GUST ROSENFELD
ATTORNEYS SINCE 1921 P.L.C.

NEWSLETTER
FALL 2012

At Firm's Annual Diversity Seminar

Speakers Share Stories of Survival

Gust Rosenfeld supports a broad range of diversity activities in the community such as minority scholarships and active participation in the Leadership Council on Legal Diversity. Our lawyers and staff participate in many diversity-related functions such as pipeline programs and minority-based conventions. Our commitment is also reflected in our in-house diversity seminars.

Recently, **Dr. Alexander B. White** and **Mr. Don Logan** spoke to the firm's lawyers and staff at its annual diversity seminar. The firm is indebted to Dr. White and Mr. Logan for their enlightening presentations to Gust Rosenfeld.

Dr. Alexander White

Dr. Alexander White, a semi-retired physician from Chicago, now lives in Scottsdale with his wife, Inez. In the 1930s, he endured life-threatening hardships as a Jew living in Poland.

Dr. White provided us with a rare opportunity to hear the story of a Holocaust survivor who was on the famed list of Oskar Schindler, an ethnic German industrialist who saved more than 1,000 Polish Jews from the Nazi death camps by employing them in his factories.

Dr. White's entire family was murdered by the Nazis, some before his eyes. He said his story is not unique, and he readily admits that many others suffered even more degradation at the hands of their oppressors. His story is told in his memoir, *Be a Mensch*; these words, roughly "be a real man," were the last words uttered by his father as he and Dr. White's brother were led away to a death camp.

The two most transfixing parts of Dr. White's life story are first, how he survived, and second, how he went on to become a medical doctor and citizen of the United States, serving in its military, and then rearing a family and successfully practicing internal medicine.

Dr. White came from a family of glaziers; he believes his craft put him on Oskar Schindler's list and saved his life. While Schindler's list ostensibly contained the names of his factory workers, many on the list were not actually skilled workers. Dr. White believes he was on the list as number 270 to provide expert installation of glass when called upon.

We were taken by Dr. White's "normalcy." He was happy and open, personally and professionally fulfilled. These traits belie his catastrophic youth experiences.

When we asked him how he thought this was possible, he said he had determined to put aside in a compartment the awful events of his youth and move on with his life. To meet and know Dr. White is to see how one exceptional human being successfully dealt with the most extreme of life experiences.

SEE **DIVERSITY** ON PAGE 4

GR Attorneys Earn Highest Peer Ratings

Gust Rosenfeld is pleased to announce to our clients that more than half of the firm's attorneys—34—are rated AV Preeminent by Martindale-Hubbell®. The AV Preeminent ranking is a testament to the fact that a lawyer's peers rank him or her at the highest level of professional excellence.

The Martindale-Hubbell® Peer Review Ratings™—the oldest attorney-to-attorney ratings system in the nation—provide an objective indicator of a lawyer's high ethical standards and professional ability. Attorneys receive Peer Review Ratings™ based on evaluations by other members of the bar and the judiciary in the United States. The highest ranking is AV Preeminent.

Those attorneys are listed here alphabetically: **Timothy W. Barton, Michael H. Bate, Kent E. Cammack, Tom Chauncey, Mark L. Collins, Peter Collins, Roger W. Frazier, Thomas E. Halter, Robert D. Haws, John L. Hay, Richard B. Hood, Gerald L. Jacobs, Martin T. Jones, James W. Kaucher, Jennifer N. MacLennan, Scott A. Malm, James H. Marburger, Craig A. McCarthy, Christopher M. McNichol, Sean P. O'Brien, Gerard R. O'Meara, David A. Pennartz, Steven K. Rendell, John P. Robertson, Frederick H. Rosenfeld, Scott W. Ruby, Shiela B. Schmidt, Richard A. Segal, Susan P. Segal, James G. Speer, Frank S. Tomkins, Wendy N. Weigand, Richard H. Whitney and Charles W. Wirken.**

Zoning and the Religious Land Use and Institutionalized Persons Act

Inherent in zoning is the idea that the government is able to dictate to a property owner the allowable uses of a property. Certain uses, like adult businesses, massage parlors, or medical marijuana dispensaries, are routinely the subject of "Not In My Backyard" (NIMBY) disputes.

One use that recently prompted an unexpected NIMBY reaction in Arizona is religious land use. The federal law known as the Religious Land Use and Institutionalized Persons Act (RLUIPA) seeks to limit government regulation of religious uses.

RLUIPA contains two applicable provisions. One provision prohibits governments imposing a "substantial burden" on religious use without a "compelling governmental interest." The second provision prohibits governments from imposing a land use restriction "on less than equal terms" with a nonreligious assembly.

In the Arizona case *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma, 651 F.3d 1163 (9th Cir. 2011)*, the Ninth Circuit Court of Appeals examined the claims a church made against the City of Yuma and its land use regulations under RLUIPA. This case involved "a sort of reverse urban blight case, with the twist that instead of bars and nightclubs being treated as blighting their more genteel environs, the church is treated as blighting the bar and nightclub district," stated the Court.

The church purchased the entertainment district property knowing that Yuma land use regulations required the church to obtain a conditional use permit, which the church did not have. Neighboring property owners objected to a permit because Arizona law limits issuance of liquor licenses in close proximity to a church. The city staff recommended denial of the permit as "inconsistent with a 24/7 downtown neighborhood involving retail, residential, office and entertainment." The Yuma Planning and Zoning Commission denied the permit.

One issue was key: had the church been a secular organization, it would not have needed the conditional use permit.

The Court analyzed the case under the "equal terms" provision of RLUIPA. It became a relatively easy analysis for the Court, as other uses with similar types of potential impacts on the properties in the area were permitted as of right, but the church was required to get a conditional use permit. This additional requirement, in the Court's view, led to the church being treated on less than equal terms than other uses, solely because it was a church.

The Court found that the Yuma land use regulations contained no zoning criteria which would justify the differing treatment of the church at the proposed location. In examining the Yuma regulations, the Court concluded that the focus on "religious organizations" in the Yuma code and its conditional use permit requirement violated RLUIPA by adding a condition on a religious use not required of other similar uses.

NIMBY perspectives can come in unexpected forms. Local land use regulations must be sensitive to the provisions of RLUIPA and state law when regulating religious uses.

Christopher A. Schmaltz | 602.257.7480 | cschmaltz@gustlaw.com
Chris practices in the area of government law.

GUST ROSENFELD

NEW FACES§

John A. Nasr

John practices in the areas of bankruptcy, restructuring, creditors' rights, and related litigation and appeals. He completed a dual J.D./M.B.A. program at Arizona State University, receiving his J.D. from the Sandra Day O'Connor College of Law and his M.B.A. from the W.P. Carey College of Business. During law school, he served as a judicial extern to the Honorable Randolph J. Haines of the United States Bankruptcy Court for the District of Arizona.

Martin T. Jones II

Martin practices in the areas of civil litigation and dispute resolution, focusing on environmental compliance, insurance defense, and commercial law. After working seven years in the front offices of the Arizona Cardinals and Arizona Diamondbacks, he earned his J.D. in 2010 from the Willamette University College of Law. While in law school, he worked for the Oregon Department of Justice in the area of Child Advocacy, helping children who were the victims of an abusive environment.

Litigation to Test SB1070's Requirement To Check Immigration Status

Now that the Supreme Court has held in *Arizona v. United States* (U.S. 2012) that SB1070's Section 2(B) is facially constitutional, the real-life application of the statute's requirement to check immigration status is certain to be tested by both civil rights litigants and state citizens who believe the law is not enforced strongly enough.

Section 2(B) [now A.R.S. §11-1051(B)] mandates that when an officer has stopped or detained a person for a violation of some non-immigration law, but develops reasonable suspicion during the encounter that the person is not in this country legally, the officer *must* (if practicable) attempt to check the person's immigration status with federal authorities. The immigration status of persons *arrested* shall be determined before they are released, regardless of reasonable suspicion.

The mere presence in this country without authorization to remain, however, is only a *civil*, not a *criminal*, offense. If officers unreasonably prolong a stop or arrest made for other reasons just to check for this *civil* offense, a check which can take at least an hour, they can be liable to the person for damages in civil rights cases for violating Fourth Amendment rights against unreasonable seizure. If reasonable suspicion is based on race or ethnicity, this may give rise to claims of profiling in violation of equal protection rights. *See Ortega-Melendres v. Arpaio* (D. Ariz. 2011).

In contrast to civil rights actions for improper stops and detention, A.R.S. §11-1051(H) allows any state citizen to sue to force a hefty fine against any agency that adopts or implements a policy that limits or restricts enforcement of §2(B)'s mandate to the maximum extent permitted under state and federal law.

Attorneys' fees may be awarded to plaintiffs in each of the above circumstances.

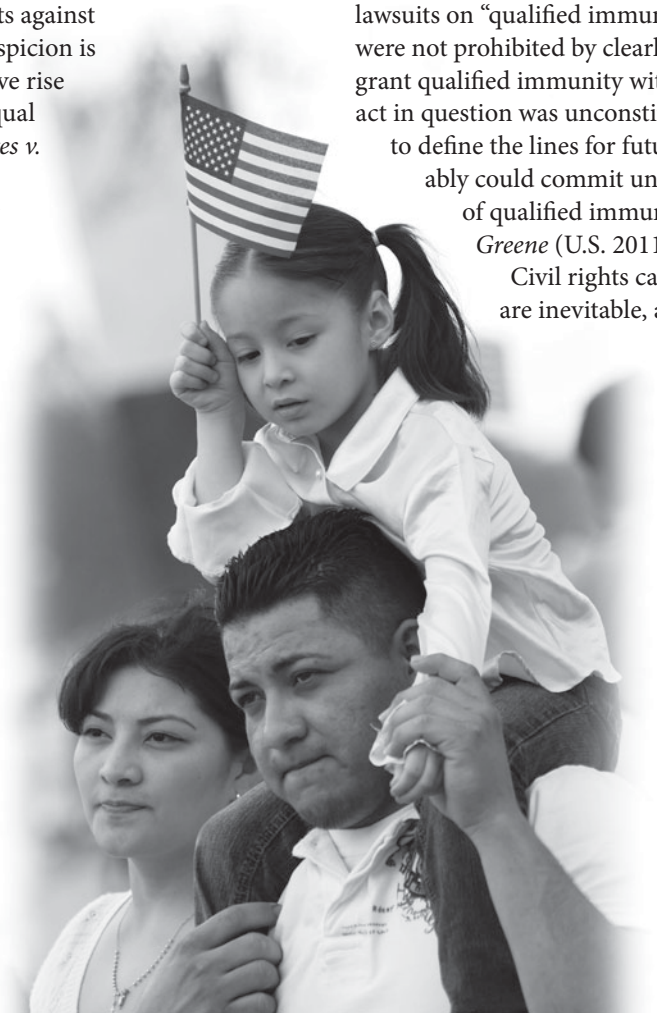
What might support reasonable suspicion of illegal presence can vary with the circumstances, but law enforcement officers should be prepared to articulate for every stop they make either what facts supported the presence of reasonable suspicion leading to an immigration check, or why such reasonable suspicion was lacking.

By itself, reasonable suspicion of unlawful presence in the country would neither support an initial stop, nor prolong an otherwise lawful stop while immigration status is checked. There must be some other basis for the stop and detention.

An officer may rightfully stop anyone whom the officer has reasonable suspicion of committing a crime or traffic offense. Detention for such a stop must be brief and last no longer than necessary to investigate the situation that justified the stop. For example, a person stopped for speeding may be detained long enough for the officer to speak to the driver about the offense, run a computer check on his license and registration, and issue a citation.

If reasonable suspicion of a second crime arises while the officer is properly investigating the original reason for the stop, the duration may be extended long enough to investigate the new suspicion. When that time is up, however, and there is still no discovery of probable cause to support an arrest for a crime, the person must be released, regardless of whether a check on a reasonable suspicion of unlawful presence is in progress.

Law enforcement officers must be dismissed from civil rights lawsuits on "qualified immunity," where their particular actions were not prohibited by clearly established law. Presently, courts may grant qualified immunity with or without determining whether the act in question was unconstitutional. Without such determinations to define the lines for future actions, however, officers conceivably could commit unconstitutional acts under the umbrella of qualified immunity again and again. *See Camreta v. Greene* (U.S. 2011).



Civil rights cases challenging enforcement of §2(B) are inevitable, and absent violations of clearly established law, so are dismissals for qualified immunity. Parties will likely present arguments on the constitutionality of acts involved, despite motions for qualified immunity. To avoid repeated questionable acts, trial courts should not shun determining the constitutionality of close cases when granting qualified immunity. Making the constitutional determinations will preserve issues for appellate review, from which guidance for further conduct can be provided for all.

Roger W. Frazier | 520.388.4786 | rfrazier@gustlaw.com
Roger focuses his practice on civil litigation and municipal government.

Reminder: Public Bodies Must Post Meeting Notices on Their Websites

It is widely known that the Arizona Open Meeting Law (OML) (A.R.S. §38-431, *et. seq.*) requires public bodies to provide notice of all meetings at least 24 hours prior to the meeting. Most public bodies physically post meeting notices, but the OML requires more.

Public bodies of the state, counties, school districts, and charter schools must not only post notices on their websites but also "conspicuously post a statement on their website stating where all public notices of the meetings will be posted, including the physical and electronic locations, and shall give additional public notice as is reasonable and practicable as to all meetings."

Cities and towns must post the statements and meeting notices on a website, but may choose to use their own website or the website of an association of cities and towns. In addition, Title 48 Special Districts may file a statement with the Clerk of the Board of Supervisors stating where public notices of the meetings will be posted in lieu of posting meeting notices on their websites.

The meeting notice required under the OML "shall include an agenda of the matters to be discussed or decided at the meeting or information on how the public may obtain a copy of such agenda." There is a limited exception to posting the statement and meeting notices on the website for "technological problems."

Remember: Providing a physical posting of a meeting notice is not enough. Posting the meeting notice on a website is also required under the Open Meeting Law.

James T. Giel | 602.257.7495 | jgiel@gustlaw.com
Jim practices in the area of public finance.

DIVERSITY FROM PAGE 1


Mr. Don Logan

Mr. Don Logan was featured on the second day of the firm's diversity seminar. Mr. Logan worked for the City of Scottsdale in various capacities for 30 years, retiring in November 2007. Mr. Logan served as Scottsdale's Director of the Office of Diversity & Dialogue, a position he held for 10 years until his retirement.

Many of us remember the day in February 2004 when a mail-bomb attack at the City of Scottsdale offices made headline news. Mr. Logan was the target of that attack. According to investigators, the mail-bomb was "built to kill."

Mr. Logan shared with the firm the story of his 30-year career with the City of Scottsdale; his rise through the ranks to become the Director of the Office of Diversity & Dialogue; the creation of a nationally recognized diversity program that included employee relations, community outreach, and education and training; the mail-bomb attack and its aftermath; and, his continued efforts to educate and foster an environment that values diversity and inclusiveness.

Mr. Logan believes that he survived that mail-bomb attack not only because he rotated the package as he opened it, but also because his life's mission was not complete. This is one reason Mr. Logan authored a book, *Targeted Delivery - Destination: Scottsdale, Arizona.* His book posits that our work towards building a community that embraces and recognizes the value of one's cultural and ethnic differences remains a work in progress.

Richard H. Whitney | 602.257.7424 | rwhitney@gustlaw.com
Dick practices trusts and estates law.

Barbara U. Rodriguez-Pashkowski |602.257.7494 | bpashkowski@gustlaw.com
Barbara practices environmental law.

ET·Y·MOL·O·GY COR·NER

holocaust

A Word with a Sad History

The word "holocaust," in its original Greek form "holokauston," referred to a sacrificial burnt offering to the gods. Over the course of history, the term grew to describe horrific human events such as the massacre by fire of the inhabitants of the French village of Vitry-le-François in 1142 and the arson and killing of Armenians in 1922. It was the Nazi genocide of European Jews during World War II, though, that epitomized "The Holocaust."

Richard B. Hood | 602.257.7470 | rhood@gustlaw.com
Rick, our etymologist, practices in the areas of commercial law and litigation.

PERSONAL NOTES

Charles W. "Chas" Wirken has been elected Chair of the State Bar of Arizona Client Protection Fund by his fellow trustees.

Chas, a former president of the State Bar of Arizona, was appointed as a trustee by the Board of Governors in 2008 and recently served as Treasurer of the fund. The trustees evaluate and determine claims alleging losses due to the dishonest conduct of Arizona lawyers; the fund reimburses eligible claimants.

Craig A. McCarthy spoke in April at the Annual Property Loss Research Bureau (PLRB) Conference in Orlando, Florida, on the topic of arson and insurance fraud investigations. In May, he spoke at the Annual Arizona Public Law Seminar in Prescott, Arizona, on the topic of premises liability issues for cities and counties.

Tom M. Murphy was named an Honorary Commander at Davis-Monthan AFB. The award is in recognition of his two years as President of the DM50, a local support group of the base by Tucson businessmen that provides assistance to airmen, airwomen and their commanders.

Sarah C. Smith recently drafted legislation for a city to accelerate transportation projects. That legislation was signed into Arizona law and became effective on August 2, 2012.

Timothy A. Stratton was recently appointed Chairman of the Board of Adjustment for the City of Scottsdale. In October, Tim spoke at the National Association of Bond Lawyers Annual Conference in Chicago on "Professionalism and Ethics in Opinion Practice," a review of the standards involved in rendering an unqualified legal opinion on a bond transaction.

Madeleine C. Wanslee has been appointed co-chair of Gust Rosenfeld's Creditors' Rights Department. As a member of the Ninth Circuit Conference Executive Committee, Madeleine helped to organize the Ninth Circuit Judicial Conference held in Maui, Hawaii. During the Conference, Madeleine became Chair-Elect of the Ninth Circuit Lawyer Representatives, which comprises lawyers selected by their Districts to work closely with federal judges of all types to improve the administration of justice. Also, Madeleine was a founding member and Master of the Arizona Bankruptcy American Inn of Court; she was elected to the Executive Committee as Membership Chair in May. At the 2012 Conference of Chief Bankruptcy Judges held in San Diego, Madeleine developed and presented two educational programs.

Wendy N. Weigand and **Craig A. McCarthy** presented at the annual Public Risk Management Association (PRIMA) conference in Flagstaff, Arizona, on the defense of premises liability claims against public entities.

Karl H. Widell was admitted as a member of the State Bar of California in June.

Susan Segal was elected to Fresh Start Women's Foundation Executive Board. Susan is also on the Board of Directors of the Arizona Theatre Company.

John A. Nasr presented on recent amendments to the "Telephone Consumer Protection Act" at the Arizona Credit Union Collector's Council.

Barbara U. Rodriguez-Pashkowski is a regular guest instructor at the training program for Underground Storage Tank Operators. As of August 2012, owners and operators of underground storage tanks are required to designate Class A, B, & C operators and secure the required training for those designated operators; retraining is required every three years.

Barbara U. Rodriguez-Pashkowski and **Martin T. Jones** hosted an all-day environmental seminar to discuss environmental due diligence in real estate transactions. The seminar's participants included environmental consultants, engineers, brokers, and environmental attorneys.

Martin T. Jones spoke at the Environmental Information Association's Southwest Regional Conference in Mesa on hydraulic fracturing.

Christopher McNichol and **Kent Cammack** spoke at the Arizona Trustee Association Conference on lending and enforcement issues.

Gerry O'Meara has been honored by the St. Thomas More Society at its annual Red Mass. The Red Mass is celebrated in the Catholic Church for judges, attorneys, law school professors, students, and government officials.

Mark Collins of the firm's Tucson office is listed in Best Lawyers in America in the Real Estate practice area. Mark joins 15 Gust Rosenfeld attorneys included in 2013 Best Lawyers in America.

Christina Noyes is the author of the Arizona chapter in *Covenants Against Competition in Franchise Agreements (3rd Edition)* published by the American Bar Association, Forum on Franchising.

James Kaucher is the author of four chapters on employment law in the forthcoming *Arizona Business Law Deskbook* by West Publishing.

Read Those Arbitration Provisions Carefully

In an effort to avoid litigation when disputes arise, mandatory arbitration provisions are now routinely key parts of written contracts in almost every area, from basic consumer transactions to the most complicated commercial deals.

State and federal statutes—including Arizona's adopted version of the Uniform Arbitration Act, as well as the Federal Arbitration Act—actively encourage and support arbitration.

However, inadequate crafting of arbitration language in an agreement can lead down the path of unintended consequences.

A recent Arizona appellate case, *National Bank of Arizona v. Schwartz*, highlights some potential pitfalls. The bank filed a judicial action against the borrower for the loan shortfall, or deficiency, following the bank's foreclosure sale of the secured property. However, the bank's promissory note contained an arbitration provision which said that "any claim or controversy" arising out of the promissory note "shall" be resolved by binding arbitration through the American Arbitration Association.

The arbitration language smartly carved out a number of scenarios in which the bank could opt to go to court—where it preferred to be—instead of arbitration, including foreclosure against the real property, the exercise of self-help remedies, and obtaining the appointment of a receiver over the property, as well as "ancillary" matters. These are legal areas more readily and typically handled through the judicial process rather than an arbitration proceeding.

The borrower balked at being in court. Citing the broad wording of the promissory note's arbitration provision, the borrower asked the court to force the deficiency action into arbitration. Stuck with its own language in the promissory note, the bank argued that the deficiency action was ancillary to the earlier foreclosure process and so was one of the carve-outs to binding arbitration.

The Appellate Court disagreed with the bank, holding that "shall" indicates a mandatory intent and that pursuit of the shortfall under a loan is its own separate matter and not ancillary to the earlier foreclosure in this context. The deficiency action had to be pursued through the specified arbitration process and not through the court, to the dismay of the bank.

This case highlights the importance of understanding the terms, scope and limits of any arbitration language in documents.

Christopher M. McNichol | 602.257.7496 |mcnichol@gustlaw.com
Chris practices in the area of real estate transactions and litigation.

PHOENIX OFFICE
One E. Washington St., Ste. 1600
Phoenix, Arizona 85004-2553
Telephone: 602.257.7422
Facsimile: 602.254.4878

TUCSON OFFICE
One S. Church Ave., Ste. 1900
Tucson, Arizona 85701-1627
Telephone: 520.628.7070
Facsimile: 520.624.3849

This newsletter is published twice a year by the law firm of Gust Rosenfeld P.L.C. as a service to our clients and friends. It is intended to provide general information only, not advice on specific legal questions. Portions may be reproduced with attribution. For change of address, additional copies, or a complimentary subscription, contact our receptionist. We invite your comments.
FALL 2012, ISSUE NO. 62 © *2012 Gust Rosenfeld P.L.C.* **www.gustlaw.com**

GUST ROSENFELD
ATTORNEYS SINCE 1921 P.L.C.

ONE E. WASHINGTON ST., SUITE 1600
PHOENIX, ARIZONA 85004-2553

RETURN SERVICE REQUESTED

PRSRT STD
U.S. POSTAGE
PAID
Phoenix, AZ
Permit No. 2659