

No Crickets in the Courtroom

In March 2020, the way the world conducted business fundamentally changed, and the practice of law was no exception. An increasing reliance on working remotely? Check. An increase in digital reliance? Check. Business meetings held



entirely via Zoom? Check. “Zoom” becoming the term used to refer to any web-conferencing platform? Check.

While some business stopped or slowed, litigation saw only a brief hiccup in April 2020. For the most part, court deadlines did not freeze in the wake of the pandemic. Discovery responses and document production were still due on time. Depositions switched from in-person to Zoom. Zoom mediations and arbitrations became the norm. The only noticeable pause in litigation occurred at the height of the pandemic as Federal and Superior Courts postponed bench and jury trials. Now that Arizona’s infection rate has decreased and remains somewhat stable, the courts have resumed a trickle of trial operations.

In the federal District Court of Arizona, two of Gust Rosenfeld’s Phoenix attorneys defended the first in-person jury trial in the state since the start of COVID. To aid the jury selection process, the court, with the input of counsel, issued a lengthy jury questionnaire including questions for infection exposure, financial hardship due to COVID, and the ability to be fair and impartial due to COVID concerns. By the time the parties and the court narrowed the pool due to questionnaire responses, the process of selecting a seven-person jury took only 90 minutes. The pre-COVID jury selection process could take a half-day or more.

SEE **CRICKETS** INSIDE

Public Meetings in a Pandemic

The pandemic of 2020 quickly transformed the conduct of public meetings, moving meetings to a virtual format for the foreseeable future. Although many political subdivisions previously used YouTube or Facebook Live to stream public meetings, we have seen further adaptations with technology to allow meetings to operate entirely on online platforms. These choices ensure the rights of the public are maintained to view agendas, attend meetings in real time, and comment on agenda items during the pandemic.

We have assisted public bodies in using web meeting platforms, including WebEx, Microsoft Teams, Zoom, and GoToMeeting in ways that allow public access required by Arizona law. Public



SEE **PUBLIC** INSIDE

Loans: Home Construction v. Home Improvement

Personal Liability on the Loan Depends on the Distinction

Arizona law shields a home-loan borrower from being sued personally on a residential mortgage loan under certain circumstances. The criteria are found in the commonly called anti-deficiency statutes.

To qualify for such anti-deficiency protection, the residence and loan must meet three essential criteria: (i) the property must be 2-1/2 acres or less; (ii) it must be a single one- or two-family dwelling; and (iii) the mortgage must secure a purchase money loan. If all three apply, the lender's remedy is only against the property as the collateral, i.e., foreclosure; the lender may not pursue a money judgment against the borrower.



The last two factors are the tricky ones and answering the question of whether a particular loan is "purchase money" for a "dwelling" is not as easy as the terminology may suggest.

For instance, consider where someone finances (i) an empty lot to build a brand new house, (ii) a partial tear-down of an existing

house for an expansion, (iii) a remodel to add just one room, or (iv) a new pool addition versus renovating an existing pool. All loans enhance the value of the property. But is the particular loan being used to "purchase" a "dwelling" within the statutes' specific language?

In addressing a grey area between home "construction" loans and home "improvement" loans, the Arizona Supreme Court recently listed various non-exclusive factors to consider when determining anti-deficiency protection. For example, the court distinguished a loan for a newly constructed house built from scratch, which is entitled to anti-deficiency protection, from a home improvement loan used to remodel a kitchen, which is not.

Other factors to consider include: whether the existing structure was demolished and replaced by a new building; what the parties intended; whether the building was lived in (or livable) during construction; whether the existing building was preserved and improved, or substantially expanded; and how the loan and governmental permitting documents characterize the project as either "home improvement" or "construction."

Bottom line: Be mindful of how the funds will be used and what the description of the loan is when buying, improving or lending on a house.

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meetings, much like other virtual meetings, have been subject to "Zoom bombings," which require quick thinking to recess meetings and either come back within 24 hours or reschedule.

Executive sessions in public meetings have posed a particular challenge for public meetings. Some public bodies trust that members of the public disconnect from the meeting platform while others use separate meetings to ensure only appropriate persons are in the executive session to maintain confidentiality. We recommend a time-specific approach for any anticipated executive session to provide the public with notice of when the public portion of the meeting will reconvene.

Minutes of a public meeting may pose another challenge during the pandemic. The Open Meeting Law does not require the approval of minutes, but many public bodies' policies require

approval. The recording made over the web meeting platform may suffice if it is used and works appropriately and is retained in accordance with the Arizona State Library and Archives retention requirements.

Finally, public bodies may want to review the support information posted with the agenda twenty-four hours before the meeting to ensure the information posted to the public sufficiently describes the agenda items. The public should be able to review documents related to personnel changes, payments of vouchers, reports, and presentations made to the public body in the same location as the meeting notice on the public body's website.

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Carrie concentrates her practice on education law and local public safety retirement boards.*

Best Lawyers® Names Four Gust Attorneys “Lawyer of the Year,” Five as “Ones to Watch” as Best Lawyers in America® for 2021

Lawyer of the Year

This honor is an award to a single lawyer in each practice area in a community.



Frederick Cummings
Personal Injury Litigation –
Defendants (Phoenix)



Gerard R. O'Meara
Banking and Finance (Tucson)



Susan Plimpton Segal
Municipal Law (Phoenix)



Charles (Chas) W. Wirken
Franchise Law (Phoenix)

Ones to Watch

This award is a new category that honors attorneys who have been in practice for fewer than ten years.



A. Daniel Coumides
Commercial Litigation



Samantha Winter McAlpin
Litigation – Trusts and Estates;
Trusts and Estates



Mina C. O'Boyle
Litigation – Real Estate



Melissa S. San Angelo
Commercial Litigation; Litigation
– Labor and Employment; Personal
Injury Litigation – Defendants



Robert Williams
Bankruptcy and Creditor
Debtor Rights / Insolvency and
Reorganization Law; Commercial
Litigation; Litigation – Bankruptcy

Lights, Camera, Action! Here are 3 Simple Video Conferencing Tips:

1. *Lights.* Ensure you have adequate lighting. Good lighting can be accomplished naturally by opening up window coverings, turning on an overhead light, or using a ring light to provide that glamorous shot the Instagrammers have honed to perfection.

2. *Camera.* Avoid unflattering camera angles. Too high? Too low? Too close? Too far away? We've all been distracted by unfortunate camera angles. Place the camera at eye level. Look at the screen as if you're looking at the person to whom you're speaking.

3. *Action.* Be in the moment. Avoid the temptation to read emails or scroll through stories. You also need to make sure your technology is working optimally. Test your audio and be prepared to mute and unmute yourself. Finally, experiment with video conferencing tools before the big day. There are lots of great options, like screen shares, available. Be mindful of how these tools work to avoid mishaps (like compromising confidential information on your desktop being shared with third parties).

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Trish's practice includes public law, civil litigation, bankruptcy and creditors' rights, employment law, and alternative dispute resolution.

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The court prepared the courtroom specifically for in-person trials and hearings. Seven jurors were safely socially distanced in the jury box (six jurors and one alternate). The witness on the stand sat behind walls of Plexiglass so that testimony could be given without a mask. The attorneys argued and questioned witnesses without a mask, but were required to replace their masks after that. Everyone else in the courtroom was required to mask up. All exhibits were handled electronically. While there was a concern before trial about potential exposure and the effect on case presentation, fears were soon alleviated. The federal court is almost back to business as usual.

Two Tucson Gust Rosenfeld attorneys recently defended a civil lawsuit in a Maricopa County Superior Court bench trial (no jury). As in federal court, there was a similar Plexiglass set up and electronic exhibit handling. However, there were only 12 people allowed in the courtroom at any time, limiting client access to the proceedings. The court furnished a GoToMeeting login for interested parties to watch and listen. Unfortunately, technology limitations and glitches kept bumping observers out, removing audio, and the camera was pointed at the lawyers' mid-sections. No witnesses or exhibits could be seen, and hearing presenters was difficult when the lawyers turned their backs to the camera.

Social distancing was practiced, allowing only one lawyer per table. Lawyers co-trying the case were allowed to pass notes and send text messages to each other. Lawyers were required to wear face-shields or masks. Witnesses were sequestered in jury rooms and vacant offices. They were allowed to continue to wear face masks during testimony if preferred. For witnesses testifying via web conferencing, there was an evident lag between the speaking parties.

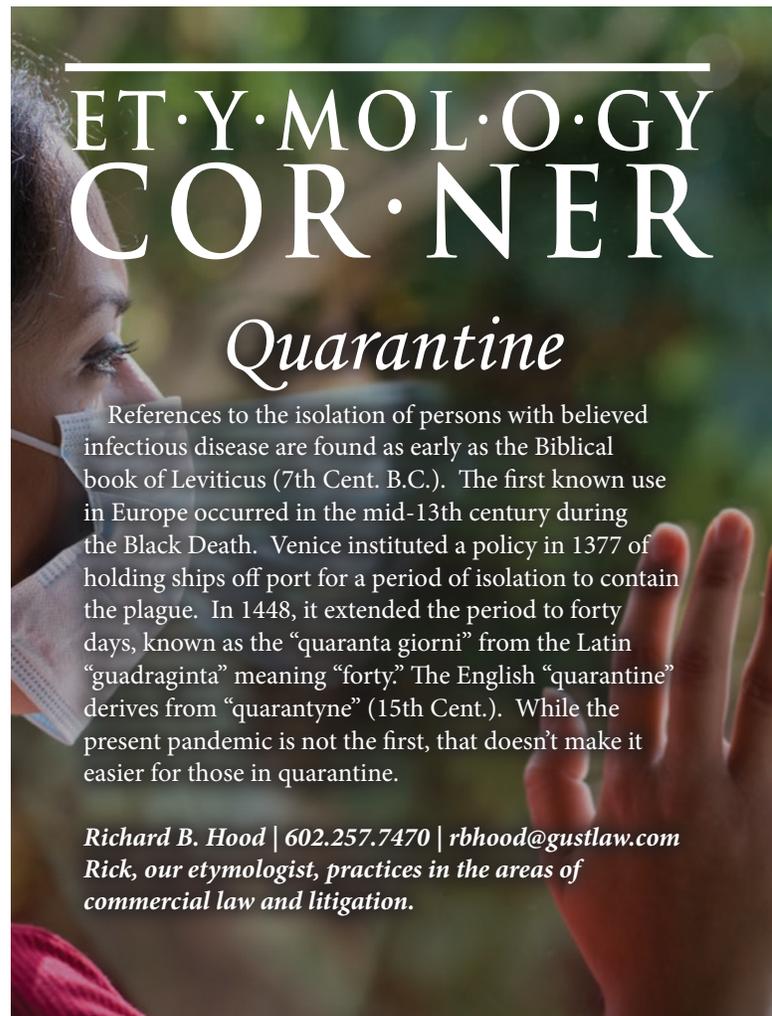
These changes required all those involved to be patient and adapt. We

expect many of these adaptations to continue and to change the way cases are tried even after COVID is no longer a threat.

In the Pima and Maricopa County courts (and Bankruptcy District Court), all hearings and discovery matters are currently being handled via teleconference and Zoom. In-person jury trials are not expected to resume in Superior Courts until Spring 2021; and even then, criminal trials will have a preference. The backlog may push parties into agreeing to bench trials or settling cases they might not otherwise settle. Despite this pandemic, we continue to work diligently on our cases, and there are certainly no crickets in the courtroom.

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Heather's practice focuses on health care and general litigation with an emphasis on insurance defense and coverage.

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Megan focuses her litigation practice on complex insurance coverage analysis and litigation and insurance defense.



References to the isolation of persons with believed infectious disease are found as early as the Biblical book of Leviticus (7th Cent. B.C.). The first known use in Europe occurred in the mid-13th century during the Black Death. Venice instituted a policy in 1377 of holding ships off port for a period of isolation to contain the plague. In 1448, it extended the period to forty days, known as the "quaranta giorni" from the Latin "quadraginta" meaning "forty." The English "quarantine" derives from "quarantyne" (15th Cent.). While the present pandemic is not the first, that doesn't make it easier for those in quarantine.

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



Making the Best of the 2020 COVID Quarantine

While we have all quarantined during the COVID outbreak in one way or another, here are ways that our attorneys thrived and made the best of a crazy and unique situation. What things did you do to get through the ongoing quarantine?

Barbara Pashkowski – Took up a new hobby: bird watching. "Hummingbirds, those beautiful little creatures! Who knew they could be so aggressive when protecting 'their' feeder!"

Chris McNichol – Started a small saltwater fish tank (36-gallon "nano") complete with colorful saltwater fish like clownfish ("Nemo"), invertebrates (shrimp and snails), and coral. A lot to it beyond temperature and clarity, for example, salinity, pH, ammonia, nitrite/nitrate, lighting and protein skimmer.

Christina Noyes – Expanded culinary skills as each kid/adult is on a different meal plan: gluten-free, vegan, vegetarian, no red meat, pescatarian, high protein/low calorie, or keto. For each meal, one person, maybe two, is happy. The rest, united in grumpiness.

William Sowders – Grew an amazing vegetable garden and completed a one-mile swim. Also, took the time to prepare the application materials for the State of Hawaii Bar Exam and registered to take it in February 2021.

Susan Segal – Started lessons with a French tutor.

Scott Malm – Organized his baseball and football cards. Some notable baseball cards include Mickey Mantle, Hank Aaron, and Sandy Koufax. Two interesting football cards to note: 1) a famous running back who became infamous for his murder case; and 2) a famous quarterback with the last name Manning whose first name is not Peyton or Eli. Can you guess their names?

Rob Haws – Hit a lot of tennis balls with the ball machine. Backhand is on point and ready for the USTA fall season. The best hike during quarantine was Peralta Canyon Trail in the Superstition Mountains.

Susan Goodwin – Learned to cook gourmet dishes (finally). Studied and figured out how to build a raised vegetable garden (in process). Read lots of books. Improved my technology competence (in process for the rest of my life).



Heidi F. Purtzer (Phoenix Office)

Heidi's practice includes a broad range of insurance defense, civil litigation, real estate, and complex commercial litigation matters. Heidi is involved in all aspects of litigation, including trial practice, mediation, and depositions, and she brings a practical perspective to planning and executing these dispute resolution and litigation strategies.

Heidi received her J.D. from the Sandra Day O'Connor College of Law at Arizona State University, where she was a Pedrick Scholar and served as the Senior Article Editor for the Sports and Entertainment Law Journal. She earned a Master's degree in Sports Management and Leadership from Northeastern University and a B.A. in Social Science from Michigan State University. While at Michigan State, she was a four-year varsity athlete on the softball team.



Jeffrey L. McLerran (Phoenix Office)

Jeff brings more than 13 years of health care, insurance, and litigation experience. His practice focuses on the defense of claims asserted against health care providers. He has extensive litigation and trial experience in medical malpractice, medical negligence, professional licensing, credentialing issues, personal injury defense, contract interpretation, and wrongful death.

Jeff earned his J.D. from the Sandra Day O'Connor College of Law at Arizona State University. He earned his B.A. in Economics Accounting from the University of Texas.



Frederick Cummings (Phoenix Office)

Fred has extensive trial experience in the areas of health care, medical malpractice and medical products liability defense litigation. He also has significant experience in all aspects of complex litigation.

In his health care/medical malpractice defense practice, Fred has represented more than 1,000 physicians and dentists in malpractice suits before federal and state courts and in disciplinary and licensing proceedings before the state licensing boards. He also has defended lawsuits on behalf of a number of major Arizona hospitals and has defended medical products manufacturers, distributors and retailers against products liability claims.

Fred earned his J.D. from the Georgetown University Law Center and his B.S.F.S. from Georgetown University.

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