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*Assessing when,
and when not,
to purge saved
documents*

Words to Keep



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ANNOUNCEMENTS

PERSONAL ACHIEVEMENT

Shareholder Joins Economic Club Board

The Economic Club of Phoenix announced that firm shareholder **ROBERT A. ROYAL** has joined its board of directors.



Rob Royal

In conjunction with Arizona State University's W.P. Carey School of Business, the Economic Club of Phoenix is designed to enhance discussion

of economic and business issues within the academic, business, labor and public sectors of the greater Phoenix metropolitan area.

The Club has attracted numerous business leaders from around the world including Meg Whitman, Michael Dell, J.W. Marriott, Milton Friedman and Steve Forbes. "The Economic Club of Phoenix is a wonderful forum here in Arizona to propel discussion for economic and business leaders," said Royal.

"I am looking forward to working with the Club's board and contributing to the organization's success." Royal's practice specializes in dealing with disputes involving businesses and business owners, specializing in director, officer and manager liability issues. He is the litigation editor for the Arizona Corporate Practice Guide and a member of the Arizona Association of Defense Counsel.

LEARN MORE

For additional information on our newest shareholders and associates, please see the firm's Web site at www.tblaw.com.



PERSONAL ACHIEVEMENT



Mark Dioguardi

Friend of the Airwaves

The Friends of Public Radio Arizona added **MARK DIOGUARDI**, chairman of the firm's real estate committee, to its board.

COMMUNITY OUTREACH

ATTORNEY ELECTED TO THE MELONHEAD FOUNDATION BOARD

Attorney **J. JAMES CHRISTIAN** has joined The Melonhead Foundation's board of trustees.



J. James Christian

The Melonhead Foundation is a non-profit organization, whose mission is to provide support for children with cancer and their families.

In addition to his roles as a trustee and the secretary for the Foundation,

Christian will also be grant writing for the organization.

Christian is a litigation associate who specializes in securities litigation, corporate litigation and general civil and commercial litigation.

LEARN MORE

For more information on The Melonhead Foundation, check out www.melonhead.org.

ANNOUNCEMENTS

FIRM NEWS

New Associates and Administrator Join Firm



Samantha Williams

SAMANTHA C. WILLIAMS has been hired as an associate in the real estate department. Prior to joining the firm, Williams was an associate at Snell & Wilmer where she focused on zoning and land use/entitlement issues. Williams has also worked as a land planner for LVA Urban Design Studio in Scottsdale. She received her J.D. with honors from Chicago-Kent College of Law and a bachelor of science in Finance from Babson College.



Tabitha A. Jecmen

TABITHA A. JECMEN has been hired as an attorney in the litigation department. Prior to joining the firm, Jecmen was an attorney with Illinois-based Konicek & Dillon, P.C., where she focused on personal injury and legal malpractice cases. Jecmen has also served as a law clerk for both Chilton Yambert Porter & Young, LLP and the DuPage County State's Attorney, where she was selected to present opening statements in *People v. Jason Deluceak*. Jecmen has a J.D. from The John Marshall Law School and a bachelor of arts in English from Indiana University.

NANCY CASSARO has been hired as the firm's director of administration. Prior to joining Tiffany & Bosco, Cassaro was the accounting manager at Lionel Sawyer & Collins, the largest private law firm in Nevada, where she supervised all of the firm's accounting functions. Cassaro has a master's of business administration from the University of Phoenix and graduated cum laude from Arizona State University with a bachelor of science in accounting.

FIRM NEWS

New Shareholders

Tiffany & Bosco, P.A. is pleased to announce the election of three shareholders:



Salvador Ongaro

SALVADOR ONGARO will continue to practice in the areas of securities litigation and civil and commercial litigation.

As a former licensed securities representative and trading analyst with a major international brokerage firm, Ongaro has extensive knowledge of complex margin, securities, options and fixed income trading strategies as well as brokerage compliance and account issues.

An attorney at Tiffany & Bosco for four years, Ongaro is a native Spanish speaker and frequently counsels the firm's Spanish-speaking clients in a variety of litigation matters.



Frank Mead

FRANK MEAD will continue practicing civil litigation, focusing primarily on securities and investment disputes prosecuted in state and federal court. Additionally, Mead's practice includes representing businesses and individuals in a wide range of civil and business disputes, representing claimants and respondents in arbitration proceedings and defending businesses and individuals in administrative proceedings.

Mead has been with the firm for six years. Prior to practicing law, Frank was a member of the United States Air Force (1990-94).



Dustin C. Jones

DUSTIN C. JONES joins the firm's real estate/zoning and entitlement department from Snell & Wilmer, LLP, where his primary focus was zoning and land use law, particularly in the West Valley.

A Phoenix native, Jones has eight years of experience practicing law in Arizona. He has assisted numerous developers, homebuilders and land owners in their pursuits of growth and expansion throughout the Valley. He brings unique experience to Tiffany & Bosco, having represented developers in unusual endeavors such as New Urbanism projects, mixed use projects and LEED green building and infill developments. Jones has also developed many strategies for public and government relations and advocacy.

Jones is also highly involved in a variety of civic and philanthropic activities throughout the Valley. He is a member of the West Valley Arts Council, Western Maricopa County Coalition (WESTMARC), the dean's advisory board at Arizona State University West and is vice-chairman of the West Valley Hospital board of trustees.

A graduate of the University of Arizona, Jones received his bachelor of arts in political science and Latin American studies in 1996 and his J.D. from the school's James E. Rogers College of Law in 1999. Jones was also the recipient of the university's distinguished John Munger Prize for scholars of international and business law.



IN BRIEF

BY DOW GLENN OSTLUND AND LANCE R. BROBERG

WORDS TO KEEP

To Shred Or Be Shredded — That Is The Question

Whether, and how long, to retain documents is a question plaguing businesses and individuals alike. The question of whether to keep original documents and letters (either sent or received), drafts, working copies, notes, memos, letters, minutes of meetings, and now emails and all sorts of other digital/electronic documents (“records” or “documents”) is constantly in conflict with the desire to clean out files and storage areas.

Is there an answer to what to keep, how long to keep it, and when and how to throw “unnecessary” stuff away? Unfortunately, the answer is: “It depends.” Your decision to retain or destroy records must involve an analysis of what each record contains and whether or not you are on notice that the record may become “discoverable” in connection with a problem at some later time. Your decision depends upon an analysis of at least the following factors:

- Is anyone presently aware of any actual or threatened lawsuits, audits, administrative inquiries, complaints from employees and the like (“problems”) that might involve the records?



Dow Glenn Ostlund



Lance R. Broberg

- Do the records serve as backup, or proof of some contract obligation, reimbursement, payment or performance involving someone else?
- Do they track income or expenses, hiring or firing, or company policies and procedures?
- Are there any other retention needs particular to your organization, industry, or business?

An analysis of the record is also important:

- Is it paper, a form, a document received from someone else?
- Is it an electronic document which was created within your organization, or received from the outside, but which is now resident on your computer system?

A formal written document preservation and destruction policy is highly recommended in today’s business and litigation environment. That policy should be tailored to your specific needs and contain at a minimum the following:

- Identification of document categories with the specific length of retention coinciding with the longest statute of limitations involving claims likely to arise from those categories.
- Each statement must include a procedure for implementing automatic destruction of the vari-

ous categories at the end of their respective retention periods.

- Each statement must include a specific procedure to stop the automatic destruction of records once you learn — or have reason to believe — that a problem exists, is threatened, or is likely. Once you have such knowledge, State and Federal law require that the policy **MUST** be stopped and all reasonable efforts (erring, if at all, on the side of retention) must be taken to protect and preserve ALL records that are — or might be — related to the problem. Failure to have and implement such a policy **WILL** result in unpleasant and expensive consequences.
- Each statement must deal with paper documents, as well as all electronic documents, you generated or received.

Once a policy is in place, you must faithfully follow the procedures set forth in that policy statement in order to avoid difficulties in the future.

The best way for you to protect yourself is for you to consult the member of the firm you normally work with and discuss your specific needs and design a policy that makes sense for you and will keep you in compliance with the constantly changing and evermore complex business and legal environment in which we live and work.

PROTECT YOURSELF

Learn how Tiffany & Bosco can help. Contact the firm at (602) 255-6000, or online at www.tblaw.com.

LEGAL REVIEW

BANKRUPTCY

'The Reform Act'

Questions Remain After Enactment of the "Perfect" Bankruptcy Code

BY MARK S. BOSCO

The arrival of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("The Reform Act") was introduced with a great deal of doomsday prophesy. Practitioners, scholars, and jurists that reviewed The Reform Act prior to its passage all came up with the same conclusion: that the new law was not a model of clarity. This conclusion was reached despite testimony before the Senate Judiciary Committee suggesting that The Reform Act was "perfect."

In spite of the apparent perfection of The Reform Act, judges, attorneys, and

parties who have sought relief in bankruptcy court after October 17, 2005 have struggled with a myriad of issues arising from the inconsistencies raised by The Reform Act. One of these issues is The Reform Act's attempt to close the "Mansion Loophole."

Under bankruptcy law prior to The Reform Act, debtors living in certain states could shield from their creditors virtually all of the equity in their homes. In light of this, some debtors actually relocated to these states just to take advantage of their "Mansion Loophole" laws.



Mark S. Bosco

The Reform Act attempted to put an end to the "Mansion Loophole." With The Reform Act there is now a \$125,000 cap on homestead that is imposed on debtors, even if applicable state exemptions allow greater or unlimited protection. In what is be-

lieved to be the first published decision regarding The Reform Act, an Arizona court analyzed the statute to determine whether the cap applied in Arizona. See *In re McKnabb*, 326 B.R. 785 (Bankr. D. Ariz. 2005).

In *McKnabb*, the court held that the \$125,000 cap in new Sections 522(p) and Section 522(q) of the Bankruptcy Code only apply in non opt-out states, that is, states in which a debtor may choose between state or federal exemptions. More than two-thirds of the states have opted out of the federal exemptions. If *McKnabb* is followed, these new caps would only apply in Texas and Minnesota, not in states like Arizona or Florida, in which debtors must utilize state exemptions. Because Arizona is an opt-out state, according to *McKnabb*, the \$125,000 cap of Code Section 522(p) is not implicated.

The applicability of Section 522(p) in opt-out states has been extensively litigated since the decision in *McKnabb*. Bankruptcy courts that considered this issue have uniformly rejected the decision of *McKnabb*. In rejecting *McKnabb*, these courts have ruled that the \$125,000 cap should apply nationwide, not just in Texas and Minnesota.

Is the statute "perfect" as promised? The answer is obviously no. On this specific issue did Congress choose the best language to accomplish its intended purposes? Once again, the answer is no. The *McKnabb* decision read narrowly and mechanically may find support, but other decisions taking into account the clear legislative intent to apply the homestead cap in all states seem to be more plausible.

Alas, this is just one of many issues that will be faced by the courts and litigants in the future as we work to make sense of the "perfect" Code.

WE'RE HERE TO HELP

For additional information on recent bankruptcy law changes, contact us at (602) 255-6000 or online at www.tblaw.com.



LEGAL REVIEW



INVESTING

ARIZONA'S SECURITIES ACT

The following is an excerpt from the Second Edition of Arizona Securities Fraud Liability: Statutory and Common-Law Remedies ©2006 by Richard G. Himelrick and Brian J. Schulman. Copies of the full treatise may be obtained through the State Bar of Arizona.

Arizona's securities statutes have evolved over nearly a century, dating from 1912. Their growth has been influenced by developments in other states and federal statutes, but as they exist today, they do not track the laws of any state or federal statutory scheme. Even decisions of the U.S. Supreme Court may not provide controlling precedent. The growth of Arizona's laws has been distinct to this state. Analogies to the law of other jurisdictions are, therefore, frequently misplaced.

Not many of the cases that work

their way through state courthouses raise securities issues, and as a group, "judges are a generalist audience with little skill or interest in securities issues."¹ It is no surprise then that appellate precedent in Arizona and other state courts is not well developed. State decisions commonly rely on federal decisions interpreting statutes with differences that go unnoticed in the state courts. Adding to the confusion, many federal cases are decided through empirically unproved judicial rules of thumb—decision-making heuristics or shortcuts like the puffery, sounds-in-fraud, and bespeaks-caution doctrines. These heuristics, while simplifying decision making, are based on plausible but undocumented assumptions about investor and market behavior. All this makes development of desirable state securities law unusually difficult and suggests the need for caution when state judges look to federal precedent for guidance.

Another layer of complexity exists

because remedies under Arizona's Securities Act do not exclude overlapping liability theories. As a result, statutory securities-fraud claims are commonly joined with other theories of recovery. When these different theories meld into a single case, analysis may become murky. The legal standards that govern a typically nonsecurities theory like common-law fraud may be inappropriate when applied to statutory-securities fraud. For example, because of the vulnerability of investors in securities transactions, proof of common-law reliance under A.R.S. § 44-1991(A) is unnecessary.

Arizona's first securities legislation was part of a spate of specialized state statutes known colloquially as "blue-sky" laws that were enacted between 1911 and 1913. The first of these was passed in Kansas in 1911. Arizona adopted its blue-sky law patterned on the Kansas model. The Arizona Supreme Court described the legislation's purpose as one of public protection "preventing the public from being imposed upon by questionable and unsound financial schemes of fortune dreamers and dishonest promoters, and to reach all get-rich-quick schemes offering to the general public their stocks and securities, under whatever name they may choose to act."²

This work collects the many strands of Arizona law that collectively represent the state's securities-law precedent. It does so in a format that analyzes the intricacies of Arizona's securities statutes and places them in the broader framework of related common law and state statutory law. Where applicable, differences between Arizona and federal securities law are identified and discussed.

1. Stephen M. Bainbridge & G. Mitu Gulati, *How Do Judges Maximize? (The Same Way Everybody Else Does—Boundedly): Rules of Thumb in Securities Fraud Opinions*, 51 EMORY L.J. 83, 108 (2002).

2. *Reilly v. Clyne*, 27 Ariz. 432, 441, 234 P. 35, 38 (1925).



Richard Himelrick

ATTORNEY DIRECTORY



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.

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, Pamela L. Kingsley or Robert A. Royal at (602) 255-6000.

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