TIFFANY & BOSCO P.A.

# TB LAW NEWSLETTER

*Experienced Lawyers Committed to Results*

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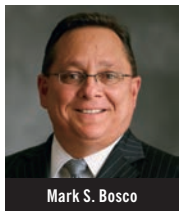
PAGE 5

# Business Spotlight

## Inside

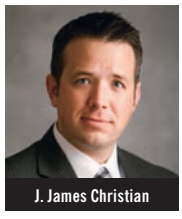
# ANNOUNCEMENTS

## PROFESSIONAL AND PERSONAL ACHIEVEMENT


Mark S. Bosco

**MARK S. BOSCO** was named a Member of the Board of Directors of Boys & Girls Clubs of Greater Scottsdale. The non-profit organization offers more than 100 youth development programs at the organization's nine branches and 12 outreach sites located in Scottsdale, Phoenix, Mesa, Fountain Hills, and the Salt River Pima-Maricopa and Hualapai Indian Communities. They provide youth development services that instill strong core values and life enhancing skills in a safe environment. The programs help promote healthy lifestyles, good character, and academic success.

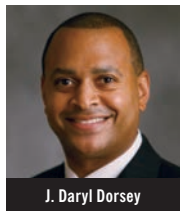
**J. JAMES CHRISTIAN** has been re-elected to the Board of Trustees for The Melonhead Foundation. The Melonhead Foundation is a charity that serves pediatric cancer patients and their families. Mr. Christian is also one of the founding members of the new Suns 88 Charities Group. This group operates within the larger Phoenix Suns Charities. Phoenix Suns Charities was incorporated in 1989 with the mission to benefit organizations that assist the needs of children in Arizona.


J. James Christian

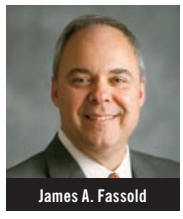
**DAVID W. COWLES** and **WILLIAM M. FISCHBACH III** presented for the Pima County Bar Association at the Sunrise Ski Resort. Mr. Cowles presented on residential evictions, and Mr. Fischbach presented on commercial evictions.


David W. Cowles

**J. DARYL DORSEY** has been appointed to the Next Gen: Emerging Leaders Board for the Turnaround Management Association's (TMA) Arizona Chapter. The Emerging Leaders Board encourages and facilitates networking and educational opportunities tailored to those turnaround professionals in the early stages of their careers. Daryl has been a member of TMA for 4 years, and also serves on the Programs Committee. TMA is the only international non-profit association dedicated to corporate renewal and turnaround management.


J. Daryl Dorsey

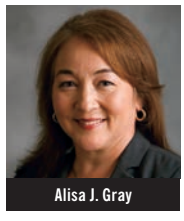
**JAMES A. FASSOLD** presented a time management webinar, "Discover What Matters: Working Smarter with the Four Quadrants," at the State Bar of Arizona on January 8, 2013, and will be presenting a seminar on work-life balance at the 14th Annual Paralegal Conference for the Maricopa County Bar Association on September 27, 2013.

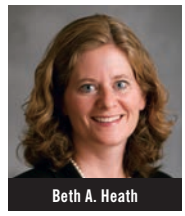

James A. Fassold

**WILLIAM M. FISCHBACH III** will teach two continuing legal education seminars for the State Bar of Arizona. In April, he is presenting a seminar on the Law of Armed Conflict. In June, he will present a seminar on the Servicemembers Civil Relief Act.


William M. Fischbach

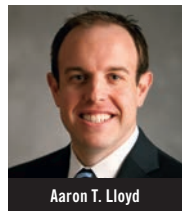
**ALISA J. GRAY** continues to present on various quality of life topics. Along with a number of other speaking engagements, Ms. Gray, a certified yoga instructor, will act as co-chair with the Honorable Donn Kessler of the Arizona Court of Appeals for an exciting program at the State Bar Convention on June 20, 2013, discussing the topic of "Welcoming Wellness, Health and Happiness into Your Law Practice and Your Life."


Alisa J. Gray

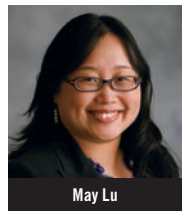

Beth A. Heath

**BETH A. HEATH** presented at a seminar, "Purchase and Sale Agreements 101," for the Maricopa County Bar Association's Real Estate 101 Series.

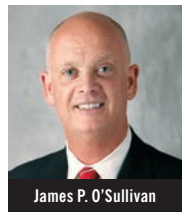
**AARON T. LLOYD** was recently named to the Board of Directors of the Michigan State University College of Law Alumni Association. Aaron will serve a three-year term.


Aaron T. Lloyd

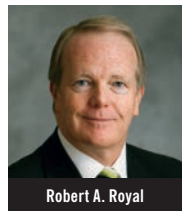
**JAMES P. O'SULLIVAN'S** and **MAY LU'S** article entitled "A Business Lawyer's Suggested Approach to Drafting ADR Language" was published in the Winter 2013 Arizona ADR Forum.


May Lu

**JAMES P. O'SULLIVAN** presented at Luke Air Force Base regarding Operation Boots to Business, a new initiative of the U.S. Small Business Administration and the branches of the United States military to assist veterans in their transition to become small business owners.


James P. O'Sullivan

**ROBERT A. ROYAL** and **JAMES P. O'SULLIVAN** presented a seminar through the State Bar of Arizona on February 15, 2013 to attorneys regarding Limited Liability Companies in Arizona.


Robert A. Royal

# ANNOUNCEMENTS

GOOD WORKS

A truckload of gifts was delivered to families in need.

## Tiffany & Bosco Participates in Holiday Angels Project

During this Holiday season, Tiffany & Bosco joined with the Jadie Lynn King Foundation to provide gifts to families in need that have a child currently in treatment at the Phoenix Children's Hospital Center for cancer or blood disorders. Each of the six families "adopted" by Tiffany & Bosco received full outfits for each family member, some "wish list" items, and grocery gift cards.

## Tiffany & Bosco Supports Local Arts Community

Tiffany & Bosco established a relationship in support of the Scottsdale Cultural Council to provide free entry to the Scottsdale Museum of Contemporary Art every Thursday from Noon to 9 p.m.

As part of the sponsorship, the Scottsdale Cultural Council and Tiffany & Bosco will also offer free admission to the museum during all of the Scottsdale Cultural Council festivals including: The Scottsdale Arts Festival, The Scottsdale Culinary Festival, and San Francisco Giants Spring Training Game Days.

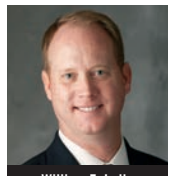

In addition, last December, the firm also sponsored "ARTrageous" starring Bernadette Peters at Scottsdale Center for the Performing Arts with all proceeds benefitting the Center.

A key part of Tiffany Bosco's firm culture is to build successful, lasting partnerships with the local arts community. Supporting the arts means supporting the local economy because it helps attract and retain a skilled workforce. Investing in the arts not only improves quality of life but also creates awareness of all the great cultural events Arizona has to offer.

NEW FACES

## NEW EQUITY SHAREHOLDER JOINS FIRM

**William E. Lally** joined the firm as a Shareholder in January 2013 to head up the Land Use and Zoning practice group. Mr. Lally has over 15 years of experience in local government and politics related to business and real estate matters. He has spent his entire legal career as a zoning attorney for some of the finest local firms, representing clients in all aspects of entitlement and development law. His past experience includes work as a senior staff member to the Maricopa County Board of Supervisors and legislative aide to the Director of the Department of Administration, as well as work on many local and regional political campaigns.



William E. Lally

Mr. Lally received his law degree from Florida Coastal School of Law and his undergraduate degree from Arizona State University. Mr. Lally is involved in the local community, currently as the Chairman of the Maricopa County Merit System Commission and a member of Valley Partnership. He previously served as a member of the Luke Air Force Base Honorary Commander's Program, the City of Phoenix Desert View Village Planning Committee, and a board member of Downtown Urban Community Kids (DUCK). Mr. Lally's planners, **Kurt A. Jones** and **Benjamin A. Patten**, have also joined Tiffany & Bosco.

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GOLF: WAVELENGTH; ART: MAREK ULIASZ/ISTOCKPHOTO

# ANNOUNCEMENTS

FIRM NEWS

## FINANCIAL SERVICES AWARDED DIAMOND AWARD OF EXCELLENCE

USFN – America's Mortgage Banking Attorneys, a network for the Mortgage Banking industry, awarded the Financial Services Department at Tiffany & Bosco the "Diamond Award of Excellence." The award is given to legal organizations that demonstrate their commitment to excellence in the legal profession and through significant contributions to industry education, on-going staff development, client relations, and community charitable contributions in the past year.

## Tiffany & Bosco Among the 2013 U.S. Top Ranked Law Firms

Tiffany & Bosco was honored to be recognized as one of the 2013 U.S. Top Ranked Law Firms nationally by LexisNexis Martindale-Hubbell. This ranking is based on the large percentage of AV-rated attorneys in the firm. As of January 1, 2013, the firm had 59% of its shareholders with an AV-rating.

## *Super Lawyers* Issues Recognitions

### SHAREHOLDERS RECOGNIZED AS LEADING ATTORNEYS

*Super Lawyers*, a listing of outstanding attorneys who have attained a high degree of peer recognition and professional achievement, selected the following shareholders for 2013: **David L. Case** (Estate Planning & Probate), **Richard G. Himelrick** (Securities Litigation), **Christopher A. LaVoy** (Business Litigation), **Leonard J. Mark** (Family Law), **Tracy S. Morehouse** (Business Litigation), **Robert A. Royal** (Business Litigation), and **Michael E. Tiffany** (Real Estate).

### SHAREHOLDER AND ASSOCIATES RECOGNIZED AS "RISING STARS"

*Super Lawyers* recognizes and selects outstanding attorneys with a high degree of peer recognition and professional achievement. In 2013, **Lance R. Broberg** (Business Litigation), **J. James Christian** (Securities Litigation), **David W. Cowles** (Business Litigation), and **May Lu** (Mergers & Acquisitions) were selected as "Rising Stars," which consists of attorneys who are 40 years old and younger or have practiced 10 or fewer years.

GOOD WORKS


## Firm Continues Phoenix Open Tradition

Tiffany & Bosco continued its proud tradition of participating at the "Greatest Show on Grass." The Thunderbirds once again hosted this great event at the TPC Scottsdale. The tournament, known as the Waste Management Phoenix Open, was held from January 31 through February 3, 2013. The Phoenix Open began in 1932, making it one of the five oldest tournaments on the PGA Tour.

This annual event always brings the largest crowds on the PGA Tour and this year was no exception. At the 2013 event, fans were fortunate to see Phil Mickelson tie the Phoenix Open tournament record for the lowest scoring round. In the end, Phil brought home the more than $1.1 million purse, scoring an overall 28 under par.

A major focus of this popular event is the charitable fundraising for Thunderbirds Charities, an affiliate of The Thunderbirds. Once again, Tiffany & Bosco underwrote a two-story skybox on the 18th hole to enjoy the event. With its contribution, Tiffany & Bosco helped make the 2013 Open another successful year for the tournament. Tiffany & Bosco is honored to be a long-time supporter of this event and Thunderbird Charities.

### FIRM IS PROUD TO SUPPORT THE BOYS & GIRLS CLUBS

Tiffany & Bosco was a Presenting Sponsor of Boys & Girls Clubs of Greater Scottsdale 2013 Youth of the Year Gala and Auction held March 9, 2013. More than 30 Club kids competed for the honor of being named Youth of the Year, the highest honor given to a member of the Boys & Girls Clubs organization. Among the nine finalists selected, the Youth of the Year was announced at the conclusion of the evening. This inspiring gala showcases how Boys & Girls Clubs help youths reach their true power of potential.

### TIFFANY & BOSCO SUPPORTS 'WEEKEND JETAWAY' CHARITY EVENT

Tiffany & Bosco teamed up with AXA Advisors Southwest last November to introduce "Weekend Jetaway," a first-class evening of gourmet food, fine wine and spirits, live entertainment, and exciting games of chance. The net proceeds benefit two very worthy causes, Boys & Girls Clubs of Greater Scottsdale and Pat Tillman Foundation.

BUSINESS TOOLKIT

# The Basics of Doing Business with State and Local Government

BY TIMOTHY A. LA SOTA

Most government contracts of any size are awarded through a public bidding process.[1] The first step in pursuing a government contract, therefore, is to sign up to receive e-mails from specific agencies so that you will know when a solicitation is out for bid.

Once you identify a promising solicitation, read it promptly and carefully. Even if bids are not due in short order, do not assume that you can wait to review the solicitation because early action, such as attendance at a pre-bid conference, may be required. If you miss the mandatory meeting, you are out of the process.

Some bidders highlight each "shall" in the document to help them identify every single requirement. And even though solicitations generally contain considerable boilerplate language, it is important to read the entire solicitation because critical requirements may be in obscure places. Additionally, many solicitations contain a "speak now or forever hold your peace" provision that requires potential bidders to raise any alleged errors in the solicitation by a certain time, or waive the ability to raise the perceived defects.

> Bidding on a government contract may be a time consuming and expensive endeavor

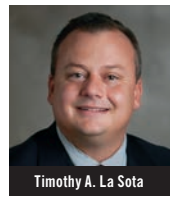
You must include all requested information in your bid. Some items, such as signing the signature sheet, are obvious. Though sometimes an item like a lack of signature can be "waived" by the governmental entity, you must address all of the solicitation's requirements. If the fact that you meet a certain requirement cannot be gleaned from your bid, it will be in jeopardy of being rejected outright, even if you do, in fact, satisfy the requirement. For example, if the solicitation requires that the person proposed to be in charge of the government contract has fifteen years of experience, make sure that your bid outlines that experience.

If you are not awarded the contract, there generally is an administrative grievance process that permits the governmental entity to grant relief if there was a legitimate flaw in the bidding process. Persuading the entity to grant you relief often is easier than convincing a court to do so. Additionally, because exhausting the administrative process is a prerequisite to bringing a lawsuit, you must file a timely administrative appeal to preserve your right to challenge the award in court.

If you choose to go to court, you generally will face an uphill battle. Although a subjective disagreement with the agency's choice rarely warrants relief, courts may intervene to remedy arbitrary and capricious conduct.

Finally, bidding on a government contract may be a time consuming and expensive endeavor, and succeeding may mean earning less than what similar work generates in the private sector. On the other hand, government agencies pay their bills. A basic familiarity with the bidding process and the issues discussed above are essential to making an informed decision about whether to bid, and the attorneys at Tiffany & Bosco can assist you with these issues.

1. A public bidding process is not always legally required, but the bidding process and the scope of the governing body's discretion in awarding contracts usually are codified in a statute or ordinance. *See generally* A.R.S. §§ 34-201 to -221, 41-2531 to -2559; Phoenix, Ariz., Code, ch. 18, art. 6.



Timothy A. La Sota

For more information about Tiffany & Bosco's resources in this area, please contact Timothy La Sota at **(602) 452-2712** or **tal@tblaw.com**.

IMAGE: KZENON/ISTOCKPHOTO

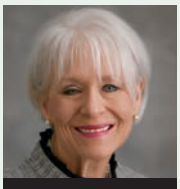
# BUSINESS TOOLKIT

## *Recognizing Employees' Rights Under the National Labor Relations Act*

**BY PAMELA L. KINGSLEY**

Arizona is a "RIGHT TO WORK" state. What does that mean; and more importantly, what doesn't it mean?

First, it should not be confused with being an "at-will employment" state, which applies to all states except Montana, and means that, if not illegal to do so and some other exception does not apply, employers and employees can terminate their employment relationships at any time for any reason. Second, it does not mean that Arizona employers can prohibit employees from organizing or joining unions. That right is secured by the 1935 National Labor Relations Act (the "NLRA"). Instead, "right to work" signifies that each employee at a workplace can decide whether or not to join the union or pay dues, even when all employees are protected by the collective bargaining agreement negotiated by the union.


Pamela L. Kingsley

The NLRA also created the National Labor Relations Board (the "NLRB"). Aside from conducting elections for labor union representation, the NLRB investigates and remedies unfair labor activities. Its five members and a General Counsel are appointed by the President with Senate consent.

While application of the NLRA's protections always has extended beyond taking part in strikes and engaging in collective bargaining, there have been significant changes in the NLRB's decisions and the focus of the NLRB field offices in processing cases since President Obama initiated appointments during a Senate recess in March 2010. Among the consequences has been the impact on many of the employer-established policies set out in Arizona's employee handbooks. The expressed attitude of NLRB's local counsel is that every existing, long-standing employee manual contains language in violation of federal law.

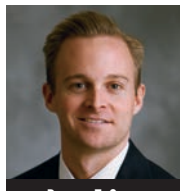
One example of many such violations in policies and manuals is the common practice of prohibiting employees from discussing their salary or wage levels. Not only do the NLRA's provisions giving all employees the right to "engage in concerted activities" assure this right, they also preclude employers from

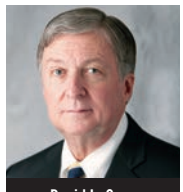
*continued on page 7 >>*

## Highlights of Federal Tax Law Changes for 2013

**BY DAVID L. CASE & DARREN T. CASE**

As 2012 came to a close, Congress passed the American Taxpayer Relief Act of 2012. Much of the "Bush" 2001 tax legislation was made permanent by removal of sunset provisions. This is a limited summary of the 2012 Act and other new tax law.


Darren T. Case


David L. Case

For 2013, the top individual federal income tax rate is increased 4.6% to 39.6% for taxable income over $450,000 for joint returns and over $400,000 for single returns. The top tax rate for long-term capital gains and qualified dividends is increased from 15% to 20% for taxpayers above those same taxable income levels. The employee portion of FICA taxes will return to 6.2% from 4.2%. Limitations on itemized deductions, personal exemptions, and dependency exemptions for taxpayers above certain income levels also return. This results in over a 1% effective tax rate increase for many taxpayers.

Certain "Obamacare" taxes also kick in for 2013, including the additional 0.9% Medicare tax (now at 3.8%) for income over $200,000, and the new 3.8% surtax on investment income (interest, dividends, long-term gains, rents, etc.) for high income taxpayers (modified adjusted gross income above $250,000 for joint returns, $200,000 for single taxpayers). Thus, in effect the total tax on long-term gains and most dividends is increased from 15% to 23.8%.

The gift, estate, and generation-skipping transfer (GST) tax exemption equivalent amount was made permanent, now $5.25 million for 2013 due to the annual inflation adjustment. With proper trust planning, a married couple can shelter up to $10.5 million for 2013. The annual donee exclusion for gifts also rises in 2013 to $14,000. The top rate for all three wealth transfer taxes is raised to 40%. Eliminating the sunset provisions on wealth transfer taxes has (1) removed the risk of recapture or "claw-back" of gift tax for large gifts exceeding the estate tax exemption amount at death, (2) permanently replaced the estate tax credit for state death taxes paid with a deduction, and (3) repealed the family owned business estate tax deduction.

"Portability" is also now made permanent. This allows the surviving spouse to preserve and later utilize any unused portion of estate tax exemption from his or her predeceased spouse's estate. Though this may be a fall back for estate tax savings, it should not be used as a planning tool because only proper trust planning can fully utilize various tax planning techniques and provide creditor protection for the surviving spouse.

Even though Congress supposedly has made the 2010 wealth transfer tax rules "permanent," there is still some urgency for estate and GST tax planning for larger estates. There is still talk of limiting or eliminating several advanced planning devices, such as the rules pertaining to "grantor trusts" and grantor retained annuity trusts ("GRATs"), and other planning methods. Utilizing these common tools before the law changes could prove very beneficial. And, with the current historically low IRS interest rates, which can greatly enhance these and other planning techniques, and the resulting estate and GST tax savings, reviewing the effect of these techniques is advisable.

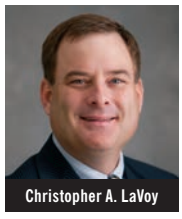
BUSINESS TOOLKIT

# Mechanic's Lien Ruling a Mixed Bag

BY CHRISTOPHER A. LAVOY & WILLIAM M. FISCHBACH, III

A recurring problem in commercial leasing is a tenant-hired contractor coming after the landlord when the tenant fails to pay, typically with mechanic's lien foreclosure and unjust enrichment claims against the landlord. The landlord often has given the tenant funds to pay the contractor as part of a build-out allowance, which the tenant spent on something else.


William M. Fischbach III


Christopher A. LaVoy

The recent decision *Wang Electric., Inc. v. Smoke Tree Resort, LLC*, 230 Ariz. 314, 283 P.3d 45 (App. 2012), resolved a number of open landlord-liability issues in this context.

In *Wang,* the tenant's general contractor failed to pay its subcontractors, who then recorded mechanic's liens against the landlord's property and filed suit to foreclose them. The lease required the tenant to make improvements approved by the landlord and the landlord gave the tenant an improvement allowance. The lease stated that "no mechanic's or other lien for any … work or materials [furnished to tenant] shall attach to or affect [landlord's] interest in the [p]remises" and represented that the sole relationship between the parties was that of landlord and tenant.

The first issue was whether a self-serving lease provision inserted by the landlord disclaiming any mechanic's lien liability or agency relationship with the tenant could insulate the landlord from liability to a tenant-hired contractor on a mechanic's lien foreclosure claim. The general rule in Arizona is that the landlord is liable if the tenant was required under the lease to make the improvements on the theory that the tenant was acting as the landlord's agent in hiring the contractor. To thwart liability, landlords began putting such disclaimers in their leases, but it was unknown whether they were enforceable. *Wang* held no.

The court ruled that the landlord could not defeat the statutory agency relationship with its tenant by including self-serving language to that effect in the lease.

The only way for a landlord to avoid mechanic's lien liability is to clearly state in the lease that any improvements are done at the tenant's sole election and expense, but that leaves the landlord at risk when a tenant does not perform the approved build-out.

Where design compliance is an issue, the better approach is to a create a mechanism for ensuring that tenant improvement funds are used to pay contractors, such as requiring lien releases in exchange for the release of funds, or hiring a third-party administrator to undertake this supervisory role. If no tenant improvement funds are provided, another possibility is to require the tenant to buy a contractor payment bond.

The second issue in *Wang* was whether a landlord is liable for unjust enrichment simply because the contractor performed work increasing the value of the property even though the landlord did nothing wrong. The court held no. The landlord is *only* liable if it engaged in improper conduct, such as not paying a promised improvement allowance. However, this is little consolation given the landlord's simultaneous mechanic's lien foreclosure liability.

>> **NLRA** *continued from page 6*

prohibiting such discussions during work hours or prohibiting their appearance on Facebook pages.

If employees are permitted to discuss non-work-related topics on-the-clock, employees should also be allowed to exchange information relating to their working conditions, including benefits and pay. And it only takes two employees talking to obtain protection. If an employee wants to grouse about a supervisor on social media and the audience includes at least one co-employee, the protection prevails.

One way to avoid NLRB scrutiny, including having to defend against an NLRB charge or lawsuit, is for employers to avoid continued reliance on existing, outdated policies or drafting their own based on samples from the Internet or generic office software. Tiffany & Bosco can provide answers and help ensure compliance with NLRA or other employment-related laws.

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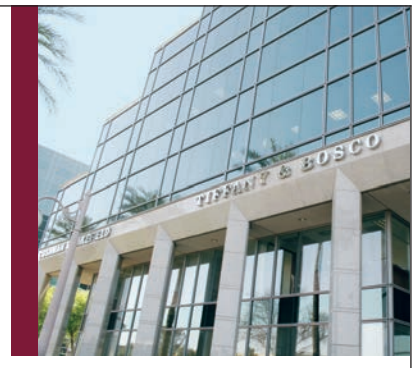
Tiffany & Bosco, P.A. has provided a wide range of legal services to the business community since 1967. The firm's experienced attorneys represent domestic and foreign clients on a local, national and international basis. Tiffany & Bosco, P.A. is the Arizona law firm member of MSI, a worldwide network 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.

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