MARICOPA LAWYER

OFFICIAL PUBLICATION OF THE MARICOPA COUNTY BAR ASSOCIATION

MAY 2023 VOLUME 42, NUMBER 5 maricopabar.org

INSIDE

WHERE THE LEGAL COMMUNITY CONNECTS

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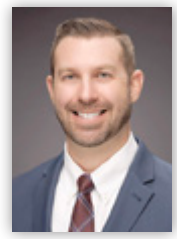
Three Reasons Why Impartiality in Workplace Investigations is Critical

Erich Knorr
Van Dermyden Makus Law Corporation



Erich A. Knorr

Workplace investigations are increasingly in the public eye. Consider the Phoenix Suns, where an investigation sustained claims of race- and gender-based misconduct against the former owner, Robert Sarver, resulting in a one-year suspension and $10 million fine. Or Uber, which fired 20 employees after an investigator interviewed 200 people about workplace culture. Outside the public eye, employers are realizing the value in conducting prompt, thorough, and—especially—*impartial* workplace investigations when complaints arise. Savvy employers and their counsel rely on unbiased workplace investigations to ensure employees have a hostile-free working environment. Doing so has the added benefit of limiting liability in some cases of litigation. Using a third-party impartial investigator also avoids actual or perceived bias.

What Does "Impartiality" Mean, Exactly?

In the context of a workplace investigation, "impartiality" means the ability to separate one's self from, and not have any personal or professional interest in, the outcome of the investigation. The Association of Workplace Investigators' Guiding Principles for Conducting Workplace Investigations states: "Whenever possible, the investigator should be someone who is, in fact, impartial and who is perceived by the participants to be impartial." This means it does not matter to the investigator whether or not the conduct occurred. The investigator's future is not at stake—the internal investigator still has a job or the external investigator still gets paid—whether the allegations are substantiated or not. An impartial investigator objectively gathers and analyzes relevant evidence and comes to a well-reasoned conclusion regardless of outside influences.

So, who should conduct the investigation to ensure it is impartial so it withstands scrutiny? While sometimes the investigation can be handled internally or by the employer's counsel, both options have significant risks. As laws and best practices have evolved, there has been a strong shift toward retaining an independent investigator. Whoever ultimately conducts the investigation, it is imperative to ensure they are impartial.

1. Improve the Work Environment

First and foremost, impartial investigations resolve conflict and improve the working environment. Complainants want to have a comfortable working environment. They want to be heard if they do not. Respondents want to be treated fairly, and also be heard. In the face of workplace conflict, both parties can feel like their livelihoods and reputations are in jeopardy. Good employers want to do the right thing.

Everyone involved wants to know that the matter is being handled with care and professionalism. Any missteps will have a ripple effect throughout the workplace effecting employee morale and confidence in the employer.

A skilled investigator who is perceived as impartial helps navigate these complex situations. Witnesses will communicate more freely with someone whom they perceive as objective and acting in good faith. This leads to more accurate information, which produces useful findings that the employer and counsel can use to make sound decisions.

See **Three Reasons** page 8

CourtWatch

Daniel P. Schaack

Subjective Intent Protects Shooter, Not Protester

In Arizona, firing a gun at a building is a criminal act. Under A.R.S. § 13-1211(B), if you knowingly discharge a firearm at a nonresidential structure, you have committed a class-3 felony.

But it turns out you haven't violated that statute if you aim at a person who happens to be standing next to a building. The Arizona Court of Appeals recently held that a violation of the statute requires intent to shoot at the structure itself. *State v. Aguirre*, No. 1 CA-CR 22-0057 (Ariz. App. April 4, 2023)

Enrique Franco Aguirre got into a physical altercation with another man—identified as "John" in the opinion—outside a nightclub. Aguirre grabbed his pistol and fired at John, striking him several times. But two bullets missed and hit the club. One passed through an open window and struck a metal tripod inside the building. The other struck and damaged the building's exterior block wall.

The state charged Aguirre with four counts of aggravated assault, one count of discharging a firearm at a nonresidential structure, and three counts of endangerment. Unsurprisingly, Aguirre and John gave different accounts of the altercation.

John testified that he was a regular at the club, that Aguirre worked there as a security guard, and that he had lent money to Aguirre. One night as John was leaving the club Aguirre approached him in the parking lot and told him that he would not repay the loan. John tried to avoid a confrontation, saying that it was not the time to discuss it. Aguirre then punched John, who pushed him back. Walking to his truck, John turned and saw Aguirre pointing a gun at his head. So he grabbed his own gun out of his truck and aimed it at Aguirre. Aguirre ran at John, firing several shots. John did not return fire.

Aguirre testified that he shot John in self-defense. He knew John as a regular at the club; he called him violent—a "gun guy" who supposedly was "associated with the cartel." Aguirre denied having borrowed money from John. Instead, he confronted John that night to discuss threats John had made the previous night, when Aguirre had asked him not to take his gun into the club. John started the fight by threatening and shoving Aguirre, after which Aguirre punched John. Aguirre admitted that he brandished his own weapon first, believing that John planned to get his gun from his vehicle. Aguirre pointed his gun at John, warning him "not to pull his gun." He denied firing until after John grabbed his gun and began firing.

The jury acquitted Aguirre of the aggravated-assault charges, and it hung on the endangerment counts. But it convicted Aguirre of dis-

See **Subjective Intent** page 8

MARICOPA Lawyer
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The Official Publication of the Maricopa County Bar Association

The mission of the MCBA is to serve its members, the legal profession, the judicial system and the public.

The *Maricopa Lawyer* is published monthly on the first of each month and mailed to members of the Maricopa County Bar Association. Please send address changes to: membership@maricopabar.org. Editorial submissions and advertising rate requests may be sent to maricopalawyer@maricopabar.org. The editorials and other views expressed in the Maricopa Lawyer are not necessarily those of the Association, its officers or its members. For more information, please visit www.maricopabar.org. The MCBA website is at www.maricopabar.org and pdf copies of past issues are available for viewing. Please send editorial submissions to Beth Sheehan at bsheehan@maricopabar.org. Advertising rates and information are also available at maricopalawyer@maricopabar.org or (602) 257-4200.

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MCBA PRESIDENT

Lauren Bostick

MCBA Sections and Divisions Enhance Membership

In addition to an MCBA membership, many members also join divisions and/or sections to enhance their experience.

MCBA's divisions and sections plan and implement CLE programs (often free to those in that section); host social/networking events; and often participate in community service activities.

Sections educate and inform their members on legal and related topics of interest and concern to attorneys practicing their area of law. They also provide an effective forum for the exchange of ideas, views, and information.

Membership in these groups is the best way to meet and mingle with like-minded practitioners, enhance your legal knowledge, and expand your network of colleagues.

Each division or section is headed by an executive board or board of directors, which is normally elected by the group's members. Division board presidents are automatically members of the MCBA Board of Directors. Boards generally meet monthly and may appoint subcommittees to implement projects. Any member may attend the monthly meetings.

The MCBA's six divisions are either employment or age-related. They include: Corporate Counsel; Paralegal; Public Lawyers; Solo and Small Firm; Young Lawyers; and a newly added division for Legal Paraprofessionals.

Ten sections are subject matter or practice-related: Bankruptcy; Construction; Criminal; Employment; Environmental & Natural Resources; Estate Planning, Probate & Trust; Family; Litigation; Personal Injury/Negligence; Real Estate.

If you are interested in finding out more about the MCBA divisions and sections, contact Laurie Williams at lwilliams@maricopabar.org

MCBA also has several committees that are open to MCBA members. They include: Awards Committee; Bench-Bar Committee; Equity, Diversity, and Inclusion Committee; Finance Committee; Hall of Fame Committee; Lawyer Referral Service Committee; and the Maricopa Lawyer Editorial Board.

If you are interested in joining one or more of these committees, contact Executive Director Beth Sheehan at bsheehan@maricopabar.org

"Your talent determines what you can do. Your motivation determines how much you're willing to do. Your attitude determines how well you do it." — Lou Holtz ■

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Arizona Free Legal Answers is a confidential question answering system that allows attorneys to give free legal advice online at a time and location convenient for you. Once you are registered as a volunteer, you can log on, decide whether you would like to answer any question and send your response via the website. As the volunteer attorney, you decide when to answer a question and when to end an exchange.

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New Learning Opportunities

Greetings legal professionals of Maricopa County! I hope you are enjoying the warmer weather these days, especially after what seemed like a longer than usual cool and rainy season. I mentioned in my last piece that I am excited about some new initiatives and improvements happening this year, one of which is a new learning opportunity that I thought would be of great benefit for those who regularly file documents with our office.

In April, members of our team presented two great virtual CLE opportunities in conjunction with the Maricopa County Bar Association. Both sessions covered eFiling, and were designed to help demystify the process and walk attendees through how to use the online eFile platforms. The first session covered eFile for juvenile cases and included a live demonstration, while providing an opportunity to ask the panelists questions. The second session covered eFile for civil cases and was presented in conjunction with the AOC. A final session is scheduled to take place this month and will cover eFile for family cases. This is the first time our office has provided CLE-based training opportunities, and I'm excited to see this effort come to fruition. My hope is that we can offer some additional CLE-based training opportunities in the future.

We have also re-launched a communications effort called the Clerk Minute. Some of you may remember this effort back in 2020, in which we published a video interview session with Vice Chief Justice Ann Timmer. She spoke about creative ways in which she and legal advocates have sought to expand access to justice and reduce barriers to legal services. Our second session involved an interview with Superior Court Presiding Judge Joseph Welty who spoke about how COVID has changed the legal landscape. In March, I had the pleasure of doing a third session with Family Court Presiding Judge Bruce Cohen. He spoke to us about some of the trends he's seen in Family Court, why it's important that all litigants are shown respect and shared details of his life before he became a judge. He even shared interesting details about his brief stints on several game shows, which he shared during our recording session. It was a pleasure speaking to him, and I greatly admire his dedication to the legal profession ... and his colorful pre-professional background!

We are still working steadfastly on some initiatives, including eFile for probate cases and replacing our Minute Entry Electronic Distribution System (MEEDS) for both adult and juvenile. We expect to see the MEEDS update go live sometime later this year and are developing a timeline for eFile for probate.

I'd like to thank the Maricopa County Bar Association for partnering with us to develop an incredible CLE opportunity centered around eFile. I hope that it will help clarify the process, which is, admittedly, a little confusing sometimes. I'd also like to extend a huge thanks to the AOC for joining us on the CLE education opportunity and look forward to future joint education opportunities should the need arise. ■

The eFile CLEs are available for self-study under CLE & Events on maricopabar.org.

So, Should You Use 'So'?

Has anyone else noticed the increased use of "so" to start a sentence or question? Some writers consider that use wrong because it is not formal (sounding) enough. They also likely adhere to the convention that conjunctions should not start sentences. The more modern approach is that conjunctions can start sentences. The hard part is making sure to use "so" as a conjunction.

Surprisingly, "so" is not always an easy word to use in writing because it can have many functions. It can be an adverb, a coordinating conjunction, a subordinating conjunction, or an informal filler. When used as an adverb, "so" indicates "to a great extent or degree": *I threw the book because I was so angry at the ending.* Because the adverb "so" is used to intensify, I suggest using it sparingly in legal writing. A little goes a long way.

The word "so" can be used as a conjunction in two ways. First, it can connect two independent clauses. In this case, "so" indicates that the second clause happened because of what happened in the first clause (a causal effect or "thus"). Because "so" is a coordinating conjunction, the writer must use a comma before it.

I was upset with the ending of the book, so I threw it.

I was upset with the ending of the book. So, I threw it.

Second, "so" can subordinate a dependent clause to the main sentence. In this case, "so/so that" is the subordinating phrase that answers the question why and explains the purpose behind the action in the main sentence. No comma is used with a subordinating conjunction, and the use of "that" is optional.

I put the book away so (that) I could find it again.

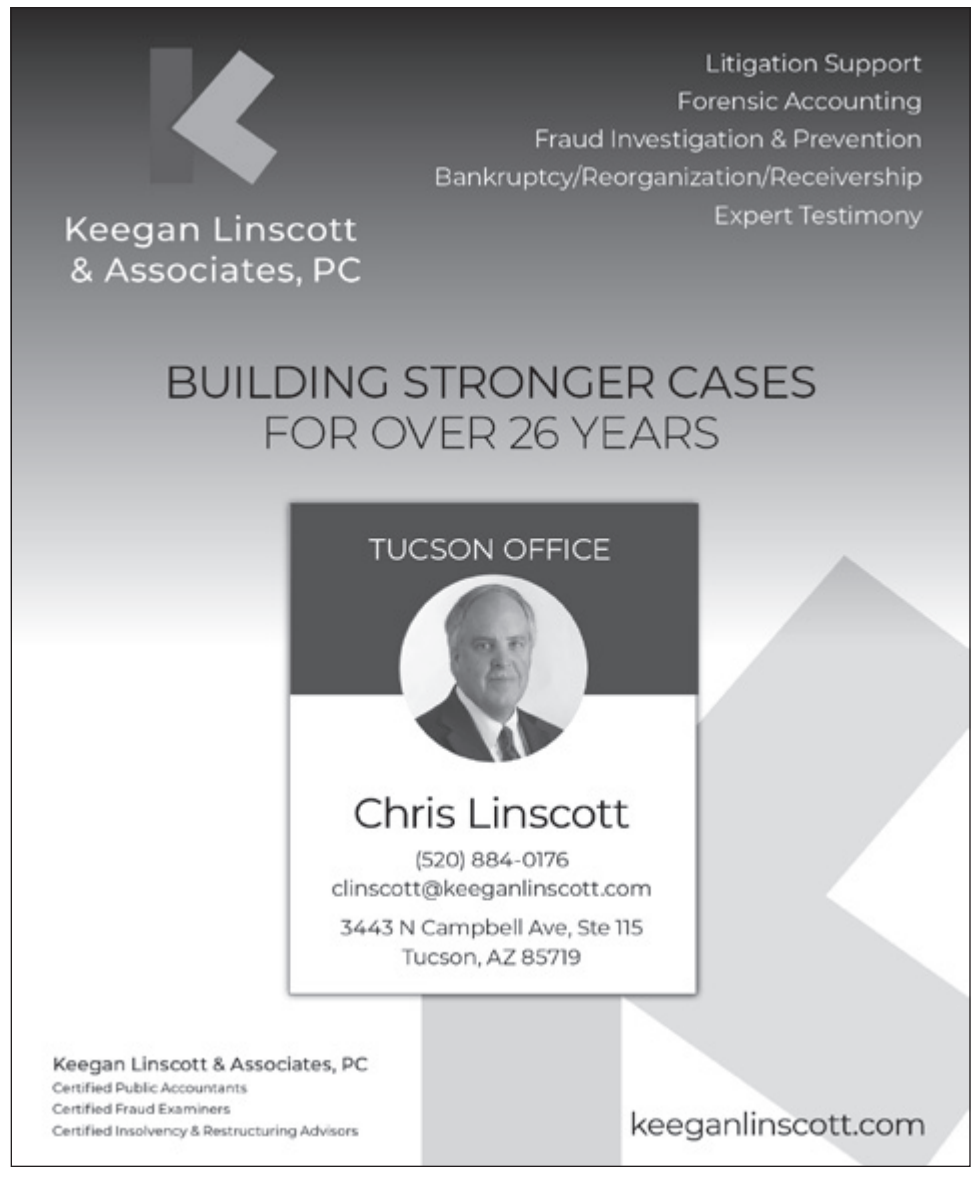
On first glance, this sentence looks like two independent clauses that require the use of a comma to separate them. To tell the difference, I replace the "so/so that" with "for the purpose that." If the replacement makes sense, the "so/so that" is subordinating.

So, can this get any more confusing?

The answer is yes. The above use of "so" to start a sentence is neither an adverb nor a conjunction. This example uses "so" as an informal sentence starter. I suggest avoiding this usage as too informal for legal writing. ■

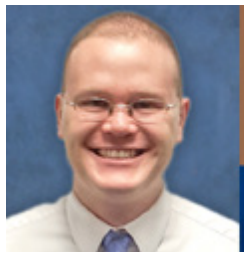
Feeding Families in Need

MCBA Paralegal Division Board Members Adriana Taylor, Michelle Olivares, Anabel Quintana, Jeanette Voss, and Julia Brown volunteered at the St. Mary's Food Bank on Saturday, March 18. They helped pack over 1,000 bags of food for families in need.



Hon. David Garbarino's Investiture

MCBA President Lauren Bostick presents a gavel to Judge David Garbarino on Friday, April 7.



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Kyle Cummings

But There was Nothing to Write About…

As lawyers, we need to write; sometimes, we need to write a lot, and very quickly. In an act of hubris, I decided to try providing some advice on writing (again, since this will be the second article I've done on the topic—recycling ideas is clearly the height of good writing).

If this attempt fails to give any useful pointers, feel free to mock it at lunch.

Introduction

For anyone who's heard judges discuss what they like to see in briefs, a common point is to not waste time with boilerplate legalese. The intro may be a judge's first time seeing your arguments, so the last thing you want is for their eyes and thoughts to start wandering.

In other words, for an introduction, lose everything but the essentials: state what you're brief is about, state your positions, and move on.

Not to say that boilerplate can't have its place—my initial drafts usually have that exact language, filled with 'undersigned presents to this Court,' 'requests of this court the following relief for good cause shown,' 'comes now,' and on and on. I find it's useful in starting, making me put fingers to keyboard and actually write; I'm forced to consider what's actually being argued and what key points to address. Once done, though, I have to remember to go back and start cutting out the excess.

Introduction, Continued

Being a maverick of the writing world (i.e., a hack), I've extended this Introduction section to address two unrelated points: 1) how lengthy is your title, and 2) starting a brief with a literary quote.

Regarding titles, I usually prefer to be succinct. While at times it may be necessary to have a longer title, it's better to keep the title short whenever possible. This not only helps the judges (as previously discussed), but also court staff—a brief will never go directly to a judge, and instead a filing clerk will handle it first, or a judicial assistant may be receiving it, and so on. Long and complicated titles can make it more difficult for staff to know what to do with the document, leading to it being miscategorized.

As for literary quotes, never start a brief with one of them. Ever. It comes across as needlessly dramatic and distracts from the point.

Undoubtedly, there are some lawyers among us who are good enough writers that they can, and may have, used such quotes, but a good rule of thumb is that anyone who thinks they're that good probably is not.

Body

As the title says, sometimes there's nothing to write about. I'm still haunted by memories of college professors emphasizing things like word-count, font size, and double-spacing. My first (and unfortunate) instinct is to worry that I'm not using enough words. Basically, if I have the space, then shouldn't I be using it to emphasize the point over and over?

More words do not necessarily mean good writing. If the point you're trying to make can be short, without leaving arguments unaddressed, then keeping the brief brief (I've officially hit rock bottom with that 'joke') is a solid strategy.

Obviously, there'll be times when you need the full page-count to present arguments, but that boils down to a judgment call, based on both knowing the audience and properly weighing the importance of the argument. I've had mentors bluntly tell me that yes, maybe I have 10 pages of space to use, but a judge may only look at the first five, given the kind of topics at issue, so plan accordingly.

Conclusion

What's a conclusion? What purpose does it serve? Am I just trying to pad out this article now?

Typically, conclusions just repeat what the party is asking for, using fewer words. And that can be a good thing. Honestly, I've only rarely come across conclusions in briefs that are either amazing or terrible.

By the time of the conclusion, a reader should already know what's being requested and the supporting arguments. So, if the conclusion is playing a vital role in either of those two aspects, something's gone wrong.

For me, a conclusion plays a fairly straightforward role: a short summation of the requested relief, alongside a short summation of the strongest arguments. Frankly, most readers will only skim the conclusion to make sure there's nothing new in them, so it's best to view this final part of a brief as something non-essential, which can give the reader broad strokes that they can easily retain.

(Also, try to limit using parentheticals. They may distract from the point.) ■

Law Firms Cringe, But Bow to the Need for Zero Trust Architecture

Sharon D. Nelson, Esq., John W. Simek, and Michael C. Maschke
Sensei Enterprises, Inc.

Zero Trust Architecture simplified

Lawyers have a "deer in the headlights" look whenever we talk about Zero Trust Architecture (ZTA)—and we do understand that look. ZTA is complicated and often causes your eyes to glaze over about two minutes after we bring ZTA into the conversation.

Let's keep it as simple as a complicated subject can be.

Zero Trust Architecture (ZTA) is not a product you can buy in a store or online. It is a security model presented in 2003 by the Jericho Forum, although the term "zero trust" dates back to 1994. The zero trust model surfaced in 2010 but would take almost a decade to become prevalent. Our old models assumed that users and devices within a network could be trusted and given access to resources based on their location or other factors.

ZTA is different. It assumes that all users, devices, applications, etc., are potentially compromised and must be validated before they are granted any access to a network. And periodically, they must be re-evaluated.

In essence, ZTA creates a security perimeter around each user, device, or application—rather than a perimeter around the entire network. Now you have more granular control over access to resources. The perimeter security model doesn't work as more and more firms move to a hybrid work environment or even complete remote access. ZTA drills down to smaller objects and is well suited for a mobile workforce. What does that mean to your firm? You stand a MUCH greater chance of defending against cyberattacks—and of limiting the damage that an attack may cause. Now that's a goal worthy of effort and money.

What steps do you need to take to implement ZTA?

There are a lot of steps to take, but here are the basics.

- Identify all users, devices, and applications that need to have access to resources on your network.
- Verify the identity of each user, device, and application prior to granting access. How do you do this? You use multi-factor authentication, device profiling, and a long list of other methods.
- Limit access to the resources that are necessary to perform particular functions, using access controls and role-based access.
- Monitor (24X7) activity on the network so that you can be alerted to any suspicious activity. Use advanced analytics and machine learning.
- Encrypt all data at rest and in transit to ensure there is no unauthorized access.

Why is it so important that law firms implement ZTA?

As all lawyers should know, their firms are one-stop shopping for cybercriminals. Break into a normal company and you (mostly) get data about that company. Break into a law firm and you've got data about a lot of people, companies, organizations and, often, governmental entities.

Much of the data may be deeply confidential (medical data, financial data, and intellectual property, etc.) and law firms have an ethical duty to protect that data. In the event of a data breach, there could be major legal and reputational consequences. With perimeter security being a broken model, there is really no choice but to move to ZTA. To be ethically competent with the technology we use, there is no other pathway.

At this point in time, law firms are connecting to their network and cloud services from many different locations—and the people connecting may be clients, employees, and third-party vendors. All of this necessarily increases the risk of unauthorized access.

ZTA can help truly secure law firm data, hardening the firm's overall security defenses. It helps firms meet compliance and ethical requirements—and it sure as heck demonstrates to clients that the firm takes the protection of client data very seriously!

Ethics and ZTA

When we lecture, we are often asked if ethical rules require that law firms adopt ZTA. Explicitly? No. But they do require that lawyers take "reasonable" measures to safeguard client data. Both the duties of competence and confidentiality require that. Very soon, within the next couple of years, no one is going to question that ZTA is "reasonable" and must be implemented. Better to start down that path now and be prepared.

Failure to move to ZTA may well, one day in the near future, be construed as failing to take reasonable measures to protect client data from unauthorized access or disclosure—and that might lead to disciplinary action or legal liability. And, as we note below, clients and cyberinsurance companies may require the implementation of ZTA.

OK, you're sold. So how much will it cost to implement ZTA?

Boy oh boy, do we wish there was an easy answer to that question. Obviously, a lot will have to do with the size of the law firm. Some firms need a greater level of security because of the data they hold. Some firms have a very complicated IT infrastructure, others (especially the smaller law firms) do not.

You will have hardware and software costs for sure, including such things as firewalls, intrusion detection systems and access control solutions.

Configuration and integration costs will be incurred as you integrate ZTA into your existing IT infrastructure. The bigger your firm, the more that will cost.

You'll need to budget for training. Employees need to understand ZTA and be comfortable using the tools that come with it. They need to get used to access controls, multi-factor authentication and other security practices. Though the training is essential, it is unlikely to be a big cost for a smaller firm.

Maintenance and monitoring costs are also a factor. There will be ongoing updates, maintenance, and monitoring on a 7X24X365 basis, with alerts likely going to a human-staffed Security Operations Center (SOC). Not to worry. There are affordable outsourced solutions available to implement a lot of the Zero Trust Architecture, even for small firms.

Overall, a small firm is looking at thousands of dollars, but likely not tens of thousands of dollars. The price tag goes up the bigger you are. As you groan about the price tag, bear in mind the much larger costs associated with a data breach. That may make your ZTA budget seem a little more palatable.

Still not persuaded? Need to understand why perimeter security won't protect you?

We're not surprised that we have to go over this ground again and again with clients. Perimeter security worked and worked well for a very long time. But with the prevalence of cloud computing, mobile devices and remote working, its effectiveness has eroded. Without a traditional perimeter, it becomes increasingly difficult to control access to data. It becomes easier for a cyberattack to succeed—and not by a little but by a lot.

Cybercriminals spend a LOT of time using techniques that will overcome a perimeter defense. These techniques include phishing (the big kahuna), social engineering and malware designed to defeat perimeter security. There are a lot of techniques—it takes us an hour to go through them all when we do a one hour lecture so forgive us for simply touching on the highlights.

Remember that it takes just ONE compromised VPN connection to pierce your perimeter security wall. And once inside the perimeter, the cybercriminals can move laterally through your network and do a world of damage, including deletion of backups and massive exfiltration of confidential data. ZTA is the inevitable upgrade you need.

Are cyberinsurance companies beginning to insist on ZTA?

Yup, they sure are. They may not explicitly demand it (yet) or even use ZTA terminology, but they are on the way to doing so. They certainly encourage all moves toward ZTA and premiums will be less the more you take steps to implement ZTA.

Today, insurers want to see multi-factor authentication. No ifs, ands, or buts about that. They also want clients in the cloud, where they are safer. They often require that you have technology which monitors for a data breach. They want all laptops used for work to be owned by and protected by the law firm—no access by personal devices. They want encryption everywhere too.

The list goes on and on—but you get the idea. Every new requirement is moving the insured closer to true ZTA. Expect that trend to continue. And if you don't do what they want, they may deny coverage altogether or limit the amount of coverage. Every time we sit down with a client to go over a cyberinsurance application, there is much gnashing of teeth by the client.

Are clients beginning to insist on ZTA?

Absolutely. The larger the client, the more they are likely to require cybersecurity assurances from their law firm(s). Even less sophisticated clients are beginning to ask questions and demand cybersecurity assurances from their law firm.

In a world where clients hear about data breaches daily, it is no wonder that they are not only looking at their own internal security but that of their law firms. Law firms, especially the smaller firms, are not noted for first class security. In March 2023, a single cybersecurity company reported that it had dealt with data breaches at six law firms (not identified by name) in just the first two months of 2023. Imagine how many law firm breaches were dealt with by all cybersecurity firms in the same time period.

Clients are currently dictating that certain security measures be followed—and larger clients may be requiring that ZTA be implemented. In some industries—healthcare and finance are good examples—there are regulatory requirements that the client AND the law firm may be bound by.

One more thought re: ZTA for law firms: Firms that implement ZTA are becoming more attractive to clients. That's something to think about as part of your marketing and client retention strategy.

If your head hurts from reading this article, a good resource is Microsoft's Zero Trust Guidance Center, which may be found at learn.microsoft.com/en-us/security/zero-trust.

Final words:

We'll note one last time that "perimeter security" is dead. That's what makes ZTA so urgently needed. So, if you choose to turn a blind eye to ZTA, remember the words of Benjamin Franklin: "By failing to prepare, you are preparing to fail." ■

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Call for Nominations for the MCBA Hall of Fame, Robert R. Mills Member of the Year, Judicial Officer of the Year, and Public Lawyer of the Year

The **Hall of Fame** was created in 2008 through the MCBA by then-president Hon. Glenn Davis (ret.). It seeks to honor in perpetuity those remarkable individuals who have built the legal profession in this county and beyond, who have made extraordinary contributions to the law and justice, and who have distinguished themselves at the highest levels of public service.

The **Robert R. Mills Member of the Year** award honors Bob Mills, a prominent trial lawyer and active MCBA volunteer who practiced at the former law firm of Evans, Kitchel and Jenckes PC from the late 1960s until his untimely death at age 41 in 1984. Mills graduated from the University of Arizona College of Law and spent his entire career at Evans Kitchel, which at the time was one of the largest firms in Phoenix. He was a leading trial lawyer practicing primarily in the railroad personal injury defense field, but also tried complex cases in condemnation and utility law.

The **Judicial Officer of the Year** award honors those who significantly contribute to the programs and activities of the MCBA; demonstrate leadership and innovation in furthering the goals of the legal profession and promote the ideal of professionalism; and show an outstanding commitment to public service, including charitable, cultural, humanitarian and/or educational service to the community at large.

The **Public Lawyer of the Year** award recognizes a public lawyer who demonstrates a dedication to public service both in the practice of law and in his or her community; shows an outstanding commitment to public service, including public practice and charitable, cultural, humanitarian and/or educational service to the community at large; significantly contributes to the programs and activities of the MCBA and/or the MCBA Public Lawyers Division; and/or dedicates himself or herself to furthering the goals of the legal profession and promoting the ideal of professionalism.

Nomination forms are available at maricopabar.org under About Us and will be included in the eNews sent out on Fridays.
The deadline for submission is June 30, 2023
Questions? Contact Beth Sheehan, bsheehan@maricopabar.org or 602.257.4200 x132

Water Judge, Special Master to Oversee Key Arizona Water Cases

General stream adjudication cases focus on priority of rights for key waterways

The Hon. Scott Blaney, judge of the Superior Court in Maricopa County and recently appointed by the Arizona Supreme Court to oversee the state's principal water claims, has appointed Sherri Zendri as the water master for general stream adjudication.

Judge Blaney, in addition to continuing to hear cases as part of the Superior Court's Civil Department, is now also presiding over the state's two major stream adjudication claims involving the Gila River and the Little Colorado River systems. The appointment of Special Master Zendri provides additional support for general stream adjudications, serving as the day-to-day arbiter of the cases.

General stream adjudications are judicial proceedings to determine the extent and priority of all water rights in an entire river system. Arizona is undertaking a general stream adjudication of both the Gila River and the Little Colorado River systems. Priority is important in Arizona, especially during times of drought.

Judge Blaney, who was appointed to the Bench in 2018, previously served in the Family and Civil departments at Superior Court. Before joining the Court, he practiced in the area of complex commercial and business litigation, as well as employment law. He's a graduate of the University of Arizona College of Law and served more than 30 years as military lawyer, including combat tours in Iraq and Afghanistan.

Special Master Zendri, who assumed her role March 20, has experience as administrative counsel for the Arizona State Lottery and the Arizona Department of Environmental Quality. Before becoming the administrative counsel at ADEQ, she worked at the agency as a hydrologist, project manager and unit manager in the Waste Programs Division, the Air Quality Division, and the Regional Compliance Program. She is a graduate of the University of Arizona College of Law and earned a master's degree in public administration from Arizona State University.

Thousands of claimants and water users participate in these cases before the Superior Court of Arizona in Maricopa County and in Apache County. The Superior Court will issue decrees determining the water rights in the Gila River and Little Colorado River systems. State law, Indian, and federal non-Indian water rights will be adjudicated. The adjudications are conducted pursuant to Arizona Revised Statutes sections 45-251 to 45-264. ■

Three Reasons

continued from page 1

2. Limit Liability

Employers need to have a policy and process to respond to complaints, including conducting an impartial investigation. If they do—and they follow it—it may limit liability in ensuing litigation.

The Equal Employment Opportunity Commission ("EEOC")—the federal agency responsible for processing and investigating employees' complaints of harassment, discrimination, and retaliation—requires employers to investigate when they become aware of allegations involving such claims. Federal courts have held that employers have a duty to investigate when they know, or should know, of allegations of harassment, discrimination, or retaliation. A prompt, impartial, and thorough investigation is an essential component of an employer's defense in harassment cases involving co-workers, non-employees, and supervisors, where no tangible employment action was taken against the employee.

3. Avoid Actual or Perceived Conflicts of Interest

An impartial investigator can avoid potential conflicts that can arise from the investigator's other roles and relationships. When the stakes are high, both impartiality in fact and *the perception* of impartiality are crucial.

The Dueling Roles of Counselor and Investigator. An impartial investigator should not also serve as counsel for the employer. An employer's counsel who undertakes an investigation risks conflicts in balancing their other roles as advisor and litigator. The Arizona Rules of Professional Conduct states a "lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness," except in limited circumstances. Where counsel investigates issues that end up in litigation, they could become a necessary witness. Even if the investigation was conducted by someone else within the advocate's firm, it is problematic for them to put their partner or associate on the witness stand to assert they conducted an impartial investigation. Opposing counsel could probe the firm's relationship with the client, other work performed, total billing to the client over the years, and more. It also may be difficult to separate advice from the investigation conclusions, raising possible attorney-client privilege issues.

Moreover, impartial investigative services and advocacy are entirely separate functions bound by contradictory duties. As an advocate, the attorney's aim is to be a zealous advocate and obtain the best outcome for their client. In contrast, an investigator's obligation is to be impartial and unbiased—and not influenced by how the outcome might affect any interested party. An attorney who acts as an advocate and investigator blurs these lines and undermines the effectiveness of the investigation, which inevitably produces negative results for the client. A lack of separation can call into question the objectivity of the findings. Opposing counsel will likely challenge the investigation as contrived to benefit the employer. If the jury, judge, or other trier of fact lacks faith in the investigation, any decisions made or actions taken based on the investigation also come under scrutiny.

Relational Conflicts. An impartial investigator should not be affected by prior relationships with the parties or pressures from superiors. Investigations conducted by internal employees—including managers, human resources employees, or in-house counsel—are often fraught with relational conflicts. Can someone who has a stake in the outcome impact the investigator's employment? Does the investigator report to someone involved in the investigation? Does the investigator have personal relationships with the complainant, respondent, or key witnesses? Does the investigator have past experiences with one or more of the parties that might color their perceptions of what occurred? If so, these influences (actual or perceived) threaten the reliability of the findings and are fodder for challengers to undercut the investigation.

In sum, an investigation must be impartial to effectively resolve disputes and ensure a fair and productive work environment. ■

Erich Knorr is a partner with the newly-opened Tempe office of Van Dermyden Makus Law Corporation, which has expanded from Sacramento. See the Bulletin Board section in this month's issue to find out more about Erich.

Subjective Intent

CourtWatch, continued from page 1

charging his gun at a nonresidential structure. The court sentenced him to five years in prison.

Aguirre appealed, contending there was insufficient evidence to sustain the conviction. He argued the state hadn't proved he targeted his shots at the nightclub. Writing for the court, Judge Jennifer B. Campbell agreed.

Aguirre conceded two of the shots he fired at John hit the building. But, he argued, the statute required the state to prove he intended to shoot the building. The state countered it only had to prove that Aguirre knew he was shooting in the building's direction.

To resolve the dispute, Campbell turned to another statute, A.R.S. § 13-202(A). Under it, if a criminal statute requires a particular mental state to establish an offense "without distinguishing among the elements of such offense, the prescribed mental state shall apply to each such element." Section 13-1211(B) does not differentiate between the elements in establishing its required mental state. "Thus," Campbell wrote, "the mens rea of knowingly must be applied to each element of this offense—including the requirement that the person discharged a firearm 'at' a non-residential structure."

This meant that the crime requires intent to shoot the structure. Holding otherwise would lower the mental state from knowingly to recklessly. "The statute requires that the defendant knowingly aimed at the structure," Campbell wrote, "not simply that he was aware of the risk that he may miss his intended target and the projectile might end up lodged in a non-residential structure."

"Had the legislature intended this result," Campbell added, "the statute would include a mens rea of recklessly engaging in conduct instead of knowingly doing so." This interpretation "also ensures that the provision 'at a non-residential structure' is given meaning," she wrote. Citing dictionary definitions, she noted "'at' is used 'to indicate the goal of an indicated or implied action or motion.'" Hence, the statute does not apply unless the person's goal was to shoot the structure.

No evidence was presented that Aguirre's goal was to shoot the building, only that he intended to shoot John but missed twice. "The fact that Aguirre knowingly shot at John," Campbell wrote, "does not transfer his intention so as to prove that he knowingly shot at the nightclub."

She noted that, because Aguirre admitted having knowingly shot at John, the jury's acquittal on the aggravated-assault charges showed that it found he acted in self-defense. "If Aguirre discharged his weapon in self-defense at his intended target, John, his poor aim was not evidence of the mens rea necessary to sustain a conviction for knowingly discharging his firearm 'at' a nonresidential structure."

But the acquittal on the endangerment counts was puzzling. "To be sure," Campbell wrote, "even when discharging a firearm in self-defense, the shooter bears a responsibility to the innocent public." She noted that "endangerment charges are appropriate if a defendant imperils others while defending himself against the aggression of another." Section 13-1201 outlaws endangerment, which a person commits "by recklessly endangering another person with a substantial risk of imminent death or physical injury." "The jury did not convict Aguirre of either count of endangerment charged by the State," Campbell noted without comment.

She concluded that "no evidence supports Aguirre's conviction and sentence" for firing at the nightclub. With Judges Brian Y. Furuya and Paul J. McMurdie joining her, the court reversed the conviction.

• • •

You decide to drive to San Diego to visit your police officer friend. You drive to her station and, when she emerges from the building, you toot your horn and yell "Hi!" She sees you and walks over. But instead of warmly greeting you, she cites you for a traffic violation.

Yes, that's right. Section 27001 of the California Vehicle Code provides, "The driver of a motor vehicle when reasonably necessary to insure safe operation shall give audible warning with his horn," but adds, "The horn shall not otherwise be used, except as a theft alarm system." This seemingly trivial traffic provision was at the center of a recent case, *Porter v. Martinez*, No. 21-55149 (9th Cir. Apr. 7, 2023), in which the Ninth Circuit held California may preclude people from using their car horns to make political statements.

Susan Porter attended a protest outside a government official's office. When she left, she honked her horn in support of the remaining protestors. A deputy sheriff pulled her over and cited her for misusing her horn.

Although the ticket was later dismissed, Porter filed suit against the county sheriff and the highway patrol seeking to enjoin officials from enforcing § 27001 against expressive uses of car horns, such as to show support for candidates and causes and to "greet friends or neighbors, summon children or co-workers, or celebrate weddings or victories." The district court ruled against her, and a split panel of the Ninth Circuit affirmed.

Circuit Judge Michelle T. Friedland, joined by District Judge Edward R. Korman of the Eastern District of New York, ruled against Porter. Although they recognized that honking a car horn sometimes expresses a message, they held the provision does not draw lines based on the content of the expression but on the surrounding factual situation. It is therefore a content-neutral law, subject to intermediate scrutiny. Applying that standard, they held the provision is narrowly tailored and furthers a substantial governmental interest in traffic safety. Porter, they noted, had not alleged there was any policy or practice of selective enforcement.

Judge Marsha S. Berzon dissented. She found § 27001 unconstitutional to the extent it infringes on core expressive conduct. She accused the majority of ignoring the fundamental fact that the statute had been used against Porter's expression of a political message. She opined that honking at a political protest is core expressive conduct that merits the most stringent constitutional protection, and is qualitatively different from warning honks. The statute was not narrowly tailored and failed to accommodate expression.

"Honking horns to support protests or rallies" is a form of political protest, Berzon wrote. And political protest "has always rested on the highest rung of the hierarchy of First Amendment values," she added, quoting the Supreme Court.

But Berzon was outvoted. So, the next time you drive to California, consider this. You might find yourself behind a car with a bumper like this:

HONK IF YOU LOVE FREEDOM

What are you going to do? ■

The Arguably Unnecessarily Complex Nature of Financial Sanctions for Traffic Violations

Hon. Gerald A. Williams
North Valley Justice Court

Every court has tables with suggested financial penalties for every civil and criminal traffic violation. Some people simply pay that amount in full. Many more might not have the resources to do so. All have options, but it can get complicated.

The Controlling Statutes Are a Patchwork and Authorize Significant Judicial Discretion

In response either to a real or to a perceived problem, financial penalties for civil and criminal traffic violations are increased, decreased, and modified nearly every legislative session. Many if not most of these changes are made without regard to how that change is consistent or inconsistent with other traffic laws. For example, why is the fine for a carpool lane violation often higher than the fine for either speeding or tailgating? Why is a type of driving on a suspended license still a class one misdemeanor but the jury trial eligible offense of reckless driving a class two misdemeanor?

In 2016, then Chief Justice Scott Bales appointed a task force that examined nearly every aspect of court-ordered fines, penalties, fees, and pre-trial release policies. The vast majority of the recommended reforms were adopted and, consequently, judges shifted from an emphasis on enforcement to focusing on payment plans based on a defendant's ability to pay. Courts also adopted alternatives to paying the full amount due. In criminal misdemeanor cases, judges now seldom issue arrest warrants for failure to pay criminal fines. Even so, some confusion remains.

Nearly everyone uses the term "fine" to mean the total amount due. In reality, there is an amount known as a fine; but various elected officials have also added a variety of surcharges and assessments on top of a fine that become part of the total amount due. Is a mandatory fine really mandatory? Probably not. Frequently, but not always, fines can be suspended, waived, or mitigated.

Civil Traffic Violations

The general rule is that the fine for a civil traffic violation cannot exceed $250.00. A.R.S. § 28-1598. However, there are exceptions and perhaps most significantly, an additional set of penalties amounting to a 68% surcharge. Contrary to popular belief, courts do not get to keep this money. Fines generally go to the general fund of county and municipal governments. Surcharges are distributed to a variety of accounts, including those that support funding for substance abuse treatment, emergency medical care, and the treatment of spinal and head injuries. There is no specific legal authority to mitigate a surcharge; but that does not end the analysis.

The amount of the surcharge is based on the amount of the fine and fines can be mitigated. Consequently, if a judge reduces the fine, then the amount due on any surcharge decreases proportionally. For example, if the recommended sanction for a civil speeding violation is $195.75, then $56.44 of that amount is distributed toward the 68% surcharge accounts. However, if a judge reduces the overall amount due to a financial hardship to $97.88, the amount going to programs funded by the 68% surcharge is reduced to $19.05.

Believe it or not, on top of the 68% surcharges, there is a second set of (don't call them surcharges) assessments. These include a $13.00 assessment for law enforcement equipment and for gang and immigration enforcement, a $9.00 victims' rights and compensation fund assessment, and another $2.00 for a different victims' rights fund that provides for access to legal representation and to social services. A.R.S. §§ 12-116.02 - 12-116.09. Civil traffic tickets have nothing to do with probation; but there is a $20.00 probation assessment to help pay for the salaries of probation officers and for probation services. A.R.S. § 12-114.01. There are two additional charges.

There are now two Clean Elections surcharges. The first one is a 10% surcharge created by statute. A.R.S. § 16-954. The second was created by the passage of Prop 211, "The Voters' Right to Know Act." It is an additional one percent surcharge that will be administered the same as the other Clean Elections surcharge.

Criminal Traffic Violations

Fines imposed for violations of criminal traffic laws contain the same surcharge assessments; but also add a few more. For example, someone convicted of racing or exhibition of speed also faces a $1,000.00 assessment to be paid into a drag racing prevention enforcement fund. A.R.S. § 12-116.11. However, the majority of additional charges for misdemeanor criminal traffic violations concern DUI cases.

As is the case in other areas, people convicted of impaired driving involuntarily fund a variety of government programs that have little if anything to do with their crime. Perhaps the best example is the $500.00 assessment to a prison constructions and operations fund, even though defendants in misdemeanor DUI cases cannot be sentenced to prison. A.R.S. § 28-1381(I)(4). A second $500.00 assessment is added and is used to purchase equipment for the Arizona Department of Public Safety's Highway Patrol Division. Both amounts are increased to $1,000.00 for an Extreme DUI (blood alcohol content of .15 to .19) and to $1,250.00 for second DUI conviction. For convictions of Extreme DUI and Super Extreme DUI (blood alcohol content of .20 or more), a judge must also order an additional $250.00 DUI abatement fund assessment.

Mitigation and Community Restitution

Surcharges generally cannot be mitigated; but as discussed before, decrease if the fine they are attached to also decreases. If a judge suspends the fine completely, then most surcharges evaporate as well. For some line items, the assessments cannot be reduced; but defendants can be offered community service (now called community restitution) at a rate tied to Arizona's minimum wage, rounded up to the nearest dollar. A.R.S. § 28-1604. Oddly, whether this option is available may depend on whether the conviction is for either a civil or a criminal charge.

When the $13.00 assessment, the $9.00 victim assessment, and the $2.00 victim assessment are imposed in connection with a civil traffic penalty, they cannot be reduced; but are eligible for community restitution. When those same assessments are attached to a criminal violation, only the $13.00 assessment is eligible for community restitution.

Every DUI conviction is a criminal conviction; but not every part of the financial sanction is treated the same way. For example, while neither the two $500.00 assessments nor the additional $250.00 assessment can be reduced, all are eligible for community restitution. However, a judge cannot order community restitution to resolve the 10% Clean Elections surcharge.

In addition to everything else discussed, when a defendant requests a payment plan, there is a one-time $20.00 charge for doing so. It does not need to be paid in order to receive a payment plan, it is simply added to the amount due. The twenty-dollar amount is divided unequally between funds used to enhance the collection of fines, to train public defenders, and to improve court automation. Oddly, a defendant can do community restitution for a criminal $20.00 payment plan fee; but cannot do community restitution for a civil payment plan fee.

Some Final Thoughts

While the political motivation for this structure is obvious, it is bad public policy. We will never see a group of convicted drunk drivers protesting at the legislature with signs proclaiming the surcharges and assessments they received were unfair. But to what extent, if any, should a highway patrol trooper's ability to get new equipment be dependent upon having a sufficient number of people convicted of DUI paying their assessments? Regardless of how anyone feels about public funding for elections, should a state senate candidate's ability to purchase yard signs depend on having an ample number of bad drivers?

No government program should be dependent upon courts serving as involuntary collection agents. Surcharges and assessments are an inefficient and largely unpredictable mechanism to fund government operations. Resources devoted toward them could arguably be better spent on almost anything else. ■

Community Legal Services Selects Roni Tropper as the VLP Director

Roni Tropper

After a nationwide search, Roni Tropper has been promoted to director of Community Legal Services' Volunteer Lawyers Program (VLP). Roni has been the coordinator of the VLP Children's Law Center (CLC) for over 24 years. During this time, Roni developed and continually improved the CLC to meet the needs of the children, families, and community. Roni has conducted outreach to law firms and recruited attorneys to provide pro bono legal services to CLS clients. To effectively administer the CLC, she has established professional relationships with the judiciary and her CLS colleagues.

CLS Executive Director Sharon Sergent states: "I am delighted to promote Roni to the position of director of the VLP. Roni's knowledge of VLP, her dedication to our community, enthusiasm for volunteerism and her track record of effectively recruiting volunteers for the VLP Children's Law Center made her the best person to assume this position. Volunteer attorneys consistently say it is impossible to say 'no' to Roni. This persuasiveness and connection to the private bar is essential to the continued success and growth of the VLP. Based on Roni's knowledge, experience, and dedication to serving our community, Roni is well positioned to take on the responsibilities of this important position. I look forward to working with Roni as a member of the CLS management team."

Speaking on behalf of the VLP Advisory Committee, Donald W. Powell, Carmichael & Powell, P.C., agrees: "Having functioned as the coordinator for the past 24 plus years for the Children's Law Center of the Volunteer Lawyers Program, Roni Tropper has continually demonstrated her dedication, knowledge, care and concerns for her clients, and work ethic. She is experienced, energetic, humble, and is able to obtain the volunteering of lawyers. Roni is an excellent choice to become the new director of the Volunteer Lawyers Program."

Roni's humble response included: "I am honored to be given such an important position and awesome responsibility. I am excited for all the possibilities! CLS, VLP, and CLC are my life's work. I always feel like this quote by Steve Jobs applies to our mission, 'The people, who are crazy enough to think they can change the world, are the ones who do.' We here at CLS/VLP/MCBA are trying to change the world for the better. We fight to make sure there is equal access to justice for all Arizonans. We help those who cannot help themselves. We give a voice to those who have none. We all know Pat Gerrich who successfully led VLP with her collaborative team for 29 years. I certainly have big shoes to fill and I hope to carve my own path and make a meaningful impact. As Martin Luther King said, 'We don't have to see the whole staircase, just take the first step.' Let's, as a community that cares for one another, take the first step together. Volunteer lawyers, we need you to take the step with us. Please reach out and make a commitment to volunteer with the VLP this year!"

We encourage you to review the MCBA Member Spotlight in the April issue of the Maricopa Lawyer to get a sense of Roni's commitment, compassion, and courage. She will not only carry on Pat's legacy but will bring new excitement and growth to the VLP. Roni will continue to coordinate the Children's Law Center as part of her ongoing commitment to children and their families.

If you would like to volunteer with the VLP, please contact Roni at rtropper@clsaz.org. ■

SUBMISSIONS POLICY

Members and non-members are encouraged to submit articles for publication. The editorial deadline for each issue is generally the 8th of the month preceding the month of issue.

PRO BONO PROFILES

Volunteer Attorneys Needed to Assist the Court: "Best Interests of a Child"

The Volunteer Lawyers Program (VLP) is recruiting additional volunteer attorneys to serve as court appointed advisors in Family Court.

Family Court Presiding Judge Bruce Cohen supports this endeavor: "Professionals regularly seek opportunities to give back to the community. One of the more rewarding of those opportunities arises when serving on behalf of a child. Court appointed advisors assist in family court proceedings by gathering information and evidence in the furtherance of protecting the best interests of a child."

Families with limited economic means cannot pay for court appointed advisors (CAA). The Children's Law Center is committed to providing access to this important service through trained volunteer lawyers.

According to Director Roni Tropper, Volunteer Lawyers Program & Children's Law Center: "Typically, when we see pro per litigants in a high conflict divorce case, the best interest of the children being met can be of greater concern. Often times it is difficult for a judge to know what is going on behind the scenes in these cases. The Judge appoints a CAA to investigate further and piece together the puzzle. The CAA prepares a report to the Court including facts related to the situation. The Court is in a much better position to determine what is in the best interest of the children after this process."

The need for CAAs is ongoing and the Children's Law Center is committed to assisting often vulnerable and desperate pro se litigants. A recorded training was held in April and will be available for viewing. Please consider learning more about this timely and urgent recruitment effort.

Gregg Woodnick, Woodnick Law PLLC, shares this goal to expand the roster of volunteers: "I have volunteered for the CAA program for years and always encourage attorneys without family court experience to participate. In addition to the great training, there is a tremendous mentorship aspect from experienced CAAs. This program really provides the opportunity for attorneys to make a difference and help the court. And, for those worried about the time commitment, it is truly manageable. I often tell volunteers that, including the anticipated video appearances at court, they can expect to invest around 10-15 hours on a case and usually over a two-to-four month time period. We welcome volunteers who are both newer attorneys and seasoned professionals with and without family court experience."

> "The best way to lift one's self up is to help someone else."
>
> *—Booker T. Washington*

To learn more about serving as a CAA through the Children's Law Center please contact Director Roni Tropper, Volunteer Lawyers Program & Children's Law Center, at rtropper@clsaz.org.

Your volunteer commitment is so important in helping insure all Arizonans have access to Justice!

The Volunteer Lawyers Program is seeking attorneys willing to provide direct representation on cases in a variety of civil law areas. Spanish speaking attorneys also make a difference for many of our clients. Please consider volunteering your time and expertise. ■

Volunteer Lawyers Program Thanks Attorneys

The Volunteer Lawyers Program thanks the following attorneys and firms for agreeing to provide pro bono representation on cases referred by VLP to help people with low incomes. VLP supports pro bono service of attorneys by screening for financial need and legal merit and provides primary malpractice coverage, verification of pro bono hours for CLE self-study credit, donated services from professionals, training, materials, mentors and consultants. Attorneys who accept cases receive a certificate from MCBA for a CLE discount. For information on rewarding pro bono opportunities, please contact VLP Director Roni Tropper at 602-258-3434 x2660 or rtropper@clsaz.org or enroll with us at clsaz.org/volunteer-lawyers-program. ■

VLP THANKS THE FOLLOWING ATTORNEYS AND FIRMS FOR ACCEPTING CASES FOR REPRESENTATION:

ADULT GUARDIANSHIP OF FAMILY MEMBERS WITH DISABILITIES:
Michelle Lauer
Lincoln & Lauer PLLC
Jennifer Puchalski
Snell & Wilmer LLP

BANKRUPTCY
James Gaudiosi
Gaudiosi Law PLLC
Robert Teague
Teague Law Firm

BENEFITS
Kiel Roeschke
Roeschke Law LLC

CONSUMER MATTERS
Shaun M Stienstra
Snell & Wilmer LLP
Jonathon Talcott
Ballard Spahr LLP

COURT APPOINTED ADVISORS
Marie Zawtocki
Zawtocki Law Offices

MINOR GUARDIANSHIP:
Rachel Peters Pugel
Snell & Wilmer LLP
Edwin Ramos
De La Ossa & Ramos PLLC
Monica Thompson
Denton US LLP

VLP THANKS THESE VOLUNTEERS WHO PROVIDED OTHER LEGAL ASSISTANCE DURING THE MONTH

ATTORNEY OF THE DAY
Nancy Anger
Children's Law Center
Lauren Bostick
Jessica Cotter
Otilia Diaz
John Gordon
Marilyn Gutierrez
Cody Hayes
Blake Moscatello
Shawnna Riggers
Brad TenBrook
Claudia Work

FAMILY LAWYERS ASSISTANCE PROJECT
Carrie Canizalez
Steven Cole
Michael Crane
Greg Davis
Charles Friedman
Honorable Jeanne Garcia
Stuart Gerrich
Robert Hahn
Christina Hamilton
Kina Harding
Lowen Jones
Tarl Johnson
Alicia Abella Korte
Katherine Kraus
Christopher Lazenby
Elizabeth Langford
Susan McGinnis
Kimberly Staley
Robert Walston
Bisi Onisile Whitney

THE FEDERAL COURT CLINIC
Michael DiGiacomo
James Driscoll-MacEachron
Booker Evans
Gabriel Hartsell

FINANCIAL DISTRESS CLINIC
Brant Hodyno
James Kahn
Donald Powell

INTEL CLINIC
Romy Drysdale
Betty Hum
Alan Pedersen-Giles
Scott Uthe

PROBATE LAWYERS ASSISTANCE PROJECT
Emily Burns
Thomas Hickey
Kelly Krall
Tracy Marsh
Troy McNemar
Carla Miramontes
James Rayburn
Ryan Talamante
Kelsey Fischer
ASU Extern/Volunteer
Brayden Harn
ASU Extern/Volunteer

SNELL & WILMER CLINIC
Jacklyn Branby
Marc Currie
Kelly Ann Daly
Barbara Dawson
J. Matthew Derstine
John Habib
Amanda Weaver

TENANTS' RIGHTS CLINIC
John Gordon
Betty Hum
Diane Mihalsky
Judy O'Neill

VLP THANKS THE FOLLOWING VOLUNTEER ATTORNEYS WHO RECENTLY ENCOURAGED COLLEAGUES TO VOLUNTEER WITH VLP

Tyler Cobb
Jessica Cotter
Romy Drysdale
David Engelman
Kelly Krall
Tom Moring
Shawnna Riggers

PRO BONO SPOTLIGHT ON CURRENT NEED FOR REPRESENTATION

Attorneys are needed to help consumers with contract matters.
Attorneys' fees can be claimed if litigation is required

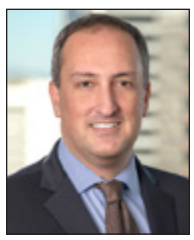
The Volunteer Lawyers Program provided $2,034,915 in measurable economic benefit to families in 2022, in addition to improving safety and well-being for children and adults.

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

Q&A

LAWYER LIABILITY AND ETHICS

California Scheming



Joseph Brophy

The great philosopher Conan the Barbarian, when he was asked "what is best in life?" memorably responded: "Crush your enemies, see them driven before you, and hear the lamentation of their women." Many lawyers, certainly most litigators, identify with Conan's sentiment. No wonder we are so beloved by the public. However, this sentiment has recently spread to the attorney discipline process as applied to lawyers who represent clients involved in contested elections.

This trend, which has arrived in Arizona, raises questions about the propriety of using the Rules of Professional Conduct to punish lawyer speech unconnected to judicial proceedings and whether licensure is being used as "politics by other means" to silence politically dissident lawyers. As is so often the case with both the good and the bad in this country, our story takes us to California where, oddly enough, Conan the Barbarian was once governor.

John Eastman was the dean of Chapman Law School in California. President Trump retained Mr. Eastman in connection with the 2020 election to evaluate possibly challenging congressional certification on the basis of what Mr. Trump believed to be widespread counting of illegal votes and procedural irregularities in certain swing states. Mr. Eastman's area of expertise was constitutional law, including the Constitution's assignment of plenary power to state legislatures to direct the manner of choosing presidential electors and the role of the vice president in presiding over the electoral college certification process in Congress. This is a practice area reserved for law professors since lawyers in private practice would starve to death if it was their practice area.

In January 2023, the State Bar of California filed a complaint against Mr. Eastman seeking his disbarment. The complaint alleged that he endeavored to "plan, promote, and assist then-President Trump in executing a strategy, unsupported by facts or law, to overturn the legitimate results of the 2020 presidential election by obstructing the count of electoral votes of certain states." The bar alleged that Mr. Eastman engaged in "an egregious and unprecedented attack on our democracy" and that he attempted "to usurp the will of the American people." Mr. Eastman's "attack" took the form of two memos totaling eight pages that he wrote for Mr. Trump laying out two potential ways to challenge in Congress the certification of the 2020 presidential election, neither of which were acted on.

Absent from the Eastman charges was citation to an ethical rule that charges lawyers with a duty to act only in accordance with "the will of the American people" or to protect "our democracy." The California bar did not define either of those amorphous concepts and did not acknowledge that "the will of the American people" is intentionally not used to elect the American president (ask President Al Gore and President Hillary Clinton about that). The California bar also appears to not know that the presidential election is not done via democracy, but rather by the electoral college, whose members are not bound by the popular vote either nationally or in their state. These details are not mere semantics when they form the basis for a lawyer to be disbarred. The California bar also did not provide authority for the proposition that a lawyer may be sanctioned for providing legal analysis to a client of which the bar disapproves.

Mr. Eastman was not practicing law in California, representing a California client, participating in a legal proceeding in California or anywhere else, and was not alleged to have breached any duties owed to his client. Nevertheless, in March 2022 the California bar took the unusual step of invoking a "public protection waiver" to justify announcing the bar's investigation into Mr. Eastman (attorney disciplinary investigations are normally confidential). No doubt the California bar conducted a cogent legal analysis to support its determination that the public was threatened in March 2022 by memos written over two years earlier regarding an election that concluded over a year earlier. However, that analysis has not been made public.

When it comes to determining which lawyers the public must be protected from, the California bar has a somewhat elastic standard. For example, between 2014 and 2018, attorney Michael Avenatti stole $3.2 million in federal payroll taxes from the government and his employees, plus another $12 million from his clients, most of whom were from California. The California bar was made aware of these activities and did nothing. In the case of the payroll tax issue, a complainant laid out in an 18-page letter to the bar the evidence that Mr. Avenatti was stealing from both his employees and the federal government. The California bar declined to discipline Mr. Avenatti even though he was eventually sent to prison for embezzlement of those taxes. Even after Mr. Avenatti was arrested (during a hearing before the California bar) and charged with extortion, wire fraud, embezzlement and tax evasion, he maintained his license to practice law in California for over a year. California only suspended his license after he was convicted of attempting to extort Nike. The California bar never disciplined Mr. Avenatti for stealing from his clients. Unfortunately, Mr. Avenatti's case was not an anomaly.

In an April 14, 2022 report, the California State Auditor excoriated the California bar for routinely failing to adequately investigate attorneys with lengthy patterns of complaints against them. One attorney was never disciplined despite 165 complaints over seven years. In another case, the bar closed multiple complaints against an attorney who was alleged to be stealing settlement funds, even though the complaints alleged similar patterns of theft. Additional clients had money stolen as the bar fiddled. When the bar finally examined the attorney's bank records, it found that he misappropriated nearly $41,000 from clients. The auditor also found that the bar failed to document the conflicts of interest of its staff and made essentially no effort to identify California lawyers who had been disciplined by other jurisdictions. The fact that the auditor yielded these results from a small, random sample is disturbing. But it gets worse.

The California bar commissioned an investigation into its handling of attorney Tom Girardi after public and legislative outcry when he was found to have stolen millions from his clients. In March 2023, a report from the investigation revealed that despite 115 complaints against Mr. Girardi over 40 years, his record with the California bar remained pristine. At least eight investigations into Mr. Girardi were closed by bar employees with conflicts of interest. Mr. Girardi appeared to have bribed at least one bar investigator and appeared to have at least improperly influenced (if not outright bribed) a number of other bar employees. The California bar inexplicably declined to discipline Mr. Girardi even after the 9th Circuit suspended him for six months in 2010 after finding that he falsified documents to facilitate enforcing a foreign judgment.

It probably helped that the California bar's chairman had an unspecified "disqualifying conflict of interest" with respect to Mr. Girardi that is also currently under investigation. According to the Los Angeles Times, Mr. Girardi donated more than $2 million to California's politicians while he was stealing from his clients and bribing the California bar, which also probably helped.

Absent the initiative of federal Judge Thomas Durkin of the Northern District of Illinois, Mr. Girardi would have continued stealing from his clients with the California bar's tacit approval.

Against this backdrop of decades of indifference and corruption, the California bar now heroically seeks to save "our democracy" from Mr. Eastman's memos, which were written for a client in Washington, D.C. by a non-practicing California attorney, after the bar publicized its investigation in the name of "public protection." Of the possible explanations reconciling the California bar's winking at predatory lawyers and its commitment to disbar Mr. Eastman, the bar's professed concern for "public protection" is not an explanation that fits the evidence.

A modest proposal—perhaps the California bar should first fire and discipline what appear to be an inordinate number of corrupt and rapacious bar employees, then deal with the California lawyers who are stealing from their California clients, and then move on to saving democracy from Mr. Eastman—in that order. Admittedly, that course of action would reduce the bar's opportunities for graft at the expense of the clients it is charged with protecting. But what is life if not a series of tradeoffs?

Mr. Eastman's case follows those of Trump lawyers Rudy Giuliani in New York (license suspended without a hearing) and Jenna Ellis

See **California Scheming** page 15

THE BULLETIN BOARD

News from the legal community

The *Maricopa Lawyer* invites members to send news of moves, promotions, honors and special events to post in this space. Photos are welcome. Send your news to maricopalawyer@maricopabar.org.

CORRECTION—TIFFANY AND BOSCO

James P. "Jim" O'Sullivan

This is a reprint from April; we regret that the wrong photo was used for O'Sullivan:

Tiffany & Bosco PA attorney **James P. "Jim" O'Sullivan** joined an impressive faculty group to present *Meeting Your Moments – Insights on Leadership and Professionalism for Lawyers in Challenging Times*, a continuing legal education (CLE) course offered by the State Bar of Arizona.

The CLE brought together legal community leaders to share their experiences and lessons learned when facing critical moments in their professional careers. It offers practical insights and actionable strategies to help attendees be prepared for pivotal junctures in their careers by developing influence and leadership through work, volunteer, and community activities.

O'Sullivan is a business attorney leader at Tiffany & Bosco. For more than three decades, he has helped business clients with a variety of legal matters from formation through dissolution. His legal practice; commitment to diversity, equity, and inclusion in the legal profession; and extensive engagement in the business law community have earned him great respect and recognition among both peers and clients, including receipt of the State Bar of Arizona 2019 Diversity and Inclusion Leadership Award.

GALLAGHER & KENNEDY

Gallagher & Kennedy is pleased to announce that attorney **Dalva "Dal" L. Moellenberg** has been appointed to the Board of Regents for Western New Mexico University. New Mexico Gov. Michelle Lujan Grisham appointed Dal to a six-year term, effective immediately.

Moellenberg joined G&K 28 years ago and has managed G&K's Santa Fe office for 11 years. He primarily represents regulated industries in the areas of environmental and natural resources, including water quality and water rights, Superfund, hazardous waste, mining and mined land reclamation, and oil and gas. His experience includes all types of administrative proceedings, including rulemaking, permitting and licensing, defense of regulatory enforcement actions, appeals of agency actions, and settlement and litigation concerning environmental and other regulatory and general civil matters.

In addition to his appointment on WNMU's Board of Regents, Moellenberg serves as chair of the New Mexico Mining Association's Environment Committee and Vice-Chair of the New Mexico Chamber of Commerce Environment, Water and Land Use Policy Committee. His environmental law practice has been recognized by Chambers USA, *The Best Lawyers in America* since 1999, and *Southwest Super Lawyers since 2007.*

HAMMER LAW

Henry Vorderbruggen

Local attorney **Henry Vorderbruggen** recently launched Hammer Law PLLC., a new law firm focusing on helping consumers who purchased a vehicle qualifying as a "lemon" by Arizona law.

As a longtime advocate of consumer rights, Vorderbruggen has dedicated his career to helping Arizonans navigate the sometimes-complicated Lemon Law and breach of warranty claims. The Arizona Lemon Law, A.R.S.§ 44-1261 et seq., requires the manufacturer to pay the consumer's attorneys' fees in addition to whatever other claims to which one is entitled.

At Hammer Law, consumers don't have to come out of pocket to seek legal guidance and consultation. According to Arizona Law, a lemon is identified as a motor vehicle "designated primarily for the transportation of person or property over public highways." It's designed to protect consumers who purchase a vehicle that has repeated defects or problems that cannot be repaired within a reasonable amount of time. The law provides remedies for consumers who find themselves stuck with a "lemon" and are unable to enjoy the benefits of their purchase. To qualify as a lemon in Arizona, the eligible vehicle must be purchased, not leased, for purposes other than resale and during the duration of the warranty. According to the Supreme Court of Arizona, the Arizona Lemon Law does not apply to a leased vehicle. A leased vehicle in Arizona, however, may still qualify under the Federal Lemon Law—Magnuson Moss Warranty Act.

"For the most part, people are not familiar with the fact that if their car qualifies as a 'lemon,' they have the right to retain the services of an attorney at no out-of-pocket cost to them to either get the car fixed, receive cash compensation or get a replacement vehicle," said Vorderbruggen. "Most clients don't know about all of the legal remedies and options a consumer has under warranty and it's important to inform people on how to use the law to their advantage."

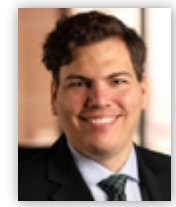
The law does not cover vehicles that were purchased without a warranty, such as those sold "as-is." Qualification criteria typically includes the number of repair attempts made, the length of time the vehicle has been in the shop, and the severity of the defects.

At Hammer Law, Vorderbruggen helps consumers navigate the process of filing a claim, negotiating with the manufacturer, and seeking compensation. Ninety-five percent of Vorderbruggen's cases are settled out of court.

Vorderbruggen lives in Scottsdale and is a single father to two young sons. He is a veteran of the US Navy.

JONES, SKELTON & HOCHULI

Michael Bayham



Austin Peril

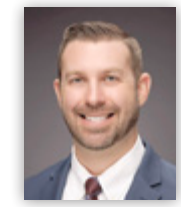
Jones, Skelton & Hochuli, PLC is pleased to announce that **Michael Bayham** and **Austin Peril** have joined the firm's Arizona office as associate attorneys in the General Liability Trial Group.

Bayham will be working on transportation, professional liability, and other general liability matters. After graduating from ASU's Sandra Day College of Law in 2021, he worked as a law clerk in a plaintiff's personal injury firm. Michael also gained experience clerking for a trust and estate firm. Prior to law school, he worked as a volunteer teacher at Loyola Academy at Brophy College Preparatory School. He received his B.S. in supply chain management from Arizona State University, and also earned a Certificate of International Business from Universitat Autonoma de Barcelona (Spain).

Peril recently joined JSH, where he will be working on trucking, premises liability, and product liability matters. After graduating from the Seattle University School of Law, he worked for the Maricopa County Attorney's Office, prosecuting felony and misdemeanor cases, conducting bench trials, negotiating offers for non-trial resolutions, and preparing law enforcement officers and civilian victim witnesses for testimony. Peril earned his Juris Doctor from the Seattle University School of Law, and his B.A. in digital culture from Arizona State University.

VAN DERMYDEN MAKUS

Erich A. Knorr, JD, AWI-CH, is a partner at Van Dermyden Makus Law Corporation, which recently opened an office in Tempe. His practice focuses on workplace investigations related to harassment, discrimination, retaliation, and misconduct.



Erich A. Knorr

Knorr is an experienced investigator who has conducted complex investigations in many different industries in the public and private sectors.

In the public sector, he regularly conducts investigations for public safety departments and is well versed in the Public Safety Officers Procedural Bill of Rights Act and the Firefighters Procedural Bill of Rights Act. His experience also includes investigations for universities, community colleges, and high schools.

In the private sector, Knorr has investigated claims for organizations ranging from start-ups to Fortune 500 companies. He is experienced in a variety of industries, including high-tech, telecommunications, biotechnology, data management, trucking, waste management, construction, medical, emergency response, and food production. He has handled numerous high-profile investigations involving top executives and elected government officials. He also has experience testifying in support of his investigations.

Knorr develops and conducts trainings on best practices in workplace investigations. He is also an active member of AWI and serves on multiple committees.

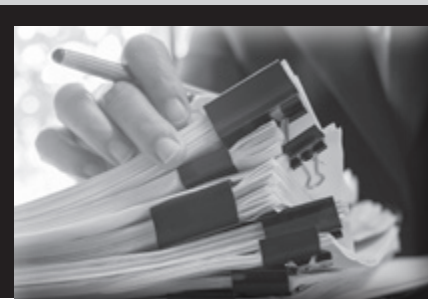
Before joining Van Dermyden Makus Law Corporation, Knorr represented public safety labor associations and their members in civil litigation, administrative proceedings, and labor disputes. During this time, Knorr represented employees throughout California in hundreds of discipline and discharge proceedings, workplace investigations, and critical incidents, including officer-involved shootings and deaths in custody. His background in representing employees gives him a unique perspective and skillset that he brings to his current practice as a neutral investigator.

Knorr graduated with Distinction from the University of the Pacific, McGeorge School of Law and is a member of the Roger J. Traynor Honor Society. He was an associate articles editor for the Global Business and Development Law Journal. Knorr served as an extern for the Honorable Ronald H. Sargis of the United States Bankruptcy Court for the Eastern District of California. He also studied Fundamental Human Rights in the U.S. and Europe under Supreme Court Associate Justice Anthony M. Kennedy. ■

CONTINUING LEGAL EDUCATION **CLE** MARICOPA COUNTY BAR ASSOCIATION

WEDNESDAY
MAY 10 ▪ 12-1 PM
LOCATION: ONLINE

Preserving the Record–Introduction



This training intends to provide practitioners with helpful tips and examples of how best to preserve the record during trial to allow meaningful appellate review. The training will also highlight areas of appellate law that will assist practitioners with improving their trial skills and presentation.

PRESENTERS: **James Baumann**, Deputy County Attorney at MCAO
Dawnese Hustad, Deputy Public Defender

FRIDAY
MAY 12 ▪ 12-1 PM
LOCATION: ONLINE

Ecclesiastical Abstention Doctrine

An overview of the Ecclesiastical Abstention Doctrine, including a discussion about its origin and how it has been applied in various types of cases, including in Arizona cases.

PRESENTERS: **Hon. Aryeh D. Schwartz**, Maricopa County Superior Court
Daniel S. Riley, Esq., Riley Law Firm, PLC

WEDNESDAY
MAY 17 ▪ 12-1:30 PM
LOCATION: ONLINE

eFiling Series – Family Court

Join court staff as they go through the ins and outs of efiling. The CLE will demonstrate how efiling works and will give you time to ask questions of the court staff to make your efiling process go smoothly.

WEDNESDAY
SEPT. 13 ▪ 5:30-7:30 PM
LOCATION: TBD

Speed Networking with the Criminal Law Judges

Join us for Speed Networking with the Criminal Court Judicial Officers!

FRIDAY ▪ SEPT.29
8:30 AM-5:30 PM
LOCATION: PHOENIX COUNTRY CLUB

2023 Bench Bar Conference

Our annual conference in partnership with the Judicial Branch of Arizona, Maricopa County. There will be a Court Advocacy session in the morning with a judicial panel; Judge Welty's State of the Court Address at lunch, along with Clerk of the Court Jeff Fine; an ethics CLE and judicial panel in the afternoon; followed by happy hour.

WAYS TO REGISTER

ONLINE

To register, go to www.maricopabar.org/events and select your CLE from the calendar. Follow the link to the registration page. If you need assistance, please email: cle@maricopabar.org

PHONE

Call (602) 257-4200

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Interested in presenting a CLE? Email cle@maricopabar.org

ATTENDANCE POLICIES

ADVANCE REGISTRATION

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

LATE REGISTRATION

Early Bird registration ends five days prior to the program date. Late registration is an additional $15. For example, registrations for a Sept. 17 program must be paid by Sept. 12 in order to receive early bird pricing.

WALK-INS

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

CANCELLATIONS/REFUNDS

Refunds, less a $25 fee, will be issued only if the MCBA receives your cancellation, in writing by mail, fax at (602) 257-4200, or email cle@maricopabar.org at least two business days prior to the program.

NO SHOWS

If you registered and paid, but could not attend, you may request that materials be sent to you, free of charge (allow 3-4 weeks). If audio media is available, registrations may be converted to a self-study package for an additional $15 charge.

The State Bar of Arizona does not approve or accredit CLE activities for the Mandatory Continuing Legal Education requirement. The activities offered by the MCBA may qualify for the indicated number of hours toward your annual CLE requirement for the State Bar of Arizona, including the indicated hours of professional responsibility (ethics), if applicable.

California Scheming

continued from page 12

in Colorado (censured by the Colorado bar). The three cases share remarkable similarities: (1) extrajudicial statements made by lawyers regarding the political issue of who won the 2020 presidential election, and in the cases of Giuliani and Ellis, statements made to the media; (2) no connection to a judicial proceeding; (3) no clients in or connection to the sanctioning jurisdiction; (4) no allegation that the lawyers breached any duty to a client; (5) an unprecedented expansion of Rule 8.4(c) (prohibiting deceptive conduct, not deceptive speech).

The purpose of raising this issue is not to defend what Mr. Giuliani or Ms. Ellis said or to endorse Mr. Eastman's legal analysis. Assume it is all garbage. The purpose is to point out that ER 8.4(c) has jumped the tracks from prohibiting deceptive conduct and is morphing into a license for the judiciary to regulate the content of speech by conditioning a lawyer's right to practice law on the expression of only those political statements that are approved by the judiciary.

The Rules of Professional Conduct exist to protect clients and the integrity of the judicial process from incompetent or dishonest lawyers. Those rules are not a license for the judiciary to regulate lawyer speech in the court of public opinion under the guise of protecting "our democracy" or "the public" from political speech that particular judges or state bars do not like. Nor do those rules exist to give the public confidence in elections.

The flimsy grounds upon which these disciplinary actions rest suggests that what is at work is not a legitimate concern for the judicial process, the legal profession, or clients, but rather Conan the Barbarian-style smashmouth politics masquerading as attorney regulation. This will not lead anywhere good and will justifiably harm the public's perception of the judiciary. It is not hard to appreciate the appeal of not just winning an election, but also having your political opponents' lawyers disbarred (Conan would love it). But one would hope that the legal profession would be better at considering the long-term consequences of its actions than our political class, who have displayed an unwavering commitment to short-term thinking for the last 20 plus years that would almost be admirable if the consequences were not so catastrophic.

Conan was seeking vengeance for the death of his parents at the hands of a snake cult, which was undoubtedly a legitimate beef that ultimately resulted in his removal of the cult leader's head and the approval of movie audiences worldwide. But Conan's methods are not ideally suited to run a state bar. Hopefully, the California courts will put the breaks on this troubling trend. ■

Joseph Brophy is a partner with Jennings Haug Keleher McLeod in Phoenix. His practice focuses on professional responsibility, lawyer discipline and complex civil litigation. He can be reached at JAB@jhkmlaw.com.