CARL BUESING ELECTED TREASURER OF THE WISCONSIN ASSOCIATION OF COUNTY CORPORATION COUNSEL

Sheboygan, Wisconsin (October 9, 2007) – Carl K. Buesing, a municipal and litigation attorney with the Sheboygan office of O'Neil Cannon, was recently elected Treasurer of the Wisconsin Association of County Corporation Counsel at the group's Fall meeting in Wisconsin Dells.

The Wisconsin Association of County Corporation Counsel is a specialized bar association comprised of attorneys who represent Wisconsin counties and county boards. Under a unique arrangement with Sheboygan County, the O'Neil law firm handles all civil matters for the county, from shoreland zoning prosecutions to airport hangar lease drafting to open meeting advice. Carl Buesing has been assigned by the firm and Sheboygan County as the lead attorney for these matters and has acted as the designated Sheboygan County Corporation Counsel since 2001.

Carl has had an eclectic legal practice starting out as the district attorney of a small northern Wisconsin county where he prosecuted three homicides in his first year of office. From that early experience, he has built a litigation practice involving subjects as varied as will contests to construction contract disputes.

O'Neil Cannon is a full-service legal practice focusing on business law, estate planning, and major complex litigation with offices in Milwaukee, Port Washington, and Sheboygan. The firm was established in 1973 and is now listed as one of the Milwaukee-area's largest law firms.

OCHD ATTORNEYS TO PRESENT "LEGAL ENTITIES AND INTELLECTUAL PROPERTY" AT UW MILWAUKEE

Milwaukee, Wisconsin (October 9, 2007) – Attorneys Angela Campion and Chad Richter will present, "Legal Entities and Intellectual Property" at Fast Trac New Venture programs held at the UW Milwaukee Small Business Development Center on October 9 and October 18, 2007. The session will cover key legal considerations for standard business entities (sole proprietorship, general partnership, corporation, limited partnership, LLP, and LLC), how to protect intellectual property (patents, trademarks, copyrights, licenses), using an intellectual property attorney, and tips for entrepreneurs to protect proprietary interests.

The Fast Trac New Venture Program is a program sponsored by the School of Continuing Education at the University of Wisconsin, Milwaukee. The program is designed to help participants explore entrepreneurship, develop a business concept, and write a business plan.

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CRYSTAL FIEBER TO PRESENT "IMMIGRATION AND YOU"

Sheboygan, Wisconsin (October 9, 2007) – On October 9 and 10, 2007, Attorney Crystal Fieber will discuss "Immigration and You" at Money Smart Week Wisconsin seminars. The October 9th session will be held at Plymouth High School at 6:00 pm, and the October 10th session will be held at Sheboygan South High School at 6:00 pm. Both sessions cover the common and expensive pitfalls to avoid when immigrating through a family member.

Crystal Fieber is an attorney with the law firm of O'Neil Cannon Crystal counsels individuals, businesses, and municipalities in a variety of areas: including, estate planning, zoning and land use, immigration, and the prosecution and defense of civil claims. She also assists municipalities and individuals with ordinance drafting and prosecution as well as eviction and foreclosure proceedings. In addition, she speaks Spanish, and utilizes this skill to assist individuals and businesses with immigration-related issues.

Money Smart Week Wisconsin is a public awareness initiative aimed at building financial knowledge to help Wisconsin residents deal with money more quickly, confidently, and shrewdly. The initiative is a creation of the Governor's council on Financial Literacy created by Wisconsin Governor Jim Doyle. For more information, visit www.moneysmartwi.org.

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DEAN LAING FEATURED IN FREEMAN PUBLICATIONS

Milwaukee, Wisconsin (September 14, 2007) – Dean Laing, a litigation attorney at the law firm of O'Neil Cannon was recently featured in articles appearing in the *Waukesha Freeman* and the *Oconomowoc Enterprise*.

The articles chronicled the story of Dean's family and how growing up with two brothers with cerebral palsy impacted Dean's career choice, spurring him towards an impressive career in both corporate and personal injury litigation. The article, entitled "A Brotherly Bond," appeared in the *Oconomowoc Enterprise* on September 6, 2007 and in the *Waukesha Freeman* on September 12, 2007. The complete article can be viewed by clicking here. Dean is the Practice Group Leader for the Firm's litigation practice. He has been with the firm his entire legal career, since graduating *cum laude* from Marquette University Law School in 1983. Dean has been repeatedly recognized as one of Milwaukee's and Wisconsin's top trial attorneys, and exhibits a tremendous passion for the law and his clients. He has litigated some of the largest cases in Wisconsin, including representing Mitsubishi Heavy Industries America in the Miller Park dispute, and obtaining many million dollar settlements and verdicts for his clients.

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CHAD RICHTER TO PRESENT "THE BASICS OF FRANCHISING"

Milwaukee, Wisconsin (September 7, 2007) – On October 5, 2007, Attorney Chad J. Richter will discuss "The Basics of Franchising" at a franchise seminar presented by the UWM Small Business Development Center.

The seminar will focus on entrepreneurship through franchising. Other speakers include a franchise consultant and a current franchise owner.

Chad Richter is an attorney with the law firm of O'Neil Cannon Chad assists clients with a variety of corporate and business law matters such as the formation and organization of various types of business entities under operating, shareholder, and subscription

agreements, including the preparation of financial and disclosure documentation. Chad has focused his practice on the structuring of business relationships under franchise, licensing, and distribution arrangements, and has worked with numerous franchise and dealership models, representing both franchisors/grantors and franchisees/dealers.

The UWM – Small Business Development Center (SBDC) is a department of the University of Wisconsin – Milwaukee that works with new entrepreneurs to turn ideas into viable business concepts, and with established entrepreneurs to improve business performance.. For more information, visit www.uwm.edu.

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MAKE SURE YOU ASK FOR WHAT YOU WANT – INSPECTIONS, TESTING, OR BOTH

One of the smartest things a potential homebuyer can do in connection with the purchase of a new home is to have an inspection of the property conducted by a licensed home inspector prior to closing. Such inspections tend to be money well spent as they provide the potential homebuyer with a more detailed picture of the condition of the house and the various components and mechanicals that may be otherwise unknown to the untrained eye.

While the commonly used WB-11 Residential Offer to Purchase provides for a home inspection contingency, some buyers are surprised to learn that the standard language contained in this form offer places certain limitations on what the seller is permitting the buyer to do by agreeing to an inspection contingency. As such, a buyer needs to make sure that they ask for what they want.

The WB-11 Residential Offer to Purchase defines "inspection" as an "observation of the property, which does not include testing of the property other than testing for leaking carbon monoxide or testing for leaking LP gas or natural gas used as a fuel source." A typical home inspection will address the condition of the foundation, basement, structural components, roof, attic and visible insulation, as well as the walls, ceilings, windows, doors, and floors. It will also cover the heating system, air conditioning system, plumbing, and the electrical systems. However, testing, other than testing for leaking carbon monoxide or LP gas or natural gas, is not authorized in the WB-11 Residential Offer to Purchase.

The WB-11 Residential Offer to Purchase defines “test” as the “taking of samples of materials such as soils, water, air or building materials from the Property and the laboratory or other analysis of these materials.” While buyers may look at the definition and decide that a “test” would be an unnecessary expense, the fact is that some very important information about the property may not be discovered unless certain testing is performed. For example, depending on the age, condition and history of the house, there may be mold, lead based paint or possibly asbestos present. However, testing for the presence of such hazards is not permissible in the standard WB-11 Residential Offer to Purchaser.

Additionally, another potential hazard that homebuyer should consider is a radon test. Radon is naturally occurring, colorless, odorless gas and has been connected to health problems due to concentrated exposure. Because every region in the state has been found to have some elevated levels of radon and since you cannot predict radon levels based on state, local, and neighborhood radon measurements, it has been recommended that every homebuyer (and every homeowner) should have a radon test performed. Again, however, based on the standard WB-11 Residential Offer to Purchase language, a Buyer would not be permitted to have a radon test completed unless specific language is added to the offer which would permit such testing.

By ensuring that your offer to purchase properly addresses your home inspection and testing needs, you can move forward with your home purchase with peace of mind.

WISCONSIN COURT OF APPEALS RULES IN FAVOR OF OCHD’S CLIENT

On July 3, 2007 the Wisconsin Court of Appeals issued a decision in favor of OCHD’s client, Mitsubishi Heavy Industries America, Inc., in an appeal of a case arising out of the construction of Miller Park, home of the Milwaukee Brewers. That case involved the issue of which of Mitsubishi’s insurers, Federal Insurance Company or Travelers Property Casualty Company of America, had the obligation to pay the attorney and expert fees incurred by Mitsubishi in defending the 2002 lawsuit filed against it by the Southeast Wisconsin Professional Baseball Park District.

In the lawsuit filed by the Baseball Park District against Mitsubishi, the Baseball Park District sought $50 million in damages from Mitsubishi for Mitsubishi’s alleged negligent design and erection of the stadium’s retractable roof. Mitsubishi denied that the roof contained any defects caused by its design or erection, and filed a counterclaim against the Baseball Park District seeking additional costs incurred by Mitsubishi in erecting the roof due to material

changes made by others to the roof's design after Mitsubishi bid the job. The case ultimately settled in 2005, with Mitsubishi paying nothing on the Baseball Park District's claims and receiving $18 million on its counterclaim.

Following that settlement, Federal Insurance Company requested that the trial court order Travelers Property Casualty Company of America to reimburse it approximately $28 million which Federal paid to Mitsubishi and two other insureds for attorney and expert fees incurred by them in litigation the underlying lawsuit. The trial court ruled in Federal's favor.

In rejecting Travelers' appeal of the trial court's ruling, the Court of Appeals held that Travelers, as the primary insurer on the project, and not Federal, as the excess insurer on the project, should have paid the attorney and expert fees of Mitsubishi and the two other insureds, and that Travelers was not entitled to a reduction of its obligation in that regard. In its decision, the Court of Appeals held that:

- "The trial court, on three occasions over nearly thirteen months, ruled repeatedly that Travelers had a duty to defend Mitsubishi… . Each time, Travelers refused to undertake the defense."
- "In the context of Travelers' repeated refusal to undertake any defense, the trial court repeated this finding on several subsequent occasions, and ultimately found that Travelers breached its duty to defend as to all three insureds. Still, Travelers did not undertake the defense of any party."
- "We perceive no good policy reason to reward Travelers … for its repeated refusal to defend — even after being repeatedly told it had a contractual duty to do so — by reducing the amount the trial court has determined it owed. Such reduction would reward a primary carrier for a wrongful refusal to defend and create something akin to a litigation expense game of 'chicken' — with offsets going to the obligated primary insurer who breached its duty. Travelers is not entitled either by contract or equitable principles to reduce its obligations because an excess carrier, Federal, performed a duty that belonged to Travelers but which Travelers refused to honor."

Mitsubishi will receive approximately $3.5 million as a result of the Court of Appeals' decision.

TURNING A DUPLEX INTO A "TWINDOMINIUM"

Some duplex owners have considered converting their properties into two unit condominiums, known as "twindominiums". There are several legal steps and quite a bit of paperwork that must be completed in order to accomplish the conversion.

In order to create a condominium, the owner, with the assistance of an attorney and a surveyor, must prepare and file documents with the Register of Deeds. They include:

- A condominium declaration (the legal document establishing the condominium form of ownership for the property)
- A condominium plat or survey of the property showing all improvements

In addition, every condominium must have an owner's association, to which all unit owners must belong. The association operates and manages the condominium and oversees the property. The association for a twindominium has only the unit owners as members.

There are additional disclosure documents that must be prepared and provided to every potential purchaser before closing. Wisconsin law has strict timelines about what information must be given and when, so an attorney should get involved early in the process to be sure everything is in order.

If one of the duplex units is rented, the owner must provide the tenant with notice of the conversion at least 120 days before they need to vacate the property. In addition, the tenant has a first right to purchase the unit for a period of 60 days from the date of the notice.

There are several other issues an owner should consider before converting a duplex. If both units are sold, then the former owner has no further involvement with the property. If the duplex owner decides to live in one of the units, the prospect of next-door renters becoming permanent property owning neighbors needs to be carefully examined.
It's very important that purchasers have a very clear understanding of how a condominium is operated. There is no longer a landlord to make any needed repairs upon demand. The owner who creates a condominium must completely understand the way it will be operated in order to explain the respective rights and obligations to the unit new owners.

The responsibilities for repairs are established in the condominium declaration. The declaration, the plat, and other disclosure materials are needed whether there are two units or two hundred units. Under condominium law, maintenance and repair of a "unit," which is the space owned and occupied exclusively by the owner, is that unit owner's obligation. The rest of the property is either "common element" or "limited common element." Each unit owner owns part of the common element, which is that portion of the property jointly owned and used by both unit owners.

Where a unit ends and the common element begins determines who is responsible for maintenance, repair, replacement, if needed, and insurance. Exterior walls, the roof, a shared garage, and a common driveway are all common elements.

Limited common elements are those parts of the condominium owned by everyone, but only used by the owner of a particular unit. Examples of limited common elements would be attached balconies, patios, decks, garage spaces, or the like. Since a limited common element is still a common element, all owners share in the maintenance, repair and replacement of those portions of the condominium, even though not everyone may use them.

A successful duplex conversion will probably include limited common elements for each unit, if possible, so each owner can enjoy the same amenities.

Wisconsin law requires each condominium to have an owners' association, organized to maintain repair and replace the common elements when they are damaged or worn out. The association also carries fire and casualty insurance for the entire property, other than the units, and a liability insurance policy to protect all of the owners from personal injury claims, such as a guest's slip and fall on common element areas such as porch steps. The association can be either incorporated or unincorporated and includes all owners as members.

The costs incurred by the association in performing these duties and carrying the insurance are assessed, usually monthly, to each unit owner. In a twindominium, the two owners must work together to take care of the property and share those costs. The monthly assessment is an additional expense for each unit owner in addition to taxes, mortgage payments and insurance for the unit itself.

The thing to remember is that the duties of repair, maintenance, and the like are based on the definitions of unit and common element. Those definitions are established by the duplex owner in the condominium declaration. The duplex owner, working with his or her attorney, has the opportunity to establish these definitions, thereby creating the rights and obligations under which the unit owners must live. The duplex owner decides who owns what and how the costs are to be shared.

This is very important to the owner who will continue to live in one of the units after the other is sold, since the duplex owner then becomes a unit owner, subject to the provisions of the declaration and the association rules. After the documents are recorded and a unit is sold, the former duplex owner is no longer in charge of the property.
With this as background, here are answers to frequently asked questions about twindominiums

Q: *Who will be in charge of the Association?*

A: Each unit owner must be a member of the association. Membership is automatic when a unit is purchased. The association can be a nonstock, not for profit corporation or a not for profit unincorporated association. In either case, the attorney preparing the declaration will also prepare the needed association documents, including bylaws. The bylaws outline how the association is operated and sets the rules under which it will control the common elements and levy assessments. All association decisions are made jointly by the owners. The association may have to file income tax returns, depending on how the assessments are handled.

Q: *What if owners cannot agree on what needs to be done by the Association?*

A: Because of the possibility of a deadlock, the Wisconsin condominium statutes provide a procedure for resolving disputes through arbitration. By accepting a deed to a unit, the owner automatically agrees to submit disagreements to arbitration, the cost for which is shared equally by the owners. The added costs of an arbitration proceeding should provide incentive for owners to settle their disagreements.

Q: *Are unit owners assessed differently if the entire roof needs to be replaced versus a leak repair in only one spot?*

A: No. The assessment procedure is the same in both cases. All owners must contribute to the cost of repairing or replacing a common element. The roof is almost always a common element. Although the leak may only affect one unit, all units must contribute to the cost of the repair since each unit owner owns a percentage interest in the common element. The declaration may provide for assessments for reserves to accumulate funds for major replacements, such as a new roof or gutters. In effect, the reserve fund assessment is a forced savings program to handle future capital expenses, such as a new roof.

Q: *Who maintains and paints the exterior?*

A: Exterior walls are common element, and the association has control of them. The association (the unit owners in a twindominium) will maintain the exterior. Usually the colors for walls, trim, gutters, and downspouts will be uniform, so the unit owners must agree on those decisions. All costs are assessed proportionately to the unit owners.

Q: *Who is responsible for repairs to exterior doors and the windows?*

A: In many declarations, the doors and windows are defined as being part of the unit, so the unit owner must take care of them, replacing them when needed. However, if a uniform appearance for the duplex is desired, the association will pick the design/color of the doors and windows.

Q: *Who repairs the garage?*

A: Typically a garage is designated a common element. All owners contribute to the cost of upkeep and repair. The parking spaces in the garage are usually limited common element. One space is assigned to each unit in the case of a two-car garage. A unit owner should be responsible for repairing any damage caused by his or her car.

Q: *Who can use the attic or the basement?*

A: The attic and basement may each be common element, allowing every owner to have access for storage, washers, dryers, and the like. They could be divided in some fashion, creating two limited common elements. Then each owner has separate space for his or her

exclusive use. In either case, all owners share in any costs.

Q: *Who mows and maintains the lawn, shovels the snow, plants trees, flowers and bushes?*

A: Lawns, sidewalks and driveways are either common elements or limited common elements. As such, the association is technically responsible for maintenance, mowing, snow removal and the like. These services could be contracted out to third parties or the unit owners could divide the work between themselves. The declaration should provide for these alternatives. Provisions can be added to the declaration to allow unit owners to garden and plant flowers and bushes in certain areas. Those costs would be paid by the unit owner who does the planting. Major landscaping, such as new trees, or tree trimming, should be agreed upon by the owners. The association would have the trees planted or trimmed and assess the owners proportionately for such expenses. Unit owners must understand that they share the yard and are not entitled to plant whatever they want without first getting consent of the other owner.

Q: *How are utilities paid?*

A: As part of a duplex conversion, separate gas and electric meters should be installed, one set for each unit. Depending on the plumbing layout, separate water meters could also be installed. If there is only one water meter, the water/sewer bill would be paid by the association and assessed to the owners. This could raise complaints about excessive water usage by an owner. The cost of outside lighting would be shared in the same manner as other assessments.

Q: *How is insurance handled?*

A: The association buys the fire/casualty and liability insurance for the condominium and the premium is paid by the unit owners. Each unit owner purchases a separate condominium unit policy which insures against damage to the unit and its contents, and includes liability insurance for the individual owner. The association and the unit owners should buy their respective policies from the same insurer. This eliminates the potential dispute between two insurers as to whether the damage or the accident occurred in the unit (unit owner’s insurer is responsible) or in the common element (association’s insurer is responsible). Insuring with the same company eliminates coverage questions.

SETH DIZARD JOINS O’NEIL CANNON

Milwaukee, Wisconsin (July 19, 2007) – Seth E. Dizard, a creditor’s rights attorney, has joined

the Milwaukee office of O'Neil Cannon

Dizard, a graduate of Marquette University Law School, represents financial institutions, secured and unsecured corporate or individual creditors, and financially troubled corporations in both state and federal courts. He also assists business owners by guiding them through the process of informal financial work-outs and refinancing.

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INHERITED RETIRMENT FUNDS ARE NOT CREDITOR EXEMPT

Chapter 815 of the Wisconsin Statutes provides that certain personal assets are exempt from judgment creditors, and these exemptions can be claimed by individuals when they file federal bankruptcy. Likewise, the federal Bankruptcy Code [11 U.S.C. Section 522(d)] also provides an alternative set of exemptions that the individual can claim instead of using the Wisconsin set. Both sets generally provide for the right of individuals to retain their retirement funds (subject to some limitations) exempt from their creditors in bankruptcy. Section 815.18(3)(j), Stat.; 11 U.S.C. Section 522(d)(12).

There has been a recent local decision, however, denying such exempt status to an inherited IRA (whether originally-formed as an IRA, or a Rollover IRA set up when the decedent withdrew from a company-sponsored retirement plan) under the Wisconsin exemptions. In re Kirchen, Bankr. E.D. Wis. Case No. 04-29434. The bankruptcy trustee in that case successfully established that inherited retirement funds did not meet the requirement under Chapter 815 that the account be a fund for the retirement of the owning debtor, and therefore was not exempt. He directed the IRA issuer to pay out the funds to him to distribute to Kirchen's creditors.

Common definitive language under the Wisconsin law ("on account of … age") is a similar element needed for qualifying such account under the federal exemption set, so undoubtedly a similar ruling will occur if the claim of exemption of an inherited account is presented to local bankruptcy courts under that set. By extension, inherited pension funds (including 401k's) are also at risk.

While under our Wisconsin marital property law, an inherited IRA or retirement fund would not be eligible to collection efforts of many creditors of the other spouse, it is still liable for debts incurred in support of the marriage (if all other assets have been exhausted) and for the liabilities of the recipient spouse. These positions may be overruled by higher courts, but for now, they pose a problem that might be avoided by planning steps that a prudent recipient of an inherited retirement funds can take. For more information and to discuss such planning steps, contact Russell C. Brannen, Jr.