THE ARIZONA BUSINESS LAWYER

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STATE BAR OF ARIZONA

Editor-in-Chief, Paul J. Buser
Scottsdale
arizonalaw@paulbuserlaw.biz
Phone: (480) 951-1222 | Fax: (480) 951-2568

Contributing Editor, William D. Black
Phoenix
william@bblaw.com

Production Manager, Michael Peel
michael.peel@staff.azbar.org

THIS ISSUE FEATURES

Business Law Ethics in the Office, in Communications and in Courtroom Litigation

editor's note

Two months ago I had the privilege of being sworn in as a member of the District of Columbia Bar. The venue was solemn. The ceremony took place at "The Historic Courthouse" in downtown Washington, D.C. From this majestic courthouse, 152 years ago, the *Dred Scott Case*, 17 How. (60 U.S.) 393, reverberated throughout the land.

Dred Scott involved a man's freedom. Justices of the United States Supreme Court, several of whom owned slaves, considered the case essentially as a property dispute. They did not recuse themselves from hearing the matter. Instead, they ruled that Scott, a black slave, had no standing to argue his case because he was not a citizen of the United States.

I've done a lot of reading, researching and writing on cases decided by the United States Supreme Court both before and during the Civil War. Yet, I was astounded to learn that there was no striving and no general compunction by the Justices to realize their own conflicts of interest – and more important, no effort to step back from the conflicts – when they decided cases pertaining to slavery issues. The "appearance of impropriety" was not then an important issue for the nation's High Court. They saw the facts and law through one lens only.

Of course, we have come a long, long way since 1858. Now when we address conflicts of interest, rules of professional conduct, rules of procedure and standards of civility in our profession, the oversight boards and disciplinary committees are definitely two of the most active in the legal profession.

The current importance of Supreme Court oversight and bar association scrutiny over attorney and judicial conduct – compared to what happened in the *Dred Scott Case* – were driven home to me one day after the D.C. Bar swearing-in ceremony. What a juxtaposition! From "The Historic Courthouse" one day to the Ronald Reagan International Trade Center on the very next day for the required all-day ethics and professionalism program (342 lawyers and judges attended).

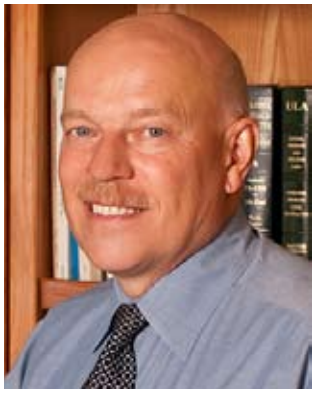
This great experience two months ago in Washington D.C. started me thinking about our next issue of *The Arizona Business Lawyer*, the one you are now reading. In the current age here in Arizona, what are our ethical duties as business lawyers? To each other? To our clients? To our profession? To the public? When do we recuse ourselves and when do we keep going forward? And why?

At the D.C. Bar ethics and professionalism CLE program, we were told – just as we are by the leaders of the State Bar of Arizona and judiciary – that *"we must be mindful of our obligations of the administration of justice."* In this issue of *The Arizona Business Lawyer*, we address our obligations for the administration of justice through two articles. The first is by ethics and risk management counsel extraordinaire, Lynda Shely. Lynda opines on ***Avoiding Conflicts of Interest: 5 Quick Tips***. The second article is authored by yours truly. The focus is on ***Business Litigation, A.R.S. 12-349 and Rule 11: What the Law and General Colin Power Say About Your Signature on Pleadings***.

Paul J. Buser
Editor-in-Chief

About The Authors

Lynda C. Shely



Paul J. Buser

LYNDA C. SHELY, of The Shely Firm, PC, provides ethics and risk management advice to lawyers and law firms. She also assists lawyers in responding to initial Bar charges. Prior to opening her own firm, she was the Director of Lawyer Ethics for the State Bar of Arizona for ten years. Lynda has received awards from the State Bar of Arizona for her contributions to Law Related Education Projects, Outstanding Leadership in Continuing Legal Education, and she was selected as Member of the Year in 2007. She is a member of the ABA Center for Professional Responsibility's Strategic Planning Committee. She currently chairs the State Bar's UPL Advisory Opinion Committee, and serves on the Professionalism Committee, the Consumer Information and Education Task Force, and the State Bar Convention Committee. Lynda was the 2008-2009 President of the Scottsdale Bar Association. She also teaches professional responsibility at the Phoenix School of Law and ASU.

Prior to moving to Arizona, Lynda was an intellectual property associate with Morgan, Lewis & Bockius in Washington, DC. Lynda received her BA from Franklin & Marshall College in Lancaster, PA and her JD from The Catholic University in Washington, DC. She may be reached at (480) 905-7237; **Lynda@ShelyLaw.com**.

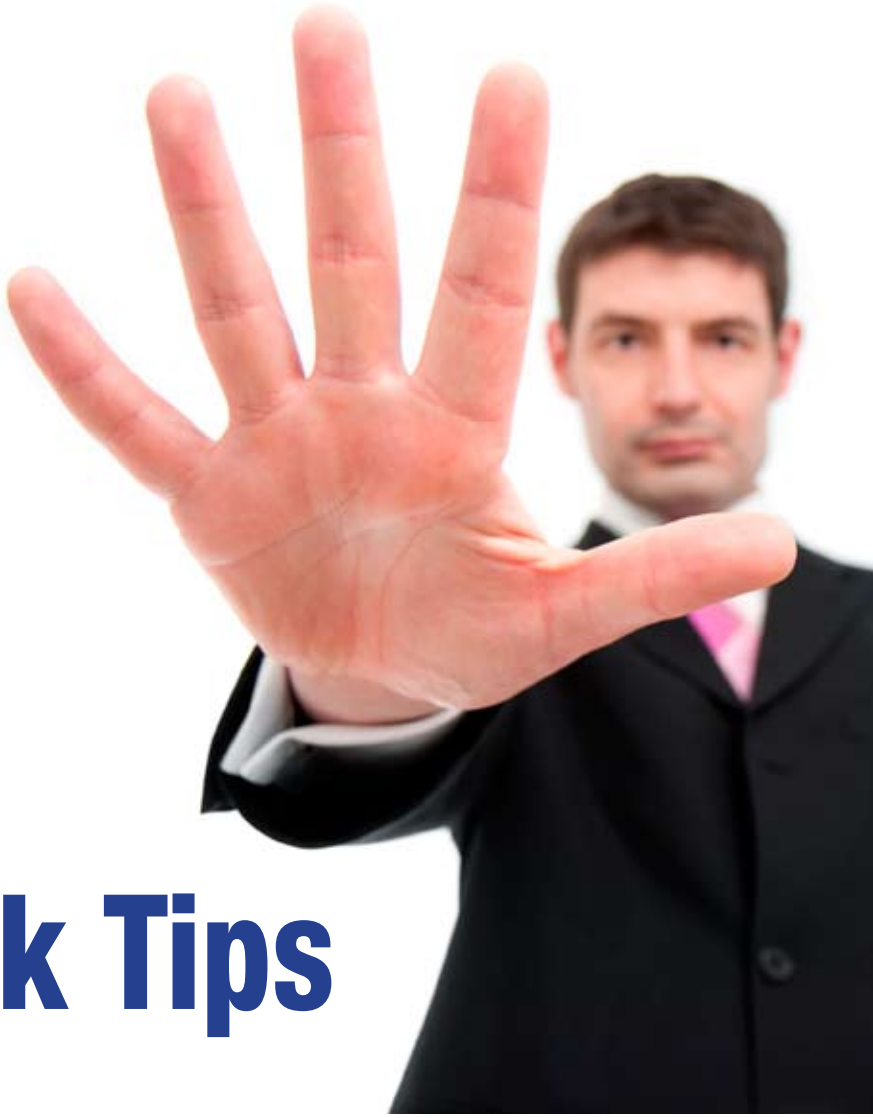
PAUL J. BUSER has for the past eight years served as Editor-in-Chief of the Business Law Section's ***The Arizona Business Lawyer***. Paul's business law practice takes place within the confines of disputes pertaining to community and marital property business interests in client cases involving family 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 at (480) 951-1222; **arizonalaw@paulbuserlaw.biz.**

The Arizona Business Lawyer **invites all members of the Business Law section to submit articles for publication. If you have a transactional- or litigation business law-related topic that you believe would be of interest to 1,000 section members, don't be shy. Send your article, photo and biographical outline to Paul J. Buser, Editor-in-Chief of *The Arizona Business Lawyer*, and you will be published in a future issue.**

Avoiding Conflicts of Interest:

5 Quick Tips



By Lynda C. Shely

Arizona Rule of Professional Conduct 1.7 is the "general" conflict of interest Rule that says, in essence, that other clients, other people, and even the lawyer's own personal interests may cause conflicts of interest with clients. A conflict is anything that could materially limit your independent professional judgment on behalf of a client. There also are Rules about former clients (ER 1.9), imputed conflicts (ER 1.10), entity conflicts (ER 1.13), and of course prohibited transactions (ER 1.8). The following are just some quick reminders for business law lawyers on some of the more common conflict mistakes.

1 Client Intake: Everyone You Talk To May be a Conflict

Every time you talk with someone, in-person, by phone, or by email, they might be considered a client…

This actually is not a new standard but it is codified as Rule 1.18. *See Foulke v. Knuck*, 162 Ariz. 517, 784 P.2d 723 (App. 1989)(the fact that a consultation with the lawyer was brief does not negate a conclusion that an attorney-client relationship was formed.).

Ethical Rule 1.18 provides, in part:

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as ER 1.6 would permit and ER 1.9 would permit with respect to information of a former client.

Moreover, under Rule 1.18, you need to treat these prospective clients as conflicts! So include them in your database and note the date when you consulted with them and that they did not retain the firm.

Checklist to Avoid Inadvertent Clients

- Confirm that your Web site has a disclaimer and warning about sending emails directly to the firm – caution that it does not establish an attorney/client relationship and they should not transmit confidential information.
- If you use paper intake forms for new clients, add a disclaimer that the disclosure of the information on the form is necessary to check for conflicts and does not establish an attorney/client relationship.
- Train staff, including receptionist, paralegals, secretaries and anyone else who has contact with prospective clients about what they can and cannot say to a non-client.
- Send "non-engagement" letters whenever *you* decide that you don't want to take on a representation.

2 Be Careful About Defining Who is the Client!

People may *think* that they are your client, even when you have no intention of representing them. Particularly in corporate representations where you believe that you are representing only the entity, specify this so that the constituents of the entity company do not mistakenly believe that they too are your clients. This requires using the "*I-am-Not-Your-Lawyer"* letter. This is the letter that you send to the CFO, the managing member, the board, the shareholders, or whomever else you will be communicating with regularly to explain that you represent the COMPANY and not Mr. Smith! If you represent both, see discussion below.

Also in *any* representation where either someone else is paying the legal fees for a client or you will have regular contact with a third party (family member, friend, etc.) to assist in a representation, specify who is and is not a client. Ethical Rule 1.8(f) requires that whenever someone other than the client is paying the legal fees, you MUST disclose this to the client, explain that your independent professional judgment cannot be affected by the payor, and that no confidential information about the representation will be conveyed to the payor without the client's consent. This should be a separate clause in the engagement letter that you go over in detail with the client, so they understand *everyone's* obligations.

3 Re-Run Conflict Checks!

One of the most common mistakes made by business transaction lawyers is not re-running the conflict check when: 1) the client company is acquired; 2) another investor/buyer/seller is added to the transaction; or 3) someone else assumes responsibility for the client (new managing member, etc.). Conflict checks are only as good as the information in the database and must be re-run any time a new player is added to the matter. Train staff to routinely re-run conflict checks any time a new name is added to the file.

4 Joint Representations

Joint representations of two or more co-clients MUST discuss, in writing, 1) the potential conflict of interest that exists and 2) how confidentiality will be addressed among the co-clients. Specifically, information must be available to all co-clients or a significant conflict of interest could occur. The engagement letter should explain how information will be shared among the clients, because the lawyer has a duty of loyalty and communication to each client. For a thorough discussion of the conflict waiver

that must be obtained in a joint representation and the shared information issue, read Arizona Ethics Opinion 07-04. Remember – that "informed consent to waive the potential conflict" must be in writing.

5 No Personal or Business Relationships with Clients

Ethical Rule 1.8 is the Conflict Rule that prohibits certain specific relationships between lawyers and clients and severely restricts other situations with clients. The most common problematic area for business law lawyers is going into any business deal with a client. *Strongly discourage your lawyers in your firm from entering into business transactions with clients.* Not only will your malpractice carrier deny coverage if you have more than a certain percentage ownership of a client, *it's really not a good idea to do business with clients.*

Sermon aside, if you really must join that deal or invest in that property, Ethical Rule 1.8(a) is mandatory – ***you must follow all three parts or the transaction will be presumed to violate ER 1.8(a)***. This is one of the few Ethical Rules that requires both a written disclosure *and* a client signature on the disclosure:

> **(a)** A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
>
> **(1)** the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing a manner that can be reasonably understood by the client;
>
> **(2)** the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
>
> **(3)** the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

Note that in addition to following ER 1.8(a) if you want to offer a client an ancillary business service (such as you own a software company and want to create software for the client, or you do financial planning or own an interest in a surveying company), you also will need to comply with Ethical Rule 5.7 regarding ancillary businesses. That is yet another disclosure statement. And this assumes that you have determined that there is no underlying conflict of interest in offering the ancillary services.

In addition to business transactions, Ethical Rule 1.8(j) also provides:

> *A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.*

Enough said – just don't do it. And if you do, make sure that someone else steps in to be the lawyer.

"OTHER" LAW AND MORAL OBLIGATION

In defining the "Scope" of the Arizona Rules of Professional Conduct, the *Preamble* makes the following observation:

> The rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general…Compliance with the rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The rules simply provide a framework for the ethical practice of law.

Arizona Rules of Professional Conduct, *Rule 42, RASC, Preamble*, ¶¶, 15, 16.

Business Litigation, A.R.S. 12-349 and RULE 11: WHAT THE LAW & GENERAL COLIN POWELL SAY ABOUT YOUR SIGNATURE ON PLEADINGS

By Paul J. Buser

There is a certain element of risk, difficult to gauge, when we sign and file pleadings.

Of course, we have to be knowledgeable of Rule 11(a), Arizona Rules of Civil Procedure ("Signing of pleadings, motions and other papers; sanctions"). We also know that Section 12-329, Arizona Revised Statutes ("Unjustified actions; attorney fees, expenses and double damages; exceptions; definition") is either on our law library shelf or on our desk when we prepare those pleadings.

Besides our awareness of the strictures of Rule 11(a) and Section 12-329 – and before we examine the case law that interprets and applies the rule and the statute – there are definite words of wisdom from the military world to instruct us in our ways.

COLIN POWELL'S RULE

In 1993, when Colin Powell served as Chairman of the Joint Chiefs of Staff, the 4-Star General created a number of rules that he believed to be important for all branches of the military to know and follow.

Of the 13 "Colin Powell Rules" there are definitely a few which should become part of the business litigator's every day lexicon. These five rules will do all of us well when we choose to file a particular pleading:

1. "Don't let adverse facts stand in the way of a good decision."
2. "You can't make someone else's choices. You shouldn't let someone else make yours."
3. "Have a vision. Be demanding."
4. "Don't take counsel of your fears or naysayers."
5. "Perpetual optimism is a force multiplier."

THE CONTESTED PLEADING SCENARIO

There is an old saying that "bad facts do not make good law". Nonetheless, the point of this article is that on

occasion we cannot avoid receiving a "bad facts" case from our clients, who are seeking either a Plaintiff's or a Defendant's remedy. Consequently, Powell Rule 1 applies. Don't let adverse facts stand in the way of creating a good and proper pleading for your client.

Our clients seek us out because they want us as their attorneys. They want us – not another attorney down the block or in another city – to help them make their decisions. Thus, Powell Rule 2 applies. Don't let opposing counsel make your decision about what you believe to be proper pleading for your client.

When your client walks in the door of your office, sits down with his or her problem and begins to tell a story of facts, you are already envisioning a scenario of what needs to be filed and why.

ENVISIONING THE PROCEDURES

For my part as counsel to my client and for many of my brethren, I am sure, at that first meeting we also begin to immediately envision

(a) what discovery needs to take place,

(b) what evidence and witnesses are needed to present the client's best case,

(c) what legal and factual arguments will be made before the Judge and/or jury at the conclusion of the case, which is still months and maybe years away.

To follow through as a business litigator for your client, you have to have a demanding vision. Powell Rule 3 applies. Following our educated instincts and good judgment – including methods for resolving the client's claim through A.R.C.P. Rule 16 Alternative Dispute Resolution – is our mantra.

WHEN THE PROBLEM FIRST ARISES

So, after first listening to our clients and after doing some preliminary investigation of the client's factual statements to us, we either file the lawsuit or defend against the claim.

And the other side immediately files a Rule 11 Motion or claim for sanctions.

And the other side immediately files an A.R.S. Section 12-329 Motion or claim for statutory relief, attorney fees and double damages.

When this problem, this challenge first arises Powell Rule 4 applies. "Don't take counsel of your fears or naysayers." If we are cowed because of a cheap shot and unwarranted pleading by the other side, then we are doing a disservice to our clients. Instead, to serve our clients' interests, we should come back with a proper argument that further supports and strengthens our client's first pleading.

At the same time we also need to constantly reevaluate the evidence supporting our client's claims or defenses, because Rule 11 and A.R.S. Section 12-329 apply throughout the course of the business litigation, including after final judgment and on appeal.

DO YOU CROSS FILE FOR SANCTIONS?

If at this juncture of the contested litigation we choose to get into a war of words with our adversary counsel, we could cross-file for sanctions. Then, a parallel litigation within the court case has begun.

When responding to the other side's request for sanctions there are other adversary counsel who will not only cross-file for sanctions but – in an attempt to sidetrack the merits of your client's case – they will also file an ethics complaint with the State Bar of Arizona office.

The strategy of cross filing for sanctions and/or filing ethics complaints with the State Bar is often meant not as a legitimate defense but rather to take the focus off the good merits of our client's position.

Avoid, if you can, getting caught up in this trap of litigating a case within a case by cross-filing for ethics sanctions. Powell Rule 5 applies. "Perpetual optimism is a force multiplier." You can serve your client's goals better and at the same time rise above opposing counsel's unwarranted tactics by staying on the high road.

AN EXAMPLE FOR ALL THE REST

Your client sues for embezzlement, conversion, and fraudulent transfers of assets. By rule of law, you are required to specifically plead and prove nine elements of fraud. "While there is no 'magic language' required to state a claim for fraud, the complaint as a whole must be

construed to plead all nine elements." *Hall v. Romero*, 141 Ariz. 120, 124, 685 P. 2d 757, 761 (App. 1984).

In addition to properly and fully pleading the nine elements as well as the facts of your client's claim, you cite the appropriate applicable statutes. The substantive sections of the Fraudulent Transfer Act appear at A.R.S. 44-1001 – 1008 and 1010. Section 1009 is the statute of limitations provision.

You also know – and to the extent required for your pleading you may state – that that the majority position of Arizona reported decisions is that the Fraudulent Transfer Act supersedes the common law action for fraudulent transfer.

Further, you know (and may plead) the nuance, too; i.e., A.R.S. 44-1010 clearly states that the Act supplements and does not supersede the common-law unless expressly provided otherwise.

Okay, so you are well prepared to plead and prove your client's case. You file, then the Defendant's immediate Answer is not only to deny your client's claims but also to charge you and your client with a Rule 11(a) violation as well as asking for A.R.S. Section 12-329 remedies for an "unjustified action".

Then, throughout the case, as you continue to plead your client's cause, the opposing party – with respect to your client's initial as well as further pleadings – continues to asks for Rule 11 (a) sanctions and for remedies under A.R.S. Section 12-329.

What to do? I mentioned above that cross-filing for sanctions is not the preferred way to reply. (Though in my next column, I will address this issue in more detail.) Instead, I am in accord with the State Bar's "Committee Note" regarding the 1984 amendments to Rule 11 (a):

> ***"It is not the amended rule's intention to encourage or create satellite litigation over the propriety of pleadings, motions or other papers. The court's inquiry into violations of the rule should ordinarily be restricted to the record then before the court, including any discovery addressed to the substance of the challenged pleading, and should focus on what was reasonable for the signer to believe at the time the pleading was submitted."***

Arizona has plenty of law to support you and your client's meritorious pleading positions. The following is a summary checklist of the leading law and ethics principles to bolster your client's case. The Supreme Court of Arizona has spoken.

LEADING LAW & ETHICS PRINCIPLES SUPPORTING YOUR CLIENT'S PLEADINGS

The rule governing an attorney's signature on pleadings and permitting pleadings to be stricken as a sham and false if the attorney signs with intent to defeat the rule was designed to encourage honesty in bar when bringing and defending actions and ought to be employed only in those rare cases in which attorney deliberately presses unfounded claim or defense. 16 A.R.S. Rules Civ.Proc., Rule 11(a). *Boone v. Superior Court*, 145 Ariz. 235, 239, 700 P.2d 1335, 1339 (1985).

Motions to dismiss or strike pleadings as sham under rule should not be granted if there is any possibility that party can prove his case. *Id.*

Allegations of factual or legal insufficiency should not be handled under rule governing attorney's signature on pleadings, but by motion to dismiss, to strike, for more definite statement, or for summary judgment. *Id* at 145 Ariz. 242, 700 P.2 1342.

The objectives sought by Rule 11 and its intent for governing issues relating to an attorney's signature on pleadings are to primarily places a moral obligation upon the lawyer to satisfy the lawyer that there are good grounds for the action. *Id* at 145 Ariz. 239, 700 P.2 1339.

Under the 1984 amendment to Rule 11 governing an attorney's signature on pleadings, the lawyer is not required to prepare a *prima facie* case for trial before filing an answer or complaint. *Id* at 145 Ariz. 241, 700 P.2d 1341.

Rather, the attorney is required to make reasonable efforts to determine that the claim or defense is not "illusory, frivolous, unnecessary, or insubstantial**".** *Id.*

What constitutes reasonable efforts by the attorney must be determined in light of situation existing, facts known, amount of time available for investigation, need for reliance upon client or others for obtaining facts, plausibility of claim, and other relevant factors. *Id.*

In closing, the Supreme Court of Arizona in *Boone* cited with approval a Second Circuit Court of Appeals Federal case, to wit: *Nemeroff v. Abelson*, 620 F. 2ndd 339, 348 (1980):

> ***"[To] prove that the action was brought or defended for improper reason or purpose there must be 'clear evidence' that a pleading of claim or defense was not colorable: 'A claim is colorable, for the purpose of the bad faith exception, when it has some legal and factual support, considered in light of the reasonable beliefs of the individual making the claim. The question is whether a reasonable attorney could have concluded that facts supporting the claim might be established, not whether such facts actually had been established.'"***

WHEN IT DOUBT – READ THE RULE AND THE STATUTE!

Rule 11(a). Signing of pleadings, motions and other papers; sanctions

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, including a reasonable attorney's fee.

§ 12-349. Unjustified actions; attorney fees, expenses and double damages; exceptions; definition

A. Except as otherwise provided by and not inconsistent with another statute, in any civil action commenced or appealed in a court of record in this state, the court shall assess reasonable attorney fees, expenses and, at the court's discretion, double damages of not to exceed five thousand dollars against an attorney or party, including this state and political subdivisions of this state, if the attorney or party does any of the following:

1. Brings or defends a claim without substantial justification.
2. Brings or defends a claim solely or primarily for delay or harassment.
3. Unreasonably expands or delays the proceeding.
4. Engages in abuse of discovery.

B. The court may allocate the payment of attorney fees among the offending attorneys and parties, jointly or severally, and may assess separate amounts against an offending attorney or party.

C. Attorney fees shall not be assessed if after filing an action a voluntary dismissal is filed for any claim or defense within a reasonable time after the attorney or party filing the dismissal knew or reasonably should have known that the claim or defense was without substantial justification.

D. This section does not apply to the adjudication of civil traffic violations or to any proceedings brought by this state pursuant to title 13.

E. Notwithstanding any other law, this state and political subdivisions of this state may be awarded attorney fees pursuant to this section.

F. In this section, "without substantial justification" means that the claim or defense constitutes harassment, is groundless and is not made in good faith.

Business Law Section Executive Council 2009-2010

Chair
Mr. Scott D DeWald
Lewis and Roca LLP // 602-262-5333
SDewald@lrlaw.com

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Mr. Charles R. Berry
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cberry@polsinelli.com

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retreau66@yahoo.com

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Lewis and Roca LLP // 520-622-2090
Matthew.Sweger@azbar.org

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bkavanagh@gustlaw.com

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llobianc@fclaw.com

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Mr. Raj N. Gangadean
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rgangadean@perkinscoie.com

Member At Large
Mr. James T. Acuff, Jr.
Ryan Rapp & Underwood PLC // 602-280-1000
sacuff@rwrplc.com

Member At Large
Ms. Ronda R. Beckerleg Thraen
Osborn Maledon PA // 602-640-9303
rbeckerleg@omlaw.com

Member At Large
Mr. William D. Black
Sole Practitioner // 602-265-2211
info@billblacklaw.com

Member At Large
Mr. Robert S. Bornhoft
Quarles & Brady LLP // 602-229-5200
rsb@quarles.com

Editor, Az Business Lawyer / Member At Large
Mr. Paul J. Buser
Sole Practitioner // 480-951-1222
arizonalaw@paulbuserlaw.biz

Member At Large
Mr. David B. Goldstein
Hymson Goldstein & Pantiliat PC // 480-991-9077
dbg@legalcounselors.com

Member At Large
Ms. Irena Makeeta Juras
Juras Law Firm PLC // 480-425-2009
Irena.Jurasova@azbar.org

Member At Large
Mr. Terence W. Thompson
Gallagher & Kennedy PA // 602-530-8515
twt@gknet.com

Member At Large
Mr. Troy A. Wallin
Wallin Harrison PLC // 480-240-4150
twallin@wallinharrison.com

Member At Large
Ms. Nancy L. White
Steptoe & Johnson LLP // 602-257-5213
nwhite@steptoe.com

Board of Governors Liaison 09-10
Mr. Tom Crowe
Crowe & Scott PA // 602-252-2570
tom@crowescott.com

Section Administrator
Ms. Nancy Nichols
State Bar of Arizona // 602-340-7304
nancy.nichols@staff.azbar.org

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- 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
- 2010 Annual Convention Issue