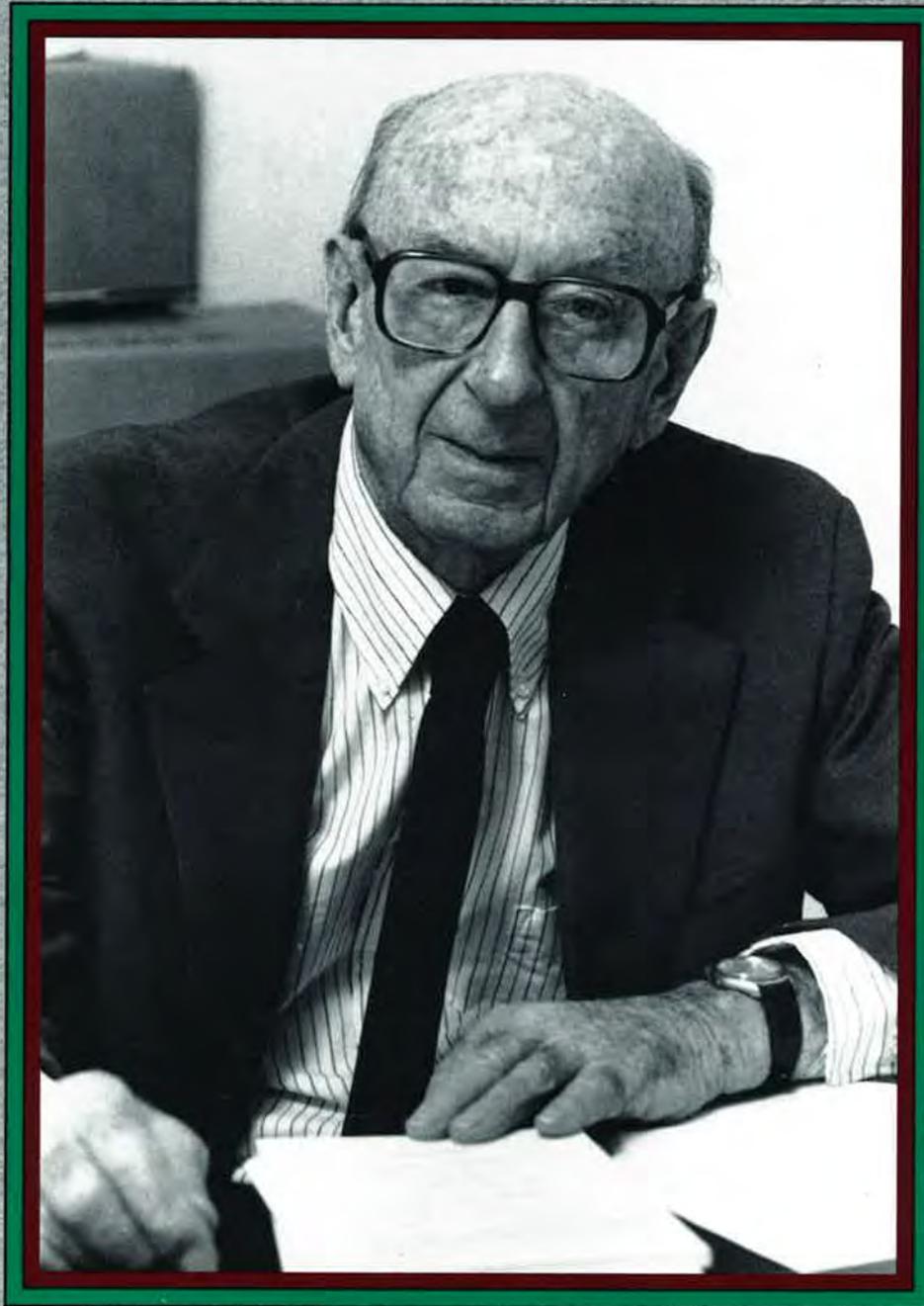


Arizona State University
College of Law

LAW FORUM



Professor Edward Cleary
1907-1990



Dean
Richard J. Morgan

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ARIZONA STATE UNIVERSITY

COLLEGE OF LAW

THE LAW FORUM

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In This Issue . . .

Law Forum pays special tribute to Professor Ed Cleary, who died in January of this year. With the passing of Professor Cleary, the College is reminded that it is "coming of age." The Law School's first graduating class just marked its 20th anniversary, and plans are well underway for a three-day 20th Anniversary Celebration in October, 1990. A description of the event is found on page 40.

Also highlighted in this issue is the fact that Richard Morgan has rejoined the College as the new Dean, and is rejuvenating both the faculty and the legal community with his presence. A special thanks to Professor Alan Matheson for serving as interim dean until Dick's arrival in January of this year.

The Library Development Campaign is nearing a successful close, with private support at an all-time high. The names of all those people and organizations who pledged their support to the Campaign are listed in the second section of the Annual Report of Giving. Contributors to the '88-'89 Annual Fund are acknowledged in section one.

Since the Law Forum is now published only once a year, this issue looks all the way back to January of 1989. As you will see, the College is uniquely positioned to continue its distinguished and dynamic development. The loyalty and generosity of alumni and friends will make the difference. Thank you all for your support.

Kathy Neitzel, Editor

Staff

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Letter from the Dean

Dear Alums and Other Friends of the Law School:

As you may know, my family and I recently returned to Arizona from Laramie, Wyoming, where I was Dean of the University of Wyoming College of Law. As pleased as I was with Laramie, I simply could not resist returning to Tempe and the terrific professional opportunity to serve as Dean of ASU's College of Law.

Having been away for a few years, I was able to re-evaluate the College from a "quasi-outsider's" perspective, and after three months in the deanship, I am quite impressed with the quality of the College and its great potential.

Achieving excellence in its short, twenty-three year life is a tribute to all of the fine faculty, students, staff and administrators who have comprised the institution over the years. If one person could be singled out, however, as the source of that excellence, it would be Willard Pedrick, who, as founding dean, had the wisdom and foresight to insist on excellence from the beginning. That insistence continues today, as superior faculty and students replace those who have gone before.

Elsewhere in this magazine you will find a tribute to the late Ed Cleary, an internationally-known law professor, wonderful human being, and member of the founding faculty, whose death is a major loss to us all (as was Dick Effland's death last year). The College and community owe these gentlemen a great deal of gratitude, for they and the other founders set us firmly on course.

Saddened as I am by these losses, I am glad to see the College continuing to progress. With fine faculty, loyal staff and "cream of the crop" students, the people who comprise the Law School continue to be first-rate, just as they were in the days of Ed Cleary. Combining our human resources with our ideal location, the College is poised to become even better over the next several years. In fact, it is this potential for greatness—more than anything else—that caused me to return from Wyoming.

To achieve that greatness, excellence must be the standard for everything that we do at the Law School. If we want to be a great law school, we must always strive for excellence and reject mediocrity, particularly in our educational programs. While I believe that the College is committed to, and has maintained, a high level of excellence, I am concerned that there are some threats to that standard.

For example, the growth of separate, distinct programs—such as the L.L.M. program, the study-abroad program, and many joint degree and interdisciplinary programs—has caused some faculty to spend more time on administrative matters, as quasi-administrators of these programs, thereby deflecting time from teaching, scholarship and community service. Similarly, the numerous University and College committees, on which our faculty are called to serve, deflect faculty time from primary pursuits to secondary ones. Thus, we need to make sure that faculty time is well spent; that our programs or committees have the resources, the potential and the support to make a contribution to the excellence of the University and the College; and, to the extent that resources, potential or support are lacking, to either 1) get the College out of that program or committee or 2) provide the missing ingredient or ingredients. Next year we will re-examine our programs and committee assignments.

Two distinct programs of the Law School—the Law, Science and Technology Program and the Indian Law Program—deserve special mention, since each of them is quite important to the College. Each of these programs has great potential for success and for enhancing the reputation of the Law School, through curricular expansion, scholarship and community service. However, for each to achieve that potential, additional resources will be needed, since the implementation of these programs was not accompanied by an infusion of operating funds.

Beyond programmatic matters, there are other challenges. Because we have such fine faculty, most of them have the opportunity to consider employment offers from other law schools, many of which provide compensation, prerequisites and support that go well beyond what we can offer. While it is wonderful that we are attracting such offers, we do not wish to lose any of our current members. Furthermore, we hope, as vacancies occur, to be able to attract first-rate faculty from other law schools. However, to retain our faculty and recruit new members will require us to provide salaries, research and other support comparable to that provided elsewhere.

This will require substantial new resources for such things as chairs, faculty salary supplement arrangements, and the development of a fund to support research, travel and equipment needs of the faculty. Thus, another major challenge will

be to seek and to justify support for these purposes from the private sector, so that we can retain and improve our faculty and, in so doing, begin to provide the kinds of compensation and support that the top schools provide.

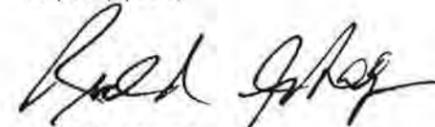
Important as the faculty are, it is the students who are the central focus and concern of a law school. Over the years, this Law School has attracted and educated terrific students, and, as noted above, that remains true today. Indeed, if one considers numerical indicators such as G.P.A. and L.S.A.T. scores, educational and cultural background, and the age, gender and experience of our students, the student body of today is as strong or stronger than ever before. The College has been doing a good job of attracting a strong and diverse group of students to the Law School.

However, this has required substantial resources, in the form of scholarships. And to continue to attract such students will require more scholarships. Thus, another challenge for the future will be to replenish and augment our scholarship funds, so that we can continue to support students whose presence will enrich our College and, ultimately, our community.

While resources are a central theme of the challenges that I have described, they are not the only challenge. Our most fundamental challenges for the future will be to increase our service to the community, to help the community understand the importance of our College, and to generate ideas from the community on how we can improve our College and its contributions to the community. For only with the understanding and support of the community will we be able to overcome the challenges that we face and move from excellence to greatness.

I look forward to working with you in the years ahead, as we strive to improve this fine College. In the meantime, if you have any questions, comments or suggestions, please write or call at (602) 965-6188. Thanks.

Very truly yours,



Richard J. Morgan
Dean

Can Others Exercise An Incapacitated Patient's Right to Die?

Ira Mark Ellman

Nancy Cruzan, a young Missouri woman whose fate will be decided this term by the United States Supreme Court,¹ suffered catastrophic brain damage as a result of an automobile accident seven years ago. From the time of that accident until today she has never been conscious. She can still breathe on her own, however, and under all standard medical and legal definitions she is still alive. But while she is alive, her upper brain is not, and her physicians have no doubt that her condition is irreversible. The standard term for her condition is "permanent vegetative state," or irreversible coma. Karen Ann Quinlan, the 22 year old woman who was the subject of a highly publicized New Jersey case 13 years ago, had the same condition. In Quinlan's case the doctors doubted she could breathe on her own and she was therefore connected to a respirator which maintained her breathing for her. In what became a seminal decision, the New Jersey Supreme Court held that the respirator could be disconnected, as her family requested.²

There is nothing necessarily terminal about permanent comas; without other complications, a comatose patient can be kept alive indefinitely. Karen Quinlan herself demonstrated that reality, for it turned out that the doctors were wrong in predicting that she could not breathe on her own. She could and did, and she lived for nine more years after her respirator was disconnected.³ Of course, a comatose patient cannot eat or drink normally; nutrition and hydration must therefore be supplied artificially, through devices such as nasogastric tubes, J-tubes, and intravenous feeding. After Quinlan's ability to breathe had been established, her father was asked at one point whether he wished to have her nasogastric tube removed. He declined immediately, exclaiming "Oh no, that is her nourishment."⁴ His attitude is shared by many, who see an important moral distinction between the withdrawal of artificial devices maintaining nutrition and hydration, and other forms of hospital care. However, in the thirteen years since Quinlan was decided, courts have generally rejected this distinction.⁵ Their position is supported by the Council on Ethical and Judicial Affairs of the American Medical Association, which in a 1986 amendment to its Opinion on Withholding or Withdrawing Life Prolonging Medical Treatment, concluded that "it is not unethical" to discontinue "artificially or technologically supplied . . . nutrition or hydration" to a patient with a confirmed



diagnosis of irreversible coma, if those "with responsibility for the care of the patient" concur.⁶

After waiting nearly five years for a miracle that did not occur, two years ago Nancy Cruzan's parents asked the hospital to remove the gastronomy tube that supplied essential nutrients maintaining her life. The hospital would not comply without judicial authorization. Relying on the medical and judicial consensus that had formed in the years since Quinlan, a trial judge issued the necessary order. The bioethics community was therefore startled last year when the Missouri Supreme Court reversed the trial judge and refused to permit the Cruzan's request. Late last term, the United States Supreme Court granted review. The stage has thus been set for a dramatic national resolution of the Cruzan family's tragic dilemma.

Medical organizations, as well as "right-to-die" groups, have rallied in support of the Cruzans. The numerous amicus briefs filed with the Supreme Court urging reversal of the Missouri decision include submissions of the American Medical Association, the American College of Physicians, the American Academy of Neurology, the National Hospice Organization, and the American Hospital Association, as well as activist organizations such

as the Society for the Right to Die and Concern for Dying. Unfortunately, the question before the Supreme Court is not really the one which has sparked the concern and criticism of ethicists. Indeed, for the Cruzans to win in the Supreme Court, they must prevail on an entirely different issue — one which the Missouri Supreme Court in fact decided correctly. In short, as the question is necessarily framed in the Supreme Court, the Cruzan's hard case can only be won with bad law.

The Missouri court's real mistake was in suggesting that there is an important moral and legal difference between the discontinuance of technologically supplied nutrition and other forms of medical treatment. In the thirteen years since *Quinlan* was decided, courts have generally rejected this distinction, and properly so. Some read *Cruzan* even more broadly, as barring forever the withdrawal of any medical care from a patient in permanent coma if she has not left explicit directions so requesting; if that reading proves correct the case is even further from the bioethical consensus that has formed since *Quinlan*. Should the United States Supreme Court therefore overrule the decision in *Cruzan*?

To do so, the Supreme Court must transform the question into one of federal law and hold that under the circumstances of this case the Constitution compels Missouri to order physicians to follow the instructions of Nancy Cruzan's family. If it did so, the Court would not only confuse constitutional doctrine; it would also set back the law of death and dying. The danger, however, is that the Court will stretch the constitutional law in order to correct Missouri's mistaken state law decision.

Usually inspired by language in *Quinlan*, the seminal case to which almost all courts still look, many courts have suggested that the patient's right to refuse medical care is an aspect of the constitutionally protected right of privacy.⁷ The constitutional right of privacy shields a variety of personal decisions, such as reproductive choices, from state coercion, and a decision whether to accept life-sustaining treatment seems intuitively within the same realm. Where the patient is able to express her views at the time of decision — obviously not the case in *Cruzan* — the claim has particular force. It may also have force in the case of an incapacitated patient who has left directions. Applying a rights analysis to the case of the comatose patient who left no directions is another matter, however. In the remainder of this essay, we will see why it is not only wrong, but dangerous.

1. The Constitutional Argument is Generally Superfluous

Whatever constitutional right may exist is surely not absolute. No court considering the matter, for example, has ever held that the Constitution forbids state laws against suicide.⁸ The *Quinlan* analysis is typical: "We think that the state interest [in preserving life] weakens and the

individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims. Ultimately there comes a point at which the individual's rights overcome the State interest."⁹ Yet these competing factors — the individual's right to refuse treatment and the state interest in preventing suicide — are balanced in the same way without reference to the constitutional doctrine. The individual has a common law right to be free of unwanted physical intrusions. The law of battery existed long before the constitutional right of privacy, which in any event does not limit private action. A court shaping the nature of the patient's civil claims against private actors must weigh the relative importance of the same competing state policies favoring the preservation of life as well as the freedom from unwanted physical intrusion. A court balancing these interests would reach the same result whether it found them in the common law or the constitution. Constitutionalizing the analysis thus adds nothing of substance; it merely provides a basis for federalizing it — for requiring every state to weigh these interests identically, under supervision of the Supreme Court.

The New Jersey Supreme Court itself has now recognized that the constitutional argument is substantively superfluous. In *In re Conroy* the court, while conceding that in *Quinlan* it had earlier raised constitutional arguments, chose to rest its analysis entirely on common law principles, concluding that the constitutional analysis was unnecessary.¹⁰ Unfortunately, the authorities that still rely on *Quinlan* for the constitutional argument generally take no notice of New Jersey's more recent disavowal of its importance.

2. The Constitutional Claim Arises From Concepts of Personal Autonomy Which Have No Application to the Incapacitated Patient

Nancy Cruzan, like Karen Ann Quinlan, was comatose and unable to express her view at the time the medical decision had to be made; nor, both courts concluded, had either left clear advance instructions.¹¹ In such a case others must decide for the patient. A constitutional right to decide one's treatment for oneself can thus have no application to her case.

The Cruzans argue that a patient like Nancy does not lose her right to decide her own medical treatment because she is incapacitated.¹² Assuming such a right exists, this is of course true. But that tells us only that Nancy Cruzan still has the formal legal right to direct her medical care, an observation that leads us nowhere, since she is incapable of exercising her right and deciding whether she wishes treatment continued. Indeed, the fact that she retains the right only emphasizes our difficulty, since by necessity others must in fact decide for her even though the right is hers. Courts are understandably uncomfortable with this process; they prefer, whenever possible, to avoid responsibility for such decisions by requiring that

individuals make such critical personal decisions for themselves.¹³ Their discomfort is healthy, for the responsibility is great. Anyone who decides for Nancy is burdened by the reality that they act from necessity rather than from moral — or constitutional — right.

The Cruzans invite the Court to dispel this discomfort through a transparent fiction. From the premise that Nancy retains her right to decide they proceed to the conclusion that others can exercise that right on her behalf. But any constitutional rule protecting each individual's right to make their own medical decisions emerges from a principle of self-determination — or autonomy — and can therefore protect only an individual's right to make decisions about his own treatment. A guardian's or family member's judgment is not entitled to the special deference arising from the autonomy principle, for it is a judgment that one person has made about another, not a judgment that the patient has made about himself.

We may well wish, as a matter of sound policy, to ensure that the views of close family members have great weight in making treatment decisions for the incapacitated. We may even wish to make their views dispositive. But we cannot base that policy on the autonomy principle: the family's claim to decide cannot be piggybacked on Nancy's autonomy. To say that the Constitution protects the right of others to exercise Nancy's right for her will not do where, as here, the right in question is a right to make a choice.¹⁴ It stands on the same footing as a claim that Nancy Cruzan's right to vote can be exercised by her family. A right to choose for oneself can be vindicated only if the individual herself makes the choice. A constitutional right arising from our core belief in individual autonomy cannot possibly be exercised by a stand-in appointed by the state.

We must recognize that where nature has deprived the patient of the capacity to choose, the Constitution cannot restore it, and the character of the decision about her treatment necessarily changes. The autonomy principle can no longer apply. Since it is foundational to the constitutional claim, it fails, unless another rationale for it can be offered. Rather surprisingly, given the frequency with which the claim has been made, none has been.¹⁵

3. The Interests of the Incapacitated Patient Are Threatened, Not Advanced, By Giving Others a Constitutional Right to Decide On Their Care

Because the autonomy principle does not apply, developing standards by which to make medical care decisions for incapacitated patients who have left no directions is a difficult task. The New Jersey Supreme Court, a national leader in this field since *Quinlan*, has rendered a series of careful opinions in the last few years in a thoughtful effort to work that problem out.¹⁶ But not every court has been as willing as New Jersey to face up to the task. Some have avoided it by taking the course now urged on the Supreme Court: pretending that the problem

does not exist by treating the surrogate decision maker as if he were the patient herself. Examining our experience with this approach is not reassuring.

The best known example of this kind of judicial self-deception is the decision of the Massachusetts Supreme Judicial Court in the case of *Superintendent of Belchertown v. Saikewicz*.¹⁷ Patients who have lacked decisionmaking capacity their whole lives present an acute problem for courts disinclined to admit the limits of the autonomy principle. Not only are such patients incapable of expressing a view at the time the medical decision must be made; there is no plausible way to reconstruct their preferences from statements made at some earlier time, as there sometimes is for patients like Nancy Cruzan. Joseph Saikewicz, for example, had been severely retarded since birth. When his case came to the trial court he was 67 years old, but his mental age was two years and eight months. He had never learned to talk; he communicated entirely through physical gestures and grunts. In short, he never had the capacity to form a view about his medical care.

Saikewicz had leukemia, for which chemotherapy was the only possible treatment. Without it he was likely to live only a couple of months at best, and perhaps only a few weeks. Chemotherapy has serious side effects, but all conceded that "most people in Saikewicz's position elect to suffer the side effects of chemotherapy rather than to allow their leukemia to run its natural course."¹⁸ Despite this fact, a guardian ad litem, appointed on the petition of the Belchertown School where he lived, recommended withholding the treatment, and his recommendation was ultimately accepted by the Massachusetts Supreme Judicial Court.

How could Massachusetts justify denying to Saikewicz the only treatment that offered him any promise of recovery, treatment which competent individuals almost always seek? The obvious suspicion is that the decision-makers felt that a severely retarded person was not worth the effort, but the Massachusetts court expressly disavowed such a view.¹⁹ Rather, the court identified as critical Saikewicz' inability to cooperate with the treatment, and to understand why the treatment was beneficial to him. But of course we would treat a child of two and a half, whose ability to understand would be the same as Saikewicz'. And as Richard Burt has pointed out, too little effort was made to elicit Saikewicz' cooperation in administering the treatment to tell whether it could be had.²⁰ There are cases in which the burdens of treatment outweigh the benefits. But with life at stake — a life which Saikewicz had the capacity to enjoy — such a conclusion surely requires a careful inquiry to establish the facts. Massachusetts made no such inquiry, and from the opinion one suspects that the reason, in part, was the court's ability to convince itself that it was protecting Saikewicz's choice rather than ending his life. For incredibly enough, much of the court's opinion is spent, not on evaluating how to establish Saikewicz's

interests, but in arguing that the court was merely honoring his decision. These portions of *Saikewicz* rely on his "constitutional right" to decline treatment, and they are often cited when the constitutional claim is made.²¹

What does the court say in this discussion? It frames the question before it as reconciling the state's interest in prolonging life with "the interest of an individual to reject the traumatic cost of that prolongation,"²² as if Saikewicz himself had determined he was unwilling to endure the side effects of chemotherapy. The court even suggests that the decision not to treat "was based on a regard for [Saikewicz's] actual . . . preferences!"²³ These parts of the opinion endow the guardian with the mythical persona of the hypothetically competent Joseph Saikewicz, a self-deception that allows the court to avoid confronting the decision it has made by pretending that Saikewicz himself has chosen to forego treatment. The self-deception reaches its crescendo in the opinion's concluding paragraph: "Finding no state interest sufficient to counterbalance a patient's decision to decline life-prolonging medical treatment in the circumstances of this case, we conclude that the patient's right to privacy and self-determination is entitled to enforcement."²⁴ One can only marvel at the court's ability to transform a case presenting the question of whether others should decide to end Saikewicz's life, into one in which the question is whether the court can keep him from making that choice. One can marvel more that others now offer it as model for the Supreme Court to follow.

Saikewicz should teach us an important lesson: in this area of the law above all, we must avoid legal fictions that allow a court to avoid confronting the hard choice before it, for terrible injustice may result. In particular, we must avoid the legal fiction that in such cases we are merely vindicating the patient's own right to decide if we terminate treatment. Some patients are better off without additional treatment; some, like Joseph Saikewicz, are better off with it. Patients vary in their values as well as their medical condition; where the patient can decide for herself, we can justify resting our decision on respect for her right of self-determination. But that luxury is not available in cases like *Saikewicz* and *Cruzan*. We do them no good by pretending it does, and this pretention lies at the heart of the constitutional argument urged on the Court.

4. Developing Appropriate Rules for Family Decisionmaking Requires the Kind of Policymaking Process Best Left to Legislatures, Or to Courts Employing Common Law Principles

In their brief on the merits in the Supreme Court the *Cruzan* family suggests, in one sentence that is not developed further, that the family should make medical care decisions for an incapacitated patient because they are the decisionmakers most likely to render a decision faithful to the patient's probable desires.²⁵ Others have

made that argument more fully, Nancy Rhoden being the most recent advocate.²⁶ As a matter of policy, family decisionmaking in these cases usually makes sense; for one thing, we probably have few better alternatives. But such proposals are generally inconsistent with the argument that the family has a constitutional claim to exercise the patient's right to decide. Rhoden, for example, would have courts review the family's decision on the physician's request, and overrule it on grounds she concedes must remain "vague."²⁷ But we would allow only very limited judicial power to override the family's decision if we really believed they were exercising the patient's constitutional right to decide, since then their decision would stand on the same footing as the patient's. But does anyone really want to vest such unlimited discretion in a surrogate decisionmaker, even a family member?

Indeed, family members are often subject to pressures that conflict with the patient's interests. These pressures are not only financial. Prolonging the dying process may also enlarge the emotional price they pay, preventing them from bringing their mourning to closure; daily exposure to a close relative ravaged by disease is another burden that ends with the patient's death. Meeting the patient's continued financial and emotional needs may impair the relative's ability to meet their obligations to other family members, including their own children. On the other hand, family members are sometimes less able to accept the oncoming death than the patient himself, and may urge difficult or pointless treatment which the patient would not want. In short, the family's intimate involvement is at once both a powerful reason they are entitled to be involved and a powerful reason they may not be motivated solely by the patient's best interests.

We may wish to recognize some of the family's interests as validly bearing on the question of whether to withdraw treatment, as some responsible commentators have urged.²⁸ But that hardly suggests we should make the family the unreviewable arbiter of how weighty these interests are, their discretion protected from regulation by a constitutional shield. The problem requires a more subtle analysis. The interests of patient and family can combine in unexpected ways. As Richard Burt has observed, continued life support is always in the apparent self-interest of the comatose patient so long as there is any chance of recovery, no matter how small, since the comatose patient surely feels no pain. Yet the patient may have wanted to spare the family the terrible burden of continued vigil when recovery is unlikely. "Karen [Quinlan's] father could not view the treatment decision through her eyes, as the court directed, without deciding whether Karen would want to view her decision through his eyes."²⁹

Yet our own interests may tempt us to think that we know what the patient would want even when she has never really told us. Once we withdraw life support, of course, we usually ensure that we will never know. But not always.

In April, 1989, a judge in New York issued an order allowing the removal of a feeding tube from an 86 year-old stroke victim who had been in a coma for four and a half months. Doctors had pronounced her in a permanent vegetative state. The order was heralded as a breakthrough in New York law, sometimes criticized for insisting too rigidly on persuasive evidence of the patient's preferences in such cases.³⁰ Over the weekend following the issuance of the order, but before the doctors acted, the woman awoke. Her physician was called to her bedside, found her alert, and proceeded to describe her legal case to her. She indicated she understood, and the physician then asked her what she wanted done. "She replied, 'These are difficult decisions' and lapsed back into sleep." The judge then withdrew his order.³¹

Conclusion

Withdrawing life support is often the right course, as I believe it is in *Cruzan*.³² But correcting Missouri's mistaken decision through a constitutional rule would necessarily

sweep too broadly. Danger lurks if the Court grants family members a constitutional right to withdraw care from a patient whose views are unknown, thus disabling the states from working out an appropriate process for weighing the competing considerations. As Professor Laurence Tribe has observed, there is a "significant potential that, without careful statutory guidelines and gradually evolved procedural controls, legalizing euthanasia, rather than respecting people, may endanger personhood."³³ It is "an error of great magnitude to conflate a substituted judgment [of a surrogate decisionmaker] with an actual judgment. . . . It is paternalism masquerading as the mere ratification of autonomous choice."³⁴ It would be an even greater error to constitutionalize the masquerade. ■

Ira Mark Ellman is a Professor of Law at Arizona State University, where he has taught since 1978. He received his Juris Doctor Degree from Boalt Hall School of Law, University of California, Berkeley, in June, 1973.

END NOTES

¹*Cruzan v. Harmon*, 760 S.W.2d 408 (Mo. 1988), cert. granted, 109 Sup.Ct. 3240 (1989).

²*In re Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976).

³She died on June 11, 1985. J. Areen, P. King, S. Goldberg, and A. Capron, *Law, Science and Medicine, 1989 Supplement*, at 283.

⁴Ramsey, *Prolonging Dying: Not Medically Indicated*, 6 *Hastings Cent. Rep.* 14 (1976).

⁵There are today a host of cases authorizing the termination of care in which the withdrawn care includes artificially supplied nutrition or hydration. For example, in *In re Jobes*, 529 A.2d 434 (N.J. 1987), the New Jersey Supreme Court allowed the removal of a j-tube that provided nourishment directly to the patient's small intestine, and in *Brophy v. New England Sinai Hospital*, 398 Mass. 417, 497 N.E.2d 626, the Massachusetts Supreme Judicial Court allowed the removal of a gastronomy tube that provided essential food and water. Neither court found it necessary to give special consideration to the fact that the medical procedure under consideration was one that provided essential nutrients rather than air or medication.

⁶American Medical Association, Council on Ethical and Judicial Affairs, Current Opinions § 2.18 (Amended March 15, 1986), *Withholding or Withdrawing Life Prolonging Medical Treatment*.

⁷There is no Supreme Court case that holds this; the Court's disposition of *Cruzan* will be its first venture into this question. However, many state courts have construed the federal constitution as implying or supporting this result. See *Rasmussen v. Fleming*, 154 Ariz. 207, 741 P.2d 674, 682 (1987), and the list of cases cited therein in note 8.

⁸*Bouvia v. Superior Ct.*, 179 Cal.App. 3d 1127, 255 Cal.Rptr. 297 (1986), comes the closest, but even that court's majority, in granting Bouvia's claim, felt compelled to deny that her plan amounted to suicide. For this they were chided by the concurring judge, who was willing to be more straightforward in his views. In *Bouvia*, of course, the court dealt with a completely lucid patient who had made her views clear.

⁹*Quinlan*, 355 A.2d at 664.

¹⁰While this right of privacy might apply in a case such as this, we need not decide that issue since the right to decline medical treatment is, in any event, embraced within the common law right to self-determination." 98 N.J. 321, 486 A.2d 1209, 1223 (N.J. 1985). Accord, *In re Storar*, 52 N.Y.2d 363, 376-77, 420 N.E.2d 64, 438 N.Y.S.2d 266, 273 (1981).

¹¹There was a dispute in *Cruzan* over whether Nancy's views were adequately known; I take the facts as Missouri states them.

¹²Brief for Petitioners at 20-22.

¹³For a more extended discussion of this point, as it relates to the necessary interplay between the principles of autonomy and paternalism in decisions on how to treat incapacitated patients — some of whom may have left indications of their wishes — see Chapter 7 of Mark Hall and Ira Ellman, *Health Care Law and Ethics in a Nutshell* (1989).

¹⁴Some of the briefs filed in the Supreme Court refer to the right to refuse medical treatment, rather than the right to decide upon it. e.g., Brief for the American Medical Association, et al., Amicus Curiae, at 20-30 (arguing that a person in a persistent vegetative state has a "fundamental right" to have "life-prolonging medical treatment withdrawn"). This formulation is surely absurd. Presumably, even the authors of the brief would not insist on conferring this "right" on a comatose patient who had left clear instructions to continue treatment indefinitely in the hope of recovery. (Which is not to say we would necessarily be bound to follow her instructions, but merely that if we withdraw care, we would justify our action on a basis other than her intentions — or her "rights.")

¹⁵For the most recent example of a court which asserts this constitutional argument without offering any rationale, see *Gray v. Romeo*, 697 F.Supp. 580, 585 (D.R.I. 1988) (grounding a decision to remove feeding and hydration tubes from a comatose patient on the patient's constitutional right to decide her own treatment, a right it finds based on "the principle of self-determination," where the patient had never expressed a view when competent and the court in fact employs this language to authorize a decision by her family).

The briefs filed with the Court in *Cruzan* are no better. For example, the American Medical Association, joined by other medical organizations, filed a fifty page amicus brief in the *Cruzan* case, arguing for the recognition of a constitutional right to have life-prolonging treatment withdrawn, in part because "the decision whether to use available means to prolong a vegetative existence or terminal condition indefinitely is profoundly intimate and personal." Brief of the American Medical Association et al., Amicus Curiae, at 23. One and one-half pages are devoted to the proposition that the right is not lost on incompetency; none is devoted to the question of how that right, if not lost, is to be exercised by the incompetent who has left no directions. A long section on the family's due process right to be heard on the matter appears to assume that they have, in effect, succeeded to the right of their incapacitated kin. But most of the Brief talks of Nancy's right to have her treatment withdrawn, as if the request were hers and not her family's.

The Brief for the Petitioner devotes two full pages, out of 43, to the argument that incompetents do not lose their right to decide, and none to why her parents therefore succeed to her right. For similar treatments, see the Brief for The American College of Physicians, Amicus Curiae, et 21-24,

and the Brief of the National Hospice Organizations, Amicus Curiae, at 13-15.

¹⁶*Quinlan* was of course the first New Jersey case, but since then the same court has developed a much more refined approach to the problem in *In re Conroy*, 98 N.J. 321, 486 A.2d 1209 (1985); *In re Jobes*, 108 N.J. 394, 529 A.2d 434 (1987); *In re Peter*, 108 N.J. 365, 529 A.2d 419 (1987); and *In re Farrell*, 108 N.J. 335, 529 A.2d 404 (1987). For a synthesis of the New Jersey approach, comparing it to the approach of New York and Massachusetts courts, see Chapter 7 of Mark Hall and Ira Ellman, *Health Care Law and Ethics in a Nutshell* (1989).

¹⁷373 Mass. 728, 370 N.E.2d 417 (Mass. 1977).

¹⁸*Id.* at 421.

¹⁹The court held that Saikewicz's ability to appreciate or experience life has "no place in the decision" and that "the chance of a longer life carries the same weight for Saikewicz as for any other person, the value of life under the law having no relation to intelligence. . . ." *Id.* at 431-32.

²⁰Burt has an insightful commentary on the case in his book, *Taking Care of Strangers* (1979). He concludes that no effort was made to employ sedatives, or institutional staff familiar to Saikewicz, to help reduce his resistance. Burt concludes that "this omission reflected everyone's unwillingness to enter into sustained interaction with Joseph Saikewicz, everyone's wish to absent themselves from any transaction with him."

In considerable contrast to *Saikewicz* is the approach of New York in *In re Storar*, 438 N.Y.S.2d 266, 420 N.E.2d 64 (N.Y. 1981). John Storar was 52 years old but his mental age was 18 months. He had terminal bladder cancer. The doctors sought to give him blood transfusions. The transfusions would not cure his bladder, but they both extended his life expectancy and made him feel better. Like Saikewicz he had no comprehension of the purpose of the treatment and occasionally resisted it, but in this case the doctors persisted and gave him sedatives to eliminate his apprehension. Nonetheless, his mother opposed the treatment. A court order authorizing the transfusions over her objections was affirmed by the New York Court of Appeals. It expressly rejected the *Saikewicz* fiction of looking to John Storar's wishes as a guide, instead treating Storar like a minor child without the capacity to evaluate things as a whole. While agreeing that Storar's family therefore had the initial responsibility of weighing the benefits and burdens of treatment for him, it found the court could override their view where, as here, it was clear that Storar was better off with the treatment they rejected.

²¹*Saikewicz* is the earliest case, other than the now withdrawn passages in *Quinlan*, that is usually cited as authority for the constitutional

argument, see, e.g., *Rasmussen*, *supra* n. 13, and Brief for Society for the Right to Die, Inc., Amicus Curiae, at 5. It is often quoted or otherwise relied upon as the principal authority for the proposition, see, e.g., Brief for the American Medical Association, et al., Amicus Curiae, at 30; Brief of Concern for Dying, Amicus Curiae, et 9; and Brief of The National Hospice Organizations, Amicus Curiae, at 13.

²²*Id.* at 425.

²³*Id.*

²⁴*Id.* at 435. I am not the only reader to notice the inherent incoherence of the *Saikewicz* opinion. For the congenial views of another recent critic, see Rhoden, *Litigating Life and Death*, 102 *Harv.L.Rev.* 375, 385-388 (1988), as well as the sources she cites.

²⁵Brief for Petitioner at 22.

²⁶Rhoden, *Litigating Life and Death*, 102 *Harv.L.Rev.* 375, 439-445 (1988). Under traditional law in most states, family members have no legal authority over the medical treatment of an adult kin, although by tradition medical personnel looked to family members as sources of decision-making authority. The law has begun to change to conform to the tradition. E.g., New York State Task Force on Life and the Law, *Life-Sustaining Treatment: Making Decisions and Appointing a Health Care Agent* 16 (1987).

²⁷*Id.* at 443.

²⁸See, e.g., note 10, *supra*.

²⁹R. Burt, *Taking Care of Strangers* 152 (1979).

³⁰Rhoden, *Litigating Life and Death*, 102 *Harv.L.Rev.* 375, 391 n.74 (1988); Brief of the Society for the Right to Die, Amicus Curiae, at 29.

³¹*New York Judge Revokes Right-to-Die Order as Patient in Coma Wakes*, *New York Times*, April 15, 1989, at pg. A15.

³²For a careful approach that would support removing the artificial nutrition and hydration in *Cruzan*, see *In re Jobes*, 108 N.J. 394, 529 A.2d 434 (1987).

³³L. Tribe, *American Constitutional Law* 1370-71 (1988).

³⁴*Brophy v. New England Sinai Hosp.*, 497 N.E.2d 626, 643 (Mass. 1986) (Lynch, J., dissenting). See also *In re Mary O'Connor*, 534 N.Y.S.2d 886, 892 (N.Y. 1988), rejecting the majority's analysis in *Brophy*, observing that "[N]o person or court should substitute its judgment as to what would be an acceptable quality of life for another."

The Current State of Ethics in the Legal Profession

A Panel Discussion Held November 8, 1989

Armstrong Hall's chapter of Phi Delta Phi, McFarland Inn, sponsored a panel discussion on "The Current State of Ethics in the Legal Profession" in November, 1989. The McFarland Inn invited Judge Thomas C. Kleinschmidt of the Arizona Court of Appeals, Adjunct Professor Roxana Bacon, and Professor Michael Berch to participate. Professor Paul Bender moderated the discussion, which was attended by over 125 students, attorneys, and citizens. The discussion was lively and produced a large number of interesting questions and a few controversial stands, most notably by the mercurial Professor Berch.

Professor Berch argued that a lawyer should remember that morality is not the same as the Rules of Professional Conduct, and opined that it might be an oxymoron to call the rules "ethics" when they cannot be surmised on an intuitive level. Professor Bacon, a partner in the Phoenix firm Bryan, Cave, McPheeters, and McRoberts, noted the increasing tendency of law firms to grow very large and argued that ethics in the future would be largely developed and nurtured by the market's demands. Judge Kleinschmidt did not offer a rosy picture of attorney ethics, but asserted that they may have actually improved over the years. He also explained Arizona's Ethics Advisory Committee system and advised the audience that Arizona's disciplinary system is tough and getting tougher, a sentiment with which the other participants agreed.

The panel discussion was successful, and Phi Delta Phi is considering establishing the event as an annual occurrence, with topics such as the factors in practice that make adherence to the Rules of Professional Responsibility difficult and ways in which the culture of the profession make ethical behavior more difficult to maintain. Excerpts of the evening's discussion are presented here.

Professor Bender

Thank you. Tonight we're going to talk about the current state of ethics in the legal profession. If there was a book entitled "Legal Ethics," most people think the pages would all be blank. Lawyers do not have a very high standing in the general community, and you have before you three people who are as qualified as anybody to talk about this.

For years, Judge Kleinschmidt was the chairman of the Committee of the State Bar of Arizona, which deals with the Rules of Professional Conduct, and was involved in the process of formulating regulations and responses to inquiries about ethical problems. Roxie Bacon will be the president-elect next year and then she will be the president of the State Bar. In her current position as vice president,

she reviews the probable cause determinations of the lawyers at the State Bar who first consider complaints against lawyers about ethics. And Professor Mike Berch—there's nothing to say about Mike Berch—his ethics are spread before you.

The order we are going to follow is Roxie Bacon first, then Judge Kleinschmidt, and as usual Professor Berch will bring up the rear. I turn you over to Roxana Bacon.

Roxana Bacon

I was going to bore you with summaries of a couple of Supreme Court decisions, Arizona and U.S. Supreme Court, that touch on ethics, and there are important cases. *Shapiro* is the advertising case. *In re Himmel* is known as the muskrat case because it requires you to report certain kinds of unethical behavior; if you fail to do so, you can be disbarred. Those are worth noting, but probably don't fit in with the real format of tonight.

So I thought instead I'd depart from being something of a professor and tell you a little bit about what I see as a probable cause review panelist. It's a unique view, kind of a catbird view. Twice a month the State Bar attorneys bring the summaries of those matters which they believe merit probable cause. That is to say, probable cause that a discipline charge should be formally filed . . . a complaint against an Arizona lawyer for some violation of the code of professional conduct. And I either agree or disagree or modify or whatnot. It's a position of uncomfortable authority, as you can imagine. But it's also one that lets me get a window, a snapshot maybe, on the profession. I want to tell you what I see happening to the profession, and what I see in terms of trends in the law affecting ethics.

About 65% of everything that comes before me is a direct and absolute pure case of not talking to your client. Failure to communicate, failure to even call them after you've filed a complaint, failure to return phone calls, failure to tell your client what it is you're doing in the privacy of your office. But seldom failure to bill your client. If you do that often enough and hard enough and mean enough, you will get probable cause, and you'll have to come before a hearing committee of your peers—three of them—to explain why it is that you refuse to acknowledge that there's a client involved in your life. That's a real common phenomenon.

The second is malicious wrongdoers, evil people. We should exterminate them on the streets. This is a very, very small percentage. These are people who really think it's okay to lie, cheat, and steal, as long as they can get away with it. Eventually they will get caught and they will be

disbarred. There's a tough Supreme Court in the State of Arizona. They are no-nonsense about discipline matters.

The last group is sad, the saddest group I deal with. They're substance abusers, and there are a lot of them. Previously, the approach has always been to treat them the same way you do the evildoers. A couple of years ago we changed that approach and now have a very good membership assistance program. We can take people out of the main stream of practicing law, put them on disability status—which is no practice of law—but not through a discipline process yet. They can get help from over 100 people in Arizona who are admitted attorneys also recovering from some kind of abuse or addiction. Our program doesn't replace regular treatment programs, but it offers some additional hope. And often this group of people can be rehabilitated. When they are, they still face Bar charges for any infractions of the Code of Professional Conduct that might have occurred before they went on disability status. They still face the entire discipline procedure. The treatment, rehabilitation, and performance while on disability status can all be considered in mitigating any discipline. Those are the three groups.

I see all too many young people with the toxic and substance abuse problem, and I'll tell you quite frankly that as a profile, cocaine use in young people is what I see, and alcohol abuse in older lawyers is what I see. I think it's clear why. Alcohol is more common to people who are older. Cocaine is a relatively new drug for the polite classes in America. Most of the time you're also looking at people who have gone from an annual income of about \$2,000-3,000 per year to, in some cases, an annual income instantly of \$50,000-60,000 per year, and that's a lot of money. Too much temptation and an enormous amount of pressure can lead to some very serious drug problems.

I want to take a few minutes and tell you what I think is happening in the profession. What I see happening is that law is becoming a big business with all of the ethics of big business, and is virtually abandoning the ethics of the profession. That's a sweeping statement but I think it's a true statement. Let me give you an example. Right now there are over 300 law firms in the United States with more than 100 lawyers. In the next 10 years it is assumed by those people who study law as a business, those who make money from law as a business—consultants—that in the next 10 years there will be megafirms, probably more than 25 firms, with over 1,000 lawyers in them. They will virtually control national legal business. A regional firm will be a thing of the past, and a large local firm will be a dinosaur. The way the economy is moving toward internationalization of economy, the internationalization of financing means that only megafirms, like mega accounting firms, will really be able to handle the sweeping kinds of legal problems and transactions that are the wave of the future.

If that's true, that means that a little state bar organization struggling with volunteer lawyers and volunteer hearing

committees to discipline each other for infractions of a code will miss the mark by far. Most lawyer discipline will happen in the marketplace, and most lawyer ethics will be determined by the marketplace. These rules will become a gentlemen's or a gentlewomen's code to be largely ignored. None of this makes me happy. But I think it is an appropriate starting point for you to think about how you're going to handle your ethics and to contemplate the business future of the industry of law.

Judge Kleinschmidt

The current state of ethics in the legal profession is not very good. I don't think it was ever very good, and I don't think it is any worse now than it ever was. One thing that has changed, though, is that the activities of the Bar and the Supreme Court directed at improving it have changed, at least in the 22 years I've been practicing. They've changed dramatically.

When I came to Arizona in the middle 60s, almost no one got disbarred, and virtually the only reason anyone got disciplined was if he or she stole money outright from a client. That has changed. The Bar has a very extensive apparatus in operation now for disciplining lawyers. Those who are found guilty ought to be found guilty with reasonable dispatch, and the punishment ought to follow with reasonable dispatch, or else the whole thing gets diluted and is ultimately ineffective.

The Bar has improved a lot, and I guess it has improved to the stage where now it has too much business. The medical profession went through an economic revolution in the 50s, and the legal profession went through that revolution in the late 70s and 80s. The business aspects of the practice of law have changed very radically. It is much more important now to law firms that lawyers earn big incomes. There's more emphasis on that than there ever was. I am not convinced that the revolution in legal economics has made any difference at all to legal ethics in the practices of lawyers. I don't see that it's much different now than it ever was.

Now, let me tell you about some practical things that you should know if you have an ethical problem. The Rules of Professional Conduct, which the Supreme Court of Arizona has adopted, are complex. A lot of the ethical problems that will be presented to you or that present themselves can't be solved by intuition. You think you know what's right and wrong? Well, try reading the Rules of Professional Conduct. It's like any other code. You have to puzzle over it.

There is one way to really stay out of trouble if you have a question, and that is go to the Bar Committee on Rules of Professional Conduct. I served on that Committee for a number of years and the Committee itself has changed radically in the last year. It is an extremely busy committee. In 1987, for example, we published 27 opinions, plus probably 40 or 50 unpublished—but written—opinions, and gave advice over the phone in response to inquiries in hundreds and probably thousands of instances. In 1988,

we dropped from 27 to eight opinions and in 1989 to five published opinions, so far.

One of the reasons for that apparent drop in productivity is the fact that the Committee gets some hard questions. Currently, for example, one of the questions they are considering has to do with surreptitious tape recording of telephone conversations by lawyers of witnesses. We've gotten into a lot of problems that have come out of lawyer advertising, and we've gotten into a series of problems that gave birth to one another about when you can ex parte interview witnesses and expert witnesses for the other side. They were knotty questions. Everybody had to have his say.

The Committee was just unwieldy and becoming ineffective. So, the Bar cut the Committee down to 20 members, and hired a full-time attorney whose job it now is to answer all the telephone inquiries that come in, to draft every published opinion, and to write every unpublished but written opinion that's provided to members. The Committee of 20 reviews all of these things and has the last word on a policy. The process is really now too new to know how well it's going to work. But if it does work, Arizona will have probably the best machinery in place for answering your questions about the application of the rules and ethics.

So when you are confronted with a problem you can't work out yourself, I suggest you look at the rules first, because they do answer a lot of questions. If you're in doubt, call the State Bar, ask for the lawyer who is in charge of handling the Ethics Committee, and talk it over with her. A person in the position of dealing with these rather narrow problems quickly develops an expertise. Hopefully, she will be able to answer your questions quickly, on the spot. If not, if it merits a written opinion, hopefully, she'll get that out quickly, too. A lot of people, a lot of lawyers, don't even know this Committee exists. But it's there and I would urge you to use it.

Professor Berch

I do agree with much of what the speakers said, and I think now I can sum things up. The speakers discussed the current state of ethics. I'm going to tell you I really have problems with that because I differ in my answers to the question, "what do we mean by ethical precepts?" Well, here's my book, and it's called the Standards of Professional Responsibility. And folks, it tells you just about everything, including how to sit down in court and be a gentle person! It talks about advertising, it talks about commingling funds, it talks about perjury. It talks about important things, and it talks about insignificant etiquette points.

Roxana said 65% of the disciplinary cases are a failure to communicate. You're in trouble if you violate these rules. Don't get me wrong, but I don't think that's ethics. Even though the rules characterize it as such, it's not ethics. The middle group contains the liars, the cheats, and those who steal. People who steal, that troubles me, and I want to talk about that in a minute.

Judge Kleinschmidt said, "Look, there's a committee here that will sort of help you." But my problem is that the Judge believes you can't intuitively know right from wrong. The rules are so complex! Folks, that's a problem in my mind. It is a problem when ethics have reached the point when you cannot intuitively know right from wrong. The moment you tell me that ethics are something you can't know, then to me they are not ethics. It's important, you'll be disbarred, but it's not ethics. You may think, well, so what? Well, to me it is a big, important thing, because motivation is the key to ethics.

We make judgments on less than all of the facts, and I'm going to do it too, as long as I agree they're tentative. These are my hypotheses that I'm going to state. These are not God-given, these are not necessarily accurate, but these are something that I've lived with 30 or 40 years. Let me note that I am sick and tired of lawyer bashing. These speakers didn't do it. I'm glad they didn't do it. And I believe what Roxana said about the big firms of the future being a grave problem. I like a society where there are individuals who work, where there are individuals who go before courts. I don't trust conglomerates. I don't like too much power concentrated in anything because power does corrupt. Watergate! The Congress of the United States! That's where the problem lies! Not with the rank and file lawyer.

You want to know something funny? Twenty years ago we appealed judgments. Today, our way of appealing is to bash the lawyer, bring the proceeding, ineffective assistance of counsel, sue them for malpractice. Try to find the cases claiming civil rights violations in 1940. You're not going to find many. Today, there are thousands of cases. Are we more racist today? Some of you will say so. The Wall Street lawyers got awfully uptight about ambulance chasers, while they were stealing money in connection with securities. Before the New Deal and after, these same Wall Street lawyers were worried that Mike Berch from Great Neck, New York ambulance-chased and found a client.

If you want to talk about competence, the level of competence is at an all-time low. But the level of ethics, what I consider ethics—and this is my thesis—is really at a high, and I'm going to tell you what I look to. We drafted the Rules; read the Rules. They're pretty inspirational. They're pretty darn good. They're tough to beat. Society demands a lot from us. And I think we measure above society, to a considerable point. Look at the pressures on the lawyer. You have a group of rules that are supposed to regulate lawyers, in very, very heated controversies, and it's a miracle, ladies and gentlemen, as Roxana Bacon says, that there is only a small group of liars and cheaters. I think again the rank and file are pretty good. I think lawyers are fairly ethical. Oh, we delay; we procrastinate, I don't deny that. And that is a violation of the ethical Rules, but it's really not a matter of ethics.

Let's consider a couple of examples. The Bates and O'Steen case is a good example. They were two of my

students. They violated the great rules of the Supreme Court—they advertised! Terrible sin—the big lawyers didn't like that at that time. And they won—the First Amendment—yet they violated ethical rules. But did they have a good reason for advertising?

Let's take another case, *Nix v. Whiteside*. That's a case where the Supreme Court held that it's not ineffective assistance of counsel for counsel to say, "Hey, you're going to take the stand. But if you take the stand, I'll blow the whistle on you. I'll report you and I'll testify against you." The Supreme Court of the United States says that's not ineffective assistance of counsel. The Rules here say that's the appropriate way to respond. Think about blowing the whistle on your client. Do you really applaud that lawyer? If you do, good for you! But I'll tell you what happens! You applaud that lawyer; the client gets another lawyer and does the same damn thing, because this time this client is sophisticated. Has the system been purified? No. Has lawyer number one gone home happy? Yes. Has he violated ethical precepts? No. I want you to live by the Rules. I live by these Rules, but note that there's also something called conscience.

Audience

Do you think Rule 11 has reduced the level of either frivolous or harassment complaints?

Judge Kleinschmidt

You know, these things take a long time to bubble up to the appellate courts. I haven't had a lot of practical experience with Rule 11. I don't particularly like it. I think it is abused, and I don't like the possible chilling factor on the filings on some types of complaints.

Roxana Bacon

I think it becomes just another litigation threat for people who are inclined to view litigation as a sport without rules. You see a lot of Rule 11s being used again just as an unfair tactic, and that I think falls squarely at the feet of the trial court. A good judge will handle it quickly and a not-so-good judge will be snookered and fall into the same trap.

At the State Bar, we take a very dim view of people taking Rule 11 and changing it into a Bar complaint. What you do there is write to the lawyer who's complaining, and to the lawyer against whom he has complained and say take it to the court. And when everything is over, if you still have something to say, come on back and we'll give it another look. But we refuse to be used as another playground for a sandbox squabble.

The thing about Rule 11 that I think is legitimate is that it can be used with effective counsel and effective judge to curb absurd litigation, but all of that presupposes a certain elegance and quality of lawyering that is not the norm, frankly.

Audience

Do you advocate some sort of speedy trial rule for disbarment-type proceedings to reduce the emotional strain and to reduce the logjam and try to move things along?

Judge Kleinschmidt

The first thing I'd want to know is what would the sanction be for violation of the speedy trial? Would it be a dismissal, like it is under the rules of criminal procedure? I don't know if we need a speedy trial rule. I don't know all the rules, and I don't know how to apply them. I just wonder if you can cure it with a rule.

Roxana Bacon

I don't think so. I think if what you want to really address are the lie, cheat, and steal cases, we have a speedy trial. This is the interim suspension. If a lawyer is found to have misappropriated funds, the Commission can then move the Supreme Court for an interim order suspending you from the practice of law. It has to be either misappropriation of funds or a pattern or practice that will do great harm to the public. There's a high threshold, as it should be. I think the fact-finding process is critical. It's not a civil trial and it's not a criminal trial, but if you're in it, it sure feels like it. And if it's your ticket to practice law, and they say they're going to take it away, I don't think you want that to be done lightly.

In fairness to the current state of the discipline, I don't think delay is a major issue anymore. I think it will be again in a couple of years when the new lawyers that we've just hired in the discipline department are inadequate for the ever growing number of lawyers in the Bar. But right now things move along pretty quickly. I see probable cause review for things that were filed as a complaint three months ago. That's moving fast.

Professor Bender

I think I disagree with Mike Berch when he says that client relationships are not an ethical problem. They may not be a problem of dishonesty, but I don't view ethics as only involving dishonesty. If you deal with somebody in a relationship where you have a tremendous amount of power and knowledge, and you leave that person feeling not only dissatisfied, but at your mercy and helpless and powerless, I think that's an aspect of ethics. It's more than etiquette. It's part of the people's ability to live a life that they feel is free from fear and free from the unknown. If you're dealing with lawyers who won't talk to you and maybe your life savings and freedom are at issue, it may not be deliberately malicious, but to me it is an aspect of ethics.

Audience

You mentioned that by the turn of the century there would likely be 25 firms of a thousand or more attorneys, with an ever concentrating power in the big megafirms. Then you talked about the trouble you'll have regulating

the big firms ethically, suggesting that the state bar associations won't be able to handle firms that size. My question is why can't we move toward a more national scheme of ethical regulation?

Roxana Bacon

I think the logical conclusion of what I was saying is that we will be doing that. But what I was really more struck with is the growing division between megalaw and the individual sole practitioner. That's moving away from the hands-on discipline of state bars, and being more market controlled. Small contract disputes, commercial matters, local matters, are going to be more subject to the local control. As it is right now, I would say that fewer than five percent of the complainants that file charges against the 11,000 lawyers in Arizona are important clients, important financially. They don't matter tremendously as individuals; they're not big money clients. And you say well, why is that? Because in that strata, if you're not responding to your clients, you don't have a client. So, it's all market driven. If there are ethical violations, they're all going to be handled in that world. That's a market reality in law today.

Professor Bender

I suppose it's possible, isn't it, that we might come to a time when ethical regulation will be divided and the regulation of the interstate large firms would take place on a national basis?

Roxana Bacon

What does that mean when you have a national law firm with partners and associates from 12 other branches in the U.S. coming in and out of your office, and all working together on a deal? Who's practicing law in Arizona? Blow a whistle. Not everybody in that national law firm branch office is admitted to practice in Arizona. Do they all have to go get admitted? Do we all have to take state bars in every state? Where do you start? Where do you stop? And how would the State Bar of Arizona ever even have a clue as to what's going on?

Audience

A year or so ago there was a feature on Sixty Minutes talking about lawyers suing lawyers for various malpractice reasons. One of the examples they used was that of two California firms that had sued each other over six times a piece. The question is, are lawyers breaking the law more or adding to their own bad name in bringing about this kind of litigation? Is it beneficial?

Professor Berch

I'd like to answer that. I think the answer is no. What I think has become a powerful tool in some cases is lawyer disqualification motions. That's a common weapon in complex litigation. Every attorney who gets a big case wants to disqualify the other attorney because of the

tactical advantages. Rule 11 has been used in connection with some of these motions. I am opposed to those things, but let me tell you that I think lawyers are usually very restrained with respect to their clients. The Rules frown on those suits. We heard one example where they sued one another six times, and I'm sure there are other anecdotal episodes. I think we should be restrained by good judgment. I don't like these disqualification motions solely as tactical advantages, and I see the abuse. But I don't see it as much as you seem to. I really think we are fairly restrained on those.

I'm going to tell you something that bothers me about Rule 11. We are so worried about Rule 11 that sometimes we try a case to please the judge and not so much for the client, especially a small client who won't come back to us anyway, win or lose. I'm afraid that lawyers are almost timid sometimes. The problem is not the lawyer who's too adamant. The problem involves the timid lawyer, the psychophant, the one who's worried about his future, who doesn't want to step on toes. Go to the Hoffman trial, go to the Chicago 7—those lawyers had guts. Now, I don't like all the things they do, don't get me wrong. How can we practice law without holding hands under the table with the owners of this business, and the owners of this business, I'm afraid, are the State Bar, the judiciary, and in some states the legislature. That's the real problem.

Audience

Professor Bacon, from your experiences at the State Bar and also in general practice, do you have any idea of the percentage of ethical violations which are actually pursued? Of those, what percent actually wind up with some kind of sanction being imposed?

Roxana Bacon

I can tell you the latter; the former I haven't a clue. As for really outrageous acts of the lie, cheat, and steal, you can only do it so many times. Somebody who does it once, does it all the time, and eventually gets caught. I have some hope that the net is wide enough that that person gets caught. As for the minor infractions, we're probably just getting tiny, tiny bits. The apparatus is not aggressive.

In terms of what actually goes up for discipline, I didn't bring the figures. The intake is very large and very unsophisticated, and we get a lot of garbage. And that goes out. We don't count that, we don't record that, we don't put it in your file. You shouldn't get tainted with it. On the other hand, if somebody says, "I hired a lawyer. I paid him \$500 three years ago and I haven't heard from him since, and his phone is disconnected." We'll look into that. We send that to the lawyer—if we can find him—and he responds, and then it comes back, and then a determination is made. For that group, about 50%, end up with discipline more than a dismissal or a dismissal with comment. Disbarred? Four or five people a year.

Audience

How many complaints do you receive each year?

Roxana Bacon

Well, total intake, garbage and all, about 800. Out of meaningful intake, about 125-140.

Professor Bender

But not all of those, even if everything in them is true, would be disbarable events.

Roxana Bacon

Absolutely not. Everybody, in my opinion, who does something that deserves disbarment, gets disbarred. If you're going to fool around with people's money, you can turn in your license to practice right now. I think this court would give you about a New York minute, and then you're out. Eventually the liar, cheater, stealer will get it. And so will the substance abuser.

Audience

Along the lines of reporting violations, the people who work for attorneys are becoming more and more professional in their attitude and may feel bound in some respects by the lawyer's professional ethics. To what degree, Judge Kleinschmidt, do paralegals have access to the State Bar counsel to call and ask whether some situation poses an ethical problem?

Judge Kleinschmidt

Well, I think the Committee would answer the question of a paralegal calling in that respect. I don't see any reason why they wouldn't. I would look at it more if the paralegal were calling as the agent of the lawyer.

Professor Berch

I do have one problem with that. I'm not too happy with paralegals in the mainstream of things making the kind of judgment which says, "Maybe this deal is unethical." Paralegals should be restrained. And the first line, of course, is to the firm. Now, if that doesn't satisfy you, and you're still concerned, then I'd say go ahead and do it. The economic sanction may be that you're not around any longer, but, of course, that's life. Associates have that problem.

Judge Kleinschmidt

Let me make something clear that I should have told you at the outset. The Ethics Committee does not answer questions for lawyers or paralegals or for anybody about the conduct of a third person. It's strictly limited, according to its jurisdictional statement, to answering the question that you want to ask about your own conduct. That's frequently misunderstood, and the Committee gets many inquiries about what the lawyer on the other side of the case is doing, and if it's proper, and we just don't answer

those. You don't get in the middle. If you think it's improper, if you think it's serious, that's the responsibility of the enforcement arm, or that's meat for a Bar complaint.

Professor Bender

You'd have to make a complaint—

Judge Kleinschmidt

Right.

Audience

Would you comment on the *In re Himmel* case?

Roxana Bacon

It's an Illinois case, first of all, not a U.S. Supreme Court case, and what really moved the court was that Casey, the lawyer who was not reported, was continuing to run amok and steal money from other clients. So really *In re Himmel* presented the most awful kind of lawyer misbehavior, and yet the lawyer who saw it, knew it, even litigated about it (Himmel), did not turn Casey in to the Bar, and his defense was, "I reached a settlement on behalf of my client." One condition of the settlement was that no other action would be taken against Casey, including turning him in to the Bar. Under those circumstances the Illinois Supreme Court said that you can't bargain away your ethical duties. They belong to you, not the client. You can't do it. You can agree that the client won't turn him in, but you have to turn him in. And because you didn't, Casey has been out there going nuts and hurting a lot of people for about a year or two longer than he otherwise would have. Given those facts, I think all of us would say, yes, the lawyer should have turned him in.

Professor Berch

One observation. I have not read that case, but it presents a real dilemma. It's very easy for the lawyer to report someone else once he's already gained the advantage for his own client, and once a Rule 60 motion can't be made to upset the judgment. If you are the lawyers in the situation, I think you would at least try to wait a little bit so that you could win the case and then report. But that presents an ethical problem. When you are in practice, you get the strain. It's not in the classroom. When I was in law school, and I was taking the bar, you know what they told me? I know it's not true anymore. They told me to answer any question by saying it's unethical. That's the honest-to-God message I got from the Bar Review at New York, the one-minute lawyer. Whatever it is, it's unethical, you can't lose. That's a terrible mentality! That's awful!

Judge Kleinschmidt

But there is this Rule 8.3 in the Arizona Rules which says that you must report conduct that raises a substantial question as to the lawyer's honesty, trustworthiness, or fitness. So you do have an ethical obligation under these

Rules to report. You know, you see these violations, lots of them. I have reported, four times I think, mostly out of things arising in court. I don't do it unless I'm really personally satisfied of my interpretation of the facts. When the facts lead me to believe that there is a substantial question, particularly where this kind of conduct is going to wind up really hurting someone, then I do report it.

Professor Bender

Are law schools doing enough to prepare people to face the ethical dilemmas and difficulties that will face them in practice?

Judge Kleinschmidt

I think they are. What you really need is an awareness that you have to live by the Rules, and that when problems arise you can't just blink at them and hope they'll go away. They have to be faced and resolved. I think the law schools are making people aware of that, from what I can see.

Roxana Bacon

I think law schools are doing as much as they can. It's a subject that remains abstract as long as you're in law school. It's gut-wrenching the first time you start actually signing something with J.D. after your name. You're always going to have that division between real life and pretend, but I think I might add a heavier ethical component in law school, where you're at a real peak learning time because this stuff is vital to you. I think more role playing would be helpful, just more hands-on, generally. Also we know about mandatory C.L.E. and that two of the units this year have to be devoted to ethics. I like the idea that whatever good the teaching of it in law school does, it doesn't end there.

Judge Kleinschmidt

Let me say one other thing on that. I have known some people who got in trouble with the law or did things they ought not to have done because they believed the Rules were really window dressing. Usually they came from places other than Arizona. I think there really are some jurisdictions where the level of practice is lower. But I think if the law school teaches it, and teaches it seriously, it sets the tone, so that when people get out they know that this is it, this is part of the profession. I think the law schools do that.

Professor Berch

I do have a suggestion to my colleagues. They won't like it, but they never like any of my suggestions. I don't think we are doing enough, and frankly, I would require every faculty member to take the course on professional responsibility. I wouldn't teach it but they'd have to take it. And then I would say use it as a component for each and every course. How much time does a contracts professor spend on ethics? How much does the property professor spend on ethics? And I can tell you zip, very little, and that

to me is a problem! Ethics is not incidental, it is everything you do! I now talk about professional responsibility, even in federal courts. When I talk about jurisdiction, I talk about professional responsibility, because I know it and it is important, and I don't think you'll find it in contracts, I don't think you'll find it in property. It is windowdressing if it is just this course. If you go to church on Sunday, it is windowdressing; if you live the good life, it is forever! We do not as faculty live it. That's my point.

Professor Bender

Well, we do have to stop. I will say something semi-inspirational. Law schools are in business to study the phenomenon of the law. That's not only the abstractions of the law and the rules of substantive law, but I think it's also the practice of the profession, and law schools have not done a very good job of analyzing what the problems of practice are in keeping up with the times. It's not necessary that things in law school have to all be abstract and hypothetical. We have clinical programs; we don't have enough of them. There are role playing situations where you can really face people with ethical problems. Law schools have not done very much to get the funding to do that kind of thing. It's expensive education, but if you want to train people for a profession, it's a good argument that you ought to have them practice the profession under supervision before you let them out. On that inspirational note, I want to thank Phi Delta Phi for putting on this wonderful program and thank the participants and the speakers for doing it. Thanks a lot. ■

Three ASU Alumni Become Top Legal Counsel For Navajo Nation

Siera Russell
Indian Legal Programs Administrator

Persistent personal energy. That's what **Claudeen Bates Arthur, Herb Yazzie** and **Michael Upshaw** have in common—and that's not all. Claudeen, Michael and Herb are all Navajo Indians who graduated from the Arizona State University College of Law and held the Attorney General position for the Navajo Nation. All three share a commitment to preserving the cultural integrity of the Navajo Nation in the face of legal and political uncertainties.

The Navajo Nation Attorney General's work is very similar to the State Attorney General's. Claudeen Arthur states that "the Attorney General's office represents a wide variety of legal matters that affect the Navajo Nation as a government and as a land and resources owner."



Claudeen Bates Arthur

Specifically, the Navajo Nation Attorney General's responsibilities include administrative and supervisory work over a legal office with twenty-seven attorneys, a staff of more than 50, and a budget in excess of three million dollars.

The Attorney General supervises all the attorneys in the Navajo Nation Department of Justice. He or she handles legislative affairs, administrative law, tax, bankruptcy, construction law, service contracts, natural resource law, economic development, regulatory matters, health and human services, litigation in state and federal courts,

representation of the Navajo Nation before federal and state agencies, congressional committees, and the U.S. Congress.

Former Attorney General Claudeen Bates Arthur was raised on the reservation by a Navajo extended family who taught her traditional values and cultural understanding. Arthur describes herself as "a Navajo Indian woman of the Tsinjikinni clan, born and raised on the Navajo reservation." Arthur attended first grade in a one-room country school house and studied from second grade through high school at a small mission school in New Mexico. While at New Mexico State University she did her undergraduate work in biology and decided to attend law school after reading a brochure on an Indian law program at the University of New Mexico (UNM).

Although attending law school was never a burning desire for Arthur herself, her parents instilled in her a will to work hard and to overcome any obstacles to her success.

Arthur was faced with a major obstacle to law school when she was turned down by the dean of UNM's law school. Judge Bill Canby, U.S. Court of Appeals for the Ninth Circuit and former professor of law at ASU, was recruiting at the summer Indian law program when he met Arthur.

Canby remembers Arthur as "one of our best students in the law program" and "certainly the easiest to remember because she possessed an unusual amount of self-confidence." He encouraged her to apply to ASU's law school.

After three years of "hard work," Arthur graduated from the ASU College of Law in 1974, and became licensed in both Arizona and New Mexico. She went to work as a staff attorney for Legal Services on the Navajo reservation which later became DNA-People's Legal Services, a non-profit legal organization that serves low-income people residing on the Navajo reservation. (DNA is an acronym for a Navajo phrase meaning "attorneys who contribute to the revitalization of the People").

Eventually, she went into private practice on the reservation where her practice included juvenile cases, consumer problems, domestic relations, and contracts.

During the Carter administration, Arthur went to the U.S. Department of Interior as a staff attorney in Washington, D.C. One and one-half years later the Interior Department had an opening in Window Rock, Arizona. Her D.C. co-workers were less than enthusiastic about living in Window Rock. However, for Arthur it meant going home.

Arthur eagerly took the position. After three years on the job, former Navajo Tribal Chairman Peter MacDonald asked Interior Secretary James Watt to remove her, and Arthur was dismissed from her position in Window Rock.

Arthur became Peterson Zah's campaign manager, and when Zah was elected tribal chairman in 1983, he asked Arthur to be the Attorney General.

"She was the first Attorney General of the Navajo Nation and in that capacity, Claudeen did an excellent job for us by bringing and winning some critical tribal sovereignty cases," Zah said. "She set a standard for the Attorney General of the Navajo Nation that others would have to emulate."

When Zah left the Chairman's position, she left.

Arthur is now general counsel to the White Mountain Apache Tribe. Her responsibilities include administrative law, bankruptcy, legislative matters, tax, natural resource law, water law, economic development and contracts with the federal government, and intergovernmental agreements with the State," all of which are very similar to the Attorney General's job but on a smaller scale."

Besides being a highly skilled Indian law attorney, Claudeen modestly states that she's a "mother, a model matriarch, and a grand mamma—with emphasis on the grand." Zah describes her as "one of the finest American Indian attorneys I know. She really cares about the American Indian people."



Michael Upshaw

Michael Upshaw became the next Attorney General of the Navajo Nation. Born in Fort Defiance, Arizona, Upshaw grew up on the Navajo reservation and graduated from Window Rock High School in 1971. He then became heavily involved in the American Indian Movement (AIM).

"AIM's primary mission was to raise the American people's consciousness about serious Indian issues such as inadequate health care, high unemployment, and alcoholism," said Upshaw, "while promoting Indian pride

in traditional culture, protecting tribal sovereignty and encouraging self-sufficiency among Indian nations."

While an AIM member, Upshaw worked with Indian activists Vernon and Clyde Bellecourt, Dennis Banks and others to publicize the injustices perpetrated against American Indians. His involvement resulted in a trial for his protest activities which in turn fueled his interest in law school. "After my experience with AIM, I decided that the more effective route to deal with the problems of tribes was to work within the legal system." Marriage in 1975 tempered his activism and he redirected his energy towards pursuing a degree in political science at ASU. "I've always been intrigued with social organizations and social dynamics," Upshaw says.

Prior to beginning law school in 1979, Michael also attended the summer law program at UNM. He recalls that "it helped me become more familiar with the professors' expectations and the amount of time and effort required for class preparation."

Law school was a childhood ambition of Upshaw's. A Catholic nun at St. Michael's Catholic School on the reservation encouraged her students, especially Upshaw, to push themselves and aim for professional occupations. It was in her class that Upshaw was first introduced to the idea that he could become a lawyer. It was an idea that he shaped into reality.

Upshaw credits his parents for emphasizing education as an important goal. They taught him the Navajo language and involved him in traditional customs and ceremonies while supporting his educational pursuits.

Following graduation from the ASU College of Law in 1982, Upshaw was assistant general counsel for the Gila River Indian Community. While assistant general counsel, Upshaw maintained a limited private practice concentrating on construction and federal Indian law.

In 1987 Navajo Tribal Chairman Peter MacDonald, impressed with Upshaw's achievements, asked him to become Attorney General.

Having successfully handled the challenge of law school and five years of an Indian law practice, Upshaw accepted the post in the midst of intense politics and factionalism. From February 1987 through March 1989, Upshaw brought to the position an energy and commitment that emanated from a great sense of responsibility to his tribe.

"I accepted the position because, professionally, I was intrigued with MacDonald's economic development platform and its compatibility with my desire for more business opportunities on the reservation," Upshaw admitted.

"I was also excited about the opportunity to give something back to the Navajo Nation for supporting my education. I wanted to show my appreciation to my tribe for putting me through undergraduate and graduate school," said Upshaw. "Among other things, I was involved in renegotiating the Navajo Nation's coal contracts and royalty rates which included a whole series of legal issues,

such as regulatory jurisdiction and labor disputes, and involved major companies like the Salt River Project, Peabody Coal Company, and Southern California Edison."

After serving two years as Attorney General, Chairman MacDonald fired Upshaw in 1989. "The tribe had been in turmoil resulting from allegations of impropriety associated with the Navajo's purchase of the Big Boquillas Ranch. When the allegations were raised, I retained former U.S. District of Arizona Attorney Michael Hawkins to review the ranch purchase transactions for any improper acts," explained Upshaw.

"With Hawkins' report in hand, I sought approval from the Tribal Council to initiate an action to recover ill-gotten profits from the sellers of the ranch, as well as Chairman MacDonald. Two days later, I was terminated," said Upshaw.

Approximately two weeks later, the Navajo Tribal Council placed Chairman MacDonald on leave. Upshaw was reinstated by the Council and resumed his position as Attorney General. However, he resigned in late March 1989 due to differences between him and new legislative legal counsel over the administration of the Navajo Department of Justice.

Presently, Upshaw has his own private practice in Scottsdale, Arizona, where he is also of counsel with the law firm of Margrave, Celmins, and Verburg.



Herb Yazzie

Herb Yazzie is the current Attorney General of the Navajo Nation. In March 1989, the interim Chairman of the Navajo Nation, Leonard Haskie, asked Yazzie to act as the Nation's Attorney General. He was officially appointed by Haskie and confirmed by the Tribal Council delegates.

According to Yazzie, "as chief legal officer for the Nation, I provide legal assistance, guidance, and services to the tribal government, including the general supervision and responsibility for the Department of Justice as well as the prosecution system, the Navajo Legal Aide and Defender's Services, and the Navajo-Hopi Legal Services."

Yazzie describes his role as having a two-part focus. One part is to assist the Navajo people in forming a government which will truly respond to the needs and wishes of the people, a government which would have the support and allegiance of the people. Yazzie states that the other part of his goal is to represent the tribal government so that the integrity of the Nation is maintained.

Yazzie graduated from ASU in 1969 with a B.A. degree in political science. While an undergraduate, Yazzie participated in the ROTC program and became a commissioned officer in the U.S. Army when he graduated.

After serving a tour of combat duty in Vietnam, he returned home to the Navajo reservation and pursued his interest in law. Once home, former Chairman Zah stirred Yazzie's interest in DNA Peoples' Legal Services, Inc.

For one year Yazzie worked as a tribal court advocate for DNA and in the summer of '72, Yazzie participated in UNM's summer Indian law program. Following the program, Yazzie started law school and graduated from ASU's College of Law in the spring of 1975. While in law school Yazzie observed "how little the legal profession knew about Indian nations and that it was incumbent upon Indian people themselves to get involved in the legal profession."

After law school, Yazzie worked for seven years with DNA, first as a staff attorney, then as managing attorney.

In 1982, Herb was recruited as staff attorney to the newly formed Navajo Nation's Department of Justice. Four years later, due to philosophical differences with the MacDonald administration, Yazzie was asked to leave the Department of Justice.

"Following the revelation of corruption by the MacDonald administration," said Herb, "the Navajo Tribal Council, wishing to preserve the integrity of the Navajo Nation, asked me for legal assistance and guidance in the face of political turmoil."

Yazzie took on the challenge with the expertise that comes with years of experience and commitment.

Eventually, MacDonald and his administration were removed from power. In March 1989, Herb became the Attorney General and the third ASU law school graduate to hold this top legal position for the Navajo Nation.

Besides having spent seven years working for DNA Peoples' Legal Services, Herb presently serves as president of its Board of Directors. Professor Alan Matheson, who also serves on the board, describes Yazzie as "a wise and thoughtful person who has the ability to deal with critical issues in an evenhanded and fair way. He makes sure that all persons affected have a chance to contribute, and the result is one that is fair to all concerned. I am impressed with his judgment, sensitivity, and integrity." ■

Richard Morgan Returns To ASU To Assume Deanship

Prof. Alan A. Matheson

Returning to the University, **Richard J. Morgan** assumed the office of Dean of the Law School on January 1, 1990. The fifth dean of the Arizona State University College of Law, he joined the faculty originally in 1980 and taught here until July, 1987, when he accepted appointment as Dean of the University of Wyoming Law School. Graduates will remember his strong teaching skills in the Business Associations and Commercial Law courses, his fairness as an Associate Dean and his wry good humor.

Dick is a graduate of the University of California at Los Angeles Law School, where he served as Editor-in-Chief of the Law Review. Prior to entering legal education as a professor, he practiced law with the Los Angeles firm of Nossaman, Guthner, Knox and Elliott and became a partner.

As a known quantity and, therefore, almost an inside candidate, Dick survived the long dean search process in the spring of 1989 and edged out other fine aspirants for the position. Satisfied with his role at Wyoming and not in the market for a new assignment so soon after going to Laramie, he stated that the opportunity at Arizona State was one he "simply could not resist." Fortunately for the School, he consented to allow his name to be placed in nomination.

During the process of selecting a new Dean, I was asked by the Search Committee to speak with persons at Wyoming who worked with Dick and who could assess his administrative performance at that institution. Because I had shared decanal assignments in the same office with Dick for one year when he served as Associate Dean at Arizona State and had observed his role in that same capacity for two additional years, I knew he had the talent, good judgment and management skills to direct a law school in superior fashion. Nonetheless, I was somewhat unprepared for the level of enthusiasm in the Wyoming contacts' responses. In his brief time at Laramie, Dick (assisted greatly by his wife **Tina**) won the hearts and the support of every constituency. Faculty members, university administrators and state officials commented upon his great effectiveness in dealing with people, and his dedication to improving educational programs and community support for the institution. Riding circuit around the state, he was soon identified as a strong force by Wyoming alumni in the legal profession and other members of the bar. He received kudos from the Governor and from members of the Supreme Court as well as Trustees



of the University. Students joined in praising Dick as "approachable," "supportive," and "caring." This record is remarkable for a newcomer to a state where he resided for only two years.

The qualities recognized by his many friends in the cold North are the same as those his friends at Arizona State know him to possess: high integrity, superior teaching ability, wisdom, unusual energy, and strong personal commitment to moving the Law School to new levels of achievement. He comes with the trust and the support of the law faculty.

Although his appointment as Dean was to have commenced on July 1, 1989, Dick requested a six-month delay in order to wind up his duties at Wyoming and to allow that law school to have additional time to select his replacement. This thoughtfulness is typical of Dick Morgan.

Dick comes back to Arizona State as a welcome friend and colleague who has proved himself in another league and now leads the batting order at the Law School. Who said you can't come home? ■

College Community Feels Great Loss Over Death Of Professor Cleary

Dean Richard J. Morgan

Professor Emeritus **Edward Cleary** passed away on January 19, 1990, at the age of 82. In deference to his wishes, no memorial services were held. The College of Law takes this opportunity, however, to remember Ed to many of those who knew him best: his students, his colleagues and his friends.

Ed Cleary was not only a member of the founding faculty of the ASU College of Law, he was the *first* member to be recruited by the founding dean, **Willard Pedrick**. This was appropriate, of course, since Ed was then (and continued to be) a nationally renowned law professor and a world-class human being.

After earning his J.D. degree from the University of Illinois in 1932 and his J.S.D. degree from Yale University in 1933, Ed practiced law before serving in the Navy in World War II. After the war, he became a distinguished



faculty member at the University of Illinois College of Law, where he established himself as one of the nation's leading scholars on the law of evidence, before joining the ASU faculty in 1967. Ed's expertise and reputation in the field of evidence led to his appointment, by Chief Justice **Earl Warren**, as reporter of the committee that drafted the *Federal Rules of Evidence*. Ed's work on these *Rules*, and his scholarship (including the editorship of *McCormick on Evidence*), helped improve and streamline the very important law of evidence. Just as importantly, he was also a wonderful teacher, as evidenced by his receipt in 1974 of ASU's Distinguished Faculty Achievement Award.

Having Edward Cleary as its first faculty member made a profound difference in the success of ASU's College of Law. As Dean Pedrick later commented, "We were fortunate indeed to have this modest man as a member of the founding faculty. After his recruitment, the job was easy. Once other founding members of the faculty we were trying to recruit found out Cleary was going to ASU, they simply said 'if it's good enough for Ed Cleary, it's certainly good enough for me.'" Because of Ed Cleary's initial belief in the potential of the new college, a small but sterling

group of legal scholars followed him to Tempe to join the faculty, ensuring the College's reputation as a first-rate state law school from the start.

Dean Pedrick recently summarized his opinion of Professor Cleary as a law professor. "A splendid classroom teacher with a wry sense of humor, he was known as "easy Ed" both at Illinois and here at ASU for his rigorous grading. In a Cleary course, an A was really an A. Over a ten-year period, his former students at ASU viewed him as a model for the profession—a cultivated, civilized, articulate, resourceful, marvelously effective lawyer. As a teacher, he touched his students and affected the way they now go about being lawyers. His reputation as one of the great legal scholars of his generation has long been secure. Members of the legal profession have, and will, continue to use and appreciate his work."

In 1976, shortly before his retirement, a fund was established to recognize Professor Cleary's contributions to the School. The Cleary Research Fund, as it is called, supports faculty research and scholarship.

Because Ed Cleary appreciated the importance of scholarship to the Law School, to the community and, indeed, to the law itself, his widow, Margaret, has requested that anyone wishing to make a memorial gift in Professor Cleary's name direct the gift to the Cleary Research Fund of the Arizona State University College of Law.

The College and the legal community have lost a great scholar, a dear friend, and a wonderful person. This College will forever be indebted to Professor Edward Cleary. ■

Professor Michael Berch Receives ASU's Distinguished Teacher Award



Professor of Law **Michael A. Berch** was recently selected to receive Arizona State University's highest teaching honor, the Distinguished Teacher Award. The Distinguished Teacher Award, created in 1964 to recognize faculty excellence, considers outstanding teaching performance in the classroom, the ability of the professor to inspire students to inquire and to learn, and the interest shown to students through outside advice and consultation. The Award is presented each year at the Alumni Association's Founders' Day Dinner, and carries with it \$1000 and a copper-engraved plaque.

Professor Berch is consistently singled out by colleagues and students as an exemplary teacher and adviser. Instructing such disparate subjects as securities regulation, federal courts, techniques of advocacy, evidence and civil procedure, he is praised by his students for his insight and understanding of the law and his ability to pass that on to his classes.

"Taking a course from Professor Berch is like taking a science course from Einstein," wrote one student on an evaluation. "He knows it all."

A lawyer and former student writes, "I selected Michael's classes . . . because he was (and still is) an incredibly exciting teacher, one who can make a dry subject interesting and who ignites within his students intellectual curiosity."

Berch's popularity among his students is enhanced by his teaching methods. While some professors employ a classic Socratic method, where the student is never completely right because each question raises another, Berch prefers to ask questions that can be answered.

"Besting a student neither pleases Mike nor teaches much to the other students," a former student writes. "I have never seen Mike make a student look small, but have often seen him make a frightened student sit up prouder and straighter because Mike has shown him or her what they have learned, not emphasized what they have not."

In addition to his time-consuming duties as professor, Berch continually volunteers to serve as coach to ASU's highly successful National Moot Court Competition teams. Under his leadership, ASU won regional competitions in 1970, 1978, 1981, 1982, 1983, 1986, and again in 1989.

Before joining the law faculty in 1969, Berch was an attorney for the U.S. Department of Justice, Criminal Division, and worked in private practice in New York City. He has served on numerous committees; published many articles, books and essays; and received two service awards. He has been a visiting professor at four law schools.

Berch received his B.A. degree from Columbia College and his J.D. degree from Columbia Law School. ■

Annual Report of Giving

Arizona State University College of Law 1988-89



Charitable Giving at the College of Law

Every year the College of Law depends heavily on private gifts from alumni and friends to support the level of excellence which it has achieved. Several different options exist for charitable giving, the most common of which are summarized below.

DIRECT GIFTS

Careful planning when making a direct gift is important because tax laws make certain types of giving more advantageous than others—for you and the College. The result may well be a greater gift than otherwise might have been possible, at a lower cost to you or your heirs. Direct gifts of cash, real property or valuable possessions may provide immediate savings of income taxes for you, as well as meaningful support for the College. Your gift may be designated for a specific purpose or for unrestricted use.

Gifts of Cash

Cash contributions are the most common and, for many, the most appropriate of all gifts. They are deductible on your income tax return for the year in which the contribution is made. You may deduct the amount of cash gifts up to specified levels. If you give more than the maximum allowed deductible in one year,

you may deduct the excess over the next five years.

Appreciated Property

Gifts of appreciated property, such as real estate or securities, may provide especially attractive tax benefits for the contributor. Many donors choose to make current gifts in the form of common stocks or other securities which have appreciated in value. In such cases, capital gains tax on long-term holdings may be eliminated and you may be able to claim the full market value of the securities as a tax deduction in the year of the gift.

Gifts-In-Kind

Valuable art or museum objects, books, historical documents, manuscripts, land, equipment and other gifts-in-kind can be accepted by the College. Some of these possessions may otherwise be subject to an estate tax on the death of the owner. You may claim a charitable income tax deduction when making a gift-in-kind.

PLANNED GIFTS

Planned giving opportunities offer distinct advantages for donors and their families, and can become part of an individual's tax and financial planning. Planned or deferred gifts can provide guaranteed or

flexible income for the donor or others, can provide tax free income, or can be used to reduce estate and gift taxes. These plans can be tailored to suit your individual circumstances. Some contributors who had not expected to have the resources to make a gift to the College have discovered that planned gift arrangements could provide increased financial security for themselves and their family. Examples of some common types of deferred gifts are summarized below.

Charitable Remainder Trusts

Unitrusts: Under a basic unitrust, the donor receives one or more yearly payments equaling a certain percentage of the value of the asset, as that value is determined at the beginning of each year. Under a net-income unitrust, the donor receives the net income, up to an agreed-upon ceiling, earned by the trust each year.

Annuity trusts: The donor receives a yearly fixed payment equaling at least 5 percent of the value of the asset at the time the deferred-giving agreement was signed.

Gift-Annuity Plans

Gift Annuity: The donor is guaranteed a fixed annual income throughout the lives of one or two individuals, often

the donor and his or her spouse, in exchange for a gift of cash, securities, real property, or other assets. **Deferred Gift Annuity:** A gift annuity in which the donor may opt to begin receiving payments at a future date.

Retained Life Estate

The donor donates his farm or home but retains the right to live there until his death. The donor can claim an income-tax deduction for the charitable gift at the time it is made.

Charitable Lead Trust

A charity receives the income from the donor's assets for an agreed-upon period, after which the asset is transferred to the donor's heirs. This arrangement can reduce gift and estate taxes and provide a charitable deduction for the donor.

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Report of Private Gifts to the College of Law

July 1, 1988 – June 30, 1989

The College of Law gratefully acknowledges the generosity and support of all who contributed to both the Law School's Annual Fund Drive and the Library Development Campaign during the 1988-1989 academic year.

Gifts to the Annual Fund, which are the backbone of the Law School's fundraising effort, are listed in the first section of this report.

Gifts to the Library Development Campaign, which began in the middle of the 1988-89 year, are listed in a separate section of this report. The list includes all gifts and pledges to this Campaign, up until March 15, 1990.

Annual Fund Gifts

	Unrestricted	Restricted	Gifts in Kind*	Total
Alumni	\$ 43,846.11	\$ 8,617.25	—	\$ 52,463.36
Law Society				
Individuals	10,209.79	36,305.00	—	46,514.79
Firms	3,800.00	39,000.00	—	42,800.00
Organizations	3,435.00	64,761.07	—	68,196.07
Subtotal	17,444.79	140,066.07	—	157,510.22
Total	\$ 61,290.90	\$148,683.32	—	\$209,947.22

*Gifts-In-Kind include all non-cash gifts (land, art, equipment, etc.)

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 Glenda Ulfers
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 Thomas A. Zlaket

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1970
No. Living: 73
No. Giving: 22
% Participation: 30

Anonymous
 Joe V. Andersen
 Warren R. Brown
 Timothy Burke
 John E. Burke
 Robert M. Cook
 Michael L. Gallagher
 Judge Sarah D. Grant
 Ralph D. Hobart
 Richard G. Johnson, Jr.
 William Jacob Johnson
 Albert Lagman
 George B. Mount
 Daniel F. Norton
 Thomas L. Palmer
 Gary R. Pope
 Paul J. Prato
 John A. Propstra
 Robert L. Schaefer, Colonel
 Rodney Bacchus Shields
 Joe Sims
 Robert J. Weber

1971
No. Living: 95
No. Giving: 20
% Participation: 21

John H. Anderson
 Mary A. Bass
 D. Wayne Brown
 William P. Crofts
 Larry F. Felix
 Richard A. Gibson
 Cheryl K. Hendrix
 Bruce A. Jensen
 Frederick A. Kaseburg
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 Cecil B. Patterson, Jr.
 Arther W. Pederson
 James M. Rutkowski
 Michael B. Scott
 Harold H. Swenson
 Kimball Udall
 Gerald A. Wolf
 John T. Zastrow

1972
No. Living: 92
No. Giving: 24
% Participation: 26

Samuel Alba
 Frederick M. Aspey
 Richard T. Aubuchon
 Harriet C. Babbitt
 Ralph J. Blake
 Andy Britton
 Gordon Campbell
 David Foster
 Ronald N. Hanley
 O. James Klein
 Robert Kuebler, Jr.
 James P. Loss
 Barry A. MacBan
 Anthony D. Mitten
 Michael R. Murphy
 Van O'Steen
 Gregory A. Robinson
 Christina Peterson Sargeant
 Robert J. Stephan, Jr.
 William L. Tift
 Kent E. Turley
 T. J. Tweeton
 John W. Wall
 Don Winder

1973
No. Living: 144
No. Giving: 34
% Participation: 24

Lois W. Abraham
 Lloyd D. Anderson
 William Douglas Back
 Redfield T. Baum
 John E. Burger
 Barbara Lee Caldwell
 David L. Case
 Tom Chauncey, II
 William S. Chick, P.C.
 Robert F. Crawford
 William K. Culbertson
 John F. Day
 LeRoy E. DeVaux
 Clifford J. Frey
 Paul S. Harter
 I. Jerome Hirsch
 John Wanderer
 Theodore C. Jarvi

Jack P. Ketterer
 Ronald F. Larson
 Chester R. Lockwood
 Frank L. Migray
 Stephen Mitnick
 Theodore D. Mote
 J. Stephen Mullen
 James Polese
 James C. Robinson
 Crystal A. Russell
 Robert E. Schmitt
 Patricia K. Stidham
 David Foster
 Ronald N. Hanley
 O. James Klein
 Robert Kuebler, Jr.
 James P. Loss
 Barry A. MacBan
 Anthony D. Mitten
 Michael R. Murphy
 Van O'Steen
 Gregory A. Robinson
 Christina Peterson Sargeant
 Robert J. Stephan, Jr.
 William L. Tift
 Kent E. Turley
 T. J. Tweeton
 John W. Wall
 Don Winder

1974
No. Living: 118
No. Giving: 35
% Participation: 30

Lawrence O. Anderson
 John C. Arnold
 Claudeen Bates Arthur
 Franzula "Dolly" Bacher
 Donald H. Bayles, Jr.
 James E. Brophy
 Daniel R. Drake
 Keith E. Galliher, Jr.
 Tim Gerking
 Leslie Hall
 James L. Heard
 Joseph Julius Hessinger
 Willie E. Jackson
 Lawrence William Katz
 Robert J. Lyman
 Kraig J. Marton
 Ruth V. McGregor
 Phyllis Garbe Merrill
 Barbara K. Miller
 Stan E. Munger
 Stephen W. Myers
 Ed Pastor
 Emmet Ronan
 Mike Rooney
 John F. Day
 LeRoy E. DeVaux
 Clifford J. Frey
 Paul S. Harter
 I. Jerome Hirsch
 John Wanderer
 Theodore C. Jarvi

1976
No. Living: 108
No. Giving: 26
% Participation: 24

Nancy C. Burnett
 Michael L. Cantor
 R. Keith Carson
 Jerry Cochran
 Linda K. Scott
 Peter N. Serino
 Gary L. Thomas
 Margaret R. Tinsley
 John P. Todd
 John Wanderer
 David A. Westerby

George L. Wood
 Chris Wotruba
 George S. Wright
 John P. Zanotti

1975
No. Living: 103
No. Giving: 25
% Participation: 24

Danny E. Adams
 Wayne C. Arnett
 William F. Atkin
 John R. Baker
 Shari M. Capra
 Douglas L. Christian
 Dave Crosby
 Norman J. Davis
 Maurice O. Ellsworth
 Curtis D. Ensign
 Stephen Gorey
 Henry G. Hester
 Mary McCord Jennings
 Gregory F. Mastin
 Dougal B. Reeves, Jr.
 Stephen C. Ryan
 Bonnie Levy Shuman
 Michael W. Sillyman
 Douglas L. Slotten
 Susan K. Smith
 Stephen K. Smith
 James A. Soto
 E. Sharon Storrs
 David M. Thomas
 William L. Topf, III
 Dr. Frederick H. Warren

Louise Parks Hytken
 Boyd T. Johnson
 Martha B. Kaplan
 Aaron Kizer
 Brent D. Klein
 Ralph Kostant
 Michael R. Law
 William M. Lawson, Jr.
 Frank E. Lesselyong
 Patricia A. O'Rorke
 Jon E. Pettibone
 Tod F. Schleier
 Judge Barry G. Silverman
 Richard C. Underwood
 Harvey Yee

1977
No. Living: 120
No. Giving: 32
% Participation: 26

Anonymous
 Marlene Appel
 Jeffry R. Baker
 Carol Benyi
 Judy C. Bishop
 Michael J. Brophy
 William R. Brown
 Jack A. Colaric
 Dan H. Cooper
 Louraine R. Crawford
 Raymond M. Deeny
 Val G. Dietrich
 Lindsay Best Ellis
 William H. Finnegan
 Jane Vandeventer Goldman
 Conrad Hohener, III
 Richard K. Mahrle
 Jeffrey D. Menicucci
 Thomas G. Morrison
 Susan H. Navran
 Stephen C. Newmark
 Patricia Norris
 Richard S. Plattner
 Jack N. Rudel
 Michael David Ryan
 M. David Shapiro
 Michael P. Stark
 Susan Garbe Todd
 Glenda Ulfers
 John C. Williams
 R. Jeff Woodburn
 John N. Wright

1978
No. Living: 108
No. Giving: 31
% Participation: 29

Anonymous
 Deborah Anderson
 Barbara McConnell Barrett
 Commissioner Jane Bayham-Lesselyong
 Bruce W. Bowers
 Steven A. Cohen
 Dianne I. Crosby
 Scott A. Crozier
 Antonio Dominguez
 Thomas Dunevant, III
 David A. Durfee

Robert B. Fabre
 Francis G. Fanning
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 Dennis E. Kovach
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 Douglas L. Rayes
 Steven K. Rendell
 Scott W. Ruby
 A. F. Schaffer
 Teri Thomson-Taylor
 Lynn K. Whyte
 Catherine E. Wilson
 Elliot Wolfe
 William D. Wright

1979
No. Living: 111
No. Giving: 45
% Participation: 41

Mark R. Allen
 Jon G. Anderson
 Mania Baghdadi
 Edward L. Barry
 Neal Beets
 Ken Behringer
 Florence L. Bain
 Rebecca White Berch
 C. Alan Bowman
 Roger A. Burrell
 Ellen M. Crowley
 Paul Cruikshank
 Isabel Gomez
 Karl D. Elledge
 JoAnn Gaffaney
 Marvin A. Glazer
 Dennis J. Goginsky
 Warren J. Granville
 Michael Herzog
 Baltazar Iniguez
 Barbara A. Jarvis
 James William Junker
 Ron Kilgard
 Lawrence E. Koslow
 Craig J. Langstraat
 Brian A. Maxwell
 Patrick E. McGillicuddy
 Edward P. McNeff
 Gregory P. Novak
 Teri O'Brien
 Leslie E. O'Hara
 W. Randolph Patton
 M. Douglas Petroff-Tobler
 Cathy Reece
 R. Chris Reece
 Nina J. Rivera
 Scott A. Rose
 Stanton A. Schafer
 John R. Tellier
 Barbara J. Topf
 Albert E. Van Wagner, Jr.
 Bill Vose
 Patrick Wallendorf
 David C. Whittemore
 Mark S. Williams

1980
No. Living: 129
No. Giving: 31
% Participation: 24

David C. Auther
 Jeri Kishiyama Auther
 Robert K. Banks
 Mark David Dioguardi
 Michael N. Emery
 Diane E. W. "Lion" Gunnels
 Theodore E. Hansen
 Patrick Irvine
 Brian E. Kelley
 Diane Skyler Lindstrom
 Thomas E. Lucas
 Ronald B. Merrill
 Barbara J. Muller
 Alicia Mykyta
 Kevin O'Malley
 Randy Nussbaum
 Jack D. Olson
 Timothy D. Peterson
 Anonymous
 A. Gregory Ramos
 Scott A. Salmon
 Vicki Mallrich Sandler
 Charles C. Schock
 Anonymous
 Mary C. Stevens
 Steven E. Tackes
 Jon A. Titus
 Reed C. Tolman
 Daniel F. Valenzuela
 Richard A. Weiss
 Edward L. Welsh
 Dale S. Zeitlin

1981
No. Living: 130
No. Giving: 26
% Participation: 20

Clare H. Abel
 Michael E. Braun
 Jamie A. Brody
 Martha McConnell Bush
 Anthony Cabot
 Emily M. Cassaday
 Anita R. Valanais Chinichian
 Bruce R. Cohen
 Richard N. Crenshaw
 Ann M. Dumenil
 John A. Fisher
 Douglas Gerlach
 Kim D. Gillespie
 Ann Woodley Harbottle
 Ralph D. Harris
 William R. Hobson
 Susan Van Slyck Jones
 Richard Kasper
 Victoria S. Lewis
 R. Todd Lundmark
 Stanton A. Schafer
 Michael P. Shiaras
 Yvonne J. Strouf
 C. Douglas Weber
 Gregory G. Wilmoth
 James B. Wright

1982
No. Living: 130
No. Giving: 30
% Participation: 23

Andrew Abraham
 James M. Ackerman
 Michael J. Ahearn
 Cal Baskerville
 Patricia J. Boland
 Diane E. W. "Lion" Gunnels
 John E. Coonley
 Richard Elliott
 Crystal Francis
 Robert M. Frank
 Susan Gallinger
 Steven Gervais
 Danna D. Hendrix
 Janet Smith Hepner
 Linda Hudson Miles
 Bob Kamman
 Mark E. Karolczyk
 Philip L. Latish
 Jonathan P. Meyer
 Judy M. Miller
 Loren E. Molever
 David Morgan
 Richard C. Onsager
 Phyllis H. Parise
 Michael R. Perry
 Mark Sanford
 Stephen R. Smith
 Gloria J. Sturman
 Ronald H. Snyder
 Wayne Turley

1983
No. Living: 131
No. Giving: 30
% Participation: 22

Shawn Keith Aiken
 Lenni B. Benson
 Brent Bradshaw
 Carmen A. Chenal
 Susan E. Davis
 Timothy B. Dickerson
 Mary Jane Gregory
 Francisco Xavier Gutierrez
 Andrew S. Hendricks
 Anonymous
 Cathey L. Joseph
 Joseph Alan Kendhammer
 Gail M. Ledward
 Julie M. Lemmon
 Hope P. McGowan
 Steven G. Mesaros
 Patricia E. Nolan
 Deena S. Norberg
 Christopher M. O'Donnell
 Roger Peterson
 Scott E. Richardson
 David J. Rivers
 Mary L. Miller
 Nancy L. Schuster
 David R. Schwartz
 Scott A. Swinson
 Randall S. Theisen
 Christopher G. Ware
 Neil Warheit
 Jessica Jeanne Youle

1984
No. Living: 129
No. Giving: 30
% Participation: 23

Barbara Cook Baskerville
 Michael L. Bengston
 Robert Boatman
 Barbara Borden-Mack
 Alan Bornstein
 James A. Burns
 Steven E. Carr
 Vincent A. Cass
 Lizbeth G. Ellis
 Jody K. Pokorski
 Jennifer Smith Flangas
 Richard Gurtler
 Pamela Doak Hayman
 Bethany Hicks
 Robert A. Hirschfeld
 Cheryl A. Ikegami
 Terrence A. Jackson
 Teri L. Kessel
 Thomas E. Klobas
 David L. Lansky
 Steve G. Lisa
 Pattie R. McDaniel-Boyer
 Patricia A. Nolan
 Gloria S. Perez
 Jody K. Pokorski
 Ricki J. Shine
 Pamela Tonn Johnson
 Larry Udall
 Theodore E. Williams

Craig K. Williams
 Lynn Thomas Ziolklo

1985
No. Living: 121
No. Giving: 25
% Participation: 21

Jane Miller Beach
 Russell C. Brown
 Cynthia Weigend Bunes
 Patricia Esser Cooper
 Andrew Lane de Mars
 Patricia Doyle-Kossick
 Ryan P. Dyches
 Susan C. Ellerhorst
 Diane M. Evans
 Douglas H. Fitch
 Glenn M. Gustafson
 James H. Hays
 Linda Herro
 Gerry T. Hickman
 Michele Iris Huff
 Jerome Michael Joseph
 Joseph William Kruckek
 Jill E. Langley
 Leslie K. McMullin
 Vicki A. Riccardo
 Helen M. Sandalls
 Gerald Shelley
 Ann Alexander Scott-Timmer
 Thomas M. Timmer
 Carol D. Vasfaret

1986
No. Living: 136
No. Giving: 20
% Participation: 14

M. Maureen Anders-Eighmey
 Susan A. Baker
 Steven R. Bauman
 William Boyle
 Vista Thompson Brown
 Julie Griffith Buckley
 Anonymous
 Jay Paul Fraude
 Diane Lynn Fuller
 Diane Albrecht Huckleberry
 Phyllis Hughes
 Karen L. Jones
 Barbara K. Mertz
 Nina Ortega
 Sarah E. Owens
 Lynda Marie Pederson
 Mark D. Samson
 Robert D. Teetsel
 Jane A. Tews
 Anonymous

1987
No. Living: 117
No. Giving: 19
% Participation: 16

Jennifer Barnes
 John R. Becker
 James J. Belanger

patricia A. Bushkin
 Russell Dickey
 K. Kirk Getsinger
 John C. Giles
 Deborah L. Gross
 Kenton D. Jones
 Kathleen Kositzky
 John C. Lemaster
 Susan R. S. Lowther
 Roberta F. Mann
 Robert D. Mitchell
 John Joseph Nissen
 Catherine O'Grady
 Marc Thomas Steadman
 Jean I. Updike
 Julianne C. Wheeler

1988
No. Living: 135
No. Giving: 12
% Participation: 8

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 Deborah Scott Engelby
 Margo Lynn Friedland
 Leslie Hatfield
 John Andrew Hink
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Faculty Highlights

During the spring and summer of 1989, Professor **Jane H. Aiken** chaired the Governor's Task Force on AIDS, and wrote a report to the Governor on pending AIDS legislation. She produced an interim report for statewide policy in the area of AIDS, and delivered the final report to the Governor in November. It included over 100 recommendations about AIDS in Arizona.

During the summer she held public hearings in Chinle, Navajo, Flagstaff, Parker, Yuma, Florence and Prescott. She spoke at several conferences and symposia, including a conference sponsored by the FDA and ASU on the use of human subjects in research, and gave an address to the Sorooptimist Club on international AIDS issues. Professor Aiken co-coached the ASU Negotiations Team, which won the regional competition and placed high in the national. She co-wrote a grant with Larry Weeks to the Department of Education for an HIV Legal Support Clinic that later received \$42,000 in funding, and was also co-principal investigator on a National Science Foundation grant studying court processing of AIDS-related cases. She continued to serve as a commissioner on the Arizona Disease Control Research Commission, which gave out close to a million dollars in medical research grants to Arizona researchers in the spring.

Professor Aiken's Committee memberships included the Dean Search Committee, the Indian Program Committee, the Executive Board, the Justice Studies Ph.D. Program, the Clinic Committee, the Board of the Faculty Women's Association, the University Governance Grievance Committee, and the Ad Hoc Committee on the Hispanic Law Journal.

Professor **Paul Bender** continues as Chair of the Governor's Task Force on Medical Malpractice Insurance. He serves as facilitator of a national panel of tribal leaders, museum directors, archaeologists and lawyers seeking to reach a consensus on the proper treatment and disposition of Native American skeletal remains, ceremonial objects and grave goods. The panel was organized by the Heard Museum in Phoenix in response to a request from the U.S. Senate Subcommittee on Indian Affairs. He is a member of the State Bar's Committee on Professionalism and

Coalition on Minorities and Women in Law. He also served on the Task Force on Productivity of the Commission on the Courts and is a member of the Advisory Committee for the South Mountain High School Law Magnet Program and the Arizona Center for Law in the Public Interest.

In October, Professor Bender delivered the Lansdowne Lecture at the University of Victoria Law School in Canada. His subject was the first seven years of development of the Canadian Charter of Rights and Freedoms under the Auspices of the Federal Judicial Center. Last semester, he lectured to the federal judges of the 6th, 8th, 9th and 10th Circuits on recent Supreme Court Rules of Rights decisions. In March he was the commencement speaker for the first class of the People's Law School in Phoenix.

Professor Bender continues service as a member of the Appellate Court of the Hopi Tribe. The Court has been sitting regularly once each month on the Hopi Reservation and has issued several significant opinions. He serves as legal analyst for Public Television Station KAET in Phoenix. KAET has begun televising oral arguments before the Arizona Supreme Court, with commentary and analysis by Bender and host Michael Grant (ASU Law School Class of 1976). Grant and Bender also do regular Horizon programs on U.S. Supreme Court decisions and trends and other legal developments.

During the spring semester of 1989, Professor **Michael A. Berch** was a visiting Professor of Law at Southern Methodist University. He co-authored, with his wife, Professor Rebecca White Berch, an article entitled "Insurer, Insurer-Retained Counsel, Insured: A Re-examination of Conflicts of Interest in the Tripartite Relationship," *55 J. of Air Law and Commerce* 689 (1989). Professor Berch gave a lecture on "Specialist Panels in the Courts of Appeals," at the Southern Methodist University School of Law, and on "Developments in RICO" at the University of Wyoming School of Law, Laramie, Wyoming.

In January, 1990, Professor Berch was appointed a Judge Pro Tem, Superior Court of Maricopa County. He was also awarded the ASU Alumni Association's prestigious Distinguished Teacher Award in March, 1990.

In the Spring, the *Journal of Air Law and Commerce* published an article entitled "Insurer, Insurer-Retained Counsel, Insured: A Re-examination of Conflicts of Interest in the Tripartite Relationship," which Professor **Rebecca White Berch** co-authored with her husband, Professor Michael Berch. Her book review entitled "Legal Writing and Oral Advocacy" was published in the *Newsletter of the AALS Section on Legal Writing, Reasoning and Research* (1989).

She was also named to the executive committee of the American Bar Association's Citizenship Education Committee. As one of her duties for that committee, she will serve as editor of the Citizenship Education Committee Newsletter. In addition, she was on the faculty of a Supreme Court-sponsored seminar for training new city court judges and justices of the peace. Professor Berch was a principal speaker at seminars on legal writing in late October, early November and again in mid-November. She still continues to write legal writing articles for the State Bar Magazine, *Arizona Attorney*.

In February, 1989, County Supervisor Carol Carpenter appointed Professor **Douglas Blaze** to serve as a public interest member on the Maricopa County Regional Travel Reduction Task Force, a task force charged with implementation of legislation designed to reduce air pollution through reduction in commuter traffic. Professor Blaze also worked with several members of the State Bar and state and federal judiciary to establish an American Inn of Court in Phoenix, an organization dedicated to fostering greater competence and professionalism with the Bar. He is also serving on the Board of the Arizona Capital Representation Project and as Chairman of the University Hearing Board, the appellate panel for all student disciplinary matters. In June, the Maricopa County Bar Association presented Professor Blaze with its 1989 Outstanding Faculty Award in recognition of sustained and outstanding academic performance and community service.

During the summer, Professor Blaze completed an article on procedural burdens imposed on plaintiffs in civil rights litigation. He has also begun work on a book, to be published by Michie Company, on Arizona negligence law.

Thank you for your support.

Professor **Richard Brown** continues to serve as Director of the Law Library. He is also the Book Review Editor for *Jurimetrics Journal*. Professor Brown was a member of the American Bar Association site evaluation team that inspected the Touro College Law School in Huntington, New York. In July, he stepped down as Associate Dean for Academic Affairs.

Professor **Charles Calleros** presented a guest lecture to the U.C. Davis School of Law faculty in April, 1989, critically evaluating the applicability of Anglo-American values and legal method in American Indian tribal courts. In November, 1989, he directed the second ASU opinion-writing workshop for tribal court judges. He also was a member of the AALS planning committee that organized the AALS Workshop for Minorities in Legal Education, held in Washington, D.C., September 8-9, 1989. He is currently serving on planning committees for public interest law workshops sponsored by the AALS and by the Society of American Law Teachers.

Professor Calleros has also assumed administrative duties: he directed the Council on Legal Education prelaw program at ASU in June and July 1989, and he assumed the post of Academic Associate Dean at the College of Law in January, 1990.

Professor **Ira Ellman's** new book, *Health Care Law and Ethics in a Nutshell*, co-authored with Professor Hall, was published in November, 1989. He is now working on the second edition of *Family Law: Cases, Text, Problems*. He has served as a referee for the *Hastings Center Report*, a leading periodical on bioethics, and continues his service on the Ethics Committee of the Good Samaritan Hospital, where he is currently chairing a subcommittee on Do Not Resuscitate orders. An essay, "Cruzan v. Harmon and the Dangerous Claim that Others Can Exercise An Incapacitated Patient's Right to Die," commenting on a pending case in the United States Supreme Court, appeared in December in *Jurimetrics Journal*; a shortened version was republished in the *Hastings Center Report*. Professor Ellman was also invited by the American Law Institute to participate this past January in a meeting of experts convened to advise the ALI on its new project on Principles of Family Law.

Professor Ellman has also been active this year on a committee of the Tempe Elementary School District that prepared

a proposal for creating magnet schools in Tempe. He also prepared an amendment to the Tempe zoning ordinance that he presented to the City Council on behalf of his neighborhood association.

Associate Professor **Joseph Feller**, who teaches Property, Environmental Law and Natural Resources Law, is studying the livestock management practices of the U.S. Forest Service and the Bureau of Land Management. As he investigates these practices, Professor Feller is also advocating reforms and encouraging increased public participation in these agencies' administration of the public lands. Professor Feller has met many times with federal officials, livestock operators, and citizens' groups in Arizona and Utah to discuss the management of particular grazing allotments, and he has submitted extensive written comments on management proposals, both national and local. He has also filed administrative appeals of decisions by the Bureau of Land Management in Arizona and in Utah. Professor Feller intends to write a law review article about his investigations, his proposals for law reform, and his experiences in working within the existing legal structure to achieve a better balance between livestock production and environmental protection.

Professor Feller was the coach of ASU's three teams in the first National Environmental Law Moot Court Competition held in 1989. One of ASU's teams won the national championship (see page 00), and two of the teams brought back best brief awards. Professor Feller coached another three teams from ASU in this year's competition.

Professor **Mark Hall** completed manuscripts of two books, *Health Care Law and Ethics in a Nutshell* (West) (with Professor Ira Ellman) and *Health Care Law, Forensic Science, and Public Policy* (4th ed., Little Brown) (with Wm. Curran and Professor David Kaye). He began work on two related articles that analyze the tax exempt status of nonprofit hospitals and the theory of the charitable tax exemption. He also published "Institutional Control of Physician Behavior: Legal Barriers to Health Care Cost Containment," in the *University of Pennsylvania Law Review*.

Professor Hall assumed editorship of the *Jurimetrics Journal of Law, Science and Technology* published by the College of Law in conjunction with the ABA. He received a gift from the Flinn



Foundation and the National Lawyer's Association to sponsor a public lecture series, and published symposium on "Interdisciplinary Perspectives on Health Care Financing Reform." He was also selected for the prestigious Robert Wood Johnson Faculty Fellowship in Health Care Finance, conducted at the Johns Hopkins University.

Professor **David Kader's** chapter essay entitled "Progress & Limitations in Basic Genocide Law" will appear in the upcoming book *Genocide: Further Critical Bibliographic Reviews*, edited by Professor I. W. Charny of Tel Aviv University and published by Mansell Publishing of London, England. He nears completion on his article "The Religion Clauses of the Arizona Constitution."

In the summer of 1989, Professor Kader was a Visiting Professor at Loyola Law School in Los Angeles. Professor Kader was recently appointed to the Task Force on Sectarian Social Services & Public Funding of the American Jewish Committee and to the Arizona Bar Foundation's Summer Institute Planning Committee for Law Related Education. He continues as a Board Member of the Phoenix Jewish Holocaust Survivors' Association and as a participant in the Jewish Studies Institute of the Bureau of Jewish Education. Professor Kader also serves as a member of the Dean's Advisory Committee and Chair of the Law School's LL.M Committee.

In March, Professor **Dennis Karjala** was an invited speaker at the plenary session of the 38th National Convention of the Japanese Information Processing Society, Tokyo, where his topic was "Intellectual Property Rights and the Protection of Software." While in Japan,



he also spoke on the subject of recent developments in software protection in the United States at several association meetings and major Japanese corporations. In April, Professor Karjala contributed two papers (on private company law in the United States and Japan, respectively) and was an invited panelist for the Symposium on Dualism in Corporation Law, held in Bregenz, Austria. In May, he was an invited presenter at the Symposium on Protection of Intellectual Property Rights in Science, Technology and Economic Performance: International Comparisons, sponsored by the National Science Foundation and the Brazil-U.S. Business Council of the U.S. Chamber of Commerce. During the spring semester, Professor Karjala also presented papers at two separate colloquia held at UCLA (on Japanese private company law and Japanese copyright law). His article "Fundamental Concepts in Japanese and American Copyright Law," co-authored with Tokyo Lawyer Keiji Sugiyama, appeared in January in Volume 36 of the *American Journal of Comparative Law*, and his article on United States securities law entitled "A Coherent Approach to Misleading Corporate Announcements, Fraud and Rule 10b-5," appeared in July in Volume 52 of the *Albany Law Review*. Two articles Professor Karjala wrote in Japanese "Intellectual Property Rights and the Protection of Software" and "Recent Developments in the Legal Protection of Software in America" were published in Tokyo during the spring semester.

Professor Karjala also served as steering committee chair and as conferee for the Computer Software Copyright Conference sponsored by the Arizona State University College of

Law's Center for the Study of Law, Science and Technology, which was held in Tempe in February, 1989. The final consensus report of the conference, of which Professor Karjala was the chief drafter, was published by the Center in June. Since June, Professor Karjala has been acting as Director of the Center.

In November 1989 Professor Karjala was an invited panelist at the Japan Software Information Center's Second International Symposium on Legal Protection of Computer Software, which was held in Tokyo. He also served as moderator of the session on Communication Protocols. While in Tokyo, he was interviewed by *Nikkei Electronics*, a major Japanese electronics magazine, on various issues concerning the copyright protection for computer programs. That interview (in Japanese) appeared in the December 25, 1989, issue.

Professor Karjala's book, co-authored with Keiji Sugiyama, entitled *Japan U.S. Computer Copyright Law* (in Japanese, 365 pages) was published by Nihon Hyoronsha in the fall of 1989.



David H. Kaye served as the Mason Ladd Distinguished Visiting Professor at the University of Iowa in 1989. On sabbatical leave for the current academic year, he has been awarded a Visiting Research Fellowship at the University of Chicago and is preparing a series of books and articles on expert witnesses, statistical proof and forensic science.

Professor Kaye continues to serve on the Law and Justice Statistics Committee of the American Statistical Association, the Test Audit Subcommittee of the Law School Admissions Council, and the Executive Committee of the Law and

Computers Section of the Association of American Law Schools. He also testified as an expert witness in a Title VII employment discrimination case involving the University of Texas at Austin.

In March, Professor Kaye was selected as an Arizona State University Regents' Professor, an honor reflecting his distinction among his colleagues, both at ASU and across the nation.

Professor **John D. Leshy** spent much of his non-teaching time in the spring and summer working on federal onshore oil and gas leasing issues, in his role as a member of a Special Committee of the National Academy of Sciences and National Research Council created by Congress. The Committee's report, which made a number of recommendations for improving environmental and planning reviews in the oil and gas leasing and development process, was released in September, and was the subject of oversight hearings in Congress. He also completed a report to the Ford Foundation for the Grand Canyon Trust on strategies for reconciling development and preservation on the Colorado Plateau, addressed the annual meeting of the Greater Yellowstone Coalition on mining issues, testified before a subcommittee of the U.S. Senate on reforming the Mining Law of 1872, and wrote an amicus brief for several Western states filed in litigation brought by the State of California against the federal government involving unsatisfied federal statehood land grants.

Professor **Gary Lowenthal** recently won the prestigious Burlington Northern Foundation Faculty Achievement Award for outstanding teaching at Arizona State University. The award included a \$2,500 cash prize. Professor Lowenthal was selected for the award on the basis of unusual efforts devoted to the quality of the student's classroom experience; possession of high scholarly standards for course content and student performance; direct impact on and involvement with students; and information and nominations submitted by students.

Professor Lowenthal also worked on a book during the fall on the lawyer-client relationship in criminal cases.

Professor **Alan Matheson** assumed the duties of Interim Dean July 1st and served until the end of the calendar year.

His new professional assignments include membership on the ABA Skills Training Committee and the State Bar of Arizona Lawyering Skills Committee. In

addition, he continued to serve as a member of the Board of Directors of DNA, Navajo Legal Services; of the Tempe Sports Authority; and of the Minority Affairs Committee of the Law School Admissions Council. At the University, he was a member of the Faculty Senate, of the Board for Faculty Development, of the President's Consultative Committee and of the Curriculum and Academic Programs Committee. Professor Matheson is also chairing the search committee for the new ASU Provost.

He spoke to the Hearing Officers of the Department of Economic Security on "Recent Developments in Administrative Law."

Professor **Jeffrie Murphy** presented an invited paper, "Getting Even: The Role of the Crime Victim" at the Conference on Crime, Culpability, and Remedy sponsored by the Center for Social Philosophy and Policy. He published an essay, "Forgiveness and Mercy" in *Criminal Justice Ethics*, Vol. 7, No. 2.

In the spring, Professor **Willard H. Pedrick** gave a lecture in Betsy Grey's Tort Class on "Proximate Cause—The Curse of the Thinking Class." He received the William L. Prosser Award from AALS, Torts Section, in January 1989. In August, he met with the Multi-State Bar Exam Torts Commission in Seattle.

Professor Pedrick talked about "The True Rule" as the graduation speaker in May of 1989. He co-authored with Walter J. Blum "The Last Roundup of the AIL: Get Along, you Nonreformers," in the January, 1989 issue of *Taxes-the Tax Magazine*.

Associate Dean **Jonathan Rose** has been involved in fundraising for the new library. He is a member of the Governor's Regulatory Review Council; member, BNA Antitrust and Trade Regulatory Report Advisory Board; member, Administrative Conference of United States; member, Academic Advisory Council, Barry Goldwater Institute for Public Policy Research; member, Consultative Committee, Restatement of Law Governing Lawyers, American Law Institute; member, Dean Search Committee. He was an expert witness for FDIC and FSLIC in the American Continental litigation.

Professor **Ann Stanton** had *Alimony, Child Support and Counsel Fees—Award Modification and Enforcement*, a three volume set, written with co-author Newman, et al., published by Matthew Bender in December 1988. She served as the President of the ASU Faculty Women's Association for 1988-89, and will continue on the FWA Board for 1989-90.

Professor Stanton was appointed to the State Board of Behavioral Health Examiners and is doing a study of divorce in Maricopa County with the American Bar Association Committee on the Delivery of Legal Services.

In April of 1989, Professor **Robert E. Suggs** moderated a debate at the College of Law on the Supreme Court decision in *City of Richmond v. J.A. Croson Co.* Later that month he traveled to Washington, D.C. to present a paper on minority business development strategies in the aftermath of the *City of Richmond v. J.A. Croson Co.* decision. In January, immediately after the *Croson* decision, he participated in a one-hour call-in program on the Phoenix all-talk radio station KFYI 910 AM.

In July, Professor Suggs attended a conference at the University of Wisconsin on Critical Race Theory where his article "Rethinking Minority Business Development Strategies" was presented. It will appear in the *Harvard Civil Rights-Civil Liberties Law Review*. In August he participated in a panel discussion at the University of California at Irvine, sponsored by the California Republican League, on the implications of privatization for minorities. His book, *Minorities and Privatization: Economic Mobility at Risk*, was published by the Joint Center for Political Studies Press at the end of 1989.

In January he traveled to Richmond, Virginia to make a presentation on urban redevelopment opportunities to the Metropolitan Business League. He is presently working on articles analyzing the peculiar legal status of racial discrimination in business transactions and on an antitrust analysis of racial steering in housing markets.

He has also been elected to the Board of Directors of the Arizona Center for Law in the Public Interest.

Professor **Bonnie Tucker** taught Trusts and Estates at the University of San Diego School of Law during the summer of 1989. She was elected to the Board of Directors of the Alexander Graham Bell Association of the Deaf, and was appointed to a special committee of the American Association of Law Schools which held its first meeting in Washington, D.C. in September to discuss problems relating to disabled law students and faculty. Professor Tucker was elected to the Board of Directors of Clarke School for the Deaf in Northampton, Massachusetts; gave speeches to over two hundred parents and educators in Cleveland, Ohio, and Yuma, Arizona, relating to the legal rights of hearing impaired people; served as an expert witness at due process hearings relating to the education of disabled children; was a finalist for a White House Fellowship; was profiled on both Channel 3 and Channel 10 News; and was awarded a Channel 10 Visionary Award.

In January, Professor **Laurence H. Winer** presented an invited paper, "The New Media Technologies and the Old Public Interest Standard," to the Section of Mass Communications Law at the annual meeting of the Association of American Law Schools. A version of this paper appears at *29 Jurimetrics Journal 377 (1989)* and was excerpted in *7 Cable T.V. and the New Media 8 (Oct. 1989)*. In February, along with Dan L. Burk (J.D., May 1990), he published "Failure to Prepare: Who's Liable in a Data Processing Disaster" in *5 Santa Clara Comp. & High Tech. L.J. 19*. Professor Winer will present an invited paper at a conference at Cardozo Law School on the regulation of the cable television industry.

As Editor of *Jurimetrics Journal* he represented the College at the meeting of the Section of Science and Technology at the ABA mid-year meeting in Denver last February. He continues to serve on the Rules of Professional Conduct Committee of the State Bar of Arizona, and on the Steering Committee of the Maricopa County Bar Association's Annual Law/Media Seminar. ■

ASU Law School National Moot Court Team Wins Regional Competition

The Arizona State University College of Law National Moot Court Team won the regional Moot Court competition in Salt Lake City in mid-November, defeating the University of Arizona and six other schools and advancing to the national competition in New York in January.

The ASU team of **Terry L. Corbett**, **Rachelle L. DesVaux** and **Catherine C. Weinberger** beat Brigham Young University in the competition finals. The ASU team also was judged to have written the best brief in the competition.

The question before the court was whether a target company in a corporate raid can claim a violation of anti-trust laws and what kind of information must be disclosed by various parties in a tender offer.

Another ASU team, comprised of **Michael Burke**, **Deanna Salazar** and **Deborah Owen**, reached the semi-finals and won the award for best oral arguments in the semi-final round. Both the winning and runner-up teams go to New York for the finals, where they will compete against 30 other teams of law students from all over the United States.

"I think they were splendid, but then I thought they were splendid before they went," said ASU Law Professor **Michael Berch**, who coached the ASU teams. Berch also praised the Maricopa County Bar Association, which has provided "generous support" for ASU's Moot Court teams.

The final round was argued in the courtroom of the Utah Supreme Court before two justices from the Texas Su-



National Moot Court Team Members (l-r): Terry L. Corbett, Rachelle L. DesVaux, Catherine C. Weinberger and Professor Michael Berch, coach.

preme Court and a judge from the 10th Circuit Court of Appeals.

Other schools represented in the competition were the Universities of Utah, New

Mexico, Wyoming, Colorado, and Denver.

In head-on competition, each of ASU's teams defeated their U. of A. counterparts. ■

Environmental Moot Court Team Wins First National Competition

The Arizona State University College of Law Environmental Moot Court Team won the first National Environmental Moot Court Competition in the spring of 1989 in White Plains, New York. The competition was held at Pace University and was sponsored by Pace and the Environmental Law Institute.

In addition to taking the overall title, the winning team of **David Goldberg**, **John Mayo**, and **Michael Running**, all third-year law students, also won the award for best brief in the competition.

Under the coaching of Professor of Law **Joseph Feller**, the winning team argued an extremely complex jurisdictional problem concerning application of the Clean Water Act in competition with 24 other teams from law schools throughout the United States.

"It was a dispute between the state government, an industrial polluter and a citizen's environmental organization," Feller said. "In each round, the team had to represent a different side of the argument."

Two other ASU teams also competed. **Michael Burke**, **Myron Scott** and **Laurie Stewart** made the quarterfinal round and won the award for best intervenor's brief. **Vernon Harris**, **Peter Schelstraete** and **Brenda Taylor** won the first preliminary round of oral argument on a unanimous vote by the judges.

Feller said he judged nine practice rounds, where the ASU teams engaged in arguments in front of ASU law professors and attorneys from the Phoenix area. Mayo said the questions asked during the practice rounds were very helpful in preparing the teams



Professor Joseph Feller (far right) offers a congratulatory toast to his winning team: (l-r) Michael Running, John Mayo, and David Goldberg.

for the intensity of the competition. "Also helpful," he said, "was a large gift from the Law Alumni Association which significantly underwrote the teams' travel expenses to New York."

In recognition of the team's win, the College now displays a specially commissioned watercolor painting of a landscape, which it will hold for at least one year. ■

Annual Dinner Pays Witty Tribute to Departing Dean

The Annual Law Society Dinner held in the spring of 1989 had the Honorable **Barry G. Silverman** from the Class of 1976 as its guest Master of Ceremonies. To the surprise of many and the amusement of everyone, Barry delighted the audience with his comedic talents as he introduced the evening's guests, all of whom were there to pay tribute to the departing dean, **Paul Bender**.

Barry, a Judge of the Superior Court of Arizona, Maricopa County, turned the tribute dinner into a series of stand-up comedy routines, with his humorous introductions, irreverent comments, and witty descriptions.

For those who missed the dinner, Barry's comments are printed below. For those who did attend, I recommend you take this opportunity to enjoy them again.



The Honorable **Barry G. Silverman** ('76) served as Master of Ceremonies at the Twenty-Second Annual Law Society Dinner.

Barry Silverman

Ladies and Gentlemen, good evening. Welcome to the 22nd Annual Dinner of the College of Law Alumni Association and the Law Society of ASU. And Louie, thank you for those semi-nice remarks.

Yes, as unbelievable as it sounds, I really am co-teaching a Criminal Procedure class with Professor Lowenthal this semester. They say the A stu-

dents become professors, the B students judges, the C students lawyers, and look at me: The D students do it all! When I graduated in '76 I didn't get a J.D. degree like everyone else. I got the J.E.D. — that's the Juris Equivalency Degree. That's the one where you get credit for life experience.

I saw in the paper that ASU hired a new basketball coach, Bill Frieder, and offered him a \$10,000 a year bonus if the team excels academically. Pedrick told me they made him the same sort of deal, and that in my first semester of law school, I personally cost him five grand.

In my first semester of law school, I got four F's and a D, and Pedrick called me in and said, "Son, you've got to quit spending all your time on one subject."

Before we go on, I see a lady

who looks familiar. I saw her face on a watch over here a second ago. We're very honored tonight to be joined by **Governor Rose Mofford**. Governor Mofford, won't you stand up. We're very honored to have you with us tonight, Governor.

Tonight we're going to be paying tribute to a man we all have come to know, but we're going to honor him anyway.



This dinner was held in tribute to departing Dean **Paul Bender**.

How many of you knew that this was going to be Dean Bender's last year at the law school; let me see a show of hands? There are a few.

It's hard to believe that after only five years, Paul Bender is calling it quits. I always heard the only time Paul ever throws in the towel is when he's checking out of a hotel.

In any event, we're going to have a little more fun at Paul's

Association and a graduate of the Class of 1971. I've known him for a long time. He's a good friend, a good lawyer, and many of you know that he represented former Governor Evan Mecham in the criminal trial. Mike, you did a great job on that case. I just wish you would have done what Tom Thinnes did and slapped him around a little bit. Mike Scott, stand up and take a bow.



Law Society President **I. Harrison Levy** ('71)

expense a bit later, but now we've got to take care of some business.

Mike Scott is the President of the College of Law Alumni

I. Harrison Levy is the President of the Law Society of Arizona State University. I had never met Mr. Levy before tonight, but during the cocktail

hour he came over and introduced himself. He stuck out his hand and said, "I. Harrison Levy." I said, "I, Barry Silverman." Anyway, he seems like a

— Ernest Gellhorn. Each of these people has made a terrific contribution in his own way and I take nothing from them. But, Paul, I tell you in all sincer-



Prof. **Ralph Spritzer**

nice guy and he's got some business to conduct.

Won't you welcome, please, Mr. I. Harrison Levy.

It's now time for the Dean's report. (Yawn . . .) For those of you who have small children at home and would like to check with the sitter, this would be a good time.

I kid Dean Bender, but we've been blessed with some terrific

ity, of all the deans we've had, you're the most recent. The Dean of the Law School, Paul Bender.

When I found out that I was to make some remarks about Paul in tribute to him, I called his office and asked for a copy of his resume, and this is what they sent me: This 14-page tome. Suffice it to say it is complete in the extreme, and



Frank X. Gordon, Jr., Chief Justice, Arizona Supreme Court

deans at this law school: Dean Pedrick, Dean Alan Matheson. And who's the other guy who was here for a couple of weeks?

it's not even the length that impressed me so much as the little card he had on the back that you can mail in for

periodic updates. It's the only resume I'd ever seen that comes with pocket parts.

To kick off the tribute portion of the program, I thought I'd hit some of the highlights of his resume. It says he was born in Brooklyn, New York in 1933. For those of you who went to the U of A, that makes him 56. Married to Margie. Has two college-age sons. Graduated from Harvard in 1954, magna cum laude from Harvard Law School in 1957, third in a class of 505. Was an editor of the *Harvard Law Review*.



The Honorable **James McDougall**, 1989 President of the Maricopa County Bar Association

And there's something on the bottom here that says, "From 1957 to 1958 he was a Frederick Sheldon Traveling Fellow." What in the hell is a Frederick Sheldon Traveling Fellow? It sounds like a carnival.

From '58 to '59 he was a law clerk for Judge Learned Hand. In '59 he gave Hand the finger, and began a clerkship with Justice Felix Frankfurter on the Supreme Court of the United States. In 1960, Paul began a teaching career at the University of Pennsylvania Law School where he taught for 24 years until coming out to ASU in 1984.

In this resume he lists several hundred articles, but I wanted to mention just a couple of them which struck me as interesting. Here on page 5, he's got one entitled, "The Legal Considerations Relating to Erotica." Then right under

that he's got one called, "Conversation with Learned Hand." I thought the juxtaposition of those was rather interesting.

He's listed all his associations and memberships and you-name-it; he's got it in here. He was on the Board of Directors of the Greater Philadelphia Chapter of the American Civil Liberties Union and he was counsel to the ACLU in what looks like about a half dozen important civil liberties cases. I guess it's fair to say that Paul is on the liberal side of the civil liberties spectrum. In fact, he's

the only guy I know who thinks the Supreme Court in *Miranda* didn't go far enough. He thinks cops ought to tell suspects they have the right to remain violent. He really lives and breathes the civil liberties thing. Even down to his dog. In fact, to Paul he's not a dog. He's a "Canine-American."

Just to show you how complete this resume is, and I'm not making this up, listen to how he lists this entry on page 11: He was "Chair-elect, Chair, and past-Chair of the University of Pennsylvania Faculty Senate." I mean, he's got the whole life cycle of this thing. Before he did it; after he did it, and that he did it. It's all on here.

It says in 1988 he was appointed a Judge of the Appellate Court of the Hopi Tribe. And it's really interesting how this appointment came about. The tribal chairman called him

up and asked him if he would sit on the Hopi Appellate Court. Of course, Paul was flattered and he said, "But you know, I'm not an Indian. My tribe's from Brooklyn. I'm not Hopi." The chairman said, "Don't worry . . . be Hopi." (Groans) Okay, one more outburst and I'll have the room cleared.

A resume only tells part of the story. Someone who has known Paul for most of his adult life is **Professor Ralph Spritzer**, who has been teaching here for the past three years, eighteen years before that he was a Deputy Solicitor General of the United States.

Won't you welcome, please, Professor Ralph Spritzer.

I always get a little nervous when I have to introduce the Chief Justice. Before dinner, I was over at the bar getting a

Thank you, Chief. All of the technical details for tonight's dinner were very ably planned by the law school's development officer, **Kathy Neitzel**. Stand up and take a bow, Kathy. [applause]

Kathy told me that tonight, from the State Bar, we would have Z. And I said, "Z what?" I thought she was talking like zee French. She goes, "No, Z. It's Tom Zlaket. Everybody calls him Z. That's his nickname."

Is that true? May I call you Z? You can call me S. Where's I. Harrison Levy? I, do you know Z? I thought the three of us could go out later and get a few vowels. Anyway, Mr. Zlaket is a lawyer practicing personal injury law in Tucson. He is the President of the State Bar and we're happy to have him tonight.

Mr. Tom "Z" Zlaket.



John Lewis, Executive Director of the Inter-Tribal Council of Arizona

drink and I told the bartender I wanted a scotch and soda. Then the Chief came over and vacated my order.

When you're a trial judge you kind of get used to these indignities. A couple of weeks ago, the Chief and I and a few other people were at a meeting at the Crescent Hotel. When the meeting was over, the Chief tossed me his keys and had me bring his car around. I knew it was his car — he had one of those yellow signs in the rear window that says "Chief Justice on Board."

Ladies and Gentlemen, the Chief Justice of the Arizona Supreme Court, **Frank X. Gordon, Jr.**

Judge Jim McDougall is the President of the Maricopa County Bar Association. He's a Superior Court Judge in Maricopa County whose chambers are right next door to mine at the Juvenile Court Center, and on July 1, he will take over as Presiding Judge of the Juvenile Department. It's my pleasure to introduce my colleague and friend, Judge Jim McDougall.

When the invitation to this tribute to Dean Bender was mailed out, the letters just poured in. Actually, we got three of them, to be honest about it. I brought them with me today and I'd like to read them to you.



Dan Durrenberger, Station Manager, Channel 8, KAET-TV

The first one is addressed: "Dear Dinner Chairman: Congressman Jim Kolbe regrets that he will be unable to attend the Friday, March 31, dinner for Dean Paul Bender due to prior commitments in the district. Sincerely, Delores Johnston." What a warm letter! I'm sure you'll want to frame this one, Paul.

Here's another one. This is a real letter from Governor Mofford's office: "Dear Gentlemen: Governor Mofford is pleased to have received your invitation and the opportunity to be present at your event. This acknowledgement is not an acceptance of your invitation, but simply to let you know quickly that your request has reached our office. Sincerely, Mary Ann Kirkland, Special Assistant." Boy, the

enthusiasm is just infectious, isn't it?

Here's another one: This one's addressed to Dean Paul Bender, College of Law, etc. "Dear Paul: Congratulations on the fine job you've done at Arizona State. Sorry I cannot attend your tribute dinner, but give me a call when you get a chance and we'll have a few drinks. Your friend, John Tower." It says, "P.S., Remember me to the Mrs."

We've heard a lot tonight about Dean Bender's interest in Indian art; in Indian law; and in the Indian community generally, and we're very honored tonight to have with us **John Lewis**, the Executive Director of the Inter-Tribal Council of Arizona.

Mr. Lewis.

If you watch *Horizon*, and

Michael Grant ('76)



who doesn't, you know that Dean Bender has been a regular on that show hosted by **Mike Grant**, a law school classmate and friend who is as nice a guy as he is talented.

Dan Durrenberger started at Channel 8 as a volunteer 17 years ago and worked his way up from production designer, to producer, to executive producer. Now he's station manager for Channel 8.

Ladies and gentlemen, won't you welcome Dan Durrenberger.

Joe Rogers is presently one of the outstanding members of the present third year class. Last year he was a member of the two-person team that won that National Negotiations Competition sponsored by the American Bar Association. Last year, as a second year student, he was President of the Black Law Students Association — much as I was when I was in my second year.

Ladies and gentlemen, won't you welcome Joe Rogers.

Thank you Joe.

I have known **Willard H.**

Pedrick for over 16 years and I can tell you, in all honesty, this is the first time I have seen him in 16 years that he isn't wearing one of those polyester bow ties.

I kid Ped, but he is a nationally renowned authority on the law of torts. His casebook is used in law schools throughout the country.

He is just as eminent an authority in the law of gift and estate tax and estate planning. In fact, he was recently retained by the lawyers for the Estate of Elvis Presley in Memphis to render a tax opinion on several issues in the Presley estate. In fact, Ped was talking to Elvis just yesterday. To digress for a moment, you've got to wonder about a society that thinks Mechem is dead and Elvis is alive, don't you?

Seriously, though, putting the jokes aside for a second, as far as I am concerned the best fringe benefit of going to law school here at ASU was having Ped as a teacher. Indeed, he is the one who inspired me to want to try my own hand at teaching law.

Joseph Rogers ('89)



Professor Emeritus and Founding Dean Willard H. Pedrick

Ladies and gentlemen, the founding dean of the Law School, Willard H. Pedrick.

We've heard from a representative of the student body, the bench, the bar. And I have been asked to say a real quick word on behalf of the alumni.

Dean Bender, your accomplishments here in the past five years have been many and we've heard a lot about them tonight: the new addition to the law building, the art in the rotunda, the Indian program, the Library Development Program, the Arizona Capital Representation Program, the Inns of Court — it goes on and on.

Suffice it to say that this was a good law school when you got here in 1984, and that it is a better law school in 1989 for your having been here. You have brought honor and prestige to the school, and for that the alumni thank you.

And as a token of our appreciation we have three gifts. Won't you come forward please. This large box contains

a Maricopa pot. Exactly what that is I don't know, but Phil Marquardt had nothing to do with it. This second package contains a book on Indian art. And thirdly, because of your long-standing interest in erotica, we have for you in this package a videotape entitled, "Nurses Without Shame." It's due back tomorrow at six. No, it's a tape on Indian art, and we hope you enjoy it and use it well. Good luck.

I was asked to make it clear that the gifts, Dean Bender, are from the faculty and staff as well as the alumni, and any implication to the contrary is expressly disclaimed.

I understand also that the police department may have accidentally ticketed the wrong cars. If any of you have gotten a parking ticket, mail it in, and the Hopi Appellate Court will take care of it.

You've been a terrific audience. Thank you very much. See you next year. Good night.

ASU Hosts C.L.E.O. Scholarship Program

Thirty-five entering law students studied contract law, criminal procedure, and legal method and writing at the Region II C.L.E.O. Institute hosted by Arizona State University College of Law from June 10, 1989 to July 21, 1989. The Institute was sponsored by the Council on Legal Education Opportunity, by a special grant from Arizona State University Central Administration, and by the following law schools from the Southwest and Rocky Mountain Regions: Arizona State University, the University of Arizona, Brigham Young University, the University of Colorado, the University of New Mexico, the University of Utah, and the University of Wyoming.

The Program

C.L.E.O. will provide a three-year scholarship totaling more than \$6,000 to each student who successfully completed the rigorous course of study and who eventually gains admission to an accredited law school. At the beginning of the Institute, 24 of the law students were accepted to the Fall 1989 entering classes of law schools throughout the nation, and several others were placed at law schools during and shortly after the Institute.

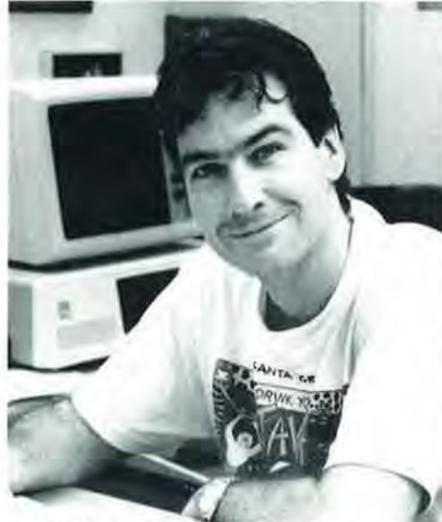
The Institute was staffed by faculty and administrators drawn from institutions throughout the area served by Region II. A.S.U. law professor **Charles Calleros** directed the program with the assistance of

student administrative assistant **Monique Branscomb**, A.S.U. Business Manager **Rhonda Kirkeide**, A.S.U. Admissions Director **Fausto Ramos**, and part-time student assistant, **Steven Escovedo**.

The five faculty members and eight student teaching assistants were drawn from schools and the legal communities throughout Region II. **Sid Moller**, formerly a law professor at the University of Wyoming and now with Mississippi College, taught contract law. He was assisted by student teaching assistants **Jerald Barbar** from the University of Colorado and **David Young** from the University of Wyoming. **Cecilia Espinoza**, a city prosecutor from Salt Lake City, Utah, taught criminal proce-

dures with help from student teaching assistants **Tineke Van Dijk** from the University of Utah and Benjamin Carl Duncan from the University of Arizona.

Three small sections of legal method and writing were taught by **Jose Bracamonte**, formerly a law professor at the University of Houston and U.C.L.A. and now a Phoenix attorney; by **Kevin Worthen**, a law professor at B.Y.U.; and by **Andrew Silverman**, a law professor at the University of Arizona and the director of an earlier C.L.E.O. Institute. They were assisted by teaching assistants **Carl Hernandez** from B.Y.U., **Chris Bulman** from the University of New Mexico, and **Pedro Castillo** from the University of Arizona.



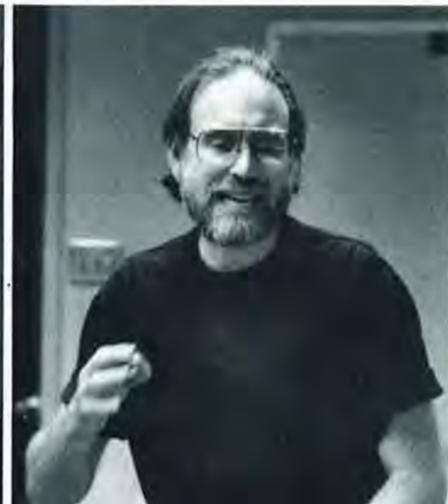
Arizona State University Law Professor Charles Calleros, C.L.E.O. Director



C.L.E.O. faculty members (l-r): Sid Moller and Cecilia Espinoza



C.L.E.O. faculty members (l-r): Jose Bracamonte, Kevin Worthen and Andrew Silverman



Student Profiles

The C.L.E.O. students represented a variety of cultural and ethnic groups, including Hispanic, African-American, American Indian, Asian-American, and Anglo-American. Profiles of a few of the successful C.L.E.O. students will serve to represent the ways in which all of them will enrich the law school classroom and the legal community.

Vihn Ly is a South Vietnamese refugee who escaped by boat to Malaysia in 1978 and later settled in Ogden, Utah. Despite the difficulty of learning English as a second language, he successfully completed his undergraduate studies at Bonneville High School and B.Y.U. His ultimate goals after graduating from law

school are to "represent America in international organizations and help re-establish peace in Indochina."

A former journalist and student of Native American Art, **Diane Enos**, is a member of the Salt River Pima-Maricopa Indian Community in Arizona. As a child growing up on the reservation, Ms. Enos was impressed by "the strength of the land and the relationship of the people to the land." After graduating from Arizona State University College of Law, Ms. Enos plans to return to the reservation to help her community strengthen its commitment to tribal lands and ways of life.

Second to the youngest of seven children, **Clarence**

Lopez grew up in "a very traditional Mexican-American family." Before attending C.L.E.O., Mr. Lopez worked for a bilingual periodical in Denver, Colorado, began a career in real estate, and acted as vice-chair of the Greeley, Colorado Housing Authority and as a member of the Greeley Community Housing Resources Board, the League of United Latin American Citizens, and the leadership training segment of a program designed to keep young adults from dropping out of school. He hopes that his law school education will help him to continue to serve the Hispanic community as mentor, role model, and active community participant.

Phoenix Community Support
The C.L.E.O. students were not totally confined to their classroom. Thanks to generous support from the Phoenix community, the students were introduced to the Arizona Bar and to local culture. The Institute owes a great debt of gratitude to local attorney **Danny Ortega**, a graduate of C.L.E.O. and Arizona State University College of Law. Mr. Ortega donated his time as guest lecturer and graduation speaker, and he generously sponsored a graduation dinner for students, faculty and family members, which featured a demonstration of Native American dances by the Wisdom Indian Dancers.



Vihn Ly



Clarence Lopez



Diane Enos

As part of the graduation ceremony, C.L.E.O. students were treated to dinner . . . and dancing.





Danny Ortega ('77) addresses the C.L.E.O. students at graduation.



Barbara Rodriguez ('81), President of Los Abogados, and Danny Carrasco ('81) at the opening reception for C.L.E.O. students.



With live Brazilian dance music providing the background, students enjoy one of several extra-curricular functions held during the Institute.



The list of other contributors to the program is impressive. In conjunction with Arizona State University College of Law, **Los Abogados** sponsored an opening reception for the Institute, complete with catered buffet and mariachi band. Superior Court Judge **Cecil Patterson** appeared in the classroom as guest lecturer. Arizona State University and the Phoenix law firm of **Lewis and Roca** co-sponsored a party at the Director's home, featuring catered Italian cuisine and live Brazilian dance music. The law firm of **Roush, McCracken and Guerrero** sponsored a field trip to the courtroom of Arizona Superior Court Judge **Gloria Ybarra**, who joined attorney Pete Guerrero in describing litigation practice in Phoenix. Immediately after the visit to Superior Court, the students enjoyed a Mexican buffet and office tour hosted by the Phoenix law firm of **Gutierrez, Contreras and Salaiz**. The law firm of **O'Connor, Cavanagh, Anderson, Westover, Killingsworth and Beshears** treated the students and national C.L.E.O. Associate Director to an office tour and a buffet reception with members of the firm and its summer associates. Finally, **Lonnie Williams**, a partner with the law firm of **Snell and Wilmer**, co-sponsored a party at his house with the **Young Lawyers Association**.

In addition to those named above, Phoenix attorneys **Chris Arden, Rosemarie Christofolo, Barbara Rodriguez** and **Kathy Stillwell** deserve acknowledgement for their efforts in organizing and obtaining sponsorship for C.L.E.O. receptions. The C.L.E.O. Institute thanks all the individuals, organizations, and law firms that helped to make the program a success. ■

Alumni News

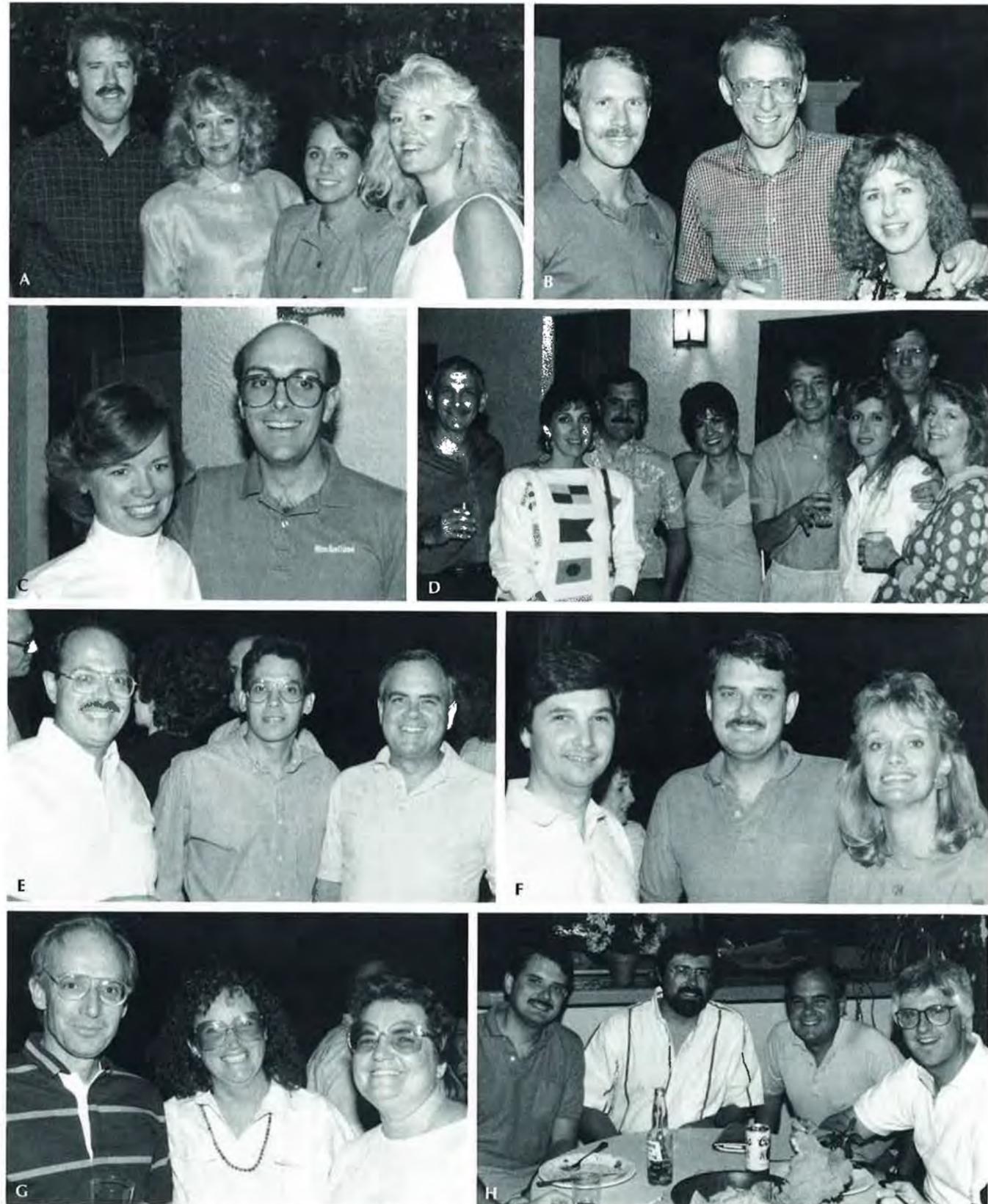
1989 College of Law Reunions

The Class of 1973



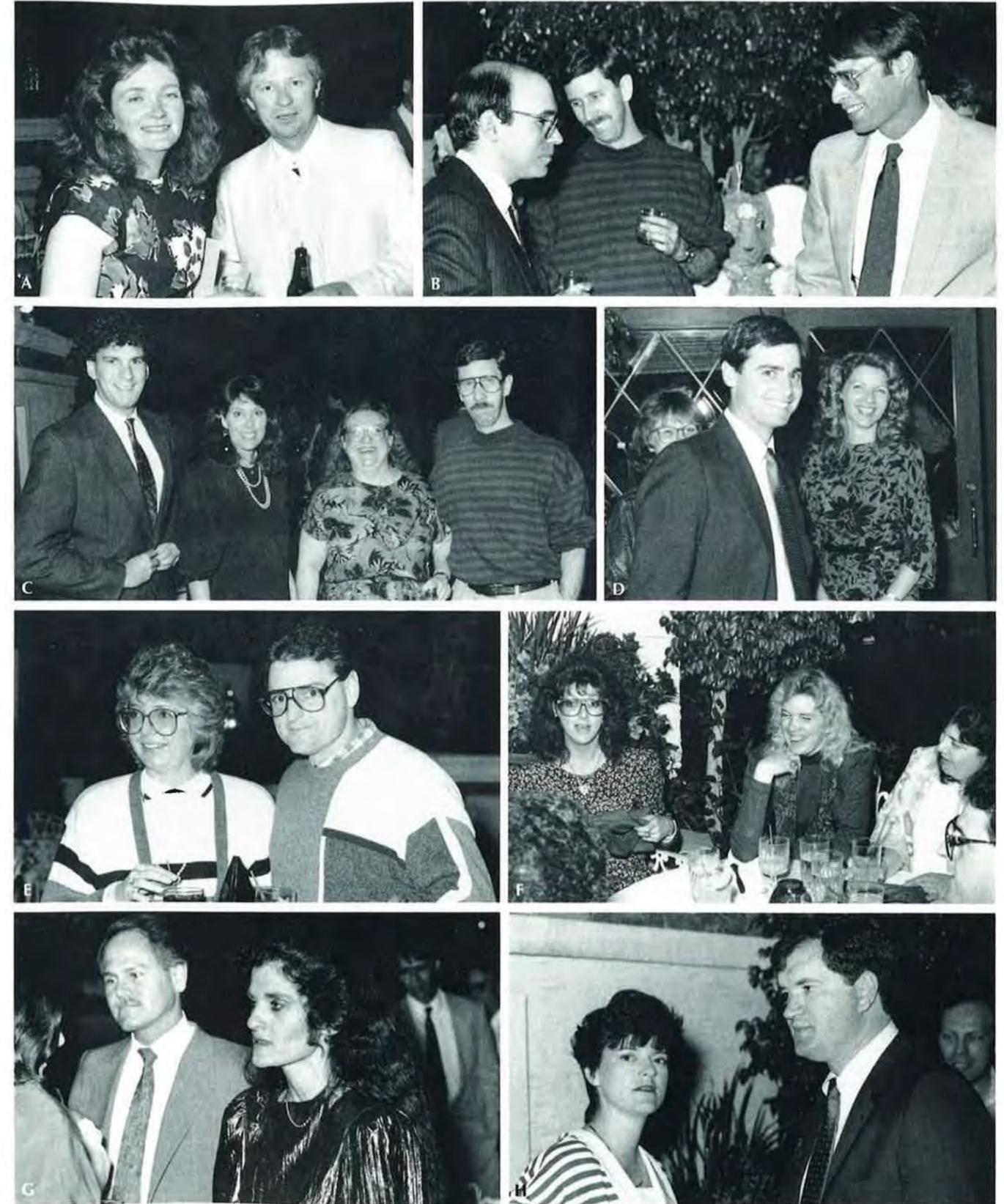
A. (l-r) David Lange, Mrs. Severiano Rodarte, Severiano Rodarte and Barbara Caldwell; B. Bruce Barton; C. Jerry Bonnett and Mrs. Greg Fairbourn; D. Founding Dean and Professor Willard Pedrick and Ted Jarvi; E. (l-r) Jerry Shultz, Mrs. Shultz, and Jerry Hirsch; F. (l-r) Greg Fairbourn and Jon Dake; G. (l-r) Mike Donovan and Tom Baum; H. (l-r) Jerry Shultz and Greg Fairbourn; I. (l-r) Tom Russel, Thomas Roberts, Crystal Russel and Kevin Maricle; J. (l-r) Rebecca Berch, Michael Berch, and reunion organizer Barbara Caldwell.

The Class of 1979



A. Dave Whitmore, Leslie O'Hara, Debbie Rose and Barbara Ross; B. Stan Schaffer, Prof. Michael Berch and Rebecca Berch; C. Pat and Mary Cunningham; D. Prof. Gary Lowenthal, Marylynn Barry, Edward Barry, Teri O'Brien, Michael Herzog, Lori Herzog, Glenn Hallman and Cheryl Hallman; E. Pat Damiani, Joe Padilla and Ken Behringer; F. Chris Reece, John Anderson and Janice Anderson; G. Larry Pringle, Chris McCracken and Janet Keating; H. John Anderson, Randy Patton, Ken Behringer and Mark Williams.

The Class of 1982



A. Stan Slonaker and Gloria Sterman; B. Marshall Gann, Ralph Harris and Brian Stark; C. Loren Molever, Kaye McCarthy, Patricia Bollen Harris and Ralph Harris; D. Dick Onsager and Ann Oakley; E. Austin Potenza and his fiancée; F. Kenna Finch and Julie Atwood; G. Richard Romley and Joanne Stark; H. Mr. and Mrs. Jim Ackerman.

**ASU Law Alumni Elect New Board of Directors;
Outstanding Alumnus and Faculty Member
Honored at Annual Alumni Membership Luncheon**

At the annual ASU College of Law Alumni Association Membership Luncheon held in January, a new Board of Directors was elected and the College's outstanding graduate and faculty member were honored.

The Alumni Association selected Flagstaff attorney **Frederick "Fritz" Aspey** ('72), to receive the College's 1989 Outstanding Alumni Award, and Professor of Law **Alan A. Matheson** was chosen to receive the Outstanding Faculty Member Award.

Mr. Aspey, a 1972 graduate of the College of Law, is a founding partner in the Flagstaff firm Aspey, Watkins & Diesel, and is the president-elect of the State Bar of Arizona. Mr. Aspey has been a member of the Board of Governors of the State Bar of Arizona since 1982, is the former president of the Coconino County Bar Association, and sits as a judge pro tempore on the Arizona Court of Appeals.

In selecting Mr. Aspey, the Alumni Association considered his contributions to the legal community, his long history of community service, his efforts to advance the reputation of the College of Law, and his continuous efforts to improve the quality of law and administration of justice for all individuals.

Professor Matheson has been a member of the law faculty since 1967 and during his 20-plus year tenure has held positions of Dean, Associate Dean, and Assistant Dean. In addition, he has been a professor of law since 1970, teaching in the areas of constitutional law, administrative law, education law, and community property.

Professor Matheson has been a member of the Board of Governors of the State Bar of Arizona since 1978, and has been active in the Arizona Center for Law in the Public Interest. He has also been heavily involved in various university matters in addition to devoting his attention to the College of Law.

In designating Professor Matheson as the recipient of

this award, the Alumni Association considered input from the College of Law student population as well as Professor Matheson's contributions to the College of Law, the University, and the community. Professor Matheson received his law degree from the University of Utah, where he was the editor-in-chief of the *Utah Law Review*.

A new Board of Directors for the Alumni Association was elected at the annual luncheon. They are:

- Andrew Abraham** ('82), Vice President
- Alan Bayham, Jr.** ('76)
- Jamie Brody** ('81)
- Hon. Elizabeth Finn** ('72)
- JoAnn Garcia** ('87)
- Mary E. Hartman** ('88)
- Theodore C. Jarvi** ('73)
- Cathey L. Joseph** ('83)
- Mark Karolczyk** ('82)
- Thomas Lucas** ('80)
- Ivan Mathew** ('87)
- Patrick E. McGillicuddy** ('79)
- Randy Nussbaum** ('80)
- Benidia Rice** ('84), Treasurer
- Michael B. Scott** ('71), President
- Michael P. Shiaras** ('81)
- Louise Stark** ('83)
- Thomas Stillwell** ('88)
- Alex Vakula** ('87), Secretary ■

Ted Jarvi, ASU College of Law—Class of 1973, presents the Outstanding Faculty Member Award to Professor of Law **Alan A. Matheson** during the Annual Law Alumni Association Luncheon held in January.



Frederick "Fritz" Aspey, ASU College of Law—Class of 1972 and State Bar President Elect, is shown here as he accepts his Outstanding Alumni Award from the ASU Law Alumni Association.



Dean **Richard J. Morgan** thanks the Law Alumni Association for its strong support of the College.



Mary Hartman ('88) and Edward Rubacha ('87).



Louise Stark ('83), organizer of the luncheon.



Dean Morgan, Frederick Schaffer ('78) and College of Law Development Director Kathy Neitzel.



(l-r) Professor **Joe Feller** and Professor **Dennis Karjala** chat with **Tom Lucas** ('80), a new member of the Board.



Arizona Supreme Court Chief Justice **Frank X. Gordon, Jr.**, the featured speaker, spoke about the Commission on the Courts.



Nearly 100 alumni attended this year's Annual Membership Luncheon. Shown here in the foreground (l-r): **Dick Onsager** ('82) and **Randy Nussbaum** ('80).



(l-r) **Albert Von Wagner** ('79), **Kevin Kane** ('71) and **Steve Rice** ('72).



(l-r) **Bob Cook** ('70), **Robert Weber** ('70) and **John Burger** ('73).

Judicial Clerkships: Class of 1989

Lynn Allen	Arizona Court of Appeals Judge Ruth McGregor
Drew Christensen	U.S. District Court of Nevada Judge Charles Thompson
Kathryn DeBano	Arizona Court of Appeals Judge Jefferson Lankford
Elizabeth Feldman	U.S. District Court of Arizona Judge Robert Broomfield
Alice Finn-Gartel	U.S. Federal Court of Appeals, Ninth Circuit Judge William C. Canby
Carolyn Hertzberg	Arizona Court of Appeals Judge Noel Fidel
Mark Knops	Arizona Court of Appeals Judge John Taylor
John Mayo	Superior Court, Appellate Division New Jersey Judge David Landau
Polly Ruhl	Arizona Court of Appeals Judge Noel Fidel
Bonnie Schwartz	New Hampshire Superior Court Arizona Court of Appeals Judge Thomas Kleinschmidt
Susan Turner	Arizona Court of Appeals Judge Ruth McGregor
Janet Wagner	Supreme Court of Arizona Chief Justice Frank X. Gordon
LynDee Wells-Stevens	Arizona Court of Appeals Judge Edward C. Voss
Michael Warzynski	

IN MEMORIUM

Susan Jacobson, a 1980 graduate of the Arizona State University College of Law, died on June 1st, 1989, of cancer. Susan was 34 years old.

After receiving her Juris Doctorate Degree, Susan took a position with the Securities Division of the Arizona Corporation Commission and later worked at the Securities and Exchange Commission in San Francisco. Most recently, she worked in the Legal Department of Sears in Chicago. Her family in Wisconsin has requested that those wishing to make a donation in her memory send their gifts to the Law Society Memorial Endowment, in care of the College of Law, Arizona State University, Tempe, AZ 85287-0604.

Jerome "Jerry" B. Schultz, an alumnus from the Class of 1973, died of a heart attack on January 28, 1990. Jerry was a partner in the Phoenix law firm of Fennemore Craig, P.C., and was 42 years old. He was chairing the Class of 1973 Alumni Carrel Drive for the Library Campaign when he died. Jerry is survived by his wife, Sharon, his son, his parents, and two brothers.

Melchor P. Evans, Class of 1973, died in January, 1990. Melchor had been living in Alaska.

Frank Jue, Class of 1983, died on August 4, 1989.

Gail Fossum, Class of 1981.

Twentieth Reunion Anniversary Celebration Planned

The year 1990 marks the 20th anniversary of the College of Law. The ASU College of Law Alumni Association plans to celebrate this anniversary with a series of events to be held on Friday, October 26 and Saturday, October 27. All alumni will be invited to attend, meet classmates, and learn how the College of Law has evolved since the first class graduated in 1970.

Committees have been formed to organize each event of the celebration and all are making progress. Arrangements are being made to get favorable room and rental car rates for out-of-towners. This promises to be an outstanding opportunity to recognize the status that the College of Law has attained over the last 20 years. It will be a great opportunity to see how classmates have done, where faculty have gone, or come from, and how much the University has grown.

Planned events include a day-long seminar, a dinner Friday night with a major speaker, a Saturday golf tournament, a giant pre-football game "tailgate" reception and attendance at the ASU-USC football game.

The Friday night dinner will be held at the Tempe Sheraton Mission Palms and will feature a major speaker.

The golf tournament on the following day will be held on the Karsten Golf Course which is directly adjacent to the University, off Rural Road. A favorable package has been set up and the golf tournament committee is actively working on an enjoyable best-ball tournament.

The tailgate party is planned to be a major event both for those who want to go to the USC football game, and even for those who don't. The University has committed 100 extra tickets for the College of Law alumni for those who don't already have season tickets. These will be distributed on a first-come, first-served basis.

Solicitations for attendance will be mailed to all alumni in the spring. Judging from the interest that has been expressed already, this will be a well attended event. Persons interested in helping are asked to call Ted Jarvi at 838-6566. ■



Interim Dean Matheson presents Amelia Lewis with "ASU Art Treasures," a framed lithograph by Leonard Lehrer, in recognition of her outstanding philanthropic support. The Amelia Lewis Endowed Professorship was established in 1983 by her son, Frank Lewis, at the College of Law.

Class Notes

Class Editor's Note: Alumni should use the enclosed information form, found at the back of this magazine, to provide address changes and news. We welcome personal notes, clippings, photographs and other forms of communication about events of interest in the lives of the College of Law Alumni. Photographs will be credited and returned after publication if so requested. Please send your news to Class Notes Editor, Law Forum, College of Law, Arizona State University, Tempe, AZ 85287-0604.

The class agents listed below are for the 1989-90 Annual Fund.

'70

Michael Hawkins
Bryan, Cave, McPheters and McRoberts
2800 N. Central, 21st Fl.
Phoenix, AZ 85004-1019

John Lancy
Lancy, Scult & Lazarus, P.A.
1313 E. Osborn, Ste. 100
PO Box 7040
Phoenix, AZ 85011-7040

'71

Larry Felix
City of Phoenix
251 W. Washington, Rm. 800
Phoenix, AZ 85003

'72

Kent E. Turley
Vermeire & Turley, P.C.
340 E. Palm Lane, Ste. 300
Phoenix, AZ 85004-1579

Robert J. Stephan, Jr. was a speaker on December 15, 1989 at an Arizona Trial Lawyers Association seminar on medical malpractice. His talk was entitled "Finding Experts"

'73

Shirley Frondorf
2720 E. Thomas, Bldg. A
Phoenix, AZ 85016

'74

Terry F. Hall
Marton & Hall, P.A.
817 N. Second St.
Phoenix, AZ 85004

Kraig Marton
Marton & Hall, P.A.
817 N. Second St.
Phoenix, AZ 85004

Susan A. Ehrlich was sworn in as Judge of the Arizona Court of Appeals on October 20, 1989.



Ruth McGregor was appointed a Judge of the Arizona Court of Appeals by Governor Rose Mofford on November 8, 1989.

John P. Zanotti recently returned to Phoenix, AZ to accept a position as publisher of the Arizona Business Gazette, the Arizona Republic and the Phoenix Gazette. John, who graduated with honors, first worked at O'Melveny and Myers, a large Los Angeles law firm, and then as general counsel and later vice-president of Harte Hanks Communications, Inc. He joined Gannett Company, the national's largest newspaper publishing company, in 1984, and became president and publisher of the Gannett-owned Enquirer in December 1985.

'75

Amy Coy
Lewis and Roca
100 W. Washington
Phoenix, AZ 85003

Stephen Gorey now has an office in both San Diego and Fresno under the name of Law Offices of Stephen Gorey.

Dougal B. Reeves, Jr.'s law firm Simon, Reeves & Roberts is now Reeves & Roberts.

Susan Smith was a chairperson for a 2036C Workshop in the Arizona Estate Planning Series sponsored by the Maricopa County Bar Association on May 4, 1989.

'76

Martha Kaplan
Home, Kaplan & Bistrow, P.C.
2 N. Central, Ste. 2800
Phoenix, AZ 85004

Michael Cantor was appointed by Phoenix Mayor Terry Goddard and the City Council to the Volunteer Census Awareness Committee.

'77

Jack Rudel
Robbins & Green, P.A.
3300 N. Central, Ste. 1800
Phoenix, AZ 85012-2578

Kevin T. Ahern is practicing with Richard Q. Nye, Robert L. Shaw, J. Lawrence McCormley, Richard E. Chambliss and William R. Brown. In 1986 they formed Nye, Shaw, Ahern, McCormley, Chambliss & Brown, P.C., 2390 E. Camelback Rd., Suite 325, Phoenix, AZ 85016. Their practice emphasizes commercial real estate and lending transactions, and commercial, real estate and construction litigation.

Robert N. Bass was appointed co-chairman of a State Bar Committee on Continuing Legal Education, is co-chairman of the State Bar's Seminar "Residential Real Estate Transactions," serves on the Legal Specialization Committee on Real Estate, and is President-Elect of the Arizona Real Estate Educators Association.

Richard S. Plattner also made a presentation on the March 1989 "Learn at Lunch Seminar" entitled "Appellate Highlights—Year in Review, June 1989-1990."

On March 13, 1990, **Janis Posner Raynak** participated in the "Learn at Lunch Seminar" series sponsored by the Arizona Trial Lawyers Association (ATLA), Phoenix Chapter. Her talk was entitled, "Cross Examining the Defense Expert." At another seminar sponsored by ATLA on medical malpractice on December 15, 1989, she presented a talk entitled "Proving Damages."

M. David Shapiro opened an office on April 1, 1989 under the name of Law Office of M. David Shapiro, 1212 East Osborn Road, Suite 106, Phoenix, Arizona 85014. His practice is limited to intellectual property law matters; patent, trademark, copyright, trade secret and employment agreements.

'78

Elliott Wolfe
Langerman, Begam, Lewis & Marks
111 W. Monroe, Ste. 1400
Phoenix, AZ 85003-1787

Tom Hannis left the Maricopa County Attorney's Office to join the United States Attorney's Office in Phoenix as an Assistant United States Attorney prosecuting general crimes beginning July 31, 1990.

At the annual conference of the American Immigration Lawyers Association in June, 1989, **Nancy-Jo Merritt** was given the Pro Bono Award "for promoting the highest goals of professional responsibility"

through exemplary efforts in support of pro bono representation of indigent aliens."

'79

Ron Kilgard

Meyer, Hendricks, Victor, Osborn & Maledon, P.A.
2700 N. Third St., Ste. 4000
Phoenix, AZ 85004

Kathleen Bowman is the new Executive Director of DNA—Navajo Community Legal Services.

Donna A. Killoughey, a civil litigation attorney, was elected to the Governing Council of the Law Practice Management Section of the American Bar Association at its annual meeting in Honolulu. This is her fifth term on the Council. Additionally, she was appointed Chair of the Products Media Board of the Section. The Board oversees production of all publications of the Section, with the exception of *Legal Economics*, the Section's magazine.

'80

Kevin O'Malley

Gallagher & Kennedy
360 E. Coronado
Phoenix, AZ 85004-1524

Diane Lindstrom serves on the State Bar Public Relations Committee and on the Board of Directors of the Arizona Living Association.

'81

Vicki Lewis

Brown & Bain, P.A.
2901 N. Central
P.O. Box 400
Phoenix, AZ 85001-0400

Vicki Gotkin-Adler gave birth to Kelsey Elizabeth Adler, who was born January 3, 1990 to Vicki and her husband, David Adler.

We regret to note that **Gail Fossum** passed away. She had multiple sclerosis.

J.B. (Jeff) McCombs, now teaching tax at the University of Nebraska College of Law, published his second article, "Tax Incentives for Investment: A Free Market Future vs. Our Pork Barrel Past," 64 *Indian Law Journal* 665 (1989).

'82

Andy Abraham

Burch & Cracchiolo, P.A.
702 E. Osborn, Ste. 200
P.O. Box 16882
Phoenix, AZ 85011-6882

Julie Putnam Comfort recently gave birth to child number three Caitlin, and is the mother of two other boys, Jimmy, 5, and Drake, 4. Julie is employed by Holder Publishing Co., writing headnotes for Illinois Appellate Court Reports, and is able to work out of her home with the help of her "trustworthy computer!!"

Mary C. McDonald formed a firm with Patty Lee Hokes in Glendale on June 12, 1989. Their practice is limited to domestic relations, bankruptcy and probate.

Richard C. Onsager was a speaker on June 22, 1989 for a seminar entitled "The Business Entity" presented by the Maricopa County Bar Association. On February 16, 1989 he chaired a seminar entitled "Partnerships" presented by the Maricopa County Bar Association.

Joanne Stark was elected chairman of the Arizona Chapter of the American Immigration Lawyers Association at the annual conference in Washington, June 7, 1989.

'83

Scott A. Swinson

3800 N. Central, Ste. 1000
Phoenix, AZ 85012

Lenni Benson was elected vice-chairman/treasurer and Scott Richardson was elected secretary of the Arizona Chapter of the American Immigration Lawyers Association at the annual conference in Washington, June 7, 1989.

We are sad to note that **Frank Jue** died August 4, 1989.

Amy Langerman spoke on "The New Malpractice Rules" in a medical malpractice seminar presented by the Arizona Trial Lawyers Association on December 15, 1989.

Michael P. Scott, formerly an Assistant City Prosecutor in Phoenix, is now a member of the California Bar and an associate at the Santa Rosa, California law firm of O'Brien, Walters, Davis, Malisch & Piasta. He and his wife Allison now make their home in Santa Rosa and are the proud parents of a son, Jake, born February, 1989.

'84

David Lansky

O'Connor, Cavanagh, Anderson, Westover, Killingsworth & Beshears
One E. Camelback, Ste. 1100
Phoenix, AZ 85012-1656

'85

Gerald T. Hickman

Teilborg, Sanders & Parks, P.C.
3030 N. Third St., Ste. 1300
Phoenix, AZ 85012-3039

Joseph William Kruchek was recently made a partner with Shimmel, Hill, Bishop & Gruender, P.C.

'86

Jeff Pyburn

Gallagher & Kennedy
360 E. Coronado
Phoenix, AZ 85004

'87

Susan Speck-Lowther

4601 W. Berridge
Glendale, AZ 85301

'88

Lee Stein

Brown & Bain, P.A.
2901 N. Central
P. O. Box 400
Phoenix, AZ 85001-0400

Len Munsil has been selected for a one-year appointment as Judicial Clerk to Judge Daniel A. Manion of the United States Court of Appeals for the Seventh Circuit, beginning September 1, 1989. Since graduation, he has served as legal counsel for Children's Legal Foundation, a national, non-profit, public interest law firm dedicated to the fight against obscenity and child pornography. In that capacity he drafted federal and state legislation, testified as an expert witness on obscenity laws before five state legislatures, filed amicus curiae and appellate briefs before the U.S. Supreme Court and several circuit courts, and frequently was interviewed by national and local media about constitutional issues relating to pornography regulations. He and his wife Tracy, who received her Master's degree in Political Science from ASU in May, are expecting their third child in October.

'89

John Titus

7845 E. Bellevue Street
Scottsdale, AZ 85287

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Tempe AZ 85287

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