Please, don’t join me for coffee

By George Winney, MCBF Chair

The past year was a steady year for the Maricopa County Bar Foundation. The annual Pro Bono Golf Classic was again a success (notwithstanding a conflict with the ASU/Notre Dame game). The much-welcomed proceeds of the tournament were presented to the Volunteer Lawyers Program. Once again, the foundation gave out its Michael D. Ryan Diversity and Inclusion Scholarships to law students demonstrating a commitment to public service. Finally, the foundation again benefited from the Baristers Ball, where drinking, dancing and fake gambling were enjoyed by many.

But with 2015 unfolding before us, the foundation is striving to achieve better than just “steady,” and aspiring to accomplish more than what it has accomplished “again and again” in recent years. While some leveling off was certainly understandable during the downturn, there is simply no excuse for not achieving better results now. With the big cases and the big deals coming back through the door, we must challenge ourselves, and each other, to ensure that our level of giving is commensurate with the successes and the blessings that we are so fortunate to receive. There’s no better place to direct a portion of that giving than to your namesake foundation.

So, what’s the deal with the coffee? This past year, the foundation launched its iGive program. A one-time, 90-second signup enables participants to make a recurring contribution to the Maricopa County Bar Foundation from a credit card or checking account. As I began inviting colleagues to coffee to explain the iGive program (and solicit signatures), it quickly became apparent that the mere threat of coffee was more mutually productive. My colleagues could continue working on that big case or big new deal, supra, and with the click of a mouse could simply contribute the cost of the foregone cup of coffee through the iGive program. It was a win-win-win outcome for my colleagues, for the foundation, and for the worthy causes and needy individuals that the Maricopa County Bar Association has committed to helping.

So my pitch to you is this: The next time you see the iGive booth at a CLE or a golf tournament or a fancy function, take a minute and sign up. Give the equivalent of one pretentious cup of coffee per paycheck. I promise you won’t miss it. You will feel good about yourself, you will be doing your part to support your foundation and, with any luck, you’ll get out of receiving a coffee invitation from me.

I’ll be checking for your name on the iGive roster. ■

CourtWatch

Daniel P. Schaack

Court of Appeals reverses judgment in learned-intermediary doctrine case

Ever wonder why it seems like half of every TV ad for a drug seems to be taken up by warnings? Do you think that maybe it would make more sense for the patient to discuss the pros and cons of a medication with his or her doctor? A recent opinion from the Arizona Court of Appeals, addressing the continued vitality of the learned-intermediary doctrine following the legislature’s adoption of several-only liability, might explain.

Amanda Watts sought treatment for chronic acne. Her medical provider prescribed Solydin, an oral antibiotic manufactured by Medicis Pharmaceutical Corporation. Watts took a 20-week course of the pills. A couple of years later she returned to her provider, again complaining of acne. Her provider again prescribed Solydin, which Watts took for another 20 weeks.

Within months, she began suffering from debilitating joint pain. She was diagnosed with lupus and hepatitis, both drug-induced. Although the hepatitis went away, doctors said that the lupus will likely afflict her for the rest of her life. Alleging that the Solydin caused her condition, Watts sued Medicis asserting a common-law claim for product liability. She claimed that the written materials that had been provided to her stated that the effects of using Solydin for more than 12 weeks were unknown. By contrast, FDA information provided to medical providers “warns specifically that lupus-like syndrome and autoimmune hepatitis are possible results associated with the ‘long-term’ use.” It also advises medical providers to warn patients of the possibility of “[a]utoimmune syndromes, including drug-induced lupus-like syndrome [and] autoimmune hepatitis.”


Judge John C. Gemmill wrote that “under the learned intermediary doctrine, a manufacturer satisfies its duty to warn so long as it provides adequate information to the party who prescribes, installs, or facilitates the use of a product.” If Medicis provided the necessary materials to Watts’s medical provider, the doctrine would bar suit against the corporation. The question for Gemmill was whether the doctrine is compatible with current Arizona law, specifically UCATA — the Uniform Contribution Among Tortfeasors Act.

Gemmill noted that UCATA establishes “a system of several-only liability, or pure comparative fault, making each co-defendant in a tort case liable for no more than his or her respective percentage of fault.” Thus, “each defendant in a product liability case is individually responsible for its own contribution to the plaintiff’s injury, independent of the actions of the co-defendants.”

He concluded that “protecting a prescription drug manufacturer from possible liability for its own actions in distributing a product, simply because another participant in the chain of distribution is also expected to act, is inconsistent with UCATA.” He noted that the statute precludes “a partially responsible defendant from being held liable for the damages caused by his co-defendant.”

The learned-intermediary doctrine, he concluded, is incompatible with that principle of UCATA. Under the common-law doctrine, “a prescribing physician may bear all of the responsibility when a consumer is given an inadequate warning about a drug, even when a manufacturer played some role in making that warning insufficient.” Furthermore, the doctrine interferes with the jury’s “complete assessment of comparative fault among tortfeasors because it preemptively limits the scope of a manufacturer’s duty.”

Gemmill also took note of modern marketing methods. “Consumers,” he noted, “are regularly presented with advertisements”
Make a big impact with small efforts

“If you’re not making someone else’s life better, then you’re wasting your time. Your life will become better by making other lives better.”

This quote is attributed to a famous prince. It hangs on my wall, so I am reminded of its wisdom daily. It is a very simple concept. By our nature we are self-interested beings. Even then, each one of us can point to a person who has impacted our life for the better, someone who made an impact on us. These beneficial interactions come in all shapes and sizes. They represent efforts that span years, down to things as small as a smile, a kind word or even a warm handshake.

As lawyers and leaders, we have unique opportunities in our everyday interactions. We have all the right and ability to change the public’s generalized distaste for legal professionals through our everyday actions and activities. We can make an impact, and it takes as little as two minutes a day. By making one small change, we can impact others in a positive way.

Start small. Smile. The simple act of smiling at someone else disarms them, comforts them and encourages interaction. Get off of your high horse and out of your comfort zone. Yes, smiling may encourage that other person to smile back. Yes, this act may lead to conversation. I assure you, you’ll survive the experience. You may learn something, and your day will be better for it. Alternatively, that person may be struggling with their day, and your expression of positive energy will encourage them to carry forward.

Say “Thank you.” From the solo practitioner to the managing partner of the Phoenix office of a national firm to legal secretaries, paralegals and beyond, we are all dependent on the efforts of others. Sadly, sometimes those efforts go unnoticed and unheralded.

Today, pick one person and thank them. (Remember to smile first.) Tell them the reasons why you appreciated their efforts of others. Sadly, sometimes those efforts go unnoticed and unheralded.

In your interactions with these board members and staff, remember to smile and to say “thank you” for the efforts they put forth. Give freely of your time and talents.

Give us your opinion

The Maricopa Lawyer welcomes letters to the editors or opinion pieces for publication. Letters and opinion pieces should be typed and preferably submitted electronically. Opinion pieces are limited to 1,500 words and letters to 700 words, and the editors reserve the right to reject submissions or condense for clarity, style and space considerations. Letters must be signed to verify authorship, but names will be withheld upon request. Authors of opinion pieces will have their names published. Letters and opinion pieces should be mailed to: MCBA editor, Maricopa County Bar Association, 303 E. Palm Lane, Phoenix, AZ 85004-1532. Phone: (602) 257-4200. Fax: (602) 257-0403. Email: mhaskins@maricopabar.org.

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Dedicated to a great lawyer and Phenician

In the summer of 1999, I was a recent graduate from eighth grade at Madison Meadows Middle School in north central Phoenix. I was preparing to begin high school at Brophy College Preparatory and concerned with the things that most 14-year-old boys are concerned about: sports, girls and anxiety about being in high school. I was a fairly short boy and I had braces on my teeth. I was awkward, but happy. I had never had to confront anything particularly serious in life.

On June 14, 1999, things changed. Shannon Smith, my classmate and friend, was talking on a portable telephone in the backyard of her home, when she was struck and killed by a stray bullet. She was killed by random gunfire, and to this day, the shooter has never been found. As you can imagine, Shannon’s parents, Otis and Lory Smith, were devastated. Otis was an attorney who attended law school at ASU and worked for the Maricopa County Attorney’s Office. Lory was a local realtor. They had adopted Shannon and she was their only child.

Looking back, I’m not sure my classmates and I knew how to deal with the grief. For the first time in many of our lives, we felt powerless, confused and deeply sad. But a group of us were also compelled to do something about this tragedy. After a small community meeting, we decided to raise money for a memorial for Shannon. We believed a memorial would remind people about this tragedy. After a small community meeting, we decided to raise money for a memorial for Shannon. We believed a memorial would remind people of the shocking loss, and hopefully prevent other tragedies and had to relive their own loss, again and again, to demonstrate the need to act.

This is not where the story ends. As with all things, time moves on. Otis and Lory, still filled with the love and desire to be parents, adopted two infant twins, Tyler and Travis. They are 14 years old now. In 2008, Lory unexpectedly died of a heart attack. That left Otis, at 62, to take care of both boys. He would eventually retire from the practice of law and, as he did with Shannon, help the boys navigate their way through the Madison schools.

On January 28, 2015, Otis passed away due to complications surrounding the treatment of his abdominal cancer. I admit that the confusion is back. In June, my wife and I welcomed our first child. His name is Wilson and he has changed our lives. Now that I’m a father, I am beginning to understand just how deeply parents love their children. It’s hard to imagine what losing him would be like and, frankly, I won’t allow my mind to consider it. I don’t understand why one family has had to deal with so much heartbreak. Just as I did when Shannon died, I feel anger and sadness. But I also feel compelled to act. Our community lost two great heroes in Lory and Otis — but, more importantly, those boys lost both their mother and father. I ask you the readers, to please keep Tyler and Travis in your thoughts and prayers. If this story compels you to act, you can. Friends and family of Otis and Lory have established a 529 College Savings Plan for the boys at Fidelity Investments. For Arizona residents, contributions may be deductible up to $2,000. The link to donate can be found online if you search for Otis Smith’s obituary. You are also welcome to email me at tyler.carrell@gmail.com and I will send you the link to the donation page.

In his time here on earth, Otis was a fine lawyer and had a career that we would all be so fortunate to have. He was an exceptional member of the community and someone who, with his wife by his side, never looked at the darkness of his suffering, but instead always faced the light. I was blessed to know his family and I wish him peace in God’s warm embrace.
Emoticons in the workplace — yay or nay?

There is an endless debate over the use of emoticons in emails, posts, blogs and any other type of electronic communication used in a professional environment. Most will say that “smiley” has no place in an email exchange with your co-worker, or worse, your boss. I respectfully disagree, kind of. I believe that every “smiley” has a time and place — and that everyone should send and receive them.

Allow me to explain. Anyone who knows me knows how I feel about the influx of technology on today’s interpersonal communication. There is a serious LACK of personal connection. People send texts and emails, and even post things on public social media forums, instead of picking up the phone to share important news. I am deeply saddened by this. You cannot tell tone and inflection from a text message or an email regardless of to whom it is intended and what it says. Even reading this, do you know where my tone changes as I am writing? You can make assumptions, but say this out loud, “Get to work!” Did you automatically say “You see how the mere presence of a smiley face can change the tone of a text?” Did you never think about the meaning of making someone feel sad or that someone could be feeling sad by this. You cannot tell tone and inflection from a text message or an email — and that everyone should send and receive them.

By Jason Houston

Mediation, country-style

Deep in the farthest reaches of California’s vast Kern County are hamlets that haven’t noticed the 21st century has already come and gone. In a land where over-charging for houses and sunsets provide a kaleidoscope of watercolor opportunities, lifelong residents don’t know what a smiley is. Telephone outages are still as common as when the service first arrived, while the latest news is swapped each morning at the post office. One such town is Omyx (pop. 400) where people still live an earthly existence that went out with the last Hank Williams 45’s and hula-hoops.

Waiting gently through this lost pocket of time drift occasional signs of the modern world. Old-fashioned dial-up is worshipped by those lucky enough to have an Internet connection. But with the nearest courts more than an hour away, it’s not surprising issues with human interaction often endure without formal resolution.

Early last year a neighbor was telling me he was losing his home. He was out of work, his wife had passed away and he didn’t have the money to make the payments. I suggested he and the lady from whom he bought the place “on a handshake” get together and restructure the agreement through mediation.

I then contacted the seller, who was enthusiastic about the prospect of keeping the buyer in the house. On the appointed date, the seller showed up but the buyer didn’t. While waiting for the buyer, the seller asked me to review the documents she had drawn up on this handshake agreement to sell her property.

The deal turned out to be a dynamite-laden rocket sled on rails roaring 90 miles an hour down a dead-end street, violating any number of California’s strict residential property-transfer statutes. Had it not involved real people, it would have been like a scene from the “The Honeymoons.”

Without benefit of escrow, the property — aging singlewide with a market value of perhaps $40,000 in summer times — was sold on a 30-year contract for $90,000. The property was sold as-is with the buyer waiving all rights to any appraisal or inspection. The buyer’s down payment consisted of a lump sum insurance settlement, followed by a stratospheric monthly obligation he could never hope to meet. Finally, the contract called for the seller’s gardener to arbitrate the matter, should a dispute arise. Nothing was notarized, no transfer of ownership was recorded and it was the buyer’s dilemma to figure out where to come up with the delinquent taxes.

Several days later the buyer called from Carson City, Nev., to advise he wasn’t coming back. He and his 7-year-old daughter had become destitute. He just wanted my help transferring the property back to the seller, so he would be free of any debt. Maintaining my status as a neutral, I suggested both sides consult a real estate attorney because it appeared there were some elements of this contract which might not be enforceable, should it come to the attention of the courts through any foreclosure action. Eventually, neither party felt this option was worth pursuing.

Shortly after, the seller moved to Reno, where she enrolled in college. For reasons not entirely clear, neither party preferred the other know their new address; in fact, neither side even knew the other had moved to northern Nevada, much less to within 30 miles of each other. But both parties — despite a lack of any hostility between them — eventually called back anxious to explore the possibility of modifying the terms. Thus mediation began, which lasted nearly a month, with an agreement eventually worked up. The seller agreed to return a substantial sum of money in exchange for a quit-claim to the property. A cashier’s check payable to the buyer was obtained in Ridgecrest. The buyer’s quitclaim documents were prepared, executed and notarized in Lake Tahoe. All documents were delivered to my office via certified mail and then redistributed to their respective Nevada destinations via more certified mail. It took most of a month to finalize and a ton of patience. The buyer covered my fee with an old 1962 Ford he left behind, and which the seller didn’t want.

The buyer placed the bulk of his proceeds in a trust account for his daughter for when she turned 18. The seller was relieved to be out from under what could have been a financial bloodbath under California’s toothy predatory lender laws. Both folks realized they could have lost any combination of time, money and aggravation had mediation not happened. They were extremely pleased with the results mediation provided and went happily on with their lives.

My satisfaction came from seeing both of these well-meaning folks come out ahead instead of losing. And that’s mediation done, country-style.
Staying informed on legislature is important for all lawyers

By Amber Pershon

Without looking it up on Google, do you know how many bills in Arizona became laws in 2014? How about the amount of legislative districts in Arizona? These are some of the questions attendees attempted to answer at the recent CLE “What Every Lawyer Should Know About the Arizona Legislature,” presented by Maureen P. Kane, Esq., and David H. Benton, Esq.

One thing this CLE made clear is no matter what level your knowledge is at, there is always more to learn when it comes to Arizona’s governing body — and as lawyers, we have extra motivation to become informed. Because we work so closely with the law, the public looks to us to be informed voters and knowledgeable about current legislative events. Additionally, there’s the more obvious reason — keeping up with changing law in any given area can affect how we advise our clients on a particular issue. The legislature is an institution that is always changing, from different representatives to different committees in any given year. So how does one keep up-to-date with important bills and stay informed on changes or amendments?

The first step is to understand the process. This CLE was a great way to really incorporate the legislative process of a bill from start to law. It also explained what occurs at each level, such as when the legislature will take public testimony and what a rules committee actually does. Certainly, understanding what can happen at each level and where a bill is going next is valuable knowledge.

The second step is bill tracking. A great resource is the Arizona legislature’s website www.azleg.gov. The website provides a multitude of legislative history materials on current bills and historical bills back to 1997. You can also keep up with current legislative news, view agendas and live proceedings, and even comment online once you register.

The third step is becoming involved in the process. Research your legislators and find committee information to help stay abreast of new developments. If you would really like to get involved or are contemplating a career change, consider lobbying. The career of lobbying was another great feature discussed at the CLE. The legislature employs a broad definition of the terms “lobbying” and “lobbyist.” If you communicate with legislators, state officers or employees in an attempt to influence legislation or procure materials or services on behalf of another, chances are you are lobbying. If you fall within the broad definition of lobbying, you may be subject to registration requirements. However, lobbying is an excellent way to help shape the future of the law in Arizona.

Overall, there are many ways lawyers can get involved with the legislature and keep informed on upcoming changes in the law. Oh, and if you’re still pondering those questions at the beginning of this article, there are 30 legislative districts in Arizona and 278 bills became laws in 2014. With that much activity and change each year, it pays to know a lot about the legislature.

Amber Pershon is a member of the Maricopa Lawyer Editorial Board and a law clerk for Judge Samuel A. Thumma in the Arizona Court of Appeals.

CLE: Bankruptcy Law Intersecting with Estate Planning

In the second session of the Bankruptcy Law Fundamentals Luncheon Series, Randy Nussbaum and Phil Rupprecht presented on bankruptcy law and estate planning on Feb. 13.

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Mistake No. 2 – Conflict of interest: Former clients

By Russell Yurk

The previous three columns in this series discussed conflicts of interest involving current clients (ERs 1.7 and 1.8). A different analysis applies when determining conflicts of interest involving former clients (ER 1.9) because the competing interests are different. Whereas lawyers owe ongoing duties of loyalty, diligence and communication to current clients, the primary obligation owed to former clients involves protecting the confidentiality of information learned during the course of representation.

The primary distinction between former client conflicts of interest involves whether the lawyer or merely the lawyer’s former law firm previously represented the client.

Lawyer formerly represented client in same or substantially related matter

A lawyer who formerly represented a client cannot represent another client with materially adverse interests “in the same or a substantially related matter” without the informed consent of the former client. ER 1.9(a). In other words, a lawyer cannot switch sides in the same case. But even when the cases are not the same, the lawyer will be prohibited from representing a materially adverse client when the cases “substantially related.”

The first requirement for a conflict is that the interests of the two clients must be “materially adverse.” In general, a material adversity exists when a former client will almost certainly be a witness against the new client or when the lawyer would need to impeach a former client to advance the interests of the new client. If the two clients are litigation opponents, or are on opposite sides of a transaction, their interests would be considered “materially adverse.” In the criminal law context, the interests of a criminal defendant and those of witnesses who will testify against that defendant typically are “materially adverse.”

Next, what is a “substantially related matter?” According to the rule’s comments, a matter is “substantially related” if it involves “the same transaction or legal dispute” or if there is “a substantial risk that confidential factual information from the former representation would materially advance the interests of the new client.” ER 1.9 cmt. 3. Notably, it is not necessary that the confidential factual information actually have been obtained — only that it would have “nearly been obtained in the prior representation.” Id. In general, there is a conflict of interest if factual information that would have been relevant in representing the former client would materially advance the new client’s interests adverse to the former client. In this situation, the duty to protect the former client’s confidential information is at odds with the duties of loyalty and diligent representation owed to the new client.

Finally, a former client conflict of interest is not absolute. The new representation is permissible if the former client gives informed consent, confirmed in writing. ER 1.9(a). As discussed in previous articles, informed consent requires the lawyer to explain the risks of the proposed conduct and the reasonably available options in a manner that allows clients to fully understand the conduct to which they are consenting. ER 1.0(e).

Lawyer’s former firm represented client in same or substantially related matter

A slightly different analysis applies when the lawyer’s former firm — as opposed to the lawyer himself or herself — previously represented a client. In this situation, even if the two matters involve the same or substantially related matter and there is material adversity, a conflict of interest exists only if the lawyer acquired material confidential information from the former client. ER 1.9(b)(2). In other words, a lawyer will not be disqualified (even when the lawyer’s former firm would be disqualified) unless the lawyer actually acquired confidential information that would be used to represent the former client’s detriment in the new matter.

If the lawyer did not personally acquire any confidential information from the former firm’s client, then there is no need to limit the lawyer’s right to represent a new client with adverse interests. This rule is intended to balance the need to allow lawyers to freely move between firms with the need to maintain duties of loyalty and confidentiality to clients. As with all former client conflicts of interest, the former client can give informed consent, confirmed in writing to allow representation of the new client.

Restrictions on use of information learned in former representation of client

Notwithstanding the existence of a conflict of interest, lawyers generally are prohibited from using any information learned during the course of a representation against the former client. Of course, such information could be used if otherwise allowed by the ethics rules (eg, the lawyer’s defense in a malpractice action or to prevent a client from committing a crime or fraud) or when the information has become generally known. ER 1.9(c)(1). Similarly, lawyers generally are prohibited from revealing any such information.

Russell Yurk is an attorney with Jennings, Hang & Cunningham, LLP, in Phoenix. His practice focuses on professional liability, lawyer discipline and complex civil litigation. He can be reached at (602) 234-7019 or ryurk@jhclaw.com.

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Petition to modernize, amend rules of professional conduct submitted

A process that began six months ago has resulted in the submission of a petition to amend several supreme court rules governing the practice of law in Arizona. The proposed changes are posted online for public comment (see link below).

In June 2014, the supreme court established the 13-member Committee on the Review of Supreme Court Rules Governing Professional Conduct and the Practice of Law, which was chaired by Justice Ann A. Scott Timmer. The proposed changes are the result of a series of public meetings, which included input from a variety of stakeholder groups and the State Bar of Arizona.

Changes within the practice of law, the emergence of global law firms, the evolution of technology and other factors affecting the modernized law office led the committee to recommend rule changes. In some cases, the rules petition adds clarifying language while maintaining the text and intent of the rules. Some of the recommendations include:

- Allowing flexibility for new forms of legal teams, for example, allowing teams of lawyers from different firms to share responsibility and fees, while still ensuring adequate protections for the public;
- Proposing language governing the admission of lawyers who relocate to Arizona due to a military spouse’s service commitment and;
- Providing guidance on safeguarding the storage, transmission and security of client data in the modern digital law practice.

The committee also submitted a report to the supreme court describing proposals. For example, the committee recommended that the court not admit on motion lawyers from jurisdictions that do not have reciprocal admission rules for Arizona lawyers.

To view or comment on the proposed rule changes, go to The Arizona Supreme Court Rules Forum or use this abbreviated link: http://goo.gl/UeZ4lZ. Comments are due on or before May 20, 2015. The earliest that the supreme court could take action on the proposed changes is August 2015.
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New judge Q&A with Hon. Geoffrey Fish

Q: What has surprised you the most about making the transition from commissioner to judge?
A: Frankly, the amount of stuff I’ve collected over the last 2.5 years, as I get ready to rotate offices. But seriously, it has been a seamless transition except for the different title. I was fortunate to be on a probate assignment, which is essentially a judge calendar. I’m looking forward to the new assignment. In addition, we are adding a bailiff to our division, so our division goes from three to four individuals.

Q: Who has been the biggest inspiration in your legal career?
A: I really don’t have one single inspiration. I’ve been fortunate over my career to have come in contact with such a wide variety of individuals from professors, attorneys and judges — all of whom have had an impact on me. From the get-go, my career has sort of been “go with the flow”—I’ve never had any sort of master plan and things have just happened, and I’ve gone with it.

Q: What’s your favorite quote?
A: “All the candy corn that was ever made was made in 1911” — Lewis Black.

Q: If you had a day to spend with anyone (living or dead, real or fictional), who would it be and what would you do?
A: Batman — we would secure the streets of Gotham, of course!

Q: What songs are currently in your playlist?

2014 Judge of the Year: Hon. Mark Aceto

Judge Mark Aceto was named 2014 Judge of the Year by the Phoenix Chapter of the American Board of Trial Advocates (ABOTA). ABOTA presented Aceto the award in December 2014 at a dinner in Phoenix. The award recognizes integrity, dedication and professionalism.

Aceto, who is currently assigned to civil court, previously served on civil, family and criminal court calendars, including a rotation as the civil presiding judge. He earned his J.D. from Arizona State University and his bachelor’s degree, with honors, in accounting from Villanova University.

ABOTA’s mission includes promoting the efficient administration of justice and constant improvement of the law.

Vacancy announcement on the superior court

Applications are being accepted for a vacancy on the superior court in Maricopa County, created by the retirement of Judge Brien Ishikawa.

The Maricopa County Commission on Trial Court Appointments will review applications, interview selected applicants and recommend at least three nominees for the vacancy to Gov. Doug Ducey, who will appoint the new judge.

Applicants must be at least 30 years old, admitted to practice law in Arizona, a resident of Arizona for the past five years and a resident of Maricopa County for the past year.

Applications can be obtained from the Administrative Office of the Courts, Human Resources Department, 1501 W. Washington, Suite 221, Phoenix, AZ. 85007; by calling (602) 452-3311; by sending an email request to jnc@courts.az.gov; or at the Judicial Department website www.azcourts.gov/jnc.

The original completed application, five double-sided copies and a single-sided copy must be returned to the Administrative Office of the Courts, Human Resources Department (address noted above), by 3 p.m. on Monday, March 16, 2015.

Applicants for the recent vacancies in Maricopa County DO NOT need to reaply to be considered for the new vacancy.

The commission may, at its discretion, use the applications filed for this vacancy to nominate candidates for any additional vacancies known to the commission before the screening meeting for this vacancy is held.

All meetings of the Maricopa County Commission on Trial Court Appointments are open to the public. Meeting dates will be announced. The new judge will be paid $145,000 annually.

Court of Appeals reverses continued from page 1

for medications to treat a variety of symptoms, prompting them to ask, encourage, and even pressure their medical providers to prescribe these brand-name medications.

At the same time, a wealth of information from manufacturers and third parties is available on the Internet. “While it is true that a patient must first receive a prescription from a ‘learned intermediary’ in order to obtain prescription drugs,” he wrote, “a physician no longer is necessarily the consumer’s sole source of information about the effects, benefits, and risks of the medications he or she takes.”

Gemmill concluded that “the learned intermediary doctrine cannot co-exist with UCATA.” He held that “when the manufacturer of a product furnishes false or misleading information to the consumer, that manufacturer should not be shielded from liability simply because it provided adequate warnings to a third party.” Gemmill added that “whether a consumer was adequately warned should ordinarily be determined by examining the actions of all involved in the chain of distribution.”

Joining him in reversing the judgment were Judges Lawrence F. Winthrop and Diane M. Johnson.

Victims’ attorney cannot play prosecutor, court says

May a private attorney who represents crime victims conduct proceedings in a criminal action? The constitutional provision known as the Victims’ Bill of Rights, and its implementing statutes and rules, give victims certain rights to participate in criminal proceedings. But the court of appeals held that it does not go so far as to allow the victim’s attorney to, in essence, become the prosecutor in proceedings regarding restitution.

Judge Mark Aceto was named 2014 Judge of the Year by the Phoenix Chapter of the American Board of Trial Advocates (ABOTA). ABOTA presented Aceto the award in December 2014 at a dinner in Phoenix. The award recognizes integrity, dedication and professionalism.

Aceto, who is currently assigned to civil court, previously served on civil, family and criminal court calendars, including a rotation as the civil presiding judge. He earned his J.D. from Arizona State University and his bachelor’s degree, with honors, in accounting from Villanova University.

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Inside the courts

New judge Q&A with Hon. Geoffrey Fish

Hon. Geoffrey Fish

INSIDE THE COURTS

MARICOPA LAWYER MARCH 2015 • 11

2014 Judge of the Year: Hon. Mark Aceto

Hon. Mark Aceto with his family.


After Jeffrey David Meyn pleaded guilty to negligent homicide in the killing of James R., the court set a restitution hearing. An attorney representing James R.’s widow and children filed a memorandum of law and notice of intent to introduce records. Objecting to the victims’ plan to conduct the restitution hearing, Meyn moved for a determination of counsel.

The superior court ruled that only the county attorney could prosecute the case. The victims’ attorney, it ruled, may not “offer evidence, examine witnesses or present arguments as to the substantive restitution claims.” The court concluded that the victims’ attorney could provide “out-of-court assistance” to the prosecutor and be present “at all proceedings to ensure that all victim rights are being protected.” But it precluded the victims’ attorney “from submitting any substantive pleadings other than those [that] are necessary to ensure that … victim rights are being protected.” The victims and the county attorney challenged the ruling in a special action to the court of appeals. That court took the case, but sided with the trial court.

Writing for the court, Judge Peter B. Swann surveyed the rules, statutes and constitutional provisions that collectively make up the bill of rights for crime victims. Victims, he noted, have several rights: to receive restitution from the defendant, to be present at restitution proceedings and all criminal proceedings where defendant has right to be present, and to confer with the prosecutor. In particular, victims have the right to “present evidence, information and opinions that concern … the need for restitution.” Swann noted, quoting A.R.S. §13-4426.

Victims may also hire private counsel to help preserve these rights. But that, Swann held, does not allow a victim’s attorney to “serve as a substitute for the prosecutor.” He noted that, as stated in the applicable statute, the right to confer with the prosecutor “does not include the authority to direct the prosecution of the case.” He also pointed out that the Arizona supreme court had previously recognized that victims may not control the proceedings, plead defenses, or examine or cross-examine witnesses. In short, Swann held, the Victims’ Bill of Rights “does not make victims ‘parties’ to the prosecution … and does not allow victims to usurp the prosecutor’s unique role.”

Prosecutors owe some responsibilities to victims, Swann noted, but their main responsibility is to represent the people. By contrast, victims’ attorneys act solely on behalf of their clients. And restitution serves different purposes: rehabilitation for society versus compensation for victims.

“Unlike a prosecutor, a victim’s personal counsel serves solely as an advocate for the victim,” Swann wrote. “The purpose of restitution proceedings would be subverted if the victim’s counsel were allowed to take the prosecutor’s place,” he continued, adding that “such an arrangement would essentially transform a criminal sentencing function into a civil damages trial.”

Joining him in affirming the superior court’s ruling were Judges Kenton D. Jones and Michael J. Brown.
THREE WAYS TO REGISTER

ONLINE
Register online at: www.maricopabar.org Click on “CLE/Events” at the top right corner and then “CLE Calendar.”

DOWNLOAD PRINTED FORM
Follow directions for online registration. Then, from the program’s online registration page, download a print registration form to mail or fax.

PHONE
Call Bree at (602) 482-8588

PROGRAM LOCATION
Unless otherwise specified, all programs are held at the Maricopa County Bar Association office at 303 E. Palm Lane, Phoenix 85004

ATTENDANCE POLICIES
ADVANCE REGISTRATION
Full payment must be received in advance of the program before you are considered registered.

LATE REGISTRATION
All registrations must be paid in full two business days prior to the program date or a late fee of $15 applies. For example, registrations for a September 17 program must be paid by September 15 in order to avoid the late fee.

WALKINS
You may register at the door if space is available; the $15 fee will apply. If you do not register at least two business days in advance of a program, MCBA cannot guarantee space or availability of materials.

CANCELLATIONS/REFUNDS
Refunds, less a $10 fee, will be issued only if the MCBA receives your cancellation, in writing, by mail, at (602) 482-8586, or email bree@maricopabar.org at least two business days prior to the program.

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.

MARCH 10 • NOON – 1 P.M. (Lunch provided)
A View From The Train Wreck
SPONSORED BY: Corporate Counsel Division
1 CLE credit hour available
An experienced trial lawyer speaks to corporate lawyers about contractual drafting, with the view from litigating a contract that has gone bad. Corporate practitioners can learn from a trial lawyer about good craftsmanship. Special emphasis will be given to the drafting of restrictive covenants, arbitration provisions and other common commercial contracts.
PRESENTER: Robert W. Sheely, Bryan Cave, LLP
COST: MCBA members: $50
Non-members: $102.50
MCBA Paralegal & Public Lawyer Division members: $35
MCBA Corporate Counsel Division members (use promo code: CONTRACTS): $45
MCBA student members: $10
Non-members: $70

MARCH 17 • NOON – 1 P.M. (Lunch provided)
Evolving Theories of Design - Professional Liability in Arizona
SPONSORED BY: Construction Law Section
1 CLE credit hour available
A discussion of contract, tort and other theories of recovery whereby claimants seek to hold design professionals liable for defective designs and the damages that result.
PRESENTERS: Andrew Q. Everroad, Bonnett, Fairbourn, Friedman & Balint, PC; P. Douglas Folks, Clark Hill, PLC; Kirk H. Hays, Holm Wright Hyde & Hays, PLC
COST: MCBA members: $50
Non-members: $110.50

MARCH 12 • 7:30 – 9 A.M. (Light breakfast provided)
Estate Planning, Taxation & Real Estate For Canadian Clients
SPONSORED BY: Estate Planning, Probate and Trust and Real Estate Sections
1.5 CLE credit hours available, including 1 hour of ethics
Topics to be covered:
• Canadians Purchasing and Selling U.S. Real Estate
• Income Tax Planning for Canadians; Foreign Tax Credits
• Estate Tax for Nonresident Aliens
COST: MCBA members: $62.50
Non-members: $102.50
MCBA Paralegal & Public Lawyer Division members: $40
MCBA Estate Planning, Probate and Trust, Real Estate Section members (use promo code: EPPTRE): $55
MCBA student members: $10
Non-members: $75

MARCH 18 • NOON – 1 P.M. (Lunch provided)
So You’re the Arbitrator
SPONSORED BY: Public Lawyers Division
1 CLE credit hour available including 0.5 ethics
The superior court appoints attorneys as arbitrators in qualifying civil cases, regardless of the appointed attorney’s background or experience. This seminar will provide a step-by-step guide for anyone in Maricopa County who gets appointed as an arbitrator pursuant to Arizona Rule of Civil Procedure 73. Walking the participants through the whole process — from receipt of the notice of appointment to conducting the arbitration hearing to issuing the arbitration award. This program is ideal for new attorneys, first-time arbitrators, and anyone who wants to be well prepared and confident in tackling arbitration. Participants will also leave with appropriate forms and a checklist of key timelines and deadlines. There will be a brief interactive segment to the seminar, providing insight on the decision-making process that takes place in arbitration.
PRESENTERS: Jennifer Cranston, Gallagher & Kennedy, PA; Nina Targovnik, Community Legal Services
COST: MCBA members: $45
Non-members: $75
MCBA Paralegal & Public Lawyer Division members: $25
MCBA student members: $10
Non-members: $75

APRIL 22 • 1 – 4 P.M.
Parental Alienation
SPONSORED BY: Family Law Section
3 CLE credit hours available
The panel will discuss:
• The history behind the term “alienation”
• Current research regarding alienation dynamics
• Ways the system can respond (what attorneys and judges can do in the face of alienation)
• Interventions

PANELISTS: Marlene Joy, PhD; John Moran, PhD; Diana Vigil, PhD; David Weinstock, PhD, JD
COST: MCBA members: $115
Non-members: $195
MCBA Paralegal & Public Lawyer Division members: $70
MCBA Family Law section members: $100 (use promo code: FAMLAPRIL)
MCBA student members: FREE
Non-members: $175

MAY 12 • 11:30 A.M. – 1 P.M. (Lunch provided)
Ethics Rules for Corporate Counsel
SPONSORED BY: Corporate Counsel Division
1.5 CLE credit hours available
This ethics CLE is back by popular demand! An interactive discussion involving voluntary (or involuntary) audience participation, revolving around the application of pertinent ethical rules and cases to hypothetical facts situations frequently encountered by corporate counsel in their daily work.
PRESENTER: Mark Harrison, Osborn Maledon
COST: MCBA members: $62.50
Non-members: $102.50
MCBA Paralegal & Public Lawyer Division members: $40
MCBA Corporate Counsel Division members (use promo code: CORP): $55
MCBA student members: $10
Non-members: $92.50

MAY 20 • NOON – 1 P.M. (Lunch provided)
Revising Arizona’s LLC Statutes
SPONSORED BY: Corporate Counsel Division
1 CLE credit hour available
Scott DeWald and Jim Reynolds have been working with members of the subcommittee for about four years on revisions to Arizona’s LLC Act, using as a point of reference the Revised Uniform Limited Liability Company Act (“ULLCIA”), a product of the Uniform Laws of the National Commissioners on Uniform State Laws. LLC laws of Delaware and the Model LLC Act of the ABA have also been compared. Although the work of the committee is not complete, it is time to start sharing the key changes proposed with a wider community. This program will be a comprehensive review of the proposed amendments, the reasons for the committee’s decisions and the possible impact of the changes. Topics to be covered:
• Fiduciary duties (current act is silent)
• Indemnification (current act is silent)
• Annual report requirements
• Dissolution
• Derivative actions
• Charging orders
• Members vs. assignees of LLC interests
• Series LLCs
• Dissents rights
PRESENTERS: Scott DeWald, Lewis Roca Rothgerber, LLP; James Reynolds, Tiffany & Bosco
COST: MCBA members: $50
Non-members: $100
MCBA Paralegal & Public Lawyer Division members: $35
MCBA Corporate Counsel Division members (use promo code: OBSCURE): $45
MCBA student members: $10
Non-members: $70

Most CLEs are available for simultaneous webcast or later viewing through West LegalEd at http://tiny.cc/kg4cjw (WebCAS)
FRIDAY FAMILY LAW SERIES

LUNCH SERIES • MARCH 6, 13, 20 AND 27

Registration: 11:15 - 11:30 a.m.
Program: 11:30 a.m. - 1 p.m.
Location: 303 E. Palm Lane, Phoenix, AZ 85004

Lunch provided • Each session offers 1.5 hours CLE credit

Sponsored by the Family Law Section

PACKAGE OF FOUR
MCBA Family Law Section Member: ... $185
MCBA Member: ..............................$215
Non-Member: ...............................$410
MCBA Student Member: ..................$55
MCBA Paralegal Division members/Paralegal Division members: $105

INDIVIDUAL SESSION PRICES
MCBA Family Law Section Member: ..... $55
MCBA Member: ..............................$62.50
Non-Member: ...............................$102.50
MCBA Student Member: ..................$10
MCBA Public Lawyers Division members/Paralegal Division members: $45

SESSION I
FRIDAY, MARCH 6
Crossover Issues in Estate Planning
PRESENTER: Robin Miskell, Dickinson Wright, PLLC

SESSION II
TUESDAY, MARCH 13
Appeals and Special Actions
PRESENTERS: Yvette Ansel, Rubin & Ansel, PLLC; Stanley D. Murray, The Murray Law Offices, PC

SESSION III
TUESDAY, MARCH 20
Determining Income For Maintenance/Support and Related Tax and Business Valuation Issues
PRESENTER: David Cantor, CPA/ABV, EPS Forensic Consulting, PLLC

SESSION IV
FRIDAY, MARCH 27
Parenting and Support Across Borders
PRESENTERS: Greg Davis, Davis Fase & Blase, PLLC; Yvette Ansel, Rubin & Ansel, PLLC; Carrie Owarsky Walker, The Owsley Law Firm

TWO WAYS TO REGISTER:
ONLINE: www.maricopabar.org under CLE/EVENTS header, then click CLE Calendar.
PHONE: Call 602-682-8588 M-F, 8:30 am to 5 pm.
Have your credit card information handy.

JUNE 9 • NOON - 1 P.M.
(Lunch provided)
Woe Is The Legal Department! What Happens, What To Do When Things Legal Go Awry
SPOONSORED BY: Corporate Counsel Division 1 CLE credit hour available, including 1 hour of ethics

New CLE self study website
Participating in CLE courses just got easier with our new self study website! Go to www.shop.maricopabarclce.com for downloadable videos and course materials.

PERSONAL INJURY FUNDAMENTALS

LUNCH SERIES • APRIL 3, 10, 18 AND 24

Registration: 11:15 - 11:30 a.m.
Program: 11:30 a.m. - 1 p.m.
Location: 303 E. Palm Lane, Phoenix, AZ 85004

Lunch provided • Each session offers 1.5 hours CLE credit

Sponsored by the Personal Injury Law Section

SESSION I
FRIDAY, APRIL 3
Pre-Litigation: Reeling Them in and Setting Expectations
This session will discuss the art of handling the initial meeting with your potential new clients. It will also cover tips and tricks for drafting your settlement demand, as well as the insurance companies procedures for demand review.

SESSION II
FRIDAY, APRIL 10
Discovery: Can’t We All Just Get Along? Prepping Your Case With the End in Mind
This session will discuss do’s and don’ts in the discovery process, and choosing your battles wisely.

SESSION III
FRIDAY, APRIL 18
Session III – Mediation: What’s Happening in the Other Room? This session will cover how to pick your mediator/using a judge pro tem, being prepared with liens and dealing with difficult clients.

SESSION IV
FRIDAY, APRIL 24
Session IV – Trial: Helping the Jury Understand Your Case This session will cover short-trial considerations; style and personality considerations; calling the other guy a liar; using experts and exhibits; and preparing witnesses with the burden of proof in mind.

TWO WAYS TO REGISTER:
ONLINE: www.maricopabar.org under CLE/EVENTS header, then click CLE Calendar.
PHONE: Call 602-682-8588 M-F, 8:30 am to 5 pm.
Have your credit card information handy.

MARCH 2015 CALENDAR
All events at MCBA office, unless otherwise specified.

17 CLE: Expanding Theories of Design Profession Liability in Arizona
Noon
Family Law Section Board Meeting
18 Bankruptcy Law Section Board Meeting
7:30 a.m.
LRS Committee Meeting
Noon
CLE: So You’re the Arbitrator
19 MCBA Board of Directors Meeting
4:30 p.m.
CLE: Family Law Fundamentals Session III: Determining Income for Maintenance/Support
11:30 a.m.
20 CLE: Family Law Fundamentals Session III: Determining Income for Maintenance/Support
11:30 a.m.
Real Estate Section Board Meeting
5 p.m.
21 Maricopa County Bar Foundation Board of Trustees Meeting
7:30 a.m.
22 MCBA Leadership Council Lunch
Noon
23 MCBA Diversity and Inclusion Committee Meeting
Noon
24 MCBA CLE Committee Meeting
Noon
Real Estate Section Board Meeting
5 p.m.
25 MCBA CLE Committee Meeting
Noon
Real Estate Section Board Meeting
5 p.m.
26 MCBA Diversity and Inclusion Committee Meeting
Noon
27 CLE Family Law Fundamentals Session IV: Parenting and Support Across Borders
11:30 a.m.

Please watch your MCBA E-News for updated information about meetings and events.
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 mhaskins@maricopabar.org.

HONORS & AWARDS

Gast Rosenfeld announced that Barbara U. Rodriguez-Pashkowski has been named chair of the Maricopa County Bar Association’s Law Day Committee. She has been a member of that committee since 2008 and also serves as chair of Gast Rosenfeld’s Diversity Committee.

Rodriguez-Pashkowski explained that the committee supports minority law students and newly admitted lawyers by providing social and professional opportunities for them to network with each other and to get to know other lawyers who come from different backgrounds.

She also serves on the Maricopa County Bar Association’s Environmental & Natural Resources Law Section’s Legislative Liaison Committee.

She is a member of the Hispanic National Bar Association and the American Bar Association’s Women’s Law Caucus.

She graduated from St. Mary’s University and holds a J.D. from the University of Houston Law Center.

Riley Carlson & Applewhite is pleased to announce that Alfred H. Ackman has been named Practice Group Leader of the firm’s Water, Energy, Resources & Environmental Law Practice Group.

Ackman will oversee 12 attorneys in our Phoenix and Denver offices, which provide a full range of knowledge in water law, environmental regulation, environmental litigation, environmental legislation, natural resource strategies, and power-related issues. The group represents municipalities, banks, golf course developers, homebuilders, and a diverse cross-section of public and private enterprises.

Ackman’s practice focuses on environmental permitting and compliance, siting of utility infrastructure projects, and environmental due diligence. His clients include leading irrigated agriculture companies, new water development projects, and more.

He joined the firm in 2013. Ackman earned his J.D. from Northwestern University School of Law and is a member of the State Bar of Arizona.

Rodriguez-Pashkowski, chair of the firm’s Diversity Committee, practices in the Environmental Law practice area, advising federal, state and local governmental agencies and private companies on a broad range of environmental and natural resources issues including environmental due diligence, Underground Storage Tank compliance and appeals, air quality and water quality permitting, RCRA, CERCLA and regulatory compliance.

Segal practices in the Public Law, Education Law and Employment Law practice areas and is a recognized expert in government education, municipal laws and real estate services.

She advises public and private sector clients and has served as lead counsel in complex litigation regarding public education financing, as well as predatory lending practices.

PROMOTIONS

Jennings Haug & Cunningham, LLP, is pleased to announce that Russell R. Yurk has been elected to partner with the law firm.

Yurk’s practice focuses on professional liability, lawyer discipline and complex civil litigation. He is serving as the chair of DRJ’s Lawyers’ Professionalism and Ethics Committee for the second consecutive year.

In addition, Yurk is an active member of the State Bar of Arizona’s Committee on the Rules of Professional Conduct and the Arizona Supreme Court’s Judicial Ethics Advisory Committee.

Yurk serves as pro bono consultant on lawyer discipline for the Arizona Association of Defense Counsel. In addition, he regularly presents and authors articles addressing professional conduct and ethics matters.

BULLETIN BOARD POLICY

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 honors determined by other publications (e.g., Super Lawyers, Best Lawyers, etc.). Notices are printed at the discretion of the publisher and are subject to editing. Items are printed as space is available. News releases regarding lawyers who are not MCBA members in good standing will not be printed.

NEW HIRE

Gast Rosenfeld announced that Zachary D. Sakas joined the firm on February 2, 2015. Sakas’s practice concentrates on public finance, municipal law and real estate services.

Sakas previously worked for 10 years on legal and investment matters in Scottsdale, where he represented approximately $400 million in assets.

Sakas received his J.D. from the University of Texas, and completed additional MBA coursework concerning real estate development and financial modeling. He holds an undergraduate degree from the University of Arizona.

Currently, he serves on the board of the Phoenix Art Museum’s Men’s Art Council. He is also a member of the University of Arizona Honors College Advisory Board.

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MESA “EXECUTIVE SUITE” OFFICE SPACE for one or two attorneys. US 60 at Alma School Road. In- cludes one or two private offices, conference room, parking, internet capability, fax, copier, and phone. 1839 S. Alma School Rd. Ste 275. Call Sandy or Gloria 480-836-9000.

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VLP ATTORNEY OF THE MONTH

Attorney aims to help tenants; protect them with knowledge

By Peggi Cornelius, VLP Programs Coordinator

The Volunteer Lawyers Program (VLP)’s “Attorney of the Month” is Nature Michele Lewis. As a child in the housing projects of New York City, Lewis observed that despite a strong work ethic and a devotion to family, her mother and many other hard-working parents faced serious obstacles in obtaining and keeping affordable, habitable housing. She recalls developing an early childhood fascination with the law, especially as it relates to family, her mother and other pro bono clients are among them.

In addition to her private law practice and a variety of community service endeavors that are an integral part of her professional pursuits, Lewis is a proud wife and mother of five children.

Paralegal Maria Fulgencio, coordinator of VLP’s advice clinic for tenants, describes the exceptional contribution Lewis has made in her first year with the program. “To participate in counseling tenants as soon as possible, Nature attended clinics with experienced attorneys several times per month,” she says. “When she was ready to begin interviewing tenants alone, she also agreed to provide representation in meritorious cases. In April, she accepted the first of six VLP caseloads she’s taken this year, and also made a monthly commitment to volunteer in the clinic. During the summer, fewer volunteers were available, so Nature came to VLP to conduct clinics twice each month in July and August. Then, during September and October, she conducted seven clinics.”

Lewis expresses the belief that people of lesser financial means or life experience may be easily victimized. “The only thing that can protect them is knowledge. I don’t feel I should charge someone for knowledge,” she says. “As a licensed attorney, one of my goals is to arm every tenant in Maricopa County with the knowledge they need to protect themselves from predatory landlords or property managers.”

As encouragement to others, Lewis says, “I think all professionals, especially lawyers, should volunteer to keep their communities honest and safe. When I appear in an Arizona Justice Court on behalf of a tenant whose cause is just, even if we don’t prevail, my being there may mitigate the negative outcome. Plus, I know three things have been accomplished. My presence in court has required the opposing attorney to work for their fee; the Justice of the Peace has had to deliberate based on the Rules; and I have provided the tenant with the choice to stand up for their rights. What keeps me coming back is my awareness that the outcome of a future case could be the one to change the way tenants are treated in Maricopa County — forever for the better!”

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