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FALL 2017

This Can't be a Public Record! Or a Meeting! It's Just FACEBOOK!

Local governments have embraced social media as effective tools for distributing information and receiving feedback from residents. Facebook, Twitter, LinkedIn, Instagram, YouTube and other social media platforms have transformed the ability to communicate with the public, whether for emergency alerts, public service announcements, citizen surveys or letting people know about services. We rely on this amazing technology. But wait! There must be a trick. Indeed there is. Public records laws, the open meeting law and the First Amendment are going to slow you down, so you might as well be prepared.

The first trick is complying with public records laws. Documents, including electronic documents, created or received by a government or public officer related to public business are public records. This includes communications using social media. If a communication meets the definition of a public record, it must be treated as any other public record – saved in accordance with the records retention policy of the government and made available for copying and inspection by the public. Retention can be done in-house, but it is probably more efficient

SEE **SOCIAL MEDIA**

Cases Spotlight ADA & Web Accessibility

Many people believe that access to the internet is an essential need in life. The internet is not as easily accessible to those with perceptual disabilities, such as those individuals who have visual or hearing impairments or who have motor difficulties.

The Americans with Disabilities Act (ADA) requires that entities provide access to those with disabilities so that they have equal access to jobs, goods and services, and requires that public and private establishments provide reasonable accommodations to the disabled. Many believe that the internet is a place of public accommodation and that Title III of the ADA should apply to the internet for both the private and the public sector.

The Office of Civil Rights has initiated multiple investigations of public sector clients about accessibility standards for a public entity's website. The standards are very technical. Multiple public entities are well underway in ensuring that their internet sites are accessible to those with hearing or visual impairments.

The United States Department of Justice (DOJ) views the internet as a place of public accommodation.

Rules making web access mandatory for all sites (both public and private sector) are under consideration by the DOJ. In the meantime, cases are making their way through the court system to make the ADA applicable to all sites.

Gust Rosenfeld attorneys will watch the development of court cases as well as legislative action which impact internet access under the ADA. We intend to keep our clients abreast of developments on this evolving issue.

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Jennifer's practice consists of representation of school districts in all legal matters.

NEW FACES

Barry Markson (Phoenix Office) Barry Markson practices in the areas of civil/commercial litigation, premises liability defense, defamation, construction defect, environmental/toxic tort, products liability, governmental liability, civil rights, personal injury defense, bad faith and insurance coverage. In his more than 23 years of practice, he has tried cases in a variety of areas, including premises liability, products liability and automobile negligence.

Barry is a Judge Pro Tem for the Maricopa County Superior Court. He also serves as a mediator and arbitrator in various civil litigation and insurance-related matters including insurance coverage and bad faith claims, catastrophic injury, product liability and cases involving public entities.

Barry was selected to be the Arizona representative to the Defense Research Institute and is a Past-President of the Arizona Association of Defense Counsel. He is AV® Preeminent™ rated by Martindale-Hubbell®, representing the highest rating in legal ability and ethical standards. In his spare time, Barry is a radio talk show host on 550 KFYI and Fox Sports 910.

SEC Brings Action Against Bond Issuer; Charges City Manager with Violation

The Securities and Exchange Commission (SEC) recently announced that the Beaumont Financing Authority located in the City of Beaumont, California, agreed to settle charges brought in a United States District Court that it made false statements of material fact about its continuing disclosure compliance efforts in past bond deals.

The SEC became aware of the alleged violations as part of a post-Municipalities Continuing Disclosure Cooperation (MCDC) review of municipal issuers that did not voluntarily self-report under the agency's MCDC Initiative in 2014. The Authority failed to self-report the possible violations as part of the self-reporting period during the MCDC Initiatives.

According to the SEC's settlement order, Beaumont agreed to provide continuing annual disclosure, including its financial information and operating data. The Financing Authority failed to provide investors with the promised information from a period of 2004 to 2013. Furthermore, Beaumont failed to disclose these failures in its official statements for subsequent transactions in 2012 and 2013, thus violating securities laws.

LeeAnn Gaunt, Chief of the SEC Enforcement Division Public Finance Abuse Unit, stated that "Investors in municipal bonds depend on timely and complete continuing disclosure from municipal issuers." Gaunt continued: "Issuers and underwriters will continue to be held accountable when they fail to provide investors with an accurate picture of past compliance with continuing disclosure obligations." The SEC has made it quite clear in some recent policy statements that it takes continuing disclosure very seriously.

In addition to the Financing Authority, the SEC also charged the City Manager of Beaumont with violations, as the SEC has recently done with other public entities. The SEC is prosecuting securities law violations against not only the entity but against individual employees or officers of the public entity based on the theory of control person liability. The complaint alleged that the City Manager personally approved and signed the misleading offering documents. The City Manager personally agreed to pay a $37,500 penalty and has also agreed to be barred from participating in any future municipal bond offerings. It is important to note that the City Manager agreed to the order without admitting or denying fault, as did the Financing Authority.

In addition to the penalty against the City Manager, the Financing Authority agreed to cease and desist from committing or causing any violations and any future violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act. Furthermore, the Financing Authority agreed to hire an outside consultant, adopt continuing disclosure policies and comply with a list of remedial items set forth by the SEC in its order.

This significant action by the SEC shows that the agency is following up on bond issuers who failed to self-report violations under the MCDC program. Most significantly, this action by the SEC shows that city staff may be subject to personal liability for securities law violations. It is therefore imperative that public officials understand disclosure obligations and are aware of the actions they are approving. In the event your issuer receives notice of such an alleged failure, it is important to retain competent counsel immediately to respond to any SEC charges.

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The Best Lawyers in America© 2018 Lists 21 Gust Rosenfeld Lawyers as Leaders in Their Field

Gust Rosenfeld is pleased to announce that 21 of the firm's attorneys, across 21 practice areas, were selected by their peers for inclusion in The Best Lawyers in America© 2018. Also, Charles W. Wirken was recognized by Best Lawyers as the 2018 Franchise Law "Lawyer of the Year" award winner in Phoenix.

The following Gust Rosenfeld attorneys were named in The Best Lawyers in America© 2018, with their respective practice area(s) designated by Best Lawyers:

Phoenix

- **Kent Cammack** (Real Estate Law)
- **Tom Chauncey II** (Corporate Law)
- **Susan D. Goodwin** (Municipal Law)
- **Robert D. Haws** (Education Law; Employment Law – Management; Litigation – Labor and Employment)
- **John L. Hay** (Franchise Law)
- **Richard B. Hood** (Commercial Litigation)
- **Gerald L. Jacobs** (Real Estate Law)
- **Jennifer MacLennan** (Education Law)
- **Craig A. McCarthy** (Insurance Law)
- **Christina M. Noyes** (Franchise Law)
- **Sean P. O'Brien** (Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law)
- **Frederick H. Rosenfeld** (Corporate Law; Municipal Law; Public Finance Law)
- **Gary Verburg** (Land Use and Zoning Law)
- **Richard H. Whitney** (Trusts and Estates)
- **Charles. W. Wirken** (Appellate Practice; Franchise Law)

Tucson

- **Mark L. Collins** (Litigation – Real Estate; Real Estate Law)
- **Peter Collins, Jr.** (Commercial Litigation; Insurance Law; Personal Injury Litigation – Plaintiffs)
- **John J. Kastner** (Personal Injury Litigation – Defendants)
- **James W. Kaucher** (Professional Malpractice Law – Defendants)
- **Gerard R. O'Meara** (Litigation – Banking and Finance)
- **Michael S. Woodlock** (Litigation – Construction)

About Best Lawyers

Since it was first published in 1983, Best Lawyers has become universally regarded as the definitive guide to legal excellence. Best Lawyers lists are compiled based on an exhaustive peer-review evaluation. More than 83,000 leading attorneys globally are eligible to vote, and Best Lawyers has received more than 10 million evaluations on the legal abilities of lawyers based on their specific practice areas around the world.

For the 2018 Edition of The Best Lawyers in America©, 7.4 million votes were analyzed, which resulted in almost 58,000 leading lawyers being included in the new edition. Lawyers are not required or allowed to pay a fee to be listed; therefore, inclusion in Best Lawyers is considered a singular honor. Corporate Counsel magazine has called Best Lawyers "the most respected referral list of attorneys in practice."

'Til divorce do us part – but maybe not

If you name your spouse as the beneficiary of some asset, or of your trust or estate, and then divorce but fail to change beneficiaries before you die, an Arizona statute will deem you to have revoked your beneficiary designation when you divorced. However, don't depend on the statute to avoid a post-mortem legal battle.

That was the situation in *Lazar v. Kroncke*, a case recently won in the United States Court of Appeals for the Ninth Circuit with the assistance of Gust Rosenfeld appellate lawyer Charles W. Wirken. The facts of that case are all too common. The husband had established an Individual Retirement Account (IRA) naming his then-wife as beneficiary. The couple later divorced, but the husband neglected to remove his ex-wife as his IRA beneficiary before he died. That simple oversight allowed his ex-wife to claim the IRA account and sue the husband's estate over its ownership.

The trial court dismissed the ex-wife's lawsuit, ruling that the husband's beneficiary designation was canceled by Arizona's revocation-on-divorce statute. The purpose of that statute is to effectuate a person's probable intent while also providing clarity and avoiding litigation.

But the ex-wife was not deterred. She appealed the dismissal, making a handful of arguments, including that the statute is unconstitutional because it impaired her contractual rights as her

SEE **DIVORCE** NEXT PAGE

Liquidated Damages in Contract: Just Compensation – or Just Punitive?

One of the main goals of a contractual relationship is to provide for a fair remedy if the contract is not honored. In that context, when one side fails to perform, the injured party must show not only the breach itself but also how much it was harmed, in the form of damages.

Proving or defending against a damage claim can be expensive, whether in or outside of litigation. To provide certainty when actual damages would be difficult or expensive to prove, in some contracts the parties fix the amount of damages up front, which the law calls "liquidated" damages.

In most real estate purchase agreements, the buyer is required to place an agreed amount into escrow as earnest money. Thus if the buyer defaults by not timely closing the deal, then the earnest money is forfeited to the seller as compensation. For example, if the purchase price is $500,000, the parties may provide for an earnest money deposit of $25,000, *i.e.,* 5% of the purchase price. The $25,000 would become the damages collectible by the seller. There is no reason to prove or calculate actual damages or to litigate the issue; the $25,000 as damages is already predetermined – or liquidated – by the agreement of the parties.

By contrast, without a liquidated damages provision, the seller would have to prove its actual loss. That could entail requiring evidence that, for instance, the seller later sold the property to a different buyer at a lesser value, or that the seller incurred additional holding costs because of the buyer's failure to purchase the property on time. In such a case, both sides would incur costs and fees in proving or disproving the existence and amount of the claimed damages. That is expensive and time-consuming; plus the damages might turn out to be more or even less than the $25,000.

What if the earnest money in this example was a lot more, say, 50% of the purchase price, *i.e.,* $250,000? Is it fair to forfeit that much, without any evidence presented of actual harm?

Courts, at least those in Arizona, support liquidated damage clauses, but only to the extent they are a reasonable forecast by the parties of what would be a difficult calculation of actual damages. The courts do not just rubber-stamp the contract damage amounts, particularly if the amounts are deemed punitive rather than compensatory.

In performing their "reasonableness" analysis, the courts consider two broad factors: the anticipated or actual loss caused by the breach and the difficulty of proof of such loss. If proving the actual loss is not necessarily difficult, or if the liquidated damage is disproportionate to the actual loss, or both, the court may well find that the agreed damage amount is not reasonable. That could spell trouble, because in contract actions, while courts will enforce a provision for reasonable damages that compensate, they will not enforce a provision deemed punitive.

Along those lines, in a recent Arizona Supreme Court case, a lender sought a $1.4 million late fee when the borrower defaulted on a $28 million matured loan. The borrower later paid the lender the balance of the Loan except for the late fee, which as a liquidated damage amount the borrower contended was unreasonable under the circumstances.

The court concluded, among other factors, that the lender had already been adequately compensated by the borrower's payment of principal, interest, default interest, and costs and fees by the borrower. The court stated that there were not any other actual uncompensated damages suffered by the lender which supported the reasonableness of such a large late fee on top of everything else the lender had recovered. On that and related grounds, the court found that the late fee was not compensatory and declined to enforce the late fee provision.

The moral of the story: Contract damages, even liquidated damages, are about compensation, not punishment.

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ex-husband's designated beneficiary. The court of appeals disagreed.

Although the ex-spouse lost (and lost again), the litigation took years and cost money. During the litigation, the IRA was frozen, leaving the husband's heirs unable to enjoy the money that was rightfully theirs.

What is the takeaway from this story? It is that, despite the statute, you should promptly change or confirm your beneficiary designations if you divorce. By doing so, your former spouse and your family will know your intentions, rather than being left to argue about them after you are gone. In other words, relying on the statute to prevent a distribution to your ex-spouse might take your family from your graveside to the courthouse.

This lesson applies to more than just IRAs. Arizona's revocation-on-divorce statute also applies to wills, trusts, insurance policies, payable-on-death bank accounts, deeds providing the right of survivorship, and other instruments that transfer your assets when you die. The statute also applies to your relatives by marriage that you designate as beneficiaries. For example, if your will made before you divorced leaves your fishing boat to your now former brother-in-law, the statute should revoke that gift. Nevertheless, you should change your will.

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Chas practices appellate and business law.

PERSONAL NOTES

Gust Rosenfeld Attorneys Recognized by Super Lawyers© 2017

Gust Rosenfeld is pleased to announce that seven of the firm's attorneys were selected for inclusion in the 2017 Southwest Super Lawyers© publication. Super Lawyers is a national rating agency that evaluates lawyers from more than 70 practice areas. The honor recognizes attorneys who have attained a high-degree of peer recognition and professional achievement. The rigorous selection process is multi-phased and includes independent research, peer nominations and peer evaluations.

Gust Rosenfeld lawyers named as Southwest Super Lawyers© 2017 are:

Kent Cammack, Business Litigation

Peter Collins, Jr., Insurance Coverage

Gerald L. Jacobs, Real Estate

Craig A. McCarthy, Personal Injury General: Defense

Christopher M. McNichol, Real Estate

Sean P. O'Brien, Bankruptcy: Business

Charles W. Wirken, Appellate

It's been a good year for the golf game of Legal Assistant **Donna Ketchum**. Donna had a hole-in-one on January 15, 2017, and another one on July 30, 2017, both at Mesa's Painted Mountain course.

Sean O'Brien was recently appointed as a Lawyer Representative to the Ninth Circuit Judicial Conference.

Whitney Scholarships

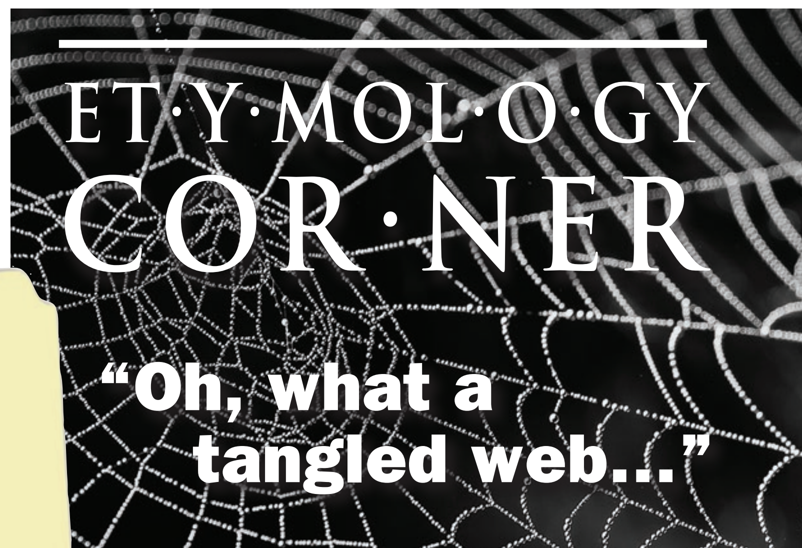
The National Society of Arts and Letters, Arizona Chapter, is presenting the Arts Advocacy Organization Award to the Phoenix Chamber Music Society (PCMS) in recognition of the **Linda and Richard "Dick" Whitney** scholarship program for schools and the youth that attend them.

The program involves six middle and high schools in Phoenix; the schools must have a music program and a professional music teacher. The teachers select one student to attend one of the concerts. At the concert, the student is joined by both the teacher and by the student's parents to enjoy the evening. According to PCMS representatives, the Whitney Scholarship program is inspiring other chamber music societies across the country to consider similar programs in their communities.

Cases *of* Note

In an adversary proceeding before the Tucson Division of the Bankruptcy Court involving a restaurant franchise, the firm successfully defended a franchisee in a case by the trustee to collect unpaid franchise and advertising fees. **Patrick Farrell** in our Tucson office worked with **Robert Williams** in Phoenix to handle the case.

Peter Collins and **Wendy Weigand** obtained a defense verdict in a highly contested slip and fall case where Plaintiffs sought almost \$2 million in damages. Trial lasted 2 ½ weeks and resulted in a unanimous jury verdict in favor of a renowned historic Arizona resort and spa. A formal pretrial settlement offer was rejected by Plaintiffs so our client is entitled to post-trial Rule 68 sanctions.



ET·Y·MOL·O·GY COR·NER

"Oh, what a tangled web..."

Most everyone knows that a website is a collection of related pages on the world wide web. In Old English, "web" meant something woven, such as tapestry or a spider's web (13th century). It has also come to mean a snare or entanglement, as in "caught in a web" of, perhaps, "fake news" (apparently, 2016), or endless "chatter" (the 1520s).

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Rick, our etymologist, practices in the areas of commercial law and litigation.

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SOCIAL MEDIA FROM FRONT PAGE

to use an outside company that specializes in systems that store or retrieve public records.

The second trick is to avoid violating Arizona's open meeting law. A gathering of a quorum of the members of a public body at which the public body's business is discussed or voted on requires posting notice and an agenda. Serial meetings of less than a quorum are "meetings." The same rules apply to gatherings on social media as apply to in-person meetings. ARS § 38-431.09 helps a little. If you express your opinion or discuss an issue on social media, you are ok if (1) the opinion/discussion is not principally directed at another member of the public body, and (2) there is no concerted plan to engage in collective deliberation to take legal action. This statute is intended to protect the normal use of social media where a quorum of a public body is in the audience.

The third trick is to avoid violating the First Amendment rights of the public. Have you created a public forum? If you do not invite public comment, no public forum is created. But if you invite public comment on issues, content/viewpoint regulation is prohibited. Be sure to clearly state the limited topics on which comments may be made. Litigation involving removing text or blocking users is in its infancy, but we will see more. Be sure to adopt policies governing your social media platforms, including centralized control of content, rules for citizen conduct and removal of objectionable material.

The fourth trick is to avoid violating the First Amendment rights of employees, who have free speech rights to speak on matters of public concern. Be sure to adopt policies that provide legal parameters for the use of public resources, no expectation of privacy when using government computers, First Amendment protections and professionalism.

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