ATTORNEYS GRANT KILLORAN AND CHRISTA WITTENBERG SPEAK AT STATE BAR OF WISCONSIN'S ANNUAL CONSTITUTIONAL LAW SYMPOSIUM

Grant Killoran and Christa Wittenberg of O'Neil, Cannon, Hollman, DeJong and Laing's Litigation Practice Group recently presented at the State Bar of Wisconsin's "Annual Constitutional Law Symposium 2018" in Pewaukee, Wisconsin.

Attorney Killoran was the Chair of the Symposium and authored an article and presented at the seminar on "The Current State of the Second Amendment." Attorney Wittenberg authored an article and presented at the seminar on "Freedom from Litigation: Personal Jurisdiction and Sovereign Immunity."

Attorneys Killoran and Wittenberg presented along with attorneys and professors from around Wisconsin and the country on various constitutional topics and issues.

Grant is a shareholder with the law firm and is the Chair of its Litigation Practice Group. He has significant and diverse trial experience representing clients in Wisconsin State and Federal Courts, and courts around the country, focusing on complex business, health care and employment law disputes. Grant also devotes a portion of his practice to arts and entertainment law, with an emphasis on the music industry.

Christa is a member of the Litigation Practice Group. She assists businesses and individuals with prosecuting and defending a variety of civil litigation matters, including complex contract disputes, trademark and copyright claims, inheritance disputes, class actions, personal injury cases, and fraud and conspiracy claims. As a former federal district court law clerk, Christa is intimately familiar with litigation and procedures in federal court. She has also litigated matters in state court, as well as resolved cases through mediation prior to litigation. Christa is well-versed in a wide range of legal issues, and especially enjoys litigating cases with disputes involving personal and subject-matter jurisdiction, testamentary capacity and undue influence, constitutional law, debt collection laws, contract formation and enforcement, and procedural and evidentiary rules.

CONSIDERATIONS FOR CONTRACTUAL ARBITRATION PROVISIONS

Arbitration is a common form of alternative dispute resolution (ADR) used frequently and effectively in business settings. In arbitration, the parties have flexibility to choose decision-makers, jurisdiction, and many procedural rules, but they limit themselves in terms of discovery and some courtroom protections.

While most courts will enforce arbitration clauses in contracts, such clauses should be sufficiently clear and precise. When considering arbitration and contractual arbitration provisions:

1. Treat arbitration clauses as key business terms.

The arbitration clause contains the details of how you will settle any dispute that arises. Review it as carefully as you would any other business term, like delivery or payment details.

2. Use the contractual negotiation process to design a mutually-agreeable arbitration clause.

During contract negotiation, most business parties are cooperating well together and are pursuing a shared interest in creating a contract that benefits them both. This atmosphere lends itself well to creating an arbitration clause that will meet the parties' respective needs if a dispute arises later.

3. Attend to the details.

Although negotiation is a good time to address arbitration decisions, remember that cooperation between the parties in negotiating their contract is not necessary a sign that this corporation will continue. Any details regarding arbitration not agreed upon at the outset of the deal may be more difficult to negotiate after the arbitration provision is part of a signed agreement and the parties face a dispute and feel less inclined to cooperate.

4. Focus on the type of arbitration that is appropriate for the transaction.

The type of arbitration that is most familiar to you may not be the best choice for every transaction or situation. Consider your business goals each time the question of arbitration is discussed. For instance, will the circumstances of a future dispute lend itself well to binding arbitration, or does non-binding arbitration provide more or better "bargaining power" to discuss a settlement of the dispute?

If you have any question, please contact Grant Killoran at grant.killoran@wilaw.com or

414-276-5000.

CREATING ARBITRATION CLAUSES IN CONTRACTS: WHERE AND HOW

Arbitration clauses in commercial and employment contracts are increasingly popular as a means to try to settle business disputes without going through a court trial. Arbitration clauses should be clear regarding how the arbitration is to be carried out.

In addition to detailing who will hear the dispute (the arbitrator), an arbitration clause should designate a place or venue for the arbitration. This is particularly important if there is a chance the dispute will be between a private party and a foreign government. If so, the private party may wish to have any arbitration take place in a neutral country.

An arbitration clause also should make clear how the arbitration will be carried out. For example, what issues will be decided in the arbitration – and what issues, if any, should be excluded from the arbitration? There may be certain issues that are not suited to arbitration, or that cannot be arbitrated in a particular jurisdiction. In addition, arbitration clauses can specify whether the arbitration is intended to be binding or non-binding, as well as the governing law to be applied.

A “good faith negotiation” or mediation clause can be useful to allow the parties to attempt to settle their dispute before the arbitration begins, either by direct negotiation or with a third party mediator.

Also, consider language to address certain procedural issues, such as: the scope and nature of discovery and the discovery process and the arbitration hearing procedures, including rules of evidence, exhibits, court reporters, and the record (if any) of the proceeding. Arbitration clauses also can include information on the scope of allowable remedies, including whether injunctive relief is allowed or the parties can agree to limitations or exclusions of remedies.

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20 OCHDL ATTORNEYS NAMED 2019 BEST LAWYERS IN AMERICA

O'Neil Cannon is pleased to announce that 20 lawyers have been named to the 2019 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 75 countries.

"For more than a third of the century," says CEO Steven Naifeh, "Best Lawyers has been the gold standard of excellence in the legal profession." President Phil Greer adds, "We are extremely proud of that record and equally proud to acknowledge the accomplishments of these exceptional legal professionals."

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 would like to congratulate the following attorneys named to the 2019 *Best Lawyers in America* list:

- Douglas P. Dehler – Litigation – Insurance
- James G. DeJong – Mergers and Acquisitions Law, Corporate Law, Securities / Capital Markets Law
- Seth E. Dizard – Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law, Litigation – Bankruptcy
- Peter J. Faust – Mergers and Acquisitions Law, Corporate Law
- Robert R. Gagan – Municipal Law
- John G. Gehringer – Real Estate Law, Construction Law, Commercial Litigation, Corporate Law
- Joseph E. Gumina – Litigation – Labor and Employment
- Dennis W. Hollman – Trusts and Estates, Corporate Law
- Grant C. Killoran – Litigation – Health Care
- Dean P. Laing – Commercial Litigation, Personal Injury Litigation – Plaintiffs, Product Liability Litigation – Defendants
- Gregory W. Lyons – Commercial Litigation, Litigation – Insurance
- Gregory S Mager – Family Law
- Patrick G. McBride – Commercial Litigation
- Thomas A. Merkle – Family Law
- Chad J. Richter – Business Organizations (including LLCs and Partnerships)

- Steven J. Slawinski – Construction Law
- John Schreiber – Bankruptcy and Creditor Debtor Rights/Insolvency and Reorganization Law, Litigation – Bankruptcy

Additionally, Attorney Dean P. Laing has been named the 2019 Milwaukee Lawyer of the Year in Product Liability Litigation–Defendants.

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 54,000 leading attorneys cast more than 7.3 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.”

GRANT KILLORAN RE-ELECTED TO THE AMERICAN BAR ASSOCIATION HOUSE OF DELEGATES

The law firm of O’Neil, Cannon, Hollman, DeJong and Laing S.C. is pleased to announce that Attorney Grant C. Killoran recently was re-elected by the State Bar of Wisconsin Board of Governors to serve another two-year term as one of the State Bar of Wisconsin’s five Delegates to the American Bar Association House of Delegates.

The House of Delegates is the policy-making body of the ABA. Control and administration of the ABA is vested in the House of Delegates. Established in 1936, the House of Delegates has over 500 members and its actions become the official policy of the ABA, the nation’s largest lawyer association.

Mr. Killoran previously has served as a Delegate to the ABA House of Delegates from 1997-1999, 2003-2009 and 2014 to present.

Mr. Killoran is a shareholder with and the Chair of O’Neil, Cannon, Hollman, DeJong and Laing’s Litigation Practice Group. He has diverse trial experience, focusing on complex business and healthcare disputes.

CONTRACTUAL ARBITRATION CLAUSES: ARBITRATOR SELECTION AND QUALIFICATIONS

An increasing number of contracts contain arbitration clauses. But not all arbitration clauses are equally clear, precise, and specific–or equally enforceable.

Like other contract clauses, an arbitration clause may be invalidated under general principles of contract law. The U.S. Supreme Court has ruled that an arbitration clause may be invalid if it is indefinite, fraudulent or unconscionable, or was agreed upon under duress. As a result, commercial arbitration clauses should be clear and specific.

Before agreeing to an arbitration clause, consider how you would want any future arbitration to proceed, and the circumstances under which arbitration would be required.

For instance, consider whether you would like to use the services of a specific alternative dispute resolution provider, such as the American Arbitration Association. If you are considering such a provider, you might wish to examine its sample arbitration clauses and compare them to your own.

Next, consider the process established to select the arbitrator or arbitrators. Do you want to present your dispute to a single arbitrator or to an arbitration panel? For example, some arbitration clauses specify a panel of three arbitrators: each party picks one arbitrator, and then those two arbitrators choose the third arbitrator.

In addition to considering *how* the arbitrator will be chosen, you also should consider *who* will be qualified to serve as an arbitrator. For example, do you want the arbitrator to have relevant experience in a particular subject area (like architecture, engineering, software, publishing, or employment) or a particular qualification (like a CPA or a JD)? By considering these sort of issues prior to entering into an arbitration agreement, you can reduce the risk of future conflicts and add a degree of certainty to the arbitration process.

If you have any question, please contact Grant Killoran at grant.killoran@wilaw.com or 414-276-5000.

TRENDS IN ARBITRATION IN THE UNITED

STATES

Businesses in the United States have used arbitration clauses in contracts for many years. The purpose of these clauses is to encourage (or require) that contract disputes be settled in arbitration rather than by litigation and trial. Consumer and employment contracts frequently include arbitration clauses.

As Internet-based businesses have exploded over the past fifteen years, so have the number and types of business contracts containing arbitration clauses. Businesses frequently include mandatory arbitration provisions in their online “terms and conditions” for use of their sites, products or services. Businesses engaging in international transactions, whether online or offline, also may include arbitration provisions in their agreements to limit litigation in countries throughout the world.

While business contracts have changed to reflect changes in alternative dispute resolution, litigation, and the business environment, the arbitration process in the United States also has changed to reflect a more technologically-interconnected world in which arbitration, not litigation, is being used to resolve many types of business disputes.

As a result, arbitration proceedings now often include many of the rules for the handling of electronically stored information (ESI) that U.S. courts already have enacted. Due to its “electronic” nature, ESI can present challenges involving discovery, security, and authentication that traditional paper-based recordkeeping does not.

Courts have addressed these challenges by creating specific rules addressing ESI issues, as well as by adapting existing rules for paper-based documentation to try to accommodate ESI. Since arbitration proceedings frequently handle disputes involving businesses that create, store, and use large quantities of electronic information, many arbitrators have adopted similar rules. But the rules governing ESI usually differ between litigation and arbitration and one potential advantage of arbitration therefore is the possibility of a limited discovery process. Arbitration often can reduce the amount of “big data” a party must parse in order to find what is relevant to the proceeding at hand.

Arbitration remains the second most popular form of alternative dispute resolution in the United States, after mediation. The formal and binding nature of most arbitration – along with the fact that parties can choose arbitrators with specialized technical knowledge helpful to understand the details of the dispute – makes arbitration an appealing alternative to litigation (and trial), particularly when international jurisdictions may be in play.

If you have any question, please contact Grant Killoran at grant.killoran@wilaw.com or 414-276-5000.

A DEEPER DIVE INTO THE ARBITRATION PROCESS AND A LOOK AT THE ADVANTAGES AND DISADVANTAGES OF ARBITRATION

During arbitration, evidence and testimony are presented at a formal arbitration hearing. Discovery may occur before then, but its scope usually is limited by the parties' agreement or the arbitrator rules. After the arbitration hearing, the arbitrator issues a decision, known as an "award."

Arbitration may be binding or non-binding. Most arbitrations held in the U.S. today are binding arbitrations. In a "binding" arbitration, the arbitrator's decision is final, binding, and enforceable in court, similar to a court judgment. Both Wisconsin state and federal courts will enforce binding arbitration decisions. A "non-binding" arbitration does not have these elements of a binding arbitration, but can be helpful for evaluating a case or creating a basis for settlement negotiations between the parties.

The utility of arbitration (and other forms of alternative dispute resolution) in a particular dispute depends on various factors, including the nature of the dispute, the contract at issue and the state and federal laws in question, as well as the potential financial and time-related costs of litigation.

So why do parties choose arbitration? They do so because the arbitration process offers certain advantages. For instance, arbitration allows the parties to choose the place, time, rules, law, and people who will make the decision on the dispute. This flexibility, in turn, can make it easier for the parties to present technical facts since they can often choose a person or panel with expertise to understand a complex situation. The arbitration process also is typically shorter and faster than litigation and a trial due to limited, private discovery and streamlined procedural rules. Finally, most arbitration decisions are final and binding, with no appeals.

As with every dispute resolution process, however, arbitration also has certain disadvantages. Arbitration does not offer the right to a judge or a jury. Discovery is limited not only by the "ground rules" of the selected arbitration forum, but also by the limited power arbitrators have to force non-parties to submit to discovery or to issue subpoenas. Third parties cannot be added to arbitration without their consent, making complex multi-party disputes more difficult to resolve. Court rules of evidence and procedure do not apply. Since complex arbitration can be costly, parties with limited financial resources may be at a disadvantage in arbitration, and may not have the leverage litigation can provide to share or

shift costs.

Arbitrators have wide discretion in their decision-making and have no obligation to explain their reasoning to the parties. Appeals from arbitration awards are rare. Typically, an arbitration award can be overturned only as a result of corruption, fraud, partiality, or prejudicial misconduct by the arbitrator.

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BEST LAWYERS® HONORS 18 ATTORNEYS IN 2018

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- Peter J. Faust – Corporate Law, Mergers and Acquisitions Law
- Robert R. Gagan – Municipal Law
- John G. Gehringer – Commercial Litigation, Construction Law, Corporate Law, Real Estate Law
- Joseph E. Gumina – Litigation-Labor and Employment
- Dennis W. Hollman – Corporate Law, Trusts and Estates
- Grant C. Killoran – Litigation-Health Care
- Dean P. Laing – Commercial Litigation, Personal Injury Litigation-Plaintiffs, Product Liability Litigation-Defendants
- Gregory W. Lyons – Commercial Litigation, Litigation-Insurance
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WHAT IS ARBITRATION?

Arbitration is a common form of alternative dispute resolution (ADR) in which parties agree to resolve a dispute by submitting it to one or more neutral decision-makers, or arbitrators, for decision. Arbitration consists of a formal hearing, similar to a trial, where the parties are represented by legal counsel and present evidence and testimony. The parties usually have the option to choose the decision-makers.

In Wisconsin, arbitration is governed by the Wisconsin Arbitration Act, which is found in Chapter 788 of the Wisconsin Statutes. Among other things, the Wisconsin Arbitration Act states that an arbitration clause in a contract is valid, irrevocable and enforceable unless certain grounds exist to invalidate the contract. However, a few disputes, including certain disputes over employment contracts, petroleum storage tank remediation and state employment relation matters, are exempt from this rule.

In a dispute governed by a contract containing an arbitration agreement, the Wisconsin Arbitration Act requires Wisconsin courts to send the parties to arbitration, instead of trial,

pursuant to the terms of their contract. If a party seeking arbitration has failed to live up to its obligations under the contract containing the arbitration agreement, however, the court may choose whether or not to stay litigation so that the arbitration may proceed.

The Federal Arbitration Act contains a similar rule that "a written provision in any … contract" that indicates an intent to settle contract-related disputes by arbitration "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

In addition, federal courts may refer civil actions and bankruptcy adversary proceedings to arbitration if the parties consent. Both federal districts in Wisconsin have rules governing arbitration and other forms of ADR. Federal constitutional claims, some civil rights claims and claims involving damages over $150,000 cannot be sent to arbitration from federal court, however.

If you have any question, please contact Grant Killoran at grant.killoran@wilaw.com or 414-276-5000.