

Law Firm Shares Spring Training Tradition Gust Rosenfeld has longtime ties with community, sports

The details of how Gust Rosenfeld assisted the City of Mesa in financing Cubs Park might be too “inside baseball” for many, but one thing is clear: the firm is continuing its tradition of ensuring that spectacular, publicly funded projects around the state succeed.

Gust Rosenfeld Executive Committee Member **Scott Ruby** explained that the firm has a longtime tie with baseball and spring training. As the lead financing attorneys when then-Bank One Ballpark (now Chase Field) was constructed, Gust Rosenfeld was also on board for the financing of several spring training facilities in Scottsdale, Goodyear and Peoria. Gust Rosenfeld has also served as bond counsel on hundreds of occasions for a wide range of projects, from the CAP

canal to a domed athletic facility in the Round Valley school district. Ruby noted that the firm has had an ongoing relationship with the



City of Mesa, having worked with that city since the mid-1940s. The law firm's roots in Arizona and its preeminence in bond law go back to the 1920s. In 1921, the firm of Gust & Smith merged with Kibbey & Bennett, which was established in 1909 in Arizona and makes Gust Rosenfeld the oldest law firm in the state.

John L. Gust was Arizona's first bond lawyer. Fred W. Rosenfeld joined the firm in 1924 and developed the municipal bond practice, which continues to be nationally respected today. His son, **Fred H. Rosenfeld**, joined the firm in 1964

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Gust Rosenfeld Announces New Office in Wickenburg, Arizona

Gust Rosenfeld announces that the law firm has opened an office in Wickenburg, Arizona, at 579 W. Wickenburg Way. With the office opening, **Craig Keller** and **Thomas Hickey**--who have extensive practices in the Wickenburg and Tempe areas--join Gust Rosenfeld, as partners.

Keller has had a law office in Wickenburg for more than 25 years, and Hickey has practiced law in Wickenburg since 1989.

“We are excited to expand our offices to Wickenburg and delighted to welcome Craig and Tom to Gust Rosenfeld. The West Valley has been one of the fastest growing areas of the state and Wickenburg, along with the firm's presence in Avondale, Tolleson and Buckeye, is an

ideal location to further strengthen our commitment to serve the West Valley,” said **Scott Ruby**, a member of the Gust Rosenfeld Executive Committee.

“Craig and Tom are outstanding attorneys with thriving practices in areas that complement the work we do here at Gust Rosenfeld. Like all of the attorneys at Gust Rosenfeld, Craig and Tom have demonstrated a commitment to delivering the highest level of legal services to clients in the most effective and efficient manner.”

Craig Keller has been litigating business, construction and real estate cases in Arizona for more than 33 years and has argued cases in the Ninth Circuit Court of Appeals, the Arizona Supreme Court, and the Arizona Court of Appeals. He is a Phi Beta Kappa

graduate from the University of Arizona and received his Juris Doctorate from the University of Arizona College of Law. He was admitted to the State Bar of Arizona in 1982.

Tom Hickey's practice areas include estate planning, probate, estate and trust administration and commercial and real estate disputes. He grew up in Anchorage, Alaska, where he was an Eagle Scout and an exchange student to Finland. Hickey graduated from Northern Arizona University with a Bachelor of Science in Business Administration and received his Juris Doctorate from the University of Arizona College of Law. Hickey was admitted to the State Bar of Arizona in 1989. He is past president of the Kyrene Corridor Rotary Club in Tempe.

“Tom and I are honored to be asked to join this outstanding law firm that has been so important to the history of our state and

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Craig Keller



Thomas Hickey

Directors, Officers of Nonprofits Face Risks, Liabilities While Serving

While serving as a director or officer of a nonprofit organization can be very rewarding, it can also be risky. If board members' duties are not properly carried out, both the nonprofit entity and the directors and officers personally may be at risk. By adhering to certain standards of conduct and adopting and enforcing adequate policies, potential risks can be reduced.

Directors and officers owe a fiduciary duty to nonprofit organizations. In carrying out these duties, officers and directors must exercise the business judgment rule, which means they must be informed of the facts (including making reasonable inquiry to ascertain the facts) and must make decisions in good faith and without conflicts of interest, bias or outside influences. Finally, they must make reasonable decisions, founded on sound, rational and defensible bases, which are in the best interests of the corporation.

In most circumstances, directors or officers exercising the business judgment rule and fulfilling their duties will be able to raise the business judgment rule as a defense to claims made against them. Factual showings of fraud, bad faith or gross overreaching will defeat the business judgment defense.

Overview of the Duties

1. The Duty of Care

Directors and officers must act prudently and reasonably in discharging their duties. They must act in good faith and in the best interests of the organization. Regularly attending meetings, putting proper financial and management controls in place, ensuring the validity of information provided by outside professionals, and carefully and regularly reviewing the bylaws are examples of acts that fulfill the duty of care.

2. The Duty of Loyalty

The duty of loyalty prohibits directors and officers from using their position in the organization to further their own personal interests. They must disclose all relevant information in their possession or control about any decision or question before the Board. Conflicts of interest, usurpation of a corporate opportunity and

breaches of confidentiality all violate the duty of loyalty. Conflicts of interest often arise on nonprofit boards because members tend to be recruited on the basis of business relationships and professional affiliations. The existence of a potential conflict does not automatically preclude the transaction; the parties should seek guidance and take proper precautions.

3. The Duty of Obedience

This duty is unique to nonprofit organizations and requires directors and officers to run the organization in accordance with its charter and bylaws and in compliance with all federal, state and administrative laws and rules. Directors and officers must ensure that the organization is adhering to its mission.

If these duties are breached, any person or entity affected by the breach may file a claim. Nonprofit organizations are susceptible to both statutory claims (federal, state, local law) and common law claims (negligence, defamation, fraud) among others. Officers and directors may face personal liability if they breach their duties.

Best Practices

Nonprofits can minimize risks of claims and liabilities by adopting and enforcing adequate policies and oversight procedures. This requires proper selection and education of board members, strong internal financial controls, accurate meeting minutes, and prompt investigation of accusations of misconduct.

Some nonprofits may provide indemnification for their directors and officers, but the cost of defense may exceed the available funds. Insurance coverage may be an option.

This is just a brief synopsis of pitfalls and practices for nonprofit directors and officers. Gust Rosenfeld has expertise in setting up nonprofit organizations, advising nonprofit boards on corporate governance, writing and amending bylaws, advising on insurance coverages, and investigating and litigating claims.

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Wendy is a litigator focusing on construction, breach of contract and commercial law.

Tech Corner: GR on Facebook

In the legal world, there is nothing more important than effective and efficient personal communication between a client and her attorney. Gust Rosenfeld prides itself on extraordinary communication and is embracing the tools of modern technology to supplement and broaden that communication. Social media streams such as Twitter and Facebook provide an up-to-the-minute, excellent means to communicate current developments and information for our clients.

The firm's updated website, found at www.gustlaw.com, and its Facebook page, at www.facebook.com/GustRosenfeld, are both portals that will enhance the ongoing relationship between our firm, our clients, and prospective clients. Take a look at both and let us know what you think. We look forward to communicating with you via all the methods the modern world provides to help you solve your challenges, and achieve your goals.

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Chris practices in the area of governmental law.

www.facebook.com/GustRosenfeld



Municipal Advisor or Bond Underwriter: Distinguishing Between Them Is Important Detail

A new rule governing advisors adopted by the Securities and Exchange Commission (SEC) has important implications for bond issuers. Effective July 1, 2014, the rule distinguishes between bond underwriters and municipal advisors. The rule requires municipal advisors to register with the SEC and subjects them to various regulatory obligations, such as disclosure and record keeping.

The most important points of the rule for bond issuers are that municipal advisors 1) provide general information to political subdivisions that does not involve a recommendation regarding municipal financial products or the issuance of governmental securities and 2) owe a fiduciary duty to political subdivisions that

is generally understood to encompass a duty of loyalty and a duty of care requiring it to act in the political subdivisions' best interests without regard to the municipal advisor's own financial or other interests.

Bond underwriters, on the other hand, are excluded from the rule's definition of municipal advisor if they advise the political subdivision on the structure, timing, terms and other similar matters in the context of a particular bond issue. Bond underwriters do not represent political subdivisions and are not subject to the same duty of loyalty and duty of care as a municipal advisor. However, under Rule G-17 of the Municipal Securities Rule-Making Board, bond underwriters owe a duty of fair dealing to any political subdivision.

Whenever a political subdivision is approached with a financing proposal, it is important to consider whether the proposal is being offered by a municipal advisor or not, because the classification of such advisor will necessarily dictate whether such person is actually representing the political subdivision (with the corresponding fiduciary duty). Please consult your Gust Rosenfeld bond counsel if you have any questions regarding the rule, in general, or municipal advisors and bond underwriters, in particular.

*James T. Giel | 602.257.7495 | jgiel@gustlaw.com
Jim practices in the area of public finance.*



Madeleine Wanslee Appointed Federal Bankruptcy Judge

Gust Rosenfeld congratulates partner **Madeleine C. Wanslee** on her appointment as a United States Bankruptcy Court judge. She was selected by the United States Court of Appeals for the Ninth Circuit and took the bench March 17, 2014. She fills a judgeship vacated by Chief Judge Randall Haines, who retired.

Wanslee, who served on Gust Rosenfeld's Executive Committee and was a co-chair of the Bankruptcy Restructuring and Creditors' Rights Practice Group, spent her entire 23-year legal career at Gust Rosenfeld. She focused her practice on creditors' rights and related state and federal court litigation, including commercial and consumer bankruptcy, loan workouts, foreclosure, replevin, deficiency and guarantor actions. She was a founding member of the Arizona Bankruptcy American Inn of Court and Bankruptcy Section Chair of the State Bar of Arizona.

In reflecting upon her experience at Gust Rosenfeld, Wanslee said, "I was privileged as a young lawyer to join this highly respected firm after clerking for a U.S. bankruptcy court judge. I had the good fortune to be mentored by Sean O'Brien, chair of my practice group, and to have the opportunity to work with the many exceptional colleagues at Gust Rosenfeld. My mother said I always wanted to go to law school and be a judge. So, while it is difficult to leave the firm, I am privileged and honored to be appointed to the bankruptcy bench. I believe being a judge is a form of public service."

Wanslee, a graduate of the University of Arizona, received her J.D. from the Gonzaga University School of Law where she was Executive Editor of the Gonzaga Law Review. During her career at Gust Rosenfeld, she was recognized in the Bankruptcy and Creditor-Debtor Rights Law category of the Best Lawyers in America® and Southwest Super Lawyers® and argued a matter before the United States Supreme Court.



All's Not a Dwelling

Earlier newsletter articles have discussed the Arizona laws that prevent the lender from suing the borrower for a deficiency--defined as the loan shortfall after the foreclosure of a mortgage--if, among other things, the property is limited to and utilized as a single one- or two-family dwelling.

Defining dwelling is key. The Arizona Supreme Court stated a few years ago that a house being built by a commercial borrower for ultimate resale to its first resident was not a deficiency-exempt dwelling where it had never been lived in. Thus, the commercial borrower was not protected by the anti-deficiency statutes.

Just two years ago, in a ruling which some suggest was driven more by public policy than a strict harmony with the early decision, the Court of Appeals held that a not-quite-finished and thus never-lived-in house was nevertheless a dwelling because the individual borrowers "intended" to live there had it been completed. That intent brought those borrowers within the ambit of the statutes.

So what would happen if the borrower had not yet started any construction on a house before the default and foreclosure? The Court of Appeals recently ruled that even though the borrower intended to build the house, the borrower was not protected. In other words, completely vacant land is not a dwelling.

The court left undecided in this context how far a borrower must go in starting to build the house, or if it even matters whether the borrower is an individual who intends to live in the house or is instead a commercial developer who plans to sell the house upon completion to its first occupant.

Stayed tuned. The Arizona Supreme Court may yet speak again on the issue, and the legislature has bills pending that attempt to better define when a property qualifies as a dwelling under the anti-deficiency statutes.

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Chris practices in the area of real estate transactions and litigation.

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and currently practices in the areas of municipal bonds and government law. Fred is a co-founder and charter member of the American College of Bond Counsel.

In addition to handling the full spectrum of legal services, Gust Rosenfeld supports a culture of giving back to the community. Gust Rosenfeld attorneys and staff offer countless hours, both as volunteers and through providing pro bono services, to support professional and nonprofit organizations. Of course, we still find time to cheer on the Cubs.

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has such an exceptional reputation in the legal community. We look forward to working with Gust Rosenfeld, which will allow us to offer legal services to our clients in additional practice areas," said Craig Keller.

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Craig L. Keller | 602.257.7663 | ckeller@gustlaw.com
Craig's practice focuses on litigating business, construction, and real estate cases.

ET·Y·MOL·O·GY COR·NER

Did You See It?

The word "balk," from the Old English "balc," originally meant a ridge of land left unplowed by mistake. Over the years, it has come to mean to stop short or refuse to proceed. In baseball, a balk is called when a pitcher starts his motion to the plate, but then fails to make the pitch. Runners are awarded one base. Unlike Justice Potter Stewart, few "know it when they see it," including umpires.

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



PERSONAL NOTES



Barbara U. Rodriguez-Pashkowski presented “Wastewater Treatment Regulations” at the 2014 Gatekeeper Regulatory Roundup Conference in February and presented “Site Assessments – Doing It Right – The Benefits for Purchasers & Tenants” at the Environmental Information Association Conference in San Antonio, Texas, in March.

In January, **Thomas M. Murphy** was appointed Honorary Commander of USAF’s 12th Air Force.

Mingyi Kang was recently installed as President of the Greater Phoenix Chapter of the Asian Real Estate Association of America (AREAA). In addition, he was approved as a member of AREAA’s National Board of Directors.

Timothy A. Stratton was invited to participate on a panel discussing municipal bond disclosure and federal securities law issues at the recent annual meeting of the Government Finance Officers of Arizona in Prescott. The meeting’s attendees included government chief financial officers, business managers and other finance professionals from across Arizona.

Christina M. Noyes has been named Secretary to the Board of Directors of the Phoenix Community Alliance.

Peter Collins Jr. received the Outstanding Pro Bono

Attorney of the Month Award for December 2013 by Southern Arizona Legal Aid’s Volunteer Lawyers Program for his efforts and contributions to the program.

Jody A. Corrales became a Certified Bankruptcy Law Specialist as approved by the State Bar of Arizona’s Board of Legal Specialization.

Michael S. Woodlock is now the budget officer for the executive council of the State Bar of Arizona’s Construction Law Section.

Christopher M. McNichol presented “Guaranties in Community Property Situations” at the Maricopa County Association of Paralegals CLE in February.

Kent E. Cammack and **Christopher M. McNichol** spoke on IRS Noticing Issues at a recent Arizona Trustee Association luncheon.

Robert D. Haws and **Jennifer N. MacLennan** made presentations to the Arizona School Personnel Administrators Association.

Robert D. Haws presented on “I-9 Compliance” and on “Medical Marijuana in the Workforce” at the Arizona Chapter of the International Public Management Association for Human Resources.

Southwest Super Lawyers, Rising Stars

We are pleased to announce that seven of our lawyers have been selected for inclusion on the *2014 Southwest Super Lawyers*® list. Each year, no more than 5 percent of the lawyers in Arizona receive this honor. Those selected, by practice area, are: Appellate – **Charles W. Wirken**; Bankruptcy & Creditor/Debtor Rights – **Séan P. O’Brien**; Business Litigation – **Richard A. Segal**; Estate Planning & Probate – **Richard H. Whitney**; Insurance Coverage – **Peter Collins, Jr.**; Real Estate – **Gerald L. Jacobs** and **Christopher M. McNichol**.

In addition, four of our lawyers have been named to the Arizona Rising Stars list as some of the top up-and-coming attorneys in Arizona for 2014. Each year, no more than 2.5 percent of the lawyers in the state receive this honor. Those selected by practice area are: Bankruptcy & Creditor/Debtor Rights – **Jody A. Corrales**; Real Estate – **Mingyi Kang** and **Calvin J. Platten, Jr.**; Government Finance – **Sarah C. Smith**.

NEW FACES



Sonia M. Blain

Sonia focuses her practice in the areas of creditors’ rights, bankruptcy and real estate transactions. Her experience includes commercial and government bankruptcy, foreclosures, loan transaction documentation, quiet title, eminent domain and development agreements. Previously, she was Assistant General Counsel for Chase Bank where she represented the bank in all levels of bankruptcy matters, including workouts and litigation. Sonia also served as Assistant City Attorney for the City of Phoenix where she provided bankruptcy advice for city departments and their counsel in bankruptcy court. Sonia received her Juris Doctor from Southern Methodist University and Bachelor of Science from Barnard College, Columbia University.

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The Internet is Forever...My Presence is Not

People of all ages, generations, and levels of technical knowledge are “plugging in” to the internet, which turns 25 years old this year. The children of today will never know a world without the internet and many people are adopting the web and social media as their primary means of communication, information, and entertainment. Social media has made it profoundly easy to communicate our thoughts, our views, and our digital “selves” to literally billions of people.

Our interface with the vastness of the web and the footprints and more that we create online will far outlive us. As the saying goes, the internet is forever. Fortunately, there are tools and services that can deal with this inevitability.

The easiest way to find these tools is to Google “digital afterlife” and review the articles and services that emerge from such a search. Facebook, Google, Twitter and Instagram have specific pages dedicated to addressing this issue. Go to our website for clickable links.

End of life planning should really include steps that address these issues. Information on accounts and your online presence can provide your representatives with the means to either preserve, update, or delete your digital self. Without addressing such steps, your Facebook page, online email account, Twitter account, and Instagram page can be a frozen reminder of your online life.

For some, that preserved reminder may be an ongoing comfort and source of happiness and remembrance. For others, it can prolong any pain that is felt from the loss. Because the modern world makes it so easy to create a digital echo of ourselves, it behooves us to think about and plan the fate of that echo. Should you need any help with such planning, **Dick Whitney, Mike Bate, Tom Hickey** and **Kyle Bate** of our firm can assist you.

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