O’NEIL, CANNON, HOLLMAN, DEJONG AND LAING S.C. RANKED IN 2015 "BEST LAW FIRMS"

O’Neil, Cannon, Hollman, DeJong and Laing S.C. has been ranked in the 2015 “Best Law Firms” list by *U.S. News and World Report* and *Best Lawyers®* in the following areas:

• Bankruptcy and Creditor Debtor Rights/Insolvency and Reorganization Law
• Commercial Litigation
• Construction Law
• Corporate Law
• Product Liability Litigation–Defendants
• Family Law
• Personal Injury Litigation–Plaintiffs
• Securities/Capital Markets Law
• Trusts and Estates Law
• Litigation–Bankruptcy
• Mergers and Acquisitions Law
• Real Estate Law
• Tax Law

Firms included in the 2015 “Best Law Firms” list are recognized for professional excellence with persistently impressive ratings from clients and peers. Achieving a ranking signals a unique combination of quality law practice and breadth of legal expertise.

The 2015 Edition of “Best Law Firms” includes rankings in 74 national practice areas and 120 metropolitan-based practice areas.

The *U.S. News—Best Lawyers* “Best Law Firms” rankings, for the fifth consecutive year, are based on a rigorous evaluation process that includes the collection of client and lawyer evaluations, peer review from leading attorneys in their field, and review of additional information provided by law firms as part of the formal submission process. Clients and peers were asked to evaluate firms based on the following criteria: responsiveness, understanding of a business and its needs, cost-effectiveness, integrity and civility, as well as whether they would refer a matter to the firm and/or consider the firm a worthy competitor.

EMPLOYMENT LAWSCENE ALERT: NLRB

DECISION INCREASES EMPLOYER RISK IN UNFAIR LABOR PRACTICE LITIGATION

In a move that could significantly increase the risk associated with unfair labor practice litigation for employers, the National Labor Relations Board (“NLRB”) issued a decision on October 24, 2014 that stated it has authority to order expanded remedies for violations of the National Labor Relations Act (“NLRA”) that are “egregious and pervasive.”

In HTH Corporation, 361 NLRB No. 65 (2014), the NLRB recognized violations by a Hawaii hotel chain for repeated violations of the NLRA, including unlawfully terminating an employee for engaging in protected activity, eliminating contributions to unionized employees’ retirement plans, maintaining an unlawful anti-solicitation policy, bargaining in bad faith, and failing to comply with NLRB orders.

The NLRB ordered, among various other remedies, the employer to reimburse both the NLRB General Counsel and the union for several years of litigation expenses, including counsel fees, salaries, witness fees, transcript and record costs, printing costs, travel expenses, per diems, and other reasonable expenses. In addition to expenses, the employer must comply with increased posting requirements. Typically, employers who are found in violation of the NLRA must post, for 60 days, a notice informing employees of their rights under the NLRA and a statement that the employer will not violate those rights. In HTH, because of the egregious and pervasive conduct, the NLRB required the employer to post the standard notice and an Explanation of Rights, outlining employees’ core rights under the NLRA and giving specific examples of violations, for three years. In addition, the company will be required to give all new hires in that three year period copies of the notice and the Explanation of Rights. The NLRB is also requiring the company to publish the notice and the Explanation of Rights in two local publications twice a week for eight weeks.

And, although the NLRB did not exercise its right to do so in this particular case, it did note that front pay is an available remedy under the NLRA as part of a make-whole remedy. Front pay is money awarded for lost compensation during the period between judgment and reinstatement or in lieu of reinstatement. The NLRB did not specify how front pay would be calculated in the event that reinstatement was not awarded and left that question for a later decision.

This decision underscores the NLRB’s recent aggressive enforcement agenda and the NLRB’s willingness to deal the unions a winning hand in unfair labor litigation. The NLRB is active in enforcing the NLRA and will continue to use its broad discretionary powers to do so. This decision is likely to increase unfair labor practice charges being filed, as now unions have additional incentive to pursue such claims because they can recover their costs, and employers will be pressured to settle such charges to avoid the risk of liability for the union’s costs and fees.

TAX AND WEALTH ADVISOR ALERT: SUCCESSION PLANNINGTHE SECOND SIN — “MISTAKING FAIRLY WITH EQUALLY"

The second sin committed in succession planning is when the business owner acts too much like a parent and mistakes “fairly” with “equally.” The origin of this sin starts on the date the second child is born. As parents, Mom and Dad want to make sure each child knows that they love him or her “the same” as the child’s siblings. This need for equality begins to permeate every part of the parent-child relationship. Many a parent has said “I need to coach Susie’s dance team because I coached Johnny’s soccer team,” or found themselves running out on Christmas Eve to purchase one last silly gift just to “even things up.” So when it comes to the estate plan, it is not surprising that most parents decide to leave everything equally to the kids. And if the parents are business owners, that oftentimes means leaving the business equally to the children; to some who are involved and some who are not.

The problem with equally is, counterintuitively, it is a selfish notion. It is born of well-intentioned parental guilt: I do not want any of my children to think I love them less, and they cannot if I treat them all the same. But what is missing in that reasoning is what the child really wants. Does the uninvolved child really want an equal amount of stock in a business that he/she does not know or care about? Or would the child rather have cash or mutual funds worth less, but that are easily usable to meet the child’s wants and desires? The key to avoiding sin #2—ask yourself what does each child want, and if possible, try to design a plan that gets those children what they want without worrying about whether each child gets the same amount. Be fair, not necessarily equal.

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.