

# MARICOPA Lawyer

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**MCBA**

MARICOPA COUNTY BAR ASSOCIATION

Where The Legal Community Connects

## Have You Made Your Reservation?



### MCBA's Annual Meeting/ Maricopa County Bar Hall of Fame Induction

#### WHEN

Wednesday, Oct. 20, 2010  
11:30 a.m.-1:30 p.m.

#### WHERE

Hyatt Regency Phoenix

#### REGISTER

Online at [www.maricopabar.org](http://www.maricopabar.org)  
or call Laurie at (602) 682-8585.

## Past Presidents Convene



MCBA President Jennifer Green addresses a breakfast meeting of the Association's past presidents and shares information about the current work of the MCBA and strategies for the future. Past president Jay Zweig, partner with Bryan Cave LLP, is at left.

## Eleven Candidates Contend for Five Board of Director Seats

After a deadline extension, seven additional candidates announced their intention to run for the MCBA Board of Directors, bringing the total to 11.

Two incumbents in the running to retain their seats are Comm. Keelan S. Bodow, a commissioner of the Maricopa County Superior Court, and T.J. Ryan, Frazer Ryan Goldberg & Arnold, LLP. Another three seats are also available, for a total of five.

New-comer candidates are: Anthony W. Austin, Lewis and Roca, LLP; Justin Beresky, Beresky & Fish, PC; Lyzzette M. Bullock, Quarles & Brady; Kyle Hirsch, Bryan Cave, LLP; Michael Kielsky, Kielsky, Rike & Elgart, PLLC, Scottsdale; Julie A. LaFave, Jennings, Strouss & Salmon, PLC; Kenneth L. Mann, Attorney at Law, Scottsdale; J. Blake Mayes, MayeStelles Law Firm; and Sarah L. Sato,

See *Eleven Candidates* page 12

## CourtWatch

Daniel P. Schaack



## Men vs. Women: Courts Handle Sexual Harassment Stereotyping

### Men *Can* be Sexually Harassed

According to the stereotype, men are pigs. And if you believe the stand-up comedians, it would be impossible for a woman to sexually harass a man: if she propositioned him, he would simply accept. The Ninth Circuit Court of Appeals recently rejected this stereotype in a workplace-harassment case: *Equal Employment Opportunity Commission v. Prospect Airport Servs. Inc.*, No. 07-17221 (9th Cir. Sep. 3, 2010).

Rudolpho Lamas worked for Prospect Airport Services as a passenger service assistant at the Las Vegas airport. He was promoted to lead passenger service assistant.

Lamas's wife had recently died, but his grief was soon to be compounded at work as a fellow passenger service assistant, Sylvia Munoz, began hitting on him. The married woman began handing love notes to Lamas, although he had never expressed any interest in her.

After the first note, Lamas told Munoz that he was not interested. Undeterred, she continued to give him notes. One night, she gave him a provocative photo of herself. Irritated, Lamas gave it back and repeated that he was not interested in her.

It didn't stop. Munoz gave him another note, telling him that she dreamed of taking a bath with him. Her note said: "It seems to me I cannot get you off my mind no matter how hard I try! I hope you will consider? I'll take care of you, you take care of me! Please let me know soon not later! Seriously, I do want you sexually and romantically!"

Munoz even recruited coworkers to help her solicit Lamas's favor. When he continued to refuse, they began speculating that he was gay. Lamas complained to several managers,

See *Men vs. Women* page 16

## Nine Vie for Ariz. Supreme Court Justice

The Commission on Appellate Court Appointments will review public comments on nine candidates for an opening on the Arizona Supreme Court created by the retirement of Justice Michael D. Ryan in August.

The candidates are Maricopa County Superior Court Judge James P. Beene; Yuma County Superior Court Judge Andrew Gould; Arizona Court of Appeals Judges Diane M. Johnsen, Ann A. Scott Timmer, Maurice Portley, Lawrence F. Winthrop and John C. Gemmill; Yavapai County Superior Court Judge Robert M. Brutinel; and Lisa G. Tewksbury Hauser, an attorney in private practice.

Their applications for the office can be viewed online at the commission's website, <http://supreme.state.az.us/jnc>.

The commission met to interview the candidates on September 30. Following the interviews the commission will recommend at least three nominees for the vacancy to Gov. Jan Brewer, who will appoint the new justice. According to commission rules, only 60 percent of the final candidates can be from one political party. ■

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**MID-SIZED CENTRAL PHOENIX** law firm seeks 1-4 year civil litigation attorney. Excellent academic credentials required. Competitive salary and benefits. C. Kevin Dykstra, BONNETT, FAIRBOURN, FRIEDMAN & BALINT, P.C. E-MAIL: [kdykstra@bffb.com](mailto:kdykstra@bffb.com). FAX: 602-798-5806.

**MID-SIZED CENTRAL PHOENIX** law firm seeks attorney with a minimum of 5 years experience in real estate and commercial transactions. Excellent academic credentials required. Competitive salary and benefits. Send resume to: C. Kevin Dykstra, BONNETT, FAIRBOURN, FRIEDMAN & BALINT, P.C. E-MAIL: [kdykstra@bffb.com](mailto:kdykstra@bffb.com), FAX: 602-798-5806.

**THE CITY ATTORNEY OF THE CITY OF SCOTTSDALE** is requesting detailed information concerning the qualifications of law firms or attorneys willing to provide legal services to the Risk Management Department of the Finance and Accounting Division of the City of Scottsdale. The Risk Management Department, with the concurrence of the City Attorney will select and contract with outside counsel on an as-needed basis to handle litigation involving the following substantive issues: personal injury, employment, construction/road/design/redevelopment, police liability, employment, general municipal liability, water and wastewater, civil appeals, fire services, negligence and workers' compensation. The City Attorney intends to establish a list of qualified attorneys or law firms from which outside counsel will be selected to provide legal services on an as-needed, case-by-case or matter-by-matter basis. To obtain a copy of the Request for Qualifications, please contact Kim Lank at 480-312-7308. Completed Requests for Qualifications should be submitted to Bruce Washburn, City Attorney's Office, 3939 N. Drinkwater Boulevard, Scottsdale, AZ 85251. (480) 312-2405.

**DEL GIORGIO & ASSOCIATES** seeks to hire an attorney with excellent research skills who has just recently

passed the Bar. The term for this position will be from six months to one year (possibly longer). Legal issues include but are not limited to zoning for property development, probate case and claim against an Estate and Trust. This position will be acting as co-counsel by assisting a litigation attorney in the probate case. This is a great opportunity for a new attorney to gain valuable experience for their legal career. Please submit resume to: Martin Del Giorgio, 671 Awatobi Ovi, Flagstaff, Arizona 86001 or email to [bobemady@needspeed.net](mailto:bobemady@needspeed.net).

**EAST VALLEY LAW FIRM** seeks associate with 1-3 years experience for commercial litigation. Requires excellent research and writing skills. Nice place to work with easy commute. Full time position but would consider part time. Email resume to [palexander@halaw.com](mailto:palexander@halaw.com)

## OFFICE SPACE

**TWO OFFICES AVAILABLE** Law firm Baumann Doyle Paytas & Bernstein located at 44th Street/Thomas. Excellent location with easy access to: 202, airport, East Valley, Northeast and Downtown courts. Additional benefits: covered parking, receptionist services, exercise/fitness room with racquetball courts, high-speed copier/fax. Call Carolyn or Amy for tour 602-952-8500.

**PROFESSIONAL OFFICE SUITES AVAILABLE** 7210 N. 16th St. Phoenix AZ 85020 (Just off of the 51 between Glendale and Northern). Owner occupied by law firm and financial advisors. Phone system, high speed internet, fax services and receptionist available. Free parking. Nice conference room and other amenities. Please call for lease rates. Monthly or longer term leases available. Contact Sue at [susan@rogerskirby.com](mailto:susan@rogerskirby.com), or call 602-748-1900.

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**FREESTANDING OFFICE BUILDING** 360 E. Coronado. Approx. 28,000 sq. ft. Formerly Gallagher and Kennedy. Multiple offices, support, conference rooms, fireplaces, etc. Excellent condition. Diamond Properties, Inc. 602-265-0011 or [rediamond@aol.com](mailto:rediamond@aol.com).

**EXECUTIVE OFFICE SUITES AVAILABLE** for Lease in N. Scottsdale located at 8985 E. Bell Rd, Scottsdale, in the Bell 101 Executive Center. Multiple suites available from approximately 120 sq ft to 320 sq ft. Spaces start at \$500.00/month. Receptionist to screen calls and visitors, Conference Room equipped with video and digital capabilities may be reserved for your important meetings, Beautifully appointed common areas, Furnished suites, Gourmet Coffee Service, Integra Telecom system, Secured T-1 high speed internet access, 24-7 Key Card entry, Cleaning and Maintenance. For more information, please contact Dana Kresojevich at [dkresojevich@householdergroup.com](mailto:dkresojevich@householdergroup.com) or 602-604-0600 ext 241.

**FULLY FURNISHED EXECUTIVE SUITES** available within the offices of a major law firm located in The Phoenix Plaza (Central/Thomas). Includes use of the firm's support services, such as receptionist, copy center, conference rooms, lunch rooms, etc. Covered parking available; conveniently located to the light rail. Contact Jill, 602-285-5055.

**TWO SPACIOUS OFFICES AVAILABLE AT THE MCBA!** Our newly remodeled building, conveniently located just north of McDowell on 3rd Street and Palm Lane, has two offices available for rent. Approximately 10' x 15' each, large picture windows, fully equipped kitchen and covered parking. Additional benefits include: Xerox copier/scanner, high speed internet, phones, access to conference rooms, reception/lobby area, 24/7 access to building... and you're always walking distance to CLEs! Leasing terms negotiable. Call or email Sandra Hamlin for additional information. [shamlin@maricopabar.org](mailto:shamlin@maricopabar.org) or 602-257-4200. 303 E Palm Lane, Phoenix, AZ 85004.

**ATTORNEY OFFICE FOR RENT** West Mesa Near 101 and Guadalupe Road. Attorney office and adjacent secretarial area (with built-in desk and work space) available for rent in newly remodeled office building. Telephone system, covered parking, and hi-speed internet all included. Tenants also enjoy access to a law library, two conference rooms (one with large granite table and large wall-mounted computer monitor) and other amenities, all in a professional and collegial environment. This arrangement is perfect for the sole practitioner. Limited reception services included and client referrals are possible. Please call 480-820-1421 to discuss further and to arrange a visit.

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## MISCELLANEOUS

**AZ DIGESTS COMPLETE SET** \$600 obo. Retail new for over \$2000. Steve 520-336-0120.

# Construction Law: Personal Liability Without Personal Gain

By Jennifer Cranston



Jennifer Cranston

Most residential contractors who conduct their business through a corporate structure assume that their personal assets are shielded from the company's liabilities and debts unless they are found to have committed a crime or misused the business for personal gain. Likewise, subcontractors and suppliers who work with such contractors may believe that their ability to seek payment is limited to claims against the business and not against the individual(s) controlling the business. Earlier this year, the Arizona Court of Appeals confirmed that individual officers and directors of a corporately structured residential contractor can be held personally liable for the company's failure to pay its subcontractors and suppliers. Anyone who represents residential contractors, subcontractors or

suppliers should take note of *Arizona Tile, LLC v. Berger*, 223 Ariz. 491, 224 P.3d 988 (App. 2010).

The case involved a countertop fabricator and installer, Design Surfaces, Inc., and its supplier, Arizona Tile. After Design Surfaces failed to pay, Arizona Tile sued the company as well as its officers and directors, Howard Berger and John McCarthy. After obtaining a judgment against Design Surfaces and garnishing what remained in its bank account, Arizona Tile pursued claims against Berger and McCarthy for breach of fiduciary duty arising out of A.R.S. § 33-1005.

The statute requires a "contractor" who receives payment from an "owner-occupant" for "labor, professional services, materials, machinery, fixtures or tools" to hold the money "in trust" for the person who provided the labor or materials. The statute also prohibits the contractor from using the money for any other purpose than to satisfy the subcontractor's or supplier's claim. The Court of Appeals found that Design Surfaces was obligated by the statute to hold funds it received from residential customers in trust for Arizona Tile. The court then addressed the

more difficult issue of whether the officers and directors could be held personally liable for the company's failure to pay.

In analyzing the personal liability issue, the court relied on a general principle of trust law which holds that an officer who causes a corporate trustee to breach its trust obligation is personally liable to the trust beneficiary for any loss caused by the breach. The court confirmed that the officer is personally liable even if he or she did not personally benefit from the transaction. Thus, in the residential contractor setting, the court found that, while officers and directors are not automatically liable for the company's conduct, an officer or director is personally liable for failure to pay under 33-1005 if he or she participated in the decision(s) that led to the breach. Because Berger and McCarthy decided which accounts should be paid with the money received from Design Surfaces' residential customers, the court affirmed the judgment against them for the company's failure to pay Arizona Tile.

The court's interpretation of A.R.S. § 33-1005 clears a path for recovery against individual officers and directors of corporately

structured contractors under the following circumstances:

- (1) the project for which the subcontractor or supplier provided labor or materials was an owner-occupied residential project;
- (2) the contractor received payment for the subcontractor's or supplier's part of the job; and
- (3) the officer or director personally participated in the decision to use the money for some other purpose.

As a practical matter, it should be noted that the court also held that attorneys' fees were not available to the successful party because the claims against the officers and directors arose from statute, not contract. Thus, while the court's ruling may invite more claims against corporate officers and directors, the attorneys' fees analysis raises potential issues concerning the financial feasibility of such litigation. ■

*Jennifer Cranston is a shareholder at Gallagher & Kennedy, P.A. She practices in the area of general litigation, with an emphasis on real estate disputes, including condemnation and valuation matters, as well as insurance coverage analysis.*