New Executive Compensation Rules Bring High Stakes

On April 19, the Maricopa County Bar Association will present a CLE seminar on the proposed regulations of deferred compensation under Section 409A of the Internal Revenue Code and proposed Securities and Exchange Commission disclosure requirements for executive and director compensation. Presenters Michael R. McCoy and Lisa A. Van Fleet of Bryan Cave, LLP will go into detailed discussion about the regulation of deferred compensation, the proposed disclosure revisions and how they can potentially change both executive compensation and the investor environment as we know it. Maricopa Lawyer sat down with McCoy to further discuss what the proposed revisions entail and the impact they may have.

Maricopa Lawyer: What are the newly proposed disclosure requirements for executive and director compensation?

Michael McCoy: The SEC is proposing significant revisions from the current disclosure regime in order to provide greater transparency to investors as to how company assets are being used. The proposed rules would require tabular disclosure of all elements of executive and director compensation, and would require that a company provide a general overview of the material factors underlying a company’s compensation policies and decisions with regard to its named executive officers. The proposed rules would also revise how companies must disclose related person transactions.

ML: How did these newly proposed requirements come to be?

MM: Executive compensation and how that compensation is tied to performance has always been an important topic to shareholders. In addition, the SEC has been increasingly concerned that some compensation and related person transactions are not being disclosed and that companies are not adequately explaining their policies behind executive compensation arrangements. In order to provide a better understanding of how corporate assets are being used to compensate an executive, the SEC proposed rules provide for clearer and easier to understand compensation disclosure.

ML: Will they affect how companies pay their high-level employees? If so, how? Will there be any impact on the mid-level employees?

MM: A company may be more careful in what it pays its named executive officers in order to avoid negative publicity that may come with such disclosure. For instance, because a company would be required to quantify the total amount due under any severance or change in control arrangement, companies may be less likely to enter into such awards or limit the amount of such payments. In addition, because the proposed rules would require additional disclosure on any perks received by a named executive officer, a company may be less inclined to grant such perks.

The proposed rules will have minimal impact on mid-level employees. Pursuant to the proposed rules, voluntary and involuntary terminations (whether for cause or without cause) must be explained and the amount and date of any payments must be disclosed. In addition, severance agreements that do not distinguish between payments due upon voluntary and involuntary terminations must be explained, to the extent that they are provided. The proposed rules also require additional disclosure on any perks received by a named executive officer, as well as the amount and date of any payments made. In addition, severance agreements that do not distinguish between payments due upon voluntary and involuntary terminations must be explained, to the extent that they are provided. The proposed rules also require additional disclosure on any perks received by a named executive officer, as well as the amount and date of any payments made.

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Are You Dedicated?

In February I traveled to Birmingham, Alabama for the first time. I had the opportunity to visit the famous Civil Rights Museum and review the history of the Freedom Riders who road on streets and highways throughout the south to obtain civil liberties for all.

After spending hours gazing at pictures, sculptures, old newspaper articles and old news broadcasts, the one thing that stood out in my mind, was a picture of old Birmingham with dirt roads and people driving in wagons. The next picture of importance showed the development of the farm land of Birmingham into communities with paved public streets and highways.

Because I am a commercial real estate attorney and land development is my practice, those old pictures made me think about how many of the property owners were willing to dedicate their land for the development of the town—specifically for public streets and highways. When land is dedicated to a town or city, it is given with no cost for the purpose of public improvements that benefit the growth and the economic development of a town. Dedication are not only good for economic development, they demonstrate a property owner’s willingness to give for the good of their community, since an owner is not obligated to make them. Whether for public roads, bridges, public schools or hospitals, land dedications are integral to the social welfare of any community.

Although we may complain about the traffic on our freeways and streets, if some land owner had not been willing to give up their land (although not all public roads and streets are dedicated), we would not be able to get from Chandler to Scottsdale in 45 minutes.

After I came out of my gaze at those old Birmingham pictures, the next thought that came to my mind was whether the property owners that dedicated their lands for the same streets and highways used by the Freedom Riders ever thought that their dedication for the public good would have had such a profound impact on American culture. Land ownership is a powerful right and owners who use their property, whether for commercial or residential development, have an awesome responsibility to the public and to society as a whole.

Are you dedicated? ■

Paralegals with Spring Fever

If you are yearning to get outside and enjoy the good weather brought on by the coming of spring, then the MCBA Paralegal Division is here to help you get into the swing of things. With visions of a great line drive and sounds of cracking bats, we are gearing up to host our fourth annual Coed Charity Softball Tournament and we are ready to play ball! This year’s event is scheduled to take place on Saturday, May 6, beginning at 8 a.m. on the Ellsworth Fields located at 107 South Horne in Mesa.

The game is slow pitch softball and the official rules of the game apply. It’s easy and fun. This event is a great opportunity to showcase your skills while battling to win the first place trophy and the accompanying bragging rights. Even if you don’t hit a ball, you’re guaranteed to have a ball! It is also an opportunity that allows us all to interact and network with each other in a casual and fun environment. Everyone is welcome to attend, so feel free to bring your family and friends.

Chief Justice McGregor to Speak at Law Week 2006 CLE

Law Week 2006 begins April 29 and the committee is busy organizing all the weeks events, which include the annual Ask-a-Lawyer and Phone-a-Lawyer Fairs and student essay contest. Check out the article on the front page for full details.

Law Week 2006 will feature a special CLE happy hour on Thursday, May 4. This year, the YLD is honored to have Arizona Supreme Court Chief Justice Ruth McGregor as the speaker for this fun and informative event. Justice McGregor has spoken many times on issues related to this year’s law week theme: “Liberty Under Law: Separate Branches, Balanced Powers.”

Regardless of your political leanings, there can be no doubt that this topic is of utmost relevance in today’s political climate. We are fortunate to have Arizona’s own chief justice share her thoughts on this subject.

Additionally, there will be time for questions from the audience. Plan to stay for the happy hour following the CLE. This is a great opportunity to meet and chat with other lawyers in the community. It will also provide great professional networking—translation—you get the chance to see if other lawyers are in the same boat you are. You can share stories of successes and frustrations and have a great time in the process.

The seminar will go from 4 until 5 p.m., with the happy hour to follow until 7 p.m., at McCormick & Schmick’s Seafood Restaurant in the Esplanade in Phoenix.

Because of the venue and YLD’s desire to keep the CLE informal and interactive, seating is very limited and will no doubt fill up quickly. The cost to attend for MCBA members is $45 and $50 for non-members, which includes one hour of CLE credit. Drink tickets and appetizers are also included. To reserve your space, contact Carrie Kersmar at ckersmar@alvarez-gilbert.com or (602) 263-0203.

Maricopa Lawyer is published monthly by the Maricopa County Bar Association (Jo Ana Saint-George, President; Leandra Lewis, Executive Director).

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

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

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to the proposed rules, a company need only include information on its principal executive officer, principal financial officer and the three other most highly paid executive officers, if such executive officer’s aggregate yearly compensation is above $100,000. In a change from the current rules, the SEC is proposing that a company provide narrative disclosure on up to three employees that are not executive officers where such employee’s total compensation was greater than that of any of the named executive officers. In that situation, the company would need to disclose the employee’s total compensation and a description of the employee’s position. The company need not disclose the employee’s name and need not include the employee in the Summary Compensation Table. So, unless an employee fits within those criteria, there will be no impact.

**ML:** How will the new rules affect investors?

**MM:** The proposed revisions to the compensation disclosure rules are intended to provide investors with a clearer and more complete picture of compensation to the named executive officers.

If the proposed rules are adopted, it will be quicker and easier for investors to compare compensation from year to year and company to company.

**ML:** Do you feel these proposed changes, specifically the Summary Compensation Table, will thoroughly address the perceived shortcomings in companies’ disclosures under the current requirements? If no, what else can be done?

**MM:** The proposed disclosure will be expansive. A company would have to disclose the aggregate compensation received by an executive for each of the last three fiscal years. It would also be required to disclose the grant date fair value of any equity award received, even if the award is subject to forfeiture or is tied to company performance. In addition, a company will have to disclose all perks received by an executive if the aggregate amount of perks exceeds $10,000. It would have to include a narrative discussion on the objectives of the company’s compensation programs, what the compensation program is designed to reward, the reason each element of compensation was chosen and how each element of compensation fits into the company’s overall compensation objectives. A company would also be required to disclose an executive’s option exercises and the value of options that have vested but have not been exercised. As you can see, if the proposed rules are adopted, a shareholder would receive significant information about an executive’s compensation.

**ML:** Do you think using plain English instead of boilerplate language will make any impact on companies’ compensation decisions?

**MM:** I do not think the proposed requirement that the disclosure be in plain English will have much of an impact. Most executives and directors are mindful of how important executive compensation and related party transactions are to shareholders. Because of that importance, they attempt to clearly and thoroughly explain the company’s compensation policies and practices and want shareholders to understand exactly what they are paying their executives.

**ML:** If the proposed requirements are accepted, how long will it take for these changes to make a difference, if at all?

**MM:** That will depend on when the final rules are adopted. The SEC is accepting comments on the proposed rules until April 10, 2006. After that, the SEC will review the comments and make changes to the proposed rules that it feels are appropriate. When the final rules are adopted, they are expected to apply 60 days after publication in the Federal Register. The SEC hopes to have the final rules in place by the start of the 2007 proxy season.

The proposed disclosure will be held on Wednesday, April 19, 2006 from 1-4:30 p.m. at Bryan Cave LLP One Renaissance Square, Two North Central Avenue, Suite 2200 in Phoenix. Attendees may earn up to three hours of CLE credit. The cost to attend is: MCBA members: Attorney/Proffesional, $75; Paralegal/Public Atty, $55; nonmember: Attorney Professional, $105; Paralegal/Public Atty: $55. Same day registrations are $15 additional. To register, contact Jennifer Deckert at (602) 792-1437 or jdeckert@mcbabar.org.
Don’t Miss These Upcoming MCBA CLE Seminars!

**Tilting Assets for Optimal Estate Planning**
- **Thursday, April 13, 2006**
- 1 – 4:30 p.m., ASU Downtown
- 3 CLE hours

This intermediate program explores the different ways estate planning can advance their assets to fit into a comprehensive estate plan. Topics to include: how clients should be advised to designate beneficiaries for life insurance and retirement plans; how community property law affects estates and trusts; and issues in funding trusts.

**Faculty:**
- Mark House, Rosepink & Estes
- Alan Wilson, Sole Practitioner
- James Bache, Sole Practitioner

**Computer Forensics for Attorneys**
- **Friday, April 14, 2006**
- 1 – 4:30 p.m., ASU Downtown
- 3 CLE hours

Originally the sole domain of law enforcement computer specialists, computer forensics has now become an important capability for attorneys, paralegals and all other legal professionals. This seminar will discuss: where forensic evidence is hiding and what you need to know about computer forensics as an attorney.

**Faculty:**
- Russell Rowe, Chief Security Officers, LLC
- Benjamin Stephan, Chief Security Officer, LLC
- John Riding, Chief Security Officers, LLC

**Executive Compensation: New Rules—High Stakes**
- **Wednesday, April 19, 2006**
- 1 – 4:30 p.m., Bryan Cave LLC, One Renaissance Square, Two North Central, Phoenix
- 3 CLE hours

Attend this seminar to gain a firm grasp on deferred compensation under Section 409A of the Internal Revenue Code and the proposed Securities and Exchange Commission disclosure requirements for executive and director compensation.

**Faculty:**
- Lisa A. Van Fleet, Bryan Cave LLP

**Economic Loss Issues in Personal Injury Litigation**
- **Friday, April 21, 2006**
- 1 – 4:30 p.m., ASU Downtown
- 3 CLE hours

This program will focus on how economic losses determined, calculated and presented in personal injury cases, including: future medical expenses, non-medical treatment expenses and vocational loss and other economic damages. Learn how damages are projected into the future and reduced to present value for purposes of stating an admissible economic loss.

**Faculty:**
- Larry Cohen, Esq., Cohen Law Firm
- J. Matthew Sims, Crawford & Company
- David Janus, Certified Rehabilitation Counselor and Certified Disability Management Specialist
- Lora K. White, Registered Nurse

**Trends in Electronic Evidence—Including the New Federal Rules of Civil Procedure**
- **Wednesday, April 26, 2006**
- 1 – 4:30 p.m., ASU Downtown
- 3 CLE hours

Current trends, cases and best practices relating to the new “E-Discovery” Amendments to the Civil Rules of Federal Procedure. Evidence spoliation sanctions, litigation holds, inaccessible evidence, cost shifting, and the importance of pre-discovery conferences are just a few of the areas that will be covered.

**Faculty:**
- George Paul, Lewis and Roca LLP
- Jim Belanger, Lewis and Roca LLP

**New Bankruptcy Code: Changing the Way Creditors Are Treated**
- **Thursday, April 27, 2006**
- 1 – 4:30 p.m., ASU Downtown
- 3 CLE hours

This focused seminar will discuss the changes to the Bankruptcy Code as it relates to creditors’ rights for manufacturers and suppliers. It will also look at changing policy and development of the automatic stay and new exceptions to automatic stay.

**Faculty:**
- Warren Stapleton, Stinson
- Morrison Hecker LLP
- Chris Graver, Stinson Morrison Hecker LLP

**The Future of Environmental Law Practice**
- **Friday, April 28, 2006**
- 1 – 4:30 p.m., ASU Downtown
- 3 CLE hours (including one hour of ethics)

What direction is environmental law heading? Don’t miss this in-depth seminar detailing environmental law’s strides into the future, put on by the MCBA Environmental and Natural Resources section. Topics include: regulation and programs; traditional environmental law vs. growth areas in environmental law; and insurance industry, corporate billing and municipal billing requirements.

**Faculty:**
- Jim Derouin, Steptoe & Johnson LLP
- Jerry D. Worsham II, Gammage & Burnham, PLLC
- Laura Raffalli, Salt River Project
- Kathy E. Shimpock, Bryan Cave LLP
- Jenny Pelton, Ryley Carlock & Applewhite
- Teddy Ryerson, U.S. Environmental Protection Agency

**Taking and Covering Depositions**
- **Thursday, May 4, 2006**
- 1 – 4:30 p.m., ASU Downtown
- 3 CLE hours

This basic course is designed for lawyers with at least one to five years experience in civil litigation and will focus on all aspects of taking and covering depositions of both lay and expert witnesses.

**Faculty:**
- Ed Hendricks, Jr., Meyer Hendricks PLLC
- Jerry D. Worsham II, Gammage & Burnham, PLLC

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

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**Law Week**

Members of the community who come prepared with their questions and documents are able to receive free legal advice at the venue. Volunteer attorneys are needed for two shifts: 9 a.m. until noon and noon until 3 p.m. Lamson College paralegal students will be on hand to conduct pre-screening interviews and help the attorneys as necessary. The college will also provide access to its library and all copying and printing needs.

The Phone-a-Lawyer Fair will be held on Tuesday, May 2, from 6 until 9 p.m., at KAET Channel 8, which is part of Arizona State University. The public is able to call in for free legal advice. Volunteers are also needed for this event.

On May 4, Arizona Supreme Court Chief Justice Ruth McGregor will be speaking on this year’s theme at the annual Law Week CLE seminar and happy hour, held at McCormick & Schmick’s Seafood Restaurant. Attendees will be able to receive one hour of continuing legal education credit as well as meet with fellow attorneys and judges.

Finally, an essay contest is being held for seventh and eighth grade students at Maricopa County schools. The contest depicts the theme “Liberty Under Law: Separate Branches, Balanced Powers.” The three top students from each grade will be recognized by Arizona Supreme Court Justice Scott Bales at an awards ceremony on May 3.

Volunteer attorneys are needed for the Ask-a-Lawyer and Phone-a-Lawyer events. In addition, volunteers are needed to grade student essays. If you are interested or have any questions, contact Law Week 2006 Chair Carrie A. Kercomar at Alvarez & Gilbert, ckercsmar@alvarez-gilbert.com or (602) 263-0203.

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**Law Week continued from page 1**

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Role Call: Meet the Always Present Dean

Dennis Shields is new to town. Like many others who move here, Shields arrived with a plan. As dean of the Phoenix International School of Law, he is implementing both past experience and new vision into his role.

Sense of belonging

Shields grew up in Iowa, where he had an atypical Midwest upbringing. He lived in many different environments, including an orphanage, foster homes and a home for teenage boys. Given his relatively humble origins, he has managed to have a pretty good and normal life.

“People might really be surprised that I believe I’ve been successful because of the help I received in meeting the challenges of my youth, and not in spite of the hurdles I may have faced.”

He attributes where he is today to the support he received from many unlikely sources in his youth: individuals who had no stake in his life, but chose to have an interest in his well being.

Role model

Shields also grew up in circumstances where there were very few, and most often, no other African Americans in the schools and communities where he lived.

“I was fortunate to have a foster father who was both African American and a family doctor. I had a role model and a sense that African Americans had high aspirations and abilities in many human endeavors.”

Shields received a bachelor of arts in business administration from Graceland University in Lamoni, Iowa, and a juris doctorate from the University of Iowa.

Field of dreams

Shields’ drive to enter the legal field came from his love of sports. His early heroes were athletes and most though not all were African American. As a teenager he became frustrated when a teacher made little mention of the role of African Americans in the Civil War.

When Shields pointed out nothing was taught about their contributions, his teacher suggested he do some research and make a presentation on his findings. “I developed a special interest in civil rights which lead me to learn about lawyers like Charles Hamilton Houston, Thurgood Marshall, and Wade McCree.”

Fateful encounter

In self-admitted naïveté, he assumed he had to become a lawyer to make a difference. And if it was naïveté that led Shields to law, it was serendipity that drew him to the legal education sector.

During his first semester of law school at the University of Iowa, he struck up a relationship with the dean of admissions. Shields later became a half-time graduate assistant in the dean’s office. Upon graduation, he accepted a full time job.

Shields stayed at the University of Iowa through a series of promotions, holding the titles of assistant dean for admissions and financial aid and special assistant in the university academic affairs office before leaving. He then became assistant dean and director of admissions at the University of Michigan Law School before joining Duke University School of Law, where he was in charge of admissions. In August 2005, Shields became dean at Phoenix International School of Law.

Common ground

In comparing legal education to the legal practice, Shields thinks advocacy skills are used a bit differently but the two career paths still intertwine. “I haven’t had clients in the way lawyers usually have clients. However, educators are advocates for students and faculty. You are required to be a problem solver, mediator, and lecturer.”

Shields feels legal education has a special responsibility to produce lawyers who are committed to seeking out ways to contribute to the community and to ensuring access to justice.

“If we are successful in producing this type of lawyer then we will be on the path of developing a profession full of lawyers addressing access to justice at every level.”

Upstanding citizen

Shields has a genuine enthusiasm about his job. “It has been gratifying to meet the members of the legal profession and feel the school being welcomed into the fold.”

He has joined the Maricopa County Bar Association, Arizona Women Lawyers Association and Hayzel B. Daniels and plans to join others. He has also supported the work of community-based organizations, including the Urban League and the Jewish Federation.

Personal pride

Shields played a part in the Michigan Law School affirmative action case Grutter v. Bollinger, which Michigan won in the US Supreme Court. He was member of the committee that drafted the admissions policy in 1991-92, and he implemented the policy during the following years. “Many people had a hand in winning that case, and my role was small, but it is a source of satisfaction that I had a small part in that great success.”

Early in his eight-year tenure as chair of the Council on Legal Education Opportunity (CLEO), the organization was de-funded by the federal government. Shields is proud to say CLEO survived and continues to make significant contribution to diversifying the legal profession.

Firmly rooted

Remaining humble is one of the best lessons Shields has learned in life.

“Coaching youth sports keeps you humble, and helping a kid who will never play in the NBA have some fun playing basketball, has given me great satisfaction.”

And the secret to Shields’ success? Showing up everyday. As simple as it may sound, it has made a world of difference in his life.

“That is what I did during the tough times as a kid and what I do now no matter what challenges face me. You take your lumps one day and then come back ready for more the next day. That persistence has gotten me through mistakes I’ve made, as well as problems not of my making.”

A simple approach for such a complex individual.
State Bar Petitions Changes to Membership Requirements

The State Bar of Arizona has petitioned the Arizona Supreme Court to modify Rules 32(c), 45, and 64(f). Arizona Rules of the Supreme Court, concerning classes of membership, continuing legal education requirements for various classes of membership, and status changes. The Arizona Supreme Court has ordered this petition circulated for comment. Comments are due by May 22, 2006.

Membership

The proposed change to Rule 32(c)(1) would add language stating that in addition to disbared persons, “resigned persons” are also not members of the bar. The proposed change to Rule 32(c)(4) would delete language allowing a retired member to transfer to inactive status. Proposed new subsection (c)(5) would, through additions and deletions, explain that active, inactive, or judicial members are not engaged in active practice in any state, district, or territory of the United States may be transferred to retired status upon written request to the bar’s executive director. Language of this subsection would also be changed to prohibit retired members from practicing law, while providing an exception to allow retired members to provide volunteer legal services to approved legal organizations as defined in Rule 38(e) and eliminating the requirement that retired members have actively practiced law within the previous five years as required by Rules 38(e)(2)(B)(1) or 58(e)(3)(A).

The change would allow retired members to return to active, inactive, or judicial status upon written request to the executive director, payment of the required membership fee, and satisfaction of any Rule 45(d) requirements.

The proposed rule would add retired members to the list of those for whom the board may establish an annual membership fee in what would become new subsection (7) of Rule 32(c). That amended subsection would add language to explain that a waiver of dues for personal hardship does not include failure of the member to calendar the deadline, failure to promptly notify the bar of an address change, or the member’s delegation of the responsibility to another person. The State Bar has also requested that beginning in 2007, members over 70 years old be required to pay dues based on their membership categories. The language of what would become Rule 32(e)(11)(C) would explain that in order for a resigned member in good standing to return to active, inactive, or judicial membership status, that person must apply for admission to the bar and pass the bar examination as required in Rule 33. Such applicant must also pay the fees required for original admission to the bar.

CLE requirements

The proposed changes to Rule 45(b)(1) would add retired members to those who are exempt from Rule 45(a) requirements relating to continuing legal education, as long as the lawyer is inactive or retired during the entire educational year. The rule would further reflect that an active member who transfers to inactive or retired status is exempt during the educational year in which the transfer occurred. The proposed change would delete language presently stating that an inactive member who transfers to active status shall comply with the educational requirements of subsection (a) in effect for the educational year in which he or she transfers to active status. The proposed amendment would delete Rule 45(b)(3), which presently explains that active members who are at least 70 years old or who will have been members of the bar for at least 45 years before June 30 are exempt from the continuing legal education requirements. Thus, the proposed change would require these members to meet continuing legal education requirements.

Status

Proposed new Rule 45(e) regarding status changes would explain that when a member returns from inactive status to active status, that member must show completion of continuing legal education hours equivalent to those required by subsection (a) for each of the last two years during which the member was on inactive status. For a member returning from retired status to active status, the member must show completion of continuing legal education hours equivalent to those required by subsection (a) for each of the last three years during which the member was on inactive status. The amendment would further explain that any inactive, retired, or judicial member who transfers to active status shall comply with educational requirements under subsection (a) in effect for the educational year in which he or she transfers to active status. A proposed change to what would become subsection (l) explains that a member summarily suspended for failing to meet the continuing legal education requirements may be reinstated upon completion of such requirements for each educational year the member was suspended in addition to payment of any required fees. The proposed change to Rule 64(f) would add language explaining that an application of a member summarily suspended also now needs to be accompanied by proof of completion of any continuing legal education hours that would have been required had the applicant remained an active member to the date of the application.

Time of the Season: Real Estate Tax Implications and Issues

When you eventually sell these properties, your gain or loss will be based on the difference between your selling price or amount realized and your cost basis in the properties. Usually, if you have held the property for more than a year, the gain from the sale of the properties will be capital gain. However, it is very possible and probable that you will have to recapture the amount of the depreciation that you took on the properties. Instead of only paying 20 percent (assuming a federal capital gain tax rate of 15 percent and an effective state tax rate of five percent), part or all of your gain may be taxable at 25 percent for federal income tax purposes, and other parts of your gain may be taxable to you as ordinary income for federal income tax purposes.

What if I purchase real estate properties and I intend to “flip” them? Should I hold these for more than a year in order to pay the capital gains rate if it is favorable to my ordinary income tax rates?

Buying properties with the intention of flipping, or reselling them, is a different activity than buying real estate with the intention of holding them as an investment and renting them out. Properties that are bought to be flipped are usually deemed inventory by the holder and should be accounted for as such.

I am considering buying the building that my business currently occupies. Should I be setting up another entity for this or just keep it in my current business?

From a tax standpoint, I usually recommend that my clients set up another Limited Liability Company (LLC), taxed as a partnership. Generally speaking, the partnership structure allows for the partners to take assets without triggering a taxable event. That is, the tax treatment is usually different for partners taking assets than it is for shareholders of S Corporations or C Corporations taking assets. Also remember that a C Corporation does not have a capital gains tax rate which can prove very unfavorable to a taxpayer.

How are my assets protected in each entity?

I’m not sure that I could give you an accurate answer. Let’s give your attorney a call!

John Nardi can be reached at (480) 837-4551 or via email at John@snjcpa.com.
Barristers Ball 2006 Brings Out the Best

An enjoyable time was had by all who attended the Maricopa County Bar Association's Barristers Ball 2006, held March 4 at The Phoenician. The annual event, put on by the MCBA Young Lawyers Division, was attended by local attorneys and judges. The evening's lively silent auction and raffle raised over $12,000 for the ball's beneficiary, Arizonans for Children, Inc. Dinner concluded with an exciting raffle of precious gems—ten sapphires and a half-carat diamond donated by local jeweler Moda Fina.

MCBA Young Lawyers Division thanks all those who made Barristers Ball 2006 a success:

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Thanks to Moda Fina and all those who donated Silent Auction items. All proceeds benefit Arizonans for Children, Inc.

A special thanks to the following individuals:
Erin McGuinness and Jeff Kuykendal (Ball co-chairs)
Jennifer Ratcliff (Silent Auction chair)
Annette Puccia and Kaye McCarthy (Beneficiary volunteers)
Paige Martin
Julie LaFave
Jennifer Green
This calendar includes CLE seminars presented by MCBA as well as MCBA meetings, luncheons and events and those of other voluntary bar associations and law-related organizations. The divisions, sections and committees listed here are those of the MCBA, unless noted otherwise. Everything takes place at the MCBA office, 303 E. Palm Lane, Phoenix, unless noted otherwise. Other frequent venues include the University Club, 39 E. Monte Vista, Phoenix; 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.

APRIL 2006

The cost for each seminar listed is: MCBA member attorneys, $75; member paralegals and public lawyers, $55; non-member attorneys, $105; non-member paralegals and public lawyers, $75. Same-day registration is an additional $15. For more details on the upcoming seminars, see page 4.

3  ML Editorial Board Meeting, (A) 5:15 p.m.
21 Judicial Reception, University Club, 5:30 p.m.
5  Family Law Meeting, (Fresh Start) 5:30 p.m.
21 MCBF Meeting, (A) 7:30 a.m.
6  Construction Law Section Meeting, (A) noon
21 Economic Loss Issues in Personal Injury Litigation
10 YLD Board Meeting, (A) noon Paralegal Board Meeting, (A) 3 CLE hours
21 1 – 4:30 p.m., ASU Downtown
24 Minority & Women Lawyers Task Force, (A) noon
11 PLD Board Meeting, (A) noon Scottsdale Bar, (Scottsdale Athletic Club) noon
25 Employment Law Section Meeting, (A) 11:30 a.m.
12 MCBA EC Meeting, (A) 7:30 a.m.
25 CCD Board Meeting (A) 4:30 p.m.
Environmental Law Section Meeting, (A) noon
26 Criminal Law Section Meeting (A) 7:30 a.m.
Hayzel B. Daniels, (A) 6:00 p.m.
27 Trends in Electronic Evidence
13 PL/Negligence Meeting, (A) noon
1 – 4:30 p.m., ASU Downtown
3 CLE hours
EP Probate/Trust Board Meeting, (A) 7:30 a.m.
CCD Luncheon, (University Club), noon
New Bankruptcy Code: Changing the Way Creditors Are Treated
1 – 4:30 p.m., ASU Downtown
3 CLE hours
19 Executive Compensation: New Rules—High Stakes
1 – 4:30 p.m., Bryan Caves LLP 3 CLE hours
19 The Future of Environmental Law Practice
1 – 4:30 p.m., ASU Downtown 3 CLE hours (including one hour of ethics)
18 IRS Committee Meeting, (A) noon
20 Bankruptcy Section Meeting, (A) 5:30 p.m.
20 Estate Planning, Probate and Trust
20 1 – 4:30 p.m.

■ Paul Giancola, a partner at Snell & Wilmer, has been appointed to the Arizona Chapter of the Partnership for a Drug-Free America’s Board of Directors.

■ Penny Willrich, associate professor of law and director of the Lawyering Process Program at the Phoenix International School of Law, was elected to the Community Legal Services Board of Directors for a three-year term. She was appointed to the board by the Maricopa County Bar Association.

The mission of the Partnership for a Drug-Free America is to reduce illicit drug use in America. Through its programs, the partnership inspires Arizonans to join in a united effort to prevent drug use among teens through community-based education.

Giancola (J.D., 1980, Syracuse University) focuses his practice on commercial, pharmaceutical, and employment litigation, as well as health care compliance and regulatory matters, including licensing board investigations, fraud and abuse, and peer review.

James Cross, an attorney at Osborn Male Wander, P.A., has been appointed to a three-year term as a lawyer representative to the Ninth Circuit Judicial Conference.

Cross (J.D., 1983, ASU) is a certified specialist in bankruptcy law, focuses his practice on distressed/insolvent businesses in restructuring and out-of-bankruptcy proceedings. His client representation covers the entire spectrum of bankruptcy and insolvency from trustees, examiners, secured and unsecured creditors, equity holders and indentured trustees to equity and unsecured creditor committees.

Willrich (J.D., 1982, Antioch School of Law) resigned from the Maricopa County Superior Court bench in 2005. She worked as a managing attorney for the Domestic Violence Project at Community Legal Services in the early 1990s.

■ A screen grab of the Maricopa County Bar Association's calendar.
Who needs MEEDS?

The Minute Entry Electronic Distribution System is known in our office and throughout the pleading-filing community by its acronym, MEEDS. Minute entries are the lifeblood of the Arizona court system, documenting what happens in court and contributing to a complete court record. Some newer attorneys have always received their minute entries electronically and are accustomed to this service as a standard business practice. Most attorneys have always had paper minute entries and are accustomed to the way they look and the way they are delivered. Recently, even the delivery of minute entries has changed. By discontinuing minute entry drop boxes at the Clerk’s Office, those who used to have a runner pick up their minute entries are now receiving them by mail or electronically.

Paper in the courts

The Clerk’s Office always addresses issues with paper. Historically, paper has been the vehicle with which to bring a dispute to the court. However, bottled ink, scribes, and quills have been replaced by ink cartridges, data entry, and computers. Where drafting documents was once labor intensive and required precision typing, pleadings can now be drafted, rewritten, and spell-checked very quickly.

The ease of drafting pleadings, coupled with the growth of Maricopa County, has resulted in the Clerk’s Office filing tens of thousands of pieces of paper every business day. While the paper process is familiar, it is also labor intensive and costly. At such a high volume, Maricopa County is always mindful of the need for storage space. An alternative and solution to housing paper is an electronic record.

Technology in the courts

Not long ago I remember our staff having their typewriters replaced with word processors. Shortly after that, word processors were replaced by computers. Culture shock ensued and some people struggled with a perceived extreme and nonsensical change in business process. Can you imagine trying to take away their computers now?

Today, technology is the norm for business practices. While Maricopa County remains a leader in electronic courtrooms, e-filing, and other notable wired and wireless processes, this technology is not the extreme process it once was. Common electronic processes like online banking and bill paying, airline ticket and hotel reservations, and other computer-based purchases and processes have helped ease the transition from paper processes to electronic processes.

By the numbers

In the Clerk’s Office, the transition from paper to electronic processes is vastly improving. At the end of last calendar year, paper minute entries were issued at a ratio of nearly one-and-a-half paper minute entries for every electronic minute entry. Already this year the ratio of paper to electronic minute entries is nearly a one-to-one split, with slightly more minute entries issued electronically than in paper. So far this fiscal year, the Clerk’s Office has e-mailed over one half-million minute entries electronically. As encouraging as this is, there are still tens of thousands of paper minute entries being printed, mailed, and stored each month. We strongly urge the use of electronic distribution, as the ongoing storage needs cannot be maintained indefinitely.

What you can do

Who needs MEEDS? We all do. MEEDS is one of the office’s earliest success stories with using technology to improve service; in the past three months, over 1,000 attorneys enrolled to receive minute entries by e-mail. Enrolling in MEEDS is easy; you can download the enrollment form today from the clerk’s Web site at www.clerkofcourt.maricopa.gov/forms.asp. You will continue to receive paper minute entries for 30 days, in addition to the e-mailed minute entries. This allows you to adjust to the transition and verify the delivery of electronic minute entries is just as reliable as paper, and much faster. Please contact the Clerk’s Office distribution center at (602) 506-7773 for more information or with any questions on MEEDS. You can also contact nearly one of every two attorneys in Maricopa County and ask how they managed the change from paper to electronic. I think you will be impressed by their response.

YLD Domestic Violence Committee Celebrates Mothers’ Courage

Mother’s Day provides children with an opportunity to say thank you for the love and support their mothers provide them throughout the year. The Maricopa County Bar Association’s Young Lawyers Division is trying to commemorate this special day for the small but deserving subset of mothers residing in Maricopa County’s domestic violence shelters.

Domestic violence shelters house not only women who have been victims of abuse, but also their children. The Young Lawyers Division’s Domestic Violence Awareness Committee established the Mother’s Day Project as a way of recognizing these women and their courage to protect and remove their children from an abusive situation.

The committee raises funds throughout the spring to purchase Mother’s Day gifts and craft supplies. It then organizes groups of volunteers to visit shelters and meet with the children. The volunteers give each child a present for his mother and help the children decorate Mother’s Day cards, gift bags and frames. While most children rely upon their fathers to assist them with purchasing or making Mother’s Day gifts, the children residing in these shelters often lack such role models. The committee attempts to fill part of that void by spending quality time with the children while giving them an opportunity to show their mothers how much they appreciate them. In that sense, the project is equally rewarding for the mothers and the children.

If you are interested in visiting a shelter as part of the Mother’s Day Project or making a monetary donation to help the MCBA YLD Domestic Violence Awareness Committee purchase gifts and supplies, please contact the chairperson, Julia Acken at jaken@cox.net.

Looking for more exposure for your business?

Have space to lease or need to fill a position at your firm?

To place a display or classified ad, call the MCBA 602-257-4200.
Superior Court Expands Director’s Responsibilities

By J.W. Brown
Maricopa Lawyer

Trial Courts Administrator Marcus Reinkensmeyer has announced the appointment of Phillip Hanley to the post of administrative services director and human resources director for Superior Court in Maricopa County. This position oversees the court’s budget, payroll, human resources, training and procurement.

“Hanley has done an exemplary job as the acting administrative services director for the court, having come to the court as human resources director in April 2004,” Reinkensmeyer said. “He has 25 years of experience in the fields of human resources, employee relations and budget management.”

Hanley expressed enthusiasm towards his new role: “I am looking forward to continuing to serve the court in this expanded capacity.” Before joining the court’s administrative team, he previously served as the director of human resources for both ATC Phoenix (formerly known as Phoenix Transit System) and the Oklahoma City Public Transit System. He serves on a number of boards focused on human resources issues, industrial relations and labor relations at both the local and national levels. He holds a master’s degree in business administration from Central State University, in Edmond, Oklahoma.

The “Only” Tip You Need to Know

Anyone who reads knows that certain words draw a reader’s attention. In legal writing, especially in contract and legislative drafting, that word is “only.” However, misplacement of the word “only” in a sentence can change the writer’s intended meaning.

Consider the following example:

The defendant only moved for summary judgment.

The word “only” in this example is a “squinting” modifier: by its placement in the middle of the sentence, it can modify two different words. On the one hand, one valid reading is for “only” to modify “defendant,” which means the defendant was the sole party to seek summary judgment. On the other hand, “only” could modify “moved,” which means the defendant’s sole action in the case was filing the motion. Although the writer most likely had a clear intention when drafting (and may, in fact, be resistant to rewriting what she perceives as a clear, succinct sentence), she should edit the sentence for clarity.

The rule of thumb for editing sentences containing the adverb “only” is to place the adverb in one of two places: at the beginning of the sentence or at the end of the sentence. This ensures that the word “only” modifies one neighboring word. Thus, the rewrite of the sentence to mean that the defendant was the sole party to seek summary judgment would be the following:

Only the defendant moved for summary judgment.

The rewrite of the sentence to mean that the defendant’s sole action in the case as filing the motion would be the following:

The defendant moved for summary judgment only.

In addition to clarity, the rewrite puts the emphasis on the word “only,” which was the reason the writer chose that word in the first place.

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Write a Letter!

We welcome letters to the editor. Letters generally should be no more than 300 words long. Maricopa Lawyer reserves the right to edit all letters for length. Letters to the editor can be e-mailed to kbrieske@mcbabar.org or mailed to: Editor, Maricopa Lawyer, Maricopa County Bar Association, 103 E. Palm Lane, Phoenix, AZ 85004.
Melanie G. McBride and Valerie Erickson have joined Gust Rosenfeld as associates.

Melbide (J.D., 2004, Suffolk University) practices in the areas of insurance defense, products liability, construction defects, and premises liability.

Erickson (J.D., 1993, ASU) joined Gust Rosenfeld as a member. Erickson (J.D, 1993, ASU) concentrates her practice on general insurance defense litigation including municipal liability.

Jennifer Erickson, Michael W. Halvorson, Rachel Love Halvorson, and Joseph J. Popolizio.

Michael L. Aguirre joined Greenberg Traurig, LLP as an associate in the firm’s business finance group.

Aguirre (J.D., 2005, ASU) authored the Arizona State Law Journal article, “From Locker Rooms to Legislatures: Student-Athletes Turn Outside the Game to Improve the Score” in 2005. He recently participated as a panelist for the John S. and James L. Knight Foundation Commission on Intercollegiate Athletics, Summit on the Collegiate Athlete Experience, in Washington, DC.

Michelle Ray Matheson has joined Gallagher & Kennedy, P.A.

Matheson (J.D, 1995, University of Kansas) focuses her practice on employment law. Immediately prior to joining Gallagher & Kennedy, Ms. Matheson served as director of legal affairs for US Airways/America West Airlines.

Jennifer Erickson, Michael W. Halvorson, Rachel Love Halvorson, and Joseph J. Popolizio.

Garry Hays has also joined Gallagher & Kennedy as an associate in its governmental affairs practice.

Hays (J.D., 2003, ASU) practices governmental affairs law with an emphasis on public utilities, water, telecommunications, zoning, land use and government regulations.

Love Halvorson (J.D., 1999, ASU) concentrates her practice on general insurance defense.

Law Halvorson (J.D., 1999, ASU) concentrates her practice on municipal liability, civil rights liability, corrections defense, law enforcement defense and employment law.

Love Halvorson (J.D., 1999, ASU) concentrates her practice on general insurance defense, wrongful death, trucking, suretyship, product liability, premises liability, law enforcement defense, and municipal liability law.

Eric D. Gere has joined Robbins & Green, P.A. as an associate.

Gere (J.D., 2004, University of Washington) focuses his practice on general, commercial, and real estate litigation.

Erickson (J.D., 1993, ASU) concentrates her practice on general insurance defense litigation including municipal liability.

Halvorson (J.D., 1999, ASU) concentrates his practice on trucking/transportation defense, motor vehicle liability, premises liability, personal injury litigation, and insurance defense.

Halvorson (J.D., 1999, ASU) concentrates his practice on trucking/transportation defense, motor vehicle liability, premises liability, personal injury litigation, and insurance defense.

January 2005. He recently participated as a panelist for the John S. and James L. Knight Foundation Commission on Intercollegiate Athletics, Summit on the Collegiate Athlete Experience, in Washington, DC.

Barry M. Markson has been elevated to partner at Thomas, Thomas & Appel.

Markson (J.D., 1994, ASU) will continue to focus on business litigation, capital transactions, securities and general corporate law.

Carla A. Consoli has joined Lewis and Roca LLP as a partner.

Consoli (J.D., 1991, Notre Dame) joins the firm’s government relations and administrative law practice group, concentrating her practice in environmental law and water rights.

John F. Daniels III, Thomas D. Ulreich-Power, and Julio M. Zapata have been elected shareholders and directors of Fennemore Craig.

Daniels (J.D., 1978, University of Missouri) practices in business and finance as well as real estate, representing clients with entity formation, tax structured business and real estate transactions, qualified plan investment and controversies, and succession planning.

Ulreich-Power (J.D., 1998, University of Virginia) practices product liability, personal injury, insurance coverage, bad faith, and commercial litigation.

Zapata (J.D., 1998, University of Washington) practices in the areas of creditors’ rights, bankruptcy, commercial litigation, general and tort litigation.

Anoma Phanthourath has been named a shareholder at Shughart Thomson & Kilroy, P.C.

Phanthourath (J.D., 1998, UA) will continue to focus on business litigation, including breaches of employment agreements, real estate agreements, service and purchase agreements, and business torts.
POSITIONS

ASSISTANT ATTORNEY GENERAL—Do you really want to be a litigator? Are you looking for a job as an attorney where you can make a difference and help children and families in Arizona? The Child and Family Protection Division, Protective Services Section (PSS) of the Arizona Attorney General’s Office, has full-time trial attorney positions in Phoenix and Mesa. PSS represents the Division of Children, Youth and Families (DCYF) of the Department of Economic Security. PSS trial attorney responsibilities include representing DCYF in dependency, severance, guardianship, and adoption matters statewide. These positions regularly conduct bench and jury trials, mediations and other child welfare hearings in juvenile court. These positions require regular travel for court hearings and client contact, and may require additional in-state travel. Seeking candidates with one to a maximum of 15 years experience in the practice of law, juvenile law, and/or trial experience or a demonstrated interest in children’s issues is preferred, but not required. Admission to and good standing with the Arizona State Bar is required (include on resume date(s) of admission in Arizona and any other states). To apply for these positions, please mail, e-mail or fax a cover letter referencing announcement A004-36, and resume to: Sharon Sergent, Chairperson Hiring Committee, Office of the Attorney General 1275 West Washington, Phoenix, AZ 85007, 602-542-8000 Fax, attorney.recruiting@azag.gov e-mail, http://www.azag.gov Website. EOE.

FENNEMORE CRAIG SEES ATTORNEYS for its expanding Phoenix office. Fennemore Craig is one of the largest firms in the Southwest and has been helping clients build the New West for more than a century. Our firm is a full service law firm with over 160 attorneys. Current openings include (1) Real Estate—experience in commercial leasing, purchase and sale of improved and unimproved property, lending, due diligence, planned communities, CC&Rs, (2) Business & Finance—experience with acquisitions, debt and equity finance, and other significant business transactions and (3) Medical Negligence—experience with significant case management responsibility and extensive client contact. Candidates must have excellent professional credentials. Qualified candidates are encouraged to forward their resumes to: Laura Zilmer, Attorney Recruitment Administrator, Fennemore Craig, 3003 N. Central Ave., Suite 2600, Phoenix, AZ 85012 or lzilmer@fcflaw.com.

GAMMAGE & BURNHAM, P.L.C., is a full service business law firm guided by an entrepreneurial spirit that is dedicated to providing high quality legal services. The firm is seeking talented attorneys with 2 to 4 years experience for its growing practice areas in COMMERCIAL LITIGATION and REAL ESTATE. Excellent academic credentials, strong writing and analytical skills and Arizona Bar membership are required. Please reply in confidence to Marsha Kendall, H.R. Director, Gammage & Burnham PLC, Two North Central Avenue, 18th Floor, Phoenix, AZ 85004.

GALLAGHER & KENNEDY has the following opportunities available: Employment Law Associate. A minimum of 4 years’ focused experience in representing businesses in labor and employment law matters in Maricopa County. Environmental Litigation Associate Environmental and Natural Resources Associate A minimum of 1 to 3 years of law firm experience in environmental litigation, administrative proceedings, regulatory compliance and permitting. Real Estate Associate A minimum of 2 to 4 years’ transactional, real estate experience in a law firm environment. Candidates must have an outstanding academic record, along with superior communication and writing skills. For more information on these positions, please view are website at gknet.com. Qualified candidates are encouraged to forward their resumes to: Amanda Powell, Attorney Recruitment Coordinator, Gallagher & Kennedy, P.A., 2575 E. Camelback Road, Phoenix, Arizona 85016. Phone 602-530-8000; Fax 602-530-8500; E-mail apowell@gk.com.

PHOENIX INTERNATIONAL SCHOOL OF LAW FACULTY POSITIONS Phoenix National School of Law (PhoenixLaw) seeks candidates for full-time faculty positions beginning August, 2006. Curricular needs include first-year and upper-level doctrinal, skills, and writing courses. Applicants should have a strong record of academic achievement and excellent skills in legal writing and oral communication. Applicants should be: (1) committed to a learning experience that is student-centered, (2) eager to help students graduate ready to practice law; (3) attracted by the process of institution building; (4) multiculturally competent; (5) committed to management and faculty development based on best practices and continuous self-improvement; (6) comfortable with change and innovation; (7) comfortable with a humility based culture and transparent interaction; (8) committed to the bridging of differences in learning styles and group performance; and (9) friendly toward the use of technology and other enhancements of traditional learning models. PhoenixLaw is part of the InfLaw consortium of independent, community based law schools. Please submit applications via mail to Gerry Hess, Chair, Faculty Appointments Committee, Phoenix International School of Law, 15011 N. 75th Street, Scottsdale, AZ 85260, or via email, ghess@phoenixlaw.org. Applications will be reviewed on an ongoing basis until the positions are filled.

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TRANSACTIONAL ASSOCIATE—Zwillinger & Georgelos P.C., a growing AV rated law firm, is currently seeking a transactional associate with 1-3 years of experience in real estate, corporate and/or securities law. Please send resume and references to Sandra J. Silvernale via email at ssilvernale@zglawgroup.com or via facsimile at (602) 224-7889.

LITIGATION ASSOCIATE—Zwillinger & Georgelos P.C., a growing AV rated law firm, is currently seeking litigation associates with 1-3 years of experience to work on complex commercial litigation matters, with a focus on corporate and real estate disputes. Please send resume and references to Sandra J. Silvernale via email at ssilvernale@zglawgroup.com or via facsimile at (602) 224-7889.

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COURT STAFF ATTORNEY—March 13, 2006—Until selection is made. First review of application material will occur on April 7, 2006. $75,379 - $118,810 annualized. Requires admission to the State Bar of Arizona and four years experience as a practicing attorney in general civil and civil law. Prefer candidates with at least one year experience to court administration and a wide variety of other legal experience in litigation, criminal and civil traffic procedures, rules of evidence, bankruptcy, collections, contracts and other areas of practice that effect court administration. YOU MAY APPLY ON-LINE AND/OR RECEIVE ADDITIONAL INFORMATION AT: www.phoenixgov.gov.
Court Watch
continued from page 1

could have been restrained from operating their business in a common-law action for public nuisance.

Public nuisance

Hall examined the reasons behind the ordinance. It proclaimed that “live sex businesses contribute to the spread of sexually transmitted diseases and [are] 'inimical to the health, safety, general welfare and morals....'” The city had investigated and produced a report backing up these conclusions. Undercover officers had witnessed numerous sex acts, “some involving more than one couple,” where the men had not worn condoms. The report “also expressed concerns with cleanliness,” noting the potential “for unwanted contact with different bodily fluids which include saliva, semen, blood, and fecal matter.” Acknowledging that the mere incantation of “public nuisance” does not insulate a law from the Takings Clause, Hall nevertheless held that “nothing... prevents a legislature from enacting a law that makes explicit its right to prohibit activity that was already contrary to existing law.”

Hall “readily conclude[d]” that the Ordinance proscribed conduct that would have qualified as a common-law public nuisance. “Relying on the extensive information presented to it and the public hearings it held, the City concluded that live sex act clubs would contribute to the spread of sexually transmitted diseases and were contrary to public morals.”

He pointed to the goal of stemming the spread of sexually transmitted diseases, noting that sex clubs in Phoenix had 33,000 or more members. “Under these circumstances, even without addressing the question of public morality, appellants’ business clearly fell within the type of conduct that could have been abated at common law as a public health hazard.” Consequently, Hall held that the bundle of rights associated with title to the property did not include the right to run a live sex act business. “Because public nuisances are not protectable property interests,” he held, “the City’s enforcement of the Ordinance did not implicate the Takings Clause and appellants are not entitled to compensation.”

Judges Donn Kessler and Ann A. Scott Timmer joined the opinion.

... Can an attorney be guilty of ineffective assistance in a capital case by acceding to his client’s wish not to offer mitigating evidence in the penalty phase? The Ninth Circuit recently wrestled with that question. The court held en banc that the defendant was entitled to a habeas-corpus hearing. Landrigan v. Schriro, No. 00-99011 (9th Cir. Mar. 8, 2006).

Jeffrey Landrigan killed Chester Dean Dyer after the two drank beer together and had sex. A jury found him guilty of felony murder. Landrigan had escaped from an Oklahoma prison, where he was serving time for assault and battery with a deadly weapon, second-degree murder, and marijuana possession.

Who’s to blame

During the penalty phase, his attorney wanted Landrigan’s ex-wife to testify to verify his drug-abuse history, to show that he had been a loving husband, and to explain the circumstances of a prior conviction. He asked Landrigan’s mother to testify that she had abused alcohol and other drugs while pregnant with Landrigan.

But Landrigan persuaded the women not to testify. In a colloquy with Landrigan, the trial judge verified that he did not want their testimony. When she asked if there were any mitigating circumstances that she should know of, he responded, “Not as far as I’m concerned.” She then sentenced him to death.


After his petition for post-conviction relief was denied, he filed for habeas corpus, but the district court denied it. A three-judge panel affirmed. The en banc Ninth Circuit reversed.

Unprepared

Writing for the majority, Judge Michael Daly Hawkins held that Landrigan had sufficiently alleged that trial counsel had failed to adequately investigate possible mitigating factors. Hawkins pointed to a recent Supreme Court opinion that “clarified the duty of an attorney to develop and present mitigating evidence, even when dealing with capital defendants who are ‘uninterested in helping’ or ‘even actively obstructive’ in developing a mitigation case.”

Landrigan presented evidence of counsel’s failure to adequately prepare for sentencing. Hawkins noted that defense lawyers are not ineffective simply for failing to find mitigating evidence, but they are ineffective if they don’t try hard enough. Landrigan had sufficiently alleged the latter, with a long list of things that counsel could have discovered “with...minimal investigation.”

Landrigan’s mother abandoned him when he was six months old. Although later adopted, “his adoptive mother was also an alcoholic, at times consuming a fifth of vodka or more a day until she passed out; she would frequently slap him and once even hit him with a frying pan.”

Landrigan had a difficult childhood, “exhibit[ing] abandonment and attachment problems, had difficulty sleeping, and had violent temper tantrums even at a very early age.” He also “had serious drug and alcohol problems while very young and he even overdosed in class....” And when he killed Dyer, “he had used amphetamines for 42 straight days and had slept on only about 14 of those days.”

A deeper look

Comparing the results of counsel’s minimal investigation with the mitigating evidence that Landrigan claims was available left Hawkins “with grave doubts whether Landrigan received effective assistance of counsel during his penalty phase proceeding.” He rejected the state’s argument that counsel’s investigation was irrelevant because Landrigan refused to permit him to use any mitigating evidence.

Landrigan’s refusal to allow his ex-wife and mother to testify, Hawkins held, had to be interpreted against the attorney’s failure to adequately investigate in the first place: “The state misreads what occurred at the sentencing hearing. Landrigan’s counsel had lined up only two witnesses to testify on his behalf during the sentencing phase.” Thus, he concluded, “there is no indication that Landrigan would have precluded the introduction of mitigating evidence by other means.” “The possibility of other evidence or witnesses simply never came up, doubtless because defense counsel had no other evidence to present.”

Hawkins accused the Arizona Supreme Court of having taken Landrigan’s colloquy with the sentencing judge out of context: “The state supreme court found that, ‘[a]lthough the sentencing hearing, defendant instructed his lawyer not to present any mitigating evidence.’ ‘In light of what actually transpired at the sentencing hearing,’ Hawkins concluded, ‘such an overly broad characterization of the colloquy is not supported by the record and thus amounts to an unreasonable determination of the facts.’”

Losing battle

Judge Carlos T. Bea dissented. While he agreed that counsel’s investigation was inadequate, he found no prejudice, concluding that Landrigan was destined to be sentenced to death. He believed that the mitigating evidence had no chance of overcoming the factors that called for the death penalty.

The evidence of antisocial personality traits caused by his tortured past was insufficient to call for leniency. Bea noted that Landrigan had displayed enough impulse control to engage in extended social interaction with Dyer before killing him.

He also believed that the evidence that supposedly mitigated his culpability also suggested that “Landrigan was unteachable and, even from prison, would present a future danger to society.”

Bea also believed that Landrigan’s own trial behavior “negated any effort by counsel to elicit sympathy based on a genetic or biological predisposition toward violence.” He quoted the panel opinion: “Each of counsel’s feints in the mitigation direction brought a statement from Landrigan that painted an even bleaker picture and made matters even worse.”

Bea noted that, in an ironic twist, the remand for a hearing may be for naught. While the appeal was pending, Landrigan wrote to the court: “As of today, I want to withdraw my petition and drop all appeals. I no longer wish to pursue any action from your court or any others, and want my execution date to be set as soon as possible. Thank you.”

OTHER

SUMMER RENTAL: South Mission Beach - Three bedroom, two bath condo. All amenities. Alex: 619-702-6076 and 619-300-6268.

DOWNTOWN TOWNHOUSE RENTAL - Artesian Village, 615 Portland Avenue. 2BD/2BA, DOWNTOWN TOWNHOUSE RENTAL

ties. Alex: 619-702-6076 and 619-300-6268.

MARICOPA LAWYER 13 • APRIL 2006
Recruitment Launched for New Court Commissioners

Opportunity and timing are on the side of lawyers in good standing with both a penchant for accepting a challenge and desire to wear a black robe.

Starting on Monday, April 17, the Superior Court in Maricopa County opens a four-week application window for attorneys interested in becoming a commissioner. Application packets are available from the court’s Human Resources Department, 101 W. Jefferson, Phoenix, or can be downloaded from the court’s Web site: www.superiorcourt.maricopa.gov. The online application will be accessible on Monday, April 17 through noon on May 12. You may also obtain an application on compact disc at the Court Human Resources Department. All applications must be submitted by 3 p.m. on Friday, May 12.

Qualifications for applicants include: must be at least 30 years old; active in the general practice of law; no less than five years experience preceding appointment; be admitted to practice law in Arizona; be of good moral character; and have a minimum of five years residency in Arizona at time of appointment.

The selection process begins the week of May 15, during which application packets will be distributed to members of the Commissioner Nomination Committee. Members will review the resumes and recommend candidates to be interviewed during an all-day screening process on Friday, June 16.

An eligibility list will be created following the interviews and will be provided to Presiding Judge Barbara Rodriguez Mundell. The eligibility list is scheduled to be finalized by July 1 and presented to Mundell. She will appoint new commissioners from that list, as vacancies occur. The current eligibility list will be replaced by the new list of finalists.

Questions about the application process should be directed to the Court Human Resources Department, (602) 506-0149.

Ninth Circuit Judicial Conference to be held in July

The Ninth Circuit Judicial Conference will meet in Huntington Beach, Calif. from July 10 through 13, and will focus on sentencing, juries, natural disasters, court security and disaster planning, and judicial wellness. The conference will welcome Anthony M. Kennedy as the Supreme Court justice recently named to attend to the Ninth Circuit. Mary M. Schroeder, chief circuit judge for the Ninth Circuit, will preside over the conference.

By law, the Ninth Circuit Judicial Conference meets annually to consider the business of the courts and to find ways to improve the administration of justice within the circuit.

Five states file motion to sue federal government; Arizona supports states’ rights

On March 3, the states of Texas, Kentucky, Maine, Missouri, and New Jersey filed a Motion to File a Bill of Complaint in the United States Supreme Court, asking the court to take original jurisdiction over a lawsuit that challenges the constitutionality of the “clawback” provision in Part D of the Medicare Prescription Drug, Improvement and Modernization Act of 2003. Under the prescription drug program, states must pay part of the costs associated with providing federal drug coverage for persons receiving either Medicare or Medicaid medical benefits. If a state fails to make the required clawback payment, the amount plus interest is deducted from any Medicaid payments the federal government would have paid to the state.

The questions presented in the lawsuit are 1) whether the clawback is an unconstitutional tax against the states in their sovereign capacities; 2) whether the clawback impermissibly commandeers state legislatures to fund the federal Medicare program; and 3) whether the clawback violates the Constitution’s Guarantee Clause by improperly usurping control of essential functions of state government.

Arizona, joined by nine other states, filed an amicus curiae brief in support of the lead states.
Civil Court Customer Service Improves Access
By J.W. Brown
Maricopa Lawyer

One of the most frequently used services for Civil Court customers has been improved and upgraded to enhance visitors’ access. “I was at first overwhelmed with the issue of public access, as it seemed nearly unattainable,” said Mitch Michkowski, of a visit to the court before becoming Civil Court administrator and senior researcher. “From the fresh eyes of an outsider, it was obvious that there were clear space-flow issues as well as workspace and noise issues that were apparent in the Civil Court headquarters in the Old Courthouse.”

Collisions between customers approaching and departing the Civil Administration service counter were inevitable—and unacceptable to Michkowski, who made it a priority to correct the problem. He was given approval to alter the Civil Administration facilities workspace in December. Budget restrictions led to a series of meetings with representatives from county facilities, court facilities, telecom, vendors and architectural firms. Not only would improvements be made to workspace and public access, but also a new telephone system would be included to provide the public with quick, easy access to information about civil cases and administration.

In a one-month period, the three areas of redesign had to be started and completed. Civil court staff came in on the first Saturday of February to pack and prepare for a temporary move—to clear out the space on the garden level of the Old Courthouse. By Monday, Feb. 6, staff had relocated and was providing full-service assistance to court customers, including attorneys, law firm runners, members of the public and court officials.

“It is one thing to come up with an initiative, plan its execution, haggle with contractors and obtain approvals,” Michkowski said. “However, in reality, making the plan actually happen is quite another. This is where the real miracle of devoted staff and caring partners can make all the difference.”

Two days later, the cubicles were torn down and furniture was removed. Total renovation and remodeling was achieved in nine days, with walls coming down, offices being rebuilt and a new public access area erected. New carpet was installed, highly functional new furniture was moved in, newly installed computer and telephone lines were in place and staff was ready to move back to the ground level space that was clean, fully functional and outstandingly efficient.

The new customer and court administration hub was fully operational on March 1, after a quick four-hour “move back” of the staff.

“Our deepest appreciation must be expressed to our well-deserving partners, including county facilities, court facilities, Court Technology Services, telecom and all of the staff in Civil Administration, for making this project genuinely successful,” said a contented, smiling Michkowski.

With the project done, he invites lawyers, law firm runners, court staff and the general public to come by and enjoy the improvement. No longer are visitors threatened by a potential collision with a door or another customer. There is now room—and a happy staff—better able to accommodate visitors seeking efficient service.

Be Wise in Our Business: Following Our Own Advice
By Mark A. Winsor
Maricopa Lawyer

Years ago I had great desires to become an attorney. I had three children and our family was struggling financially. I designed a plan to enter the financial services industry and build a residual income by selling financial products, sufficient to support us through law school. The company I joined emphasized variable universal life insurance as their main product. During one of my first sales training meetings, one of the most wealthy and successful leaders of the company addressed those of us who were new representatives. He told us to picture a missionary going out and telling people to come to his church. When people would ask the missionary if he was baptized as a member of that church the missionary would reply, “No, I am just paid to get others to join; I don’t believe in it myself.”

We all laughed at how ridiculous that sounded. Then the leader sold us on owning the variable universal life insurance ourselves. He said, “Be wise business leaders.” Some ignored the counsel. I bought the insurance. I was amazed then and have often been amazed since then at how many salesmen do not believe in their products enough to be their own customer. Years later I saw the financial tragedy compounding the devastation in the family of an insurance salesman who died without adequate insurance coverage. You would be surprised how many insurance agents don’t own adequate insurance coverage.

This challenge of not “practicing what you preach” is not limited to salesmen. We see it in most aspects of society, even in the legal profession. I know you are busy, but maybe these friendly reminders will inspire you to take care of some of your own legal needs so you, too, can be a wise business leader.

Although a living trust is not for everyone, it is certainly a wonderful estate planning tool for many people. Other estate planning options should also be considered. My wife and I recently went through the process of updating our estate plan and I was reminded how important that process can be. With the experiences we have gained since we first created our living trust, we were able to make significant improvements to the distribution provisions. If you have not gone through the estate planning process, you should. As an attorney, you likely know a good estate planning attorney to help you.

A closely related topic is business succession planning. If you are in private practice as a solo practitioner or as a partner in a firm, you should ask yourself what would happen with your practice or the equity in your practice if you die prior to retirement. Does your partnership agreement provide for your trust or heirs? A.R.S. § 10-2220(B) allows you to include a living trust in your business succession plan.

That leads me to ask whether you have structured your practice properly. Now, many of you analyze that question for business clients regularly. You understand, as I do, how broad that question is. It covers numerous issues that can only be uncovered and addressed in one or more comprehensive interviews. These issues are especially important where two or more attorneys are practicing together. When and how can you retire? What if one of you becomes disabled? What if one attorney dies? How can new partners be added? How can they be terminated? What happens when a partner withdraws? Is there a distinction between equity and non-equity partners? Are the partners entitled to guaranteed payments? How will profit and losses be split? What are the tax consequences? How will management decisions be made? What if there is a disagreement?

The list goes on.

Our firm recently re-drafted our operating agreement. We carefully went over every issue we would address with our clients. We had a meeting with the partners after all but one provision was finished. The purpose was to discuss and decide the final details of that last provision. That was an interesting meeting. Unless you have ever tried to get a dozen attorneys to agree on sensitive issues related to their future, you cannot appreciate how fun that meeting was. However, what would you tell a client who hesitated to go through that process because of the challenges that accompany the discussions and decisions? Do it anyway. I am confident you would tell them that you know it is worth it for the clients. Likewise, I know it is worth it for you.

Far too many attorneys are operating their partnerships either without an adequate partnership agreement or, worse, without one at all.

I encourage you to follow your own advice. Be a wise business leader.
Mandatory CLE - Do We Need It?

By Jack Levine
Marcopa Lawyer

Aside from membership dues, the mandatory CLE program is by far the largest single source of income to the State Bar. Perhaps that is why efforts are now underway to remove the MCLE exemption presently enjoyed by lawyers who have reached their 70th birthday, even though these lawyers have contributed handsomely to the State Bar’s coffers over the many years they have practiced during their younger days. As more and more lawyers in their senior years continue to practice, the State Bar’s CLE income has undoubtedly suffered.

However, as an alternative to afflicting seniors with the financial burden of returning to the MCLE program, perhaps the State Bar should consider the novel idea of cutting unnecessary programs and expenditures from their present budget, which currently exceeds 11 million dollars.

Since CLE has been made mandatory it has, in effect, served as a substantial indirect tax on members. How effective has the MCLE program been? Is there any evidence that lawyers are any more knowledgeable, or ethical because of our MCLE requirements? To paraphrase an old proverb: “You can lead lawyers to CLE programs, but you can’t make them learn.” Is there any lawyer who has not learned more law while working on an appellate brief or in preparing or responding to a complex motion than by attending a CLE program? Why shouldn’t lawyers receive CLE credit for such research? An appellate brief results in a product that can be objectively verified in an audit, just like attendance at a CLE program. If, during the course of the year, a lawyer’s legal research does not involve ethics issues, lifetime CLE ethics credits could be earned by a lawyer serving either as State Bar counsel in a disciplinary proceeding or by defending a fellow lawyer accused of ethical violations. Furthermore, the research and learning involved in such an effort would, in my opinion, be far more meaningful than sitting in a lecture hall with someone preaching ethics by wagging their finger in your face.

As we go about our day-to-day activities, doing our best for our clients, it is easy to miss the forest for the trees. As lawyers, we should be alert to what is going on around us, assessing what is working well in our profession and identifying those areas that need reform. We should, whenever we have the opportunity, hold those in positions of leadership at the State Bar responsible for not fixing things when they are broke.