

ATTORNEY JOSEPH E. GUMINA JOINS OCHD

Milwaukee, WI (August, 2008) – Joseph E. Gumina joined the Milwaukee law firm O’Neil Cannon to lead their labor and employment practice. He brings with him extensive experience representing management in a vast array of employment and labor matters. Attorney Gumina is licensed to practice law in the states of Illinois and Wisconsin and has represented clients in litigation matters in both state and federal courts, including the federal district courts in Illinois, Indiana, and Wisconsin.

Attorney Gumina has significant experience as a seasoned litigator having tried cases to juries in both federal and state courts achieving resounding success for his clients. He has also represented the interests of his clients in other parts of the country, including Florida, Indiana, Kentucky, Michigan, Minnesota, Mississippi, Nebraska, Ohio, New York, and Utah.

OCHD is a full-service legal practice with offices in Milwaukee, Port Washington and Sheboygan. Founded in 1973, the firm focuses its practice on corporate law, estate and succession planning, real estate and construction, municipal and civil litigation.

ELECTION DAY REMINDERS FOR EMPLOYERS

While for some it may not come fast enough, election days will soon arrive—September 9 for primary contests, November 4 for the general election. As a reminder, Wisconsin law gives time off to employees to vote or work as an election official.

Employees must be allowed up to three (3) successive hours off to vote on election day. However, the employee must request the time off before the election day. The employer may decide what time of day the employee may leave and is not required to pay the employee for missed time.

If an employee wishes to act as an election official, he or she must be allowed to take off for all or any part of the work day, if the employee has given advance notice of at least seven (7) days. This is an uncompensated leave.

There are penalties for violating these rules. Failure to give time off for voting may result in six months’ imprisonment or a fine of up to \$1,000. Any person who attempts to influence a voter by threatening discharge, reduced wages or promising increased wages may be fined \$100.

EMPLOYMENT CONTRACTS AGAIN BEFORE THE SUPREME COURT

Employers who want to protect their customer base and their businesses often ask their employees to sign an agreement pledging not to solicit customers or compete in the same area when they leave the employer. Two recent Court of Appeals cases demonstrate just how difficult writing an enforceable agreement on these two points can be.

In *Star Direct, Inc., v. Pra*, 2008 WI App 17, the Court of Appeals addressed whether one invalid clause in an employment agreement invalidates the whole agreement, even though the agreement explicitly provides that if a court finds one provision unenforceable, the rest of the agreement remains in place.

The Court found that one provision of the agreement, the “business clause,” which restricted Mr. Dal Pra from engaging in any similar business within a fifty mile radius that was substantially similar to or in competition with the employer’s business, to be both overboard and vague.

The second provision of the agreement, the “customer clause,” provided that Mr. Dal Pra could not entice away any customers that Star Direct had before Dal Pra left the business for a period of twenty four months. The Court did not discuss whether this provision, on its face, was unenforceable. Instead it held that the provision governed similar types of activities and restraints and was indivisible from the business clause. Having determined that the business clause was unenforceable, the Court held that the intertwined customer clause was also unenforceable.

The employer also lost its bid to impose a penalty period for violation of an employment contract in *H and R Block E. Enter v. Swenson*, 2008 WI App 3. H and R Block’s employment agreement provided that both its noncompetition and nonsolicitation covenants ran for two years after termination. However, both covenants also provided that if there were a violation of the agreement, the two year period would be extended by any period that the violation was taking place.

As in *Star Direct*, the Court applied four rules of legal construction in interpreting employment agreements: 1) they are prima facie suspect; 2) they must withstand strict scrutiny to pass legal muster as being reasonable; 3) they will not be construed further than the language of the contract absolutely requires; and 4) they are to be construed in favor of the employee.

In that context, the Court held that the language of H and R Block’s agreement was unreasonable and hard to construe, and therefore not enforceable.

The last word has not been written, however. The Supreme Court has agreed to review the Star Direct case. H and R Block has also petitioned for Supreme Court review, but has stayed its petition until Star Direct is resolved. So, stay tuned.

THOMAS G. CANNON SELECTED AS A LEADING WISCONSIN ATTORNEY

O'Neil Cannon is proud to announce that Thomas G. Cannon has been selected as a Leading Wisconsin Attorney. The American Research Corporation recently completed an extensive survey in Wisconsin to identify the attorneys most highly regarded by their peers in the Wisconsin Bar Association. Attorneys that have received numerous independent nominations are reviewed by the Advisory Board and further verified to be in good standing with the Wisconsin Bar Association. Fewer than 6% of the attorneys licensed to practice in Wisconsin are selected as Leading Wisconsin Attorneys.

Attorney Cannon currently serves as the Executive Director of the Milwaukee Legal Aid Society. He is an experienced trial and appellate lawyer with an extensive background in complex litigation. He has also served as an expert witness and consultant to other lawyers in the fields of legal ethics and constitutional law.

LAKE SHORE NAMES ATTORNEY ELDON L. BOHROFEN CHAIRMAN OF THE BOARD

Lake Shore Wisconsin Corp., the proposed holding company for Lake Shore Bank, recently announced the formation of its board of directors. Attorney Bohrofen was among the nine individuals selected to serve as external directors. "We asked Eldon to serve for a variety of reasons - his banking experience, business expertise, prominence in the community and knowledge of our market," states Jeanene Meisser, COO and controller.

Eldon is an attorney of the Sheboygan office of O'Neil Cannon. He assists individuals and business owners with their estate planning needs, helping them minimize estate tax costs to effectively transfer their wealth from one generation to the next. He also focuses on the establishment of family foundations and represents corporate and individual fiduciaries.

O'Neil Cannon is a full-service legal practice with offices in Milwaukee, Port Washington and Sheboygan. Founded in 1973, the firm focuses its practice on corporate law, estate and succession planning, real estate and construction, municipal law and civil litigation.

CHAD RICHTER TO PRESENT “HOW TO BEGIN THE BUSINESS ACQUISITION/SALE PROCESS”

On Wednesday, April 9, 2008, Chad J. Richter will be presenting “How to Begin the Business Acquisition/Sale Process.” Mr. Richter will also discuss the effective use of Term Sheets and Letters of Intent in business transactions; including key legal components, misconceptions and pitfalls of these documents. The presentation is taking place at Cornerstone’s M&A Alliance Event from 7:30 a.m. – 9:30 a.m. at the Country Springs Hotel in Waukesha.

Mr. Richter is an attorney with the law firm of O'Neil Cannon He assists clients with a variety of corporate and business law matters such as the formation and organization of various types of business entities under operating, shareholder, and subscription agreements, including the preparation of financial and disclosure documentation. Chad concentrates his practice on the structuring of business relationships under franchise, licensing, and distribution arrangements, and has worked with numerous franchise and dealership models, representing both franchisors/grantors and franchisees/dealers.

O'Neil Cannon is a full-service legal practice with offices in Milwaukee, Port Washington and Sheboygan. Founded in 1973, the firm focuses its practice on corporate law, estate and succession planning, real estate and construction, municipal law and civil litigation.

E-VERIFY MODERNIZES THE EMPLOYMENT VERIFICATION PROCESS

The E-Verify system is the best available means for employers to maintain a legal workforce. E-Verify allows employers to confirm employment eligibility in seconds, virtually eliminates the hassle of social security number mismatch letters, and improves the accuracy of wage and tax reporting.

E-Verify is an Internet-based program that is free to participating employers. The United

States Citizenship and Immigration Services, which is part of the Department of Homeland Security (DHS), and the U.S. Social Security Administration (SSA) jointly operate the E-Verify system. As of December 2007, more than 33,000 employers had registered to participate in E-Verify, and nearly 3 million employee eligibility searches had been completed.

According to DHS and SSA, 92% of the searches produced employment eligibility confirmation within seconds.

Employers may use E-Verify to confirm the employment eligibility of new hires. If employers choose to use the system, E-Verify must be used for all new hires regardless of citizenship status. To use E-Verify, the employer must register online and post notices of participation. After registration is complete, employers have access to an automated system which searches the databases of the DHS and SSA. The employer submits the information supplied by the employee on the Form I-9 into the E-Verify system. Within seconds, the system will return one of three results: Employment Authorized, SSA Tentative Non-Confirmation, or DHS Verification in Process.

If the system returns a finding of Employment Authorized, the employer then records the system generated verification number on the Form I-9. If there is a SSA Tentative Non-Confirmation, which means the employee's social security number does not match the employee's name, the employer must follow the proper procedure to notify the employee of the SSA mismatch. The employee then has an opportunity to contest the finding. If the employee does not contest the Tentative Non-Confirmation, it is considered a Final Non-Confirmation, and the employer may terminate the employee. If the system shows a DHS Verification in Process, DHS will respond to the employer with a finding of Employment Authorized or Tentative Non-Confirmation, generally within 24 hours.

Wisconsin employers are not required to participate in E-Verify; however, nearly half of the other states require, or have pending legislation to require, employer participation in the public sector or both public and private sectors. Employers interested in registering for the E-Verify program may do so at <https://www.vis-dhs.com/employerregistration>. If you are interested in learning more about the E-Verify program, please contact Crystal Fieber at (920) 457-8400 or crystal.fieber@www.wilaw.com.

SHEBOYGAN COUNTY BAR ASSOCIATION ELECTS MUELLER AS V.P. AND PRESIDENT ELECT

J. Phil Mueller has been elected vice president of the Sheboygan County Bar Association. He will serve as vice president of the Association for 1 year, followed by a 1 year term as president starting January 1, 2009.

Mueller is an attorney with the Sheboygan law office of O'Neil Cannon. He graduated from the University of Wisconsin-Madison in 1985 and received his law degree in 1988 from Creighton University. His practice focuses on business law and estate planning for small to medium sized companies. "I am honored to be elected by the local Bar Association," states Mueller. "I look forward to carrying on the Association's mission to encourage participation in public service, enhance the public perception of lawyers and foster professionalism and camaraderie."

O'Neil Cannon is a full-service legal practice with offices in Milwaukee, Port Washington and Sheboygan. Founded in 1973, the firm focuses its practice on corporate law, estate and succession planning, real estate and construction, municipal and civil litigation.

OCHD ELECTS GREGORY S. MAGER AS SHAREHOLDER

Gregory S. Mager has been elected shareholder in the law firm of O'Neil Cannon, and will continue his practice in the areas of civil litigation and family law, including mediation services. Mr. Mager graduated from Marquette University with an undergraduate degree in political science and philosophy, and a graduate degree in political science. He received his Juris Doctor degree from Marquette University Law School.

Mr. Mager is the Editor-in-Chief of the Wisconsin Journal of Family Law, a publication of the Family Law Section of the State Bar of Wisconsin. He was selected as a 2007 Wisconsin Super Lawyer Rising Star, *Law and Politics* and *Milwaukee Magazine*. In addition, Mr. Mager has received a Martindale-Hubbell Peer Review Rating of AV, reflecting an attorney who has reached the height of professional excellence and is recognized for the highest levels of skill and integrity. His memberships include the American Bar Association and the State Bar of Wisconsin as well as the Ozaukee, Milwaukee, Washington, and Waukesha County Bar Associations. Mr. Mager is also a member of the Society of Family Lawyers, the Lender J. Foley Matrimonial Inns of Court, the Collaborative Family Law Council of Wisconsin, Inc., and the Divorce Cooperation Institute, Inc.

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. We also assist business owners with their personal legal needs including tax and estate planning, family law and litigation – including personal injury litigation.

MUST AN LLC BE REPRESENTED BY AN ATTORNEY IN A LAWSUIT?

A small business man recently called and indicated that a limited liability company he ran had been sued. He had filed a response to the allegations of the complaint with the court and sent a copy to the attorney for the plaintiff. The plaintiff's lawyer immediately filed a motion to strike the answer and for default judgment on the basis that the response was not a proper answer to the complaint because it failed to follow the requirements of an answer, and because it had not been signed by an attorney. Since the time to file a proper answer had expired, the plaintiff asked the court for a default judgment.

About ten years ago, the Wisconsin Supreme Court was asked whether a notice of appeal by a corporation signed by an officer of the corporation who was not an attorney was valid. The court concluded that it was not a valid notice of appeal, and therefore, the appeal was dismissed. There were primarily two bases for that decision; first, under Wisconsin statutes, a corporation, except in small claims court, must be represented by an attorney, and second, in that case, the notice of appeal filed by a person who was not an attorney was determined to be the unauthorized practice of law, that is to say, the practice of law by someone other than a licensed attorney.

Wisconsin, like most states, imposes penalties for the unauthorized practice of law. The unauthorized practice of law is a crime which may result in fines or imprisonment and may be punished as a contempt of court.

While an individual is permitted to represent himself or herself in a lawsuit, a corporation is not an individual. Only a person authorized to practice law may appear in court for a corporation. The only exception is small claims court.

Limited liability companies have been permitted to exist in Wisconsin for approximately 15 years. LLCs attempt to combine some of the advantages of the partnership form of doing business and the corporate form of doing business. In many ways, LLCs attempt to avoid some of the formalities required of corporations. There are, however, risks when avoiding those formalities if, for example, there is a dispute between the owners, or, as in this recent matter, if a member of an LLC attempts to respond to a complaint. In this recent matter, a

proper answer was filed within a day after our firm was retained. In addition, written arguments were made to the court relating to the discretion to be exercised by the trial court as to whether a default judgment was appropriate. Prompt action in filing a proper answer was one factor considered by the court. Significant costs were incurred in order to regain the ability to defend this lawsuit.

Whether an LLC could avoid this holding relating to corporations has not been directly addressed by the Wisconsin appellate courts. We of course would recommend that your business not be the business that has to make those arguments. Those arguments were unsuccessful ten years ago in a slightly different factual situation. In our recent case, attempting initially to avoid the cost of hiring an attorney resulted in substantially higher costs and the risk that the defendant would be barred from defending the lawsuit.