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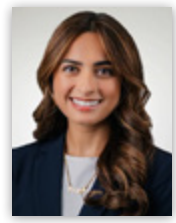
From Washington to the West: New EPA Policies Meet Arizona Business

John Habib & Sukhmani Singh
Snell & Wilmer LLP

John Habib



Sukhmani Singh

On March 12, 2025, Environmental Protection Agency Administrator Lee Zeldin announced a series of deregulatory actions he described as the most consequential in the agency's history. Framed as part of the "Powering the Great American Comeback" initiative, the thirty-one actions are said to aim to increase domestic energy production, reduce cost of living, and strengthen the role of states in environmental policymaking. While the announcement drew national attention, Arizona may feel this policy shift acutely. Air quality regulations, energy infrastructure, and industrial permitting have long been points of tension between local interests and federal oversight.

One of the most immediate implications for Arizona stems from the EPA's decision to rescind Clean Air Act guidance that previously held states accountable for cross-border air pollution. Arizona, particularly Maricopa County, has struggled with emissions originating in other countries. This rollback of the earlier guidance, which had made it difficult to meet federal standards, was met with support from local officials who argued that Arizona should not be penalized for pollution beyond its control. The change could offer relief from pressure to adopt far-reaching regulatory measures that, according to critics, would have imposed steep costs on businesses without meaningfully improving environmental outcomes.

Administrator Zeldin also announced plans to reconsider several national air quality and emissions rules, including the 2024 standard for fine particulate matter, known as PM2.5. While average PM2.5 concentrations have declined significantly in the United States over the past two decades, the latest revised standard was seen by some industry groups as too aggressive. According to the EPA, its upcoming guidance will focus on increasing flexibility and reforming permitting rules that have historically delayed or prohibited industrial development. Arizona's burgeoning construction, manufacturing, and logistics sectors may see fewer permitting challenges

See **From Washington to the West** page 7

CourtWatch

Daniel P. Schaack

Tripping Over Tort Duty: Supreme Court Brings Clarity to Vexing Legal Issue

Determining whether there is a tort duty in a personal-injury case can be vexing. Also vexing is determining *how to determine* whether a duty exists. Last year, judges on a panel of Division One of the Arizona Court of Appeals found themselves in disagreement on the latter question, which led to disagreement on the former. In his opinion departing from the majority's reasoning, Vice Chief Judge Randall Howe essentially petitioned the Arizona Supreme Court to grant review to resolve their rift. The supreme court answered his call and recently issued an opinion that it hopes will remove the confusion that, ironically, it had helped to create in the first place. *Perez v. Circle K Convenience Stores, Inc.*, No. CV-24-0104-PR (Ariz. Mar. 12, 2025).

The plaintiff, Roxanne Perez, stopped for ice cream at a Circle K store where she frequently shopped. After retrieving the ice cream from the store freezer, she turned to go down the next aisle but tripped over a case of water that had been placed on the floor in an end-cap display. Suffering significant injuries to her elbow, neck, and back, she sued the store, asserting claims of negligence and premises liability.

In addition to admitting that she was familiar with the store, Perez agreed that the water display was out in the open; she would have seen it had she only looked. The store moved for summary judgment, asserting that her admissions demonstrated that it did not owe her a duty of due care. The superior court granted the motion, and the court of appeals affirmed. *Perez v. Circle K Convenience Stores, Inc.*, 257 Ariz. 271 (App. 2024). The majority held that Circle K did not owe Perez a duty under the circumstances. Howe agreed with the result but not the reasoning. He believed the store did owe a duty but Perez had failed to show that it had breached that duty. The supreme court granted review and reversed in an opinion by Chief Justice Ann A. Scott Timmer.

The duty issue harks back to the seminal case of *Markowitz v. Arizona Parks Board*, 146 Ariz. 352 (1985), where the court had admonished bench and bar against conflating the question of duty with the separate question of whether that duty has been breached. Twenty-two years later in *Gipson v. Casey*, 214 Ariz. 141 (2007), the court stated that the duty question "is a legal matter to be determined *before* the case-specific facts are considered."

That statement, of course, presents some-

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MARICOPA Lawyer
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The mission of the MCBA is to serve its members, the legal profession, the judicial system and the public.

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GIVE US YOUR OPINION

The *Maricopa Lawyer* welcomes letters to the editors or opinion pieces for publication. Letters and opinion pieces should be typed and preferably submitted electronically. Opinion pieces are limited to 1,500 words and letters to 700 words, and the editors reserve the right to reject submissions or condense for clarity, style and space considerations. Letters must be signed to verify authorship, but names will be withheld upon request. Authors of opinion pieces will have their names published. Letters and opinion pieces should be mailed to: MCBA editor, Maricopa County Bar Association 3550 N. Central Ave., Suite 1101 Phoenix, AZ 85012 Phone: (602) 257-4200 Fax: (602) 257-0405 Email: maricopalawyer@maricopabar.org

Hello MCBA Members and Friends

Summer is already making an early entrance—and it's only May! April brought us a 100-degree day... Yikes!

As we dive into the season, I hope you'll join us for one of our favorite events of the year—the MCBA Diversity Summer Social on June 4th at the beautiful Biltmore Golf Club. This annual gathering is a fantastic opportunity for students, summer associates, first-year associates, interns, and externs to connect with legal leaders in a relaxed, welcoming atmosphere. RSVP at www.maricopabar.org/summersocial25

As the pace of work (hopefully) slows a bit for summer, it's the perfect time to recharge, spend quality time with family and friends, and reflect on the year so far. And while you're soaking up some sun—whether on vacation or in the office—we encourage you to think about nominating someone for one of MCBA's most prestigious honors:

- MCBA Hall of Fame – Celebrating individuals who have shaped the legal profession, advanced justice, and served the public at the highest levels.
- Robert R. Mills Member of the Year
- Public Lawyer of the Year
- Judicial Officer of the Year

To learn more or submit nominations, simply scan the QR code or visit the MCBA website.

And while you're marking your calendar, don't miss these upcoming events:

- Barristers Ball – September 27
- Paralegal Powerhouse Conference – October 24
- Hall of Fame & Awards Dinner – November 4
- Family Law Section Holiday Party – December 3
- MCBA Holiday Party (2025) – December 18

Looking ahead, MCBA is working on our 2026–2030 Strategic Plan. Have ideas or feedback? We'd love to hear from you! Reach out to any board member or connect directly with Laurie Williams at MCBA.

Wishing you a joyful, sunny, and inspiring summer! ■

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When Less is More: Using Ellipses

Legal writers use ellipses as a tool to indicate that part of a quoted text has been omitted, generally because the omitted part is either irrelevant or redundant. An ellipsis is made up of three periods, with a space before each one, despite what autocorrect may do to the sentence. Fortunately, the rules for using ellipses correctly are straightforward.

First, use an ellipsis to indicate an omission occurring in the middle of the quoted text. Do not use an ellipsis to indicate that material is left off at the beginning of the quoted text.

Quote: I saw a total of four cars that were traveling in the same direction in the construction zone stopped at the scene.

Correct: He said that "four cars . . . stopped at the scene."

Not correct: He said that ". . . four cars . . . stopped at the scene."

Make sure that the omission does not change the meaning of the quoted text, though, as doing so could affect the integrity of the argument.

Example: He said that all "cars . . . stopped at the scene."

Second, use an ellipsis to indicate an omission occurring at the end of the material only if the quoted text is an entire sentence. In this case, a fourth period is added to the ellipsis as the final punctuation mark. Do not use an ellipsis if the quoted text is incorporated into your own sentence (starting with your own words).

Example: "[F]our cars that were traveling in the same direction . . . stopped. . . ."

Example: I knew we had many potential witnesses because "four cars that were traveling in the same direction . . . stopped."

Finally, when omitting a whole paragraph from the quoted text, center an ellipsis on its own line to show the omission. Continue with the quoted text on a new line with an indent to show a new paragraph. ■

A Message from Acting Clerk Nancy Rodriguez

It is my honor to serve as the Acting Clerk of the Superior Court for Maricopa County, per Administrative Order No. 2025-051, until a new, appointed Clerk can assume office. I would like to take a moment to express my gratitude to Jeff Fine for his outstanding service as Clerk since 2019. Jeff's leadership has been a beacon of excellence, integrity, and unwavering service to the public. Under his direction, the Clerk's Office has reached new heights, marked by significant milestones, innovative partnerships, and a steadfast commitment to enhancing the efficiency and accessibility of the services we provide to the community.

After more than 38 years in public service, including 11 years with the Clerk's Office, I've witnessed firsthand how difficult it can be to drive change in our field. Yet Jeff has done just that with remarkable speed, creating lasting improvements in the processes and relationships that have made our office and court system more effective.

Under Jeff's tenure, we saw transformative advancements, particularly in the realm of technology. The modernization of systems and the introduction of key technological innovations allowed the Clerk's Office to reduce wait times, streamline workflows, and bring us closer to our goal of ensuring equal access to justice for all. Moreover, Jeff's commitment to fostering collaboration within the office—cultivating a work environment that values respect and empathy—has been key to our success. His dedication to empowering others and supporting staff development has left a lasting impact on the culture of our office.

Jeff's leadership and contributions will resonate for years to come, and I speak for everyone at the Clerk's Office when I say it was an honor to serve under his leadership. We extend our deepest gratitude for his tireless service and wish him the best in his next chapter.

Updates from the Clerk's Office

As we continue the work that Jeff began, I'm pleased to share some exciting developments within the Clerk's Office.

Later this year the Clerk's Office will be launching subsequent document e-filing for probate cases, which has been a long-awaited development, not only for our Office, but for many probate practitioners. This step is part of our broader strategy to modernize our systems and make court processes more accessible and efficient for everyone.

Another key update in the last few months is the new ability detailed under Administrative Order 2025-01 for electronically submitted Applications for Fee Deferral and Waiver. These applications will be accepted through our own online portal, which allows members of the public to submit applications directly to the Clerk's Office for review. The portal is available on the Clerk's Office website at clerkofcourt.maricopa.gov.

As part of our continued focus on improving case evidentiary hearing and trial exhibit management, all Family and Civil hearings and trials will be managed using the Bundle Method in Case Center. The Bundle Method simplifies exhibit management by grouping all hearings and trials under a single case, ensuring a smoother and more efficient process for both our staff and the legal community. Further instructions and resources are available to assist you in navigating these changes, including guides for uploading evidence and accessing cases through the new system.

As always, I look forward to working alongside all of you to ensure that we continue to build a justice system that positively impacts the lives of those we serve.

Thank you for your continued partnership and support as we move forward together. ■

YOUNG LAWYERS DIVISION PRESIDENT

Logan Matura

Barrister's Ball 2025: Supporting Diversity in Law

Mark your calendars for one of the most anticipated events of the year—the Barrister's Ball, hosted by the Maricopa County Bar Association Young Lawyers Division. This elegant evening will take place on **September 27, 2025**, at the historic **Arizona Biltmore Hotel,** and will be a wonderful affair full of celebration, networking, and philanthropy to make a lasting impact on the future of law in Arizona.

The Barrister's Ball is more than just a formal social gathering; it's a wonderful fundraising event. This year, the beneficiary of the Barrister's Ball is the **Justice Michael D. Ryan Scholarship Fund**. The late Justice Michael D. Ryan, a distinguished jurist of the Arizona Supreme Court, dedicated his career to improving the justice system and mentoring young legal professionals. His legacy lives on through these scholarships, which are given out every year by the Maricopa County Bar Foundation. This scholarship fund embodies Justice Ryan's commitment to diversity and service in the legal field, by providing financial aid to law students from diverse backgrounds who aspire to serve their communities through legal careers. By alleviating some of the burden of student loan debt, these scholarships enable recipients to focus on their dreams of justice and advocacy without financial barriers.

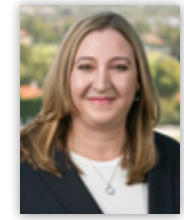
Attendees can expect an evening filled with opportunities to connect with legal professionals, enjoy fine dining, and participate in exciting activities like silent auctions—all while contributing to a wonderful cause, celebrating the achievements of scholarship recipients and honoring those who support diversity in law.

The Young Lawyers Division of MCBA is proud and excited to host this impactful event. Whether you're purchasing tickets, sponsoring a table, or donating directly to the scholarship fund, your involvement makes a difference. Together, we can empower aspiring legal professionals to achieve their dreams and uphold Justice Ryan's legacy of excellence and service.

Please save the date for September 27th at the Biltmore Hotel for an unforgettable evening that combines elegance with purpose. Let's raise our glasses to diversity, community service, and the future of law! Additional information, including ticket sales, will be coming soon! ■

Monitoring Wells Not Required at Point of Compliance

By Samantha Catalano



Samantha Catalano

In a recent Arizona Court of Appeals decision, the Court upheld the Arizona Department of Environmental Quality's ("ADEQ" or "Agency") decision to approve a permit amendment to Arizona Minerals, Inc.'s ("AMI") aquifer protection permit ("APP") and denied the appeal of non-profit Patagonia Area Resource Alliance ("PARA").

In *Patagonia Area Res. All. v. Arizona Dep't of Env't Quality*, 564 P.3d 296, 299 (Ariz. Ct. App. 2025), the Court was tasked with interpreting A.R.S.§ 49-244 to determine whether the statute requires a mine to install a groundwater monitoring well at the point of compliance to determine whether effluent meets Arizona's water quality standards. The Court determined that the statute does not require mines to install a monitoring well at the point of compliance. Instead, mines can determine compliance with other Agency approved methods.

This decision is noteworthy for two reasons. First, it upholds the Agency's position and approval of AMI's amended permit in the face of a challenge by an environmental non-profit. Second, this decision provides important clarification to discharging facilities subject to the APP statutes and permits.

Background of *Patagonia*

AMI is a Nevada mining company that has been working on a mining project known as the Hermosa Project in Santa Cruz County, Arizona. AMI received approval by ADEQ for an APP in 2018, under which AMI constructed a lined storage facility for the consolidation for historic tailings; an underdrain collection pond; and a water treatment plant for treatment of underdrain seepage, storm runoff, and mine-influenced water. Following ADEQ's approval of AMI's initial permit, AMI determined that to provide safe passage for people and equipment, it needed to add a second water treatment plant to dewater rock units. AMI then applied to ADEQ for amendments to its APP permit, which were granted on August 4, 2021. PARA appealed ADEQ's approval of the amended APP permit to the Water Quality Appeals Board, resulting in a hearing before an Administrative Law Judge, who affirmed ADEQ's grant of the amended permit in June 2022.

PARA then appealed the Administrative Law Judge's finding to the Superior Court of Arizona on August 12, 2022. PARA argued that ADEQ misinterpreted A.R.S. § 49-244 by granting a permit which required no monitoring well be drilled in the Harshaw Creek aquifer. Specifically, PARA argued that a monitoring well must be drilled at the point of compliance to determine that the discharged water meets water quality standards.

The statute defines the "point of compliance" as "the point at which compliance must be determined for either the aquifer water quality standards or, if an aquifer water quality standard is exceeded at the time the aquifer protection permit is issued, the requirement that there be no further degradation of the aquifer . . . [and] [t]he point of compliance shall be a vertical plane downgradient of the facility that extends through the uppermost aquifers underlying that facility."

ADEQ refuted PARA's argument that the statute requires monitoring wells to be drilled at the point of compliance, noting that the statute does not include a requirement for drilling a well, and arguing that the Agency is allowed to determine compliance with water quality standards by other means.

ADEQ further explained that when a facility is determining compliance at the point of discharge, this is a "more stringent location" and is more conservative "because it does not allow for any dilution of pollutants upstream of the point of compliance." The Superior Court affirmed the Administrative Law Judge's Final Order in favor of ADEQ.

Patagonia's Appeal

PARA appealed the Superior Court's affirmation to the Court of Appeals in Arizona, arguing that the Superior Court abused its discretion by finding that the Agency's grant of AMI's amended permit was in accordance with Arizona law.

The Appeals Court interpreted A.R.S. § 49-244 *de novo* to answer the question of whether the statute required AMI to drill a monitoring well at the point of compliance. It noted that the term "determine" as used in the statute ("the point at which compliance must be determined") is not defined in Arizona water quality laws. Therefore, the Appeals Court looked to the American Heritage Dictionary definition, "[t]o establish or ascertain definitely, as after consideration, investigation, or calculation" and to its prior interpretation of the term, "as synonymous with 'finds.'"

The Court reasoned AMI was only required to confirm "through investigation and calculation" that groundwater at the point of compliance met the water quality standards. ADEQ's "comprehensive regulatory scheme" at the second treatment plant—including requiring record keeping, maintenance schedules, contingency plans in case of a spill, assessments of environmental conditions, monitoring controls, and the requirement that AMI measure the discharged water as it is discharged, upstream of the point of compliance—were key indicators that ADEQ's reasoning was sound.

The decision clarifies that mines in Arizona can determine whether effluent meets aquifer ground water quality standards at a point of compliance without drilling a groundwater monitoring well at that location. ■

Samantha Catalano is an associate attorney at Gallagher & Kennedy, licensed in both Arizona and New Mexico. She focuses her practice primarily in the regulatory areas of civil litigation, environmental and natural resources, and oil and gas law, successfully handling motions and trial preparation, and appearing before regulatory bodies such as the Oil Conservation Division ("OCD") and in rulemaking hearings before the New Mexico Environmental Improvement Board.

Lessons Learned: How Legal Marketing Can Foster Trust and Expand Access

By Brandon B. Rafi

Brandon B. Rafi

In 1977, the U.S. Supreme Court in Bates v. State Bar of Arizona upheld that lawyers had the right to advertise their services. This landmark decision transformed the legal industry, allowing law firms to engage directly with potential clients. As you probably know from all of our billboards across the Valley, Rafi Law Group has fully embraced this opportunity. We heavily invest in and continue to use proactive marketing and outreach as a tool to build trust, expand access to justice, and raise awareness of our firm within underserved communities. Through strategic, people-first marketing efforts led by our amazing marketing team, we have learned six key lessons on how legal professionals can use advertising to build relationships and make a meaningful impact.

Meet People Where They Are.

Marketing is not just about visibility—it's about accessibility and understanding the community you serve. Our marketing team, led by Phoenix-area natives who grew up in the communities we serve, have a deep understanding of how to develop culturally appropriate communications strategics to reach our target audiences.

Underserved communities often face barriers to legal assistance, including language barriers, limited transportation, and a lack of trust in the system. To address these challenges, we take a grassroots approach, ensuring our messaging and services reach people where they live and work. This means bilingual advertisements, community outreach initiatives, and an approachable online presence that makes it easy for individuals to connect with us when they need help.

Trust Takes Time. Be Consistent.

Through our efforts, we learned that people want to feel confident that their legal team is there for them—not just when they need help, but as a constant presence in their community. That's why we maintain a steady and visible marketing presence. Whether it's billboards featuring a friendly smile, consistent messaging in digital campaigns, or community sponsorships, our goal is to demonstrate our reliability and commitment to community. We back up our presence with action, launching Rafi's Hope in 2023 to support local nonprofits, volunteer efforts, and community engagement programs. Last year alone, our team volunteered 4,000 hours and directed over $400,000 to Arizona nonprofits.

Keep It Simple.

Anyone in the legal industry will tell you legal services can be intimidating. Complex jargon and convoluted processes often discourage people from seeking help. Marketing lets us simplify the conversation. Our advertisements and social media content breaks down the "legal speak" and puts concepts into relatable terms. A simple, clear message—paired with a friendly and accessible brand presence—goes a long way in making legal assistance feel within reach. I may be the face of Rafi Law Group but the brand is really the people on my team who ensure that everything we do is simple and authentic.

Be Transparent.

The legal process can be overwhelming, especially for those who have never needed a lawyer before. We use marketing as a tool for transparency, ensuring our messaging clearly explains what clients may expect. Whether through social media or video content, we address concerns and try to do it in a welcoming way to help potential clients understand their rights, options, and the legal journey ahead.

Prioritize the Well-Being of Your Clients with Professionalism and Care.

Trust isn't just about words—it's about actions. At Rafi Law Group, professionalism means putting our clients first in everything we do. From the strategic messaging in our marketing to the compassionate guidance we offer in every case, we are committed to ensuring that potential clients feel respected, valued, and understood. Whether it's the approachable imagery on our billboards, the street wear clothing, or the memorable jingles that reinforce our commitment, we maintain the highest level of professionalism while keeping our brand relatable and client-focused.

It All Starts With Trust.

Marketing in the legal field is not just about getting attention—it's about building lasting relationships. Every campaign, social post, and community event contributes to fostering a sense of trust with those we serve. The result? More empowered individuals who know their rights, feel confident seeking legal assistance, and can access justice regardless of their background.

Advertising in the legal field is about more than just business growth; it's about social impact. By meeting people where they are, maintaining a consistent presence, keeping things simple, promoting transparency, prior-

See **Lessons Learned** page 7

In Fond Remembrance

In Memory of Jared Sandler

The Maricopa County Bar Association is deeply saddened by the passing of Jared Sandler, a partner at Arizona Mediation Institute, a cherished member of our community, a dedicated Maricopa Family Law Section member, and a former Family Law Section Board member. Jared's kindness, warmth, and unwavering spirit touched the lives of so many, and he will be profoundly missed. Jared is survived by his significant other, Amy Witzleb, his son, Owen Sandler, and his mother. Our hearts go out to his family, friends, and colleagues during this difficult time.

ENVIRONMENTAL LAW SECTION

The Demise of "Chevron Deference" on the Federal Level Has Also Arrived In the Arizona State Courts

By Jerry D. Worsham II
Clark Hill PLC

Jerry D. Worsham II

Changes in Federal and many states' laws (e.g., just last month in Arizona) may put industry on more equal footing with agencies when interpreting rules and permit terms. If Agencies have overreached on these interpretations, companies now have a better chance to challenge these interpretations (or prepare to defend their preferred interpretation if challenged by the Agency). The key is to intentionally identify and analyze – in advance – which aggressive or objectionable Agency interpretations you are impacted by and are candidates worth challenging, either in a permit renewal/modification, or by preparing to defend an enforcement case. In contrast to deference-focused reviews of agency interpretations, it is now possible to defend your position in Court based on logical interpretations of rules and permit terms.

Background

In defending regulated industries and challenging Administrative Agency decisions at the federal level, defense attorneys have historically been at a disadvantage in Federal Court based on the historical decision in *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Commonly referred to as "***Chevron Deference***", the Federal Courts generally adopted the following position in reviewing Administrative Agency decisions:

> With regard to judicial review of an agency's construction of the statute which it administers, if Congress has not directly spoken to the precise question at issue, the question for the Court is whether the agency's interpretation is a permissible construction of the statute. "We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative determinations." (467 U.S. at 844)

Since 1984, *Chevron Deference* has been cited in at least 17,661 federal cases and, in such cases the Agencies almost always won.

Since 1983, Arizona Courts have similarly determined that an Agency's interpretation of a statute or regulation which it implements is entitled to great weight. Although the ultimate responsibility rested with the Courts, the [Arizona] appellate courts do give more "deference" to an Agency's long-standing interpretation of its own rules. *See Marlar v. State,* 666 P.2d 504 (Ariz. App. 1983).

Federal and State Agency Deference Overturned

Good news! In June 2024, the U. S. Supreme Court overturned *Chevron Deference* in the landmark decision *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 144 S.Ct. 2244 (2024). In the *Loper Bright* case the SCOTUS overruled Chevron Deference and determined that the Administrative Procedures Act (APA) requires federal courts to exercise independent judgment in deciding whether an agency has acted within its statutory authority and Federal courts should not "defer" to an agency's legal interpretation just because the statute is ambiguous. (144 S.Ct. at 2273)

The law in Arizona has also abandoned agency deference. Arizona courts have now implemented the AZ legislature's mandate to drop *Chevron*-like deference to agency interpretations. In 2018 and 2021, the Arizona Legislature amended Arizona Revised Statute § 12-910(F), which governs judicial review of Administrative Agency decisions such that, in a regulated-party proceedings, Arizona Courts should decide questions of law and fact interpreting Administrative actions without deference to prior agency interpretations.

AZ Rev Stat § 12-910 (F) (2024) provides,

> "F. . . . In a proceeding brought by or against the regulated party, **the court shall decide all questions of law, including the interpretation of a constitutional or statutory provision or a rule adopted by an agency, without deference to any previous determination that may have been made on the question by the agency.** In a proceeding brought by or against the regulated party, **the court shall decide all questions of fact without deference to any previous determination that may have been made on the question by the agency.** Notwithstanding any other law, this subsection applies in any action for judicial review of any agency action that is authorized by law."

After reviewing the Administrative record and supporting evidence, the Arizona Courts may affirm, reverse, modify or vacate and remand the Agency action. Now is the time to create the Administrative record to support your position to win your case!

Two recent Arizona cases, *S. Arizona Home Bldg. Assoc. v. Town of Marana*, 522 P.3d 671, 254 Ariz. 281 (Ariz. App. 2023) and *Simms v. Simms*, Case No. CA-CV23-0139 (Ariz. App. March 18, 2025), have interpreted A.R.S. § 12-910(F) and specifically curtailed deference to agency interpretations by the Arizona Courts. As stated in *Simms*:

> "Now, in regulated-party cases, reviewing courts do not defer to an agency's legal interpretations. As 910(F) puts it, "[i]n proceeding" involving "the regulated party," courts "decide all questions of law." Questions of law include "the interpretation of a constitutional or statutory provision or a rule adopted by an agency[.]" A.R.S. § 12-910(F). And reviewing courts no longer defer even when an agency has interpreted a statute or regulation in the same way for a long time. *Id.* (instructing courts to decide "all" legal questions "without deference to any previous determination that may have been made on the question by the agency"). Put differently, reviewing courts have the final say on what the law is." (*See, Simms* ¶31)

What's Left?

After the demise of both *Chevron deference* and Arizona State deference, what is left? Attorneys must be prepared to address agency claims to deference under a U. S. Supreme Court decision from 1944. "Although the rulings, interpretation, and opinions of the administrator under the [Fair Labor Standards] Act do not control judicial decisions, they do constitute a body of experienced and informed judgment to which Courts and litigants may property resort for guidance." *See, Skidmore v. Swift & Company*, 323 U.S. 134, 140 (1944) (commonly referred to as **"Skidmore Deference."**)

Arizona State Courts will follow a similar interpretation of State Agency positions on laws, rules or regulations. "Agency action also sometimes involves expertise. This court has long-recognized that a reviewing court "may not function as a 'super agency' and substitute its own judgment for that of the agency where . . . agency expertise [is] involved." (*See, Simms* ¶57.) "Although reviewing courts must decide all legal and factual questions without deferring, if an agency uses discretion or expertise in other ways referring courts can defer on those matters." (*See, Simms* ¶58.)

Conclusion

The Supreme Court's decision in *Loper Bright* now requires Federal Courts to exercise their independent judgment in deciding if the agency has acted within its statutory authority and federal courts may not defer to an agency interpretation of the law because a statute is ambiguous. Now, Arizona law and two recent Arizona State Court cases require Arizona Courts to no longer give deference to Arizona Administrative Agencies on both questions of law and fact when reviewing agency action involving regulated-parties. **But there remains some uncertainty in the level of deference that will be given by Arizona Courts to Arizona agencies. Accordingly, we recommend that you closely monitor State administrative law decisions to see if this trend continues.**

We strongly recommend that regulated industries closely monitor the legislative and/or administrative agency rulemaking processes and comment upon laws, rules and regulations that may affect your business. These efforts can create an Administrative Record that supports a logical or favorable interpretation of administrative law, rules or regulations. You should also consider identifying current Agency interpretations of regulations that impact your bottom line and prepare to challenge the Agency, knowing that Courts will not just defer to the Agency's interpretation, even if it is a historical position of the Agency. Although Federal or Arizona State Courts may consider rulings, interpretations or opinions of the applicable agency, the Agency's position will only provide an experienced and informed judgment. ■

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ENVIRONMENTAL LAW SECTION

From Washington to the West
continued from page 1

and reduced compliance costs.

The EPA's broader emphasis on cooperative governance has also drawn attention from state and tribal agencies which may now have greater influence over environmental decision-making. Administrator Zeldin is committed to resolving a significant backlog of State and Tribal Implementation Plans, with hundreds of submissions still awaiting review. Streamlining this process may allow projects to move forward more predictably, although environmental advocates caution that expedited review may compromise scientific and public health evaluations.

The new agenda also signals a strong pivot from the previous administration's regulatory approach toward the energy sector. Administrator Zeldin announced reviews of rules targeting power plant emissions, mercury, and air toxics standards; greenhouse gas reporting; and wastewater discharges from oil and gas operations. Arizona's energy producers, particularly those relying on natural gas and coal, may benefit from regulatory relief if the agency scales back or delays compliance obligations. However, the potential reduction in oversight has raised concerns among environmental groups about long-term consequences for air and water quality, especially in areas near industrial sites or power generation facilities.

One policy that drew particular attention in Arizona was the restructuring of the Regional Haze Program, which addresses visibility and pollution in national parks and wilderness areas. In Arizona, which relies heavily on outdoor tourism and is home to iconic protected lands, this program has been a source of both federal investment and federal regulation. The EPA has said it will update the program to reflect current scientific data and improve consistency with congressional intent. While restructuring may help to prevent abrupt shutdowns of industrial operations, it also raises questions about whether air quality gains will be maintained in sensitive ecological zones.

The approach has not been without controversy. In addition to terminating the EPA's Office of Environmental Justice and initiating staff reductions, the agency is also reconsidering the 2009 Endangerment Finding, a foundational legal determination that greenhouse gases pose a threat to public health. Critics argue this move undermines climate policy and could limit the government's ability to regulate emissions in the future.

During a recent visit to Phoenix, Administrator Zeldin met with elected officials, industry leaders, and state environmental regulators. Discussions touched on ongoing Superfund cleanups, permitting challenges, and the role of federal grants. While Administrator Zeldin emphasized that statutory obligations for hazardous site remediation would continue to be met, his administration has also paused several environmental grant programs pending further review.

For Arizona businesses, the changes come with relief and uncertainty. A promise of streamlined permitting and reduced regulatory costs may spur new investment, particularly in industries like mining, homebuilding, and energy. But the removal of certain protections and oversight mechanisms may shift regulatory responsibility to state agencies and local stakeholders to monitor environmental outcomes. As the EPA continues to reshape its priorities, Arizona will likely remain a crucible where these national policies play out at the state level. ■

***Any opinions expressed are the authors' and not necessarily those of the firm or their colleagues.*

Lessons Learned
continued from page 5

itizing client well-being, and fostering trust, legal professionals can use marketing as a powerful tool for change. The legal profession has the ability—and the responsibility—to expand access to justice, and strategic, community-focused marketing is one of the most effective ways to do so.

Deepening Our Community Commitment.

In our view, underserved communities are not just defined by economic or geographic factors, but by a history of being overlooked and under-resourced. We believe in fostering more engagement by actively communicating and working in coordination with community members, local organizations, and future legal professionals. By prioritizing access to legal justice and inspiring the next generation, we build long-term relationships based on transparency, mutual respect, and trust. Our commitment goes beyond marketing-it's about nurturing a vibrant, informed community where everyone has the opportunity to be heard and empowered.

Nearly 50 years later, firms are taking advantage of the Bates case by being present in their communities, engaging with their potential clients and demonstrating a commitment to accessibility. The tactics may have changed over the years, but the strategy is still solid. ■

Brandon B. Rafi is the Founder of Rafi Law Group, a firm dedicated to serving underserved communities through innovative legal solutions and proactive advocacy. More information is available at https://www.rafilawgroup.com.

ETIQUETTE TIPS

Elevate Your Etiquette: Mastering Cell Phone Usage at Work and in Court

Nicholas Boca

Nicholas Boca
Cantor Law Group

Continuing our monthly etiquette series in collaboration with Judge Elizabeth Bingert, we turn our attention to the proper use of cell phones. Our smartphones, powerful tools connecting us to the world, have become extensions of ourselves. Yet, in the workplace and courtroom, these devices can easily morph from helpful assistants to disruptive distractions. Navigating cell phone etiquette is paramount for maintaining professionalism and fostering a respectful environment. Moreover, cultivating genuine interactions by being fully present strengthens professional relationships and expands your network. This guide addresses common pitfalls, ensuring you're a responsible digital citizen in both professional spheres.

Navigating Public Spaces with Discretion:

- **Walking and Talking (and Bumping):** The ubiquitous distracted walker, eyes glued to their screen, disrupts flow and creates hazards. In busy offices and courthouses, prioritize situational awareness. If a call is unavoidable, step aside. Otherwise, keep your phone tucked away, maintaining clear pathways and courtesy.
- **Elevator Etiquette: A Silent Sanctuary:** The elevator is a shared, confined space. Avoid talking on the phone or taking calls. Refrain from calls; brief message checks are acceptable. Ideally, use this time to connect with fellow passengers. A simple introduction can foster future rapport.
- **Speakerphone: A Public Intrusion:** Using speakerphone in public areas, including open office spaces, courthouses, lunchrooms, or hallways, is a significant breach of etiquette. It forces everyone around you to become unwilling participants in your conversation. If a call requires speakerphone, find a private room.

Courtroom Conduct: Absolute Silence and Respect:

- **Absolute Silence:** Courtrooms demand silence. Ensure your phone and those of your clients are completely silenced.
- **Concealment and Permission:** Phones should remain concealed. If courtroom use is essential, seek explicit judicial permission. For example, coordinating virtual witness testimony during a trial.

Communication Courtesy: Clarity and Consideration:

- **Messages, Voicemail, and Follow-Up:** Deliver concise, professional messages, including your full name, purpose, availability, and the specific day of the week, date and time. A brief follow-up text is acceptable but avoid excessive contact.
- **The Enduring Value of Voicemail:** Do not assume everyone will answer a text immediately. Leaving a voicemail gives the recipient context and allows them to call back when they have the time.
- **Meetings: A Realm of Presence:** Meetings demand undivided attention. Silenced, concealed phones are non-negotiable. Even visible phones on tables project disinterest.
- **Lunchroom: A Hub for Connection:** Resist the urge to retreat into your phone during lunch, especially when others are present. Engage, build rapport, and foster professional relationships.

Private Spaces, Private Practices:

- **The Bathroom: A Phone-Free Zone:** Bathroom use is unsanitary and unprofessional. It's a private space, and your phone should remain tucked away.

Understand the Negative Impact of Cell Phones:

- Studies have shown that the mere presence of a cell phone, even when not in use, can diminish the quality of face-to-face conversations. Linares *C, Sellier AL. How bad is the mere presence of a phone? A replication of Przybylski and Weinstein (2013) and an extension of creativity. PLoS O*ne. 2021 Jun 9.
- It can lead to decreased empathy, less eye contact, and a reduced focus on the interaction. Research indicates that people often underestimate the negative impact their own phone use has on social interactions.
- "Phubbing," or phone snubbing, is the act of ignoring someone in favor of a cell phone. This behavior can lead to feelings of social exclusion and decreased relationship satisfaction.

The Foundation of Professionalism: Respect and Consideration:

Ultimately, cell phone etiquette boils down to respect and consideration for your colleagues. Meaningful engagement with others is as crucial as mindful phone use. By prioritizing both, you significantly improve workplace harmony, demonstrate professionalism, and contribute to a more positive and productive environment. ■

Judge Gass Recognition

Every year, the Maricopa Chapter of AWLA honors a person for their extraordinary contributions in supporting the goals of AWLA as well as the advancement of women in the legal profession. Every year since 1994 the honoree is celebrated at the Wine and Cheese Reception.

In 2015, the Maricopa Chapter was thrilled to receive permission from the Honorable Ruth V. McGregor to name the award in her honor. Chief Justice McGregor was the second female justice on the Arizona Supreme Court and eventually, Chief Justice. She continues to serve as a leader and inspiration to women in the law. Thus, the Ruth V. McGregor Award befits the exceptional individuals who promote the mission of AWLA. ■

Dave Gass accepting the Ruth V. McGregor Award

Ruth V. McGregor Award Honorees

THANK YOU

To all the players and sponsors who made this event a huge success in support of the Volunteer Lawyers Program!

TIM HUFF PRO BONO GOLF CLASSIC

Volunteer Lawyers Program Thanks Attorneys

The Volunteer Lawyers Program thanks the following attorneys and firms for agreeing to provide pro bono representation on cases referred by VLP to help people with low incomes. VLP supports pro bono services of attorneys by screening for financial need and legal merit and provides primary malpractice coverage, verification of pro bono hours for CLE self-study credit, donated services from professionals, training, materials, mentors and consultants. Attorneys who accept cases receive a certificate from MCBA for a CLE discount. For information on rewarding pro bono opportunities, please contact Roni Tropper, VLP Director, at 602-258-3434 x 2660 or Rtropper@clsaz.org or enroll with us at https://clsaz.org/volunteer-lawyers-program/. ■

VLP THANKS THE FOLLOWING ATTORNEYS AND FIRMS FOR ACCEPTING CASES FOR REPRESENTATION

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VLP THANKS THE FOLLOWING INDIVIDUALS WHO RECENTLY HELPED OR ENCOURAGED COLLEAGUES TO VOLUNTEER WITH VLP

Diane Drain | Michelle Lauer | Maria Mathus | Judge Madeleine Wanslee

PRO BONO SPOTLIGHT ON CURRENT NEED FOR REPRESENTATION

Attorneys are needed to help consumers with contract matters. Attorneys' fees can be claimed if litigation is required.

The Volunteer Lawyers Program is a joint venture of Community Legal Services and the Maricopa County Bar Association

THE VOLUNTEER LAWYERS PROGRAM OF COMMUNITY LEGAL SERVICES

Cordially invites

ALL LAWYERS, JUDGES AND LEGAL PROFESSIONALS TO JOIN VLP'S PRO BONO TEAM!

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ASAP

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Your heart, compassion and skills to serve the underserved and marginalized

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To ensure equal access to justice for all

Help those less fortunate in your community.

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VLP provides a wide range of opportunities that can fit any attorney's interests, skills and schedule.

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Many VLP pro bono opportunities require very little time.

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Networking opportunities.

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It is personally rewarding to help people!

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Bankruptcy ■ Consumer ■ Contracts
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VLP Staff at volunteerlawyers@clsaz.org
Thank you to those who have already enrolled & are helping our clients.
We appreciate you all!

Tripping Over Tort Duty

CourtWatch, continued from page 1

thing of a conundrum. After all, the court must consider *some* facts to determine whether, for example, the plaintiff and the defendant were in the type of relationship giving rise to a duty. Pertinent here was the business-invitee relationship, which forms, Timmer wrote, "when a business owner invites persons to enter or remain on" the owner's "property ... for purposes directly or indirectly connected with its business dealings." So, the court must determine from the facts alleged in the complaint whether that standard has been met. But how far should the examination go? Quoting her concurring opinion in a recent case, Timmer answered that "a court does not act contrary to *Gipson* by examining the case-specific facts to decide whether 'an unreasonable risk of harm' arose from a special relationship to trigger a duty."

The thing that had confounded the court of appeals was another recent supreme court opinion, *Dinsmoor v. City of Phoenix*, 251 Ariz. 370 (2021), a tragic case where a high-school student was murdered by her boyfriend, also a student. The student–school relationship gives rise to a tort duty, but the question there was the *scope* of that duty, given that the killing did not occur on school grounds but at a friend's home.

Acknowledging that "the school–student relationship creates a duty to protect students from unreasonable risks of harm arising within the confines of the relationship," the court nonetheless held the school did not owe a duty in those circumstances. The opinion, Timmer noted, had "clarified that a duty based on special relationships ... applies only to risks that arise within the scope of the relationship," which is generally "bounded by geography and time."

The court of appeals majority had extrapolated from *Dinsmoor* that duty in premises-liability cases requires the court to determine whether an allegedly dangerous condition was, in fact, unreasonably dangerous. And that required an examination of the allegedly tortious incident. Not so, Timmer held.

"The purpose in examining case-specific facts in the duty inquiry involving a special relationship," she wrote, "is determining *when* and *where* the alleged risk of harm arose—within or outside the scope of the special relationship—not *whether* the alleged risk actually constituted an unreasonably dangerous condition." She pointed out that the risk in *Dinsmoor* was the danger that Matthew, the boyfriend, would harm Ana, the victim. "But because nothing suggested that this risk arose while Ana was in the school's custody or control, and therefore within the school-student relationship," Timmer explained, "the school had no duty to Ana to protect her from Matthew once she left the school's custody and control."

Contrary to the view of the court of appeals majority, *Dinsmoor* had not altered the *Markowitz* analysis. "Rather, *Dinsmoor* complemented the *Markowitz* analysis by focusing on whether, when a harm occurs outside the traditional time-and-space bounds of a special relationship, the risk of harm nonetheless arose within the special relationship to trigger a duty."

Timmer acknowledged that the court does have to examine facts to determine the duty question. "As in *Dinsmoor*," she wrote, "sometimes certain antecedent facts must be considered in determining whether a duty exists." But there is a limit: "Factual issues of breach and causation are not part of this inquiry," she explained. "Rather, they generally are questions for the jury once a duty is established."

She continued, "Circle K and the court of appeals majority's analysis conflicts with *Markowitz* by resolving within the duty determination whether Circle K's end-cap display presented an unreasonably dangerous condition or was open and obvious." But "the proper inquiry in the duty analysis is whether a special relationship existed between the plaintiff and defendant and, if so, whether the risk of harm alleged to have injured the plaintiff arose within that relationship."

That required the court to determine whether Perez was a business invitee when she tripped over the end-cap water display. "She indisputably was," Timmer held. Under *Markowitz*, she continued, whether there was an unreasonably dangerous condition "should be considered when addressing whether Circle K breached the standard of conduct." It is in that inquiry that "considerations like the open and obvious nature of the display can be considered."

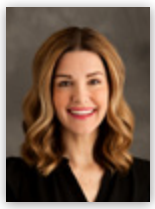
Judge Howe, in his concurring opinion, would have affirmed the summary judgment on that basis—that the open and obvious nature of the display meant Perez had failed to establish a breach of its duty. Timmer declined to take that tack. "Circle K moved for summary judgment solely on the issue of duty," she wrote, so "any other issues regarding premises liability should be fully briefed and decided in the trial court before appellate review."

Joining Timmer in vacating the court of appeals' opinion and reversing the summary judgment were Vice Chief Justice John R. Lopez IV, and Justices Clint Bolick, James P. Beene, William G. Montgomery, and Kathryn H. King, and retired Justice John Pelander, who sat for the recently retired Justice Robert Brutinel. ■

THE BULLETIN BOARD

News from the legal community

The *Maricopa Lawyer* invites members to send news of moves, promotions, honors and special events to post in this space. Photos are welcome. Send your news to maricopalawyer@maricopabar.org.



Ashley Case

The Board of Regents of The American College of Trust and Estate Counsel (ACTEC) convened during the College's 2025 Annual Meeting in La Quinta, California, to consider nominations for a new class of ACTEC Fellows. The College is pleased to announce that **Ashley Case** and 33 other individuals were elected: 26 Fellows, one Academic Fellow, three Fiduciary Counsel Fellows, two International Fellows from Canada, one International Fellow from Japan, and **Russell N. James, III**, Professor of Charitable Financial Planning at Texas Tech University, was elected as an Honorary Fellow.

ACTEC President **Peter S. Gordon** states: "On behalf of ACTEC, I welcome these experienced trust and estate lawyers to the College, and look forward to their contributions. I am honored to welcome Professor Russell N. James, III as an Honorary Fellow. His expertise and commitment to charitable financial planning is an invaluable asset to the trust and estate profession."

To qualify for nomination and election as an ACTEC Fellow, a lawyer must have no fewer than ten years of experience in the active practice of trust and estate law, as fiduciary counsel with a fiduciary services company, or a combination thereof. Lawyers and law professors are elected to be Fellows based on their outstanding reputation, exceptional skill, and substantial contributions to the field by lecturing, writing, teaching, and participating in bar leadership or legislative activities, with the goal of improving and reforming probate, trust and tax laws and procedures, and creating a greater awareness of the rules of professional responsibility.

ASU Law launches Wolin Family Center for Intellectual Property Law to drive innovation and legal excellence

The Sandra Day O'Connor College of Law at Arizona State University is proud to announce the launch of the Wolin Family Center for Intellectual Property Law (Wolin Center) as a groundbreaking initiative designed to shape the future of intellectual property law through legal education and industry collaboration.

"The launch of the Wolin Family Center for Intellectual Property Law solidifies ASU Law's commitment to equipping students with the knowledge and practical skills necessary to excel in IP law. Combining rigorous academic curriculum, including real-world experience, with mentorship and guidance from industry leaders, we are confident that the Wolin Center will quickly achieve national prominence in the field," said Willard H. Pedrick Dean, Regents and Foundation Professor of Law **Stacy Leeds**. "We appreciate the Wolin family's generous donation and their dedication to fostering innovation and legal education. Their support enables us to create unparalleled opportunities for our students and to shape the future of intellectual property law." ■

100% CLUB MEMBERS

The Maricopa County Bar Association is pleased to endorse its 100% Club members of the MCBA. These firms have made a commitment to the bar association and its work on behalf of the local legal profession and the public by assuring membership to all of their attorneys. To join, contact Laurie Williams at lwilliams@maricopabar.org

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Law Office of Katherine Kraus, PLLC

HOW LONG HAVE YOU BEEN A MEMBER OF THE MCBA?

I believe since 2011

HAVE YOU EVER BEEN INVOLVED WITH ANY SECTIONS OR DIVISIONS?

I am a member of the family law section. I love attending MCBA events!

HOW LONG HAVE YOU BEEN PRACTICING IN YOUR FIELD?

13 years

WHAT DO YOU SEE AS THE FOCUS FOR THE MCBA THIS YEAR?

I believe the MCBA has a focus of serving its members, the broader legal community and the public. The MCBA provides quality CLEs to attorneys, paraprofessionals, paralegals, and others in the legal profession. The MCBA provides countless opportunities for attorneys and legal professionals to engage and network within and across practice areas and firm types. The MCBA also supports the justice system locally through pro bono opportunities allowing members to use their skills for charitable purposes and to support our community. Further, the MCBA will continue its focus on providing member resources and benefits which include legal and substantive articles, access to a career center and discounts on products and services though member partners. The MCBA will continue to demonstrate a commitment to servings its members, enhancing the legal profession, supporting the judicial system, and benefiting the public.

WHAT ISSUES DO YOU SEE FACING THE LEGAL COMMUNITY IN ARIZONA?

There is not equal access to justice. Access to affordable legal representation in family law is a significant challenge in Arizona. The high cost of legal representation often leaves those facing issues such as divorce, child custody, and domestic violence without counsel and they are left to navigate a complex system on their own. Further, people that reside in smaller counties and rural areas face additional challenges due to lack of resources and limited options for affordable local counsel. I also recognize that if someone is not from the United States and/or they do no speak English the resources are even more scarce. While the court will provide interpreters for hearings, cultural and language barriers pose a challenge in fully understanding legal proceedings and the overall process of their legal matter. Further, domestic violence victims often need immediate protection. They may need an Order of Protection or an emergency custody order. Many lack resources, support, or knowledge about legal options.

I strongly believe our legal community plays a crucial role in improving access to justice. Whether by volunteering time, mentoring young attorneys in pro bono work, or advocating for policy changes, we all have the opportunity to strengthen legal accessibility for Arizona families.

IF YOU HADN'T BEEN AN ATTORNEY WHAT ELSE WOULD YOU BE?

I would want to be an aerial artist. I would really like to take trapeze lessons still so it can become a more solid back up plan.

IF YOU COULD BE ANY FICTIONAL CHARACTER—ON TV, IN BOOKS, IN MOVIES—WHO WOULD IT BE AND WHY?

Doctor Who for so many reasons. The Doctor embodies endless adaptability, constantly regenerating into new versions while maintaining the same core values of kindness and intelligence. Their wit and sharp mind make them one of the most compelling characters in fiction, always solving problems through cleverness rather than brute force. What truly sets the Doctor apart is their deep sense of morality and compassion—they always fight for the underdog, stand against injustice, and believe in the potential for good in others. Their adventures through time and space represent the ultimate sense of wonder, making every moment an opportunity for discovery and learning. Unlike traditional heroes, the Doctor relies on intelligence and persuasion instead of violence, proving that heroism comes in many forms. Above all, the Doctor is a symbol of hope, constantly reminding us that no matter how dark things seem, there's always a way forward.

WHAT'S THE STRANGEST JOB YOU'VE EVER HELD?

This is a difficult question. I went to college later in life and have been on my own since I was sixteen. I have sold vacuums, light bulbs, credit card machines, comedy show tickets, window furnishings, magazines, newspapers, pizzas, cowboy boots, hearing aids, long-distance phone service, chess lessons, and more. One of my favorite jobs was being a blackjack and poker dealer. ■

SUBMISSIONS POLICY

Members and non-members are encouraged to submit articles for publication. The editorial deadline for each issue is generally the 8th of the month preceding the month of issue.

CONTINUING LEGAL EDUCATION **CLE** MARICOPA COUNTY BAR ASSOCIATION

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In-person, Online or Hybrid will be listed for each program.
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Interested in presenting a CLE? Email cle@maricopabar.org

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Full payment must be received in advance of the program before you are considered registered.

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Refunds, less a $25 fee, will be issued only if the MCBA receives your cancellation, by emailing cle@maricopabar.org at least two business days prior to the program.

NO SHOWS
If you registered and paid, but could not attend, you may request that the self-study program be sent to you after the program. Allow 3-5 days.

THURSDAY ▪ MAY 1
1-2 PM
What's Hot with Solar

ONLINE

One of the most common legal issues we see at Counxel is solar disputes. This can cost both the solar company and the consumer thousands of dollars if there aren't proper safeguards in place.
In this program, we will discuss:
- Contract and agreement disputes
- Installation and performance issues
- Financial Misunderstandings or Fraud
- Permitting and Regulatory Issues

PRESENTER: **Aaron Ludwig**, Counxel

TUESDAY ▪ MAY 6 ▪ 12-1 PM
Domestic Violence, Abuse, Sexual Abuse, and Child Pornography Allegations in Family Law Cases

ONLINE & IN-PERSON AT MCBA, 3550 N. CENTRAL, SUITE 1101, PHOENIX

Being a litigant in a family law case is already stressful. Allegations of abuse only further complicate and add to your client's already stressful situation. Attendees will learn how to defend family law cases involving criminal allegations. As either a sword or a shield, we will discuss using the relationship between the discovery process and trial rules of evidence to your client's benefit. You will learn how to handle these allegations during every step of the process while maintaining client and case credibility involving bad facts.

PRESENTERS: **David Cantor,** Founding Partner, DM Cantor & Cantor Law Group
Nicholas Boca, Partner/Managing Attorney, Cantor Law Group

WEDNESDAY ▪ MAY 7
5-7 PM
Family Law Game Night and Happy Hour

IN-PERSON AT MCBA, 3550 N. CENTRAL, SUITE 1101, PHOENIX

Gather with your family law colleagues for a fun, interactive game night! Test your knowledge and learn new things on a wide variety of family law issues, including buzzing in with answers to thought-provoking questions. Appetizers and drinks will be provided.

PRESENTER: **Hon. Aryeh Schwartz,** Maricopa County Superior Court
Hon. Amy Kalman, Maricopa County Superior Court
Nichol Fitzpatrick, Code 4 Legal
Kathleen Stillman, Stillman Smith Gadow

TUESDAY ▪ MAY 13
12:30-1:30 PM
Building an Undue Influence Case in Arizona – A Practical Checklist for Litigators

ONLINE

This session offers attorneys a comprehensive, step-by-step guide to litigating undue influence claims in Arizona, from evaluating timeliness and gathering key records to identifying the indicia of undue influence and navigating burdens of proof. Whether prosecuting or defending, participants will gain practical tools for assembling the puzzle of undue influence, including how to craft discovery strategies, and assess a decedent's susceptibility through medical, physical, and social factors. Designed for new probate litigators, this CLE provides a clear road map for putting together a compelling undue influence case with confidence.

PRESENTER: **Amanda L. Barney,** Becker & House, PLLC

WEDNESDAY ▪ MAY 14
5:30-7:30 PM
Speed Networking with the Family Law Judges

ONLINE & IN-PERSON AT MCBA, 3550 N. CENTRAL, SUITE 1101, PHOENIX

Please join us for the Family Law Bench Speed Networking event on May 14, 2025, from 5:30 pm – 7:30 pm at the Embassy Suites Biltmore. This event allows practitioners to meet with Judges in a casual yet organized setting and learn about their likes and dislikes on the bench, suggestions in practice, and even their favorite food! Socializing from 5:30-6:00 pm. Speed Networking begins promptly at 6:00 pm.

JUDICIAL OFFICERS ATTENDING:

Hon. Quintin Cushner
Hon. Harla Davison
Hon. Greg Gnepper
Hon. Ashley Halvorson
Hon. Amy Kalman
Hon. Colleen O'Donnell-Smith
Hon. Amanda Parker
Hon. Andrew Russell
Hon. Paula Williams
And more to come!

The State Bar of Arizona does not approve or accredit CLE activities for the Mandatory Continuing Legal Education requirement. The activities offered by the MCBA may qualify for the indicated number of hours toward your annual CLE requirement for the State Bar of Arizona, including the indicated hours of professional responsibility (ethics), if applicable.

Does Inclusion of Athlete Tattoos in Video Games Constitute Copyright Infringement?

By Daniel F. Gourash
Seeley Savidge Ebert & Gourash Co., LPA

Many athletes and entertainers adorn their bodies with ink—tattoos—a form of self-expression, which become part of their image and likeness. Many such athletes and entertainers license their image and likeness, including their tattoos, to video game developers for use in their gaming products. Of course, the origin of tattoos shown in such games begins with the tattoo artists who created and inked the body art designs.

In recent years, tattoo artists have taken steps to copyright their tattoo designs and have filed lawsuits against video game developers claiming copyright infringement arising from the publication of exact replicas of their tattoo designs on the depictions of athletes and entertainers appearing in the video developers' games. This litigation pits the tattoo artists' rights to their designs against the rights of athletes and entertainers to control publicity rights to their image and likeness by licensing them to video game developers. Trial courts have grappled with how to handle these claims, and three recent cases illustrate the different approaches courts have taken.

In *Solid Oak Sketches, LLC v. 2K Games, Inc.* (2020), the plaintiff, a licensing company for athletes and entertainers, brought a copyright infringement claim against 2K Games for depicting lifelike images of National Basketball Association (NBA) basketball players and their tattoos. Five tattoos were depicted on NBA players Eric Bledsoe, LeBron James, and Kenyon Martin in three annual versions of the NBA 2K game. The plaintiff claimed these depictions constituted an infringement of the tattoo designs and copyrights owned by the tattoo artists. 2K Games raised three main defenses: first, that the plaintiff could not establish substantial similarity of the depictions to the designs because the use of the tattoos was *de minimis*; second, that the copyright infringement claim failed because 2K Games held an implied license to feature the tattoos as part of the players' likeness; and third, that use of the tattoos in the NBA 2K games constituted "fair use." The U.S. District Court for the Southern District of New York granted summary judgment in favor of 2KGames on all three defenses.

In its ruling that "no reasonable trier of fact could find the Tattoos as they appear in NBA 2K to be substantially similar to the Tattoo designs licensed to *Solid Oak*," the court found it significant that the tattoos appeared on only three of over 400 players available to choose from on the 2K game and that the average game play would not likely include these three players. It also found that the tattoos depicted were small and indistinct and could not be identified or observed when viewed on rapidly moving figures in groups of player figures. Based on these findings, the court held the use of the tattoos to be *de minimis*.

The court also found the copyright infringement claims failed because 2KGames was authorized to use the tattoos under an implied license. The factual record established that the three players each requested the creation of the tattoos, the tattoo artists created and delivered the designs to the players by inking them onto their skin, and the tattoo artists intended the tattoos to become a part of the players' image and likeness knowing they would appear in public, on television, in commercials, and in other forms of media like the video games. Because a copyright owner who grants a nonexclusive license to use his copyrighted material waives his right to sue for infringement, the court held that by granting the players an implied license to use the tattoos as part of their likeness, Solid Oak could not sue for infringement.

In considering the "fair use" defense of the tattoos, the court engaged in a multifactor analysis. It found 2K Games' use of the tattoos to be transformative because the display of the tattoos on the 2K game had a different purpose from the purpose for which the tattoos were originally designed. Originally, the tattoos were designed for the purpose of the players' self-expression. The purpose of the use in the 2K game was to depict the players' images accurately. It was also significant to the court's finding of "fair use" that the size of the tattoos in the 2K games was significantly reduced and that the tattoos were infrequently observable and were an inconsequential part of the game given only three of over 400 players were depicted with tattoos.

What was significant about the *Solid Oak* case was that it was decided on summary judgment as a matter of law. However, in two other cases in which tattoo artists asserted similar copyright infringement claims against video game developers that, in turn, raised the same defenses that were raised in *Solid Oak*, the courts denied summary judgment based on issues of fact and sent the cases to trial before a jury.

In *Alexander v. Take-Two Interactive Software, Inc.* (2020), a former tattoo artist who inked tattoos on WWE professional wrestler Randy Orton sued the creators of the *WWE 2K* series of video games for copyright infringement for reproducing the tattoos digitally in the video games. The U.S. District Court for the Southern District of Illinois first granted summary judgment in favor of the plaintiff, finding that the defendants had copied the tattoo designs. It then denied summary judgment on the defendant's affirmative defenses of implied license, fair use, and *de minimis* use, finding issues of fact. The case was tried solely on the affirmative defense of fair use. The jury returned a verdict rejecting the affirmative defense, awarding the plaintiff $3,750 in actual losses and awarding zero dollars for profits attributable to the use of the tattoos.

In *Hayden v. 2K Games, Inc.* (2022), a tattoo artist filed suit against the same video game developer defendants in the *Solid Oak* case, alleging copyright infringement for depictions of tattoos he designed and inked on NBA players Lebron James, Danny Green, and Tristan Thompson. The case involved different tattoos on LeBron James and different annual versions of the NBA 2K games from those at issue in *Solid Oak*. The 2K Games defendants used the same lawyers who defended them in *Solid Oak* and asserted the same affirmative defenses and arguments they successfully raised on summary judgment in *Solid Oak*. However, the U.S. District Court for the Northern District of Ohio reached a different result, denying summary judgment to the 2K Game defendants based on factual issues and sending the case to trial. The verdict form asked whether the defendants proved their defenses of implied license (the first defense listed), waiver, *de minimis* use, and fair use. The jury found in favor of the defendants on the implied license defense and did not need to reach a verdict on the other defenses.

These three cases, raising the same copyright claims and affirmative defenses, were all treated differently with varying results. In *Solid Oak*, the court granted summary judgment on the affirmative defenses of implied license, *de minimis* use, and fair use as a matter of law. In both *Alexander* and *Hayden*, the courts denied summary judgment finding issues of fact on the same affirmative defenses. Granted, the facts were a bit different in each case, but not significantly. In the two cases that went to trial, the juries came to different conclusions, with one rendering only a modest award in favor of the tattoo artist and a defense verdict for the video game developers in the other.

Given these different approaches and outcomes, it is evident this area of copyright infringement law is in a state of flux and could use further development. However, that confusion may not soon be resolved. Because no tattoo artist has yet received a significant monetary award based on actual losses or alleged profits attributable to the video game developers' use of the copyrighted tattoos, the incentive for tattoo artists to bring these complex claims may be diminished. This fact alone may deter further development of this area of the law. But it is worth watching how similar new cases, if any, will be adjudicated and what outcomes may result. ■

Daniel F. Gourash is chair of the Judicial Division Lawyers Conference and director of the Insurance Coverage and Complex Litigation Groups of Seeley Savidge Ebert &Gourash Co., LPA in Cleveland, Ohio.

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