



## Gust Rosenfeld Commemorates 95th Anniversary

*Results.  
Relationships.  
Reputation.*

In 1921 four prominent attorneys and community leaders formed the law firm of Kibbey, Bennett, Gust and Smith. A short

three years later, Fred W. Rosenfeld joined Joseph H. Kibbey, Walter Bennett, John. L. Gust and Frank O. Smith in the practice of law.

Nearly a century later and under the

name of Gust Rosenfeld, we celebrate our 95th Anniversary and honor these five as our founders and partners.

Each of these civic leaders helped lay the foundation for our state, the City of Phoenix, and our firm. One was an Arizona Territorial Supreme Court Judge and Governor; another was a Yavapai County Superior Court judge and World War I veteran, and one was a Phoenix city engineer before becoming a lawyer. All were leaders in the legal community and their respective fields of practice.

Making Arizona a great place to live and work is still just as important to us today as it was to the firm's founding partners. They each contributed to the success of the firm and Arizona in their own ways both before and after Arizona gained statehood.



SEE **ANNIVERSARY** INSIDE

## How Much Risk Transfer is Allowed in Public Construction Contracts?

Changes to Arizona's "anti-indemnification" statute call for extra attention from public agencies and contractors to ensure their contracts are valid.

The law (A.R.S. § 34-226) previously prohibited a contractor from holding an agency harmless from liability caused by the agency's own negligence. The Arizona legislature amended the statute in 2013.

Now, instead of prohibiting clauses that would indemnify the agency from its own

negligence, the statute limits indemnity, "to the extent caused by the negligence, recklessness or intentional wrongful conduct" of the contractor.

Also, the statute now prohibits a contractor, subcontractor or design professional from insuring the agency against liability not permitted by Section 34-226(B).

The amendment applies to all contracts entered into after September 13, 2013.

Nonetheless, we continue to see construction contracts which require indemnity for losses "arising from the work" or "on account of the operations of" the contractor or subcontractor without the limitations covered by the amended statute.

These contracts also commonly contain "additional insured" provisions requiring the contractor or subcontractor to name

SEE **RISK TRANSFER** INSIDE

# Gun Trusts

Recent changes in federal regulations about the transfer of Title II firearms—such as machine guns, short-barreled rifles and shotguns, silencers or sound suppressors—has prompted discussion of gun trusts. Unfortunately, some of this debate has been negative and uninformed. In reality, owning firearms through a gun trust is an excellent idea for many enthusiasts.

**What is a Gun Trust?** Like any other trust, a gun trust is an agreement in which the trustee agrees to hold assets on behalf of and to the benefit of one or more people. Once created, the trust becomes a separate legal entity that owns whatever guns and related devices that the settlor chooses to transfer to it. An effective gun trust should have its own tax ID number and bank account. It should also have a secure safe in which the firearms and devices are kept. Only the trustees should have access to this safe.

**Why Have a Gun Trust?** There are two main purposes of a gun trust. First, it makes clear who actually possesses the firearm. This is crucial when dealing with Title II firearms and devices, such as select fire weapons, fully automatic firearms, silencers, and short-barreled rifles and shotguns. Although these devices are legal in Arizona, the restrictions on possession and transfer are strict.



Severe criminal penalties can result from a violation. Second, it provides clarity if an owner dies, becomes disabled, or becomes unable to possess the device. The trust remains the owner, and the alternate trustee becomes the de facto possessor. This avoids a change in possession, which can have significant legal consequences when Title II devices are involved or when the law requires an NICS check and approval for a change in ownership. It also prevents owners from inadvertently putting their family or friends in possession of devices that they might not be allowed lawfully to possess.

**Can I Use My Regular Family Trust?** Ownership, possession, and transfer of firearms are important responsibilities and are subject to significant regulation. Most family trusts do not have the provisions necessary to ensure that these devices are possessed and disposed of in accordance with the law.

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# Investing in Real Estate Tax Liens

Taxes provide income for governmental entities. When unpaid, they can also provide income for the savvy investor through tax liens, which are a senior priority lien on the property, ahead of virtually all other liens including any mortgage/deed of trust liens securing loans.

Property taxes are paid in arrears, in two half-year payments. Unpaid taxes accrue interest at 16% per annum. If the taxes, interest, and the statutory penalty fees are not paid, the tax liens are sold in an open auction conducted by the County Treasurer during the second following February after the tax year. For example, unpaid taxes for the 2015 tax year will be sold in February of 2017.

The auction process in Maricopa County is now entirely online, replacing the live auction that still exists in most of the other thirteen counties. The auction is not a matter of bidding the price up, but rather bidding the interest rate down. The winning bidder is the person who offers the lowest interest rate that must be paid to redeem the property from the tax sale, starting at 16%, pro-rated monthly. The bids go down from there in 1% increments. Years ago, when there were fewer investors, the interest rates would often settle out at 8% to 10%. However, now, with so many interested investors, especially large fund investors bidding on blocks of tax liens, the winning interest rates have dropped to 2% to 4% for most tax liens.

The winning bidder acquires what is called a Certificate of

Purchase (CP), not the property itself. After three years, if the taxes are not redeemed by the owner of the property, a lienholder such as a secured mortgage lender, or (in certain circumstances) the holder of a CP from a different tax year, then the holder may file a lawsuit to foreclose all rights of redemption.

CPs can be assigned. The person who successfully bid for the CP at the tax sale thus may not be the same person foreclosing the CP three years later.

Until a final judgment is entered in the foreclosure action, the taxes can still be redeemed, although the price goes up. After the filing of the foreclosure action, the reasonable attorneys' fees and costs must also be paid to redeem the property and dismiss the action.

Once the CP holder obtains a judgment in the foreclosure action, it applies to the County Treasurer for a Treasurer's Deed. It is this deed that then transfers the property title, completing the process of turning the tax lien into ownership of the property for the investor.

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# Gust Rosenfeld and Equitable Subrogation: From Great Depression to Great Recession

The classic comedy skit titled “Who’s on First, What’s on Second, I Don’t Know is on Third” aptly describes the lien priority disputes created by Arizona’s Great Recession. While the memory of the recession has subsided, the resulting lawsuits still continue. To date, Gust Rosenfeld has actively represented the parties in fifteen published appellate decisions addressing issues exposed by the Great Recession, including three at the Arizona Supreme Court.

At the height of the real estate boom ten years ago, Arizona was the promised land flowing with low-interest rate loans and new housing permits. Everyone was “in real estate.” With land values dramatically rising, refinancing a project during construction offered a unique opportunity to take advantage of the paper profit.

Then came the crash. Developers went bust with unpaid contractors often continuing to work hoping to get paid because of their powerful mechanic’s lien. With tumbleweeds accumulating against the portable perimeter chain link fence, only a project’s empty shell provided any value. Suddenly, the issue of lien priority mattered, and the question arose, “Who’s on first?” Unfortunately, “I Don’t Know” often made his appearance.

To resolve the issues, courts looked back to a case from the

Great Depression era involving the Ice Princess of Phoenix, Hattie Mosher. The Mosher family owned the first ice making factory in Phoenix in the late 1800s, and when Hattie’s parents died in 1910, she inherited much of downtown Phoenix. After years of funding the local social scene, Hattie ran out of cash during the Great Depression and did not pay her ever-increasing property taxes.

Gust Rosenfeld, then known as Kibbey, Bennett, Gust, Smith & Rosenfeld, opposed Hattie in many other cases, including the 1935 case known as *Mosher v. Conway*. In that case, the Arizona Supreme Court answered some of the lien priority questions raised 75 years later by holding that courts could adjust lien priority based on Equitable Subrogation.

Based on *Mosher*, and in more precedent-setting cases than any other Arizona law firm, Gust Rosenfeld successfully asserted and continues to assert the doctrine of equitable subrogation to resolve the lien priority disputes still continuing from the Great Recession.

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***Scott concentrates his practice on litigation and dispute resolution for businesses and individuals.***



## Gust Rosenfeld Named to Vault’s List of Best Small and Midsized Law Firms



Gust Rosenfeld has been named as one of the top 150 small and midsized law firms in the United States by the website Vault. Gust Rosenfeld is one of only three law firms with offices in Arizona to be included on this year’s list.

Vault’s Top 150 Under 150 list recognizes leading law firms with less than 150 attorneys, and is an information source for students and lateral candidates seeking a high-quality law firm.

According to Vault, editors for the list “assessed each firm for prestige, quality of life and professional growth opportunities, and then narrowed the results to come up with a list of 150 law firms known for providing top-notch service and delivering big results.”

“We are honored to be named to Vault’s 150 Under 150 list,” said Tom Chauncey, Gust Rosenfeld’s managing partner. “It is fulfilling to be recognized not only for results, but also for our reputation and relationships with clients, our attorneys, and our community.”

## ANNIVERSARY FROM FRONT PAGE

Using their foundation, we continue to build the communities, cities, and state which we call home. We honor them and their commitment to service by actively contributing time and resources to local and regional philanthropic causes, serving on professional and not-for-profit boards and providing pro bono legal services to organizations.

For nearly a century, we have represented Arizona's public institutions, including governmental bodies and other public entities, a majority of school districts, most of Arizona's counties, and many of her towns and cities. We also provide practical solutions for Fortune 100 companies, privately held firms, and individuals. The relationships we develop with our clients are important to us and the vital part of our success.

Through hard work and dedication, our founding partners obtained the results necessary for the success of the territory and state. We continue to focus on results our clients need to sustain their success.

Our story would not be complete without giving credit to the many people and community leaders that have called Gust Rosenfeld home at some point over the last 95 years. Each one has contributed to the success of our clients and the growth of the many communities and entities that serve Arizona.

Embracing our 95-year history, we are proud to practice as Gust Rosenfeld, as we strive to maintain the results, relationships and reputation that those names represent. We want to thank you, our friends, as we continue the tradition of serving Arizona set by our founding partners.

## RISK TRANSFER FROM FRONT PAGE

the agency and/or contractor as an additional insured on the contractor's general liability insurance policies, without appropriate limitations to comply with the statute. To the extent those provisions are broader than what is allowed under Section 34-226, they may be declared void as against public policy.

To ensure they are achieving proper risk transfer, it is vital for public agencies--and contractors undertaking public improvement projects--to carefully review the indemnity and additional insurance requirements in their contracts and confirm they do not run afoul of the amended statute.

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*Mike's practice focuses on litigation with an emphasis on construction law.*

# NEW FACES



### Nicole Sandoval

Nicole Sandoval (Phoenix Office) focuses her practice on commercial bankruptcy, restructuring, creditors' rights, related litigation, appeals and mediation. Nicole represents institutional clients, corporations, partnerships and individuals in all areas of creditor and debtor relations. She is currently receiving training to become a member of the U.S. Army Reserves Judge Advocate General's Corps (JAG).



### John T. (J.T.) Shoaf

John T. (J.T.) Shoaf's (Phoenix Office) practice includes a broad range of insurance defense and civil litigation matters. He represents clients in litigation matters dealing with construction defect, aviation and airline liability, insurance coverage and bad faith, personal injury, medical malpractice, healthcare, and products liability claims.

## ET·Y·MOL·O·GY COR·NER



### Mother Knows Best

These days, parties to a dispute often employ an arbitrator (Old French from Latin root for one who hears and decides disputes). Some prefer a mediator or one who intervenes to help the parties reach a settlement (Late Latin). As a child, it was my mother who acted as arbitress (first used in English as a feminine noun in the 14th century) to determine grievances among my brothers and me. Justice was swift and certain. There was no mediation.

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*Rick, our etymologist, practices in the areas of commercial law and litigation.*

# PERSONAL NOTES



**Nicholle Harris** was honored by Az Business Magazine as one of its Most Influential Women in Arizona Business for 2016. The women were selected from a pool of more than 1,000 candidates by the editorial team at Az Business Magazine and a panel of industry experts.

**James W. Kaucher** has been invited and accepted into the Federation of Defense and Corporate Counsel. An organization comprising leaders in insurance and corporate defense, FDCC membership is a selective membership judged by their peers to have achieved professional distinction. Also, Jim presented in April to the Arizona Healthcare Association on “Proposed Changes to the Overtime Regulations Under the Fair Labor Standards Act.”

**Danielle J. K. Constant** will serve as secretary to the board of the Tucson Defense Bar for 2016-17. Danielle was also appointed to the advisory board of the Salvation Army of Tucson.

**Scott A. Malm** spoke at the annual meeting of the American Escrow Association about the effect of new technologies on real estate escrows.

In September, **Susan Goodwin** spoke on legal issues in an eight module certification course for Job Order Contracting under A.R.S. Title 34. The certification program is sponsored by the Alliance for Construction Excellence at Arizona State University.

**Susan Goodwin** and **Phyllis Smiley** conducted the City Attorney Fundamentals portion of the annual Arizona City Attorneys Association two-day meeting in May. The topic this year was “Land Use Law Basics”.

**Tom Chauncey** was elected to the board of directors for Soldier’s Best Friend. The organization provides U.S. military veterans living with combat-related Post Traumatic Stress Disorder (PTSD) or Traumatic Brain Injury (TBI) with service or therapeutic companion dogs, most of which are rescued from local shelters.

August was a month of milestones for **Fred H. Rosenfeld**. On August 1, Fred celebrated his 52nd anniversary with the firm; August 10 was Fred and wife Marilyn’s 53rd wedding anniversary.

In September, **Christopher M. McNichol** and **Kent E. Cammack** spoke at the annual convention of the Arizona Trustee Association. The topic was deed of trust issues.

**Christopher M. McNichol** is speaking at the Arizona Association of Corporate Counsel in December on the subject of springing/limited recourse guaranties.

In May, **Zachary D. Sakas** presented “Options for Financing in the Bond Market” to the Government Finance Officers Association of Arizona. In another meeting in January to GFOA/AZ and the Arizona City/County Management Association, Zach presented “Bond Elections 101.”

**Craig L. Keller** was elected chairman of the board of the Tempe Coalition. The organization comprises a broad mix of local residents and professionals who work to improve the City of Tempe by advocating for the reduction of underage drinking and drug use among Tempe youth.

**Laura Sever Blanco** wrote an article for The Arizona Banker magazine titled “Timing is Critical for Competing Liens,” outlining why the Arizona landlord’s lien statute may prefer the landlord’s secured interest to that of the lender.

**Timothy A. Stratton** is Vice Chair and Co-Editor of the Editorial Board for the upcoming 7th Edition of the Federal Securities Laws of Municipal Bonds Deskbook, published by Lexis-Nexis. Tim has previously served on the editorial board, as well as a contributing author on past editions.

**Kyle Bate** has been elected to the board of directors of Friendly House, a multi-service organization with wide-ranging programs aimed at addressing the pressing needs of our diverse community.

**John L. Hay** was named by Az Business Leaders magazine as a leader in intellectual property law for 2017.

In a recent edition of the publication Bond Buyer, Gust Rosenfeld is ranked as top bond counsel in Arizona, with volume of \$1,268.9 million, according to Bond Buyer’s midyear review. The publication also ranks Gust Rosenfeld at sixth for bond counsel in the Southwest.

## Gust Rosenfeld Attorneys Named in Best Lawyers in America® 2017

Gust Rosenfeld is pleased to announce that 17 of the firm's attorneys, across 18 practice areas, were selected by their peers for inclusion in the Best Lawyers in America® 2017.

The 23rd edition of Best Lawyers in America®, one of the most respected and oldest peer review publications, includes 54,905 attorneys in 140 practice areas covering all 50 states and the District of Columbia. Inclusion in this year's publication is based on more than 7.3 million detailed evaluations of lawyers by other lawyers. In addition, lawyers are not required or allowed to pay a fee to be listed. Inclusion in Best Lawyers is considered a singular honor.

The following Gust Rosenfeld attorneys were named in Best Lawyers in America® 2017, with their respective practice area(s) designated by Best Lawyers:

### Phoenix

- **Tom Chauncey II** (Corporate Law)
- **Susan D. Goodwin** (Municipal Law)
- **Robert D. Haws** (Education Law; Employment Law – Management; Litigation – Labor and Employment)
- **John L. Hay** (Franchise Law)
- **Gerald L. Jacobs** (Real Estate Law)
- **Christopher Kramer** (Eminent Domain and Condemnation Law)
- **Jennifer MacLennan** (Education Law)
- **Christina M. Noyes** (Franchise Law)
- **Sean P. O'Brien** (Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law)

- **Frederick H. Rosenfeld** (Corporate Law; Municipal Law; Public Finance Law)
- **Scott W. Ruby** (Corporate Law; Public Finance Law)
- **Richard H. Whitney** (Trusts and Estates)
- **Charles. W. Wirken** (Appellate Practice; Franchise Law)

### Tucson

- **Mark L. Collins** (Litigation – Real Estate; Real Estate Law)
- **Peter Collins, Jr.** (Commercial Litigation, Insurance Law, Personal Injury Litigation – Plaintiffs)
- **James W. Kaucher** (Professional Malpractice Law – Defendants)
- **Gerard R. O'Meara** (Litigation – Banking and Finance)

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