10 inductees selected for the MCBA Hall of Fame

Congratulations to the 10 exemplary lawyers and judges who have been inducted into the Maricopa County Bar Hall of Fame. Eight were chosen for the modern era and two were selected into the pioneer era, for accomplishments occurring before 1964.

For the modern era, the honorees are Hon. Elizabeth Finn, Susan Freeman, Hon. John Gennmill, Timothy Hogan, Kevin O’Malley, Van O’Stein, Hon. Ron Reinstein (ret.) and Charles Wirken.

For the pioneer era, we honor Charles A. Carson, Jr. and Hon. Raul Castro.

The Hall of Fame was created in 2008 by the MCBA to recognize the outstanding lawyers and judges who are, or were, true giants of the profession, primarily in Maricopa County.

Inductees were selected based on criteria, which includes: Practiced for at least 10 years; played prominent and important roles that have had an impact on the history and development of our local bar and the legal profession; made significant or unique contributions to the law or the administration of justice; and/or demonstrated significant leadership, advocacy and accomplishments in service to the community or the profession.

These 10 inductees will be honored on Oct. 27 at the MCBA’s Annual Meeting/Hall of Fame Luncheon at the Hyatt Regency Phoenix. Registration for this event is available at www.maricopabar.org or go to page 6 to fill out your registration form.


High court limits government’s immunity against claims from drunk and reckless drivers

Faith Mascolino was killed on a Tucson highway. Having been pulled over and arrested for drunk driving, she was sitting in a DPS patrol car awaiting transportation to the police station when Robert Gallivan, driving his car at high speed, smashed into the patrol car. Mascolino was killed instantly. Her family sued Gallivan. They also sued the state, contending that the DPS officers had negligently conducted the investigation and arrest, exposing Mascolino to the danger posed by Gallivan’s driving.

The jury found for the family against Gallivan, but it allocated 25 percent of the fault to Mascolino. It exonerated the state.

The family appealed, contending that the trial judge had erred in giving a jury instruction under A.R.S. § 12-821.02(A)(7). The statute provides that plaintiffs must prove intentional conduct or gross negligence when suing to recover for “[i]njury to the driver of a motor vehicle that is attributable to the violation by the driver of [enumerated] statutes prohibiting both DUl and reckless driving.

The court of appeals affirmed, holding that the statute applied to Mascolino because the jury could reasonably have found that her fatal injuries were attributable to her drunken driving. Fleming v. State, Dep’t of Pub. Safety, 236 Ariz. 210 (App. 2014). The state supreme court granted review and, in an opinion by Vice Chief Justice John Pelander, held that the trial judge should not have given the instruction. Fleming v. State, Dep’t of Pub. Safety, 237 Ariz. 414 (2015).

Although the parties had concentrated their arguments on whether Mascolino’s fatal injuries were attributable to her prior drunken driving, Pelander analyzed the issue as a definitional one: Whether Mascolino qualified as a “driver” under the statute. He acknowledged that the court of appeals had appropriately consulted dictionaries that define “driver” as “one who drives,” a definition that included Mascolino.

But the word, Pelander wrote, may also be interpreted differently. “The definition of driver as ‘one that drives’ does not necessarily include one who merely drive in the past,” he wrote. “To ‘drive,’” he added, “is commonly understood to be ‘an act of driving.’” Thus, a driver can be one who does “an act of driving.”

Consistent with these definitions, he concluded, “once the act of driving ends, the person is no longer one who drives and thus not a driver.” Consequently, an injury to a person who is no longer driving is not “an injury to the driver,” as envisioned by the statute.

Fleming: The phantom dissent

By Daniel P. Schaack

With a nod to Irving Younger’s “Imaginary Judicial Opinions: A Creative View from the Bench” (1989), I present the dissenting opinion of Justice Samuel H. Cullison in Fleming v. State, Department of Public Safety. (Don’t bother searching Westlaw or the Arizona Reports for it: You won’t find it.)

Cullison, J., dissenting

Because the majority opinion strays beyond statutory construction and enters the realm of judicial legislation, I must respectfully dissent.

Section 12-821.02(A)(7) provides qualified immunity for “[i]njury to the driver of a motor vehicle that is attributable to the violation by the driver of § 28-603, 28-1381 or 28-1382,” which, in turn, prohibit reckless driving and driving under the influence of intoxicating substances. The plaintiff asks us to limit the immunity to injuries that the driver suffers while in the act of driving. The task before us is therefore a straightforward matter of legislative intent. Did the legislature intend to include the plaintiff’s proposed limitation in its statute?

The statute is short and simple, and the answer to the plaintiff’s plea is crystal clear. The legislature included no language limiting its application to injuries suffered while an act of driving is occurring. Thus, to rule in the plaintiff’s favor, we have to ourselves write the provision that the plaintiff urges. The majority unfortunately does just that.

The majority is correct in a sense: § 12-821.02(A)(7) — See Fleming: The phantom dissent
Getting the most from your new bar

For many, you read this latest epistle wait-
ing in anticipation of receiving your bar re-
sults. You thereby, solidify, and strengthen your place into the Arizona legal community as a licensed attorney. Please accept my hearty congratulations on your achievement. Graduating from law school is no small task and required substantial effort and sacrifice on your part. Having completed these steps, you are about to embark on a wonderful journey in the law.

Once the initial excitement fades, however, the realities of practicing law are going to smack you square in the face. Deadlines, stress and an overload of responsibilities await you, whether you ask for them or not. In addition to your personal responsibilities, you should shoulder a great burden of keeping pace with ethical responsibilities, as well as those incident to remaining licensed in the state of Arizona.

The first (and most obvious) responsibility is that of satisfying your continuing legal education requirements. In your first year the amount of CLE required is reduced; thereafter, you are responsible to seek out and receive 15 hours of continuing legal education, three of which must be in the area of ethics. On first glance, it does not appear to be an insurmountable hurdle. Indeed, it is not so long as you plan ahead and schedule your seminars on a regular basis. If you wait until the last minute, however, you (like many) will have to scramble.

My advice: Don’t wait; get it done.

In November, MCBA members will be selecting five persons to serve on the Board of Directors for 2016-17. The candidates are: Lynne Adams*, Gail Barsky*, Flynn Carey*, Tyler Carrell, Michael Kielsky*, Jack Levine, and Brian Winter (incumbents marked *).

Voting will commence on Nov. 1 and ends Nov. 15, with the winners being announced shortly thereafter. Eligible voters are all attorneys currently licensed to practice in Arizona and who are members in good standing with both the MCBA and the State Bar.

The board election will again be held electronically with members receiving voting information by email. Within the email, voters will find a link to the voting website and their individual user names and passwords.

As a member of the MCBA and through our website, you have at your fingertips access to online CLE and web-based, self-study CLE. Better yet, if you want to interact with the audience and speakers, the MCBA offers live, in-person CLE nearly every week at our offices at 303 E. Palm Lane, in downtown Phoenix. If you need a nudge to attend live CLE, you might read my August column regarding “physical and engaging” legal education.

With a focus on lawyers practicing in Maricopa County, our CLE committee endeavors to provide CLE educators who represent the finest of legal talent in our community, in an environment that encourages interaction and networking among the attendees and the speakers. The topics cover a wide range and span from basic foundational programs (which help new lawyers to lay the foundation for their practice) to the complex and challenging, even to seasoned veterans. At the MCBA, too, you have the safety of knowing that the Socratic method is something of your past.

Our ethical rules require that lawyers maintain competency. While CLE certainly contributes, maintaining a network of peers with whom you can fellowship and discuss complex issues is key to your longevity and success. At the MCBA, there are nearly dozens of ways to become involved with your peers and colleagues. First, practice-related sections offer you the ability to meet and network with lawyers who do what you do (or, maybe, what you think you want to do). Through the practice-specific sections, you have access to CLE, which is directly focused on you.

Specifically for lawyers within their first five years of practice or under the age of 36, the Young Lawyers Division represents a prime opportunity for involvement. Considered the “public service” arm of the MCBA, the YLD has long been the gateway to bar leadership at the MCBA. Numerous past presidents and board of director members trace their lineage within the MCBA back to this division, and many (myself included) were once on the YLD executive committee or the president of the YLD. At the YLD, life-long connections and friendships are made. To this day, I keep in contact with many of my YLD compatriots, and count them among my close friends. This group gives me a continued resource from which to draw inspiration and knowledge, whether it is in tackling an ethical issue or understanding how they addressed problems in their respective practices. Never forget that there are many around you who are facing the same struggles you are, and that they, too, would love to hear alternative perspectives on how to challenge the latest adversary. You are stronger as a community; create it, share in it and take advantage of it.

Because the MCBA strives to maintain the highest levels of member services, we are always looking for ways to improve. Often we find that our best resources are our members themselves. So, if you don’t see the MCBA offering a seminar, resource or practice support service that you feel is necessary, get involved and help us create it. Much of the positive work that the MCBA does on an annual basis is credited to the hard work and dedication of its lawyer volunteers — people who have taken bits of their own time to give back to the MCBA and, by doing so, the greater legal community as a whole.

Welcome to the Bar. Now, get involved, and I’ll see you at the MCBA!

Seven file for seats on MCBA Board of Directors

Gail Barsky

I am a graduate of Temple University School of Law, with an LL.M. in Trial Advocacy. For twenty-five years, I have always been proud to say I was a member of our bar. It was during that time, I began my legal career in the Federal Government in Philadelphia, then went to work for an insurance defense firm and later assumed the Managing Trial Attorney position for Nationwide Insurance Company for 14 years, ending with my own private practice.

In Arizona, my legal career began with Reyle, Carlock, & Applewhite in Phoenix, then Restick & Louis in Scottsdale (for over three years doing insurance defense work and construction defect litigation) and now I am one of the Managing Attorneys for Goldberg & Osborne, serving the Phoenix and suburban areas.

Community involvement and volunteerism has been a way of life for me since I was a teenager, including serving in leadership positions, which has been extremely gratifying.

Recently, I have served on: the Board of Directors for Scottsdale Bar Association starting in April 2013, and The Phoenix Philanthropic Society since October 2017. I volunteer often for Free Arts of Arizona, Community Senior Centers, U.S. VETS, Andrés House of Hospitality, Duet and Paute Center.

Flynn Carey

I am a founding member of Mitchell, Stein, Carey, PC, a boutique criminal defense and regulatory firm. In my practice, I defend clients throughout Arizona in violent crime and vehicular prosecutions, advocate for professionals in licensing investigations and in board proceedings, and assist companies and governmental entities in conducting internal investigations and litigating white collar and fraud cases. Prior to founding MSC, I practiced in the Criminal Law and Regulatory Enforcement Group at Gallagher & Kennedy, PA.

I am seeking my second term on the MCBA
With the 2016 presidential election (somehow) already in full swing, we’re all bracing for attack ads, dark money and mud-slinging. It’s all very depressing. However, it’s shortsighted to think that the dirty tricks in this election will be “worse than ever.” As long as there have been elections, there have been smear campaigns and rumors passed off as fact — even at the highest level. Let’s take a stroll through presidential election history for some perspective:

1800: Thomas Jefferson vs. John Adams

The first duel between these two ended with the Federalist, John Adams, sitting as the second U.S. President. This time, after Jefferson made deliberate efforts to distance himself from his boss, the clowns came out. Jeffersonian benchman James Callender wrote scathing characterizations of Adams, calling him a “gross hypocrite” and “a hideous hermaphroditical character which has neither the force and firmness of a man, nor the gentleness and sensibility of a woman.” Of course, the Federalists fired back, saying Jefferson swindled his legal clients, was a godless atheist, a coward during the Revolutionary War and slept with slaves while at Monticello. Not exactly “disagreements over policy,” Jefferson eventually prevailed.

1828: Andrew Jackson vs. John Quincy Adams

The 1828 battle between Democrat-Republican Andrew Jackson and President John Quincy Adams was also a rematch from four years earlier, where Adams won thanks to the force and firmness of a man, nor the gentleness and sensibility of a woman. Of course, Cleveland won in a close race and his supporters celebrated with “Ma! Ma! Where’s my pa? Gone to the White House! Ha! Ha! Ha!”

1864: Grover Cleveland vs. James G. Blaine

President James Garfield was assassinated in 1881, and even though his vice president Chester A. Arthur took over, Arthur lost the Republican nomination to James Blaine, Garfield’s secretary of state. Blaine was painted as a corrupt man who was in the pocket of railroad bosses. Democrats even uncovered a letter written by Blaine to a railroad attorney, wherein Blaine appeared complicit in shady business dealings, and even signed off with “Burn this letter!”

But Democrats, despite having a candidate who was so honest that he was considered “ugly honest” (think Joe Biden), were shocked by the revelation that as a bachelor, Cleveland had an “illicit” affair with a 36-year-old widow named Maria Halpin. She later gave birth to a baby boy, whom Cleveland supported, despite his private doubts about the child’s paternity. Republicans called Cleveland a “morat leper” and an “obese nincompoop” (he was 250 pounds). Worse yet, Republicans repeated the chant: “Ma! Ma! Where’s my pa?” Cleveland told the truth, acknowledging that he supported the child, but refused to say anything else. Of course, Cleveland wasn’t married, and Maria Halpin refused to give any statements, but Cleveland’s honesty controlled the damage. Cleveland won in a close race and his supporters celebrated with “Ma! Ma! Where’s my pa? Gone to the White House! Ha! Ha! Ha!”

1964: Lyndon Johnson vs. Barry Goldwater

LBJ, a backslapping “New Deal Democrat” faced off with Goldwater in a campaign for the ages. Goldwater was an ultra-conservative, who favored giving army field commanders the right to use tactical nuclear weapons and liked to say “[s]ometimes I think this country would be better off if we could just saw off the Eastern seaboard and let it float out to sea.”

Consequently, LBJ painted Goldwater as a scary, trigger-happy bomb thrower. Goldwater didn’t help, remarking “let’s lob one into the Kremlin and put it right into the men’s room.” Eventually, national publications called him “the fastest gun” and a man of “one-sentence solutions.” Goldwater responded with an old-school book that brought together all the nasty stories about Johnson. In its first year of publication, the book supposedly outsold the Bible in Texas.

But on September 7, LBJ dropped a bomb. “Daisy,” in what may well be the most famous and effective campaign commercial of all time, debuted during NBC’s top-rated Monday Night at the Movies. In the ad, a blonde girl walks through a field, stops to pick a daisy, and a military voice begins a countdown: “10 … 9 … 8 … 7 …” As the counting reaches zero, the little girl looks up, startled. You stare into her face and a mushroom cloud explodes, filling the screen. Over the cloud, LBJ’s voice says, “These are the stakes. To make a world in which all of God’s children can live, or to go into the dark. We must love each other or we must die.” WHOA! LBJ’s associates also fed hostile questions to reporters on Goldwater’s campaign, wrote letters to Ann Landers posing as ordinary people terrified of Goldwater, and even infiltrated Goldwater’s campaign headquarters and stole advance texts of Goldwater’s speeches. The tactics worked: Johnson won with the biggest percentage of the popular vote in history, 61.1 percent.

2016?

With so many characters and issues at the forefront of the upcoming election, there are sure to be more dirty tactics and mud-slinging in this election. It’s easy to be angered by what you see, and think that the world is caving in around us. But politics is mess, and neither party is blameless. Yet somehow, when the dust settles and the campaigns end, it’s the people who look past the rhetoric — those who simply want to provide a better future for their families and their neighbors — that help keep this country moving forward. More than most, we as attorneys must understand the difference between an artful argument and actual merit. We can’t stop people from getting swept up in the intrigue and the scandal, but perhaps we can’t at least be examples of civility and do our best to separate the theatrics from the important issues we must face.
Rebecca Lumley was commended for her legal work by the adoption of her now 2-year-old son. She resulted in a positive outcome and the biological father, Cannon conducted when legal complications arose with the opportunity to adopt her niece’s son. Their own, Cannon and her husband had departments at ASU for 13 years before high school and went on to work in various personal injury and bankruptcy firms after

in justice studies. She briefly worked for in Arizona, she graduated from ASU in obtain a college education. Born and raised and the second child in her family to sire to work in the legal field, is what moti

Nilda Jimenez is working closely with our conference speakers and vendors to make this year’s event a huge success. She is also reaching out to potential members to grow the division. Her continued hard work and dedication to the division make her the perfect choice for this year’s Paralegal Member of the Year award. It will be my pleasure to present her with this award at this year’s conference. I encourage all paralegals to become more active in the division so they may be eligible to receive the prestigious honor in the future. Congratulations to both of them! ■

Paralegal Division selects scholarship recipient and Paralegal Member of the Year

Kathryn (Kacie) Cannon

Cannon is the youngest of 12 children and the second child in her family to obtain a college education. Born and raised in Arizona, she graduated from ASU in December 2012 with a bachelor’s degree in justice studies. She briefly worked for personal injury and bankruptcy firms after high school and went on to work in various departments at ASU for 13 years before deciding to return to school to obtain her paralegal certificate.

After being unable to have a child of their own, Cannon and her husband had the opportunity to adopt her niece’s son. When legal complications arose with the biological father, Cannon conducted legal research to support her case, which resulted in a positive outcome and the adoption of her now 2-year-old son. She was commended for her legal work by the commissioner handling her case, and this encouragement, coupled with her own desire to work in the legal field, is what motivated her to enroll in a paralegal program. Cannon is attending Phoenix College full time and anticipates receiving her paralegal certificate in May 2016. Her goal is to obtain a government paralegal position.

Our next board meeting is Tuesday, Oct. 13 at 5:30 p.m. at the MCBA office, 303 E. Palm, in Phoenix. Following the meeting, we will have our Bag Stuffing Pizza Party sponsored by Ottnear & Associates, Inc., to get ready for our conference later that week. If you plan on attending, please RSVP to Tina@hammerman-hultgren.com by Oct. 9.

Leon Silver

By Leon Silver and Rebecca Lumley

Last October, we wrote about the interplay between social media and the First Amendment. And, in particular, we noted that the Supreme Court had granted certiorari in Elonis v. United States, a case in which a Pennsylvania man, Anthony Elonis, “threatened” to kill his wife — among other horrible acts — on Facebook. The Court would decide: Is it a crime to make repeated Facebook postings that unintentionally cause reason for people to feel threatened? The Supreme Court held that it is not. Elonis v. United States, No. 13-983, Slip Op. (Jun. 1, 2015).

The Court, in an opinion written by Chief Justice Roberts, explained “a guilty mind is a ‘necessary element in the indictment and proof’ of every crime.” Id. at *10 (quoting United States v. Balint, 258 U.S. 250, 251 (1922)). It, therefore, generally “interprets criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them.” Id. (citing alteration and quoting United States v. X-Citement Video, Inc., 513 U.S. 64, 70 (1994)). Hence, “a defendant generally must ‘know the facts that make his conduct fit the definition of the offense,’ even if he does not know that those facts give rise to a crime.” Id. (quoting Staples v. United States, 511 U.S. 600, 608, n. 3 (1994)).

An individual who ‘transmits in interstate commerce any communication containing...any threat to injure the person of another’ is guilty of a felony and faces up to five years’ imprisonment. 18 U.S.C. §875(c). This statute does not indicate whether the defendant must intend that his communication contain a threat. Id.

If these rules are, as the Court states, “general,” then what are the exceptions? The Court did not explain. It indicated that it might not require a mens rea element if it were not “necessary to separate wrongful conduct from ‘otherwise innocent conduct.’” Id. at *12 (citing Caster v. United States, 530 U.S. 255, 269 (2000)). But, it did not give an example where it had done so. And, the Court did not decide whether the mens rea element here could be satisfied by reckless conduct. Id. at *16-17. It remedied the case to the court of appeals leaving that issue for another day. Id. at *16.

Another question raised by Elonis but left unanswered was whether the threats low, when applied to speech like Elonis’ postings, would violate the First Amendment protection of free speech. Rather, the conviction was overturned applied to speech like Elonis’s postings, would be satisfied by reckless conduct. Id. at *12. But, it did not give an example where it had done so. And, the Court did not decide whether the mens rea element here could be satisfied by reckless conduct. Id. at *16-17. It remedied the case to the court of appeals leaving that issue for another day. Id. at *16.

The Elonis opinion may have created more questions than answers. Stay tuned. ■
Make the most of comparisons

Legal writers make comparisons in many types of writing, especially when analyzing a client's facts. The grammar rules for comparisons are mostly straightforward: add "er" to an adjective to form the comparative and "est" to form the superlative. In addition, most of us know the most common exceptions to these rules (ex. good, better, best). But, many of us could use a refresher on some of the less common comparison rules in Bryan Garner’s “The Redbook, A Manual on Style.”

For/Far: To form the comparative of most one-syllable and many two-syllable adjectives, add "er." To form the superlative, add "est." If the word ends in "y", change the "y" to an "i." If the word ends in "t" or "d" and is preceded by a single vowel, then double the "t" or "d."

long, longer, longest
angry, angrier, angriest
sad, sadder, saddest

More/Most and Less/Least: For most adjectives that are two or more syllables, use "more/less" to form the comparative and "most/least" to form the superlative. Do not use this construction if the adjective is already in comparative or superlative form.

more afraid
less stable
NOT: more dwarver
NOT: least highest

Comparing Within a Group: In order to compare an individual to the rest of her class or group, make sure to use the words "other" or "else" to make the comparison clear.

Diane closed more files than anyone else in the group.

NOT: Diane closed more files than anyone else in the group. (This construction suggests Diane is not part of the group.)

Absolute Adjectives: Some adjectives are absolute in nature by their meaning: absolute, complete, false, fatal, final, irrevocable, perfect, sufficient and void. Do not add comparative qualifiers to these words, although it does make sense to use qualifiers such as "almost" or "nearly."

Nearly complete
NOT: more complete.

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Relationships are the focus in October

This article looks at three events taking place in October: Domestic Violence Awareness Month, the last month to file for families taking part in November’s National Adoption Day, and National Customer Service Week. Each event has ties to the clerk’s office, and although they are very different situations, these events deal with important relationships that the court and clerk’s office both take seriously.

Protective Orders

The Superior Court in Maricopa County processes a combined total of approximately 13,500 orders of protection and injunctions against harassment each year. Court rules and state and federal statutes drive the requirements, processing and maintenance of these documents. All courts hear protective order cases but the superior court has exclusive jurisdiction when parties to the protective order proceeding have an open domestic relations case.

The court issues protective orders that inform individuals of the actions that will maintain or violate public safety and personal rights. Police agencies enforce the orders, and the parties can challenge the terms and duration of the orders in court. The Superior Court in Maricopa County has a Protective Order Center online. From this website, individuals can learn about protective orders, including, how and where to obtain a protective order during and after business hours; answers to frequently asked questions; contacting a domestic violence advocate; and locating counseling, shelters, legal services and other support. For more information, visit the court’s website at http://www.supercourt.maricopa.gov/SuperiorCourt/ProtectiveOrders,center/index.asp.

National Adoption Day

Maricopa County expects to lead the nation again in adoptions at this year’s 16th annual National Adoption Day, scheduled for Saturday, Nov. 21, 2015 at the Juvenile Court Center located at 3131 W. Durango St. in Phoenix. The public is welcome to attend this free event and can expect appearances from well-known local figures as well as sports team mascots and other supporters of this family-friendly celebration.

Judges, clerks and court staff work with other volunteers to prepare for and carry out the event each year, which has been the largest of its kind in the country for several years. The deadline for filing an adoption petition to take part in the event is Friday, Oct. 9, 2015. The deadline for all other adoption paperwork is Friday, Oct. 30, 2015 to participate in the National Adoption Day events in November. For questions regarding this year’s adoption event and for more information, see the Facebook page for the Maricopa County National Adoption Day Foundation.

National Customer Service Week

National Customer Service Week is celebrated in October. From handwritten docket books to typewriters and PCs, the clerk’s office has been fortunate to employ professionals who care about doing the right things, right. Staff members who enjoy their work share that enthusiasm with the litigants, attorneys, runner support staff and others who start their judicial journey at the clerk’s office. Feedback, suggestions and advice from both our internal and external customers make this a better office. We thank you for it and look forward to serving you soon.

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2015 MCBA ANNUAL MEETING
MARICOPA COUNTY HALL OF FAME INDUCTION

Luncheon

TUESDAY, OCT. 27, 2015

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5. ___________________________ 10. __________________________

REGISTRATION DEADLINE IS OCT. 21

Mail form and payment to: MCBA, Laurie Williams, 303 E. Palm Lane, Phoenix, AZ 85004. Please contact Laurie with questions at (602) 682-8585.
Seven file for seats continued from page 2

Board of Directors. During my first time, I worked to restructure the Solo and Small Firm section as one of the MCBA’s Divisions. I am also a member of the Strategic Plan Task Force, which is developing a long-term strategic plan for the MCBA. I have drafted sections of the MCBA’s Civil Litigation Guide, taught CLEs to members starting practice on their own, and met with members regularly on a one-on-one basis to consult with them about all aspects of opening a law practice.

Thank you for your consideration. I look forward to the opportunity to continue to serve the MCBA.

Tyler Carrell

Tyler Carrell, an attorney at Gallagher & Kennedy, PA, is a current member of the MCBA Board of Directors, and has been involved in the MCBA for many years. Carrell served on the Young Lawyers Division Board in various capacities, including chair of the Mock Trial Committee, moderator, and most recently as President. This year, Carrell became the first attorney in Arizona history to serve concurrently as the President of the State Bar and MCBA Young Lawyers Division. Carrell also served on the MCBA Law Week Committee, chaired by the Honorable Patricia Norris. During his involvement in the MCBA, Carrell helped coordinate programs including mock interviews for law students, the Barrister’s Ball, and first-time attorneys.

Carrell is also a volunteer mock trial coach and a St. Mary’s Food Bank volunteer. Carrell is honored to serve the MCBA and its members, and would work to continue and expand the MCBA’s valuable programming and pro bono services to benefit lawyers and the general public.

Michael Kiebsky

Michael Kiebsky is a partner in the Phoenix law firm of Kiebsky Rike, PLLC. He is admitted in Arizona and California, and to Arizona’s U.S. District Court. Kiebsky’s general practice areas include criminal defense and traffic ticket defense. He has served on the MCBA Board since 2012, was President of the East Valley Bar Association from 2011-12 and is currently its Vice President. His committee memberships include the State Bar’s Technology Committee since 2012, and the MCBA’s Lawyer Referral Service Committee since 2012. Kiebsky has presented CLEs on numerous groups, and is a State Bar of Arizona Certified CLE Presenter. Kiebsky is a founding board member of “Generations After: Descendants of Holocaust Survivors in Greater Phoenix.” Also active in politics, Kiebsky was the Libertarian candidate for Maricopa County Attorney in 2008, 2010 and 2012, receiving nearly 26 percent and 28 percent of the votes in the last two races, respectively. Kiebsky has consistently advocated and worked, professionally and in volunteer activities, for the advancement of individual rights, personal autonomy and responsibility, and justice.

Jack Levine

I have been an active member of the MCBA since 1964. I am a graduate of the N.Y.U. School of Law. After graduation, I served as a Special Agent with the F.B.I.

I am a past member of the Editorial Board of the Maricopa Lawyer, a participant in the MCBA’s Lawyer Referral Service, and a past member of the Associations Family Law Committee. I served as President of the Arizona Trial Lawyers Association in 1983 and as a member of the State Bar Board of Governors from 2011-2013.

Although I am somewhat older than the average candidate for the MCBA Board of Directors, I have not lost my zeal and energy for supporting our Associations efforts in building its membership and prominence in the legal community. While with the State Bar Board of Governors, I advocated converting the State Bar from a mandatory Bar to a voluntary one, which would permit many more lawyers to afford membership in the MCBA.

This could result in the membership of our Association doubling or tripling to become the largest and most prestigious Bar Association in the state. I hope you will support me.

Brian Winter

Winter received his B.A. in Government and Politics in 1990 from St. John’s University and his J.D. from St. John’s University School of Law in 1993. He has extensive practice in Family Law, Divorce Mediation and Collaborative Law, Probate Law and Estate Planning.

Winter is admitted to practice law in Arizona, Connecticut, New York, Florida and the United States District Court, District of Connecticut.

In 2015, Winter received Avvo Clients’ Choice Award for Divorce, a recognition that is based off of positive reviews on Avvo.com. Winter is Lead Counsel Rated in Family Law, a distinction that recognizes his profound legal experience, reputation and ethics.

A native of Connecticut, Winter was actively involved in the local community and was a member of the Board of Directors of Habitat for Humanity of Coastal Fairfield County, Inc. from 2006 to 2012. Winter was formerly the chair of the Site Selection Committee and served as the organization’s legal counsel. In 2008, Winter was awarded the Second Mile Award for his strong dedication and outstanding leadership for the organization.

Winter is a member of the Scottsdale Bar and Maricopa County Bar Associations.

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

Thank you for making a difference!

Understanding rule changes for screening disqualified lawyers

By Russell Yurk

On Aug. 27, 2015, the Supreme Court of Arizona issued an Order Amending ERs 1.10, 1.11, 1.12, 1.18, Comments to ER 1.10, and Comment [8] to ER 1.10 in No. R-13-0046. This Order changes the procedure and requirements for screening disqualified lawyers. This column describes some of the changes.

QUESTION: When will the amended rules become effective?

ANSWER: The rule changes are amended effective January 1, 2016.

Q: What is ER 1.10 and what does it have to do with screening?

A: In general, ER 1.10 imputes conflicts of interest to one lawyer in a law firm to all other lawyers in the law firm. When a lawyer joins a law firm, any former-client conflicts of interest (under ER 1.9) of that lawyer are imputed to all the other lawyers in the new law firm. However, ER 1.10(d) allows the new law firm to screen the new lawyer under certain circumstances to allow an otherwise prohibited representation.

Q: How did the applicability of screening to avoid disqualification change?

A: The applicability of screening changes in two respects. First, the current version of ER 1.10(g) allows screening if the new matter “does not involve a proceeding before a tribunal in which the personally disqualified lawyer had a substantial role.” The amended rule eliminates any reference to a tribunal, so it now applies to both transactional and litigation representations. More significantly, the amended rule will now only preclude screening of lawyers who “did not have primary responsibility for the matter that causes disqualification under Rule 1.9.” By eliminating the terms “involve” and “substantial role,” the amendment makes application of the rule more predictable — and, in the context of litigation, makes the screening exception apply to fewer lawyers. A lawyer who did some work on a pending case but was not the lawyer with primary responsibility for it can move to the other law firm without disqualifying that firm from the matter.

Q: What other requirements for screening changed?

A: The amended ER 1.10(d) requires that the written notice of screening provided to the former client include “a description of the particular screening procedures adopted.” The notice must also describe when the screening procedures were adopted, a statement by both the disqualified lawyer and the law firm that confidential information has not been disclosed and will not be used, and an agreement by the law firm to respond promptly to written inquiries or objections by the former client about the screening procedure. Finally, new ER 1.10(d)(4) limits screening to only those situations where the personally disqualified lawyer and the new firm reasonably believe that the screening will be effective in preventing disclosure of confidential information.

Q: What did not change?

A: The contester addressed by screening can still be waived if the affected clients give informed consent to the representation. The potential for screening becomes relevant only if one of the affected clients will not waive the conflict. The moving lawyer still may not be appointed any part of the fee from the new firm’s work on the matter. And, obviously, the moving lawyer may not work on the matter at the new firm.

If you have any questions on the issues discussed in this column or if you have topics that you’d like me to address in future columns, please email me at ryurk@jhc-law.com.

Russell Yurk is a partner at Stevens, Haig & Cunningham, L.L.P., in Phoenix. His practice focuses on professional liability, lawyer discipline and complex civil litigation.

Q&A

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Calling all loyal readers and history buffs!

The Maricopa Lawyer is trying to assemble a complete archive of all MCBA monthly newsletters published since 1956 (or earlier if they exist) and all editions of the Maricopa Lawyer published since October 1982.

If you have historic copies of either and are willing to share your collection with us, contact Stan Watts at watts@dwlaw.net or 602-279-7488. Thank you!

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HYATT REGENCY PHOENIX
New rules for the new commercial court

By Lorena C. Van Assche

Attention all commercial litigators. There is a new mandatory rule governing the lawsuits you file in the Maricopa County Superior Court. Effective July 1, 2015, in Maricopa County, all qualified commercial cases must be filed in the new commercial court. The Maricopa County Superior Court has enacted a three-year pilot program that will manage all qualified commercial cases.

All qualified commercial case filings will be governed by the new experimental Rule 8.1. Currently, you will not find Rule 8.1 in your Arizona Rules of Civil Procedure book. However, you can find Rule 8.1 on Westlaw and in the new commercial court website at www.superiorcourt.maricopa.gov/commercial-court/. You can also find Rule 8.1 in an Administrative Order issued by the Arizona Supreme Court. Here is a link to that order: www.azcourts.gov/Portals/22/admonter/Orders15/2015-15EPdf.pdf

How to determine if your case qualifies as a commercial case

Rule 8.1 is structured as a multistep process that the practitioner must go through to determine if her case fits within the new commercial court pilot program. Step one defines a commercial case under Rule 8.1. However, not all cases that meet the definition of a commercial case under Rule 8.1 qualify under the commercial court pilot program. Rule 8.1 requires you to move on to the second step to finish your assessment. Step two contains a three-tiered process. The first tier identifies eligible commercial cases with no amount in controversy requirement. The second tier identifies eligible commercial cases with a $50,000 amount in controversy requirement. Finally, the third tier specifically excludes commercial cases that may intuitively be thought of as fit within the program. The following addresses the multistep process in more detail.

Step 1: Is your case a commercial case?

First, you must determine if your case is a commercial case under Rule 8.1. Rule 8.1(a)(1) provides that a commercial case is one in which:

A. At least one plaintiff and one defendant are “business organizations;”
B. The primary issues of law and fact concern a “business organization;” or
C. The primary issues of law and fact concern a “business contract or transaction.”

“Business organizations” and “business contract or transactions” are defined in Rule 8.1(a)(2) and (3) as follows:

A “business organization” includes a sole proprietorship, corporation, partnership, limited liability company, limited partnership, professional association, joint venture, business trust, or a political subdivision or government entity that is not a party to a business contract or transaction.

A “business organization” excludes an individual, a family trust, or a political subdivision or a government entity that is not a party to a business contract or transaction.

A “business contract or transaction” is one in which a business organization sold, purchased, licensed, transferred, or otherwise provided goods, materials, services, intellectual property, funds, realty, or other obligations. The term “business contract or transaction” excludes a “consumer contract or transaction.”

Thus, if you satisfy any of the requirements of 8.1(a)(1)(A)-(C), your case is a commercial case and you can move on to the second step.

Step 2: Does your commercial case qualify for the commercial court?

Second, if you have established that your case is a commercial case under Rule 8.1(a)(1), you must move on to Rule 8.1(b) and 8.1(c) to determine if your commercial case qualifies for the mandatory commercial court. You only need to satisfy either of the requirements of Rule 8.1(b), which does not have an amount in controversy requirement, or Rule 8.1(c), which has a $50,000 amount in controversy requirement. Finally, there are specific types of cases that are excluded and those are identified in Rule 8.1(d).

Tier 1: Cases with no amount in controversy requirement

Rule 8.1(b) governs cases with no amount in controversy requirement. To summarize, they include cases that concern:

1. A business organization’s internal affairs, governance, dissolution, receivership or liquidation;
2. The obligations, liabilities or indemnity claims between owners of the business organization, or liability or indemnity of individuals within a business organization;
3. Sale, merger or dissolution of a business organization;
4. Trade secrets, misappropriation of IP, non-solicit, non-compete or non-disclose matters;
5. Shareholder or derivative actions;
6. Real estate transactions;
7. Franchisor or franchisee matters;
8. Purchase or sale of securities or securities fraud;

Therefore, if you have a commercial case under Rule 8.1(a)(1) and that case also is one that fits within Rule 8.1(b), you must file your case with the new commercial court.

Tier 2: Cases with a $50,000 amount in controversy requirement

Rule 8.1(c) governs cases with a $50,000 amount in controversy requirement. To summarize, they include cases that concern:

1. Contracts or transactions governed by the UCC;
2. Sale of services by, or to, a business organization;
3. Professional malpractice claims (other than medical);
4. Tortious or statutorily prohibited business activity like unfair competition, tortious interference, misrepresentation or fraud; or
5. Surety bonds or commercial insurance policies including actions for coverage, bad faith or a third-party indemnity claim against an insurer.

Therefore, if you have a commercial case under Rule 8.1(a)(1) and that case also is one that fits within Rule 8.1(c), you must file your case with the new commercial court.

Tier 3: Specific cases that are excluded

Rule 8.1(d) provides that the following types of cases are excluded unless other criteria specified in Rule 8.1(b) and (c) predominate the case:

1. Eviction;
2. Eminent domain or condemnation;
3. Civil rights;
4. Motor vehicle torts and other torts involving physical injury to a plaintiff;
5. Administrative appeals;
6. Domestic relations, protective orders or criminal matters, except a criminal contempt arising in a commercial court case;
7. Wrongful termination of employment.

Therefore, if your case meets the definition of a commercial case; (2) is one of the cases identified in Rule 8.1(b) or (c); and (3) is not one of the cases identified in Rule 8.1(d), then your case is subject to mandatory filing in the new commercial court.

Plaintiff’s duties when filing a complaint in the commercial court

Under the new rule, the judge assigned to the case must independently determine if a case is within the jurisdiction of the commercial court and has discretion to grant or decline such jurisdiction. To assist the judge in making this determination, the rule requires that if your case qualifies as a commercial case, you write the caption of your complaint “commercial court assignment requested.” You must also use a new civil cover sheet that includes a box for “commercial cases” and check the box.

New case management requirements for commercial court cases

Rule 8.1 also makes changes to Rule 16, however, Rule 16 does not reflect those changes. Therefore, as a practice tip, be sure to make a note in Rule 16 to refer back to Rule 8.1. Rule 8.1(f) clarifies which part of existing Rule 16 will apply to commercial court cases. Specifically, it provides that Rules 16(a) and 16(k) apply to cases in the commercial court, except:

1. Scheduling conferences under Rule 16(d) are mandatory.
2. Prior to filing a Joint Report, parties must confer, as set forth in the commercial court’s ESI checklist, and attempt to reach agreements that may be appropriate in the case concerning the disclosure and production of electronically stored information (“ESI”).
3. The parties’ Joint Report must address the following additional items, whether:
   A. Any agreements have been reached with regard to ESI;
   B. Any agreements were reached under Ariz.R.Evid. 502;
   C. A protective order under Rule 26(c) is being requested and the grounds for that order;
   D. There are any issues concerning claims of privilege or protection of trial preparation materials pursuant to Rule 26.10(c).

Finally, also important is the availability of new forms for a Joint Report and Proposed Scheduling Order that are available in the link above to the Administrative Order and should be available on the commercial court’s website.

The foregoing identifies the material provisions of Rule 8.1, however, there are additional provisions in Rule 8.1 that are not addressed here, so be sure to carefully review Rule 8.1. Although the analysis of Rule 8.1 is not difficult, the first several times you are assessing whether your case fits within the parameters of Rule 8.1, it would be helpful to go through each step carefully. By doing so, you will readily become familiar with Rule 8.1’s requirements. Your apt familiarization with the rule will come in handy if and when the experimental rule becomes permanent.

Van Assche is an associate at Engelmann Berger, PC, who focuses her practice in the firm’s commercial litigation group.
New judge Q&A: Hon. Jeffrey Rueter

Q: What has surprised you the most about making the transition from commissioner to judge?
A: Being a commissioner for seven years was excellent preparation for transitioning to being a judge. The most surprising thing was how quickly my sign outside my office was changed from commissioner to judge.

Q: Who has been the biggest inspiration in your legal career?
A: Jim Rizer was a Deputy Maricopa County Attorney and my first supervisor when I was assigned to a trial bureau as a new County Attorney and my first supervisor. He taught me a lot about how to treat people, how prosecutors have a duty to seek justice and how to handle myself in the courtroom. He did a great job of molding how I comport myself and was a great friend even after I left the County Attorney's Office.

Q: What's your favorite quote?
A: This is a paraphrase: "If the only tool you have is a hammer, every problem begins to look like a hammer." I wish that I had one more day to spend with my parents.

Q: What songs are currently in your playlist?
A: I have a pretty eclectic list of songs. I like all sorts of music. I have songs ranging from Miles Davis to Rage Against the Machine to Lil Wayne to Johnny Cash.

Judicial appointments

Gov. Doug Ducey appointed Ronee Korbin Steiner and Josh Rogers to the Maricopa County Superior Court Bench. Judge Korbin Steiner worked as a family law attorney at her own firm, Korbin Steiner & Martha. In 2010, she received the Family Law Litigator of the Year Award from the Volunteer Lawyers for Justice. Judge Steiner is interested in becoming a 100% Club Member, contact cquinonez@maricopabar.org or call (602) 682-8582.

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Law School in 1990. Korbin Steiner re-

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Nussbaum Gillis & Dinner serves businesses and individuals by providing transactional and litigation services for clients throughout Arizona. Our attorneys work to address each client's diverse legal needs by providing counsel in areas of construction and real estate law, corporate law, financial restructuring and bankruptcy, trust and estate planning, probate, insurance defense, as well as administrative and regulatory matters pertaining to the pest control and landscaping industries. The firm was founded in 2008 by Randy Nussbaum and Greg Gillis. Dean Dinner became the third named partner in 2010. Nussbaum Gillis & Dinner is located in Scottsdale with offices in Casa Grande and Avondale, Arizona. For additional information, visit www.NGDLaw.com.
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**NO SHOWS**: If you registered and paid, but could not attend, you may request that materials be sent to you, free of charge (allow 3-4 weeks). If audio media is available, registrations may be converted to a self-study package for an additional $15 charge.

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**OCT. 9 • 12:30 P.M. – 4 P.M.**

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**OCT. 14 • 11:30 A.M. – 1 P.M.**

**(Lunch provided)**

**Same-Sex Marriage in Arizona: One Year Later**

**SPONSORED BY**: Family Law Section

1.5 CLE: credit hours available

A follow-up to last year’s CLE; how same-sex marriage in Arizona is affecting the practice of family law.

**PRESENTERS**: Claudia D. Work, Esq., Campbell Law Group, Chartered; David N. Horowitz, Esq., May, Potenza, Baran & Gillespie, PC

**COST**:
- MCBA members: $62.50
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**OCT. 21 • 11:30 A.M. – 1 P.M.**

**(Lunch provided)**

**Financial Exploitation Claims Under Arizona’s Adult Protective Services Act**

1.5 CLE: credit hours available

This will be an interactive session to discuss:
- Purpose of the Act
- Who is protected
- Your reporting obligations

**Other issues, e.g. standing and statute of limitations**
- Who is subject to the Act
- Standard of care and exceptions
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**PRESENTER**: Kent S. Berk, Esq., Berk Law Group, PC

**COST**:
- MCBA members: $62.50
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**NOV. 12 • 7:30 – 9 A.M.**

**(Breakfast provided)**

**Top Things That Irritate JAs and Clerks**

**SPONSORED BY**: Estate Planning, Probate and Trust Section

1.5 CLE: credit hours available

Have you ever wondered which situations truly frustrate court clerks and judicial assistants? Have you had any specific instances that have frustrated you? This interactive CLE will address the top situations that give clerks and judicial assistants the most problems. Whether it’s filing, getting hearing dates, contacting divisions, submitting exhibits or obtaining letters — inevitably, you will run into difficulty. Find out how to best handle these situations or head issues off before they happen. In addition, please bring any of your own comments or suggestions.

**PRESENTERS**: Brittainy Chipley, Deputy Probate Court Administrator; Angela Kinkead, Probate Court Administrative Assistant/Former JA; Samuel Pena, Probate Court Administration Supervisor; Comm. Lisa Ann Vandenberg, Probate Court

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**NOV. 12 • Noon – 1:30 P.M.**

**What Every Family Lawyer Should Know About the Service Member Civil Relief Act (SCRA)**

**SPONSORED BY**: Family Law Section

1.5 CLE: Credit Available

This CLE will navigate the family law practitioner with regard to the Service Member Civil Relief Act. The course will provide information on who can invoke the Act, when it is proper for a military member to invoke this Act and the proper procedure for invoking the same. With the large population of active duty military members in the Maricopa County area it is good practice to know this Federal Act and how to properly use it.

**PRESENTERS**: Rebecca L. Owen, Esq., Rebecca L. Owen, PLLC

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Early exposure to pro bono work fuels attorney’s desire to aid others

By Peggi Cornelius, VLP Programs Coordinator

In graciously accepting recognition as the Volunteer Lawyer’s Program “Attorney of the Month,” London Burns spoke of her belief that pro bono work is an investment in her community, and how the experience of helping to transform the lives of others inspires her to keep investing.

“I’ve witnessed how transformative legal assistance can be to the people who need it most,” she said. The road Burns traveled to her present career and employment at Kutak Rock originated in her birthplace of Dallas, Texas, and led to St. Louis, Missouri. When it was time for college, she completed an undergraduate degree in political science and English at the University of California, Santa Barbara. Her first places of employment included real estate and accounting offices, as well as a cocktail lounge. However, divergent the places and pursuits of her formative years may have been, Burns says she was drawn to the field of law at an early age. “I always wanted a meaningful career where I could make a difference,” she said. “For me, that meant being a lawyer, and what better place to pursue that dream than the Sandra Day O’Connor College of Law?”

Her commitment to pro bono work began while Burns was in law school. “I participated in the Ruth V. McGregor Family Law Clinic and was blown away at the difficulty many people face in the legal process they so desperately need for things like child custody, guardianship, divorce and other issues,” she said. “It bothered me to see people struggle with forms and procedures because they couldn’t afford representation by an attorney.”

Once licensed to practice in Arizona, Burns joined the Volunteer Lawyers Program. “The law school’s assistant director of pro bono and public interest programs, attorney Michelle Roddy, serves on the advisory committee for the Volunteer Lawyers Program. She encouraged me to serve as a liaison between VLP and Kutak Rock. When I asked if our firm could partner with VLP to accept clients needing a volunteer lawyer, I was met with a resounding ‘yes!’” Burns said.

Although her practice is focused on commercial litigation involving creditor’s rights, bankruptcy, contract disputes, landlord/tenant, insurance defense and insurance regulatory matters, Burns is willing to accept pro bono cases outside the realm of her usual expertise.

“As a liaison, the biggest concern I hear from colleagues is naturally a little reticence to represent someone if it’s an area that’s new to them. I was nervous, too, when I took my first VLP case to petition for an uncontroverted guardianship of a minor child,” she said. “But, VLP is supportive and offered a mentor. Attorney Nancy Tribiensee was fantastic. She answered my questions and provided guidance all along the way. It was especially gratifying because we worked our way through an unexpected and complex jurisdictional issue that would probably have stopped anyone proceeding in propria persona. Plus, I had the opportunity to meet another attorney who is passionate about pro bono service.”

In addition to the community service Burns undertakes through VLP, she donates her time to NATN-SEEDS, a nonprofit organization that maintains shelters and provides support services to battered and sexually abused women in recovery. The organization also educates law enforcement officers, healthcare providers, and business and community groups about domestic violence, sexual assault and substance abuse issues. To women in recovery, Burns offers help and hope for the opportunities they need to live happy and healthy home lives. Perhaps one like she enjoys. Her family life includes her boyfriend, whom she describes as “the love of my life and my best friend.”

“London Burns spoke of her belief that pro bono work is an investment in her community, and how the experience of helping to transform the lives of others inspires her to keep investing.”

**VLP ATTORNEY OF THE MONTH**

London Burns

### CLE Review

The legal department: What to do when things go awry

By Jason Houston

It’s no secret the attorney-client privilege for large companies is increasingly under attack. Just ask Maritza Munich, Steven Trzaska, John Wolf, Lynn Coates or Timothy Mayopoulos, the latest victims of the crossfire between besmirching the attorney-client privilege and the right to know of wrongdoing by their employers’ shareholders.

As we reported here previously, Munich was counsel for Wal-Mart’s international division who took a proactive stance to investigating scandals, but was hushed from speaking about an ongoing 2004 bribery scandal over the construction of new stores in Mexico. However, a recent Delaware court decision against Wal-Mart may now give shareholders of all companies a new way to bypass the attorney-client privilege when they suspect wrongdoing.

Trzaska was a New York patent attorney for cosmetics manufacturer L’Oreal. Trzaska was fired for refusing to file patent applications for ideas he felt were so poor that he risked ethical and legal violations, if they were filed.

In San Jose, Calif., Coates was in-house counsel for Farmers Insurance. When she complained that female attorneys were paid less and put on slower career tracks than their male counterparts, Farmers responded by stripping her of her duties and constructively demoting her.

Wolf resigned from New Jersey’s esteemed Rutgers University amid criticism of his handling of fired coach Mike Rice, who was videotaped physically abusing basketball players.

New York’s Mayopoulos, general counsel for Bank of America, was fired four days after the merger between the bank and Merrill-Lynch, when it was discovered that Merrill-Lynch failed to disclose billions of dollars in executive bonuses and huge losses.

General counsel lawyers frequently play the role of investigator in companies’ most sensitive situations. The attorney-client privilege applies to the company and mid- and lower-level employees’ communications. Generally speaking, privilege applies, even to former employees. At the same time, in-house counsel often provides both business and legal advice; business is discoverable while legal isn’t. But all too often, the two become dangerously intertwined.

A good rule is to label ALL communications (including emails, correspondence, memos, etc.) “Attorney-Client Privileged - Work Product Protected. Keep legal advice and business advice clearly separated. Establishment of in-house counsel represents only the company, and no one else.

Properly vetting candidates for in-house counsel cannot be overstated. Besides a background check, ask key questions and verify all references. Speak with former colleagues and ask candidates if they are OK with your contacting previous employers and references.

After the hire is successful, follow the four Cs of onboarding, which is a process of helping new hires with the social and performance aspects of their new jobs: Compliance, clarification, culture and connection. And, finally, create a performance evaluation specific for in-house counsel.

Corporate secrets — and who may keep them — are the latest sticky wicket that in-house counsel is forced to confront. And this could apply to any corporation, large or small, if shareholders are able to persuade a judge that a genuine reason exists for obtaining information and documents that otherwise would be protected by the attorney-client privilege.

A great thanks to Nonnie Shivers of Ogletree Deakins for this informative CLE presentation. It provided a well timed segue to last month’s CLE, “Important Developments in Attorney-Client Privilege.”

By Jason Houston is a family court mediator and civil arbitrator in private practice and serves on the California State Bar’s Mandatory Fee Arbitration Panel. He is a member of the Maricopa Lawyer Editorial Board.
The Maricopa Lawyer invites members to send news of moves, promotions, honors and special events to post in this space. Photos are welcome. Send your news to mhsaskin@maricopabar.org.

**PROMOTIONS**

Ryley Carlock & Applewhite is pleased to announce that James E. Brophy has been elected as the firm’s new managing shareholder. Brophy succeeds long-time leader Rodolfo “Rudy” Parra Jr., who has served as managing shareholder since 2007.

A third-generation Arizona native, Brophy has been an attorney with Ryley Carlock & Applewhite since 1974 and has served on the firm’s executive committee a number of times. Brophy has been the leader of the firm’s Corporate Practice Group for several years and served as the firm’s risk management shareholder. His legal practice focuses on securities and business law, and he is experienced in insurance and banking law. His practice includes regulatory representation before the Arizona Department of Financial Institutions and the Arizona Department of Insurance.

Brophy is a past president of the Maricopa County Bar Association’s Young Lawyers Division for the 2015-2016 bar year.

The ABA Young Lawyers Division Assembly is the principal policy-making body of the division. As speaker, Paly will lead the assembly meetings.

Paly practices in the firm’s litigation division in the Phoenix office. He focuses on business litigation, discovery issues, intra-corporate disputes and lender liability defense. He also handles civil rights litigation and appeals.

He is an active member of the ABA Young Lawyers Division, having served as the vice chair of the Tort, Trial and Insurance Practice Committee, the co-chair of the Bankruptcy Committee, a district representative for Arizona and New Mexico to the YLD Council, and as the administrative co-director, among other positions.

**NEW HIRES**

The law firm of O’Connor & Campbell, PC, is pleased to announce that Michael R. Altaffer has been named an equity shareholder in the law firm. A graduate of Texas Tech University School of Law in 1984, Altaffer’s practice focuses on personal injury litigation and insurance coverage litigation, bad faith litigation, construction defect and general construction litigation, fire loss litigation, subrogation litigation arising from property claims, insurance claims consulting (including arson and fraud), insurance property claim appraisals and general construction law matters.

If you are an MCBA member and you’ve moved, been promoted, hired an associate, taken on a partner, or received a promotion or award, we’d like to hear from you. Talks, speeches (unless they are of national stature), CLE presentations and political announcements are not accepted. In addition, the Maricopa Lawyer will not print notices of assets of faith-based ministries and secular charities against uninsured, under-insured and uninsured unjust claims. He was a certified specialist in real estate and real property law for more than 20 years. In the community, he serves on numerous nonprofit boards as a legal advisor and trustee. Brown completed his B.S. from Yale University before receiving his J.D. from the University of Wyoming Law School.

Mason is an experienced transactional attorney with an emphasis on nonprofit, real estate and corporate representation. In advising his clients, who include real estate investment companies, charter schools, churches and other nonprofits, he provides outside general counsel to help efficiently resolve legal and regulatory issues, along with routine and complex operational matters.

He is a member of the Arizona State Board for Charter Schools and the city of Scottsdale Development Review Board. He has taught as an adjunct professor at Arizona Christian University. Mason completed his B.S. from Arizona State University in 2002 and received his J.D. and M.D.R. from Pepperdine University School of Law in 2007.

The Lipson Neilson law firm’s Phoenix office announced that it has expanded its Real Estate and Professional Liability Defense litigation teams with the addition of attorney John Fyke.

An experienced litigator, Fyke has successfully represented real estate agents and brokers, architects, engineers, appraisers and lawyers in professional liability cases. His real estate practice includes commercial litigation and transactions as well as representing home owner associations and condominium associations. In addition to his practice, Fyke is an adjunct professor at Arizona State University College of Law. He also brings over a decade of practical business experience, primarily with a national media company.

**BULLETIN BOARD POLICY**

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High court limits government's immunity provision

CourtWatch, continued from page 1

“This alternative, reasonable reading does not require any rewriting of the statute,” he wrote. Palender found support for his conclusion in the definition of “driver” in Title 28. For years, the Arizona statutes limited the word to those who actually drove. But in 1950, the legislature expanded the definition to encompass more situations. The current statute, A.R.S. § 28-202, defines the term not only as “a person who drives” but also a person “who is in actual physical control of a vehicle.”

That definition, Palender wrote, “does not include one who is neither in the act of driving nor in actual physical control of a vehicle.” Thus, construing the qualified-immunity statute “in pari materia with the highway statutes in Title 28, he concluded that “[a]n injury to the driver of a motor vehicle” in § 12-820.02(A) (7) means an injury to a person who is driving or in actual physical control of a vehicle when she is injured.”

Palender concluded that “driver” is therefore ambiguous. That conclusion was significant because it subjected the qualified-immunity statute subject to a limiting canon of construction. “It is well established,” he wrote, “that [when] ambiguity is the exception and not the rule, ... judicial construction of immunity provisions in statutes applicable to government entities should be restrained and narrow.” He concluded that construing the statute narrowly conformed with the legislature’s statement of intent when it enacted § 12-820.02(A) (7), along with other immunities and defenses in the Actions Against Public Entities and Public Employes Act.

Thus, the court of appeals’ opinion erroneously interpreted the statute. “Under our interpretation,” Palender wrote, “the injury must occur while the driver is driving or in actual physical control of the motor vehicle.” He added that this interpretation “represents a narrower application of the statute, without undermining the legislature’s grant of qualified immunity.”

“Accordingly,” Palender concluded, “we hold that [an injury to the driver of a motor vehicle] in § 12-820.02(A) (7) means an injury to a person who is driving or in actual physical control of a motor vehicle when she is injured.” And because there was no evidence that “Mascolino was either driving or in actual physical control of a vehicle when Gallivan collided with the DPS cruiser in which she died, he held that the qualified-immunity instruction should not have been given.

Joining the opinion were Chief Justice Scott Bales, Justices Rebecca White Berch and Robert Brutinel, and Court of Appeals Judge Andrew W. Gould, who filled in for Justice Ann A. Scott Timmer, who recused herself.

Editor’s note: Daniel P. Schaack, an assistant attorney general, was one of the attorneys representing the state of Arizona in Fleming v. State, Department of Public Safety.

The views and opinions expressed herein are those of the author and do not necessarily reflect the views of the Maricopa Lawyer or the Maricopa County Bar Association.
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