MILWAUKEE BAR ASSOCIATION APPOINTS ATTORNEY GRANT KILLORAN TO MILWAUKEE JUSTICE CENTER COMMITTEE

Attorney Grant Killoran of O'Neil Cannon has been chosen by the Milwaukee Bar Association to serve on its newly formed Milwaukee Justice Center Committee. He will serve alongside the current and a former Chief Judge of the Milwaukee County Circuit Court, the Clerk of Milwaukee County Circuit Court and Milwaukee Bar Association executives.

The Milwaukee Justice Center opened in October, 2009 and is located in the Milwaukee County Courthouse. The Center uses transformative collaborative partnerships to provide free legal assistance to Milwaukee County's unrepresented litigants through court-based self help desks and legal resources.

Grant concentrates his practice on complex business and health care disputes and devotes a portion of his practice to arts and entertainment law, with an emphasis on the music and film industries. He has served as one of the State Bar of Wisconsin's Delegates to the American Bar Association's House Delegates and as Co-Chair of the ABA Section of Litigation Health Law Litigation Committee.

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

WISCONSIN SUPREME COURT REAPPOINTS ATTORNEY MERKLE

Attorney Tom Merkle has been reappointed by the Wisconsin Supreme Court to the District 2 Committee of the Office of Lawyer Regulation. He will serve a three-year term from January 1, 2010 through December 31, 2012. The Committee consists of twenty-five attorney and 17 public members, and is responsible for investigating and recommending disciplinary actions for complaints against lawyers in the greater Milwaukee area.

Tom is one of the initial members of the Firm. He counsels his clients with general corporate and business law matters, including transactions such as acquisitions, sales, contracts, and financing. He also litigates cases involving shareholder disputes as well as family law cases involving closely-held businesses, partnerships, and professional associations.

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THE NEW ERA OF M&A – DECEMBER 8, 2009

Listen to expert Clare Zempel about the current economic outlook.

Learn from various professionals about what they do to make sure a deal crosses the finish line. Learn about the pitfalls and opportunities in distressed company acquisitions.

Conference Topics Include:

- Economic Outlook
- Deal Momentum: How to Get it, How to Maintain it – OCHD's attorney Peter J. Faust is one of three panelists who will discuss how to ensure a deal crosses the finish line.
- Deal Mart
- Distressed and Bankrupt Company Acquisitions

Register Here

IN YOUR BIZ: PROFIT FROM PLANNING – DECEMBER 3, 2009

Business owners, Mr. and Mrs. Jones, return ready to sell. Tune in as they learn what they need to do to ensure they get top dollar from their business. Attorney Jim DeJong is one of three advisers that will address the planning the owners need to do to:

- Maximize the value of the transaction;
- Create a sustainable business beyond the current owners;
- Develop transferable business relationships; and
- Employ effective tax and accounting strategies.

SIXTEEN OCHD ATTORNEYS AWARDED WITH SUPER LAWYERS DESIGNATION

Sixteen attorneys from O'Neil Cannon have been selected for inclusion on the Wisconsin *Super Lawyers* 2009 list.

Super Lawyers is a peer-nominated award that recognizes the top 5% of outstanding attorneys across the state of Wisconsin. The Super Lawyers are selected using a rigorous, multiphase rating process. Peer nominations and evaluations are combined with third party research, and each candidate is evaluated based on 12 indicators of peer recognition and professional achievement.

Super Lawyers:

- James G. DeJong
- Peter J. Faust
- John G. Gehringer
- Grant C. Killoran
- Dean P. Laing*
- Gregory W. Lyons
- Patrick G. McBride
- Steven J. Slawinski

Rising Stars:

- Timothy C. Caprez
- Seth E. Dizard
- Gregory S. Mager
- Chad J. Richter
- John R. Schreiber
- Robert J. Tess

**Top 50 Super Lawyers Recipient*

BUSINESS JOURNAL M&A ADVERTISING UNDERWAY

Be The Wolf

O’Neil Cannon offers an unexpected departure in a forest full of “me too” legal advertising. OCHD’s reputation for superior Mergers and Acquisitions counsel is well known within the legal and financial community, but less so amongst business owners throughout Wisconsin. With the assistance of the marketing firm JacksonSpencer, an unusually bold step was taken to attract attention within the business community via the most recent issue of the Milwaukee Business Journal.

Mike Farley, President of JacksonSpencer stated, “Over the years, OCHD attorneys have been involved in many very sophisticated deals that have taken place… why shouldn’t their marketing match their expertise? We wanted to move beyond a shot of lawyers in front of a library of law books. That type of marketing is supposed to mean you’re trustworthy… we believe OCHD is already on everyone’s A-list.”

Jim DeJong, the Firm’s president and member of its M&A practice group added, “What JacksonSpencer has given us is a very strong voice… and we’d like to think that business executives will consider us more carefully when complex business transactions are on the line.”

The image of a wolf’s menacing glare has tremendous stopping power and the headline, “What do you see?” forces the reader to choose between being predator or prey. Farley commented, “All too often, business owners feel that they’re on the wrong side of the deal. In the case of this ad… the ‘wrong side’ could be very dangerous, indeed.”
Body copy reads: “Our experience in negotiating the deal is matched by our reputation for improving the deal. If you’re unsure where you fall in the M&A food chain, you’d be wise to run with a stronger pack.”

O’Neil Cannon was ranked as Milwaukee’s 12th largest law firm by The Book of Lists and has been known for their strong corporate and litigation work since its founding in 1973.

BUSINESS BANKRUPTCY OPTIONS

BizTimes – Published July 24, 2009

The three most common avenues available to corporate entities seeking relief from creditors are Chapters 7 and 11 of the U.S. Bankruptcy Code, and Chapter 128 of the Wisconsin State Statutes.

In a Chapter 7 proceeding, which can be filed voluntarily by an insolvent entity, or involuntarily by an insolvent company's creditors, a trustee is immediately appointed by the court to liquidate the company's assets, on a piecemeal basis. It is not possible for a company in a Chapter 7 proceeding to remain open, or reorganize. As soon as a bankruptcy is filed, all creditors are enjoined and restrained from trying to collect their debts.

In a Chapter 11 proceeding, a company is typically able to remain in control of its affairs, and maintain day-to-day operations in the ordinary course, under supervision of the bankruptcy court, and its creditors. A company may reorganize its debts in a Chapter 11, subject to court approval, and the opportunity for creditors to scrutinize and object to the company's proposed plan for reorganization. A sale of the company, as a going concern, is also possible.

A Chapter 128 proceeding, also known as receivership, or an assignment for the benefit of creditors, is also available to Wisconsin-based companies. It is similar to a Chapter 11 proceeding, however, it takes place in the circuit court for the county in which the company has its place of business, rather than in federal court. A court-appointed receiver, usually selected by the company or the company's lender, may operate the business in the ordinary course while the receiver markets the company's assets for sale, as a going concern.

A receivership can also be started voluntarily, or involuntarily by a company's creditors. Although the filing of a receivership also restrains and enjoins creditors, generally, secured creditors (typically banks) who withhold their consent cannot be bound by a receiver's actions.

Creditors are paid, according to statutory priority, from the proceeds generated by the sale of the company's assets, to the extent such proceeds are enough to pay secured creditors, in full. Or, in the event of a reorganization, creditors are paid, again according to priority, from the company's ongoing revenue.

ATTORNEY SCOBY JOINS O'NEIL CANNON

Attorney Jason Scoby, a recent graduate of Marquette University Law School, *cum laude*, has joined the Corporate Practice Group of the Milwaukee law firm O'Neil Cannon He advises clients on a wide range of corporate and business-related issues, including commercial transactions governed by the Uniform Commercial Code, mergers and acquisitions, new business formation, and franchising.

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MANAGING DATA IN A LITIGIOUS WORLD

Almost 99% of today's information created by businesses is generated and stored electronically. The ability to easily and conveniently store large amounts of data has created a hidden liability that did not exist in the age of when companies maintained its information primarily in paper format. This hidden liability is twofold. First, companies create more information then they know what to do with. Second, companies sometimes delete or destroy data and information that they actually do need.

For the unwary, these hidden liabilities may become exposed when your company is faced with a lawsuit.

In today's litigation, the age of electronic data has generated a paradigm shift away from traditional paper documents to digital information. This shift has changed the discovery process in litigation by changing what attorneys are looking for; how they are looking; and where they are looking for relevant information. Companies can expect in today's litigation that the way it stores and preserves electronic information will be a central topic during the discovery process that will involve not only your record custodians, but also your information technology department. How well a company manages and preserves its electronic information may be an outcome determinative factor for it in litigation.

Today, companies that find themselves involved in a lawsuit oftentimes are faced with attacks through the discovery process as to how they typically store and delete electronic information. The purpose of this inquiry is to set the expectation as to what electronic information, such as e-mails, the company should or should not reasonable have at its disposable for discovery purposes. Companies that do not have a well-drafted and followed record retention plan that addresses electronic information and which incorporates a comprehensive litigation hold policy may find itself at a significant disadvantage in trying to defend what might otherwise be a winnable case. That is why it is more important than ever for all companies, both large and small, to effectively manage their electronic information. This means that companies must be litigation ready by taking affirmative actions that effectively manages and retains electronic information. It is simply too late to start thinking about the manner and method of retention and destruction of electronic data after you have been served with a lawsuit.

The best tools to avoid these hidden liabilities is a record retention policy that addresses electronic information as well as a litigation hold policy that is designed to preserve electronic data once litigation is reasonably anticipated. A record retention policy should be designed so that your company does not destroy information that it is obligated to maintain and at the same time the policy should be designed to destroy or delete information that the company no longer needs and/or is no longer mandated to maintain. Most companies have some sort of document retention policy. These retention policies were originally implemented to manage the volume and space occupied by paper documents. Companies have been less diligent, however, in applying their retention policies to the electronic information that they store on their servers and individual computer hard drives. This lack of diligence in managing electronic data has created a treasure trove for plaintiffs' lawyers looking for the proverbial "smoking gun," such as that e-mail that explains exactly what motivated the company's decision to terminate that troublesome employee.

A litigation hold policy has long been an important concept in litigation. In simple terms, it means that once you are sued, you have to stop destroying documents. It is an easy concept to understand when applied to paper documents, but it becomes a much more complicated task when dealing with electronic information. Electronic evidence can easily disappear, be altered or destroyed if not properly preserved. For example, some companies' computer systems provide for automatic deletion of e-mails and documents, so stopping that process takes an affirmative effort on behalf of management. When implementing a legal hold, a company needs to address the hold requirement from a team effort. Business units, IT, records management and custodial personnel, and either in-house or outside counsel need to be involved and work together in the process of implementing the hold.

How your company routinely stores or destroys electronic data has become an increasingly important subject during a lawsuit. As more lawyers become sophisticated in this topic, companies can expect, as routine, that there electronic records management policies and practices will be warily scrutinized. Consequently, it will be too late to start thinking about electronic data, the method and manner of retention as well as the deletion of such data after you have been served with a lawsuit. The failure to have a properly drafted record retention policy as well as a litigation hold policy may result in serious and adverse consequences for your company and may compromise your company's ability to defend itself in a lawsuit. For example, failure to have these policies in place can result in court-imposed sanctions, adverse jury instructions and significant monetary awards. Thinking ahead and addressing the hidden liabilities created by your electronic information can save your company time and money, and, more importantly, potentially prevent your company from having to incur an unnecessary judgment as the result of electronic information being inadvertently deleted.

Register for Managing Data in a Litigious World Webinar on July 22

WORKPLACE DIVERSITY: DEFINING SUCCESS GOES BEYOND NUMBERS

It has been over 40 years since Congress passed Title VII of the Civil Rights Act of 1964 ("Title VII") prohibiting workplace discrimination on the basis of race, color, religion, gender, and national origin. Since the passage of Title VII, employers have developed diversity and affirmative action programs to open the American workplace to historically excluded demographic groups (i.e., African-Americans, Hispanics, Asians, and women). Many employers recognize the value of a diverse workforce and the positive effect it can have on the overall performance of their company, however, many companies still measure the success of their diversity programs by the totals on their EEO-1 reports. Employers that measure the success of their diversity programs this way often lack a true understanding of the difference between affirmative action and diversity. These same employers also run the risk of violating the antidiscrimination provisions of Title VII by confusing the concepts of diversity and equal treatment. Although affirmative action and diversity are related concepts, they each have different origins and legal connotations; a distinction that all employers must understand in today's demographically changing society.

AFFIRMATIVE ACTION – Addressing Past Inequities

The origins of affirmative action can be traced back to President Franklin D. Roosevelt when he issued Executive Order 8802 on June 25, 1941 to address concerns by African-Americans that they had not been given a fair opportunity to bid for government defense contracts following the devastating economic effects of the Great Depression. Although Executive Order 8802 did not provide for any enforcement authority, it did create the Fair Employment Practices Committee to promote the integration of workers into the defense industry regardless of race, creed, color or national origin. Successive presidential administrations continued to address the issue of affirmative action in government contracts, however, it was President Kennedy, with the issuance of Executive Order 10925 in 1961, who for the first time, required government contractors to take “affirmative action” to ensure nondiscrimination. In 1965, President Johnson continued the contract compliance requirements found in President Kennedy’s Executive Order 10925 with the signing of Executive Order 11246. President Johnson’s Executive Order 11246 also resulted in the creation of what is now known as the Office of Federal Contract Compliance Programs (“OFCCP”) that is administered by the U.S. Department of Labor. Affirmative action has, for the most part, been created to permit “those actions appropriate to overcome the effects of past or present practices, policies, or other barriers to equal employment opportunity.” Beyond the contract compliance requirements mandated by the OFCCP or other government regulations, affirmative action under Title VII has also been required as part of (1) a court order after a finding of discrimination or (2) negotiated as a remedy in a consent decree. Consequently, affirmative action is mainly viewed as a government initiated, legally driven policy to deal with racism, sexism, and the other “isms” that have found their way into the American workplace premised upon the concept that everyone shall be treated the same regardless of their race, sex, religion or national origin.

DIVERSITY – Recognizing the Difference from Affirmative Action

Diversity, on the other hand, is a “business management concept under which employers voluntarily promote an inclusive workplace” by recognizing that employees bring to the workplace unique perspectives that provide a competitive advantage in an increasingly global economy. The U.S. Supreme Court has recognized that the benefits of diversity “are not theoretical but real, as major American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas and viewpoints.” However, the spectrum of diversity management varies among employers. Some employers embrace diversity with an affirmative action-like model by promoting programs that stress equal opportunity and fair treatment for all employees in compliance with the various equal employment opportunity laws. Success of diversity under this model is measured by recruitment and retention of individuals within various minority groups and is focused on treating everyone the same rather than recognizing the differences between individuals. While achieving the laudable goal of eliminating discrimination in the workplace, diversity under this model falls critically short in recognizing and utilizing the cultural experiences that members from different demographic groups can offer to the overall success of a business. Other employers promote diversity by matching the demographics of their workforce with the demographics of a particular market segment or customer base. The best example of this type of diversity model was utilized by Pepsi in the 1940’s when, through the vision of Pepsi’s president, Walter S. Mack, and the courageous and precedent-setting work of Edward F. Boyd, Pepsi hired a team of African-American salespeople to tap the full potential of what was then called "the Negro market," valued at $10 billion at the time. This African-American sales staff marketed and sold Pepsi products directly to the African-American community with tremendous success when other competitors ignored this significant market segment, and, instead, directed their marketing and sales efforts to the mainstream. Today, companies still utilize this type of diversity model, drawing upon the experiences and perspectives of a defined demographic group to sell or market to the same or similar group. Many employers correctly recognize that it makes good business sense to make sure that the demographics of their own employees and leaders match that of the customers they serve. However, utilization of this type of diversity model can create a hidden liability under Title VII for employers when the diversity program itself either mandates assignment of a specified protected group to a particular geographical area or the program creates barriers or impediments to advancement by pigeon-holing employees within an organization. A recent example of the liability that an employer may face with this type of diversity model can be found in a class lawsuit against Walgreens alleging that Walgreens assigned managers, management trainees, and pharmacists to low-performing stores and stores in African-American communities because of their race. The employees in this case alleged, among other things, that Walgreens denied promotions to qualified African-American employees within the retail and pharmacy management career path, and to district and corporate positions as well as discriminated against these same employees by denying them the ability to earn comparable compensation when measured with similarly situated white employees assigned to retail stores located in other neighborhoods and communities. In denying any liability whatsoever, Walgreens settled this lawsuit by agreeing to pay $20 million to resolve all claims amongst an estimated 10,000 class members. The case against Walgreens illustrates that while an employer may be able to claim that a specific demographic group of employees are well represented within its ranks, achieving diversity by assigning a certain demographic group to serve a niche or defined customer base can cause such employees within the group to feel undervalued and exploited while at the same time exposing the company to significant liability for violating the requirements of Title VII. Companies that utilize this type of diversity model, while capable of boasting the employment of a diverse workforce, typically fail to recognize how the unique skills and perspectives of a diverse workforce can be integrated into the overall operation and success of the company.

EEOC's E-RACE INITIATIVE – A Reason to Achieve Diversity

Given the dramatic and anticipated changes in the demographics of today's workforce together with the U.S. Equal Employment Opportunity Commission's ("EEOC") recognition that color discrimination in employment appears to be on the rise the EEOC launched, earlier this year, a national enforcement initiative known as the E-RACE (Eradicating Racism And Colorism from Employment) initiative. The EEOC has labeled its E-RACE initiative as an "outreach, education, and enforcement campaign" to bring a fresh, 21st century approach to combating racism in the workplace. The EEOC, through this national initiative, will focus its enforcement resources more closely on how employers' policies and practices affects the hiring and advancement of individuals within protected demographic groups. The EEOC's E-RACE initiative, although it represents an enforcement policy and not a change or mandate with regard to Title VII or other current EEO laws, will nonetheless require all employers to adopt strategies to increase the number of minority employees they hire, and also, and perhaps more importantly, will require employers to define more precisely as to how they will promote and advance minority employees within their companies. Employers that decide to ignore the EEOC's current emphasis and enforcement efforts related to race discrimination will subject themselves not only to closer EEOC scrutiny and potentially costly litigation, but will also represent employers that most likely fail to recognize the true benefits of diversity.

SUCCESSFUL DIVERSITY – A Step Beyond Simple EEO Compliance

The significant demographic changes that the U.S. workforce will experience in the next 10 to 12 years will require many employers to embrace diversity in a different light. Employers that equate the concept of diversity with affirmative action will often view diversity as only a means to comply with the various state and federal anti-discrimination employment laws. This limited viewpoint of diversity is usually self-defeating for the employer as it rarely addresses the prejudices and biases that exist in the workplace nor is it designed to get people to work together. These employers try very hard to treat everyone the same regardless of their background, but never attempt to understand the differences between people that makes each individual unique and how those differences can add value to the business of the company. Employers that adopt this viewpoint of diversity often "nicely wrap" their diversity program in a list of "best practices" that are designed to avoid liability rather than develop policies and programs that promote the integration of skills and talents from a wide variety of backgrounds. Successful diversity programs, on the other hand, are created upon the premise that having a diverse workforce is a business asset rather than a legal mandate initiated to avoid legal liability. That is, diversity is valued because it is something that benefits the company by allowing it to draw upon a diverse group of individuals that brings a variety of work styles and values to the workplace. Employers with this understanding of diversity adhere to a diverse workforce because they have concluded that having a diverse workforce makes their company stronger, more profitable and more competitive where employees with different perspectives, ideas and values are integrated into how a company approaches the way it conducts its business. These companies also recognize the importance of having a workforce that reflects the racial, ethnic and gender diversity of the company's customers.

KEYS TO ACHIEVING DIVERSITY

A successful diversity program, on whatever level, begins with a clear and well-articulated mission statement where diversity is identified as a key component to the mission and goals of the company as a successful competitor in the marketplace. Achieving diversity requires proper management training that stresses that a variety of opinions and perspectives as to how to conduct work is a valued asset to the company. Diversity further requires, obviously, a program to recruit and hire individuals from diverse demographic groups, but also requires a program that mentors these individuals in a manner that allows these individuals to advance upward within the company. Finally, diversity requires an understanding that it is not a euphemism for affirmative action, but rather represents a way to conduct business and to interact with the people that we work with focused on valuing the differences between us. The Supreme Court of the United States has recognized, although never directly holding, that diversity and non-remedial diversity programs are valued within our society to promote and advance the goals of Title VII. Companies that do not strive to achieve diversity in the coming years and do not in-fact attain diversity will be in the cross-hairs of the EEOC through the agency's E-RACE enforcement initiative. In short, it will be within these companies that prejudices and stereotypical preconceptions will still exist between individuals from different demographic groups. These prejudices and stereotypical preconceptions will emerge in the workplace in the form of different types of unlawful discrimination. Employers, in order to avoid liability and achieve diversity, will have to develop the answers to the following five questions. First, how does my company define diversity? Second, once my company has defined diversity, what plan does my company have to achieve it? Third, what efforts is my company going to make to develop a diverse management team in order to be a successful competitor in a diverse marketplace? Fourth, what plan does my company have to integrate and mentor individuals from different demographic groups that comprise our workforce that allows for the upward mobility of these individuals within the company? Finally, how will my company allow and foster the exchange of information, ideas and values between different demographic groups to promote the success of the company?