitration Fee Donations Help
Partnering with the Maricopa County Superior Court, the Maricopa County Bar Foundation (MCBF) is once again encouraging attorneys assigned to arbitration to donate the $75 fee to the Foundation’s fundraising efforts.

It’s Easy to Contribute
The court has made it easy to contribute with a convenient “pro bono” check-off box located at the bottom of the Invoice in Support of Request for Warrant, a form provided in your arbitration packet. For more information, go to www.maricopabar.org and click on the Maricopa County Bar Foundation link located on the homepage sidebar.

Thank you for making a difference!

MCBA Corporate Partners save you money
Visit MCBA’s Corporate Partners at www.maricopabar.org and use their products and services at the member discount. It’s a benefit of membership in the Maricopa County Bar Association.
Japanese judge visits superior court

Presiding Judge Norman Davis welcomes Judge Tomohiko Kageyama, a visiting judge from Japan. Kageyama travelled to the U.S. to learn about the American Judicial System and to share insights on how Japanese courts operate. Kageyama will be taking this year to attend law school classes at Arizona State University.

Commissioner appointed

Presiding Judge Norman Davis appointed Andrew J. Russell as a Court Commissioner, filling the vacancy created by the recent appointment of Judge Lori Horn Bustamante to a judgeship.

Russell has most recently practiced law with Kutak Rock, LLP, where he focused on commercial and appellate litigation. He received his Juris Doctorate from Washington & Lee University School of Law and served a clerkship with the Arizona Court of Appeals. Russell will assume a civil/probate calendar.

New superior court judge appointed

Gov. Jan Brewer appointed Lori Horn Bustamante as a judge on the Maricopa County Superior Court Bench to fill the vacancy created by the retirement of Judge Harriet Chavez.

Since 2011, Bustamante has been a commissioner for the Maricopa County Superior Court, presiding over conservatorships, guardianships, mental health matters and personal representative appointments for decedent estates. Previously, she was a solo practitioner with the Law Office of Lori Horn (2006-2011); a trial attorney with Allstate Insurance Company (2001-2006); and a Deputy County Attorney with the Maricopa County Attorney’s Office (1997-2001).

Bustamante was a co-senior editor of the 2014 Arizona Probate Code Practice Manual. She also is the judicial liaison for the Arizona State Bar Probate and Trust Section Executive Council, and has worked to draft the Judicial Collage of Arizona Probate Bench Book. In the past, Bustamante has volunteered as a judicial officer on National Adoption Day and with Veterans Stand Down.

She obtained a Bachelor of Science degree in history and justice studies from Grand Canyon University. She graduated from Pepperdine University School of Law.

Can you guess who they are?

continued from page 8

Photo #1 is Lesa J. Storey. Photo #2 is Daniel J. Noblitt. Photo #3 is Stephen C. Earl.

If your client suspects fraud in their business, we can help you get to the bottom of it.

According to the Association of Certified Fraud Examiners (ACFE), 5% of an organization’s gross revenue is lost to fraud. Don’t let your client become part of this statistic!

Our forensic accounting and investigation professionals have over 60 years of experience investigating and uncovering acts of financial fraud. We can help you build a stronger case.

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- Contractor Fraud
- Bribery and Corruption
- Financial Statement Fraud
- Conflict of Interest
- Breach of Fiduciary Duty

Call Chris Linscott today for a free consultation!
THURSDAY • OCT. 2
NOON-1:30 PM
State of the Courts with Justice Timmer
SPONSORED BY: the Public Lawyers Division
1.5 CLE Credits Available
Justice Ann Timmer will address the state of the courts and various issues facing the Arizona legal system.
PRESENTER: Hon Ann A. Scott Timmer, Arizona Supreme Court
COST: $40 – MCBA member
$55 – MCBA Student members
$62.50 – MCBA Paralegal & Public Lawyer Division members
$75 – Non-members

THURSDAY • OCT. 9
7:30-9 AM (Breakfast included)
SPONSORED BY: the Estate Planning, Probate and Trust and Family Law sections
1.5 CLE Credits Available
Join our panel as they discuss how the demise of DOMA is affecting the legal landscape in Arizona.
The panel will give an update on Connolly, the pending Arizona case seeking to overturn the ban on same-sex marriage. You will learn how to navigate the estate planning issues that may arise with same-sex couples. Panel members will also discuss the family law implications of same-sex relationships.
PRESENTER: Claudia Work, Mariscal, Weeks, Mcintyre & Friedlander, P.A.
Kathie Gummere, Attorney at Law
Heather Macer, Aiken Schenk
COST: $62.50 – MCBA members
$65 – MCBA Estate Planning, Probate and Trust and Family Law Section members
$80 – MCBA Paralegal & Public Lawyer Division members
$100 – Non-members

THURSDAY • OCT. 23
NOON-1 PM (Lunch included)
In-House Counsel Share the Real Deal
SPONSORED BY: Corporate Counsel Division
1 CLE credit available
This amazing panel of in-house attorneys will provide their best tips to outside counsel on how to serve their clients best, their path to in-house greatness, changing dynamics of the legal industry, and the latest and greatest on how they think in-house and outside counsel can best partner to maximize opportunities for companies.
PRESENTERS: Karl Fazio, IOP Associate General Counsel at Go Daddy; Melissa Goldenberg, Vice President, General Counsel of the Phoenix Suns; Michelle Askew, Associate General Counsel of LifeLock
COST: $45 – MCBA members
$40 – MCBA Corporate Counsel Division members
$50 – MCBA Paralegal & Public Lawyer Division members
$75 – MCBA Student members
$80 – Non-members

THURSDAY • OCT. 30 • 5-6 PM
Preparing for a Construction Mediation: A Mediator’s Perspective
SPONSORED BY: Construction Law Section
1 CLE: ethics credit available
Mediation in construction disputes is no longer an “alternative” dispute resolution process; almost all disputes in construction engage mediation now. As the number of issues involved grows, the number of parties increases and there are more complex inter-relationships of technical, legal and insurance issues. As a result, construction mediation requires a different model to prepare for the mediation and be ready to participate. Come hear one mediator’s perspective on how parties and their counsel might prepare for such a construction mediation.
PRESENTER: John Jozwick, Rider Levett Bucknall Ltd.
COST: $62.50 – MCBA members
$65 – MCBA Construction Law Section members
$65 – Non-members

Reflections: 1999-2000 continued from page 8
I can’t take the credit of conceiving the event on my own. The event had its genesis in similar galas held previously in several other states. However, the MCBA’s First 100 event was unique in that it honored minority lawyers, as well as women. Other bar associations that held similar events in 1998 (Urah, Delaware, Wisconsin, Florida and Chicago) honored only women. The MCBA’s attention to race recruitment and retention of women and minorities must be a priority for lawyers to the expanded First 100 concept.
Other key members of the steering committee who should receive plenty of kudos for their hard work and efforts in making the First 100 event so successful included subcommittee chairs Hon. Ann Timmer, Host. Lynda Shely, Patricia Huntwork, Julie Pace, Leelee Kim, Yvette Gray and Dan Siciliano. Thank you again to everyone who participated in making the event such a huge success!
I am proud to have set in motion the planning, work and implementation of such a wonderful event to applaud the pioneers in the Arizona legal community. But for their efforts, many of us would not be in the positions we are today. We owe them a big thank you for refusing to sit in the back of the bus, and instead taking a stand and creating a trail for future generations to follow.
I’ll sign off this article as I signed off all of my president columns by saying I’m proud to be a Maricopa County lawyer!
Thirty-two VLP liaisons make a difference by promoting pro bono

By Pat Gerrich

This month, the Volunteer Lawyers Program recognizes and thanks not just one outstanding volunteer, but a group of 32 outstanding volunteers who serve at VLP liaisons and promote pro bono in their firms and law departments.

The liaisons help VLP serve more people and respond more promptly. They let colleagues know about ways they can prevent or resolve civil legal problems in less than three hours by doing interviews or providing brief advice. They provide updated information about available pro bono cases so any attorney can find an opportunity that fits the attorney’s interests and skills. The liaisons also help their firms and departments increase support and recognition for those who provide pro bono service.

VLP firm liaison Amanda Sheridan at Snell & Wilmer arranged a new way for the firm to recognize pro bono contributions by presenting a VLP Spotlight Award. The firm provides a thank-you certificate signed by firm chairman John Bouma and the liaison, and publicizes the attorney’s success to all of the attorneys in their Phoenix office.

A recent firm honoree, James Gottry, interviewed an elderly man at VLP who had survived a stroke and had been unable to get his scooter repaired after an accident caused by the driver of a wheelchair accessible transport van. Gottry promptly accepted the case and after only eight hours was successful in getting the transportation company’s insurance to pay for a new scooter.

When he was notified about his award, James said he was “thrilled that we were able to get a prompt resolution” and “thank you for the opportunity to be involved.” Other recent Spotlight Award honorees at the firm were Andrew Stone and Aborn Cohen.

VLP liaisons at corporate law departments help locate or arrange training and consultants and make pro bono opportunities convenient for attorneys and other volunteers. The Intel Arizona Legal and Corporate Affairs Team offers a monthly advice clinic at their location in Chandler.

One of the VLP liaisons at Intel, Scott Utche, reported that volunteers “enjoy the most seeing the relief that people feel after a consult where they find out that someone is not going to throw them in jail over debts they cannot afford to pay.”

Recently, volunteers participating in Intel’s advice clinic were thanked by being invited to a lunch with Steve Rodgers, Intel’s general counsel.

Some liaisons sought out the role of promoting pro bono because they found their own pro bono experiences to be so personally rewarding. As Lars Lagerman of Bryan Cave expressed, “It is personally fulfilling to do some good in a world that can be both cruel and mean, especially to those people who for whatever reasons do not have the means or abilities to fend for themselves. Long after I have forgotten the many million dollar transactions we have handled, I will always remember the good — however small — that I did for my pro bono clients.”

VLP thanks these liaisons for making a difference by promoting pro bono: Joseph Kanefield and Elizabeth Lee, Ballard Spahr; Michael Tamrin, Brownstein Hyatt Farber Schreck; Lars Lagerman, Bryan Cave; Abbie Shindler, Clark Hall; David Guimette, Dickinson Wright; Stacie Smith, Fennemore Craig; Mike Ross and Jon Hasebe, Gallagher & Kennedy; Nicole Goodwin and Karl Freeburg, Greenberg Traurig; Jennifer MacLennan, Gust Rosenfeld; Daniel Christiansen and Scott Utche, Intel; Corey Foley, Jennings Haug & Cunningham; Mike Palmbo, Jennings Stross & Salmon; and London Burns, Kutak Rock.

Also, Mike Hallam, Lewis Roca Rothgerber; Lynne Adams, Osborn Maledon; Lauren Stine, Quarles & Brady; Dan Barr, Perkins Coie; Alex Sheffer, PetSmart; Jamie Nelson and Melissa Salle, Pinnacle West; Troy Froderson, Polsinelli; Tom Stack, Ryle Carlock & Applewhite; Patrick Solomon, Sanders & Parks; Amanda Sheridan, Snell & Wilmer; Lawrence Rosenfeld, Squire Patton Boggs; Kate Frenzinger, Steptoe & Johnson; James Gough, Warner Angle Hallam Jackson & Formanek; and Jack Wilenchik, Wilenchik & Bantwort.

“Finding volunteers and matching the right volunteers with available cases is time consuming,” says Stefanie Layton, VLP Advisory Committee chair. “The liaisons’ help with this is invaluable. VLP truly appreciates their time and commitment.”

For more information about pro bono opportunities and how to participate, please contact VLP Director Pat Gerrich at 602-254-4714 or pgerrich@clsaz.org.

The Volunteer Lawyers Program is a joint venture of Community Legal Services and the Maricopa County Bar Association

Volunteer Lawyers Program Thanks Attorneys

The Volunteer Lawyers Program thanks the following attorneys and firms for agreeing to assist on 22 cases referred by VLP to help low-income families: VLP supports pro bono service of attorneys by screening for financial need and legal merit and provides primary malpractice coverage, donated services from professionals, training, materials, mentors and consultants. Each attorney receives a certificate from MCBA for aCLE discount.

For information about ways to help, please contact Pat Gerrich at VLP at 602-254-4714 or pgerrich@clsaz.org.

VOLUNTEER LAWYERS PROGRAM

COURT ADVISORS FOR CHILDREN IN FAMILY COURT

Jessica M. Cotter
Law Office of Jessica M. Cotter

Rebecca Smith Masterson
Smith Masterson Law

GUARDIANSHIP OF INCAPACITATED ADULTS

Alex Lozada
Rosette

Christopher Payne
Snell & Wilmer

Jennifer R. Phillips
Snell & Wilmer

GUARDIANSHIP OF MINOR CHILDREN

Harold M. (Pat) Gilbert
Law Office of Harold Gilbert

Anthony Merritt – 2 cases
Polsinelli

Justin Sabin
Bryan Cave

Nancy E. Tribbensee
Counsel to the Arizona Board of Regents

EDUCATION/SPECIAL EDUCATION

Lori A. Bird
Law Office of Lori A. Bird

MOTOR VEHICLE ISSUE

Robert F. Crawford
Solicitor Practitioner

TENANT’S RIGHTS

Nature Lewis
Jarie Law Office

**PRO BONO SPOTLIGHT ON CURRENT NEED**

Volunteer lawyers are needed to assist working families with low incomes who are dealing with debts and debt collectors.

The Volunteer Lawyers Program is a joint venture of Community Legal Services and the Maricopa County Bar Association.

All net proceeds will go to the Volunteer Lawyers program

NOVEMBER 8, 2014

THE LEGACY GOLF RESORT • 6808 S. 32nd Street, Phoenix, AZ 85042

Designed by renowned golf course architect Gary Panks, The Legacy Golf Course’s lush green fairways, forgiving rough, well placed hazards, and manicured greens offer a challenge for golfers of all skill level.

SCHEDULE

6:30 am
Registration • Breakfast • Driving range open
7:00 am
Shotgun Start followed by lunch, raffle and awards
Registration includes breakfast, green fees, golf carts, range balls, lunch, gift bag

FOR INFORMATION
Contact Laurie Williams 602-682-8585 or lwilliams@maricopabar.org

BMO Private Bank
2014 PRO BONO GOLF CLASSIC

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APPEAL

Kevin Myer
Renaud Cook Druzy Mesors

BANKRUPTCY TO STOP LOSS OF WAGES

Mark Atchley – 2 cases
Ardley & Delgado

Diane Drain
Law Office of D. L. Drain

Shawn L. Stone – 2 cases
Stone Law Group

CONSUMER ISSUES

Chelsa S. Gabendel
Osborn Maledon

Michael Grubbs
Polsinelli

JACOB JONES
Snell & Wilmer

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Phoenix divorce attorney. Before Mendoza began her practice in family law, she worked as a staff attorney for the Hawaii State Senate Minority Caucus and opened her own law office in Hawaii.

She later moved back to Phoenix and opened the law office of Peralta & Associates, LLC, before joining Rose Law Group.

HONORS & AWARDS
Helene S. Fenlon of Helene S. Fenlon, PLLC, is the recipient of the Scottsdale Bar Association's 2014 Award of Excellence. The award is given annually to an individual who resides or works in Scottsdale and has given outstanding service to the legal community.

NEW HIRES
Arizona Summit Law School is pleased to welcome Phoenix Mayor Greg Stanton to the faculty this fall as an adjunct distinguished lecturer in residence. Mayor Stanton will bring his experience as a practicing attorney and public servant into the classroom, teaching Designing Land-Use Policies, and providing valuable instruction to future real-estate-transactional and land-use attorneys.

Kelly Mendoza, who has a concentration in Intellectual Property.

Rose Law Group, PC, is pleased to announce the newest addition to its firm, Kelly Mendoza, who brings an extensive background specializing in family law.

Mendoza graduated from Arizona State University's Sandra Day O'Connor College of Law and holds extensive experience in domestic relations as a Phoenix divorce attorney. Before Mendoza began her practice in family law, she worked as a staff attorney for the Hawaii State Senate Minority Caucus and opened her own law office in Hawaii.

She later moved back to Phoenix and opened the law office of Peralta & Associates, LLC, before joining Rose Law Group.

Fennimore Craig has announced that Victoria Stazio has joined the firm's Phoenix office as an associate practicing in the areas of health care litigation, professional liability, long term care and catastrophic injury defense.

Prior to joining the firm, Stazio worked as an associate at Quintairos, Prieto, Wood & Boyer in Phoenix. She also served as Deputy County Attorney with the Mohave County Attorney's Office. She earned her J.D. from St. John's University School of Law and her B.A. from Siena College.

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Vegas Rosenfeld congratulates Fred H. Rosenfeld on completing 50 years with the law firm, which bears his family name. Rosenfeld, whose father, Fred W. Rosenfeld, joined the firm in 1924, concentrates his practice on governmental law, including municipal finance, real estate and elections. He has vast experience in the law of general obligation, revenue and special tax and assessment bonds and represents issuers, borrowers, trustees, underwriters and financial institutions. He also appears before the state legislature on behalf of his clients, and has been asked by members of the Arizona legislature to testify before their body and draft public finance legislation.

Like Gust Rosenfeld, Fred Rosenfeld has been integrally involved in the growth and development of Arizona. He has advised hundreds of public entities on the legal requirements of funding public improvements financed by tax-exempt bonds. In addition to the transactional side of public finance, Rosenfeld has successfully argued before the U.S. Supreme Court, as well as representing public entities in numerous cases decided by Arizona courts.

A native of Phoenix, Rosenfeld pursued a six-year program at the University of Arizona, receiving a B.A. degree in business in 1959, and a J.D. in law in 1961.

Ryley Carlock & Applewhite is pleased to announce that Judith K. Gargiulo has joined the firm's Phoenix office.

Gargiulo often serves as outside general counsel and as the primary contact for her clients to help with their ongoing legal and business needs. Her experience includes business formation and structure, joint ventures, mergers and acquisitions, private securities offerings, corporate/bond financings, business workouts and business disputes. In addition, Gargiulo helps financial institutions and financial service companies with licensing and regulatory compliance issues and provides state agencies with review and advice on regulatory and administrative law issues.

Gargiulo earned her J.D. from Brooklyn Law School, and her Bachelor of Arts degree from William Smith College.

ANNOUNCEMENTS
Gust Rosenfeld congratulates Fred H. Rosenfeld on completing 50 years with the law firm, which bears his family name. Rosenfeld, whose father, Fred W. Rosenfeld, joined the firm in 1924, concentrates his practice on governmental law, including municipal finance, real estate and elections. He has vast experience in the law of general obligation, revenue and special tax and assessment bonds and represents issuers, borrowers, trustees, underwriters and financial institutions. He also appears before the state legislature on behalf of his clients, and has been asked by members of the Arizona legislature to testify before their body and draft public finance legislation.

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**Golf tournament to support VLP**

The BMO Private Bank Pro Bono Golf Classic on November 8 creates an incompa-
rable opportunity to enjoy top-notch golf at a very reasonable price, all to benefit a most worthy cause. Plus, where else can the best of the worst (or worst of the best) win garden gnomes? Each year, the Pro Bono Golf Classic provides an enjoyable way to support the Volunteer Lawyers Program and its services to families, children and individuals who cannot afford legal help for their civil legal problems. All of the net proceeds of the event go to VLP, which is co-sponsored by Maricopa County Bar Association and Community Legal Services (legal aid).

VLP arranges civil legal help to more than 10,000 people each year by recruiting and supporting pro bono service by attorneys in Maricopa County. VLP partners with the MCBA Bankruptcy Section to provide clinics at MCBA to advise people who are troubled about debts. VLP’s Family Lawyers Assistance Project, which provides family law advice and brief service to 5,000 people a year, began in 1992 with support from the MCBA Lawyer Referral Service. VLP also supports the Probate Lawyers Assistance Project, which provides consultations at MCBA one day a week on probate issues. VLP’s Children’s Law Center impacts nearly 3,000 children a year by arranging pro bono legal assistance through services such as minor guardianships, adoptions and court advisors for children in family court, and provides advice and education to children, parents and grandparents.

This year’s tournament is sponsored again by the Maricopa County Bar Foundation and the Volunteer Lawyers Program and will take place on November 8 at the Legacy Golf Resort. Registration includes breakfast, green fees and lunch. Winning foursomes receive prizes and trophies. There also are prizes for longest drive and closest to the pin. Raffle prizes include Ping equipment, sports memorabilia, restaurant gift cards, golf foursomes, passes to golf events, game tickets and other items. The tournament’s title sponsor is BMO Private Bank. The golf committee appreciates this special support and thanks Senior Private Banker Donna Gandre, who is a member of the Maricopa County Bar Foundation Board. Alep Inc. is donating all of the sign printing for the third straight year. Law firms and other companies support the tournament as Hole Sponsors. Businesses and individuals donate prizes. Golf Committee Chair Joel Hoffman thanked all who participate and said, “I am hopeful that we have sponsors for all 18 holes and a great turnout of golfers again this year so we can continue to support the good work the Volunteer Lawyers Program does for our community.”

To register to golf, arrange a sponsor or donate a prize, please contact Laurie Williams at lwilliams@maricopabar.org.

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**CourtWatch**

from page 1

not a nonresidential structure encompassed by the applicable statutes. The judge went on to dismiss the burglary counts, and the state appealed.

The third-degree burglary makes it illegal to enter or remain “unlawfully in or on a nonresidential structure ... with the intent to commit any theft or any felony therein.” A structure is defined as “any vending machine or any building, object, vehicle, railroad car or place with sides and a floor that is separately securable from any other structure attached to it and that is used for lodging, business, transportation, recreation or storage.” Writing for the court, Judge John C. Gemmill first concluded that the requirement of sides and a roof applied only to the word “place,” not the words before it. It therefore did not matter, as the superior court had concluded, that a mailbox might not have sides and a roof. He therefore focused on the fact that a mailbox is an object.

The parties agreed that mailboxes are separately securable from any attached structures. So the question was whether mailboxes are used for lodging, business, transportation, recreation or storage. Gemmill rejected the notion that mailboxes are used for lodging, transportation or recreation. And he left for another day whether they are used for business.

The question therefore boiled down to whether they are used for storage. Although Gill conceded that mail is stored in mailboxes, he argued that this does not satisfy the statute because the storage is only temporary. Gemmill was unpersuaded, writing that “the ordinary meaning of the term ‘storage’ does not indicate that a thing must be in storage for a specific amount of time before it can be considered ‘stored’ or ‘in storage.’” The trial judge had concluded that the state’s allegations demonstrated theft but not burglary. Gemmill conceded that it acceded with the common law. “Nevertheless,” he wrote, “modern definitions of burglary, as reflected in various states’ statutes,” including Arizona’s, “have considerably broadened the range of acts that may constitute burglary.”

“Therefore,” he concluded, “despite the logical distinction between theft and burglary identified by the trial court, we defer to the legislature’s policy judgment expanding the scope of the offense of burglary, and we base our interpretation on the words and sentences enacted by the legislature.” Joining Gemmill in vacating the dismissal of the burglary charges were Judges Peter B. Swann and Patricia A. Orozco.

**Supreme court answers appellate court’s plea**

Last month we discussed Gallardo v. State, No. 1 CA-CV 14-0272AZ (Ariz. App. July 23, 2014). There, Division One of the Court of Appeals held that the Legislature violated the Arizona Constitution’s prohibition on special legislation by amending A.R.S. § 15-1441(A). The amendment provides that, in addition to the members elected from each of the five precincts in community-college districts, two additional at-large members shall be elected in any “county with a population of at least three million persons.”

The court held that the amended statute did not have the required elasticity to avoid being branded as inappropriate special legislation. The court relied on the fact that Maricopa is the only county that currently qualifies or will qualify in the foreseeable future. Its ruling would have cancelled the at-large election slated for this November. The three judges, in two separate opinions, asked the Arizona Supreme Court to give guidance on the elasticity requirement.

The judges got their wish. Acting on an expedited basis, the court granted the state’s petition for review, vacated the court of appeals’ opinion, and ordered the election to proceed as scheduled. It announced that an opinion explaining its ruling “will follow in due course.”

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**OCTOBER 2014 CALENDAR**

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
</tr>
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<tbody>
<tr>
<td>8:00 a.m.</td>
<td>Executive Committee Meeting</td>
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<tr>
<td>7:30 a.m.</td>
<td>Columbus Day — MCBA office closed</td>
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<tr>
<td>7:30 a.m.</td>
<td>10 2014 Arizona Paralegal Conference</td>
</tr>
<tr>
<td>7:30 a.m.</td>
<td>13 Executive Committee Meeting</td>
</tr>
<tr>
<td>14 4:30 p.m.</td>
<td>Corporate Counsel Division Board Meeting</td>
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<tr>
<td>5:30 p.m.</td>
<td>15 Bankruptcy Law Section Board Meeting</td>
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<tr>
<td>7:30 a.m.</td>
<td>21 Family Law Section Board Meeting</td>
</tr>
<tr>
<td>8:00 a.m.</td>
<td>22 CLE: In-House Counsel Share the Real Deal</td>
</tr>
<tr>
<td>9:00 a.m.</td>
<td>27 Solo &amp; Small Firm Division Board Meeting</td>
</tr>
<tr>
<td>11:00 a.m.</td>
<td>28 MCBA Diversity Committee Meeting</td>
</tr>
<tr>
<td>1:00 p.m.</td>
<td>30 CLE: Preparing for a Construction Mediation — A Mediator’s Perspective</td>
</tr>
<tr>
<td>11:00 a.m.</td>
<td>Executive Committee Meeting</td>
</tr>
</tbody>
</table>

All events at MCBA Office, unless otherwise specified.

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**WE’RE ON FACEBOOK AND TWITTER**

There’s a lot going on at the MCBA. Keep up with us by following our Facebook and Twitter pages.
Supreme Court to address social media and the First Amendment

By Leon Silver and Rebecca Luley

Upon being asked by a member of his cabinet whether a report was clear, President Rufus T. Firefly (Groucho Marx) replied indigently, “Why, a 4-year-old child could understand this report!” He then turns to his secretary (Zeppo Marx) and commands, “Run out and find me a 4-year-old child. I can’t make head nor tail out of it.”

So it is that an 80-year-old joke leads us to a discussion of Facebook and the U.S. Supreme Court — a court that only four years ago addressed the use of pagers as its foray into modern technology. While the joke is older than all but one Supreme Court justice, the vast majority of us have the shared experience of having to ask a teenager how to use the simplest feature on our smartphone or how to post that video we can’t wait to share on a Facebook page. We suppose that is one of the many reasons Supreme Court justices have bright young people as clerks.

We were asked to write about the interplay between social media and the First Amendment. But, it turns out, having granted certiorari in Elonis v. United States in 2010, Anthony Elonis’ wife left him, kids estranged him and he posted a Halloween costume featuring his estranged wife’s “head on a stick.” He posted “enough elementary schools in a ten mile radius…and hell hath no fury like a crazy man in a kindergarten class.” He talked about killing a law enforcement agent, posting, “took all the strength I had not to turn the b***h ghost.”

As a result, Elonis was indicted on five counts of making threatening communications. He argued the graphic language was a joke. Elonis’ wife, on the other hand, testified that she took the statements seriously. Did Elonis’ intent matter? The lower courts said no. The trial court found that the prosecution need only prove that a “reasonable person” would expect that others would see his posts “as a serious expression of an intention to inflict bodily injury or take the life of an individual.” The judge wrote that he did not intend to make “something said in a joking manner or an outburst of transitory anger” a crime. Sometimes, though, it is hard discern the intent behind the written word.

Elonis was convicted under federal law and sentenced to 44 months in prison and three years of supervised community release. According to an amicus curiae brief supporting Elonis from several First Amendment groups, the Elonis case is one of many recent prosecutions for alleged threats conveyed on social media like Facebook, YouTube and Twitter. As we know, the First Amendment does not protect all speech. There are exceptions for libel, obscenity, incitement, fighting words and one for the alleged “true threats” at issue in Elonis’ case.

But what makes a true threat and does intent matter, as advocated by Elonis? The Supreme Court has yet to give a definitive answer. In 1969, the Court threw out a case against a draft protester charged with threatening President Lyndon B. Johnson. “I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.,” the protester said. The Court determined that the comment was “political hyperbole” rather than a true threat, because it was conditional, political speech and the listeners responded by laughing. Would the Court have reached the same conclusion if this comment had been posted online?

Elonis has said, “art is about pushing limits…” I’m willing to go to jail for my constitutional rights.” In the coming months, the Supreme Court will decide whether Elonis’ language was art or a “true threat.”

This year marks the 50th anniversary of the U.S. Supreme Court opinion in New York Times v. Sullivan. So, some 25 years after the birth of the Internet, and 50 years after a landmark Supreme Court decision defining broad constitutional free speech rights (and 80 years since Groucho first made that joke), we have a come to a place where ideas collide. The Supreme Court will soon decide which way to go. And, in the meantime, Hail, Hail Freedoms!!

*Freudonia is a country of which Rufus T. Firefly is president in Duck Soup, the 1933 Marx Brothers film. Leon Silver and Rebecca Luley practice in the Commercial Litigation group in Polsinelli’s Phoenix office.*

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