



SETTLING UP

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How to pursue a FINRA arbitration case against a stockbroker or investment adviser

ILLUSTRATION: FEDORA CHICHEVA/DEPOSITPICTURE

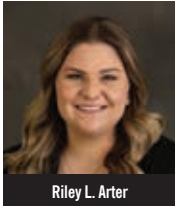
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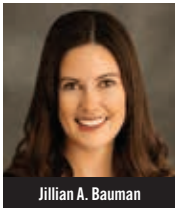
PROFESSIONAL & PERSONAL ACHIEVEMENT



Riley L. Arter

RILEY L. ARTER was selected to join the Maricopa County Bar Association's Estate Planning, Probate, and Trust section for a 2-year term, which began in January of 2024.

JILLIAN A. BAUMAN has been elected as Secretary of the Maricopa County Chapter of the Arizona Women Lawyers Association. Jillian was also asked to serve as a Co-Chair of the Young Lawyer Subcommittee of the American Bar Association's Business Law Section's Middle Market and Small Business Committee.

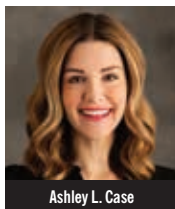


Jillian A. Bauman



Jodi R. Bohr

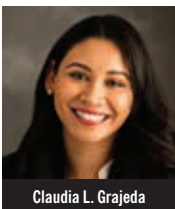
JODI R. BOHR has been recognized again by *AZ Business Leaders Magazine* as a 2024 Leader in the Law.



Ashley L. Case

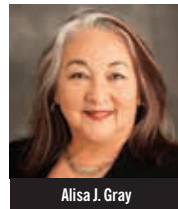
ASHLEY L. CASE has been re-elected to the Maricopa County Bar Association Board of Directors for 2024-2026. This will be Ashley's second term on the Board; she previously served as the Chair of the Maricopa County Bar Association Estate Planning, Probate, and Trust section.

CLAUDIA L. GRAJEDA was accepted by Northwestern University Tax LL.M. studies program and will begin courses this Fall. The Tax Program at Northwestern Pritzker School of Law has been recognized as a leader in the field, ranked among the very best annually in



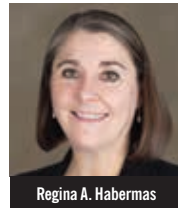
Claudia L. Grajeda

U.S. News and World Report. Claudia was also elected as Secretary of the Hispanic National Bar Association (HNBA) for Young Lawyers Division.



Alisa J. Gray

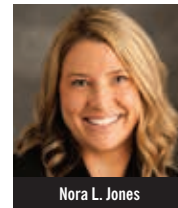
In January, **ALISA J. GRAY** gave a CLE presentation to the members of the Probate and Trust Law Section of the State Bar of Arizona. The topic was "Mindfulness and the Power of Attorney: Cultivating Calm, Focus and Resolve." Over 100 attorneys attended the seminar, which was conducted over Zoom, bringing attorneys from around the state together for this presentation.



Regina A. Habermas

In March, **REGINA A. HABERMAS** co-presented a CLE in conjunction with the Southern Nevada Association of Bankruptcy Attorneys on the topic of "Representing Secured Creditors in Bankruptcy."

NORA L. JONES and **KRYSTA C. FURNELL** were honored to present regarding the basics of estate plans, including wills, trusts, and powers of attorney, and what happens when these documents are not



Nora L. Jones

in place. Their one-hour CLE addressed how to approach difficult conversations with parents, such as who will be making decisions when that person is incapacitated and how that person's assets will be distributed at death.

NORA L. JONES has been appointed to the Board of Directors for the Arizona Chapter of the National Academy of Elder Law Attorneys (NAELA). NAELA is a respected and established national organization

dedicated to improving the quality of services provided to older adults and people with disabilities. Nora also joined a panel discussion with court leadership and fellow volunteer judges pro tempore about serving as a judge pro tempore with the Maricopa County Superior Court.

MAY LU recently joined accountant Eric Longenbaugh to guide local business owners through various issues related to business formations at the White Mountain Business Owners Roundtable in Show Low, Arizona. Amid the



May Lu

eclectic backdrop of Buffalo Bill's Tavern and Grill—home to the White Mountain region's largest private collection of Buffalo Bill artifacts and Old West memorabilia—Eric and May discussed the diverse legal and tax considerations that can arise when forming business entities. May was asked to serve another 3-year term as a Co-Vice Chair of the Middle Market and Small Business Committee of the American Bar Association's Business Law Section and was re-elected to the Board of Directors of the Arizona Asian American Bar Association for her final 3-year term.

JAMES P. O'SULLIVAN and **DARREN**



James P. O'Sullivan



Darren T. Case

T. CASE of Tiffany & Bosco, P.A., along with Jim Benedict of PNC Private Bank Hawthorn SM, were panelists for the "2024 Family Business Forum: Wealth, legacy and transition planning" on November 7, 2023. Excerpts from the panel discussion were published

in the *Phoenix Business Journal* on January 5, 2024.

ANNOUNCEMENTS

GOOD WORKS

Helping Families in Need

Tiffany & Bosco is proudly committed to being an active, contributing member of our great community. This past holiday season, the firm continued its partnership with the **Jaydie Lynn King Foundation** to collect more than 200 gifts for families with children in treatment at Phoenix Children's Hospital's Center for Cancer and Blood Disorders.

The Jaydie Lynn King Foundation partners with organizations to help children and their families who are receiving treatment at the center. Each holiday season, Tiffany & Bosco participates in the Foundation's Adopt-a-Family Program. This time, the firm used a coordinated effort to provide gifts, food, and household necessities to three deserving families. The items donated included everything from groceries and clothing to tricycles. Everyone at Tiffany & Bosco enjoys this



rewarding opportunity to give back to our community, spread some holiday cheer, and help families in need. We are honored to do our part to make our community here in the Valley such a special place to live.

Another Successful Open Season

The 2024 Waste Management Phoenix Open continued its tradition of drawing fans from around the world to partake in what is now deemed "The People's Open." Heavy rain throughout the week created tough course conditions for the players, but resulted in many "viral" videos of fans enjoying the muddy conditions, which took the nation by storm.

For the week, unofficial counts estimate that the Open welcomed between 600,000 and 700,000 guests, with tournament organizers temporarily closing all of the entrances to the Open on Saturday due to larger-than-usual crowds and complications created by the weather.

Meanwhile, Tiffany & Bosco looked on from its skybox near the 18th green, watching the action unfold. Nick Taylor, who lost in a playoff last year to Scottie Scheffler, would not be denied victory for a second year in a row. Taylor birdied three of his last four holes in regulation to force a playoff against Charley Hoffman. Taylor then proceeded to birdie both playoff holes to bring home the victory.

The Open is not simply a golf tournament. It also serves as a powerful fundraising vehicle that enables the Thunderbirds to generate millions of dollars in support of local Arizona charities. Tiffany & Bosco prides itself on giving back to the local community, and is honored to be a perennial sponsor of the Open. The firm is proud of its longstanding association with the Open, and is excited to continue sponsoring the Open and doing its part to support the worthy causes benefitted by the Open for years to come.

RECOGNITION

'Super' Attorneys Recognized

Super Lawyers®, a listing of outstanding attorneys who have attained a high degree of peer recognition and professional achievement, selected the following shareholders for 2024 Super Lawyers:

- > David L. Case – Estate Planning & Probate
- > May Lu – Mergers & Acquisitions

- > Robert D. Mitchell – Business Litigation
- > Mark S. Bosco – Banking
- > Alisa J. Gray – Estate & Trust Litigation
- > Christopher R. Kaup – Bankruptcy
- > Robert A. Royal – Business Litigation

2024 RISING STARS ARIZONA

- > Elise B. Adams – Estate & Trust Litigation
- > Timothy C. Bode – General

Litigation

- > Michael F. Bosco – Banking
- > Chelsea A. Hesla – Estate & Trust Litigation
- > Nora L. Jones – Estate & Trust Litigation
- > Mina C. O'Boyle – Real Estate
- > Michael A. Wrapp – Real Estate

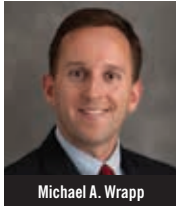
2024 RISING STAR NEW MEXICO

- > Joshua T. Chappell – Creditor Debtor Rights

ANNOUNCEMENTS

PROMOTIONS

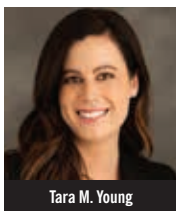
MICHAEL A. WRAPP was promoted to Shareholder in November 2023. Michael is licensed to practice law in Arizona



Michael A. Wrapp

and California, and focuses his practice in the areas of real estate transactions and financing, business formations and transactions, and automotive law. During his first few years of practice, Michael obtained substantial civil litigation and appellate experience, particularly in the areas of real estate and banking. That experience enables him to help clients avoid potential pitfalls when guiding them through transactions. Michael earned his undergraduate degree, his MBA, and his law degree from the University of Notre Dame.

TARA M. YOUNG was promoted to Shareholder in January 2024. Tara focuses her practice on civil litigation, encompassing areas such as contract disputes, real estate



Tara M. Young

disputes, real estate licensing, automotive law, construction, and matters before the Arizona Registrar of Contractors. Her experience in litigation allows her to provide strategic and effective advocacy for her clients, ensuring that their interests are always first and foremost at every step. Tara earned her Juris Doctor from the University of Idaho College of Law and her Bachelor's degree in Psychology from Arizona State University.

{ NEED AN ATTORNEY? }

See the directory on the back page of this newsletter or visit us online at tblaw.com.

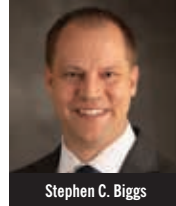
NEW FACES

Tiffany & Bosco Welcomes 8 Attorneys

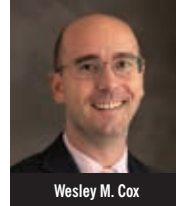
STEPHEN C. BIGGS joined Tiffany & Bosco as a Shareholder in October 2023. Stephen is a seasoned appellate lawyer, effective trial attorney, and creative problem solver. He handles a wide array of business litigation matters, including intellectual property disputes, defamation cases, contract dis-

putes, business ownership disputes, business management disputes, failed business deals, claims for fraud or other forms of misrepresentation, breach of fiduciary duty claims, conversion claims, and negligence claims. Stephen has also represented clients in appellate matters in a wide variety of federal and state courts. In addition, Stephen represents workers' compensation insurers in Arizona and Utah in protecting and enforcing their third-party recovery rights. Stephen received his law degree from the Seton Hall University School of Law, after which he clerked for the Honorable Mary M. Schroeder at the United States Court of Appeals for the Ninth Circuit and the Honorable Patricia K. Norris at the Arizona Court of Appeals before going into private practice. Stephen is admitted to practice law in both Arizona and Utah.

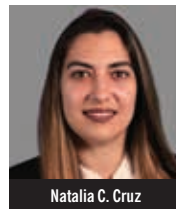
WESLEY M. COX joined the firm in November 2023. Wesley focuses his practice on construction-related litigation and has spent the majority of his career working on residential construction matters. Prior to joining the firm, Wesley represented the Registrar of Contractors in contractor discipline and recovery fund hearings. Wesley received his law degree from the James E. Rogers College of Law at the University of Arizona. Prior to law school, Wesley received a degree in political science from the University of California, San Diego.



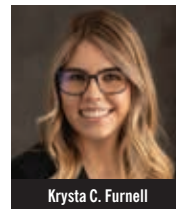
Stephen C. Biggs



Wesley M. Cox



Natalia C. Cruz



Krysta C. Furnell

NATALIA C. CRUZ joined the firm February 2024. She currently practices civil litigation. Before becoming an attorney, Natalia received a Bachelor of Science degree in Legal Studies from the University of Central Florida. She received her law degree from the

Florida International University College of Law, where she participated in various litigation competitions as a member of the FIU Trial Team. Prior to joining Tiffany & Bosco, Natalia served to protect the State of Florida as a prosecutor for one year.

KRYSTA C. FURNELL joined the firm as an Associate in October 2023. Krysta's practice focuses exclusively on trust and probate litigation, elder law, and estate and trust administration. As an advocate for families, individuals, and professional fiduciaries, Krysta has been able to build upon her passion for resolving trust, estate, and elder law disputes, which started while she was in law school at the Sandra Day O'Connor College of Law at Arizona State University. While at ASU Law, Krysta received the highest grades in both her Decedent's Estates and Trust Law classes and was also named a William H. Pedrick Scholar for academic excellence.

MALCOLM A. GILES joined the firm as an intern in January of 2022 and was subsequently welcomed as an Associate. Malcolm advises clients on all aspects of complex commercial real estate transactions. Malcolm also represents automobile dealers, providing support in their daily operations, licensing, business management, commercial disputes, and real estate, financing, and business

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BUSINESS COMPLIANCE

It is Here to Stay!

Navigating the Corporate Transparency Act

BY J. LAWRENCE MCCORMLEY
& EMILY S. FANN

The recently enacted federal Corporate Transparency Act (CTA) demands affirmative engagement in regulatory compliance for certain entities formed in the United States, designated as “Reporting Companies,” and from specific individuals within these companies, referred to as “Beneficial Owners.” The CTA is intended to uncover the owners behind shell companies and similar entities used to conceal illicit funds or engage in money laundering or other criminal activities. The CTA requires time-sensitive actions that directly impact how businesses operate and disclose their ownership structures—and that will likely affect you.

Under the legislation, Reporting Companies (including corporations, limited liability companies, partnerships, and some trusts) are required to disclose beneficial ownership information to the Financial Crimes Enforcement Network (FinCEN). While some entities are exempt from reporting to FinCEN, those entities typically include publicly traded companies and highly regulated industries (for example, banking institutions).

“Beneficial Ownership” includes individuals who, directly or indirectly, own or control a significant portion of the entity, including but not limited to shareholders, officers, directors,

members, managers, and individuals with options to acquire controlling interests.

Recent legal challenges to the constitutionality of the CTA, such as a lawsuit resulting in the March 1, 2024 decision issued by the

United States District Court for the Northern District of Alabama, which declared the CTA unconstitutional in *Nat'l Small Bus. United v. Yellen*, 5:22-CV-1448-LCB, 2024 WL 899372 (N.D. Ala. Mar.

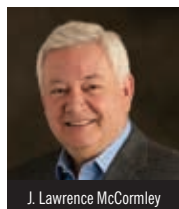
1, 2024), have heightened uncertainty regarding the CTA's applicability and potential staying power. However, FinCEN's subsequent clarification issued on March 4, 2024 affirmed the legislation's

enforceability, emphasizing that the district court's ruling was specific to the circumstances of that case and its particular plaintiffs. As a result, all individuals to whom the CTA applies should comply with its requirements to avoid severe penalties for intentional noncompliance.

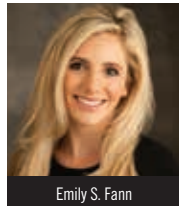
Companies formed before January 1, 2024 must submit their Beneficial Ownership information to FinCEN by December 31, 2024 at the latest. Newly-formed companies have 90 days from their date of formation to complete their initial filing. Subsequent updates to the Beneficial Owners must be filed with FinCEN no

later than 30 days after each change. Failure to meet these deadlines can result in penalties and fines, with willful noncompliance carrying severe consequences, including civil penalties of up to \$10,000 and criminal penalties of up to two years of imprisonment.

Creating a FinCEN identifier can significantly streamline the filing process for individuals who must report under more than one entity. A FinCEN identifier serves as a unique identifier for individuals and entities, compiling and storing relevant information directly with FinCEN for later filings. Using an identifier can significantly reduce the compliance burden imposed by the CTA. Another proactive measure to ensure timely filing with FinCEN is amending existing entity governing documents to include provisions requiring that Beneficial Owners comply with the CTA and related FinCEN requirements.



J. Lawrence McCormley



Emily S. Fann



FULL DISCLOSURE

Navigating the complexities of the CTA requires proactive compliance measures, and potentially expert legal guidance. At Tiffany & Bosco, P.A., we are committed to helping our clients navigate the CTA's complexities and achieve confidence in their compliance. Please contact our CTA team if you have any questions or require assistance with CTA compliance.

FINANCIAL LITIGATION



How to pursue a FINRA arbitration case against a stockbroker or investment adviser BY ROBERT D. MITCHELL & CM MATTHEW LUK

The Financial Industry Regulatory Authority (FINRA) provides an arbitration forum for disputes between investors and broker-dealers, and most broker-dealers include arbitration provisions in their customer agreements that require customers to pursue their legal claims against the broker-dealers in arbitration before FINRA, rather than in ordinary court proceedings. Such arbitration agreements limit an investor's remedies for pursuit of claims against investment professionals.

Investors also sometimes enter into arbitration agreements with other investment professionals not subject to FINRA's authority. This may include



Robert D. Mitchell



CM Matthew Luk

investment advisers who are regulated by the SEC or state agencies. Although FINRA does not regulate these investment professionals, FINRA accepts jurisdiction of cases involving them so long as the parties agree to arbitrate before FINRA.

FINRA ARBITRATION PROCESS

To initiate a FINRA arbitration, a party begins by filing a written claim known

as a "Statement of Claim" or "SOC." This party is the "claimant" in the case. The SOC must include details of the dispute, including any relevant dates or names, and the type of relief requested. The SOC can be filed online, alongside a required "Submission Agreement" and the required filing fees. Once the filing requirements are met, FINRA will serve the SOC on the "respondent" identified in the SOC.

After service of the papers by FINRA, the respondent has 45 days to submit a written answer. The respondent may assert counterclaims with its answer. A claimant must respond to any counterclaims within 20 days.

Once all claims have been filed and

answered, the parties begin the process of selecting arbitrators. For claims of up to \$100,000, the case will be decided by one arbitrator. For claims over \$100,000, the case will be decided by three arbitrators. FINRA arbitrators are independent third parties with diverse backgrounds and may include regulators, lawyers, bankers, accountants, investment professionals and retirees. Disclosure reports (which include information such as the potential arbitrators' resumes, backgrounds, and prior awards information are provided to the parties before selection. Parties must rank the list of potential arbitrators and may strike a certain limited number of arbitrators. FINRA then selects the arbitrator(s) for the case.

Next, FINRA will schedule an Initial Pre-Hearing Conference (IPHC), wherein the parties (or their counsel) and the arbitrator(s) meet for the first time to discuss hearing dates, discovery deadlines, and other preliminary matters. This conference will happen either telephonically or through a virtual meeting held on a platform such as Zoom. After the IPHC, the arbitrator or chairman of the arbitration panel issues a written order confirming the case schedule that is sent to the parties or their counsel.

After the IPHC, parties begin to exchange information and documents in a process known as "discovery." The FINRA Discovery Guide (accessible at www.finra.org/arbitration-mediation/discovery-guide) sets forth a list of documents that parties must produce in all customer cases. Parties may request additional documents from one another, but the available requests are more limited than in general court proceedings. For example, standard interrogatories and depositions are generally not permitted in arbitration.

Generally, FINRA selects a hearing location closest to the investor's residence at the time of the events, unless the hearing location closest to the investor's residence is in a different state or the parties agreed to a different location. With the consent of all parties or permission from the arbitration panel, hearings may also be conducted

virtually. A typical arbitration hearing concludes within three to five days.

TYPES OF CLAIMS IN SECURITIES ARBITRATION

At the outset of the case, an investor must decide what claims to bring and against whom. The investor must show more than simple losses incurred with respect to his or her investments because FINRA arbitrators understand that most investments involve some degree of risk of loss. Some key considerations include whether material facts were adequately disclosed, whether the investment was suitable based upon the investor's stated investment objectives, or whether the investment was otherwise fraudulent (such as a Ponzi scheme). Investor claimants may assert claims based on several theories of liability, including unsuitability, churning, fraud, breach of fiduciary duty, statutory securities violation, negligence, and/or failure to supervise.

Unsuitability, negligence, and breach of fiduciary duty are common claims made by investors when a broker or adviser knew or should have known that the type of security conflicted with the investor-claimant's objectives. Documents showing an investor's risk tolerance, time horizon, and investment objectives tend to help prove the unsuitability of certain investments. For example, high-risk alternative investments are generally not suitable for retirees who choose a conservative risk portfolio.

Finally, claims generally include the employing investment advisor firm or brokerage firm. Broker-dealer firms must "establish and maintain a system to supervise the activities of each associated person that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable FINRA rules." Thus, any defense they may have that they are not responsible for the actions of their salespersons holds little weight.

CONSIDERATIONS BEFORE FILING

A claimant should carefully consider what type of claims to assert. In

HELP TO RECOVER

If you have any questions regarding a potential securities investment claim, please contact the experienced securities litigation/arbitration attorneys at Tiffany & Bosco, P.A.

general, claims sounding in negligence will be covered by insurance, while intentional-conduct claims such as fraud will be excluded under standard insurance contracts. Therefore, if, as a result of preliminary demand letters and responses a claimant believes there may be insurance coverage, it may be better to focus on claims centered on negligence as opposed to fraudulent intentional conduct, which may give an insurance company the basis to deny coverage to the brokerage firm and could therefore make it more difficult to collect any amount awarded.

SELECTING ARBITRATORS

The process of selecting an arbitrator is governed by FINRA Code of Arbitration Procedures Rules 12400-12410. The importance of this aspect of the overall arbitration process cannot be emphasized enough. Unlike in court, parties actually have a say in who decides their arbitration case. Investor claimants will want arbitrators with a history of being open-minded about legitimate claims rather than arbitrators who are skeptical of all investor claims. Engaging seasoned counsel with knowledge of this process and experience with the pool of FINRA arbitrators in a certain geographical area can be critically important. Many FINRA arbitrators have previously served in other cases. Some may have served in many cases. A seasoned securities lawyer has personal experience and other resources to draw upon to better evaluate potential arbitrators.

THE DISCOVERY PROCESS

The discovery process in FINRA arbitration is intended to be simpler and less expensive than the discovery process that is generally required when litigating in court. In customer

GET TO KNOW US

Meet Our Financial Litigation Team

Tiffany & Bosco, P.A. boasts several outstanding litigation departments, one of which is headed by Robert D. Mitchell. Robert's department represents clients in complex financial litigation involving business disputes, securities and investment claims, business torts—including defamation—and commercial real estate matters.

For more than three decades, Robert has enjoyed a remarkable legal career that has included more than 100 trials and arbitrations, and featured numerous successful outcomes, including, for example:

- > securing a record \$38.5 million Internet defamation verdict, featured on the front page of *The Wall Street Journal*, for a prominent Los Angeles real estate investor;
- > representing hundreds of investors against major investment firms and trust companies, recovering millions of dollars in damages for his clients;
- > recovering millions more in a Ponzi securities fraud case against well-known Phoenix real estate professionals;
- > obtaining and collecting a multi-million-dollar judgment in an environmental contamination case involving a commercial real estate building;
- > saving a 5,000-acre Hawaii ranch from a \$50 million foreclosure and securing a settlement that preserved the ranch for its owners; and
- > successfully defending an engineer wrongfully accused of causing \$167 million in stock price declines to a major publicly traded company—another case that was covered in many national news publications at the time.

Taking on high-profile cases nationwide and working with local counsel as needed, Robert has successfully tried cases from Los Angeles to New York, and from Seattle to Miami, in addition to Arizona.

With Robert is an accomplished team, including **Christopher J. Waznik**, a highly-skilled attorney who has served three federal court clerkships, including one with the Ninth Circuit Court of Appeals. Chris, a gifted legal writer, stands out as one of the firm's youngest shareholders. Also on the attorney team is **CM**



From left: Matt Frohlick, Kaleigh Stilchen, Anne P. Barber, Robert D. Mitchell, Christopher J. Waznik, CM Matthew Luk, Rebecca Klug

Matthew Luk, who undertook internships and clerkship positions with the SEC, FINRA, and FDIC during and after his tenure at Georgetown Law School, and subsequently completed a two-year clerkship after graduation. **Anne P. Barber**, another attorney on the team who is deeply rooted in Arizona, graduated from ASU before attending Lewis & Clark Law School. The team is supported by three top-tier paralegals: **Kaleigh Stilchen**, a 12-year firm veteran with an AA and paralegal certification; **Rebecca Klug**, who holds a B.A. from ASU and previously worked with the Maricopa County Superior Court; and **Matt Frohlick**, an ASU graduate holding a B.A. in Business Law who has aspirations of attending law school.

"Most of our clients face complex legal problems that threaten the success it has taken them a lifetime to achieve," Robert notes. "Many are victims of financial wrongdoing, and they want a dedicated advocate who takes on their burden as his own. We treat our clients as our close friends, and their problems as our problems. We have enjoyed heartfelt hugs and gracious expressions of appreciation many times over the years, and that is the reward that keeps us coming back and striving for more excellence in the representation of our clients."

disputes, parties can provide discovery responses according to the items listed in the FINRA Discovery Guide and through other case-specific document requests. The FINRA Discovery Guide contains an extensive list of items that are all presumed to be discoverable.

THE ARBITRATION HEARING

FINRA arbitration hearings are conducted in a manner similar to court trials. Typically, the parties or their counsel make opening statements explaining what they believe the evidence will show during the hearing. Then,

the claimant calls his or her witnesses. When the claimant's witnesses are finished testifying, the claimant will "rest" his or her case. At that point, the respondent presents his or her witnesses. All witnesses are subject to cross examination. At the end of witness presentations, closing arguments are given by the parties or their counsel.

AWARDS

After the hearing, a written decision and award is issued within 30 days. The award typically contains little detail of the factors leading to the

decision. Instead, it is typically limited to a short statement of whether the arbitrators found in favor of one party or the other and the amount of money awarded, if any. The award is binding and is generally not subject to appeal.

CONCLUSION

While this article is meant to serve as a brief introduction to the FINRA arbitration process, please keep in mind that each case has its own unique facts, circumstances, and particular issues and considerations that arise alongside it.

LABOR LAW

Cracking the Code

Ensuring proper inclusion of bonuses in overtime calculations under the FLSA

BY JODI R. BOHR

The Fair Labor Standards Act (FLSA) requires employers to pay overtime to non-exempt employees based on an employee's regular rate of pay and the number of hours worked in a work-week. While this sounds straightforward on paper, employers commonly fail to realize that non-discretionary bonus payments must be included in calculating the regular rate of pay and ultimately, the amount of overtime owed to an employee. Arizona has not codified an overtime statute so Arizona employers must look to the FLSA for overtime compliance.

When is a bonus factored into the regular rate of pay?

The FLSA distinguishes between discretionary and non-discretionary bonuses when determining whether the bonus should be included in an employee's regular rate of pay. A discretionary bonus is essentially any bonus that is not guaranteed, based on performance, or expected by the employee. A discretionary bonus is excludable from the regular rate of pay.

In contrast, any bonus that does not fit within all of the statutory requirements of a discretionary bonus is considered a non-discretionary bonus. Possible examples include attendance bonuses, productivity bonuses, safety bonuses, or bonuses made pursuant to a contract. Additionally, commissions, incentive pay, or perfect attendance awards are considered bonuses. Non-discretionary bonuses must be included in the regular rate of pay.

How do I calculate the regular rate of pay when paying non-discretionary bonuses?

Once an employer determines whether

other compensation (e.g., a non-discretionary bonus) should be included when calculating the regular rate of pay, the employer must take steps to properly calculate the regular rate of pay in order to properly pay overtime. To start, an employer must identify what timeframe the bonus covered. Was the bonus paid for a certain level of production in a week or based on a quarterly project? If the timeframe is for the past quarter, the employer will need to go back to recalculate the compensation for anyone who worked overtime during that period.

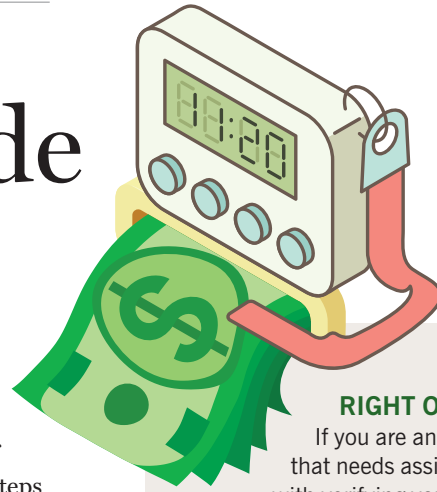
Next, the employer should calculate the total straight-time compensation. This is done by multiplying the hours worked by the employee's straight time rate and adding the bonus for the timeframe in which overtime is being calculated.

Once total compensation is calculated, the new regular rate of pay needs to be determined by dividing the total compensation (including the bonus but excluding statutory exclusions) by the total number of hours worked.

Can you provide me with an example?

For instance, Jane makes \$16 per hour and received a \$100 bonus based on a special order she completed during the week. Jane worked 44 hours during that week. The employer will calculate her overtime in that week by:

- > Multiplying hourly rate by hours worked: $\$16 \times 44 = \704
- > Add straight time pay to bonus pay: $\$704 + \$100 = \$804$
- > Divide total compensation by total hours worked to obtain new regular rate of pay: $\$804 \div 44 = \18.27 per hour.
- > Multiply regular rate by .5 (remember, you have already paid



RIGHT ON TIME

If you are an employer that needs assistance with verifying your company's calculation of overtime wages, please contact the attorneys at Tiffany & Bosco, P.A.

straight-time compensation): $\$18.27 \times .5 = \9.14

- > Multiply half-time rate by overtime hours worked: $\$9.14 \times 4 = \36.56 (overtime pay due)
- > Total compensation including overtime: $\$840.56$

Other examples of calculations from the Department of Labor (DOL) are available in Fact Sheet 56C.

What if I have not been properly calculating overtime?

After reading this article, if you discover that your company has not been properly calculating the regular rate of pay for the purpose of paying overtime, a comprehensive audit of overtime payments must be completed with a lookback period of at least two years. The statute of limitations on an overtime claim is two years, or three years if underpayment of overtime was willful.

Employers should seek out competent employment counsel to walk the company through paying back overtime wages to employees and former employees in order to avoid potential wage claims. Because the DOL has found this to be a common compliance issue among employers, employers should review their practices to determine whether a bonus program for their non-exempt employees has been properly implemented.

TRUSTS

You Have Been Appointed as Trustee of a Trust ... Now What?

Commonly violated fiduciary duties and some tips on how to avoid violating them

BY NORA L. JONES &
KRYSTA C. FURNELL

Being appointed as trustee may seem scary or intimidating. But with the right guidance, acting as trustee can be a simple process. A trustee is a person or company who serves as a fiduciary and takes legal ownership of assets held in the name of a trust. A trustee is responsible for administering trust assets for the benefit of a beneficiary. A beneficiary is a person entitled to receive assets from a trust. In carrying out these responsibilities, a trustee is required to uphold certain duties that a trustee has to both the trust and the beneficiaries. This article highlights some key duties required of a trustee—specifically those that are commonly violated—in order to ensure that the trust administration process runs smoothly.

The duty of loyalty provides that a trustee must administer the trust solely in the best interest of the beneficiaries. This means that a trustee may not place himself or herself in a position where his or her interests conflict, or may conflict, with those of a beneficiary. Unlike a personal representative's duty of fairness and impartiality, which requires the representative to treat all heirs, devisees, and creditors alike in the administration of an estate, a trustee is only required to consider the beneficiaries' interests when making decisions.

A violation of the duty of loyalty can result in the removal of the trustee and liability for damages incurred as a result of the trustee's actions. One of the most common

examples of a violation of the duty of loyalty occurs when a trustee engages in self-dealing. If a trust owns a piece of real property to be sold, the sale of the property to the individual serving as trustee, even if the sale is for fair market value and on equitable terms, constitutes self-dealing.

As trustee, if a particular transaction may violate the duty of loyalty, there are a few options to avoid liability: (1) obtain affirmative consent from all of the beneficiaries after full and fair disclosure of all details relevant to the transaction; (2) receive court approval in advance of the transaction; or (3) resign as trustee and enter into the transaction after the resignation. Upon resignation as trustee, any duties previously owed to beneficiaries as a trustee no longer apply.

The duty of impartiality requires a trustee to act impartially in investing, managing, and distributing trust property and to treat beneficiaries equitably in light of the terms of the trust. Many trusts are constructed to include both present beneficiaries, who are entitled to distributions from the trust now, and future beneficiaries, who are entitled to receive distributions upon the passing of the present beneficiaries. Under the duty of impartiality, a trustee must balance the interests of both the present and future beneficiaries and make decisions that will benefit the present beneficiary without harming the interests of the future beneficiary. Often these decisions

come down to how to invest trust assets to produce enough income for the present beneficiary but also protect enough assets for the future beneficiary. If there is a potential conflict inherent in a trust term which can be interpreted to favor either the present or future beneficiary, before acting, a trustee should seek guidance from the court as to what actions should be taken.

The duty to inform and report is one of the most commonly violated duties. This duty requires a trustee both to keep precise records and to keep beneficiaries reasonably informed regarding the administration of the trust. Trustees must promptly respond to any beneficiary's request for information, so long as said request is reasonably related to the trust administration. Further, a trustee is generally required to furnish a report to the beneficiaries on an annual basis and upon termination of the trust. Such reports include an accounting of all money coming into and exiting the trust, as well as an inventory of all assets in the trust. Often, litigation ensues because a trustee fails to keep adequate records and is unable to explain transactions.

While the foregoing duties are some important examples of those that a trustee is required to uphold, they are far from the only duties relevant to a serving trustee. Other trustee duties include the duty of prudence (including the Prudent Investor Rule), the duty to diversify, and the duty to enforce and defend claims.



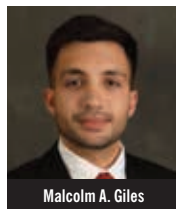
HELP YOU CAN TRUST

If you find yourself serving as trustee, consider hiring an attorney, like the qualified attorneys at Tiffany & Bosco, P.A., to represent your interests and to help you further understand these duties in order to ensure that you meet your responsibilities and make the trust administration process as straightforward as possible.

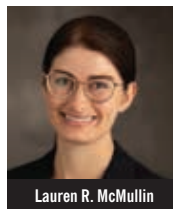
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transactions. Malcolm earned his Juris Doctor from the Sandra Day O'Connor College of Law at Arizona State University, where he served as the Managing Editor of the *Corporate and Business Law Journal* and was repeatedly named a William H. Pedrick Scholar for academic excellence. Before law school, Malcolm graduated from the University of Arizona with a Bachelor's degree in Political Science and Spanish.

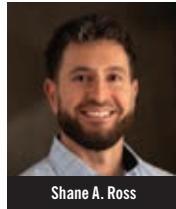
LAUREN R. MCMULLIN joined the firm in November 2023 as an Associate. Before joining Tiffany & Bosco, she completed a 2-year clerkship with the Honorable Stephen M. McNamee of the United States District Court for the District of Arizona. She received her law degree from the University of Arizona. While attending, she served as a Managing Editor for the *Arizona Law Review*. Prior to law school, she obtained a Bachelor's degree in Chemistry at the University of Utah.



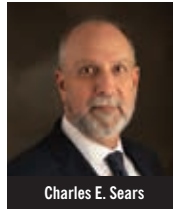
Malcolm A. Giles



Lauren R. McMullin



Shane A. Ross



Charles E. Sears

SHANE A. ROSS joined the firm in January 2024 as an Associate. He focuses his practice in Land Use and Zoning. Shane has several years of experience as a real estate developer, land investor, and broker which gives him a unique vantage point and ability to connect with his clients while striving to provide exceptional representation on a variety of land use and zoning matters. Shane also has previous legal experience in insurance

defense, real estate, employment law, and family law. Shane earned his Juris Doctor from the Sandra Day O'Connor College of Law at Arizona State University.

CHARLES E. SEARS joined the firm as a Shareholder in January 2024. Prior to joining the firm, Charles managed his own law office for approximately 14 years, with the focus of his practice being family law and international parental child abduction cases. Joining Charles at Tiffany & Bosco is his long-time paralegal, Marina Applegate, who is from Mexico City and is licensed as an attorney in Mexico, where she also practiced family law. Prior to becoming an attorney, Charles was a police detective and detective sergeant, investigated a variety of crimes, and was assigned to various specialty units. Charles also speaks Spanish as a second language, and has handled or consulted on parental child abduction cases involving countries in Asia, Europe, and the Americas.

All attorneys are licensed in their home state, as well as: ¹Alabama; ²Arizona; ³California; ⁴Colorado; ⁵Nevada; ⁶New Mexico; ⁷Texas; ⁸Utah; ⁹Washington

ALABAMA

Enslin L. Crowe	(205) 918-5013	elc@tblaw.com	Bankruptcy
Jacob A. Kiser	(205) 918-5037	jak@tblaw.com	Eviction; Mortgage and Real Estate Litigation
Elizabeth C. Loefgren	(205) 930-5011	ecl@tblaw.com	Foreclosure; Real Estate and Title Resolution
LaWanda Mitchell	(205) 930-5306	lmitchell@tblaw.com	Financial Services (Default Servicing)
B. Andrew Monaghan	(205) 930-5186	bam@tblaw.com	Eviction; Bankruptcy; Mortgage and Real Estate Litigation
Diane C. Murray	(205) 930-5257	dcm@tblaw.com	Bankruptcy
Ginny C. Rutledge	(205) 930-5161	gcr@tblaw.com	Foreclosure; Bankruptcy; Evictions; Financial Compliance and Regulation; Real Estate and Title Resolution
Andy W. Saag	(205) 930-5226	aws@tblaw.com	Foreclosure; Bankruptcy; Evictions; Financial Compliance and Regulation; Real Estate and Title Resolution
Don M. Wright	(205) 930-5159	dwm@tblaw.com	Bankruptcy and Litigation

CALIFORNIA

Chad L. Butler	(619) 501-3503	clb@tblaw.com	Bankruptcy
Seth M. Harris	(619) 794-0515	smh@tblaw.com	Banking; Bankruptcy; Civil Litigation; Financial Services (Default Servicing); Forcible Entry & Detainer (Eviction); Foreclosure; Real Estate

FLORIDA - FORT LAUDERDALE

Julio Bertemati	(954) 828-1122	jcb@tblaw.com	Foreclosure; Financial and Real Estate Litigation
Jason A. Weber	(954) 828-1118	jaw@tblaw.com	Foreclosure; Bankruptcy; Financial and Real Estate Litigation

FLORIDA - ORLANDO

Natalia C. Cruz	(407) 712-9204	ncc@tblaw.com	Financial Services (Default Servicing)
Anthony R. Smith ¹	(407) 712-9202	ars@tblaw.com	Foreclosure; Financial and Real Estate Litigation
Racquel A. White	(407) 712-9210	rwhite@tblaw.com	Foreclosure

FLORIDA - PENSACOLA

Kathryn I. Kasper ^{1,9}	(850) 462-1510	kik@tblaw.com	Foreclosure; Financial and Real Estate Litigation
----------------------------------	----------------	---------------	---

MICHIGAN

Kevin P. Nelson ^{2,6}	(602) 255-6028	kpn@tblaw.com	Banking, Commercial, and Real Estate Litigation; Construction Law; Indian Law
--------------------------------	----------------	---------------	---

NEVADA

Regina A. Habermas	(702) 258-8200	rh@tblaw.com	Bankruptcy and Creditor's Rights; Real Estate Litigation
Krista J. Nielson	(702) 258-8200	knielson@tblaw.com	Bankruptcy and Creditors' Rights; Civil and Commercial Litigation; Financial Services (Default Servicing); Mediation; Arbitration
Kevin S. Soderstrom	(702) 258-8200	kss@tblaw.com	Bankruptcy; Civil Litigation; Fin. Srv. (Default Servicing); Foreclosures (Trustee Sales); Mediation; Arbitration; Real Estate; Forcible Entry & Detainer (Eviction)

NEW MEXICO

Joshua T. Chappell	(505) 248-2400	jtc@tblaw.com	Bankruptcy; Default Servicing; Civil and Commercial Litigation
Deborah A. Nesbit	(505) 248-2400	dnesbitt@tblaw.com	Banking; Bankruptcy; Foreclosures (Judicial & Tax Lien); Civil Litigation; Default Servicing; Forcible Entry & Detainer (Eviction); General Real Estate
Denise A. Snyder	(505) 248-2400	das@tblaw.com	Appellate; Bankruptcy; Forcible Entry & Detainer (Eviction); Residential Foreclosure Litigation; Business Litigation; Civil Litigation; Mediation-Arbitration



Tiffany & Bosco, P.A.
Camelback Esplanade II
Seventh Floor
2525 East Camelback Road
Phoenix, AZ 85016-9240

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Arizona
Camelback Esplanade II, Seventh Floor
2525 E. Camelback Rd.
Phoenix, AZ 85016
T: (602) 255-6000 F: (602) 255-0103

Alabama
2311 Highland Avenue
Suite 330
Birmingham, AL 35205
T: (205) 930-5200

California
1455 Frazee Rd., Suite 820
San Diego, CA 92108
T: (619) 501-3503
F: (619) 487-9079

Florida - Fort Lauderdale
1000 Corporate Drive
Suite 100
Fort Lauderdale, FL 33334
T: (954) 828-1118

Florida - Orlando
1201 S. Orlando Avenue
Suite 430
Winter Park, FL 32789
T: (407) 712-9200

Michigan
115 N. Center Street
Suite 204
Northville, MI 48167
T: (248) 924-3349

Nevada
10100 W. Charleston Blvd.
Las Vegas, NV 89135
T: (702) 258-8200
F: (702) 258-8787

New Mexico
1700 Louisiana Blvd. NE, Suite 300
Albuquerque, NM 87110
T: (505) 248-2400
F: (505) 254-4722

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ARIZONA				All attorneys are licensed in their home state, as well as: ¹ Alabama; ² Arizona; ³ California; ⁴ Colorado; ⁵ Nevada; ⁶ New Mexico; ⁷ Texas; ⁸ Utah; ⁹ Washington; ¹⁰ New York & New Jersey
Elise B. Adams	(602) 255-6066	eba@tblaw.com	Probate/Trust Litigation and Administration; Elder Law	
Shaine T. Alleman	(602) 452-2712	sta@tblaw.com	Land Use and Zoning; Real Estate Development; Governmental Relations; Planned Community and Condo Law	
Mitchell S. Antalis	(602) 452-2740	msa@tblaw.com	Civil and Commercial Litigation	
Riley L. Arter	(602) 255-0397	rla@tblaw.com	Estate Planning and Trust Administration	
Anne P. Barber	(602) 255-0294	apb@tblaw.com	Civil and Commercial Litigation; Business Litigation	
David M. Barlow	(602) 452-2714	dmb@tblaw.com	Civil and Commercial Litigation; Bankruptcy	
Jillian A. Bauman	(602) 255-6045	jab@tblaw.com	Business Solutions; Intra-Company Disputes; Mergers and Acquisitions; Business Divorce	
Nicholas A. Beatty	(602) 255-6094	nab@tblaw.com	Civil and Commercial Litigation; Real Estate Litigation	
Benjamin Bednarek	(602) 255-6022	bbb@tblaw.com	Intra-Company and Business Litigation; Business Divorce; Shareholder, Director, Officer, and Manager Litigation	
Stephen C. Biggs	(602) 255-6081	scb@tblaw.com	Appellate Practice; Business Disputes; Business Divorce; Business Litigation; Civil Litigation; Intellectual Property; Securities Litigation	
Timothy C. Bode	(602) 255-6069	tcb@tblaw.com	Civil Litigation, Business Disputes, Personal Injury & Wrongful Death; General Real Estate	
Jodi R. Bohr	(602) 255-6082	jrb@tblaw.com	Labor and Employment; Appellate; Business and Commercial Litigation	
Mark S. Bosco	(602) 255-6006	msb@tblaw.com	Foreclosures/Trustee Sales; Creditor Bankruptcy; Forcible Entry and Detainer/Eviction; REO Closings and All Loan Default Issues	
Michael F. Bosco ⁶	(602) 255-6010	mfb@tblaw.com	Banking; Bankruptcy; Civil Litigation; Financial Services; Financing; Forcible Entry & Detainer; Foreclosures; General Real Estate; Tax Lien Foreclosures	
Lance R. Broberg ⁶	(602) 255-6016	lrb@tblaw.com	Civil and Commercial Litigation; Corporation and Shareholder Litigation; Intra-Company Disputes	
Ashley L. Case	(602) 255-6063	alc@tblaw.com	Estate Planning; Probate Administration	
Darren T. Case	(602) 255-6093	dtc@tblaw.com	Estate Planning; Taxation; Corporate, Business Planning, and Formations; Employee Benefits	
David L. Case ³	(602) 255-6097	dlc@tblaw.com	Estate Planning; Taxation; Corporate, Business Planning, and Formations; Real Estate	
Wesley M. Cox	(602) 255-6057	wmc@tblaw.com	Construction Law; Civil Litigation; Real Estate Litigation	
Sarah K. Deutsch	(602) 452-2726	skd@tblaw.com	Probate/Trust Litigation and Administration; Elder Law	
Tina M. Ezzell ⁵	(602) 452-2747	tme@tblaw.com	Automotive Law; Civil and Commercial Litigation; Appellate Practice; Business Divorce; Employment and Labor; Real Estate Litigation	
Emily S. Fann ⁷	(602) 288-7893	esf@tblaw.com	Commercial Financing; Real Estate Transactions; Corporate Law; Automotive Law	
James A. Fassold	(602) 452-2720	jaf@tblaw.com	Probate/Trust Litigation and Administration; Elder Law; Appellate Practice	
William H. Finnegan	(602) 255-6009	wfh@tblaw.com	Business Planning, Formations, and Dispositions/Corporate; Estate Planning; Taxation; Tax Controversy	
William M. Fischbach	(602) 255-6036	wmf@tblaw.com	Civil and Commercial Litigation; Real Estate Litigation; Personal Injury, Medical Malpractice and Wrongful Death	
Stanley W. Fronczak Jr.	(602) 255-6025	swf@tblaw.com	Banking; Bankruptcy; Civil Litigation; Financial Services; Financing; Forcible Entry & Detainer; Foreclosures; Real Estate; Tax Lien Foreclosure	
Krysta C. Furnell	(602) 255-6016	kcf@tblaw.com	Estate Planning & Trusts; Probate Administration & Litigation; Elder Law	
Claudia L. Grajeda ³	(602) 288-7924	clg@tblaw.com	Estate Planning	
Richard C. Gramlich	(602) 255-6079	rcg@tblaw.com	Construction, Business, and Real Estate Litigation; Personal Injury	
Alisa J. Gray	(602) 452-2719	aig@tblaw.com	Probate/Trust Litigation and Administration; Elder Law; Mediation; Alternative Dispute Resolution	
Malcolm A. Giles	(480) 240-1829	mag@tblaw.com	Automotive; Business Disputes; Corporate, Business Planning & Formations; Financing; Real Estate; Real Estate and General Business Transactions	
Vanessa R. Heim	(602) 452-2736	vrh@tblaw.com	Estate Planning & Trusts; Probate Administration & Litigation; Elder Law	
Chelsea A. Hesla	(602) 288-7944	cah@tblaw.com	Probate/Trust Litigation and Administration; Elder Law; Real Estate	
John A. Hink	(602) 255-6099	jah@tblaw.com	Real Estate Acquisition, Development, and Financing; Multi-family and Subdivisions; Office, Industrial and Retail Leasing; Administrative and Zoning Law	
Nora L. Jones	(602) 255-6014	nlij@tblaw.com	Probate/Trust Litigation and Administration; Elder Law	
Christopher R. Kaup	(602) 255-6024	crk@tblaw.com	Commercial Bankruptcy/Creditors' Rights; Fraudulent Transfers; Civil and Commercial Litigation	
Kyle J. Kopinsky	(602) 452-2743	kjk@tblaw.com	Civil and Commercial Litigation; Real Estate Litigation	
William E. Lally	(602) 452-2716	wel@tblaw.com	Land Use; Zoning; Real Estate Due-Diligence; Regulatory and Administrative Law	
May Lu	(602) 255-6032	mlu@tblaw.com	Business Solutions; Intra-Company Disputes; Mergers and Acquisitions; Business Divorce	
CM Matthew Luk	(602) 255-6065	cml@tblaw.com	Business and Commercial Litigation; Securities and Financial Litigation; Bankruptcy	
J. Lawrence McCormley	(602) 255-6005	jlj@tblaw.com	Real Estate; Bankruptcy; Commercial Litigation	
Leonard J. McDonald	(602) 255-6007	ljm@tblaw.com	Forcible Entry and Detainer/Eviction; Foreclosures/Trustee Sales and Default Servicing; Bankruptcy; Real Estate Litigation; Receiverships	
Lauren R. McMullin	(602) 255-0454	lrm@tblaw.com	Civil Litigation	
Kelly L. Mendoza	(602) 288-7907	klm@tblaw.com	Family Law; Probate; Civil Litigation; Contract Disputes	
Robert D. Mitchell ^{3,7,8}	(602) 452-2730	rdm@tblaw.com	Complex Financial and Commercial Litigation; Securities Litigation; Civil Trials and Arbitrations	
Anthony D. Nordman	(602) 288-7900	adn@tblaw.com	Civil and Commercial Litigation; Real Estate Litigation	
Mina C. O'Boyle	(602) 255-0078	mco@tblaw.com	Real Estate Transactions; Real Estate Litigation	
James P. O'Sullivan	(602) 255-6017	jpo@tblaw.com	Business Solutions; Intra-Company Disputes; Mergers and Acquisitions; Business Divorce	
Gianni Pattas	(602) 288-7940	gp@tblaw.com	Civil and Commercial Litigation; Family Law; Employment and Labor Law	
Audra E. Petrolle ¹⁰	(602) 255-6059	aep@tblaw.com	Family Law	
Alexander Poulos	(602) 255-6030	ap@tblaw.com	Family Law; Criminal Investigations and Defense	
Shane A. Ross	(602) 255-6248	sar@tblaw.com	Land Use and Zoning	
Robert A. Royal	(602) 255-6011	rar@tblaw.com	Intra-Company and Business Litigation; Business Divorce; Shareholder, Director, Officer, and Manager Litigation	
Rafaella P. Safarian	(602) 452-2742	rps@tblaw.com	Civil and Commercial Litigation	
Evan P. Schube	(602) 288-7922	eps@tblaw.com	Banking; Commercial and Real Estate Litigation; Professional Liability	
Charles E. Sears	(602) 255-6048	ces@tblaw.com	Family Law	
Amy D. Sells	(602) 452-2713	ads@tblaw.com	Appellate Practice; Civil Litigation	
Elliot C. Stratton	(602) 255-6087	ecs@tblaw.com	Civil and Commercial Litigation; Real Estate Litigation	
Kyle D. Swartz ⁹	(602) 255-6066	kds@tblaw.com	Real Estate Transactions; Commercial, Industrial, and Retail Leasing and Finance	
Michael E. Tiffany	(602) 255-6001	met@tblaw.com	Real Estate; General Business Counseling; HUD Insured Multihousing Loans	
Christopher J. Waznik	(602) 452-2749	cjw@tblaw.com	Civil Litigation; Business Litigation	
Michael A. Wrapp ³	(602) 452-2741	maw@tblaw.com	Real Estate Transactions; Financing; Corporate, Business Planning and Formations; Automotive Law; Banking, Commercial, and Real Estate Litigation	
Tara M. Young ⁴	(602) 255-6084	tmy@tblaw.com	Civil Litigation; Construction Law; Real Estate Litigation	