Access to Justice Stops at Nothing—Even Fire
By Kathleen Briese

Even though the Maricopa County Bar Association experienced an electrical fire last month, its Lawyer Referral Service did not miss a beat in providing the public with accessible and affordable legal advice. While the building itself will be inaccessible for at least four to six months, business operations have continued as usual, albeit from various locations. The fire caused no uninsured losses and the building is being restored.

The day after the fire, the MCBA Lawyer Referral Service fielded hundreds of calls from the public and has continued to do so every day since, maintaining a regular scheduling procedure. It has also stayed on track with its membership campaign, continuing to build its attorney panel to meet the increasing need for legal help in Maricopa County.

The program is dedicated to ensuring that the public has access to the legal advice it deserves. Established in 1964, it handles more than 100,000 calls per year, matching clients with qualified Maricopa County attorneys.

The service continues to grow annually, increasing the demand for experienced attorneys. The 300-plus attorney panel practices in all areas of law including: family, real estate, debt, employment and criminal. By joining the panel, attorneys are able to build their practices through the program and refer cases outside of their specific practice areas.

Despite the fire, the Maricopa County Bar Association has had no lapse in serving it members and the community-at-large, with some staff working from home and others housed in offices throughout the central corridor. Community Legal Services; Dodge, Anderson, Mableson, Steiner, Jones & Horowitz, Ltd.; the Chinese Cultural Center (COFCO Property Management); and the State Bar of Arizona have all provided temporary office space for staff members.

MCBA membership is at an all-time high and all board, section and division meetings continue to meet on schedule.

To join the MCBA Lawyer Referral Service panel, contact LRS Director Joanne Hayes at (602) 257-4434.

Blown-up Imaginations and Shot-Down Convictions
By J.W. Brown

This month we start with an Arizona case defining the interest that the state passes to a private party when deeding land to it as compensation in eminent domain proceedings. We then venture to the Ninth Circuit for a case that discusses airport security screening. We end up with a couple of habeas corpus cases where the Ninth Circuit overturned convictions, chiding the state courts in the process.

Let’s first turn to Tucson...

... Lawyers can be inventive, resourceful, and imaginative in advocating their clients’ cases. That was true of the attorneys in Pima County v. Clear Channel Outdoor, Inc., No. 2 CA-CV 2005-0025 (App. Jan. 25, 2006). They displayed great ingenuity in defending a company that had neglected to comply with county ordinances in erecting several billboards.

The state had condemned land alongside I-10, including several parcels where Clear Channel had billboards. Instead of paying cash for the condemned signs, the Department of Transportation conveyed to Clear Channel some of the property alongside the freeway. Clear Channel erected new billboards on those parcels.

But the company didn’t get county building permits. And the new billboards didn’t comply with county building codes or zoning ordinances. So, the county sued Clear Channel, seeking an injunction and a declaratory judgment that the signs were illegal.

Clear Channel’s lawyers argued that the county ordinances were inapplicable because the land under the signs came from the state and the state is not subject to local zoning laws. They persuaded the trial court, which...
What Does Membership Mean to You?

This is my personal invitation to you to join the division, not just as a member but as a participant in the paralegal leadership that is making things happen in our legal community and our community at large. We are an active and enthusiastic group of paralegals and would welcome and greatly appreciate the value of your time, experience and expertise in helping to make an impact in this profession and in the lives of others. Besides, we are a lot of fun to be around—just ask us!

So where do you start? You can log on to our website at www.maricopaparalegals.org to find out when we are getting together again and just show up! Our board of director meetings are open to our members, so come and find out what we are working on and then volunteer to join something of interest to you. It’s just that easy. I look forward to seeing and working with more of you this year.

Mock Interviews Help ASU Law Students

On February 8, MCBA Young Lawyers Division board members along with young lawyer volunteers had the unique opportunity of going back in time—although it might not have been their favorite time. They experienced all over again the nerves, jitters, sweaty palms, and dry mouth that comes with on-campus interviews. But fortunately for our volunteers, they were on the other side of the table this time.

Board members and volunteers participated in a mock interview program at ASU College of Law. Interested students signed up to be “drilled and grilled” (yes, students would volunteer for that sort of abuse) about why they deserved the job. The students who participated weren’t just gluttons for punishment. They were using the mock interviews as a practice round before on-campus interviewing season begins.

The MCBA YLD began this program last year as an opportunity to meet some of the students who will soon join our ranks as young lawyers. When asked what we might be able to offer, the response was overwhelming: “help us get where you are!” While our volunteers couldn’t issue the coveted bar numbers in response, we could try to take away some of the jitters; after all, some of us can still remember them.

The interviews were conducted in earnest, often by volunteers who are participants in their firm’s hiring committees. But there was more support than The interview will provide. “Do-overs” were freely granted and the feedback from our volunteers was helpful, honest, supportive and positive.

And so off they go. Law student season has officially begun. Get your license and post your signup list. As you interview them for your firms, fire at will. Be tough, get your answers, make sure you pick the right candidates for your firm. But go back in time too. Remember the sweaty palms. Maybe smile a bit about the style of suit you wore “back in the day.” You might be less aggressive about going in for the kill. The next time you see these talented future colleagues, it could be across a very different table. Happy hunting.

If you are interested in participating in the mock interviews this fall, please contact Tom Hall, thall@cavanaghlaw.com
Making a First Impression That Counts

Most likely, the first impression in an appellate brief, or a petition for review or certiorari is the Question Presented. A good Question Presented provides a clear summary of the argument and convinces the reader that the writer’s opinion is the right one. Writing a clear Question Presented, however, is sometimes easier said than done. Fortunately, there are some fool-proof tips for drafting the ideal Question Presented.

1. Write the Question Presented after the discussion or argument section of the document has been written and edited. Some writers draft the Question Presented first because it is short and is generally on one of the first pages of the document. This approach, however, does not take into account the fact that a discussion or argument section may change substantially during the writing and rewriting stages. In order for the Question Presented to reflect accurately the arguments in the document, it should be drafted after these arguments are solidified.

2. Use the formula “Under/Does/When” to ensure the Question Presented is a complete summary of the issue. Many poor questions presented assume the reader already has intimate knowledge of the relevant issues and facts. These incomplete questions do nothing to promote the writer’s opinion and, in fact, may persuade the reader that the writer is unsure of the opinion. Here is an example:

   Does an attorney who fails to appear at his client’s trial commit criminal contempt of court?

A good Question Presented is not only a complete summary of the issue and the relevant facts, but it is also answerable by “yes” or “no.” Using a formula ensures both goals are met. In the Under/Does/When formula, the “under” portion refers to the jurisdiction; the “does” portion refers to the applicable law; and the “when” portion refers the legally relevant facts. Here is an example that improves the poor question from above:

   Under Arizona law, an attorney who does not appear in court for his client’s trial guilty of criminal contempt when he was notified of the trial date but did not record it, and on the day of trial, had the case file in his briefcase along with files of cases for which he did appear

   The formula ensures all the relevant information is included in the Question Presented; a reader can read this question and have a clear sense of the legal dilemma and the key facts upon which the answer to the dilemma turns. It is important to note that the formula is not a rigid one. For instance, different words can be substituted (“is” for “does” as shown in the example), the past tense can be used instead of present tense (as shown in the example), and the order of the formula’s components can vary.

3. Give each discreet issue its own Question Presented. Cramming all the issues in a document into one global Question Presented is confusing to the reader. One way to approach writing the Question Presented section is to have a separate question for each major sub-division or heading in the document.

4. To draft a persuasive Question Presented (for appellate briefs and petitions for review and certiorari), make sure to write the question so that the answer to it is “yes” in your client’s favor.

These tips remind me of an adage that one of my colleagues shares with law students and attorneys: Good legal writing should make the reader feel smart. I would add that good legal writing should also make the reader feel fully informed of the argument and leave the reader with a positive impression of the writer’s opinion, which is precisely what a carefully and thoughtfully drafted Question Presented can do.

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Mundell continued from page 1

the richness of our various cultures and languages represented in our community.”

Mundell adds: “It is the courts’ duty to protect individual rights, regardless of a person’s skin color, gender, religion or creed. The courts credibility and integrity is based on the public’s trust and confidence in how well the court performs its duties,” she said. “Therefore, we need a workforce that reflects the community we serve, but more importantly, we need a workforce that respects and honors all people and their cultures.”

In 2004, Maricopa County officials hired its first diversity director and launched a countywide diversity program to “insure the ethnicity base of county employees is keeping pace with the county’s changing demographics of its growing and diverse community.”

Mundell, upon becoming presiding judge last summer, launched a community-outreach initiative to reach out to all groups of Valley residents. Through a series of forums around the Valley, she has opened a dialog with people interested in sharing their concerns, opinions and suggestions about the courts.

Since mid-November, six such forums have been scheduled, in the southeast, northeast, northwest, southwest regions of the Valley, as well as in downtown Phoenix. The important message being presented is that courts are “committed to the timely, fair and impartial administration of justice.”

Among Mundell’s additional efforts to develop, expand and support cultural diversity; she developed a plan to address cultural competency throughout the Judicial Branch in Maricopa County; hired a director of community outreach; approved an American with Disabilities Act coordinator; and established and presides over a Spanish DUI calendar that addresses cultural differences in response to positive motivators and sanctions.

Mundell also seeks improvements in hiring a culturally diverse workforce as well as funds for after-hours courts in Family Court, Juvenile Court and the Justice of the Peace Courts to improve use of county funded government resources and better serve the working public. She endorses pay incentive of bilingual Spanish and English staff to better serve all court customers.
Arizona Redistricting Battle Over For Now

By Jennifer Holman
Maricopa Lawyer

Arizona has an extensive history of redistricting and election challenges, based on the Court of Appeals October 2005 redistricting decision and the Arizona Supreme Court’s denial of certiorari. It appears the redistricting battle is over, at least for now.

In November of 2000, Arizona voters approved Proposition 106, amending the Arizona Constitution and transferring the authority to redraw lines for both legislative and congressional districts from the state legislature to the Arizona Independent Redistricting Commission.

The commission was tasked with making adjustments to a previously designed legislative plan while accommodating various goals, including compliance with the Voting Rights Act and respecting geographic, community, and competitive interests.

After several rounds of public comment and input from various sources, the commission certified the 2001 legislative and congressional plans to the Arizona Secretary of State on November 9, 2001. The plans were subsequently certified for the 2002 elections and submitted to the Department of Justice for “pre-clearance.”

On March 6, 2002, a collective group of representatives from the state legislature, the Arizona Minority Coalition for Fair Redistricting and others, filed suit in the Arizona Superior Court against the commission challenging the legislative plan previously submitted to the Department of Justice. The coalition asserted, among other things, that the commission had failed to create competitive voting districts when “it was possible to do so.” The coalition sought a writ of mandamus and declaratory or injunctive relief.

A separate action challenging the commission’s redistricting plan was also filed on March 14, 2002, in which it was alleged that the plan discriminated on the basis of race. The Superior Court then consolidated the two cases and numerous parties intervened to protect their respective interests.

The Navajo Nation subsequently filed a Motion for Summary Judgment contesting the commission’s redistricting plan because it effectively removed members of the Hopi Tribe from one district and placed them in another. Thus, the Navajo Nation alleged, violated the commission’s constitutional responsibilities. The trial court denied the motion, ruling that the constitution allowed the commission flexibility in creating districts as long as the criteria used to support its decisions had a basis. The Navajo Nation appealed this decision.

After the courts ruling in the Navajo Nation Motion for Summary Judgment, the remaining parties participated in a trial that took place in late 2003. In January 2004, the court entered an order finding that the commission’s final legislative plan did not “sufficiently favor competitive districts” and enjoined use of the plan. The court also ruled that the constitutional provisions related to the commission were not “self-executing.” The commission was then directed to formulate definitions and standards regarding the constitutional provisions. This decision was subsequently appealed.

In compliance with the court’s order the commission prepared a new legislative redistricting plan and presented it to the court. This plan was subsequently approved by the trial court on April 16, 2004. The court’s approval of the adopted redistricting plan was also appealed.

In April 2005 the Court of Appeals heard arguments regarding the complex legal issues raised in this case. In the court’s October 18, 2005 decision, they relied on the United States Supreme Court opinion of Wise v. Lipscomb, 437 U.S. 535, 539 (1978), which held that “redistricting is a legislative matter which the courts should make every effort not to preempt.” With this restriction, the court was limited to determining whether the commission’s proposed redistricting plan was constitutional.

The following is a summary of the court’s holdings related to the redistricting process:

- In deciding whether the commission violated the Equal Protection Clause, the court determined that the trial court was required to apply the strict scrutiny standard of review only if the “legislative and congressional redistricting plans substantially burdened fundamental rights or made distinctions based on a suspect class.” If not, the court was required to use the rational basis standard of review to evaluate equal protection challenges to the redistricting plans.
- The court held that the commission’s placement of voters into various legislative and congressional districts after applying constitutional criteria did not burden voters’ fundamental right to vote. In addition, nothing in the record reflected that the commission singled out or discriminated against a suspect class. Accordingly, the court determined that application of the strict scrutiny standard to evaluate the parties’ equal protection claims was warranted. This issue was then remanded to the trial court for further review.
- The court found that the terms used in Article 4, Part 2, Section 1(14) of the Arizona Constitution, which directed the redistricting process, were self-executing. Thus, the court reversed the trial court’s decision on this issue and found that the commission did not violate equal protection principles by failing to adopt definitions for those terms before utilizing them.
- Pursuant to Article 4, Part 2, Section 1(14)(F) of the Arizona Constitution, the commission was required to consider competitiveness in establishing legislative and congressional districts. This goal, however, was subordinate to other goals listed in Section 14(B) – (E), and the trial court erred by entering a contrary ruling. The court found that if drawing competitive districts would not be practicable or would cause significant detriment to the goals listed in subsections (B) – (E), the commission must refrain from establishing such districts.
- Article 4, Part 2, Section 1(15) of the Arizona Constitution provides that “the places of residence of incumbents or candidates shall not be identified or considered” in the redistricting process. The constitutional provision, however, does not prohibit the commission from knowing or providing this information to the Department of Justice at their request. Rather, the commission is prohibited from using incumbent residential information in establishing district boundaries.
- Article 4, Part 2, Section 1(14)(D) requires the commission to create district boundaries “that respect communities of interest to the extent practicable.” This provision authorized the commission to place the Hopi Tribe’s community of interest in a congressional district separate from one containing the Navajo Nation. The court also found that the commission did not violate the above-referenced constitutional provision by balancing the interests of the Tribe and the Navajo Nation in a manner that only slightly divided the Navajo Nation’s “community interest.” Thus, the trial court’s decision on this issue was upheld.
- The Arizona Constitution requires district boundaries that are compact and contiguous. The court found that the commission did not violate this constitutional provision by placing the Hopi Tribe and Navajo Nation into separate congressional districts, even though the separation caused the district to become less compact and contiguous. In other words, the commission was found to have reasonably sacrificed a measure of compactness and contiguity in striking a balance with the goal of protecting the tribe’s community of interest.
- Finally, Article 4, Part 2, Section 1(14)(E) states that “[t]o the extent practicable, district lines shall use…undivided census tracts.” The commission was found to have not violated this constitutional provision by dividing a census tract in order to place the Tribe in a congressional district separate from the majority of Navajo Nation members. Thus, the census tract goal was validly compromised to accommodate the tribe’s community of interest.

Several of the above identified issues were remanded back to the trial court for further review. Most significant was determining whether the legislative redistricting plan was rationally related to a legitimate governmental purpose.

Recently, the Arizona Supreme Court declined to consider multiple appeals of the Court of Appeals October 18, 2005 decision. The appeals were aimed at forcing the state to adopt new congressional and legislative district maps. The court’s denial of certiorari effectively ended the parties challenge to the commission’s proposed congressional map and ensured that the current legislative map will be used again during the 2006 elections.
Every computer user is aware of the importance of regular backups and daily flossing of teeth. Both are easy to do and easy to avoid. Every lawyer is sensitive to the critical importance of regular securing of client information and data. That is easy to do and it cannot be avoided without terrible risk. The hard part is the creation of a system that insures regular and complete backup of your critical information. As we move toward a world in which almost all of the information in our law offices is contained only in electronic form, regular and careful electronic backup becomes both an ethical mandate and a potential malpractice concern.

Disaster will strike

If there is one rule that is always true it is that all hard drives will fail—sometime. Whether that “sometime” is one year or five makes no difference because failure means catastrophic loss of data and if there is no proper backup that data is gone forever.

At the outset, we need to distinguish between two basic backup goals. The first, which I will talk about in more detail later, deals with the preservation of data. The second deals with the preservation of your computer system and the ability to restore it to a functioning state in the event of disaster. Disaster may be a physical crash of your computer occasioned by uncontrolled power surge or simple component failure. However, disaster may also be caused by a virus or by hacker who has broken into your computer system for fun. Disaster occurs on a regular basis with all computers and unless you are prepared, it can be devasting.

One thing is sure: if you use computers you will some day experience a hard drive crash. If you have a very simple computer system, it may be enough to simply plan to re-install Windows and your basic applications that are necessary to access your data files. Few of us have such a simple system however. Even if you have all of your original software disks easily available, it may take hours or even days to rebuild your system from a big time crash.

Image matters

A much simpler solution is to create what is called an image of your system using a product such as Symantec’s Ghost 9 imaging software or my personal favorite Casper XP (www.fssdev.com).

Both of these imaging programs will create an exact bootable duplicate of each of your hard drives that can be transferred to a new hard drive or simply installed in your computer as replacement. Both of these products are relatively inexpensive and easy to use and they are the first critical line of defense against computer disaster. You cannot afford to not have this as a minimum.

An image of your drive or drives, however, simply freezes your system at a particular point in time. If you take the image every Monday, you’ll be up-to-date as of the last Monday. If your office was acting during the preceding week relying on a weekly image as your only backup solution, it means that you will lose a week’s worth of work. That is an intolerable risk for most of us and therefore you must supplement the drive image process with what is called incremental data backups.

Backup choices

Here the choices are not so easy. After trying many of the so-called “backup” programs I cannot find one that I recommend more highly than the one that comes as a part of Windows XP Pro. It has its faults, but it does the job.

Recently, based on advice of several magazine columnists (See, www.pcmag.com/article2/0,1895,1749336,00.asp and www.pcmag.com/article2/0,1895,1911153,00.asp) I bought a Maxtor OneTouch external hard drive that is supposed have software so easy to use that my dog could do it. I didn’t ask Remington to try, but I found it very difficult to set up and use though once working it is easy to use but very, very slow. Oddly, most of the trouble occurred with the Maxtor drive itself and when I used the Dantz Retrospect software on one of my Western Digital drives it worked fine. Several of the other programs are reviewed at www.pcworld.com/reviews/article/0,aid,117255,pg,2.00.asp and you can take your pick.

All I know is that the Microsoft product works reliably and when coupled with image software such as Ghost 9 or Casper XP you pretty much have all the bases covered. Microsoft has just come out with a beta version of a virus scan and automatic backup software called OneCare. Because it is in beta, it is free and appears to me to be very easy to use and reasonably fast. I am using it right now and you might want to try it. www.windowsonecare.com will get you to the download site.

Fool proof plan

The next matter of concern is the hardware side of the backup process. You must back up to someplace other than your computer itself. Small backups of individual computers can be done on DVD disks or even CDROM.

If you have large amounts of information to back up you can choose a variety of solutions based upon recording tape. Tape is cheap but the drives are expensive and slow. But it has the advantage of being able to be easily taken off-site every night so that there is no possibility of backup destruction by way of fire or theft. It is easy to establish a routine that provides for daily tape exchange and off-site storage. There are even companies that will come every day and pickup your tape and take it away to a secure spot.

The other alternative is to backup to a removable hard drive which is also taken off-site every night. Very large hard drives are now available at far less than the cost of a high-quality tape backup system. Installing a removable hard drive is not complicated and because of its speed, I think it is an ideal solution for local backup. There are some open questions about the life span of CDROM and DVD disks and you run some risk if you depend on discs that are more than 2 to 5 years old. Higher quality discs will last longer and the method of storing the discs has a big impact. Moreover, as we store more photographs and other large files the use of discs that are limited to just a few gigabytes makes complete backup a chore. And, because it is a chore you may be inclined to put it off much to your future regret when the inevitable crash happens.

Best backup plan

By far the best and easiest procedure is to back up directly to another physical hard drive. It is much faster and the physical drive can be taken away from the office or locked in a safe for extra security. Western Digital 300 GB Firewire and USB2 external hard drives have dropped below $200 (www.westerndigital.com) and provide a perfect vehicle for regular backup. They are very reliable and easy to install and use. The other alternative, which is the one I use, is to backup to a removable internal hard drive which is also taken off-site every night. Western Digital 200 GB internal hard drives are now available for around $100. A removable drive tray costs $15 and is easy to install and use. You can use the external or removable hard drive with Ghost 9 or Casper XP and you have a bootable complete hard drive copy of your system in case of a total system failure. A third option is to purchase an external drive enclosure for about $30 and swap the drives in and out of the enclosure. If you leave the case open the switch is quick and easy. Which ever method you choose, however, you must discipline yourself to establish a routine and do it. Just do it!
Will Your Stuff Go Where You Want: The Need For the Harmless Error Rule

By Tom Asimou
Maricopa Lawyer

Last year, Division One of the Arizona Court of Appeals decided In re Jung, 210 Ariz. 202, 109 P.3d 98 (2005), a probate case in which the court reversed the Maricopa County Superior Court over what constitutes the formal requirements for a valid codicil to a will. What the court didn’t decide, however, and what the Arizona legislature sidestepped in 1994 when it adopted the vast majority of the 1990 revisions to the Uniform Probate Code, was how trial courts should make these decisions on a uniform, rather than an ad hoc, basis.

Jung involved a will contest of a technical sort. Bernard William Jung had executed a codicil, but dated his signature the day after Bernard executed the codicil. Marc was the other.

The issue of witnesses became murky when Marc faxed the codicil the next day to his attorney, and it only had Bernard’s signature. Four days later, a copy of the codicil bearing only the caregiver’s signature as witness was shown to Bernard’s other son Ted. Ted, unfortunately, was getting less under the codicil than under the 1980 will that Bernard duly and validly executed under Arizona law.

Marc executed the codicil as a witness. However, he did so the day after Bernard executed the codicil, but dated his signature the same as the day his father signed the codicil. Marc reasoned that he dated his signature the same as his father’s signature because that was the day he witnessed the codicil rather than the day he affixed his signature.

The issue was whether or not a testator’s codicil is valid when one of the attesting witnesses affixes his signature to the documents the day after the testator. The trial court ruled no and entered only the 1980 will to probate.

The Court of Appeals reversed. The court analyzed the finer points of when a witness must sign in order for an attestation to be valid, and wrote a comprehensive discussion of Uniform Probate Code §2-502 (adopted in Arizona as A.R.S. §14-2502). The legislative history of §14-2502 is the same as UPC §2-502, in that it only requires a witness to “sign within a reasonable time after witnessing the signing or acknowledgment.” See U.P.C. §2-502. The legislative history even contemplates the witness execution taking place after the death of the testator.

The court’s reversal and the final ruling did not require the court to resolve the important policy reasons for the Arizona Probate Code. The AZUPC provides that the purpose of the AZUPC is to “clarify the law concerning the affairs of decedents . . .” [and to discover and make effective the intent of testators with a “speedy and efficient system” of distributing estates. See A.R.S. §14-1102(B)(1).]

The AZUPC was enacted in 1994 as part of Arizona’s adoption of most of the 1990 version of the Uniform Probate Code. One of the specific provisions of the Uniform Probate Code not adopted by Arizona was §2-503. Arizona deviated from the U.P.C. on this provision. In Arizona, A.R.S. §14-2503 is the holographic will statute. The court, in Jung, briefly discusses this provision and its inapplicability to the Jung case because the legislature did not enact the Uniform Probate Code §2-503 as part of Arizona’s statutory scheme. Section 2-503 of the Uniform Probate Code is known as the “Harmless Error Rule” for non-conforming wills. A non-conforming will is a will that does not meet formal requirements.

Reasons for rule

The Harmless Error Rule permits a will not executed in conformity with Uniform Probate Code §2-502 to be admitted to probate. The corresponding UPC section, 2-503, permits admission if the proponent of the document can show, by “clear and convincing evidence that the decedent intended the document or writing... as his or her will, a revocation of his or her will, an alteration or codicil to his or her will or the partial or wholesale revival of a previously revoked will.”

The Harmless Error Rule was adopted by six states when Arizona enacted the 1990 version of the Uniform Probate Code. These six are Colorado, Hawaii, Michigan, Montana, South Dakota, and Utah. These states have put in place a methodology for weighing extrinsic evidence of the non-compliance with the formalities required by §2-502. A superb discussion is contained in Leigh A. Schipp Equitable Remedies for Nonconforming Wills: New Choices for Probate Courts in the United States, 79 Tul. L. Rev. 723 (2005).

The six states require the formalities attendant to wills in order for a will to be valid. The formalities ensure safeguards as mentioned in Jung against fraud and mistake. Fraud can be assumed to encompass undue influence. The Harmless Error Rule is not intended for, nor does it remedy, will contests based on capacity or undue influence. The rule does, however, assist courts in the orderly administration of estates when only technical but non-nejarious errors are found in the documents submitted for probate. A further safeguard is the judge, who can apply common sense to the clear and convincing evidence standard so that the intent of testators is not frustrated simply because of a technical defect in a document submitted for probate or as a revocation or revival.

The Harmless Error Rule places a laser beam focus by the trial court on testamentary intent. If there is no evidence of nefarious conduct (which can otherwise be dealt within its proper realm vis-à-vis contents based on undue influence or lack of capacity), the Harmless Error Standard permits the trial court to review and admit nonconforming documents as wills which carry out the intent of the testator. Adoption of the Harmless Error Standard permits a uniform practical standard rather than an ad hoc decision by a trial court and/or, later, an appellate court.

The Jung decision signals that the state of the law in Arizona as it concerns technical defects is moving toward a more practical and testator friendly approach. Forcing an appellate court to decide such issues on an ad hoc basis, however, drives litigation costs skyward. It is only practical and efficient to give guidance to the trial court in an effort to reduce litigation at the appellate level. The state of the law is no clearer after Jung. The court expressed a willingness to be practical, however. But, without a line in the sand, which the Harmless Error Standard would provide, lawyers are no further along at giving litigants certainty than they were before the Jung decision.

See Jung page 16

Home is Where the Heart is

Though he has lived in Arizona his entire life, Dan Lowrance found his life continuing a great distance from home, while traveling to the Czech Republic in 1979, when it was still behind the Iron Curtain.

That far away trip drew Lowrance to the practice of law. “It was disturbing to see how the government treated its citizens.”

Homegrown boy

Lowrance, who grew up in Wickenburg, received his undergraduate degree at Northern Arizona University and law degree from Arizona State University. He spent his first five years in law in private practice before becoming the City of Tempe’s assistant city prosecutor. From there, he became a deputy at the Maricopa County Public Defender’s Office.

He briefly went back into private practice but returned to the Maricopa County Public Defender’s Office in 1993 and has been there ever since. Presently the training director, Lowrance credits the quality of the people he works with as the reason he became a public defender.

Lowrance is also an adjunct professor at Arizona State University College of Law as well as the director of its Public Defender Clinic. He is equally involved with the local legal community as a Maricopa County Bar Association board member and Public Lawyer Division director. He also sits on the City of Phoenix Public Defender Review Committee.

Lowrance values the Maricopa County Bar Association for its service to both its members and the public. He feels his role as a board member is to further that quality of service.

Role model

The biggest accomplishment of Lowrance’s career thus far has been being asked to mentor students and attorneys at Arizona State University College of Law and the Maricopa County Public Defender’s Office. “Mentoring law students is the most fulfilling thing that I have ever done.”

The best lesson Lowrance has learned as an attorney? “Not to only treat everyone with respect but to respect everyone.” He is driven most in his career by the desire to help others and believes the secret to his success is trying to know how much he doesn’t know. “Keep learning” is a motto he lives by.

In his personal time, Lowrance enjoys traveling, cooking and hiking. He has been coaching soccer and baseball for 10 years. In five years, he sees himself where he is now—helping others alongside quality people. And in ten years, Lowrance sees himself retired. Perhaps he will fit in some long distance traveling—as he knows well, leaving home can show you where your heart truly is.
Raising the Communication Bar

Q What do attorneys need to remember when dealing with the media?
A Remember the strengths and weaknesses in the system. The media has a hard time capturing ideas, thoughts and arguments. What it does do is a good job in capturing energy, emotion and personality. You can take time to explain an idea or an argument on behalf of your client, but you should also be prepared with a quote or sound bite that gets to the heart of your position. Don't wait for the journalist to figure it out, because they may not see it your way. While it is sometimes scary to deal with the media, it also is a great way to level the playing field when the other side uses the headlines against you or to get out in front of an issue. Every major firm should utilize the services of a communication professional to make sure they are prepared before a client ends up in the newspaper or on TV.

Q What is the most common mistake made by people when they stand up to speak?
A Most of us try to get too many ideas across in a short time. People want to know what time it is, not how the watch is made. The most effective communicators keep their message clear, straightforward and specifically geared to the audience in front of them. A short story or anecdote can underline a critical point. It’s most important to make sure you are relating to the audience and understand what they are expecting.

The other key is preparation. Most speakers do no pre work, or practice in front of people who already know the material! It usually shows within the first twenty seconds. Get a “third party” to provide feedback or use a tape recorder or video camera. It can make a huge difference.

Q What background and qualifications should someone look for when searching for communications training?
A A good choice would be someone with an exact resume…

Okay, seriously, look for a combination of professional and real-life experience. Someone who has only dealt with the media or audiences in a classroom environment cannot understand what it’s like to be in your shoes. Having recent media experience is helpful as is a track record of results in dealing with a diverse list of clients. While that may be pretty close to my exact resume I’m sure there are others out there who could do a good job as well.

Cary Pfeffer can be reached at 480-219-6485 or via e-mail at Cary@Clear-Comm.net. His website is www.Clear-Comm.net.

State Legislature Introduces Bills Affecting Arizona Courts

By Joan Dalton
Maricopa Lawyer

The following measures affecting Arizona’s Judicial Department were introduced by the Legislature:

HCR 2016: justices and judges; governor appointment

HCR 2016 would allow the governor to appoint “any person of the Governor’s own choosing,” when a vacancy occurs in the office of a justice or judge of any court of record, except for superior court judges and judges of a court of record inferior to the superior court in counties having a population of less than two hundred fifty thousand persons. The governor must then submit the name of her nominee to the Senate, who will consent to or reject the nominee. In addition to electors voting to retain judges at general elections, judges confirmed by the Senate are subject to reconfirmation by the Senate every four years.

HCR 2016 was assigned to the House Judiciary Committee, but no hearing has been held.

HCR 2015: judges; merit selection; population

HCR 2015 increases the population requirements for counties electing superior court judges from those counties having less than 250,000 persons to those counties having less than 600,000 persons.

HCR 2015 was assigned to the House Judiciary Committee, but no hearing has been held.

HCR 2011: Supreme Court; jurisdiction

HCR 2011 provides that procedural and evidentiary rules made by the Supreme Court are subject to amendment or repeal by the Legislature. This legislation also establishes that the authority to enact substantive, procedural and evidentiary laws emanates from the power inherent in the Legislature and the people rather than the judiciary, and precludes the Supreme Court from infringing on the authority of the Legislature or people in enacting laws to protect the rights of victims or to carry out any other matter under the Constitution.

HCR 2011 was passed without amendment in the House Judiciary Committee.

HCR 2020: separation of powers; judicial lawmaking

HCR 2020 adds a section “B” to Article VI, section 1 of the Arizona Constitution. If passed by the Legislature and approved by Arizona voters, this measure would add the language: “[b]ecause the Legislature and the people are vested with the sole authority to establish laws in light of the public interest and the courts are vested with the sole authority to adjudicate cases by applying those laws to the facts of applicable cases pursuant to Article III, the courts shall not establish rules of law on a retroactive basis, including rules of law that would apply to conduct that occurred before a claim is filed arising out of that conduct.”

HCR 2020 was assigned to the House Judiciary Committee, but no hearing has been held.

SB 1047: courts; personnel and volunteers; fingerprinting

SB 1047 mandates that the Supreme Court require each person who applies for certification or licensure to practice law, to furnish a full set of fingerprints that will enable a criminal background investigation to be performed. This measure also provides that the Supreme Court may require each person who provides contract or volunteer services in the judicial department to furnish fingerprints for a criminal background check.

SB 1047 was passed in the Senate, and awaits assignment in the House of Representatives.

HCR 2012: election; presiding Superior Court judges

HCR 2012 removes the authority of the Supreme Court to select presiding judges and instead, installs that authority with Superior Court judges to “periodically select, as set forth by the Legislature” the presiding judge in each county.

HCR 2012 was assigned to the House Judiciary Committee, but no hearing has been scheduled.

SB 1180: constable ethics committee; membership

SB 1180 removes the superior court judge and the chairperson of the Arizona Commission on Judicial Conduct from membership on the Constable Ethics Committee. Instead of the chairperson of the Arizona Commission on Judicial Conduct presiding as the chairperson for the Constable Ethics Committee, the committee would elect the chairperson.

SB 1180 was assigned to the Senate Government Committee, but no hearing has been scheduled.
Same-day CLE registrations/payments, $15 additional.

1. Family Law Meeting, (Fresh Start) 5:30 p.m.
2. Construction Law Section Meeting, (TBD) noon
3. MCBA Paralegal Career Day, (Phoenix College) 8:30 a.m.
4. CLA Review Course, (Phoenix College) 9 a.m.
5. MCBA YLD Barristers Ball, (The Phoenician) 6 p.m.
6. Barristers Ball Meeting, (TBD) 5:30 p.m.
7. MCBA EC Meeting, (TBD) 7:30 a.m.
8. Environmental Law Section Meeting, (TBD) noon
9. Hayzel B. Daniels Association, (TBD) 6 p.m.
10. CLA Review Course, (Phoenix College) 9 a.m.
11. YLD Board Meeting, (TBD) noon
12. Paralegal Board Meeting, (Snell & Wilmer) 5:30 p.m.
13. PLD Board Meeting, (TBD) noon
14. Scottsdale Bar, (Scottsdale Athl. Club) noon
15. Barristers Ball Meeting, (TBD) 5:30 p.m.
16. Legal Writing 1 to 4:30 p.m., ASU Downtown Center Bldg C 302 E. Monroe St. Phoenix CLE: 3 hours Cost: MCBA members: atty/prof, $75; paralegals/public atty, $55; Nonmember: atty/prof, $105; paralegals/public atty, $55.
17. MCBF Meeting, (TBD) 4:30 p.m.
18. CLA Review Course, (Phoenix College) 9 a.m.
19. LRS Committee Meeting, (TBD) noon
20. Corporate Counsel Board Meeting, (TBD) 4:30 p.m.
21. Barristers Ball Meeting, (TBD) 5:30 p.m.
22. Bankruptcy Section Meeting, (TBD) 5:30 p.m.
23. Criminal Law Section Meeting, (TBD) 7:30 a.m.
24. EP Probate/Trust Board Meeting, (TBD) 7:30 a.m.
25. CLA Review Course, (Phoenix College) 9:00 a.m.
26. Minority and Women Lawyers Task Force, (TBD) noon
27. Editorial Board Meeting, (TBD) 5:15 p.m.
28. Employment Law Section, (TBD) 11:30 a.m.
29. Barristers Ball Meeting, (TBD) 5:30 p.m.
30. Litigation, (TBD) 5:30 p.m.
31. Corporate Counsel Luncheon, (University Club), noon

Take and Ye Shall Not Receive: Recent Cases Clarify Financial Exploitation Statute

By David R. Frazer and Grant N. McKeehan Special to Maricopa Lawyer


Statutory background
A.R.S. § 46-456, targeting the financial exploitation of incapacitated or vulnerable adults, was enacted in 1996. The statute imposes fiduciary duties upon a person in a position of trust and confidence to an incapacitated or vulnerable adult. It also provides that a person who, by intimidation, threat of force, or enticement, takes control, title, use or management of an incapacitated or vulnerable adult’s property, with the intent to permanently deprive the person of property, is guilty of theft. Under the statute, the courts can impose penalties against persons who breach their fiduciary duties, including up to treble damages and disinheritance by operation of law.

Facts in Zlatos
In 1993, Gertrude Zlatos and her husband hired Pete Tanguma Saenz to perform in-home cleaning services. In 1998, when Gertrude’s daughter-in-law, Myrna and her husband, discovered that Gertrude and her husband had not filed income tax returns for several years, the Cagneys began handling most of the Zlatos’ finances. By 1999, Saenz performed cooking, cleaning and transportation services for the Zlatos on a full-time basis. After Gertrude fell in her home on several occasions, Saenz and his daughter began providing her with in-home care twelve hours each day, seven days a week. Saenz and his daughter were each paid $500 per week. In 2000, Zlatos was placed in a nursing home.

Between February 2000 and June 2000, Gertrude wrote checks to Saenz totaling $23,400, and wrote the notation “loan” on each check. Saenz said that Gertrude provided these funds as loans to enable him to purchase two cars, pay for his son’s college tuition, pay for his mother-in-law’s funeral expenses and to pay for a portion of his wife’s medical bills. In February 2000, Gertrude told Saenz that she wanted to transfer the Zlatos’ Sun City real property to Saenz as a gift. Gertrude contacted the title company and, on behalf of herself and pursuant to a power of attorney from her husband, signed a warranty deed conveying the property to Saenz.

In June 2000, the Cagneys learned that Gertrude had transferred money and property to Saenz. Months later, Gertrude was diagnosed with Alzheimer’s dementia, which may have developed in the prior months or as early as a year before. In January 2002, the Zlatoses filed a complaint against Saenz in the Superior Court, alleging that Saenz had breached his fiduciary duties to the Zlatoses in violation of A.R.S. § 46-456.

Breach of fiduciary duty
The court concluded that the plaintiff failed to establish that Gertrude was an incapacitated or vulnerable adult at the time the loans were made and the real property transferred, or that Saenz had breached the statute. The Court of Appeals later examined whether Gertrude was a “vulnerable adult” under A.R.S. § 46-451(A)(10), which defines a vulnerable adult as: “...an individual who is over eighteen years of age or older who is unable to protect himself from abuse, neglect or exploitation by others because of a physical or mental impairment.” The court cited Gertrude’s age, physical frailty, inability to walk, and total dependence upon Saenz’s assistance for bathing, walking and meal preparation during the time that Gertrude transferred money and property to Saenz as support for
Law Office Management: Positive Leadership

By Mark A. Winsor

I have yet to find a man, whatever his situation in life, who did not do better work and put forth greater effort under a spirit of approval than he ever would do under a spirit of criticism.” Charles M. Schwab

The practice of law can be an extremely stressful profession. Litigators advocate their clients’ causes in an adversarial system. Family lawyers work through both the legal and emotional challenges of families breaking up. We have demanding clients and heavy work loads. When the pressure builds, a mistake by a staff member sometimes seems like a pin bursting the balloon of frustration releasing unnecessarily harsh criticism.


It is certainly necessary to have high expectations of our staff. The nature of our profession requires it. The goal, however, is to steadily improve their performance and ability, not to hire perfect staff. Criticism is, in my opinion, counter-productive to the process of steady improvement. A good leader can direct change without criticism. Although it is often necessary to identify a mistake with the person who made it, the way it is done can make all the difference in the world between a motivated staff and a revolving door.

The following principles are a few of the many things I have learned about “positive leadership” over my many years in leadership positions.

Do not point fingers of blame at your staff. During my command of a Field Artillery Battery in the National Guard I learned to accept full responsibility for any mistake made by any person in my unit. I took the heat and instead of relying the heat downstream, I continued to encourage those under my command to reach my high expectations. I constantly assured them that I knew they could achieve our goals of excellence. They responded magnificently and when the awards and commendations naturally followed, I directed the limelight and glory to them. I found that rewarded behavior did indeed confirm their expected behavior.

Build your staff’s self-esteem and self-confidence. Years ago I was a marketing director with a large financial services company. I had offices in five states and dozens of sales representatives on my team. I was taught by some of the greatest leaders in the industry how to motivate my team by building their self-confidence and morale. I have discovered that those principles of positive, uplifting leadership also motivate my law office staff to do their best and steadily improve. Many times they recognize their mistakes and weaknesses. They need reassurance and guidance, not to be demeaned. I have experienced greater loyalty and effort from my staff when I sincerely believe in and express appreciation for their ability and potential.

Identify mistakes with kindness and in a spirit of mentoring. Nobody is perfect. It may be harder for you to teach and mentor than to simply point out every mistake, but the results are worth it. You may wonder what the difference is between mentoring and criticizing. I have discovered that the greatest difference is the results you achieve. The differences in the process include: a) your demeanor and body language; b) your tone of voice; and, c) your choice of words.

A few tips on mentoring are in order. Be kind. Smile. Talk calmly and never condescendingly. Do not treat the mistake as a “fault,” but instead as something to be improved. Take responsibility for your part of the mistake (e.g., failure to properly explain or teach). Be patient. Show respect for the important role staff plays in your practice. Focus on methods to improve areas of weaknesses. Share frequent compliments for strengths and accomplishments. Develop a sincere interest in staff members’ career development and success. Listen to your staff’s ideas, concerns and suggestions.

Recognize and admit your mistakes and weaknesses. Roger Eastman once said, “Usually our criticism of others is not because they have faults, but because their faults are different from ours.” It is worth considering the golden rule and “doing unto others as you would have others do unto you.”

Who knows, positive leadership may very well reduce the stress inherent in our profession.

Kevin Bonner, an attorney at Fennemore Craig, has been selected by judges of the United States District Court in Arizona for a three-year term as a lawyer representative to the 9th Circuit Judicial Conference.

Lawyer representatives play a leading role in the annual Arizona District Conference for Federal Judges and practitioners and 9th Circuit Judicial Conference which brings together federal judges from the 9th Circuit Court of Appeals and all the District Court judges, magistrates and Bankruptcy Court judges within the 9th Circuit. Lawyer representatives also meet regularly with Arizona’s federal judges to discuss potential improvement to court operations and procedures.

Bonner (J.D., 1993, University of Michigan) practices in the areas of construction litigation, general commercial litigation and creditors’ rights, including bankruptcy matters.

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

Cross (J.D., 1983, ASU) focuses his practice on distressed/insolvent businesses in restructurings and in 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.

Lindsay Jones, an attorney at Gust Rosenfeld, has been elected to a two-year term on the Board of Directors of the Arizona Education Foundation.

The Arizona Education Foundation works to improve education by focusing resources from the private sector to promote, recognize, and reward excellence in K-12 public education in Arizona. To that end, the AEF sponsors Teacher of the Year, the Spelling Bee and the Polly Rosenbaum Writing contest.

Jones (J.D., 2001, UA) focuses her practice on education law, including special education, board governance and employment matters.
HCR 2010: justice courts; jurisdiction

HCR 2010 changes the civil jurisdiction of courts inferior to the Superior Court and justice courts from a sum not to exceed ten thousand dollars, to “an amount as provided by law.”

HCR 2010 was passed in the House Judiciary Committee and caucused.

HB 2002: justices of the peace; duties

HB 2002 establishes that a justice of the peace has managerial control over the court clerks and other support personnel who perform duties in direct support of the justice court, and provides that a justice of the peace may delegate managerial duties to a court manager, court clerk, or court administrator.

Additionally, if a reprimand or formal charge is filed against the justice of the peace by the Arizona Commission on Judicial Conduct, the presiding judge of the county in which the presiding judge is located may remove or restrict the ability of the justice of the peace to perform any or all managerial duties.

HB 2002 was assigned to the House Judiciary Committee, but no hearing has been held.

SB 1529: tribal courts

SB 1529 amends A.R.S. § 12-136 to require an enforceable involuntary commitment order of an Arizona tribal court to contain findings that reflect:

• The legal and factual basis of the tribal jurisdiction over the civil commitment proceedings and over the proposed patient;

• The proposed patient received notice of the civil commitment proceedings and the allegations regarding the patient’s mental condition, and had the opportunity to be heard with the assistance of a person recognized by the tribal court as competent to represent the proposed patient;

• That the proposed patient has been diagnosed with a mental disorder that renders the proposed patient a danger to self, a danger to others, persistently or acutely disabled or gravely disabled;

• The treatment ordered is the least restrictive and the proposed patient is unable or unwilling voluntarily to receive the treatment;

• The state, through the attorney general, was given notice of the filing of the petition for commitment order and a copy of the petition before issuance of the order by the tribal court.

The bill would also establish that an involuntary commitment order issued by a tribal court is subject to the same procedures, defenses and proceedings for reopening, vacating or staying as a judgment of the Superior Court.

SB 1529 was assigned to the Senate Judiciary Committee, but no hearing has been scheduled.

SB 1435: civil legal services fund; fees

SB 1435 requires each county treasurer to establish a civil legal services fund consisting of monies received pursuant to the filing fees established by A.R.S. § 12-284. Five dollars of each filing fee denoted in A.R.S. § 12-284(A) would be used to fund organizations that provide legal services to indigent persons in civil cases and that presently receive monies from the Legal Services Corporation. The county’s board of supervisors, along with the county’s presiding judge, would administer the fund and spend monies in the fund to provide monies to organizations that receive monies from the Legal Services Corporation and which provide civil legal services to residents of the county. The county treasurer is authorized to invest monies in the fund and invest monies earned from investment. Additionally, the county treasurer must submit an annual report to the presiding judge of the Superior Court and to the Board of Supervisors indicating the total amount of monies in the fund.

SB 1435 was assigned to the Senate Judiciary and Senate Appropriations Committees, but no hearing has been scheduled.
Brian H. Blaney, Kevin J. Morris, David M. Paltzik and Scott K. Weiss have been promoted to partners at Greenberg Traurig.

Blaney (J.D., 1998, University of Notre Dame) concentrates his practice on corporate and securities, including public offerings, mergers and acquisitions, venture capital and private placements.

Morris (J.D., 1988, Brigham Young University) represents clients in the areas of commercial real estate finance and real estate development.

Paltzik (J.D., 1995, UA) focuses his real estate practice on the representation of both public national and private local homebuilders and developers of residential single family and multi-family communities.

Weiss (J.D., 1998, ASU) represents both public and private companies in the areas of securities, public offerings, private placements, venture capital, mergers and acquisitions and corporate finance.

Alexandra C. Mijares has joined Greenberg Traurig.

Mijares (J.D., 2004, ASU) joins the firm’s white collar crime and commercial litigation practice.

Elizabeth Hall, Shannon Ivanyi, Steven Leach and Kelly Shira have joined Jones, Skelton & Hochuli, P.L.C.

Hall (J.D., 2005, UA) joined the firm as an associate and concentrates her practice on general insurance defense.

Ivanyi (J.D., 1997, UA) joined the firm as an associate and concentrates her practice on governmental liability, education law, general insurance defense and employment law.

Leach (J.D., 1987, University of Iowa) joined the firm as a partner and concentrates his practice on government tort defense with an emphasis on public entity/school district defense, employment law, insurance bad faith, civil rights, product liability and aviation law.

Shira (J.D., 2003, ASU) joined the firm as an associate and concentrates her practice on environmental law, education law, Indian law and general insurance litigation.

Lewis and Roca also welcomed four new associates: Kirsten Copeland, David Cowles, Kristina Holmstrom, and Marvin Ruth.

Copeland (J.D., 2002, UA) joined the firm’s construction and commercial litigation groups.

Cowles (J.D., 2001 ASU) joined the firm’s commercial litigation practice group.

Holmstrom (J.D., 2004, University of Nevada, Law Las Vegas) joined the firm’s life, health and disability and commercial litigation practice groups.

Ruth (J.D., 2005, UA) joins the firm’s commercial litigation practice group.

J. Blake Mayes has joined Galbut & Hunter, P.C. as an associate.

Mayes (J.D., 2005, UA) concentrates his practice in commercial litigation and business & commercial transactions.

David Fitzgerald and Patrick Davis have been promoted to partners at Titus, Brueckner & Berry, P.C.

Fitzgerald (J.D., 1998, University of Connecticut) practices business law and commercial litigation.

Davis (J.D., 1989, ASU) focuses on business, construction real estate and bankruptcy law.

Damien Meyer and Darrell Husband have joined Titus, Brueckner & Berry, P.C. as associates.

Meyer (J.D., 2002, University of Iowa) practices commercial litigation, real estate litigation, and employment law.

Husband (J.D., 2002, Pepperdine University) practices real estate law, including finance, business and corporate transactions.
granted summary judgment. But the county appealed and the Court of Appeals reversed.

Wrong state of mind
Judge Joseph W. Howard rejected the notion that Clear Channel had stepped into the state’s shoes by taking title from it. He agreed that the “state is not subject to the general police power of local governments when it performs governmental functions,” but he held that Clear Channel did not enjoy the same benefit.

To begin with, the state’s exemption is not a property interest that can be transferred. Howard noted that Clear Channel is not an agent of the state, because it had no mandate to perform any governmental function. Even if Clear Channel could have received the state’s exemption, it would not apply here because billboards are not governmental functions. “[U]nless the activity is a fundamentally inherent function of or encompassed within the basic nature of government,” Howard wrote, quoting a previous case, “it is a proprietary function,” not a governmental one. “[T]he erection and leaving of billboards is a commercial endeavor that directly competes with other commercial enterprises, is privately funded, and not something that can reasonably be considered fundamental or basic to the nature of government.”

Howard also found that the state had not passed the incidents of sovereignty to the company. He noted that the transfer agreement specifically required Clear Channel to comply with state and local laws in erecting any replacement billboards.

Finally, Howard found adopting Clear Channel’s position would run counter to legislative intent. In the Arizona Highway Beautification Act, the legislature had granted local jurisdictions the power to regulate billboards. Joining Howard’s opinion were Judges J. William Brammer, Jr., and Peter J. Eckerstrom.

Boarding proof
For seasoned travelers, it’s fairly automatic. We have our driver’s license or other identification at the ready to show to officials and airline representatives so that we can board the plane. But some people, including John Gilmore of California, aren’t as willing to play ball, as was shown in Gilmore v. Gonzalez, No. 04-15736 (9th Cir. Jan. 26, 2006).

Gilmore planned to fly from Oakland to Washington, D.C. He presented his ticket to an airline ticketing agent, who asked him to show identification. Gilmore balked. The agent told him that he could still get on board if he consented to additional screening at the gate. At the gate, Gilmore again refused to show his I.D. or to be searched, and left the airport.

Persistent, he went to the San Francisco airport to buy a ticket from a different airline. He was again confronted with the option of either showing identification or submitting to a “selectee” search at the gate. Gilmore refused and was again barred from the flight.

Vague reasoning
Gilmore’s next move was to sue the airlines and numerous government officials. The district court dismissed, and the Ninth Circuit affirmed.

Gilmore argued that the regulation was unconstitutionally vague because the government—citing national security—refused to reveal its content. Judge Richard A. Paez rejected the argument, noting that although Gilmore was not allowed to read the regulation, he had actual notice of it. And Paez rejected Gilmore’s claim that it vested to much discretion in airline employees.

Paez also rejected Gilmore’s claim that his right to travel was violated. He noted that Gilmore was prevented from flying without showing I.D. only because he had refused to undergo the more intense search. Paez added that “Gilmore does not possess a fundamental right to travel by airplane even though it is the most convenient mode of travel for him.”

Paez rejected the search-and-seizure argument, noting that a request for I.D. does not implicate the Fourth Amendment. Nor is a request for I.D. a seizure under the Constitution. As for the request to submit to a search, the Fourth Amendment only prevents unreasonable searches, he held, and a pre-boarding search is not unreasonable. Judges Stephen S. Trots and Thomas G. Nelson joined the opinion.

Let-down decision
Kozinski did not show the usual federal–state deference. He concluded: “No rational trier of fact could have found that Goldyn committed the crime of writing bad checks as defined by Nevada law. . . . And no rational judicial system would have upheld her conviction… . We are saddened and disappointed that the state supreme court unanimously affirmed a conviction carrying multiple life sentences based on such cursory and inadequate review of the record in light of the applicable statute.”

Joining Kozinski was Ninth Circuit Judge Robert B. Beezer and District Court Judge Cormac J. Carney.

Week after Goldyn, another panel of the Ninth Circuit faced a similar situation when it examined California’s conviction of Shirley Reel Smith in the death of her granddaughter. The state alleged that the child died of shaken-baby syndrome, adducing a couple of expert opinions that shaking had caused a shearing of the brain stem. But they acknowledged that there was no evidence of any shaking.

The district court refused to grant habeas corpus, but the Ninth Circuit reversed. This time, it showed a little more deference: “With all due respect to the California Court of Appeal… , we conclude that the Court of Appeal [acted] unreasonably . . . when it held the evidence to be sufficient to convict Smith of causing Erzel’s death. There was simply no demonstrable support for shaking as the cause of death.”

Judge William C. Canby, Jr., wrote the opinion in Smith v. Mitchell, No. 04-55831 (9th Cir. Feb. 9, 2006). Circuit Judge Harry Pregerson and District Judge Edward C. Reed, Jr., joined him. ■

(Over)drawing the line
In habeas-corpus proceedings, federal courts look over state courts’ shoulders to determine whether convictions comply with the United States Constitution. When they do so with deference and respect to the state court. The United States Constitution. As for the request to submit to a search, the Fourth Amendment only prevents unreasonable searches, he held, and a pre-boarding search is not unreasonable.

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POSITIONS

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ATTORNEY POSITION: 3-5 year experience (some trial experience), good people skills, East Valley firm, send resume to: Hiring Partner and writing sample to: Hiring Partner and credentials required. Forward resume to: T. Zamora, Fennemore Craig, 3003 N. Central Ave., Suite 2600, Phoenix, AZ 85012 or tzamora@mbwlaw.com. FENNEMORE CRAIG SEEKS ATTORNEY 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&R’s, (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. FROMM, SMITH & GADOW, P.C., an AV Rated family law practice has an immediate opportunity for an attorney with a minimum of three years experience handling family law matters. Excellent research, writing, and communication skills a must. Appellate experience a plus. Compensation commensurate with credentials and experience. Fax resumes in confidence to Marcia at (602) 955-0509 or email to mhart@fsg-law.com. PARALEGAL with min. 3 years commercial litigation experience. Must have excellent organization, communication and writing skills. Experience with large document cases in both state and federal courts. MS Word proficiency required. The firm offers competitive salary and benefits. Forward resume to: T. Zamora, 2929 N. Central Ave., Ste. 1600, Phx., AZ 85012, fax (602) 258-6212 or e-mail tzamora@mbwlaw.com.

AV RATED LAW FIRM SEEKS associate attorney with Real Estate/Transaction experience. Applicants must have excellent academic credentials and strong writing skills. One to four years experience preferred. For immediate consideration send resume to: Firm Administrator; Warner Angle Hallam Jackson & Formanek PLC; 3550 N. Central Ave., Suite 2600, Phoenix, AZ 85012; Email: yam@warnerangle.com; Fax: 602-234-0419.

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Please send resume and references to Sandra J. Silvernale via email at ssilvernale@zglawgroup.com or via facsimile at (602) 224-7889.
Superior Court Creates New Justice System Planning Position

By J.W. Brown
Maricopa Lawyer

Jessica Gifford Funkhouser, a highly respected attorney whose career in public service has earned her many awards and commendations, has accepted appointment to the newly created position of special court counsel—justice system planning and communications.

A key responsibility of the job is to "help reduce jail and juvenile detention overcrowding," said Presiding Judge Barbara Rodriguez Mundell, who made the announcement today. "She is perfect in helping further the court's commitment to assuring timely, fair and impartial administration of justice to everyone."

Funkhouser will analyze and make recommendations to improve case processing and system improvements to help reduce jail and juvenile detention overcrowding. She will serve as a court liaison to the county, other justice agencies and the Citizens Jail Oversight Commission. She also will oversee communications and community outreach for the Judicial Branch in Maricopa County, which includes the courts and juvenile and adult probation departments.

"I am honored to have been selected to work for the best Superior Court system in the U.S. and to assist Judge Mundell in achieving her mission and goals in finding innovative ways of improving an already excellent system," Funkhouser said. "This exciting, new challenge will utilize the experience I've gained over the past 27 years in public service."

"Maricopa County is committed to working with the Superior Court to provide fair and equal justice for all. At the same time the Board of Supervisors is committed to providing services at the most reasonable costs."

This new position helps us achieve both of these goals," said Board of Supervisors Chairman Don Stapley.

Funkhouser joined the court on Feb. 27. She was the special counsel for elections, open meetings and public records in the Office of the Arizona Attorney General for the past three years. Prior to that, she served as state election director, assistant chief counsel of the Division of County Counsel, chief counsel of the Appeals Division of the Maricopa County Attorney’s Office and chief counsel of the Criminal Division of the Arizona Attorney General’s Office.

Funkhouser graduated from the University of Arizona College of Law in 1978. She is the 1999 recipient of the Maricopa County Bar Association’s Distinguished Public Lawyer Award, the Attorney General’s 2004 Attorney of the Year Award for the Solicitor General’s Division and the Attorney General’s 2005 Exceptional Public Service and Outstanding Teams Award.

The county and the court are sharing funding for the newly established post.

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

Arizona District Court’s published opinions available online

Published opinions for the United States District Court for the District of Arizona are now available at the court’s website: www.azd.uscourts.gov/ under the “Opinions & Rules” button.

Judicial Conference okays policy recommendations At its September 20, 2005, meeting, the United States Judicial Conference adopted its Committee on Judicial Resources’ recommendations to implement a policy on electronic transcript availability by:

• Adopting a 75 cents per-page fee for remote electronic public access to transcripts;
• Seeking legislation necessary to effectuate the fee;
• Authorizing the expansion of the existing electronic transcript availability pilot project;
• Directing the Committee on Judicial Resources to work with the Defender Services Committee to evaluate the impact of the policy on the Defender Services Program and to determine whether to recommend changes to the policy.

On the recommendation of the Committee on Court Administration and Case Management, the conference also adopted a policy that federal judges:

• Maintain only subscriptions to print case reporters that are deemed essential;
• Cancel any non-essential subscription to print case reporters;
• Give serious consideration to whether subscriptions to law journals, law reviews and treatises are essential.

The Judicial Conference recognized that a significant number of judges regard print reporters as an essential resource.

The conference report is available in its entirety at: http://www.uscourts.gov/judconfindex.html.

No butts about indecent exposure in Maryland

On January 3, a Maryland appellate court reversed a county district court ruling that a Maryland man who mooned his neighbor and her eight-year-old daughter was guilty of indecent exposure. Circuit Court Judge John Debelius explained to reporters that indecent exposure relates only to the display of a person’s genitals. Calling the defendant’s act “disgusting” and “demeaning,” Debelius indicated the outcome could have been different had the defendant been on trial for “being a jerk.”

“If exposure of half the buttock constituted indecent exposure, any woman wearing a thong at the beach at Ocean City would be guilty,” said Debelius.

James Maxwell, one of the defendant’s attorneys, told the Washington Post that the ruling should “bring comfort to all beachgoers and plumbers” in the state.

WSBA to file amicus brief addressing ethics of police posing as lawyers

The Washington State Bar Association will file an amicus brief in that state’s supreme court which will address the detrimental impact on the bar and the administration of justice if police are allowed to pose as lawyers.

The case involves a New Jersey man who was convicted of murdering a 13-year-old Seattle girl more that 22 years ago—when the defendant was 14-years old. Police, posing as a fictitious law firm, sent the suspect a letter offering to represent him in a class-action law suit involving parking tickets. When the suspect sealed the envelope containing the reply requested from the fictitious law firm, police were able to match the DNA on the envelope to DNA found on the dead girl’s body.

In an outline of its brief, the bar association wrote that “[p]ersons who consult with a lawyer justifiably expect that they are interacting with their counselor and advocate,” and pointed out that “[a]ny number of alternative ruses could have achieved the same result without unnecessarily creating— and abusing—the attorney-client relationship.”

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Cross-Examination Basic Techniques

By Jack Levine

Cross-examination, if done well, can destroy your adversary’s case. Learning to become an effective cross-examiner is not all that difficult. To be sure, there are some basic principles, which need to be mastered, but once they are learned, you will be able to apply them in any type of courtroom situation.

Before there were rules of discovery and disclosure, lawyers prepared for cross-examination by preparing a “worst case scenario.” That is, they would anticipate the most damaging testimony imaginable from each witness and then determine how they could meet this testimony. Frequently the cross-examiner would have to prepare a number of alternative lines of questions depending upon the answers that the witness might give to key questions. This was frequently done with stacks of index cards containing the prepared questions. If the witness answered “yes” to a pivotal question, the cross-examiner would then proceed to the group of “yes” cards immediately following. If the witness answered “no” to a pivotal question, the cross-examiner would skip over the “yes” group of cards and proceed with the following “no” group.

Recognize cross-examination is hard and tedious work. Our present rules of discovery, if used with cross-examination in mind, will make your task considerably easier. Don’t lose sight of the fact, however, that preparing for cross-examination is hard and tedious work. In order to cross-examine either a lay or expert witness you must know your subject thoroughly. For example, in a personal injury case you might have to learn such diverse subjects as accident reconstruction; the anatomy and physiology of the human body; the basic principles of machinery and electricity; or whatever other issues may be involved in your case. Many people think that cross-examination questions by skillful lawyers in a trial are due to spontaneous brilliance—not so. It is the result of considerable effort.

Retain control of the witness. In addition to preparing your questions in advance, consider arranging your questions in a precise order for maximum effectiveness. However, except for special circumstances that might require it, do not read the questions. It is the concept expressed in the question that is important and not the precise words. On cross-examination you want to shape the question so that the witness must give the desired answer and you want to close your examination with the greatest possible impact.

Know when not to cross-examine. Of course, practitioners should keep in mind that you are not required to cross-examine a witness, and if the witness doesn’t hurt your case, you should not do so. If you feel, however, that the jury may read your failure to cross-examine as a sign of weakness, you may always question the witness on collateral or “safe issues” as:

Q. “Were you subpoenaed as a witness or did you come voluntarily?”
Q. “Whom have you talked to about this case?”
Q. “When did you last discuss your testimony?”

But if you invest a little more time and patience with your cross-examination, taking it step by step, notice the difference.

Q. How long have you been a police officer?
Q. And I take it you are frequently called to the scene of an accident similar to this. I suppose as many as several hundred a year?
Q. And in many of those cases one car was coming from the right and one from the left?
Q. And in many of these intersection accidents there were skid marks from one or both of the vehicles?
Q. And the skid marks varied in length and the location of debris varied from accident to accident, isn’t that true?
Q. So you may have seen as many as a thousand accident scenes since the time this accident occurred over three years ago?
Q. And your testimony then is based on your recollection of what occurred over three years ago of then one of over a thousand accidents you have investigated since that time?

Maintain control over the witness. It is important to let the witness know who is boss. If you let a witness ramble on, or if a witness is not responding directly to your question, you run the risk of appearing weak and ineffective in front of the jury. Even worse, you run the risk of damaging evidence coming in through a long narrative answer that might otherwise be inadmissible. Here are some suggestions for handling these problems.

The witness who rambles on:
Q. Mr. Jones, please try to be more direct in answering my questions. Your attorney will be able to ask you for more details if she wishes to.

The witness who does not respond:
Q. Mr. Jones, did you hear my question?
Q. Did you understand my question?
Q. Do you prefer not to answer my question?
Q. Well, if it embarrasses you for the jury to know the answer to my question, I have no further questions, you are excused.

Summary of important rules:
1. Prepare in advance for each witness.
2. Don’t cross-examine unless necessary.
3. Don’t read your questions.
4. Have a specific purpose in mind.
5. Concentrate on essential points.
6. Never ask a witness “why” unless you don’t care what the answer is.
7. Do not permit yourself to be side tracked.
8. Begin and end your cross-examination at a high point for maximum effectiveness.
9. Stand up when cross-examining.
10. Close all avenues of escape before confronting the witness with impeaching material.
11. Don’t attempt to break down the story of a witness who has testified truthfully.
12. Never try to get a witness to admit he is a liar.
13. Do not display anger.
15. Be ready to immediately proceed with your next question if an objection to your last question is sustained.
16. Use words such as “might,” “could conceivably,” “isn’t it possible” to gain concessions from an adverse witness.

Jack Levine is a past chair of the Trial Practice Section of the State Bar of Arizona, and has lectured and written extensively on courtroom strategy and trial techniques.
Exploitation
continued from page 8
its finding that Gertrude was physically im-
paired.

The court addressed whether Gertrude was
unable to protect herself from abuse, ne-
glect or exploitation because of her impair-
ment and concluded that Gertrude was unable to
protect herself because the impairment left
her totally dependent upon Saenz’s services.

Finally, the court determined that Saenz
breached his fiduciary duties of loyalty and ac-
countability to Gertrude by failing to put her
interests first and by failing to encourage her
to seek the help of a family member or the
advice of counsel in making such transfers.

Shirley’s facts
Although Zlam is the first published
Arizona decision involving A.R.S. § 46-456,
the Court of Appeals issued its Memorandum
Decision in Shirley two years earlier.

In Shirley, Robert and May Shirley ex-
cuted wills and established a trust for the
equal benefit of their two adult daughters,
Christine and Donna. Upon Robert’s death in
1998, the trust became irrevocable and was
divided into three subtrusts; a survivor’s trust
funded with May’s marital property, a fami-
ly trust funded with Robert’s marital prop-
erty and a marital trust. Although the assets
of each trust were to be distributed equally
to Christine and Donna, each trust gave May a
limited power of appointment through which
she could elect to leave all of each trust’s assets
to either daughter.

After Robert’s death, Donna provided
care to her mother, who suffered from macu-
lar degenerative eye disease, pulmonary fibro-
sis and depression. Donna became a signatory
to her mother’s joint checking account, and
the proceeds paid from a life insurance policy
on Robert’s life were deposited into a joint
savings account held in Donna and May’s
names. Donna acknowledged that she spent
funds from the accounts toward the purchase
and maintenance of her horse, the payment
of her daughter’s tuition, and wrote checks to
herself for cash.

During the month following Robert’s
death, May visited her lawyer and executed
health care and general durable powers of at-
torney, naming Donna as her agent. Weeks
later, Donna arranged for May to visit with a
second estate planning lawyer. After meet-
ing with the second lawyer, May signed a new
will, exercising her powers of appointment to
make Donna the sole beneficiary of the survi-
vor’s and marital trusts.

Less than two days later, May was hos-
pitalized with pneumonia and doctors de-
termined that she was near death. Just hours
before May’s demise, Donna transferred
$40,000 from the joint savings account into
her own bank account.

Donna’s sister, Christine, alleged that
Donna had committed financial exploita-
tion in violation of A.R.S. § 46-456. The trial
court found that Donna’s $40,000 with-
drawal from the joint savings account violated
the statute. The trial court assessed damages
against Donna in the amount of $80,000, set
aside May’s final will as a product of undue
influence, and ruled that Donna had forfeited
all of her beneficial interest in May’s estate,
including any interest in the survivor’s trust,
the marital trust and the family trust.

“No Harm-No Foul” rejected
On appeal, the Court of Appeals af-
irmed the trial court’s finding that Donna’s
withdrawal from the joint savings account
constituted financial exploitation. The Court
of Appeals determined that because Donna as-
sumed the position of caring for her mother’s
finances, she owed her mother the same duty
of care which a trustee owes to a trust’s benefi-
ciaries. The Court refused to accept Donna’s
advice of counsel in making such transfers.

The court addressed whether Gertrude
was physically impaired.

The court understood that the document needed two
witnesses. What the witness, but not the trial

Jung
continued from page 6
tator. Respect for the legal system is eroded
when litigants perceive winning and losing as
technicalities.

Purpose
The purpose behind the Harmless Error
rule as discussed in the annotations to UPC
§2-503 addresses its application to a few cir-
cumstances. The first, when the testator mis-
terstands the testamentary requirements. The
second, a defective execution of the docu-
ment. The UPC recognizes the tension inher-
ent in the strict requirements for a formally
attested will and the laxities of a holographic
document considered a will. Section 2-503 is
intended to ameliorate the harsh result for
someone who makes an honest effort to ex-
press their testamentary intentions, but does
so with a typewritten rather than a suicide note.
The author had the opportunity to success-
fully litigate, and uphold, what may have been
a suicide note as a will. The issue in the case
was whether the language “You get the ranch
when I croak” manifested sufficient testamen-
tary intent.

It is hornbook law that a will requires
two witnesses unless it is holographic in na-
ture. The Jung case demonstrates that the
layman who drafted that testamentary device
understood that the document needed two
witnesses. What the witness, but not the trial
court understood, was the timing of when the
document needed to be signed by the attest-
ing witness. The A.L.R. is full of circumstanc-
es that bespeak some variation on Jung.

The Arizona legislature, by adopting
the harmless error rule, would give real mean-
ing and purpose to A.R.S. §14-1102(A), that is,
having a probate code that is “liberally con-
strued,” and is intended to “simplify and
clarify the law,” as it pertains to the affairs of
decedents.

The Jung court’s reversal never afforded
practitioners of a meaningful analysis of just
how far the courts were willing to go to “dis-
cover and make effective the intent of a de-
cendent in distribution of his property,” pursuant
to A.R.S. §14-1102(B)(2). They should not
have to. The legislature should provide the
guidance the court cannot by enacting the
Harmless Error Standard within the AZUPC.