

The Arizona Association of Defense Counsel

Common Defense

Spring 2020

A Magazine for Arizona Defense Attorneys

2019 AADC Judicial Receptions

Tucson and Phoenix
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Recipients of the DRI Mary Massaron Award

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2020 DRI Leadership Conference

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President's Message



**Alison R. Christian, Esq.
Christian, Dichter & Sluga**

Friends,

By the time this newsletter reaches you, 2019 will be over and 2020 will be well underway! What a year it has been! The AADC's mainstay, Executive Director Debbie Hanson-Tripp, retired on July 1st after nineteen years serving our organization. She was called to join her husband in retirement and sail the Pacific as they both set their sights on life's next adventure. This change brought a new opportunity to us as well...

Doreen Myles joined us as the AADC's Executive Director last fall! Over the last several years, Doreen has assisted with planning and execution of legal conferences and networking events for a national organization of leading defense counsel and served as executive director for a local chapter of trial attorneys. With her extensive experience supporting legal professionals, Doreen brings a unique perspective in helping legal organizations fulfill their missions and serve their membership. Please introduce yourself to Doreen at our upcoming events and welcome her to the team.

A special thank you to everyone who attended or supported our Barry Fish Memorial Fundraiser at Top Golf in September—we were able to raise nearly \$12,000 for the Phoenix ALS Chapter! This new format allowed us to more than double the amounts we raise for the charity each year. We also recently wrapped our spring charity event – the YLD Softball Tournament – where we were able to “Play Ball for Kids” and raise over \$9,000 for Southwest Human Development! Thanks again to all the firms who supported this amazing cause.

Next on the horizon is our 2020 Annual Meeting at the historic Yavapai County Courthouse in Prescott on Friday May 22nd. We hope you will bring a friend and take advantage of the chance to escape the heat (and to get three hours of ethics credit!).

While the AADC was on summer recess last year, I sat down for coffee with each of our Board members with two goals in mind. My first goal was to get to know our team on a more personal level and understand their individual goals, strengths, and recommendations for our organization. You should be very proud of your Board, because we have an incredible group! We have community leaders, cancer survivors, talented singers, marathoners, and a whole bunch of parents working hard to provide for their families. Our Board alone proves that the AADC is more than insurance defense attorneys: we have a product liability lawyer who tries cases across the country, one of the top-rated sports law attorneys in Arizona, and a Rising Star employment litigator.

In fact, last year we created an Employment Substantive Law Committee to meet the needs of Arizona's growing employment practitioners. We also have our first in-house member on the Executive Committee and look forward to expanding our connection with Arizona's corporate counsel this year. Last but not least, we created Women In the Law Board Liaison position held by Micalann Pepe to connect the AADC's female members with members of DRI's WITL, the FDCC Professional Women's Forum, and the AWLA.

My second goal was to share with the Board my personal mission during my presidency. I have been lucky enough to serve the AADC through the Board and the YLD for the last ten years. Within the last several years, we have lost two of our Board members to substance-related suicide. Their memories sit with me often. I am sure their stories would echo with others, and their deaths are indicative of a much broader problem. It is not a problem I can ignore. It is much more important to me that we take action to avoid the loss of another life than it is to worry about losing the next case.

It is also clear that the resources available to struggling attorneys in Arizona are inadequate. The Member Assistance Program is currently relegated to a single individual, who is not a clinician and not available 24/7, and member volunteers, who are also not capable of providing evaluations or treatment. Although it is confidential, it is not anonymous, and callers are required to provide their bar number.

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All views, opinions, and conclusions expressed in articles of this magazine are those of the authors and are not necessarily that of the Arizona Association of Defense Counsel, and/or the Board of Directors.

Correspondence and articles are welcome and should be sent to the Editor. Email articles for submission to Amy Wilkens at awilkens@lorberlaw.com. The right is reserved to select materials to be published. Material accepted for publication becomes property of the Arizona Association of Defense Counsel.

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President's Message (continued)

After raising my concerns to State Bar CEO Joel England, a Member Assistance Program Task Force was created in October. I currently serve on the Task Force with nine other volunteers. The Charter states "The Member Assistance Program (MAP) Task Force is charged with formulating a recommendation

for the revitalization of the Bar's Member Assistance Program with the intent to expand the services offered to lawyers and judges struggling with substance use disorder, addiction, mental health challenges, and stress. The recommendation must be for a model that is scalable, statewide and financially sustainable, and utilize outsourced, or affiliations with, treatment providers." I connected with the Tucson Defense Bar President, Danielle Constant, and the Arizona Association for

Justice President, Scott Palumbo, and they are committed to joining our efforts to make a difference for lawyers in Arizona.

These are some of the changes we have underway at the AADC, and I would value any input you want to share! As we look toward the spring, I encourage you to connect with our members and our community at upcoming events. Share successes, share joys, share struggles, share frustrations. And perhaps consider sharing a non-alcoholic beverage with someone who may need a friend.

Truly,
Alison R. Christian
2019-2020
AADC President



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Legislative Update HB 2644 and SB 1449

By AADC Legislative Committee

With the start of the second regular session of Arizona's 54th legislature in January, the AADC's legislative committee has been issuing its periodic legislative updates to members. The AADC issues these updates through its email list serv and may also post them on its website or LinkedIn page. As of early February, the AADC is tracking more than 30 bills of interest to the civil defense bar.

HB 2644 and SB 1449 are of particular interest. HB 2644 addresses the American Law

Institute's Restatement of the Law, Liability Insurance, stating that the ALI's new restatement is not an expression of the law or public policy of Arizona. The AADC anticipates that the Defense Research Institute, the national analog to the AADC, will support this bill. SB 1449 (as well as its House counterpart HB 2380) seeks to amend A.R.S. § 12-684 in a way that would prohibit the assertion of a product liability action against a seller that did not manufacture the product and that was not independently negligent, the so-called "innocent

seller." Please see the AADC's legislative updates for further details on these bills.

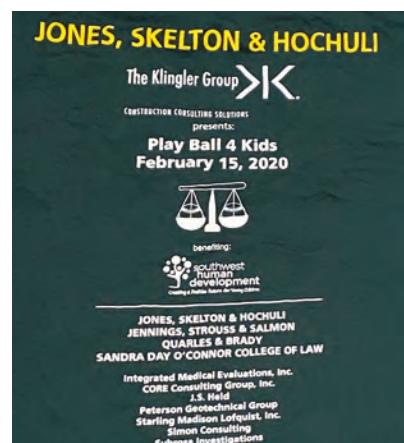
If you have input on pending legislation, please contact members of the legislative committee (Ben Branson, Shanks Leonhardt, Max Mahoney, Alexix Terriquez) or any member of the AADC's board of directors. You can also post comments on the AADC's LinkedIn and Facebook pages. We want to hear from you.

YLD 2020 Charity Softball Tournament *Benefitting Southwest Human Development*

By Nicolas Martino, Esq.
Jones, Skelton & Hochuli

The Arizona Association of Defense Counsel's Young Lawyers Division hosted its annual charity softball tournament on Saturday, February 15, 2020 at Tempe Sports Complex. Four teams participated in the tournament—Quarles & Brady; Jennings, Strauss & Salmon; Sandra Day O'Connor College of Law; and Jones, Skelton & Hochuli—with the law firm Quarles & Brady taking home the championship.

Through team entry fees, sponsorships, and raffle ticket sales, the tournament raised nearly \$9,000 for Southwest Human Development, which supports early childhood development in Arizona through various local programs. The money raised directly supports these programs and the families they serve.



2020 AADC CALENDAR OF EVENTS

To register for any of these events go to the AADC website, www.azadc.org.

ADVOCACY LUNCHEONS

Advocacy luncheons are held the second Wednesday of the month at:

Gust Rosenfeld,
1 E. Washington Street, 15th floor
From 12pm-1pm

The 1 hour CLE programs are free to members and include lunch.

March 11, 2020

April 8, 2020

May 13, 2020

September 9, 2020

October 14, 2020

November 11, 2020

December 9, 2020

AADC Annual Meeting

May 22, 2020
Prescott, Arizona
Details TBA

Past Presidents Fall Kickoff

September 10, 2020
Province Urban Kitchen
333 N Central Avenue
Phoenix, AZ

Barry Fish ALS Charity Golf Tournament

October 8, 2020
Top Golf
9500 E. Talking Stick Way,
Scottsdale, AZ 85256

Phoenix Judicial Reception

December, 2020
Details TBA

Tucson Judicial Reception

December, 2020
Arizona Inn
2200 E. Elm Street
Tucson, AZ



Taxpayer Cybersecurity

By Alexix Terríquez, Esq. and Patrick Fowler, Esq.

Snell & Wilmer



Alexix Terríquez, Esq.



Patrick Fowler, Esq.

In March 2015, the Internal Revenue Service (“IRS”) convened an unprecedented coalition of state tax agencies and private-sector tax industry officials to fight back against emerging criminal syndicates exploiting sensitive taxpayer information by creating the Security Summit.¹ The Security Summit members are organized into six work groups addressing different areas of need with the goal of putting in place safeguards to protect taxpayer information, help battle identity theft, prevent tax fraud, and counter evolving criminal tactics.

The Security Summit encourages tax professionals to assess their security policies and review critical security steps to ensure adequate measures are in place to fully protect sensitive taxpayer information from cybercriminals. To do so, the Security Summit announced that it was creating

a “Taxes-Security-Together” Checklist as a starting point for analyzing office data security addresses deploying basic safeguards, creating a data security plan, educating on phishing scams, and creating a theft recovery plan.²

Although the recommendations of the Security Summit are generally geared towards tax professionals, the recommendations include basic system protections and information that anyone handling sensitive data should consider employing in their Information Security arsenal.

Step 1: Protect Your Systems!

The First Step of the “Taxes-Security-Together” Checklist is to protect systems with the following “Security Six”³ protections, which are a starting point for providing basic security protection for computer systems handling sensitive taxpayer data.

i. Anti-virus software.

It is important to have the latest updates installed on computers

as anti-virus vendors find new issues and update protections against malicious programs (malware) daily. Keeping security software set to automatically receive the latest updates will help ensure the software is always current and able to provide the best protection. Preferably, anti-virus software should perform automatic scans periodically, but if there are no automatic scans performed then manual scans of files and media received from outside sources should be performed before opening them.

ii. Firewalls.

Properly configured firewalls, whether hardware or software based, may be effective at blocking some cyber-attacks as they provide protection against outside attackers by shielding computers or networks from malicious or unnecessary web traffic. Firewalls primarily help protect against malicious traffic, not malware, and may not protect the device if the user accidentally installs malware.

iii. Two-factor (multi-factor) authentication.

The use of multi-factor, particularly two-factor, authentication is on the rise. Two-factor authentication requires that a user enter credentials such as a username and password plus another step, such as entering a security code sent via text to a mobile phone. This adds an extra layer of protection beyond the traditional username and password. If a valid username and password is stolen, then the second step to

¹ https://www.irs.gov/pub/irs-utl/about_the_security_summit.pdf

² <https://www.irs.gov/newsroom/tax-security-2-O-a-taxes-security-together-checklist-step-1>

³ *Id.*

New Site



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Taxpayer Cybersecurity (continued)

authenticate access should thwart unauthorized access despite the unauthorized user having a valid username and password.

iv. Backup software/service.

Critical files on computers should routinely be backed up to external sources, whether cloud-based or on an external hard drive and encrypted.

v. Drive encryption.

Drive encryption, or disk encryption, transforms data on a computer into unreadable files for an unauthorized person accessing the computer to obtain data. This can be useful for sensitive data that is necessarily maintained on computers.

vi. Virtual Private Network (VPN).

Useful to protect data when connecting to unknown networks or connecting to networks remotely, such as when working at home. A VPN provides a secure, encrypted tunnel to transmit data between a remote user via the Internet and a company's network. As remote work increases across various industries, having a VPN in place is becoming more and more important.

These "Security Six" protections, however, cannot protect data if computer users fall for email phishing scams and divulge sensitive data, such as usernames and passwords. Users, not the software, is the first-line of defense in protecting sensitive data.

The Security Summit also encourages a review of any professional insurance policies to ensure businesses are protected should a data theft occur as having the proper insurance coverage is

a common recommendation from those who have experienced data thefts.

Step 2: Create A Data Security Plan

Some tax professionals may not realize they are legally required to have a data security plan. Federal law requires professional tax preparers to create a written information security plan to protect clients' data.

The Financial Services Modernization Act of 1999, also known as the Gramm-Leach-Bliley (GLB) Act, gives the Federal Trade Commission ("FTC") authority to set information safeguard regulations for various entities, including professional tax return preparers.⁴ According to the FTC Safeguards Rule⁵, tax return preparers must create and enact security plans to protect client data.

The FTC-required information security plan must be appropriate to the company's size and complexity, the nature and scope of its activities and the sensitivity of the customer information it handles. According to the FTC, each company, as part of its plan, must:

- designate one or more employees to coordinate its information security program;
- identify and assess the risks to customer information in each relevant area of the company's operation and

4 16 CFR § 314.1 et al., 2019.

5 <https://www.ftc.gov/tips-advice/business-center/guidance/financial-institutions-customer-information-complying>

evaluate the effectiveness of the current safeguards for controlling these risks;

- design and implement a safeguards program and regularly monitor and test it;
- select service providers that can maintain appropriate safeguards, make sure the contract requires them to maintain safeguards and oversee their handling of customer information; and
- evaluate and adjust the program in light of relevant circumstances, including changes in the firm's business or operations, or the results of security testing and monitoring.⁶

Failure to have a data security plan may result in an FTC investigation. The IRS also may treat a violation of the FTC Safeguards Rule as a violation of IRS Revenue Procedure 2007-40, which sets the rules for tax professionals participating as an Authorized IRS e-file Provider.

IRS Publication 4557, Safeguarding Taxpayer data, includes information on how to comply with the FTC Safeguards Rule, including a checklist of items for a prospective data security plan.

Step 3: Avoid E-mail Phishing Scams

Cybercriminals use phishing emails and malware to gain

6 In March 2019 the FTC published some proposed amendments to the Safeguard Rule. Consequently, changes in the Safeguards Rule and its effect on the tax preparation community may be forthcoming.

Taxpayer Cybersecurity (continued)

control of computer systems or to steal usernames and passwords. According to a recent report from Verizon, as much as **90% of all external data thefts start via email**⁷, particularly phishing emails, when the method of malware installation is known. A user will click on a link that takes them to a fake site or downloads an attachment embedded with malware that downloads onto the computer.

Spear phishing emails pose as a trusted source and “bait” the recipient into opening an embedded link or an attachment. The email appears to come from a trusted source or from a known name within the organization that demands some sort of urgency and immediate action. The name of the sender may appear as if it is being sent internally by a known employee, but the email address itself is from an external source. The perceived trusted source could also be a thief posing as a prospective client sending unsolicited emails.

After an exchange of emails, the spear phishing thief will send a

link or attachment that contains malicious software. These links or emails may contain keylogging malware, for example, which secretly infects computers and provides thieves with the ability to see every keystroke. Allowing them to steal passwords or take remote control of computers to steal data. At times the links will send the recipient to a fake site that mirrors a real site to trick the recipient into entering usernames and passwords, which the thieves can then steal.

Another cyber-attack method, which the Federal Bureau of Investigation (“FBI”) has deemed a growing threat to businesses and others, is the use of ransomware. Rather than stealing data, thieves will encrypt data, preventing its access, then demand a ransom in return for a code to unencrypt the data. The FBI warns victims not to pay the ransom because thieves often do not provide the code.

Information Security is only effective when employees are educated and know how to avoid phishing scams. The Security Summit recommends these steps to protect against data theft:

- Use separate personal and business email accounts;

⁷ <https://enterprise.verizon.com/resources/reports/dbir/2019/results-and-analysis/>



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Taxpayer Cybersecurity (continued)

- protect email accounts with strong passwords and two-factor authentication if available.
- Install an anti-phishing tool bar to help identify known phishing sites. Anti-phishing tools may be included in security software products.
- Use security software to help protect systems from malware and scan emails for viruses.
- Never open or download attachments from unknown senders, including potential clients; make contact first by phone, for example.
- Send only password-protected and encrypted documents if files must be shared with clients via email.
- Do not respond to suspicious or unknown emails; if IRS-related, the IRS encourages users to forward to phishing@irs.gov.

Step 4: Recognize Identity Theft

It is critical to react quickly to a possible breach of sensitive taxpayer data. The Security Summit has created a list of

warning signs of possible identity theft:

- Client e-filed returns begin to be rejected by the IRS or state tax agencies because returns with their Social Security Number were already filed;
- Clients who haven't filed tax returns begin to receive taxpayer authentication letters (5071C, 4883C, 5747C) from the IRS to confirm their identity for a submitted tax return.
- Clients who haven't filed tax returns receive refunds;
- Clients receive tax transcripts that they did not request;
- Clients who created an IRS Online Services account receive an IRS notice that their account was accessed or IRS emails stating their account has been disabled. Another variation: Clients unexpectedly receive an IRS notice that an IRS online account was created in their names;
- The number of returns filed with the tax professional's Electronic Filing Identification Number

(EFIN) exceeds the number of clients;

- Tax professionals or clients responding to emails that the firm did not send;
- Network computers running slower than normal;
- Computer cursors moving or changing numbers without touching the keyboard;
- Network computers locking out employees.

People often realize they have become victims of identity theft when their tax return is rejected because the IRS system has already processed a return for that taxpayer. IRS and state tax systems will only accept one unique Social Security Number for each taxpayer.

One method for taxpayer identity theft occurs when a cybercriminal improperly gains access to a tax professional's office computers. When that occurs, the hacker can misuse that access to complete pending tax forms, change electronic deposit information to their own accounts and then e-file the returns – all performed remotely.



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Taxpayer Cybersecurity (continued)

Identity thieves often try to exploit stolen data by using stolen taxpayer data to access the IRS Get Transcript system, despite the IRS two-factor authentication process. This often triggers identification of a breach by the IRS, which disables the account and sends the taxpayer a letter requesting the taxpayer contact the IRS.

Tax preparers can access their e-file applications and select “check EFIN status” to see a count of the application submitted by that tax preparer. The IRS encourages tax preparers to check that count weekly during tax filing season to stay alert for possible identity theft. If the numbers are inflated, practitioners should contact the IRS e-Help Desk.

Once a cyberthief gains access to a computer system, the hacker can harvest the victim's contact list, stealing names and email addresses of colleagues and clients and enabling the crooks to use the organization to expand their spear phishing scam. Finally, there are several tell-tale signs that office computer systems may be under attack or may be under remote control, such as the cursor moving with no one at the keyboard.

Tax professionals who notice any signs of identity theft should contact their state's IRS Stakeholder Liaison immediately. The process for reporting data theft to the IRS is outlined in Data Theft Information for Tax Professionals.

In some states, data thefts must be reported to various authorities and notices sent to the owner of the compromised within a certain number of days

that vary state by state. To help tax professionals find where to report data security incidents at the state level, email the Federation of Tax Administrators at statealert@taxadmin.org and you should contact attorneys well versed in cybersecurity.

Step 5: Create a Data Theft Recovery Plan

The last and final step, is to create a data theft recovery plan, to be used if it has been determined that a data breach has occurred. Tax professionals must understand the risks posed by national and international criminal syndicates and take the appropriate steps to protect sensitive data as well as understand the laws, regulations, and other obligations surrounding information security. You do not want to be caught by a data breach without having a response plan in place — preferably one that your data breach response and recovery team has practiced using table top exercise drills.

Contacting the IRS and law enforcement:

- Report client data theft to local IRS Stakeholder Liaisons, who will notify IRS Criminal Investigation and others within the agency on the tax professional's behalf. Speed is critical. If reported quickly, the IRS can take steps to block fraudulent access to sensitive taxpayer information.
- Federal Bureau of Investigation, local office (if directed).
- Secret Service, local office (if directed).

Contacting states in which the tax professional prepares state returns:

- Any breach of personal information could have an effect on the victim's tax accounts with the state revenue agencies as well as the IRS. To help tax professionals find where to report data security incidents at the state level, contact: StateAlert@taxadmin.org.
- State Attorneys General for each state in which the tax professional prepares returns. Most states require that the attorney general be notified of data breaches, so this notification process may involve multiple offices in some locations. Check local state requirements.

Contacting subject matter experts:

- Security experts can help determine the cause and scope of the breach as well as stop the breach and prevent further breaches from occurring.
- Report a breach to your Insurance Company as soon as reasonably possible and verify if the insurance policy covers data breach mitigation expenses.
- Lawyers with experience assisting clients with data breach response can help navigate the aftermath of data breaches, including mitigating damages, preparing for and possibly avoiding potential litigation claims resulting from data breaches.

Taxpayer Cybersecurity (*continued*)

Contacting clients and other services:

- See the Federal Trade Commission's data breach response guide for businesses. Contact the FTC at idt-brt@ftc.gov for individualized help.
- Certain states require offering credit monitoring and identity theft protection to victims of identity theft. Check local state requirements.
- Notify credit bureaus if there is a compromise.

Your clients may seek their services.

- If a reportable data breach has occurred, notify all affected customers/clients to inform them of the breach — but work with law enforcement on timing. Clients should complete IRS Form 14039, Identity Theft Affidavit, but only if their e-filed return is rejected because of a duplicate Social Security number or they are instructed to do so.
- Tax preparers should use

their local IRS Stakeholder Liaison to report data loss.

Professionals and businesses that deal with sensitive client data should be aware that cybercriminals are constantly creating new scams to trick victims into divulging sensitive information and steal valuable data. Your information security systems and response plans must always be ready; breaches come like cyberthieves in the night. Be vigilant!



The AADC's Annual Meeting will be held at the historic Yavapai County Courthouse in Prescott, AZ on Friday, May 22nd. The Court of Appeals will hear oral argument on an active case followed by a lunch dine-around along Whiskey Row and an afternoon Ethics CLE session. Make a weekend of it in one of Arizona's original frontier towns.

Mark your calendars and stay tuned for details!

2020 DRI Leadership Conference

By Adam Lang, Esq.
Snell & Wilmer



DRI held its annual Leadership Conference in Chicago January 8-10, 2020. AADC President, Alison Christian; State Representative and Past AADC President, Adam Lang; newly elected DRI Regional Director, Scott Freeman; and AADC Executive Director,

Doreen Myles participated in the conference. As always, DRI put on a great conference with networking events, substantive committee meetings, and state and local defense organization roundtables. AADC's President, Alison Christian, presented on "Team Building Strategies." Alison highlighted the need to connect with team members individually to identify their goals, strengths, and suggestions for improvement. She also emphasized the importance of celebrating successes and maintaining motivation.

The highlight of the Leadership Conference was the "DRI Cares"

philanthropic event. Participants at the meeting were divided into more than a dozen teams and tasked with building bikes for local kids in need of transportation. Each team was missing a key part required to completely assemble the bicycle, making it necessary for the teams to work closely, not only with each other, but with other teams to complete the bikes. At the end of the program, 18 bikes were built and ultimately delivered to kids around the city. Not only did DRI and attendees give back to the community, but attendees got to know each other even better by working together.



Reasonable Safety at Live Events: The Duty of Care Regarding Active Shooters

By Steven A. Adelman, Esq.
Adelman Law Group, PLLC



Steven A. Adelman, Esq.

Every year I begin *Risk Management in Venues*, an upper-level seminar I teach in Arizona State University's excellent Sports Law and Business program, by having my students recite the four elements of a tort. With a mix of dim recollection and boredom, they say "duty, breach, causation, damages." *Oh brother, we know this.*

Next, I ask them to state every person's common law duty of care. A moment of hesitation follows. Then a far smaller number of students mumbles something about being reasonable. Regret now palpably mixes with panic. *Uh oh, we should know this.*

Indeed they should. Yet, my students' omission of the critical second half of the duty of care formula - ***under the circumstances*** - is not unusual. In my practice, which has evolved over the years from ordinary litigator to internationally recognized expert regarding safety and security at

live events,¹ the most common error I see is that parties fail to consider what is reasonable under the circumstances. This matters for spectator sports, concerts, corporate activations, and other live events in public places because behavior that would be unthinkable in other contexts may be reasonably foreseeable where people are invited to play. In other words, if reasonable patrons under these circumstances are relatively less attentive to their own safety because they are more focused on enjoying the experience - which is a key distinction between participating in a live event versus watching from one's sofa - then the event organizer who collected their admission has a corresponding duty to mitigate the risks made reasonably foreseeable by the circumstances they've created.

Conceptually, this shouldn't be hard for people with legal training. The linkage between the duty to behave reasonably and the circumstances in which the duty arises goes back at least to 1837.² Everyone reading this article was exposed as a law student to some variation on Restatement

(Second) of Torts § 283 (1965),³ which is still good law here in Arizona.⁴

Nonetheless, in both my teaching and my practice, I spend a great deal of time reminding people that the circumstances of live events have a significant impact on the duty of care of all participants, including venue operators, event promoters, security providers, and even the patrons themselves. Consider the shiny object of our day.

ACTIVE SHOOTERS

Active shooter incidents consume a massively disproportionate amount of attention relative to their number. This is not to minimize their significance - there are far too many gun-related injuries and deaths in the United States, and the fact that this is a uniquely American problem suggests that solutions do exist - but to observe that an armed gunman is rarely considered reasonably foreseeable as a matter of law.⁵ And because

¹ See, *Event Horizon*, NFPA Journal, July/August 2019 ("Steve Adelman, a lawyer and one of the world's leading consultants on safety, security, and risk management for live events...."). It's not boasting if someone else says it, right?

² The "reasonable man" is first mentioned in *Vaughan v. Menlove*, 3 Bing.N.C. 468, 132 Eng.Rep. 490 (1837). See Restatement (Second) of Torts § 283 (1965), Reporter's Notes.

³ "Unless the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances."

⁴ E.g., *Markowitz v. Ariz. Parks Bd.*, 146 Ariz. 352, 357, 706 P.2d 364, 369 (1985) ("What is reasonable on the one hand or negligent on the other will depend on the circumstances").

⁵ A long line of cases throughout the United States holds that there is no "general duty" of venue or event operators to anticipate third-party violence, although specific circumstances can make violent acts reasonably foreseeable. See, e.g., *Casey v. McDonald's Corp.*, 880

Reasonable Safety at Live Events (continued)

third-party violence in public accommodations is still relatively rare as a matter of fact,⁶ it can be challenging to convince event professionals to address the risk of something they likely will never experience.

Our government has offered its “Run, Hide, Fight” advice.⁷ Unfortunately for people who work in or attend live events, this program was devised for office buildings.⁸ One need

F.3d 564 (D.C. Cir. 2018), an interesting opinion by then-Judge Brett Kavanaugh; *Martinez v. Woodmar IV Condominium Homeowners Ass'n, Inc.*, 189 Ariz. 206 (1997); Restatement (Second) of Torts § 314A, comment e (1965) (a party “is not required to take precautions against a sudden attack from a third person which he has no reason to anticipate”).

6 E.g., *Mass Attacks in Public Spaces* - 2018, United States Secret Service, National Threat Assessment Center, July 2019 (“Mass Attacks”) (in 2018, there were 27 “mass attacks” in public spaces, defined as incidents in which three or more persons were harmed; of those, all but three were carried out with a firearm); but see, “Inside a Deadly American Summer,” *The New York Times*, Sept. 21, 2019, <https://www.nytimes.com/interactive/2019/09/21/us/summer-mass-shootings.html?smid=nytcore-ios-share> (active shooter incidents more common in 2019 than ever before).

7 See U.S. Department of Homeland Security Active Shooter pocket card, https://www.dhs.gov/sites/default/files/publications/active_shooter_pocket_card_508.pdf.

8 See, e.g., Ready Houston’s video,

hardly remind lawyers that white collar office spaces are generally well-lit with good wayfinding signage, populated by sober people who are familiar with their surroundings because they work there every day, and who may like their co-workers well enough but are not willing to die for them. Compare this with a concert or sporting event. Everything relevant to quickly recognizing gunfire and responding decisively to it is different. Event spaces are generally dark, crowded, loud, and unfamiliar; patrons are likely with at least one person they don’t want to leave behind; they are excited by the event, the environment, or a controlled substance; their attention is focused on the show they came to enjoy.⁹

It gets worse. Witness accounts repeatedly show that people do not quickly or correctly identify the sound as gunfire, determine

RUN. HIDE. FIGHT. Surviving an Active Shooter Event, which has been viewed more than eight million times as of this writing. <https://www.youtube.com/watch?v=5VcSwejU2D0>.

9 See Steven A. Adelman, *Run, Hide, Fight: Why the current version doesn't work for live events, and how to do better*, Protocol, Summer 2016. <http://adelmanlawgroup.com/wp-content/uploads/2016/07/2016-07-12-Protocol-article-re-Run-Hide-Fight.pdf>.

where it is coming from, and run in the opposite direction.¹⁰ After headlines describing a week of shootings at events as diverse as a garlic festival in rural California, a big box retailer in El Paso, and an outdoor entertainment district in Dayton, even *The New York Times* felt compelled to explain to its understandably nervous readers how to distinguish gunfire from fireworks or other innocuous sounds.¹¹ The Department of Homeland Security’s latest national threat assessment describes a profile of active shooters that fits many people walking the halls of an average law firm.¹²

10 See, e.g., *The Unthinkable*, Amanda Ripley (Three Rivers Press, 2008), at 9-10 (one survivor of the World Trade Center attacks described walking in circles in her cubicle until someone screamed at her to evacuate, a typical response to unfamiliar stress called “milling”).

11 E.g., “How to Tell Gunfire from Fireworks,” *The New York Times*, August 6, 2019 (shooters tend to pull the trigger in some kind of rhythm; fireworks tend to explode in a more staccato fashion – I suppose this is useful information if one has time to count beats before getting shot).

12 See “Mass Attacks,” p. 2 (half the perpetrators of mass violence in 2018 were “motivated by a grievance related to a domestic situation, workplace, or other personal issue,” two-thirds “had histories of mental health symptoms,” including depression, and over half had “indications of financial instability” in the preceding five years).

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Reasonable Safety at Live Events (continued)

So no geographic region of the country is immune? No genre of public accommodation is safe? Unlike the shooter in *Ready Houston's* video, the bad guys don't look like Vin Diesel, if they ever did.¹³ Run? Hide? Fight? From whom? Where? Is there any way clients can protect themselves from the scourge of gun violence?

THE SAFETY ACT

Among many federal government responses to the terrorist attacks of September 11, 2001 was enactment of the Support Anti-Terrorism by Fostering Effective Technologies (SAFETY) Act of 2002.¹⁴ The SAFETY Act is intended to enhance public safety by encouraging the operators of public accommodations and their vendors to adopt DHS-approved security "technology," a term with an impressively elastic statutory definition.¹⁵ The big carrot is that if there is a "terrorist" attack against an entity employing SAFETY Act approved "technology," then the Act provides immunity from the resulting personal injury claims.¹⁶

¹³ Stephen Paddock, the shooter in the worst mass shooting in U.S. history, at the 2017 Route 91 Harvest Festival country music concert in Las Vegas, was a 64 year old accountant and real estate investor. He looked like neither Vin Diesel nor any of the 9/11 terrorists.

¹⁴ 6 U.S.C. §§441-444.

¹⁵ "Technology" can refer to hourly security guards hired by a company whose training program has received DHS certification under the Act, even if the particular guards working an event just went through the training and have no other security experience. <https://www.safetyact.gov/>.

¹⁶ E.g., *Snapshot: SAFETY Act Program in its 15th Year, Passes 1,000 Qualified Anti-Terrorism Technologies.* <https://www.dhs.gov/science-and-technology/news/2018/07/06/snapshot-safety-act-program-its-15th-year-passes-1000>

This seems like a huge benefit about which every defense lawyer should advise his or her clients immediately. Before you start working on the certification process, however, consider this. Despite the most deadly mass shootings in U.S. history all having occurred since the SAFETY Act's enactment,¹⁷ not one has been declared a "terrorist" incident to trigger immunity from liability under the Act. Even the October 1, 2017 Las Vegas attack, currently the worst mass shooting in U.S. history which left 58 dead and more than 500 other people injured, was not declared a "terrorist" event by the Director of Homeland Security.

If Vegas, or Gilroy, or El Paso, or Dayton, or any of the other dishearteningly frequent mass shooting incidents does not qualify as terrorism under the statutory definition, it is hard to imagine what would.

THE DUTY OF CARE CHANGES OVER TIME

This brings us back to common law. When considering the duty of care for any particular event, the past is an important guide. But it's not the only one. Regarding the rapidly changing landscape around safety and security at live events, an old case involving tugboat safety is instructive.

Think back to first year Torts class. In *The T.J. Hooper*, two tugs lost their cargo in a storm because they didn't have working weather

¹⁷ Mother Jones magazine provides a constantly updated list of shootings in the United States, *US Mass Shootings, 1982-2019: Data from Mother Jones' Investigation*, <https://www.motherjones.com/politics/2012/12/mass-shootings-mother-jones-full-data/>.

radios, which were considered a "toy" back in the 1920s. Judge Learned Hand wrote for the Second Circuit Court of Appeals,

Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.¹⁸

At some point, a jury seems likely to find that an active shooter is so foreseeable in the United States, whether because of frequency or impact on lives lost or just our state of collective emotional trauma, that any venue or event operator that lacks an emergency action plan and corresponding crowd manager training, which then suffers third-party violence, has failed to reasonably address a threat it should have anticipated.¹⁹ Then there will be a new precedent, that acts of third-party violence are reasonably foreseeable.

After the most recent spate of shootings (or the inevitable next one), can you confidently advise your client that some act of violence is not reasonably foreseeable for them? Shouldn't reasonable lawyers urge their clients to start planning to mitigate the risk of what appears to be increasingly likely third-party violence? If not now, when?

¹⁸ *The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932).

¹⁹ With each incident, another opportunity arises for lawyers to make precisely this argument. See, e.g., *Towner v. Gilroy Garlic Festival, et al.*, 2019 WL 5960376, filed in Santa Clara (CA) County Superior Court, November 12, 2019.

YLD President's Message

By Alexix Terríquez, Esq.
Snell & Wilmer



Alexix Terríquez, Esq.

I first became involved with the AADC Young Lawyers Division ("YLD") soon after beginning my practice as a civil defense litigator. My then-boss and now-mentor - a past AADC president herself - encouraged me to attend AADC events and to become involved with the AADC YLD Board of Directors. At first, I was reluctant to add another time commitment to an already busy professional and personal calendar - not to mention that I was trying to learn how to be an actual lawyer! I was reluctant to "waste" non-billable time. As a brand-new first-year attorney, I feared being out of the office at any time during working hours, let alone leaving the office early to go to a Happy Hour. What would the partner say if I didn't respond to a 4:15 p.m. email by 4:16 p.m. because I was out!? Despite that reluctance, but primarily because of the strong encouragement and support of my direct supervisor, I became involved and have been ever

since. I am now honored to serve as the 2019-2020 YLD President.

My experience with the YLD has been personally and professionally beneficial. The YLD hosts multiple networking events within the legal community and other young professional groups. We host Fall and Spring CLE events that provide relevant CLE specifically for newer attorneys, but always open to any level, with a Happy Hour afterwards to network and discuss the CLE topics. This Fall's CLE centered around "Technology and the Internet" within the practice of law and included speakers discussing how to manage ESI; the use and implications of emojis in litigation, the ethics of posting as an attorney and finding and using social media information.

The YLD also promotes a mentorship program pairing newer attorneys with more seasoned AADC member attorneys. We also coordinate community outreach programs, such as our annual softball tournament that benefits Southwest Human Development. The YLD, as general AADC members, are encouraged to attend the general AADC events as well.

Seasoned attorneys understand the value of involvement in professional organizations and, more importantly, the value of creating long-lasting, meaningful professional relationships as early as possible in any attorney's career.

Therefore, I hope longstanding AADC members genuinely encourage and support your newer lawyers to get involved in the legal community as early as possible by letting them know that "wasting" non-billable time in cultivating your network is anything but a waste of time. The AADC YLD Board is an excellent place to become involved early as a newer attorney since it is geared specifically for this purpose.

"If you are a new(er) attorney looking for a way to become more involved, develop meaningful relationships in the legal community, or are interested in being paired with a more seasoned AADC member as a mentor please contact me with any questions at aterriquez@swlaw.com. I have experienced the benefits of involvement in this organization and strongly encourage newer attorneys to become involved."

The YLD Board looks forward to seeing you at our events this year!

Alexix Terríquez
2019-2020
YLD President

Report and Recommendations on The Delivery of Legal Services

By Alison Christian, Esq.
Christian, Dichter & Sluga

The Arizona Judicial Branch recently posted a summary of the Legal Services Task Force that was established by Administrative Order 2018-111 to review the regulation of the delivery of legal services in Arizona. According to the Judicial Branch, the Task Force on Delivery of Legal Services will make recommendations as follows:

- Restyle, update, and reorganize Rule 31(d) of the Arizona Rules of Supreme Court to simplify and clarify its provisions.
- Review the Legal Document Preparers program and related Arizona Code of Judicial Administration requirements and, if warranted, recommend revisions to the existing rules and code sections that would improve access to and quality of legal services and information provided by legal document preparers.
- Examine and recommend whether other non-lawyers, with specified qualifications, should be allowed to provide limited legal services, including representing individuals in civil proceedings in limited jurisdiction courts, administrative hearings not otherwise allowed by Rule 31(d), and family court matters.

- Review Supreme Court Rule 42. E.R. 1.2 related to the scope of representation and determine if changes to this and other rules would encourage broader use of limited scope representation by individuals needing legal services.
- Recommend whether rules should be modified to allow for co-ownership by lawyers and non-lawyers in entities providing legal services.

The Opposition Statement to the Report, drafted by the Honorable Peter B. Swann, observes, “The Report begins with a discussion of a problem whose existence cannot be disputed: legal services are too expensive, and most citizens are priced out of the ability to secure meaningful justice through the courts. The Report does not, however, examine the barriers to justice erected by the court system itself: understaffing, which contributes to delay and cost, and bloated, one-size-fits-all procedural rules that are designed for the most complex cases. The recommendations then take an odd turn: rather than examining the reasons that the system is so difficult and expensive to navigate, the Task Force’s first recommendation is to cast aside ethical rules in an effort to make the practice of law more profitable. Such a proposal would make Arizona unique in the

nation, and a leader is the race to the bottom of legal ethics.”

The Opposition Statement goes on to state, “Recommendation number one is to eliminate the ethical rules prohibiting nonlawyer ownership of law practices. To be clear, this recommendation would allow anyone, including disbarred lawyers, large corporations, and venture capitalists to have full equity stakes in law firms while escaping any duties to the clients. No other state has adopted such a proposal. And while I take pride in Arizona’s spirit of innovation, this proposal is neither innovative nor responsible. The proposal would surely open vistas of new sources of wealth for lawyers, but it would not benefit the public.”

Members are encouraged to read the full report, which is available online at:

<https://www.azcourts.gov/Portals/74/LSTF/Report/LSTFReportRecommendationsRETD10042019.pdf?ver=2019-10-07-084849-750/>

2019 Phoenix Judicial Reception

By Melissa Posner Jarrett
Spencer Fane LLP



Hon. Judge Peter B. Swann

The AADC held its annual Phoenix Judicial Reception on December 5, 2019 at Bitter & Twisted honoring Judge Peter B. Swann, Arizona Court of Appeals, Division 1, with the Judicial Excellence Award. Judge Swann was introduced by former law clerk, James Hanson (Lang & Klain).

In his introduction, James cited Judge Swann's thoughtful and serious approach to appellate cases and the writing of legal opinions. James also commented on Judge Swann's ability to impartially consider the arguments and insights of all parties while maintaining a sense of collegiality between the bench and the bar.

Judge Swann remarked on the ethical foundation of the legal profession and judiciary. He urged Arizona lawyers to familiarize themselves with the recent Report and Recommendations of the Task Force on the Delivery of Legal Services and how these recommendations may impact the practice of law in Arizona.

Judge Swann earned his bachelor's degree from University of California at Berkeley in 1987 and his J.D. from the University of

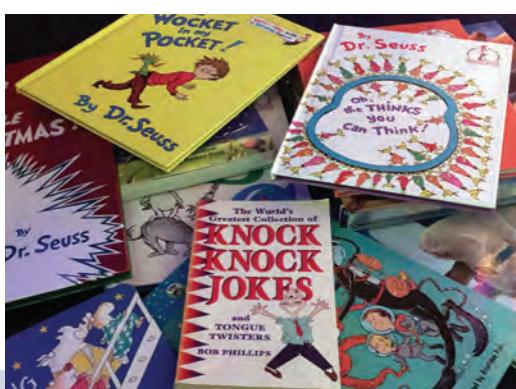
Maryland in 1991. After clerking in Maryland for Senior Judge Ramsay of the U.S. District Court, Judge Swann joined the law firm of Steptoe & Johnson in Phoenix where he specialized in First Amendment law becoming a partner in 2001.

Judge Swann was appointed to the Maricopa County Superior Court in 2003 and the Arizona Court of Appeals in 2008 by Governor Janet Napolitano. Judge Swann currently serves as Chief Judge on the Arizona Court of Appeals.

When not consumed by his judicial duties, Judge Swann moonlights a bass player in the band Capital Punishment with his high school friends Peter Zusi, Kriss Roebling, and Ben Stiller. Their album, Roadkill, was re-released in November 2018.



2019 Phoenix Judicial Reception (continued)



YLD Holiday Book Drive Supporting the Children at SW Human Development.

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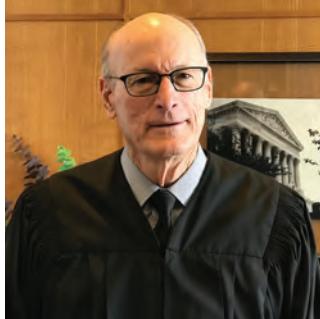
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2019 Tucson Judicial Reception

By JC Patrascioiu, Esq.
Curl, Glasson, Patrascioiu, PLC



Hon. David C. Bury

The AADC along with the Tucson Defense Bar hosted the Tucson Judicial Reception on December 10, 2019 at the Arizona Inn. The Honorable David C. Bury, U.S. District Court, Pima County was recognized by the defense bar for his exemplary service as a member of the federal judiciary. The reception was well attended by the judiciary as well as Tucson's defense community.

The winners of the 2019 Jenckes Closing Argument Competition sponsored by AADC and the University of Arizona Rogers College of Law were also honored guests. AADC President, Alison Christian, presented scholarship awards to winners Clarissa Todd (1st Place - \$1000), Maura Hilser (2nd Place - \$500), Stephanie

Baldwin (Finalist - \$250), Rachel Madore (Finalist - \$250), and Michael Victor (Finalist- \$250).

Marshall Humphrey introduced Judge Bury and recounted stories from the years he worked under Judge Bury as a young associate learning from the skilled litigator as they became friends and partners over the years.

Born in Tulsa, Oklahoma, Judge Bury graduated from Oklahoma State in 1964 and earned his juris doctorate from the University of Arizona in 1967. Over the ensuing 35 years, Judge Bury, practiced primarily in the area of insurance defense, earning his reputation as an incisive litigator and skilled trial attorney, completing over 200 jury trials.

Prior to joining the federal bench, Judge Bury practiced law for 35 years primarily in the area of insurance defense, earning his reputation as an incisive litigator and skilled trial attorney, completing over 200 jury trials.

Judge Bury was invited to join the ranks of several elite national organizations including the

American Board of Trial Attorneys (ABOTA) and American College of Trial Lawyers over the course of his career as a litigator. Judge Bury was nominated to the federal bench by President George W. Bush in 2001 and confirmed in 2002.

Judge Bury has never lost his empathy for the experience of litigants appearing before him and the stress of trial. And, while known to hold counsel appearing before him to high standards, he faithfully imposes those same standards, if not higher, upon himself. Judge Bury took senior status in 2017, yet seven years later, he continues to serve on the bench.

AADC President, Alison Christian, presented Judge Bury with the Judicial Excellence Award on behalf of the AADC and Tucson Defense Bar. Judge Bury expressed his gratitude for the opportunity to serve the system of justice, and his ongoing enjoyment of the law. Judge Bury also thanked his family for their support, in particular his wife and children, some of whom were present for the occasion.



AADC YLD Mentorship Program

Interested in being paired with a more seasoned attorney? The AADC Young Lawyers Division has a mentor/mentee program that connects new(er) attorneys with more seasoned AADC member attorneys.

If you are interested in the program, please email
Alexix Terríquez, YLD President,
aterriquez@swlaw.com.

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Membership in AADC is open to any attorney who has been admitted to the practice of law in Arizona (or any in-house attorney who manages Arizona litigation) and who practices a substantial amount of defense litigation. The Association's purpose is to provide a forum for discussion and education, and to further professionalism of the defense bar. Please return the application with your membership dues of \$200.00 per attorney, \$100.00 per in house counsel (\$650 for a corporate membership that includes membership for an unlimited number of in-house and government attorneys managing Arizona litigation), or public sector attorney, \$3,300.00 for law firms with 20 or more members, \$1,700.00 for law firms with 10-19 members or \$850.00 for law firms with 5 - 9 members and \$50.00 for retired members. You can also renew and pay online at www.azadc.org. FREE MEMBERSHIP TO ATTORNEYS PRACTICING 1 YEAR OR LESS.

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Tom Toone - At Home In A Courtroom Or On A Range

By John T. Shoaf, Esq.
Gust Rosenfeld



Tom Toone, Esq.

I had the distinct luck and pleasure to work for Tom Toone straight out of law school. Tom is a world-class litigator, who personally helped remodel and improve on the many bad habits I had coming out of law school. I am thankful every day that I was lucky enough to have him as my mentor.

Tom was born in Kermit, Texas and received his undergraduate and Juris Doctorate degrees from the University of Texas at Austin. Tom moved to Arizona in 1975, where he joined the law firm of Beer & Kalyna. Shortly after, the name was changed to Beer & Toone. Tom has been there ever since.

Although Tom practices all different types of civil litigation, Beer & Toone is known for its specialty in aviation litigation. Tom served as President of the Maricopa County Bar Association as well as President

of the American Board of Trial Advocates ("ABOTA"). In 2015, he was honored by ABOTA as its Lawyer of the Year. In 2016, Tom was named by Best Lawyers as its Personal Injury Litigation Defendant's Lawyer of the Year. Tom was also Certified by the State Bar of Arizona as a specialist in the area of Personal Injury and Wrongful Death Litigation for 20 years.

In recent years, Tom's practice has focused almost entirely on conducting mediations and arbitration. In this regard, Tom is highly regarded as one of the best mediators in the Valley. Tom is a member of the National Academy of Distinguished Neutrals.

When he's not working, Tom's passion is horses and horse riding competitions. In particular, Tom is very skilled at the sport of team roping. Tom is the Past President of the Verde Vaqueros of Scottsdale, which is a trail ride group that benefits the Boys and Girls Club of Scottsdale. Tom is also the Past President of the Sheriff's Mounted Posse of Maricopa County.

When Tom is not being a true cowboy or practicing law, he likes to spend what remains of his free time in Carlsbad, California with his wife and visiting his grandkids.

Q: What do you do when you are not practicing law?

A: For body and mind, I work out in the gym or walk/bike almost every day of the week.

In Arizona, I focus on horse-related group and activities, but have recently retired from competitive team roping for safety reasons. In California, since Jane and I live in a beach community, we play beach sports, boogie board, body surf and ride bicycles. Aside from the active lifestyle, we frequently travel to Utah and Idaho to visit with and spoil our grandkids. It's a very fulfilling activity!

Q: What do you enjoy most about the practice of law?

A: Helping people solve the problems that life has presented to them. Whether they are the injured aggrieved party or the party alleged to have caused the injury, they are all engaged in emotional, expensive legal processes, and need a lawyer's help in coming to a resolution, whether by settlement, hearing or trial.

Q: What are the biggest changes, both good and bad, that you have seen in the profession?

A: I am not one to lament or long for the "good old days", so I've learned to pretty much to accept changes as they come and learn to adapt to them. Probably the biggest change is the trend away from the jury trial as the primary means of resolving disputes. The rise of ADR and contractual arbitration agreements and the time and expense of a jury trial, coupled with the inconvenience to jurors, makes

Tom Toone - At Home In A Courtroom Or On A Range

(continued)

trial less attractive to litigants. This makes for a smaller pool of experienced trial lawyers, but maybe such large numbers won't be needed in the future.

Specific to this group (AADC) and the defense bar in general, I've noticed a big problem with the deteriorating relationship between insurers and insurance defense counsel. As a Mediator, I have a unique opportunity to observe adjusters/claims persons and their retained counsel interact. Where most all of the claims adjusters I used to work with also became close personal friends over the years, I now detect the existence of a wall of distrust in these relationships. With competitive bidding between

law firms for insurance defense cases, auditing of attorneys' fee bills, and the use of captive defense firms, the "family relationship" no longer exists. It really was more fun to do insurance defense work "back in the day", so maybe I do lament those good old days!!

Q: What advice would you give to young lawyers just starting out?

A: Be patient. Don't move from firm to firm just for small increases in salary. It takes time to find your niche in the wide array of possibilities within the legal profession. If you move, do it because you find something that interests and fulfills you. It then takes time to become good at your chosen field, so remain

patient. The beauty of the law is that you can never master it, but you can always learn from it. Be proud that you have qualified to be a part of this important profession.

Q: What, if anything, would you do differently if you had to start your career over?

A: This one is easy. Not a damn thing. I've been with the same firm in a general trial practice since I moved to Arizona in 1975. I've had some thrilling victories, and many agonizing defeats, but learned valuable lessons from all of them. Serving in the legal profession has been a privilege which I continue to enjoy.



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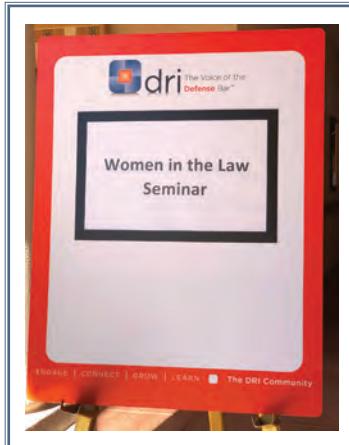
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AADC Congratulates National Defense Leaders

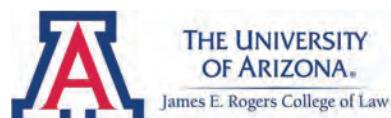


Co-Recipients of the DRI Mary Massaron Award for the Advancement of Women in the Legal Profession: ADTA President, Lori Berke; DRI President-Elect, Emily Coughlin; FDCC President, Elizabeth Lorell and IADC President, Amy Fischer. For the first time in history, four women lead the four national defense organizations. Congratulations!

Congratulations to the 2019 Jenckes Scholarship Winners!



Clarissa Todd - 1st Place
Maura Hilsler - 2nd Place
Stephanie Baldwin - Finalist
Rachel Madore - Finalist
Michael Victor - Finalist



Save The Date!

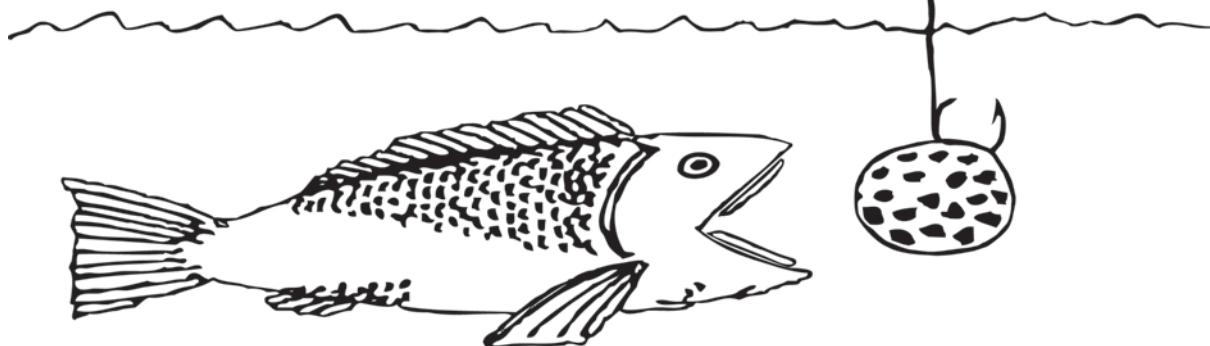


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