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NEWS FLASH

We continue to grow.

Bob McKirgan has joined us, and as a result, we are excited to announce that we have changed our name to **Papetti Samuels Weiss McKirgan LLP.**

Bob McKirgan

Bob is one of the premier trial lawyers in Arizona. During his thirty-four year career, he has litigated and tried a number of bet-the-company cases and his experience ranges from commercial and intellectual property to bankruptcy and sports related matters.

Hannah Dolski

We are also proud to welcome **Hannah** to our firm. She is a commercial litigator with experience representing a wide variety of clients across the Southwest. Her practice has focused on commercial litigation, bankruptcy, and employment matters.

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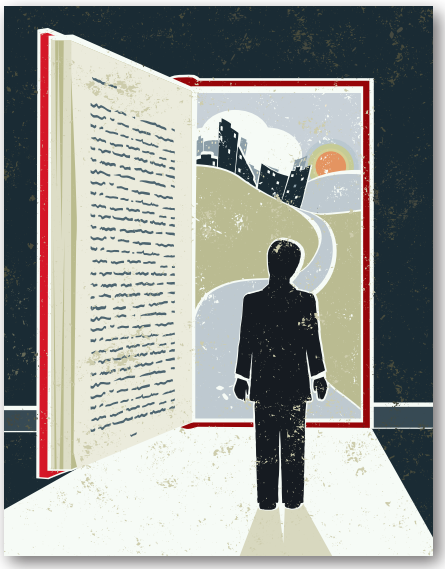

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ON THE COVER

In this issue our authors explain all things appellate, covering every step of the process and adding some overarching elements for good measure. Start reading on page 14.

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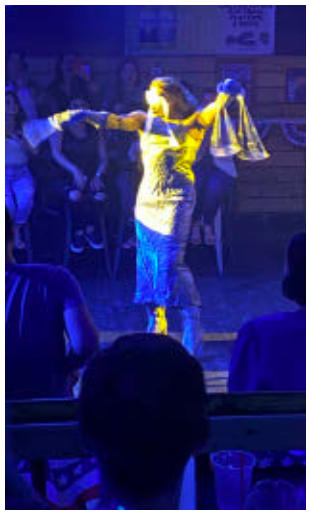
Dragging us back together

In center, Wil Comer and Jaylen Lopez are cheered by the crowd.

We've all heard the term "Nature is healing." It's uttered as an aspiration as much as it is a statement of fact by many of us who are **pandemic-weary** and yearning for a little **human contact**—or "networking," to be all LinkedIn about it.

Maybe that's why in early 2022 I scanned my email eagerly for something beyond **Zoom-based fare** (which I truly do *love*, but still). And why I nearly broke my finger clicking the following subject line: "Join AZ LGBT Bar for a **Drag Happy Hour**."

Wait what? Is it possible our long night of professional hibernation could be ended via a mixer hosted by a terrific partner bar association? And that our emergence from the cave could be greeted with good cheer, prizes—and **sequins**?



Yes, I did go to the February 11 event at **Charlie's Phoenix**—and I hope you did too. A great evening was had by all, thanks to comestibles sponsored by **Husch Blackwell**—and onstage entertainment provided by a few LGBT Bar members, whose contributions should make us all reexamine our personal courage … and flexibility (clearly, every day *is* leg day for some people).

Congratulations to attorneys **Wil Comer** and **Jaylen Lopez**, who *brought* it that night. And thanks to **Randy McDonald**, president of the **Arizona LGBT Bar Association**, which birthed the idea out of a shared interest in the reality competition show ***RuPaul's Drag Race***.

I asked the lawyers what brought them to the stage and how the experience aligned with **their day jobs**. Wil Comer says:

> When I think about the performance aspect of drag, it is very similar to how we as attorneys present ourselves in court and the ways that we express our **oral arguments**. Rehearsing and memorizing the lyrics to a song felt similar to preparing for trial, and I had the same anxiety before going on stage.

He adds there may be a historic aspect: "**Wigs and robes** are still part of traditional dress in the British judicial system, so I guess the concept of drag costuming is not too far removed from the legal profession either." (Barristers from **BBC's *Silk*** may agree.)

But for the lawyers onstage and many others at Charlie's that night, there may have been deeper lessons, as Comer describes:

> As lawyers, our advocacy work often parallels the same fight for social justice and activism that many drag performance artists have contributed throughout the gay rights movement. This event created an **interactive DEI** [diversity, equity, inclusion] space for the Arizona LGBT Bar Association to celebrate our collective achievements and recognize excellence within the intersectionality of our own membership and the LGBTQIA+ experience.

Brava! Whether or not drag's in *your* future, I hope nature is healing for you. See you out there!

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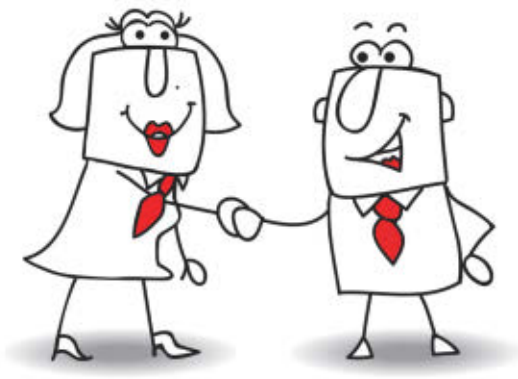

April is a month filled with promises of renewal. We celebrate spring with warmer weather and blooming desert flowers. In my house, we also celebrate two holidays that represent new beginnings, Passover and Easter. These holidays represent a lot of things to a lot of different people, but the thing that always stands out to me is the idea that even when others do something that hurts or upsets you, you are not supposed to wish harm on them. You are supposed to remain civil, kind and loving—even when others don't treat you that way.

This is a good lesson for anyone, but it's particularly important to those of us who work in such an adversarial profession.

Civility—a polite act or expression—is required of all members and affiliate members of the bar. This year, I had the pleasure of attending the new lawyer's admission ceremony at the Supreme Court. In preparation of the event I reviewed the Oath of Admission to the Bar and the Lawyer's and Paraprofessionals Creed of Professionalism, both of which are found in Ariz.R.S.Ct. 41. In the oath we took when we first became lawyers, we affirmed that we would treat others with respect and that we would diligently adhere to the Creed of Professionalism.

It is always better to do the right thing, even if you feel like you are the only one doing it. Others will recognize your professionalism.

The Creed that we vowed to adhere to requires us at every step to treat not just the court, but opposing counsel and opposing parties, with civility and courtesy. And it explains exactly how you are supposed to do this.

You are required to be courteous and civil in oral and written communications. You are supposed to agree to reasonable requests for extensions and waiver of procedural formalities. You are supposed to work with opposing counsel when scheduling things like depositions and meetings. You are told that you are not supposed to quarrel over matters of form or style but instead should concentrate on the substance and content. You are required to work with opposing counsel, to try to resolve issues that you can by agreement, and to stipulate to facts where there is no genuine dispute. You also are told that you need to counsel your client so they know that this civility and courtesy is not weakness but is what is required of you.

When you read through these requirements, you will notice that there are no exceptions. It does not say you have to be courteous in all communication … unless you happen to be really upset about something. It does not say you only have to agree to reasonable requests … if opposing counsel did the same for you. No, your requirement to treat your client, your opposing party and the court with civility exists whether or not you feel you've received the same civility from them.

This is a hard rule to follow. I understand the desire—especially when you are upset because someone treated you poorly—to treat them the same way. However, this is not only bad practice, it also is against the oath you took.

In practice, I will tell you that it is always better to do the right thing, even if you feel like you are the only one doing it. You want your reputation to be someone who is always fair and reasonable. I understand that is hard, especially when you receive a nasty email or you are not granted an extension. You may not realize it in the moment, but others do see you and will recognize your professionalism and respect you for it.

In this season of renewal, I encourage everyone to look back at the oath we took when we became lawyers and to review the Creed of Professionalism. Renew your vow to treat all others with respect and to act with civility in all matters.

Chad Snow

October 27, 1970 - January 23, 2022

Chad Snow, founding partner of Snow, Carpio & Weekley, passed away on January 23, 2022, after a distinguished legal career and a record of outstanding service to his community. Chad started The Law Offices of Chad Snow in 2003 as a single attorney with a cell phone and a desk on loan from a local attorney. His firm has since evolved to become Snow, Carpio, & Weekly, with nine attorneys, 34 employees, and multiple offices statewide. He has dedicated his career to representing thousands of injured workers, thus changing countless lives. Chad will be remembered for leading a 2011 recall effort against Senator Russell Pearce, working and volunteering with his church (Church of Jesus Christ of Latter Day Saints), and his work with immigrants in Arizona. Chad Snow will be missed.

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We are pleased to (re)introduce you to Patricia Sallen, longtime author and former Ethics Counsel at the State Bar, who has taken over the role of Eye on Ethics columnist. Wecome back, Pat!

Modern Multijurisdictional Practice

Lawyers usually can name, by rule number, high-profile Ethical Rules such as ER 1.7 (conflict of interest: current clients) and ER 4.2 (communication with person represented by counsel) and the subjects ("the business-transaction rule") of many others.

But ER 8.5? Not so much.

It addresses jurisdiction and choice of law. No yawning! It's maybe not the most exciting of ethical issues, but as multijurisdictional practice becomes increasingly easier and with the advent of nonlawyer law firm ownership, it's critical.

If you're licensed in multiple jurisdictions, or practice temporarily in multiple jurisdictions, whose ethical rules do you abide by? What if they differ? If you (unfortunately) engage in misconduct, may multiple jurisdictions assert disciplinary jurisdiction over you and the *same* conduct? What about those not licensed in Arizona but allowed to practice here?

Also, think about jurisdiction and choice of law considering Arizona's alternative business structures (ABS) program. Arizona eliminated its rule (former ER 5.4) that prohibited nonlawyers from owning all or part of law practices and set up a licensing system for ABS entities, but other jurisdictions (except for Utah and the District of Columbia) continue to prohibit nonlawyers from owning law firms. May a lawyer licensed in one of those other jurisdictions invest or take an active role in an Arizona-authorized ABS?

Most U.S. jurisdictions have adopted the ABA's Model Rule 8.5 or a substantially similar rule. Arizona's ER 8.5 is identical to MR 8.5, although our comment is different.

Ethics Opinions and the Rules of Professional Conduct are available at www.azbar.org/Ethics

The adage "wherever you go, there you are" pretty much summarizes the disciplinary authority described in ER 8.5(a). No matter where an Arizona-licensed lawyer practices, Arizona has authority over that lawyer. Because the jurisdiction where the lawyer practices also may assert authority—depending on that jurisdiction's rules—the lawyer may end up being disciplined, perhaps differently, in multiple jurisdictions for the same conduct. For example, in *In re Morris*, 164 Ariz. 391 (1990), the Arizona-licensed lawyer practiced in California (where he also was licensed) and pled guilty in Texas to a federal charge of misprision of felony. Both states imposed discipline.

ER 8.5(a) also makes clear that Arizona has disciplinary jurisdiction over lawyers not licensed in Arizona but who practice or offer to provide services here. For example, in *In re Olsen*, 180 Ariz. 5 (1994), the non-Arizona-licensed lawyer was disciplined after he claimed as part of his pro hac vice application that he was an active member of the Utah and California bars—while suspended in both jurisdictions.

Once authority is established, ER 8.5(b) directs which law is applied. For conduct "in connection with a matter pending before a tribunal," ER 8.5(b)(1) says the rules "of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise" should be applied. For other conduct, ER 8.5(b)(2) provides that the applicable rules are those of the jurisdiction where the lawyer's conduct occurred or, "if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction."

"Predominant effect" is not a clear standard. But ER 8.5(b)(2) adds a safe harbor for a lawyer who "reasonably believes" the predominant effect will occur in a particular jurisdiction.

This all would be easier if we had one unified, consistent system of U.S. lawyer regulation. But we don't, and rules can be significantly different among jurisdictions.

Arizona's ABS program is a stark example of such differences. Because virtually all other jurisdictions differ, does participating in an Arizona-licensed ABS mean lawyers licensed in those jurisdictions are violating their rules?

ABA Formal Op. 499 provides a partial answer. It concludes the predominant effect of passive financial investment in an ABS is in the jurisdiction where the ABS is allowed. If the investment is passive, "The lawyer cannot be deemed to be practicing law in the ABS-permissive jurisdiction, just as a lawyer who is an investor in a mutual fund that includes widget company stock in its portfolio is not deemed to be making widgets." Thus, the only relevant conduct and the only meaningful effect of it occurs in the ABS-permissive jurisdiction—according to the opinion.

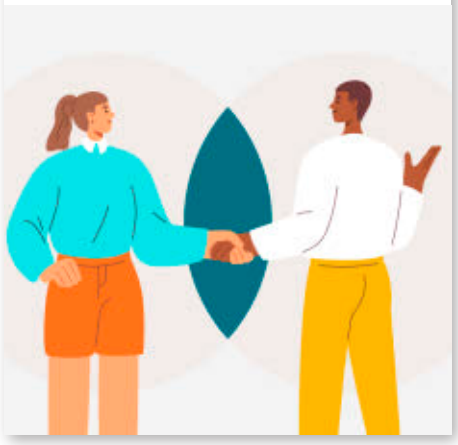
Under this rationale, a non-Arizona licensed lawyer could passively invest in an Arizona ABS and the lawyer's home jurisdiction that prohibits nonlawyer ownership should look to Arizona's rules authorizing ABSs, not their own rules banning them. For choice-of-law purposes, the "predominant effect" of the conduct would be in Arizona.

Opinion 499 does not evaluate other scenarios than passive investment—like whether a non-Arizona licensed lawyer whose jurisdiction bans nonlawyer ownership may take an *active* role in an Arizona-licensed ABS, or the jurisdictional intersection between a lawyer licensed in Arizona and another jurisdiction that bans nonlawyer ownership.

One thing is clear, however. When applied to lawyers involved with Arizona's ABS system, ER 8.5 and its counterparts in other jurisdictions are *not* yawn-worthy. AZAT

Patricia A. Sallen

Patricia A. Sallen (ethicsatlaw.com) is an Arizona attorney who specializes in lawyer professional responsibility issues. In taking over this column after David Dodge wrote it for so many years, she knows she has big shoes to fill.



How to Set Communication Boundaries for Healthy Client Relationships

Just because clients can contact you at any time, doesn't mean they should.

Technology can be a double-edged sword when it comes to your clients. When there's good news to share, you can reach out in an instant. If you need more details for a case, your client is just a click away.

But just because clients can contact you at any time doesn't mean they should.

Remember: Your clients expect their bosses to respect their work–life balance. You should expect the same from them.

Here's a checklist to help identify when your communication boundaries are in danger*:

- Altering the established management of your communication: either more or less than your customary frequency of phone calls, written correspondence, emails and/or texts.
- Disruption of your normal office routine.
- Providing "special treatment": meeting at odd hours, providing your home phone number, allowing "drop in" appointments (if that is not your customary practice), agreeing to unusual requests.
- Increased level of overall stress in your life, which can result in increased vulnerability to boundary violations.
- Avoiding discussion of unrealistic or inappropriate client attitudes and/or perceptions of you and the attorney-client relationship.
- Unusual or out-of-proportion feelings or reactions toward your client, or thinking about a client in a personal or emotional way.

Here's a few tips for setting communication boundaries at any stage of a client relationship:

FOR NEW CLIENTS

Start early.
Clients are more likely to respect boundaries if they're in place from the onset. Ask for their preferences, communicate yours and figure out a plan that works for everyone.

Set the right tone.
Email and texts can easily drift into a more casual arena, especially now that real estate lawyers are closing on homes in their sweatpants via Zoom. But communications need to keep consistent levels of professionalism, no matter the arena.

FOR EXISTING CLIENTS

Make changes where it counts.
If your clients prefer email over phone calls, or vice versa, there's no need to rock the boat. Boundaries are about what works for everyone, so only change what's needed for your emotional health.

Don't worry about repeating yourself.
Add your available hours to your email signature, include them in your communication portal and remind clients of any changes as needed.

FOR YOURSELF

Figure out your personal, realistic limits.
Does it make sense to reply to only email after hours, but not take calls? Choose certain days of the week, like Monday and Thursday, as your after-hours days? Write out a plan and stick to it.

Identify your designated communication tools.
Rule 1: Never, ever give clients your ***personal*** email or cell number. No matter how hard you try to set a boundary here, clients will contact you at inappropriate times. Limit their communication lines to your work email or cell number and, if you choose, tie these tools to your firm's internal communications portal so you can access messages and respond at your own pace. ■

Source: The Washington State Bar Association

BY
RUCHIE CHADHA
PRESIDENT, SMOKEBALL

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LET'S PRACTICE **by Bradley Perry**

Sign on the Dotted Line, Part 2

As promised, this month's column is dedicated to representation agreement clauses. Practical clauses are designed to help set client expectations and mitigate future conflict, whereas common problematic clauses often arise from a lawyer's desire to make representation easier for themselves. Having reviewed many fee agreements during my time at the Bar, I can say with confidence that the path of least resistance is not always best. Sometimes that path, instead of being a shortcut, leads you to a minefield.

Practice 2.0 wants you on the right track, so here are some common problematic clauses to avoid, followed by practical clauses to include in your representation agreements.

Problematic

- A waiver of future conflicts that require informed consent. A client can't give informed consent to waive a conflict that has not occurred. How can you expect a client to understand the circumstances surrounding the conflict if those circumstances have yet to occur? While conflicts may arise in "typical" ways, a general description of the possible conflict does not allow your client to make an informed decision.
- Minimum billable hours by task. For example, a representation agreement that states a client will be charged no less than three hours for drafting a complaint. All fees must be reasonable pursuant to ER 1.5. In the world of hourly billing, a reasonable bill is, in part, one that accurately reflects the time spent on tasks. If it only takes two hours to draft the complaint, charging for three is unreasonable—regardless of the language in your agreement.
- Limiting a client's right to file a malpractice claim or bar charge. ER 1.8(h) prevents lawyer from making an agreement: (1) "prospectively limiting the lawyers liability to a client for malpractice unless the client is independently represented in making the agreement," (2) "prospectively limiting the client's right to report the lawyer to appropriate professional authorities" or (3) settling "such allegations, claims, or potential claims with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith."
- Advance authorization to withdraw if the client refuses a settlement offer or fails to timely pay their bill. ER 1.16 allows lawyers to withdraw from representation in certain circumstances. You can notify your clients of those circumstances in a representation agreement, but you cannot prospectively agree that such a withdrawal will be with client permission. A client needs to be advised of your intention to withdraw and be given an opportunity to agree or disagree at that time.

Practical

- A communication clause that explains how you will communicate with your client, how quickly clients should expect responses to their inquiries, and how you expect the client to communicate with your firm. Clear communication expectations also help set boundaries and can discourage clients from contacting you in the evening and on weekends.
- Every firm should have a file retention policy that is communicated to clients at the outset of representation. Ethics Op. 98-07 suggests a five-year retention policy for general matters and indefinite retention for probate and estate matters and criminal cases involving homicide, life sentences or lifetime probation. Ethics Op. 08-02 clarifies that a five-year retention policy is not mandatory, stating "with the consent of the client and under appropriate circumstances, lawyers may establish more flexible, individual file-retention periods."
- A fee arbitration provision. Fee disputes are an unfortunate reality in the practice of law. Planning for them in your representation agreement helps shorten the dispute process by having a third-party neutral decide if your fee is reasonable. Lawyers and clients can still resolve the dispute on their own, but sometimes no amount of compromise will make an unhappy client agree to pay their bill. (The State Bar offers a free fee arbitration program. For more information call 602.340.7379 or visit azbar.org.)
- A fee-shifting clause if you practice in an area that allows for an award of attorney's fees. For example:

  The matter for which you have hired us is one in which lawyers' fees may be recovered by one party from the other. Regardless whether fees are awarded, you are responsible for all fees owing under the terms of this fee agreement. If appropriate, we will press a claim asking the court to award your fees incurred in this matter. Please also understand that the other party may attempt to shift their fees to you. Moreover, the provisions under which a court may shift fees generally leaves that decision to the discretion of the court to decide whether, and in what amount, to award fees.

Have questions about a representation agreement clause I didn't mention? Call Practice 2.0 to discuss or to have a free, confidential representation agreement review.

This column provides tips on starting, building and running your law practice. Send your column ideas and questions to **practice2.0@staff.azbar.org.**

Bradley Perry is the Lawyer Assistance Programs Director for the State Bar of Arizona. He is responsible for managing three free, confidential services available to all Arizona attorneys: Practice 2.0, the Trust Account Hotline, and the Member Assistance Program. Prior to becoming LAP Director, he served as a Deputy County Attorney and Staff Bar Counsel.

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What a phishing email looks like ... and more.

Phishing and malware attacks are major threats to your firm.

Here's how you can safeguard against them.

Phishing

In phishing attacks, cybercriminals generally send a web link that is disguised to look genuine, and prompt the receiver to share information that will then be misused.

For example, an email may look as though it came from your bank or the IRS, announcing a tax refund that your firm is eligible to receive. You may be asked to log into your bank account or a fake IRS site, and enter your bank details to receive the refund or download a receipt. The cybercriminals will have access to any details you share and later use it to clear out your bank account.

Phishing links may also lead to clone websites. Clone websites, as the name suggests, are websites that look strikingly like original websites, but are not the same and are controlled by cybercriminals and used to steal data from unsuspecting victims.

Tips to identify clone websites

If you receive an email with a link to a familiar website asking you to log into the site or enter your personal information, cross check the URL.

First, check the spelling and domain. For example, www.amazon.com is the correct URL, whereas a clone website may have an URL that looks similar, but is not the same. An example would be www.amaazon.com (note the two 'a's) or www.amazon-offer.com.

Another action to protect yourself is always type the URL you intend to visit. For example, if you are being asked to log into your bank account, type your bank's website address *instead* of clicking on the link they provided to you in the email.

Sometimes, phishing attacks can be manual, meaning, instead of asking you to enter personal information in a website or a form, the cybercriminal may pose as someone you know and send an email from an email address that looks authentic, and try to get money or personal information from you this way. Such attacks usually happen if your network or that of your recipient's has been compromised in a hacking attack, where the cybercriminal has some information that they can use to make their messaging sound genuine.

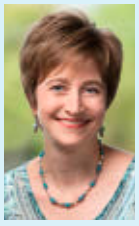
Ransomware and other malware attacks

Phishing is a way to get access to personal information and probably even to your IT network by stealing access credentials, but that's not the only way.

Cybercriminals also deploy various malware such as viruses, worms and trojan horses to attack IT networks. These malware usually gain entry into the system disguised as genuine email attachments, links to file downloads, etc. and then corrupt the data.

In the case of ransomware, as the name suggests, the malware attack goes beyond data corruption. The cybercriminals hold the data hostage and demand a ransom for restoring data access. While malware and phishing attacks have evolved over time and are constantly becoming more sophisticated, there are ways to protect your data from them. ■

DAVE KINSEY
PRESIDENT



STEPHANIE KINSEY
CEO/CFO

*Contact us at **602-412-5025** to answer specific questions or if you are a legal expert in this area and are willing to share your thoughts.*

As a non-lawyer member of the technology committee of the State Bar of Arizona, and as a member of the Phoenix legal community, Dave routinely collaborates with lawyer experts for CLEs, and welcomes all overtures for collaboration.

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BEST PRACTICE

TO SAFEGUARD YOUR FIRM

INSTALL A STRONG FIREWALL

A firewall can help prevent unauthorized access to your network by monitoring access attempts and allowing or rejecting them. Firewalls are flexible in that you choose how stringent or lenient you want it to be in terms of limiting access. There are different kinds of firewalls, each serving a particular purpose and offering different protection levels. Firewalls basically work to block unauthorized traffic to your network based on various factors including IP address, location and any other custom parameters that you may choose. Without a firewall, your network is essentially open, exposed to anyone on the web, which puts you at serious risk.

INVEST IN ANTIVIRUS SOFTWARE

Antivirus software programs identify viruses and other malicious attachments that cybercriminals may use to gain entry into your system or network. Invest in a good antivirus software and update it regularly so it can protect you against newer versions of malware that crop up with time.

TRAIN YOUR STAFF

Train your staff to identify and steer clear of phishing emails, links and messages. Educate them on password hygiene, safe web surfing, and basic IT best practices, even when using their own devices.

You can conduct mock drills and IT workshops. Also, consider sending regular emails on these topics so your staff remains alert. Update your staff on any new vulnerabilities discovered, and be sure to immediately apply any security updates or patches released in the market.

While these actions are important and you can't afford to ignore them, it can be difficult to keep up and perform these safeguards consistently, especially when you are practicing law and running your firm.

It makes sense in such a scenario to bring an experienced Managed Services Provider (MSP) on board who can help you with data security, training and general up-keep and maintenance of your IT infrastructure.

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Arizona Trials, Settlements and Arbitrations

By West's Jury Verdicts – Arizona Reports

MARICOPA COUNTY

Medical Malpractice	$5,000,000
Vehicle Negligence	Defense

MOHAVE COUNTY

Premises Liability	Defense

PIMA COUNTY

Insurance	$2,850,000
Negligence	Defense

U.S.D.C., D. Ariz.

Contracts	$1,300,000
Insurance	$4,500,000
Labor & Employment	$120,000

Civil cases reported in a recent issue of *West's Jury Verdicts—Arizona Reports*. One free case report upon request. To report your case results, go to www.westsjuryverdicts.com/AZBar or call 800-689-9378. To subscribe to *West's Jury Verdicts—Arizona Reports*, call 800-689-9378.

Paralysis

Jury: $4,500,000

Plaintiff alleged he ended up partially paralyzed resulting in an inability to walk or fully use his hands after defendant unreasonably delayed approving recommended spinal decompression and fusion (*Jarman v. American Family Ins. Co.*, U.S.D.C., D. Ariz., Plaintiff attorneys: Tanveer A. Shah, Cassidy L. Gerardy, David Chami).

Medical Malpractice

Jury: $5,000,000

A jury returned a verdict of $5,000,000 assigning 95 percent liability to a former defendant and 5 percent to remaining defendants (*Marquez v. Sobel, M.D.*, Maricopa Co. Super. Ct., Plaintiff attorneys: Zaheer A. Shah, Kyle J. Shelton).

Mild Traumatic Brain Injury

Arbitration: $2,850,000

An arbitrator awarded plaintiff $2.75M and his wife $100,000 for loss of consortium on their claim against their insurer for underinsured motorist benefits (*Hoffman v. Cincinnati Ins. Co.*, Pima Co. Super. Ct., Plaintiff attorneys: Ronald D. Mercaldo, Marco B. Mercaldo).

Editor's Note: Arizona Attorney magazine publishes this abbreviated summary of important trials in Arizona by ***West's Jury Verdicts—Arizona Reports****, as a monthly service to the membership.*

Disengagement Letters — Why Send Them?

End of representation letters are an important tool for reducing the risk of malpractice claims.

Disengagement, or end of representation, letters are an important tool for reducing the risk of malpractice claims. They provide other significant benefits as well.

Confirm Conclusion in Writing for every Matter

Lawyers should always confirm to clients in writing every time a matter has concluded, confirming the lawyer is no longer representing the client in that matter. It is usually clear when litigation or business transactions have concluded. It is less clear in other representations. For example, clients may regularly seek a lawyer's advice on various issues, which are then treated as a single "matter" typically identified as a "General" file. In those situations, there should be written confirmation that the advice was rendered, and no further work will be done on the issue. A short email to the client should suffice.

Disengagement letters serve several useful purposes. They meet the lawyer's ethical obligation to communicate material information to the client. They confirm the matter has concluded, giving the lawyer the opportunity to summarize the outcome, state that no further work will be done, and that the representation has ended.

Help Limit Potential Malpractice Claims

Confirming the matter has concluded also helps avoid situations where clients later assert that additional work was to be done – the basis of potential malpractice claims. Like important provisions in engagement agreements that clearly spell out the scope of the service to be provided (and those that will not be provided), the disengagement letter confirms those services have been rendered and the representation concluded.

A major benefit of disengagement letters is that they constitute evidence of when the representation ended, which is critical to the statute of limitations for malpractice claims. In Arizona, the statute of limitations for legal malpractice is the two-year negligence statute. (A.R.S. § 12-542.) The statute for malpractice claims arising in the litigation context is generally tolled until the litigation is concluded, at least so long as the attorney continues representing the client in the matter. Thus, documenting the end of the representation – even in non-litigation matters – can avoid tolling the statute based on continuing representation by providing evidence to defeat untimely malpractice claims.

Unfortunately, even lawyers who send disengagement letters sometimes provide additional legal services in the matter, undercutting the statute of limitations defense. Where the lawyer believes further, even minimal, services should be provided after sending a disengagement letter, a follow up letter should then be sent to the client confirming the new date the representation concluded.

Suing for Fees – When?

Using disengagement letters is also important where a suit against the client for unpaid fees is contemplated. Lawyers should always be reluctant to sue clients for fees since it usually generates a responsive malpractice claim. If, after careful analysis, the conclusion is reached that there is no malpractice exposure, the lawyer or firm should still delay suing for fees until after the two-year malpractice statute of limitations has run – as to which the disengagement letter is critical. In Arizona, the statute of limitations for breach of written contract claims is six years and three years for oral contracts. (A.R.S. §§ 12-543, 12-548.) Thus, if one is confident of when the malpractice statute of limitations will run, a suit for fees could be filed after that date and still be timely for asserting a contract claim. (If considering the risky step of suing for fees, keep in mind that even a time-barred malpractice claim may still be a defense to the fee claim.)

Help Avoid Conflicts of Interest

Disengagement letters that confirm that a current client has now become a former client are also useful for properly analyzing potential conflicts of interest in future matters. Generally, much stricter standards apply to conflicts between current clients than between a current client and a former client. Sometimes clients the lawyer believes were former clients later assert they are current clients, resulting in conflict problems. Disengagement letters can help avoid those problems.

Disengagement letters also provide an opportunity to confirm the lawyer's file retention policy for closed matters (which is advisable to first address in the engagement agreement). The letters can remind clients that their files will be destroyed after a specified period unless the client requests the file and can offer clients their original documents or property in the file.

Preserve the Disengagement Letter

Finally, make sure all disengagement letters are preserved. Maintain the letter not only in the matter's correspondence file, but in a file containing documents pertinent to the existence of the representation itself, such as new business intake forms, conflict reports, and the engagement agreement.

Risk Management

Using effective disengagement letters should be an important risk management tool used by all lawyers and firms. ■

DANIEL W. HAGER
CORPORATE COUNSEL
AHERN INSURANCE BROKERAGE

A recognized expert in lawyers' malpractice prevention and legal ethics, Daniel has provided consultations and risk management services to law firms for more than 20 years. Before joining AHERN, Dan was a partner at AV-rated Roeca Haas Hager LLP, where he defended lawyers against malpractice and other claims for more than 25 years.

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Judicial Perspectives on Appellate Court Procedures, Technology, and the Pandemic's Impact on Court Operations in Arizona

The following article was adapted from a panel discussion on December 3, 2021, during a continuing legal education seminar on appellate topics, hosted by the Arizona Prosecuting Attorneys' Advisory Council. The panelists were:

- **Chief Justice Robert M. Brutinel**, Arizona Supreme Court
- **Chief Judge Kent E. Cattani**, Division One of the Arizona Court of Appeals
- **Vice Chief Judge Christopher P. Staring**, Division Two of the Arizona Court of Appeals
- **Linley Wilson**, Deputy Solicitor General/Criminal Appeals Section Chief Counsel, Arizona Attorney General's Office

The authors thank APAAC staff for their technological assistance and for transcribing the panel discussion, which has been lightly edited, condensed and formatted for this article.

Linley Wilson: Thank you, judges, for participating in this CLE today. I'll give some quick introductions and we'll get started.

Until 2010, Chief Justice Robert Brutinel was the Presiding Judge on the Yavapai County Superior Court. He was appointed to the Arizona Supreme Court in 2010, elected as Vice Chief Justice in January 2018, and elected Chief Justice in July 2019.

Chief Judge Kent Cattani on Division One of the Arizona Court of Appeals is a former Arizona Solicitor General. He was appointed to Division One in 2013, served as Vice Chief Judge, and was elected as Chief Judge this past summer.

Chief Justice Robert M. Brutinel

Chief Judge Kent E. Cattani

Vice Chief Judge Christopher Staring was appointed to Division Two of the Arizona Court of Appeals in 2015. Prior to his appointment, he served on the Pima County Superior Court and worked as a lawyer in private practice at Fennemore Craig.

How do your courts determine which judges will fill the leadership positions of chief and vice chief?

Chief Justice Robert Brutinel: In the Arizona Supreme Court, it's a straight election, so we get together when there's an opening and we have a vote. There's no specific criteria, although it usually goes by seniority; it always has since I've been on the Court.

Judge Kent Cattani: We have two-year terms, and our process is similar. We have an election when a chief's term is going to end, and we'll vote for a new chief and a new vice chief; the vice chief generally becomes the next chief. It's a straightforward election. Seniority is considered but is not the determining factor. Judges generally ask a colleague whether they are interested in being the chief, and if you say yes, someone will nominate you. Some people are not interested in being chief. I agreed to do it, and it will be my turn for two years.

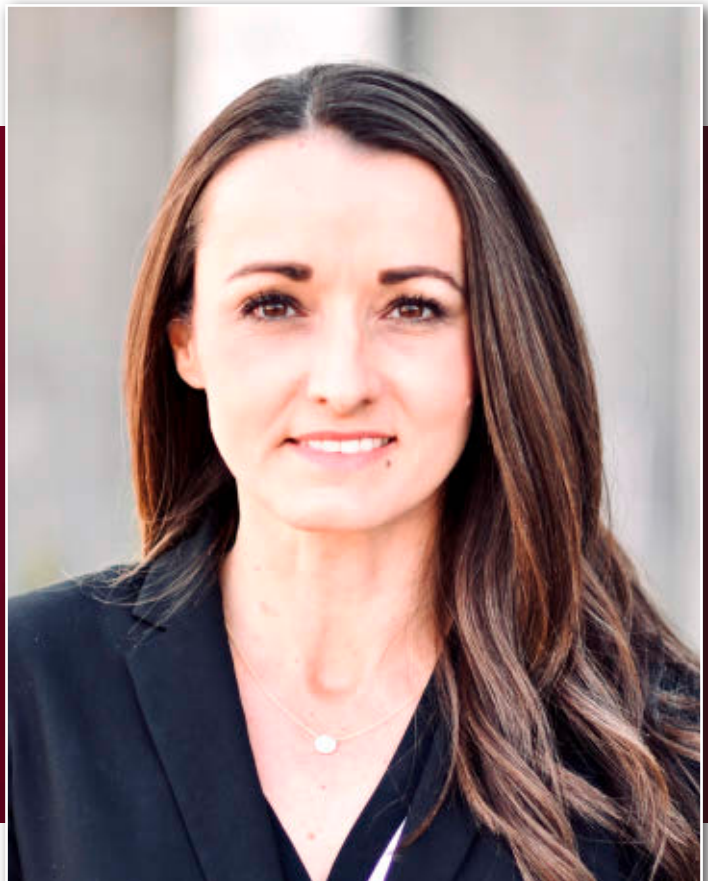
Judge Christopher Staring: We serve five-year terms as both chief and vice chief. It sounds very similar to the Arizona Supreme Court. It is an election, but historically it follows seniority, and the chief would generally be the most senior judge who has never been the chief and then the vice chief is the next person. And then the vice chief presumably would become the chief.

Wilson: Great, thank you. All our state appellate courts conduct oral arguments in various civil and criminal appeals, special actions and other matters. Do your courts typically discuss a case prior to argument?

CJ Brutinel: You know, we typically do not. It's not unusual for judges to talk in the hallway or in the elevator or walk down the hall and try to find out where somebody else is on a case. But we do not meet as a full group. We just met as a full court recently for the first time in my 11 years on the court to pre-conference a case. We briefly discussed the case and then I advised the lawyers when the argument started that in fact, we had discussed the case. That's the only time we've ever done that, and I don't know that we'll do it again anytime soon.

Judge Cattani: Division One uses a very different approach in that we have a conference the day of the oral argument after having shared draft decisions on SharePoint. If a staff attorney has been assigned to work on the case, he or she submits a draft to the authoring judge two weeks ahead of the conference, which allows the judge an extra week to edit it before posting it for the other judges. The judges post their drafts a week before conference and then the other judges weigh in. And there's a way to comment on each other's drafts and to edit them. So we have a pretty good idea what the other two judges are thinking even before we get together for conference. We get together the assigned conference day, which is also the day we hold oral argument, and we'll discuss the cases. Our conferences usually last about an hour. Sometimes we'll have three cases that are argued. Sometimes there's only one, but we'll talk about all the

Vice Chief Judge Christopher P. Staring



Linley Wilson

cases on our docket for that day, regardless of whether they're being argued.

Wilson: Judge Staring, does that procedure differ from Division Two's practice?

Judge Staring: It does. We ordinarily release a draft decision before oral argument, which has been prepared by one chambers, the authoring judge. And we do not conference cases before oral argument. There is some informal give and take. The draft is usually released to the lawyers at least one week prior to argument, and it's often released to the panel earlier than that. There may be discussion, but not necessarily—so, no, we don't conference until after oral argument.

Wilson: And to follow up on that answer, why does Division Two use the draft decision procedure? Have you found that to be helpful in your experience?

Judge Staring: OK, so I have to start with the disclaimer that you're getting my view and my view is different than my colleagues on this. It is a historical practice in Division Two that we released draft decisions. I don't know how the practice developed. There are differing views about the efficacy of doing this, and some of my colleagues think it's absolutely wonderful. I may be the most skeptical about the value of doing it. I think the feeling is that the draft decision focuses the parties on what are likely to be very important issues in the case. I think that's a valuable thing when the potential differences of views among the panel members are nuanced. If the potential views are really, really different, then I'm not sure that the draft decision focuses the parties, because you may be looking at a point of view that might actually end up being the dissent. The draft could end up being outvoted by the other two based on a completely different reason. So I have really mixed views about it, to be honest with you.

And I'm always curious to know what lawyers think. And to know whether people think it's a good thing or not. I must note that survey responses from the Bar continue to strongly reflect a favorable view of issuing drafts. But some people think it indicates that we've prejudged the case. I'm not sure that's a fair assessment, because Division One conferences cases before oral argument, so in theory, Division One would be subject to the same critique. It's not something I draw a line in the sand on, but I'm not the biggest fan of it.

One other thing about it is that I'm guessing that attorneys are able to identify the draft author anyway. They know who authored the draft.

Wilson: I've tried to guess who wrote a draft decision, but I've turned out to be very wrong in a lot of cases. But it is an interesting process because in a way, the court is previewing its work product. And from what I understand, there's only a handful of other courts across the country that distribute draft decisions.

Judge Staring: I think you can count it on one hand. I have talked to judges at conferences. I remember one judge from Florida saying, "Oh, you're on that court that does that insane draft decision." No fan there. Anyway, that's my view on it.

Wilson: Judge Cattani or Justice Brutinel, anything to add on this topic?

CJ Brutinel: None other than when I was practicing, I had a Division Two case and got the draft decision, and even though it didn't go the way that I wanted it to go, I liked the process. It's nice to know what at least one of the members of the panel is thinking.

Judge Cattani: As an advocate, I liked having the draft, which was certainly helpful in preparing for oral argument. But as a judge, when I've been asked if Division One is going to adopt that practice, my answer has been not just "no," but "hell no." One of the things I like most about this job is revising and editing, and I don't really want to share my initial drafts with people. I much prefer waiting until we're certain of what we want to say before issuing a written decision. So I don't anticipate Division One adopting that practice.

Wilson: Thank you. A per curiam decision is generally understood as a decision from the court that does not identify the specific judges who wrote or took part in the decision. Chief Justice Brutinel, does the Arizona Supreme Court write per curiam decisions, and in what circumstances or types of cases would the court do so?

CJ Brutinel: We do, rarely. The joke, of course, is that "per curiam" directly translates to mean, "We thought you would have known that." The Arizona Supreme Court has done it; we have issued five per curiam opinions in the last 10 years. All but one of those were two-page decisions, and one of them was an elections decision that basically said, with some modification, that we agree with the Court of Appeals. And then there was an outlier, a case called *Molera v. Reagan*, which is a 10-page elections decision. If I wanted to generalize, I would say that we issue a per curiam opinion when we want to get something out quickly and we agree with the Court of Appeals, or we don't have a lot to say on the legal issue involved in the case. So again, *Molera v. Reagan* is simply an outlier.

Wilson: Judge Staring, does Division Two write per curiam decisions?

Judge Staring: I have never seen one done, so I think the answer is no. Maybe somebody has seen one in the time that I've been on the court. I don't think we do it. What we do is issue decision orders. If we're looking at a simple issue or we want to get something out fast, we will issue a decision order, but the decision order will identify an author.

Wilson: Judge Cattani, it seems that Division One issues decision orders and per curiam decisions on occasion. What factors are relevant to Division One when deciding whether to issue those types of decisions?

Judge Cattani: I'm not certain what the practice has been over the years. The per curiam decisions that are going out now are primarily in cases arising from post-conviction relief petitions for review. If a staff attorney has been assigned to draft a proposed decision, and the three judges have conferenced and agreed on the draft, we may decide to issue a denial of the petition for review on a per curiam basis. Otherwise, our decisions generally reflect an authoring judge.

Wilson: The Court of Appeals sits on three-judge panels to decide cases. How often do the panels rotate in each division?

Judge Staring: Ordinarily, it's every 12 to 18 months, so we sit on panels for a pretty long period of time in Division Two.

Judge Cattani: We are currently sitting for six months at a time. We have significantly more judges than Division Two, and I think more frequent rotations are in part to give everyone a chance to work together sooner. We used to have four-month panels, with two-month panels in the summer. I'm not sure the rhyme or reason as to why we were doing that, but we recently changed to six-month rotations, which are simpler from an administrative standpoint.

CJ Brutinel: On that question, the Arizona Supreme Court typically doesn't issue in-division decisions, except during an election season. Additionally, in the last couple of years, we've had a fair number of recusals. When that occurs, we'll bring somebody up from the Court of Appeals or ask a retired justice to sit. If two justices have to recuse, I typically don't bring anybody up because we've got an odd number of people, and five justices can decide the case.

Wilson: Is there a particular process for recusals and substitutions? Or do those decisions vary depending on the case or other circumstances?

CJ Brutinel: It's not case-specific. There's a process. Sometimes I'll call a retired Justice, John Pelander, and without describing the case, see if he's available. If I don't call him or another retired justice, typically I will email the Chief Judge of the division of the Court of Appeals that the case did not arise out of. I will say I need a judge for a specific date. I don't cherry pick judges to sit on cases heard by the Supreme Court, and I don't identify the cases for the Chief Judge of the Court of Appeals prior to the selection of a fill-in judge.

Judge Staring: There's only six of us, so we have a rotation. I think I'm up there on the 16th of this month, and whoever is up next will follow, assuming no conflict.

Wilson: To what extent do your courts utilize staff attorneys when drafting decisions?

CJ Brutinel: Staff attorneys work on petitions for review. They don't typically work on opinions or on the case much at all after we grant review.

Judge Cattani: In Division One, if we conference, for example, six cases, there will often be one or two staff drafts. I'm guessing roughly 80 percent of our decisions are drafted in chambers. We let the chief staff attorney make recommendations on which cases she thinks should be assigned to the staff attorney's office. If, for example, there is a tax case and we have a staff attorney who has expertise in that area, it is likely the appeal will be assigned to that attorney. We also use staff attorneys to help with most of our Rule 32 cases.

Judge Staring: We use staff attorneys for Rule 32 cases, juvenile cases, and mental health cases. And we also use them for special actions after we've decided to accept jurisdiction. All our staff attorneys except one are former Division Two clerks, and many of them have a great deal of institutional knowledge about juvenile matters and Rule 32 in particular.

Wilson: Sometimes advocacy intersects with technology. Electronic appellate briefs, for example, have become the norm. Feel free to answer any part of this compound question: How important is it for advocates to hyperlink to cases or provide electronic bookmarks in an appellate brief? Are those functions helpful to appellate judges who may work electronically themselves? Or does the importance of those technological aspects of a brief vary among your colleagues?

Judge Staring: I think I can say that all of us on Division Two are unanimous, that it's very important. I think it's the easiest way to focus in on the record to points that people are relying on and see if contextually they line up well with the advocate's position. Hyperlinks provide an easy way to research the cases and find other cases that may be important but may not have been cited. My law clerks are much better than I am at coming up with the wording of Westlaw searches. So I think getting into the cases through a hyperlink and then exploring from there is really helpful.

Everybody works electronically now, and we don't see paper briefs any longer, we don't see a paper record any longer.

Judge Cattani: I certainly like the hyperlinking; it's just a quick way to access Westlaw. But I don't hold it against someone if hyperlinks are not included in a brief. Because of the resources we have at Division One, our law clerks and judicial staff create folders with all the relevant documents. So I'm going to get the briefs and the cited documents, regardless whether they're hyperlinked. I may be more of a dinosaur than some of the newer judges in that I frequently print paper copies of the briefs. Other judges read almost exclusively on the computer, and hyperlinks are certainly helpful when doing so; they allow us to just click on a link and see if the description in the brief accurately reflects the holding in the cited case.

CJ Brutinel: You know, when I started at the Court, there were still justices who were getting paper briefs. And you hit it on the head. We've gone away from all that. Everybody works electronically now, and we don't see paper briefs any longer, we don't see a paper record any longer. I still use a three-ring binder for oral arguments, but I find hyperlinks to be very useful. I find bookmarking to be even more useful, particularly links to the appendices because I can immediately turn to the document. And I believe my colleagues find that to be helpful as well. So, I would strongly encourage that.

The other thing is, when I'm taking notes, I like to cut and paste. So I like to pull something out of one of the briefs and stick it in my notes, if I find it to be relevant. And if you format your briefs in such a way that

you make it easy for me to do that, that's a helpful thing for me.

Wilson: All right, thank you. I think we're all curious to hear, from your perspective, how the pandemic has altered trial and appellate court operations for better or worse. Chief Justice Brutinel, how would you describe Arizona's experience? Have there been temporary or permanent changes to trial court procedures or Arizona Supreme Court procedures in the past two years or so that you find significant or positive as a result of the pandemic?

CJ Brutinel: Well, both significant and positive. Our goal from the beginning of the pandemic was to keep Arizona's courts open while doing our best to keep our employees and citizens using the courts, safe. We issued what I think was the first pandemic-related order in the nation. Among other things, we moved to virtual or limited in-person hearings. We required appropriate distancing and developed other safety measures. We waived release time. We suspended peremptory notices for changes of judge and limited peremptory strikes of jurors. My goal really was to recognize that we have 15 individual counties in the state of Arizona, and they all needed to react to the pandemic differently. So what Yavapai County did as opposed to Pima County or Maricopa County was substantially different. And so I tried to give individual presiding judges as much discretion as I possibly could to react to the specific situation in that county.

In the Supreme Court, we moved to virtual oral arguments. I didn't much like virtual oral arguments. I found it difficult to get the lawyers to stop talking long enough so that I could ask a question. But we worked through all of it, and, generally speaking, Arizona courts remained open and continued to do business. Unfortunately, we're still in the midst of a pandemic now. I wish it was over, but it's not. All 15 Arizona counties are back doing trials to some degree. We've got backlogs of civil and domestic relations cases. We're looking at the best way to handle those cases, but we're starting to try civil cases again.

We also created what was called the Plan B committee. We had a broad cross-section of people from across the state discuss what the court's return to business should look like. You can find a copy of their report on our website. I commend it to you—they did an outstanding job. A lot of changes that courts made in response to the pandemic were really positive.

One of my colleagues in another state said that this may not have been the crisis we wanted, but it might have been a crisis we needed. I think that's true.

The Arizona Supreme Court's goal was to recognize that we have 15 individual counties in the state of Arizona, and they all needed to react to the pandemic differently.

We've seen vast amounts of technological innovation in a very short period of time. Arizona courts moved very quickly to be able to do virtual hearings. We have one county that does virtual grand jury proceedings, and we have approved a pilot project for virtual civil trials to see how that works. There will be a new set of jury rules and a committee to determine how we can continue innovation with jury trials, including whether we ought to be doing voir dire primarily online and through questionnaires. That way, we don't bring people to the courthouse to wait for hours, sometimes only to be sent home.

We will continue to do virtual hearings. We're exploring where that's appropriate, what cases ought to be virtual, and how we protect people's rights in virtual proceedings. I think a virtual grand jury works in a lot of different situations, particularly in rural Arizona, for instance, and in evictions cases; those virtual hearings are here to stay, and we'll continue to do them. But that's where we are.

Wilson: Thank you. It seems that the Arizona Supreme Court has resumed in-person arguments. Are you still holding virtual arguments in certain cases?

CJ Brutinel: No, we're back to live arguments. Would we consider a request for a virtual argument in the right circumstances? I suspect that we would. And we got rid of the baby judge's table below the bench, although for a while to keep distance on the bench, we had to sit three people below.

Wilson: Chief Judge Cattani, it seemed like the Court of Appeals was streaming oral arguments and uploading them to the court's YouTube channel before the pandemic began. Have there been any Court of Appeals operations or procedures that have changed either temporarily or permanently on Division One as a result of the pandemic?

Judge Cattani: Yes, we have the little kid's table, we call it, off to the side in the courtroom. But if all three members of a panel want to sit in the regular chairs, we're going to start doing that again. We did have virtual arguments for some time, but we have now resumed in-person arguments. Like the Supreme Court, however, we're open to requests for virtual arguments. And it makes sense, for example, if the advocates are from Flagstaff and a virtual argument would avoid the need to drive down to Phoenix for a 20-minute argument. I think holding virtual arguments is probably easier for the Court of Appeals than for the Supreme Court because we only have three judges on a panel. I think it can be difficult in a virtual argument to let the advocates and your colleagues know when you want to say something, but it is certainly doable.

Most judges worked remotely for a long period of time before returning to the court this year. It showed us that it can work, that you can do most of this job remotely, particularly since we can share drafts and documents remotely.

You do lose something, and I think most of us prefer being in the courtroom. Additionally, I like the discussions that you can have with your colleagues across the hall and with your law clerks. If you have new law clerks whom you haven't spent as much time with, the remote clerkship experience isn't nearly as enjoyable. We had a lot of Zoom chats, but it's hard to feel like you're getting to know people through remote chats. If

you've previously worked with someone in person, the Zoom chats are a great way to communicate and stay in touch.

We're certainly going to continue to permit some level of remote work here at Division One, and likely more so than prior to the pandemic.

Judge Staring: Since there are only six of us and two of the judges, Judge Vasquez and Judge Eppich, live remotely, remote work has been part of Division Two for quite some time. I don't think it was a huge adjustment, even for those of us who live quite close to the court to work at home. I think that the real adjustment was for court staff and particularly the clerk's office, for those who had to be in the courthouse on a regular basis because of the need to have an open clerk's office. They went to a split shift so that only half of them were in at any given time. And they really did a remarkable job. I think all of the judges are coming in to some extent, but we still have staff attorneys and some others who are working remotely, almost exclusively. Many of them have health concerns or concerns related to family members.

Division Two went to essentially telephonic oral arguments, which were difficult. When we went back to live arguments, we put the little table in the middle. And so it was the Presiding Judge who sat down below the other two and wondered whether faces were being made or anything like that behind them. We've now started streaming video with our arguments, although I don't think it's live—I think it comes up the next day. But we now have a camera on the bench.

We are back to live arguments. But I think we're going to see more telephonic or virtual arguments. And I think our orders are reflecting that people can request it if they want, and I do not think we have turned down a request for a virtual oral argument.

Our oral arguments are 25 minutes long per side, but oral arguments in the Arizona Supreme Court and Division One are only 20 minutes long. I have proposed (and I don't know how well it's going to be received) that we come up with Oral Argument Lite, in which we would have oral argument in some cases for a shorter period of time, 10 to 15 minutes per side and maybe virtually. If you look at the Ninth Circuit, historically, they've got longer oral arguments and shorter oral arguments, which must reflect what they think of a particular case.

I think we're still working some things out. Chief Judge Vasquez has done a great job leading us through this. But I will also say some have expressed the view that we've never done it this way before, so why should we do this, and we should get back to the way we used to do things. And I like the smell of old books as much as the next person. But I think that those days are gone, obviously. So we're still working out what the future is going to look like.

Wilson: Justice Brutinel, do you like 20-minute arguments, or would you entertain a shorter oral argument?

CJ Brutinel: To me, it's really case-specific, and 20 minutes is kind of the average, although we occasionally will extend oral arguments in a case when doing so is justified for a specific reason or because somebody still has questions. My view is if the justices want to ask questions, I'll let it go as long as it needs to. And so I'd kind of leave the time where that is.

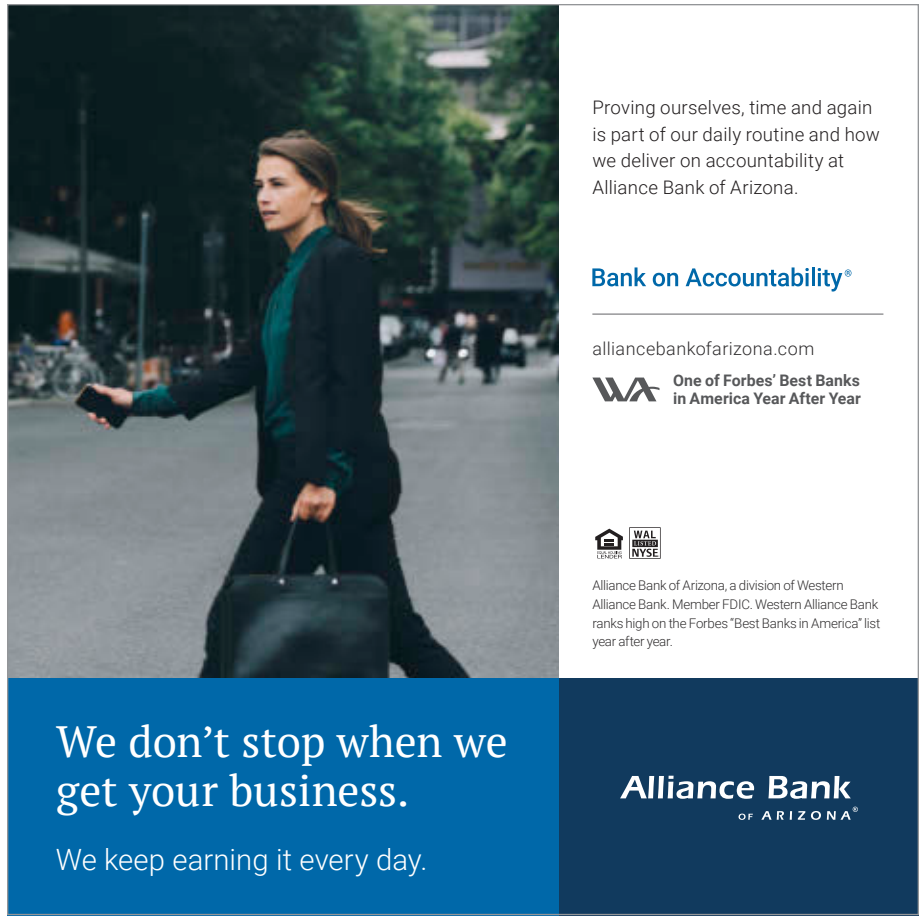
Wilson: Judge Cattani, any thoughts?

Judge Cattani: I like 20 minutes, but I don't mind going over a few minutes. I might be in the minority on that; I know a number of judges feel strongly about stopping immediately at 20.

As an advocate, I had a couple of 10-minute arguments in the Ninth Circuit and did not like them. I remember one in particular where a judge had questions on a relatively minor issue, and the time was up before I had a chance to make any of the points I wanted to raise. In a 10-minute argument, it's hard for judges to ask questions while still allowing some initiative on the part of counsel.

CJ Brutinel: Sometimes advocates will say, "Look, if you don't have any more questions, then I'm finished." I would encourage that.

Wilson: On that note, we're finished! Thank you so much for your insight and participation in this virtual seminar.



Tips for APPELLATE PRACTICE

BY HON. JENNIFER M. PERKINS

1 First, The Basics

A special action is a separate, original proceeding in which an appellate court examines the action or inaction of public officials and may issue orders (similar to a common law writ) affecting future proceedings in a case.[1] And when the Court of Appeals does not accept special action jurisdiction, you do not then petition the Supreme Court to accept special action jurisdiction; you must instead file a petition for review.[2]

2 Consider Carefully Whether To File a Special Action Petition

When the late Judge Jon Thompson, a member of Division One for 24 years, would be asked for advice about filing a special action, his facetious reply was always the same: "Don't!" His advice is worth consideration—setting aside your frustration with the ruling at issue, is there a reason not to file?

Of greatest significance, is the issue you want to raise one that you can raise in a traditional appeal? The court generally does not exercise special action jurisdiction to merely allow a party to "jump the appeal line." Perhaps your petition would be more appropriately handled as an accelerated appeal under ARCAP 29 after an appealable ruling is filed.

Also, be careful what you wish for. Can you fully address your issue during the expedited special-action briefing schedule? Or will your issue require more careful briefing or more thorough legal research? Also, if the Court of Appeals accepts special action jurisdiction of your petition but denies your requested relief, that denial of relief becomes law of your case.

3 Be Familiar With the Relevant Rules and Policies

The Rules of Procedure for Special Actions and Division One's related "Policies" are available on our court website (www.azcourts.gov/coa1). Familiarize yourself with both before filing.

A Division One department designated as that week's "hot panel" receives petitions as soon as the clerk's office processes them. The hot panel will "close" at the end of the week or before then if it receives eight cases. The panel will review the petition, typically within 24 hours, and decide whether to wait for a response or decline jurisdiction summarily.

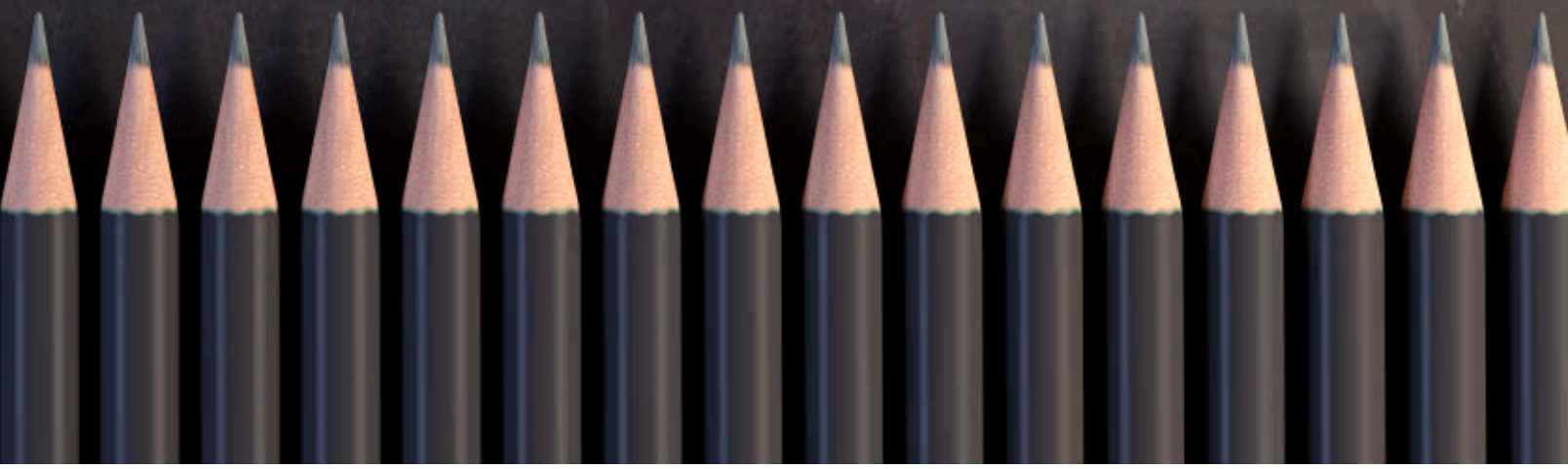
When the clerk's office sends the panel a new special action, it also issues a scheduling order containing guidance for the parties. That "order setting dates" contains a great deal of information and should be read carefully. This is particularly true for petitioners who are requesting a stay of proceedings.

I say again: The rules, policies and scheduling order together provide the information parties need regarding the procedure they should anticipate. Read them.

HON. JENNIFER M. PERKINS began service on the Arizona Court of Appeals, Division One, in 2017. Before her appointment, Judge Perkins served as Assistant Solicitor General, responsible for oversight of Attorney General Opinions, and Ethics Counsel to the Office of the Attorney General. Her earlier career includes work as Disciplinary Counsel for the Arizona Commission on Judicial Conduct and Staff Attorney at the Institute for Justice Arizona Chapter.

Successful Special Action Litigation

Division One of the Arizona Court of Appeals receives around 300 special action petitions each year—more than one every business day. I am often asked about special actions by practicing lawyers who have little or no experience with this lesser-known, yet frequently deployed, procedural device. This article provides some tips based on my own experience and those I have compiled from colleagues.



4 For Those Seeking a Stay of Superior Court Proceedings

Unlike an appeal, a petition for special action does not divest the superior court of jurisdiction. This means, absent entry of a stay, the superior court may proceed in the underlying action during a special action. And if the superior court takes any action that affects the issues raised in the special action, you should immediately alert the Court of Appeals.

As we make clear in our Policies, Division One will not consider a stay request in a special action if the party did not first ask the superior court for a stay. This will be the first question if you get a stay hearing. So if you want a stay, ask the superior court first, then include its response in your stay request to us.

Some practical pointers:

- Submit a separate filing requesting a stay; do not simply include it in your petition. This makes it easier for the clerk's office and the panel to recognize and take up the stay request.
- Your request should clearly identify the scope of the stay you seek, whether you want the court to stay the application of a specific order or a global stay of your entire case. The panel should not have to ask at the beginning of the stay hearing, "What exactly are you asking us to stay?"
- As the scheduling order will say, the petitioner must call the court in order to set up a stay hearing. The phone number you should call is in the scheduling order. **If you don't contact the court to set up a stay hearing, no stay hearing will ever be scheduled.**

5 The Petition, Step One: Provide a Brief Introduction

The judges reviewing your petition typically have no prior knowledge of your case. We have no context, no history. The caption is our only initial hint at whether the case is civil, criminal, family or juvenile. If you frame the petition quickly and clearly, you can help the court more efficiently review your case. Be direct and straightforward: What type of case are we confronting; what is the legal issue in plain language; and what relief do you seek?

6 The Petition, Step Two: The Importance of Jurisdiction

In a significant number of cases, we decline special action jurisdiction without waiting for a response and without further explanation. Some of these summary declines occur because we can identify no merit in the argument raised. But often the panel determines there is not a sufficient basis for exercising special action jurisdiction regardless of potential merit in the legal argument presented.

Your jurisdiction section should be robust—but that does not mean it needs to be a lengthy tome jammed with string-cites. Rather than merely repeat the standard for special action jurisdiction, explain clearly and succinctly why you do not have the ability to appeal this issue or why an appeal would be inadequate. "Because the appeal will take more time" is universally true—why is that timing uniquely critical in your case? In other words, if you can raise this issue in a later appeal, you must explain why your case deserves to be moved to the front of the line, requiring the panel to resolve your issue immediately.

7 The Petition, Step Three: Be Succinct, Be Clear

A special action petition should rarely involve multiple issues; this is not an appropriate vehicle for appellate review of every error you believe the superior court has made. The more issues you list for review, the more you may signal that you are attempting to file a traditional appeal before receiving an appealable order.

8 The Petition, Step Four: The Record and Appendix

The record in a special action is whatever you submit with your special action pleadings. Nothing more. We do not see pleadings, filings or minute entries in your case unless you have provided us with copies. As Rule 7(e) states, the petitioner must file an appendix that contains all "documents in the record before the trial court that are necessary for a determination of the issues raised by the petition." (The real party in interest may file such an appendix, too.)

You should *not* take this as a suggestion to recreate the entire trial court record for us as an appendix. Please do not do this.

Your special action appendix should include:

- A copy of the minute entry or order from which you seek relief. Put this first—it is often the first part of the appendix we read.
- If motion practice led to the ruling you challenge, include the motion and all the briefs both sides filed. Many petitioners remember to include their own briefs but omit the other side's briefs, suggesting (inadvertently) that they do not want the special action panel to see the opposing arguments.
- If a hearing led to the challenged ruling, provide the transcript or relevant portion if possible. And if you ordered the transcript but it is not yet available, say so, and file it as a supplemental appendix as soon as you can.

9 Request Oral Argument If You Want Oral Argument

The court's scheduling order identifies the panel's anticipated conference date for the petition. This does not necessarily mean that the court will hear oral argument on the petition. On rare occasions, a panel will set oral argument *sua sponte*, but in general you should file a written request for oral argument if you want the court to consider setting one. If the court has decided to hear oral argument on your petition, it will send you a notice to that effect.

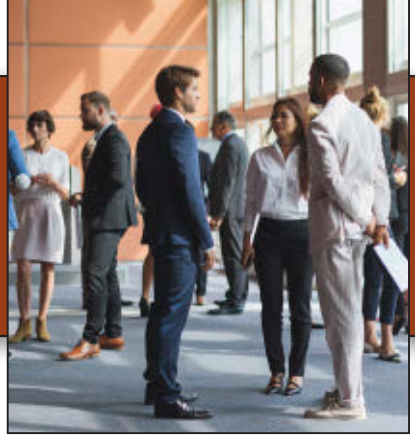
10 Responding to a Petition for Special Action

Much of the advice above also applies to those responding to a petition. Consider a few additional practice pointers for respondents, called the real parties in interest:

- Stay requests: If one was made, do you oppose it? If not, consider immediately alerting the court and opposing counsel.
- Appendix: As noted above, the court generally does not need a copy of everything (or even most things) filed in superior court. Resist the temptation to attach attenuated filings for "completeness" or even to make a point about the petitioner's tactics; confine your attachments to documents truly necessary for resolution of the special action issue.
- Timing: If the court is going to decline the petition without awaiting your response, that order should generally issue within two business days after the petition is served. For that reason, if the circumstances allow, you might wait a couple of days before investing significant amounts of your time—and your client's money—drafting a response.

endnotes

1. Ariz. R.P. Spec. Act. 1(a) (combining writs of certiorari, mandamus and prohibition in to "special action" proceeding); *see also State ex rel. Hance v. Ariz. Bd. of Pardons & Paroles*, 178 Ariz. 591, 594-95 (Ct. App. 1993) ("[T]he legislature expanded our special action jurisdiction" under A.R.S. § 12-120.21(A)(4) to "cases to which our appellate jurisdiction does not extend.").
2. *See* Ariz. R.P. Spec. Act. 8(b); *State ex rel. Romley v. Hauser*, 209 Ariz. 539, 540 n.1 (2005).



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APPELLATE PRACTICE

12 Things To Know About the Art of Managing Trial and Appellate Court Litigation

BY PAUL G. ULRICH

Trial and appellate litigation are inseparable. Both require creative, positive management for best results. This article explains 12 underlying concepts.

The Ethics Framework

1 **ER 1.1 requires professional competence, and associating or referral to competent counsel when necessary.** It states, "A lawyer shall provide competent representation to clients." Doing so requires "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Trial counsel therefore risk ethical problems and malpractice claims if they attempt to handle appeals for which they're not prepared or equipped, without referring the matter to or associating someone who is competent.[1]

A Comment to ER 1.1 states, "Perhaps the most fundamental legal skill consists of determining what kind of legal problem a situation may involve, a skill that necessarily transcends any particular specialized knowledge." Competent handling of a matter includes inquiry into and analysis of the problem's factual and legal elements, and use of methods and procedures meeting competent practitioners' standards. Ethical problems and malpractice claims also might occur if trial counsel don't see, ignore or fail to analyze their case's legal or procedural elements, and fail to refer the matter to or associate competent counsel.

2 **ER 5.1 imposes vicarious responsibility on law firm partners, managers and supervisors for ethical compliance.** Partners and managers must make "reasonable efforts

to ensure that the firm has in effect reasonable measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct." Lawyers supervising another lawyer must make reasonable efforts to ensure the other lawyer conforms to the Rules.

ER 5.1 clearly requires taking reasonable firm-wide measures to reasonably assure ER 1.1's requirements are satisfied. Litigation and appellate management systems are thus required to ensure all lawsuits and appeals are properly staffed and managed, all procedural requirements and deadlines are met, and all filings, briefs and arguments meet professional standards.

The Litigation-Appellate Connection

3 **Appeals are continuations of litigation, not separate proceedings.** Appeals are based on trial court records. Possible appellate issues must first be decided there. Disputed trial court rulings concerning the parties' decision-points become appellate decision-points, based on their briefs and oral arguments.

Applying appellate review standards, many of which favor appellees, appellate courts then consider whether the disputed rulings were reversible error, and decide the appeal accordingly. With few exceptions, if an issue wasn't presented to and decided in the trial court, it doesn't exist on appeal, even though it might have changed the result. There are no "do-overs" on appeal. Any new such arguments have been waived.

4 **Appellate counsel should become involved in trial court litigation.** Traditional separation of trial and appellate counsel's roles has often limited appellate counsel to handling post-judgment appeals in appellate courts, assuming separation of trial and appellate processes. There is no such separation. Trial court rulings become appellate decision-points. Appeals continue the litigation, based on that record. Trial and appellate counsel's roles and responsibilities therefore need to be redefined.

More than 99 percent of civil cases filed in Arizona's superior court don't go to trial. "Settlement through alternative dispute resolution—especially mediation—is the most likely endpoint for civil litigation in the 21st century."[2] Maricopa County civil jury trials have decreased from 150 in Fiscal Year 2015 to 83 in FY2020.[3]

Appellate counsel can't pursue appeals if there's no trial court reversible error or the case has settled. They need to redirect their efforts to participating in prefiling decision-point analyses and strategy decisions, and as "appellate counsel in residence" in trial court litigation teams, even if the case might settle.[4] Settlements are rarely certain. Every case therefore needs to be prepared as if it were going to trial, at least until there's a definite possibility settlement might occur.

Management Principles

5 **The goal is to win the litigation, not just a possible appeal and another trial.** Many clients want to avoid appeals because of their expense, inconvenience, delay, small likelihood of success, and possible worse outcomes in a new trial.[5] Preferred outcomes include settling the dispute favorably, or winning it in pretrial rulings or at trial, without an appeal.

6 **Positive management is essential to individual and group success.** Many management techniques improve personal effectiveness.[6] Positive management also can empower litigation teams,[7] multi-author book projects[8] and other groups[9] to achieve their goals. Management shouldn't be restrictive or controlling. Innovation is a most important element. Management is creative rather than adaptive, always entrepreneurial in character, never simply a bureaucratic job.[10] Specific techniques include:

- Designing and implementing critical paths to establish necessary factual, legal and procedural decision-points
- Managing by objectives (establishing goals, and creating intermediate objectives and plans to achieve them) and exception (concentrating management efforts on events occurring outside established ranges) to define, monitor and accomplish specific action steps and tasks within required timelines and expense constraints
- Situational leadership, in which leadership is task-relevant, and leaders adapt their style to the performance readiness (ability and willingness) of those they are attempting to lead or influence[11]
- Prioritizing, assigning, communicating, coordinating and reviewing the resulting tasks, responsibilities and accomplishments with other team members
- Applying total quality management and reengineering principles to improve the firm's service quality and its members' satisfaction[12]

7 **Litigation Teams**

Getting organized. Whether a litigation team is required, its composition and its decision-making processes depend on the case's nature and size, and its lawyers' skills, experience and relationships. In larger cases, the team might consist of a senior trial and appellate lawyer, one or more junior trial and appellate lawyers, and legal and clerical assistants. Other lawyers also might fill specific roles.[13]

The team first needs to decide its goals, strategy and how it will make decisions and assign responsibilities. It also requires continuing management effort. One lawyer should become project manager, to schedule and coordinate its activities. That role also includes improving working relationships and communications, particularly where team members are from different firms.[14]

PAUL G. ULRICH practiced as a Phoenix appellate lawyer for 46 years. He earned his B.A. from the University of Montana in 1961, and his J.D. from Stanford University in 1964. This article is based on a paper presented at a State Bar seminar on November 18, 2021. Contact the author at ulrichpc@aol.com, 602-485-5521, to obtain that paper and related materials. Contact the State Bar Continuing Legal Education Department to view the presentation. Assistance provided by Amy D. Sells, a shareholder and appellate lawyer at Tiffany & Bosco, P.A., is acknowledged with appreciation.

Adding appellate counsel to litigation teams can improve the representation's quality and results, including better settlements. Trial lawyers may not see legal issues and therefore don't pursue them. Appellate lawyers are more attuned to identifying such issues, then researching, writing and arguing them. If there's an appeal, trial counsel should continue to be involved, to help decide the issues and arguments to be presented, review draft briefs, and help oral argument preparations.

Cost concerns may cause reluctance or delay in retaining appellate counsel. But they add value by helping litigation teams become better focused and more efficient—the sooner the better. Any additional expense also must be compared with possibly better outcomes. When those events occur, "quality is free." It costs less to do things right the first time. The price of nonconformance is the expense of doing things wrong.[15] Providing quality services is an important issue for lawyers generally.[16]

Litigation Analysis, Management and Strategy

8 **Decision-point theory and practice.** Analyzing potential cases before they're filed might suggest alternatives in pursuing them. Alleging specific claims, theories and facts in pleadings and disclosures creates decision-points that must be won to prevail. Counsel also must consider how to defeat opponents' expected decision-points.

Successful litigation requires "beginning with the end in mind."[17] Those evaluations should occur in every case, regardless of whether appellate counsel are involved or the amount at issue. They should be repeated as necessary and any required adjustments made to the litigation plan.

9 **The "art" begins with analyzing legal situations to look for what "isn't there,"[18] then finding unexpected, dispositive facts and principles.** Doing so requires creative imagination not limited by conventional thinking or assumptions.[19] Litigation strategies and procedures then present those matters for decision through pretrial motion practice or at trial. The goal is to obtain favorable rulings or verdicts that will be affirmed if there's an appeal.

10 **A five-step approach to litigation management** can improve a representation's quality, cost-effectiveness and likelihood of success, both for plaintiffs and defendants. Those steps are:

- Initial creative brainstorming and research, including obtaining any necessary expert opinions, concerning what the case will be about. Identify and evaluate possible legal claims and defenses' likelihood of success and how they will be established.
- Include the claims or defenses, theories, issues and facts most likely to succeed in the complaint, answer or other responsive pleading, and initial disclosures.
- Develop and establish the resulting required decision-points, and block your opponents', through managed pretrial disclosure and discovery strategies.
- Based on what occurs during disclosure/discovery, use planned, coordinated pretrial motion practice to win your decision points and defeat your opponent's.
- Prior to trial, plan how to introduce all necessary information into evidence and confirm how each item helps your client's case. Coordinate your opening statement, closing argument and proposed jury instructions. Consider what rulings the court must make, and prepare timely motions, trial memoranda or responses to obtain them. Present your evidence and arguments so the court or jury has everything it needs to decide the case in your client's favor.

11 **"Three-dimensional" litigation strategy creates more possibilities for success than "one-dimensional" strategy.** "One-dimensional" litigation strategy involves merely presenting and disputing specific facts. Possibly dispositive legal issues may not be identified, developed or argued. Accordingly, cases are won or lost simply on their facts, without appellate review.

"Three-dimensional" strategy's elements are facts, legal issues and procedural strategy. It views litigation as a dynamic, continuous, managed process. It identifies and seeks to prevail on decision points in any dimension, using proactive motion practice. It causes legal and procedural issues to become as important as factual ones.

"Three-dimensional" strategic decisions lead to more cost-effective, better-focused pretrial actions, more proactive motion practice, and better trial presentations—and possible victory on legal issues, not just the facts, either in the trial court or on appeal. It increases the likelihood of success in the litigation generally.[20]

Appellate Management

12 **Creating a firm-wide appellate management system.** ER 5.1 requires a firm-wide system to provide reasonable assurance appeals are handled competently. Key elements in that system include creating an "appellate lawyer" role, designating one or more of the firm's lawyers as such, and requiring that all appeals be assigned to an appellate lawyer for greatest efficiency and quality control. Junior appellate lawyers also may be designated to help perform appellate lawyer responsibilities. An appellate assistant also works under the appellate lawyer's supervision.

The appellate lawyer's responsibilities include: evaluating and advising whether an appeal should be filed and the issues to be presented; approving the fee arrangement; deciding upon the appeal's general strategy and approach; deciding how to handle briefing and oral arguments, then managing specific assignments; and supervising the general appellate docket and calendar.

The appellate lawyer is also responsible for drafting or reviewing draft briefs; arguing appeals or helping other lawyers prepare for arguments using moot court conferences; appellate motion practice; developing standard appellate policies, forms and procedures; general quality control; developing junior appellate lawyers; and marketing the firm's appellate practice. Detailed descriptions concerning how such a system works are published elsewhere.[21]

Conclusion. The "art" of managing appellate and trial court litigation begins with managing yourself and your practice. Extending that approach to litigation teams and other groups can create a successful, satisfying long-term career.

endnotes

1. Raymond T. (Tom) Elligett, Jr., & John M. Scheb, *Appellate Competence as an Ethical Requirement*, Appellate Prac. J. 7 (Spring 1999).
2. Myles P. Hassett, *Mediation Is the New Trial*, Ariz. Att'y (Nov. 2017), at 38.
3. Email from Humberto Cisneros, senior statistical analyst, Arizona Administrative Office of the Courts, to Paul G. Ulrich (Nov. 15, 2021).
4. *See generally* Paul G. Ulrich, *Settlements and Appellate Counsel: Improving Your Case Results*, Ariz. Att'y (July/Aug. 2019), at 28.
5. Only about 10 percent to 15 percent of trial court decisions are reversed on appeal. *See, e.g.*, Ruggiero J. Aldisert, *Preface*, in Appellate Practice in Federal and State Courts iii, vii (David M. Axelrad, ed., 2018).
6. *See generally* Paul G. Ulrich, *Sixteen Management Tips to Develop Your Practice*, For the Defense 20 (Sept. 2011).
7. Paul G. Ulrich, *Working With Appellate Counsel: Increase Your Clients' Litigation and Appellate Success*, For the Defense 24 (Nov. 2013).
8. *See generally in this issue* Paul G. Ulrich, *Arizona Appellate Handbook History*, Ariz. Att'y (April 2022), at 70.
9. *See generally* Paul G. Ulrich, *Motivating and Managing Volunteers To Create Continuing Legal Education Books and Programs*, 23 LOEM 373 (1982).
10. Peter F. Drucker, The Practice of Management 47 (1954).
11. *Situational leadership theory*, en.wikipedia.org/wiki/Situational_leadership_theory (viewed Feb. 16, 2022).
12. *See generally* Paul G. Ulrich, *Applying Quality and Reengineering Principles to Law Practice*, in Life, Law and the Pursuit of Balance 53 (MCBA 1996).
13. *See generally* Paul G. Ulrich, *Develop Your Firm's Core Competencies*, For the Defense 74 (Oct. 2014).
14. *See generally* Paul G. Ulrich, *How to Build and Manage an Appellate Practice*, in Appellate Practice §§ 15.06 [1], 15.12 [2][g], *supra* note 1.
15. The concept originated in a 14-point plan to systematically increase quality, stated in Philip B. Crosby, Quality Is Free (1979). *See* Patrick M. Weightman, *Book Synopsis: Quality Is Free*, patrickweightman.com (viewed Feb. 16, 2022); Andrew Everett, *Quality is Still Free*, https://thekeypoint.org/2016/10/25/quality-is-still-free/ (viewed Feb. 16, 2022).
16. *See generally* Paul G. Ulrich & Kathleen N. Ulrich, *Motivating for Quality*, in The Quality Pursuit 194 (ABA 1989).
17. *See generally* Stephen R. Covey, The 7 Habits of Highly Effective People 95-114 (Free Press ed. 2004).
18. Looking for what "isn't there" is based on *Antigonish* (1922), a poem by William Hughes Mearns (1875-1965): "Yesterday, upon the stair,/ I met a man who wasn't there/ He wasn't there again today/ I wish, I wish he'd go away." The poem is a reminder to look "outside the box" to find "what isn't there" in facts or arguments that might become dispositive.
19. *See* David Brooks, *The Awesome Power of Imagination*, N.Y. Times (Nov. 11, 2021).
20. For a more detailed description of "three-dimensional" strategy, *see* Paul G. Ulrich, *Increase Your Clients' Litigation and Appellate Success*, For the Defense 24 (Nov. 2013).
21. Paul G. Ulrich, *Managing an Appellate Practice*, in 1-B Arizona Appellate Handbook §§ 12.1-12-6 (6th ed. 2015); Ulrich, *How to Build and Manage an Appellate Practice* §§ 15.03, 15.08-15.11, in Appellate Practice, *supra* note 1; *Managing Your Appellate Practice*, Ch. 2, in Ulrich et al., Federal Appellate Practice: Ninth Circuit (2d ed. 1999, 2013 Supp.).

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In my earlier days of legal writing, I never gave much thought to the introductory section of an appellate brief. I focused all my energy poring over the record, scouring Westlaw for analogous precedent, and attempting to write a compelling legal argument. Only as an afterthought, back in those days, would I summarize the main points of my brief in a half-hearted introduction—if I even wrote one at all.

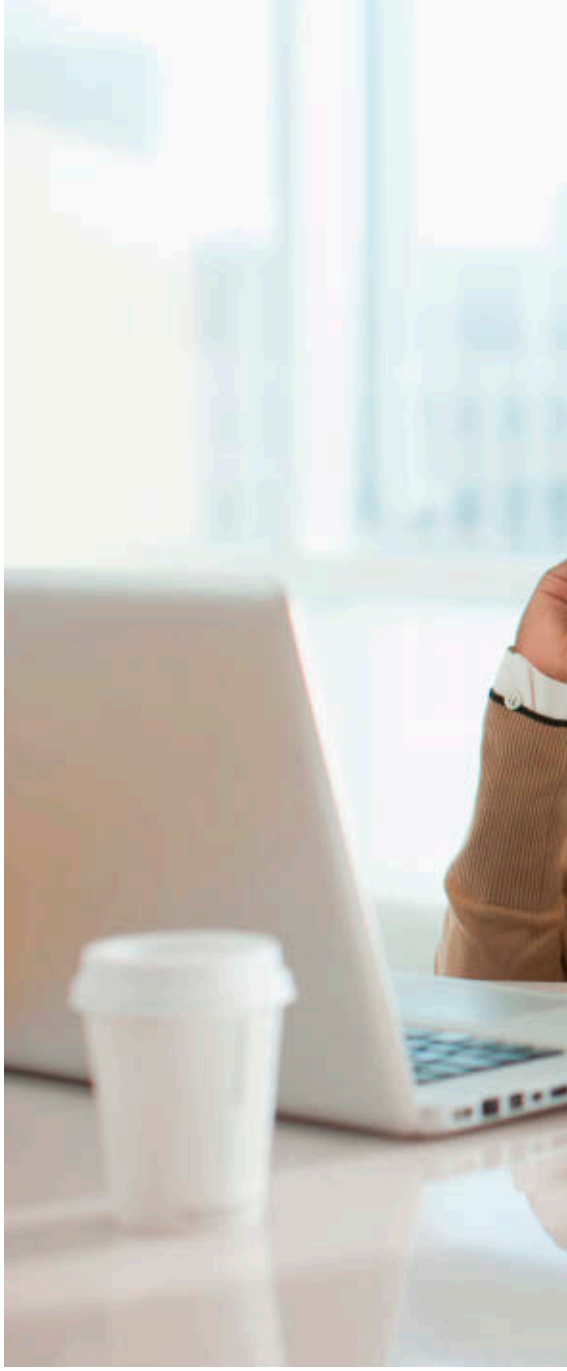
I soon came to realize that I was missing out on a golden opportunity to frame my arguments and create a lasting first impression.

In fact, I've heard at least one appellate judge say that the "preliminary statement" (i.e., fancy language for "introduction") is the "most persuasive" part of a brief. The thought is, if you take the first page of your brief, and use it to efficiently recite your "elevator pitch" for how the court should decide the case, the judge will assume that everything you're saying is true for that one page. If the judge gets to the end of that page and thinks, "That logic really holds together, this person ought to win," you have advanced your case right off the bat. Of course, the judge is still going to review the rest of your brief and verify whether what you've said in the introduction is true. But done right, the introduction gives you an opportunity to point the judge in the right direction on page 1 without having to delve into the minute details of your case.

One of the most important words in the previous paragraph is "efficiently." The last thing you want to do is start out by reciting the names of all the parties you represent with parentheticals tagging each litigant using labels or abbreviations. That does nothing to advance your case. If anything, all it does is show that you represent lots of parties with complicated names. Big whoop. Like the phrase "COMES NOW," listing all the parties you represent is about as useful as a screen door on a submarine. We are not paid by the word anymore, so all the initial "throat clearing" can be jettisoned. Where introductions are concerned, you should make sure that every single word counts. And make no mistake, this takes time. But assuming you (and your client) can afford it, this will be time well spent.

The first thing you want to do is put the judge in the right starting place on the map. Begin by telling the judge what kind of case this is. That way, she can activate the appropriate memory center of her brain, and immediately start drawing upon her own experience in the relevant area of law to help her understand the issues. For example, "This is an appeal from summary judgment in a medical malpractice case." Or, "This appeal arises from a defense verdict in a trip-and-fall case." With just a few simple words, you can signal to the court which area of law you will be discussing, and tell the judge in general terms what kind of analysis will follow. Right away, you've narrowed the issues and provided context for everything that comes next.

After putting the judge on the map, you must give her directions and a compass for the journey ahead (snacks are optional but encouraged). Specifically, you want to give the judge a preview of your main arguments—including only the most essential points of interest—so that she knows where she is eventually going to wind up and how you plan to get her there. As one appellate judge has already put it, "When used, an introduction should be short and to the point and *provide a roadmap* of the arguments that follow."[1] This roadmap should say, in basic terms: what happened; what law applies; and what the result should be. If you can string that logic together clearly and coherently in no more than a few paragraphs, you will already be miles ahead of the competition.



Next, and finally, you want to articulate a theme that should engage the reader. And nothing gets a lawyer's blood pumping like a fundamental sense of fairness (judges are still lawyers, no?). One strategy I often find myself drawn to is, instead of focusing on why my client was right, I will emphasize why my opponent is wrong. As humans, we are naturally drawn to seek justice as a result of bad acts. Punishing the wrongdoer is often seen as a more compelling interest than rewarding the do-gooder. That's why Marvel movies don't typically end with our heroes receiving accolades—they end when the villain is defeated.

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BY JON BARNES

Intro to Intros

How to Write the Winning Preliminary Statement

Guiding the court through a story arc alone is not enough; you also must convey a sense of meaning that underlies the result you seek. But "Good vs. Evil" is only the low-hanging fruit. The best briefs that I've ever read use creativity and an intimate familiarity with the key facts to craft an engaging theme. Again, however, this takes time—time that is more often than not worth the investment.

In short, an effective introduction should achieve three basic goals: "to convey what the case is about, to create a meaningful context for the facts and argument that follow, and to engage the reader."[2] But of course, the overarching objective is to chart a path to victory. After all, "The purpose of an introduction is nothing less than to proclaim immediately why you must win."[3] Doing this on the first page, in accordance with the principles outlined above, will more than likely leave a pleasant taste in the judge's mouth that she won't forget while reading the meatier portions of your brief as the main course (use a meat substitute here if you are vegetarian).

With the foregoing in mind, it is difficult to articulate a persuasive excuse for omitting the preliminary statement from your brief. Admittedly, the introduction section is technically not required in state court. Indeed, according to Rule 13 of the Arizona Rules of Civil Appellate Procedure, the introduction is, by definition, optional. But why would you waste the perfect opportunity to communicate the most significant aspects of your case to the court without all the rigmarole that so often comes with legal writing? This should be the fun part! As appellate lawyers, we are in the business of communication, and the bulk of that discourse typically occurs on paper (or a computer screen if you are not a Luddite). The preliminary statement is a chance to make a lasting first impression you won't want to miss.

endnotes

1. Samuel A. Thumma, *Writing Appellate Briefs: Thoughts of a Rookie Appellate Judge*, Ariz. Att'y (Dec. 2013), at 34-35 (emphasis added).
2. David J. Perlman, *How To Write an Introduction*, Appellate Issues, Spring 2012, at 1.
3. *Id.*

APPELLATE PRACTICE

Streamlining Briefs

Should We Eliminate the Table of Authorities?

BY CASEY BALL, KELLEY JANCAITIS & GEOFFREY BUTZINE

Historically, the table of authorities ("TOA") existed as a navigational tool, allowing the reader to quickly identify and locate authorities cited within an appellate brief. TOAs are finnicky and require substantial time to make, even with software designed to speed up the process. But in the digital age, the TOA no longer serves its original purpose as a navigational tool. Instead, readers use features like searchable text and hyperlinks to navigate the brief.

Thus, although Arizona litigants spend thousands of hours every year building TOAs, these tables go largely ignored by courts and opposing counsel. This begs the question: In an era of electronic briefs, is the TOA necessary?

In this article, Casey and Kelley make the case for eliminating TOAs. Geoff then provides a rebuttal. Our arguments are informed by our own experience as well as conversations with other appellate attorneys, judicial law clerks, staff attorneys and judges.

The Case for Eliminating the TOA

The invisible costs of the TOA

The time it takes to make a TOA depends on a number of factors, including the length of the brief, the number of citations, the expertise of the person building the TOA, and the availability of assistive software. Justice Scalia and Bryan Garner warn advocates to "[a]llow a full day" to prepare a TOA, and to "[n]ever trust computers to prepare the tables automatically."[1] This advice may be somewhat outdated; for those who use it, modern brief-editing software can reduce the time it takes to prepare a TOA.

If an advocate uses Westlaw's Drafting Assistant, an average-length brief requires about 45 minutes to mark all the citations, correctly format the TOA, and doublecheck the table's page numbers. The program is not perfect; it will sometimes miss a citation or attribute an "*Id.*" to the wrong case. Conscientious advocates will expend additional time reviewing and fixing the program's errors. But case law (and our own experience) show that not every advocate carefully prepares the TOA.[2]

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The time it takes to compile the TOA, doublecheck the citation formatting, and confirm its accuracy and correct errors or ambiguities is not insignificant. This leaves no room for procrastination, which creates its own challenges in cases where the drafting attorney needs to seek feedback from a supervisor, trial counsel or a client. And in civil litigation, "the time it takes" translates into actual dollars—hundreds per brief.

Still, not every advocate has access to Westlaw's Drafting Assistant, and instead they (or more often, their staff) use Word's citation-marking tool. The tool is not intuitive, and an average-length brief requires anywhere from a couple of hours to a full day to build a TOA, depending on the user's familiarity with the tool.

Finally, some litigants, particularly self-represented parties and those who do not regularly practice in appellate courts, manually create the TOA.[3] And self-represented inmates usually write out the TOA by hand.

In 2020, a combined total of 4,395 new cases were filed in Arizona appellate courts.[4] Conservatively estimating that (1) each case had only two briefs filed, and (2) it takes only 45 minutes to prepare a TOA for each brief, in 2020 alone, litigants spent a total of 6,593 hours (roughly 275 days) building TOAs.

Is that time and expense worth it? We argue no. But in a few paragraphs we'll hear from Geoffrey, who can provide us a perspective from the other side of the bench.

Other features of electronic briefs replace the TOA's primary purpose.

As noted, TOAs originally were intended to help courts identify and locate the authorities cited in a brief. But Arizona courts and most practitioners have moved to electronic briefs, which are "easier to read, use, and search" because "[i]nstead of plowing through page after page … and attaching yellow sticky notes, it [is] possible to instantly search for and locate particular subjects, words, phrases, names, or dates."[5]

Hyperlinks also expedite locating authorities. Both Westlaw and LexisNexis have software that automatically adds hyperlinks to citations in briefs, and more advocates are using these tools. Thus, searchable text and hyperlinks efficiently replace the TOA's primary function as a navigational tool. Our discussions with fellow practitioners and court staff confirm that few people still use the TOA to locate citations within a brief.

The rebuttal lists several alternative uses for the TOA. While some are intriguing, we keep coming back to the same question: Are these alternative uses worth the time it takes to make the TOA? We'll revisit that question after Geoff makes the case for keeping the TOA.

The Case for Retaining the TOA

Recognizing that the TOA's original use has been mostly abandoned in the post-paper era, it still retains value and should remain for two reasons. First, the TOA still serves its navigational purpose for handwritten briefs, and second, judges and court staff have developed other meaningful, non-navigational uses for TOAs.

A The TOA still serves as a navigational tool in some instances.

Although "[a]ppellate courts strongly encourage parties to file documents that are typed and prepared on a computer,"[6] handwritten and print-form documents are still accepted.[7] Appellate courts routinely receive paper (mostly handwritten) briefs, particularly from self-represented inmates. Print-form briefs are scanned on arrival, and a digital, searchable copy is added to the docket.

However, Adobe Acrobat's "recognize text" tool fares poorly with handwritten documents, even where the handwriting is exceptionally neat. As an experiment, I ran several handwritten briefs through the tool. In one brief with particularly messy handwriting, the tool identified no searchable text. In another with clearer handwriting, the tool identified a few two- or three-letter combinations—but not any whole words.

In addition, court staff continue to use the TOA as a navigational tool when working from printed versions of the briefs. Although appellate courts have made great strides toward "giving up [their] paper 'security blanket,'"[8] they occasionally fall back into the comfort of the printed page. And, printed versions are useful during an inevitable computer malfunction.

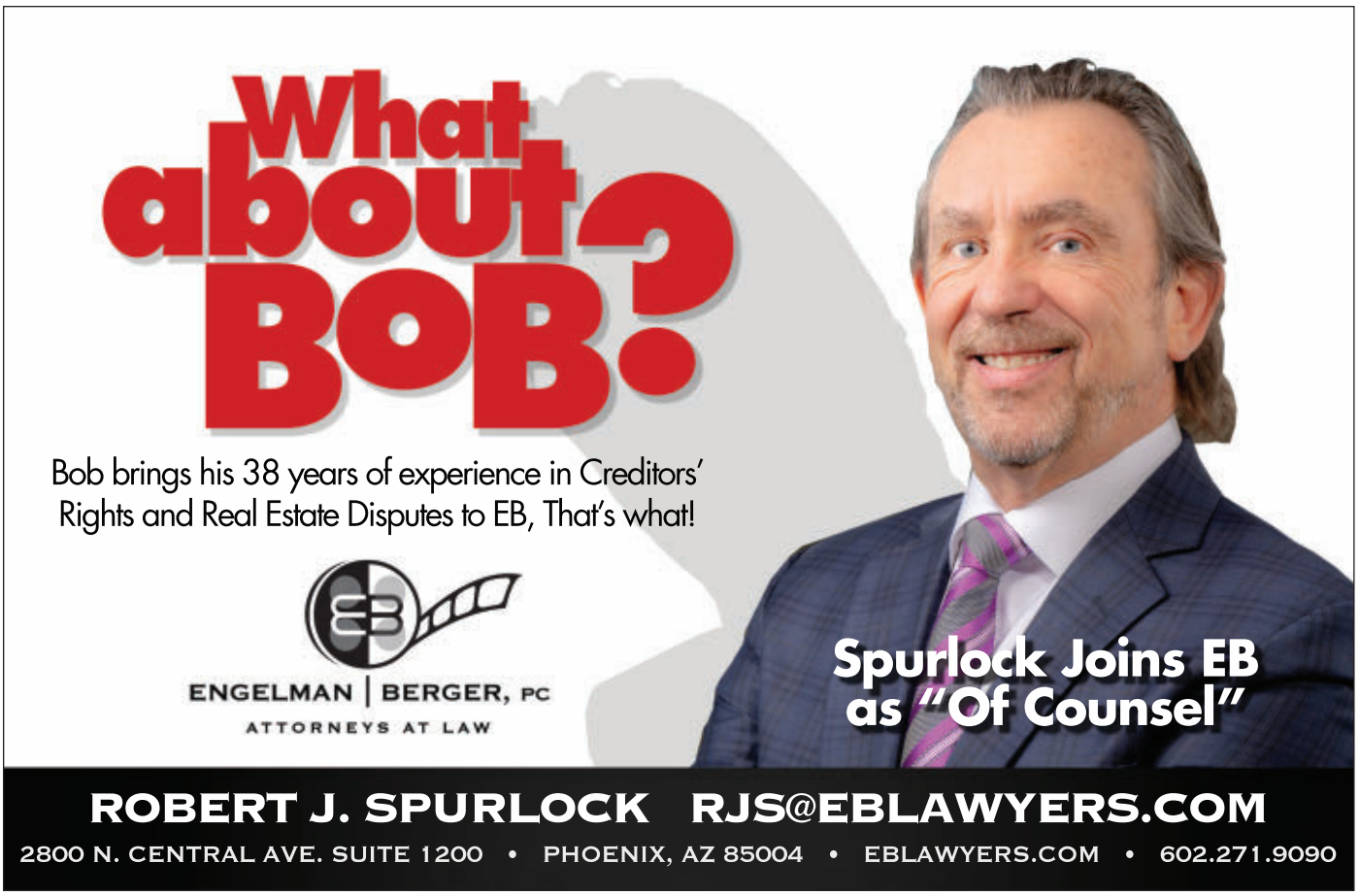
A recent oral argument before the Arizona Supreme Court highlights both the penchant of some Justices to use paper, and the inherent risks of an entirely paperless court. There, Vice Chief Justice Timmer prefaced a question about the language of the statute by saying, "I'd read it [to you], except my computer just blew up before I came out here." Chief Justice Brutinel then flipped through a binder and slid over a printed version of the statute and quipped, "My notebook seems to be working."[9]

Thus, even though appellate courts receive digital copies of every brief, the TOA still serves as a navigational tool for (1) handwritten briefs and (2) when working from a printed copy out of preference or necessity.

B Courts have developed meaningful alternative uses for the TOA.

When I asked folks at the court whether they find the TOA helpful, I noticed the responses varied based on how long the person had spent in practice. Generally speaking, those who started their appellate careers during the paper era felt more attached to the TOA than those whose appellate practice started in the post-paper world. (Having graduated from law school in 2003, Geoff considers himself a straddler.)

For example, "Ron" and "Penelope" joined the court after we transitioned to



e-briefs. Ron has "literally never used the TOA," and Penelope said the TOA is "not really helpful." On the other hand, all the longtime appellate practitioners reported using the TOA to some extent, and some with regularity.

The TOA is a good example of what probably happens, over time, to other similar briefing requirements. They are created as tools to serve a specific function, and then, in the course of using them for their intended purpose (here to find a particular cited authority in a brief), readers find other creative uses. Suddenly, a change in technology perhaps negates the original function entirely. But the newly discovered uses remain.

A person who begins appellate work after the technological change may not find the tool useful for its intended purpose, and therefore never uses it. As a result, the tool is considered useless, and alternative uses are not developed. Hence, it makes sense that more experienced appellate practitioners view the TOA as a multifunctional tool that serves a number of purposes, while someone like "Ron" has "literally never looked at the TOA."

> **Generally speaking, those who started their appellate careers during the paper era felt more attached to the TOA than those whose appellate practice started in the post-paper world.**

Below are some of the alternative uses of the TOA that came to light in my discussions:

1 **To get a "feel" for the case before reading the brief.** "Rightly or wrongly, many readers form an impression of [an advocate's] credibility based on whether [they] conform to the minutiae of court rules."[10] Justice Scalia and Bryan Garner warn, "The Table of Authorities is more important than you might think. *Some judges will fan through it just to assess how careful a lawyer they are dealing with.*"[11] Appellate briefs are "a more formal and even lengthier document" than the typical trial court pleading, and "[t]he significance of [the brief] … is evidenced by its length, as well as the elaborate rules governing its form and content."[12] The TOA adds to the formality of the brief and further emphasizes what the court expects from the arguments: "contentions concerning each issue presented for review, with supporting reasons for each contention, and with citations of legal authorities … on which the [party] relies."[13]

After reviewing the "statement of issues" (another requirement for briefs), I sometimes scan the TOA to see if anything stands out. Is a case cited that reflects a recent legal development? If this an area of law that is fa-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miliar to me, does the TOA contain unexpected authority? Conversely, are expected authorities *not* listed? If I see heavily relied-upon cases that I am not familiar with, I collect and review them before diving in. Another "brief reader" noted that a quick review of the TOA can reveal other helpful information, such as extensive reliance on non-Arizona caselaw or secondary sources.

2 To doublecheck a draft decision or opinion. Before submitting a draft decision to the judges, or before issuing the final version to the public, it is helpful to review the TOA and confirm that the main authorities cited by the parties are addressed. And if the draft asserts that a party does not address a particular case, a quick glance at the TOA will confirm or refute that assertion.

A number of court decisions refer to the TOA when criticizing a party's failure to cite relevant authority. Notably, in *NASA v. Nelson*, Justice Scalia observed:

> Respondents' brief, in arguing that the Federal Government violated the Constitution, does not once identify which provision of the Constitution that might be. The "Table of Authorities" contains citations of cases from federal and state courts, federal and state statutes, Rules of Evidence from four States, two Executive Orders, a House Report, and even more exotic sources of law, such as two reports of the Government Accountability Office and an Equal Employment Opportunity Commission document concerning "Enforcement Guidance." And yet it contains not a single citation of the sole document we are called upon to construe: the Constitution of the United States.[14]

3 A tool to prepare for conference and oral argument. The TOA provides a succinct list of relevant authorities that we can skim before conference or oral argument. Sometimes, it's useful either to have a printed copy or, for those who bring their laptops to argument, a downloaded version of the statute readily available.

Because the TOA still functions as a navigational tool for handwritten briefs and some members of the court find the TOA a useful tool, we should keep it.

4 An aid for finding the correct citation. When, in the body of the brief, a citation contains a typo, or the advocate has used "*Id.*" incorrectly, the table of authorities becomes a resource for finding the correct citation. For example, in *State v. Haggard*,[15] a petitioner failed to provide full citations in his argument section. Instead, he generally referred to cases as "Gonzalez versus the state," "AZ versus Ortega," and "the Mendoza case." Had the petitioner provided a TOA, perhaps the court could have ascertained exactly which cases he was referring to. Regrettably, the court was left to speculate which cases the petitioner meant to cite and only found two of the three cases on its own.

No doubt judges and staff attorneys have found even more alternative uses for the TOA than those listed here. Appellate practice has evolved significantly over time, and I suspect it will continue to evolve, as will the court's reliance on particular aspects of the brief. But for now, because the TOA still functions as a navigational tool for handwritten briefs and at least some of the more seasoned members of the court find the TOA a useful tool, we should keep it.

Are Those Alternatives Truly Worth It?

Geoff provides some excellent counterpoints to our crusade to dispose of the TOA. His arguments concerning handwritten briefs are particularly compelling. Until text recognition software improves, it makes sense to require a TOA for all handwritten briefs. Fortunately, the rules of appellate procedure already distinguish requirements for handwritten briefs, so they could easily be amended to limit the TOA requirement to handwritten briefs.

But while it may be easy on attorneys and the courts to limit the TOA to handwritten briefs, the same cannot be said of those who most often handwrite their briefs—incarcerated individuals. Inmates frequently point out their limited access to legal resources, as was the case in *Haggard*. There, the petitioner said he failed to provide a TOA or full citations because "as an inmate … he ha[d] no access to a law library or legal materials."[16] Nevertheless, the TOA's primary purpose is to aid the court in navigating a brief, and this rule change would not add to an inmate's current formatting requirements.

With respect to the alternative uses of TOAs, we are unpersuaded that any outweigh the time and costs spent making them. First, readers can just as easily "get a feel" for the case by reading the introduction, summary of the argument, and the table of contents. Separately, is there a valid purpose for "feeling out" the argument before actually reading it? The substance of the arguments should be far more persuasive than a mere list of authorities.

Second, while the TOA may make the brief more formal and emphasize the need to support arguments with legal authorities, other procedural rules and formatting requirements would compensate for the loss of the TOA. Moreover, formatting rules are meant to "promote succinct, orderly briefs that judges can readily follow."[17] That purpose is not served if the TOA is being used merely to test an advocate's ability to follow directions. Other aspects of the brief can provide that signal while *also* improving readability.

Finally, while the TOA may be a helpful list for gathering sources to download, or to refer to when criticizing a party's failure to cite a particular authority, it is not a necessary tool to complete either task. A simple search for a particular authority will reveal whether a party has relied on it, and hyperlinked briefs will easily guide the reader to a needed authority.

Ultimately, given the significant time and money spent creating the TOA, it's

time we ask ourselves, is it worth it? Because the TOA serves such a limited role, the answer is no; perhaps it's time to eliminate it.

endnotes

1. Antonin Scalia & Bryan A. Garner, Making Your Case: The Art of Persuading Judges 90 (2008).
2. *See, e.g.*, *Nixon v. City and County of Denver*, 784 F.3d 1364 n.1 (10th Cir. 2015) (chastising the opening brief for, among other deficiencies, failing to "contain an *alphabetized table of authorities*") (emphasis in original); *Papaliolios v. Davidson*, 2 CA-CV 2010-0191, 2011 WL 2695742, at *4, ¶ 13 n.3 (Ariz. App. May 20, 2011) ("Although Papaliolios cited and referred to § 12–548 several times in her opening brief, she neglected to list the statute in her table of citations as required by [ARCAP] 13(a)(2)").
3. *See, e.g.*, *Lvov v. Goltsman*, 1 CA-CV 13-0345, 2014 WL 458147, at *1, ¶ 6 & n.2 (Ariz. App. Feb. 4, 2014) (observing significant procedural deficiencies in both self-represented litigants' briefs, including the failure to include a TOA).
4. *See* Sup. Ct. Ariz., Arizona Judicial Annual Report Fiscal Year 2020, 5–7 (available at https://www.azcourts.gov/Portals/38/pdf/AnnualReportFY2020.pdf)
5. *See* Hon. Philip G. Espinosa, *A Word from the Future: The Virtually Paperless Court of Appeals*, 49 Judges J. 10 (2010).
6. ARCAP 4(b)(3).
7. *See, e.g.*, Ariz.R.Crim.P. 31.12(c); ARCAP 14(b)-(c).
8. Espinosa, *supra* note 5.
9. *See* Oral Argument, *Saba v. Khoury*, CV-21-0023-PR, at 33:19 (Oct. 7, 2021).
10. Mary Beth Beazley, A Practical Guide to Appellate Advocacy, 165–66 (4th ed. 2014).
11. Scalia & Garner, *supra* note 1, at 89 (emphasis added).
12. Suzanne Ehrenberg, *Embracing the Writing-Centered Legal Process*, 89 Iowa L. Rev. 1159, 1165 & n.15 (2004).
13. ARCAP 13(a)(7)(A).
14. 562 U.S. 134, 160 (2011) (Scalia, J., concurring).
15. 2 CA-CR 2010-0307-PR, 2011 WL 315537, at *2 (App. Feb. 1, 2011).
16. *See id.* at n.1.
17. Judith D. Fischer, Pleasing the Court: Writing Ethical and Effective Briefs 51 (2d ed. 2011).

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APPELLATE PRACTICE

MIKEL STEINFELD supervises the appeals unit of the Office of the Maricopa County Public Defender. He also has strong opinions on comic book movies, adores romance novels, writes terrible poetry, and dives dungeons and destroys dragons.

BY MIKEL STEINFELD

Draft "I":
An Approach for Crafting Compelling Factual Statements

I clicked my pen as I waited for the group of 10 young attorneys to finish. We'd talked about the role of storytelling when writing the facts section of a motion, then took an hour so they could each write a first draft. I wasn't sure my lesson had connected.

"Okay, email me your drafts," I said.

I opened an email and put it on the screen so the class could give feedback. The first paragraph stunned me:

> I froze. An officer had just pulled up in his patrol car. Out of a huge crowd leaving the arena after the Suns basketball game, he told me and my friend to "Stop!" I was nervous. "Sit on the curb," the officer said. It took us a second, but we sat down on the curb. The officer asked my name. "Lance Bass," I said.[1]

I'd been teaching this class for a couple years and nobody had ever sent a draft in the first person. I didn't know how I felt about it. So I did what all my good teachers had done.

"How do we feel about this?" I asked the class.

"I don't like it," one student responded. Several others nodded their heads in agreement.

"Why not?"

"It doesn't look like legal writing." More head nodding in the gallery.

"Why not?" By this point, I knew how I felt.

The objecting attorney stared at the screen, stammered, then fell silent. None of the nodding heads piped up to help.

"Let's try this." I made some edits and put up the following:

> *Lance* froze. An officer had just pulled up in his patrol car. Out of a huge crowd leaving the arena after the Suns' basketball game, he told *Lance* and *his* friend to "Stop!" *Lance* was nervous. "Sit on the curb," the officer said. It took *them* a second, but *they* sat down on the curb. The officer asked *for their* names. "Lance Bass," *Lance* said.

"How do you feel about that?" I asked.

"I like it a lot better." The nodding heads returned to signal their approval.

"Why?"

"The changes make it read better." Heads nodding.

"But why do the changes make it read better?"

He opened his mouth for a moment, then snapped it shut. He stared at the screen and moved his head side to side. Again, he was stuck. Again, nobody in the gallery chimed in.

I've been obsessed with storytelling and

its role in legal writing ever since I went to a seminar that emphasized its importance.

At that seminar, instructor after instructor stood at the front of a hotel conference room and told us that storytelling was important. "People make emotional decisions," one said. "We communicate through stories," said another.

Legal writing experts concur. Judge Ruggero Aldisert explains, "The statement of facts tells the story of your case."[2] Steven Stark notes, "Though storytelling is an art rarely taught in law school, it is an essential skill for a legal writer."[3] And Bryan Garner agrees: "In narrating the facts, you have an opportunity to shine as a storyteller."[4]

I returned from the seminar motivated to tell my clients' stories. I worked on snappy openings. I used illustrative language.

But I quickly realized a problem. Despite attending the conference, and separately reading several books on legal writing, I had no clue what a story was or how to tell one.

In this article, my goal is to fill that gap. Writers already have explored what a story is and how to tell one, generally in the context of fiction or narrative nonfiction. The lessons learned in those fields translate well to the stories we tell in factual statements.

In the first section, we'll explore how to define story. And in the second and third sections I'll give you the approach I learned from my student—the Draft "I"—and explain why it regularly creates compelling narratives.

What Is a Story?

My first exposure to the definition of story happened almost by accident. I'd been studying plot, and one of the first books I bought was James Scott Bell's *Plot & Structure*.

According to Bell, plot is comprised of four elements, spelling out LOCK: Lead character, Objective, Confrontation and Knockout.[5] Leave it to a former lawyer to break down something like plot into a series of elements.

While Bell was explaining his approach to plot, he'd also given the definition of story. Consider how Jack Hart, former managing editor of the *Oregonian*, defined story: "So, at its most basic, a story begins with a character who wants something, struggles to overcome barriers that stand in the way of achieving it, and moves through a series of actions—the actual story structure—to overcome them."[6] Lisa Cron gave a similar definition: "A story is how what happens affects someone who is trying to achieve what turns out to be a difficult goal, and how he or she changes as a result."[7] Both definitions mirror Bell's four elements.

Because story boils down to these four elements, let's look at them in more depth.

Lead character: A plot should focus on a specific character. This is Katniss Everdeen in the *Hunger Games*, Robin Hood in *Robin Hood*, Luke Skywalker in *Star Wars*. When writing fiction, the goal is to have an interesting lead character.

In the context of legal writing, Professor Susie Salmon has explained in this magazine, "Generally, you know that you should present your client's story from your client's point of view."[8] This echoes Professor Ruth Anne Robbins's observation that "more

STEVEN J.W. HEELEY

We are thrilled to welcome Steven J.W. Heeley, of counsel, to our Tempe office. Steven advises Indian tribes on corporate, transactional, and natural resources matters, as well as on tribal governance and jurisdictional issues.

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skilled lawyers understand … that their client is the protagonist of the story and that the story must be told from the protagonist's point of view."[9] While the client may not always be the protagonist of our factual statement, it's an ideal starting point. And it reinforces the idea that our legal writing should include protagonist-driven stories.

A plot should focus on a specific character. This is Katniss Everdeen in the *Hunger Games*, Robin Hood in *Robin Hood*, Luke Skywalker in *Star Wars*.

Objective: The lead character should have some sort of objective—a goal or desire. This objective is what gives the story movement. In your prototypical quest, the objective is to accomplish a goal. In *Lord of the Rings*, the objective was to destroy the One Ring. In *Star Wars*, the first objective was to save Princess Leia and the second objective was to destroy the Death Star. But an objective still exists even if there's no stereotypical journey or quest. In *Die Hard*, John McClane's objective was to rescue his wife (in hopes they could reunite). And the objective can be simple. Consider Katniss's objectives in the *Hunger Games*. At first, she wanted to live as normal a life as possible. At selection, Katniss volunteered to save her sister—a new objective. During the games, Katniss's primary goal was to stay alive. Most of these goals are relatively ordinary—leading a normal life, being left alone, staying alive.

Confrontation: "All drama is conflict."[10] Syd Field's observation in *Screenplay* is simple and powerful. Conflict and confrontation build a story and make it interesting. In books, movies and short stories, conflict is the bulk of the narrative. In fiction, this opposition often comes from other characters.[11] But that's not necessary. The forces opposing a lead character can come from anything, including weather, fate, personal weakness and so on.[12]

Think about our normal, everyday needs. If I (lead) want to get some milk (objective), there are a couple stories I could tell.

In the first, I drive to the store, pay for the milk, and return home. There's nothing interesting there. Setting aside that I'm a boring lead and my need for milk isn't vital, there's no conflict or confrontation.

But if I had to walk, got mugged on the way to the store, was unable to pay for the milk, and had to decide whether to shoplift the milk, we would have conflict and confrontation. We'd have the bones of an interesting story.

Knockout: Bell recommended that a story end with a strong knockout blow to the primary antagonist to allow the lead to over-

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come the confrontation and obtain their objective.[13] Luke Skywalker used the Force to destroy the Death Star before Darth Vader could shoot him down. Through wit and perseverance, Katniss survived the games and managed to save Peeta (and outsmart the Gamemaker and Capitol) in the process. Both are knockout endings that leave us satisfied.

As we tell legal stories, we want satisfying endings for our clients. But our story doesn't always include them yet. That's fine. When the result reached below is appropriate (where you're the Appellee), tell a complete story with a knockout punch. That punch can be the order dismissing the case or suppressing evidence, verdict finding in favor of your client, or nominal damages award. But where the result has gone against you, tell a story that isn't yet complete. Use the result below as an example of the conflict that has risen to a climax—and ask the court to deliver the just result.

Tell a complete story with a knockout punch. That punch can be the order dismissing the case or suppressing evidence or verdict finding in favor of your client.

Draft "I"—Writing the First Draft in First-Person POV

The first-person draft swirled in my mind for days. Was this young attorney on to something? Could this help with storytelling?

I reread my earlier briefs that told persuasive stories. Sure enough, if I swapped in first-person pronouns, it would be a decent first-person narrative. I did the same thing with some great storytelling briefs written by other lawyers.[14] I saw the same result: The briefs could have been drafted in the first-person POV, and then edited.

So was that attorney on to something? Yes.

And could the approach help with storytelling? Absolutely!

To see the power of a Draft "I," let's look at an example: the Certiorari Petition filed in *Levin v. United States*.[15] Steven Levin—who filed his brief pro se—drafted the facts in the first person:

> The Veteran's Administration is my health care provider. They referred me to the eye clinic at the United States Naval Hospital Guam for exams and then cataract surgery.
>
> The day of the surgery, when I was in the operating room with an IV inserted for conscious sedation, I had my first chance to discuss directly with the Navy surgeon, Dr. Bishop, my concerns about some pre-op eye drops that were not given as planned. He later testified that he meets and talks with patients in the anteroom before they enter the OR. I asked to see him in the anteroom, but was told he would see me in the OR after I signed the consent for anesthesia and the IV was inserted.
>
> For several reasons, based on new information learned in the OR, I changed my mind about having the surgery. When they could have harmlessly stopped, I made it clear, at least twice, that I was withdrawing my consent and that I did not want the surgery.
>
> They proceeded nonetheless. Severe corneal edema resulted. Both sides agree continued treatment is needed, with uncertain prospects for success.

Although this is a short factual statement, we find most of Bell's four story elements and see how the first-person perspective created a compelling narrative.

Lead character: Writing in the first-person POV forces us to identify a lead character. We need to figure out who "I" is.

For Mr. Levin, this was easy: He told the narrative from his point of view. If we represented Mr. Levin, we would likely tell the story from his perspective as well. As discussed above, Professors Susie Salmon and Ruth Anne Robbins have noted the benefit of this approach.[16] By telling the story from our client's eyes, we place our client in the role of a heroic protagonist. This contextualizes their journey, even if they're not the most sympathetic of characters. Mr. Levin was the victim of an unwanted surgery who was trying to use the law to correct that unjust action. We relate to that.

But what if we don't represent a person? That's fine; there are two approaches we can take. First, the first-person draft doesn't demand that we represent an individual; we can use first-person pronouns to refer to an agency, company or organization. Because we know we're going to change the pronouns during our editing process, we can use "I" to refer to the governmental agency or company we represent. Doing so will humanize the organization in the final draft. Second, we can pick a proxy for our client. For example, a prosecutor doesn't "represent" victims or police officers, but relating the facts through the eyes of the arresting officer or victim can be powerful. Along the same lines, an insurance adjuster can be a proxy for an insurance company. And these two approaches don't live in isolation. We can combine them.

Sometimes our client doesn't make for a compelling story. Writing a first-person draft will expose that and force us to make a conscious decision about how to fix the problem. In some cases we'll want to identify a new protagonist. But sometimes all we need to do is fill in a gap. We can do this by shifting to a second character's perspective. Or we can just supplement information without worrying too much about perspective. After all, it's just going to be a one- to two-paragraph deviation from our client's point of view. In either case, the first-person draft helps us identify storytelling problems that we often miss when we write the first draft in a third-person perspective.

Beyond the lead character, our other character decisions fall into place. Once we've cast our protagonist, we can identify the antagonist. For Mr. Levin, this was Dr. Bishop. We also begin to understand the supporting characters who are important to the narrative. Not every witness is crucial to our story. Not every character needs a name. Mr. Levin, for example, didn't name the members of the surgery team. We can make these decisions once we know our lead.

Objective: When we write a first-person

draft, we also force ourselves into our protagonist's shoes. Doing so demands that we determine what motivates our protagonist's actions or inactions.

When drafting in the first person, we must rationalize our protagonist's decisions. That means we're figuring out our lead character's objective. This is motivated in part by the argument we intend to raise, and it's aided by the other characters who fall in place. When we identify our protagonist and the argument we intend to raise, we can identify the force that stands in our lead's way. This also helps crystallize our protagonist's desire. And, of course, objectives can change during a story. Forcing ourselves into the shoes of our protagonist means we can identify these shifting objectives.

Looking at Mr. Levin's factual statement, we can assess his objectives. At first, he just wanted some questions answered. When those questions weren't answered to his satisfaction, he wanted to withdraw his consent. And when the surgery team ignored his changed decision, he wanted the courts to help him rectify the injustice.

Confrontation: Again, writing a first-person draft helps us identify the conflict. By writing in the first-person POV, we view the conflict and confrontation from our protagonist's eyes. And because we've identified our protagonist's objective, we can understand the decision they made, and why that created more obstacles. The first-person draft has a second benefit: It helps us figure out what facts to include in our statement. When we look at a case from a detached, withdrawn view, we can stumble into two problems. Sometimes we view inconsequential conflicts as important. Other times we miss key facts that would enhance our narrative. When we embrace the "I" and allow ourselves to tell the story from our lead's perspective, we will find the facts and conflicts that are important to our story and weed out the rest.

This is the real power of Mr. Levin's factual statement—we are with Mr. Levin as he tries to talk to the doctor in the anteroom; as he asks Dr. Bishop last-second questions in the operating room, an IV already inserted for sedation; and as he withdraws his consent, only to be ignored. We experience the conflict with the main character.

Knockout: According to Professors Brian Foley and Ruth Anne Robbins, "The goal of the lawyer … is much like the fiction writer's, but with a twist—to portray the characters and conflict in such a way that the resolution the lawyer seeks 'fits,' and so the judge will naturally *choose* that resolution over the competing resolution offered by the opposing party."[17]

In most cases, we already have one side that's unhappy. In an appeal, one side has already lost. In a criminal trial case, one person's already been charged with an offense. In a civil case, the plaintiff has already had to sue the defendant, and the defendant's already been sued. As a result, we may be in a position where our client doesn't believe their current situation is just.

This is the perfect time to focus on the first three parts of our story—the lead character, objective and confrontation—and tell an incomplete narrative. Our legal argument then becomes the tool to empower

the court to provide the knockout ending we want.

This is precisely what Mr. Levin did. Remember, he was asking the Supreme Court to review his case. He'd lost below. His story thus focused on character, objective and conflict, leaving it to the Supreme Court to provide a just ending to his narrative.

But maybe our client believes everything that's happened was warranted. Parties who won at trial and are defending on appeal are often in this situation.

When we write in the first-person POV, we naturally default to the active voice and tend to avoid jargon and stuffy language.

This is the perfect time for a complete narrative. The jury or judge already threw the knockout blow after a trial or hearing. The legal argument then becomes the tool to empower the court to affirm the knockout ending we've already received.

In either circumstance, writing a first-person draft will help you identify whether the story you're telling is complete or incomplete.

Putting Draft "I" Into Practice

After I realized the young attorney in my class might be on to something, I tested it. For every Opening Brief I filed over the next few months, I wrote the first draft of the factual statement in the first-person POV. In the second draft, I changed the pronouns from first person to third. Each time it made the narrative better.

Mr. Levin's factual statement shows how easy it is to convert a first-person draft into third-person. For the most part, all we need to do is change the pronouns:

> The Veteran's Administration is Mr. Levin's health care provider. They referred Mr. Levin to the eye clinic at the United States Naval Hospital Guam for exams and then cataract surgery. The day of the surgery, when Mr. Levin was in the operating room with an IV inserted for conscious sedation, he had his first chance to discuss directly with the Navy surgeon, Dr. Bishop, his concerns about some pre-op eye drops that were not given as planned. Dr. Bishop later testified that he meets and talks with patients in the anteroom before they enter the OR. Mr. Levin asked to see Dr. Bishop in the anteroom, but was told Dr. Bishop would see Mr. Levin in the OR after Mr. Levin signed the consent for anesthesia and the IV was inserted.
>
> For several reasons, based on new information learned in the OR, Mr. Levin changed his mind about having the surgery. When Dr. Bishop and the surgery team could have harmlessly stopped, Mr. Levin made it clear, at least twice, that he was withdrawing his consent and that he did not want the surgery.
>
> Dr. Bishop proceeded nonetheless. Severe corneal edema resulted. Both sides agree continued treatment is needed, with uncertain prospects for success.

The story stays the same. We still see character, objective and conflict. And the statement retains much of the power it held in the first-person POV.

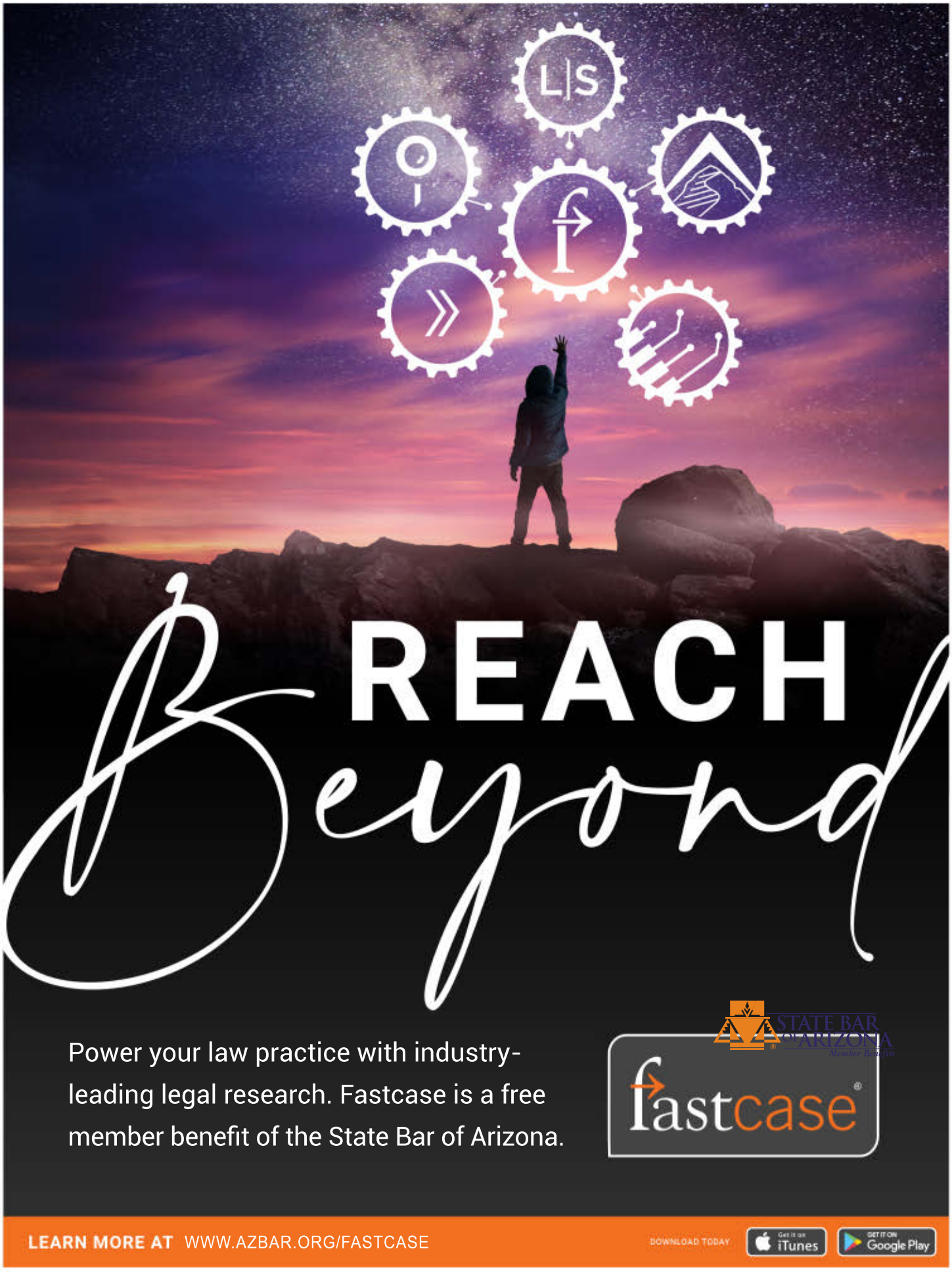
What I'm recommending will be uncomfortable. When I got out of law school, I would've been one of the nodding heads in my classroom complaining that the first-person draft didn't "look" like legal writing, while offering no recommendations to improve it.

But there are a host of additional benefits to writing a first-person draft: First-person narratives are naturally structured like stories, often include more striking opening scenes, and contain opening sentences that are more likely to hook the reader's attention. When we write in the first-person POV, we naturally default to the active voice and tend to avoid jargon and stuffy language.

So here's my pitch: Try writing a first-person draft in an upcoming case. If you like the result, try it again. But even if you don't like it, you'll learn a bit more about storytelling strategies that you can incorporate into your writing in the future.

endnotes

1. Yes, we used Lance Bass as the name of our hypothetical client.
2. Ruggero Aldisert, Winning on Appeal 154 (1992).
3. Steven Stark, Writing to Win 95 (2012).
4. Bryan Garner, The Winning Brief 311 (1999).
5. James Scott Bell, Plot & Structure 9-13 (2004).
6. Jack Hart, Storycraft 10 (2011).
7. Lisa Cron, Wired for Story 11 (2012).
8. Susie Salmon, *POV*, Ariz. Att'y (Dec. 2016), at 8.
9. Ruth Anne Robbins, *Harry Potter, Ruby Slippers and Merlin*, 29 Seattle U. L. Rev. 767, 772 (2006).
10. Syd Field, Screenplay 25 (2005)
11. *See* Michael Hauge, Writing Screenplays that Sell 65 (2011) (noting that in screenplays the "nemesis must be a visible and specific character, not a collective noun ('the Mafia'), force of nature ('cancer'), or quality of life ('evil in the world').").
12. John Vorwald & Ethan Wolff, How to Write a Short Story 26 (2008) (describing the antagonist in a short story).
13. Bell, *supra* note 5, at 12-13.
14. One of my favorite storytelling briefs is the Answering Brief Jonathan Bridges and Suyash Agrawal filed in *Martinez-Aguero v. Gonzalez*, 459 F.3d 618 (5th Cir. 2006) (opinion); 2005 WL 6056629 (brief). Spoiler alert: You can swap out the third-person pronouns for first-person ones and it still reads well.
15. *Levin v. United States*, 568 U.S. 503 (2013) (opinion); 2012 WL 1636906 (brief).
16. Salmon, *supra* note 8; Robbins, *supra* note 9, at 772.
17. Brian J. Foley & Ruth Anne Robbins, *Fiction 101*, 32 Rutgers L.J. 459, 467 (2001).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A Delicate Dance

Minimizing Bloat in Summary Judgment Statements of Fact While Maximizing Preservation of the Record

BY JUSTIN M. ACKERMAN

A central task for a trial court, and later an appellate court, is to discern not only what facts are material but also whether they are disputed during summary judgment motion practice. This is particularly important at the appellate stage of litigation, as summary judgment records are entirely based on what facts were properly submitted to the trial court on a closed record. The primary way most Arizona state and federal courts perform this function is to carefully look at the parties' respective statements of facts in support of their summary judgment motions.

Specifically, a moving party at summary judgment should craft targeted statements of fact that relate to the material facts at issue. By extension, a non-moving party should craft objections directly attacking the moving party's material facts and why they are either disputed or inconsequential. This practice is codified in both the federal and Arizona rules of civil procedure under Rule 56.

This process is intended to simply, not overcomplicate, the actual summary judgment motion. However, particularly in complex civil cases, summary judgment statements of facts can take on a life of their own, spanning pages upon pages that sometimes become even lengthier than the legal arguments they support. Perhaps this is because a moving party feels the need to support every non-material fact with a separate statement of fact. Maybe it is because a non-moving party equally perceives the need to object to every moving party's statement of fact regardless of its overall impact on the legal issues before the Court. There is even a growing trend of parties adding more and more detailed argument within the statement of facts, sometimes even including citations to legal authorities, to support a party's fact or objections. Finally, after receiving a non-moving parties' separate objections, the moving party is equally tempted to address each of those objections (both factual and legal) in kind using a separate "reply" statement of facts.[1] This back and forth tug of war over the facts in any given case to ensure a party has preserved their appellate record has led to ever-increasing complexity, argument and, frankly, paper "bloat" in what should be a straightforward process.

Indeed, practitioners' zeal during this process can backfire. In *Hunton v. Am. Zurich Ins. Co.*,[2] one Arizona district court went to great lengths in explaining what a proper summary judgment statement of facts and objections should be as well as how the process of briefing summary judgment motions has led to a proliferation of excessive, unhelpful argument. In *Hunton,* the court noted that the parties submitted statements of facts that that were entirely immaterial to the bad faith claim at issue. The court also noted that the parties' voluminous objections were improper, as they repeatedly included inappropriate argument and commentary, even in instances where a party admitted certain facts. As the court perhaps most succinctly put the issue when denying summary

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judgment and admonishing counsel for statement of fact bloat:

> Lawyers are tasked with bringing clarity out of chaos, and voluminous filings rarely do that. Regrettably, the briefing in this case has sown more chaos than it has ordered. As a result, the Court cannot confidently conclude that there are no material factual disputes bearing on the availability of punitive damages.[3]

While the issues involved in *Hunton* may be a unique example of summary judgment bloat, it is representative of the issues facing Arizona state and federal courts. How should they cull the ever-expanding girth of summary judgment statements of fact while at the same time allowing the parties to preserve their record on what facts are truly contested and material? At least from this practitioner's perspective, several trends are now emerging to address statement of fact bloat.

First, some courts have ordered parties in their scheduling orders to review the court's discussion in *Hunton* prior to filing any summary judgment briefing as a guidepost for how to properly craft statements of fact and related objections. Courts in this instance have typically become more engaged at policing statement of fact bloat during the actual summary judgment process, later refusing to consider certain facts or objections if they devolve into improper or unimportant argument.

Second, some courts have placed a hard cap on the permitted page range of separate statements of fact in support of summary judgment motions. The most common this practitioner has seen is courts imposing a 10-page statement of fact limitation. Imposing such a limitation is an attempt to force parties to be judicious with the facts they choose to introduce in support of their moving and opposing summary judgment motions.

Finally, some courts have elected to eliminate the practice of statement of facts all together. In this scenario parties are prohibited from filing separate statements of fact or separate controverting statements of fact. Instead, they must include all facts in their moving motion, response or reply itself. Those same courts typically further note that all evidence to support a motion or response that is not already part of the record must be attached directly to the motion or response itself and that no evidence may be submitted with a reply. As a result, because no controverting statements of facts are permitted, those courts typically note that the responding party must carefully address all material facts raised in the moving motion. Likewise, the reply must carefully address all material facts raised in the response. Critically, any fact that is ignored may be deemed uncontested by these courts.[4]

It is difficult to crown one trend "better" than the other at reducing summary judgment bloat while also allowing practitioners to preserve their respective appellate record, as each comes with its own benefits and drawbacks.

Under the first trend, the least number of restrictions exist on crafting a factual record for the trial court and later appellate review. But with that comes all the potential

abuse that *Hunton* discussed. The second trend places some guardrails that may prevent statements of fact from getting out of hand—but not every case is created equal. Some dispositive motions are truly simple, easily fitting into a 10-page requirement. Some are extremely complex, requiring much more than 10 pages to explain to the court what the material facts are and why they are (or are not) contested. If a trial court is inflexible on amending this limitation when appropriate, it could put practitioners in a bind when they need to submit facts beyond 10 pages to support a summary judgment motion with a complex record.

On the opposite end of the spectrum, eliminating statements of fact altogether eliminates any potential for bloat but raises a host of other potential issues. With no statements of fact and associated objections, the trial court and any appellate court is forced to wade through the factual background sections of summary judgment motions and spend an inordinate amount of time attempting to compare one sentence to another to ascertain if facts truly are disputed or not. And if a sentence does not squarely address one fact or another in the moving motion, response or reply, there is a potential trap for the unwary practitioner to be accused of waiving an objection to that fact if they fail to squarely object to it. At a minimum it invites the parties to engage on side litigation for waiver issues that did not exist before.

Finally, if all facts and objections must be preserved in the moving motion, response or reply, then practitioners likely will need to seek page extension requests in support of their summary judgment pleadings to now include facts and objections not normally raised in the body of their summary judgment motions.

While practitioners have little say in how courts impose these kinds of restrictions, there are some common tips to help you wade your way through each scenario to achieve the best preservation of your record as possible.

- Trend 1: Follow the advice set forth in *Hunton*. The discussion in that matter is well stated and serves as a good refresher for all practitioners experienced and new. Craft summary judgment statements of fact that are direct and focus on addressing the facts material to your summary judgment legal argument. Outside supporting information can be included in the fact section of the moving motion, but if it is not material, consider avoiding using a statement of fact to support it. When responding to summary judgment facts, object only to facts that are truly contested. And when crafting objections, only include the specific objection, and avoid excessive argument.
- Trend 2: If there is a specific page limitation to support or oppose a summary judgment motion, make sure you follow this requirement. Always check your court's scheduling order before starting work on a summary judgment pleading to know what rules the court is following. There is nothing worse than asking a judge to grant or deny a summary judgment motion after breaking their rules on briefing it. Again, following the advice given in *Hunton* can assist in

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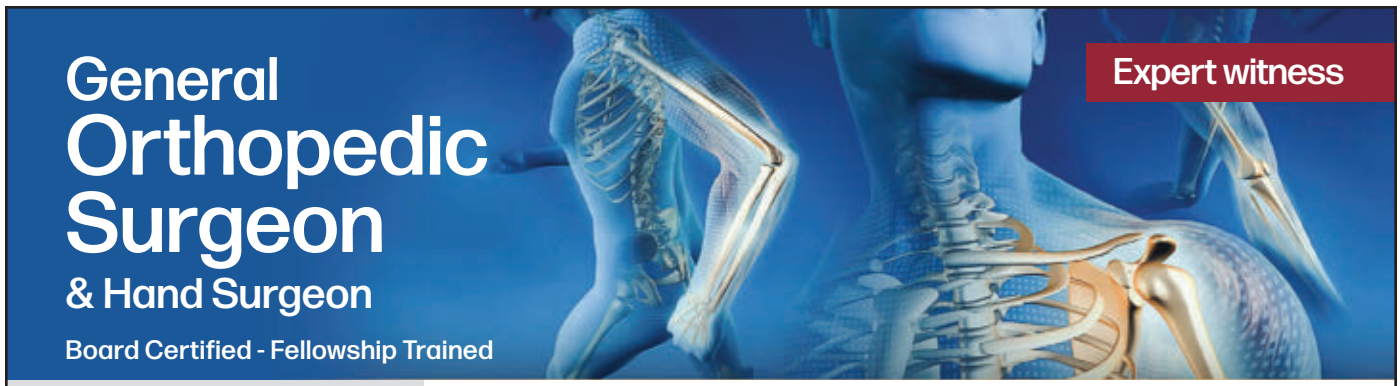
keeping statements of facts within page limits. But because not all cases are the same, if you truly need more pages to preserve your record regarding material facts or objections, request a page extension for the statement of facts in advance of filing them with the court. This practitioner has had to make this request numerous times in complex litigation, which has been approved on multiple occasions.

- Trend 3: When no separate statement of facts is permitted and you are a non-moving party, structure your summary judgment response in the same vein as you would a statement of fact objections. Make sure each material fact from the moving motion is squarely addressed in your factual background section of your opposition, dropping footnotes if a more direct attack on a specific sentence is needed. If you are a moving party, structure the reply in a way that squarely addresses any new fact raised in the response or any fact contested by the response so it is crystal clear to the trial court and any reviewing court what the material facts are and why they are not disputed (or why the opposing party's objection should be disregarded).

This issue continues to evolve as the courts and parties experiment with the best methods to judiciously brief, assess and dispose of summary judgment motions. As a result of this shifting landscape, practitioners should remain vigilant in carefully screening a judge's scheduling order and any information provided on a judge's respective website to ensure they are properly complying with any special rules imposed by a court when briefing summary judgment motions. This becomes particularly important if any appeal is taken from a summary judgment ruling and a practitioner wants the appellate court to affirm or reverse a summary judgment ruling based on the material facts properly in the record (or objected thereto).

endnotes

1. Several Arizona District Court judges have granted motions to strike a party's attempt to separately file such objections at the reply stage. *See e.g.*, *EEOC v. AutoZone Inc.*, No. 06-CV-0926-PHX-SMM, 2008 WL 2509302, at *1 (D. Ariz. June 19, 2008). To this practitioner's knowledge, however, no published Arizona state court decision has approved or rejected this practice.
2. CV-16-00539-PHX-DLR, 2018 WL 1182552, at *6 (D. Ariz. Mar. 7, 2018).
3. *See also Marceau v. Int'l Broth. of Elec. Workers*, 618 F. Supp. 2d 1127, 1141-42 (D. Ariz. 2009) (internal quotations and citation omitted) ("The parties' voluminous objections are sadly representative of a growing trend where attorneys … raise every objection imaginable without regard to whether the objections are necessary, or even useful, given the nature of summary judgment motions in general, and the facts of their cases in particular.").
4. In this practitioner's experience, this trend has largely been limited to the federal district courts within Arizona—though the author has observed at least one Arizona Superior Court Judge express interest in pursuing this practice.



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APPELLATE PRACTICE

What Are You Signaling?

The Changing Landscape of Citation Culture

BY ASHLEY CABALLERO-DALTREY

ASHLEY CABALLERO-DALTREY is an associate in the Appellate Department at Jones, Skelton & Hochuli. Before joining the firm, she clerked for Vice Chief Justice Ann Scott Timmer at the Arizona Supreme Court. Her passion for the *Bluebook* started in law school, where she served as the Editor-in-Chief of the *Arizona Law Review*.

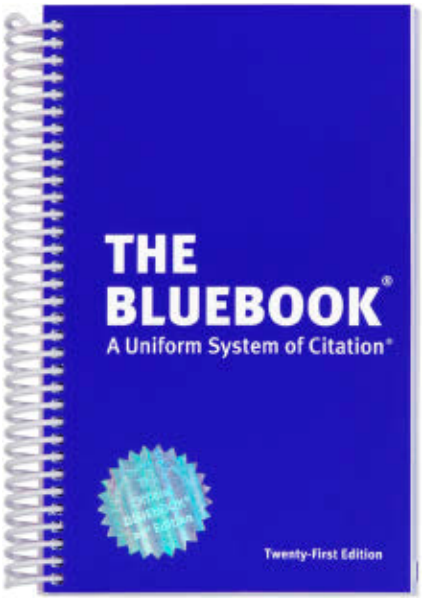
For most attorneys, the *Bluebook* is nothing more than a hassle.[1] A lengthy citation guide that seems like a trap for the unwary, full of citations to cover anything and everything a person might cite. The Twentieth Edition of the *Bluebook* boasted a full 560 pages with a robust section on citation for international sources of law. Although the most recent edition, the Twenty-First Edition,[2] consumes fewer pages, it still contains lengthy and sometimes difficult-to-parse sections for citation, a far cry from the "tiny paper pamphlet" my dad insists he used (which, incidentally, turned out to be a 1989 edition of *University of Chicago Manual of Legal Citation*).

But the reality of the *Bluebook*—and citation in general—is that it has the power to signal our preferences and our biases. We convey importance through hierarchy; parentheticals tell us what information is important; and whether adherence to form can give way to practicality can shed light on our priorities.

This article discusses the changing landscape of citation from recent changes to the *Bluebook* to instances of the legal community "going rogue," examining what these changes are truly signaling to the audience.

Bluebook Rule 1.4 Order of Authorities

Which is more important: federal courts or state courts? According to the Twentieth Edition Rule 1.4, federal courts. The seemingly innocuous Rule 1.4 explains how to order authorities within a signal, a simple question of organization. In the Twentieth Edition, this is a lengthy, multistep rule. First, you list constitutions (federal, and then state, and then foreign, and then documents from the U.N. and similar entities).[3] Second, you list statutes (in the same order; note, however, that federal rules of evidence



and procedure are more important than state-codified statutes). Third are treaties and international agreements. Fourth come cases (federal, and then state, and then foreign, and then international)—followed by a series of six additional categories of other materials. In the print edition, this singular rule takes up three entire pages.

At first blush, the organization is attractive. Here, a perfectly harmonized system has been created with each source given its own place. The *Bluebook* even allows for deviation: "If one authority or several authorities together are considerably more helpful or authoritative than the other authorities cited within a signal, they should precede the others." Otherwise, citation should follow the rule. If you are citing both the Arizona and federal Constitutions for a search and seizure issue, is one "considerably more helpful or authoritative"? Does the mere fact that you are appearing before an Arizona state court mean that the Arizona Constitution meets the exception to the rule? Or is the Arizona Constitution forever relegated to a second-tier position behind the federal Constitution? The same discussion plays out again and again across statutes, rules and cases. In every instance, this quite literally signals to the reader that the federal sources are more important. Within this hierarchy, even federal rules are given more weight that state statutes.

The Twenty-First Edition of the *Bluebook*, however, tells us something different: "Authorities should be ordered in a logical manner." The three-page hierarchy from the

Twentieth Edition has become a three-paragraph explanation: (1) separate your authorities by semicolons; (2) group them logically with the most important ones first; (3) short cites are ordered as though cited in full. Which is more important, now? Whichever matters the most for what you're trying to explain—a simple, elegant solution. More than that, however, it removes the signaling that tells us how to view the courts in our federal system. No longer do the Federal Rules of Evidence come before state-codified statutes. The hierarchy is removed.

This may seem like pure semantics. Who is really paying attention to the order of authorities, besides law clerks and law review editors? But those clerks and editors shape the citations in opinions and prestigious articles. Those opinions and articles go on to be read by a greater audience, and the hierarchy that clerks and editors have grappled with is reinforced in subtle ways. Whether or not we think about it consciously, the hierarchy of sources becomes like second nature after all that we have read and written. It informs us of the "proper" way to order these statutes and courts. Although the change to Rule 1.4 cannot alleviate the myriad complications of our federalist system, at least it returns logic to citation and removes an (often impractical) artificial and imposed hierarchy.

Bluebook B6: Shorter Reporters

Not every change to the *Bluebook* is so theoretical. There is one practical change that lawyers can take advantage of in Rule B6: Practitioners can close up abbreviations in reporter names. This means that "S. Ct." may become "S.Ct." and "F. Supp." may become "F.Supp."

Admittedly, this is a shortcut that many lawyers have probably been taking already, knowingly or unknowingly. The official rule, however, is that any abbreviations of more than two letters are not closed up with the single-letter abbreviation. The editors of the *Bluebook* responded to growing concerns that this increased word counts and offended local rules of citations in documents.[4]

Although the *Bluebook* may often be proscriptive, explaining to practitioners how citations ought to be written, the editors also (occasionally) pay attention to the needs of practitioners. What is useful for academia is not always useful for the reality of printing briefs, especially when word counters might be counting entirely different things depending on the software.[5] This new change accommodates the reality of modern practice and allows for a brief reprieve from the formalistic regime of the *Bluebook*'s rules.

The Twenty-First edition removes the signaling that tells us how to view the courts in our federal system. No longer do the Federal Rules of Evidence come before state-codified statutes. The hierarchy is removed.

Bluebook Rule 10.7.1(d) Slave Cases

Nestled into the prior and subsequent history rule, 10.7, is a subsection new to the 2021 printing of the Twenty-First Edition of the *Bluebook*: 10.7.1(d) "Slave Cases." The rule provides:

> For cases involving an enslaved person as a party, use the parenthetical "(enslaved party)." For cases involving an enslaved person as the subject of a property or other legal dispute but not named as a party to the suit, use the parenthetical "(enslaved person at issue)." For other cases involving enslaved persons, use an *adequately-descriptive* parenthetical.

The *Bluebook* provides two examples of citations for this new parenthetical: "*Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. Const. amend. XIV" and "*Wall v. Wall*, 30 Miss. 91 (1855) (enslaved person at issue)." The *Dred Scott* decision previously served as an example of a case superseded by constitutional amendment in the Twentieth edition's Rule 10.7.1(c)(iii).

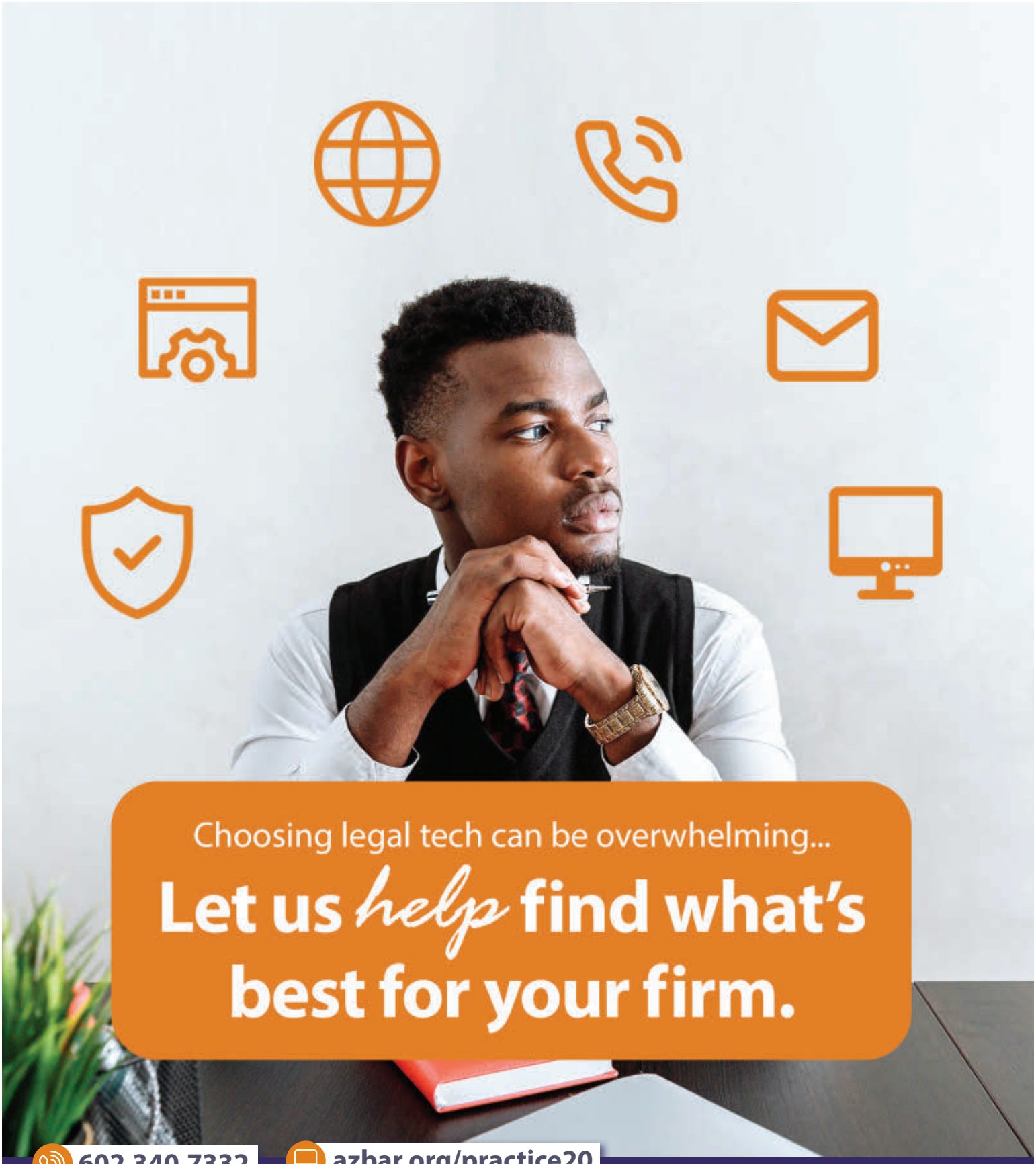
This new rule is a big undertaking for the *Bluebook*. Its editors ask us to reconsider the way cases have been cited for hundreds of years. This change apparently came about in reaction to an article by Professor Justin Simard, who argues that the legal profession needs to acknowledge what he refers to as "the law of slavery."[6]

For some, this change may seem superfluous—everyone knows that *Dred Scott* was a slave case, so why should we suddenly be required to notate it? For others, the change is an affront, institutionalizing "cancel culture."[7] The *Bluebook*, following Professor Simard, asks us to confront that history and put it up front, in the citation, before any other explanatory history. It is an acknowledgment not just of our country's history with slavery, but our *profession's* history with it.

Consider the citation of *Wall v. Wall*. Unlike *Dred Scott*, which involved an enslaved party, *Wall*'s parenthetical tells us "enslaved person at issue." This parenthetical reminds us of the way the law treated people as property. The issue in *Wall* was whether an instrument was a deed or a will. It had nothing to do with the notions of slavery, but the instrument concerned both real property and slaves. Like Rule 1.4's hierarchy, this citation tells us what is important. The *Bluebook*'s new rule reminds us that this case involved people, and it asks us to put that history up front.

Professor Simard also points out in his article that these cases are of questionable legal authority after the Thirteenth Amendment, but that they are never flagged as questionable on Westlaw or LexisNexis.[8] He argues further that because these cases blur the categories of property and person, the legal reasoning is unclear.[9] Beyond that, the cases themselves may have been political and poorly reasoned and, as he explains, ask the courts to distinguish the "'good parts of slave law from the 'bad parts.'"[10] Ultimately, "All other things being equal, a case about enslaved people serves as poorer legal support than a case about property that is still recognized as property."[11]

The far more important harm that he addresses, however, is the dignitary harm.[12] By failing to acknowledge the history of these cases, judges, lawyers and authors give them power and authority they should not have.[13]



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Acknowledging and addressing the continued role of the slave cases in legal precedent—such as through the *Bluebook*'s new rule—is one way that lawyers can start to recognize the role that our profession played in that history.[14]

Of course, the division in our country is well documented. But like Professor Simard's article, there is a growing trend of people in our profession attempting to find solutions and acknowledge the problems of the past. For example, *The Journal of Appellate Practice and Process* recently published a special issue discussing how judges might help mitigate the division in our country. In a discussion of incarceration of communities of color and the LGBTQ community, Judge Joshua D. Wayser, of the Los Angeles County Superior Court, explains, "We committed reversible error as a system by not recognizing and addressing the issue. Continuing without recognition of that error, and without consideration of how it happened and what it all means, puts our treasured system at risk."[15] California Court of Appeal Justice Therese M. Stewart also discusses the power of language in the midst of this debate and writes, "The language we use in our opinions (and in public writing and speaking) can project partiality or worse, partisanship and ideology. Our words can, in the alternative, project openness, an ability to listen, and a nonpartisan and impartial state of mind."[16] Though both authors were writing from a judicial perspective to other judges, their articles reminds us of the power of language. Even seemingly minor changes—like whether to include a parenthetical—can begin to change the way we discuss our history and shape our perspective.

(cleaned up)

The last notable citation change isn't actually a *Bluebook* rule, but it is a growing trend. The parenthetical "(cleaned up)" appears to stem from a 2017 tweet by appellate attorney Jack Metzler (@SCOTUSPlaces) who suggested use of the phrase to omit "messy quotation marks, brackets, ellipses, etc."[17] He then wrote an entire article explaining how to use it, including a proposed rule for

endnotes

1. *See, e.g.*, Hon. Richard A. Posner, *What Is Obviously Wrong With The Federal Judiciary, Yet Eminently Curable Part I*, 19 Green Bag 2D 187, 193–94 (2016) ("[T]he first thing to do is burn all copies of the *Bluebook*, in its latest edition 560 pages of rubbish, a terrible time waster for law clerks employed by judges who insist as many do that the citations in their opinions conform to the *Bluebook*; also for students at the Yale Law School who aspire to be selected for the staff of the *Yale Law Journal*—they must pass a five-hour exam on the *Bluebook*. Yet no serious reader pays attention to citation format; all the reader cares about is that the citation enable him or her to find the cited materials.").
2. Note that the *Bluebook* has two versions of the Twenty-First Edition, the 2020 and 2021 printing. Some of the changes discussed here are new to the 2021 printing.
3. Incidentally, the new edition clarifies that you may capitalize the Arizona Constitution and its parts in a textual sentence, something clear in the Twentieth Edition's examples but not its text. *Compare* Rule 8 (21st ed.) *with* Rule 8 (20th ed.).
4. The Bluebook: A Uniform System of Citation, Preface (Columbia L. Rev. Ass'n et al. eds., 21st ed. 2020); *see also How Many Words is a Citation?* Citing Legally (Sept. 25, 2020), https://citeblog.access-to-law.com/?p=1048.
5. *How Many Words is a Citation?* supra note 4.
6. Justin Simard, *Citing Slavery*, 72 Stanford L. Rev. 79 (2020); *see also* Citing Slavery Project, www.citingslavery.org/court_cases (last visited Feb. 16, 2022) (Professor Simard's project documenting slave cases and their citations).
7. *See, e.g.*, Josh Blackman, *Cancellation by Citation*, The Volokh Conspiracy (Oct. 30, 2020), https://reason.com/volokh/2020/10/30/cancellation-by-citation/, stating:

   > I think the upshot of this regime is that scholars will simply stop citing articles with a (slavery) parenthetical. Given today's culture, why would any professor willingly litter his or her footnote with the mark of original sin? Asking a research assistant to shepardize a (slavery) case could itself be a traumatic act. And this outcome will not be limited to legal scholarship. Progressive law clerks can now insist that judges should stop citing (slavery) cases. … And junior associates will refuse to embrace (slavery) cases. Partners will have to give in.

8. Simard, *supra* note 6 at 81.
9. *Id.* at 107-08.
10. *Id.* at 109.
11. *Id.*
12. *Id.* at 109-113.
13. *Id.* at 112.
14. *Id.* at 125.
15. Hon. Joshua D. Wayser, *An LGBTQ Jurist's Perspective on the Crisis in the Justice System*, 21 J. App. Prac. & Process 456, 470 (2021).
16. Hon. Therese M. Stewart, *Judicial Words Matter*, 21 J. App. Prac. & Process 433, 433 (2021).
17. *See* Jack Metzler, *Cleaning Up Quotations*, 18 J. App. Prac. & Process 144, 144 n.* (2017).
18. *See generally id.*
19. *Id.* at 160–61.
20. 141 S. Ct. 740, 748 (2021).
21. 251 Ariz. 293, 300 ¶ 18 (2021).
22. Metzler, *supra* note 17 at 155.
23. *Id.* at 154-55. The proposed text of Metzler's rule is:

   Cleaning Up Quotations

   (a) Cleaning up. When language quoted from a court decision contains material quoted from an earlier decision, the quotation may, for readability, be stripped of internal quotation marks, brackets, ellipses, internal citations, and footnote reference numbers; the original sources of quotations within the quotation need not be cited parenthetically; and capitalization may be changed without brackets. Indicate these changes parenthetically with (cleaned up). Other than the changes specified, the text of the quotation after it has been cleaned up should match the text used in the opinion cited. If the quotation is altered further, indicate the changes or omissions according to Rules 5.2 and 5.3.

   (b) Cleaning up intermediary case citations. In addition to the alterations described in Rule 5.4(a), when a quoted passage quotes a second case quoting a third case, the citation to the middle case may be omitted to show that the first court quoted the third. To indicate this change, retain the quotation marks around the material quoted from the third case and any alterations that were made to the quotation, and insert (cleaned up) before the "quoting" parenthetical citation to the third case. Indicate any alterations that were made to language quoted from the third case according to Rules 5.2 and 5.3.

24. *Compare Bluebook* Rule 10 (21st Ed.) (citation of cases) *with The University of Chicago Manual of Legal Citation* Rule 4.2 (1989 ed.) (citation of cases). The format is the same: [case name], [reporter volume] [reporter name] [first page of case], [specific page] ([court name, decision year]).

the *Bluebook* editors, which has not yet been adopted.[18] At the time of his article, several courts had already begun to use the citation.[19] In February 2021, it was used in a United States Supreme Court opinion by Justice Thomas in *Brownback v. King*.[20] Later that year, the Arizona Supreme Court followed this example in *State v. Porter*.[21]

So how do you use (cleaned up)? Metzler explains:

> Using *(cleaned up)* is simple. To quote language from an opinion that includes a quotation from another opinion, simply enclose the words of the quotation itself within a single set of double quotation marks, leaving out brackets, ellipses, internal quotation marks and citations, and footnote reference numbers. Capitalize the first letter of the quotation if it begins your sentence; make it lower case if it does not. Cite the source of the quotation as if the words were original to the court you're citing, and add *(cleaned up)* to the citation.[22]

His proposed rule lays this out in more formal terms and even provides for citations of intermediary sources, that is, when the cited case quotes a second case quoting a third case.[23] Not only does this rule make citations easier to read, it also cuts down on the word count of briefs—something the *Bluebook* has already acknowledged is an issue for practitioners with its change to B6.

Although we may not have an official rule for (cleaned up) in the current edition of the *Bluebook*, its use by both the United States and Arizona Supreme Courts signals a change in the way we cite cases. It also shows a trend away from the formalities of the *Bluebook*, creating a more accessible structure for readers and writers alike.

Conclusion

Citation is part of our daily lives in this profession, and especially so for appellate attorneys and judges. At times it may seem that citation is almost exactly the same as it ever was, aside from the lengthy (and, to some, superfluous) pages added to the *Bluebook*.[24] But as we've seen, citation changes in subtle ways to reflect—or to proscribe—values to our culture. Maybe it's time to think a little more critically about what we are signaling.

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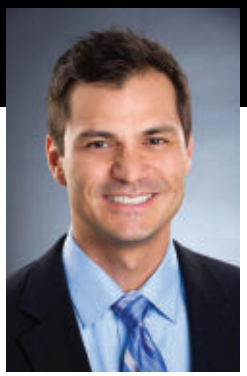

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APPELLATE PRACTICE

Why and How To Moot Cases on Appeal

BY ERIC M. FRASER & HAYLEIGH S. CRAWFORD

Justice Scalia and Bryan Garner emphatically urged lawyers to conduct moot arguments: "No preparation for oral argument is as valuable as a moot court in which you're interrogated by lawyers as familiar with your case as the court is likely to be. Nothing, absolutely nothing, is so effective in bringing to your attention issues that have not occurred to you and in revealing the flaws in your responses to issues you have been aware of."[1]

Why is the practice so popular, and how can it be used effectively? This article explores why to hold moot arguments and explains how to conduct an effective one, from the perspective of both the arguing attorney and the other attorneys helping with the moot.

Why to Conduct a Moot Argument

Although "moot argument" essentially means a practice argument, it is much more than a dress rehearsal. For experienced and inexperienced lawyers alike, an effective moot helps to avoid being caught unprepared for a question at oral argument. A moot court will help to reveal weaknesses in the case. And it will help develop responses to those weaknesses and the particularly tough questions the judges might ask. It also helps practice the flow of an argument, the opening and closing points, major talking points, and the choreography of pivoting among questions, answers and argument.

For those with less oral argument experience, a moot also provides an opportunity to practice delivering argument and responding to questions, work out vocal tics, and get comfortable with the whole process. It's a safe place to practice and refine one's argument, both in substance and style.

How to Organize a Moot Argument

An effective moot requires more than just hopping into a conference room with the other lawyers on the case. To be most useful, you'll want to assemble the right team and make sure that everyone prepares.

Choosing the right panel

The first step in preparing an effective moot is assembling a good panel of mock judges. We typically have three lawyers in most moots, or at least five lawyers for arguments in front of larger panels of judges.

The best panels have a mix of lawyers who possess different perspectives, such as fresh eyes, deep or unique knowledge about the case or issues, or significant appellate experience.

ERIC M. FRASER and **HAYLEIGH S. CRAWFORD** are partners at Osborn Maledon. Their practices focus on civil appeals and consulting with trial lawyers on appellate issues and major motions.

We always include at least one person **new to the case**. A person new to the case will be reading the briefs and reviewing the record cold, just like the appellate judges and clerks, thereby bringing a more realistic and unbiased perspective. Recycling the team that wrote the briefs risks creating an echo chamber with knowledge about the case beyond what the panel will have.

Consider also finding a **recent appellate law clerk**, who just spent a year working closely with a judge. A recent clerk will have fresh experience, knowing what goes into a bench memo and how the clerks and judges might view the case.

Other candidates are the **other lawyers who worked on the briefing**, particularly if one of them will also come to the real argument, **lawyers who recently argued** before a judge or judges on your panel, or **lawyers with particular expertise** on the issues.

For a less-experienced lawyer, **a seasoned appellate lawyer** who knows the ropes can offer tips on the courtroom, insights into the judges, and help refine the arguments. Most appellate lawyers also have experience running moot arguments and can help less-experienced lawyers get the most value out of the exercise.

In cases involving lengthy or complicated records, asking **trial counsel** to attend can be helpful because of their familiarity with the record and knowledge about ambiguities in the case. Trial counsel can sometimes provide helpful context about the current statute of the dispute, which may inform your strategy and framing at oral argument. In addition, the **client** (particularly in-house counsel) might want to come.

Circulating materials

After organizing your panel, the next step is to provide them with the key materials and instructions.

Circulate the key materials to the panel at least a week ahead of time. We circulate all appellate briefs and copies of the appendix or excerpts of record submitted to the appellate court. At a minimum, send the decision on review and other crucial record items. If the rest of the record is easily available electronically, we advise letting the panel members know how to access it (e.g., on the firm's network or via PACER link). We also send details about the argument: the argument date, the panel composition (if known), and who will argue on the other side.

When appropriate, consider sharing an overview of how you like to run your moots with the panel ahead of time. For inexperienced participants, we also explain our expectations for moot participants, such as whether to prepare a written list of questions.

Time and place

The best moot arguments simulate the courtroom experience as closely as possible. Find a large conference room with a lectern (or call in a favor if you have access to a mock courtroom).

There's a sweet spot for when to hold the moot. We aim to schedule the moot for when you will have at least 80 percent of your preparation done, but with enough time to adjust your arguments. Two or three business days before the argument works well. Any earlier and you risk not being prepared well enough to get the most value from the moot. Any later and you might not have enough time to adjust your approach before the real argument. We also try to hold the moot around the same time of day as the real argument. Most people operate differently at 9 a.m. than they do at 2 p.m., so we do morning moots for morning arguments and vice versa.

How to Prepare To Moot Someone

Mooting someone is a big responsibility. Quickly skimming the briefs and asking the obvious questions doesn't help much. Be realistic—if that's all you will have time for, it's better to decline the invitation.

Preparing well doesn't have to take much time, but it does require serious focused

thought. Read the briefs actively and skeptically. Every time you get confused, spot an ambiguity, or have a question, make a note in the margin (in hard copies or the PDFs). Our copies end up covered with highlighted passages, question marks, stars, notes and questions.

Different lawyers read the briefs differently. Some lawyers prefer to read the briefing straight through in chronological order. Others recommend taking them in reverse order—reply brief, answering brief, and then opening brief. Some analyze one issue at a time, by reading how the opening brief, answering brief, and reply brief handle one issue before moving on to the next.

No matter what approach you take, the goal is to identify the core dispute between the parties for each issue. In other words, after all the briefing is done, what do the parties really disagree about? What are they asking the court to resolve, and how will the court write its decision? For key disputes about facts or law, we check the record or pull up the case or statute while analyzing that issue.

As part of this process, write a list of questions. We typically end up with a dozen or more questions. It's a good idea to write down questions you had initially, even if you later resolve them yourself, because they can help identify ambiguities or weaknesses in the briefing that could come up at argument. Not all questions are created equal, of course. We recommend flagging he best and toughest questions to make sure they're addressed during the moot.

In many appeals, this doesn't take too much time. It might take an hour per brief, another hour for analyzing the key record items and cases, and half an hour for the list of questions. For a typical case, that's under five hours. You don't need to (and generally shouldn't) look at every record item or every case. For most run-of-the-mill appeals, we end up looking at fewer than five record items and fewer than five cases for the whole appeal. The key cases and documents tend to jump out.

How To Run the Moot Argument

Preferences for running moot arguments vary wildly. Here's one system that we find works well.

Treat it like the real thing at first. We begin the moot argument as if it were the actual argument. Everyone stays in character. The presenting attorney addresses the panelists as if they were judges. We even include the formalities, such as introducing the lawyers and clients, and reserving time for rebuttal. This helps to shake out mispronunciations and other issues.

Minimize mid-moot brainstorming. We think it's best not to brainstorm before or during the argument (no time-outs). There's plenty of time to brainstorm afterward. The person taking charge calls the panel to order and starts a stopwatch. After letting the presenting attorney speak a bit, the panelists jump in with questions.

Vary the questions. The point of the moot is to ask the meaty questions that cut to the heart of the argument and surface the weakest points of the case to help develop the best answers and the best strategy. But we think it's also wise to include questions about factual disputes, hypotheticals about the consequences of a decision, and ambiguities in the briefing. The best moots have a mix of tough questions and softballs. The moot should reflect the wide range of question types that different judges ask.

Drill down. If the lawyer stumbles, we advise asking a couple of follow-up questions. This isn't being cruel; it's giving the lawyer practice on how to gracefully deal with a tough situation at argument. Better to prac-

Checklists

Arrange moot panel (3-5 judges)

- ✓ Lawyer new to the case
- ✓ Recent appellate law clerk
- ✓ Experienced appellate lawyer
- ✓ Other lawyer with relevant experience
- ✓ Trial counsel
- ✓ In-house counsel

Schedule moot argument

- ✓ Circulate materials (briefing + record) to participants 1 week ahead
- ✓ Reserve a conference room with lectern, or mock courtroom if available
- ✓ Conduct moot argument about 2-3 days before real argument

Panelist preparation

- ✓ Read briefs
- ✓ Identify the parties' core dispute for each legal issue, plus any important fact disputes
- ✓ Write list of questions covering tough points, ambiguities, etc.

At the moot

- ✓ Assign someone to start moot and keep time
- ✓ Save brainstorming for afterwards; no time-outs
- ✓ Flag end of argument time
- ✓ Stop after about double the allotted argument time
- ✓ Take notes during argument
  - Good and bad answers
  - Proposed alternative answers or framing
  - Unaddressed or unclear points

Debriefing

- ✓ Provide feedback on opening and closing remarks
- ✓ Flag good answers and bad answers; workshop proposed alternatives
- ✓ Identify 2-3 must-make points
- ✓ Give the arguing lawyer list of questions and notes

tice how to recover now, in a safe space, rather than learning for the first time at the real argument. At some point, enough is enough; it shouldn't become torture. During the moot, participants can write notes about weaknesses, stumbles and advice for better answers.

Watch the clock. We don't let the "dress rehearsal" part linger on too long. For a 20-minute argument, we announce the 20-minute mark and cut things off after 40 minutes. Because the moot is artificial and designed for practice, asking more questions rather than strictly following the allotted time for argument can be helpful. But going too long has diminishing benefits.

Give feedback and brainstorm. When the time is up, it's time for feedback. Encouraging but honest feedback is best. The arguing lawyer should hear the good, the bad and the ugly. This involves discussing the most important points to convey during the argument, how to begin the argument, and how to close it. We try to identify distracting filler words. We talk about the good answers and what made them good. We brainstorm together on how to answer the toughest questions. We also want to discuss any important questions on anyone's list that didn't get asked. This feedback/brainstorming part of the moot frequently takes longer than the "dress rehearsal" part.

Hand over the documents. After the moot, we always have the panelists hand over their prepared list of questions and their notes from the moot. The comprehensive list of questions gives the lawyer one more tool for preparation. We always run through the lists of questions the night before the argument as last-minute practice.

Justifying the Cost of a Moot Argument

Moots are important. Even the most experienced Supreme Court advocates moot important arguments. For less-experienced lawyers, it provides valuable practice. For more seasoned lawyers, a moot can give valuable insights into the best ways to frame the case and address the central issues. It's the last chance to identify weaknesses in the case. It is well worth the money.

If costs are a concern, even a streamlined moot can help. Cutting the panel down to one or two lawyers, using junior lawyers with lower rates, or using the client's in-house lawyers can help minimize costs.

In our view, skipping a moot is penny-wise, pound-foolish. A moot argument is a drop in the bucket in the grand scheme of an appeal, but it provides tremendous value.

Conclusion

Practice makes perfect, and a well-run moot argument adds tremendous value. Taking the time to think carefully about organizing a moot, selecting the panel, preparing for the moot, and running the moot will likely pay dividends by leading to better advocacy at argument.

endnotes

1. Antonin Scalia & Bryan A. Garner, Making Your Case: The Art of Persuading Judges 158 (2008).

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APPELLATE PRACTICE

Apprenticeship in the Halls

BY VANESSA KUBOTA

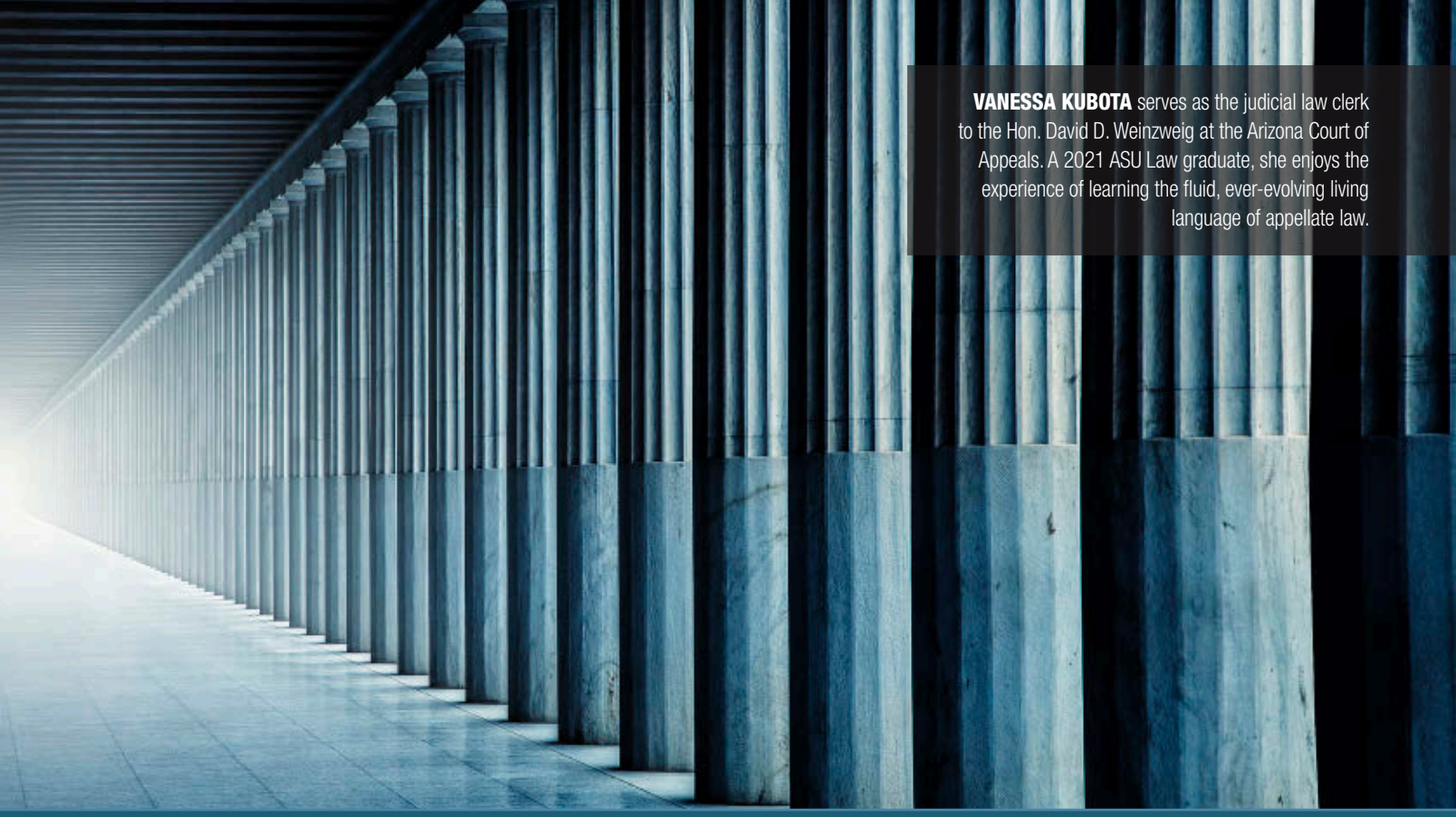
I was a teenager when I became the ad hoc interpreter for Lama Sang, a charismatic lama from the outskirts of Eastern Tibet. Worshipped as a living Buddha throughout much of Central Asia, this 86-year-old sage was disarmingly authentic and unpretentious. He regularly toured the United States with his own interpreter, but that interpreter missed the flight, leaving me as his mouthpiece to dispense ancient wisdom to cowboys and corporate executives alike. He spoke not a word of English. And being from a far-flung region of Tibet, his thick nomadic dialect was incomprehensible to mainland Tibetans.

I still remember the first event, seated before a packed house of eager listeners who expected me to translate this ancient and often unintelligible language into clear and concise English. But I struggled to understand Lama Sang's obscure mountain dialect. Although fluent in Tibetan, I could only pick out fragments and phrases from a sea of unfamiliar sounds. My previous knowledge of Tibetan did little for me now, and I could feel the hot flush of humiliation rising on my cheeks. The lama, sensing my panic, chuckled at me—gently of course. He repeated himself—this time using more generic terms. Chastened by the realization that I was not fully prepared, I summoned what I knew and proceeded to deliver a competent if not particularly elegant translation. By relying on the lama for clarification and drawing from my instinct and training, I could comprehend and convey the essence of his words.

My experience in these short months serving as an appellate law clerk has not been so different. Thrust into the appellate lexicon, I am reminded of the growing pains of language immersion, and the sudden epiphanies of comprehension that come when we least expect them.

Clerking is an immersive apprenticeship—shadowing the teacher and emulating the model, while learning from every interaction. Fresh out of law school, my fellow law clerks and I passed the bar and became lawyers within months of beginning our posts in chambers. It felt strange to be reviewing a seasoned trial court's decision for error when we had barely learned how to proverbially tie our legal shoes. But clerking for an appellate judge requires us to renounce the fear of not knowing the "right answer," embracing the challenge to learn and improve from docket to docket.

And sure enough, under the mentorship of our judges and the senior law clerks, we learn to trust legal instincts we didn't know we had. Clerking for an appellate judge means honoring the law and its processes and remaining impartial judicial actors even when the legally sound decision is unpleasant. That said, being impartial does not mean robotically regurgitating precedent without regard for the nuances of the case. As one fellow clerk remarked, sometimes we get that gut feeling that something is unjust, requiring a second look. Our judges teach us to remain perpetually curious.



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# of Justice The Joy of the Appellate Clerkship

Since I may be alone in likening the experience of an appellate clerkship to interpreting for an octogenarian Buddhist lama, I interviewed my colleagues for their take, surveying their experiences in the chambers of sharp and intellectually honest judges. Though by no means exhaustive, I hope this brief synopsis of our appellate clerkship experience (so far) will shed some light on the profound enigmatic world of the Court of Appeals.

The Beginning

In the first week, the new law clerks participate in a lengthy training process, replete with lectures on various topics of appellate court practice, such as jurisdiction, standards of review, writing style, citation conventions, and of course, judicial ethics. We hear from the judges and the senior law clerks and staff attorneys. At the court we are fortunate to have a wealth of experts on every aspect of appellate practice, and we are encouraged and invited to ask questions—not only of our judges, but of the senior law clerks, the staff attorneys who specialize in many different areas of law, and the judicial assistants.

We soon received our first assignments in chambers and authored our first pre-conference draft decisions. My co-clerk and I were fortunate: Our judge patiently sat down with us and went line by line through our drafts, showing us our strengths and weaknesses, making suggestions, and inviting questions and feedback. Like other clerks I have spoken to, we expected our drafts would be "mutilat[ed]" and "vandalized" by the ruthless red pens of our judges.[1] Instead, the process was far more collaborative—learning from the judges while recognizing patterns of corrections and places to improve.

Like those terrifying first few moments interpreting for Lama Sang, I spent my first few months in chambers convinced that I was incompetent. There is some consolation in knowing that I was not alone in this, and my colleagues and I exchanged stories about particularly obtuse moments. But I found solace in the advice of my judge and the senior law clerks, who reminded me that it was a process and not a gap year of self-doubt, and to embrace the chance for precipitous growth as a writer, lawyer, thinker and human being. And so, I began to relax, learning to approach every case with discernment, honesty and care.

Panels, Conference, Oral Argument

Judges on the Court of Appeals sit in panels of three and change panels every six months. Each panel conferences cases almost every week. Each clerk is assigned a share of cases from the docket, spanning all genres, categories and levels of complexity. Some judges allow their clerks to draft special action decisions, while others write these themselves. Law clerks are often tasked with finding hidden details in the record, and an intricate knowledge of the lifespan of the case is imperative.

One special attribute of the Court of Appeals is its practice of letting law clerks participate in conferences and present a draft-decision to the panel. The law clerks watch and listen as the judges discuss and

deliberate. When the panel agrees, not much need be said. But when there are questions among the judges, conference becomes lively. Even when the judges on the panel seem to have made up their minds, they approach the conference with intellectual honesty, openness, and discernment. And even when there is firm disagreement, it is couched in mutual respect, honoring the other judges with wise and collegial banter.

Oral argument is the time for judges to ask questions and pressure-test theories. It might change the judges' views—and it might not. The law clerks take turns serving as bailiffs. The first time I struck the gavel to open proceedings was both exhilarating and terrifying. Although not always possible with the pandemic, in-person arguments are an indescribable experience. There is something magical about watching the arguments up close after we have studied the cases and discussed them with our judges. In this way, we are immersed in every facet of the appellate court experience, absorbing appellate practice as if through osmosis.

From my limited experience, the trial court and the appellate court are different animals. At trial, advocates can play on fact-finders' sympathies, modify tone and diction to capitalize on emotion. That does not translate on the pages of a reporter's transcript. At the appellate court, there is no presentation of evidence; everyone must rely on the trial court record. The advocates must capitalize on legal principles and legal errors, showing a willingness to concede where concession is necessary.

The Secret

Indeed, there is something slightly mystical and secret about the judicial process—but now that I have seen a bit of what goes on, I can say with some certitude that judges are not reclusive loners who discourage debate and dissent. Chambers is a place for intellectual curiosity, collaboration and dialogue. There is constant brainstorming. Judges sometimes have their clerks argue the case in front of them to help unravel a complicated issue. Our judge once asked us to argue opposite sides of a conceptually nebulous case before him, peppering my co-clerk and me with difficult questions until we all knew which side had won.

This is the appellate court process. We study the briefs, immerse ourselves in the record, and apply the law. We discuss how the standard of review limits our reach or narrows our perspective. By working closely with our mentors in the law, we learn how to think more clearly, how to write simply, concisely and without artifice, how to present our draft before the panel without talking too long or putting anyone to sleep, and how to listen critically to arguments without being led by the seductive sirens of rhetoric.

In the appellate courtroom, we witness excellent attorneys make arguments that are even, disciplined, tethered to reason, buttressed by authority, rooted in law, yet pliant enough to yield gracefully to the curves and arches of the judges' questioning. This is a treat to watch, especially for us newer law clerks who have never before argued a case. Oral argument is an adventure in problem-solving. Some lawyers fight the judges' questioning or try to evade the tougher is-

sues. But the judges are trying to reach an intellectually honest result and will likely increase the pressure to shed light on any inconsistencies. While many cases are decided on the briefing, sometimes a case can go both ways, and the difference between an affirm and a reverse or how a decision is worded turns on a forthright, simple statement at oral argument, or, conversely, a single slip of the tongue from an overzealous advocate.

Like my peers, I already have developed preferences. We enjoy reading clean and engaging briefs that don't belabor the obvious. Our judge will often point these out to us as examples of stellar appellate advocacy. We learn to appreciate straightforward, pithy briefs that hold the reader's attention and focus the issues. This is not to say that briefs that do not meet that standard will lose the case. Far from it. If the trial court record was made, the side with the law in its favor will win, regardless of how much the style of the brief helps (or hurts) the cause. One fellow clerk recalls a pro per inmate's handwritten motion for reconsideration that sparked pages of memorandums and hours of intense debate over the merits.

The law is serious, and the courtroom is saturnine. But there is a healthy dose of ebullience and good fun behind the curtain. Every day, the halls of justice resound with laughter. Judge Howe sends us original haikus each month, detailing the Highest Court's latest decisions to grant certiorari. And yes, the judges make jokes. The joy of working at the appellate court is palpable among all members of the judicial staff. Creativity is welcomed within the strictures of law and reason.

Before completing this article, I asked my colleagues to sum up their appellate clerkship experience in one word. More than one person chose the word "humbling." Others chose "impactful," "compelling," "educational," "absorbing," and "all-encompassing." My good friend and colleague Allison Martin, a judicial law clerk at the Arizona Supreme Court, said it best when she shared, "It is a privilege to clerk because you have the opportunity to glean wisdom from some of the best legal minds in the state. It is also humbling to read about the people whose lives are deeply affected by the decisions this Court makes. It brings a certain weightiness to the job."

Working closely with hard-working, intellectually honest appellate court judges on difficult issues and monumental cases is an immersive learning experience that mirrors the sacred relationship between master and apprentice celebrated throughout the ages. And like Lama Sang, who kindly and patiently guided his young and nervous translator from insecurity to confidence, the judges continue to envelop their clerks with inexhaustible patience, tutelage and enthusiasm for teaching the rule of law, preserving the unbroken lineage of jurisprudence.

endnotes

1. *See* Stephen L. Wasby, *Clerking for an Appellate Judge: A Close Look*, 5 Seton Hall Cir. Rev. 19, 25, n. 20 (2008).

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APPELLATE PRACTICE

BY MELINA BRILL & HON. PAUL J. McMURDIE

Family Court Appeals Where Are We Now?

In family law cases, proceedings often continue in the superior court even after a decree is entered. This results in unusual appellate jurisdictional issues that differ from civil appeals. Along with the Arizona Revised Statutes, a recent opinion interpreting the 2019 amendments to the Arizona Rules of Family Law Procedure and previous decisions has led to even more complicated jurisdictional issues. This article attempts to identify how we got here, the problems with the current rules, and offers guidance to the unwary who handle family appeals.

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Civil Cases vs. Family Court Cases

In 2006, the Supreme Court implemented the Arizona Rules of Family Law Procedure ("Family Rules"). Until that point, family court cases were governed by the Arizona Rules of Civil Procedure ("Civil Rules"). The Civil Rules provided a basis for many Family Rules and influenced their interpretation.[1]

A civil case begins by filing a complaint and concludes upon entry of judgment and resolution of any post-judgment motion. A family court case is started by filing a dissolution or separation petition or petition to establish parentage, legal decision-making, parenting time, and child support. Everything before the entry of a decree or parentage judgment is a pre-decree proceeding. Thus, the rulings in pre-decree proceedings are generally reviewable upon entry of the final decree or parentage judgment.[2]

Unlike civil cases, family court cases may continue indefinitely. After the entry of a decree or judgment, either parent or a non-parent[3] may file a post-judgment proceeding.[4] Such proceedings include, but are not limited to, a petition to modify or enforce provisions in the decree or judgment. There is no limit on the number of post-judgment proceedings a party may file.

Family Law Rule 78(b)

When enacted in 2006, Family Rule 78(b) provided:

> When more than one claim for relief is presented in an action, … or when multiple parties are involved, the court may direct the entry of final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

Unlike civil cases, family court cases may continue indefinitely. There is no limit on the number of post-judgment proceedings a party may file.

This rule was nearly identical to Civil Rule 54(b). It enabled the superior court to certify an order as immediately appealable despite remaining claims such as child support, parenting time, and attorney fees. Family Rule 78(b) was applied to both decrees and judgments and orders ruling on post-judgment petitions.[5]

The 2019 Rule Amendments

Effective January 1, 2019, the Supreme Court substantially amended the Family Rules. One key change was the addition of Family Rule 78(c). Modeled on Civil Rule 54(c), Family Rule 78(c) provides, "A judgment as to all claims, issues, and parties is not final unless the judgment recites that no further matters remain pending and that the judgment is entered under Rule 78(c)."

As noted above, litigation may continue for years, and matters remain pending post-judgment.

The Court also modified Family Rule 83. Previously, Family Rule 83, based on Civil Rule 59, was titled "Motion for New Trial" and listed six grounds for a superior court to vacate its decision and grant a new trial. A Family Rule 83 motion had to be filed within 15 days after entry of a judgment.

Under the 2019 amendment, the title of Family Rule 83 no longer references a "motion for a new trial." Instead, Family Rule 83 is now titled "Altering or Amending a Judgment" and lists eight grounds on which a superior court may alter or amend its judgment. Of significance, the time to file a Family Rule 83 motion was extended. Family Rule 83(c)(1) provides, "A motion under this rule must be filed not later than 25 days after the entry of judgment under Rule 78(b) or (c)."

Previously, a Family Rule 83 motion could be directed to a "judgment," which included "an order from which an appeal lies."[6] In addition, Family Rule 83(c)(2) now provides, "Within 15 days of the filing of a motion under this rule, the court must either summarily deny the motion or set a

deadline for a response. … The court may not grant a motion without providing the non-moving party an opportunity to file a response."

Before that amendment, Family Rule 83 was governed by standard motion practice.

Another notable 2019 amendment was Family Rule 78(e)(3), which addresses the time for a determination of attorney fees, costs and expenses, and provides:

> The determination of attorney fees, costs, and expenses must be included in the judgment or as otherwise ordered by the court. If a party asserts a claim for attorney fees, costs, and expenses under subpart (e)(1), and a judgment is entered under this rule that omits a ruling on the claim, the claim is deemed denied unless the party files a Rule 83 motion within 15 days after entry of the judgment.

Under previous Family Rule 78(d)(2), attorney fees claims had to be "included with a decision on the merits of a case or as otherwise ordered by the court."

Yee v. Yee

The recent opinion *Yee v. Yee*,[7] addresses jurisdictional issues in post-judgment appeals. *Yee* explains that a ruling on a post-judgment petition is appealable as a special order after final judgment under A.R.S. § 12-2101(A)(2) if all issues in the petition are resolved.[8] This case held that Family Rule 78 language was not required for post-judgment rulings to be appealable.[9]

The *Yee* court found that Family Rule 78 no longer applies to post-judgment orders under the amended rules, and a Family Rule 83 motion may not be directed to such an order.[10] The court noted the restriction on filing a Family Rule 83 motion resulted from the 2019 amendment requiring such a motion to be directed to a Family Rule 78(b) or (c) judgment. This is distinguishable from a civil proceeding with a Civil Rule 59 motion, directed to a post-judgment order.[11] As explained in *Yee,* the text of Family Rule 83 required the motion to be filed "after the entry of judgment under Rule 78(b) or (c)" while Civil Rule 59 contained no such restriction.[12]

Yee deviates from previous cases that determined the prior Family Rule 78(b) applied to post-judgment orders.[13] Before *Yee*, Family Rule 83 motions were considered a time-extending motion to post-judgment orders.

Parties continue to file Family Rule 83 motions directed to post-judgment orders believing the filing of such a motion extends the time to appeal. It does not.

Current Issues

Many jurisdictional issues are arising because of *Yee* and the 2019 Family Rule amendments.

The first issue is when the superior court rules on a post-judgment petition that does not resolve all issues but includes Family Rule 78(b) finality language. According to *Yee,* all issues in the post-decree petition must be resolved before a notice of appeal is filed. If an issue remains pending in the petition, the post-judgment order is not appealable, and a notice of appeal from that ruling will be considered premature and a nullity despite the court's inclusion of Family Rule 78(b) language.

Second, parties continue to file Family Rule 83 motions directed to post-judgment orders believing the filing of such a motion extends the time to appeal. Without *Yee*, Family Rule 83 conveys a motion to alter or amend may be filed after a post-judgment order that includes Family Rule 78 language. Nevertheless, because a post-judgment Family Rule 83 motion is improper, as explained in *Yee*, it does not extend the time to file a notice of appeal, creating a trap for unwary.

Third, three years after enactment, Family Rule 78(c) is not always used appropriately. Often, Family Rule 78(c) finality language is included in a decree or judgment when an issue remains pending. If a party appeals from the decree and the pending issue is resolved, the party must file a notice of appeal from the final order as the original notice of appeal is premature and a nullity.[14] In addition, the later order must include Family Law Rule 78(c) language, as the original language in the decree or judgment was inaccurate.[15]

Fourth, unresolved is the question of whether Family Rule 78(c) language is inaccurate if a ruling on attorney fees and costs is omitted from a decree or judgment. The following hypothetical illustrates the issue.

The superior court enters a dissolution decree that includes Rule 78(c) finality language but does not mention attorney fees, although that issue was properly before that court. One party files a notice of appeal 14-days later. The other party files a Family Rule 83 motion the next day, asserting the Family Rule 78(c) judgment did not adjudicate the attorney fees issues.

Was the Family Rule 78(c) language in the decree correct? The answer depends on the outcome of the Family Rule 83 motion. The superior court might grant the motion, award attorney fees, and include Family Rule 78(c) language in such order. If the appealing party does not file a new notice of appeal from the attorney fees order, the appeal will likely be dismissed as the first notice of appeal was premature and a nullity.[16]

If the superior court denies the Rule 83 motion, whether the appeal was timely depends on the reason for denial. For example, the ruling might clarify the decree was intended to deny the claim for attorney fees. Or the decision might show the court neglected to include an order on attorney fees, but after considering the relevant factors, the claim is denied. Or the motion may be rejected without explanation. Of these three potential rulings, it seems like the second

ruling and potentially the third may require Family Rule 78(c) language. In any event, the ruling on the Family Rule 83 motion should clarify whether the decree correctly included Family Rule 78(c) language. Such a ruling may assist a party who is unsure when to file a notice of appeal.[17]

Other Jurisdictional Issues

Although not the result of a rule change or *Yee*, another appellate issue concerns the superior court's jurisdiction to address and rule on matters while an appeal is pending. The superior court retains jurisdiction over matters in furtherance of the appeal that are not the subject matter of the appeal.[18] But the superior court cannot "negate the decision in a pending appeal or frustrate the appeal process."[19]

In a family court case, it is unclear how these parameters factor into a petition to modify during an appeal. For example, an appellant appeals from a decree ruling on parenting time. Before a decision on appeal is issued, there are changed circumstances that the appellant believes warrant modifying parenting time in the decree. Yet it is unclear whether the superior court has jurisdiction to modify parenting time because parenting time is an issue on appeal. According to *O'Hair,* the superior court lacks jurisdiction to rule on such matters while the appeal is pending. Does this make a new parenting time order void?

Under A.R.S. § 25-411, the superior court may modify a parenting time order "whenever modification would serve the best interest of the child" and when "the child's present environment may seriously endanger the child's physical, mental, moral or emotional health."[20] If there are changed circumstances that warrant a court's intervention to address parenting time immediately, it seems illogical to require a party to first seek a stay from the Court of Appeals to allow the superior court to rule. All the same, based on existing law, the extent of the superior court's jurisdiction in such a situation is unclear.

Proposed Solutions

More rule amendments may be necessary to clear up some of these jurisdictional issues.[21] One suggestion is for the rules to specify when post-judgment orders are appealable. Including such a rule can hopefully guide people on the correct time to file a notice of appeal and lead to fewer premature notices of appeal.

Amending Family Rule 83 may also prove helpful. The superior court should address or correct an alleged error before such an issue is presented to the Court of Appeals. Indeed, an appeal may be unnecessary if the superior court is presented with a purported mistake via a Family Rule 83 motion first. To allow such a procedure in a post-judgment action, an amendment to Family Rule 83 is recommended to remove the requirement that such motion be directed to a Family Rule 78(b) or (c) judgment.

It is always helpful to notify the Court of Appeals of pending matters in the superior court that may affect or be relevant to the appeal. This includes a motion related to the ruling being appealed or a petition to modify. If the Court of Appeals is notified of a pending matter, there is a greater possibility that any potential jurisdiction issues will be identified and corrected, if feasible.

Keeping up to date on rule changes and opinions in family court matters helps pursue and defend family court appeals. The issues identified in this article are not exhaustive of all issues facing parties and practitioners in family court actions and appeals. Nevertheless, it is hoped that by identifying some current issues coupled with potential rule changes, jurisdictional issues in appeals in family court actions may decrease.

endnotes

1. *In re Marriage of Kassa*, 231 Ariz. 592, 593 n.1, ¶ 5 (Ct. App. 2013).
2. Family Rule 78(a)(1) and 91(a)(1).
3. A non-parent third party such as a grandparent also may file a proceeding by petitioning for visitation. A.R.S. § 25-409.
4. Family Rule 91 through Rules 91.1 to 91.6.
5. *See, e.g.*, *Williams v. Williams,* 228 Ariz. 160, 167 n.8, ¶ 29 (App. 2011) (noting the superior court may allow an immediate appeal of an order that does not resolve all issues in a post-decree petition by including a determination of finality under Rule 78(b)); accord *In re Marriage of Kassa*, 231 Ariz. at 594, ¶ 6.
6. Family Rule 78(a)(1).
7. 251 Ariz. 71 (Ct. App. 2021).
8. *Id*. at 76, ¶¶ 13-14.
9. *Id*. at ¶ 14.
10. *Id*. at 77, ¶ 19 ("a Rule 83 motion challenging a post-decree order or any ruling other than a Rule 78(b) or (c) judgment is improper and can provide no basis for relief").
11. *Id*. at ¶ 20; *see Desmond v. J.W. Hancock Enters. Inc.,* 123 Ariz. 474 (1979), and *Tripati v. Forwith*, 223 Ariz. 81 (Ct. App. 2009).
12. *Compare* Family Rule 83(c)(1) *with* Civil Rule 59(b)(1).
13. *See, e.g.*, *Williams*, 228 Ariz. at 167 n.8 ¶ 29; *Natale v. Natale*, 234 Ariz. 507, 509 (Ct. App. 2014); *Ochoa v. Bojorquez*, 245 Ariz. 535, 536, ¶¶ 4-5 (Ct. App. 2018).
14. *Camasura v. Camasura*, 238 Ariz. 179, 182-83, ¶¶ 9-16 (Ct. App. 2015).
15. *Madrid v. Avalon Care Center-Chandler LLC,* 236 Ariz. 221, 224-25, ¶ 11 (Ct. App. 2014).
16. *Ghadimi v. Soraya*, 230 Ariz. 621, 622-24, ¶ ¶ 10-14 (Ct. App. 2012); *Camasura,* 238 Ariz. at 179.
17. Family Rules 78(e)(3) and 83(c)(1) conflict because of the differing time frames for filing a Family Rule 83 motion. Family Rule 78(e)(3) provides that a Family Rule 83 motion must be filed within 15 days after a judgment if an attorney fees, costs, or expenses claim is omitted from the judgment. Family Rule 83(c)(1), however, provides a Rule 83 motion must be filed "not later than 25 days after entry of judgment."
18. *Burkhardt v. Burkhardt,* 109 Ariz. 419, 421 (1973); *see also O'Hair v. O'Hair,* 109 Ariz. 236, 241-42 (Ariz. 1973) (family court retains jurisdiction over "provisions for the care, custody and maintenance of" children when such is not the subject matter of the appeal).
19. *State v. O'Connor,* 171 Ariz. 19, 22 (Ct. App. 1992).
20. A.R.S. § 25-411(A), (J).
21. A rule change petition is being submitted to alert the Supreme Court to some of these issues.

APPELLATE PRACTICE

Must Attorneys' Fees Be Included in the Supersedeas Bond Amounts?

Analyzing the Conflict Between A.R.S. § 12-2108 and ARCAP 7

BY TIMOTHY J. BERG, EMILY WARD & BRADLEY J. PEW

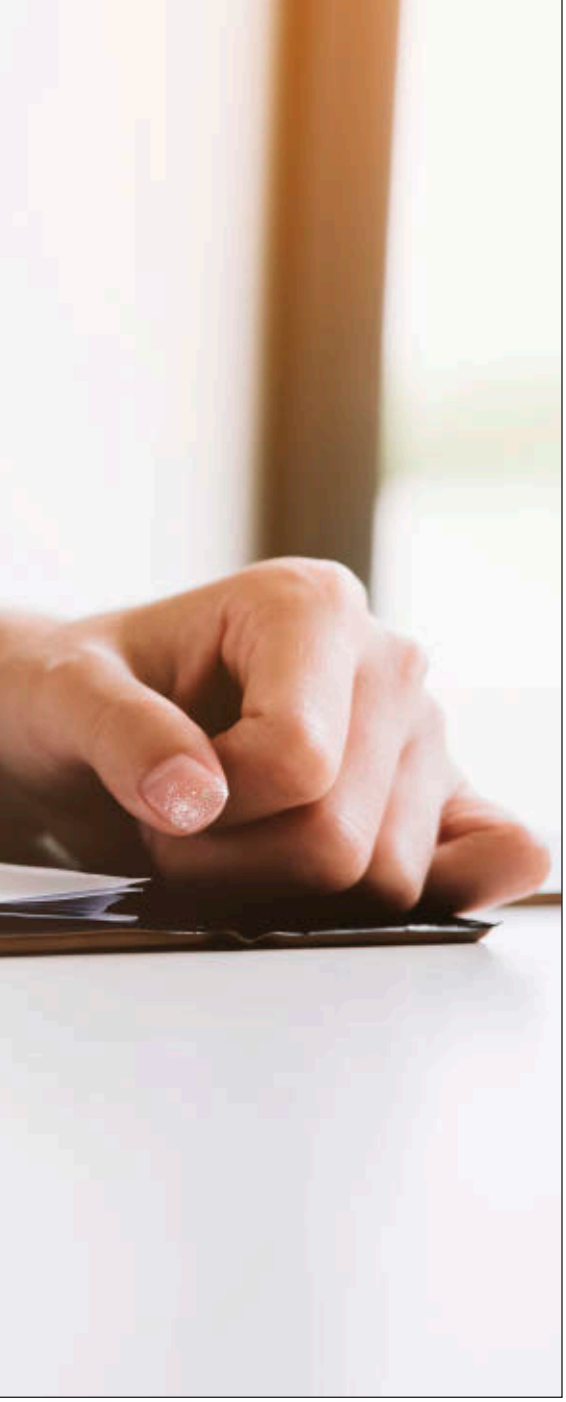
You lost your case. You filed an appeal, but your client naturally would prefer not to pay the money judgment entered against it to the opposing party while the appeal is pending. Fortunately, it is possible to stay execution of the judgment pending the appeal by posting a supersedeas bond. However, it is presently unclear under Arizona law whether the bond amount should include attorneys' fees and costs awarded as part of the judgment.

Attorneys' fees often make up a significant portion of a judgment, so whether attorneys' fees and costs are included when setting a supersedeas bond can be an important issue. For some appellants, whether attorneys' fees are included in setting the bond may affect their ability to post the bond at all.

A.R.S. § 12-2108 and ARCAP 7

The lack of clarity on whether attorneys' fees and costs are included in the bond amount stems from an apparent conflict between A.R.S. § 12-2108 and Arizona Rule of Civil Appellate Procedure ("ARCAP") 7, which *both* address how to set the amount of a supersedeas bond.

A.R.S. § 12-2108(A) limits the amount of a supersedeas bond to the lesser of (1) the "total amount of damages awarded excluding punitive damages"; (2) 50 percent of the appellant's net worth; or (3) $25 million. In enacting A.R.S. § 12-2108 in 2011, the Legislature sought to address the concern of ever-increasing damage awards and their impact on an appellant's ability to "post a bond to protect [its] assets and assert [its]



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appeal rights."[1]

ARCAP 7(a)(4) was substantively identical to A.R.S. § 12-2108 until it was amended in 2018. The amendment was precipitated by *City Center Executive Plaza LLC v. Jantzen*,[2] which had held that attorneys' fees were not "damages" so that attorneys' fees awards were not required to be bonded to stay enforcement of a judgment on appeal.[3]

In 2018, the Arizona Supreme Court amended ARCAP 7(a)(4) to expressly include "attorneys' fees" as part of the supersedeas bond amount.[4] A.R.S. § 12-2108 thus limits supersedeas bonds to non-punitive damages, whereas ARCAP 7 also includes costs, attorneys' fees and prejudgment interest.

Addressing the Bond Amount Conflict

Resolving the apparent conflict between A.R.S. § 12-2108 and ARCAP 7 requires addressing two questions. First, can the statute and the rule be read in harmony? Second, if they cannot be harmonized, does the statute or the rule prevail?

Can A.R.S. § 12-2108 and ARCAP 7(a) be harmonized?

The petition for the 2018 amendment to ARCAP 7 stated that the amendment was intended to "clarify" an ambiguity in A.R.S. § 12-2108, which uses the term "damages" despite legislative history suggesting that the Legislature intended the entire "value of the judgment" (excluding punitive damages) to be considered in setting the bond amount. Proponents of including attorneys' fees and costs in the bond amount rely on this language in the petition to contend that there is no real conflict between A.R.S. § 12-2108 and amended ARCAP 7, as the latter simply *clarifies* the former.

On the other hand, those who would exclude attorneys' fees from the bond amount argue that the statute and the rule cannot be harmonized, citing case law holding that the term "damages" in A.R.S. § 12-2108 does not include attorneys' fees.[5] Indeed, even the 2018 petition to ARCAP 7 acknowledged the potential conflict between amended ARCAP 7 and A.R.S. § 12-2108, and suggested that a conforming statutory amendment, while not "strictly" necessary, may eliminate any conflict between the statute and the amended rule.

There is further evidence of conflict in that construing the term "damages" in A.R.S. § 12-2108(A) to mean "value of the judgment" would nullify A.R.S. § 12-2108 (B), which permits the court to set the bond to the full amount of the judgment if the appellant intentionally dissipates assets to avoid paying the judgment.

Assuming a conflict, does A.R.S. § 12-2108 or ARCAP 7 control?

Arizona law provides that when there is a conflict between a statute and a court rule that cannot be harmonized, the statute prevails if it concerns a *substantive right*, whereas the rule prevails if it is merely *procedural*.[6] Substantive law is "that part of the law which creates, defines and regulates rights."[7] Procedural law, in contrast, "prescribes the method of enforcing the right or obtaining redress for its invasion."[8] These distinctions sound simple enough in theory, but the dividing line between substance and procedure is elusive in practice.

Those who would exclude attorneys' fees from the bond amount contend that A.R.S. § 12-2108 must prevail over ARCAP 7 because it concerns the substantive right to a stay pending appeal, citing legislative history suggesting that A.R.S. § 12-2108 was enacted out of concern for overly large supersedeas bonds that might preclude appellants from pursuing their appeal.

Proponents of including fees and costs in the bond amount argue that ARCAP 7 controls because it addresses the procedural mechanism for securing a stay of the judgment pending appeal and not a substantive right to appeal at all.

No Arizona appellate court has yet addressed whether the legislative cap on the amount of a supersedeas bond in A.R.S. § 12-2108 is a substantive or procedural issue. Existing Arizona case law holds that "the right to appeal is substantive," but that "the manner in which the right may be exercised is subject to control through the use of procedure rules."[9] Some Arizona cases have generally referred to the posting of a supersedeas bond as a procedural matter.[10] But no Arizona case has yet addressed whether

the legislative cap on a bond amount imposed by A.R.S. § 12-2108 is substantive or procedural.

Cases addressing similar issues in other states have reached differing results. In *BDO Seidman LLP v. Banco Espirito Santo Int'l Ltd.*,[11] the Florida Court of Appeals determined that a statutory bond cap concerned "substantive rights to property and to appeal" and took precedence over a court rule permitting a higher bond amount. In contrast, the New Mexico Court of Appeals held in *Grassie v. Roswell Hosp. Corp.*[12] that while "a stay pending appeal is a substantive right," "setting the amount of a supersedeas bond is a procedural matter."

Attorneys' fees often make up a significant portion of a judgment, so whether attorneys' fees and costs are included when setting a supersedeas bond can be an important issue.

The competing interpretations of A.R.S. § 12-2108 and ARCAP 7 are also motivated by competing policy rationales. On the one hand, high supersedeas bonds can make it difficult or impossible for some appellants to post the bond. If they are unable to post the bond and the appellee decides to enforce the judgment pending appeal, the appellant may have insufficient resources to pursue the appeal or may be forced into bankruptcy or compelled to settle their case. On the other hand, the supersedeas bond is intended to secure the appellee's right to collect on a judgment if the trial court's ruling is affirmed, and a bond in an amount less than the full value of the judgment may not adequately secure that right.

Conclusion

Absent a legislative amendment to A.R.S. § 12-2108 or further amendment to ARCAP 7, Arizona courts ultimately will need to decide whether the rule conflicts with the statute and, if so, which one prevails. The Arizona Supreme Court recently accepted special action jurisdiction to address this issue, but the action was subsequently dismissed as moot after the parties stipulated to the bond amount.[13] While we do not yet have an answer from the Court, its willingness to accept special action jurisdiction suggests that the Court sees the need to resolve the apparent conflict and will likely take up the issue in the future.

endnotes

1. S.B. 1212 at § 16, 50th Legis., 1st Reg. Sess. (Ariz. 2011) (commenting that "defendants who are subject to overly large damage awards may simply be unable to post a bond to protect their assets and assert their appeal rights").
2. 237 Ariz. 37 (Ct. App. 2015).
3. *Accord Kresock v. Gordon*, 239 Ariz. 251, 254, ¶ 10 (App. 2016) (attorneys' fees imposed as sanctions under A.R.S. § 12-349 and Rule 11 are not "damages" for supersedeas bond purposes); *Chula Vista Homeowners Ass'n v. Irwin*, 245 Ariz. 249, 252, ¶ 10 (App. 2018) (attorneys' fees awarded under A.R.S. § 33-420(A) are not "damages").
4. *See* ARCAP 7(a)(4) ("[T]he amount of the bond relating to the monetary award must be the lowest of the following: (A) the total amount of damages, costs, attorney's fees, and prejudgment interest included in the judgment when entered, excluding punitive damages.").
5. *See Jantzen*, 237 Ariz. at 41-42.
6. *See Seisinger v. Siebel*, 220 Ariz. 85, 91, ¶ 24 (2009).
7. *State v. Birmingham*, 96 Ariz. 109, 110 (1964).
8. *Id.*
9. *Id.*
10. *See, e.g., Wells Fargo Bank N.A. v. Rogers*, 239 Ariz. 106, 107-08 (App. 2016) (describing the pre-amendment version of ARCAP 7(a)(4) as "a procedural rule that governs supersedeas bonds").
11. 998 So. 2d 1, 2 (Fla. App. 2008).
12. 185 P.3d 1091, 1093 (N.M. App. 2008).
13. *See Peace Releaf Center I v. Smith*, No. CV-21-0151-SA, Order filed Dec. 1, 2021.

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PAUL G. ULRICH practiced as a Phoenix appellate lawyer for 46 years. He earned his B.A. from the University of Montana in 1961 and his J.D. from Stanford University in 1964. He was the *Arizona Appellate Handbook*'s founding lawyer co-chair and co-editor from 1976 to 2000, then continued as a contributor until 2015.

Arizona Appellate Handbook History

BY PAUL G. ULRICH

The *Arizona Appellate Handbook* project began in 1976 as part of a national effort to improve appellate practice. At least 161 Arizona judges and lawyers contributed to the *Handbook* through 2017.[1] It has provided both a comprehensive resource for handling Arizona appeals and a model for many publications nationally.

National Beginnings

Warren E. Burger became Chief Justice of the United States in 1969. He repeatedly criticized lawyers' appellate advocacy, stating their poor-quality presentations contributed to appellate backlogs. In response, an appellate advocacy committee within the American Bar Association's appellate judges conference created a national handbook project in 1976. Its goal was to have appellate judges and lawyers in every state prepare handbooks and present seminars to improve their state's appellate practice.

Launching the Arizona Project

The national project asked every chief justice and bar president to appoint appellate judge and lawyer co-chairs, who would recruit the necessary committee members. Hon. L. Ray Haire was appointed Arizona's court co-chair. I was appointed lawyer co-chair. Judge Haire had extensive knowledge and experience concerning Arizona appellate law and practice. I had been a *Stanford Law Review* managing editor and attended American Law Institute meetings discussing its proposed *Restatements of the Law*.

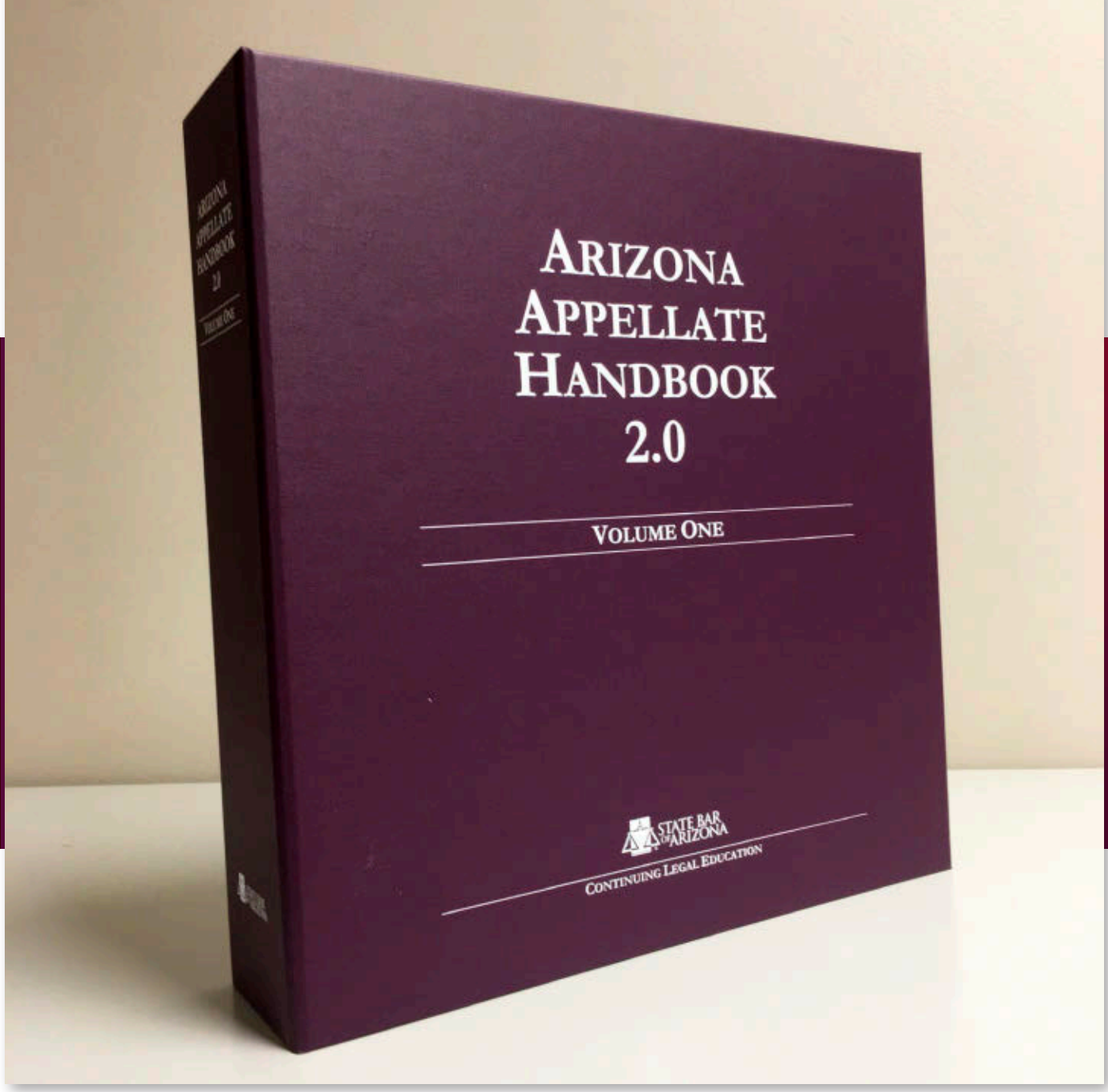
We weren't given an instruction manual. We therefore created our own process, combining the benefits of extended ALI discussions and the steps required to publish law review issues on time. They included setting a firm publication date followed by a seminar, clearly defined intermediate deadlines, and several drafts and thorough editorial discussions for every chapter.

Judge Haire became the *Handbook's* editor-in-chief, responsible for its content. I became its managing editor, responsible for management and editing, maintaining the schedule and handling the publication process. We thought three drafts and editorial meetings for each chapter, followed by final editing, were sufficient. The *Handbook* then would be published in about a year.

We created separate chapters for each category of Arizona's categories—civil, criminal, post-conviction relief and habeas corpus, workers' compensation reviews, and juvenile. Each had its own set of rules, creating separate procedural silos. They did not form a single hub-and-spoke system like the Federal Rules of Appellate Procedure. Organizing the *Handbook* on that basis would have been inconsistent with the Arizona rules' structure. Although each set of rules involved the same general processes, they had to be covered separately. Those discussions weren't repetitious, because different rules and related authorities were involved.

We also included chapters on how Arizona's appellate courts operate, appellate advocacy, special actions, and appellate practice management. The latter chapter's first edition stated all appeals needed to be handled through firm-wide management systems.[2] Later editions emphasized appellate counsel's value in trial court litigation.[3]

We then recruited 12 committee members to write chapters, based on their experience: Grove M. Callison, Dan M. Durrant, John A. Flood, John Foreman, Susan M. Freeman, Michael Preston Green, David B.



Krom, James B. Long, Michael J. Meehan, Doris Mindell, John R. Perry, Jr., and Charles S. Pierson. Their participation perfected the *Handbook's* approach and made its first edition possible.

The national project apparently assumed handbooks would be published and marketed by their respective state bars. The State Bar of Arizona had never published a book. It had no staff or funds to do so. But Ilene J. Lashinsky, then its continuing legal education director, agreed that if we provided a final manuscript, the State Bar would advance the *Handbook's* printing cost, publish and market it, then sponsor a seminar in which its authors would be the presenters.

Completing the First Edition

Our committee soon became a project team. The *Handbook*'s chapters were organized to discuss issues occurring within each appellate category in sequence step-by-step, using logically ordered sections and descriptive, numbered headings. First drafts varied considerably in quality and approach. But our editorial process soon created better, more uniform drafts.

Our management principles included management by objectives to define and maintain the completion schedule and intermediate deadlines, and management by exception to address situations where the schedule wasn't being followed. A positive approach in encouraging better performance was essential. Drafts were discussed in 15 day-long editorial meetings. Positive reinforcement caused improved next drafts. Presenting a seminar when the *Handbook* was completed encouraged everyone to help complete it as scheduled.

Most of the *Handbook* was ready for final editing by early 1977. Drafts were transferred to central word processors to permit easier final editing. They were critiqued by outside appellate judges and lawyers, as well as team members. Revised final drafts were converted to camera-ready copy by an outside printing firm.

A problem then arose. The *Handbook's*

The Handbook in 2006-2017

BY PAMELA B. PETERSEN

I served as the *Handbook's* lawyer co-chair and co-editor from 2006 to 2017. I worked first with court co-chair and co-editor Judge Phillip Hall until his retirement, and then with Judge Samuel Thumma after his appointment to Division One in 2012.

We then moved away from issuing separate supplements to refer to new cases, rule changes and other developments occurring since each volume's last publication. With the ease of word processing, necessary supplements after 2008 were integrated directly into their chapters and made available by CD.

Many changes came with electronic filing requirements and available internet resources. Chapter forms were revamped to be more user-friendly. They could be easily copied and tailored from the searchable CDs we provided with the hard-copy volumes.

We authorized selling chapters separately to make the *Handbook* accessible, practical and affordable for all appellate lawyers. For example, instead of buying all of volume one, criminal lawyers could purchase only Chapter 4, concerning criminal appeals and post-conviction relief. We also tried to publish new editions prior to the State Bar's annual convention and to publicize their releases, typically with discounts, during appellate-related convention programming.

We also coordinated with the State Bar's Appellate Practice Section to offer free CLE programs by chapter authors when major developments required comprehensive chapter rewrites. This occurred with publication of the new sixth edition of volume one in 2015, following the Arizona Supreme Court's comprehensive amendments to the Arizona Rules of Civil Appellate Procedure.

PAMELA B. PETERSEN is Vice President of Litigation at Axon. She earned her B.A. from the University of Iowa in 1983 and her J.D. from American University in 1986. She was the *Handbook's* lawyer co-chair and co-editor from 2006 to 2017. This article is based on Paul G. Ulrich & Pamela B. Petersen, *The History of the Arizona Appellate Handbook*, in 1 Arizona Appellate Handbook 2.0, at 1 (2020).

civil appeals chapter described old Arizona rules. The State Bar's civil practice committee had repeatedly proposed new rules, based on federal rules of appellate procedure. The Supreme Court refused to adopt them. The *Handbook* couldn't be published until that impasse was resolved.

We therefore proposed that the Supreme Court adopt the proposed new rules, with any necessary amendments. We would rewrite the civil appeals chapter to cover them. Assuming they became effective on January 1, 1978, we also would publish the *Handbook* by then and present a seminar as soon as possible.

The Court accepted our suggestions. It adopted the Arizona Rules of Civil Appellate Procedure, effective January 1, 1978. The civil appeals chapter was rewritten, the *Handbook* was also published that month, and the seminars then occurred.

Judge Haire and I wrote an article for the *Arizona Bar Journal* describing how the *Handbook* was prepared and stating its methods could be used to prepare texts on any subject.[4] I also presented that idea to an Association of Continuing Legal Education Administrators' annual conference in 1982 and, in a related article,[5] urged those administrators to lead in preparing such texts nationally.

Initial Supplements, New Volumes

The *Handbook* was supplemented in 1979 and 1980. The 1980 supplement also included a new chapter on Department of Economic Security reviews.

New volumes two and three also were published in 1980. Volume two discussed appeals and special actions to the superior court from justice and municipal courts, and review of local governmental decisions. It also discussed how the superior court operates, tax appeals, and contract and negligence claims against the state. Volume three covered review of state agency decisions, both under the general administrative review act and through numerous specific statutes governing individual agencies.

The *Handbook's* original project team expanded to three groups in adding the two new volumes. They also used volume one's management, editorial and scheduling systems. All three volumes were supplemented in 1981 and 1982. Later editions and supplements followed separate paths.

Reviews

All three volumes received highly favorable reviews. Circuit Judge Mary M. Schroeder quoted Justice Frank X. Gordon, Jr.'s statement that "with this [handbook], only an orangutan could mess up an appeal."[6] Justice Gordon's review stated that volume one "did a masterful job of explaining how all types of appeals are accomplished," and that "all three volumes are musts for a lawyer's library."[7]

Justice Gordon's opinion in *Barassi v. Matison* also endorsed the *Handbook*, describing it as "a valuable and helpful tool for all Arizona appellate practitioners," and stating, "in absence of contrary authority it would be prudent for Arizona practitioners to follow the Arizona Appellate Handbook."[8]

Later reviews were also highly favorable.

Reviewing volume one's 1989 supplement, John P. Frank stated, "To attempt to get along without the *Handbook* is just plain foolish. … The whole work … [is] at the highest professional level."[9] Reviewing volume three's second edition in 1991, Roger K. Ferland stated, "Since their initial publication in 1978 and 1980, the three volumes of the *Arizona Appellate Handbook* have demonstrated that they truly are indispensable."[10] Reviewing volume two's second edition in 1993, Justice James Duke Cameron stated, "All of the members of the committee deserve our respect and gratitude for the great work they have done."[11]

> We weren't given an instruction manual. We created our own process, combining the benefits of extended ALI discussions and the steps required to publish law review issues on time.

Publishing *Handbook* Chapters and Using Its Processes in Other Publications

The first three editions of the *Handbook's* civil appeals chapter were reformatted for publication as *Arizona State Law Journal* articles.[12] Its appellate practice management chapter was adapted for other publications.[13] The *Handbook's* organizational and editorial processes were also used as well.

For example, the ABA published *Working With Legal Assistants*[14] during 1980-81. It followed the *Handbook's* organizational processes, using a small editorial steering group and two outside author groups. It became one of the ABA's best-sellers. It also was used in many seminars to show how lawyers and legal assistants could work together, thereby helping establish the legal assistant profession nationally.

The State Bar of Arizona published *Future Directions for Law Office Management*[15] in 1982 as a basic law practice management text. It also used a small editorial steering group and numerous outside contributors. Seminars there led to the book rather than the book leading to seminars. Contributors either first published their chapters as *Arizona Bar Journal* articles or presented them in seminars coordinated with the book's organization. They were then edited for consistency into book chapters.

Giving Back to Chief Justic Burger

By 1983, the Handbook was well established. Volume one had a new 1983 second edition, adding chapters concerning direct appeals from corporation commission decisions and attorneys' fees. Volumes two and three had new 1983 supplements. However, only about 20 state handbooks existed nationally. Very few were created by the national project.

Someone mentioned during the national project's February 1983 steering group meeting that an ABA annual meeting would occur in Washington, D.C. in July 1985. The ABA meeting provided the opportunity to complete the project by giving every state's handbook to Chief Justice Burger.

States that hadn't as yet completed their handbooks still could do so, using Arizona's *Handbook* and management process as models. Instruction materials also could now be provided, including the Arizona *Handbook's* scheduling control sheet, sample pages, and articles describing how it and other publications were prepared.

Hon. Winslow Christian of the California Court of Appeal and I became the steering group's co-chairs. The group identified the remaining states and assigned responsibilities for pursuing them. Many, like Arizona, had never published a multi-author book. We gave instruction packets to every remaining state. We presented handbook workshops at annual and midyear ABA meetings[16] and met with several state committees. We also confirmed Chief Justice Burger's willingness to receive the handbooks at a U.S. Supreme Court ceremony.

Those efforts were highly successful. More than 20 states completed handbooks during the next two years. Appellate judges, bar and handbook leaders from 43 states then gathered at the U.S. Supreme Court in July 1985 to present their handbooks to Chief Justice Burger for the Court's library. He graciously accepted them. After nine years, the national appellate handbook project was finally completed.[17]

Federal Appellate Handbooks

The ABA national handbook project then also encouraged preparation of handbooks for every federal circuit. Judge Christian and I continued as its co-chairs. Several such handbooks then existed, primarily prepared by circuit bar associations, commercial publishers or the courts themselves.

The ABA federal handbook project encouraged several other circuit handbooks to be completed. However, the Ninth Circuit was then engaged in a lengthy local rule revision process. We couldn't find a continuing legal education organization or commercial publisher willing and able to create and publish a Ninth Circuit handbook.

The ABA federal handbook project concluded in 1988. By then, six circuit handbooks were published. Two states also included chapters on other circuits in their state handbooks.

In 1992, Lawyers Cooperative Publishing became interested in publishing appellate handbooks for every federal circuit. My firm and Sidley & Austin's Los Angeles office therefore followed a modified *Handbook* process in preparing a Ninth Circuit handbook with annual supplements, which Lawyers Coop published in 1994.[18] It provided the basis for Ninth Circuit practice seminars held throughout the circuit.

West Group published a two-volume second edition of our Ninth Circuit handbook in 1999. It was supplemented annually until 2013.[19] It has since been reorganized and updated annually by Bennett Evan Cooper.[20] The *Handbook's* process also was adapted for a publication edited by David M. Axelrad concerning federal and state

court appellate practice nationally.[21]

Other Publications

The *Handbook* confirmed Arizona's ability to publish multi-author books. *Employment Law Handbook*[22] followed its approach. Arizona also has published other multi-author handbooks. *Working With Legal Assistants* also provided a model for other ABA Law Practice Management Section publications.[23]

Future Directions for Law Office Management provided the model for Maricopa County Bar Association seminars and articles, leading to *Life, Law and the Pursuit of Balance*,[24] a multi-author book concerning improved law practice management and lawyers' quality of life. The county bar published it and marketed it locally. The ABA marketed it nationally. An Australian legal publications distributor also marketed it there.

More Recent History

All three Handbook volumes were updated regularly after 1983. Volume one had new editions in 1992, 2000, 2010 and 2015. Volume two had new editions in 1993, 2002, 2011 and 2017. Volume three had new editions in 1991, 2001, 2011 and 2014. All three volumes also provided periodic supplements.

Judge Haire retired as the *Handbook's* court co-chair and co-editor in 1990. Judges Jefferson L. Lankford, Sheldon H. Weisberg, Philip Hall and Samuel A. Thumma succeeded him through 2017. They all maintained his high editorial standards and contributed substantially to the *Handbook's* ongoing success.

I retired as the committee's lawyer co-chair and co-editor in 2000 but continued as a contributor until volume one's sixth edition was published in 2015. Hon. Robert E. Miles, Thomas J. Dennis and Pamela B. Petersen succeeded me as lawyer co-chair and co-editor through 2017. Pam's addendum (see p. 72) describes new developments occurring during 2006-2017.The *Handbook* continued to improve under their leadership. Team members returned to update and improve their chapters whenever necessary. It succeeded based on everyone's continued participation and good will.

Supplements

All legal texts require new editions and interim supplements to remain current. Ten years after the 1985 Supreme Court presentation ceremony, many, but not all, of the handbooks presented there were supplemented or had new editions. I spoke at the American Academy of Appellate Lawyers 1995 annual meeting and published a related article in 1996 urging appellate lawyers to continue to lead in developing and maintaining such publications and related seminars nationally.[25]

A current bibliography lists appellate handbooks in 37 states and nine federal circuits.[26] Forty-six years after the ABA national handbook project began and 37 years after the Supreme Court presentation ceremony, its goal of creating state- and circuit-specific appellate practice handbooks nationally has largely been achieved. But continued efforts are still required to maintain and improve them.

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Devoted to mediation, arbitration, and alternative dispute resolution for over ten years, Michele previously litigated cases in Arizona, primarily in areas of medical malpractice, wrongful death, personal injury and other tort litigation. Michele is truly neutral, works hard to accomplish fair settlements, and will treat you and your clients with respect.

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The attorneys in Osborn Maledon's Alternative Dispute Resolution group serve both as advocates and third-party neutrals. Our ADR attorneys specialize in solving commercial disputes without resorting to expensive litigation. We assess the relative merits of mediation and arbitration in any type of dispute and recommend the optimum course, serving as advocates where appropriate or as neutral facilitators or arbitrators.

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casesteph@gmail.com
Best Lawyers in America, 30 years; former Chair of both Tax Section and Probate and Trust Section; Mediation experience since 1995; Zoom and in person mediations available; presently a Contract Mediator for Coconino County Superior Court (mostly divorce); specializing in family and small business/contract disputes and expert in estates and trusts; in person services in Phoenix, Prescott and Flagstaff areas.

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FOCUSED: With 27 years of law practice emphasizing commercial disputes, Tricia can identify and overcome obstacles to settlement.

APPROACHABLE: A seasoned wellness professional, Tricia facilitates connections, puts people at ease, and builds trust.

- AAA National Roster
- Center for Conflict Resolution
- American Institute of Mediation
- American Bar Association Dispute Resolution Section Fellow
- Maricopa County Bar Association Litigation Section Board

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Attorney Mediator Arbitrator. AAA National Roster. Experience as a wellness professional facilitates connections, puts people at ease, and builds trust. Center for Conflict Resolution, American Institute of Mediation, ABA Dispute Resolution Section fellowship, Arbitration Training Institute. Persuasive communicator; intuitive listener.

Appeals

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Certified Criminal Law Specialist per Arizona Board of Legal Specialization; Death Penalty Qualified; Former Phoenix Assistant City Prosecutor; Former Trial Instructor at Phoenix Police Academy; AAJ National Executive Committee Member, Criminal Law Section; National College for DUI Defense; National Association of Criminal Defense Lawyers; Arizona Attorneys for Criminal Justice. AV-Rated/Bar Register of Preeminent Lawyers, *Southwest Super Lawyers* for Criminal Defense.

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Bradley has briefed and argued appeals in both state and federal appellate courts on a wide range of issues, including contract and business disputes, bankruptcies, creditors' rights, and real estate controversies, successfully obtaining a number of precedent-setting opinions. He works hand-in-hand with trial counsel to provide the most effective presentation of the facts and legal arguments.

JONATHAN LAURANS
ATTORNEY AT LAW
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When asked about the possibility of challenging a conviction or reducing a sentence, please call. I have 30 years experience writing appeals and litigating state and federal post-conviction/habeas corpus cases around the country. Practicing in Arizona since 2019. *SuperLawyers*, Missouri & Kansas; AV rated by Martindale Hubbell.

Appeals, Freelance

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I am an AV Rated Freelance Support Attorney with 28 years experience providing high quality, cost effective legal services on a project-by-project as needed basis. I have experience in all types of appellate work including special actions, interlocutory appeals, general appeals, and petitions for review. Extensive references available. I look forward to becoming a valued temporary member of your team.

Appellate Practice

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www.gustlaw.com
Practice Area: Civil Appeals & Special Actions. Available to consult, co-counsel or substitute for appeals, special actions, post-trial motions, and amicus briefs. 46 years experience, including United States Supreme Court, Ninth, Tenth and Federal Circuits, and Arizona appellate courts. Fellow, American Academy of Appellate Lawyers. Listed in *The Best Lawyers in America* and *Southwest Super Lawyers*. Senior Fellow, Litigation Counsel of America. Martindale-Hubbell AV Preeminent 5 out of 5 rating. Former judge pro tem of Arizona Court of Appeals, Division One (1984-1985, 1992-2994, 1998-1999).

JONES, SKELTON & HOCHULI, PLC
(see ad pg. 81)
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Eileen leads JSHs Appellate Team. She counsels and assists trial lawyers in the substantive areas of their practices, from the answer stage through the post-trial motion stage. A former clerk to Arizona Supreme Court Justice Thomas A. Zlaket, Eileen has handled over 500 appeals in many substantiative areas of civil practice and at every level of the state and federal courts, in Arizona and other states, which have resulted in over 80 published decisions.

JONES, SKELTON & HOCHULI, PLC
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Jon is a clerkship-trained appellate lawyer and partner in JSHs appellate department. He has significant experience handling federal and state appeals in all types of civil litigation. In addition to briefing and arguing appeals, Jon also assists trial counsel with crafting litigation strategy, preserving the record for appeal, and preparing and arguing complex motions.

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Justin represents clients in federal and state appellate matters in cases involving excessive force, wrongful death, personal injury, bad faith, and premises liability. After graduating as the valedictorian of his class from Phoenix School of Law, Justin worked as a law clerk for the Honorable Michael J. Brown in Division One of the Arizona Court of Appeals.

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Elizabeth focuses her practice on appeals and dispositive motions in federal and state court. appellate matters. Liz honed her appellate writing and research skills through a judicial clerkship for the Honorable Maurice Portley at the Arizona Court of Appeals, Division I. Following her clerkship, Elizabeth worked on criminal appeals, while serving in the Criminal Appeals Section of the Arizona Attorney General's Office. She transitioned into private practice in 2019, and has experience working on class action defense and other complex litigation.

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Ashley, a recent clerk for Arizona Supreme Court Vice Chief Justice Ann Scott Timmer, assists in researching and drafting federal and state appellate matters and dispositive motions. Ashley also served as the Editor-in-Chief of the *Arizona Law Review* at the University of Arizona.

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Petra represents clients in federal and state appellate matters involving insurance defense, bad faith, medical and legal malpractice, civil rights, governmental liability, employment law, and torts. Petra previously worked as a law clerk for Justice James P. Beene of the Arizona Supreme Court and for the Honorable Paul J. McMurdie of the Arizona Court of Appeals.

Arbitration

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www.bricebuehler.com
I have served as an arbitrator hundreds of times, sometimes as the neutral arbitrator in a three-person panel. The cases have been commercial, real estate, construction, contract, bodily injury, and wrongful death. Please call on me if you need help or questions answered. (602-234-1212).

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One of Arizona's most experienced trial lawyers, Don is available for mediations, arbitrations, appraisals, and expert witness testimony. Don has completed advanced mediation training at the Straus Institute for Dispute Resolution at Pepperdine Caruso School of Law. He has served as an expert witness in insurance-related matters and mediates tort claims in the areas of professional liability, insurance bad faith, coverage, and general tort liability.

Asset Protection

PRO ASSET PROTECTION
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Among Arizona's most experienced counsel in this area of law, Attorney Ike Devji has nearly 20 years of practice experience devoted exclusively to Asset Protection, Risk Management and Wealth Preservation planning for a national client base including thousands of business owners, physicians, entrepreneurs and other HNW individuals representing over $6 Billion in protected assets. Planning is proven, tax neutral. Co-Counsel opportunities available.

Attorney Discipline

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Our firm focuses on professional responsibility law. We represent attorneys in State Bar discipline matters, applicants in State Bar admission and reinstatement matters, parties in fee disputes and provide expert witness services. Mr. Adams' experience includes work as Bar Counsel in two states and more than 25 years of practice in attorney discipline and ethics issues. Ms. Clark's experience includes work as Senior Bar Counsel, Ethics Counsel and more than 25 years of practice in attorney discipline and ethics issues.

Attorney, Freelance

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I am an AV Rated Freelance Support Attorney with 28 years experience providing high quality, cost effective legal services on a project-by-project as needed basis including research and memorandum preparation, document drafting (letters, pleadings, motion practice, discovery, trial preparation), strategy planning, and appellate briefing. Extensive references available. I look forward to becoming a valued temporary member of your team.

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MARK ZUKOWSKI provides ADR services in all manner of civil and tort claims, including personal injury, construction, insurance, product liability, HOA, auto, contracts, and commercial matters. He received extensive training through the American Arbitration Association (AAA) and the Straus Institute for Dispute Resolution at Pepperdine University. In his 38+ years as a litigator, Mark has tried 25 cases to verdict.

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Mr. Norling, Managing Attorney, is a recognized leader in the retail automotive dealership industry, advises dealer clients on the legal and practical aspects of the operation of a retail automotive dealership, including the acquisition or sale of a dealership, commencement of dealership operations, manufacturer and lending relationships, operational and consumer issues, ownership succession, licensing issues, federal and state compliance, and advertising law.

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My 25 years as a corporate marketing executive gives me a unique and valuable perspective when providing strategic counsel to service-sector business owners. I assist with entity formation, operating agreements and bylaws; draft contracts and other documentation for normal business operations and unusual circumstances; advise regarding independent contractors and employment law matters; and negotiate settlements in business disputes.

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As a small but sophisticated Phoenix-based law firm, Midtown Law offers a suite of services designed for small businesses, entrepreneurs, and startups in any stage of operation. Especially when businesses face potential headaches in highly regulated industries such as legal cannabis, we help clients prevent litigation, anticipate roadblocks, navigate through sudden challenges, and make confident legal decisions. Attorney Tabitha Myers, *Southwest Super Lawyer* Rising Star 2018-2022.

Civil Litigation

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(see ad pg. 82)
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Mark has served as an arbitrator and mediator for over 20 years, providing ADR services in all manner of civil and tort claims, including personal injury, premises liability, construction, insurance, product liability, HOA, auto, contracts, and commercial matters. He serves as a construction and commercial arbitrator and mediator for the American Arbitration Association (AAA), and is a member of the National Academy of Distinguished Neutrals.

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David provides ADR services for all types of civil claims, including those involving medical malpractice, Adult Protective Services Act, wrongful death, personal injury, and other civil claims. His 28 years of experience representing clients in civil claims makes him better-equipped to understand both parties objectives. He trained at the Straus Institute for Dispute Resolution at Pepperdine University.

Civil Rights

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Certified Criminal Law Specialist per Arizona Board of Legal Specialization; Death Penalty Qualified; Former Phoenix Assistant City Prosecutor; Former Trial Instructor at Phoenix Police Academy; AAJ National Executive Committee Member, Criminal Law Section; National College for DUI Defense; National Association of Criminal Defense Lawyers; Arizona Attorneys for Criminal Justice. AV-Rated/Bar Register of Preeminent Lawyers, *Southwest Super Lawyers* for Criminal Defense.

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Smith & Green Attorneys at Law, PLLC practices both criminal and civil rights litigation. Mr. Smith has represented in cases involving employment discrimination, use of excessive force and other violations of constitutional rights. Quacy is a former police officer and Federal Investigator for the EEOC. He uses his unique skills and training to navigate clients through civil rights litigation to obtain the best outcome.

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Commercial Litigation

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Best Lawyers 2012-2021 (Arbitration, Commercial Litigation, Securities Litigation, Mediation); *Southwest Super Lawyers* 2012-2020 (Dispute Resolution & Business Litigation); *Best Lawyers* 2017 Arbitration Lawyer of the Year (Phoenix), 2015 & 2020 Securities Litigation Lawyer of the Year (Phoenix); member of multiple AAA panels; National Academy of Distinguished Neutrals; Fellow and Chartered Arbitrator, International Chartered Institute of Arbitrators, and Panelist, International Institute for Conflict Prevention & Resolution. Over 30 years of complex commercial dispute experience, representing public and private companies throughout the US. Licensed in Arizona and New York.

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Damien has extensive and comprehensive commercial litigation and arbitration experience, including enforcement and defense of interests under commercial loan agreements and guaranties, partnership and operating agreements, commercial and residential real estate transactions, construction litigation, and bankruptcy litigation. Damien is also experienced in assisting his clients with obtaining or defending applications for provisional remedies, temporary restraining orders and injunctive relief, and commercial forcible entry and detainer proceedings; appellate work including petitions for special actions, applications for discretionary appellate review and traditional appellate briefs and argument. Damien is recognized by *Super Lawyers* for business litigation and listed in *The Best Lawyers in America* for his commercial litigation practice.

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Our commercial litigation attorneys at Murphy Cordier Casale Axel PLC provide skilled and experienced legal counsel in our representation of businesses and business owners in commercial litigation issues. Examples of issues include contract disputes, business torts, business fraud, partnership/joint venture disputes, class actions, fiduciary duty issues, and shareholder issues.

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Attorney Mediator Arbitrator. AAA National Roster. With 27 years of practice emphasizing commercial disputes, and combined educational disciplines of law and economics, Tricia identifies and overcomes obstacles to settlement. Experience as a wellness professional facilitates connections, puts people at ease, and builds trust. Center for Conflict Resolution, American Institute of Mediation, ABA Dispute Resolution Section fellowship, Arbitration Training Institute. Persuasive communicator; intuitive listener.

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Denny Esford is a commercial litigator with 18 years of experience in Arizona and Illinois state and federal courts. Denny's practice focuses on contract disputes, business torts and intellectual property claims.

Attorney Denny Esford

COMMERCIAL MEDIATION

Denny Esford is a commercial mediator, arbitrator and litigator with 18 years of experience in Arizona and Illinois state and federal courts.

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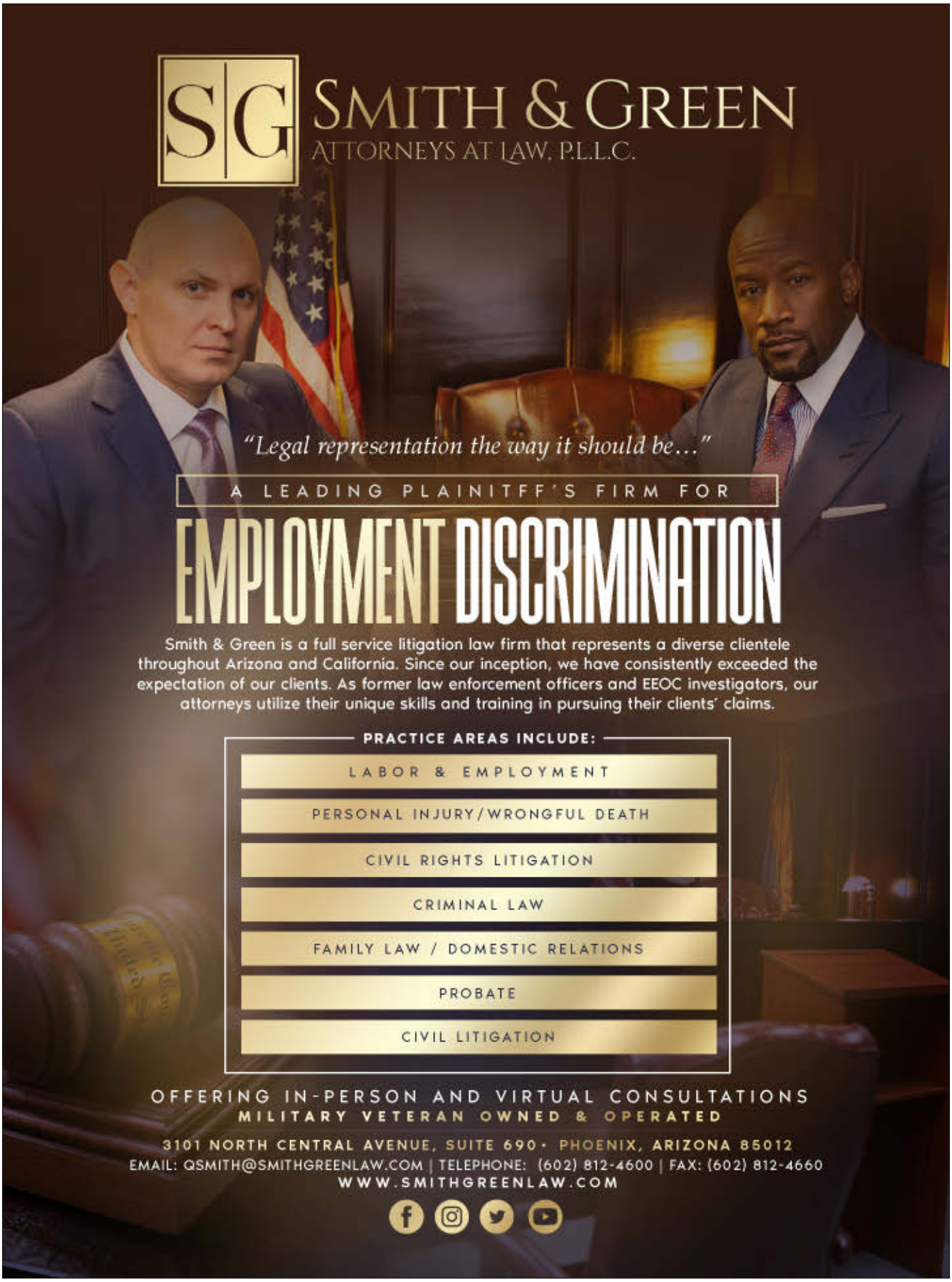
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Commercial Litigation & Water Law

ENGELMAN BERGER PC
(see ad pg. 101)
MICHAEL P. ROLLAND
2800 N. Central Avenue, Suite 1200
Phoenix, AZ 85004
602-271-9090 / Fax: 602-222-4999
mpr@eblawyers.com
www.eblawyers.com
Michael has extensive experience representing businesses, lenders, and debtors in both commercial litigation and chapter 11 bankruptcy, including enforcement of claims relating to operating agreements, ownership disputes, commercial loan transactions, and water law. Michael prides himself on helping his clients find pragmatic solutions to difficult problems. Michael serves on the executive counsel of the State Bar of Arizona's Business Law Section, and is recognized by *Southwest Super Lawyers* as a Rising Star and by *The Best Lawyers in America* as One to Watch.

Construction

MURPHY CORDIER CASALE AXEL PLC
(see ad pg. 89)
RICHARD B. MURPHY
2025 N. 3rd Street, Suite 200
Phoenix, AZ 85004
602-274-9000 / Fax: 602-795-5896
rich@mcattorneys.com
mcattorneys.com
Murphy Cordier Casale Axel PLC frequently help with the preparation and negotiation of loan documents, project delivery approaches, and bid requests from contractors. We also draft and negotiate contracts between owners and general contractors, as well as the general and its subcontractors. Our construction law attorneys also frequently assist with insurance and bonding arrangements.

Construction Litigation

FR LAW
(see ad this page)
SCOTT RYAN
4745 N. 7th Street, Suite 310
Phoenix, AZ 85014
602-312-2588
sryan@frlawgroup.com
In addition to his law practice, Scott Ryan is an experienced construction engineer, having been involved in +$20B worth of projects. After graduating from DePaul University College of Law in 2001, Scott started his practice with a large law firm and eventually returned to the construction industry, where he served as general counsel for one of the countrys largest contractors. Scott is a Fellow of the Construction Lawyers Society of America and a member of the American Bar Association and ABAs Forum on the Construction Industry.

Creditors' Litigation/ Collection

ENGELMAN BERGER PC
(see ad pg. 101)
SCOTT B. COHEN
2800 N. Central Avenue, Suite 1200
Phoenix, AZ 85004
602-222-4960 / Cell: 602-550-1105
sbc@eblawyers.com
www.eblawyers.com
Scott regularly represents secured creditors, lenders, and banks, in loan enforcements, both inside and outside of bankruptcy. Scott also drafts custom loan documents for his clients. Scott is a natural problem solver who enjoys pragmatic solutions that meet the clients business objectives. In the last 30 years, Scott has substantial experience litigating receiverships, non-dischargeability, contested Chapter 11 confirmation cases, fraudulent transfer claims, involuntary bankruptcies, and lender liability defense actions.

LAW OFFICES OF PAUL WEICH
PAUL WEICH
2234 S. McClintock Drive
Tempe, AZ 85282
480-759-1983 / Fax: 480-968-2726
Paul.Weich@PWLawArizona.com
www.PWLawArizona.com
Paul Weich has been representing creditors and landlords large and small – in Arizona and Bankruptcy Courts – for more than 25 years. When your client needs to utilize the legal system to collect a debt owed, Law Offices of Paul Weich can help. If a debtor files a bankruptcy, he will help determine whether to pursue or drop.

Creditors' Rights

SEIDBERG LAW OFFICES, P.C.
KEN SEIDBERG
2412 E. Campbell Avenue
Phoenix, AZ 85016
602-248-8117
ContactUs@SeidbergLaw.com
SeidbergLaw.com
Does one of your clients need help with debt collections? Seidberg Law, a debt collection Law Firm since 1988, has collected over 200 Million dollars for it's clients. Established by Attorney Ken Seidberg licensed to practice law since 1974, the firm is operated by Ken and Dave Seidberg. Servicing the state of Arizona.

Criminal Defense

BLUMBERG & ASSOCIATES
(see ad pg. 87)
BRUCE BLUMBERG
3600 N. 19th Avenue
Phoenix, AZ 85015
602-277-6180 / Fax: 602-889-9167
bruce@azblumberglaw.net
www.azblumberglaw.com
Bruce Blumberg is a certified specialist in criminal law. He has concentrated his practice in major felonies. Mr. Blumberg has achieved great success, including having won six first degree murder trials. There is a focus on sex related crimes (including juveniles); violent crimes and white-collar crimes. Mr. Blumberg has been lead counsel in death penalty cases and many other homicides in thirty years of practice in Arizona.

DM CANTOR
(see ad pp. 3, 87)
DAVID CANTOR
40 N. Central Avenue, Suite 2300
Phoenix, AZ 85004
602-307-0808
info@dmcantor.com
dmcantor.com
Certified Criminal Law Specialist per Arizona Board of Legal Specialization; Death Penalty Qualified; Former Phoenix Assistant City Prosecutor; Former Trial Instructor at Phoenix Police Academy; AAJ National Executive Committee Member, Criminal Law Section; National College for DUI Defense; National Association of Criminal Defense Lawyers; Arizona Attorneys for Criminal Justice. AV-Rated/ Bar Register of Preeminent Lawyers, *Southwest Super Lawyers* for Criminal Defense.

FR Law continues to grow,

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Welcome Richie Edwards and Rita Gara!

Katie Flaherty, Rita Gara, Troy Froderman, Richie Edwards, Scott Ryan

FR Law Group offers national experience, with Arizona expertise. To date, we have tried more than 75 cases to conclusion and have litigated more than 1,000 cases.

- **Troy Froderman** has recovered more than a billion dollars in insurance proceeds.
- In addition to his law practice, **Scott Ryan** is an experienced construction engineer, having been involved in +$20B worth of projects.

FR LAW GROUP

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(602) 566-7425 | www.frlawgroup.com


Christine Whalin
Partner
Board-Certified
Criminal Law Specialist
David Michael Cantor
Founding Partner
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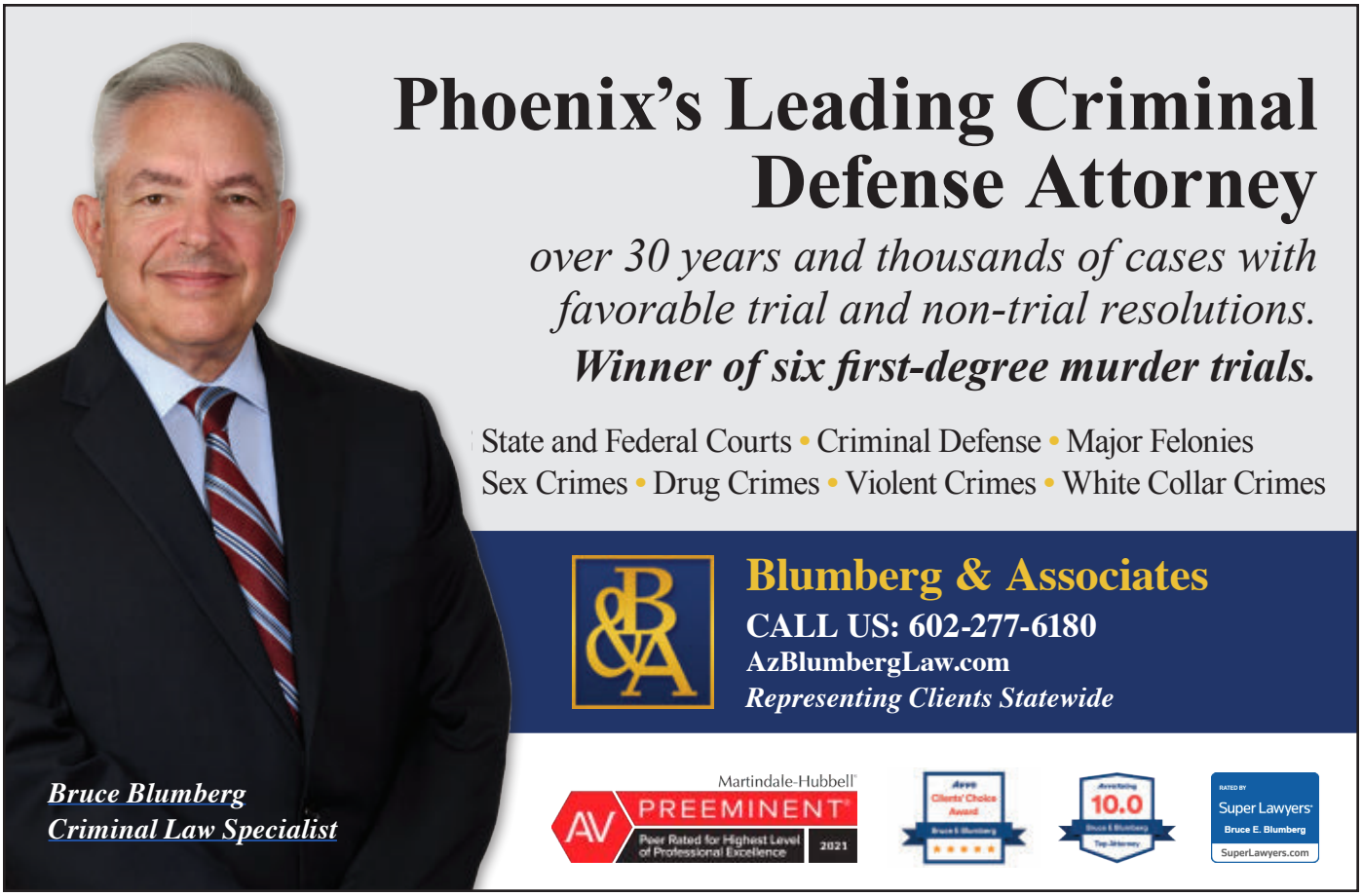
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SMITH & GREEN
ATTORNEYS AT LAW
(see ad pg. 85)
QUACY L. SMITH
JAMES M. GREEN
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602-812-4600
qsmith@smithgreenlaw.com
smithgreenlaw.com
Smith & Green represents clients through many different criminal matters involving felony offenses, DUI, misdemeanors, drug offenses, and homicides. Quacy Smith represents clients through pre-trial stages, jury trials, and post-conviction relief. Quacy is a skilled trial attorney, who continuously fights for the best outcome for his clients that is within reason of the law. As former police officer a Federal investigator, he understands both sides of the criminal investigative and litigation process.

Criminal Law

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Certified Criminal Law Specialist per Arizona Board of Legal Specialization; Death Penalty Qualified; Former Phoenix Assistant City Prosecutor; Former Trial Instructor at Phoenix Police Academy; AAJ National Executive Committee Member, Criminal Law Section; National College for DUI Defense; National Association of Criminal Defense Lawyers; Arizona Attorneys for Criminal Justice. AV-Rated/Bar Register of Preeminent Lawyers, *Southwest Super Lawyers* for Criminal Defense.

JONATHAN LAURANS
ATTORNEY AT LAW
201 Easy Street, Suite 206
Carefree, AZ 85377
833-421-5200
JLaurans@msn.com
www.AZpostconviction.com
When asked about the possibility of challenging a conviction or reducing a sentence, please call. I have 30 years experience writing appeals and litigating state and federal post-conviction/habeas corpus cases around the country. Practicing in Arizona since 2019. *SuperLawyers*, Missouri & Kansas; AV rated by Martindale Hubbell.

Disability Insurance Claims

SCOTT E. DAVIS, P.C.
(see ad this page)
SCOTT E. DAVIS, ESQ.
8360 E. Raintree Drive, Suite 140
Scottsdale, AZ 85260
602-482-4300
info@scottdavispc.com
www.scottdavispc.com
For the past 24 years, Scott Davis has focused his practice on disability insurance claims, ERISA disability claims and Arizona State Retirement disability claims. Scott has been fortunate over the years to have earned the trust of Arizona attorneys as a large portion of his practice is due to your referrals.

DUI/Traffic

DM CANTOR
(see ad pp. 3, 87)
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dmcantor.com
Certified Criminal Law Specialist per Arizona Board of Legal Specialization; Death Penalty Qualified; Former Phoenix Assistant City Prosecutor; Former Trial Instructor at Phoenix Police Academy; AAJ National Executive Committee Member, Criminal Law Section; National College for DUI Defense; National Association of Criminal Defense Lawyers; Arizona Attorneys for Criminal Justice. AV-Rated/Bar Register of Preeminent Lawyers, *Southwest Super Lawyers* for Criminal Defense.

EEOC Representation

LAW OFFICE OF JOSHUA BLACK, PLC
(see ad pg. 99)
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623-738-2225 / Fax: 623-471-6516
josh@azemploymentlawyer.com
www.azemploymentlawyer.com
The Law Office of Joshua Black, PLC regularly represents both employees and employers in matters before the Equal Employment Opportunity Commission (EEOC). We represent clients in mediations and other administrative proceedings related to claims of discrimination, wrongful termination, harassment, wage disputes, contract and severance negotiations, and workplace accommodations. Our firm also provides strategic legal counsel to small and medium-sized businesses.

Election Law

LAW OFFICES OF PAUL WEICH
PAUL WEICH
2234 S. McClintock Drive
Tempe, AZ 85282
480-759-1983 / Fax: 480-968-2726
Paul.Weich@PWLawArizona.com
www.PWLawArizona.com
Your client or friend (heck, maybe even YOU) is running for office. The Law Offices of Paul Weich has represented candidates, parties, independent expenditure committees, and more since 1992! The campaign finance and petition challenges laws are quirky areas – work with someone who knows his way around. (And, don't forget to vote!)

Employment

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(see ad pg. 100)
CYNTHIA E. GITT
225 S. Lake Avenue, Suite 300
Pasadena, CA 91101
626-432-7202 / Fax: 626-432-7213
Cell: 626-325-3575
cgitt@browngitt.com
www.browngitt.com
Throughout the past 40 years, Cynthia has represented clients across Arizona, California and throughout the West in a wide array of legal matters ranging from employment law, harassment and wage hour disputes to business and commercial litigation. She handles litigation as well as training

ERISA &
Disability Insurance Lawyer

Scott E. Davis

– 24 years of ERISA disability experience –

– Representing individuals and professionals in all phases of their claim, including Federal Court litigation –

– Arizona State Retirement System Disability Claims –

Scott E. Davis, P.C.
8360 E. Raintree Drive, Suite 140, Scottsdale, AZ 85260
21501 N. 78th Ave, Suite 100, Peoria, AZ 85382

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MURPHY CORDIER CASALE AXEL

In recognition of the contributions to their clients, the Firm and to the legal community over their respective careers, member ALICIA M. CASALE and partner JENNIFER J. AXEL have been added to the Firm's name.

JEN AXEL and CHASE HALSEY have also been named members effective immediately.

MCCA LAW has been dedicated to our clients' legal needs since its founding in 2010. These changes will strengthen our resolve to continue providing personal and expert legal advice.

Pictured left to right: Richard B. Murphy, Alicia Casale, Jennifer Axel, Michael Cordier

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Phoenix, AZ 85004

602.274.9000

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- **Elder Law & ALTCS**

Emily B. Kile has been practicing law since 1993. She is currently a member of the National Academy of Elder Law Attorneys, the Academy of Special Needs Planners, and the Special Needs Alliance.


Emily B. Kile, Esq.

www.KileLawFirm.com
Emily@KileLawFirm.com
(480) 348-1590 ■ Fax: 1-866-404-5085
8727 E. Via de Commercio, Scottsdale, AZ 85258

and advice for the benefit of employers. Cynthia has been an arbitrator with NAM and AAA for approximately three years, and an arbitrator and mediator for ARC for about one year. She is available to mediate or arbitrate throughout Arizona and California and other western states. Mediation Services available through ARC or direct contact.

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(see ad pg. 99)
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josh@azemploymentlawyer.com
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The Law Office of Joshua Black, PLC regularly represents both employees and employers in workplace disputes. We represent clients in matters of discrimination, wrongful termination, harassment, wage disputes, contract and severance negotiations, and workplace accommodations. Our firm also provides strategic legal counsel to small and medium-sized businesses.

Estate Planning

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(see ad this page)
EMILY KILE
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Scottsdale, AZ 85258
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RACHEL STODDARD, ESQ.
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480-210-6444
rachel@stoddardpllc.com
www.stoddardpllc.com
Ms. Stoddard founded Stoddard Legal Solutions, PLLC, in 2016 after a decade-long career in government service. While an Assistant U.S. Attorney, she successfully litigated at the 9th Circuit Court of Appeals. She now takes that expertise and extends it to a private clientele. Ms. Stoddard helps her clients achieve their estate planning goals through high-quality, compassionate, flat-fee representation.

Ethics & Professional Responsibility

ADAMS & CLARK, PC
RALPH ADAMS
KAREN CLARK
1650 N. First Avenue
Phoenix, AZ 85003
602-258-3542 / Fax: 602-258-1377
thefirm@adamsclark.com
www.adamsclark.com
Our firm focuses on professional responsibility law. We represent attorneys in State Bar discipline matters, applicants in State Bar admission and reinstatement matters, parties in fee disputes and provide expert witness services. Mr. Adams' experience includes work as Bar Counsel in two states and more than 25 years of practice in attorney discipline and ethics issues. Ms. Clark's experience includes work as Senior Bar Counsel, Ethics Counsel and more than 25 years of practice in attorney discipline and ethics issues.

JENNINGS, STROUSS & SALMON, P.L.C.
(see ad pg. 91)
J. SCOTT RHODES
One E. Washington Street, Suite 1900
Phoenix, AZ 85004
602-262-5862 / Fax: 602-495-2648
srhodes@jsslaw.com
www.jsslaw.com
Mr. Rhodes has an extensive background in legal ethics and professional responsibility. He regularly represents clients in State Bar matters, fee disputes, disciplinary matters, bar admissions, and other

professional responsibility issues. Mr. Rhodes was named *The Best Lawyers in America* Phoenix Lawyer of the Year for Ethics and Responsibility Law in 2022.

JENNINGS, STROUSS & SALMON, P.L.C.
(see ad this page)
KERRY A. HODGES
One E. Washington Street, Suite 1900
Phoenix, AZ 85004
602-262-5820 / Fax: 602-495-2783
khodges@jsslaw.com
www.jsslaw.com
Mr. Hodges has substantial experience advising lawyers and law firms in matters involving legal ethics and professional responsibility. He regularly represents lawyers in State Bar matters, character-and-fitness proceedings, and legal-malpractice defense. He is also an experienced commercial and business litigator.

JENNINGS, STROUSS & SALMON, P.L.C.
(see ad this page)
ANNE E. McCLELLAN
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www.jsslaw.com
Ms. McClellan has substantial experience advising lawyers and law firms in matters involving legal ethics and professional responsibility. She regularly represents lawyers in State Bar matters, character-and-fitness proceedings, and legal-malpractice litigation. She is also an experienced trial attorney with litigation experience in the areas of medical malpractice defense, healthcare, personal injury defense, and business disputes. Ms. McClellan serves as the Firms General Counsel.

JENNINGS, STROUSS & SALMON, P.L.C.
(see ad this page)
JANET H. LINTON
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Tucson, AZ 85718
520-618-1055 / Fax: 520-618-1069
jlinton@jsslaw.com
www.jsslaw.com
Ms. Linton is a trial attorney who practices in the area of civil litigation defense, including legal malpractice, ethics proceedings, and personal injury. Her practice also includes other professional malpractice, insurance defense, wrongful death, appellate work on both the State and Federal levels, as well as general commercial litigation.

JENNINGS, STROUSS & SALMON, P.L.C.
(see ad this page)
ASHLEY M. MAHONEY
One E. Washington Street, Suite 1900
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amahoney@jsslaw.com
www.jsslaw.com
Ms. Mahoney is a litigation associate focusing her practice on legal ethics and commercial litigation. In 2018-2019, she served a two-year term as a judicial law clerk with the Honorable Paul J. McMurdie at the Arizona Court of Appeals. Ms. Mahoney was appointed to the Ethics Advisory Committee of the Arizona Supreme Court in 2020.

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(see ad pg. 90)
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Expert Witness

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(see ad pg. 113)
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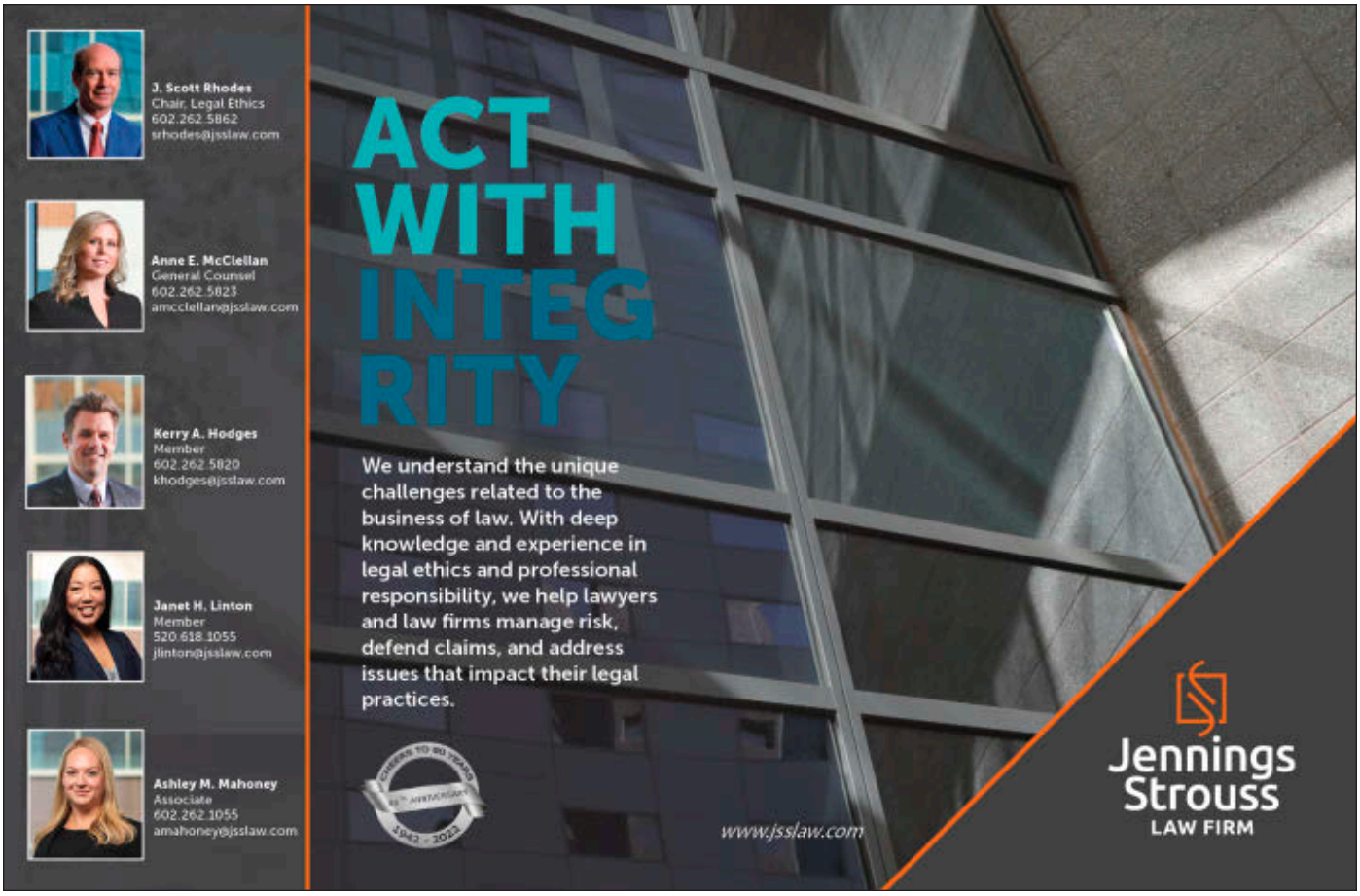
602-234-3700 / Fax: 602-230-7579
In AZ: 800-224-3220
bob@azhurtonthejob.com
www.azhurtonthejob.com
Robert E. Wisniewski is a Certified Specialist, Workers' Compensation, State Bar of Arizona. Bob has represented injured Arizona workers' in Workers' Compensation at over 12,000 hearings before the Arizona Industrial Commission over the last 44 years. You can confidently refer your injured worker clients for personal service by an experienced, reputable, Workers' Compensation Certified Specialist. Referral fees are extended per ethical rules. Mr. Wisniewski offers expert testimony in Workers' Compensation bad faith cases and Workers' Compensation malpractice cases.

False Claims Act/ Whistleblower

HALUNEN LAW
LON R. LEAVITT
One Renaissance Tower
Two N. Central Avenue, Suite 1800
Phoenix, AZ 85004
602-254-6494 / Fax: 612-605-4099
leavitt@halunenlaw.com
www.halunenlaw.com
Successful plaintiffs' firm with tenacious and experienced False Claims Act/Whistleblower practice group representing whistleblowers nationwide. Based in the firm's Phoenix office and licensed in Arizona, Utah, and Minnesota, Lon Leavitt is a former Assistant United States Attorney with substantial experience investigating and litigating False Claims Act cases in several fields, including healthcare, defense, and education.

Family Law

ARIZONA DIVORCE PROS
(see ad pg. 95)
KATHY L. HENRY, ESQ.
3100 W. Ray Road, Suite 291
Chandler, AZ 85226
480-487-5635
attnykathy@gmail.com
arizonadivorcepro.com
Kathy L. Henry, Esq. has 30 years experience as a family law divorce practitioner, offering peaceful, affordable family law mediation. Our court approved mediators offer remote and in-person mediation services. We encourage parties in conflict to build consensus to achieve optimal solutions. Our services are confidential, neutral and impartial. Let us help you find peace and lasting solutions to your disputes through mediation.



BURCH & CRACCHIOLO
(see ad pg. 93)
SUSAN DANA-KOBEY
1850 N. Central Avenue, Suite 1700
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sdana-kobey@bcattorneys.com
www.bcattorneys.com
Susan practices and mediates in all areas of family law, juvenile law, business litigation, construction law and bad faith disputes. She is fluent in Spanish and Portuguese. Susan has been selected as a *Best Lawyer in America* in 2021 and 2022.

BURCH & CRACCHIOLO
(see ad pg. 93)
TONYA MACBETH
1850 N. Central Avenue, Suite 1700
Phoenix, AZ 85004
602-234-9926
tmacbeth@bcattorneys.com
www.bcattorneys.com
Tonya mediates in Family Law in the areas of divorce, parenting issues and civil family disputes. Her practice encompasses all areas of Family Law to include parenting time, legal decision-making and adoption. Tonya was a 2021 *Best Lawyer in America.*

DICKINSON WRIGHT PLLC
(see ad pg. 93)
MARLENE A. PONTRELLI
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mpontrelli@dickinsonwright.com
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Marlene A. Pontrelli is consistently recognized by *Best Lawyers* in Family Law and is a Certified Family Law Specialist. Her practice focuses on all aspects of family law including dissolution and legal separation of marriage, business valuations, division of property, spousal support, post-dissolution modifications, premarital and post-marital agreements, child custody and support matters. Marlene does private mediation for clients seeking an out of court resolution.

DICKINSON WRIGHT PLLC
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rschwartz@dickinsonwright.com
www.dickinsonwright.com
Robert L. Schwartz was recognized by *Best Lawyers* as Family Law Mediation Lawyer of the Year 2020 and in both Family Law and Family Law Mediation again for 2022. He is a Certified Family Law Specialist and has been practicing law for over 40 years, and handles mediations involving all aspects of family law. He has been a frequent lecturer on family law and published two books related to Arizona family law.

DICKINSON WRIGHT PLLC
(see ad pg. 93)
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Dana M. Levy is consistently recognized by *Best Lawyers* in Family Law and is a Certified Family Law Specialist. For over 25 years Dana has exclusively practiced family law, and handles mediations involving all aspects of family law. Mediation clients have described her as kind, informative and impartial, direct yet pleasant, and a clear analytical lawyer.

DICKINSON WRIGHT PLLC
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lrichard@dickinsonwright.com
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Leonce Richard has been a certified Specialist in Family Law for 20 years. He focuses on all aspects of family law, including appeals and premarital agreements. Accolades: Past president of the Arizona chapter of the American Academy of Matrimonial Lawyers; Arizona Lawyer of the Year For Family Law in 2019; *Best Lawyers in America*; Top Attorneys in Arizona.

DICKINSON WRIGHT PLLC
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swolfson@dickinsonwright.com
www.dickinsonwright.com
Steven D. Wolfson is a Certified Specialist in Family Law and serves as a Judge Pro Tem in the Maricopa County Superior Court for family law cases. His practice focuses on all areas of family law. He has mediated settlements in many family law cases and regularly is a speaker at continuing legal education seminars on family law issues.

DONALDSON STEWART, PC
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Our attorneys and team of professionals provide compassionate, results-oriented representation that encourages our clients to actively participate in every step of his or her legal action. We handle all aspects of family law, including mediation and collaborative divorce. We also handle matters related to adoption and termination of parental rights, estate planning, probate and guardianship/conservatorship.

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DORIAN L. EDEN, ESQ.
10201 S. 51st Street, Suite 270
Phoenix, AZ 85044
480-285-1735 / Fax: 480-285-1711
dori@dec-law.com
www.dec-law.com
We listen to our clients, educating and guiding them to protect their children and their assets without encouraging drawn-out legal battles. We assertively protect their interests in mediation, settlement or litigation. We strive to help clients resolve disputes efficiently. If litigation is necessary, we use our nearly six decades of legal knowledge and courtroom experience to vigorously represent our clients.

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A Successful Divorce Starts with the Right Attorney

Susan Dana-Kobey
sdana-kobey@bcattorneys.com
602-234-8784

Tonya Macbeth
tmacbeth@bcattorneys.com
602-234-9926

Fluctuating asset values, changing parenting time needs, vaccination decisions, mask wearing-it seemingly never ends.

- We are seasoned trial attorneys and mediators who will strive to bring your case to an efficient conclusion
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(see ad this page)
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2201 E. Camelback Road, Suite 650
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602-955-1515
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fsg-law.com
Steve Smith has over 25 years of experience exclusively in family law. His practice focuses on complex family law litigation, mediation, and appellate matters. He is a State Bar of Arizona Certified Specialist, a Fellow of the American Academy of Matrimonial Lawyers, and is listed in *Best Lawyers in America* and *Super Lawyers* in Family Law.

FROMM SMITH & GADOW, P.C.
(see ad this page)
JENNIFER G. GADOW
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Jennifer Gadow has over 25 years of experience exclusively handling family law matters, including; divorce, legal separation, custody disputes, third party rights, spousal/child support and relocation. She is a certified specialist with the State Bar of Arizona, a Fellow of the American Academy of Matrimonial Lawyers, and is listed in *Best Lawyers in America* in Family Law for 2021.

FROMM SMITH & GADOW, P.C.
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KATHLEEN STILLMAN
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Kathleen Stillman is a Certified Specialist in Family Law with the State Bar of Arizona, exclusively handling complex family law matters, including; divorce, legal separation, custody disputes, third party rights, spousal/child support, relocation and pre-marital/post-marital agreements. She is currently the chair-elect to the Maricopa County Bar Association Family Law Board.

FROMM SMITH & GADOW, P.C.
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KAREEN O'BRIEN
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Kareen OBrien handles all areas of family law, including divorce, legal separation, custody disputes, third party rights, spousal/child support and relocation. She has over 16 years of experience in handling domestic violence matters. As a major crimes prosecutor, she prosecuted the most serious and violent domestic violence and sexual assault crimes. When she began practicing exclusively in the family law area over seven years ago, she quickly gained a reputation for skillfully handling complex domestic violence family law matters. She has extensive trial experience, particularly in complex custody matters.

FROMM SMITH & GADOW, P.C.
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MARILYN GUITIERREZ
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Marilyn Gutierrez began her legal career as an Assistant Attorney General representing the Arizona Department of Child Safety in juvenile matters. Marilyn currently handles family law matters consisting of paternity, dissolution of marriage, and modifications and enforcement of existing orders (parenting time, legal decision-making, and child support). Marilyn is bilingual in Spanish.

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(see ad pg. 95)
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TABITHA JECMEN
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Rebecca has been focusing on family law since 1996. Rebecca serves as Judge Pro Tempore and is a licensed mediator. Rebecca has been selected as one of the Top Valley Lawyers for the past ten years and was also previously selected as a Top Pro Bono Lawyer. Rebecca was active-duty Air Force and assists military members with family law questions.

Family Law – Domestic Relations

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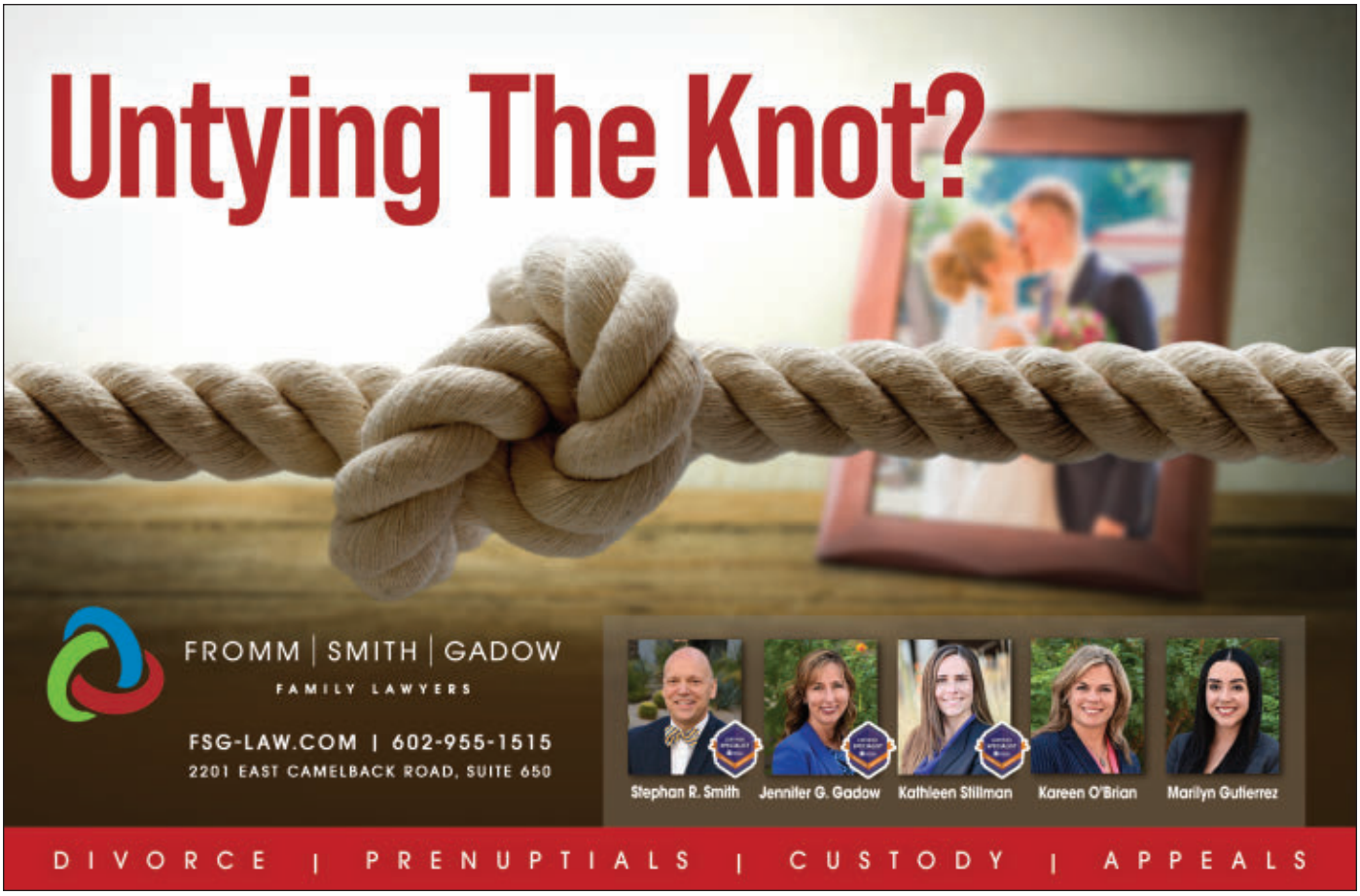
bruce@azblumberglaw.net
www.azblumberglaw.com
Mr. Blumberg's domestic relations practice focuses on the higher-conflict matters, including child-custody battles in order to utilize his litigation skills.



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Ms. Izzo, Chair of the Firm's Family Law and Domestic Relations Department, concentrates her practice in the area of family law and domestic relations matters, including complex litigation and asset division, business dissolutions, collaborative divorce, mediation, arbitration, parent coordination, child custody and child support, and spousal maintenance. She is recognized as a Certified Family Law Specialist by the State Bar of Arizona Board of Legal Specialization and is Past President of the Arizona Chapter of the Association of Family and Conciliation Courts.

JENNINGS, STROUSS & SALMON, P.L.C.
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ALEXANDRA HICKS LECLAIR
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aleclair@jsslaw.com
www.jsslaw.com
Ms. LeClair has significant trial experience and focuses her practice on family law. Her practice includes representation related to prenuptial agreements and all issues related to divorce, legal separation, child custody, child support, spousal maintenance, and post-divorce modifications. She is also a Certified Mediator through Mosten Guthrie Academy.

JENNINGS, STROUSS & SALMON, P.L.C.
(see ad pg. 92)
KAREN N. WOHLGEMUTH
One E. Washington Street, Suite 1900
Phoenix, AZ 85004
602-262-5968 / Fax: 602-495-2789
kwohlgemuth@jsslaw.com
www.jsslaw.com
Ms. Wohlgemuth is an associate focusing her practice primarily on family law, including divorce, premarital agreements, child support, spousal maintenance, and post-decree modifications. She is also experienced in civil and commercial litigation, including construction defect, premises liability, personal injury, and wrongful death. In 2021, she was listed in *Southwest Super Lawyers* Rising Stars in the category of Family Law and is a Certified Mediator through Mosten Guthrie Academy.

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Don Crowell is a certified Specialist in Personal Injury and Wrongful Death Litigation by the State Bar of Arizona. Don has worked exclusively representing injured victims in Arizona since 1976. He has spent much of his early career on his own, followed by supervising the litigation department of a prominent Arizona law firm for 15 years before joining Accident Law Group. Accident Law Group was founded on the principle of providing our clients with exceptional face to face service from trustworthy, experienced attorneys.

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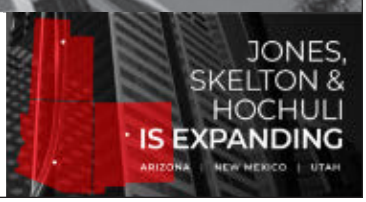

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Troy Froderman has recovered more than a billion dollars in insurance proceeds. Troy is ranked by the highest-ranking legal peer review group, Chambers, as tier 1 leading lawyer in Arizona. He is a trusted and experienced trial lawyer with over 75 jury trials under his belt. For over 32 years, he has represented clients in state and federal courts throughout the United States. This breadth of experience makes him one of the nation's leading lawyers for insurance coverage disputes.

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Mike Patterson helps inbound (to US) and outbound (from US) businesses navigate corporate, compliance, distribution, structuring, risk evaluation and securities matters with his extensive network of top local counsel in over 60 countries. He has handled domestic and international mergers and acquisitions, joint ventures, strategic alliances, equity and debt offerings, foreign direct investment, agency/licensing matters, market entry and foreign due diligence.

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Throughout the past 40 years, Cynthia has represented clients across Arizona, California and throughout the West in a wide array of legal matters ranging from employment law, harassment and wage hour disputes to business and commercial litigation. She handles litigation as well as training and advice for the benefit of employers. Cynthia has been an arbitrator with NAM and AAA for approximately three years, and an arbitrator and mediator for ARC for about one year. She is available to mediate or arbitrate throughout Arizona and California and other western states. Mediation Services available through ARC or direct contact.

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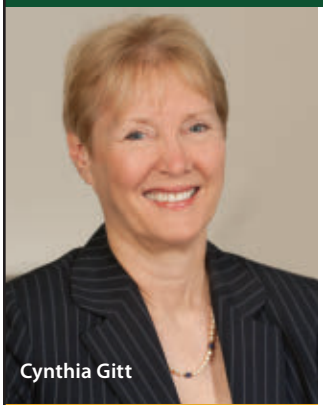

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smithgreenlaw.com
Smith & Green represents employees in workplace disputes such as discrimination, wrongful termination, harassment, and workplace accommodations. James has worked at the Attorney Generals Office supplying advice to various state agencies. James is a former Equal Employment Opportunity Commission (EEOC) Federal Investigator. He navigates clients through initial EEOC filings, investigative stages, mediations, severance negotiations, as well as litigating cases in Federal and State Court.

Legal Ethics

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Mr. Zelms practices in the areas of professional liability, defense litigation, lawyers professional liability, and miscellaneous professional liability. He defends attorneys in State Bar matters, and is dedicated to protecting the rights of Arizona attorneys. Mr. Zelms is nationally board certified by the American Board of Professional Liability Attorneys (ABPLA) as a specialist in Legal Malpractice. He has been named a 2017 – 2021 *Southwest Super Lawyers*, a distinction awarded to the top five percent of attorneys.

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Thomas L. Toone has served as a court-appointed settlement judge, a private mediator, an arbitrator, and a special master in over 4,000 cases over the past 34 years. He was certified by the State Bar of Arizona as a Certified Specialist in Personal Injury and Wrongful Death litigation for over 20 years, but has mediated and arbitrated civil cases of all categories throughout his career. Currently offering only services via Zoom, or other remote services, and telephonically.

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Wendi mediates in the areas of personal injury, insurance coverage, construction defect and professional liability. She is a certified specialist in Personal Injury and Wrongful Death law with more than three decades of complex litigation experience. Wendi is the chair of the Board of Legal Specialization and is a member of the Executive Board of the American Board of Trial Advocates (Phoenix Chapter).

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Steve brings to the mediation table his 36 years of experience in analyzing, formulating, and implementing business transactions, disputes and resolutions. Steve uses both facilitative and evaluative styles in bringing the parties to an agreement. He brings a truly neutral viewpoint to a dispute having represented parties on all sides of the table in many and varied commercial and lending scenarios.

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Amy Lieberman has been mediating and arbitrating full time since 2001, and has successfully resolved over 3,000 employment, commercial and general civil disputes. Listed in *Best Lawyers in America* (2004-present), *Arizona's Top Lawyers* (2006-present), and *Southwest Superlawyers* (2007-present) in ADR, Amy's affiliations include the National Academy of Distinguished Neutrals, American College of Civil Trial Mediators, and the American Arbitration Association, among others. Author of the acclaimed book, *Mediation Success: Get it Out, Get it Over and Get Back to Business.*

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One of Arizona's most experienced trial lawyers, Don is available for mediations, arbitrations, appraisals, and expert witness testimony. Don has completed advanced mediation training at the Straus Institute for Dispute Resolution at Pepperdine Caruso School of Law. He has served as an expert witness in insurance-related matters and mediates tort claims in the areas of professional liability, insurance bad faith, coverage, and general tort liability.

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denlaw1217@gmail.com
www.windycitytrialgroup.com
Denny Esford is a mediator with 18 years of experience settling litigated disputes and conducts mediations via Zoom and Microsoft Teams as well as in-person sessions. Denny served as an engineer for 17 years in the automotive, machine tool and electric motor industries before entering the legal profession.

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Bill Sandweg and John Ager are both Board-Certified Injury & Wrongful Death Specialists and Fellows of the American College of Trial Lawyers. They have over 70 years combined litigation experience with many multimillion-dollar verdicts and settlements. We are dedicated medical malpractice lawyers with a full-time nurse consultant, a lawyer-physician "of counsel, and relationships with some of the best medical experts in the county. Let us absorb the costs of valuating/litigating your medical malpractice case and share fees as permitted by E.R. 1.5.

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DAVID COHEN provides ADR services for all types of civil matters, including those involving medical malpractice, Adult Protective Services Act, wrongful death, personal injury, and other torts. His years of experience serving as a mediator and representing clients in civil matters makes him equipped to understand and resolve cases. He trained at the Straus Institute for Dispute Resolution at Pepperdine University.

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Thomas L. Toone, a Fellow of the American College of Trial Lawyers, has served as President of the Maricopa County Bar Association and is a past president of the American Board of Trial Advocates (Phoenix Chapter). He was certified by the State Bar of Arizona as a Specialist in Personal Injury and Wrongful Death for 20 years.

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See listing above for subject matter expertise of Arizona Women Neutrals.

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Kate Newman is part of the firm's litigation team. Kate is an experienced and refined trial attorney with extensive federal jury trial experience gained while serving as an Assistant US Attorney and Federal Public Defender. She also has comprehensive experience representing clients in commercial and business litigation matters, including shareholder and partnership disputes, contract, corporate law, fraud, and trademark litigation.

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Joseph Brown has served as a Personal Injury attorney for 18 years, as a former insurance adjuster, he understands firsthand how the insurance company can and will take advantage of those unrepresented or who are represented ineffectively. Accident Law Group was founded on the principle of providing our clients with exceptional face to face service from trustworthy, experienced attorneys.

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Our personal injury and wrongful death law office provides representation for victims of catastrophic loss throughout Arizona. The Attorneys with the Mercaldo Law Firm have dedicated themselves to the legal and financial needs of our clients and families for more than 30 years and rank among the top litigation attorneys in Arizona. They work hard to achieve maximum compensation for lost wages, future earnings capacity, mounting medical expenses, pain and suffering, and all other aspects of catastrophic loss.

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Nora Jones is a skilled trial attorney specializing in probate and trust litigation, guardianships and conservatorships, and estate and trust administration. A recognized leader in the elder law community, Nora blends compassion and strength to resolve matters with her clients' best interests at heart. Nora uses creative strategies and multi-faceted solutions for a holistic approach that achieves client goals.

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Murphy Cordier Casale Axel PLC provide expertise when negotiating real estate transactions and moderating real estate disputes. The experienced real estate attorneys at Murphy Cordier Casale Axel PLC will help you with all aspects of your issue, whether it is buying or selling a home or commercial property in Arizona or attempting to settle an issue with a tenant, landlord, or property owner.

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Mr. Charles has successfully resolve hundreds of real estate disputes involving the AAR Purchase Contract. He is a former "Hotline Attorney"

for the Arizona Association of REALTORS (AAR) and he is an approved Mediator and Arbitrator for AAR. In addition to being a Real Estate Certified Legal Specialist, he is a licensed Real Estate Instructor and teaches continuing education classes to attorneys and REALTORS with the State Bar of Arizona and at the Arizona School of Real Estate and Business. Mr. Charles holds the AV Preeminent Rating with Martindale-Hubbell.

Receivership

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(see ad pg. 101)
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wmb@eblawyers.com
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Wade has 25 years of experience representing clients in state and federal courts, encompassing all types of commercial disputes, including representation of court-appointed receivers, as well as petitioning courts for the appointment of receivers. Wades receivership experience includes corporate governance disputes, enforcement and defense of commercial agreements, real estate disputes, and the cannabis industry.

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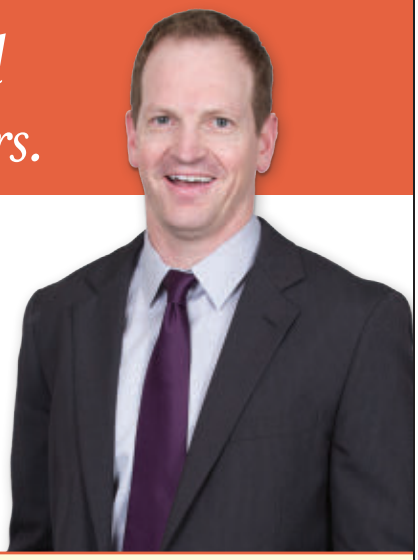

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As a Certified Specialist, Workers Compensation, State Bar of Arizona, Javier C. Grajeda has exclusively represented Arizona injured workers for the last 9 years. Javier is a Spanish bilingual litigator and served on the Board of Los Abogados. He is a member of the Hispanic National Bar Association and The Workers' Injury Litigation Group. Javier has published and lectured on undocumented workers' rights. He maintains a Statewide practice with emphasis on Yuma County. Referral fees are extended per ethical rules.

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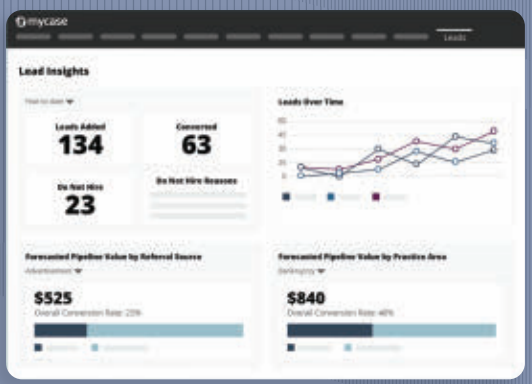

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APPELLATE HIGHLIGHTS

by Eric M. Fraser and **Joseph N. Roth** (civil), **Patrick C. Coppen** (criminal), and **James M. Susa** (tax). Family Law summaries are prepared by the **Case Law Update Committee of the Family Law Section** of the State Bar of Arizona.

SUPREME COURT CIVIL MATTERS

A judgment lien may attach to homestead property if the debtor owns equity greater than the amount exempt under Arizona's homestead law. Under Arizona's homestead exemption statute, A.R.S. § 33-1101, up to $150,000 in value of a person's interest in the person's own home is exempt from attachment, execution or forced sale. A.R.S. § 33-964(B) further provides that a judgment lien does not attach to homestead property "[e]xcept as provided for in § 33-1103." Section 33-1103 in turn provides that the homestead is exempt except "to the extent that a judgment or other lien may be satisfied from the equity of the debtor exceeding the homestead exemption." Under this statutory scheme, a judgment lien does attach to homestead property to property sale proceeds in excess of the homestead exemption amount. *In re McLauchlan*, CV-21-0095-CQ, 1/27/22.

An interlocutory order dismissing some parties does not preclude claims for vicarious liability against an employer for the same conduct. Physicians were jointly employed by a private hospital and a government entity. In a case for medical malpractice against both the physicians and the private hospital, the claims against the physicians were dismissed for failure to serve a notice of claim under A.R.S. § 12-821.01. That statute did not apply to the private hospital. An unsigned minute entry dismissing the physicians is not sufficient to preclude vicarious liability claims against the hospital because issue and claim preclusion require a final judgment on the merits. An unsigned minute entry not certified under Rule 54(b) or (c) is not a final judgment on the merits and therefore does not trigger issue or claim preclusion. *Banner Univ. Med. Ctr. Tucson Campus LLC v. Gordon*, CV-20-0179-PR, 1/20/22.

In a garnishment action against a judgment debtor's insurer for coverage, the insurer may not invoke the doctrine of direct benefits estoppel to bind the judgment creditor to the arbitration terms of the insurance contract. Under the Federal Arbitration Act, written agreements to arbitrate are generally enforceable. But a party is not generally bound to an arbitration agreement within a contract to which the party is not a signatory. The doctrine of direct benefits estoppel is an exception to this rule and provides that a nonsignatory may be forced to arbitrate only if the doctrine applies. This exception does not apply in an Arizona garnishment proceeding. Garnishment actions are creatures of statute, and the statutory scheme governing garnishment requires that a "court, sitting without a jury, shall decide all issues of fact and law." A.R.S. § 12-1584(A). Accordingly, the equitable doctrine of direct benefits estoppel cannot trump the clear statutory intent that a judge, not an arbitrator, decide all factual and legal issues in garnishment actions. *Benson v. Casa de Capri Enterprises*, CV-20-0331-CQ, 1/20/22.

Parts of the state legislature's budget reconciliation bills are void due to violations of the title requirement and single subject rule. The Arizona Constitution requires that each legislative act may address only one subject and that the title must express that subject. The legislature's 2022 budget included eight budget reconciliation bills. For four of the bills (HB 2898, SB 1824, SB 1825, and SB 1819), the titles do not have a natural connection to the subject matter of the challenged portion of bills, so those portions are void. One of the bills contains 52 sections spanning about 30 distinct subjects (e.g., dog racing, election integrity, Covid-19 measures). Because these subjects do not fall under one general idea, this bill (SB 1819) is void in full. *Ariz. Sch. Bds. Ass'n Inc. v. State*, CV21-0234-T/AP, 1/6/22.

SUPREME COURT CRIMINAL MATTERS

Affirming defendant's convictions, death sentences and concurrent sentences on non-capital counts, the Arizona Supreme Court ruled against defendant on numerous grounds, including holding that the trial court did not err by, inter alia, denying his motion to dismiss counts 3 and 4 (felony murder based on burglary) and permitting imposition of the death penalty for his convictions on these counts; and directing defense counsel not to ask prospective jurors whether certain facts could never constitute mitigating evidence, which defendant argued violated *Morgan v. Illinois*, 504 U.S. 719, 728 (1992). Defense counsel had no right to "stake out" jurors' views on the types of mitigation they would find unpersuasive to identify jurors who would automatically impose the death penalty upon a finding of guilt alone. *State v. Thompson*, CR-19-0141-AP, 1/19/22.

COURT OF APPEALS CIVIL MATTERS

Court of Appeals sanctions litigant for noncompliant brief. ARCAP 13 requires appellate briefs to meet certain requirements, including containing a statement of the case, statement of facts, arguments for each issue, all supported by citations to legal authorities and references to the record. In this case, a litigant's brief fell far short of that standard and resorted to name-calling.

The Court of Appeals sanctioned the party for the noncompliant brief, ordering the party to pay the opponent's attorneys' fees. The court also sanctioned the party for abusive language in the brief, ordering the party to pay $500 to the Court of Appeals. *Ramos v. Nichols*, 1 CA-CV 21-0322, 1/25/22.

A party cannot collaterally attack an agency's jurisdiction where the party previously challenged jurisdiction in an administrative proceeding but failed to timely appeal the agency's decision. The Citizens Clean Election Commission imposed a civil penalty against an entity. In proceedings before the Commission, the entity challenged the Commission's subject matter jurisdiction. The entity then sought judicial review of the Commission's subject-matter jurisdiction to impose the penalty but missed the statutory deadline for doing so. This forfeiture of the right to timely appeal has res judicata effect, which precludes the entity from collaterally attacking the Commission's jurisdiction in trial court. *Legacy Found. Action Fund v. Citizens Clean Elections Comm'n*, 1 CA-CV 19-0773, 1/20/22.

A bankruptcy discharge of the personal obligation to make payments on a home equity loan does not extinguish bank's ability to compel a sale under a deed of trust. When an individual's debt for money owed under a home equity line of credit is discharged in bankruptcy, the discharge relieves the individual of the personal obligation

Eric M. Fraser and **Joseph N. Roth** are attorneys at Osborn Maledon PA, where their practices include civil appeals and appellate consulting with trial lawyers. They may be reached at efraser@omlaw.com, jroth@omlaw.com, and are ably assisted with this column by Osborn Maledon PA's appellate group, which maintains www.omlaw.com/azapp-blog/. AzAPP contributors include **Annabel Barraza, Payslie M. Bowman, John S. Bullock, Travis C. Hunt, BriAnne Illich Meeds, Phillip W. Londen, Shannon Hawley Mataele, Joshua J. Messer, Heather Robles and Matthew Stanford.**

Patrick C. Coppen is a sole practitioner in Tucson.

James M. Susa is a shareholder in the Tucson office of DeConcini McDonald Yetwin & Lacy PC.

to pay the loan. The lending bank may not obtain an *in personam* judgment for payment of the discharged debt. But the discharge does not affect the lender's other security, such as a related deed of trust giving the power to compel a sale of the property. *Diaz v. BBVA USA*, 2 CA-CV 2021-0046, 1/7/22.

COURT OF APPEALS CRIMINAL MATTERS

A trial court's acceptance of a plea agreement that contains an express admission of underlying sexual gratification constitutes a finding of sexual motivation under A.R.S. § 13-118, such that the conviction is ineligible to be set aside under § 13-905(N). Defendant's plea agreement constituted more than a mere allegation of sexual motivation. Rather, it was an admission of sexual motivation, and the sentencing court's acceptance of the plea agreement's terms thus constituted a finding of sexual motivation, satisfying § 13-118's requirement that the trier of fact find the crime was committed with sexual motivation. *State v. Cruz*, 2-CA-CR-2021-0035, 1/26/22.

COURT OF APPEALS SPECIAL ACTION MATTERS

The legislative privilege does not categorically shield from disclosure under Arizona public records law communications between legislators or legislators and agents regarding the Senate's election audit. Where it applies, the legislative privilege protects legislators from being required to testify or produce evidence about their legislative activities or the motivations for those activities. Similarly, to the extent the privilege protects against inquiry about a legislative act or related communication, the privilege also shields from disclosure documents reflecting those acts or communications. Although this privilege is absolute where it applies, the privilege is construed narrowly and may apply only to activities within the sphere of legitimate legislative activity. To reach activities other than speech or debate in the legislature, the invoking party must show that the other activities are an integral part of the deliberative and communicative processes used for the consideration and passage or rejection of proposed legislation. Further, the privilege extends to these other matters only when necessary to prevent indirect impairment of such deliberations. Under this framework, the privilege does not attach automatically to every legislative investigation merely because the investigation could potentially relate to future legislation that is not yet proposed or contemplated in connection with the investigation. Thus, the privilege does not categorically apply to communications related to the Senate's election audit because the Senate could not show that the election audit was related to proposed legislation. *Fann v. Kemp*, No. 1 CA-SA 21-0216, 1/21/22.

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With a BS degree from Arizona State University in Software Engineering Technology, Ms. Melton later attended the Phoenix School of Law achieving the School's CALI Award for top scores in Property Law, Constitutional Law and Evidence and served as a Staff Editor on the Phoenix Law Review. Ms. Melton also served as a Research Assistant and Teaching Assistant, and worked assigned immigration matters for the School's Immigration Clinic under the supervision of licensed Counsel.

Following her graduation from Phoenix School of Law, Ms. Melton worked in the field of healthcare compliance and pursued her personal interests as a volunteer on legislative issues impacting children for the National Organization for Women (NOW) Phoenix Chapter.

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Appointments will be made by President-Elect Jessica Sanchez for a term that begins July 1, 2022.

Committees

Appointments

This group makes recommendations to the Board of Governors regarding the appointment of members to fill openings on statewide boards, committees and commissions. Time commitment: The committee meets approximately seven times per year, usually for two hours. Committee members perform the due diligence on applicants in advance of the meeting.

Board of Legal Specialization

The Arizona Board of Legal Specialization (BLS) awards certificates of specialization to attorneys in various areas of law. Applications are reviewed by the Appointments Committee, and its recommendations are submitted to the Arizona Supreme Court for consideration and appointment. While being a certified specialist is not necessary for BLS service, see the BLS Rules and Regulations for the requirements at www.azbar.org/for-lawyers/career-advancement/legal-specialization/. Time commitment: The board meets monthly, usually for 30 minutes.

Civil Jury Instructions Committee

Updates the Revised Arizona Jury Instructions (civil). Keeps the Civil RAJIs current, correct and concise. Time commitment: The committee meets eight times per year on the first Wednesday of the month, usually for two hours.

Civil Practice and Procedure Committee

Studies and makes recommendations on proposals and/or issues involving the Arizona Rules of Civil Procedure and related rules impacting civil practice, prepares petitions recommending civil rules amendments, and comments on third-party petitions affecting civil practice. Time commitment: The committee meets approximately 10 times per year, usually on the first Thursday of the month, for up to 1.5 hours. Additional time may be required for committee members serving on subcommittees or work groups.

Criminal Jury Instructions Committee

Updates the Revised Arizona Jury Instructions (criminal). Keeps the Criminal RAJIs current, correct and concise. Time commitment: The committee meets two times each fall and one time each spring, usually for three hours.

Criminal Practice and Procedure Committee

Proposes, reviews and makes recommendations on rule-change proposals and/or issues affecting litigation of criminal cases. The committee includes defense, prosecuting attorneys and judges. Time commitment: The committee meets approximately four to six times per year, usually for up to two hours. Additional time may be required for committee members to do legal research and draft responses to Rule Change Petitions.

Family Law Practice and Procedure Committee

Studies and makes recommendations on legislation, proposals or issues raised by judges, lawyers and the public, including rules amendments in other areas of practice that implicate the Arizona Rules of Family Law Procedure; may also propose new family law rules. Time commitment: The committee meets approximately eight times per year, usually on the third Wednesday of each month, for one hour.

Advisory Groups

Advisory Groups are charged by the Board of Governors with providing advice and recommendations concerning Bar policy and programs or participation in a Bar program.

Board of Legal Specialization Advisory Commissions

The Advisory Commissions administer the specialization program for each of the eight areas of specialization including the review and recommendation for certification of applicants to BLS. Advisory Commissions consist of 10 members appointed by the President of the Board of Governors for three-year terms. Members are not required to be certified specialists but must practice/teach in the field. See the BLS Rules and Regulations for qualifications. The commissions meet approximately eight times per year, usually for one hour.

Convention Working Group

Creates the three-day convention providing quality CLE, networking opportunities and social events that meet the needs of membership. Time commitment: The group meets

approximately seven times per year for about one hour; additional time may be required for sub-group work.

Council on Minorities and Women in the Law

Encourages and facilitates the active and effective participation of women and minorities in the legal profession and promotes the professional development of minority and women attorneys. Time commitment: The council meets eight times per year for one hour.

Council on Persons with Disabilities in the Legal Profession

Promotes the full and equal participation of persons with disabilities in the legal profession and sponsors legal educational programs on disability rights. Time commitment: The council meets four to six times per year for one hour.

Ethics Advisory Group

Assists the State Bar and its members in providing occasional backup assistance for the State Bar's Ethics Hotline calls. In addition, the group provides nonbinding written best practices guidance that are posted on the State Bar's website, and group members present every other month a one-hour Ethics Café in which two or three members discuss one Ethical Rule in detail. Finally, there is typically a State Bar Convention CLE program. Time commitment: The group meets for approximately 10-20 hours per year.

Fee Arbitration Program

The free voluntary program focuses on resolving fee disputes over $500 between Bar members and their clients, or under certain circumstances between Bar members. Both client and attorney must agree to the arbitration for it to proceed. Time commitment: The group meets approximately once each year for a two-hour training. Throughout the year the volunteers are assigned as arbitrators for fee dispute matters.

Legal Services Advisory Panel

Charged with the "study and recommend ways to meet the legal needs of the indigent and working-poor in Arizona." Time commitment: The council meets four to six times per year for one hour.

Member Assistance Council

Promotes the health and well-being of Bar members by providing policy and program recommendations to the Board of Governors regarding assistance to members facing personal and/or professional challenges. Time commitment: The council meets quarterly totaling no more than 15 hours per year; participation with specific projects may require an additional time commitment.

Mentor Advisory Group

Provides oversight, advice and recommendations regarding the operation of the Mentor Program. Time commitment: The group meets approximately eight times per year for one to two hours.

Professionalism Advisory Council

Provides advice and recommendations regarding the Professionalism Course curriculum, materials, faculty and policies for the Bar's course on professionalism, which is mandatory for all Bar members. Time commitment: The council meets approximately 5 to 10 hours per year.

Technology Working Group

Advises the Bar about the challenges and opportunities arising from the impact of technology on the practice of law and may propose or plan educational programming. Time commitment: The group meets approximately 15 hours per year.

For more information and applications for each committee and other advisory groups, go to **www.azbar.org/for-lawyers/communities.** Applications must be completed and submitted by April 8, 2022.

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OUR LAWYERS HAVE RECOVERED MORE THAN $3 BILLION FOR OUR CLIENTS

The State Bar of Arizona Board of Governors held its regular meeting on December 10, 2021, via Zoom.

- President Jennifer Rebholz called the meeting to order at 8:37 a.m. and made a Call to the Public. Hearing nothing, she moved on to the next item on the agenda.
- **President's Report**—President Jennifer Rebholz:
  - Made a presentation to Paul Phelps, the recipient of the highest score on Arizona's July 2021 Uniform Bar Exam. Mr. Phelps made brief comments via Zoom having received his memento from the board earlier in the week.
  - Attended:
    - Arizona Judicial Council retreat in Flagstaff on October 21, 2021. Topics discussed were mental health issues, opportunities to collaborate with the court and jury pools. The December 9, 2021, meeting was held in Phoenix. Topics discussed were the question of what will stay virtual and participation at hearings. The Court is looking at how to transition out of the pandemic.
    - New Member Orientation on October 27-28, 2021
    - Hon. Brian Furuya's investiture on October 29, 2021, in Flagstaff
    - Bar Foundation meeting on December 9, 2021; an award was given for the hotline.
  - Thank you to Anna Thomasson for opening her home and hosting the Board's holiday reception on December 9.
- **CEO's Report**—Joel England:
  - Recognized employees of the 3rd and 4th quarters:
    - 3rd quarter: Katherine Jendrisak, Conservatorship Coordinator, who took over the position in January and since then has: catalogued 80+ wills from a deceased attorney; inventoried, made client notifications, and produced 140 archived boxes; and overseen and protected over $56K in client funds
    - 4th quarter: Alexandria Marlar, Marketing Manager, who created a demographic report (first of its kind) of the Board of Governors and the active members for the State Bar website
  - Sections Leadership Orientation, led by Roberta Tepper, was held on October 19, 2021.
  - New Member Orientation, two 90-minute sessions held on October 27 and 28; Justice William Montgomery participated in session 1.
  - Attended Hon. Brian Furuya's investiture in Flagstaff.
  - The staff holiday party was held on December 3, 2021, outside in the parking lot and was followed by a Town Hall meeting and activity.
  - Managers/supervisors (approximately 25 members) attended training on how to lead in a hybrid environment.
  - Highlighted Rachel Williams, HR Manager, for her selection as a speaker at the Arizona Society for Association Executives' Annual Leadership Forum.
  - The American Bar Association sent an invitation to be part of a working group that addresses the measurement of outcomes for bar associations. Group will look at what associations do and how to set standards and track progress. Elena Nethers, Director of Diversity, Equity, and Inclusion, and the CEO will participate.
- **Strategic Planning**—Joel England:
  - Introduced Danielle Latimore from Cascade, a software platform used to track progress on our strategic plan. She demonstrated how data is captured, how to drill down for action items, specific due dates and owners, quarterly reports, and viewing the dashboard.
  - Approximately 20 staff members have "ownership" of the data for which they are responsible and are tasked with keeping updated.
- **Mark Harrison Memorial 10-Minute Topics**—Robert McWhirter presented on the Constitution's Pro-Slavery Clauses and Black Self-Determination.
- **Client Protection Fund (CPF) 2020 Annual Report**—Robert Schmitt and Sandra Etherton:
  - CPF Board Chair Robert Schmitt explained that Rule 32 established the CPF in the early 1960s. It is a separate entity from the State Bar of Arizona that protects the public from dishonest lawyers (when they lose either money or property). There are five Trustees who meet quarterly. Terms are for five years, and they can be reappointed once.
  - CPF Administrator Karen Oschmann does an excellent job of investigating each claim.
  - Highlighted information in the 2020 CPF Annual Report: Fewer claims were filed in 2020 than in 2019, and the amount paid out was also lower in 2020 than in 2019. The 2020 fund balance wass higher at the end of 2020 than it was in 2019.
- **Appointments to Arizona Foundation for Legal Services & Education's Board of Directors**—Jennifer Rebholz provided an overview of the Foundation's mission and the work of its Board of Directors.
  - There are two openings, replacing Ms. Rebholz and Doreen McPaul. New appointees will serve three-year terms.
  - Ted Schmidt and Denis Fitzgibbons indicated their interest in being appointed. Sam Saks also had indicated he would be willing to serve again, having served several years ago, but encouraged the appointment of new members and voluntarily withdrew from consideration.
  - **Motion:** Bob McWhirter moved, Chris Russell seconded and the motion carried unanimously to appoint Ted Schmidt and Denis Fitzgibbons to the Foundation's Board of Directors.
- **Finance and Audit Committee**—David Rosenbaum and Kathy Gerhart. David Rosenbaum presented the final draft of the 2022 budget:
  - The currently projected surplus may shrink as things return to normal; it is not permanent.
  - The budget has been to the Finance and Audit Committee twice and also been presented to the Executive Council and meets the technical requirements as outlined by the Budget Guidelines for 2022.
  - Caveat is the ability to provide hybrid CLE meetings.
  - Benefits and raises have been approved by the HR Subcommittee.
  - No projections for paraprofessionals revenue are included.
  - Response to inquiries: (1) $99,000 increased cost for the Office of the Presiding Disciplinary Judge is primarily due to additional personnel and accrued vacation costs. (2) $392,000 IT capital budget primarily relates to network upgrades required, accounting software platform replacement, and call-management system refresh.
  - **Motion:** Denis Fitzgibbons moved, Jessica Sanchez seconded and the motion to approve the 2022 SBA Budget and Capital Budget passed unanimously.
  - Reviewed the Q3 2021 Dashboard: Recommendation to add a third category to the reserve policy will be presented in January for the board's consideration and vote. The goal is to have the revised reserve policy in place to use for allocation of the projected 2021 $1.7m surplus.
  - The Accounting Team and entire staff were thanked for their tremendous work on the budget.
- **Break:** 10:18–10:36 a.m.
- **Awards Working Group**—Benjamin Taylor:
  - Proposal to create a new Excellence in Mentorship Award to honor Mark Harrison. This was previously discussed by the board. Mentoring represents one of the things that Mark Harrison stood for. Mr. Harrison's daughters were consulted on the creation of this award. It is not limited to lawyers but any legal professional.
  - **Motion:** Jessica Sanchez moved, Denis Fitzgibbons seconded and the motion carried unanimously to approve the creation of the Mark I. Harrison Excellence in Mentorship Award.
- **Consent Agenda**—Jennifer Rebholz, hearing no requests to have any items removed from the Consent Agenda:

- Approval of Oct. 15, 2021, board meeting minutes
- Approval of resignations in good standing or in lieu of reinstatement
- Approval of reinstatements of members suspended for noncompliance with MCLE requirements (Rule 45, ARIZ.R.S.CT.)
- Approval of reinstatements of members suspended for noncompliance with annual membership fees and/or trust account compliance (Rule 32 (c)(10) and/or Rule 43, ARIZ.R.S.CT.)
- Proposed Petition to Amend Rule 17, ARIZ.R.CIV.P. and Add New Rule 17.1
- Proposed Petition to Amend Rule 51(a), ARIZ.R.FAM.L.P.
- Proposed Petition to Amend Rule 76(b)(1)(B), ARIZ.R. FAM.L.P.
- Proposed Petition to Amend Rule 76.1, ARIZ.R.FAM.L.P.
- Proposed Petition to Amend Rule 38, ARIZ.R.S.CT.
- **Motion:** Denis Fitzgibbons moved, John Moody seconded, and the motion to approve the Consent Agenda carried unanimously.

- **Rules Review Committee**—Chris Russell:
  - Proposed Petition to Amend Rules 30(b) and 32(d), ARIZ.R. CIV.P.: Amendment clarifies the notice to be provided and procedures to be followed when recording/videoing an oral deposition and its use. Questions:
    - Is there a time limit for when you must give notice?
    - Where does the Rule say you can use an iPhone or other means?
    - Michael Farrell: Thinks people favor consistency with the Federal Rules; the technology is less than 25 years old; trying to provide clarity.
    - Kate Mahady, a member of the subcommittee, thought this would decrease a litigant's costs, not increase them.
  - **Motion:** Chris Russell moved, Jessica Sanchez seconded, and the motion to approve the Proposed Petition to Amend Rules 30(b) and 32(d), ARIZ.R.CIV.P., carried by a vote of 10–4–2.
- **Status Reports**
  - Delivery of Legal Services Implementation Team—Lisa Panahi: Awaiting official notice, but the Court approved the first 10 Legal Paraprofessionals. President Rebholz added that eight are in family law, one in civil, and one in criminal, according to announcement made at the previous day's AJC meeting. Also: 21 people passed the exam; the other 11 are in the character and fitness stage.
  - Legislative Update—Tim Eigo: (1) CCO Joe Hengemuehler and Public Service Center Manager Carol Rose attended annual refresher training for Legislation On Line Arizona (LOLA), a bill-tracking platform. (2) There are still multiple ways to find legal assistance, including via the online Member Directory, even with Find-A-Lawyer (FAL) removed from the website. (3) Legislative updates will begin in January.
  - Social Justice, Bias and Inclusion Working Group—Roberta Tepper: Member survey: A data-sharing agreement with the University of Arizona has been drafted (the Executive Committee approved modified demographics questions, the work should be concluded in the first quarter, and President Rebholz asked the board to remind their colleagues that the survey is coming). Elena Nethers is working on a supplier diversity policy. Demographic data for the Bar's leadership and members is posted on the website.
  - Strategic Planning Working Group—Sam Saks: Other than the earlier Cascade platform demonstration, nothing to report.
- **Correspondence/Reports:**
  - Executive Council meetings: Oct. 1, 2021, and Nov. 19, 2021
- **Adjourn:** Robert McWhirter moved, John Moody seconded, and the motion carried unanimously to adjourn at 11:28 a.m.
- **Obituaries**

  To honor our members who have passed, death notices and obituaries are posted at https://azbar.org/news-publications/in-memoriam/.

REINSTATED ATTORNEY
DAVID WILSON LUNN

Bar No. 019526; File No. 21-2294-R
PDJ No. 2021-9086-R

David Wilson Lunn, Scottsdale, was reinstated effective Oct. 25, 2021. Mr. Lunn also was placed on probation to complete nine hours of CLE on professionalism, high-conflict litigation, and case management and docketing.

SANCTIONED ATTORNEYS
GOVE L. ALLEN

Bar No. 001030; File No. 20-2217
PDJ No. 2021-9098

By final judgment and order dated Dec. 2, 2021, the presiding disciplinary judge accepted an agreement for discipline by consent by which Gove L. Allen, Mesa, Ariz., was reprimanded and placed on probation for two years. The terms of probation require Mr. Allen to commit no further violations of the Rules of Professional Conduct. Mr. Allen also was ordered to pay the State Bar's costs and expenses of $1,200.

While representing a client as the personal representative of her late father's estate, Mr. Allen committed multiple ethical violations, including not having a written fee agreement, taking a lien against estate property without the proper conflicts disclosures/consents and failing to finish work on the matter to the estate's closure.

Aggravating factors: prior disciplinary offenses and substantial experience in the practice of law.

Mitigating factors: remoteness of prior offenses and Mr. Allen's subsequent retirement from the practice of law.

Mr. Allen violated Rule 42, ARIZ. R.S.CT., ERs 1.3, 1.5(b), 1.8(a), 3.2, 3.4(c) and 8.4(d).

JOSEPH E. COLLINS

Bar No. 018289; File No. 20-2121
PDJ No. 2021-9094

By final judgment and order dated Nov. 3, 2021, the presiding disciplinary judge accepted an agreement for discipline by consent by which Joseph E. Collins, Phoenix, was reprimanded and placed on two years of probation. Mr. Collins must complete at least six hours of continuing legal education. He also was assessed the State Bar's costs and expenses of $1,200.

In a family court case, Mr. Collins failed to provide his client a written communication of the scope of representation and his fees. He failed adequately to communicate with and diligently represent his client and entered into a Family Court Rule 69 agreement the client did not understand and to which she later objected. Mr. Collins advised opposing counsel to lodge the agreement/decree despite his client's objections, withdrew from the representation, billed for tasks performed after he withdrew, and asserted a lien to recover outstanding fees. He erroneously advised the court that the lien was supported by a contract with the client. The client had to hire another attorney to address her concerns with the agreement/decree. Mr. Collins voluntarily participated in fee arbitration with the client and waived his claimed unpaid fees.

Aggravating factors: prior disciplinary offenses, selfish or dishonest motive, multiple offenses, vulnerability of victim, and substantial experience in the practice of law.

Mitigating factors: timely good faith effort to make restitution or rectify consequences of misconduct, full and free disclosure to disciplinary board or cooperative attitude toward proceedings, imposition of other penalties or sanctions, and remoteness of prior offenses.

Mr. Collins violated Rule 42, ARIZ.R.S.CT., ERs 1.2, 1.3, 1.4, 1.5, 3.1, 3.3, and 8.4(c).

LEONIDAS G. CONDOS

Bar No. 016153;
File Nos. 21-0889, 21-1102
PDJ No. 2021-9074

By final judgment and order dated Nov. 10, 2021, the presiding disciplinary judge accepted an agreement for discipline by consent by which Leonidas G. Condos, Mesa, Ariz., was suspended for four years effective immediately. Mr. Condos also was assessed the State Bar's costs and expenses of $1,209.10.

In count one, Mr. Condos failed to satisfy an outstanding Medicare lien in a personal injury case and instead distributed all funds to himself and his client. Mr. Condos did so despite first signing a Medicare addendum in which he agreed to satisfy all liens.

In count two, Mr. Condos en-

gaged in the unauthorized practice of law by appearing for a client in Bankruptcy Court while serving a disciplinary suspension in PDJ2019-9088. Mr. Condos did not advise the court or the United States Trustee's Office of his suspension.

Aggravating factors: prior discipline, multiple offenses, and substantial experience in the practice of law.

Mitigating factor: full and free disclosure to the State Bar.

Mr. Condos violated Rule 42, ARIZ.R.S.CT., ERs 1.3, 1.15, 3.4(c), 5.5, 8.4(c), and 8.4(d).

WARREN M. DENETSOSIE

Bar No. 019051; File No. 21-0075
PDJ No. 2021-9096

By final judgment and order dated Nov. 22, 2021, the presiding disciplinary judge accepted an agreement for discipline by consent by which Warren M. Denetsosie, Phoenix, was suspended for one year. Mr. Denetsosie was ordered to pay restitution of $350. He also was assessed the State Bar's costs and expenses of $1,200.

While suspended for nonpayment of bar dues, Mr. Denetsosie accepted representation of a client in a family court case. He did not inform his client of the suspension and charged an advance fee. Mr. Denetsosie failed to communicate adequately with and diligently represent the client, resulting in a default judgment against the client. When the client hired another attorney to set the default judgment aside, Mr. Denetsosie did not respond to requests for the client's file.

Aggravating factors: selfish or dishonest motive and substantial experience in the practice of law.

Mitigating factors: personal or emotional problems, full and free disclosure to the disciplinary board or cooperative attitude toward proceedings, and remorse.

Mr. Denetsosie violated Rule 42, ARIZ.R.S.CT., ERs 1.2, 1.3, 1.4, 1.5, 1.16, 5.5, 8.4(c), and 8.4(d).

DANA REED HOGLE

Bar No.022898;
File Nos. 20-0364, 20-1957
PDJ No. 2021-9028

By final judgment and order dated Nov. 30, 2021, Dana Reed Hogle, Phoenix, was suspended for two years effective 30 days from the date of the order. Mr. Hogle also was ordered to pay the State Bar's costs and expenses of $4,613.95.

In count one, Mr. Hogle represented a plaintiff injured in an auto accident that took place within the scope of his employment. Despite being advised by the worker's compensation carrier he would need to seek reassignment of the claim to file suit, Mr. Hogle signed and filed a complaint without such authority. When he signed the complaint, Mr. Hogle knew nothing about the case and had never communicated with the client. The defendant successfully moved to dismiss.

CAUTION!
Nearly 19,000 attorneys are eligible to practice law in Arizona. Many attorneys share the same names. All discipline reports should be read carefully for names, addresses and Bar numbers.

In count two, Mr. Hogle represented a plaintiff on a false imprisonment claim related to the actions of security guard. He never communicated with the client and allowed his paralegal to engage in the unauthorized practice of law. He did not diligently prosecute the case and it was dismissed on procedural grounds. During the litigation, Mr. Hogle began serving a suspension in a prior disciplinary case and failed to advise the client of the suspension.

Mr. Hogle violated Rule 42, ARIZ.R.S.CT., ERs 1.1, 1.3, 1.4, 3.2, 5.1, 5.3, 5.5, and 8.4(d); and Rule 72, ARIZ.R.S.CT.

AUGUSTINE JIMENEZ III

Bar No. 012208; File No. 20-1672
PDJ No. 2021-9061

By final judgment and order dated November 22, 2021, the presiding disciplinary judge accepted an agreement for discipline by consent by which Augustine Jimenez III, Phoenix, was suspended for 18 months. He also was assessed the State Bar's costs and expenses of $1,200.

Mr. Jimenez failed to adhere to rules governing the management of trust accounts resulting in overdrafts and disbursement errors. After the State Bar Trust Account Examiner brought the errors to his attention, Mr. Jimenez wrote checks to previously uncompensated lienholders in personal injury cases.

Aggravating factors: prior discipline, pattern of misconduct, multiple offenses, and substantial experience in the practice of law.

Mitigating factors: None.

Mr. Jimenez violated Rule 42, ARIZ.R.S.CT., ER 1.15, and Rule 43, ARIZ.R.S.CT.

PEOPLE, PLACES, HONORS & AWARDS


DELGADO

Burch & Cracchiolo PA, Phoenix, announced that **Jennifer R. Delgado** was named a shareholder effective January 1, 2022. She focuses her practice on the representation of entrepreneurial individuals and companies in all areas of transactional business and real estate law.

She received her undergraduate degree with honors from the University of Massachusetts at Amherst and her law degree from Boston College. Delgado is a board member of the American Civil Liberties Union of Arizona. She is also a charter member of Local First Arizona and was recently appointed to the organization's Business Coalition Advisory Council. Local First Arizona is a non-profit organization committed to community and economic development by connecting people, locally owned businesses and communities to build a diverse, inclusive and prosperous Arizona economy.

Derek L. Sorenson joined **Ballard Spahr** in January as a partner in the firm's Phoenix office. He has a national practice advising clients in an array of real estate matters, including development, acquisitions and dispositions, as well as leasing and financing projects. He handles complex land use and regulatory matters for real estate acquisitions and development projects. His clients include one of the nation's leading owners, operators and developers of top retail and mixed-use destinations and a convenience delivery startup that is among the country's most valuable emerging companies.

While working across the United States, much of Sorenson's work currently is located in Arizona, California, Pennsylvania and Nevada.

In December, **Buchalter** announced the promotion of **Josiah Reid** to Shareholder in the firm's Arizona office. He concentrates his practice primarily in the areas of commercial real estate finance, acquisition, development, leasing, joint ventures and related corporate work.

The firm also signed a new lease for its Arizona office in the Scottsdale Quarter, 15169 N. Scottsdale Road. It will move its 45 attorneys and support staff into the new 20,000-square foot space by March.

Lewis Roca promoted the following Phoenix lawyers to join the firm's partnership, effective January 1, 2022.

Nicholas S. Bauman, a member of the firm's Litigation Practice Group, is a trial court litigator whose practice focuses on commercial litigation, including disputes within companies, breach of contract, business torts, breach of fiduciary duty, and bankruptcy proceedings.

Michael Charles Brown, a member of the firm's Litigation Practice Group, is an experienced litigator whose practice focuses on construction, securities and real estate disputes.

Tyler Carrell, a member of the firm's Business Transactions Practice Group, focuses his practice on real

estate transactions, commercial finance and general corporate law. He has significant experience in all aspects of corporate law representing real estate developers, lenders, nonprofit organizations and borrowers.

Molly A. Magestro, a member of the firm's Business Transactions Practice Group, focuses on corporate and real estate transactions providing comprehensive representation and legal consulting services to corporate clients in the real estate, construction, property management and finance industries. Her experience includes the development of custom contracts and related legal instruments for complex business and real estate transactions, strategic negotiation, and advising clients about transactional and regulatory requirements.

Rachel A. Nicholas is a member of the firm's Intellectual Property Practice Group and partners with clients on trademark, copyright, publicity rights and social media matters. She represents clients of all sizes and across a variety of industries, including one of the world's top hotel chains, and a major league sports team as well as fitness and wellness influencers. She also provides counsel to local nonprofit organizations and startups.

Adam Reich, a member of the firm's Litigation Practice Group, focuses his practice on commercial litigation, insurance coverage, business and personal injury torts, and construction litigation. He has represented clients in state and federal courts throughout the United States, including at trial.

Kutak Rock LLP named **Vanessa Alvarez** a new partner in its Scottsdale office, effective January. She focuses her practice on commercial real estate and financing transactions, including construction financing, multistate acquisitions, refinancing, leasing and development. She possesses a broad range of experience in negotiating financing documents and conducting due diligence in the representation of commercial lenders, REITs, and real estate investors for a wide variety of transactions.

The 2022 partner class reflects the firm's ongoing commitment to diversity and inclusion, with 56 percent from diverse backgrounds, 48 percent women and 15 percent identifying as races and/or ethnicities other than white/Caucasian.

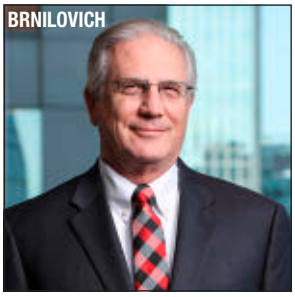
Dickinson Wright PLLC, Phoenix, announced the election of **Amanda Newman** as a new member attorney in the firm's Phoenix office, effective January 1. Her practice focuses on commercial and business litigation with a particular emphasis on contract and ownership disputes. She has represented public and private entities and business owners in litigation claims, business, contract formation, and general corporate and employment matters. She is recognized as a leader in her field by *Best Lawyers in America* "Ones to Watch." Amanda received her B.A. from George Fox University and her J.D. from Arizona State University Sandra Day O'Connor College of Law.

Spencer Fane LLP announced the attorneys elected to the partnership effective January 1, including **Andy Anderson** in the Phoenix office. He assists clients in corporate transactions such as debt and equity financings and mergers and acquisitions from negotiation to closing. He also regularly advises clients in joint ventures on issues pertaining to limited liability company and partnership law, having served on the subcommittee of the State Bar of Arizona that drafted the Arizona Limited Liability Company Act.

Berk Law Group, Scottsdale, introduced its newest associate, **Ryan Murphy**. He attended Oklahoma

State University where he graduated cum laude, earned a bachelor's degree in economics, and a bachelor's degree in political science. He earned his law degree at the Sandra Day O'Connor of Law at Arizona State University. Like his law firm colleagues, his practice focuses on Arizona probate, trust and estate litigation, guardianships and conservatorships, and financial exploitation of vulnerable adults.

HONORS AND AWARDS



Jennings Strouss & Salmon PLC, Phoenix, announced that attorney **David Brnilovich** was appointed as the Chairman of the **City of Peoria's Judicial and Public Defender Advisory Board**, responsible for conducting investigations into the background and qualifications of candidates for the office of Presiding Municipal Judge and Associate Municipal Judge, reviewing proposals for the selection of Public Defender, and alternative defender services.

Brnilovich has been representing the area's businesses and individuals for more than 40 years and has substantial legal experience with business clients in the areas of real estate, construction, corporate governance, small business formation, and succession planning.

Doug Passon recently published a new book, ***The Narrative Gym for Law:*** *Introducing the ABT Framework for Persuasive Advocacy.* Lawyers have been looking for a simple, analytical approach to "story," and Passon says the ABT is it. The ABT framework stands for AND, BUT, and THEREFORE. It's the brainchild of Dr. Randy Olson, Ph.D., a Harvard-educated scientist and story expert. When Passon learned of Dr. Olson and his groundbreaking work in narrative communication, he convinced him to co-author this book. Available now on Amazon in Kindle and print. More information: www.dougpassonlaw.com.

In January, the **Arizona Bar Foundation** announced its new board.

Hon. Todd Lang of the Maricopa Superior Court is 2022 Board President. **Lance Broberg**, Tiffany & Bosco, joins the Board's Executive team as Secretary. New Board members are **Joseph Adams** (Snell & Wilmer), **David Bell** (Christian Dichter & Sluga), **Denis Fitzgibbons** (Fitzgibbons Law Offices), **Craig Lewandowski** (KPMG), **Leslie Ross** (Arizona Attorney General's Office), and **Ted Schmidt** (Schmidt Sethi Akmajian).

Community Legal Services announced that **Lillian O. Johnson**, the firm's Executive Director, has decided to retire effective April 2022. CLS is Arizona's largest nonprofit civil legal aid program, established in 1952. The law firm currently has offices in five counties, a budget of $7 million, and a staff of over 80, including 28 attorneys.

Johnson has served as E.D. since 1982. She graduated from Howard University and the University of Chicago, where she earned her law degree. Among other honors, she was recognized as a White House Champion of Change as part of President Barack Obama's Winning the Future Initiative.

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PEOPLE

pacted over 300,000 low-income Arizona residents. The board will conduct a nationwide search for an Executive Director.

Roopali Desai, a partner at Phoenix-based Coppersmith Brockelman, was elected a member of the **American Law Institute**, whose mission is to clarify, modernize and improve the law to promote better administration of justice. Desai's ALI honor follows a year in which she prevailed in 11 lawsuits related to Arizona's 2020 General Election, was recognized as an *In Business* 2021 Woman of Achievement and *Arizona Capitol Times* Best Capitol/Political Lawyer. She also was recognized by Chambers USA in its Litigation–General Commercial category.

Gust Rosenfeld, Phoenix, announced that **Barry M. Markson** was inducted into the **National Academy of Distinguished Neutrals**, a professional association whose membership consists of ADR professionals distinguished by their hands-on experience in the field of civil and commercial conflict resolution. Membership is by invitation only.

Markson chairs the firm's Mediation and Arbitration group and has been a Judge Pro Tem for the Maricopa County Superior Court since 2005. He serves as a mediator and arbitrator in various civil and commercial litigation and insurance related matters including insurance coverage and bad faith claims, catastrophic injury, product liability, medical malpractice and premises liability. He practices in the areas of civil and commercial litigation, professional liability, premises liability, defamation, construction defect, environmental/toxic tort, products liability, governmental liability, civil rights, personal injury, bad faith and insurance coverage. In his 27-plus year career, he has tried numerous cases to verdict including premises liability, medical malpractice, products liability and automobile negligence.

Lester Schiefelbein was honored with the 2021 Alumni Service Award from the **Sandra Day O'Connor College of Law** at Arizona State University. It recognizes his contributions to ASU Law including the establishment of the Schiefelbein Global Dispute Resolution Program in 2018 within the school's Lodestar Dispute Resolution Center. The program hosts an annual global dispute resolution conference and provides scholarships for ASU Law students to gain knowledge, experience and the necessary professional contacts to prepare them for careers in the global dispute resolution community.

RECENTLY DECEASED

Andrew R. Alex, Phoenix
Kimberly A. Baxter, Tempe, Ariz.
Thomas D. Bennett, Phoenix
Daniel Lane Broadbent, Mesa, Ariz.
Carol L. Childress, Peoria, Ariz.
Robert J. Cruse, Peoria, Ariz.
Eric Devany, Phoenix
Norman S. Fenton, Tucson
Harry J. Gerrity, West Hills, Calif.
Daniel F. Gruender, Phoenix
David L. Haga, Phoenix
Eileen W. Haga, Phoenix
Robert M. Handy, Scottsdale, Ariz.
Michael G. Helms, Queen Creek, Ariz.
Stuart Herzog, Tucson
Sid A. Horwitz, Scottsdale, Ariz.
Cheryl A. Ikegami, Phoenix
Anthony R. Iniguez, Phoenix
Sam Insana, Phoenix
David W. Kreutzberg, Phoenix
Jerry W. Lawson, Phoenix
Donald J. Lisa, Mesa, Ariz.
Keli B. Luther, Scottsdale, Ariz.
Paul J. Matte, Mount Vernon, Wash.
Carole J. McHale-Hubbs, Anaheim, Calif.
Salvador Perez-Saldana, Phoenix
Michelle Ann Rathkamp, Phoenix
Calvin L. Raup, Phoenix
Paul G. Rees, Tucson
William C. Scott, Dragoon, Ariz.
Stephen P. Shadle, Yuma, Ariz.
Jay S. Volquardsen, Phoenix
Michael O. Wilkinson, Phoenix
J. Grant Woods, Phoenix
Richard G. Zielinski, Phoenix


Send items for the People column to
people@staff.azbar.org
Items run free of charge, but because we receive many submissions, we cannot guarantee when an item will run. If you also send a photo with the item, we try to use it, depending on that month's space and the photo quality (high-resolution required).

Classifieds

RESOURCES FOR YOUR PRACTICE

ADR / MEDIATION / ARBITRATION

Stephen Case is available for mediation statewide. Currently Coconino County Superior Court mediator (primarily DR); 15+ years Maricopa County mediation experience; available both in person and through Zoom. 30-year *Best Lawyers* honoree, former ASU Adjunct, former certified specialist in both Estate and Trust Law and Taxation Law. Court filed pleadings not a prerequisite to initiating mediation. Fees negotiable. casesteph@gmail.com; 970-946-0128.

APPELLATE SERVICES

Appellate attorney can take referrals, co-counsel, or assist behind the scenes. For information, visit focused appeals.com or call Austin Martineau at 480-818-4362.

Family Law Appeals, Post-Trial Motions, Special Actions and Appeals since 2003. Family law litigation since 1994. Located and licensed (in good standing) in Arizona. Flat fees for law firms. Capped fees for referred, potential clients. Please call Randi Sirlin at 602-561-8107.

APPS — PROBATE LAW

Quickly Draft Informal Probate Pleadings — For over a decade, AvidLaw Probate has streamlined probate practice in all Arizona counties. 30-day trial. cliff.jones@avidlaw.com; 480-361-1324.

CRIMINAL LAW SERVICES

Criminal Defense practitioner? Criminal Defense Trial lawyers are brilliant storytellers but that skill may not extend to the sentencing phase. 40+ year criminal defense trial lawyer (retired) will write creative sentencing memoranda to tell your clients story, interview client and, if desired, appear for sentencing. Mara Siegel – 602-320-7691; msmara2222@hotmail.com.

EXPERT WITNESSES

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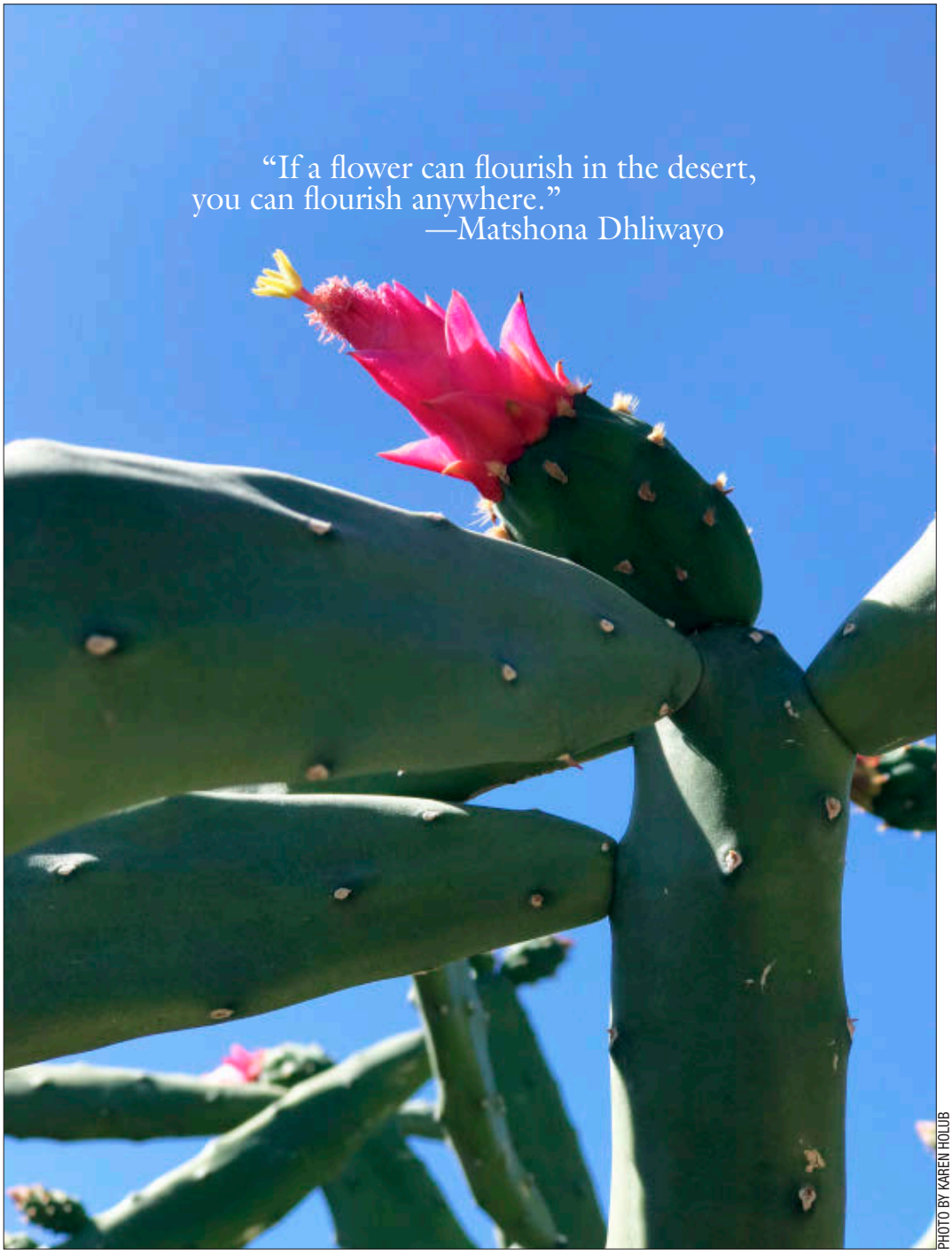

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