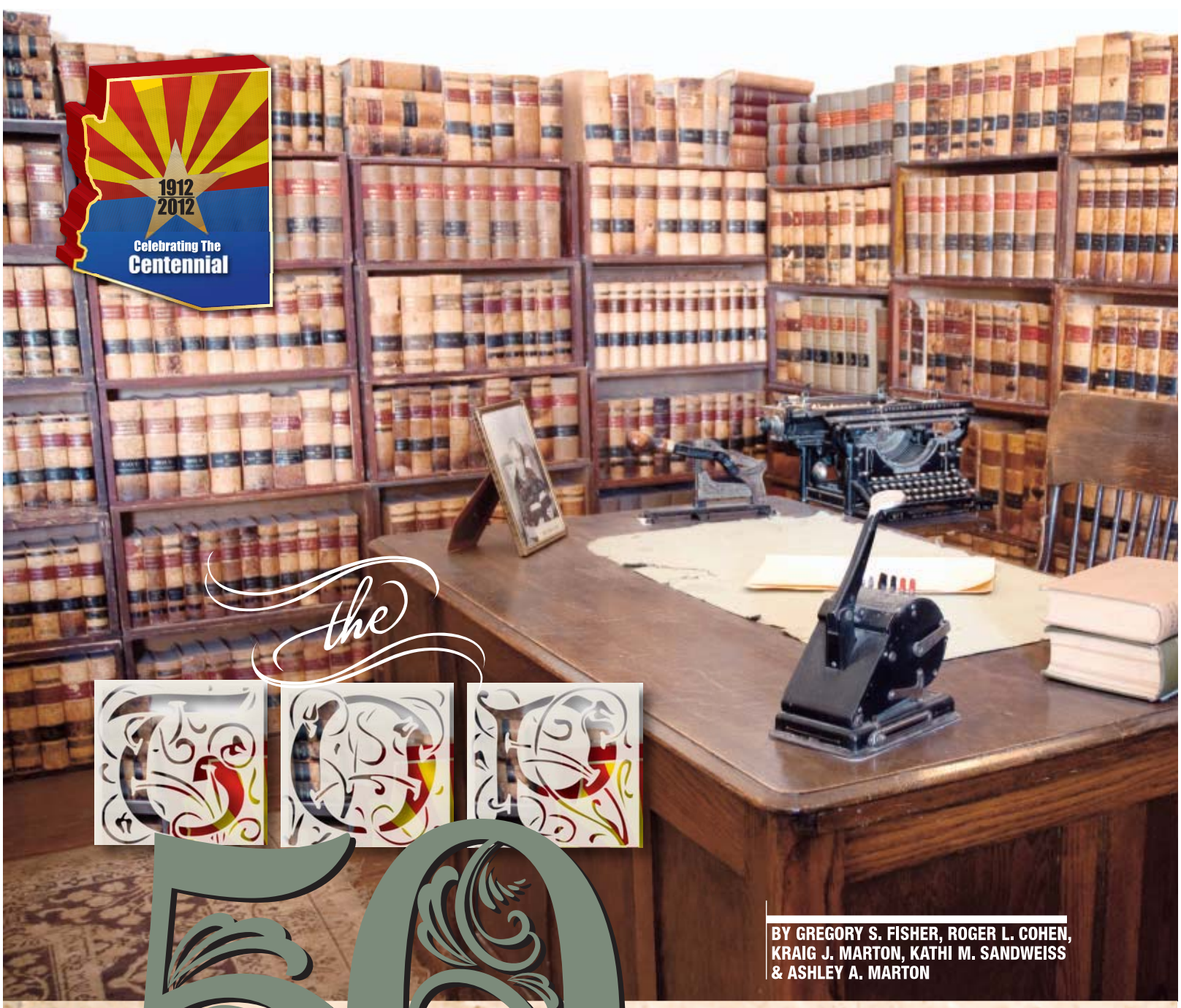

the 50

Leading Cases That Shaped Life and Law in Arizona's First 100 Years

BY GREGORY S. FISHER, ROGER L. COHEN, KRAIG J. MARTON, KATHI M. SANDWEISS & ASHLEY A. MARTON

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Arizona joined the Union on February 12, 1912. It was the 48th state and the last in what is known as the "continental United States," Alaska and Hawaii completing the nation (so far, anyway) 47 years later.

Commemorating a state's centennial is no small task. We decided to select the Top 50 cases that we believed had the greatest impact on life and law in Arizona (or beyond) over the state's first century. To compile our list, we contacted state and federal judges, commissioners, law school deans, law professors, section chairs of practice groups, and leading members of the Bar. We confined our list to published opinions.

Obviously, our list reflects a substantial degree of editorial discretion. In some respects, it is no better or worse than a Top 25 college football poll. However, we think most will generally agree with many of the case selections, even if they find fault with the precise rankings or quarrel with respect to some cases that were not included.

We briefly reviewed the Top 10 in some detail. The remaining "Best of the Rest" are ranked with parentheticals. Please let us know your thoughts on the cases and rankings—or your own suggestions—at **arizona.attorney@azbar.org.**

Here, then: Our Top 50.

transactional law. He was admitted to the California Bar in 1975 and to the Arizona Bar in 1976. He is a former Arizona Supreme Court law clerk. He is an author and lecturer on various topics, including civil procedure, secured transactions and legal ethics. He has published numerous articles. Mr. Cohen is a Member of the Law Review Committee for the Arizona State Board of Accountancy, and a former Member of the State Bar of Arizona Arbitration Committee.

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Arizona v. California is not really one case, but instead a series of different but related cases stretching from the 1930s to the present day.[1] However, without question, these cases represent Arizona's most significant legal dispute, because the fight is over water, without which Arizona as we know it today would not exist.

States relying on water from the Colorado River basin began negotiating water allocation in the early 1920s, around the same time that the U. S. Supreme Court established prior appropriation as the foundation for water rights. (Prior appropriation promotes development and discourages waste.) Negotiations led to the Colorado River Compact of 1922. Water allocation was divided between upper-basin (Colorado, Utah, Wyoming and New Mexico), and lower-basin states (Arizona, California and Nevada), each basin receiving 7.5 million acre-feet of water. However, Arizona refused to sign the compact. A major concern was that California's booming development would allow it to apply prior appropriation to claim more water than Arizona believed was reasonable or fair.

In 1928, Congress passed the Boulder Canyon Project Act to begin construction of the Hoover Dam. Arizona filed suit, seeking to have the Boulder Canyon Project Act declared unconstitutional. In a 1931 opinion authored by Justice Brandeis, the U. S. Supreme Court rejected Arizona's arguments. However, the Court left the door open a crack, observing that Arizona might be able to secure relief if it could show that its prior appropriation rights were subsequently infringed. Arizona believed that in order to show sufficient injury it would probably have to show prior appropriation by reference to what other signatory states to the 1922 compact believed Arizona's prior appropriation rights to be. However, the Hoover Dam would not be constructed for several years. Arizona therefore sought relief to perpetuate testimony for purposes of preserving the record. The Court denied relief. Subsequent action was dismissed for failing to join the United States as an indispensable party.

After years of frustrating court losses, punctuated in between by Governor Moeur's naval excursion to halt the Parker Dam's construction (see story, page 23), Arizona finally executed the Colorado River Compact in 1944. Plans for the Central Arizona Project entered negotiations. However, details were held up due to uncertainties related to the fact that California and Arizona had never resolved their dispute over use of the Colorado River. Arizona therefore filed suit in 1952, seeking an apportionment of water. Eleven years later, the Court finally decided the case in 1963. The Court awarded California 4.4 million acre-feet, Arizona 2.8 million acre-feet, and Nevada 300,000 acre-feet, with each state also awarded all water in their tributaries. The result was a clear win for Arizona—in effect, allocating to Arizona what it first sought in 1922 when the Colorado River compact was executed.

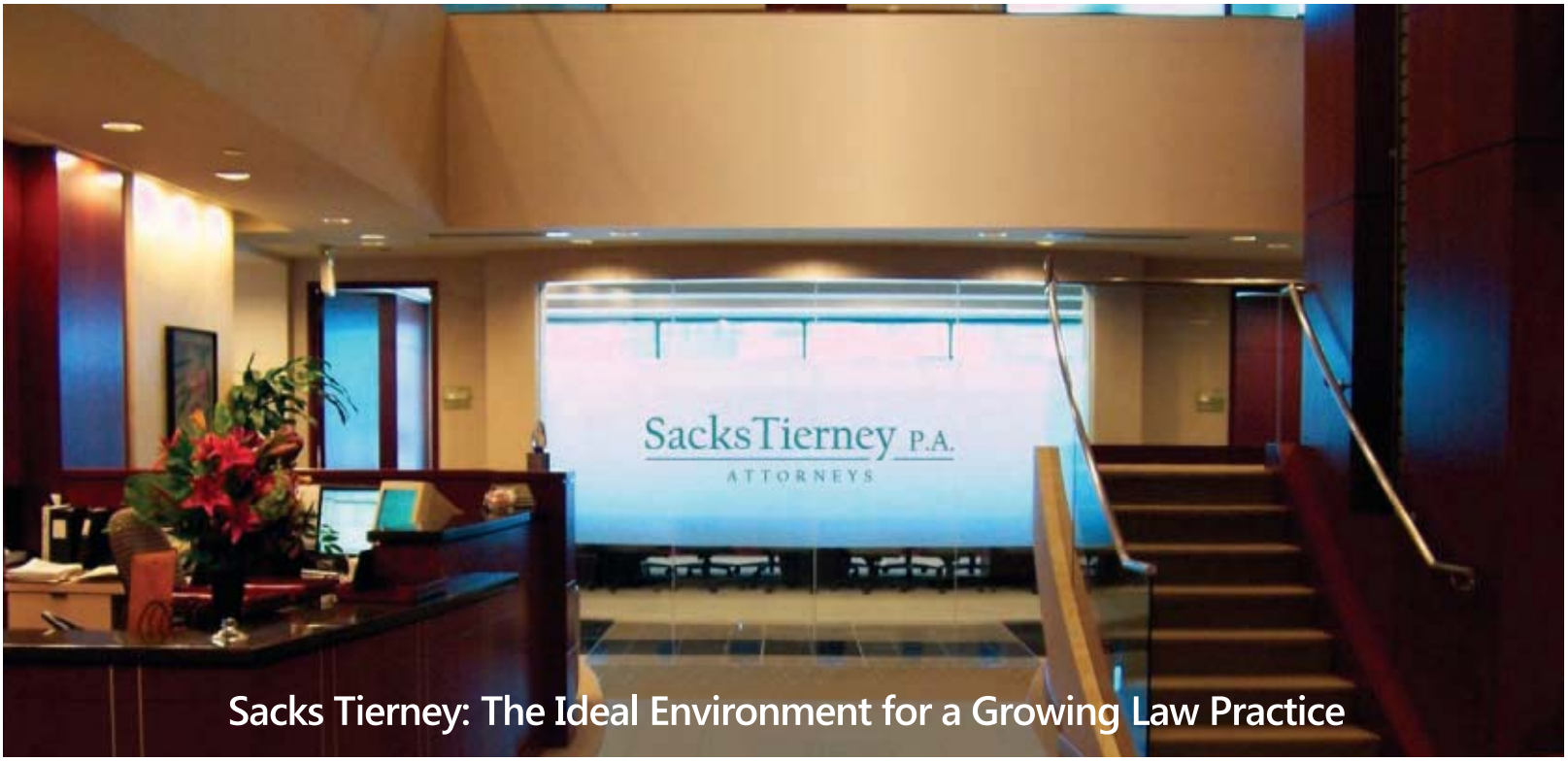
In succeeding years, additional decree modifications have adjusted allocable water rights as between different entities, the most recent case being decided in 2000. It is probable that further decree modifications will be sought in the future. However future issues are resolved, the *Arizona v. California* cycle remains probably the most significant dispute in Arizona during its first century.

Arguably the most widely recognized criminal case to come out of the United States Supreme Court, *Miranda v. Arizona* revolutionized the way police officers handle suspected criminals.[2] In an opinion authored by Chief Justice Earl Warren, the majority held that criminal suspects taken into custody and questioned by the police must be informed of certain constitutional rights: namely, the right to remain silent; that anything the suspect says may be used against him or her; the right to consult with a lawyer and have counsel present during the interrogation; and if the accused is without funds to obtain a lawyer, a lawyer will be appointed for him or her. If the suspect is not properly advised of *Miranda* rights, any statements made cannot be used against him or her during trial. Known as the *Miranda* warnings, these famous words are a staple in police enforcement, criminal proceedings and popular culture.

The *Miranda* decision consolidated four distinct cases that dealt with the admissibility of a defendant's confession given during a custodial interrogation. In 1963, Ernesto Miranda was arrested by Phoenix police and taken into custody. While he was in custody, the police interrogated him for two hours and obtained his written confession to the kidnapping and rape of a woman 11 days before his arrest. At no point did the officers inform him of his right to have an attorney present or remain silent. Despite objection by Miranda's counsel, the trial court admitted the confession into evidence, and he was found guilty of kidnapping and rape. Miranda appealed to the Arizona Supreme Court and eventually petitioned the U. S. Supreme Court for a writ of certiorari.

The basis for the Court's holding was its determination that custodial interrogations are inherently coercive, and the very nature of the interrogation was contrary to the protection assured by the Fifth Amendment's self-incrimination clause. The majority feared that without a warning requirement and the availability of the exclusionary rule, the Fifth Amendment would be deemed meaningless. Although the Court relied heavily on the Fifth Amendment protections, it extended its ruling to the Sixth Amendment by finding that without knowledge of the availability of counsel, questioning will likely induce confessions in violation of the Fifth Amendment's self-incrimination clause.

Ultimately, the Court created a set of procedural safeguards for criminal suspects that continue to be used by law enforcement today. As for Miranda, his conviction was reversed, but he did not become a free man. Police obtained evidence independent of the confession and the defendant



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*Arizona Board of Legal Specialization

was convicted during a second trial.[3] Despite Ernesto Miranda's fate, the case that bears his name lives on as one of the most recognizable and controversial cases of the Court's history.

3 Civil Procedure, Summary Judgment (*Orme School*)

Until 1990, Arizona courts advocated a stringent standard for granting summary judgment, in accordance with *Peterson v. Valley National Bank*, which held that "summary judgment … is not a substitute for a trial" and "litigants are entitled to the right of trial where there is the slightest doubt as to the facts."[4] A series of cases from the 1960s appeared even more rigorous, explaining that summary judgment is proper only in "clear cases" where there is "no doubt," that summary judgment should never be entered unless the facts are "clear and undisputed," and that it is improper to grant summary judgment if there is any "substantial doubt" as to the "critical facts." One court explained that, even in cases where the judge may be of the opinion that she or he will have to direct a verdict for one party or the other "[the Judge] should hear the evidence first" rather than grant summary judgment because "[w]hen the case is tried evidence may be produced which would put an entirely different light upon what happened."

This changed with *Orme School*, a special action proceeding, following the denial of summary judgment (generally not reviewable on appeal).

Ryan Mills was a student at Orme, a private boarding school in Mayer, Ariz., when he contracted salmonella food poisoning. Mills sued the school, which had provided the ill-fated meal, and College World Services, Inc. (CWS), the school's food service contractor. During a six-week period, Mills ate 100 to 120 meals provided by Orme, and all except a single meal were prepared by CWS. While there was no evidence inculpating a particular meal, as between Orme and CWS, the mathematical odds were more than 100 to 1 in favor of the conclusion that the "culpable meal" was prepared by CWS rather than Orme. Conversely, there was a remote possibility (1 out of 100) that Mills contracted salmonella from the meal prepared by Orme.

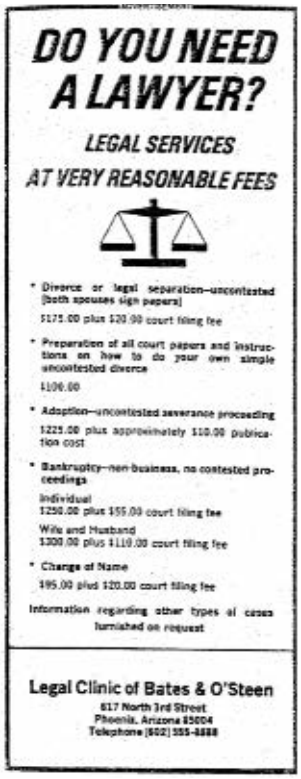
Orme cross-claimed against CWS for indemnity and moved for summary judgment; the trial court denied the motion. The Supreme Court accepted review and reversed, ordering judgment in favor of Orme on its indemnity claim. The Court noted that, at best, the chances were 1 out of 100 that Orme was a tortfeasor, and 99 out of 100 that CWS was the active wrongdoer responsible for the salmonella infestation. While 1 chance in 100 may qualify as a "slightest doubt" and might be described as a "scintilla of evidence," the Court said, "it is apparent that with no direct evidence and no circumstantial evidence permitting any other or better inference, the trial judge would be required to direct a verdict in favor of Orme."

Applying then-recently adopted federal standards (the *Anderson v. Liberty Lobby* trilogy), the Supreme Court held that the trial judge is to apply the same standards as used for a directed verdict. Either motion should be granted if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense. In addition, the moving party is required only to point out by specific reference to the relevant discovery that no evidence existed to support an essential element of the claim, but need not affirmatively establish the negative of the element. Even though CWS had raised a scintilla of evidence or a slight doubt, summary judgment was appropriate.

Of course, most summary judgment cases lack the mathematical formula of an *Orme School*. Nevertheless, in the more than 20 years of post-*Orme School* legal practice, there have been hundreds of published opinions in Arizona examining, discussing, citing or mentioning *Orme School*, many more unpublished appellate decisions citing the case, and presumably untold numbers of practitioners who regularly employ a pre-written "*Orme School* summary judgment section" in their summary judgment motions.[5]

4 First Amendment, Advertising (*Bates v. State Bar*)

Lawyers could not advertise in 1979, when John R. Bates and Van O'Steen thought they should. So these two lawyers placed a small ad in the *Arizona Republic* that listed the prices their "Legal Clinic" would charge for such things as an uncontested divorce, name change or uncontested bankruptcy. They knew their ad was in direct violation of then applicable Disciplinary Rule 2-101(B), which at the time stated that "A lawyer shall not publicize … through newspaper or magazine advertisements, radio or television announcements, display advertisements in the city or telephone directories or other means of commercial publicity."


DO YOU NEED A LAWYER?

LEGAL SERVICES AT VERY REASONABLE FEES

* Divorce or legal separation—uncontested [both spouses sign papers]
$175.00 plus $20.00 court filing fee

* Preparation of all court papers and instructions on how to do your own simple uncontested divorce
$100.00

* Adoption—uncontested severance proceeding
$225.00 plus approximately $10.00 publication cost

* Bankruptcy—non-business, no contested proceedings
Individual
$250.00 plus $55.00 court filing fee
Wife and Husband
$300.00 plus $110.00 court filing fee

* Change of Name
$95.00 plus $20.00 court filing fee

Information regarding other types of cases furnished on request

Legal Clinic of Bates & O'Steen
617 North 3rd Street
Phoenix, Arizona 85004
Telephone [602] 255-4888

The Disciplinary Committee that heard their case found they violated this rule and recommended a six-month suspension (Bates and O'Steen admitted the violation), but the State Bar Board of Governors instead recommended a week's suspension for each because it was an intentional challenge to a rule they disput-

ed. The Arizona Supreme Court, in a 4–1 decision, rejected the First Amendment challenge (and other challenges) and instead imposed a censure.

The U.S. Supreme Court struck down Arizona's rule as violative of the First Amendment in a hotly contested 5–4 opinion.[6] The majority felt "the disciplinary rule serves to inhibit the free flow of commercial information and to keep the public in ignorance" and concluded that "advertising by attorneys may not be subjected to blanket suppression."

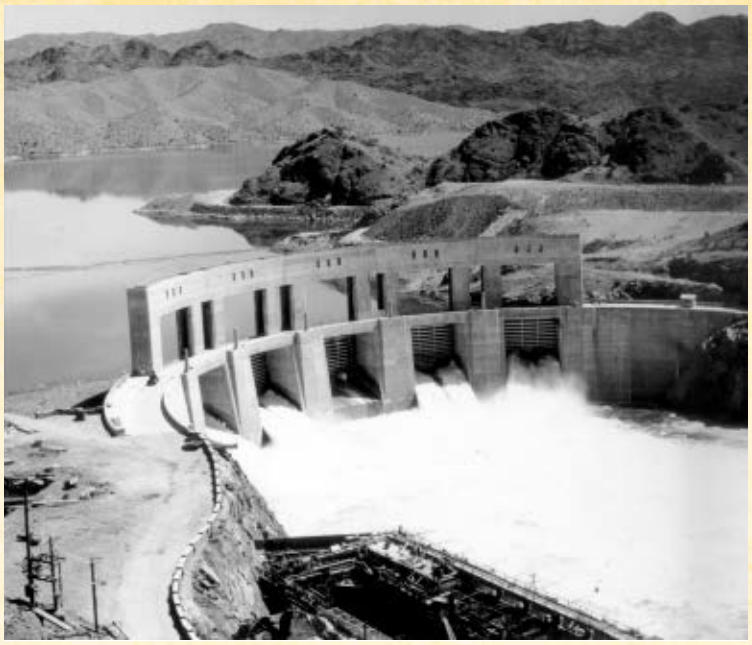
The dissent was in strong opposition. Justice Warren Burger felt the majority's ruling "will create problems of unmanageable proportions," while Justices Lewis Powell and Potter Stewart feared the opinion "will effect profound changes in the practice of law." Justice William Rehnquist repeated his long-held view that the First Amendment does not protect commercial speech at all.

In today's society, it is hard to miss lawyer advertising. Whether on television, the Internet, billboards or elsewhere, lawyers across the nation can present themselves and their services like any other service—all because two Arizona lawyers wanted to advertise their legal clinic.

5 Contracts *(Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.)*

Because of *Darner Motors*,[7] we never read a form contract, particularly on the Internet, before we sign it. Given the Supreme Court's adoption of the "reasonable expectations" rule of Subsection (3) of § 211 of *Restatement (Second) of Contracts*, we would prefer to take our chances arguing unfair surprise rather than frustrating ourselves with the knowledge of the oppressive terms of a contract we have no ability to negotiate. While this reaction is perhaps extreme, the influence of *Darner Motors* on Arizona contract litigation is difficult to overstate.

The operative facts of *Darner Motors* are straightforward. Darner Motors, an



Photograph of Parker Dam, in La Paz County (Ariz.)., 1940 ca., Kegley, Max. © Arizona State Library, Archives and Public Records, History and Archives Division, #95-2839a.jpg

Arizona's Navy Goes to War

In early 1934, the federal government concluded plans for the Parker Dam project to create Lake Havasu. It was to be a reservoir for the Metropolitan Water Project of Southern California. In a sense, this was the last major water project of William Mulholland (the water baron of *Chinatown* fame), because he acted as an informal adviser. The plan was to divert water from the Colorado River across the Mohave Desert via the Colorado River Aqueduct to several cities in Southern California.

Arizona's Governor Ben Moeur resolved to make sure that Arizona got its fair share of that water. In March 1934, he dispatched a handful of Arizona National Guard soldiers to observe the construction scene aboard the *Nellie Jo*, a ferry boat donated by a Yuma County state senator Nellie Bush. Arriving at the scene, the soldiers reported back that California had sent surveyors across the Colorado River into Arizona. The press dubbed the expedition "The Arizona Navy," a label that quickly gained comical notoriety after the soldiers-turned-sailors snagged their vessel in cables and had to be rescued by the "enemy" Californians.

Construction on the dam began on September 10, 1934. Undeterred by the prior mishap, the Governor doubled-down and declared martial law. Arizona deployed 60 soldiers armed with machine guns to prevent any construction on the Arizona side of the river. Conflict loomed. People blinked. The U.S. Secretary of the Interior Harold Ickes intervened. Ickes promised that no further work would be completed until Arizona's protest was resolved. Governor Moeur recalled the troops after securing the Roosevelt Administration's approval for the Gila River project. It was a political win for Arizona.

Ickes brooded. Something had to be done. On January 14, 1935, the United States filed suit against Arizona, seeking to enjoin any further interference with the Parker Dam Project. In something of a surprise, the U.S. Supreme Court (Mr. Justice Butler writing for a unanimous Court) ruled in Arizona's favor, concluding that the United States lacked grounds for any relief because Congress had never authorized the Parker Dam project. *See United States v. Arizona*, 295 U.S. 174 (1935). The Court's opinion was filed on April 29, 1935. Mulholland died less than three months later, on July 22, 1935.

In the end, the Arizona Navy prevailed. Bravo Zulu.

automobile sales and leasing company, obtained two insurance policies from Universal Underwriters: a "U-Drive" insurance policy providing coverage for itself and its vehicle lessees, and a subsequently obtained "Unicover" policy, providing umbrella coverage. The original U-Drive Policy had coverage limits of $100,000/$300,000, and the policy in effect at the time of the occurrences in question purported to have policy limits of $15,000/$30,000. Darner's representative testified that, when the renewal policy was delivered, he noticed the lower policy limits and contacted the agent who sold the policy, who assured him that $100,000/$300,000 coverage was provided by virtue of the "all-risk" cause of the Unicover policy.

The Court framed the issue on appeal as "whether the courts will enforce an unambiguous provision contrary to the agreement made by the parties because, after the insurer's representation of coverage, the insured failed to read the insurance contract in his possession." Despite the limited nature of the issue as so framed, the Supreme Court, through Justice Stanley Feldman, proceeded to an expansive discussion of modern contract law, contrasting the old-fashioned "four corners" approach—under which the court was required first to find an ambiguity in order to consider extrinsic factors—with the modern view, espoused by Corbin and others, which emphasizes context and "takes into account the realities of present day commercial practice."

The Supreme Court explicitly approved the approach reflected in *Restatement* § 211 (3), which it characterized as "basically a modification of the parol evidence rule when dealing with contracts containing boiler-plate provisions which are not negotiated, and often not even read by the parties," and concluded, on the facts presented, that issues of fact precluded the granting of summary judgment in favor of the insurer.

In dissent, Justice William Holohan characterized the majority opinion as adopting "virtually every minority position taken by any court or text writer in the United States" and forecast a future in which insurance companies would refuse to conduct business in the State of Arizona because of the Court's decision "making the contents of a written insurance policy irrelevant in the determination of the nature and extent of coverage."

While those dire consequences have not ensued, the approach to contract interpretation reflected in *Darner Motors* has continued to inform the law in Arizona. Most significant, in *Taylor v. State Farm Mut. Auto. Ins. Co.*,[8] the Supreme Court, again writing through Justice Feldman, rejected the traditional rule that a facial ambiguity must exist in order to justify the consideration of parol evidence, adopting instead the Corbin approach, under which the court "first considers the offered evidence and, if he or she finds that the contract language is 'reasonably susceptible' to the interpretation asserted by its proponent, the evidence is admissible to determine the meaning intended by the parties."[9] Although perhaps not going so far as to abolish the parol evidence rule entirely, *Taylor* has made it virtually impossible to obtain summary judgment in any case where there is conflicting testimony as to the meaning of a contract, however clear the contract language appears to be.[10]

6 Criminal Procedure, Fourteenth Amendment *(In re Gault)*

In the seminal juvenile law case of *In re Gault*,[11] the U.S. Supreme Court extended certain constitutional due process guarantees to juvenile proceedings, where a minor is facing potential commitment in a state institution. The Court held that juvenile delinquency proceedings must give juveniles and their parent: notice of the charges against them, notice of their right to have an attorney, the right to confront and cross-examine witnesses against them, and the right not to testify against themselves. Prior to *Gault*, juvenile proceedings generally operated under the *parens patriae* doctrine, and minors had little to no constitutional protections. However, this all changed in the 1960s when the Court initiated a "patchwork jurisprudence of juveniles' constitutional rights." The *Gault* case was a dramatic shift in juvenile jurisprudence and afforded minors with the rights necessary to fulfill the fundamental fairness guarantee of the Due Process clause.

Gerald Gault was 15 years old when he was detained by Gila County Sheriff Department for making telephone calls of the "irritatingly offensive, adolescent, sex variety." At the time, Gerald was on probation for being present when another boy stole a wallet from a woman's purse. When police took Gerald into custody, his family was not notified of his arrest. The next day, Gerald appeared before a juvenile judge, without the representation of an attorney. No transcript, recording or other record of the proceedings was created, and Gerald was not able to confront his accuser. The only information about the proceedings was found in the testimony of the juvenile court judge, Gerald's parents, and the arresting police officers during the habeas proceedings.

Following the hearing, the judge sentenced Gerald as a juvenile delinquent to the State Industrial School for the duration of his minority, that is until the age of 21. This sentence stripped Gerald of the remainder of his adolescence. Surprisingly, if an adult was charged with the same offense of making "lewd phone calls," the maximum penalty was a fine of $50 and two months' imprisonment.

In Arizona, appeals were not allowed for juvenile cases. Therefore, Gerald, through counsel, filed numerous habeas corpus petitions, eventually making his way to the U.S. Supreme Court. The Court granted certiorari to address the impact of the Fourteenth Amendment's Due Process clause upon juvenile court proceedings. While the Court acknowledged the benefits of the special procedures utilized in juvenile proceedings, it held that the imposition of due process standards was necessary to curtail the "unbridled discretion" of juvenile court judges. The availability of procedure was key to the Court's holding, and without adequate procedures in place, the Court feared that juveniles could easily be deprived of fundamental rights. As the Court noted, "Neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."

After *Gault*, juveniles cannot be detained without first being afforded certain procedural due process rights. This case stands as a victory not only for juvenile defendants

The Soul Hovering over the Body Reluctantly Parting with Life
An illustration from a series designed for a publication of the poem "The Grave" by Robert Blair. The illustration was designed by William Blake and engraved by Louis Schiavonetti.
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Searching for a Soul

The Strange Case of James Kidd

James Kidd was a reclusive miner. He worked for the Miami Copper company from about 1920 until 1948, when he retired to a small room in Phoenix on North 9th Avenue. Kidd had no family or friends. By all accounts he was polite enough, but reserved and solitary. He had a habit of leaving for days or weeks at a time on prospecting trips in the Superstition Mountains. One day in November 1949, he walked off and was never seen again.

Years later, after Arizona passed the Uniform Disposition of Unclaimed Property Act, state officials were examining unclaimed, dormant accounts in 1964 when they stumbled upon a box with Kidd's name on it. It included stock certificates and other bank deposit records. With interest, the total value was in the range of $200,000. Also in the box was a handwritten note torn from a ledger page that Kidd declared to be "his first and only will" and by which he directed that his estate "go in a research or some scientific proof of a soul of the human body which leaves at death I think in time their [sic] can be Photograph of soul leaving the human at death."

The holographic will was admitted to probate. Thousands of petitioners filed claims seeking disbursement of Kidd's estate. In June 1967, trial commenced in the Superior Court of Maricopa County. After more than 90 days of testimony, the court awarded the estate to the Barrow Neurological Institute of Phoenix (BNI). BNI conceded that it had no intent of researchng whether there was a soul. Instead, it intended to use the funds for research into the central nervous system. The court concluded that research into the existence of a soul could "best be done in the combined fields of medical science, psychiatry and psychology," and awarded the estate to BNI.

Two individuals and two organizations appealed. The individuals were Dr. Joseph Still and Russell Dilts, and each asserted that they were competent to seek scientific proof of a soul that left the human body at death. The organizations were the American Society for Psychical Research (ASPR) and the Psychical Research Foundation (PRF). The appellants argued that Kidd's intent should be honored, and that his intent as expressed by his holographic will clearly demonstrated his wish that research be conducted into the existence of a soul. It was, they contended, inappropriate to award the estate to BNI, because BNI had no intention of conducting such research.

The Arizona Supreme Court agreed, holding that Kidd's will should be honored for its declared purpose. On remand, the Superior Court awarded the estate to ASPR in 1972, which in turn shared some of the proceeds with PRF. As best as may be ascertained, neither subsequently produced the requested proof. Mr. Kidd's remains were never found.

but also for the notion of ordered liberty and a system where fundamental fairness is extended to adults and minors alike.

In 2002, the U. S. Supreme Court held that the Sixth Amendment right to a jury trial required that a jury, not the judge, find the aggravating factors necessary to render the death penalty.[12] *Ring v. Arizona* was largely seen as a watershed case that overruled precedent and established new requirements in the way capital sentences were handled in the United States. It was no longer the job of the judge to decide whether the death penalty should be imposed; it was now rightly in the hands of the jury.

The facts of *Ring* read much like a John Grisham novel. In 1994, an armed Wells Fargo van arrived at the Arrowhead Mall in Glendale, Ariz., to collect check and money deposits from retail stores. The passenger in the van proceeded into mall, while the driver remained in the vehicle. When the passenger returned to the van, the driver had vanished. Later that day, the Sheriff's department discovered the van with the engine running and the driver shot dead in the back seat. The robbers made off with more than $500,000 in cash and $250,000 in checks. What followed was a flurry of misleading news stories and television reenactments.

Police surveillance (aided or not by numerous informants) eventually led to the execution of a search warrant of Timothy Ring's house. Police found a duffel bag full of money. Ring was charged with murder and robbery. During his trial, the jury convicted Ring of first-degree murder on a felony-murder theory, but they did not agree as to whether it was premeditated. Pursuant to Arizona law, Ring could not be put to death without a judge finding the presence of at least one "aggravating factor" and no "mitigating factors." The trial judge found two aggravating factors and sentenced Ring to death. Ring appealed the decision and eventually petitioned the U.S. Supreme Court for a writ of certiorari. On appeal, Ring argued that the "Arizona's capital sentencing scheme violates the Sixth and Fourteenth Amendments to the U.S. Constitution because it entrusts to a judge the finding of a fact raising the defendant's maximum penalty."

In a 7–2 decision the Court overturned Ring's conviction and remanded the case for further proceedings. The Court held that "because Arizona's enumerated aggravating factors operate as the functional equivalent of an element of a greater offense, the Sixth Amendment requires that they be found by a jury."

Following the Court's ruling in *Ring*, several states scrambled to enact new legislation. *Ring* affected capital sentencing legislation in at least five states, and the fate of at least 150 death row inmates was seriously called into question. To date the impact of *Ring* in capital jurisprudence has not fully manifested itself.

Phares v. Nutter[13] arose out a set of facts that may properly be described as Kafkaesque. Jack Nutter and his partner, Wally Duepner, had entered into a contract to purchase a gravel pit in Texas from Gil Phares, but they could not consummate the transaction because Mr. Phares was unable to deliver clear title. During a meeting at a hotel near the Houston airport, Nutter was served with a complaint filed by Phares in a Texas court. Phares, who was present, assured Nutter that the lawsuit was "technical" and introduced him to an attorney named Selman, who agreed to defend Nutter and Duepner. Selman, however, without Nutter and Duepner's knowledge, turned the case over to another lawyer, Harvill. For unknown reasons, Harvill failed to respond to requests for admission, which were deemed admitted, and judgment was entered against his "clients" for the full price of the gravel pit, $1.4 million.

Phares and Duepner thus found themselves subject to a massive judgment, for a debt they did not owe, entered without their having an opportunity to defend, in a "technical" lawsuit, as a result of the negligent or possibly intentional misconduct of an attorney they did not know and had not authorized to appear on their behalf.

The issue raised on appeal in Arizona was the interplay among (1) the Full Faith & Credit Clause of the United States Constitution, Art. IV, § 1; (2) Rule 60(c), Arizona Rules of Civil Procedure, which authorizes the court to grant relief from a final judgment on enumerated grounds, including fraud and excusable neglect; and (3) the provision of the Revised Uniform Enforcement of Foreign Judgments Act ("RUEFJA"), A.R.S. §§ 12-1701, *et seq.*, stating that a judgment registered under that Act "has the same effect and is subject to the same procedures, defenses and proceedings for reopening, vacating, or staying as a judgment of a superior court of this state." A.R.S. § 12-1702. Complicating matters was the apparent conflict between *Springfield Credit Union v. Johnson*,[14] which permitted a judgment debtor to use Rule 60(c) to collaterally attack a judgment registered under the RUEFJA, and a Court of Appeals case, *Jones v. Roach*,[15] which stated that the statute "does not authorize this state to entertain a Rule 60(c) motion to avoid the enforcement of a 'foreign judgment.'"

While recognizing the breadth of the Court's language in *Jones v. Roach,* the Supreme Court distinguished that case as not involving any allegation of fraud or lack of jurisdiction by the rendering court. It went on to hold (1) that the Full Faith & Credit Clause permits a court to deny enforcement of a sister state judgment for lack of jurisdiction by the rendering court or where "the judgment was the result of extrinsic fraud, or … invalid or unenforceable," and (2) that Rule 60(c) is the proper procedural mechanism to obtain such relief from a judgment registered under the RUEFJA. The Court accordingly remanded the case with directions that Nutter and Duepner be permitted to challenge the Texas judgment under Rule 60(c). On remand, the judgment was set aside.

9 Civil Procedure, Attorneys' Fees
(Schweiger v. China Doll Restaurant, Inc.)

For most of us practicing in the area of commercial litigation in Arizona, the phrase "*China Doll* affidavit" is part of the vernacular. We use it as a sort of shorthand in the final steps to concluding our cases, obtaining an award of our attorneys' fees and entering judgment. We know that a reference to "January, 2011 – $5,922.00," or even "8 hours – $2,200.00," without further explanation, is insufficient and fails to meet the "*China Doll* standard."[16]

Although courts had long provided generalized guidance, none ever instructed what exactly was required or what an application for attorneys' fees should look like—a clear standard by which the trial courts, attorneys and their opposing counsel could measure sufficiency of a fee request.

In 1983, Court of Appeals Judge Bruce Meyerson, joined by Judges Ray Haire and William Eubank, set forth a specific set of guidelines for the filing of fee applications. Acknowledging that the court would normally dispose of such matters by an unpublished memorandum, Judge Meyerson said that the growing number of fee applications, resulting from the steady shift from the historic American rule (each party should bear its own fees), to the English rule (prevailing party is entitled to recover fees), made a published opinion both necessary and appropriate. Thus was created the now-famous "*China Doll* Affidavit" (albeit, mostly by declaration these days).

After trial, judgment was entered in favor of Schweiger, finding that China Doll had breached an oral agreement to cancel the lease of a property; Schweiger filed a statement of costs and attorneys' fees requesting $235 in costs and $10,331.75 in attorneys' fees. China Doll objected that the affidavit was insufficient because it failed to disclose work performed, failed to itemize the services provided, and because the amount of fees was unreasonable. Schweiger filed a supplemental statement in which he itemized the attorneys' fees by month with no description of work performed or the applicable billing rate.

The court agreed and seized the case as an opportunity to offer clarifying guidance. The court instructed that a supporting affidavit must indicate the agreed-upon hourly billing rate between the lawyer and the client. Next, the affidavit of counsel should indicate the type of legal services provided, the date the service was provided, the attorney providing the service, and the time spent in providing the service. It is insufficient, the court held, to write "broad summaries of the work done and time incurred." Instead, "any attorney who hopes to obtain an allowance from the court should keep accurate and current records of work done and time spent." Practitioners were duly advised to prepare their summaries based on contemporaneous time records, showing the work performed by each attorney for whom fees were sought. And, Judge Meyerson counseled, if there was an expectation that the fee application would be opposed on the grounds that the hours claimed were excessive, "counsel may find that it is useful to submit actual time records to support the fee request."

> The facts of *Ring v. Arizona* read much like a John Grisham novel.

This has become the standard, the "China Doll Affidavit" for which we all are familiar and for which most of us maintain standard office forms; indeed, when occasionally faced with a substandard declaration, lacking in the essentials, we are quick to object, on the grounds that the offending counsel has "failed to comply with the *China Doll* standard."

China Doll itself arose of a request for attorneys' fees under a contractual provision in the parties' lease. In 2008, the Court of Appeals made clear that *China Doll* deals with fee awards in contract disputes and not sanctions for disclosure violations.[17] However, in dozens of reported and non-reported Court of Appeals cases, there are references to "China Doll Affidavits" in everything from family court matters to probate to property redemption cases.

10 Constitutional Law, First Amendment, Privacy
(Godbehere)

When Sheriff Godbehere and some of his staff sued the *Arizona Republic* and the *Phoenix Gazette*, they probably never realized that they would make significant changes in the landscape of Arizona privacy law—and at the same time lose their case.[18]

The law of privacy had been in a state of flux when the Arizona Supreme Court accepted review of the *Godbehere* case in 1989. It was only in 1960 that Dean Prosser had published his landmark article suggesting four prongs of privacy law revolving around a person's right to be left alone: (1) intrusion on the plaintiff's seclusion or private affairs; (2) public disclosure of embarrassing private facts; (3) appropriation of the plaintiff's name or likeness; and (4) publicity placing the plaintiff in a false light in the public eye. In 1977, the framers of the *Restatement* adopted Prosser's classifications.[19]

Arizona courts, however, had not been following the *Restatement* or Prosser's characterization as to false light claims. Instead, a series of cases had held that a false light claim required the same showing of "outrageousness" that was part of intentional infliction cases.[20]

But the Arizona Supreme Court saw it differently. The prior cases and the Court of Appeal's position were rejected, and the *Restatement's* formulation was adopted. Instead of requiring a plaintiff to prove that the publication was "extreme and outrageous," a plaintiff thereafter needed to prove that a reasonable person would find the publication or its innuendo "highly offensive." This relaxed standard has made false light privacy claims more viable and available.[21]

Ironically, Sheriff Godbehere and his staff lost. After making significant inroads for privacy plaintiffs, he was still barred from pursing his personal claims because "a plaintiff cannot sue for false light invasion of privacy if he or she is a public official and the publication relates to performance of his or her public life or duties." The *Godbehere* case also stands for the now-clear proposition that public officials have no privacy rights in their public lives.

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11 ***Baird v. Arizona***, 401 U.S. 1 (1971) (cannot ask the question on the Bar Admission form: "Are you member of the Communist Party"?).

12 ***Damron v. Sledge***, 460 P.2d 997 (Ariz. 1969) and *United Servs. Auto Assoc. v. Morris*, 154 Ariz. 113, 741 P.2d 246 (1987) (*Damron/Morris* agreements) (for an excellent review of *Damron/Morris* agreements, the reader is referred to the December 2004 issue of *Arizona Attorney*, online at http://www.azbar.org/AZAttorney).

13 ***Williams v. Lee***, 358 U.S. 217 (1959) (jurisdiction for civil actions arising on tribal lands).

14 ***Taylor v. State Farm Mut. Auto. Ins. Co.***, 175 Ariz. 148, 854 P.2d 1134 (1993) (rejecting traditional rule that a facial ambiguity must exist in order to justify the consideration of parol evidence).

15 ***Salladay v. Old Dominion Copper Mining & Smelting Co.***, 12 Ariz. 124, 100 P. 441, 442 (1909) (attractive nuisance and immunity in context of irrigation and water sources).

16 ***Ontiveros v. Borak***, 136 Ariz. 500, 504, 667 P.2d 200, 204 (1983) (abolishing common law doctrine of tavern owner immunity and establishing general duty of reasonable care).

17 ***McLanahan v. Arizona State Tax Commission***, 411 U.S. 164 (1973) (state income tax cannot be applied to income earned on Indian reservation).

18 ***White Mountain Apache v. Bracher***, 488 U.S. 136 (1980) (state commercial taxes cannot be imposed on business activities carried out wholly on Indian reservation).

19 ***Harrison v. Laveen***, 67 Ariz. 337, 196 P.2d 456 (1948) (right of tribal members to vote in state elections).

20 ***Edwards v. Arizona***, 451 U.S. 477 (1981) (Fifth and Sixth Amendment, extending *Miranda v. Arizona*, and establishing a bright-line rule that once custodial suspects invoke right to counsel under *Miranda*, they cannot be questioned again "until counsel has been made available … unless the suspect himself initiates further communication, exchanges or conversation with the police.").

21 ***Markowitz v. Arizona Parks Board***, 146 Ariz. 352, 356, 706 P.2d 364, 368 (1985) (addressing negligence standards and invitees to recreational areas).

22 ***Arizona v. Hicks***, 480 U.S. 321 (1987) (Fourth Amendment, police must have probable cause to seize items in plain view. No seizure occurred under the Fourth Amendment when police recorded serial numbers of stereo equipment observed in plain view. However, action of moving the equipment to locate the serial numbers constituted a search that had to be supported by probable cause).

23 ***Mincey v. Arizona***, 437 U.S. 385 (1978) (Fourth Amendment, there is no "murder scene" exception to the requirement that police obtain a warrant before searching someone's home).

24 ***Arizona v. Evans***, 514 U.S. 1 (1995) (Fourth Amendment, "good faith" exception to exclusionary rule recognized for clerical errors of court employees).

25 ***Arizona v. Youngblood***, 488 U.S. 51 (1988) (Fifth and Fourteenth Amendments, due process, police failure to preserve potential usefully evidence is not a denial of due process absent a showing of bad faith on the part of the police).

26 ***Thornton v. Carlson***, 111 Ariz. 490, 533 P.2d 657 (Ariz. 1975) (changed law on provisional remedies).

27 ***Burns v. Davis***, 196 Ariz. 155, 993 P.2d 1119 (App. 1999) (privilege in defamation cases).

28 ***Ball v. James***, 451 U.S. 351 (1981) (voting rights in special district elections).

29 ***Safford Unified School District v. Redding***, ___ U.S. ___, 129 S. Ct. 2633 (2009) (Fourth Amendment, searches in the context of a school district policy).

30 ***Arizona v. Gant***, 556 U.S. ___, 129 S. Ct. 1710 (2009) (Fourth Amendment, extension of *New York v. Belton* rule, officer may search the passenger compartment of car).

31 ***Arizona v. Johnson***, ___ U.S. ___, 129 S. Ct. 781 (2009) (Fourth Amendment, *Terry* Stop, officer may conduct a pat-down search of a passenger in a car stopped for a minor traffic violation).

32 ***Zobrest v. Catalina Foothills School Dist.***, 509 U.S. 1 (1993) (requiring state to provide sign-language interpreter for deaf student who transferred from private to parochial school does not violate the Establishment Clause).

33 ***Lewis v. Casey***, 518 U.S. 343 (1996) (Prisoners do not have "an abstract, freestanding right to a law library," and "must go one step further and demonstrate that the alleged shortcomings of the law library … hindered his efforts to pursue a legal claim.").

34 ***Raytheon Co. v. Hernandez***, 540 U.S. 44 (2003) (whether ADA confers preferential rehire rights on disabled employees terminated for violating workplace conduct rules).

35 ***Boswell v. Phoenix Newspapers***, 152 Ariz. 9, 730 P.2d 186 (1986) (holding that Arizona's retraction statute was unconstitutional).

36 ***United States v. Arizona*****,** 295 U.S. 174 (1935) (United States denied injunctive relief to enjoin interference with Parker Dam project).

37 ***Rackmaster Systems, Inc. v. Maderia*****,** 219 Ariz. 60, 193 P.3d 314 (Ariz. App. 2008) (foreign judgment creditor cannot garnish community bank account based on foreign judgment entered against one spouse arising from a guaranty).

38 ***Zork Hardware Co. v. Gottlieb*****,** 170 Ariz. 5, 821 P.2d 272 (Ariz. App. 1991) (confirming that one spouse cannot unilaterally convert a separate obligation into a community debt).

39 ***Oyakawa v. Gillett*****,** 175 Ariz. 226, 854 P.2d 1212 (Ariz. App. 1993) (foreign judgment entitled to full faith and credit against community property).

40 ***National Union Fire Ins. Co. v. Greene*****,** 195 Ariz. 105 985 P.2d 590 (Ariz. App. 1999) (foreign judgment based on breach of promissory note enforced against community property because underlying debt would have been a community debt if incurred in Arizona).

41 ***Alberta Securities Commission v. Ryckman*****,** 200 Ariz. 540, 30 P.3d 121 (App. 2001) (foreign judgment based on securities violation enforced against community property because underlying debt would have been a community debt if incurred in Arizona).

42 ***Estate of Kidd*****,** 106 Ariz. 554, 479 P.2d 697 (1971) (attempts to prove the existence of the human soul to recover under a holographic will).

43 ***Mid Kansas Federal Sav. and Loan Ass'n of Wichita v. Dynamic Development Corp.*****,** 167 Ariz. 122, 804 P.2d 1310 (Ariz. 1991) (addressing Arizona anti-deficiency statutes).

44 ***Spur Industries, Inc. v. Dell Webb Development Co.*****,** 108 Ariz. 178, 494 P.2d 700 (1972) (cattle feed lot enjoined from operating near retirement housing development, but developer must indemnify feed lot owner).

45 ***Bayham v. Funk*****,** 3 Ariz. App. 220, 413 P.2d 279 (1966) (federal decisions addressing comparable civil rules are persuasive, but not binding on Arizona courts).

46 ***Shotwell v. Donahoe*****,** 207 Ariz. 287, 85 P.3d 1045 (2004) (standards for admissibility of EEOC Determinations in subsequent actions).

47 ***Matter of Estate of Ryan*****,** 187 Ariz. 311, 928 P.2d 735 (App. 1996) (adopted child retained inheritance rights from biological parents).

48 ***Sobol v. Marsh*****,** 212 Ariz. 301, 130 P.3d 1000 (Ariz. App. 2006) (recognizing absolute privilege for complaints to board governing legal document preparers).

49 ***Cronin v. Sheldon*****,** 195 Ariz. 531, 991 P.2d 231 (1999) (upholding constitutionality of Arizona Employment Protection Act).

50 ***Cullen v. Auto-Owners Ins. Co.*****,** 218 Ariz. 417, 189 P.3d 344 (Ariz. 2008) (rejecting federal *Twombly* pleading standard).

endnotes

1. *Arizona v. California*, 283 U.S. 423 (1931) (how much water is Arizona entitled to under the Colorado River Compact of 1922?), 292 U.S. 341 (1934) (whether Colorado River Compact is constitutional), 373 U.S. 546 (1963) (how much water is each state entitled to under the Colorado River Compact?), 376 U.S. 340 (1964) (decree setting amount of water), 383 U.S. 268 (1968) (decree judgment), 439 U.S. 419 (1979) (decree adjusting amount of water), 460 U.S. 605 (1983) (decree related to water rights for Indian Tribes whose rights had never been adjudicated), 466 U.S. 144 (1984) (decree adjustment), 531 U.S. 1 (2000) (adjustment).
2. *Miranda v. Arizona*, 384 U.S. 436.
3. The reader may find Judge Barry G. Silverman's personal account of Miranda interesting. *See Remembering Miranda*, PHOENIX MAG. (June 2006).
4. 90 Ariz. 361, 362, 368 P.2d 317, 318 (1962).
5. A Westlaw KeyCite search shows that *Orme School* is examined, discussed, cited or mentioned more than 900 times in published opinions, unpublished memorandum decisions, trial court orders, minute entries and secondary sources. No negative history of *Orme School* appears in the KeyCite.
6. *Bates & O'Steen v. State Bar of Arizona*, 433 U.S. 450 (1977).
7. *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, 140 Ariz. 383, 682 P.2d 388 (1984).
8. 175 Ariz. 148, 854 P.2d 1134 (1993).
9. 175 Ariz. at 154, 854 P.2d at 1140, citing RESTATEMENT (SECOND) OF CONTRACTS § 215 cmt. b.
10. *See, e.g., State v. Mabery Ranch, Co., L.L.C.*, 216 Ariz. 233, 241, 165 P.3d 211, 219 (Ariz. App. 2007). *But see Long v. City of Glendale*, 208 Ariz. 319, 329, 93 P.3d 519, 529 (Ariz. App. 2004):

    Even under Arizona's more permissive approach to the parol evidence rule, a proponent of parol evidence cannot completely escape the confines of the actual writing. In appropriate circumstances, the court can accept as true the allegations in the complaint and still determine that the written language is not reasonably susceptible of the meaning asserted.
11. *In re Gault*, 387 U.S. 1 (1967).
12. *Ring v. Arizona*, 536 U.S. 584, 609 (2002).
13. 125 Ariz. 291, 609 P.2d 561 (1980).
14. 123 Ariz. 319, 599 P.2d 772 (1979).
15. 118 Ariz. 146, 150, 575 P.2d 345, 349 (App.1978).
16. *Schweiger v. China Doll Restaurant, Inc.*, 138 Ariz. 183, 673 P.2d 927 (App.1983).
17. *Security Title Agency, Inc. v. Pope,* 219 Ariz. 480, 506, 200 P.3d 977, 1003 (App. 2008).
18. *Godbehere v. Phoenix Newspapers*, 162 Ariz. 335, 783 P.2d 781 (1989).
19. *See* RESTATEMENT OF TORTS (SECOND) § 652A (1977).
20. *See Cluff v. Farmer's Insurance Exchange,* 10 Ariz. App. 560, 563, 460 P.2d 666, 669 (1969); *Duhammel v. Star*, 133 Ariz. 558, 561-62, 653 P.2d 15, 18-19 (App.1982).
21. *See Dube v. Likins*, 216 Ariz. 406, 167 P.3d 93 (Ariz. App. 2007).