

THE ARIZONA SUPREME COURT OVERHAULS ITS RULES ON CLIENT MONEY HELD IN TRUST BY LAW FIRMS.

by Salvador Ongaro

Wholesale changes were adopted last year by the Arizona Supreme Court to Arizona's ethical rules regarding lawyers. As part of these amendments, the Arizona Supreme Court set forth new attorney trust account guidelines for the first time in nearly a generation. Those guideline changes, which took effect on December 1, 2003, have required law firms and lawyers in many instances to markedly restructure the way they handle their trust accounts and their clients' funds.



Attorney trust accounts are utilized to hold funds or other property belonging to a law firm's clients or to third parties. These are often used when a client receives a payment from an opposing party or when the client deposits a retainer with the client's law firm in anticipation of receiving legal services. A law firm's duty to segregate client funds from its own in these instances remains a critical and important aspect of the new trust account guidelines.

Prior rules on attorney trust accounts left many members of the Arizona bar unclear on acceptable methods of disbursements and the timing of those disbursements. For example, prior guidelines required that disbursements of funds to clients be made on a pre-numbered check. *See* State Bar of Ariz. Trust Acct. Guidelines 2(c) (revised May 1, 1984). In recognition of advances in modern commercial transactions, the new guidelines now permit the electronic transfer of funds to clients and third parties. *See* Ariz. Sup. Ct. R. 43(d)(4). A client thus no longer needs to wait to pick up or receive a check if the client can provide his law firm with acceptable information for an electronic transfer.

Concerns over the timing of disbursements from trust accounts have led to tighter restrictions on when funds may be ethically disbursed. The new guidelines are now very

(Continued to Page 5)

Announcements

MICHAEL E. TIFFANY has chaired the Committee for the Japanese Friendship Garden of Phoenix, Arizona since its inception. During Mike's tenure, the Garden, a joint project of the Sister Cities of Phoenix, Arizona and Himeji, Japan, was designed, financed and constructed. The grand opening for the authentic three-acre Japanese Garden was held in January of this year. The event included the Mayors of both Sister Cities and over 100 representatives from Himeji.

SALVADOR ONGARO was recently re-appointed to the Ethics Committee of the State Bar of Arizona for another term by State Bar President Pamela Treadwell-Rubin. Sal practices in the areas of securities litigation, investment-related disputes and general civil litigation. He was also appointed as an officer and director of Los Abogados, the Hispanic bar association of Maricopa County.

CHRISTOPHER R. KAUP was recently named faculty for a Maricopa County Bar Association: Bankruptcy Law Section Continuing Legal Education seminar in which Chris, along with several other panelists, lectured on issues involved in filing an involuntary bankruptcy petition.

JAMES F. MURPHY has joined Tiffany & Bosco as a Shareholder. A Phoenix native, Jim has prior experience in commercial real estate brokerage and mortgage banking. His practice focuses on real estate acquisitions, development and finance, and related commercial transactions.

ROBIN L. DUGAS has joined Tiffany & Bosco as an Associate. She practices in the area of Bankruptcy and Creditors' Rights.

CHRISTINA A. KINNEAR has joined Tiffany & Bosco as an Associate. She practices in the area of commercial litigation, including engagement by insurance companies in commercial disputes.

INSIDE THIS ISSUE:

Unsolicited Fax Ads - P. 2
Child Out of Wedlock - P. 2
Updates by Fax - P. 3
Mutual Funds - P. 4
News Update - P. 5

CAN ANYTHING BE DONE ABOUT THE RECEIPT OF UNSOLICITED FAX ADVERTISEMENTS?

by Dow Glenn Ostlund

Have you ever wondered if there is anything you can do about the receipt of unsolicited commercial fax advertisements? Well, there is.

There are both federal and state statutes that address this situation.

47 U.S.C. § 227 makes the sending of an “unsolicited advertisement” by “any telephone facsimile machine, computer or other device to send an unsolicited advertisement to a telephone facsimile machine” unlawful. The act defines an unsolicited advertisement as:

“Any material advertising the commercial availability or quality of any property, goods or services which is transmitted to any person without that person’s prior express invitation or permission.”

Section (C)(3) of the act creates a “private right of action.” This private right of action allows “a person or entity . . . if otherwise permitted by the laws or rules of the court of a state, [to bring] in an appropriate court of that state . . . an action to recover for actual monetary loss from such a violation, or to receive \$500.00 in damages for such a violation, whichever is greater.”

Thus, if state laws recognize a cause of action for this type of situation, you can bring suit against the advertiser, but only in state court.

Arizona does recognize a cause of action for this type of situation. A.R.S. § 44-1482 deals with “unsolicited commercial fax advertisements.” However, under the Arizona statute, the definition of what is an actionable “unsolicited” fax is a little different than that which might be presumed under the federal act.

The Arizona statute puts the initial burden to set up the actionable receipt of an unsolicited fax upon the recipient. The recipient must first contact the sender and request that no further faxes be sent. Effectively, the advertiser gets one free bite at the apple.

(Continued to Page 6)

Editors’ Note: In an effort to present both positions regarding faxes, two articles on this subject have been included in this edition of the newsletter.

ISSUES THAT MUST BE RESOLVED WHEN A CHILD IS BORN OUT OF WEDLOCK.

by Leonard J. Mark

There are a number of issues that must be resolved when a child is born out of wedlock. The parentage of the child must be determined; custodial and access arrangements relative to the child must be established; child support must be calculated; which parent is going to be responsible for providing health insurance for the benefit of the child must be determined; how non-covered health related expenses concerning the child will be paid must be determined; which parent will have the child as a dependent for Federal and State Income Tax purposes must be determined; which of the parents is going to pay for any expenses related to the birth of the child that are not covered by insurance; and finally, it must be resolved who is going to be responsible for the payment of any attorneys’ fees and costs that are incurred.

Each of the above issues is governed by the statutory laws of the State of Arizona. Generally they provide as follows.

Maternity and paternity proceedings are governed by A.R.S. § 25-801 *et seq.* Either the mother or the father can initiate proceedings to establish for parentage of the child. This proceeding is in the form of a lawsuit which is governed by the Arizona Rules of Civil Procedure.

In the event there is an issue as to who is the father of the child, that is resolved by the administration of blood testing which is now so sophisticated that the results have an accuracy rate in excess of 99% certainty.

A determination of child custody is governed by A.R.S. § 25-403. In deciding that issue, the court will consider what is in the best interest of the child and in making that determination the court will consider all relevant factors.

Child support is governed by A.R.S. § 25-501 *et seq.* In determining child support, the court will rely upon the guidelines established by the state legislature. Those guidelines are predicated upon the income of each of the parties or the imputed income of each of the parties, and not upon expenses relative to the care of the child except that credit will be given to the party that pays health insurance and child care costs. Also, the court will make an adjustment to a person’s obligation to pay child support based upon the access time that person will have with the

(Continued to Page 5)

DO YOU SEND UPDATES OR NOTICE FAXES TO YOUR CLIENTS OR MEMBERS: IF SO, YOU MAY BE HAULED INTO SMALL CLAIMS COURT.

by Christina A. Kinnea

Arizona justice courts have been inundated with small claims litigation over for-profit businesses' attempts to enforce the federal Telephone Consumer Protection Act, 47 U.S.C. § 227 (1991) ("TCPA"). These for-profit businesses go door-to-door and offer to purchase the faxes sent to small businesses for a minimal amount. They give the money to the employee at the front desk and ask the employee to sign an agreement.



What many of these employees do not realize is that in return for the \$1.00 they will use to buy their afternoon-coffee, they have just allegedly assigned to the for-profit business the right to bring a claim under the TCPA as successor in interest.

More importantly, often these employees provide the for-profit business with faxes that the small business legitimately received. For example, if your business sent your clients a fax "update" on its latest activities, the business could be sued up to \$1,500 for each fax. Likewise, if your organization is comprised of members to whom you send "notices" about the next monthly luncheon, you may soon receive a **notice** that your organization has been sued in justice court for violating federal law.

There are however, several defenses to these claims and action you can take to protect your business or organization.

1. A "Notice" is Not an "Unsolicited Advertisement."

A fax sent to the members of your organization reminding them to participate in upcoming events is likely **not subject** to the prohibition set forth in the TCPA because it is not an "unsolicited advertisement." The TCPA defines an "unsolicited advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." 47 U.S.C. § 227(a)(4) (1991).

A fax notice which serves as a communication to an organization's members to remind them of monthly breakfasts and mixers, involvement in committees, business support, education, leadership training, marketing and involvement in special events is likely not "materials advertising commercial activity" because they do not deal with "commercial activities." Instead, the organization uses such fax notices to inform its members about these activities as one of the

primary benefits of membership.

2. Prior Express Invitation

If the fax your business or organization sent **is an advertisement**, you may still avoid liability under the TCPA if you can show that it was sent with the prior express invitation of the recipient. 47 U.S.C. § 227(a)(4) (1991).

Although through 47 C.F.R. § 64.1200(a)(3)(i), the Code of Federal Regulations provides a detailed description of the necessary requirements to show prior express invitation or permission, it is not clear whether an application for membership submitted by the business, on which the primary agent or employee of the recipient, signed the application and included both the telephone number and the facsimile number, could serve as "express invitation" under which any "advertisements" of your organization could be sent. If your organization has a similar application or you have a written statement expressly authorizing receipt of faxes, you may be protected from claims brought under the TCPA.

3. Established Business Relationship

Alternatively, if you have no evidence of a signed, written statement authorizing the recipient's prior express invitation to receive your fax, your best defense may be that you had an established business relationship with the recipient which authorized receipt of the fax.

On August 18, 2003, the Federal Communications Commission issued Order 03-208 which offered a **reprieve** from the harsh requirements of prior Rules and allowed the established business relationship and consent exceptions to the TCPA. The FCC provided businesses and organizations additional time to secure an express writing which clearly indicates that the recipient consents to receiving facsimile advertisements from the company. Therefore, even if you have no signed, written statement, evidence of your past business dealings with the recipient may serve as a defense to allegations that you violated the TCPA.

If you receive a demand letter or are served with a complaint alleging a violation of the federal TCPA, you have several available defenses. However, in the meantime, to protect your business or organization from these claims, ensure that your fax machine identifies your business or organization in the header, including the telephone number of the sending machine and contact your attorney to draft the written statement authorizing the recipient's prior express invitation prior to the January 1, 2005 deadline. Also, do not forget to remind your employees not to sell anything to a fax solicitor.

Christina Kinnea is a graduate of the Arizona State University College of Law where she received a certificate of specialization in Law, Science & Technology. In addition, she holds a Masters of Public Administration and a Bachelor of Arts from Arizona State University.

MUTUAL FUND INVESTORS - CHECK YOUR BROKERAGE ACCOUNT STATEMENTS TWICE.

by Richard G. Himelrick, Frank R. Mead and Salvador Ongaro

The Securities and Exchange Commission and the National Association of Securities Dealers recently issued several notices and warnings to investors about a variety of mutual fund abuses.



One type of mutual fund abuse involves “Mutual Fund Breakpoints.” Mutual funds often offer discounts on front-end sales charges for larger investments. The investment levels at which the discounts become available are called “breakpoints.” For instance, a mutual fund may charge a front-end sales load of 5.75% for all purchases of less than \$50,000, but reduce the load to 4.50% for investments between \$50,000 and \$99,999, and further reduce or eliminate the sales load for even larger investments. The NASD offers the following example on how breakpoints work:



a purchase of \$49,500 in mutual fund shares may be charged a front-end sales load of 5.75% or \$2,846.25, while a purchase of \$50,000 in fund shares might be charged a sales load of 4.50% or \$2,250. In this example, by choosing to invest \$500 more in funds, you would have \$596.25 more invested in fund assets. Typically, there are several breakpoints, and if you invest more and reach each of these thresholds, the greater the reduction in the sales load. http://www.nasd.com/Investor/Alerts/alert_breakpoint.htm.

Mutual funds purchasers who may not have qualified for these breakpoints because the size of their purchase did not reach a breakpoint level nevertheless may be entitled to receive these discounts. Depending on the mutual fund purchased, breakpoint discounts are available to investors by accumulating prior purchases of the same mutual fund into their most recent purchase to reach a breakpoint level. Investors can sometimes combine purchases from other accounts, including those of other family members to reach the necessary breakpoint level. Investors may also be able to sign a letter of intent to invest a total amount in a mutual fund that will entitle the investor to the breakpoint discount. This letter of intent allows the investor to make smaller investments that each receive breakpoint discounts as long

as the total amount invested reaches a breakpoint level. A letter of intent may also be used in conjunction with accumulation rights and combination rights to provide an even greater breakpoint discount depending on the fund involved. Each mutual fund operates under a different set of rules, and as a result, advisors may not be fully aware of them.



The SEC and the NASD recently took disciplinary action against fifteen firms for failure to deliver mutual fund breakpoint discounts to investors during 2001 and 2002. The discounts withheld from investors ranged from \$240 to \$10,000 per transaction. As a result, the NASD directed all firms to provide refunds to customers who were overcharged. Whether all firms will repay their overcharged investors remains to be seen.

Another type of mutual fund abuse involves the sale of “Class B shares.” The difference between mutual fund classes is the amount investors pay in expenses (which reduces the overall rate of return) and the amount of the commission paid to the broker. Brokers generally receive higher commissions on Class B shares.

There are important differences between Class A and Class B mutual fund shares. Class B shares do not impose a front-end sales charge, but they may charge higher expenses that investors must pay over the lifetime of their investment when compared to Class A shares. Class B shares also normally impose a “contingent deferred sales charge,” which the investor pays if the investor sells the Class B shares within a certain number of years. Additionally, investors who purchase Class B shares cannot take advantage of breakpoint discounts available on large purchases of Class A shares of the same fund. The NASD advises investors to verify that purchasing Class B mutual fund shares is in their best interest, and not just in the interest of their broker who may receive higher commissions from the sale of Class B shares than other classes of fund shares.

Investors can learn more about these mutual fund abuses on the NASD and SEC websites. Please contact Frank Mead, Rich Himelrick, or Sal Ongaro if you believe you’ve fallen victim to these mutual fund abuses or any other investor abuse.

Richard G. Himelrick heads the firm’s securities litigation department. He is the author of several articles and a book on Arizona securities law. He is listed in The Best Lawyers in America.

Frank R. Mead is a litigation associate with the Firm. His practice areas include securities and commercial litigation.

Salvador Ongaro practices in the areas of securities litigation, investment-related disputes and general civil litigation.

clear that disbursements may not be made until the funds have been deposited, completely settled, and credited to the law firm's trust account. *See* Ariz. Sup. Ct. R. 43(d)(3). This rule thus prohibits disbursements of deposited funds until the law firm can confirm with certainty that the deposit has cleared, even if the law firm is familiar with the depositor of the funds and has allowed a specified period of time to pass. If a law firm fails to abide by this requirement and the deposit is later not honored, this results in a *per se* violation of the ethical rules and possible attorney discipline by the State Bar of Arizona. *See* Ariz. Sup. Ct. R. 43(d)(3)(B).

Notwithstanding this seemingly harsh restriction, certain exceptions apply. Under these circumstances, a disbursement of trust account funds may be made immediately upon deposit. These include:

- (i) when the deposit is made by certified check or cashier's check;
- (ii) when the deposit is made by a bank check, official check, treasurer's check, money order, or other such instrument where the payor is a bank, savings and loan association, or credit union;
- (iii) when the deposit is made by a check issued by the United States, the State of Arizona, or any agency or political subdivision of the State of Arizona; or
- (iv) when the deposit is made by a check or draft issued by an insurance company, title insurance company, or a licensed title insurance agency authorized to do business in the state of Arizona. Ariz. Sup. Ct. R. 43(d)(3)(A). The rule may lead to some anomalous results. For instance, a check from Ford Motor Company or Merrill Lynch will still need to clear before funds may be disbursed to a client while a money order from an unknown small town credit union may be deposited and disbursed immediately. For now, the line of demarcation has been drawn. A premium is sure to be placed on the receipt of cleared funds going forward, particularly at the time of a closing or settlement. Lawyers (and their clients) will have to act and set their expectations accordingly.

Salvador Ongaro is an appointed member of the State Bar of Arizona's Ethics Committee. He practices in the areas of securities litigation, investment-related disputes and general civil litigation.

NEWS UPDATE - ALL EMPLOYERS - On April 20, 2004, the Secretary of the U.S. Dept. of Labor announced revised regulations under the Fair Labor Standards Act ("FLSA") which address overtime pay for administrative, professional and executive employment classifications. These new regulations provide a threshold salary amount for exempt status of \$23,660/year. Employees earning under \$23,660/year are eligible for overtime regardless of their job duties. The FLSA classification of employees earning between \$23,660 and \$100,000/year will continue to depend upon their job duties. Additional changes include a provision that permits an employee's pay on a single day to be docked for any violation of company rules. Further, a "safe harbor" provision will allow employers to correct mistakes made for non-payment of overtime. In fiscal 2003, employers were assessed \$182,100,000 in back pay fines by DOL. Thus, it is critical that the intricacies of the evolving FLSA be understood by Tiffany & Bosco's clients. Please contact John P. Flynn of our office at 602-255-6020 (jjpf@tblaw.com) with any questions concerning FLSA classifications or any other employment law or commercial litigation matter.

child. In addition, the court will take into consideration extraordinary health and education expenses.

A.R.S. § 25-809(B) provides that any order for child support shall be retroactive to the time of the beginning of the lawsuit. Also, the court shall not order past support retroactive to more than three years before the commencement of the lawsuit unless good cause has been shown to warrant that.

Payment of non-covered health related expenses and which parent is going to have the child as a dependent for Federal and State Income Tax purposes is usually controlled by the pro rata share of each of their combined income. By way of illustration, if one parent is earning two-thirds of the total of the income of the parties, that parent will pay two-thirds of any non-covered health related expense and receive the child as a dependent for Federal and State Income Tax purposes two out of every three years.

The assignment of the payment of the expenses related to the birth of the child that were not covered by insurance is discretionary with the court. Usually consideration is given to all of the circumstances existing relative to the parties, particularly their financial circumstances.

The decision concerning payment of attorneys' fees and costs is governed by A.R.S. § 25-809(G), which provides that the court consider the financial resources of both parties and the reasonableness of the positions taken by each party during the proceedings.

Needless to say, the birth of a child has immediate and everlasting personal, social, and financial consequences. As a consequence, when it occurs, each party should consult with an attorney and determine their respective rights and responsibilities and thereafter act accordingly.

Leonard J. Mark's practice focuses primarily on domestic relations and personal injury and wrongful death. He is certified as a specialist in both domestic relations and personal injury and wrongful death cases.

TIFFANY & BOSCO, P.A.
Third Floor Camelback Esplanade II
2525 East Camelback Road
Phoenix, Arizona 85016

(Continued Unsolicited Fax Advertisements)

It is not until this request has been made, and the sender sends additional unsolicited faxes, that the recipient may then sue the sender.

By comparison to the federal act, the Arizona statute carries some fairly dull teeth that do not take a particularly sharp bite out of the sender's pocketbook. Arizona allows for the recovery of only \$5.00 per offending page, without the recovery of attorneys' fees. However, as noted above, the federal act allows the recipient to recover actual damages or \$500.00, *whichever is greater* (but again without the recovery of attorneys' fees), for each violation irrespective of the sender's intent. If the recipient can prove that the sender acted "willfully or knowingly" in violating the federal act, which he ought to be able to be do if the recipient has complied with the Arizona statute, the court can then increase the amount of the damages to three times the presumptive amount, or \$1,500.00 per violation under the federal act.

If you want to stop unsolicited business faxes, send the vendor a letter or a fax citing A.R.S. § 44-1482 and 47 U.S.C. § 227(C)(3) and demand that they send you no further faxes. Keep proof that you sent the demand (date, time, address, etc.) and contact your favorite lawyer the next time that vendor sends you an unsolicited fax.

Dow Glenn Ostlund's practice focuses primarily on real property, contract, commercial litigation and intellectual property rights. He has given lectures concerning intellectual property issues including the uses and pitfalls of injunctive relief in theft of trade secrets and confidentiality rights litigation. Mr. Ostlund also acts as an expert witness in litigation matters involving sophisticated real property issues and/or community standards of legal representation in matters arising out of real property transactions.

TIFFANY & BOSCO, P.A. has provided a wide range of legal services to the business community since 1967. The firm is comprised of experienced attorneys each of whom concentrates in specific areas of law. The division of legal responsibilities and the use of up to date technology, highly qualified staff and progressive management concepts has resulted in a streamlined organization that provides high quality, responsive legal services. The firm represents domestic and foreign clients on a local, national and international basis. Tiffany & Bosco, P.A. is the Arizona law firm member of MSI, a worldwide network of independent legal and accounting firms. Tiffany & Bosco, P.A. is also a member of the USFN and the FNMA and FHLMC designated counsel programs.

This newsletter is published as a service to clients and friends. It is intended to give general information only and not to provide advice on specific legal issues. For information, change of address or copies, please contact our Editors, Dorian L. Eden, Esq. and Robin L. Dugas, Esq. at (602) 255-6000 or fax (602) 255-0103. We welcome your comments and suggestions.

TIFFANY & BOSCO, P.A., Third Floor Camelback Esplanade II, 2525 East Camelback Road, Phoenix, Arizona 85016
