JURY POOLS AND FAIRNESS (p. 14) HOMESTEAD EXEMPTION CHANGES (p. 24)

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JANUARY 2022

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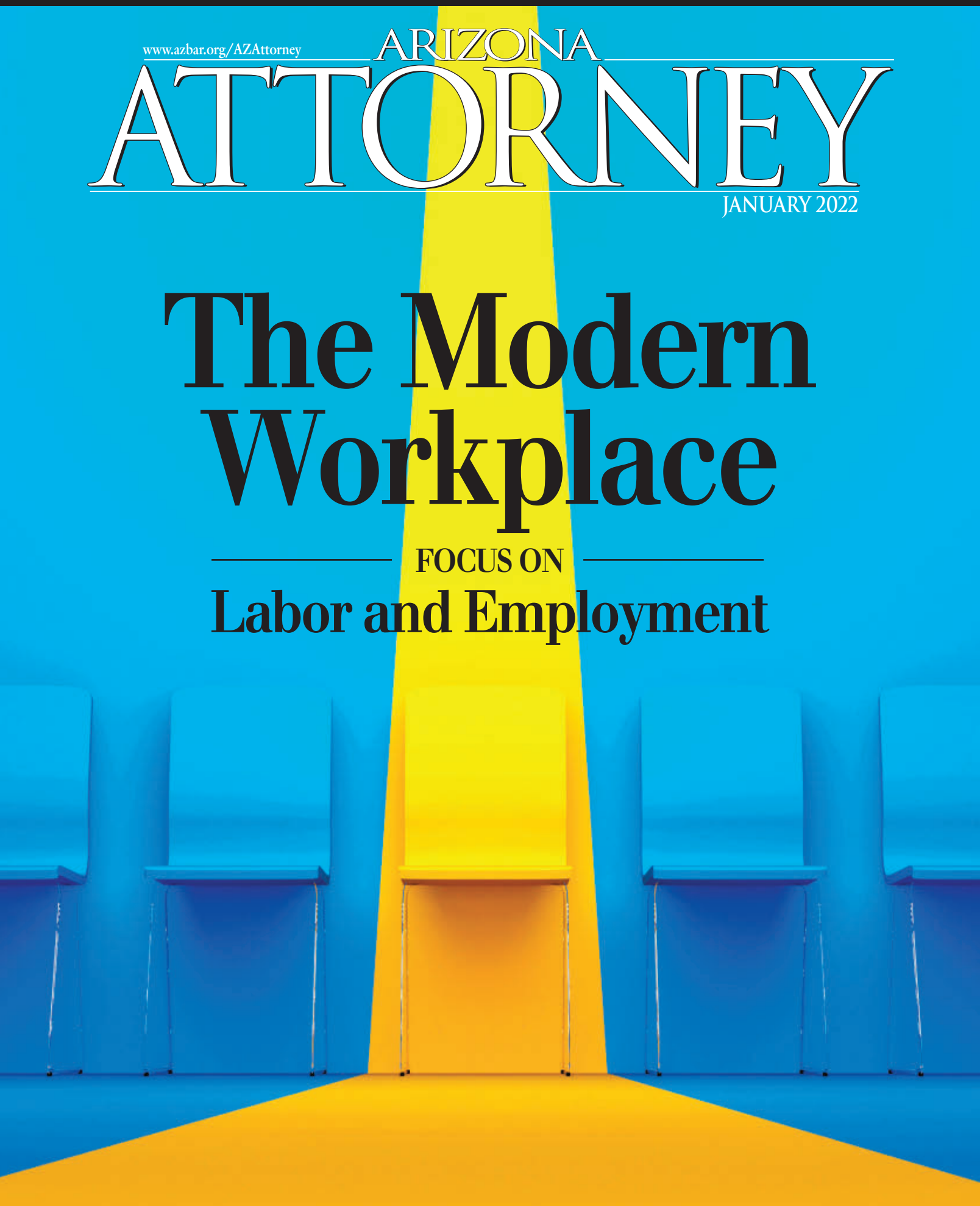

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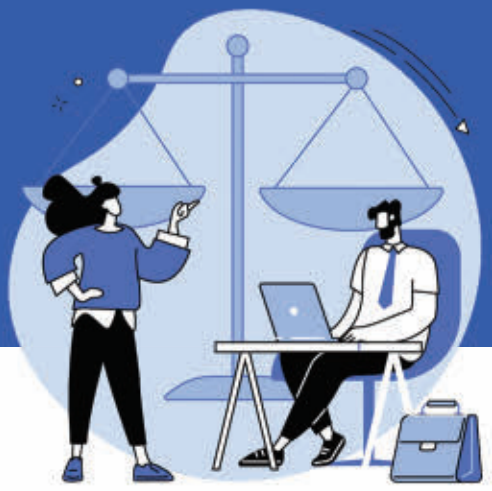

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ARIZONA ATTORNEY MAGAZINE
VOLUME 58 NUMBER 5

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FEATURES

ON THE COVER

Once again, our talented authors address a wide variety of employment law issues, including EEOC rulings, restrictive covenants and workplace romance. Begin reading on page 34.

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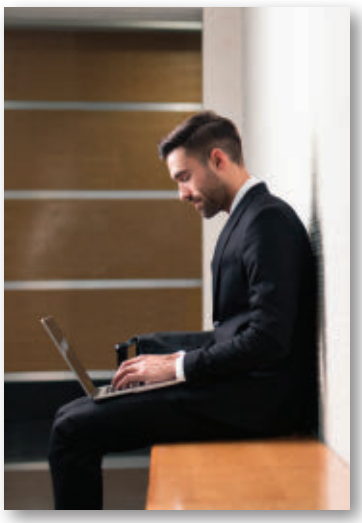

BACK

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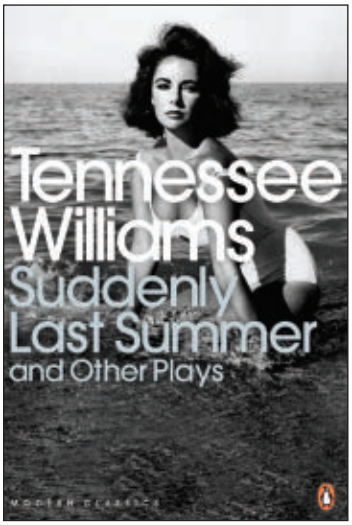
FROM THE EDITOR

Summer on my mind



Working at a magazine means you always ignore that classic advice: **"Live in the moment."** Try that at a publication, and you'll end up with a whole lot of **nothin' on the page**.

That thought immediately gives me the jitters, reminding me instantly of the scene in the movie **"Elf"** in which a publishing executive played by **James Caan** is presented evidence of a nightmare-come-to-life: a book that was shipped with two blank pages. Yup, it happens. Happy holidays!

The **holidays** themselves are an example of this. As I write this in early December, Christmas music fills the air, and people annoy me by saying they finished their shopping weeks ago. (In my estimation, last-minute shopping loses its white-knuckle thrill if it's anything other than last minute.)

We're wrapping up the January issue and beginning in earnest on the February edition long before the holidays are in full swing. In that non-holiday spirit, I have a non-seasonal question for you: What would you recommend for **summer reading**?

Or summer viewing, listening, or maybe even eating? We're interested in all things summer. Here at AzAt, it's **suddenly next summer** (with apologies to Tennessee Williams).

What I propose: a series of **short reviews for busy people**. We've launched these in the past, but I think a summer issue may be just the time to offer even more.

CHAPTER/VERSE
reviews for busy folks

It's like the perfect summer storm: brief reviews penned by **opinionated but busy lawyers**, drafted for an audience of busy lawyers who'd like to see if their own opinions are confirmed or undermined.

Sweet, right?


Coffee excellence may demand a review.

A couple hundred words each on a recommended book or podcast. Another couple hundred on streamable joys, like a reviewer who's come across the next *Succession, Ted Lasso* or *Black Mirror*—but legal-ish—and feels compelled to share their discovery. Or a reviewer who's gaga over what appetizing things are happening at *Milk Street*, or who is spurred to action by *Code Switch*. Or someone else whose mornings are transformed by a Moccamaster coffeemaker.

Don't know all those programs or products? No worries, a reviewer may explain all there is to know.

Interested in contributing **your own short and pointed take** on what would bring reading, eating, listening or buying joy? Write to me at tim.eigo@staff.azbar.org with your idea and the object of your heart's desire.

Who knows, maybe something even bigger will come from this. Perhaps what Arizona Attorney Magazine needs (yes, beyond discipline summaries) is a **popular culture critic**(s)—tour guides to the larger world of media and **craveable content** who will curate the best of what's out there.

OK, but first … **baby steps**. Let's get some mini reviews in a summer issue and see how it goes. And before you know it, I'll be asking for holiday content … for 2022. Happy spring!

Tim Eigo

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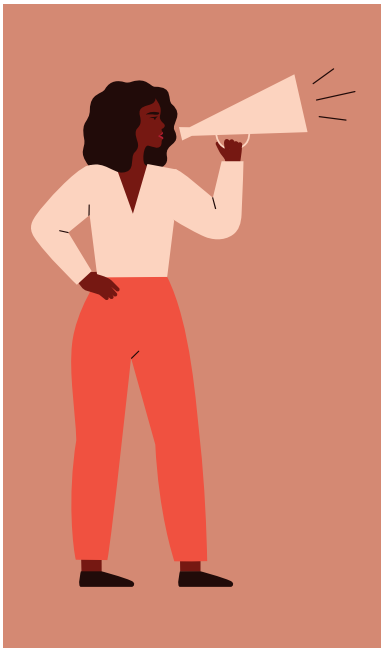

Pardon Me

Happy New Year. As we all get back into the swing of work, it is likely that our calendars will start to fill up with meetings, both in person and virtually. Meetings can be a great way to collaborate. However, for a large number of lawyers—specifically women—it is increasingly difficult to participate in those meetings. The difficulty does not have anything to do with the ability to use technology but rather stems from an amplification of an issue that has existed for years: interrupting.

It should not be news to anyone that women are interrupted at meetings and even at hearings much more often than men. This is not limited to associates or younger women lawyers. Female judges, including Justices on the United States Supreme Court, have reported being interrupted by both other judges and even attorneys and litigants. This became such an issue that the Supreme Court changed how questions are asked, allowing each justice to have a specific amount of time starting with the most senior justice, so that everyone gets a chance to ask their questions. Interestingly, after this change, Clarence Thomas—whom many had joked never asked questions—began asking questions, as well. This simple change has made it so that all the Justices at the Court can fully participate in oral arguments. This allows for more thoughtful and complete arguments.

I believe this example can help all of have more meaningful meetings.

Most of us do not have the same power as Chief Justice John Roberts to change how our office meetings are run. If you happen to be the person who is in charge your office, then I encourage you to consider devising a way ensure everyone is at the table and sharing their opinions. This may require you to set up the meeting in a way where you go around the room having everyone give their input. Or it may just require you as a meeting leader to step in and stop the interrupting.

The first step here is to be aware of behavior that shuts down or precludes some people from sharing their opinions. It is important to realize that this behavior is not necessarily intended to preclude someone's opinions or statements. We are lawyers, and it is not uncommon for us to want to express our opinion. That may lead to some jumping in to share their thoughts. This unfortunately leads to some voices being shut out. As a leader, you should strive to stop that type of behavior in a respectful way. Try simply stopping the interrupter and saying you want the person who was talking to finish their thought first. As a leader you can set to tone for a more orderly and inclusive meeting that will benefit everyone.

Be aware of behavior that shuts down or precludes some people from sharing their opinions.

Women in particular find themselves in an impossible situation when they get interrupted. If they don't push back to make themselves heard, they may not be seen as contributing, or others may take credit for their ideas. If they do push back, then they can be labeled as too aggressive or bossy. Here is where you as colleagues can step in. If you notice that someone was interrupted, you can step in and advocate for the person who was cut off. If you notice that someone's idea was dismissed prematurely or someone else tried to spin it as their own, you can call that out. By doing so you will distinguish yourself as someone who is not only attentive but who sticks up for their coworkers.

It is important to remember that most of the time interrupting or moving to a new idea is not done with malice—but that doesn't make the behavior any less harmful. This year I encourage us all to pay more attention to behavior in group settings. Be mindful of ways to stop ourselves when we want to talk over someone else and to stop others when we notice them doing the same. With just those simple changes, I believe we will see far more productive and collaborative meetings in 2022 and beyond.

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SEMICOLONS SEAL THE DEAL

Semicolons being much in the news of late,[1] I thought that perhaps a real-world answer might be in order to Professor Simon's question whether anyone had ever exclaimed, "This would have been much more understandable if the writer had just used a semicolon!"

The opportunity to lease space to a rapidly expanding retail outlet was presented to my client, a real estate developer. A continuing relationship with this prospective tenant would be a game-changer, as several projects were in the works where the tenant would fit right in. The tenant was strong enough to demand that *its* lease form (rather than the landlord's form) be used. In such circumstances the first lease is always the hardest—if only agreement can be reached on changes to the form, future deals are relatively smooth sailing.

The sticking point of the negotiation came down to one sentence, and it was a doozy. Its Flesch Reading Ease score was -84.1 (impossible to comprehend), which is to say, it was a fairly typical sentence in a "hazardous substances" article. The landlord first proposed a complete rewrite, which was a non-starter. Then we tinkered at the edges, only to be rebuffed again. We finally were advised that this particular sentence was sacrosanct to the tenant's general counsel, and if we changed one word, this would be the last deal we did, if any.

Cue the hand-wringing.

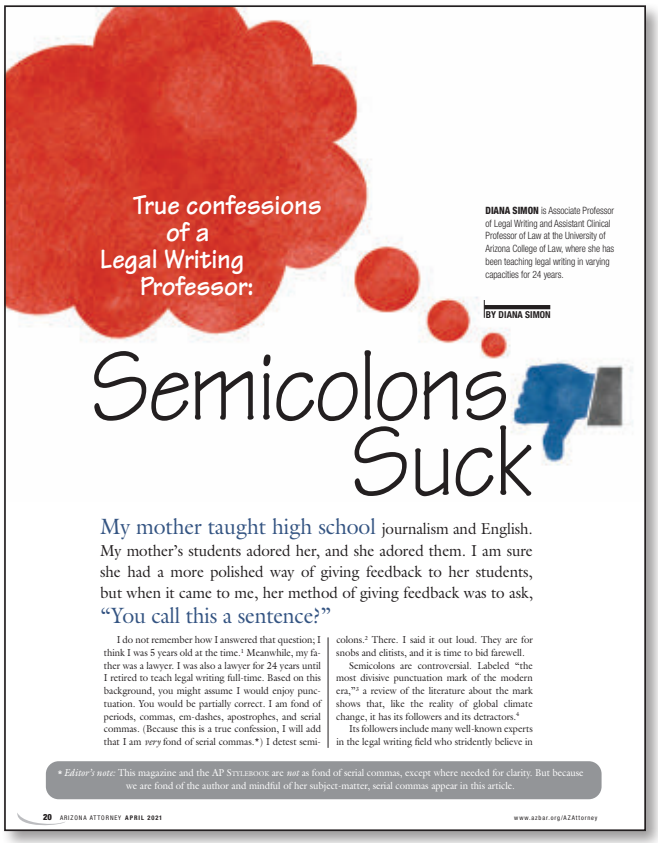
The problem was, the sentence was acceptable to the landlord only if the last part (previously or now existing contamination) applied both to the middle part (underground storage tanks) *and* the first part (hazardous substances). If the last part applied only to the middle part (it was perfectly unclear), the landlord was unwilling to move forward.

What to do?

Two judiciously placed semicolons were the answer (I'm still not sure the second is even kosher). Well, that and a couple letters in parentheses. With these utilitarian punctuation marks, we met general counsel's stricture, while clarifying the meaning to our satisfaction. But for semicolons, the task was insurmountable.

Needless to say, in addition to all the back-slapping and high-fives, much exclaiming concerning enhanced understandability using semicolons ensued. Why, even the brokers exclaimed they now understood the provision. Many leases with this tenant later, I still chuckle to read it.[2]

—*Stephen W. Baum, Phoenix*



True confessions of a Legal Writing Professor:

Semicolons Suck

DIANA SIMON is Associate Professor of Legal Writing and Assistant Clinical Professor of Law at the University of Arizona College of Law, where she has been teaching legal writing in varying capacities for 24 years.

BY DIANA SIMON

My mother taught high school journalism and English. My mother's students adored her, and she adored them. I am sure she had a more polished way of giving feedback to her students, but when it came to me, her method of giving feedback was to ask, "You call this a sentence?"

I do not remember how I answered that question; I think I was 5 years old at the time.[1] Meanwhile, my father was a lawyer. I was also a lawyer for 24 years until I retired to teach legal writing full-time. Based on this background, you might assume I would enjoy punctuation. You would be partially correct. I am fond of periods, commas, em-dashes, apostrophes, and serial commas. (Because this is a true confession, I will add that I am *very* fond of serial commas.*) I detest semicolons.[2] There. I said it out loud. They are for snobs and elitists, and it is time to bid farewell.

Semicolons are controversial. Labeled "the most divisive punctuation mark of the modern era,"[3] a review of the literature about the mark shows that, like the reality of global climate change, it has its followers and its detractors.[4]

Its followers include many well-known experts in the legal writing field who stridently believe in

* *Editor's note:* This magazine and the AP Stylebook are *not* as fond of serial commas, except where needed for clarity. But because we are fond of the author and mindful of her subject-matter, serial commas appear in this article.

endnotes

1. Diana Simon, *True Confessions of a Legal Writing Professor; Semicolons Suck*, Ariz. Att'y (April 2021) at 20; Jeffrey Sparks & Elizabeth Bingert, *Why the World Needs Semicolons*, Ariz. Att'y (October 2021) at 12.
2. Landlord, at its sole cost, will indemnify, defend (with counsel reasonably acceptable to Tenant) and hold harmless Tenant and its officers, directors, agents, employees, representatives, successors, and assigns from and against any and all liability arising from third-party claims, demands, action, litigation, or governmental action relating to or arising out of (a) the use, storage, disposal, or presence of hazardous substances or wastes, toxic and nontoxic pollutants and contaminants including, but not limited to, petroleum products, agricultural chemicals, polychlorinated biphenyls (PCBs) and asbestos (collectively "Hazardous Substances");; or (b) the presence of any underground storage tanks or irrigation wells; at, on, or under the Premises, previously or now existing, or which Landlord or its agents or employees causes to exist in the future, except to the extent caused by Tenant.

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This column provides tips on starting, building and running your law practice. Send your column ideas and questions to **practice2.0@staff.azbar.org.**

Parting as Friends

It was true when Neil Sedaka first sang it in the 60's, and it's true today—breaking up is hard to do. Sure, there may be hurt feelings, business impact, or even a bit of jealousy when firms break up—or when a single lawyer decides to go another way. But it's not impossible to manage the breakup with professionalism and dignity—leaving behind respect and possible referrals both ways in the future—rather than making this situation rife with tension, distrust and resentment.

We get lots of calls at Practice 2.0 both from the departing lawyer(s) and the "left-behind" firm. While some are seeking information and sound emotionally neutral, more often those calls are filled with anxiety and some level of accusation on one or both sides. Understandable, surely, but avoidable.

The bottom line is that, yes, the firm may lose some clients to the departing lawyer. But wouldn't it be better to maintain a professional connection with a lawyer who until moments ago you were happy working with? Since we deal in best-practice advice (aka advice most likely to benefit you, your firm and keep you from violating the ethical rules), it seemed like a good idea to offer suggestions on how to minimize drama and maximize the potential for a productive, professional relationship going forward.

It's all about the client. The first thing to remember is that the client's interests must be protected. The firm and the lawyer are both responsible for making sure the client doesn't suffer disruption to their matter regardless of who is their lawyer going forward. The unfortunate situation we are frequently called about is this: The lawyer gives notice. Immediately, or the next day, the lawyer is locked out of the physical office, and/or denied access to electronic files and client data.

Looking at it in the abstract, one might see where this is coming from—the lawyer's leaving; the firm doesn't want to lose a client (or account receivable). But what this course of action doesn't consider is that the client is not a widget—it's up to the client who will be handling their legal matter going forward. Practice 2.0 offers a **sample joint letter** we recommend the firm and departing lawyer send jointly to all the departing lawyer's clients. It lays out the choices for the client—stay with the firm, stay with the departing lawyer, or move on entirely to a new firm or lawyer.

Client lists. Departing lawyers will need some information about the matters they've handled in the firm, primarily for conflict-checking purposes. The firm should provide the lawyer with those lists as promptly as possible. The lists should include not only client names/matters, but also witnesses, opposing counsel and any other information that was needed for conflict checking while the lawyer was at the firm. Some firms are reluctant to provide this information, but the departing lawyer is entitled to it. Even if you are not planning to leave a firm anytime soon, it is wise for each lawyer to (safely, securely) maintain their own list—but be sure you update it so if you ever leave you have an accurate list and need not depend on your former firm to get it. And please note the "safely and securely" advisory—you shouldn't store this on your family computer. Remember, you have a duty to protect this confidential information.

Ethics. Yes, this is a practice management column, but you can't manage your practice without keeping an eye on the ethical rules and opinions. (Note: There are both advisory and binding ethics opinions now—those issued by the Supreme Court of Arizona Attorney Ethics Advisory Committee are binding). A search of the ethics opinions on the Bar's website may help, but Practice 2.0's lawyers are here to advise you on making the departure as seamless as possible.

A cool head may be just what you need. If you can't get past the hurt (I'm thinking of that classic *My Big Fat Greek Wedding* moment when the father asks, with tears in his eyes, "Why do you want to leave me?"), or the "You're the worst and that's why I'm leaving" feelings, it may be time to involve a neutral third party. This may not be the solution for everyone, depending on your human and financial resources, but sometimes paying a neutral to serve as an intermediary for a few hours might be the way to go. Most lawyers realize it's hard to be objective in the heat of battle—and what's more personal than this situation?

Transition at Practice 2.0. A column about transitions and departures seemed like the perfect time to introduce our new Lawyer Assistance Programs Director here at the Bar, **Bradley Perry**. Bradley is taking over this column; you'll still be hearing about practice management and lawyer well-being, and I'm confident you'll enjoy hearing from Bradley. It's been an honor and a privilege to talk with you each month through Let's Practice.

Roberta Tepper is the Chief Member Services Officer for the State Bar of Arizona. She is on the Board of Directors of the Arizona Women Lawyers Association and serves on the American Bar Association's Law Practice Division Council, is the Features Editor for *Law Practice Magazine* and serves on the Law Practice Division's Strategy and Planning Committee.

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TOP 10 THINGS I LEARNED AS ABA PRESIDENT

BY TRISH REFO

As the pandemic hit, I was preparing to become only the second Arizona lawyer to serve as President of the American Bar Association in its 144-year history. As with every other bar association president last year—including our own 2020-2021 State Bar of Arizona President Denis Fitzgibbons—I served during an unprecedented year on many levels. So, what did I learn?

1 Lawyers and judges really *can* embrace change. Who knew?

Imagine if someone had asked the legal profession in March 2020, "How long will it take to move your practices, all of the nation's law schools, and much of the court system to remote status?" Nearly all of us would have said such a transformation would take years to plan for and implement. And then we did it seemingly overnight. Lawyers and judges who had never used video conferencing were soon Zooming around the country all day, every day. Sure, there were some snafus—cat filters, pets and kids appearing on screen in meetings or at hearings—but video appearances are now old hat to even the tech-clueless among us. We learned how to work from home, meet with clients, appear virtually in court, and teach law through a screen.

At the same time, our profession is also beginning to embrace fundamental changes in the regulation of lawyers. With the support of lawyers and judges, states across the country are experimenting with nonlawyer practitioners, relaxing restrictions around who can own law firms, and other innovations designed to make legal services more affordable and more available to the majority of our citizens who have no access to help for their civil legal needs. Arizona's new rules took effect on January 1, 2021.

We can't know for sure where these innovations will take us, but we are willing to try change anyway. Who knew lawyers could do that?

2 Don't try to boil the ocean. Eat the elephant one bite at a time.

Serving as ABA President is an endless job. There is *always* more you can do—every day. I survived by trying not to boil the ocean and reminding myself to eat the elephant one bite at a time. In other words, don't try to do everything, and don't get overwhelmed when the task is enormous.

The challenges facing our justice system, especially during a global pandemic, can seem overwhelming. There are so many things to work on, and they all require attention. It is easy to lose focus and try to do everything at once. Pretty soon, you realize that you are trying to boil the ocean. As is true in so many aspects of life, I had to learn to choose the things to focus on, and then stick with them.

When our son was little and was struggling—as we all do—with how and where to start on some task that seemed huge to him, we always resorted to, "How do you eat an elephant? One bite at a time." Likewise, you can't solve every problem facing our justice system and our profession—especially in one year of service as ABA President. But we can start one bite at a time.

3 Justice Ginsburg was right. Enduring change is incremental.

Justice Ruth Bader Ginsburg famously said, "Real change, enduring change, happens one step at a time." This maxim is certainly true in the legal profession. Taking a mental "patience pill" every day helped me focus on making incremental change. And the pandemic freed us, in a way, to try some new things.

4 You can go more places by standing still.

The ABA Presidents who preceded me were on the road constantly, visiting law schools, speaking at

bar associations, and doing all the travel that came with leading the world's largest voluntary bar association. I had been told to plan to sleep on a hotel pillow about 300 nights of the year I would serve as President. And then the pandemic hit. When I was sworn in as President in August 2020, travel was largely shut down, and lawyers were not meeting in person anywhere. Everything was virtual. So the ABA team and I pivoted to projecting the Office of the President in a virtual world.

We said "yes" to just about every remote speaking invitation, absent a direct scheduling conflict. And because all the travel time was eliminated, I could give remarks "in" multiple places back-to-back, without ever leaving home. In one two-day period, I spoke at a webinar in Paris, was on the faculty for a CLE in New York, taught a class at Harvard Law School, and gave major addresses at two state bar conventions. That schedule would have been physically impossible in-person. Over the course of a year, I literally gave virtual remarks at every hour on the 24-hour clock, thanks to international time zones. I "went to" 33 states plus D.C. and the Navajo Nation (five in person) and 14 countries (three in person). By the end of the year, I had spoken to more than 60,000 lawyers—vastly more than any ABA President in history—mostly by standing still.

5 Explicit and implicit bias still poison our profession and justice system.

We have the best justice system in the world, but overt racism and implicit bias remain embedded in it. As I said when the jury convicted Derek Chauvin for the murder of George Floyd, the verdict was neither an indictment of all police nor a solution to the systemic inequities in our justice system. The organized bar must continue its all-out effort to eradicate these scourges.

Our profession continues to face its own reckoning. Women lawyers and lawyers of color were demonstrably more impacted by the pandemic, and study after study shows how much remains to be done for our own profession to achieve equity.

6 Leadership is all about people.

Colin Powell was right when he said, "Leadership is all about people. It's not about organizations. It is not about plans. It is not about strategies. It is all about people—motivating people to get the job done."

And it is certainly true leading an organization of volunteer lawyers. I learned to pay attention to motivating and responding to the people around me. I learned to not always respond to every email with another email, but to pick up the phone and talk to my colleagues. I tried to be sure I responded timely to every single email I received (and there were lots!) from a lawyer—whether they were an ABA member or not. I tried to remember that taking the time to listen to someone is part of how to motivate them. And by the way, it might even make me smarter!

OUR PROFESSION IS BEGINNING TO EMBRACE FUNDAMENTAL CHANGES IN THE REGULATION OF LAWYERS. WITH THE SUPPORT OF LAWYERS AND JUDGES, STATES ARE EXPERIMENTING.

7 Always understand the difference between you and any titile you hold. Put differently, don't take yourself too seriously.

I had the high privilege to meet virtually and in person with officials from the White House, the Department of Justice, the United Nations, judges and justices at home and abroad, foreign leaders, and even a head of state. Not one of them was interested in meeting with Trish Refo. They wanted to meet with the President of the American Bar Association. Keeping that distinction front and center was key to being effective—and was oddly empowering. Trish had no business being in the rooms I was invited into, but the ABA President did.

8 Lawyers and judges can, and must, be examples in this moment of divisiveness in our country.

Almost all of us went to law school, at least in part, because we wanted to help people, serve our communities, and make whatever positive difference we can. We are trained to be advocates, and we know how to argue. But the lawyer we are arguing against in today's case or transaction may be our co-counsel next week in another matter. We know how to fight all day with opposing counsel and then go out for a beer together. Plaintiffs lawyers and defense lawyers, prosecutors and the criminal defense bar, work together every day to find ways to improve the justice system even though they bring differing perspectives, experiences and sometimes values to the table. Our nation needs that example right now.

9 The world still looks to our legal systems as a shining example.

The high esteem in which the rest of the world holds the American justice system and the American Bar Association was an almost daily revelation for me. When American lawyers and judges come together, we understandably focus on the things we still need to improve in our profession and our justice system. But to the rest of the world, and especially to our colleagues in the global bar, the ideals we stand for really are a shining light on the hill.

The examples are many. In countries where the rule of law is still emerging or is under direct threat from dictators and autocrats, our still-imperfect system gives hope and inspiration. Where the law expressly treats women and girls as second-class citizens, our ideal of equality under the law gives courage to and empowers those who fight for gender equity. When lawyers want to form their country's first national bar association, they ask the ABA for help. I was proud every day to represent the lawyers of America.

—continued on p. 92

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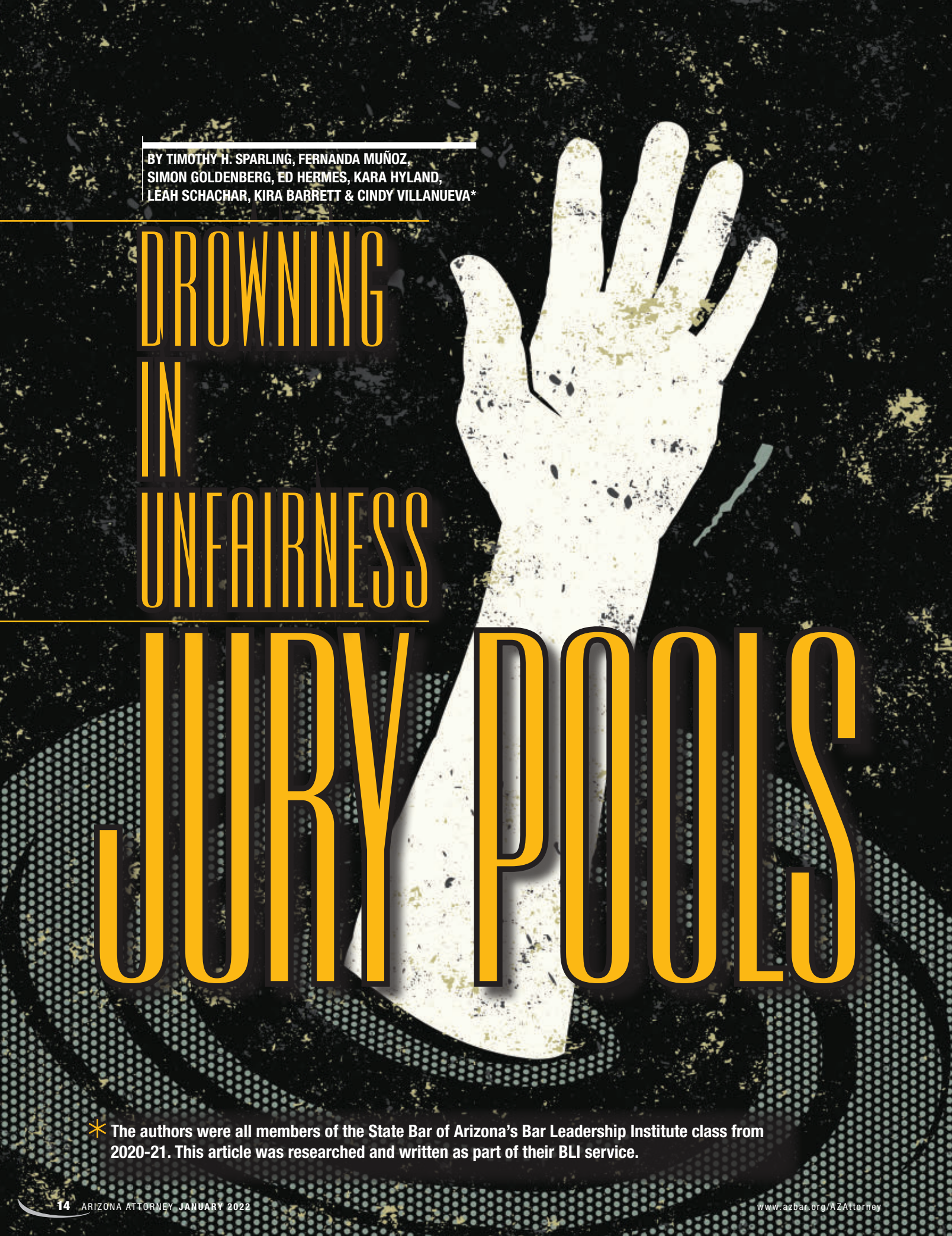
BY TIMOTHY H. SPARLING, FERNANDA MUÑOZ, SIMON GOLDENBERG, ED HERMES, KARA HYLAND, LEAH SCHACHAR, KIRA BARRETT & CINDY VILLANUEVA*

DROWNING IN UNFAIRNESS

JURY POOLS



* The authors were all members of the State Bar of Arizona's Bar Leadership Institute class from 2020-21. This article was researched and written as part of their BLI service.

On April 11, 2015, Taurice Singleton, an African American man, drove his 5-year-old son to purchase a mattress for his son's new bed. While waiting to pick up the mattress, Taurice left his son in the front seat of the car, where he could watch him from the doorway of the store to make sure he remained safe. Minutes later, a police officer approached Taurice to question him about his activities. The officer became hostile with Taurice and

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suggested he endangered his son by leaving him in the car. She requested to see Taurice's identification and implied that he could be criminally charged for leaving his son in the car alone. Taurice explained to the officer that his son never left his eyesight the entire time. He shrugged off the encounter and left with his son after picking the mattress up from the store.

Minutes into his drive home, Taurice passed the same officer on the road. The officer pulled a U-turn and activated her lights to pull him over. Taurice noticed that his son was visibly afraid. As the officer came closer to Taurice's car, his son began to cry. Taurice remembered his past negative interactions with the police.

"I was trying to get my son to somewhere safe," Taurice recalled, "I didn't want my son to judge police officers based off a trauma he received from watching something that happened with his father."

Taurice did not speed or violate any traffic laws on his way home. He pulled into his driveway, just a quarter-mile from where the car was when the officers turned on their lights. He began helping his son out of the passenger seat of the car. During this time, an officer pulled Taurice out of the driver's side of the car and arrested him for felony flight. Taurice explained to officers that he was only trying to get his son to a safe place before pulling over. No one listened to him.

The State charged Taurice, and he decided to take his case to trial by jury. He never intended to flee from police. "I didn't think there was anybody in their right mind who would look at the evidence … and see that as the case. Especially a jury of my peers."

Taurice's jury pool fell woefully short of his expectations. He believed that a jury of his peers would mostly consist of people from his community. "If you don't even have an understanding of a similar background, then you won't understand the anxiety or fear that is in the community of people of color when it comes to dealing with police officers," he explains. Instead, his jury was overwhelmingly Caucasian, and the age and education levels of the jurors were vastly different from his own. "I saw one person that looked like me in that jury," he recalls. "I don't know how they considered any of those people my peer group." Taurice's jury convicted him.

Jury Diversity Is Important, but the Legal System Falls Short

Courts are struggling to effectively and randomly select jury pools that fairly reflect the demographics of the community. In *Taylor v. Louisiana*, the U.S. Supreme Court recognized that the presence of a fair cross-section of the community in the jury pool is essential to a criminal defendant's right to an impartial jury.[1] Still, defendants often face a jury that features a majority of white, upper-middle class individuals who do not fairly represent the diverse community.[2] People of lower-income status tend to move more frequently, making it difficult to locate and deliver a juror summons to them.[3] Furthermore, answering a summons is prohibitive for those who cannot afford to miss a day of work.[4] This poses a challenge when creating fair and impartial juries.

The Supreme Court recognized the importance of jury diversity in *Peters v. Kiff*, stating, "When a large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable."[5]

Diverse juries are more likely to deliberate, examine and defend their positions than non-diverse juries. A 2006 study shows that racially diverse juries deliberated longer, made fewer factually inaccurate statements, and more thoroughly discussed trial evidence than all-white juries.[6] These juries are more likely to examine the support for their own beliefs and abandon positions that are unsupported by the evidence. This occurs because diverse juries curb groupthink errors. Groupthink occurs when there is a lack of alternative viewpoints because the worldview of the jurors is too similar.[7] The group actively suppresses dissenting or minority viewpoints. Jurors find themselves in this exact situation when deliberating on juries lacking in diversity.

Fortunately, Arizona has pursued some measures to address these problems.

Arizona's Attempts To Ensure Jury Diversity

People cannot be blocked from jury service based on race, nationality, color, ethnicity, ancestry, gender, age, religious belief, income, occupation, disability or sexual orientation under the Arizona Code of Judicial Administration ("Code").[8] The Code requires courts to periodically monitor the performance of their jury system to ensure:

1. the representativeness of juries
2. the inclusiveness of juries
3. the effectiveness of qualifications and summoning procedures
4. the responsiveness of individual citizens to jury service summonses
5. the efficient utilization of jurors
6. the cost effectiveness of the jury system
7. the court's ability to meet juror needs.[9]

However, the COVID-19 pandemic has exacerbated the struggle to effectively select representative jury pools, given its disproportionate impact on racial and ethnic minority groups and the elderly.[10] Consequently, the jury pool could dwindle significantly by automatically granting a juror's request to be excused for risk or fear of contracting COVID-19, resulting in juries that skew younger and whiter.[11]

In Arizona, county jury commissioners create a master jury list that includes the names and addresses of eligible persons who reside in the county. The list gathers persons from the voter registration list, persons

licensed pursuant to general licensing provisions of the Motor Vehicle Division ("MVD"), and persons from other lists determined by the Supreme Court.[12] Commissioners select jurors by collecting data from the County Recorder's Office and MVD to identify citizens who are 18 or older. If a person appears on the master list, they are presumed to be a resident for jury pool purposes. The Arizona Department of Health Services Office of Vital Records also provides a list of persons who have passed away, and they are removed from the system. Commissioners update this data every six months.

Once the jury commissioners summon prospective jurors, they screen them with an eligibility questionnaire. Prospective jurors are asked to verify that:

- they are a resident of the jurisdiction;
- they are a U.S. citizen;
- no court has adjudicated them mentally incompetent or insane; and
- they are not a felon whose rights have not been restored[13]

By statute, prospective jurors are entitled to two postponements of their jury duty.[14] Prospective jurors seeking to postpone jury service can do so by phone, mail, in person or electronically, but postponements are not tracked.[15] Persons with a mental or physical condition rendering them incapable of performing jury service, or persons for whom jury service would pose undue financial hardship, are statutorily exempt.[16]

Plugging the Gaps in Arizona's Jury Selection Process

Arizona's screening process risks thinning diverse jurors from the selection pool. Adrian Fontes, Maricopa County Recorder from 2016 to 2021 and past interim Chief Deputy Recorder for Pima County, notes that the jury selection process suffers from the same problems as the election process: "The big problem facing elections is that there is no way of finding out if someone moved away. All we can do in the current system is mail out election notices to last known addresses." Therefore, people who move often are less likely to receive voting materials or be called for jury duty due to obsolete contact information.

The first solution Fontes proposes is for counties to purchase commercial data commonly kept by private companies. Commercial data is everywhere. Google, Amazon, Apple and similar companies collect data from video platforms, email services and map applications to mine information from over 1 billion users.[17] This data more accurately reflects the physical location and demographics of people in the community, which would help counties locate underrepresented jurors.

This suggestion is not particularly groundbreaking. The Departments of Justice and Homeland Security and the Social Security Administration alone paid as much as $30

million to access commercial data in 2005—an amount that likely has only increased since.[18] Scholars have also considered using commercial data, but no known jurisdiction has implemented such information to create more representative juries.[19]

Diverse juries are more likely to deliberate, examine and defend their positions than non-diverse juries. A 2006 study shows that racially diverse juries deliberated longer and made fewer factually incorrect statements than all-white juries.

Fontes's second solution is simpler and equally helpful. An automatic voter registration system would help update and maintain juror lists by refreshing demographic and residential data every time an eligible voter applies for or renews their state identification. For every extra data point it uses, an automatic voter registration system increases diversity in jury selection.

For instance, the automatic voter registration systems in New York, Maryland and Massachusetts immediately register a person every time they provide information to the Department of Health, Department of Labor, Division of Medical Assistance, Social Services, and public transportation certification systems.[20] An automatic voter registration system would update data in the jury selection system. The jury selection system could then increase pool diversity by collecting data from state and county agencies heavily used by low-income persons and communities of color.

While the cost of an automatic voter registration system may concern critics, existing examples prove inexpensive. A 2018 report from Massachusetts evaluated the costs of automatic voter registration in Oregon, Vermont and Colorado when determining whether to adopt a similar system.[21] The report concluded that the cost of their automatic voter registration systems were hardly prohibitive and that automatic voter registration was "a cost-effective, practical, and effective reform."[22] The same would likely be true for Arizona.

Once counties can more accurately locate and pool potential jurors, another hurdle to achieving a diverse jury pool is to ensure that potential jurors can actually *afford* to serve. Arizona law currently caps compensation for jurors at $12 per day of service—an amount that has not been updated

since 1985.[23] Furthermore, Arizona does not provide childcare for jurors at the courthouse or cover child care expenses during jury service. The minimum wage and child care expenses have increased significantly since Arizona set juror compensation in 1985—but juror compensation has not.[24]

To address the lack of child care accommodations and inadequate compensation, the Maricopa County Superior Court excuses jurors of low means and jurors whose first language is not English. Prospective jurors may be excused if they:

1. "provide actual and necessary care for another and alternate arrangements are not feasible,"
2. "[w]ill suffer extreme financial burden if required to serve that would substantially prevent the prospective juror from paying his/her necessary daily living expenses" or
3. are "unable to read or understand the English language."[25]

Although facially neutral, these policies disproportionately impact the working poor and communities of color. When combined with the meager juror stipend and lack of interpreting services for jurors, Arizona is left with a jury pool that does not accurately reflect the community.

To address these structural inequities, Arizona should increase the juror stipend so jurors of less financial means can afford to take a day off work for jury service, provide on-site daycare to potential jurors, and provide English interpreters. Many courts around the country already provide free on-site child care for jurors.[26] Although courts must provide interpreting services to hearing-impaired jurors, courts may reject jurors who cannot speak English as their native language.[27] Courts can still reject jurors whose primary language is not English.[28]

On August 30, 2021, the Arizona Supreme Court announced it had adopted court rule changes eliminating the practice of exercising peremptory strikes—the first state in the nation to do so.

Current Reform Efforts — Where Do We Go From Here?

The benefits of a diverse jury pool are obvious, not to mention constitutionally required. Aside from being an intrinsic good itself, diversity in juries brings tangible benefits to the community. Studies show that diverse juries tend to be more deliberative, resulting in decisions that are well reasoned and thoroughly debated.[29] Despite this, the sort of funding required for county offices to purchase commercial data or provide child care services to jurors demands unlikely legislative enforcement. The Legislature also has rejected at least five measures to create an automatic voter registration system in recent years.[30]

While the Legislature is resistant to reform, the Arizona Supreme Court is considering possible solutions to jury pool issues. On March 10, 2021, Chief Justice Robert Brutinel established a task force to explore and make recommendations regarding jury pool composition, juror source lists, and increasing summons response.[31] The task force also considered juror pay, the role of peremptory challenges and their impact on post-pandemic trials, the relationship between peremptory challenges and systemic exclusion, and public education on the process and value of jury service.[32] The task force issued its report on October 4, 2021.[33] The task force's policy recommendations include increased juror compensation and implicit bias training for attorneys and judges.[34]

On August 30, 2021, the Arizona Supreme Court announced it had adopted court rule changes eliminating the practice of exercising peremptory strikes. The change—the first in the nation—applies to both civil and criminal trials and became effective January 1, 2022.[35]

The State will need to be proactive to assure fair representation in juries, especially because COVID-19 has worsened preexisting trends. Proactive action would include a more nimble jury system that automatically incorporates data on citizens who are or should be on the master jury list, as well as funding for child care and a higher daily wage for jurors. While these changes require financial investment from the State, Arizona has a duty to keep up with its changing demographics and assure that juries look similar to the community where they sit. Without updates to the current system, more defendants will endure a similar experience to Taurice Singleton: frustration with a jury that does not represent a fair cross-section of their community and the feeling that it led to a conviction. AZ AT

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FORECLOSURE

LARRY FOLKS is a Member of Folks Hess PLLC, which represents banks, credit unions and mortgage servicers in every county of Arizona concerning a broad range of legal services related to consumer and commercial loan workout, bankruptcy, collection, foreclosure, mortgage deficiency and other creditors' rights litigation cases. Contact the author at folks@folkshess.com.

Enforcing Money Judgments Against a Judgment Debtor's "Homestead"

A STEP-BY-STEP GUIDE FOR 2022

BY LARRY O. FOLKS

Legislation to protect "homestead" property—historically the family farm and now personal residences—from loss to judgment creditors is traceable in the United States to a statute enacted in Texas in 1839.[1] Legislatures across the United States have enacted such laws for the primary purpose of serving the public interest to allow judgment debtors to avoid a complete loss of the value of their "homestead" property to judgment creditors through forced judgment execution sales.

In Arizona, the "homestead" exemption and related judgment lien and judgment enforcement laws have evolved over time. As an example, in 1977, the dollar amount of the "homestead" exemption was increased from $15,000 to $20,000, and it has steadily been increased over time through ongoing statutory amendments.[2]

More changes to these laws are rolling out now. Specifically, on May 19, 2021, Governor Ducey signed into law Arizona House Bill 2617 ("HB 2617"), which implemented sweeping changes to the Arizona judgment lien, judgment execution and "homestead" exemption statutes, effective on January 1, 2022.[3]

HB 2617 specifically implements significant amendments to Arizona's:

- judgment lien statute located at A.R.S. § 33-964 (the "Judgment Lien Statute");
- judgment execution statute located at A.R.S. § 12-1551 (the "Judgment Execution Statute"); and
- "homestead" exemption statutes located at A.R.S. §§ 33-1101 and 33-1103 (collectively, the "Homestead Exemption Statutes").[4]

The most significant of these amendments for judgment creditors are:

- the imposition of a judgment lien upon "homestead" property upon the recordation of a money judgment in the county where the real property is located; and
- an increase of the "homestead" exemp-

tion amount allowed for judgment debtors from $150,000 to $250,000.

This article is a step-by-step practical guide to help judgment creditors understand the changes implemented by HB 2617 and evaluate enforcement of a money judgment against a "homestead" property on or after January 1, 2022, pursuant to the revised Judgment Lien Statute, Judgment Execution Statute and Homestead Exemption Statutes.

STEP 1:

Confirm the judgment has not expired

In 2018, the Arizona Judgment Execution Statute was amended to extend the validity of civil money judgments from five years to 10.[5]

HB 2617 confirmed the validity of money judgments for 10 years that:

- were entered on or after August 3, 2013; or
- were entered on or before August 2, 2013, and that were renewed on or before August 2, 2018.[6]

If a civil money judgment has expired, it is no longer enforceable. As a result, the first step to enforcement of a money judgment against "homestead" property is for the judgment creditor to review the court docket and/or face of the judgment to determine the date of entry and/or renewal of the judgment, if applicable. That will allow the judgment creditor to make the decision concerning whether the judgment in hand remains enforceable.

STEP 2:

Confirm if the property qualifies for the exemption—and for how much

HB 2617 includes revisions to the Homestead Exemption Statute located at A.R.S. § 33-1101(A), which provide that any person 18 years of age who resides in Arizona and is married or single may hold a "homestead" exemption for the following types of real property (hereinafter, a "Homestead Property"):

- the person's interest in real property in one compact body on which exists a dwelling house in which the person resides;
- the person's interest in one condominium or cooperative in which the person resides;
- a mobile home in which the person resides; or
- a mobile home in which the person resides plus the land on which that mobile home is located.[7]

For the most part, the analysis is very straightforward to determine whether the real property subject to collection is a Homestead Property. The main exception is to determine whether the property is a rental property that the judgment debtor cannot claim as a Homestead Property.

HB 2617 also implements the major change to the Homestead Exemption Statute of increasing the dollar amount of the

exemption from $150,000 to $250,000.[8]

STEP 3:

Determine whether the judgment is a lien upon the homestead property

For many years, the Arizona Judgment Lien Statute has included:

- the general rule that a recorded money judgment creates a statutory judgment lien on all real property then owned by a judgment debtor, or acquired by the judgment debtor in the future, in the county where the judgment is recorded; and
- the exception to the general rule that a recorded money judgment is *not a lien* upon real property that qualifies under the definition of a Homestead Property, which is typically the judgment debtor's personal residence, whether it be a single-family home, condominium or mobile home.[9]

Under the statute effective through December 31, 2021, even though the judgment creditor does not have a lien on the Homestead Property, the judgment creditor is given the legal remedy to force a sheriff's execution sale of the Homestead Property, if there is equity in the property above all consensual liens on the property and the $150,000 homestead exemption available to the judgment debtor.[10]

HB 2617 repealed the exception to the general rule by revising the Arizona Judgment Lien Statute.[11] As a result, as of January 1, 2022, *all civil money judgments recorded with a county recorder shall become a lien upon*:

- all real property, including Homestead Property, owned by the subject judgment debtor in that county on the date that the judgment is recorded; and
- all real property that may be acquired by the subject judgment debtor in that county in the future.[12]

The practical requirements for a judgment creditor to obtain a valid recorded judgment lien have not been changed by HB 2617 and will continue to be that:

- a certified copy of the judgment will need to be obtained for recordation; and
- a judgment information sheet must be recorded with the judgment.[13]

The Judgment Lien Statute also includes certain transitional rules in new A.R.S. § 33-964(G)[14] concerning when a judgment lien is imposed by the new statutes. The transitional rules are:

1. If a sale, transfer or refinance of the judgment debtor's Homestead Property is completed prior to January 1, 2022, then the judgment creditor does not have a judgment lien upon the Homestead Property.[15]
2. If the judgment debtor receives a bankruptcy discharge prior to January 1, 2022, then the judgment creditor does not have a judgment lien upon the Homestead Property.
3. If the judgment debtor has filed for

bankruptcy protection prior to January 1, 2022, and ultimately receives a discharge, then the judgment creditor does not have a judgment lien upon the Homestead Property.

4. For any sale, transfer or refinance that is completed on or after January 1, 2022, judgments that are recorded before January 1, 2022, and that are still valid attach to the homestead property, are enforceable, and create judgment liens pursuant to the priority rules listed in the statute.

STEP 4:

Determine the judgment creditor's collection rights as a result of its judgment lien

Judgment creditors must evaluate their collection rights granted by the new statutes under their particular circumstances. Several recurring scenarios faced by creditors when collecting upon money judgments secured by real property are specifically addressed by HB 2617 and discussed below.

"Cash out" refinance transaction by the judgment debtor concerning a homestead property secured by a judgment lien

HB 2617 grants judgment creditors a new collection right when a judgment debtor refinances a mortgage loan on a Homestead Property and there are "cash out" proceeds available from the refinance transaction.

In particular, A.R.S. § 33-964(C) has been added to the Judgment Lien Statute to provide that the judgment creditor's judgment lien balance must be paid in full from the refinance "cash out" proceeds before the judgment debtor or any other person receives any of the proceeds.[16] The new text of § 33-964(C) is as follows:

> If the judgment debtor receives cash proceeds from refinancing the homestead property that is subject to a judgment lien, the judgment creditor must be paid in full from those proceeds before the judgment debtor or other person receives any proceeds, except that monies used to pay direct costs associated with the refinance or to satisfy liens with priority over a judgment lien on a homestead property do not constitute cash proceeds. In subsequent refinance transactions on the homestead property that is subject to a judgment lien, the judgment lien is subordinated by operation of law to the new lender's interest in the homestead property. A notice of subordination may be recorded by any person who is a party to that refinance.[17]

Judgment creditors must evaluate their collection rights granted by the new statutes under their particular circumstances.

HB 2617 makes a conforming change to the Homestead Exemption Statute, located at § 33-1101(C), to provide that "the homestead exemption does not attach to the person's interest in identifiable cash proceeds from refinancing the homestead property.[18]

HB 2617 also added the following new subsection § 33-1101(D), which gives the parties' guidance concerning how to determine whether there is equity in a Homestead Property for the purpose of complying with several provisions of the Judgment Lien Statute, Judgment Execution Statutes, and Homestead Exemption Statutes as revised. The new section provides as follows:

> For the purposes of determining the amount of equity in a homestead property that is sold or for determining whether the property owner is receiving cash back from refinancing the homestead property, the parties may rely on the valuation of the property in the final closing document disclosure that is used for that transaction.[19]

The effect of the above revisions to the Judgment Lien Statute and Homestead Exemption Statute is to grant judgment creditors a very significant new substantive collection legal right to enforce their judgment lien by executing upon the "cash out" refinance proceeds that did not exist prior to enactment of HB 2617.

Stated alternatively, the new amended statutes close the loophole that existed to allow judgment debtors to strip the equity out of their Homestead Properties and not pay the refinance "cash out" proceeds to judgment creditors, because the proceeds by definition under current law are not encumbered by a lien in favor of the judgment creditors.

Voluntary sale of homestead property subject to a judgment lien by the judgment debtor

HB 2617 has added to the Judgment Lien Statute a new section, A.R.S. § 33-964(B). This grants a judgment creditor rights with respect to payment of its judgment lien balance upon a judgment debtor's voluntary sale of a Homestead Property as follows[20]:

> B. On the sale of homestead property that is subject to a judgment lien, the judgment creditor shall be paid from the proceeds of the sale after the homestead exemption amount is paid to the judgment debtor as prescribed in section 33-1101 and after payment of any liens on the property that have priority over the judgment lien[.][21]

This change is a codification of the judgment creditor's substantive right to payment under existing lien priority and Homestead Exemption Statutes now that the judgment creditor's recorded judgment is recognized as a statutory judgment lien upon the

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The ACTL Fellows Congratulate the Winners of the Annual Jenckes Cup Competition

The Jenckes Cup is named for the late Joseph S. Jenckes ('61), an ACTL Fellow and prominent Phoenix Attorney. The competition, sponsored and judged by Fellows of the Arizona Chapter of the ACTL, was held on November 6 at the University of Arizona College of Law.

Law Students from the University of Arizona and Arizona State University competed by presenting closing arguments on a closed case that had been tried to a jury. After deliberation, the Fellows awarded the Jenckes Cup to the ASU team.

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Homestead Property.

The primary effect of this new law is to expand judgment creditors' rights to sale proceeds without having to take other enforcement steps that were previously necessary as a result of the judgment creditor not having an actual lien upon the sale proceeds.

New § 33-964(B) also grants title companies the right to record a partial release of the judgment creditor's judgment under certain circumstances. If the company makes a determination that the payment to the judgment debtor from the proceeds of the sale of the Homestead Property shall total less than 80 percent of the amount of the $250,000 homestead exemption (i.e., less than $200,000), then the title company may record the partial release of the judgment without prior notice to the judgment creditor.

Alternatively, if the title company determines that the sales proceeds to be paid to the judgment debtor will exceed the $200,000 threshold, then the judgment creditor's lien upon the Homestead Property will be extinguished if:

- the title company mails a notice (including certain specific information listed in the statute) to the judgment creditor by certified mail, return receipt, which informs the judgment creditor of the title company's position that its judgment lien will be extinguished by the sale transaction; and
- the judgment creditor fails to object within the required 20-day statutory notice and objection period.[22]

If the judgment creditor sends the title company an objection prior to expiration of the 20-day statutory objection time period that provides the judgment creditor has good cause for its judgment lien not to be extinguished by the sale transaction, then the title company may not record the partial release of the judgment lien.[23]

If a court subsequently determines the judgment creditor did not have good cause to object, then the prevailing party is entitled to a court order extinguishing the judgment lien on the Homestead Property and an award of actual damages, court costs and attorneys' fees and costs.[24]

If a title company records a notice of a partial release of judgment lien wrongfully, then the company is liable to any party for the actual damages, including attorney's fees and costs, that are caused by wrongfully recording the release.[25]

Involuntary sheriff's execution sale of the homestead property forced by the judgment creditor

HB 2617 was revised to expressly authorize a judgment creditor to force an involuntary sheriff's execution sale of a Homestead Property (with equity in it that exceeds the homestead exemption amount) encumbered by its judgment lien by amending § 33-1103(A) to provide as follows:[26]

A. Real property that is subject to the homestead exemption provided for in section 33-1101, subsection A is exempt from involuntary sale under a judgment or lien, *except in connection with:*

…

4. *A recorded civil judgment* or other non-consensual lien that is not otherwise prescribed in this subsection *if the debtor's equity in the real property exceeds the homestead exemption* under section 33-1101 (emphasis added)

The following example of the Maricopa County Sheriff's forced execution sale requirements discussed is useful to understand the requirements and collection rights of a judgment creditor to pursue this collection remedy.[27]

Judgment creditor (the "Judgment Creditor") obtains a money judgment (the "Judgment") against an individual judgment debtor (the "Judgment Debtor"). The Judgment is recorded with the Maricopa County Recorder ("County Recorder") while Judgment Debtor owns a residence located in Maricopa County that is the Judgment Debtor's Homestead Property.[28]

Judgment Creditor obtains a Writ of General Execution from the Clerk of the Superior Court to direct the Sheriff of Maricopa County, Arizona ("Sheriff"), to schedule a Sheriff's execution sale of the Homestead Property. This is a straightforward application process; it does not require a hearing, and the Writ of General Execution is summarily issued by the Clerk of the Superior Court. The Writ of General Execution is delivered to the Civil Enforcement Division of the Sheriff's Department along with an initial $200 fee deposit. The Sheriff will schedule an execution sale of the Homestead Property to enforce the Judgment only if all the legal requirements discussed below are satisfied ("Sheriff's Execution Sale").

The Sheriff's Execution Sale of the Judgment Debtor's Homestead Property will be scheduled by the Sheriff after:

- it is determined that the legal requirements of §§ 33-1103(A) and 33-1105(A) are met, which is that the value of the Homestead Property exceeds the total of any senior liens upon the property plus the $250,000 statutory homestead exemption amount due to the Judgment Debtor pursuant to revised § 33-1101(A) (the "Homestead Exemption Amount");
- the Sheriff makes demand upon the Judgment Debtor to pay the Judgment, and the Judgment Debtor fails to pay the Judgment balance; and
- the Sheriff determines that the Judgment balance cannot be collected by selling the Judgment Debtor's personal property.

The Sheriff initially enforces the Writ of General Execution by recording it with the Maricopa County Recorder as the act of levying upon the property. In addition, the Sheriff must publish the Notice of Sale for three weeks prior to the date of sale and post the Notice of Sale at three designated public places at least 15 days prior to the date of the Sheriff's Execution Sale.

The Sheriff will mail a copy of the Notice of Sale to the Judgment Creditor well in advance of the Sheriff's Execution Sale date.

Once the Sheriff's execution sale of the Homestead Property is scheduled, Judgment Creditor will have to comply with the Sheriff's bidding requirements to prepare for and participate in the Sheriff's execution sale of the Homestead Property. The statutes relevant to and specific bidding requirements of the Sheriff are discussed below.

The Arizona statute, which includes the conditions that must be complied with before the Sheriff will even schedule a Sheriff's Execution Sale of a Homestead Property, is set forth in full below[29]:

33-1105. Sale by judgment creditor of property subject to homestead exemption.

A judgment creditor other than a mortgagee or beneficiary under a trust deed may elect to sell by judicial sale as specified in title 12 the property in which the judgment debtor has a homestead under section 33-1101, subsection A, provided that the judgment debtor's interest in the property shall exceed the sum of the judgment debtor's homestead plus the amount of any consensual liens on the property having priority to the judgment. A bid shall not be accepted by the officer in charge of a sale under this section which does not exceed the amount of the judgment debtor's homestead plus the amount of any consensual liens on the property having a priority to the judgment plus the costs of the sale allowable under title 12. After receipt of a sufficient bid, the officer shall sell the property. From the proceeds, the officer shall first pay the amount of the homestead to the judgment debtor plus the amount of any consensual liens on the property having a priority to the judgment and then pay the costs of the sale. The remaining proceeds shall be applied in accordance with the provisions of section 12-1562, subsection A.

The Sheriff's interpretation and implementation of A.R.S. § 33-1105 to schedule a Sheriff's Execution Sale of a Homestead Property and accept a Judgment Creditor's bid are set forth below:

- In advance of the Sheriff's Execution Sale date, the Judgment Creditor must provide the Sheriff with the dollar amount of unpaid real property taxes upon the Homestead Property to be paid to the Maricopa County Treasurer upon completion of the sale, good through two weeks and one day after the scheduled date of the Sheriff's Execution Sale ("Senior Real Property Tax Lien Amount").
- In advance of the Sheriff's Execution Sale date, the Judgment Creditor must provide the Sheriff with payoff amounts of all Deeds of Trust and other liens of record senior upon the Homestead Property that are senior to the money Judgment being enforced good through two weeks and one day after the scheduled date of the Sheriff's Execution Sale (the "Senior Lien Payoff Amount").
- The Judgment Creditor is required by the Sheriff to bid $1.00 over the total amount of the Senior Real Property Tax Lien Amount + the Senior Lien Payoff Amount + the $250,000 Homestead Exemption Amount as its opening credit bid at the Sheriff's Execution Sale.[30]

Effective as of January 1, 2022, judgment creditors should be prepared to comply with the sweeping changes that HB2617 imposes on the current judgment enforcement process in Arizona.

The Judgment Creditor must have a representative physically present at the Sheriff's office to attend the Sheriff's Execution Sale, which is a public auction. The representative must fully understand the bidding process and make the Judgment Creditor's opening credit bid and any additional higher bids during the auction sale.

At the beginning of the public auction Sheriff's Execution Sale, the Sheriff will announce the total judgment principal amount, interest accrued upon the judgment amount until the date of sale, and the Sheriff's sale commission and other hard costs. This is known as the Judgment, Interest and Costs ("JIC") announced amount for informational purposes.

For a Homestead Property execution sale, the actual bidding begins at $1 over the total amount of the Senior Real Property Tax Lien Amount + the Senior Lien Payoff Amount + the $250,000 Homestead Exemption Amount as the Judgment Creditor's opening credit bid at the Sheriff's Execution Sale.

If the Judgment Creditor is the successful bidder for the Homestead Property, the Judgment Creditor is responsible for paying the $250,000 Homestead Exemption Amount, the prior unpaid real property taxes, the prior consensual liens, and the Sheriff's costs of sale in cash within five days after the date of the Sheriff's Execution Sale.

Any additional amount over the foregoing sums generated by the bidding process would go toward satisfying the Judgment. (When the homestead exemption does not apply, the Judgment Creditor is responsible for paying only the Sheriff's fees for the sale of the property.)

Should the property be more valuable than the homestead exemption, prior consensual liens, Judgment amount, and Sheriff's costs of sale, any bid over that amount is sent to the Clerk of the Superior Court as excess proceeds. (If the Judgment Creditor was the high bidder, the Judgment Creditor would be responsible dollar-for-dollar for any amount over the satisfaction of the Judgment, homestead exemption, prior consensual liens, and Sheriff's fees).

CONCLUSION

Effective as of January 1, 2022, judgment creditors should be prepared to comply with the sweeping new changes that HB 2617 imposes on the current judgment enforcement process in Arizona. Failure to understand these changes and implement policies to address them may result in the judgment creditor's rights being prejudiced.

In addition, the changes to Arizona law imposed by HB 2617 will have multiple bankruptcy law implications that will cer-

tainly be litigated once the laws become effective.

Several major bankruptcy law implications will include, without limitation, that:

- judgment creditors will be secured creditors on the petition date and have the rights of a secured creditor in bankruptcy proceedings;
- unless set aside by the Bankruptcy Court, judgment liens should now pass through the bankruptcy and remain enforceable post-discharge *in rem* against the Homestead Property through a forced Sheriff's execution sale or otherwise; and
- bankruptcy debtors will likely pursue avoidance actions when the circumstances apply pursuant to Bankruptcy Code Section 522(f)[31] (to avoid the judgment lien as impairing the debtor's homestead exemption) or Bankruptcy Code Section 506(d) and various Bankruptcy Rules to attempt to strip the judgment lien from the Homestead Property.

endnotes

1. Kathi Mann Sandweiss & Roger L. Cohen, *Preserving the Family Farm in an Urban Age: Recent Changes to the Arizona Judgment Lien and Homestead Statutes*, ARIZ. ATT'Y (Sept. 1997) at 18, *citing* Act of January 26, 1839, Laws of Republic of Texas, 3d Cong., 1st Sess. 113.
2. *Id.*
3. Section 5 of Chapter 368, House Bill 2617, 55th Legislature, State of Arizona (2021).
4. *Id.*
5. A.R.S.§ 12-1551(A).
6. *See* A.R.S. § 12-1551(D) as revised by Chapter 368, House Bill 2617, 55th Legislature, State of Arizona (2021).
7. *See* A.R.S. § 33-1101 as revised by Chapter 368, House Bill 2617, 55th Legislature, State of Arizona (2021). Judgment creditors should also be advised that the homestead exemption amount is the same for an individual or a married couple.
8. A.R.S. § 33-1101(A) as revised.
9. *See* the Judgment Lien Statute located A.R.S. § 33-964(A) and (B) and the definition of "homestead" property located at § 33-1101(A) and *Pacific Western Bank v. Castleton,* 434 P.3d 1187, 1189-1190 (Ariz. Ct. App. 2018) (which includes a comprehensive analysis of a judgment creditor's rights with respect to collecting upon a recorded money judgment against a debtor's homestead property under Arizona law prior to the enactment of House Bill 2617).
10. *Pacific Western Bank,* 434 P.3d at 1190.
11. *See* A.R.S. § 33-964(A) as revised by House Bill 2617.
12. *Id.*
13. *See* A.R.S. § 33-961 (judgment recording requirements) and § 33-967(D) (which provides that the priority of a recorded judgment is established on the date that the judgment is recorded with the required judgment information sheet attached). These practical requirements were not changed by House Bill 2617.
14. *See* A.R.S. § 33-964(G) as revised by House Bill 2617.
15. *Id.*
16. *See* A.R.S. § 33-964(C) added by House Bill 2617.
17. *Id.*
18. *See* A.R.S. § 33-1101(C) added by House Bill 2617.
19. *See* A.R.S. § 33-1101(D) added by House Bill 2617.
20. *See* A.R.S. § 33-964(B) added by House Bill 2617.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *See* A.R.S. § 33-1103(A) as revised by House Bill 2617.
27. Maricopa County is Arizona's most populous county. The procedures of the sheriffs of other counties differ in small respects, but the process is generally the same in all Arizona counties.
28. The requirements for real property to qualify as a Judgment Debtor's "homestead" property and for the $250,000 homestead exemption to apply are set forth at § 33-1101 *et seq.* as revised by House Bill 2617.
29. A.R.S. § 33-1105.
30. If the Sheriff's Execution Sale is of real property that is not a homestead property, then the Judgment Creditor does not have to pay cash to pay off the senior liens on the property and is only responsible for paying the sheriff's fees to schedule and conduct the sale. Also, under this circumstance, the sheriff's procedure is to have the Judgment Creditor bid $1 as its opening bid. The Judgment Creditor and other bidders must do their due diligence to understand what liens will have to be paid off if they are the successful bidder and plan their bidding strategy accordingly. In addition, the sheriff's hard costs and sale commission must be verified with the sheriff and taken into account by any bidder at a Sheriff's Execution Sale.
31. The United States Bankruptcy Code is located at 11 U.S.C. § 101 *et seq.*

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SPECIAL FEATURE

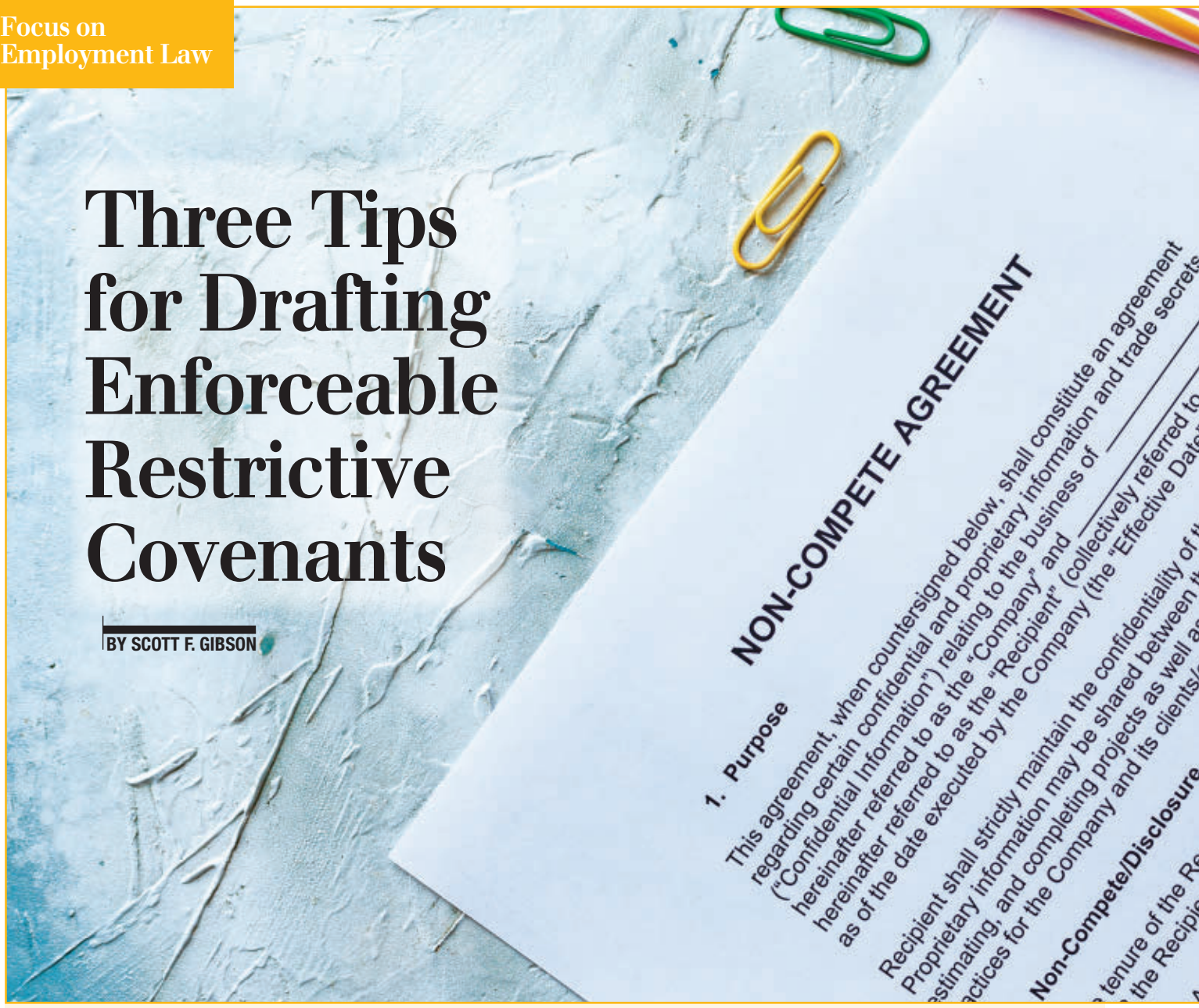
Focus on Employment Law

This month, we once again survey the workplace landscape for legal issues, challenges and pitfalls. And what we've learned is … things are more complicated than ever.

We hope you enjoy this deep dive into topics as diverse as EEOC developments, sex bias, immigration risks, workers' comp, and workplace romance—among many others.

Thank you to the authors who engaged on some hard questions. And if we've missed something important, we need not wait a year to cover a compelling employment law idea. As always, write to us with suggestions for future content, at **tim.eigo@staff.azbar.org**.

in this issue



Three Tips for Drafting Enforceable Restrictive Covenants

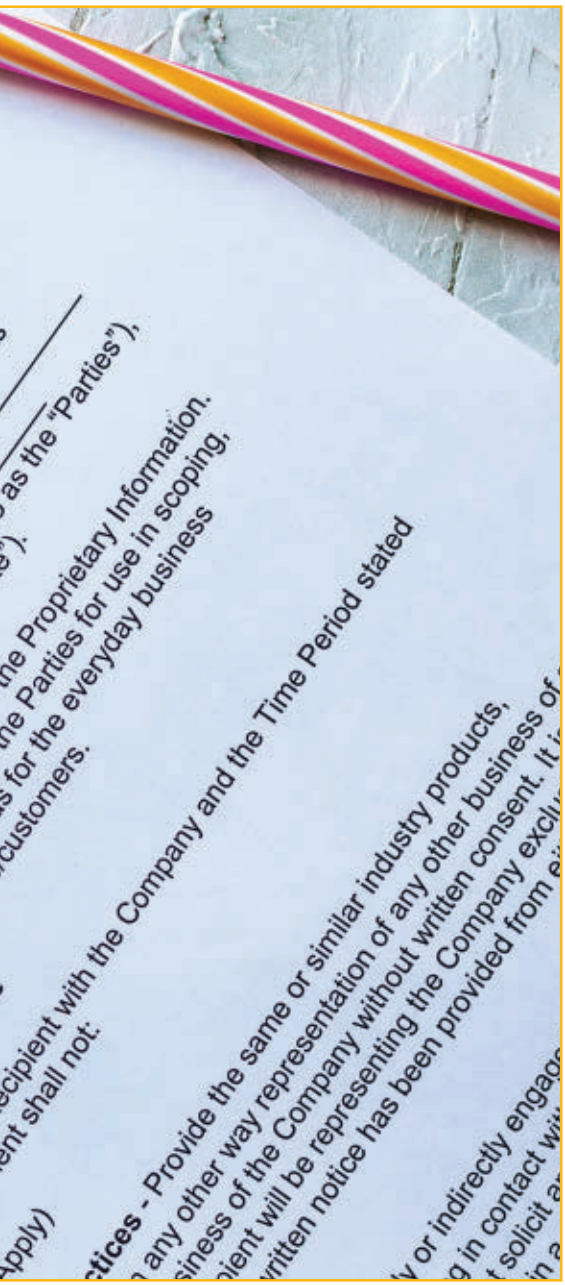
BY SCOTT F. GIBSON

Restrictive covenants are valuable tools that help a company protect its most important intangible assets: the ideas, innovations, goodwill and relationships that fuel a company's growth and prosperity.

But restrictive covenants frequently are misused, often with disastrous consequences. Consider, for example, Jimmy John's attempt to use non-compete agreements to keep its sandwich crews from working for competitors. Instead of protecting its business, the sandwich maker found itself on the wrong end of complaints filed by the attorneys general in multiple states.

Moreover, the overbroad restrictions reinvigorated a call for change that is sweeping the country. In an era when liberals and conservatives find it difficult to agree that the sky is blue, they find common ground in their opposition to restrictive covenants. In recent years, both Marco Rubio and Elizabeth Warren have introduced bills that would federalize and radically change the law of restrictive covenants. And in July 2021, President Biden issued an executive order asking the FTC to ban or dramatically limit the use of restrictive covenants.

I typically represent employers in drafting and enforcing restrictive covenants. As I talk with my colleagues representing employers across the country, we agree that poorly drafted restrictive covenants are the



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greatest threat to the ongoing use of restrictions. No one objects to using restrictions to prohibit *unfair* competition, but problems arise when poorly drafted agreements—sometimes unintentionally but often by design—seek to prevent competition *per se*. Those poorly drafted agreements make it more difficult for other employers to enforce even the most narrowly tailored agreements.

So as you draft restrictive covenants for your employer clients, I urge you to think small. Clearly and concisely identify what the employee can and cannot do post-termination, and make the list of "cannots" as small as possible. Draft narrow agreements focused on preventing *unfair* competition. Let former employees compete fairly once they leave your clients' employ. Stated simply, don't overreach.

When your client contacts you about drafting a restrictive covenant, she almost always wants you to do what the law expressly prohibits: draft a restrictive covenant that prevents competition *per se*. It's your job to explain why the restriction must be limited. You must overcome your client's inherent desire to overreach.

When I first began thinking seriously about restrictive covenants, I realized that drafting a restrictive covenant provided a unique opportunity to ethically shape the evidence that we would introduce at trial. And so I adapted my practices. Consider how these three tips might impact the way you draft restrictive covenants. (For more background, see sidebar on p. 38.)

1 Understand your client's legitimate business interests *before* you begin drafting the agreement.

Restrictive covenants are an unreasonable restraint on trade unless they are narrowly tailored to protect the employer's legitimate business interest. If you are going to draft an enforceable agreement, you must clearly understand the business interest you seek to protect.

A protectable business interest centers on information or relationships that "pertain peculiarly to the employer" and that the employee gained access to because of his relationship with the employer.[1] The employer has a legitimate interest in preventing a former employee from exploiting valuable business information or relationships that are unique to the employer and that the employee learned about solely because of her employment. Under these circumstances, the law recognizes that it is *unfair* for the employee to compete using this insider's advantage.

But the converse is true, as well. The employer does *not* have a legitimate business interest in protecting information or relationships that are *not* unique to the employer or that the employee gained access outside of her employment with the employer. That is why restrictive covenants cannot prevent an employee from using general skills and knowledge, even if the employee acquired those skills because of her employment.[2] Those skills and knowledge belong to every competent person working in the profession and do not belong uniquely to the employer.

Similarly, the employer cannot prohibit an employee from using information that is generally available to the public. It is not *unfair* for the employee to compete using the information that is generally available to the public; the employer has no legitimate interest in preventing the employee from using publicly available information.

Likewise, the employer does not have a business interest in relationships with potential customers,[3] customers who typically do business with multiple competitors[4] or former customers who terminated the relationship with the employer without any encouragement from the employee.[5] If the employee brought the customer relationship with him when he joined the employer, the

—continued on p. 40

Arizona's Law of Restrictive Covenants

Because "the right of an individual to follow and pursue the particular occupation for which he is best trained is a most fundamental right,"[1] our courts disfavor restrictive covenants, particularly when the covenant seeks to prevent an employee from pursuing a similar vocation after termination.[2] Regardless of the type of restrictive covenant involved, the covenant is not enforceable unless it meets certain formalities.

A restrictive covenant is enforceable *only* if it is no broader than the employer's legitimate business interests.[3] The employer has the burden of proving both the existence and extent of its protectable interest.[4] That protectable interest is found in information or relationships that "pertain peculiarly to the employer" and which the employee gained access to because of his relationship with the employer.[5]

"The test of validity of restrictive covenants is one of reasonableness."[6] Reasonableness requires employers to distinguish between *unfair* competition (which can be restricted) and competition *per se* (which cannot). It requires employers to have a compelling answer to the question, "Why is it *unfair* for *this person* to compete in *this way*?"

Reasonableness requires that the restriction last no longer than is necessary and, in the case of covenants not to compete, also have a reasonable geographic limitation.

In addition to these general principles, the following items are applicable to specific types of restrictive covenants.

1. **Covenants Not to Compete.** Covenants not to compete prohibit a person from engaging in a certain type of occupation or profession in a specific area for a specified time.

   A covenant not to compete may not unreasonably restrict the employee's right to work in his chosen occupation.[7] "An employer may not enforce a post-termination restriction on a former employee simply to eliminate competition *per se*."[8]

2. **Non-Solicitation Agreements.** Non-solicitation agreements "prevent former employees from using information learned during their employment to divert or to 'steal' customers from the former employer."[9]

   A non-solicitation agreement is unreasonable if it is "broader than necessary to protect the employer's legitimate business interests."[10] For example, an employer may not restrict a former employee from soliciting a customer who previously severed his business relationship with the employer.

   "Solicitation" contemplates that the employee initiated and sought out the relationship. "Merely informing customers of one's former employer of a change of employment, without more, is not solicitation."[11] Courts will not enjoin a former employee from accepting business from the customers of his former employer even though he could be enjoined from soliciting the business.

3. **Confidentiality Agreements.** Non-disclosure agreements protect an employer's confidential business information, such as trade secrets and customer lists.

   Trade secrets are defined and protected under both state and federal statutes.[12] As long as the owner of the trade secret takes "reasonable" efforts to maintain the secrecy of the information, trade secrets are protected indefinitely as a matter of law regardless of whether the employer has a written contract with the employee.

The employer has the burden of proving the existence and scope of its trade secrets. "The subject matter of the trade secret must be secret and be of such a character that it would not occur to persons in the trade with the knowledge of the state of art."[13] For that reason, "matters of public knowledge or of general knowledge in the industry cannot be appropriated to one as his secret."[14]

Similarly, no trade secret exists for information that "is available in trade journals, reference books, or published materials."[15] Likewise, "Information that forms the general skill, knowledge, training, and experience of an employee cannot be claimed as a trade secret by a former employer even when the information is directly attributable to an investment of resources by the employer in the employee."[16]

"[A] nondisclosure agreement prohibiting the use or disclosure of particular information can clarify and *extend* the scope of an employer's rights" beyond the protection afforded by trade secret statutes.[17] The key is whether the information actually is confidential.

Although the law distinguishes confidential information from trade secrets, "the rules governing trade secrets are still relevant in analyzing the reasonableness and enforceability of non-disclosure provisions because, in order to justify the contractual restraint, information subject to non-disclosure provisions must share at least some characteristics with information protected by trade secret statutes."[18]

endnotes

1. *Amex Distrib. Co. Inc. v. Mascari*, 724 P.2d 596, 603 (Ariz. Ct. App. 1986), *quoting ILB Indus. Inc. v. Scott*, 273 N.E.2d 393, 396 (Ill. 1971); *see also* Restatement (Third) of Unfair Competition § 1, cmt. a (Am. Law Inst. 1995) (competition is fundamental to the American free enterprise system).
2. *E.g., Amex Distributing*, 724 P.2d 596 at 600-01.
3. *E.g., American Credit Bureau Inc. v. Carter*, 462 P.2d 838, 840 (Ariz. Ct. App. 1969).
4. *Olliver/Pilcher Ins. v. Daniels*, 715 P.2d 1218, 1220 (Ariz. 1986).
5. *Valley Med. Specialists v. Farber*, 982 P.2d 1277, 1281 ¶ 12 (Ariz. 1999), *quoting* Harlan M. Blake, *Employee Agreements Not To Compete*, 73 Harv. L. Rev. 625, 647 (1960); *see also Bryceland v. Northey*, 772 P.2d 36, 39 (Ariz. Ct. App. 1999).
6. *Lessner Dental Laboratories Inc. v. Kidney*, 492 P.2d 39, 40 (Ari. Ct. App. 1971).
7. *E.g., Olliver/Pilcher*, 715 P.2d at 1220.
8. *Bryceland*, 772 P.2d at 39.
9. *Olliver/Pilcher*, 715 P.2d at 1219.
10. *Hilb, Rogal and Hamilton Co. of Arizona Inc. v. McKinney*, 946 P.2d 464, 467 (Ariz. Ct. App. 1997).
11. *Alpha Tax Services Inc. v. Stuart*, 761 P.2d 1073, 1075 (Ariz. Ct. App. 1988).
12. *See, e.g.*, Arizona Uniform Trade Secrets Act, Ariz. Rev. Stat. Ann. §§ 44-401 to -407 (West 2019); Defend Trade Secrets Act, 18 U.S.C. §§1831-1839 (2018).
13. *Wright v. Palmer*, 464 P.2d 363, 366 (1970).
14. *Id.*
15. Uniform Trade Secrets Act, § 1 *Commissioners' Comment.*
16. Restatement (Third) of Unfair Competition § 42 cmt. d (Am. Law Inst. 1995).
17. *Id.* § 42 cmt. g (emphasis added)
18. *Orthofix Inc. v. Hunter*, 630 F.App'x 566, 568 (6th Cir. 2015) (citations omitted).

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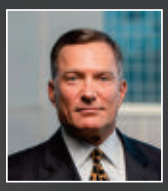

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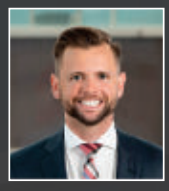

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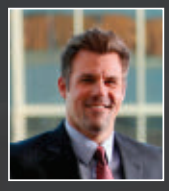

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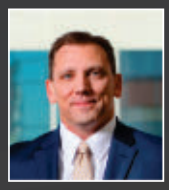

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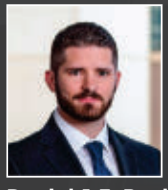

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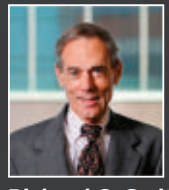

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protectable relationship belongs to the *employee* and not to the employer.

Once you have identified your client's protectable business interest, draft a restriction that protects that interest and nothing more than that interest. If your client provides only *services*, don't include language that protects *products* that your client does not provide. Some might argue that overinclusive language is of no concern because a court interpreting the restriction can disregard the unnecessary language. In reality, however, overinclusive language emphasizes that the restriction is overbroad, and overbroad restrictions are unenforceable.[6]

2 Ask yourself, "Why is it *unfair* for *this* person to compete in *this* way?

If you are going to protect your client's business, you must understand the difference between *unfair* competition (which can be restricted) and *fair* competition (which cannot). (See sidebar on p. 42.)

You can't prevent a former employee from engaging in fair competition, so don't try to do so. Rather, focus on the ways that the employee can compete unfairly, and draft an agreement that is limited to preventing unfair competition. A valid restrictive covenant not only prohibits *unfair* competition, but it also allows the employee to compete *fairly*.

When a court analyzes the reasonableness of a restrictive covenant, it will focus on *who* is being restrained and *what* conduct is being restricted. The Director of Sales and Marketing typically has access to more specialized, unique company information than does a sales representative. For example, she likely has greater insights into the marketing strategies that the company will implement in the coming year. Because of that greater access, the company has a greater interest in preventing her from exploiting that information.

Distilled to its essence, your ability to enforce a restrictive covenant depends on your answer to a single question: "Why is it *unfair* for *this person* to compete in *this way*?" You need to answer that question before you draft the restriction. Ask your client why certain types of competition are unfair, but be prepared to push back against her initial answer. A court reviewing your restrictive covenant will view that answer skeptically. So should you.

Push back on your client's stated reasons. Determine the parameters of your client's legitimate business interests, then tighten the scope of the restriction around those interests. Cut back the scope of your restriction, then cut back some more. Critically explore the minimum geographic and temporal restrictions your client needs. Cut back your restriction to a minimum.

When you get to the courthouse, you will need an articulate corporate representative who can explain *why* the company needs the specific restriction and *how* the employee is competing unfairly. Begin preparing that witness *before* you start drafting.

Failure to prepare your witness can be disastrous. I once took the deposition of a

corporate representative who had verified the complaint but could not tell me why the company needed the restrictions contained in the agreement. I was floored when I asked him why the company needed a two-year restriction. His candid answer: "I don't know. That's what my attorney put."

3 Don't count on "step-down" provisions to save a poorly drafted agreement.

Arizona is firmly committed to the "blue pencil rule" in interpreting and enforcing unreasonable restrictive covenants. Under the Arizona version of the blue pencil rule, the trial court may eliminate "grammatically severable, unreasonable provisions"[7] from the agreement, and then "enforce the lawful part and ignore the unlawful part."[8]

However, the court may not "add terms or rewrite an agreement to make it enforceable."[9] The court will not become a scrivener and draft the agreement that the parties could have (and should have) prepared if they had done their homework. Applied appropriately, the blue pencil rule "requires an *employer's counsel* to focus on the bottom line of post-serverance [sic] validity' and places the burden "*upon counsel rather than the court* to fashion a legitimate restriction."[10]

Step-down provisions often are used today to cover up slipshod and imprecise drafting.

Beginning in the early 1990s, employers attempted to exploit the blue pencil rule by drafting "step-down" provisions containing increasingly more limited restrictions.[11] No Arizona appellate court has directly considered whether step-down provisions are valid under Arizona law,[12] although the federal district court has held that "under limited circumstances carefully crafted step-down provisions are a permissible application of Arizona's blue-pencil rule, if they permit a Court to cross-out some unreasonable sections in favor of more reasonable ones without rewriting them."[13]

Although lawyers may have begun using step-down provisions "under limited circumstances" and "carefully crafted" the provisions to meet the requirements of the blue pencil rule, they often are used today to cover up slipshod and imprecise drafting. The step-down provisions from *Orca Communications* highlight the mischief that step-down provisions can create. The agreement identified 18 months as the duration of the restriction, with a step-down provision providing that:

in the event that a reviewing court finds the duration of eighteen (18) months to be unenforceable, for the longest of the following periods immediately following the termination of Employee's employment with The Company for any reasons that is found to be enforceable: fifteen (15) months; twelve (12) months; nine (9) months; six (6) months.[14]

Likewise, the agreement defines restrictive covenant that goes beyond protecting a legitimate business interest and prevents a former employee from using skills and talents learned on the former job is unenforceable."[10]

Competition is a foundational right, a "fundamental premise of the free enterprise system."[1] We owe our high standard of living to our economic system that rewards innovation and provides incentives for entrepreneurs to build a better mousetrap. Fair competition is the American way.

But the same competition that boosts our standard of living can be cruel and messy, creating economic winners and losers in its path. Nonetheless, "competition is not a tort"[2] even though it may be "painful, fierce, frequently ruthless, sometimes Darwinian in its pitilessness."[3]

"The freedom to compete necessarily contemplates the probability of harm to the commercial relations of other participants in the market."[4] And so our courts have grappled with the idea of how far the right to compete extends.

In the world of restrictive covenants, although an employer may protect her business interests with restrictive covenants, she "may not enforce a post-employment restriction on a former employee simply to eliminate competition *per se*."[5] Rather, the employer has the heavy burden of showing that the restrictions are limited, reasonable, and no greater than is required to prevent unfair competition. That burden requires he employer to distinguish *unfair* competition (which can be restricted) from competition *per se* (which cannot).[6]

The inherent "fairness" of a particular competitive activity is determined on a case-by-case basis. In general, competition is *unfair* when it exploits the employer's unique business interest (i.e., the employer's proprietary ideas, innovations, goodwill, and relationships) that the employee would not know but for his employment with the company.

Fairness depends on the extent of the employer's legitimate business interest. A protectable business interest has some aspect of novelty. It must not be commonly known in the industry or otherwise available through publicly available sources. The more novel the interest, the more likely the employer can protect it with a restrictive covenant.

For example, a mattress superstore had a legitimate business interest in its "Product Bible," which contained employer-specific information about merchandise, wholesale prices of the merchandise, and unique promotional deals that the suppliers offered the employer.[7] The six-month restriction was narrowly tailored to meet this business interest because (1) the employer needed approximately six months to hire and train a new employee to be profitable, and (2) the company updated its "Product Bible" approximately every six months.[8]

On the other hand, a restriction seeks to eliminate competition *per se* "when there is no other, valid interest of the employer to protect."[9] Because the employer may not restrict competition *per se*, "a

If the employer's business interest is insufficiently novel, it is not *unfair* for the employee to exploit the information post-termination. That competition constitutes *fair* competition, no matter how painful, fierce, ruthless, and Darwinian it might be.

For example, employers may not use a non-disclosure agreement to prevent a former employee from using her general skills and knowledge – i.e., those things that a competent person in field knows – even she acquired those skills and knowledge as a result of her employment.[11] Because those skills and knowledge are not unique to the employer, the employer has no right to prevent others from using those skills and knowledge. As one Arizona court bluntly explained, the former employee "is not required to undergo a prefrontal lobotomy" when she leaves her job.[12]

Likewise, it is not *unfair* for an employee to do business with a former customer of the employer when the employee is not responsible for the termination of the relationship. "Although [an employer] has a protectable interest in customer relationships when an employee leaves, an employer has no protectable interest in persons or entities as customers when the employer has no business ties to them."[13]

endnotes

1. Restatement (Third) of Unfair Competition § 1 cmt. 1 (Am. Law Inst. 1995).
2. *Frandsen v. Jensen-Sundquist Agency Inc.*, 802 F.2d 941, 947 (7th Cir. 1986).
3. *Speakers of Sport Inc. v. ProServ Inc.*, 178 F.3d 862 (7th Cir. 1999).
4. Restatement (Third) of Unfair Competition § 1 cmt. 1 (Am. Law Inst. 1995).
5. *Bryceland v. Northey*, 772 P.2d 36, 39 (Ariz. Ct. App. 1989).
6. *See, e.g., id.*
7. *Bed Mart Inc. v. Kelley*, 45 P.3d 1219, 1222 ¶ 14 (Ariz. Ct. App. 2002).
8. *Id.*
9. *Amex Distrib. Co. Inc. v. Mascari*, 724 P.2d 596, 604 (Ariz. Ct. App. 1986).
10. *Orca Commc'ns Unlimited LLC v. Noder*, 314 P.3d 89, 95 ¶ 19 (Ariz. Ct. App. 2013), *aff'd in part, depublished in part by* 337 P.3d 545 (Ariz. 2014).
11. *See, e.g., Lessner Dental Labs. Inc. v. Kidney*, 492 P.2d 39, 42 (Ariz. Ct. App. 1971) (the restrictive covenant violated public policy because it prevented the employee from using her skill and general knowledge).
12. *Amex Distrib.*, 724 P.2d at 603.
13. *Orca*, 314 P.3d at 96 ¶ 21.

its Restricted Territory as "the largest of the following geographic areas or combinations thereof that is found to [be] enforceable by a reviewing court."[15] The agreement then lists in alphabetical order all 50 states and the District of Columbia, with the additional step-down provisions of:

> within 150 radial miles of the Company's offices in Phoenix Arizona; within 100 miles of the Company's offices in Phoenix Arizona; within 50 radial miles of the Company's offices in Phoenix Arizona; within 25 radial miles of the Company's offices in Phoenix Arizona; or within 10 radial miles of the Company's offices in Phoenix Arizona.[16]

These broad restrictions highlight the problem with step-down provisions: No one (not even the employer) can identify what the parties intended by their agreement. And if the parties don't know what they intended, they cannot abide by the terms of the agreement.

I predict that when our appellate courts thoughtfully consider the validity of step-down provisions, they will condemn the provisions as being antithetical to well-established Arizona law in at least five different ways:[17]

- Arizona law requires the employer to both prove the scope of its protectable business interest *and* narrowly tailor the restriction so that it solely covers that interest. Step-down provisions allow the employer to improperly transfer those burdens to the court.
- Basic contract principles require an offer, acceptance of that offer, consideration and sufficiently specific terms so that the parties can ascertain what their rights and obligations are. An employee cannot tell what her obligations are when the step-down provision requires her to not engage in her chosen field for either 18 months or 15 months or 12 months or 9 months or 6 months, depending on what a court finds to be "reasonable." A step-down provision lacks the specificity required under Arizona law.
- The employer has a duty to act in good faith when drafting a restrictive covenant. A step-down provision is not procured in good faith because the employer tacitly acknowledges that at least some of the provisions are overbroad. After all, if the employer were confident that a 15-month restriction is reasonable, she would not need to include provisions authorizing a restriction of 12 or 9 or 6 months. The fact that she is willing to accept a 6-month restriction signals that the 15-month restriction is unreasonable and unenforceable.

Heed the injunction that a restrictive covenant must be narrowly tailored to cover no more than the employer's legitimate interest.

- The blue pencil rule allows courts to edit but not rewrite restrictive covenants. Step-down provisions encourage the court to rewrite the provision, particularly when the provisions contain multiple steps.
- Arizona courts repeatedly denounce the *in terrorem* effect of overly broad restrictive covenants. Step-down provisions—particularly those with multiple steps—highlight the mischief that overly broad restrictions create. An honorable employee attempting to comply with her contractual obligations will defer to the broader restriction (e.g., 15 months instead of 6 months) even though that broader restriction is in fact unreasonable and unenforceable. As Professor Harlan Blake wrote in his masterful study of restrictive covenants more than 60 years ago, "This smacks of having one's employee's cake, and eating it too."[18]

Heed the injunction that a restrictive covenant must be narrowly tailored to cover no more than the employer's legitimate interest. *Tailoring* requires that you fit the restriction to the specific employee rather than use a general "off-the-shelf" restrictive covenant. It contemplates that you will need to cut the agreement and fit it to cover the particular employee.

In the same way that a tailor must customize a suit to properly fit his customer, you must customize your restrictive covenant so that it appropriately fits the employee. A tailor uses only as much material as is needed to cover the customer who will wear the suit. A suit for a 150-pound man uses much less material than does a suit for a 300-pound man. A skilled tailor uses no more and no less material than is required to prepare a suit that fits his customer exquisitely.

In similar vein, a well-tailored restrictive covenant contains no greater or lesser coverage than is required in the particular circumstance. A restrictive covenant that is not well tailored is overbroad, unreasonable and unenforceable. And you cannot "fix" the unenforceable agreement with step-down provisions.

Conclusion

Spend the time necessary to create an enforceable restrictive covenant for your client. Define the scope of her legitimate business interest. Make sure that you restrict only *unfair* competition with covenants that allow former employees to compete fairly. Avoid step-down provisions, and take responsibility to limit the scope of the restrictions.

Cut the restrictions until they are no greater than what is required to protect the legitimate business interest. You can prevent *unfair* competition without restricting competition *per se*.

endnotes

1. *Valley Med. Specialists v. Farber*, 982 P.2d 1277, 1281 ¶ 12 (Ariz. 1999) *quoting* Harlan M. Blake, *Employee Agreements Not to Compete*, 73 Harv. L. Rev. 625, 647 (1960); *see also Bryceland v. Northey*, 772 P.2d 36, 39 (Ariz. Ct. App. 1999).
2. *Lessner Dental Labs. Inc. v. Kidney*, 492 P.2d 39, 42 (Ariz. Ct. App. 1971).
3. *Orca Commc'ns Unlimited LLC v. Noder*, 314 P.3d 89, 96 ¶ 21 (Ariz. Ct. App. 2013), *aff'd in part, depublished in part by* 337 P.3d 545 (Ariz. 2014).

4. *Amex Distrib. Co. Inc. v. Mascari*, 724 P.2d 596, 603 (Ariz. Ct. App. 1986).
5. *Hilb, Rogal & Hamilton Co. of Arizona v. McKinney*, 946 P.2d 464, 467 (Ariz. Ct. App. 1997).
6. *See Valley Med. Specialists*, 982 P.2d at 1281 ¶ 12, *quoting Mandeville v. Harman*, 7 A. 37, 39 (N.J. Ch. 1886) ("Whatever restraint is larger than the necessary protection of the [employer] can be of no benefit to either [the employer or the employee]; it can only be oppressive, and, if oppressive, it is, in the eye of the law, unreasonable and void, on the ground of public policy, as being injurious to the interests of the public").
7. *Valley Med. Specialists*, 982 P.2d at 1286 ¶ 30.
8. *Olliver/Pilcher Ins. v. Daniels*, 715 P.2d 1218, 1221 (Ariz. 1986).
9. *Orca Communic'ns*, 314 P.3d at 96 ¶ 23.
10. *Amex. Distrib.*, 721 P.2d at 605 n.6 (emphasis added).
11. A typical step-down provision might read as follows:

    Non-Compete Covenant. During Employee's employment with the Company and throughout the Restricted Period, Employee will not compete in the Business of Employer within the Restricted Area.
    Definitions. For purposes of this Agreement, the following terms have the definitions indicated below:
    "Restricted Period" means the 18 months immediately following the termination of Employee's employment with the Company for any reason. In the event that a court of competent jurisdiction finds this duration to be unreasonable for any reason, the temporal limitation shall be limited to the 12 months immediately following the termination of Employees employment with Company for any reason.
    "Restricted Area" means the area within 150 radial miles of the Company's offices in Phoenix, Arizona. If a court of competent jurisdiction finds this geographic scope to be unreasonable for any reason, the geographic restriction shall be 50 radial miles of the Company's offices in Phoenix, Arizona.
12. In *Orca Communications,* the Court of Appeals declined to rule on the enforceability of step-down provisions, holding instead that the restrictive covenants involved were unenforceable "because the covenants' content is too broad: the covenants restrict too much information and too much activity." *Orca Communications*, 314 P.3d at 96 ¶ 22 n.3.
13. *Compass Bank v. Hartley*, 430 F.Supp. 2d 973, 981 (D. Ariz. 2006).
14. Confidentiality, Non-Solicitation, and Non-Competition Agreement between Ann Noder and Orca Communications Unlimited LLC, 4 (Oct. 27, 2005) (on file with author).
15. *Id.*
16. *Id.*
17. For a more detailed description of the legal inadequacy of step-down provision, *see* Scott F. Gibson, *Restrictive Covenants Under Arizona Law: Step Away from the Step-Down Provisions* 51 Ariz. St. L.J. 593 (2019). For additional thoughts on step-down provisions, *see* Ali J. Farhang & Ray K. Harris, *Non-Compete Agreements with Step-Down Provisions: Will Arizona Court Enforce Them?* Ariz. Att'y, Dec. 2005 at 26; David G. Bray & David N. Ferrucci, *Top 3 Unanswered Questions in Arizona Non-Compete Law,* Ariz. Att'y, Sept. 2012 at 22.
18. Blake, *supra* note 1, at 682-83. The *in terrorem* effect is real. "Many employees are deterred from testing the legality of unreasonably onerous restrictions because of the expense and vicissitudes of litigation. Thus they are condemned to have legitimate options forever foreclosed because of the fear of a violation of an unreasonable and excessive restriction." *Sidco Paper Co. v. Aaron*, 351 A.2d 250, 261 n.1 (Pa. 1976) (Nix, J., dissenting).

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Be careful what you wish for with arbitration agreements ... you might get it.

BY TODD C. WERTS

Over the last 30 years, mandatory arbitration provisions have proliferated in employment agreements. Indeed, arbitration agreements are now almost uniformly enforced in the employment context. Proponents of employment arbitration contend it is a faster process led by a professional decision-maker to get to a result with less discovery, greater predictability, more finality, and overall less costs. Opponents argue that employees have such unequal bargaining power in today's economy that forced arbitration agreements are little more than unconscionable attacks on the fundamental right to a jury trial for civil disputes guaranteed by the U.S. Constitution and in every state.

Arbitration agreements became even more attractive to companies after the Supreme Court's 2011 decision in *AT&T Mobility v. Concepcion*,[1] which upheld the enforceability of class action waivers in arbitration agreements. After *Concepcion*, companies could reliably avoid risks attendant to larger-scale class action litigation simply by requiring arbitration as a term of doing business and insisting on a class waiver provision.

For many years after *Concepcion*, plaintiffs' attorneys continued to try and attack underlying arbitration agreements through a variety of substantive and due process challenges. As is typical with such things, the pendulum began to swing back toward the plaintiffs' side when successful challenges were made against mandatory arbitration agreements based on a lack of consideration when the arbitration provision was published and based on a number of due process grounds, including the disparity between the case initiation fees of the most prominent arbitration providers that were measured in the thousands of dollars as opposed to the filing fees in court that are almost always measured in the hundreds of dollars.

But then the pendulum swung again when the American Arbitration Association ("AAA") and Judicial Arbitration and Mediation Services ("JAMS") instituted certain minimum standards they would enforce in an effort to prevent arbitral awards rendered by their services being subject to due process challenges and, perhaps cynically, to ensure the viability of their business model. Under these minimum standards, a plaintiff in an employment arbitration is typically only required to pay whatever it would have cost to file the claim in court, and the defendant is required to pay the balance of the administrative fees.

By way of example, as of the time of this writing, the filing fee in federal court is $402 and in Maricopa County Superior Court it is at most $500 for a complex case. But in the AAA, the most an employee can be made to pay is $300, while the employer must pay $1,900 to initiate the case as well as pay a $750 Case Management Fee. The JAMS initial fees for most employment cases are slightly less at a total of $1,750 for two-party matters, of which an employee can be made to pay as

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much as $400. But regardless of the forum, the arbitrator then has to be paid at the rate of several hundred dollars per hour. And under the current AAA and JAMS rules, those arbitrator fees will typically be borne by the employer, unless the employee both loses the case and the employer is able to show sanctionable conduct on the part of the employee. Despite these costs, as one law professor earlier this year observed, "Companies are betting on consumers being unwilling to individually arbitrate."[2]

It is against this background that mass arbitration cases have begun to percolate.

In 2015, our office was plaintiffs' counsel in a large wage and hour case brought under the Fair Labor Standards Act ("FLSA") involving thousands of workers who were classified as either independent contractors or employees of independent contractors such that our defendant disavowed the role of employer with respect to these workers. At the time the arbitration issue arose in our case, we had roughly 4,000 opt-ins participating in the case—the FLSA uses an opt-in collective action mechanism for aggregated claims rather than the more familiar Rule 23 class action process. Our defendant discovered that roughly half of these workers had signed arbitration agreements with an employing entity "between" them and our defendant. The defendant moved to compel arbitration, which the trial court was required by precedent to grant. This is where it got complicated.

Like many arbitration agreements in the employment sector, the agreement at issue in our case had a class and collective action waiver that, by its terms, required each worker to arbitrate any claims individually. But as with any contract, the parties could agree to modify the contract by mutual consent. We invited such a modification by filing a single arbitration (and paying a single filing fee of a few hundred dollars) with JAMS. We then asked the defendant if it would consent to a single, joined arbitration with the 1,500 or so plaintiffs who had individually retained our and our co-counsel's law firms to prosecute their individual claims. We indicated that our clients would waive the requirement to arbitrate individually but that it was up to the defendant to decide how it wanted to proceed. If the defendant insisted on individual arbitration, though, we pointed out it would need to pay the initial case initiation fee to get an arbitrator appointed who could then decide whether to grant a motion to sever the cases. If that severance was granted, JAMS would, of course, need an administrative fee for each case to get the claims started. And we pointed out that the defendant would then need to pay for however many arbitrators who would need to be appointed to guide the cases through summary judgment (something specifically allowed by this particular arbitration agreement) and hearing.

Mass-arbitration cases have begun to percolate. The mass arbitration approach has been used in several cases involving so-called gig-economy workers.

Unwilling to arbitrate in the aggregate and faced with the prospect of more than $1.5 million in administrative fees to just get started, our defendant did nothing. Indeed, it refused to pay the initial fees but maintained that our plaintiffs were barred from federal court because of a valid arbitration agreement. After some back and forth with JAMS, which was understandably not going to take any action until it was paid, including appointing an arbitrator who would have the authority to dismiss our demand for arbitration, we eventually had to go back to our district judge and ask him to vacate his order compelling arbitration. Over a year later, all those plaintiffs were back into a case that had continued to proceed in discovery without them. In the end, that defendant didn't want to arbitrate so much as it just didn't want to be sued.

We were by no means the first plaintiffs' law firm to utilize a mass approach to arbitration. And others have done so to much greater effect. Specifically, the mass arbitration approach has been used in several cases involving so-called gig-economy workers.

By way of example, in *Abernathy et al. v. DoorDash*,[3] a large group of food delivery drivers banded together and sought to individually arbitrate their claims that they were misclassified as independent contractors under California law. Those drivers filed their individual demands for arbitration with AAA as was required by the "Mutual Arbitration Provision" contained in DoorDash's "click-through" employment agreement that included a class action waiver. And in total, the drivers paid over $1.2 million in filing fees. As a result, DoorDash owed the AAA over $10 million in administrative fees. When DoorDash refused to pay, the plaintiffs brought a motion to compel individual arbitration in federal court.

In the meantime, the employer's counsel began communicating with the International Institute for Conflict Prevention & Resolution ("CPR") to try to develop a more cost-effective way for dealing with such a mass arbitration filing. DoorDash changed the arbitration provider listed in its arbitration agreements to CPR but ultimately did not seek to require the *Abernathy* plaintiffs to arbitrate there. Notably, the court's order describes the role employer's counsel had in drafting and editing the new potential mass arbitration protocol at CPR. And the court refused to seal the documents outlining this role, commenting, "These documents would be useful to the public in evaluating the true extent to which the organization is impartial."

The court pointed out the irony of compelling arbitration for over 5,000 plaintiffs over the objection of the employer who wanted arbitration in the first place. And while the court's final paragraph uses rather sweeping rhetoric,[4] the judge concluded, "This hypocrisy will not be blessed, at least by this order." According to some news reports, DoorDash was effectively liable for approximately $9.5 million in fees.

Employers have taken divergent approaches in response to the advent of mass arbitrations. Some employers and human resources consultants have doubled down on the use of arbitration by trying to require not only arbitration but arbitration under rules aimed at mitigating any dynamics unfa-

vorable to the employer that could be created by a large number of similar arbitration demands. But at least one major employer, Amazon, has reportedly removed mandatory arbitration from the majority of its employment agreements rather than face the prospect of future mass arbitration filings.

So what does the advent of mass arbitration mean for lawyers who are just trying to advise their employer–clients? Employers' counsel should closely consider what they are trying to accomplish for their client in drafting an arbitration agreement. What claims could be brought by affected employees? Is arbitration really preferable, or does it just look like an easy way to avoid aggregated claims? Does the client have exposure for some sort of collective claim based on its systematic practices? Does the client want to take on the risk of paying thousands and maybe hundreds of thousands of dollars or more in administrative fees to an arbitral provider as opposed to the risks inherent to the traditional civil justice system? Does the employer want to retain the option to win on a class-wide basis?

On the other hand, employees' counsel faced with the prospect of mandatory arbitration also should consider its options. Does the arbitration agreement address class, collective or mass actions at all? What dynamics are created by the fee provisions in the agreement itself and in the rules of any arbitral forum specified in the agreement? Is the matter at issue systemic such that aggregate litigation options should be closely considered? Even if the claim is potentially amenable to class treatment, could individual plaintiffs fare better in a series of individual actions and, if so, how much better?

And while this article has focused on employment arbitration, mass arbitration also stands to heavily impact consumer disputes. According to a 2020 *New York Times* article, two large telecom companies that combined for 330 million customers were averaging only 30 arbitration claims per year.[5] But in the last few years, this number has increased to more than 1,000 as certain plaintiffs' counsel have embraced arbitration rather than run from it. Time will tell. But businesses serving the consumer market may begin to see an increase in arbitration demands and potentially a practical return to aggregated claims.

Conclusion

It has long been known that the law abhors a wrong without a remedy. Barring significant legislative action, the struggle between employers and employees over the role of arbitration will continue for many years to come. But as plaintiffs move to embrace arbitration, some employers may want to rethink their strategy for resolving the unfortunately inevitable disputes that arise in the employment relationship.

To paraphrase Jeff Goldblum's character in *Jurassic Park*, "Litigation, uh, finds a way."

endnotes

1. 563 U.S. 333 (2011).
2. David Lazarus, *Column: AT&T's new arbitration clause isn't doing you any favors*, L.A. Times, Mar. 19, 2021, www.latimes.com/business/story/2021-03-19/column-arbitration-clauses (last accessed Nov. 8, 2021) (quoting professor Myriam Gilles).
3. 438 F. Supp. 3d 1062 (N.D. Cal. 2020).
4. The court wrote:
   > "For decades, the employer-side bar and their employer clients have forced arbitration clauses upon workers, thus taking away their right to go to court, and forced class-action waivers upon them too, thus taking away their ability to join collectively to vindicate common rights. The employer-side bar has succeeded in the United States Supreme Court to sustain such provisions. The irony, in this case, is that the workers wish to enforce the very provisions forced on them by seeking, even if by the thousands, individual arbitrations, the remnant of procedural rights left to them. The employer here, DoorDash, faced with having to actually honor its side of the bargain, now blanches at the cost of the filing fees it agreed to pay in the arbitration clause. No doubt, DoorDash never expected that so many would actually seek arbitration. Instead, in irony upon irony, DoorDash now wishes to resort to a class-wide lawsuit, the very device it denied to the workers, to avoid its duty to arbitrate. This hypocrisy will not be blessed, at least by this order." *Id.* at 1067-68.
5. Michael Corkery & Jessica Silver-Greenberg, *'Scared to Death' by Arbitration: Companies Drowning in Their Own System*, N.Y. Times, April 6, 2020, https://www.nytimes.com/2020/04/06/business/arbitration-overload.html (last accessed Nov. 22, 2021).

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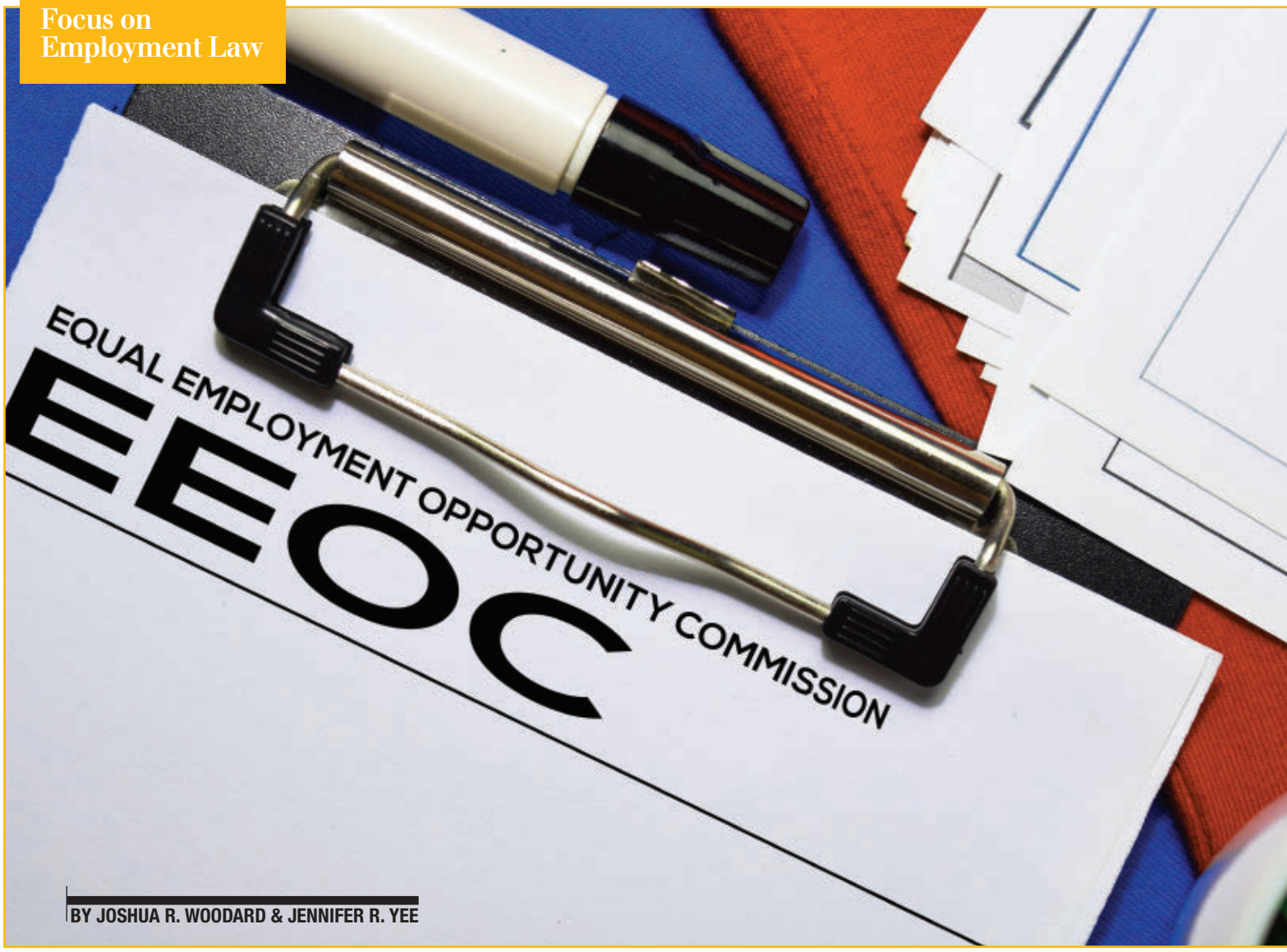


BY JOSHUA R. WOODARD & JENNIFER R. YEE

Federal Equal Employment Opportunity Law

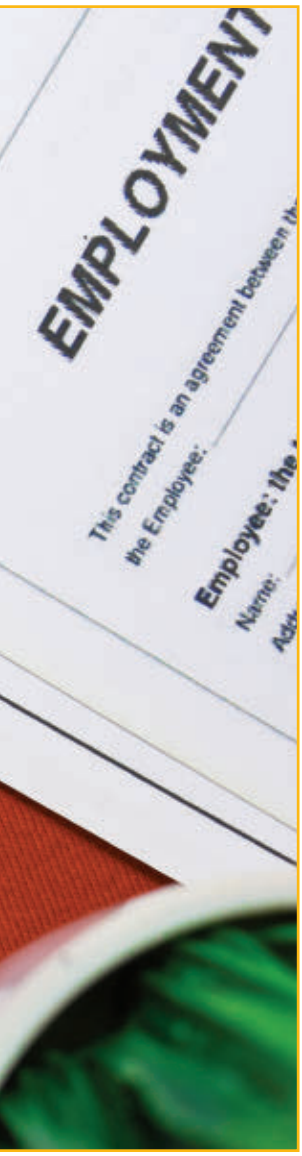
Recent Developments

Despite being the second full year of the pandemic, 2021 brought several federal court decisions that were instructive to employment law practitioners. Some decisions were victories for employers, and others were victories for employees. Regardless of the outcome, all the opinions continue to shape the landscape of federal EEO jurisprudence. Below are summaries of 10 of these key cases, along with "Practical Takeaways."

Race Discrimination

In ***Watkins v. Tregre***,[1] the Fifth Circuit reversed summary judgment in favor of the employer in a race discrimination case and held that, under the *McDonnell Douglas* framework, the plaintiff was able to show there was substantial evidence of pretext.

Watkins, a Black female, was criticized for sleeping on the job, making personal calls, missing license plate recognition hits, and failing to ensure prompt dispatch of emergency responses. However, there



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was no discipline imposed. Watkins then submitted a doctor's note requesting three days off per week due to anxiety. Just days later, Watkins' supervisor requested a disciplinary board review the matter. The board evaluated only the allegation of sleeping on the job and unanimously recommended termination. Watkins was fired the next day. A white male was also caught sleeping on the job, but he was not fired.

Because Watkins was fired and the white male was merely counseled for the same policy infraction, the Fifth Circuit held there was a genuine issue of material fact whether the firing was a pretext for race discrimination, and whether there was a violation of the Family and Medical Leave Act (FMLA).

PRACTICAL TAKEAWAYS

Even where there is good cause to terminate, if the employer is not treating similarly situated employees the same, an inference of discrimination can be created. When considering discipline or termination, employers should carefully evaluate whether there has been consistent treatment among employees. If not, pump the brakes!

In ***Joseph v. Lincare Inc.***[2] the First Circuit reversed summary judgment in favor of the employer and held that, even with no direct evidence of racial animus, inconsistent and untrue proffered reasons for termination by the employer created a genuine issue of material fact.

Joseph, a Black sales representative, was verbally harassed by a potential client during a sales call. Joseph complained to his supervisor that such conduct was directed toward him because of his race. The supervisor encouraged Joseph to file a police report. Joseph then reached out to the client to repair the relationship. The potential client told Joseph to "stop crying" and that he (the potential client) was going to have Joseph fired. Joseph was fired because he called the potential client after the harassing incident.

Joseph alleged he had been discriminated against on the basis of his race and retaliated against in violation of 42 U.S.C. § 1981 and the Maine Human Rights Act. The employer proffered several inconsistent and untrue reasons for the termination.

PRACTICAL TAKEAWAYS

Inconsistent reasons for termination can result in genuine issues of material fact. Employers should carefully evaluate termination decisions prior to taking any adverse action. If an employer is unable to articulate a legitimate, non-discriminatory reason at the time of the termination and, later, tries to justify or explain the decision with multiple and inconsistent, or factually untrue, reasons, it is likely the case will proceed to trial to allow the fact-finder to determine the real reason for such action.

Employers should carefully evaluate termination decisions prior to taking any adverse action.

Religious Discrimination

In ***Bailey v. Metro Ambulance Services Inc.***[3] the Eleventh Circuit held that the employer satisfied Title VII of the Civil Rights Act by offering Bailey a reasonable accommodation that would have allowed him to keep his facial hair and that would not impact his salary, hours or job description.

Bailey, a Rastafarian paramedic, brought Title VII claims for religious discrimination, failure to accommodate, and retaliation after his employer adjusted the job position because of Bailey's failure to comply with the facial hair policy. Bailey objected to the policy and stated that facial hair is seen by Rastafarians as sacred. The employer offered to allow Bailey to work solely on the none-

mergency side of its operations, which did not fall under its facial hair policy. Although Bailey asserted that he would not be guaranteed as many hours in the new position and that the new position would hurt his promotion opportunities, the court found that the employer had enough nonemergency shifts to keep Bailey fully employed, and that at the employer would equally consider his nonemergency work in its advancement requirements.

PRACTICAL TAKEAWAYS

Employers would be well advised to engage in the interactive process and offer reasonable accommodations that allow employees the opportunity to perform their duties without any adverse action. And, employers will be pleased to know that, although employees have the right to reasonable accommodations based upon their religion, they are not necessarily entitled to their preferred accommodation if the one offered is effective and fair.

In ***EEOC v. Walmart Stores LP***[4] the Seventh Circuit affirmed summary judgment for the employer and held that an undue burden would have been created if the employer's rotating shift policy for managers was altered to accommodate a Seventh Day Adventist's request for time off every Friday evening and Saturday.

The EEOC sued on behalf of an applicant who received an offer from Walmart for a full-time assistant manager position. Walmart reconsidered when the applicant disclosed he could not work certain times during the rotating shift. Walmart offered an alternative position that was still in management but paid hourly. The district court granted summary judgment in Walmart's favor, finding that it had offered a reasonable accommodation to the applicant.

The court found that the applicant's request would have hindered Walmart's ability to continue its rotating shift scheme for assistant managers, leave the store shorthanded at times or require it to hire another manager. Although the EEOC proposed alternative accommodations, including that the applicant could have traded weekend shifts with other salaried assistant managers, such accommodations would have shifted the duty to accommodate from Walmart onto other workers, and would have imposed more than a slight burden on Walmart, and such burden was more than what is required under Title VII.

The Ninth Circuit held that giving preference based upon a romantic relationship is not tantamount to sex discrimination.

PRACTICAL TAKEAWAYS

Accommodations that result in anything more than a de minimis burden are not required under Title VII. However, employers may want to keep a careful watch on the United States Supreme Court in this regard. Indeed, there are Justices who appear to be eager to reevaluate this standard and perhaps establish an undue burden analysis under Title VII that is similar to the much-heightened undue burden analysis under the Americans with Disabilities Act (ADA).

Sex Discrimination

In ***Maner v. Dignity Health***[5] the Ninth Circuit held that giving preference based upon a romantic relationship is not tantamount to sex discrimination and, in so holding, ruled consistently with several other circuits and the position of the EEOC.

Maner was terminated due to poor performance and after his employer experienced a reduction in grant funding. The girlfriend of Maner's manager worked with Maner but was not terminated. Maner alleged he was discriminated against on the basis of sex and argued that the employer protected the manager's girlfriend, but not Maner, from the impact of reduced funding.

The district court determined that Maner's complaint was not based on sex and, rather, was based upon the manager's preference for his romantic partner—the "paramour preference" theory.

The Ninth Circuit affirmed and held that "sex" as used in the statute does not mean "sexual liaisons" or "sexual attractions" and should be read alongside "race," "color," "religion," and "national origin." The court utilized the test from *Bostock v. Clayton County*, 140 S. Ct. 1731, 1741 (2020): "If the employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee—put differently, if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred."

As there was no evidence that Maner's sex was relevant, and no evidence that the manager's relationship was anything other than consensual, Maner had no sex discrimination claim.

PRACTICAL TAKEAWAYS

Paramour preference is rejected as sex discrimination in the Ninth Circuit. However, employers may want to tread carefully here. If there is a pattern of relationships, there could be a different outcome. And, from an employee morale perspective, the appearance of favoritism can have its own adverse consequences that may cause employees to leave for other jobs in which the employees believe they have legitimate opportunities to advance.

Sexual Harassment

In ***Wyatt v. Nissan North America, Inc.***[6] the Sixth Circuit reversed summary judgment for Nissan on a hostile work environment harassment claim, and held that the trial court erred by considering Nissan's conduct only *after* the employee reported a manager's unwelcome touching to Human Resources (HR), rather than when she earlier reported it to another manager.

Wyatt, a female project manager, was trapped in a hotel room by a senior manager who exposed himself. Wyatt confronted the

senior manager, who apologized. Later, the senior manager worked to have Wyatt removed from the project and began touching her, despite her instructions to stop. Wyatt reported the touching, but not the hotel incident, to another manager and to HR. HR began investigating nearly a month later, and a day after interviewing the senior manager, recommended that he be terminated. The senior manager resigned before his termination was effective. Later, Wyatt took six months off for back surgery, but was given poor reviews when she returned. Wyatt was eventually placed on a performance improvement plan, which she refused to sign, believing it was retaliatory. Wyatt sued, alleging a hostile work environment and various retaliation claims.

Because Nissan required its managers to report harassment immediately, and the manager took nine days to report it, and HR took nearly a month after that to begin an investigation, the Sixth Circuit held that a factfinder could determine that Nissan did not exercise reasonable care to prevent and correct any harassing behavior.

PRACTICAL TAKEAWAYS

Effective harassment training should include the requirement that matters be reported and addressed quickly. Ideally, an employee's first report of harassment to any manager should trigger an immediate employer response. It is also not unusual for a harassment victim to delay reporting, which could be legitimate because the victim fears retaliation.

Same-Sex Harassment

In ***Roberts v. Glenn Industrial Group Inc.***[7] the Fourth Circuit held that the *Oncale v. Sundowner Offshore Services*[8] scenarios were three examples of how an employee could prove sexual harassment, ***but not the only ways***.

Roberts, a male underwater diver, alleged repeated sexual harassment by his supervisor, another male. Roberts reported the harassment to the supervisor's supervisor and the director of HR, but not to the CEO, as was required by the handbook. Roberts was fired after two safety incidents.

Roberts sued for same-sex sexual harassment and retaliation in violation of Title VII. The trial court granted summary judgment to the employer and had held that Roberts had not proved he was harassed on the basis of sex through any of the three scenarios described in *Oncale*: (1) when there is credible evidence that the harasser is homosexual and the harassing conduct involves explicit or implicit proposals of sexual activity; (2) when the sex-specific and derogatory terms of the harassment indicate general hostility to the presence of the victim's sex in the workplace; and (3) when comparative evidence shows that the harasser treated members of one sex worse than members of the other sex in a mixed-sex workplace. The trial court also held that there was no retaliation claim because there was no evidence the CEO was aware of the sexual harassment claims when he fired Roberts.

The Fourth Circuit reversed summary judgment on the harassment claim and identified other means to prove that same-sex harassment has occurred, such as unwelcome conduct because an employee does not confirm to a sex stereotype, as reinforced by the Supreme Court in *Bostock*.[9] The Fourth Circuit also ruled that it was wrong to disregard the evidence of physical assaults because they were not "sexual in nature," noting there is no requirement that they must be so long as they occurred because of sex. Instead, these assaults can be used to prove a pattern of "objectionable, sex-based discriminatory behavior."

PRACTICAL TAKEAWAYS

There are multiple evidentiary routes a plaintiff may take to prove that same-sex harassment occurred because of an employee's sex. The three scenarios described in *Oncale* are not an exhaustive list. Particularly in a post-*Bostock* world, a plaintiff may prove that unlawful same-sex harassment occurred because the plaintiff was perceived as not conforming to traditional sex stereotypes.

Disability Discrimination

In ***Todd v. Fayette County School District***[10] the Eleventh Circuit affirmed summary judgment for the employer and held that, although the employee, who suffered from depression, denied making threats in the workplace, she failed to show that the employer did not honestly believe that she engaged in threatening conduct, which was a legitimate basis for her termination.

Todd, a middle school art teacher with major depressive disorder, sued, claiming discrimination under the ADA and the Rehabilitation Act after she was terminated for allegedly threatening to kill herself, her son and others, and for allegedly consuming an excessive amount of Xanax while working. Todd disputed such conduct had occurred.

In affirming summary judgment for the employer, the Fourth Circuit held that Todd had been terminated because the decision-maker honestly believed she had engaged in threatening conduct, not because she had major depressive disorder or because she participated in statutorily protected activity.

PRACTICAL TAKEAWAYS

The ADA often protects employees from adverse employment actions taken for reasons relating to their mental health condition; but not always. The ADA does not require an employer to retain an employee whom it believes behaved in a threatening and dangerous way—even if the employee's mental health disorder is one reason, or the sole reason, that the employee engaged in that behavior.

In ***Burnett v. Ocean Properties Ltd.***[11] the First Circuit, in an important win for employees with disabilities, affirmed a substantial jury verdict for a paraplegic and held that employers cannot recklessly ignore requests for accommodations, even if the employee is able to eventually overcome a physical barrier.

An employee's reasonable belief that they suffered associational discrimination is a valid basis to make a protected complaint.

Burnett, a paraplegic call center associate who relied on a wheelchair, sued his employer under the ADA and state law for failing to accommodate his disability. To access his workplace, a golf clubhouse, Burnett was required to enter a set of heavy wooden doors that pulled outward and automatically closed. Daily, Burnett had difficulty opening the heavy doors, and even injured his wrist once trying to do so. Burnett made repeated requests to his managers for push-button, automatic doors, to which he received no response.

Following a three-day trial, the jury awarded Burnett $150,000 in compensatory damages and $500,000 in punitive damages for his failure-to-accommodate claim, which was reduced to the applicable statutory limits under the ADA and Maine law. In affirming the verdict, the First Circuit noted that, even though Burnett was able to enter the workplace (albeit at risk of bodily injury), and that he excelled at his job despite his difficulties, it did not mean that he did not require an accommodation, or that his requested accommodation was unreasonable. The heavy wooden doors were not "readily accessible and usable" by Burnett, and an accommodation was necessary for him to have the same workplace opportunities as an employee without a disability. The First Circuit affirmed the punitive damages award because the employer acted with reckless indifference toward Burnett's rights by failing to follow up after his three separate requests for a simple accommodation: a push-button door.

PRACTICAL TAKEAWAYS

A reasonable accommodation may include making existing facilities readily accessible by an employee with disabilities—even if such employee has overcome the physical barrier and is able to perform their job well. Employee requests for disability accommodations should be viewed through a commonsense lens; namely, requests should not be ignored, and if it is not unduly burdensome, the accommodation should be granted.

Retaliation

In ***Kengerski v. Harper***[12] the Third Circuit held that Title VII protects all employees—including white males—from retaliation when they reasonably believe that associational discrimination has occurred.

Kengerski, a white captain at a county jail, made a written complaint to the warden that a colleague had called his biracial grandniece a "monkey" and sent him text messages with racially offensive comments about his coworkers. Seven months later, Kengerski was fired after he allegedly mishandled a sexual harassment complaint and instructed two subordinates to lie on their reports.

Kengerski sued the county for retaliation under Title VII, and the district court granted summary judgment to the county, holding that a white plaintiff could not maintain a Title VII retaliation claim. The Third Circuit vacated and remanded, holding that Title VII protects all employees from retaliation when they reasonably believe that behavior at work violates the statute. Harassment against an employee because he associates with a person of another race, such as a family member, may violate Title VII by creating a hostile work environment. Because a reasonable person could determine that the jail was a hostile work environment for Kengerski, and that he was terminated as the result of his complaint, he met his burden of stating a Title VII retaliation claim.

PRACTICAL TAKEAWAYS

Employers should take all complaints—even from non-minority groups—seriously. An employee's reasonable belief that they suffered associational discrimination is a valid basis to make a protected complaint. And, a white male can maintain a retaliation claim if he opposes a unlawful practice under Title VII.

endnotes

1. 997 F.3d 275 (5th Cir. 2021).
2. 989 F.3d 147 (1st Cir. 2021).
3. 992 F.3d 1265 (11th Cir. 2021).
4. 992 F.3d 656 (7th Cir. 2021)
5. 9 F.4th 1114 (9th Cir. 2021).
6. 999 F.3d 400 (6th Cir. 2021).
7. 998 F.3d 111 (4th Cir. 2021).
8. 525 U.S. 75 (1998).
9. 140 S. Ct. 1731.
10. 998 F.3d 1203 (11th Cir. 2021).
11. 987 F.3d 57 (1st Cir. 2021).
12. 6 F.4th 531 (3rd Cir. 2021).

Workplace Romance: Still Unwise, But Not Unlawful

BY STEPHANIE QUINCY & LINDSAY FIORE*

Last summer, the Ninth Circuit Court of Appeals considered for the first time whether an employer violates Title VII's prohibition against sex discrimination when a supervisor makes employment decisions in favor of a subordinate employee who is his or her romantic or sexual partner.[1] The court joined several other circuit courts of appeal in holding that this claim does not exist under the law. Because this activity disadvantages every other employee who is not the favored "paramour"—both men and women—it is not an adverse action based on sex.

The Facts

William Maner worked as a biomedical design engineer in an obstetrics and gynecological lab in Phoenix with his supervisor, Dr. Robert Garfield, and a researcher, Dr. Leili Shi. Dr. Garfield and Dr. Shi were in a long-term romantic relationship the entire time that Mr. Maner worked with them, and he was well aware of that relationship. Mr. Maner alleged in his lawsuit that, because of that relationship, Dr. Garfield favored Dr. Shi in a number of ways. For example, he brought Dr. Shi with him to conferences when other employees were not invited, and she was listed as a co-inventor on patent applications undeservedly.

Mr. Maner eventually relocated to Texas and worked remotely for about a year. His performance suffered during that time, and when the lab lost some funding and had to a eliminate a position, he was the obvious choice.

Mr. Maner brought a Title VII claim against his employer, alleging that Dr. Garfield eliminated Mr. Maner's position, instead of Dr. Shi's, based solely on their romantic relationship. Mr. Maner argued that favoring an employee based on a sexual relationship is an impermissible act of discrimination "because of sex."

After losing on summary judgment, Mr. Maner appealed to the Ninth Circuit. This "paramour preference" theory of liability had been previously considered and rejected by other circuit courts of appeal (and the EEOC), but until recently, the Ninth Circuit had never opined. Although represented by counsel at the district court level, Mr. Maner proceeded pro se on appeal. Interestingly, the Ninth Circuit appointed pro bono counsel to represent him through the appellate process.

The Holding

The court ordered the parties to address how the United States Supreme Court's landmark ruling in *Bostock v. Clayton County*[2] impacted Mr. Maner's claim. *Bostock*, decided in 2020, expanded Title VII by holding that discrimination "because of sex" includes discrimination based on sexual orientation and gender identity. *Bostock* relied on a long line of Title VII cases to arrive at its holding, reiterating that any action taken even in part because of sex is unlawful.

The Ninth Circuit, in turn, relied heavily on *Bostock* in concluding that discrimination based on a romantic or sexual relationship is not discrimination because of sex. *Bostock* described a "simple test," derived from Title VII precedent, to determine if sex discrimination occurred: "if changing the employee's sex would have yielded a different choice by the employer," the employer has violated the law.

In Mr. Maner's case, the Ninth Circuit reasoned, the outcome would not have been different if Mr. Maner's sex were different, because he still would not have been the person in a romantic relationship with Dr. Garfield; changing Mr. Maner's sex would make him woman, but it would not make him Dr. Shi.

In reaching this holding, the court rejected the argument that "sex" under Title

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VII includes "sexual activity." Citing well-accepted principles of statutory interpretation, the court explained that text of the statute refers to an "*individual's* sex"—implying that sex in this context is something an individual owns or possesses. The expansion suggested by Mr. Maner would turn a noun into an adjective.

Mr. Maner also argued that simple statistical analysis establishes that sex is unavoidably a factor in any decision made that favors a paramour. As the Ninth Circuit described it, "If an employer protects a supervisor's female paramour from termination in a reduction in force, the argument goes, the chance that a male will be selected for termination increases because fewer females are available for termination." This of course ignores a scenario where there are no male employees at all to choose from, or a scenario where the supervisor and the paramour are of the same sex. More important, statistics do not tell us anything about why the person who actually suffered the adverse employment action was selected—in other words, it adds nothing to the analysis of whether *intentional* discrimination occurred.

Notably, EEOC regulations regarding sexual harassment allow a cause of action under similar (but distinguishable) facts: "Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit."

The court concluded that this regulation applies only to hostile work environment claims, where the employer's actions suggest that employees must engage in sexual conduct in order to advance in their careers—a claim Mr. Maner never made.

The opinion concludes with an oft-cited proposition—a favorite among employment defense lawyers—which rings especially true here: "Title VII is not a 'general civility code,' and employment practices are not unlawful simply because they are unwise."

Key Takeaways

Most employers prohibit relationships between supervisors and and their subordinate employees—no doubt for very good reasons. If a supervisor displays favoritism toward any of his or her direct reports, on any basis, it can affect employee morale. It may result in higher turnover, lower productivity, and increased claims of unlawful discrimination (even if ultimately meritless). Workplace romances gone bad also may give rise to legitimate sexual harassment claims.

The Ninth Circuit declined to extend Title VII in a way that certainly would have given rise to a host of new claims. For example, had this decision gone the other way, a family-owned business could have faced Title VII liability if the owner of a business promoted his or her spouse instead of another employee. Employers can rest easier knowing they will be absolved of liability for discrimination based on romantic favoritism, but this case should not be read to encourage these types of potentially problematic pairings in the workplace. Employers should continue to monitor romantic or familiar relationships among employees and avoid direct reporting lines between the employees involved.

endnotes

1. *Maner v. Dignity Health*, 9 F.4th 1114 (9th Cir. 2021).
2. 140 S. Ct. 1731, 1741 (2020).

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Arizona Minimum Wage Set To Increase on New Year's Day

BY JOSHUA C. BLACK

For the fifth consecutive year, Arizona is scheduled to raise its minimum wage.

The Industrial Commission of Arizona recently announced the state's minimum wage will increase from the current $12.15 per hour to $12.80 per hour, effective Jan. 1, 2022. The 65-cent an hour raise will result in a $26 a week increase for full-time employees earning the minimum wage.

Mandated by federal law, minimum wage is the lowest amount an employer can pay their employees. This applies to all businesses in the state—no matter the industry or size of the organization. The only exception to the rule applies to restaurant servers and other tipped employees, who can still be paid $3 per hour less than the minimum wage, as long as their wages and tips combined at least equal minimum wage.

The current federal minimum wage is $7.25 and has not increased since July 2009. However, many states across the country, including Arizona, have set higher minimum wages to help workers live above the poverty line as housing and goods and services costs continue to rise.

Arizona's 2022 wage hike is a result of Prop 206, which voters approved in 2016. The proposition increased the state's minimum wage each year until it reached $12 per hour in 2020. After that, the proposition required the minimum wage to be adjusted annually based on the rate of inflation, which is determined each August.

Minimum wage was first was established under the Fair Labor Standards Act (FLSA) of 1938. The FLSA created a series of government regulations designed to eliminate conditions that were deemed "detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers." In addition to establishing a minimum wage, the FLSA also banned child labor practices, created a standardized 40-hour work week and mandated overtime compensation for hourly employees.

Since 1938, the federal minimum wage has increased 22 times and continues to be a priority of many in the government. The "Raise the Wage Act of 2021" was proposed with a goal to increase the wage floor to $15 by 2025 in phased stages. It still needs to pass the Senate and House and be signed by the president to be enacted.

While it is unquestionable that families are better off when incomes increase, an increased hourly wage can also aid the economy as a whole. According to Elise Gould, Senior Economist at the Economic Policy Institute, "A fair wage doesn't just help low-income people, it helps the economy grow by giving more money back to consumers."

Proponents of minimum wage increases suggest many benefits, including:

- **Less worker turnover.** Higher wages often help employers retain a workforce resulting in fewer costs related to onboarding and training new employees because fairly compensated employees have less incentive to seek higher-paying jobs elsewhere. The amount saved from employee turnover could help employers manage some of the increased labor costs associated with minimum wage increases.
- **Organizational loyalty, business efficiency.** When employers invest in employees by paying them adequate wages, workers generally respond with improved efficiency. Raising pay has been shown to lead to better performance, higher customer satisfaction, increased morale and lower error and accident rates among employees.
- **Improved local economy.** Increased

minimum wages would have the most significant impact on those with lower household incomes. These households tend to spend a larger percentage of their income on living expenses, so a minimum wage increase is likely to lead to a larger demand for goods and services, which may in turn have a stimulative effect on the economy.

Among the disadvantages of increasing the minimum wage is the need for businesses to increase prices to offset labor costs, potentially causing inflation. Increased labor costs may force business owners to cut their staff and/or look for ways to automate jobs that previously had been done by entry-level employees. Increasing the minimum wage also could diminish the value of hiring inexperienced or younger workers, which could have a long-term effect on the future workforce.

In November, Tucson voters passed Prop 206, opting to implement its own higher minimum wage standard for the city and elevating pay requirements for those making minimum wage in Arizona's second most populous city to $15 an hour by 2025. This voter-led initiative is part of a growing national trend acknowledging that the current minimum wage is not a "living wage" for those who work and live in many of the nation's cities.

In fact, Tucson is not even the first city in Arizona to take this approach. In 2016, Flagstaff voters approved Prop 414, a citywide gradual minimum wage increase proposition intended to provide a livable wage for Flagstaff workers. The measure gradually increased the minimum wage in Flagstaff to a level of $15 per hour by 2021.

As Tucson joins Flagstaff in elevating its minimum wage, this leaves the metro Phoenix area as the only large urban zone in the state that does not offer the higher minimum wage. With housing costs rising rapidly in Phoenix and the cost of living in the Valley likely to increase, it will put a further crunch on minimum-wage workers to cover day-to-day living expenses. Phoenix may see itself at a disadvantage when it comes to filling minimum-wage jobs as workers find alternatives in other metropolitan areas in the state with higher wages and a better chance at being able to live above the poverty line.

With the competitive job market right now, industries that usually pay employees minimum wage—restaurants, hotels and retailers—are struggling to find enough people to fill job openings. One of the solutions to the worker shortage has been to increase hourly pay above the minimum wage as well as to increase perks or incentives to attract new employees. Countless businesses in the Valley have started paying well above $12.15 for entry-level jobs in order to fill shifts necessary to keep businesses open and operating.

Raising pay has been shown to lead to better performance and higher customer satisfaction.

While the recent increases help those being paid the absolute legal minimum, it will not likely have an impact on those making slightly above minimum wage. The required increase only applies to employees making exactly minimum wage, and there is no incentive (or penalty) to encourage employers to extend the wage increase to other employees.

The global pandemic caused many workforce challenges that are now forcing business owners to shift their focus away from the mindset of "How do I get the most for the least" to "How do I provide a competitive workplace where both my company and its employees can grow and prosper?" Hopefully, this mentality is here to stay, for the benefit of workers and the economy as a whole. AZ AT

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BY JEFF SILENCE

Wouldn't You Want to Know?

As the owner of a small law firm, you are proud of the firm that you helped build. One day, a female employee tells you that a male coworker is making her uncomfortable and won't stop sexually harassing her. The #MeToo movement is strong, and you had hoped that your male employees "knew better." You thank her for reporting her concerns and tell her that you will promptly investigate.

After a prompt and thorough investigation, you issue a "final" written warning to the co-worker after reaching the conclusion that he was sexually harassing her. You also require that he undergo sex harassment training. You are convinced that he "got the message" and that he will never harass her, or anyone else, again.

You then proudly announce to the female employee that you promptly completed the investigation and appropriate action has been taken. When she asks what actions were taken, you say that you are not at liberty to discuss personnel matters. However, you assure her that appropriate action has been taken and encourage her to report any concerns she may have going forward. She nods her head and thanks you.

You go home feeling great.

Meanwhile, your female employee is distraught. Questions begin swirling. Does my coworker know I reported him? Is that why he stopped talking to me? What kind of investigation was conducted? What findings were made? Who else knows about the investigation? Was my coworker disciplined? What happens now?

This is the most common mistake I see employers make. *They fail to communicate with the victim, both before and after the investigation.*

Before the investigation, the employer should ask the following questions:

1. Which witnesses should I interview?
2. What discipline do you feel is appropriate?
3. Can you continue working with the harasser?
4. What information are you comfortable with me sharing with the harasser?
5. Are you concerned about other employees finding out?
6. What can I do to protect you while we investigate?
7. Do you want me to separate you from the harasser during the investigation?

After the investigation, employers should tell the victim what investigation was conducted, what findings were made, and what discipline was imposed.

There is no Arizona or federal law that prohibits an employer from providing this information. In fact, some courts have held that employers owe a duty to provide at least some of this information as part of their obligation to take "prompt remedial action." The action may not be "remedial" if the employee continues to feel uncomfortable.

Maintaining confidentiality can be important during an investigation to ensure witnesses are not influenced. *There is, however, no Arizona or federal law that prohibits an employer from telling the victim of harassment what investigation was conducted, what findings were made, and what discipline was imposed.*

Employers also should keep in mind that in many cases, the employee does not want the harasser to be terminated. They simply want to know what findings were made and what actions were taken.

So, why not provide this information? Wouldn't you want to know?

The Expansion of the State Board of Education's Disciplinary Regime to Other Educators

BY DENISE BLOMMEL
& JARRETT HASKOVEC

Introduction

Teaching of the 1.1 million kindergarten through 12th grade students in Arizona is heavily regulated by the State. Teachers in public school districts ("districts") and charter schools ("charters") must obtain fingerprint clearance cards ("FCCs") from the Arizona Department of Public Safety ("DPS") before interacting with students. Arizona law also requires all public school district teachers and certain school counselors and administrators to hold and maintain a certificate issued by the Arizona Department of Education ("ADE").[1] Applicants for certification must undergo a thorough process, involving disclosures, references and testing by the ADE Certification Division. Once FCCs and any necessary certification have been obtained, Title 15 of the Arizona Revised Statutes regulates many other aspects of the day-to-day conduct, management, and oversight of schools and educators, particularly for districts.

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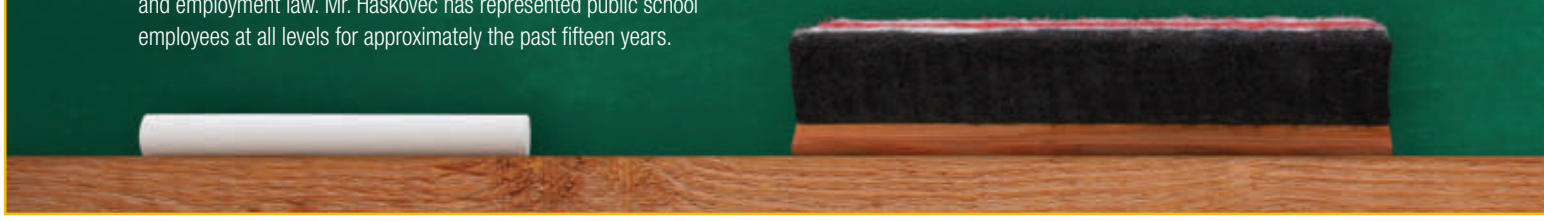
JARRETT HASKOVEC is the General Counsel at the Arizona Education Association. Prior to serving in that role, Mr. Haskovec was a shareholder at a Phoenix-based law firm with a multi-state practice focusing on labor and employment law. Mr. Haskovec has represented public school employees at all levels for approximately the past fifteen years.



As such, it is clear that we, as lawyers, are not the only ones in a highly regulated profession. Moreover, like lawyers, school employees are always in the public eye. If a lawyer or teacher does a good deed, it may or may not be recognized by the media. On the other hand, if a lawyer or teacher commits misconduct, it is on page 1 of the newspapers—or highlighted on social media.

For many years, Arizona law has assigned responsibility to the State Board of Education ("SBE") to supervise the people to whom ADE has granted certification. Part of that supervision is to monitor certificated (or certified) persons for misconduct, also known as immoral or unprofessional acts. The SBE has had the authority to discipline the certificates of these individuals if investigation reveals misconduct.

In 2021, the Arizona Legislature introduced two bills, House Bill 2023 and Senate Bill 1061, to expand the regulation of educator misconduct by the SBE. HB 2023 passed the House of Representatives on January 28, 2021 by a 58–0–2 vote, and SB 1061 was incorporated into HB 2023 and passed the Senate by a 29–0 vote on the same day. The Governor signed HB 2023, now Session Law, Chapter 2, into law on February 5, 2021. It became effective on September 29, 2021.

The 2021 legislation creates a new category of school employees who are subject to the SBE's discipline—the "noncertificated person."[2] These are employees of districts and charters who do not have certificates and are required or allowed to provide services directly to students without being supervised by a certificated employee. The legislation exempted transportation, food service, and maintenance employees, and employees who are not required to have an FCC from the definition. With the expansion of SBE disciplinary oversight, many teachers at charter schools who are not certified by ADE (according to a 2019 estimate, roughly 40 percent) and many other employees at districts and charter schools, including coaches who are not certified teachers, are now covered by SBE's educator discipline system.

The Legislature gave the SBE power to direct districts and charters to fire or prohibit the hiring of noncertificated employees found guilty of misconduct and to prohibit the hiring of certificated employees who had their certificates suspended or revoked or who had surrendered them.

2021 legislation creates a new category of school employees who are subject to the SBE's discipline—the "noncertificated" person.

The new law also permits disclosure of previously confidential disciplinary investigation files to current and prospective employers, other state licensing agencies, and the SBE's counterparts in other states. The Legislature moved the investigatory function from ADE to the SBE in subsequent legislation.[3]

Educator Disciplinary Process Overview

The SBE consists of the Superintendent of Public Instruction, the president of a state university or state college, four lay members, a president of chancellor of a community college district, an owner or administrator of a charter school, a superintendent of a high school district, a classroom teacher and a county school superintendent. The Governor appoints all members for four-year terms, except for the Superintendent of Public Instruction, who is elected. The Superintendent of Public Instruction leads the ADE. The SBE meets monthly.

The conduct of certificated individuals, including teachers, is governed by the SBE pursuant to A.R.S. §15-203 and A.A.C. R7-2-1301, *et seq*. The SBE Investigative Unit (formerly at the ADE) investigates all reports accusing teachers and other certificate holders of unprofessional or immoral conduct. Any person may report a teacher.

Each year since 2017, the SBE staff has published an Enforcement Action Report. The 2020 version[4] shows that from 2012 through 2020, the greatest number of reports of misconduct (44 percent) came from district administrators, and the second greatest number (34 percent) came from the suspension of FCCs by DPS, typically as a result of an arrest. That the largest share of reports come from district administrators is not surprising, both given their relative proximity to, and greater awareness of, educators working in the same district and in light of state law, which provides that any time a teacher is slated for termination for unprofessional conduct, the district administration must report the misconduct to the state.[5]

The SBE Investigative Unit notifies a teacher about a pending investigation of a certificate or an application for certificate renewal by mail. These letters contain the nature of the reported misconduct and solicit a reply. The teacher's employer also receives this letter from the SBE, and there is a database available only to school administrators which indicates that a teacher is under investigation. Teachers can check their own disciplinary history at the SBE's website.[6]

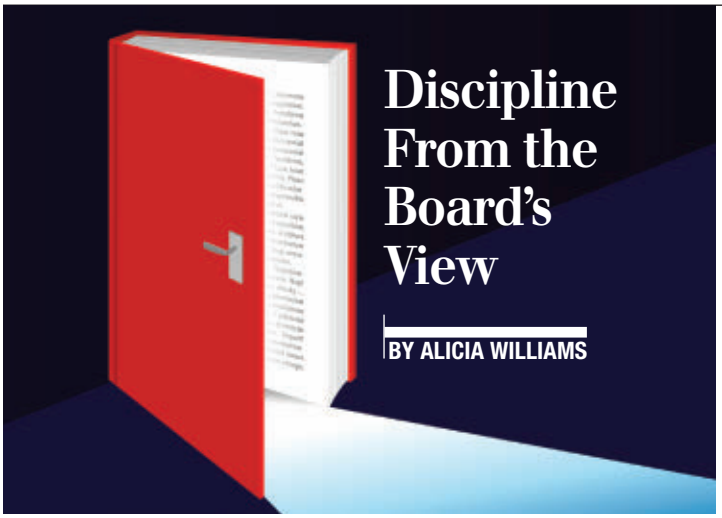
Actions subject to discipline consist of unprofessional or immoral conduct. Arizona

Administrative Code R7-2-1308B defines *Unprofessional and Immoral Conduct* as follows:

> B. Individuals holding certificates issued by the Board pursuant to R7-2-601 et seq. and individuals applying for certificates issued by the Board pursuant to R7-2-601 et seq. shall not:
>
> 1. Discriminate against or harass any pupil or school employee on the basis of race, national origin, religion, sex, including sexual orientation, disability, color or age;
> 2. Deliberately suppress or distort information or facts relevant to a pupil's academic progress;
> 3. Misrepresent or falsify pupil, classroom, school, or district-level data from the administration of a test or assessment;
> 4. Engage in a pattern of conduct for the sole purpose or with the sole intent of embarrassing or disparaging a pupil;
> 5. Use professional position or relationships with pupils, parents, or colleagues for improper personal gain or advantage;
> 6. Falsify or misrepresent documents, records, or facts related to professional qualifications or educational history or character;
> 7. Assist in the professional certification or employment of a person the certificate holder knows to be unqualified to hold a position;
> 8. Accept gratuities or gifts that influence judgment in the exercise of professional duties;
> 9. Possess, consume, or be under the influence of alcohol on school premises or at school-sponsored activities;
> 10. Illegally possess, use, or be under the influence of marijuana, dangerous drugs, or narcotic drugs, as each is defined in A.R.S. § 13-3401;
> 11. Make any sexual advance towards a pupil or child, either verbal, written, or physical;
> 12. Engage in sexual activity, a romantic relationship, or dating of a pupil or child;
> 13. Submit fraudulent requests for reimbursement of expenses or for pay;
> 14. Use school equipment to access pornographic, obscene, or illegal materials; or
> 15. Engage in conduct which would discredit the teaching profession.

Subsection 15 is a "catchall" and has included a wide range of behaviors evidencing errors in judgment, such as a conviction of Driving Under the Influence (DUI). Literally every certification case contains subsection 15.

Certificated educators also must follow the rules prescriptions in Section A.[7] The balance of AAC R7-2-1308 provides for SBE discipline of the certificated individual.[8]



Discipline From the Board's View

BY ALICIA WILLIAMS

After reviewing the certified educator discipline reports, formed by studying the various State Board of Education adjudicated certified educator discipline cases and the educator behaviors that caused the discipline, the Board found that many of the most serious offenses oftentimes did not have court outcomes associated with the misconduct.

Since the Board knew of this at the certified educator level, the Board began to question if it was possible that the same serious offenses could be occurring with non-certified educators and coaches, at both district and charter schools, with no court outcomes. Thus, with no court outcomes, a non-certified educator or coach would not have the incident in their background reports, nor would their Fingerprint Clearance Card be affected. Schools that hired these individuals would be none the wiser, as there was not a state agency that had administrative oversight, or reporting responsibilities, of these individuals.

After digging deeper into this question, Board staff found that they had had instances where the media reported on an act of serious misconduct by a non-certified educator or coach and the misconduct did not rise to the level of criminal charges.

Because of this, the Board knew that serious offenses involving students had occurred previously and may occur in the future. Therefore, the Board felt it was their responsibility to keep all Arizona students safe and understood that if the Board continued to not have administrative oversight of non-certified educators and coaches, the Board would be failing to protect future students. Hence, the new legislative language was written, with all stakeholder groups, Legislators and the Governor's Office in support of keeping students safe at school.

The new law ensures that the Board has the administrative oversight of the adults, both certified and non-certified, who are in front of Arizona students. Because of this, the Board is now able to inform schools, district and charter, of all educator misconduct, but most importantly, of immoral misconduct between a student and an educator, the most serious of offenses, ensuring that the educator cannot move between schools and harm additional students because of lack of state administrative oversight and reporting.

Along with the new language, current Arizona law, the investigative processes and procedures and the Board's adjudication methods, Board staff continues to push for other states to adopt what Arizona has done to ensure student safety. Arizona is the only state to have this amount of oversight of educators, both certified and non-certified, with some states having no established educator discipline process at all, even for certified educators.

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The SBE has adopted a "Discipline Matrix"[9] for certain types of behavior. There are mitigating and aggravating factors that influence the level of discipline pursued. "Category 1" misconduct can range from actual sexual contact between a teacher and student to "boundaries violations" between a teacher and student on social media to sexually inappropriate remarks made by a teacher. Interestingly, the SBE used the State Bar's disciplinary methodology as a model for aggravating and mitigating factors.

If the Executive Director, after reviewing the Discipline Matrix, historical SBE actions, the case evidence, the nature of the accusations, and consulting with the Assistant Attorney General ("Assistant AG") and other SBE staff, decides to issue a complaint against a teacher's certificate, she will ask that the SBE take certain disciplinary action(s). All certificate discipline issued by the SBE is recorded in the National Association of State Directors of Teacher Education and Certification ("NASDTEC") database, where it will forever appear in the 50 states and all territories. Discipline against a teacher's certificate includes:

a. Letter of Censure: This is the lowest level of discipline. It serves to put an individual on notice that the conduct in question is sanctionable and that any further misconduct of the same sort will result in a greater form of discipline. The receipt of a letter of censure does not itself preclude new or continuing employment.
b. Suspension: Suspension can be for up to five years. It means that the teacher cannot teach in the district during the time period set by the SBE. The 2021 legislation forbids charters and districts from hiring this teacher. Suspensions can be with conditions. For example, a teacher convicted of being under the influence of alcohol on the job may need to provide evidence of treatment during the suspended period to SBE staff in order to effectively complete the suspension. Sometimes the conditions include automatic expiration of the certificate upon SBE action and requiring the teacher to reapply for certification at the end of the suspension with the permission of the Professional Practices Advisory Committee ("PPAC") of the SBE.
c. Revocation: There are two forms of revocation, the most severe discipline. The first is for a five-year period. A teacher needs to reapply with the PPAC after the five-year period and, in effect, is treated like a new teacher. The second is the permanent revocation.[10] Charters and districts are prohibited from hiring individuals with revoked certificates under the 2021 law.
d. Surrender: This is similar to the *nolo contendre* plea in a criminal matter. While many believe that surrender is simply "giving up" the certificate to avoid discipline and save time, surrender is disciplinary and is recorded in the permanent NASDTEC database. Like revocation, the teacher cannot teach for five years in the districts and also cannot be hired by charters for five years.

All district and charter schools now have the same duty to report immoral or unprofessional misconduct.

Due Process and Administrative Procedure

If SBE staff pursues a Complaint against an existing certificate, or decides to contest the application for renewal of a certificate, the teacher can request a hearing before the PPAC of the SBE[11] The PPAC consists of an elementary classroom teacher, a secondary classroom teacher, a principal, a superintendent or assistant/associate superintendent, two lay members,[12] one of whom is a parent of a student currently attending a public school, and a governing board member.

There are two PPAC hearing panels. An Administrative Law Judge presides over the PPAC hearings. Testimony is recorded and given under oath. The PPAC makes findings of fact and conclusions of law. The PPAC then makes recommendations to the SBE. The SBE can accept, modify, or reject those recommendations.

SBE staff has two other options. They can return the case file to the Investigative Unit to dismiss the case. If they want to pursue discipline, SBE staff can ask the Assistant AG to offer a Negotiated Settlement Agreement ("NSA") to the teacher. If an NSA is reached, it is presented to the SBE for approval. The SBE can accept, modify or reject an NSA. If modified or rejected, the matter is remanded to the PPAC.

The SBE has a disciplinary agenda at its monthly meeting that follows its regular business. Teachers who have a PPAC recommendation or NSA are encouraged to attend the SBE meeting in the event members of the SBE have questions. There must be six votes by SBE members to make a decision concerning certificate discipline. SBE decisions are appealable to the Superior Court.

Effects of New Legislation

The SBE disciplined less than one percent of certified educators during 2012 through 2020.[13] While misconduct (and especially serious misconduct) is relatively rare, the harm caused to students in any such instance can be extremely serious. Constant public attention and the need to keep students safe at school prompted SBE to ask the Legislature in 2021[14] for disciplinary jurisdiction over all educators, whether or not certificated.

The new law subjects noncertificated employees (*e.g.*, teachers in charters that do not require certificates) to the same disciplinary process and requirements as certificated employees. All district and charter schools now have the same duty to report immoral or unprofessional misconduct. As before, others can also report educators.

Unlike certificated employees, noncertificated employees are not subject to letters of censure, suspension, revocation and surrender. SBE discipline of noncertificated employees can result in termination of their employment and prohibition of future employment for up to five years. SBE also can permanently prohibit noncertificated individuals from school employment if they have been convicted of certain sex crimes and dangerous crimes against children.[15]

Unlike the past confidentiality of investigative records, SBE can now provide investigative information about either certificated or noncertificated employees to their current or prospective employers, a state licensing agency to which they have applied, or to an out-of-state counterpart to the SBE. Each charter and district school now must

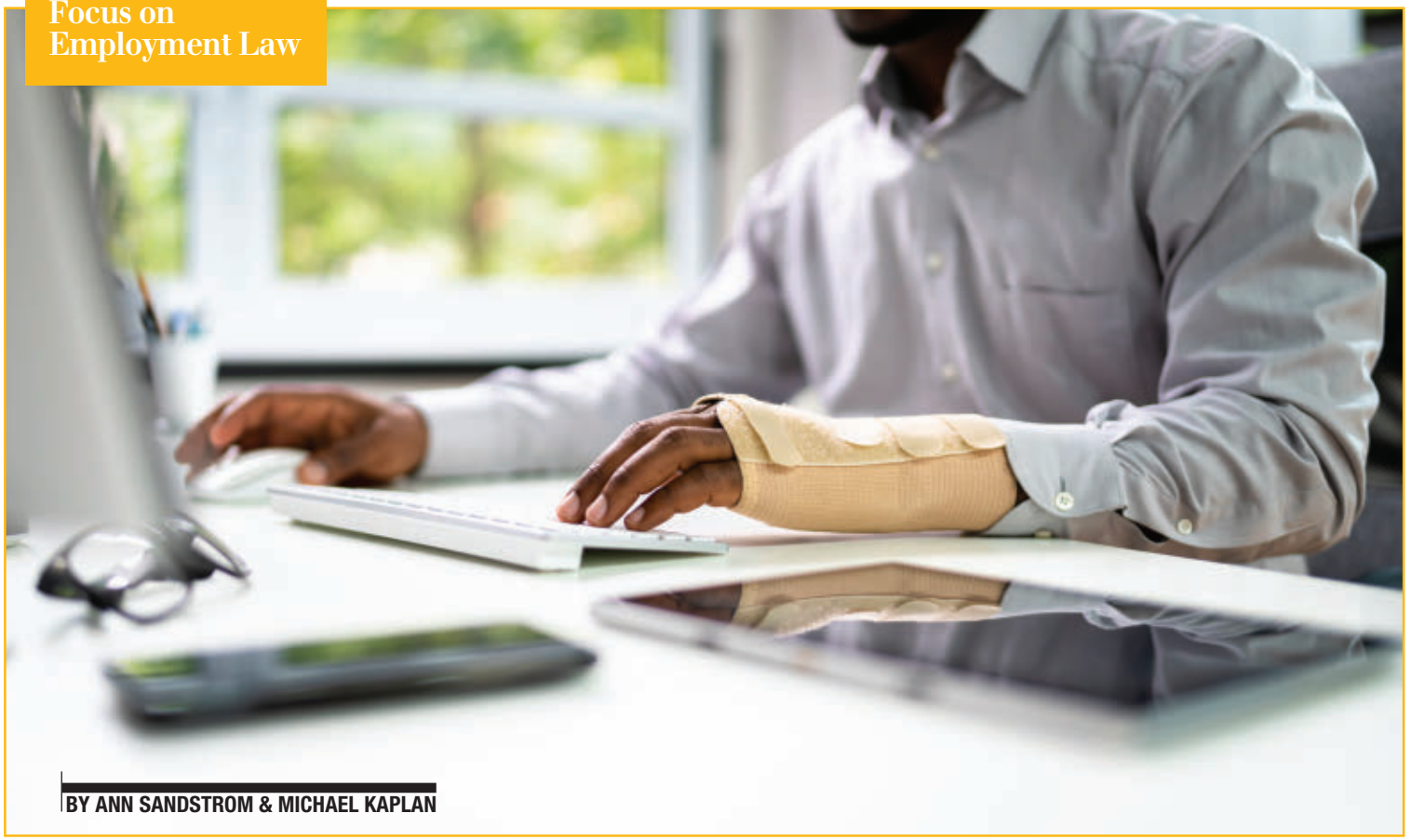
search the SBE's database before hiring any certificated or noncertificated person and submit an annual list to ADE of all certificated and noncertificated employees.

A certificated employee whose certificate has been surrendered, revoked or suspended cannot work in a charter or district school. A noncertificated employee prohibited by the SBE from employment cannot work in a charter or district school.

The expansion of jurisdiction to include some 5,000 noncertificated teachers (generally, but not exclusively, outside of the public school district system) and other staff at district and charter schools is of great moment. Although the legislation did not go as far as to require that all charter school teachers be certified in order to teach in charters, the passage of HB 2023 is a very significant step toward protecting Arizona students to a greater degree by closing loopholes that allowed teachers whose certificate had been suspended to continue to teach in other roles elsewhere and by subjecting the conduct of other staff members at districts and charters to the SBE's oversight and enforcement activities.

endnotes

1. Arizona law does not require that teachers at charter schools have certification, although some charter schools require teachers whom they employ to be certified. That remains true, even after the legislative changes that are the subject of this article were passed.
2. *See* A.R.S. § 15-505(F)(1), *inter alia*.
3. *See* HB 2898.
4. *Available at* https://azsbe.az.gov/sites/default/files/media/2020%20Enforcement%20Action%20Report.pdf.
5. *See* A.R.S. §15-514(B).
6. *Available at* https://azsbe.az.gov/teacher-certification-ppac.
7. AAC R7-2-1308A. Individuals holding certificates issued by the Board pursuant to R7-2-601 et seq. and individuals applying for certificates issued by the Board pursuant to R7-2-601 et seq. shall:
   - Make reasonable efforts to protect pupils from conditions harmful to learning, health, or safety;
   - Account for all funds collected from pupils, parents, or school personnel;
   - Adhere to provisions of the Uniform System of Financial Records related to use of school property, resources, or equipment; and
   - Abide by copyright restrictions, security, or administration procedures for a test or assessment.
8. AAC R7-2-1308C: Individuals found to have engaged in unprofessional or immoral conduct shall be subject to, and may be disciplined by, the Board. *See* A.A.C. R7-2-1307 for automatic revocation of certification. AAC R7-2-1308D: Procedures for making allegations, complaints, and investigation of unprofessional or immoral conduct shall be as set forth in this Article.
9. *Available at* https://azsbe.az.gov/sites/default/files/media/Discipline%20Process%20%26%20Resources_2.pdf.
10. A.R.S. § 15-550.
11. *See* rules at A.A.C. R2-7- 701, *et seq.*
12. SBE recently added two members: one lay member and one charter school representative.
13. SBE 2020 Enforcement Action Report, *supra* note 4.
14. A similar bill in 2020 was held up due to the COVID-19 crisis.
15. A.R.S. §15-550.



BY ANN SANDSTROM & MICHAEL KAPLAN

The Big Picture Approach to Full and Final Medical Settlements in Workers' Compensation Claims

Why Relying on a Medicare Set-Aside Is Not Enough

Although a Full and Final (F&F) settlement analysis differs between the Applicant and Defense, both parties benefit when viewing an F&F settlement through a "big picture" lens. This article captures the importance of understanding all areas of potential future medical exposure, from each party's perspective, when considering closing an Arizona workers' compensation claim on an F&F basis. The advantages of settling on an F&F basis are also discussed.

Arizona's "full and final" settlement law, codified at A.R.S. § 23-941.01, allows parties to settle accepted workers' compensation claims for compensation, penalties, interest and other benefits, including future medical. S.B. 1100 made several changes to the initial process and addresses, among other things, attestations regarding future medical care, final settlement and release of claims.

According to the statute, the carrier, special fund or self-insured employer ("Payer") must provide the injured worker ("Applicant") with an outline of reasonable anticipated future medical, surgical and hospital benefits related to the claim, the projected costs and an explanation of how those projected costs were determined. A disclosure of the amount of the settlement that represents the future medical amount is also required. Pursuant to § 23-941.01(C)(2), the parties must attest to this information being provided.

In addition, the F&F settlement statute requires the parties to attest that they have considered and taken reasonable steps to protect any interests of secondary payers such as Medicare, Medicaid, The Indian Health Service, and U.S. Department of Veterans Affairs, including establishing a Medicare savings account if necessary. The Applicant must attest that they understand monies received for future medical treatment associated with the industrial injury should be "set aside" to ensure that the costs of future claim-related treatment will be paid.

On a federal level, the Medicare Secondary Payor Act[1] addresses the need to consider and protect the interests of Medicare as a secondary payer. The Center for Medicare and

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Medicaid Services ("CMS"), created in 2001, reviews and tracks workers' compensation settlements to assure that Medicare remains the secondary payer to the workers' compensation carrier, and is not paying Medicare-covered medical expenses that should have been paid by the workers' compensation carrier or out of the settlement proceeds allocated for medical care.

CMS created a vehicle called a Medicare Set-Aside ("MSA") to consider and protect Medicare's interests when a workers' compensation claim is settled. The goal of establishing an MSA is to estimate, as accurately as possible, the total cost that will be incurred for all medical expenses otherwise reimbursable by Medicare for industrially related conditions during the course of the Applicant's life, and to "set-aside" sufficient funds from the settlement, judgment or award to cover that cost.[2]

The MSA may be funded by a lump sum or may be structured, with a fixed amount of funds paid each year for a fixed number of years, often using an annuity. CMS requires attestation that the MSA is being properly utilized post-settlement, and this can be done by the Applicant or a professional administration company. If Medicare's interests are not considered, CMS has a priority right of recovery against any entity that received any portion of a third-party payment either directly or indirectly. CMS also has a subrogation right with respect to any such third-party payment.

In order to comply with the Medicare Secondary Payer Act as well as the Arizona F&F statute, many Payers use the MSA allocation process to determine the cost of future medical care. It is important to note, however, that the MSA was created to consider and protect the interests of Medicare; it is not intended to address all future medical care benefits to which an Applicant may be entitled, nor is an MSA representative of the extent of Payer exposure that may apply for a F&F settlement.

For example, an MSA allocation deals with Medicare-covered expenses only and typically will not include the cost of medical items and services that are not covered by Medicare (e.g., grab bars, raised toilet seats, shower chairs, home health care providers, transportation, various medications, etc.).

The issue of Medicare-covered vs. non-Medicare covered benefits is particularly confusing because a complete list of what Medicare will not cover changes over time and is described in a general manner throughout various Medicare resources. To complicate matters further, whether Medicare will pay for an item can depend on the particular type of prescription, or the diagnosis for which it was prescribed. The cost of items not covered by Medicare will not be part of the MSA funding, and an Applicant will have to pay for those items out of their own pocket. Therefore, knowledge of, and consideration for, such items when assessing future medical exposure for F&F settlement is paramount.

Arizona's "full and final" settlement law allows parties to settle accepted workers' compensation claims for compensation, penalties, interest and other benefits including future medical.

In addition, the MSA allocation excludes "conditional payments." Conditional payments are claim-related medical benefits already paid by Medicare, often occurring while the claim was under dispute or when claim-related bills are inadvertently submitted to, and paid by, Medicare. Discussion between the parties as to the status of conditional payments and how those will be paid out of the settlement is necessary. As the Responsible Reporting Entity (RRE), the Payer is typically in the position of reporting to CMS an Applicant who is also a Medicare Beneficiary, identifying conditional payments and including conditional payments in the settlement analysis.[3]

Both parties benefit from assessing whether the MSA meets CMS review thresholds and, if so, whether to submit the MSA to CMS for approval. Another issue for consideration is how co-morbidities or contested claims that remain at issue may affect future medical requirements and potential Payer exposure.

In an F&F settlement, the Applicant is relinquishing all rights for future claim-related benefits, including future medical care. Looking at the "big picture" is critical. For example, an MSA may not apply to all claims, and when that is the case, the Payer may use varying pricing methods or life expectancy tables to determine the cost of future medical care. When an MSA is appropriate, it is important for the Applicant to understand the type of MSA that will be used (e.g., traditional submission MSA, non-submit evidence based MSA, indemnified MSA) and how that may affect the future medical care allocations. For example, a non-submit, evidenced-based MSA may use criteria other than the Medicare Set-Aside guidelines to justify inclusion or exclusion of medical care or medications.

If items have been recommended by a treating physician but denied by independent medical examination (IME), an Applicant may nevertheless decide to include those items in their F&F settlement analysis, as CMS typically gives deference to primary treating physician opinions over the opinions of an IME. At a minimum, denied care that may be deemed compensable represents Payer exposure. Whether a structured settlement will be performed also can impact settlement, as a structured settlement may be more agreeable to the Payer on larger cases.

The Applicant's agreement to permanently close the claim should be taken into account. As such, the Applicant may require additional consideration, often called "waivers," for their agreement to forego future benefits.

Assessing the big picture of an F&F settlement is also important for the Payer. Relying solely on the MSA projection to determine future medical exposure often will result in a stalemate during settlement if reserves are improperly set. Looking at the totality of considerations allows the Payer to assess the risk versus benefit of keeping the claim open. This includes an evaluation of litigation costs that may be incurred to fight disputed claims or benefits that eventually may be deemed compensable. Knowledge of the potential medical exposure, particularly on cases with complex medical diagnosis or progressive conditions, is helpful.

If an MSA is applicable, the Payer will determine which MSA method they will use on a claim. Viewing the big picture allows the carrier to ensure inclusion of proper claims and related diagnoses in the settlement documents and MSA allocations and provides understanding of the costs of items and services not covered by Medicare.

Although it may seem a daunting process, the option to settle an Arizona workers' compensation claim on a Full & Final basis offers benefit to both parties. Many Applicants appreciate the opportunity to take control of their future medical care. An F&F settlement allows the Applicant to permanently close out their claims, thus ending what is often a stressful litigation and paperwork process. F&F settlement may be provided in a lump-sum settlement or a structured settlement, either of which may benefit the Applicant depending on their circumstances.

In addition, Applicants can benefit emotionally from the sense of closure. A structured settlement broker and post-settlement resources such as professional administration of the MSA also can provide helpful reassurance to the Applicant during the settlement and post-settlement process.

An F&F settlement can provide Payers with fiscal benefits when the workers' compensation claim closes by allowing them to manage their risk. An open workers' compensation claim, especially those that are complex procedurally or medically, results in unpredictable and often increasing exposure as time goes on. In addition, closing claims frees up reserves, allowing the Payer to set proper premiums and save on the expense of adjusting the claim.

The option to close out an Arizona workers' compensation claim can be advantageous for both Applicant and Payer. Looking at the "big picture" when preparing for an F&F settlement provides a roadmap for what can be discussed and negotiated between the parties.

endnotes

1. 42 U.S.C. § 1395y.
2. Center for Medicare & Medicaid Services Workers' Compensation Medicare Set-Aside Arrangement Reference Guide v. 3.4; October 4, 2021.
3. Section 111 of the Medicare, Medicaid and SCHIP Extension Act of 2007.

Lawsuit Reveals Dangers of Asking Immigration-Related Questions During Hiring

BY JOHN FAY

When it comes to hiring protocol and immigration in the U.S., HR folks really are caught between a rock and a hard place. On the one hand, you need to ensure you're only hiring and employing a legal workforce, an assertion made on everyone's favorite government form, the beloved I-9.

But at the same time, you also have to avoid treating a candidate differently during the hiring process based on an individual's real or perceived citizenship or immigration status. These requirements come courtesy of the Immigration Reform and Control Act of 1986 ("IRCA"), the seminal law that's best known for introducing the Form I-9 requirement, employer sanctions, and immigration-related discrimination prohibitions.

And when you combine all those elements together, you get the ultimate slippery slope for employers. The more you try to safeguard against an immigration or I-9 audit, the higher the likelihood that you may inadvertently or even deliberately treat non-citizen employees differently in ways that are not allowed.

But wait, there's more! As it turns out, pre-hire immigration questioning is a lot muddier than you think. Because now, some 30+ years later after IRCA was passed, employers need to consider additional state laws that offer individuals even broader protection against immigration-related discrimination.

Which brings us to an interesting lawsuit out of Washington State against Zoom Video Communications, Inc., whose cloud-based peer-to-peer software platform is used across the globe to facilitate teleconferencing, telecommuting, distance education, and, yes, recruitment and hiring as well.

Before proceeding with this article, please note that this lawsuit is still in the very early stages, and all the facts described below are only "alleged to have occurred." Zoom may have an entirely different story to tell once they get their day in court.

Dashed Dreams for a Dreamer

The plaintiff, Royer Ramirez Ruiz, is a Washington State resident with a bachelor's degree in applied mathematics, who has worked in the fields of software development and data engineering. He's also a so-called "Dreamer," having been brought to the U.S. by his parents when he was only 6 years old on a tourist visa, which expired long ago.

In 2012, Ruiz applied with the USCIS under the agency's Deferred Action for Childhood Arrivals (DACA) program, an Obama-era executive action that provides both temporary protection from deportation and work authorization to qualified applicants. He received his first DACA approval in October 2012 and has renewed it every two years since that time. According to the complaint, Ruiz is currently authorized to work until April 2022 (and has an EAD to prove it).

In July 2021, a technical recruiter contacted Ruiz about some open engineering

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positions at Zoom, which eventually led to a series of interviews.

At the onset, the recruiter inquired whether the plaintiff needed immigration sponsorship, and Ruiz confirmed that he did not (since his EAD provides for "open market" employment). A different recruiter then interviewed Ruiz for two open positions at the company: a SecOps ("security") engineering position and an MLOps ("machine learning") engineering position. As part of those discussions, the recruiter once again asked the standard HR question regarding work authorization, and Ruiz informed them that he was authorized to work.

A third recruiter then spoke with Ruiz about the MLOps position. According to the complaint, the recruiter seemed genuinely interested—even going so far as to remark that Ruiz's current background made him an ideal candidate for the position. As the call was wrapping up, the recruiter asked once again if Ruiz needed sponsorship. As he had done before, Ruiz confirmed that he had work authorization and would not need sponsorship.

However, according to the complaint, the recruiter pressed him further, asking "If you are not a citizen, does this mean you are a permanent resident?" and then later tried to find out what type of protected program Ruiz was working under. As the recruiter continued to pressure him, Ruiz eventually divulged that he was part of DACA.

The recruiter then allegedly replied with "Ooh, that might be an issue" and said he would need to check internally before sending his resume to the hiring manager. A few days later, Ruiz received a tersely written email informing him that they could not move forward "due to immigration" and offering to provide more information. Ruiz followed up seeking further clarification but never heard from them again.

The Cause of Action

According to the complaint, Ruiz was shocked and upset by the email. "He had sacrificed a significant amount of time preparing for multiple rounds of interviews with Zoom and had never experienced such blatant discrimination in a professional setting before, making him feel disposable and worthless," the complaint alleges.

The lawsuit, filed in federal court in Seattle, alleges that Zoom discriminated against Ruiz when it rejected him for a job position solely on the basis of his citizenship or immigration status. Ruiz is seeking damages from Zoom for lost wages and emotional distress.

The Justice Department advises employers wishing to inquire about sponsorship to limit their questions to that topic, without asking about immigration status.

The Law

But wait, you say, can a DACA holder even sue for citizenship status discrimination? I thought you had to be a member of a certain protected class. Right you are, my intelligent made-up friend. Under IRCA, only U.S. citizens, U.S. nationals, asylees, refugees, and recent lawful permanent residents are protected from citizenship status discrimination. All individuals are protected against national origin discrimination, but that does not appear to be alleged in the case at hand.

Which is why the plaintiffs are bringing this case under Washington State's law against discrimination (WLAD), which, as of last year, now includes "citizenship or immigrant status" in the list of protected classes, without otherwise limiting or defining those characteristics. The recent change in the WLAD essentially prohibits discrimination in Washington State based on citizenship or immigration status unless a distinction or differential treatment is required by a state or federal law, regulation or government contract.

The lawsuit also alleges violation of 42 U.S.C. § 1981, which prohibits discrimination on the basis of race or alienage (citizenship) in making and enforcing contracts, including employment contracts.

Lessons for Employers

As mentioned earlier, it remains to be seen how Zoom will respond to the allegations presented in Ruiz's lawsuit. Will they tell a different story about the hiring process? Were the recruiters even Zoom employees? Perhaps there were other legitimate reasons for refusing to hire the candidate.

Regardless, this case gives us an opportunity to review some basic (but important) pre-hiring rules and principles for asking immigration-related information from candidates:

1. **Limit your questions**. The Immigrant and Employee Rights Section (IER) of the Department of Justice has long advised employers wishing to inquire about sponsorship to limit their questions to that topic, without asking specifically about immigration status. IER has recommended the following "yes/no" questions:
   - Are you legally authorized to work in the United States?
   - Will you now or in the future require sponsorship for employment visa status? (e.g., H-1B visa status)

   Such questions are generally permissible

as they are designed to inform you as to whether the applicant is permitted to work in the U.S. while also letting you know whether you would need to sponsor the individual. Both are legitimate inquiries that have nothing to do with the candidate's status.

Employment law experts also generally advise asking these questions on the employment application, rather during an interview (as was alleged to have occurred in this case). Having the questions in writing ensures that they are asked of each applicant in exactly the same way and eliminates the risk of the employer blurting out an inappropriate comment (such as "Ooh, that might be an issue").

2. **Know the law(s).** IER strongly cautions employers about asking questions that may make applicants concerned that their citizenship status is going to affect hiring decisions, even if it turns out those individuals are not "protected" under IRCA. As this case illustrates, there are a variety of state and federal laws that protect employees from employment discrimination based on several factors, including their citizenship, immigration status, national origin, and race.

3. **Consult the IER's publications for workers and advocates.** The IER maintains a detailed library of educational documents aimed at helping employers and workers understand the anti-discrimination provision of IRCA. For example, IER has a DACA flyer that includes many do's and don'ts relating to pre-employment screening and the I-9 process.

4. **Create standard operating procedures for your employment eligibility process.** Experts have long recommended that employers create their own internal handbook that specifically documents (in some detail) how employment eligibility verification will be conducted. Having an SOP not only shows good faith (in the event of government audit), it also serves as a training document—which is particularly important for large organizations where there is a possibility that a recruiter might go rogue or off-script.

5. **Use Electronic I-9 software to enforce your procedure.** Once you've crafted your SOP (ideally, with the help of counsel), you'll want to consider using an integrated electronic I-9 and E-Verify solution that will ensure your onboarding efficiency and enforce the delicate balancing act described above. A well-designed system will alleviate many I-9 and E-Verify concerns by preventing mistakes, standardizing practices, and guiding employers on the proper procedure for requesting I-9 documentation. Be careful, though, because not all I-9 systems are created equally. You'll need to make sure the system is fully compliant with the I-9 regulations and treats employees consistently, regardless of their status. AZ AT

APPELLATE HIGHLIGHTS

by Eric M. Fraser and **Joseph N. Roth** (civil), **Patrick C. Coppen** (criminal), and **James M. Susa** (tax). Family Law summaries are prepared by the **Case Law Update Committee of the Family Law Section** of the State Bar of Arizona.

SUPREME COURT CIVIL MATTERS

Decisions of the Arizona Corporation Commission are not entitled to "extreme deference." All governmental bodies, including the Corporation Commission, are subject to constitutional constraints, both general (such as due process) and specific. Although the Commission exercises plenary power over ratemaking and classifications, which requires courts to defer to its findings of fact and only disturb its decisions if they are arbitrary, unlawful, or unsupported by substantial evidence, its decisions as to constitutional and statutory compliance receive no such deference. Instead, a court's review of such questions is de novo, and the Commission's decisions are not entitled to "extreme deference." *Sun City Home Owners Ass'n v. Ariz. Corp. Comm'n*, CV-20-0047-PR, 10/1/21.

SUPREME COURT JUVENILE MATTERS

Affirming the juvenile court's order terminating a parent–child relationship, the Court held that **reasonable evidence supports the court's findings that Father's parental rights may be terminated. Substantial evidence exists in the record to support the finding that Father's conviction and length of sentence of imprisonment was of such a length as to deprive the children of a normal home for a period of years and that termination of Father's parental rights would be in the children's best interests.** Although the juvenile court misapplied two factors from *Michael J. v. Arizona Dep't of Econ. Sec.*, 196 Ariz. 246, 251–52 ¶ 29 (2000)—which describes the relevant factors a juvenile court should consider in making this determination—substantial evidence exists to support termination. *Jessie D. v. Dep't of Child Safety/F.V./M.D./M.D./C.D.*, CV-19-0321-PR, 10/8/21.

Eric M. Fraser and **Joseph N. Roth** are attorneys at Osborn Maledon PA, where their practices include civil appeals and appellate consulting with trial lawyers. They may be reached at efraser@omlaw.com, jroth@omlaw.com, and are ably assisted with this column by Osborn Maledon PA's appellate group, which maintains www.omlaw.com/azapp-blog. AzAPP contributors include **Payslie M. Bowman, John S. Bullock, Emma J. Cone-Roddy, Hayleigh S. Crawford, Travis C. Hunt, Phillip W. Londen, Joshua J. Messer** and **Bryce Talbot.**

Patrick C. Coppen is a sole practitioner in Tucson.

James M. Susa is a shareholder in the Tucson office of DeConcini McDonald Yetwin & Lacy PC.

COURT OF APPEALS CIVIL MATTERS

When notices mailed to addresses on file with county are returned unclaimed, a tax lien holder intending to foreclose must make a diligent and "genuine" effort to provide pre-litigation notice to the property owner. If the holder of a tax lien intends to foreclose on the liened property, A.R.S. § 42-18202(A)(1) requires the lien holder to provide pre-litigation notice. The pre-litigation notice requirement is jurisdictional; that is, if the notice is not sent as required, the trial court may not proceed with the foreclosure action. Under § 42-18202(A)(1)(a)-(c), notice may be sent to the property owner of record according to the county recorder, the records of the county assessor, and—if different—the location of the property along with the tax bill mailing address according to the county treasurer. If, however, notices mailed to those addresses are returned unclaimed, the lien holder must do more to provide notice to the owner of record. Arizona law requires a "genuine investigation into locating persons who have recorded and unrecorded interests in the property, not an incomplete or nominal attempt to locate." *Advanced Prop. Tax Liens Inc. v. Othon*, 2 CA-CV-2021-0001, 10/25/21.

Deciding whether to clear all vegetation over a large area of land falls outside the "normal day to day management" of a planned community. An airpark lies on property subject to multiple easements as well as recorded covenants, conditions, and restrictions. The relevant documents give a small group of managing members the authority to carry out the "normal day to day management" of the community. The managers decided to clear out native vegetation on a portion of an easement overlaying a member's property as part of a five-year development plan to improve the airstrip. This type of decision falls outside the "normal day to day management" of the community because it involves a "thematic transformation[s] to the establishment," among other reasons. *Prieve v. Flying Diamond Airpark LLC*, 2 CA-CV-2020-0175, 10/13/21.

The superior court may allow a party to substitute as real party in interest when requested in response to a motion to dismiss rather than a separate motion to amend under Rule 15(a). Under Rule 17(a)(3), "the court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action." Rule 17(a)(3), however, is not self-executing. The Supreme Court has said that the procedure for adding or sub-

stituting a party is governed by Rule 15(a). If, however, a party requests substitution in response to a motion to dismiss rather than in a separate motion to substitute under Rule 15(a), the trial court may deem the request sufficient and grant the substitution without a separate filing. *Walker v. Lipin*, 2 CA-CV-2021-0023, 10/6/21.

COURT OF APPEALS JUVENILE MATTERS

The trial court did not err by granting the Department of Child Safety's motion, filed pursuant to Rule 59, Ariz.R.P.Juv.Ct., to return the minor to a non-biological parent who is the minor's legal father pursuant to A.R.S. § 25-814(A)(3), absent any evidence that returning the minor to the father would create a substantial risk of harm to the child. It also affirmed the trial court's determination that a minor may not seek to disestablish paternity in his legal parent, and instead seek to establish paternity in an unknown individual, pursuant to A.R.S. § 12-621. *J.W. v. DCS, Angelique G., and Matthew W.*, 2 CA-JV-2021-0027, 10/4/21.

COURT OF APPEALS SPECIAL ACTION MATTERS

Explaining its previous order, the Arizona Court of Appeals, Div. One, held that **time limitations under A.R.S. § 25- 812(E) apply even to a genetic father's paternity petition challenging a voluntary acknowledgment signed by someone else.** Paternity established by means of a properly filed voluntary acknowledgment of paternity pursuant to § 25-812(A)(1) and (D) may be challenged by a third-party biological father, but that challenge must adhere to the substantive and temporal limitations for such a challenge set forth in § 25-812(E). *Johnson v. Hon. Edelstein et al.*, 1 CA-SA-2021-0072, 10/26/21.

Use immunity is co-extensive with the Fifth Amendment, and, given the trial court's grant of use immunity to victim, along with its preclusion of questions about victim's other conduct unrelated to the charge against the real party in interest, victim has not shown that the court's orders violate his Fifth Amendment rights, and so he cannot withhold his testimony as a condition of obtaining transactional immunity. The Court of Appeals further held that the Victims' Bill of Rights does not preclude the state from deposing a victim if the deposition is permissible under Rule 15.3. The statute and rule upon which the victim relies do not afford him a right to refuse a deposition ordered at the request of the State. Nothing in the plain text of the Arizona Constitution, statute or rule declares or even implies that a victim has a constitutional right to refuse to obey a court order to appear and testify in a deposition requested by the State. *E.L. v. Hon. Carman et al.*, 1-CA-SA-2021-0046, 10/5/21.

Detailed summaries of selected cases and other court news may be found at www.omlaw.com/azapp-blog

BAR COMMUNITY

LAWYER REGULATION

REINSTATED ATTORNEYS

PHILLIP D. HINEMAN

Bar No. 011887; File No. 21-1824-R
PDJ No. 2021-9075-R

Phillip D. Hineman, Phoenix, was reinstated from a short-term suspension, effective Sept. 3, 2021. Mr. Hineman filed an affidavit under Rule 64(e)(2)(A), ARIZ.R.S.CT., in which he avowed he complied with the terms of his suspension and verified he paid all fees, costs and expenses.

GUY P. ROLL

Bar No. 015987; File No. 21-1918-R
PDJ No. 2021-9079-R

By order of the presiding disciplinary judge dated Sept. 20, 2021, Guy P. Roll, Phoenix, was reinstated as an active member of the State Bar of Arizona.

COURTNEY JOSEPHINE VERNON

Bar No. 031057; File No. 20-2135-R
SB-21-0046-R
PDJ No. 2020-9090-R

On Oct. 5, 2021, the Supreme Court of Arizona issued an order reinstating Courtney Josephine Vernon, Gilbert, Ariz., to the practice of law and placing Ms. Vernon on two years' probation requiring participation in the State Bar's Member Assistance Program.

SANCTIONED ATTORNEYS

JARED WINSOR BENNETT

Bar No. 020372;
File Nos. 21-0749, 21-1011
PDJ No. 2021-9056

By final judgment and order dated Sept. 30, 2021, the hearing panel disbarred Jared Winsor Bennett, Phoenix, effective Sept. 17, 2021. Mr. Bennett also was ordered to pay restitution of $2,875 in count 1, restitution of $2,390 in count 2, and the State Bar's costs and expenses of $2,000.

In count 1, a client paid Mr. Bennett $2,875 for bankruptcy representation. Shortly afterward the client told Mr. Bennett she intended to sell her home, which she estimated to have about $90,000 in equity. Mr. Bennett failed to advise the client the proceeds of sale would go to the bankruptcy estate. Mr. Bennett also failed to discuss or explain ways to avoid the home becoming an asset of the bankruptcy estate.

From December 2019 to February 2020, the client tried to reach Mr. Bennett and had to hire substitute counsel. Despite the client's repeated demands for her file and a refund of the prepaid fees, Mr. Bennett failed to respond. In September 2020, the client sued Mr. Bennett and obtained a default judgment for $38,475 plus attorney's fees and costs totaling $3,111.95.

Twice the State Bar asked Mr. Bennett to respond in writing to the client's charges. Mr. Bennett failed to respond, failed to account for or refund the prepaid fees, and failed to return the client's file.

In count 2, in March 2020 a client paid Mr. Bennett $2,390 for a bankruptcy representation. In August 2020, Mr. Bennett was suspended from the practice of law. Between late 2020 and March 2021, the client tried (unsuccessfully) to reach Mr. Bennett. In March 2021, the client terminated the representation, and requested the client file and a refund of the prepaid fees. Mr. Bennett falsely claimed to have refunded the fees; he failed to file the bankruptcy, failed to return the client file, and failed to refund the prepaid fees.

Twice the State Bar asked Mr. Bennett to respond in writing to the client's charges. Mr. Bennett failed to respond.

Aggravating factors: prior disciplinary offenses, dishonest or selfish motive, and indifference to making restitution.

Mitigating factors: none.

Mr. Bennett violated Rule 42, ARIZ.R.S.CT., ERs 1.2, 1.3, 1.4, 1.5 (a), 1.16(d), and 8.1(b); and Rule 54(d), ARIZ.R.S.CT.

JARED WINSOR BENNETT

Bar No.020372; File No. 21-0049
PDJ No. 2021-9040

By final judgment and order dated Sept. 30, 2021, a hearing panel suspended Jared Winsor Bennett, Phoenix, for three years effective August 19, 2021. Mr. Bennett also was ordered to pay restitution of $2,375 and the State Bar's costs and expenses of $2,000.30.

In September 2019 a client paid Mr. Bennett $2,375 to file a Chapter 7 bankruptcy petition. In August 2020, Mr. Bennett was suspended from the practice of law. In October 2020, the client tried to reach Mr. Bennett regarding the case status, and an assistant told him to contact Mr. Bennett after the first of the year. Mr. Bennett did not inform the client of his suspension. Despite numerous telephone calls and emails in early 2021, the client could not reach Mr. Bennett. Eventually the client learned Mr. Bennett was suspended and failed to file a bankruptcy petition.

Twice the State Bar asked Mr. Bennett to respond in writing to the client's charge but Mr. Bennett failed to respond, failed to account for or refund the prepaid fees, and failed to return the client's file.

Aggravating factors: disciplinary offenses, dishonest or selfish motive, and indifference to making restitution.

Mitigating factors: none.

Mr. Bennett violated Rule 42, ARIZ.R.S.CT., ERs 1.2, 1.3, 1.4, 1.5 (a), 1.16(d), and 8.1(b); and Rule 54(d), ARIZ.R.S.CT.

MICHAEL V. BLACK

Bar No. 007671; File No. 20-1372
PDJ No. 2021-9037

By final judgment and order dated Aug. 31, 2021, the presiding disciplinary judge accepted an agreement for discipline by consent by which Michael V. Black, Phoenix, was reprimanded and placed on probation for one year. Mr. Black's probation includes a one-time consult with the State Bar's Law Office Management Assistance Program and restitution totaling $15,116. Mr. Black also was ordered to pay the State Bar's costs and expenses totaling $1,200.

Mr. Black represented a criminal defendant charged with aggravated assault, a dangerous felony. The client's mother, the complainant, paid Mr. Black's initial, earned-upon-receipt fee for pretrial services. Later, the client's mother paid an additional $10,500 advance fee for Mr. Black's trial services. Mr. Black's fee agreement provided, "Attorney will refund to Client any unused portion of the trial fee." The client accepted a plea offer. Mr. Black did not refund the advance trial fee. Despite the complainant's demands, in three years Mr. Black made one $500 refund payment. He since has paid restitution in full.

Aggravating factors: A prior disciplinary offense and indifference to making restitution.

Mitigating factors: Remorse, full and free disclosures throughout the proceedings, positive character and reputation within the legal community, and personal problems.

Mr. Black violated Rule 42, ARIZ.R.S.CT., ERs 1.5, 1.15, 1.16, and 8.4(d).

JOHN BURTON

Bar No. 012445; File No. 21-0299
PDJ No. 2021-9052

By final judgment and order dated Sept. 30, 2021, the hearing panel suspended John Burton, Phoenix, for 90 days effective Sept. 14, 2021, to run concurrently with his suspension in PDJ 2019-9101. Mr. Burton also was ordered to pay the State Bar's costs and expenses of $2,000.

After Mr. Burton was suspended in PDJ 2019-9101, the State Bar received three insufficient funds notices for Mr. Burton's IOLTA. Although the amounts were small, the State Bar requested Mr. Burton to explain the overdrafts and provide copies of the related mandatory records. Mr. Burton failed to comply with those requests or furnish proof he closed his trust account.

Aggravating factors: prior disciplinary offenses, pattern of misconduct, multiple offenses, and substantial experience in the practice of law.

Mitigating factors: none.

Mr. Burton violated Rule 42, ARIZ.R.S.CT., ER 8.1(b); Rule 43(b),

Ariz.R.S.Ct.; and Rule 54(d), Ariz. R.S.Ct.

GREG CLARK

Bar No. 009431; File No. 20-1011
PDJ No. 2021-9032

By final judgment and order dated Aug. 12, 2021, Greg Clark, Phoenix, was disbarred effective July 28, 2021 and ordered to pay the State Bar's costs and expenses of $2,000.

Mr. Clark represented a client in a criminal case. During the representation, Mr. Clark orally contracted with the client and her mother to purchase their vehicles, including a Mercedes-Benz, to offset the legal fees. He did not obtain a writing signed by the client identifying the terms of the transaction and containing an advisement that the client and her mother seek the advice of independent legal counsel regarding the agreement.

Mr. Clark did not attend the sentencing hearing, and coverage counsel was unaware of a miscalculation of the days of presentence incarceration in the presentence report. When the client learned of the miscalculation, she unsuccessfully attempted to contact Mr. Clark to rectify the error.

Approximately one month later, the client contacted Mr. Clark and asked that he file the appropriate paperwork with the court. Mr. Clark ultimately filed a one-paragraph motion but improperly tried to charge the client $1,000 for doing so.

Aggravating factors: prior disciplinary offenses, dishonest or selfish motive, and substantial experience in the practice of law.

Mr. Clark violated Rule 42, Ariz.R.S.Ct., ERs 1.3, 1.5(a) and (b), 1.8(a)(1)-(3), and 8.4(d).

GREG CLARK

Bar No. 009431;
File Nos. 20-1493, 20-1622
PDJ No. 2021-9048

By final judgment and order dated Sept. 14, 2021, Greg Clark, Phoenix, was disbarred effective Aug. 25, 2021. Mr. Clark was ordered to pay restitution to two clients of $7,420 and $2,000, respectively, and was ordered to pay the State Bar's costs and expenses of $2,000.

In the first count, Mr. Clark represented a client in a criminal case. During the representation, Mr. Clark was suspended from the practice of law for six months and one day (PDJ 2019-9096). He failed to inform the client, opposing counsel or the court of his suspension. The court scheduled a hearing to address Mr. Clark's suspension, but he failed to appear as ordered. Despite being removed from the case, Mr. Clark failed to respond to the client and successor counsel's repeated requests for the client file.

In the second count, Mr. Clark represented a client in a criminal case. During the representation, Mr. Clark ignored most of the client's repeated requests for information. Mr. Clark failed to file a notice of appearance or otherwise appear as attorney of record. Later, he agreed to refund a portion of the prepaid fees but failed to issue the promised refund.

During the State Bar investigation, Mr. Clark submitted false billing records that were contradicted by, among other things, the client's phone records. Mr. Clark also failed to inform the client of his suspension from the practice of law.

Aggravating factors: prior disciplinary offenses, dishonest or selfish motive, bad faith obstruction of the disciplinary proceedings, substantial experience in the practice of law, and indifference to making restitution.

Mr. Clark violated Rule 42, Ariz.R.S.Ct., ERs 1.3, 1.4, 1.5(a), 1.16(d), 3.4(c), 8.1(a), and 8.4(c); Rule 54(d), Ariz.R.S.Ct.; and Rule 72, Ariz.R.S.Ct.

SCOTT MICHAEL FORRESTER

Bar No. 029252; File No. 19-0223
PDJ No. 2020-9120
Supreme Court No. SB-21-0063-AP

By decision and order imposing sanctions dated May 5, 2021, the hearing panel disbarred Scott Michael Forrester, Phoenix, effective immediately. Mr. Forrester was ordered to pay restitution of $4,500 and pay the State Bar's costs and expenses $6,014.96. The Arizona Supreme Court denied Mr. Forrester's appeal and other post-hearing requests.

Mr. Forrester took payment from a bankruptcy client, was terminated before performing services, and thereafter refused to give the client a refund. The client disputed the charges with his credit card company and filed a complaint with the Attorney General's Office. Mr. Forrester provided intentionally misleading information to the credit card company and the Attorney General when responding to the complaints.

During the disciplinary proceedings, Mr. Forrester failed to attend the mandatory settlement conference and was held in contempt. Mr. Forrester missed the deadline to purge the contempt and default was entered against him.

Aggravating factors: dishonest or selfish motive, bad faith obstruction of the disciplinary process, submission of false evidence, refusal to acknowledge the wrongful nature of the conduct, substantial experience in the practice of law, and indifference to making restitution.

Mitigating factors: none.

Mr. Forrester violated Rule 42, Ariz.R.S.Ct., ERs 1.5(a),(b) and (d)(3), 1.16(d), 8.1(b), and 8.4(c); and Rule 54(d)(1) and (2), Ariz.R.S.Ct.

RICHARD A. MADRIL

Bar No. 034676; File No. 19-3494
PDJ No. 2021-9011

By final judgment of disbarment dated Sept. 27, 2021, the presiding disciplinary judge accepted a consent to disbarment for Richard A. Madril, Tucson, effective that date. Mr. Madril was ordered to pay the State Bar's costs and expenses of $1,201.40.

Mr. Madril was found guilty after trial of Conspiracy to Defraud the United States, a Class D felony offense. The conviction arose from Mr. Madril's work with now-disbarred attorney Marivel Cantu-Madril.

Mr. Madril violated Rule 42, Ariz.R.S.Ct., ER 8.4(b), and Rule 54(g), Ariz.R.S.Ct.

RICHARD M. SWARTZ

Bar No. 026120;
File Nos. 20-2285, 20-2616, 21-0747
PDJ No. 2021-9047

By final judgment and order dated Sept. 30, 2021, a hearing panel suspended Richard M. Swartz, Sierra Vista, Ariz., for two years, effective September 16, 2021. Mr. Swartz also was assessed the State Bar's costs and expenses totaling $2,000.

In Count One, Mr. Swartz failed to provide a copy of a client file to successor counsel, despite multiple promises to do so, prompting a court to set an order to show cause hearing for Mr. Swartz to comply or explain his failure to provide the file. Mr. Swartz abandoned his practice and never provided the file to successor counsel or the client.

In Count Two, Mr. Swartz engaged in the practice of law while administratively suspended.

In Count Three, Mr. Swartz violated terms of diversion from a prior bar charge.

Aggravating factors: dishonest or selfish motive, multiple offenses, vulnerability of the victim, and substantial experience in the practice of law.

Mitigating factors: absence of a prior disciplinary sanction, personal or emotional problems, and remorse.

Mr. Swartz violated Rule 42, Ariz.R.S.Ct., ERs 1.16, 5.5, and 8.4(c) and (d); and Rule 54(e), Ariz.R.S.Ct.

CAUTION!

Nearly 17,000 attorneys are eligible to practice law in Arizona. Many attorneys share the same names. All discipline reports should be read carefully for names, addresses and Bar numbers.


DONNELLY

Buchalter announced the addition of corporate law attorney **Philip Donnelly** to its Arizona office. He focuses his practice on corporate governance, banking and regulatory compliance, complex litigation management, and human resources support. He regularly advises boards and executive committees of public and private institutions on their fiduciary responsibilities to company stakeholders and regulatory authorities.

Jones Skelton & Hochuli announced the addition of associate attorney **Elizabeth B. N. Garcia** to its Appellate Group, where she focuses her practice in federal and state appellate matters. At her previous multistate firm, she handled class action defense and other complex litigation. She also has handled breach of contract and other sophisticated commercial litigation for clients across industries. Garcia previously worked for the Arizona Attorney General's Office as an Assistant


GARCIA

Attorney General for Criminal Appeals and was named the 2017 Emerging Star for the Solicitor General's Office. She also served as a judicial clerk for Hon. Maurice Portley at the Arizona Court of Appeals.

At the Arizona State University Sandra Day O'Connor College of Law, Garcia was named a Willard H. Pedrick Scholar and volunteered as a Rule 38(d) Certified Limited Practice Student at the ASU Immigration Law & Policy Clinic.

Jennings Strouss & Salmon PLC, Phoenix, announced that **Richard K. Delo** was elected to the firm's Management Committee for a three-year term. He succeeds John J. Egbert, who stepped down from the position after six years to embark on a three-year mission for his church. The three-person committee also includes Managing Attorney John C. Norling and Member Jeffrey D. Gardner.


DELO

Delo primarily practices in the areas of medical malpractice defense, health care law and personal injury, focusing his practice on the defense of physicians, hospitals and health care providers in medical malpractice cases. He also represents physicians in disciplinary hearings before the Arizona Medical Board and the Arizona Board of Osteopathic Examiners.

Spencer Fane LLP announced that **Jim Baglini, Jr.**, joined the firm's Phoenix office as an associate in the Intellectual Property Practice Group. He brings more than 10 years of business and technical experience in the aerospace and engineering industries to his legal practice.

Prior to entering private practice, he served as Lead for Intellectual Management at a global aerospace engineering company dedicated to creating and delivering advanced systems, products and services. He also spent time there as a Principal Propulsion Engineer before transitioning to handle IP and related legal needs.

After earning degrees in chemical engineering, materials science and engineering, he graduated from Arizona State's Sandra Day O'Connor College of Law.


ACKEN

Jennings Strouss & Salmon PLC announced that **Albert "Bert" H. Acken** joined the firm's energy practice group in the Phoenix office. He represents clients in public utility commission and other administrative proceedings, permitting, compliance and enforcement matters, and environmental, real estate, and tax litigation. He also represents energy, utility, mining, and remediation clients in business transactions, and he serves as board counsel for an aggregate mining trade association.

HONORS AND AWARDS

LuAnn Haley, Administrative Law Judge for the Industrial Commission of Arizona, was named by the National Association of Workers'

Compensation Judiciary to the inaugural class of the **Adjudicator Hall of Fame**. Judge Haley has worked in the Tucson office of the ICA since 1999. She is one of a group of eight workers' compensation judges from across the country to be named to the Hall of Fame. These judges were inducted into the Hall of Fame in December 2021 at the NAWCJ Judiciary College in Orlando, Florida.

The latest novel of Glendale attorney **WF Waldrip**, ***Gaslight***, is now available in print and Kindle editions at Amazon and other online booksellers.

Jennings Strouss & Salmon PLC announced that Managing Attorney **John C. Norling** was appointed as a member of the **Arizona Center for Nature Conservation/Phoenix Zoo**'s Board of Directors.

Norling is the Managing Attorney of Jennings Strouss and serves on the firm's Management Committee. His practice is focused on advising clients on all aspects of their operations, including but not limited to commercial transactions, real estate, business organizations, corporate law, mergers and acquisitions, automobile dealership law, and federal and administrative compliance, business contract negotiations, and advertising law.

Paul G. Ulrich grew up in Butte, Montana, and he has written and published ***Montana Stories***. Five of the book's 10 major stories are about Butte's mining history, from early placer mining days to the "war of the copper kings" and the effects of later block-cave and open-pit mining on the community. The other five are about other Montana subjects—its newspapers' history, the University of Montana, Thomas Francis Meagher, Burton K. Wheeler and Mike Mansfield. For more information or to obtain a copy, contact the author at ulrichpc@aol.com or (602) 485-5521.

Jennings Strouss & Salmon PLC, Phoenix, announced that attorney **Patrick F. Welch** was appointed as a member of **Arizona Town Hall**'s Board of Directors. The Town Hall is a private statewide nonprofit organization that focuses on fostering an open forum for discussing and exploring some of the state's most essential topics and issues.

Welch focuses his practice in general and complex commercial litigation, construction litigation, fidelity and surety litigation, and the U.S.–Mexico cross-border business transactions and litigation. He is licensed in Arizona, Nevada, and the Commonwealth of Massachusetts. Based in Arizona, he regularly assists surety and fidelity clients with all facets of Arizona and Nevada claim investigations, litigation, trial, arbitration, mediation and appeals.

Gust Rosenfeld PLC announced that **Michael C. S. J. Goodman** was appointed to the **Arizona Board of Osteopathic Examiners in Medicine and Surgery**. The Board's mission is to protect the public by setting educational and training standards for licensure, and by reviewing complaints made against osteopathic physicians, interns and residents to ensure that their conduct meets the standards of the profession. The board is made up of five osteopathic doctors and two members of the public who do not have financial ties to the osteopathic profession. The Governor appoints each member.

At the firm, Goodman's practice focuses on government, municipal and public law, including land use, development, open meeting law, conflict of interest, public records, construction law, elections, campaign finance law, annexations, civil rights, code enforcement and compliance, community facilities districts, procurement, utilities and water resources.

PEOPLE

Jennings Strouss & Salmon PLC announced the appointment of attorney **Scott F. Frerichs** as co-chair of the **Herberger Theater Fund Development Committee**. Since its opening in 1989, the Theater has contributed to the cultural and educational development of the Valley and served as advocate and incubator for the arts. The committee raises funds essential to support the Theater's outreach programs for low-income children and teens across Phoenix.

Frerichs' practice includes all aspect of construction law, including surety claims, owner/contractor disputes, mechanic's liens, bid protests, real estate disclosures, and Registrar of Contractors matters.

Chris M. Mason, an attorney at Jennings Strouss & Salmon PLC, Phoenix, was appointed as a member of the **United Food Bank**'s Board of Directors. The organization is a non-profit dedicated to ending hunger within Arizona's communities. A Feeding America member, the United Food Bank distributes more than 19 million meals to those struggling with hunger in Apache, Gila, Maricopa, Navajo, and Pinal counties, including some of the most remote areas in the state where resources are scarce and the next town can be up to 40 miles away.

Mason counsels employers and management on all aspects of labor and employment law, including collective bargaining and union organizing; restrictive covenants; employment discrimination; sexual harassment; whistleblowing; retaliation; wrongful termination; personnel policies; reductions in force; trade secrets; duty of loyalty; drug and alcohol testing; and other state and federal laws, rules, and regulations.

Snell & Wilmer announced that Phoenix associate **Matthew P. Chiarello** was elected president of the board of directors for the Phoenix Chapter of **Western Pension & Benefits Council**. He's been a member of the organization since 2016 and was first elected to the board of directors in 2019.

Chiarello focuses his practice on employee benefits, including compliance with the requirements of the Employee Retirement Income Security Act and the Internal Revenue Code. To that end, he regularly assists employers in the design, administration and documentation of qualified and non-qualified retirement plans, health and welfare plans, and executive compensation programs.

RECENTLY DECEASED

Michael S. Darflinger, Sun Lakes, Ariz.
James N. Hankey, Phoenix
Mandel E. Himelstein, Coronado, Calif.
Benjamin E. Hiser, Piqua, Ohio
Timothy G. Kasparek, Goodyear, Ariz.
Robert S. Lynch, Phoenix
Ralph W. Pepino, Flagstaff, Ariz.
Denise A. Scammon, Scottsdale, Ariz.
Howard Schwartz, Scottsdale, Ariz.
Christopher L. Straub, Tucson
Eleanor M. ter Horst, Easley, S.C.
Robert E. Updike, Moreno Valley, Calif.
Rodolfo Rudy Valenzuela, Tucson
William Lee Vaughan, Glendale, Ariz.

Send items for the People column to
people@staff.azbar.org
Items run free of charge, but because we receive many submissions, we cannot guarantee when an item will run. If you also send a photo with the item, we try to use it, depending on that month's space and the photo quality (high-resolution required).

10 THINGS I LEARNED AS ABA PRESIDENT

—continued from p. 13

10 Lawyers are heroes.

Lawyers are heroes and make a difference for people every day. Military lawyers who serve both our nation and the soldiers, sailors, airmen and marines who keep us safe. Legal aid and public interest lawyers who work on access to justice and advance arguments from the left, right and center to improve our justice system. Solo and small firm lawyers on Main Streets in every state and territory, doing the work of "people law" and meeting the legal needs of the small businesses that drive America's economic engine. Big Law lawyers who volunteer in impact litigation, death penalty cases and other matters that require major commitment of resources. Pro bono lawyers volunteering to help solve legal problems for those in our communities who are most vulnerable and underserved. Human right defenders around the world working in countries where the light of justice is just emerging and in places where there are threats to extinguish that light altogether.

The list of lawyer heroes is very long, and all of you make me proud to be a lawyer and humbled by your examples of standing up for the rule of law and the vulnerable.

Classifieds

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EXPERT WITNESSES

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A Foreign Language Service, 27 years providing certified legal Interpreting & Translations. www.400languages.com; 480-813-4242.

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Casa Grande, Early Arizona Territorial Architecture – patterned after the Rosson House in Phoenix, 4,646 sqft, eight offices, fireplace in reception area, conference room, library, spiral staircase, kitchen facility, copper roof, covered patio, large basement for storage. $850,000. 520-251-1034.

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Can't settle auto accident case on a demand letter and don't want to litigate it? Former in-house defense counsel for major insurance carrier and experienced Plaintiff attorney, Daniel S. Brill, Esq., MBA will litigate it for you and we'll split the fee in accordance with E.R. 1.5. Great references available. 480-361-2757.

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POSITIONS AVAILABLE

Criminal Law Attorney. DM Cantor offers a minimum starting salary of $125,000 per year more, depending on experience. We are looking for attorneys with three (3) plus years Arizona experience handling a wide variety of Arizona criminal law matters. Private practitioners, public defenders, and prosecutors are all encouraged to apply. We also offer outstanding benefits, which includes 30 paid days off per year, medical, dental, vision, life insurance, and 401K. Please email your resume to HR@dmcantor.com.

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"I thought one of the perks of having a family
was that you didn't have to spend
New Year's Eve alone with Chinese food."
—Miranda Hobbes, *Sex and the City*

LARSEN ART AUCTION

Ed Mell *Untitled Landscape* Est: $15,000/25,000 **SOLD**: $45,000

ACCEPTING CONSIGNMENTS

For consignment consideration, please send visuals and artwork information to consignments@larsengallery.com. Deadline for auction consignment is February 1st.

FINE ART SALES

Larsen Gallery has specialized in consigning fine art for sale for more than 28 years in the gallery.

LARSEN ART AUCTION

Mark your calendar for our spring auction on Saturday, April 23rd, 10am at the gallery.

Left: Benny Andrews *Brothers Keeper*, 1996
Est: $8,000/12,000 **SOLD**: $42,000

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