O’NEIL, CANNON, HOLLMAN, DEJONG AND LAING S.C. HOSTS CLE SEMINAR FOR SMALL FIRM AND SOLO PRACTITIONERS

On October 8, 2014, O’Neil, Cannon, Hollman, DeJong and Laing S.C. hosted a Continuing Legal Education seminar focusing on legal issues of interest to Wisconsin small firm and solo practice attorneys. Approximately 70 attorneys attended the event. The firm’s Managing Shareholder, Jim DeJong, presided over the event.

Chad Baruch of Dallas, Texas was the keynote speaker for the seminar. Attorney Baruch spoke on effective legal writing. He also spoke on constitutional law issues and moderated a panel discussion on corporate drafting issues. Bob Gagan, President of the State Bar of Wisconsin, also participated in the seminar. Attorney Gagan discussed the resources available from the State Bar of Wisconsin to assist small firm and solo practice attorneys.

A number of O’Neil, Cannon, Hollman, DeJong and Laing S.C. attorneys spoke at the event, including:

• Randy Nash and Greg Mager discussed State Bar of Wisconsin projects with State Bar President, Bob Gagan.
• Dean Laing presented on several litigation issues, including the impact of social media research in litigation and emerging deposition and expert witness practice issues.
• Pete Faust, Doug Dehler, Joe Maier, and Joe Newbold participated in a panel discussion with Chad Baruch on corporate document drafting issues.
• Joseph Gumina presented on recent developments in labor and employment law.
• Grant Killoran presented on legal and practical issues related to the handling of electronically stored information.
• Seth Dizard, Melissa Blair, and Tim Van de Kamp participated in a panel discussion on recent developments in creditors’ rights, bankruptcy and receivership law.

If you would like any additional information regarding the seminar, including copies of the seminar materials, please contact Grant Killoran via e-mail at grant.killoran@wilaw.com or by telephone at 414.276.5000.

TAX AND WEALTH ADVISOR ALERT: THE SEVEN

DEADLY SINS OF SUCCESSION PLANNING

Over the next few weeks, this blog will analyze the Seven Deadly Sins of Succession Planning. And what are those sins? They are the mistakes business owners make in attempting to make the transition of their closely-held business successful. Why do they make them? They forget the most important fundamental that their estate plan needs to be a plan that will take care of the people they care about. This can be accomplished by getting the right stuff to the right people at the right time. And they do it through maximizing the value of that stuff.

This blog will focus on these mistakes, why they are so common, and most importantly, how to avoid them.

THE FIRST SIN—"Not Putting Leadership First"

The first sin committed in succession planning is when the business owner does not place the leadership of the company as the highest planning priority. A succession plan is an amalgam of the company's leadership succession strategy and the owner's estate plan. The succession plan and the owner's estate plan should have the same central focus. The business' leadership succession strategy should be focused on choosing the best leader to maximize the value of the business. The owner's estate plan strategy should be to take care of the people they care about. Furthermore, the plan should be executed by maximizing the value of the property the business owner leaves to take care of those people. And with most business owners, the bulk of their property is tied up in their businesses.

So putting these two things together, the best estate plan requires a successful leadership succession strategy. Simply put, before addressing matters like dispositive strategies, tax planning, or asset protection, the business owner needs to make sure that the right people are empowered to make the right business decisions when the owner can no longer make those decisions. Stated another way, if the wrong leader runs the business into the ground, what assets are there to protect or what value is left to tax?

Are your succession planning advisors putting first things first? Or, are they running elaborate spreadsheets with intricate tax analyses before they help you with THE threshold question: If not you, then who? A successful succession plan requires answering that question… and answering it FIRST.

ATTORNEY MAGER PRESENTS AT THE COLLABORATIVE FAMILY LAW COUNCIL OF WISCONSIN SEMINAR

Attorney Gregory S. Mager presented at the Collaborative Family Law Council of Wisconsin's Second Saturday on October 11, 2014. The Council's Second Saturday program is designed to inform the general public regarding collaborative divorce.

Mr. Mager is a member of the Collaborative Family Law Council of Wisconsin, and a shareholder with O'Neil Cannon

---

WISCONSIN ADOPTS NEW "SINGLE-PRIME" DELIVERY METHOD FOR STATE CONSTRUCTION PROJECTS

Effective January 1, 2014, a fundamental change was made to the method by which public construction projects are led by the State of Wisconsin's Department of Administration. Wisconsin adopted a new single-prime delivery method to replace its former multiple-prime method. Under the former multiple-prime method, the State would contract with a principal contractor, but would also enter separate contracts directly with mechanical, electrical, plumbing, and fire protection (MEP) subcontractors. Under the new single-prime method, the State will only enter into a single contract with a general prime contractor.

Wisconsin's new single-prime delivery method is actually a unique hybrid, because the State will continue to solicit competitive public bids from the MEP subcontractors, as was done under prior law. However, the successful MEP bidders will enter subcontracts with the general prime contractor, rather than with the State.

Under the new law, all contractors must first be certified by the Division of Facilities Development before submitting any bid. The bidding process begins with the submission of competitive public bids by the MEP subcontractors. The successful low MEP bidders are then selected and identified by the Department of Administration, and the Division of Facilities Development must post the bidders' names and the amounts of the successful MEP bids on its website. Within five (5) days thereafter competitive public bids for the general prime contract must be submitted. The bidders must include the bids of the successful MEP contractors in their own bids for the general prime contract. The general prime contract is

then awarded to the lowest qualified responsible bidder.

The general prime contractor is required by law to enter into subcontracts with each of the successful MEP subcontract bidders selected by the Department. The law mandates that each subcontract must contain certain terms prescribed by statute, including provisions pertaining to prompt payment, insurance and bonding, indemnification, and retainage. The law generally precludes alteration of the scope or price of the subcontract work. It is up to the general prime contractor and each of the MEP subcontractors to negotiate all other subcontract terms. Reaching agreement on the many remaining critical subcontract terms could prove problematic, however, given the arranged marriage between the general prime contractor and each MEP subcontractor that results from Wisconsin's hybrid single-prime delivery method. The general prime contractor will probably find it difficult or impossible to dictate terms unfavorable to the MEP subcontractors, because it has no voice in the selection of the MEP subcontractors and the law does not require the MEP subcontractors to accept any terms besides those imposed by statute.

Wisconsin's new hybrid single-prime system affords protection to MEP subcontractors against bid shopping, and continues the relative autonomy they enjoyed under the old multiple prime system. Those benefits come at a price, however. The new law requires each MEP subcontractor to obtain a 100% performance bond and a separate 100% payment bond naming the general prime contractor as the obligee.

Of perhaps greatest concern to MEP subcontractors are the new law's indemnification provisions. The new law mandates the inclusion into all MEP subcontracts of certain extensive and complex indemnification terms, which generally obligate the MEP subcontractor to "defend, indemnify, and hold harmless" the general prime contractor and its principals for damages and fines for "bodily injury, sickness, disease, or death, or injury to or destruction of property, including… loss of use" arising from the performance of the subcontract work. This includes an obligation to indemnify the general prime contractor for claims arising from its own negligence or fault in providing supervision or oversight of the MEP subcontractor's work. MEP subcontractors may find that these indemnification obligations expose them to potential liability for which they may have no insurance coverage under their general liability policies.

By creating its own unique hybrid delivery method, Wisconsin has ventured into uncharted territory. Time will tell whether this experiment meets with success or failure. The new law raises many unanswered questions. Prospective bidders need to know that the rules have changed, how they have changed, and the significant implications of those changes.

ATTORNEY MAGER PRESENTS AT WISCONSIN STATE BAR'S WORKSHOP

Attorney Gregory S. Mager presented "Civil Procedure, Evidence, and Pretrial Discovery" and "Temporary Hearings—A Panel Discussion" in August, 2014 at the State Bar of Wisconsin's 33rd Annual Family Law Workshop in Sturgeon Bay, Wisconsin.

Mr. Mager is the Director of the Family Law Section of the State Bar of Wisconsin, and a shareholder with O'Neil Cannon

---

TAX AND WEALTH ADVISOR ALERT: IRA DISTRIBUTION: THE GOLDILOCKS RULE

Understanding the rules of IRA distributions is like taking a trip through our childhood. Remember Goldilocks and the three bears? Too hot, too cold, just right? IRA distributions work a sort of the same way.

Cannot Be Too Early

IRAs were created by Congress to be retirement savings vehicles. Because of that intent, Congress (through the tax code) penalizes distributions from IRAs that are "too early." Too early is generally when the account owner is younger than 59½. The consequence of taking distributions too early is that when the account owner receives the distributions from the IRA, not only will the distributions be taxed at ordinary income rates, an additional 10% penalty will apply. There are some exceptions to the 10% penalty; most of which the account owner cannot plan for (death, disability) and others which are really not all that helpful (substantially equal payments over the owner's life expectancy).

Cannot Be Too Late

The power of the IRA is tax-deferred growth. The so-called Rule of 72 is supercharged when earnings can grow without the drag of income taxes. But always remember, when it comes to tax advantages, the government tends to see the taxes we save as its lost revenue. And it only delays receiving "its revenue" for so long. With IRAs, that time of reckoning comes on April 15 of the year after the year when the account holder reaches 70½. Thereafter, each year, the account holder must take what are known as required minimum distributions.

Cannot be Too Little

At 70½, account owners need to take required minimum distributions; any distributions that are less than that are penalized. Required minimum distributions are calculated based upon the life expectancy of the account owner. That life expectancy gets recalculated every year. The essence of recalculation is that even though the percentage of the account balance that must be distributed each year increases (due to the lessening of the account owner's life expectancy), it will never require the distribution of the entire account balance during the account holder's lifetime.

Cannot Go On Forever

While recalculation of life expectancy of the account owner means the IRA will never be depleted by required minimum distributions during the account owner's lifetime, the same cannot be said for periods after the death of that person. If the IRA is left to the surviving spouse, the spouse also gets the benefit of annual recalculation. However, if the IRA is left to someone other than the surviving spouse, the best that beneficiary can hope for is the use of his or her life expectancy at the time of inheritance for the calculation of IRA distributions. That life expectancy will not be recalculated. So, for example, if an IRA is left to a child with a 30 year life expectancy, that child must receive 1/30th of the IRA the first year, 1/29th the second year and so on until the balance is distributed in the 30th year following inheritance. It is in that 30th year that the IRA will no longer be allowed to exist as a tax-free accumulation vehicle. (For more information on so-called stretch planning strategies for inherited IRAs, please see other articles on the website dedicated exclusively to this topic).

So when it comes to retirement, IRAs can be powerful planning tools. But like Goldilocks, there are a lot of restrictions in getting your clients' plans "just right."

VICTORY FOR WHISTLEBLOWERS AND TAXPAYERS: USE OF PUBLICLY AVAILABLE INFORMATION DOES NOT BAR CASES INVOLVING GOVERNMENT FRAUD

Under a federal statute known as the False Claims Act, whistleblowers with knowledge of overcharges or other fraudulent activity directed at the federal government may be entitled to substantial monetary rewards through lawsuits known as *qui tam* cases. The monetary

rewards authorized by the False Claims Act provide those who have valuable information about government fraud a strong incentive to come forward and report it. Companies alleged to have engaged in such fraud often fight back by arguing that a whistleblower's *qui tam* case should be dismissed because it is improperly based on "publicly available" information, citing the False Claims Act's "public disclosure bar."

In a victory for whistleblowers and taxpayers, a federal appellate court based in Chicago recently rejected a broad reading of the public disclosure bar. In *U.S. ex rel. Heath v. Wisconsin Bell, Inc.*, the Seventh Circuit Court of Appeals ruled that the public disclosure bar did not apply where a whistleblower's *qui tam* claim cited a contract that was available for public review on a government website. The Court of Appeals decided that the whistleblower's claim against Wisconsin Bell could proceed because it was not "based upon" the publicly available contract, but instead was based on "genuinely new and material information" that the whistleblower obtained through "his own investigation and initiative."

The whistleblower who filed the case, Todd Heath, is a telecommunications consultant based in Waupun, Wisconsin. Heath is retained by school districts and private businesses to identify overcharges contained in their telephone bills. Those bills and supporting materials are often complex and can be confusing even to sophisticated consumers. Heath, who has been auditing phone bills for more than 20 years, has the training and experience necessary to interpret such materials. Relying on information obtained through his own investigation and professional experience, Health filed a *qui tam* case alleging that Wisconsin school districts were overcharged for telecommunications services.

The Wisconsin school districts were not the only victims of the alleged overcharging, according to Heath, because the federal government subsidizes and pays a substantial portion of the schools' telecommunications bills under a federal program known as the E-Rate program. Before he filed his *qui tam* case, Heath notified the federal government of his findings, as required by the False Claims Act.

The public disclosure bar relied upon by Wisconsin Bell as a defense is intended to prevent whistleblowers from filing "parasitic" or "opportunistic" *qui tam* lawsuits based on information obtained through government reports or other public documents of the type specifically listed in the federal law. The Court of Appeals concluded that the public disclosure bar did not apply to Heath's lawsuit, however, explaining that his case was not "based upon" the contract that Wisconsin Bell cited to support its defense. After ruling in Heath's favor on this issue, the Court of Appeals decided not to consider other arguments made by Heath concerning the public disclosure bar.

Heath is represented in this case by Doug Dehler of O'Neil, Cannon, Hollman, DeJong and Laing, S.C. in Milwaukee, Wisconsin. It is expected that, within several weeks, the Seventh Circuit Court of Appeals will send the case back to a federal court in Wisconsin for additional

proceedings.

If you have questions regarding this case or any other potential whistleblower case under the False Claims Act, please contact Attorney Doug Dehler at 414-291-4719 or doug.dehler@wilaw.com.

TAX AND WEALTH ADVISOR ALERT: ROLE OF A REVOCABLE TRUST IN AN ESTATE PLAN

The revocable trust is the document that is almost always the centerpiece of the estate plan. Simply put, the revocable trust is almost always the document that controls who gets what. That might be counterintuitive to some people who assume the Will is the "dispositive document." But, most often, the Will serves only two purposes: (1) It is where clients nominate the person or persons who will raise their minor children, and (2) it is the clean-up document which transfers any property that has inadvertently not been otherwise transferred as part of the estate plan. In other words, other than the critical, crucial role of naming the so-called guardian of minor children, if the planning has been done correctly, the Will is irrelevant.

Let's take a step back—how can that be? Isn't the Will THE document that states who gets property when someone dies? First, if the property transfers by either title or contract, it is that title or contract (not the Will or trust) that determines who gets that property. For example, if Mr. and Mrs. Smith own their house as joint tenants with the right of survivorship, and Mr. Smith's Will provides that his interest in the house goes to his son upon his death, then if Mr. Smith dies first, Mrs. Smith will own the entire house. Given the titling of the property, the survivor—in this case Mrs. Smith—is the sole owner upon the death of the joint tenant (Mr. Smith). So even though Mr. Smith's Will attempts to transfer one-half interest in the house to his son, the title trumps that intent—making the Will, as to the house, irrelevant.

Second, if property is transferred by contract, it is the contract rather than the Will (or trust for that matter) that controls who gets that property. For example, let's say Mr. Smith owns a stock brokerage account. Mr. Smith completes a beneficiary form leaving the stock account to his son. Later, Mr. Smith remarries and thereafter has a falling out with his son and disinherits him under his Will. When Mr. Smith dies, who gets the stock in the brokerage account? The answer is, his son—the property passes by contract, so the contract, not the Will, controls. The contract says that the account goes to Mr. Smith's son at his death. Again, as to that account, the Will is irrelevant.

Finally, it is inevitable that the client will own some property that does not pass by either title or contract. So that property will pass by Will, correct? The answer to that question is yes; if our client, Mr. Smith, dies owning property—property that does not pass by title or contract—it will pass by his Will. But the goal of our estate plan is to have Mr. Smith die owning no property—at least no property that does not pass by contract or title. But why?

If Mr. Smith dies owning property that does not pass by title or Will, that property generally must go through the process of probate before it gets to its intended recipient. So what is probate? Essentially it is a public process wherein what you own and who you owe is filed with the court and becomes part of the public record. For some people, the lack of privacy in that process is troublesome. For others, that is not an issue, but the cost and delay of the probate process is problematic. Generally, all things considered, most clients decide that probate is to be avoided rather than embraced. But the only way to avoid probate is to die owning nothing, nothing other than assets that pass by title or contract. Is that practical? It is if you transfer all of those assets to a revocable trust.

A revocable trust is a trust controlled by the client. So if Mr. Smith creates a revocable trust, he will be able to access that trust property any time he wants, for any needs or desires he has. He will be able to change the trust and terminate the trust any time he chooses. From a practical perspective, a revocable trust is identical to outright ownership. But the advantage is that, legally, it is not ownership and any asset in the trust does not have to go through probate. If all of Mr. Smith's assets—those that do not pass by title or contract—are in his revocable trust—he avoids probate. And again, all things being equal, that is a good thing. Finally, the trust would provide who gets the property upon Mr. Smith's death—it can be worded identically to how he would draft his Will. For example, the trust could provide that, at his death, the trust property is distributed equally to Mr. Smith's children.

So that is the revocable trust in a nutshell; the centerpiece of the estate plan.

BEST LAWYERS® HONORS 14 ATTORNEYS IN 2015

O'Neil, Cannon, Hollman, DeJong and Laing S.C. is pleased to announce that 14 lawyers have been named to the 2015 Edition of *Best Lawyers*®, the oldest and most respected peer-review publication in the legal profession.

Best Lawyers® has published their list for over three decades, earning the respect of the profession, the media, and the public as the most reliable, unbiased source of legal referrals.

Its first international list was published in 2006 and since then has grown to provide lists in over 65 countries. Lawyers on the *Best Lawyers in America*® list are divided by geographic region and practice areas. They are reviewed by their peers on the basis of professional expertise, and undergo an authentication process to make sure they are in current practice and in good standing.

O'Neil, Cannon, Hollman, DeJong and Laing S.C. would like to congratulate the following attorneys named to the 2015 *Best Lawyers in America*® list:

- James G. DeJong – Corporate Law, Mergers and Acquisitions Law, and Securities/Capital Markets Law
- Seth E. Dizard – Bankruptcy and Creditor Debtor Rights/Insolvency and Reorganization Law, and Litigation-Bankruptcy
- Peter J. Faust – Corporate Law, and Mergers and Acquisitions Law
- John G. Gehringer – Commercial Litigation, Construction Law, Corporate Law, and Real Estate Law
- Dennis W. Hollman – Corporate Law, and Trusts and Estates
- Grant C. Killoran – Litigation-Health Care
- Dean P. Laing – Commercial Litigation, Personal Injury Litigation-Plaintiffs, and Product Liability Litigation-Defendants
- Gregory W. Lyons – Commercial Litigation and Litigation-Insurance
- Patrick G. McBride – Commercial Litigation
- Thomas A. Merkle – Family Law
- Steven J. Slawinski – Construction Law\

Since it was first published in 1983, *Best Lawyers*® has become universally regarded as the definitive guide to legal excellence. *Best Lawyers*® is based on an exhaustive peer-review survey. Over 52,000 leading attorneys cast more than 5.5 million votes on the legal abilities of other lawyers in their practice areas. Lawyers are not required or allowed to pay a fee to be listed; therefore inclusion in *Best Lawyers*® is considered a singular honor. *Corporate Counsel* magazine has called *Best Lawyers*® "the most respected referral list of attorneys in practice."

TAX AND WEALTH ADVISOR ALERT: DO I NEED A WILL AND WHY?

As an estate planning attorney, the most common question I get—both from potential clients and at cocktail parties (or kids' soccer games)—is, "do I need a Will?" Now, I know that a lot of estate planners have a simple, consistent three letter answer for that is, "YES". But that is not my answer. My answer, maybe a typically frustrating lawyer answer is, "it depends."

So let's say a potential estate planning client, John, has asked me that exact question— do I need a Will? The first question I will lob back to my new inquisitive friend, is does he have minor children? If the answer is yes, my questions are complete and my answer is "yes, you need a Will." Why, might you or John ask? Well, what is more important to a parent than who will raise his kids if he (and his wife) cannot? The answer is nothing. Who makes that decision? In other words, if John and his wife get into a fatal car accident on the way home from dinner that night, who will decide who gets to raise his kids? The answer is, under all circumstances, a judge…A probate court judge. The next question is how will the judge make that decision? Well, from experience, I will tell you what the judge hopes will be in place to aid in making that decision: a nomination of a guardian in John's Will. The Will is the only document in which John can nominate a guardian for his children; if there is no Will, regardless of whether John has written down his hopes on another document, the judge will be on his or her own in making the decision. Therefore, if the answer to the question, "do you have minor children?" is "yes," then the answer to whether "you need a Will" is also "yes."

But what if the answer is no—what if John and his wife do not have minor children—does he need a Will? The second question is, in general, who do you want your property to go to? You see, even if John does not have a Will, he does have an estate disposition plan that dictates where all of his property will go when he dies. It is just not a plan he has created. Instead, it is a plan created by the state in which he resides under that state's "intestacy" law . While each state's law is different, generally, the intestacy laws provide that, first, everything goes to the surviving spouse; if no spouse, then equally to the kids, then if no kids, to the grandkids, if no grandkids, to parents, then siblings, then nieces, and nephews, then cousins. So, if John wants everything to go to his wife when he dies, does he need a Will? Maybe not. But what if he and his wife die together, in a common accident? Given they have no chidren, everything he owns goes to his parents. And if his wife outlives him, everything they own goes to her parents. Is that what he wants? Is he okay with that? If so, he does not need a Will. But if he is not, then, yes, he does need a Will.

Finally, even if the intestacy statutes work in general, I need to make sure they work specifically. For example, let's say John was not married but rather a 70-year-old widower with three adult children. Who does John want the property to go to? Equally to his three kids. If he had no Will, where would his property go? Equally to his three kids. Seems like he does not need a Will. But what if he wants specific property to go to specific people? Maybe John has some real estate investments, and he has a child that has strong acumen and passion in real estate development. And, he also has a stock portfolio with a child who is talented in managing and trading equities. Remember an estate plan gets the right property to the right people. Intestacy laws give the kids 1/3 of each asset—only a Will gets the right property to the right people. So if that is the case, and John wants to get specific property to specific people, he needs a Will.

So your client asks, do I need a Will? Don’t be a sheep and simply say “yes.” Be an advisor and ask:

1. Do you have minor children?
2. Who do you want your property to go to?
3. Do you want specific property to go to specific people?

The answers to these questions will drive the answer to your client’s question.