EMPLOYMENT LAWSCENE ALERT: ACCOMMODATING EMPLOYEES UNDER THE ADA — THE EFFORT DOESN'T HAVE TO BE PERFECT, IT JUST HAS TO BE MADE

The Americans with Disabilities Act requires employers to make reasonable accommodations for employees with disabilities. This process requires that employers and employees engage in an interactive process to discuss potential reasonable accommodations. The interactive process requires an informal dialogue between the employer and the employee in which the parties discuss reasonable accommodations for an employee's disabilities. A recent case out of the First Circuit shows that the process does not have to be perfect to be adequate and that both the employee and the employer have to engage in the interactive process in good faith.

In *EEOC v. Kohl's Department Stores, Inc.*, No. 14-1268, the employee suffered from Type I diabetes and claimed that her unpredictable work schedule as a sales associate was aggravating her condition and endangering her health. When the employee supported her request for accommodation with a doctor's note, her supervisor spoke with human resources. When the employee and the supervisor met, the employee requested a consistent schedule, which the supervisor said she could not give her. This was a valid decision by the employer as the accommodation given does not have to be the accommodation the employee specifically requests. Instead of proposing another accommodation or discussing the options, the employee got upset and quit. While the employee was leaving, the supervisor asked that she reconsider her resignation and asked to discuss other potential accommodations. The employee refused and left the premises. A week later, the supervisor again called the employee and requested that she come back to work and they could discuss accommodations. The employee did not accept this offer.

The interactive process requires bilateral cooperation and communication and, because the employee did not cooperate in the process and was responsible for the breakdown of communication, the court found that the employer could not be held liable for failure to provide a reasonable accommodation.   The lesson for employers is that their efforts do not need to be perfect to fulfill their requirements under the Americans with Disabilities Act; employers simply need to engage in the interactive process in good faith, be willing to discuss potential accommodations with the employee, and, if appropriate, provide the employee with a reasonable accommodation, not necessarily the employee's preferred accommodation, that permits the employee to perform his or her job.

O’NEIL, CANNON, HOLLMAN, DEJONG AND LAING ELECTS VAN DE KAMP AS SHAREHOLDER

O’Neil, Cannon, Hollman, DeJong and Laing is pleased to announce that Timothy Van de Kamp was recently elected a shareholder of the firm. Mr. Van de Kamp has been with the firm since 2012 and is a member of the Corporate Practice Group. He focuses his practice in Real Estate and Construction Law and Banking and Creditors’ Rights.

Mr. Van de Kamp is an active member of the community. He is a member of the Board of Directors for the Iota Court Preservation Association, the Real Estate Alliance for Charity, and NAIOP Commercial Real Estate Development Association.

Learn more about Mr. Van de Kamp by visiting his full profile.

TAX AND WEALTH ADVISOR ALERT: SUCCESSION PLANNINGTHE SIXTH SIN — "FAILURE TO COMMUNICATE"

Keen observers of human behavior know a couple of things to be true.

1. In the absence of information, people assume the worst
2. People flee uncertainty

My clients are smart, successful people that have built enviable businesses. Intuitively, they know these “truths.” But to their detriment, they forget them. Instead, if they actually do engage in strategic succession planning, they tend to keep the plan to themselves. Why? A common reason is to maintain familial peace; fearing a combative Christmas dinner “conversation” between involved and uninvolved children over the differences between fair and equal. Or maybe it is the fear of facing an uninvolved child to explain why he or she is not included in the succession plan (and is treated fairly, but maybe not equally in the estate plan). But I try to help my clients understand that giving into these fears is a selfish act. And I also remind my clients of the two truths laid out above. All of their children have normal, human reactions that lead them to (1) assume the absence of information and guidance from their parents is because there is only bad news, and (2) maybe flee the family business to avoid whatever that unknown bad news is.

What's interesting is that after we communicate with the children, I get the benefit of asking them what they thought would happen. Inevitably, these "truths" play themselves out. The involved children assume Mom and Dad, being guided by the parental need to be equal, will put them in a position to be outvoted by their uninvolved (and typically, in their opinion, uninformed) siblings. Of course the uninvolved children tend to feel lingering guilt about shunning the family business and assume they will get nothing. When both sets of children learn that the plan is to have the business run by the right people and fairly get everybody what they want, there is almost always relief and happiness.

But the children are not the only people coming to problematic, often incorrect, conclusions in the absence of knowing the succession plan. Vendors, customers, suppliers, banks, and employees are also making assumptions. I have gotten a growing number of succession planning clients in the last two years not because the client has decided the time is right to engage in planning, but because banks and customers are requiring a copy of a written succession plan to continue to do business. Remember, the more critical the relationship, typically the more that person has at risk with the business owner's failure to properly plan. Powerful stakeholders will want to mitigate that risk by knowing what the owner's plans are.

So if you are a business owner, what assumptions are people making about your plans?

EMPLOYMENT LAWSCENE ALERT: RELIGIOUS ACCOMMODATIONS AND YOUR WORKPLACE

Under Title VII of the Civil Rights Act of 1964, employers are required to accommodate employees' religious beliefs. Two recent cases demonstrate the importance of recognizing when religious accommodations might be necessary.

In March 2014, the EEOC published guidance on religious garb and grooming in the workplace. The guidance states that an employee does not have to use "magic words" to request an accommodation and that a request for a religious accommodation may not even be necessary when the religious practice is "obvious." Of course, the EEOC's guidance is only guidance and does not have the force of law.

Whether notification to the employer and a specific request is necessary to succeed on a Title VII religious discrimination case will be decided by the United States Supreme Court in the coming year when it hears the case *EEOC v. Abercrombie and Fitch*. The case stems from a Muslim applicant who was not given a job at the retailer, allegedly because she wore a headscarf to her interview that conflicted with the store's dress code, which prohibited headgear. The case was dismissed because the Tenth Circuit found that forcing employers to infer that an accommodation was necessary was too burdensome and that a request for accommodation from the employee is necessary before the employer is required to act on it. The Supreme Court will determine whether that is the correct standard for religious discrimination. Until a final decision is made, employers should be aware of the potential need for a religious accommodation even if the employee does not request it because the EEOC is likely to support employees who bring these kinds of claims.

Another recent example is the January 15, 2015 jury verdict out of a West Virginia federal court. In *EEOC v. CONSOL Energy, Inc. and Consolidated Coal Company*, the jury determined that the employer had violated Title VII by failing to accommodate a mine worker's religious objection to using a biometric hand-scanning system that tracked employee time. The employee claimed that he had a sincerely-held religious belief that the hand-scanning system was connected to the "mark of the beast" and the Antichrist and retired instead of using the device. Although the employer offered to let the employee use his left hand with his palm up, the jury determined that it was not a reasonable accommodation.

Employers need to be aware of the need to discuss accommodations for sincerely-held religious beliefs with their employees and their applicants when those issues arise.

A FAMILY MATTER: PROTECTING AN ELDERLY PARENT WITH DEMENTIA FROM FINANCIAL ABUSE

As Baby Boomers continue to age, an increasing number of elderly Americans and their families are forced to deal with the devastating effects of dementia. According to the National Center on Elder Abuse, approximately 5.1 million Americans over the age of 65 suffer from some form of dementia. In addition, nearly half of all individuals over the age of 85, the fastest growing segment of our population, currently suffer from Alzheimer's disease or some other type of dementia. Many of these individuals do not have a will or a trust, nor have they executed power of attorney documentation. Conversely, many others have planned ahead, going to great lengths to ensure that "everything is taken care of" in advance for their families.

Today, advance planning commonly includes nominating an individual to be a Durable Power of Attorney. This approach allows one (assuming mental competency is intact) to choose the person who will manage his or her affairs and assets if that person is unable to do so adequately in the future. Appointing a Durable Power of Attorney in advance alleviates the need for the initiation of public proceedings to address the elder individual's mental capacity.

In many cases, it is common for one or more of an elderly parent's adult children to step in and help manage the parent's affairs, particularly when the elderly parent's spouse has passed. Oftentimes, due to the proximity of one child to the parent's residence, a strong relationship with the parent, or for a multitude of other possible reasons, one child ends up visiting with and assisting an elderly parent more than other children. That child might even live with the parent. In those cases, the elderly parent will frequently name this child as his or her Durable Power of Attorney.

Unfortunately, with vulnerability comes opportunity. Provided with suddenly unfettered access to significant funds from numerous accounts and sometimes very little oversight, there can be disputes between adult children about how an elderly parent's assets and financial affairs are being handled.

It goes without saying that every family with multiple siblings has unique dynamics that may change over time. It is not uncommon for siblings to grow apart over the years due to differences in lifestyles, ideologies, or personalities. On the other hand, sometimes, siblings become each other's best friends, talking to each other nearly every day. These unique family dynamics can sometimes play a role in disputes over estate planning matters, especially after one parent has passed and the other parent is suffering from some infirmity associated with an advanced age.

These family dynamics sometimes manifest themselves into unfortunate scenarios. At its extreme, the most troubling situation is when there are allegations that one child is stealing from an elderly parent. This may lead to a problem that inheritance trial attorneys are all too familiar with — most or all of an elderly parent's assets slowly dissipate, not necessarily on expenses associated with caring for the parent.

Imagine, for instance, that a doctor just recently diagnosed an elderly mother with Alzheimer's disease. The husband, and father, passed away years earlier. The mother has $500,000 in assets at the time of her diagnosis. She has four children and drafted a will after her husband passed away indicating that it is her wish to leave one-fourth her estate to each of her children. At the same time, the mother has named one child (Child A) as her Durable Power of Attorney. After the Alzheimer's diagnosis, two doctors sign a Statement of Incapacity, which results in Child A taking over all of the mother's financial affairs. The mother passes away one year later, and in the estate proceedings, Children B, C, and D learn that each of them will receive $25,000 — far less than they had expected. Children B, C, and D concede that Child A legitimately spent $100,000 on their mother's medical care and other living expenses. But where did the other $300,000 go? Some family members do not want to broach the subject because they find it to be an uncomfortable discussion. Nobody wants to wrongly accuse a family member of such an egregious act. Moreover, family members may feel they are being “greedy” if they initiate a legal proceeding involving property that, to that point, had never belonged to them.

There is more to consider, however. Parents often spend a lifetime working, saving, and investing in hopes of being able to provide loved ones with financial support after they pass. Is it fair to a parent’s legacy to walk away to avoid the confrontation? Ultimately, this is the very personal and difficult decision many adult children have to make.

There are several things one can do to try to protect against such situations:

- **Ask Questions**
  If you get the sense that somebody is taking advantage of an ailing parent, ask that person questions. Stay involved to the extent you can. If you believe there are unusual or suspicious circumstances surrounding an elderly parent, take note of them. One who might otherwise take advantage of an elderly parent might not do so if he or she knows that others are regularly checking on the status of the parent’s care and financial matters.
- **Talk to Your Parent**
  The effects of dementia are unquestionably devastating, but, to a point, an ailing parent may still have the capacity to sense when something is wrong. On occasion, talk with your elderly parent outside the presence of the caretaker or power of attorney. If your parent never answers the phone or somebody refuses to let you inside your parent’s home, continue your efforts to initiate contact.
- **Look for the Signs of Improper Purchases**
  Not every purchase that a caretaker makes should cause immediate suspicion. But, if one who is appointed Durable Power of Attorney suddenly buys a new luxury car, takes an expensive vacation, or engages in other activity that is clearly out of the ordinary, you should inquire. Try to engage in honest and open conversations with all of your family members about these matters. If concerns remain, it may be time to consider other arrangements.
- **Inquire as to Whether the Durable Power of Attorney Documentation Includes Gifting Powers**
  If your parent signed a Durable Power of Attorney document, ask whether the document specifically grants the person appointed the Durable Power of Attorney the power to make gifts on their behalf. While a Durable Power of Attorney document can provide an individual with expansive power over the finances of the elderly parent, the more general language typically seen in these documents often will not provide the Durable Power of Attorney with the authority to make gifts to himself, herself, or to others. If an elderly parent wants to give the Durable Power of Attorney the authority to give gifts, this must be stated explicitly in the Power of Attorney document. Any person who is considering granting such expansive powers to a loved one needs to give such matters very careful consideration.

Unfortunately, elder financial abuse is all too real. This abuse can have devastating consequences both on the ailing parent and on their families. Be mindful of the potential problem. Naivety is not a sufficient excuse when it comes to caring for those who need our help the most. There are legal avenues you can take to try to protect the rights of your parents and your parents' beneficiaries.

If you have any questions, please contact Attorney Trevor Lippman at O'Neil Cannon at 414-276-5000.

UNITED STATES SUPREME COURT CLARIFIES THAT NOTICE, AS OPPOSED TO FILING A LAWSUIT, IS A PROPER METHOD OF EXERCISING TILA RESCISSION RIGHTS

In an opinion dated January 13, 2015, the Supreme Court of the United States reversed a decision of the Eighth Circuit Court of Appeals, unanimously holding that borrowers may exercise their three-year right of rescission under the Truth in Lending Act (TILA) simply by providing written notice to their lender.

The Court in *Jesinoski v. Countrywide Home Loans, Inc.* held that the petitioners' written notice to Countrywide of their election to exercise the right to rescind their loan was sufficient, resolving conflicting authority among federal circuit and district courts that interpret TILA as requiring a borrower to file a lawsuit within three years of loan consummation in order to exercise such rescission rights.

According to the Court's opinion delivered by Justice Scalia, TILA explains in unequivocal terms that a borrower shall have the right to rescind a loan by notifying the creditor of his intention to do so. According to Justice Scalia, "[this] language leaves no doubt that rescission is effected when the borrower notifies the creditor of his intention to rescind. … The statute does not also require him to sue within three years."

Interestingly, the Court's opinion goes on to provide that, unlike the elements of common-law rescission which require a party to tender back what it received in order to be entitled to such relief, a borrower does not necessarily need to tender to a creditor funds received under the loan in order to effectuate its election to exercise its rescission rights under TILA. In the words of the Court, "[t]o the extent [TILA] alters the traditional process for unwinding such a unilaterally rescinded transaction, this is simply a case in which statutory law modifies common-law practice."

The full opinion of the Supreme Court of the United States in *Jesinoski v. Countrywide Home Loans, Inc.* can be found at: http://www.supremecourt.gov/opinions/14pdf/13-684_ba7d.pdf.

EMPLOYMENT LAWSCENE ALERT: SUPREME COURT HEARS ORAL ARGUMENTS ON THE EEOC'S DUTY TO CONCILIATE

On Tuesday, January 13, 2015, the United States Supreme Court heard oral arguments in *Mach Mining LLC v. EEOC*, 13-1019, the outcome of which will have a significant effect on the EEOC conciliation process and a case we have posted on this blog previously. The dispute revolves around whether — and to what extent — courts can enforce the EEOC's obligation under Title VII to conciliate before filing a lawsuit.

The EEOC initially filed a Title VII gender discrimination complaint against Mach Mining in 2011 for allegedly failing to hire or refusing to hire women because of their gender. The EEOC claims that it filed suit after trying to reach a prelitigation settlement through its conciliation process. Mach Mining disagreed and asserted as an affirmative defense in its answer to the complaint that the EEOC had failed to conciliate in good faith as required by the statute.

The Seventh Circuit Court of Appeals created a circuit split when it ruled that employers cannot allege as a defense that the EEOC didn't work hard enough to reconcile disputes before filing suit. All other circuit courts have held that the adequacy of conciliation is subject to court review, although the standard of review varies between courts. According to the Seventh Circuit, the failure-to-conciliate defense went against the statutory prohibition on using what was said and done in conciliation as evidence in future proceedings.

During oral arguments, Mach Mining's attorney suggested that courts be able to conduct a "modest inquiry" into whether the EEOC attempted to resolve a claim of discrimination through conciliation and, if determined that the EEOC had not done so, to require it to conciliate. The EEOC, on the other hand, does not want the courts to have any ability to review its pre-suit conciliation efforts. Chief Justice Roberts, however, voiced his concern that he was "troubled by the idea that the government can do something that [the courts] can't even look at whether they've complied with the law." Justice Beyer echoed Chief Justice Roberts' concerns by saying that "everything just about" is subject to judicial review. Justice Scalia called the EEOC's request that its conciliation efforts be exempted from judicial review as “extraordinary.”

The main concern over any judicial inquiry into the EEOC’s pre-suit conciliation efforts is the level of inquiry a court should undertake. This is where the appellate circuit courts differ. The Second, Fifth, and Eleventh Circuits evaluate conciliation under a three-part inquiry whereas the Fourth, Sixth, and Tenth Circuits require instead that the EEOC’s efforts meet a minimal level of good faith.

Justices Kagan and Ginsberg’s questions seemed to belie a belief that Congress has not put an onerous requirement on what was required of the EEOC in conciliation. Justice Sotomayor stated that she didn’t “know how you make something that’s designated by Congress as informal into a formal proceeding.” Justice Kennedy stated that Title VII’s requirement that the EEOC try to eliminate allegedly unlawful employment practices “by informal methods of conference, conciliation, and persuasion” were “very difficult words” for Mach Mining’s position. Mach Mining responded by stating that “informal” did not mean that the EEOC could do whatever it wanted.

Although the Court continued to ask the parties to give them a rule that would be acceptable to them, neither came up with an answer the Justices seemed satisfied with. The EEOC initially argued that it should only be required to show that an attempt to conciliate had been made. Justice Scalia, however, honed in on the fact that the EEOC is obligated to try to obtain an agreement that is acceptable to it but, in order to try to obtain an agreement, you have to tell the other side what you want. Similarly, Chief Justice Roberts did not like the “just trust us” approach. The EEOC eventually conceded that the Court could require it to say that it informed the employer of what it objected to and that they had communicated about the issue.

Mach Mining argued that the Court should require that the EEOC reach out to the employer and, if the employer responded that it wanted to conciliate, that the EEOC should have to tell the employer what would be an acceptable offer, which they could legally obtain in court, and how they had arrived at that number. Justice Kennedy stated that this would be akin to enforcing the good faith bargaining of contracts and labor law, which he referred to as “a morass.” Justice Kagan called this inquiry “intrusive.”

The decision in this case will have a large impact on how the EEOC conciliates cases prior to litigation and how employers will need to approach such conciliation efforts. If the Court rules in the EEOC’s favor, it would likely mean that the EEOC could become even more aggressive with its charge to the courthouse with high profile cases, as a lack of good faith or reasonableness would not create a barrier to the EEOC’s efforts to litigate a case that an employer might be more than willing to conciliate on fair and reasonable terms — if only given an opportunity.

EMPLOYMENT LAWSCENE ALERT: OSHA IMPLEMENTS NEW REPORTING REQUIREMENTS

New Occupational Safety and Health Administration (OSHA) reporting requirements went into effect on January 1, 2015. These new rules require all employers, even those who are exempt from routinely keeping OSHA injury and illness records due to company size or industry, to report all work-related fatalities, hospitalizations, amputations, and losses of an eye to OSHA.

Employers must report work-related fatalities within 8 hours of finding out about them. Employers will also now be required to report all amputations, partial amputations, losses of an eye, and any inpatient hospitalization of an employee due to workplace injuries to OSHA within 24 hours of the incident. Previously, employers only had to report hospitalizations if they involved three or more employees, which was rare. Employers do not have to report a hospitalization if it is only for diagnostic testing or observation. OSHA's new reporting requirements will dramatically increase the number of incidents that have to be reported to OSHA.

For example, employers will now be required to report all work-related amputations as OSHA broadly defines "amputations" to include a part, such as a limb or appendage, that has been severed, cut off, amputated (either completely or partially); fingertip amputations with or without bone loss; medical amputations resulting from irreparable damage; and amputations of body parts that have since been reattached.

Employers will have three options by which to comply with their reporting requirement to OSHA. First, employers may make a report by telephone to the nearest OSHA area office. Second, employers may make a report by telephone to the 24-hour OSHA hotline at 1-800-321-OSHA (6742). Lastly, employers can report online through OSHA's website (www.osha.gov), which is expected to be operational by mid-January.   It is OSHA's plan to publish all reports of injuries on its website.

Because there is likely to be additional reporting to OSHA, OSHA will have additional enforcement opportunities, which means additional inspections for employers. Because OSHA enforcement inspections typically result in citations, this could have a significant impact on the companies that face these inspections due to on-the-job injuries.

Employers should make sure that they are aware of their new reporting duties and are complying properly. More importantly, employers should make sure that they have safe work practices and procedures, have proper safety policies, provide adequate safety training, and ensure that all workplace safety rules are strictly enforced. Preventing workplace injuries should be every employer’s goal.

EMPLOYMENT LAWSCENE ALERT: SUCCESSFUL EMPLOYERS RECOGNIZE THE IMPORTANCE OF HAVING WELL-TRAINED SUPERVISORS

Employers in today’s society are faced with a variety of workplace challenges, from complying with complex and often confusing employment laws to effectively managing a diverse workforce comprised of individuals from a broad spectrum of society. Let’s face it: managing your workforce, making the right employment decisions with regard to hiring, promotions, and terminations; and complying with the numerous, complicated, and sometimes overlapping federal, state, and local employment laws is no easy task. It is even more difficult in these uncertain economic times as employers struggle to maintain their workforce amidst declining revenue and increased costs. The numerous recent changes in employment laws, like the NLRB decisions on union organizing and elections, and proposed changes, such as updates to the FLSA Overtime Exemption, that are certain to take place, will not make things any easier for employers. Successful employers realize that the success of their business to comply with these numerous and complex challenges is dependent upon well-trained supervisors.

A supervisor has several key roles that are essential to the success of the workplace. One of the most critical roles of the supervisor is to carry forward the mission and the vision of the company. This requires the supervisor to embrace and foster the values of the company and to instill those values in the workforce. A supervisor must also possess the technical skills to support the organization, the management skills to achieve the objectives and goals of the company, and the people skills to effectively lead and communicate with employees to enable them to achieve the goals of their job. Supervisors must also direct employees, instruct them, and ensure that they follow organizational policies and procedures. Moreover, supervisors must make important decisions with regard to hiring, job assignments, job performance and evaluation, promotions, pay increases, accommodations, discipline, and termination, all while complying with a myriad of state and federal laws.

Given these very large and demanding responsibilities, individuals placed in a supervisory position soon begin to realize that they have not been given the skills and tools necessary to handle all the dynamic challenges of the job. Successful employers, however, recognize this shortfall and provide their supervisors either inside or outside training to help these individuals become good and successful supervisors.

What defines a good and successful supervisor? A good supervisor is a leader and a motivator who promotes teamwork, teaches safe and efficient work practices, and consistently communicates and enforces work rules and policies. A good supervisor understands his or her role within your organization and the importance of communicating the vision and mission of the company to employees. A good supervisor also demonstrates a loyalty to the values of your company and values the people that contribute to the success of your organization – your employees! Many employers rightly recognize that it is their employees who represent their most important asset and who, in most cases, make the difference between a successful company and an unsuccessful company. Employers also recognize that the best way to achieve value from their employees is to have good and well-trained supervisors who are committed to maximizing the productivity from each and every employee. Wellmotivated employees are more productive than less-motivated employees. This is a simple truism but one that is often neglected by employers. Employees who are not motivated in their jobs have lower morale, lower productivity, and diminished loyalty to the organization. Consequently, employees who are not motivated in their jobs usually become disinterested and unsatisfied in their jobs, which, in turn, leads to increased employee turnover and higher operating costs and lower profit margins for the employer. Supervisors are the individuals who have the most influence and effect upon an employee's motivation.

Well-trained supervisors have the ability to enhance an employee's motivation and the overall morale of your workforce. Well-trained supervisors understand that by (i) treating employees fairly; (ii) valuing and appreciating employees' efforts and contributions to the company; (iii) recognizing their work; and (iv) assigning job tasks that match an employee's skills with the employee's interest in the job will increase employees' motivation and interest in their jobs. A good and productive employee is often times determined by a well-trained supervisor who understands that he or she must be a leader, a communicator, a teacher, and a motivator; sometimes all at the same time. These functions are what define a good supervisor.

Many readers, after reading this article, may think that they don't need to actively train their supervisors as their business is successful or profitable. However, being profitable or successful does not mean that you have good supervisors committed to the values of your company or that your employees are motivated or satisfied in their jobs. Also, giving an individual a "supervisor" job title does not make them automatically equipped to handle the various and demanding responsibilities of the job. To determine the level of your supervisors' understanding of their own role in your company, you should ask each of your supervisors the following three questions:

(1) How do you define your role as a supervisor in our company?

(2) What characteristics or traits do you believe you possess that makes you an effective supervisor?

(3) What is the most important skill you possess as a supervisor?

Depending on their answers, you may want to consider whether providing your supervisors training on the fundamentals of good supervision makes good business sense.

TAX AND WEALTH ADVISOR ALERT: SUCCESSION PLANNINGTHE FIFTH SIN — "ENGAGING IN COMPLEXITY FOR COMPLEXITY'S SAKE"

There is a great quote from Oliver Wendall Holmes on complexity: "*I would not give a fig for the simplicity this side of complexity, but I would give my life for the simplicity on the other side of complexity".*

Of course, there is the other great quote about complexity with its author of unknown origin: "*Keep it simple stupid.*"

But when it comes to planning, particularly tax-based planning, in my experience, advisors of all kinds—lawyers, accountants, financial advisors—violate the tenants of simplicity and engage in some of the most complex, indecipherable planning known to mankind. I have seen plans that use charitable planning techniques to transition business ownership for clients that have no charitable inclinations. I have seen complex buy-sell plans and operating agreements created for clients that just want to pass the business on to the children. I have seen all types of acronym planning that, upon further review, is akin to killing an ant with a sledgehammer—GRATs, BDITs, IDGTs, FLPs, DAPTs and the like.

Just to be clear, the planning techniques behind each of these acronyms are wonderful, useful and powerful planning techniques when implemented in the right situation with the right client. I have implemented many of them myself. But for some clients, it is more than what they need to get where they want to go.

The question might be what is the problem? Even if a simpler solution might accomplish the same client goal, at the end of the day, the solution still accomplished the goal. In my experience, there is a reason that someone as brilliant as Oliver Wendall Holmes valued simplicity to the point of figuratively giving his life to get it—the lack of understanding leads to fear, and fear leads to inaction. Taking a step back, why did I become involved in these cases in the first place, when the plan (generally a costly plan) had been created by a former advisor? Simply put, the clients had no idea what they had, why they had it or what to do with it. Stated another way, it was the advisor's plan, not the clients'.

So my suggested process: determine first what the client wants and then determine the possible ways to get there. Then recommend and implement the solution that gets the client the best result in the simplest way. The plan should not be about the advisor's ego, but if it is, remember what Oliver Wendall Holmes is really saying—true brilliance lies not in complexity, but rather simplicity.