

Nothing Certain Except Death and Taxes

Benjamin Franklin wrote in a 1789 letter, “Our new Constitution is now established, and has an appearance that promises permanency; but in this world nothing can be said to be certain, except

death and taxes.” While the excise taxes imposed on the American colonists by Great Britain arguably sparked the revolution that led to our country’s formation, the founders understood that

taxes are necessary for our government to function. The evolution of American tax laws illustrates this necessity.

The federal government had no direct power to raise revenue until the ratification of the Constitution. Under the Constitution, the federal government could raise revenue through tariffs on certain imported goods and excise taxes on the sale of specific products. In 1797, Congress passed an estate tax, then repealed it in 1802.

The first income tax was enacted in 1861 to finance the Civil War, and in 1862, a federal estate and gift tax was enacted for the same purpose. These taxes were repealed following the end of the Civil War. In 1894, another income tax was passed by Congress. In 1895, the Supreme



SEE **DEATH AND TAXES** INSIDE

Rescue Dogs, Vets: Soldier’s Best Friend

All it takes is one time watching the magic bond between a rescued dog and a veteran dealing with combat-related Post Traumatic Stress Disorder (PTSD) or a Traumatic Brain Injury (TBI) to make you a believer in the mission and work of Soldier’s Best Friend, an Arizona 501(c)3 in Peoria, Arizona.

Based on his years as a practicing veterinarian, John Burnham, DVM, knew firsthand the benefit given to folks who live with and care for their dogs. So when he decided to do something in



memory of his father, the idea of pairing rescue dogs with veterans led to starting Soldier’s Best Friend in a spare bedroom with the help of his wife, Jan, and a few good friends, mostly other veterinarians scattered throughout the state.

In six years, with a dedicated staff of volunteers, trainers, dog foster homes and contacts from the Phoenix VA Hospital, that startup now has more than 150 graduates of a program which helps veterans train their adopted dogs as either a service or therapeutic companion dog. The dogs support veterans in their readjustment to civilian life dealing with PTSD/TBI issues such as panic attacks, depression, flashbacks, irritability, reclusive behavior, anxiety, nightmares, uneasiness in crowded places and suicidal thoughts.

SEE **BEST FRIEND** INSIDE

Gust Rosenfeld Returns To United States Supreme Court

Many attorneys are admitted to practice in the United States Supreme Court, but for the vast majority, it means only having a handsome certificate suitable for framing and display on an office wall. Very few attorneys ever argue a case before the Court. Yet Gust Rosenfeld is doing so again this spring.

The firm's next case before the Supreme Court is *Howell v. Howell*. It involves the division of military retirement pay between spouses when they divorce, and afterward. Most recently, the firm appeared before the high court in 2009 in a case that established the proper legal procedure for seeking a discharge of student loan debt in bankruptcy. In 1970, the firm was also successful when representing a Phoenix resident who was unconstitutionally denied the right to vote in a bond election.

Arguing the *Howell* case for the firm and its client will be **Charles W. Wirken**. His previous Supreme Court experience includes successfully petitioning the



Court to hear the 2009 bankruptcy case. That case was then argued by former Gust Rosenfeld attorney Madeleine Wanslee, who is now a bankruptcy judge. Wirken is a Fellow of the American Academy of Appellate Lawyers, a distinction held by

only eleven Arizona attorneys, and is a past-president of the State Bar of Arizona.

The 1970 case was argued by **Fred H. Rosenfeld**, the son of firm founder Fred W. Rosenfeld. When young Fred, who is still practicing bond law at Gust Rosenfeld, argued before the Court, he had been a lawyer for only eight years. In contrast, Wirken has been arguing appeals for more than 41 years.

The *Howell* case was argued in March. Unlike the old days when lawyers like Daniel Webster and Abraham Lincoln argued for hours, today's oral arguments are limited to thirty minutes per side. Much of that time is spent answering questions from the Justices. The decision, which is expected by June, will be reported in the next Gust Rosenfeld newsletter.

“Bad Boy” Guaranties

It may be a company's real estate loan, but lenders often want the principals to provide additional security. That typically leads to a personal guaranty of payment.

Most payment guaranties are full recourse. If the borrower defaults, in addition to any collateral the lender may realize upon, the guarantor is also liable for payment. Sometimes the borrower and guarantor have the leverage to negotiate a guaranty that is less than full recourse. A guaranty might then be limited in amount, or in duration, or in the circumstances that create liability.

One such limited guaranty is commonly referred to (non-gender neutrally) as a “bad boy” guaranty. In effect, the

guarantor's liability is triggered only in particular circumstances. Those acts are often distinguished as “above-the-line” or “below-the-line.” Above-the-line events, such as fraud by the borrower or guarantors, misuse of the rents and income from the property, or removal of personal property, mean the lender can recover from the guarantor only for the actual monetary losses to the lender caused by the particular prohibited acts, not the entire amount of the loan.

A guarantor has a greater need for concern about below-the-line exposure. That would follow circumstances like a transfer of the property without the lender's consent, the borrower's insolvency or

the borrower not remaining a single-purpose entity. Those events will trigger full recourse liability, meaning that the guarantor is then liable for the full amount of the loan, even though the lender may suffer little or no real monetary damage from the particular act.

The moral: all girls and boys should read a guaranty carefully – and be sure to understand it.

Christopher M. McNichol | 602.257.7496
mcnichol@gustlaw.com

Chris focuses his practice on general commercial transactions and litigation, with an emphasis on real property matters.

PERSONAL NOTES



Scott W. Ruby, Zach Sakas and the City of Buckeye's Kim Sandstrom presented on "Opportunities and Challenges to Utilizing Community Facilities Districts" at the January training session for the Government Finance Officers Association of Arizona.

Scott A. Malm presented three seminars for the Arizona State Escrow Association in September, November and January regarding laws and court decisions affecting the title and escrow industry.

Richard H. Whitney is president-elect of The Phoenix Chamber Music Society which is enjoying its 57th year of bringing to Phoenix the world's finest chamber groups. Dick has a long history of leadership in the arts and non-profit organizations in Arizona and is looking forward to this opportunity. For further information on the society and its calendar of concerts, visit the website at: phoenixchambermusicsociety.org

Phyllis L.N. Smiley was elected President of the Arizona City Attorneys Association.

In December, **Christopher M. McNichol** spoke to the Arizona Association of Corporate Counsel on the topic of limited recourse guaranties. Chris is also a regular guest speaker on Phoenix KFNN 1510 AM Money Radio as well as a regular instructor at the Arizona School of Real Estate and Business on various real estate curriculum.

At the 109th Arizona Town Hall in November, **John L. Hay** and **Fred H. Rosenfeld** were participants in "Financing Arizona's Future."

Shelby (Lile) Exposito spoke on "Documentation: Requirements and Best Practices" at a conference in February hosted by the Council of Administrators of Special Education.

Susan D. Goodwin and **Christopher Kramer** presented a program at the annual meeting of the Transportation Research Board of the National Academies of Sciences, Engineering, and Medicine. Susan and Chris presented on the effect of the Supreme Court's recent decision in *Town of Gilbert v. Reed* and the regulation of signage within public rights of way. Their presentation also addressed the decision's effect on the Highway Beautification Act. The meeting was held in Washington, D.C., in January.

Christopher Kramer presented "Eminent Domain for Right of Way Professionals: Principles and Procedures" to the International Right of Way Association in March. Chris is also co-chairing Condemnation Summit XX on May 19, co-sponsored by Gust Rosenfeld.

In July 2016, **Barbara U. Pashkowski** spoke at the 55th Annual Workshop on Transportation Law – Environmental Due Diligence, in Washington, D.C. At Condemnation Summit XIX in October, Barbara spoke on "The Intersection of Environmental Due Diligence, Condemnation and Valuation" in Phoenix. In March, Barbara spoke at the 12th Annual Gatekeeper Regulatory Roundup in Phoenix on the topic "Regulatory Engagement: Building Trust with Regulators."

J.T. Shoaf filmed a 6.5-hour presentation for the National Business Institute/Institute for Paralegal Education in Eau Claire, Wisconsin, that aired nationally in February. Entitled "A Paralegal's Guide to Pleadings, Motions, Discovery Requests and Briefs," the presentation was a '101' course on all things related to how to draft motions and briefs and properly draft and respond to discovery requests. There was also an hour of ethics discussion.

Carol M. Romano was elected to the Board of Directors of the Arizona Society for Healthcare Risk Management (ASHRM).

Gust Rosenfeld Announces Three New Members

Gust Rosenfeld is pleased to announce that Christopher Kramer, Zach Sakas and Phyllis Smiley were elected members of the firm effective January 1, 2017.



Christopher Kramer's
(Phoenix Office)

30 years in practice have been focused on eminent domain and condemnation litigation. Chris primarily represents condem-

ing authorities in Arizona, Nevada and California. He also represents select private clients, where his intimate knowledge of public projects and procedures facilitates early and favorable outcomes. Chris serves as a mediator or arbitrator in disputes involving eminent domain, condemnation, right of way, property valuation, and property rights issues throughout the western United States. Chris holds a B.S. from Illinois State University and a J.D. from the University of Notre Dame.



Zach Sakas (Phoenix Office) focuses his practice in the area of public finance. He has broad bond counsel experience and provides advice to municipali-

ties, universities, school districts, industrial development authorities, counties, non-profit hospitals, tribal governments and special taxing districts. He also provides advice to underwriters for transactions, including fixed rate and variable rate tax-exempt bonds, lease-purchase certificates of participation, revolving fund loan programs and tax credit bonds. Zach holds a B.S.B.A. from the University of Arizona and a J.D. from the University of Texas. He volunteers time with the Men's Arts Council of the Phoenix Art Museum.



Phyllis L. N. Smiley's
(Phoenix Office) practice is focused on all aspects of municipal law, including general legal advice, contracts, employment, open meeting law, elections, land use, real estate transactions,

telecom, and eminent domain. She serves as City/Town Attorney for multiple Arizona cities and towns and provides support for other municipalities represented by the firm. Phyllis' litigation experience includes condemnations, quiet title, discrimination, civil rights defense, campaign finance enforcement actions, and transaction privilege tax collections. Phyllis holds a B.Ed. from the University of Michigan and a J.D. from Arizona State University. Phyllis is currently serving as the President of the Arizona City Attorneys Association.

Tax Deductions vs. Tax Credits

What is the difference between a tax deduction and a tax credit? Is one better than the other? The classic lawyer response: it depends.

TAX DEDUCTIONS:

Tax deductions reduce a taxpayer's taxable income. Above-the-line deductions reduce adjusted gross income ("AGI") and, consequently, taxable income. Below-the-line deductions are taken after AGI is calculated and also reduce taxable income.

Once taxable income is determined, the amount of tax owed is calculated. The amount of tax a deduction saves a taxpayer depends on the tax bracket that applies to the taxpayer. For example, a \$10,000 tax deduction would reduce the tax owed for a person in the 25% tax bracket by \$2,500.

TAX CREDITS:

Tax credits reduce, dollar for dollar, the amount of tax owed. There are two types of tax credits: refundable and nonrefundable. A nonrefundable tax credit reduces taxes to the extent any are owed. For example, under the Arizona School Tax Credit, if a taxpayer owes \$100 in Arizona taxes and spends \$150 on eligible extracurricular activities, the taxpayer loses the benefit of the \$50 excess (although this credit allows unused amounts to be carried forward).

A refundable tax credit allows a taxpayer to receive a refund of the excess of the credit over the amount of tax owed. In other words, even if a taxpayer owes no taxes, an eligible taxpayer can receive a refund from the government up to the remaining credit amount.

Generally, tax credits are more beneficial; however, it is worth calculating your taxes incorporating all available credit and deduction scenarios to determine the best result.

*Kyle B. Bate | 602.257.7437 | kbate@gustlaw.com
Kyle practices in the areas of business, nonprofit and corporate law, taxation, wills, probate, trusts and estates.*

NEW FACES



Carrie L. O'Brien (Phoenix Office) Carrie concentrates her practice on education law. Carrie represents schools, school districts and other educational organizations in all types of legal matters, including data privacy and school finance

issues. Carrie also assists education clients with their business needs, compliance reviews, inter-governmental agreements, lease-purchase agreements, Public Records Requests, Open Meeting Law compliance, special education litigation, and civil rights matters.

Carrie has substantial experience in education law. Prior to joining Gust Rosenfeld, she was the Chief Privacy Officer and Director of Legal Services for the Arizona Department of Education from 2012 to 2016. Carrie was an Assistant Attorney General at the Arizona Office of the Attorney General for six years, where she represented the Arizona Department of Education.

While at the Arizona Department of Education, Carrie overhauled the handling of confidential student and teacher data and developed data protection agreements with partner agencies. She is a frequent speaker on topics related to data privacy and public records in schools.



Victoria A. Otto (Tucson Office) Vicki's litigation practice focuses on health care and general civil litigation. She has experience in defending clients in vulnerable adult abuse

claims asserted against health care facilities and providers. She brings more than 11 years of litigation experience, having practiced at the Pima County Attorney's office in Tucson before joining Gust Rosenfeld.

For the Pima County Attorney's Office, Vicki prosecuted more than 60 felony and misdemeanor jury trials and appeared in Justice and Superior Courts for bench trials. She became a supervisor in 2010 and supervised the misdemeanor unit, the special victims unit, and the violent crimes unit.

Previously, Vicki clerked for the Honorable Virginia C. Kelly when she was on the Pima County Superior Court bench, interned with the U.S. Attorney's Office in Tucson, and interned with the Bureau of Prisons Western Regional Office in Dublin, California.



Robert Williams (Phoenix Office) Rob focuses his practice on commercial bankruptcy, restructuring, creditors' rights

and related litigation, appeals and mediation. Rob represents institutional clients, corporations, partnerships and individuals in all areas of creditor and debtor relations.

Before law school, Rob worked as a business consultant for RSM US LLP, an international provider of audit, tax and consulting services. This experience, coupled with B.S. degrees in Finance and Business Administration, gives him a practical perspective and understanding of business operations and finance.

Before joining Gust Rosenfeld, Rob worked for two years as a law clerk to the Hon. Robert D. Berger of the U.S. Bankruptcy Court for the District of Kansas.

Diversity Programs Increase Effectiveness

Gust Rosenfeld is committed to a policy of inclusiveness and diversity because we believe that a diverse workforce enables us to serve our clients more effectively. Our people reflect our commitment to those values by actively supporting, endorsing, and participating in diverse activities and programs in the firm, the community, and the legal profession.

Our attorneys and staff actively participate in mentoring and pipeline programs, seminars, and other activities that reflect Gust Rosenfeld's commitment to diversity. Our attorneys willingly give their time to mentor up-and-coming young professionals through programs such as: the Leadership Council on Legal Diversity (LCLD), the Hispanic National Bar Association/ASU Mentoring Program, the University of Arizona Law School Mentoring Program, the Ladder Down Program, the ABA Forum

on Franchising Women's Caucus Mentoring Program and the Judicial Intern Opportunity Program.

We conduct an annual In-House Diversity Seminar, and we are currently in the planning stage for our 11th annual seminar. We publish a bi-weekly "cultural corner," which is a firm-wide e-mail notice to provide information regarding upcoming diversity and cultural events. We distribute a firm publication which features the firm's or member's participation in or sponsorship of diversity activities. We also host other events to sharpen our focus and enhance our firm-wide diversity awareness.

Barbara U. Rodriguez-Pashkowski | 602.257.7494 | bpashkowski@gustlaw.com *Barbara practices in the area of environmental law, air quality and water quality.*

Cases of Note

Sharing Successes on Behalf of Our Clients

■ **John J. Kastner, Jr.**, argued before the Arizona Supreme Court, Court of Appeals and trial court on behalf of his client, ELM. In *US Airways v. Qwest*, the Arizona Supreme Court unanimously affirmed the ruling by the Court of Appeals that an underground utility locator was not liable for economic damages from a service interruption. The Supreme Court's ruling also affirmed the Court of Appeals' dismissal of a \$2 million plus claim against One Call Locators, Ltd., dba ELM Locating & Utility Services ("ELM"). *US Airways, Inc. v. Qwest Corp.*, 238 Ariz. 413, 421, 361 P.3d 942, 950 (Ct. App. 2015), review granted in part (Sept. 20, 2016), aff'd in part (Nov. 23, 2016), opinion ordered depublished in part, No. CV-16-0027-PR, 2016 WL 6892136 (Ariz. Nov. 23, 2016). Richard P. Doyle, partner at Doyle Low, was co-counsel for ELM during the trial court and Court of Appeals phases.

■ **Laura R. Curry** won a contested right to take case for the Town of Wickenburg after a half-day evidentiary hearing.

■ With assistance from **Charles W. Wirken** and **Laura R. Curry** on the appeal, **Christopher Kramer** won a right to take challenge in the trial court after a full-day evidentiary hearing, and that result was upheld by the Court of Appeals. A petition for review is currently pending in the Arizona Supreme Court.

■ **Trish Stuhan** won treble damages in an employment dispute where the employer repeatedly miscalculated an employee's commissions and deducted expenses without the employee's permission. The arbitrator found that the employee was due the wages owed plus treble damages due to the employer's bad faith. *Peters v. DHR Ins. Servs., LLC., et. al.*, 01-14-0002-7181 and -7185 (American Arbitration Association).

■ **Trish Stuhan** won a Ninth Circuit appeal for the Town of Quartzsite. A

resident alleged that her civil rights were violated when the Town enforced its zoning laws against her dog grooming business. The District Court found that she failed to allege sufficient facts to state a plausible claim for relief and that amendment would have been futile. The Ninth Circuit agreed, holding that judgment on the pleadings was proper. The Ninth Circuit rejected the resident's claim that the court must construe her complaint liberally. *Jones v. Town of Quartzsite*, No. 15-16261 (9th Cir. Jan. 18, 2017).

■ **James W. Kaucher** and **Victoria A. Otto** won a motion for summary judgment for one of the firm's hospital clients. They also won a motion to dismiss and motion for judgment on the pleadings, obtaining dismissal of a suit which had been brought against several of the firm's health care clients.

■ **Richard B. Hood** and **William S. Sowers** obtained summary judgment for their client, the defendant, Mohave Sportsman Club, on the plaintiffs' breach of contract claim. This is a defamation action where plaintiffs also alleged a breach of a contract (the membership agreement). As a result of the judge's ruling, the client will be able to seek an award of at least part of its attorney's fees. Attorney's fees are not generally recoverable in tort actions.

■ Following a day-long evidentiary hearing in *Passport Health v. Travel Vaccines and Wellness Solutions, et. al.*, **J.T. Shoaf** was successful in defeating an Application for Preliminary Injunction filed by plaintiff claiming that the clients violated a covenant not to compete and raising other contractual issues. If the application had been granted, defendants' business would have effectively been forced to shut down. Instead, the court ruled that the application failed for numerous reasons and that the plaintiff did not meet a single requirement to warrant entering the injunction.

BEST FRIEND FROM FRONT PAGE

With the help of a large matching capital campaign fund from The Dorrance Family Foundation, Soldier's Best Friend recently completed a 4,640 square-foot training center on their campus in Peoria. The new building provides increased capacity and more flexible schedules for veteran/dog teams.

There is no charge to the veterans for the program, with the average cost of \$4,000 funded by donations and grants. Soldier's Best Friend has two annual fund-raising events, a golf tournament held in December at Grand Canyon University golf course and a sporting clays event in March. Sponsors and donations are always welcome.

For more information, contact Brenda Meir at (623) 218-6486 or visit the website at www.soldiersbestfriend.org.

Tom Chauncey | 602.257.7479 | chauncey@gustlaw.com

Managing Partner Tom Chauncey is a Soldier's Best Friend board member.



Military vet Norm is paired with his canine partner, Sundance.

DEATH AND TAXES FROM FRONT PAGE

Court held the income tax unconstitutional because it was not apportioned among the states based on population as required by the Constitution. The federal government again could only raise revenue through excise taxes.

With World War I looming in 1913, Congress ratified the 16th Amendment, granting it the power “to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States.”

The 16th Amendment was followed by the Revenue Act of 1913, which imposed a tax on net business income, gains and earned income. The following year saw the introduction of the first individual income tax return, Form 1040. The Revenue Act of 1916 imposed an estate tax, and the gift tax was again introduced in 1924.

Federal tax revenues plunged, and the nation’s debt soared during the Great Depression. In 1932, Congress enacted a massive tax bill, the Revenue Act of 1932, which was intended to balance the federal budget without stifling economic growth. During the first 26 years of the federal income tax, the tax laws grew to about 500 pages.

Even through the New Deal, the tax code had not grown significantly. However, there was no central, comprehensive source for the various income, excise, estate and gift tax laws until the adoption of the Internal Revenue Code of 1939.

The tax code ballooned with the tax law changes made during World War II, including withholding tax from paychecks and quarterly estimated tax payments. The Internal Revenue Code of 1954 overhauled the 1939 code. Congress passed significant revenue acts in 1969 and again in 1976. The current tax code is the Internal Revenue Code of 1986.

The historical 15-year window between new tax codes was manageable by businesses, individuals and tax professionals, but then tax law changes proliferated. New revenue acts came quickly, in 1988, 1989, 1990, 1993, 1997 and 2001, and Congress has continued to expand the tax code. One tax nonprofit determined that the tax code changed 4,680 times between 2001 and 2012.

When I began studying at New York University law school’s graduate tax program in the mid-1970s, the tax code was in one 1 ¾ inches thick volume. With the passage of the 1976 act, the tax code expanded to one 2 ¾ inches thick volume. The current tax code in my office is in two volumes, each one 2 ½ inches thick, containing more than 9,800 sections.

Another way to gauge the volume of the current tax code is to count the number of words at 450 words per page, according to a tax foundation. Based on the Government Printing Office’s count of 2,652 pages, the current tax code is more than one million words. By way of comparison, the King James Bible has some 788,000 words; Tolstoy’s epic novel, War and Peace, has 560,000 words.

A tax practitioner cannot rely only on the tax code because the IRS has issued regulations, published rulings and notices. A tax nonprofit did a computer word count of the tax statutes

and regulations in 2012 and came up with roughly four million words. At 450 words per page, that comes to about 9,000 pages.

In addition to IRS rulings and notices, there are court decisions interpreting the statutes and regulations. Commerce Clearing House publishes a compilation of tax statutes, regulations, annotations of cases, and explanations that exceeds 70,000 pages. By comparison, its compilation in 1950, even after the changes during World War II, was about 10,000 pages.

Given the length of today’s tax code, regulations, rulings and court decisions, perhaps Benjamin Franklin would say to today’s tax lawyers that “nothing can be certain except death by the proliferation of tax laws.”

Michael H. Bate | 602.257.7406 | mhbate@gustlaw.com

Mike practices estate and tax law.

ET·Y·MOL·O·GY COR·NER



Washington Theatre

In this political season, many have watched with interest as the President has announced his nominees (from the Latin “to name”). As hearings go forward, will we witness filibusters (I enjoy the Dutch root “flibutor” meaning “pirate”) by a firebrand (from the Old English “torch”) who will steal the stage and inflame the opposition, while attempting to derail the nominee?

Richard B. Hood | 602.257.7470 | rbhood@gustlaw.com

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

GUST ROSENFELD

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Chauncey Named Outstanding Alumnus, Honored by ASU College of Law

Tom Chauncey has been named Outstanding Alumnus by the Arizona State University Sandra Day O'Connor College of Law. Tom was honored by the college in March at its Alumni Luncheon.

Each year the college honors an Outstanding Alumnus for his or her contributions to the legal profession, as well as an Outstanding Faculty member and student recipients of that year's Alumni Association scholarships.

Tom earned his J.D. in 1973 from the ASU College of Law. Over the past 44 years, Tom has been a leader in the legal and broadcasting community. Tom is a founding member and former president of the First Amendment Coalition. He is a founding member of the Cronkite Foundation and a member of the Federal Communications Commission Bar Association. Tom also is a former co-chairman of The National Conference for Community and Justice and a former chairman of the Arizona Cameras in the Courtroom Committee.

Giving back to the community has been an ongoing commitment of Gust Rosenfeld, and Tom epitomizes that commitment. He has served as Director of Friendly House, President of Barrow Neurological Foundation, Director of St. Joseph's Hospital and Medical Center, and President of Northwestern University Alumni Association of Phoenix. He has also supported many other organizations, including Homeward Bound, the Foundation for Blind Children, and the Fund for Central Arizona History.

Tom currently serves as the Nominating Committee Chair of the Cronkite School Foundation and as a Board Member of Soldier's Best Friend, which pairs veterans with Post Traumatic Stress Disorder (PTSD) and Traumatic Brain Injury (TBI) with service or therapeutic dogs, most of which are rescued from local shelters. The team of veteran and dog train together to build a trusting relationship that helps save each of them.

PHOENIX OFFICE

One E. Washington St., Ste. 1600
Phoenix, Arizona 85004-2553
Telephone: 602.257.7422
Facsimile: 602.254.4878

WICKENBURG OFFICE

579 West Wickenburg Way, Ste. 4
Wickenburg, Arizona 85390-4300
Telephone: 928.684.7833
Facsimile: 602.254.4878

TUCSON OFFICE

One S. Church Ave., Ste. 1900
Tucson, Arizona 85701-1627
Telephone: 520.628.7070
Facsimile: 520.624.3849

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