Inside 4Q2019

ACC Association of Corporate Counsel
ARIZONA

FOCUS

President's Message

Mark Rogers

#ACCAM2019 was a great success!

We enjoyed acting as the host Chapter for the 2019 ACC Annual Meeting in October. We saw many of you and met ACC members from around the USA and the world – Argentina, Brazil, Canada, Israel, Taiwan, Singapore, Dubai, & Saudi Arabia, who stopped by our Exhibit Hall Booth to say hello and sample the locally–crafted snacks we featured. A big thank you to Arizona Chapter member, Sarah Asta, and her husband, Steve Burg, for managing the Chapter's Booth and giving a warm welcome to the 3,000+ Annual Meeting attendees. We also want to thank the AZ Chapter Board members who volunteered at the booth.

The Chapter–hosted reception, Celebrate in State 48!, welcomed approximately 400 Annual Meeting attendees! Thank you to Heather Bjella, Kelllen Brennan and Amy Rasor, who all served on the committee that organized the evening.

Next, we want to express our gratitude to our Celebrate in State 48! Sponsors who underwrote the evening.

Presenting Sponsors: Snell & Wilmer & Dentons

Premier Sponsors: Barker Gilmore, Barnes & Thornburg, Mintz, Morrison Foerster, Ogletree Deakins & Perkins Coie

It was a busy October, with a regular CLE meeting the day after #ACCAM19 wrapped up and a social event soon after. Thank you to Ogletree Deakins for hosting the Chapter at a Tamale Making & Tequila Tasting event in November at the Barrio Queen. Thank you to the Chapter members who attended this event. The reviews are in – it was great fun for all!

Thanks to AZ Chapter Platinum Sponsors, Ogletree Deakins and Rusing Lopez & Lizardi for the articles in this newsletter. Both of these articles cover important topics for Arizona in–house counsel.

Our CLE year is off to a strong start with great programming from sponsors and strong program attendance. We hope all of our Chapter members will try to join us for CLE lunches or other special events we will be offering over the next few months.

We've had a challenge recently with accurately projecting attendance at our regular CLE meetings. As a result, we are overselling the meetings. On only one occasion has this resulted in turning someone away from a program. We're sorry about doing that, and, *before a CLE luncheon starts*, all Board members will give up their seat to help with this issue. Please understand that attendance at the meetings is vital to keep our sponsors engaged with the Chapter; this policy is meant to ensure a full house so that sponsors see the benefit of working with us to provide you with high–quality, custom–tailored programs.

We have a few Roundtable Dinners on tap and a community service event with Ogletree Deakins. Watch your weekly emails for registration information!

I look forward to seeing you at our 2019–2020 Chapter events!

Template for Disaster

By Neil Peretz

"Who knows what evil lurks in the hearts of agreements?" Not you, if you have an over-reliance on templates.

As a former litigator, I have witnessed numerous scenarios where a slavish devotion to template agreements paved the road to disaster. Organizations felt that the template agreement was sacrosanct and dared not contemplate how new facts and situations might require its alteration.

Obeisance to and reliance upon a "template" is not surprising, given the history of the term. The etymology of "template" traces back to the Latin word "*templum*," which means not only "plank or rafter," but also means a "temple, shrine, sacred, or consecrated place."

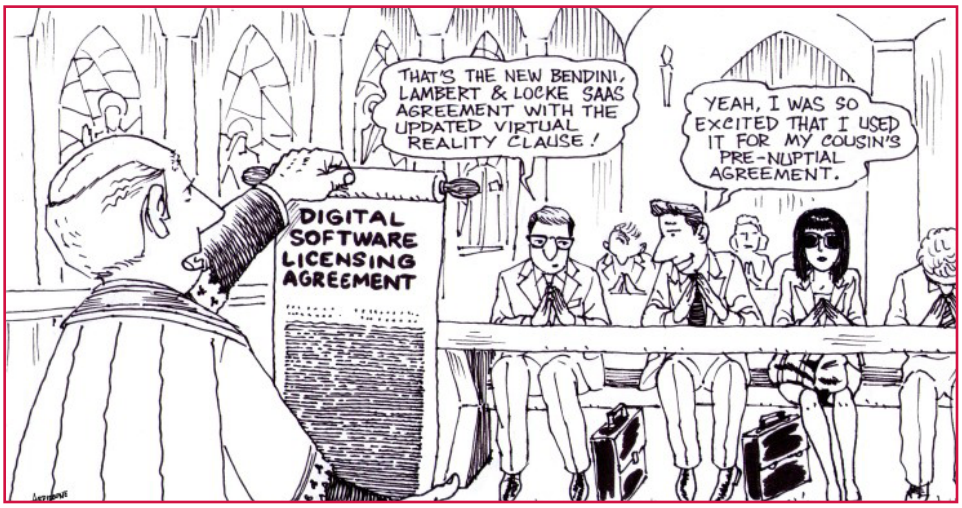
Many cultures have adapted historic religious concepts to today's mores and practices. For example, in most locales, it is no longer de rigeur to stone people to death for working on the Sabbath. (Indeed, there would be much stoning of lawyers if such a rule were still in place.) Similarly, one cannot rely solely on historic templates as the times change.

When translated into Swedish, one word for "template" is "mönster." Remove the diacritical marks above the "ö" and you have the perfect English-language descriptor of templates run amuck.

As a former federal trial attorney and financial services regulator, I often encountered situations where companies violated their own agreements with customers. Why? Because they did not know what was in those agreements.

Maybe once upon a time, they read a template customer agreement but never noted when the template changed — or how each version of their template impacted their practices with respect to future customers. Only after class action or regulatory enforcement did they realize that not all customer agreements were the same.

Using templates lulled them into a false complacency around knowing the



content of their customer agreements. In reality, their templates evolved over time, and they should have been reading and implementing each agreement independently.

In the business-to-business context, an over-reliance on templates can lead to even bigger disasters. Businesses are more likely to have attorneys representing them, and business deals are often a higher dollar amount, which means the salespeople pushing the deals are more willing to negotiate in order to get the deal done.

The result is a contract that might look a lot like the standard template agreement yet contains multiple significant deviations from the template that are overlooked during contract implementation … until it's too late.

For example, a major commercial property manager thought its standard lease template was in place with a tenant. The property manager failed to note that the notice requirements had been renegotiated, and, as a result, missed the opportunity to exercise an option to re-assess and potentially raise the rent.

Many large organizations have grown through acquisition. As a result, even if they deploy their own templated agreements going forward, their day-to-day work relies on implementing agreements created by their predecessors and acquisitions. Even if all these inherited prior agreements could be changed, the next acquisition just brings in more types of templates.

Large companies may have hundreds of different agreement templates, meaning they need to start reading each agreement, rather than assuming that all agreements of a certain type are the same. The failure to treat each agreement individually can lead to dangerous assumptions.

For example, some inherited templates might not request that the customer opt-in to receive calls via an auto dialer. The company may face substantial Telephone Consumer Protection Act liability when contacting customers subject to these inherited agreements.

Without careful attention to the contents of each agreement, the use of templates can breed a pernicious complacency throughout the organization. Employees assume that agreements need not be read because they are inviolable and blessed from above.

When a new situation arises where the standard template doesn't fit, the employee chooses to use the template regardless, because doing so creates the least internal organizational friction. The end result is an agreement that doesn't fit the transaction and cannot be smoothly implemented.

continued on page 3

continued from page 2

Surely templates can serve a certain purpose: We cannot afford to write each business agreement from scratch. However, we need to remember that speed in drafting is not the sole benchmark for a successful agreement or successful relationship.

The most successful business relationships are those where both sides receive the benefit of their bargain. This means they need a contract that actually reflects their bargain. And, more importantly, the real relationship work begins after the contract is signed.

Because templates change over time and key terms may be custom-negotiated, implementation of the contract must be based on reading its actual terms, rather than assuming it follows the same format and terms of a mythical template from the past.

As an in-house counsel, you should not assume that the use of a template for a certain type of agreement means that you know the terms of all of your relationships. Start sampling your historic agreements to see how they have changed over time.

If your organization has had acquisitions, sample the agreements of acquired entities as well. And start talking with your business colleagues about how often they need to change agreement terms to conclude a negotiation.

Most importantly, even if you think it's just a standard template that you know by heart, read the key terms of each agreement anyway, because that is what the court and your counterparty will rely upon.

Author:

Neil Peretz has served as general counsel of multiple companies, as well as a corporate CEO, CFO, and COO. Outside of the corporate sphere, he co-founded the Office of Enforcement of the Consumer Financial Protection Bureau and practiced law with the US Department of Justice and the Securities and Exchange Commission. Peretz holds a JD from the University of California, Los Angeles (UCLA) School of Law, an LLM (master of laws) from Katholieke Universiteit Leuven (where he was a Fulbright Scholar), bachelor's and master's degrees from Tufts University, and has been ABD at the George Mason University School of Public Policy. Peretz's most recent technology endeavor is serving as general counsel to Contract Wrangler, which applies attorney-trained artificial intelligence to identify the key business terms in a wide variety of contracts.

ACC News

ACC Xchange: Program Schedule Now Available

Xchange 2020 (April 19-21, Chicago, IL) offers **advanced, practical, interactive, member-driven** education for in-house counsel and legal operations professionals that you won't find at any other conference. By uniting complementary professions to exchange ideas and best practices, this program creates a powerful and unique environment that offers a fresh take on how to deliver your in-house legal services more efficiently and effectively. Register today.

Are your vendors putting you at RISK under the pending California Consumer Privacy Act (CCPA)?

At the ACC Annual Meeting register for, Untangling Third-Party Data Privacy Privacy & Cybersecurity Risk, and learn how to ensure you're ready for the CCPA and your third-party vendors aren't putting you at risk. Save your spot at this session now. Seating is limited.

In-house Counsel Certified (ICC) Designation

The ACC In-house Counsel Certification Program, helps in-house counsel become proficient in the essential skills identified as critical to an in-house legal career. The program includes live instruction, hands-on experience, and a final assessment. Those who successfully complete the program will earn the elite ICC credential. Your law department and your employer will benefit from having a lawyer that returns with global best practices in providing effective and efficient legal counsel. Attend one of these upcoming programs:

- **Dubai, UAE**, March 2-5, 2020

ACC's Top 10 30-Somethings nominations are now open!

This award recognizes in-house counsel trailblazers for their innovation, global perspectives, proactive practice, advocacy efforts, and pro bono and community service work. Self-nominating is acceptable. Nominations are due December 6. Nominate someone today.

The Importance of Written Job Descriptions

By Kate Frenzinger, Partner, Rusing Lopze & Lizardi

Job descriptions are critical not only for identifying and managing expectations of an employee for recruiting, retention, performance, and compensation purposes, but too, in managing legal risk. A well-drafted job description (and in some cases, even a poorly drafted job description) can spell the difference between compliance and liability.

Job Descriptions Are Critical To Assessing Compliance and Defending Against Claims

A job description sets forth the duties, expectations, and requirements for the job. The primary purpose of a job description is practical – it allows an employee to understand what is required of them, it allows candidates to identify roles for which they are qualified, it sets a baseline for performance analysis, it may highlight an employee's path to promotion, and it sets a framework for calculating compensation. However, job descriptions also perform a critical legal purpose, as they identify the essential functions of the job, as well as the required qualifications and required duties, by which discrimination, accommodation, leave, and wage claims may be assessed.

Job descriptions can be critical to resolving and defending employment-related legal claims, such as:

- ADA/Disability Accommodation

Under the ADA, an employer must provide a reasonable accommodation to a "qualified individual with a disability." A qualified individual with a disability is a person who meets the legitimate skill, experience, education, or other requirements of an employment position that they hold or seek, and who can perform the "essential functions" of the position with or without reasonable accommodation. The value of a job description—in particular, an accurate job description—is clear; the job description is the means through which an employer identifies the very skill, experience, education, other requirements, and the essential functions of the job, needed to assess eligibility for and reasonableness of a requested accommodation, presumably contemporaneously with developing the job, recruiting for the job, or at least in connection with the employee on-boarding process (or upon internal job changes due to promotion, transfer, or demotion). This improves the interactive process through which the employer and employee identify and negotiate a reasonable accommodation, and it forms the foundation of an employer's defense in the event an employee claims that the employer failed to provide a reasonable accommodation. Indeed, in most cases, the absence of a job description or failure to provide the job description to the employee or the employee's physician will result in a presumption that the employee's job duties are whatever the employee says they are. In such cases, it is nearly impossible for an employer to defend a lack of accommodation/discrimination claim on the basis that the employee was unable to perform the essential functions of their job or that the employer was unable to accommodate the employee's accommodation request.

- Medical Leave Issues

Similar to assessing an ADA request or claim, job descriptions are also vital is assessing eligibility for and reasonableness of medical leave requests and return to work issues. For example, when an employee on medical leave pursuant to the FMLA returns to work, an employer may require that employee to provide a medical certification to return. For a physician to assess whether to certify an employee for fitness-for-duty, a physician must know the essential job functions. An employer must provide this information to the employee and physician before the employee seeks a fitness-for-duty certification; if a physician does not have this information at the time of assessing the employee, the physician can rely on the employee's own description of their job duties.

In addition, under the FMLA, employees may be entitled to intermittent leave to address a serious medical condition. While an employer typically cannot deny an employee intermittent leave where the employee qualifies, an employer may transfer the employee to another position with equivalent compensation and benefits temporarily that better accommodates the employee's need for intermittent leave. Determining whether and when such a transfer is appropriate may require a comparison of the two positions' job descriptions.

- Religious Accommodation

Under Title 7, an employer must reasonably accommodate a candidate or employee's "sincerely held religious beliefs" unless doing so will create an undue hardship on the employer. In determining whether a requested religious accommodation is appropriate or an undue hardship, it is critical to determine how the accommodation may impact the employee's performance of required job duties—an accurate job description will facilitate evaluating a request for a religious accommodation, and in the event of a claim that the employer failed to accommodate, will serve as evidence of the key functions of the employee's role.

- Exempt, Non-Exempt Classifications

Under the Fair Labor Standards Act, a nonexempt employee is entitled to minimum wage and overtime; nonexempt employees may be entitled to other protections and benefits under state law. Assessing an employee's exemption status requires an analysis of their job duties, and a determination of whether an employee fits into any of the exemptions—exemptions that are dependent upon the employee's primary duty. While a job description is not determinative of exemption status, they are a starting point for determining whether an employee might be eligible for exemption and whether exemptions

continued on page 5

continued from page 4

are applied consistently within the organization. Job descriptions are evidence (again, not determinative, but extremely powerful for a claimant in its absence) that may support an employer's defense in the case of a claim of misclassification.

- Discrimination, Retaliation, Wrongful Termination Claims

Title VII prohibits discrimination against applicants and employees on the basis of race, color, religion, sex and national origin, and prohibits retaliation against an employee that reports discrimination. Similarly, federal and state whistleblower statutes prohibit retaliation against an employee for reporting wrongful conduct or violations of law, and various federal and state laws protect against other forms of retaliation against an employee exercising legal rights. An employee that claims that they have been discriminated or retaliated against in an employment decision—such as passing over the employee for a promotion or terminating the employee—an employer may need to demonstrate a legitimate business reason for the employment decision. If that decision was based on an employee's (poor) performance, a written description may be effective evidence of the employer's expectations of the employee and the employee's failure to meet those expectations, justifying the employment decision. An employer will face an uphill battle in court if an employee claims that the alleged defects in performance are a pretext for discrimination or retaliation if an employer cannot point to a contemporaneous description of the employee's job duties.

- Wage and Hour Claims

In many wage and hour claims, the employee's rate of pay is a critical component. It is vital for calculating an employee's overtime rate, minimum wage compliance, and penalties for violations, among other things. While calculating the rate of pay of an employee that is paid by the hour at the same hourly rate regardless of the shift, responsibilities, or variable elements can be straightforward, some rate of pay calculations are more complicated and depend greatly on the number of hours an employee is scheduled or expected to work (for example, when determining the rate of pay for a salaried employee). A comprehensive job description that includes the expected working hours may be critical to calculating the rate of pay, particularly when defending a wage claim.

These are simply examples of instances in which a complete, accurate job description may serve a critical role in assessing compliance with state and federal employment laws, and in an employer's defense against alleged violations.

What Should Be In A Job Description?

Though the name seems self-explanatory, a job description is more than merely listing out an employee's duties. A comprehensive job description usually includes:

- Employee's title
- Employee's classification (e.g., exempt versus non-exempt)
- Employee's reporting structure/chain of command
- Qualifications required (or preferred) for the job, including level of education, quantity and quality of prior experience, specific skills or licenses, and physical requirements
- Job duties, in particular the "essential functions" of the job as well as the ancillary duties
- Salary expectations and any formulas or objective criteria that may be applied to calculate rate of compensation
- Other pertinent information, such as travel requirements, geographic location, etc.

It is critical to not only develop complete and accurate job descriptions, but to revisit them regularly to ensure that they still align with the employer's expectations of the employee, and the duties that employee is actually performing. Drafting and evaluating job descriptions can feel like a drain on HR, management, and legal resources—but it is far more efficient to develop and maintain job descriptions (which are useful to multiple stakeholders, not just legal) than to be without a crucial piece of evidence in the event of a legal claim.

Important Disclaimer: The foregoing is not legal advice and does not create an attorney-client relationship. If you have any questions or require any assistance, please contact Ms. Frenzinger at kfrenzinger@rllac.com.

Author:

Kate Frenzinger is Partner with Rusing Lopez & Lizardi in the area of employment law and litigation. Ms. Frenzinger works with employers to ensure compliance with state and federal employment laws, and defends employers in investigations, agency proceedings, and litigation.

Established 1992, Rusing Lopez & Lizardi, PLLC, provides advice and representation to businesses and business owners on matters concerning commercial litigation, employment and disputes, real estate, immigration, business transactions, contract negotiations and drafting, complex litigation and general business advice. RL&L is a member of The National Association of Minority & Women Owned Law Firms. Numerous RL&L attorneys have been distinguished as Best Lawyers in America and Super Lawyers, and the firm has been recognized as a Best Law Firm in U.S. News and World Report's Best Law Firms. It is AV Preeminent Peer Review Rated through Martindale-Hubbell.

Smart and Safe Arizona Act
How Will Legalized Marijuana Affect Arizona Employers?

Marijuana legalization is a hot topic in the United States, and next year Arizona voters will most likely have the opportunity to vote once again on whether marijuana should be legalized for recreational use. In the 2016 election, the people of Arizona narrowly voted "no" to Proposition 205. By a slim margin of only 2.6% of voters, Arizona elected not to legalize recreational marijuana and allow people over the age of 21 to legally purchase and consume marijuana in the state. To increase their likelihood of success in the 2020 election, backers of the Smart and Safe Arizona Act have addressed some of the concerns plaguing the 2016 ballot initiative, including, employers' concerns that the initiative would limit their ability to take disciplinary action against employees who test positive for marijuana. The 2020 ballot initiative looks to expressly address this concern.

The Smart and Safe Arizona Act is a voter initiative that will appear on the 2020 ballot if the measure meets the minimum number of valid signatures required (15% of votes cast in the most recent gubernatorial election). Heading into the 2020 election, there are currently 11 states (as well as the District of Columbia) that have legalized recreational marijuana. After the narrow defeat in 2016, Arizona could be among the next wave of states in 2020 to do the same. In addition to Arizona, we anticipate attempts to legalize recreational marijuana in Arkansas, Florida, Mississippi, Missouri, New Jersey, and North Dakota, if not more.

What is the Smart and Safe Arizona Act?

Originally filed on August 9, 2019, the Smart and Safe Arizona Act would legalize "the responsible adult use of marijuana." At its core, the Smart and Safe Arizona Act would allow Arizonans over the age of 21 to possess up to one ounce of marijuana for recreational use. The Department of Health Services would be responsible for regulating recreational marijuana as well as medical marijuana (which the Department already does). Marijuana sales would be taxed as an ordinary retail good, and then an additional 16% excise tax would be imposed as well. Ultimately, Smart and Safe Arizona claims that the tax could generate up to $300 million a year for Arizona once the recreational marijuana program is fully functioning. The tax revenue would then be directed primarily towards community colleges, public safety, public health programs, and infrastructure improvements in the state.

How would the proposed Smart and Safe Arizona Act affect employers?

From an employer's perspective, the Smart and Safe Arizona Act brings up a familiar question: Can an employer fire an employee who uses recreational marijuana outside of work and then subsequently fails a drug test? Under the Smart and Safe Arizona Act as currently written, *the answer is likely yes*.

Under the most recent version of the Smart and Safe Arizona Act, several provisions relate directly to employers. Specifically the new law:

- "Does not restrict the rights of employers to maintain a drug-and-alcohol free workplace or affect the ability of employers to have workplace policies restricting the use of marijuana by employees or prospective employees." Section 36-2851(1).
- "Does not require an employer to allow or accommodate the use, consumption, possession, transfer, display, transportation, sale or cultivation of marijuana in a place of employment." Section 36-2851(2).
- "Does not restrict the rights of employers . . . to prohibit or regulate conduct otherwise allowed by this chapter when such conduct occurs on or in their properties." Section 36-2851(3).

Notably, the proposed ballot proposition does not offer any explicit protections for Arizona employees. Instead, as noted above, the Smart and Safe Arizona Act states that it does not restrict the rights of employers to maintain a drug-free workplace or maintain policies restricting the use of marijuana by employees or prospective employers. Unlike the provision on accommodation, this provision is not limited to use in the employee's place of employment.

Although it is difficult to predict how a court would interpret the law, the current version of the Smart and Safe Arizona Act, should not negatively impact an employer's ability to maintain and enforce its zero-tolerance drug-free workplace policies. However, employers will need to decide if having and enforcing these rules is beneficial to their business. A study by Quest Diagnostics found that marijuana use is at a 14-year high among American workers, and the number of employees and prospective employees who tested positive for marijuana has grown almost 17% since 2014. As more states legalize marijuana, employers in these states worry about their ability to attract and retain talent. Many employers are grappling with the threshold question of whether to test for marijuana at all, especially when it comes to pre-employment testing, and whether to prohibit off-duty marijuana use in their workforce.

In states where recreational marijuana is legal, some employers have chosen to address marijuana use in the same manner as they address alcohol use. While on company property or on-duty, employees cannot not possess, use, or be under the influence of marijuana. The difficulty is that, unlike for alcohol, we do not yet have a reliable testing method to detect if someone is currently impaired by marijuana. Currently, marijuana testing can show the presence of marijuana, but cannot establish whether an individual was impaired at the time

continued on page 7

continued from page 6

of the test. For instance, a urine drug test can detect marijuana as soon as 2 to 5 hours after use. However, the length of time marijuana is detected in urine depends on the amount used, its potency, frequency of use and the user's weight and body fat. The more frequent the use, the longer it stays in the user's system and for heavy users, marijuana can be detected for 30 days or more. Although we do not currently have an effective marijuana impairment test, such tests are in development. Once these are available and accepted as a reliable testing method, employers will have more options for addressing employees' marijuana use. Employers will be able to focus on whether the employee is "fit for duty" versus whether they use legally marijuana when they are off-duty.

Anecdotally, in states where recreational marijuana is legal, the trend appears to be moving away from pre-employment testing for marijuana especially for employers who are not governed by federal regulations (e.g. Department of Transportation regulations) or who do not have large populations of safety-sensitive employees. While pre-employment testing for marijuana is largely a business decision, employers should continue to maintain post-employment testing for marijuana, such as for reasonable suspicion, even if marijuana is legalized for recreational use. If Arizona legalizes recreational marijuana, employers should revisit their policies to make it clear that the use or possession of, or being impaired by, medical or recreational marijuana while working or on company property is prohibited. Employers do not want to lose good employees because the employees did know that their legal use of marijuana could lead to the termination of their employment.

What's next for the recreational marijuana initiative in Arizona?

Although the Smart and Safe Arizona Act is the most popular and publicized initiative so far, not all pro-recreational marijuana advocates are in agreement. Mason Cave of the Arizona Cannabis Chamber of Commerce is in the process of helping to draft a competing marijuana legalization initiative. Cave says that the Smart and Safe Arizona Act would essentially create a monopoly on the market since a majority of recreational licenses would be given to already-existing medical marijuana dispensaries. Cave also thinks that a 16% sales tax could promote black market sales. As the election grows closer, Arizonans might have to choose not only whether recreational marijuana should be legal, but also which proposal makes the most sense.

Whether the Smart and Safe Arizona Act or a competing initiative reaches the ballot and passes, or even if the Arizona legislature takes action themselves, there is a realistic probability that recreational marijuana will be legal in Arizona in 2020. With the prospect of more marijuana users in the workforce, Employers need to be prepared to examine their substance abuse policies and update them as necessary.

Please plan to join us for our upcoming meetings:

December 5, 2019
at The Capital Grille
MEMBERS ONLY CLE: The Drought Contingency Plan, What Happens Now?

December 10, 2019
at Blanco Biltmore
Cybersecurity & Data Breach Notifications: How to Protect Your Company & Customers

January 9, 2020
at Blanco Biltmore
MEMBERS-ONLY CLE: When the Comfort Parrot Starts Cursing: ADA Accommodation Quandaries

January 14, 2020
at Blanco Biltmore
Understanding the Role & Mandate of your Board's Audit Committee

January 21, 2020
at Blanco Biltmore
Employee Benefits 2019–2020 – Finish Strong/Be Ready

January 28, 2020
at Paradise Valley Country Club
The Evolution & Integration of the Legal Workflow Process: Contract & Matter Management

January 30, 2020
at Blanco Biltmore
MEMBERS ONLY CLE: Cross–Border Transactions: Doing Business in Canada

February 6, 2020
at The Capital Grille
MEMBERS ONLY CLE: ETHICS: Attorney–Client Privilege in Internal Investigations
&
MEMBERS ONLY CLE: False Claims Act Litigation: Factors Influencing Government Intervention

February 13, 2020
at The Capital Grille
MEMBERS ONLY CLE: Six Questions Senior Management & Board Members Ask Corporate Counsel About D&O Insurance

February 18, 2020
at Blanco Biltmore
ETHICS: Protecting the Attorney–Client Privilege in M&A & Other Transactions

The Arizona Chapter gratefully acknowledges the support of our 2019 Newsletter Patron

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