

# THE ARIZONA BUSINESS LAWYER

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## a note from the chair –

by Scott DeWald, Chair  
Business Law Section

Dear Business Law Section Member,

### ARE YOU INTERESTED IN BECOMING MORE ACTIVE IN THE BUSINESS LAW SECTION? WOULD YOU LIKE TO ATTEND THE BUSINESS LAW ANNUAL MEETING LUNCHEON?

The Executive Council is looking to add members-at-large from current members of the Business Law Section of the State Bar. What's involved? The Council meets at least four times per year for about an hour or so. Depending on your level of responsibilities, the time commitment outside of meeting time varies. You can learn more at the Council's annual meeting, to be held on Wednesday, June 9.

**ALL MEMBERS ARE INVITED TO THE ANNUAL MEETING OF THE BUSINESS LAW SECTION, JUNE 9, 2010, NOON AT THE YARD HOUSE**, in the middle of Westgate Center (in the Glendale Sports Complex), an easy walk across the parking lot from the Renaissance Hotel, where the State Bar of Arizona Convention will be held. The **first 30 people to RSVP to Nancy Nichols at [nancy.nichols@staff.azbar.org](mailto:nancy.nichols@staff.azbar.org) will get lunch free**. You don't need to register for the convention to attend the meeting. The election of officers and Executive Committee members will be held at the Annual Meeting, at approximately 12:30. The meeting will end not later than 1:30 pm, 30 minutes before the Business Law Section Program at the Convention (at the Renaissance Hotel), summarized below.

### ANNUAL CONVENTION: BUSINESS LAW SECTION PROGRAM

At this year's Annual Convention on June 9 from 2 pm to 5:30 pm, the Business Law Section is sponsoring a seminar entitled **Business Law in Divorce and Estate Planning**, educating the business lawyer on how to interact with divorce and estate planning lawyers in order to best the client. (There are a number of programs of interest to business lawyers in the morning of June 9, including a program about Internet contracting and technology contract negotiation from 8:50 am to noon, hosted by the E-commerce and Technology Section.)

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## editor's note

Dear Business Law Section Members:

As mentioned in summary fashion by our Chairman Scott DeWald, our June 9 CLE convention program will be an interesting mix of business law, estate planning and family law, and will as well involve tax and valuation issues for the business lawyer to consider for his or her clients.

There will be a panel of 9 presenters – each with expertise in a certain field – to present an exciting and educational format which includes a fact pattern of issues and problems, which a business client faces in everyday life.

### CLE OVERVIEW

Business lawyers counsel business owners through formation, governance, and contractual issues, but when the client goes through a divorce, or makes an estate plan that involves potential divorce among family members, the business lawyer needs to collaborate with divorce and estate planning lawyers. What are the issues that the business, divorce, estate planning and probate lawyers and other professionals deal with in order to best serve the client?

### CLE SPEAKERS AND FORMAT

The moderator (Mr. DeWald) will play the role of the business lawyer asking questions of the faculty. All faculty will be welcome to contribute, but specified faculty will make sure that certain important basic principles are covered.

The main topics will be introduced using a creative fact pattern. Our CLE faculty speakers and their bios appear immediately after the fact pattern on pages 3-6 of this issue.

Paul J. Buser  
Editor-in-Chief



## a note from the chair *(continued from page 1)*

### AMENDING ARIZONA'S LLC, CORPORATION, AND PARTNERSHIP STATUTES

The Legislative Committee of the Business Law Section held organizational meetings and formed separate subcommittees, which have begun to hold meetings. Contact the chairs to join in this important work.

#### 1. THE LLC SUBCOMMITTEE

(Revisions to the LLC Act, including consideration of the Revised Uniform LLC Act provisions.)

**Co-Chairs: Jim Reynolds and Kevin Hunter**

**jamesreynolds@qwestoffice.net | khunter@steptoe.com**

#### 2. THE CONVERSION AND MERGER SUBCOMMITTEE

(Moving all merger, conversion and redomestication provisions for all entities to one place with consistent requirements.)  
(Some conversion provisions currently missing will be added.)

**Co-Chairs: Terry Thompson and Raj Gangadean**

**ttw@gknet.com | rgangadean@perkinscoie.com**

#### 3. THE CORPORATE AND PARTNERSHIP SUBCOMMITTEE

(Everything not covered by first two. We have assembled a long wish list.)

**Co-Chairs: Rick Lieberman and Karen Liepmann**

**rlieberman@jsslaw.com | kliepmann@stinson.com**

#### 4. THE FINANCING SUBCOMMITTEE

(Looking into how to assure financing for the ACC Corporations Division that will assure service levels important to our clients, including expedited service.)

**Chair: Mike Patterson | mfpatterson@polsinelli.com**

#### 5. LITIGATION ISSUES SUBCOMMITTEE

(Addressing provisions of all entity statutes relevant to litigation procedures).

**Chair: Rob Royal | RAR@tblaw.com**

**Each of the subcommittees has its own schedule.** Everyone is invited to each meeting. There is no "sign up" required. There will be occasional meetings of the over-arching committee for purposes of status check and coordination. The Business Law Section Web page contains documents relevant to this work. At present, the page contains RULLCA, title 10 and title 29, each as a Word document, and several other documents. To remind you how to access that page, here are instructions:

First, you need a user name and password issued by the State Bar. You already have one, but might not know it. You can call Web Services, 602-340-7295, for your user name and password.

- \* Go to [www.myazbar.org](http://www.myazbar.org)
- \* On the blue menu bar, put the curser on Sections & Committees, click on Section
- \* Select Business Law in the menu and click on the tan menu bar, click on login
- \* Enter your Username and Password
- \* The tan menu bar now says "Good evening, Your name" (if it is evening)
- \* On the right column, click on Online Community
- \* Under the heading, "Business Law Online Community," click on Document Vault
- \* On the left column is a list of Recent Documents. Click on one and download it
- \* Documents are read-only, but if you save them to your computer, they are good for editing, cutting and pasting

### ASU LAW SCHOOL STUDENT NETWORKING

Finally, I would like to report that earlier this spring, several members of your section hosted a networking event with students of the ASU Law School Business Law Society under the supervision of Professor Myles Lynk. With the help of more volunteers, we plan to repeat this interaction, and plan similar events for the U of A and Phoenix Law Schools.

Thanks to all Executive Council and subcommittee chairs and speakers for their work throughout the year.

Scott DeWald, Chair  
Business Law Section  
State Bar of Arizona



# fact pattern

1. Dick (unmarried) starts a business
2. Dick has girlfriend Fifi and they break up
3. Dick proposes marriage to Jane
4. Dick (married to Jane) starts a second business
5. Dick and Jane have children, Jack and Jill.  
Dick and Jane create an estate plan
6. Jack (son) marries Dee, then divorces
7. Jill (daughter) becomes incapacitated
8. Dick has a new girlfriend, Lola, and they break up
9. Jane becomes incapacitated
10. Dick divorces Jane
11. Businesses fail, Bankruptcy Filing
12. Dick dies

## OUTLINE

### 1. Dick (unmarried) starts a business.

*Dick engages business lawyer to form business entity.*

Business lawyers: Brief overview of the choice-of-entity alternatives. *Jeff Fugal; Jim O'Sullivan has an entity chart.* (These different entity types will have unique issues in the subsequent phases of the programs.)

Dick's equity will be separate property.

If there are any other owners of the business, and they are married, Dick may want to know about topics discussed later in this program.

Simple asset protection issues. *Whitney.*

### 2. Dick has girlfriend Fifi and they break up.

*After closing the negotiation of a major contract in your office, Dick takes a call and you overhear Fifi screaming that she is moving out. Dick turns to you and says he is glad Fifi will never have any rights to his business empire. Then asks you, Will she?*

Family lawyers: Palimony claims and potential claims of property interests. Discuss equitable and legal remedies and Arizona's statutes. *Steve Smith and Paul Buser.*

What could Dick have done to minimize the risk of palimony and property claims?

Checklist: Cohabitation Agreement

#### 2a. Child out of wedlock.

#### 2b. Fifi provided services to the business.

### 3. Dick proposes marriage to Jane.

Prenuptial Agreements and Community Property Law: *Stephen Smith and Chuck Friedman.*

Key points in every prenup agreement, with particular emphasis on treatment of stock, appreciation in value of the business, compensation, valuation, and potential start of new businesses in Arizona and other states.

Process and enforceability.

Maintenance and protection of separate estates;  
Creation of a community estate.

Future events that can destroy the separate character of property (Dick spends 100% of his time developing the separately owned business; co-mingling; spouse's participation in management).







If there are children from Jane's prior marriage:  
coordinate prenup agreement with her estate plans.

Choice of governing law.

Valuation issues and disclosure of value.

*Lynton Kotzin.*

Future increase in value of business: how much to  
allocate to community property.

#### **4. Dick (married to Jane) starts a second business.**

Presumption that the second business is community  
property, unless:

Prenuptial agreement says otherwise, or

Funded from segregated, "traceable" separate  
funds

The business lawyer's typical perspective:

**4a. Dick opens the bank account for the new  
entity (with funds that are separate or  
community?)**

**4b. Is the stock CP or SP? Must the lawyer  
preparing the stock certificate advise the  
client on the character of the stock? Does  
a spouse have an adverse interest in this  
issue, and should the spouse have sepa-  
rate counsel?**

#### **MORE ON COMMUNITY PROPERTY**

- Spouses are domiciled where?
- Source of funds
- Effect of connections to Non-Community  
Property States: Quasi-community  
property

Compensation and benefits: CP

Dividends on Stock: SP

- Appreciation in value

- Tracing and Commingling
- Presumptions and Practicalities from the  
Family Lawyer's Perspective
- Waivers and Disclaimers

#### **4c. Single – member LLC with husband and wife as sole members.**

– spouse's right to revoke election.

#### **4d. If CP, what are voting rights of a spouse who does not have record title? (Corp, partnership, LLC, trust)**

#### **4e. If Dick says "I'm not married, title the stock as SP," can the lawyer rely? Is there a duty to inquire?**

**If Dick says, "I'm married, but these are  
separate funds, title the stock as SP,"  
can the lawyer rely? Is there a duty to  
inquire?**

#### **4f. Should attorney recommend client consider a postnuptial agreement?**

#### **4g. Buy-sell agreements.**

*Jeff Fugal, Scott DeWald, Jim O'Sullivan*

- Summary of typical structure  
(redemption, cross-purchase, hybrid,  
use of insurance):
- Containing a disclaimer by the spouse
- Containing agreement to sell any  
interest in the shares at an agreed price  
in the event of divorce or death
- Enforceability

Review of sample terms.

Provisions dealing with valuation--enforceability.  
*Malloy v Malloy. Steve Smith.*

Valuation differences in different types of entity.

Valuation issues to be addressed in drafting.

*Lynton Kotzin.*

*Gene Cole:* buy-sell drafting tips (handout and  
PowerPoint)

- Discounts
- Methodology
- Standard of value



## 5. Dick and Jane have children, Jack and Jill.

*Dick and Jane create meet with an estate planning lawyer to make a will and trust.*

- Minimizing Estate Taxes: Valuation and Discounts: parents maintain control over business, have income from business during life, but leave the business to next generation
- Creation and Use of Basic Family Trusts (simple sample provisions)
- [Whitney: PowerPoint]
- Use of Insurance
- Children from prior marriages
- If Jack participates in the business, but Jill becomes a doctor, what are the issues the estate planning lawyer will deal with, and how?
- Common Techniques (Living Trusts, Testamentary Trusts, Revocable and Irrevocable Trusts, ILITs (Irrevocable Life Insurance Trust))
- Advanced Techniques (Grantor Trusts, Sprinkle Discretionary Trusts, Total Return Trust, Asset Protection Trusts, Special Needs Trusts, Spendthrift Trusts, “Offshore” Trusts, GRATS, GRITS, QPRTS (or Residential Trust), “Unitrust” Conversion, “Decanting” Trusts under the authority of the new Arizona version of the Uniform Trust Code (UTC), Marital Deduction Trusts, Credit Shelter Trust)--in brief. Trust statutes.

The ownership of the business entities may be restructured to be consistent with the estate plan. Stock may be transferred into new trusts. An entirely new entity may be formed (family limited partnership) to own equity of the business.

At the time of making a will, Dick and Jane should prepare a medical power of attorney, living will, and durable power of attorney. (brief summary by estate planning lawyers.)

Buy-sell provisions dealing with stock held by family trusts.

## 6. Jack (son) marries Dee, then divorces.

Jack’s wife may allege that all Jack’s ownership in the business entities is community property.

- The attorney for the corporation does not act as attorney for Jack.
- Jack, as officer, continues to meet with the business lawyer for the entity
- Wife will compel discovery of corporate documents
- If Dick and Jack consult with the business lawyer about forming new entities which will continue existing businesses:

Molloy v. Molloy

Fraudulent conveyance issues

Common terms in marital settlement agreement

Valuation issues common in settlement negotiations

The single member LLC in a divorce.

## 7. Jill (daughter) becomes incapacitated.

Varieties of legal incapacity (estate planning, probate and family lawyers summarize)

Guardianship: when necessary or appropriate?

Conservatorship: when necessary or appropriate? (When will a financial institution require a court order to handle Jill’s separate accounts?)

Typical steps and timetable for appointment.

Financial exploitation: definition and liability.

## 8. Dick has a new girlfriend, Lola, and they break up.

Palimony claims (see above) – but cohabitation agreement not practical.



If Lola is an employee of the business: risk of suit for harassment, discrimination.

Typical and potential claims of the jilted partner

Tort liability for transmission of disease.

### **9. Jane becomes incapacitated.** *Paul Buser*

Is there a power of attorney?

Does Jane need a guardian or a conservator?

The attorney for the conservator will need to understand which assets are Jane's community and separate property.

Was there abuse by Dick? (Physical, verbal, emotional) Another family member can:

Seek restraining order

Change existing power of attorney and guardianship

Seek divorce?

### **10. Dick divorces Jane.** *Family lawyers*

Overview of the divorce process (family lawyers summarize)

See 7 above: discovery requests from Jane

Valuation issues

Has one spouse committed "waste" of CP by negligent mismanagement?

Special Family court rules

### **11. Businesses fail, Bankruptcy Filing** *Paul Buser*

The difference between the company filing for bankruptcy and a personal filing (practically speaking, by both Dick and Jane, handled by a single lawyer).

Property and debt issues handled by bankruptcy court; Support issues handled by divorce court; procedural interrelationship of the two courts

### **12. Dick dies.**

Process for administration of existing trusts not requiring court supervision.

Shares formerly held by Dick's trust may continue owned by trust or may shift to subtrusts.

Can counsel to company be counsel to the trustee?

Challenge of administration of the trust, or challenge of the will, by family members (probate court proceedings)

Who is now the business lawyer's client?

Who might sue the lawyers? Which lawyers? For what?

# About the Convention CLE Presenters



**Scott DeWald**

**SCOTT DEWALD** is a partner at Lewis and Roca LLP, practicing in the areas of corporate, securities, mergers and acquisitions, lending and other commercial transactions, with particular emphasis on the legal needs of high-tech, emerging companies, limited liability companies, government contracts and non-profit corporations.

Scott has represented buyers, sellers, investors, borrowers and lenders in connection with stock and asset acquisitions, secured loans, mergers and joint ventures. He has also represented a wide variety of corporations, directors and shareholders, as well as partnerships and limited liability companies, in complex transactions and disputes.

He has represented public universities, state agencies and private, non-profit corporations in tech-transfer and collaboration agreements. He has represented issuers, underwriters and venture capital investors in connection with public and private offerings and venture capital transactions.

Scott has been active in the drafting of legislation amending the Arizona corporate, partnership and limited liability company statutes.

## AFFILIATIONS

- \* He is Chair of the Business Law Section of the State Bar of Arizona.
- \* He has served on a variety of boards, including: Maricopa County Bar Association Corporate Counsel Division, Arizona Technology Council, Invest Southwest, and Phoenix Theatre.

## OTHER DISTINCTIONS

Scott is listed in *Chambers USA America's Leading Business Lawyers*®, in *The Best Lawyers in America*®, in *Southwest Super Lawyers*, and in *AZ Business' Top Lawyers*.



**James O'Sullivan**

**JAMES P. O'SULLIVAN** is a Shareholder of the law firm of Tiffany & Bosco, P.A., of Phoenix. James represents primarily closely-held businesses, including law firms and other service professionals. James frequently serves as counsel and as consulting counsel to other attorneys in transactions and as an expert witness in business law matters. He has substantial experience with mergers and acquisitions, business growth issues, formation and dissolution of businesses, and resolving disputes among owners.

He has lectured and published extensively on business law and related ethics issues. James was one of the drafters of the revised Arizona corporate statutes and is a co-author of *Arizona Corporate Practice*, published by Thomson Reuters. He received his law degree from the University of California, Hastings College of the Law and his B.S. from the University of Southern California.

More information regarding James O'Sullivan and his practice experience can be found on the Web at [www.tblaw.com](http://www.tblaw.com). He can also be contacted by **PHONE**: (602) 255-6017; by **EMAIL**: [jpo@tblaw.com](mailto:jpo@tblaw.com) or at LinkedIn <http://www.linkedin.com/in/jamesosullivanseq>



# About the Convention CLE Presenters



**Jeffery Fugal**

**JEFFREY B. FUGAL** is a partner with the law firm of Quarles & Brady LLP in Phoenix, Arizona. His practice focuses on corporate, limited liability company and partnership law and transactional tax planning for businesses in connection with business formations, restructurings, recapitalizations, joint ventures, mergers and acquisitions, real estate ventures and private equity investment transactions.

Jeffery is a past lecturer on various limited liability company, corporate, partnership and federal income tax topics. He received his B.A. degree from Brigham Young University, his J.D. degree from Indiana University and his LL.M. degree in Taxation from the University of Denver. He is a member of the American Bar Association and the State Bar of Arizona. He is also a former chair of the State Bar of Arizona's Tax Law Section.



**Paul J. Buser**

**PAUL J. BUSER** has for the past eight years served as Editor-in-Chief of the Business Law Section's *The Arizona Business Lawyer*. Paul's business law practice takes place within the confines of disputes pertaining to community and marital property business interests in client cases involving family law, estate and probate litigation matters, as well as for their resolution by Alternative Dispute Resolution.

A Scottsdale sole practitioner, Paul is AV rated as a Preeminent Attorney by Martindale Hubbell. He is a graduate of the Arizona College of Trial Advocacy and has CLE training in both mediation (Harvard University) and arbitration (Pepperdine University and also the Northwest Institute of Dispute Resolution). Paul has previously served on the Executive Council of the Family Law Section of the American Bar Association as well as a member of the Board of Editors for both the ABA *Family Advocate* and the ABA *Family Law Quarterly*.

Paul recently completed a 9-year term on the Board of Editors of the *Journal of the American Academy of Matrimonial Lawyers* (AAML). He also recently served as Chair of the AAML's Amicus Curiae Committee. He can be reached by **PHONE:** (480) 951-1222; or by **EMAIL:** [arizonalaw@paul-buserlaw.biz](mailto:arizonalaw@paul-buserlaw.biz)





# About the Convention CLE Presenters



**Stephen Smith**

**STEPHEN R. SMITH** is a Certified Specialist in Family Law and a partner in the Phoenix law firm of *Fromm Smith & Gadow, P.C.* Admitted to the State Bar of Arizona in 1994, Stephen received his Bachelor of Science degree in Finance from Arizona State University in 1991, and his law degree from Whittier College in 1994, where he was a member of the Whittier Law Review. He is a Judge *Pro Tem* of the Maricopa County Superior Court.

Stephen has presented at numerous seminars for both the State Bar of Arizona and the Maricopa County Bar Association and is a current member of the Family Law Advisory Commission to the Arizona State Bar Board of Legal Specialization. Stephen's practice is limited to complex family law matters, including family law appellate practice.



**Charles Friedman**

**CHARLES I. FRIEDMAN** is a solo practitioner in the Phoenix law firm of Charles I. Friedman, P.C. Born in Phoenix, Arizona, and admitted to the State Bar of Arizona in 1976, Charles received his Bachelor of Science degree from Arizona State University in Business Administration with High Distinction in 1973, and his law degree from Arizona State University in 1976.

He is a member of Beta Gamma Sigma, the Maricopa County Bar Association and the State Bar of Arizona's Family Law section. He has held an AV rating with Martindale Hubble for over 15 years and has a reported case: *USAA v. Morris*, 154 Ariz. 113, 741 P.2d 246 (1987). Charles' practice emphasizes premarital agreements and family law matters.

# About the Convention CLE Presenters



**Whitney Sorrell**

**WHITNEY L. SORRELL**, JD, CPA, MBA is a member of Wealth-Counsel, a national collaborative of estate planning attorneys developing and sharing state of the art estate tax planning techniques and processes. After seven years as a member of the Executive Counsel for the Tax Section, Whitney was appointed its Chairman for the 2009 – 2010 fiscal years.

## EDUCATION

**Juris Doctor:** Arizona State University College of Law, 1998  
*Editor, Law Journal, 1996-1998*

**MBA:** University of Phoenix, 1995 (*Summa Cum Laude*)

**BS Finance:** Arizona State University, 1987

## POST GRADUATE SPECIALTY EDUCATION

IRS Fraud Detection School, 1994

IRS Expert Witness School, 1993

IRS Employment Tax School, 1992

IRS Income Tax School, Business Tax Returns, 1991

IRS Income Tax School, Individual Tax Returns, 1991

## PROFESSIONAL DESIGNATIONS & LICENSES

**Lawyer:** Member of the State Bar of Arizona

**CPA:** Licensed by the Arizona State Board of Accountancy

**Life Insurance Producer:** Licensed by the Arizona Dept of Insurance

**Securities License:** Series 6 and 63 (Registered Representative)

He can be reached by **PHONE:** (480) 776-6055



**Lynton Kotzin**

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## EDUCATION

Bachelor of Commerce (1984) and Bachelor of Accounting (1986),  
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## PROFESSIONAL DESIGNATIONS

Chartered Financial Analyst (CFA)

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Accredited in Business Valuation (ABV)

Accredited Senior Appraiser (ASA)

Certified Business Appraiser (CBA)

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## PROFESSIONAL AFFILIATIONS

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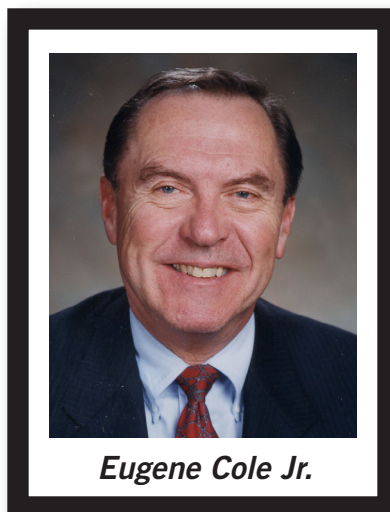
Institute of Business Appraisers (IBA)

Association of Certified Fraud Examiners (ACFE)

Intellectual Property Management Institute (IPMI)



# About the Convention CLE Presenters



**EUGENE H. COLE JR., CPA/ABV, CVA, CFF** is a Principal with OnPointe Financial Valuation Services, PLLC. His focus is providing expert witness testimony, litigation consulting and business valuation services used in discovery assistance, damage and economic loss claims, marriage dissolution, estate and gift taxes, and business succession planning.

Gene has over 35 years of experience in public and private accounting. Prior to forming OnPointe in 2008, he was a Managing Director of the Valuation and Litigation Services practice with Henry & Horne, LLP (2002 – 2008) and a Partner with Clifton Gunderson LLP in Wausau, Wisconsin responsible for the valuation and litigation service practice in central Wisconsin.

Gene is a member of the American Institute of Certified Public Accountants, the Arizona Society of Certified Public Accountants, and the Wisconsin Institute of Certified Public Accountants where he was former chair of the Litigation Services Committee, the National Association of Certified Valuation Analysts (NACVA), the Institute of Business Appraisers, and the American Society of Appraisers. His professional designations include Certified Public Accountant, Accredited in Business Valuation (ABV), Certified Valuation Analyst (CVA) and Certified in Financial Forensics (CFF).



# Business Law Section Executive Council 2009-2010

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## FUTURE ISSUES OF THE ARIZONA BUSINESS LAWYER

☐ Are You Compliant With Circular 230?  
Do You Need to Be? Why?

☐ Update on Current ACC Securities Division  
Enforcement and Registration Trends and  
Current Issues

*Matt Neubert and Julie Coleman with the Arizona Corporation  
Commission provide an update on current Securities Division  
enforcement & registration trends and current issues.*

☐ The State of the Arizona Corporation  
Commission – 2010 and Beyond  
*A Special ACC Report*

☐ Planning for Contract Disputes and  
Intracorporate Disputes

*Part I – The Transactional Lawyer And  
Contract Dispute Resolution*

*Part II – When Business Partners Part Company*

☐ 8-Year Index of Subject Matter Articles,  
their Authors and Dates of Publication  
in *The Arizona Business Lawyer*