ATTORNEY DEAN LAING AND LAURA NOW CONTRIBUTE ARTICLE TO THE ABA HEALTH LAW LITIGATION NEWSLETTER

The article, published in the American Bar Association, Section of Litigation, Committee on Health Law Litigation's Winter 2010 Health Law Litigation Newsletter, discusses the common law development of a radiologist's duty to directly communicate his or her findings to a treating physician, and how the American College of Radiology's attempt to provide guidance to radiologists by establishing communication guidelines may not have had the effect that the ACR intended.

While the duty to directly communicate radiological findings has been firmly recognized by the courts for a number of years, courts have not been as consistent in articulating when that duty is triggered. The ACR originally set forth its recommendations to radiologists by creating its Standard for Communication-Diagnostic Radiology in September of 1991 which required radiologists to directly communicate their findings to treating physicians under certain circumstances. Since that time, this standard has undergone a number of revisions and is currently recognized as the ACR Practice Guideline for Communication of Diagnostic Imaging Findings. This Practice Guideline continues to provide guidance to radiologists regarding when direct communication with a treating physician may be necessary. More importantly, however, this Practice Guideline has increasingly been recognized and relied on by medical journal articles and the courts as evidence of a standard of care for the communication of radiological findings, despite the ACR's explicit statement that its standards are not to be used to establish a legal standard of care.

Keeping this trend in mind, whether relying on established case law or the guidelines established by the ACR, radiologists should be especially diligent in communicating directly with a treating physician when the circumstances surrounding the radiologist's findings mandate immediate communication.

A full copy of the A Radiologist's Duty to Communicate with the Treating Physician can be found here.

THE UNEXPECTED REAL ESTATE BROKER

COMMISSION

Many older home owners decide to downsize and move into smaller quarters. They then become not only buyers of a new property, but also sellers of the old homestead. While looking at smaller homes or condominiums, they may meet the seller's real estate broker who has a listing contract on the property they are considering. That broker might offer his or her services to sell the potential purchaser's home. The broker will ask for a listing contract on the old home to be sold. Since most buyers need the equity in the existing home to close the deal, the sale of the home, which should be defined as a closing, not just an accepted offer to purchase, is almost always a condition to buying the new property. This is a fairly normal situation, but there is one problem which lurks in the background.

For any number of reasons, the purchaser may not close on the new property and may then decide to remain in the home. That does not end the matter; however, because the existing home is still subject to the listing contract signed earlier in the transaction. If the broker procures a qualified buyer who submits an offer meeting the price requirements under the listing contract, the broker has earned his or her commission. The home need not be sold, but the listing contract requires the payment of the "earned commission" upon procurement of such a buyer. What started out as a cost saving transaction becomes an unexpected expense; one which could have been eliminated.

In order to avoid this situation, the purchaser/seller should include a provision in the standard Wisconsin listing contract which provides that, if the purchase of the new property fails to close for any reason, the home owner has the right to terminate the listing contract on the existing home and take it off the market. There are issues relating to individuals who have been shown the home before the listing contract is terminated and who subsequently submit an offer, but that instance can also be addressed to negate a commission being earned. In any event, once the listing contract is over, there will be no more open houses nor additional potential buyers who could trigger the payment of a commission notwithstanding the fact that the home is not sold.

Because a broker will, in all likelihood, resist such terms being added to the standard form, people in the market to both buy and sell would be well advised to seek the advice of an experienced real estate attorney in negotiating the terms of the listing contract.

CLARIFYING THE TAX TREATMENT OF GIFTS TO

GRANTOR TRUSTS IN 2010 – NOTICE 2010-19

Back in 2001, Congress passed the Economic Growth and Tax Relief Reconciliation Act (EGTRRA). While many provisions of EGTRRA have been acutely focused on by planners since that time, one provision has received little attention until recently. Under Section 511(e) of EGTRRA, Section 2511(c) of the Internal Revenue Code was added and provides that for transfers between December 31, 2009 and January 1, 2011, except as provided in the regulations, a transfer in trust shall be treated as a transfer of property by gift unless the trust is a grantor trust.

As 2010 approached, planners began to wring their hands over what this provision means: (1) does it make incomplete gifts to non-grantor trusts complete; (2) does it make completed gifts to grantor trusts incomplete or (3) both? In Notice 2010-19, the IRS confirmed that it is the former, but not the latter. So planners can breathe easier knowing that completed gifts to grantor trusts are still an effective planning technique in 2010.

WISCONSIN INCREASES THE HOMESTEAD EXEMPTION AVAILABLE TO ALL RESIDENTS

Under Wisconsin law, a person's "homestead" is the dwelling and so much of the land surrounding it necessary for use as a home, not exceeding 40 acres. An individual resident is generally entitled to exempt his or her homestead from execution of a judgment, from the lien of a judgment, and from liability for his or her personal debts up to the amount designated by the Wisconsin Statutes.

Formerly, this amount equaled $40,000.00 per resident. On December 1, 2009, however, the Wisconsin Legislature increased the exemption to which each resident is entitled to $75,000.00. Additionally, the Legislature lifted its limitation of a $40,000.00 homestead exemption per household (the "Marriage Penalty"), now allowing spouses to pool their exemptions and collectively claim a $150,000.00 exemption. Unchanged are certain exceptions unaffected by the homestead exemption such as mortgages, laborers', mechanics', and purchase money liens and taxes recorded against the homestead property.

NOT ALL CONDOMINIUMS ARE CREATED EQUAL

Many people fail to see the benefit of consulting with an attorney before making a residential condominium purchase. The real estate attorneys in our firm have been called upon to suggest revisions to declarations and plats for residential condominium projects which were established incorrectly under Chapter 703 of the Wisconsin Statutes. This failure to meet the strict requirements of the law raises serious questions concerning whether a project is, indeed, a condominium under the legal definition.

The expenses that can be incurred by unit owners to correct an ineffective declaration or plat under the Condominium Act can be significant. The problems we have seen in the past could be identified in an initial document review. Armed with that information, a prospective buyer might decide not to purchase a unit in a condominium with such problems.

As many Baby Boomers downsize from their homes to condominiums, they should consider having an experienced real estate lawyer review the condominium documents to make sure there are no problems of this sort hidden in the disclosure materials they receive before they buy.

HEALTH CARE REFORM PASSES; BUSINESSES NEED TO START PLANNING FOR IMPLEMENTATION

The Patient Protection and Affordable Care Act has been signed into law, and with certain modifications to be added through the House Reconciliation Act, health care reform is certain to have a substantial impact on American businesses in the years to come. Among other things, the reform includes over $400 billion in revenue raisers and new taxes on employers and individuals as well as a laundry list of new reporting requirements. More forms and red tape are in the cards for all of us. Here is a list of a few such changes:

- Starting in 2014, individuals not otherwise eligible for health insurance under a government program shall be required either to maintain minimum essential coverage or to pay an annual penalty;
- Grants for premium assistance tax credits and other benefits to guarantee that certain low income individuals do not have to spend more than a specific percentage of their income on medical insurance premiums;
- Businesses that employ 50 or more workers will have to either provide “minimum essential coverage” to the workers or pay an annual penalty of up to $2,000 per

uninsured employee (the first 30 workers are not included in the penalty calculation);
- Businesses may also face the imposition of penalties for waiting periods in excess of 90 days for employee insurance coverage;
- Businesses of less than 25 employees and average annual wages of less than $40,000 may be eligible for a sliding-scale small employer tax credit of between 35-50 percent to help offset the cost of employer-provided coverage;
- Restrictions on cafeteria plans are relaxed to encourage small employers to offer tax-free benefits to employees, including those related to health insurance coverage;
- Starting in 2013, higher-income taxpayers will face an increase in their Medicare payroll tax of 0.9 percent upon earned income in excess of $200,000 for single individuals and $250,000 for families, and 3.8 percent upon unearned income from interest, dividends, rents and certain passive activities in excess of $200,000 for single individuals and $250,000 for joint filers;
- Also starting in 2013, new spending restrictions, contribution limits and nonqualified distribution penalties are imposed upon Qualified Health Savings Accounts (HSAs); the threshold for the medical expense deduction is increased from 7.5 percent to 10 percent of adjusted gross income for individuals under 65 years of age; and the deduction for employers who maintain prescription drug coverage is eliminated for employees who are eligible for Medicare Part D; and
- Starting in 2018, group insurers face a 40% surtax on high-end employer-sponsored health plans in which annual premium payments exceed an inflation adjusted $10,200 for individual coverage and $27,500 for family coverage.

The implementation of these taxes and reporting requirements are to be made between now and 2018, depending on the particular item. Each business should begin considering the reform's impact on its own operations to soften the impending blow. Planning opportunities are sure to arise as the reform moves from Washington to Main Street.

OCHD IS A FOUNDING VOLUNTEER LAW FIRM FOR THE MILWAUKEE JUSTICE CENTER

Since late 2009, OCHD attorneys have been working with Marquette University Law School and the Milwaukee Volunteer Lawyers Project to provide free legal assistance to Milwaukee County's unrepresented litigants through court-based self help desks and legal resources.

OCHD is proud to assist the Milwaukee Justice Center work to help make the communities in which we work better places to live.

ATTORNEY GRANT KILLORAN PARTICIPATES IN MACALESTER COLLEGE LEGAL STUDIES FORUM

Grant Killoran, a partner in OCHD's Litigation Practice Group, recently participated as a speaker in the Macalester College "Front Row" lecture series, a two-day event focusing on law and entrepreneurship and business, held in St. Paul, Minnesota on February 25 and 26, 2010.

Attorney Killoran was one of twelve lawyer alumni of Macalester College invited to participate in the event. There, he met with Macalester College administration, faculty, alumni and students to discuss the role of a liberal arts education in the legal training and preparation of lawyers.

Other speakers at the forum included the general counsel of a large multi-national company, a sitting United States District Judge, a sitting United States Attorney and other distinguished corporate and private practice attorneys.

NEW FCC RULING AFFECTS APPLICATION PROCESS FOR THE CONSTRUCTION OF WIRELESS COMMUNICATION FACILITIES

In an effort to "promote the deployment of broadband and other wireless services by reducing delays in the construction and improvement of wireless networks," the Federal Communications Commission recently issued a ruling that affects the way in which state and local governments review applications to construct wireless communication facilities, such as cell phone towers and other similar structures.

Significantly, under the new ruling, a state or local government may not deny an application for a wireless communication facility solely because one or more cell phone carriers already serve a given geographic market. Moreover, state and local governments now have a specified time period to process an application, depending on the type of structure proposed. Failure by the government to comply with these strict time periods constitutes a "failure to act" and entitles the wireless applicant to commence a lawsuit, which will be heard and decided on an expedited basis. However, this lawsuit must be filed within 30 days of the government's failure to act.

Prior to the ruling, state and local governments had to process an application “within a reasonable period of time.” Not surprisingly, this inexact period of time led to numerous lengthy delays in the application process, frustrating many wireless service providers throughout the country.

With the new ruling in place, it is important for wireless service providers and state and local governments to understand their rights and obligations in the wireless application process.

OCHD ELECTS CHAD J. RICHTER AS SHAREHOLDER

O’Neil Cannon is pleased to announce that Attorney Chad Richter has recently been elected as a shareholder of the firm. He will continue his practice working on corporate and business law matters, including the structuring, acquisition and sale of businesses under operating and purchase agreements, as well as providing assistance on various business contracts and certifications. Attorney Richter will continue serving clients operating under franchise, dealership and agency arrangements.

O’Neil Cannon, founded in Milwaukee in 1973, is a full-service legal practice that primarily focuses on providing business law and civil litigation services to closely-held businesses and their owners. The firm represents corporations, institutions and partnerships at all stages of the business life cycle, helping them start, grow and transition from one generation to the next. OCHD also assists business owners with their personal legal needs including tax and estate planning, family law and litigation – including personal injury litigation.