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BURKE, WARREN, MACKay & SERRITELLA, P.C.

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ESTATE PLANNING

POWERS OF ATTORNEY FOR HEALTH CARE AND LIVING WILLS

On March 16, Karen K. MacKay, of Burke, Warren, MacKay & Serritella, P.C. addressed members



Karen MacKay

of the Chicago Estate Planning Council. Karen's presentation included a discussion of Powers of Attorney for Health Care and Living Wills. The following information was part of that presentation. Karen is the 2004 recipient of the Austin Fleming Distinguished Service Award, awarded by the CEPC.

The Terri Schiavo case in Florida has focused the attention of many Americans on the issue of life-

sustaining procedures if they become terminally ill or incapacitated. Illinois, like most states in the United States, allows individuals to provide directions with respect to medical care if they are unable to direct their physician or other health care provider as to their wishes.

Living Will

By statute in Illinois, you may in writing express your decisions relating to the withholding or withdrawal of death delaying procedures in the event of a "terminal condition". A "terminal condition" is an incurable and irreversible condition in which death is imminent and use of death delaying procedures (such as intravenous or tube feeding and assisted ventilation) would only prolong the dying process. The statute provides a form of declaration containing instructions to a physician. The statute also permits you to choose an alternative form and include other specific directions if you wish.

While the press focused on "Living Wills" in the Schiavo matter, in fact a Living Will has limited scope, since it applies only to a terminal condition and only expresses your intention. A far more powerful and important document is the Power of Attorney for Health Care.

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CORPORATE LAW

SOX 101 — A REVIEW OF SARBANES-OXLEY

How Some Private Companies Respond

The Sarbanes-Oxley Act of 2002 (SOX) is the wide-ranging statute that was passed by Congress in the wake of the Tyco, Enron, Arthur Andersen and WorldCom scandals. It established new laws and charged the Securities and Exchange Commission (SEC) with creating new regulations that make corporate governance and financial reporting standards for public companies far more stringent. While most owners and managers of privately held businesses are at least peripherally aware of SOX, many do not have a sense of the impact SOX could have on their firms.

Public companies necessarily have to spend large amounts of time and money complying with SOX. However, private companies can also benefit from a better understanding of SOX and its requirements for a variety of reasons.

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The firm's Danielle Szukala, Nora Flaherty Couri, Jonathan Michael and John Fogarty were among 22,000 runners in the 2005 LaSalle Bank Shamrock Shuffle on April 3 in Chicago.

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NEXT ISSUE: The firm grows again, a client profile and More...

BWM&S CLASS ACTION DEFENSE PRACTICE ADDS DIRECTOR

Burke, Warren, MacKay & Serritella has promoted Robert Emanuel to director. Emanuel has been with the firm since 2001. Prior to joining the



Robert Emanuel

firm, he practiced with another firm that specializes in consumer financial service litigation.

According to LeAnn Pedersen Pope, chair of the firm's Class

Action Defense practice, "Over the last few years, we have experienced incredible growth and success in serving the needs of some of the largest and most professional financial service providers in the country. Bob has been integral to that success. His promotion reflects his experience and accomplishments."

Emanuel's practice is dedicated to defending banks, mortgage lenders, and related entities in class actions brought on behalf of consumers throughout the United States. In addition to his class action defense practice, Emanuel handles a variety of consumer financial services

matters and other general commercial litigation.

Emanuel received his undergraduate degree from the University of Iowa in 1991, and was awarded his J.D. from The Chicago-Kent College of Law in 1995. Prior to attending law school, Bob was employed by the United States Department of Justice, where he received a "Special Achievement Award" for his outstanding service.

Bob Emanuel can be contacted at 312/840-7021 or remanuel@burkelaw.com. **B**

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SISTERS OF THE LIVING WORD CELEBRATES 30 YEARS

The Sisters of the Living Word is a community of 73 women religious founded in 1975 and headquartered in Arlington Heights, Illinois.

The sisters abide by a simple mission statement: *As Jesus was sent by the Father in the power of the Holy Spirit, so are we sent as Sisters of the Living Word. We reflect and affirm the Word in the world, the Word who continually frees the oppressed and gives new life.*

Thirty years ago, the founders were seeking a more participatory religious community, which led to the creation of Sisters of the Living Word. "Unlike other religious communities, we do not own an institution," says Sister Barbara Mass, one of three sisters elected to five-year terms on its leadership team. "In 1975 and still to this

day, we find our own jobs. We need to spread out to use the talents of the sisters to support ourselves."

Free of brick and mortar and dedicated to their mission, the sisters now reside and work in eight states from South Dakota to Ohio and including Mississippi in the south. Their individual jobs include youth and adult education; parish, campus and diocesan ministry; health care; retreat and spiritual direction; counseling; healing ministries; environmental advocacy; and outreach to new immigrants as well as to victims of violence, hunger, unemployment and homelessness. This list also includes a computer analyst.

The sisters meet annually as a whole group, with various committees meeting more frequently. They stay connected through a weekly newsletter as well as email. As for the future, according to Sister Barbara, "We look forward to the direction in which God will speak to us in spreading the Word."

Burke, Warren, MacKay & Serritella, P.C. includes a group, headed by James Serritella, dedicated to serving the needs of non-profit and religious organizations. The firm is honored to serve the Sisters of the Living Word. For more information, please contact Jim Serritella, 312/840-7040 or jserritella@burkelaw.com. **B**



Sisters of the Living Word, L to R: Genevieve Shea, Georgene Schumacher, Mary Ambrose Wack, and Barbara Mass, prepare a meal for PADS, an organization that provides meals and a place to sleep for the homeless.

SOX 101

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Best Practices As a new and stringent governmental standard, as well as the standard of public companies, SOX is becoming the best practice standard for corporate governance and financial reporting.

Attract investment A private company looking to attract investors may want to comply with certain provisions of SOX, as bankers and venture capitalists may tend to prefer investing in companies with a uniform, known set of standards in place. SOX provides such standards.

Initial public offering of securities/merger or acquisition For private companies intending to go public, compliance with certain provisions of SOX should lessen the compliance burden upon a changeover to public company standards.

Major categories regulated by SOX are the behavior of corporate officials; financial disclosure and transparency; auditing and auditor independence; and white-collar crime and penalty enhancements.

Behavior of Corporate Officials

The board and management of publicly-held companies are now required, among other things, to do the following:

- CEOs and CFOs of public companies must now sign and certify filings with the SEC that contain financial statements.
- Public companies must disclose whether they have a code of ethics for financial officers, and if not, the reason.
- Public companies are now barred from extending loans to directors and executive officers.
- The duties of the audit committee of the board of directors are heavily prescribed; among other things, they must oversee all auditing work and establish procedures for handling company complaints on accounting matters.
- Directors or executive officers are forbidden to trade in securities acquired in connection with employment during pension fund blackout periods.

Financial Disclosure and Transparency

Publicly-held companies are now required, among other things, to comply with the following financial disclosures:

- Financial reports filed with the SEC must reflect “material correcting adjustments” and “material off-balance sheet transactions”.
- There are now limits on the acceptable use of “pro forma financial information” (i.e., financials or financial measures not prepared in compliance with generally accepted accounting principles).
- Publicly-held companies must now annually certify their internal controls and procedures for financial reporting, and the company’s accountants must attest to and report on this assessment.

Auditing and Auditor Independence

The burden of many of the SOX requirements falls heavily on the accounting industry. The most relevant of those auditing and accounting rules include the following:

- Public accounting firms cannot provide auditing services to non-audit clients.
- Public companies and their auditors must retain audit materials for specified periods of time.
- A public accounting firm may not provide audit services to a client where certain top managers of the company were employed by the accounting firm and participated in the company’s prior audit.

White-Collar Crime; Penalty Enhancements

Many of the SOX requirements are backed by criminal penalties. Some of the most relevant are:

- SOX makes it illegal to intimidate, demote, harass, discriminate against or fire any whistleblower who brings attention to violations of securities laws or regulations, fraud and similar causes of action.
- Fraudulent certification of periodic reports is punishable by penalties of up to \$5 million and 20 years in prison.
- Investigators are given new powers when

investigating corporate fraud, such as the ability to freeze extraordinary payments to executives of a public company during an investigation.

SOX And Private Companies

Some state legislatures are considering imposing requirements similar to those of SOX on private entities. Indeed, California has already done so with respect to charitable organizations, with the passage of the Non-Profit Integrity Act of 2004.

Survey data of executive officers of privately held companies has found that many have felt impacted by SOX and have implemented measures in response to the act. Some of the more popular SOX-influenced reforms are as follows:

- The requirement of the CEO or CFO to sign and attest to the veracity of the company’s financial statements.
- The establishment of procedures for dealing with whistleblower complaints.
- Requiring the Board of Directors to approve all non-audit services by auditors.
- The adoption of formal corporate governance policy guidelines.
- The use of audited financial statements.
- Establishing independent directorships (i.e., where directors don’t accept a consulting, advisory or other similar fee from the corporation).
- Disclosure of critical accounting policies and estimates.
- Disclosure of off-balance sheet and contingent liabilities.

Private companies generally have options to implement portions of SOX or none at all. Some are following the lead of public companies and using two accounting firms; one for auditing and one for non-audit services. The costs and benefits of SOX will remain a priority for Congress and other lawmakers in the foreseeable future. Updates will appear in future issues of the Bulletin.

For further questions regarding the Sarbanes-Oxley Act, please contact your Burke, Warren, MacKay & Serritella attorney or Christopher Schafer at 312/840-7086 or cschafer@burkelaw.com. **B**

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The Bulletin is written by the firm of Burke, Warren, MacKay & Serritella, P.C. to keep clients and friends current on developments in the law and the firm that might affect their business or personal lives. This publication is intended as a general discussion and should not be construed as legal advice or legal opinion on any specific facts or circumstances. It is meant as general information only. Consult an attorney with any specific questions. This is a promotional publication. ©2004 Editor: Cy H. Griffith, Director of Marketing; Legal Editor: Jay S. Dobrutzky, Esq.

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LIVING WILL

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Power of Attorney for Health Care

The Illinois Power of Attorney for Health Care statute allows you to designate an agent to make medical decisions, by delegating without limitation any powers that you would have individually to refuse or direct withdrawal of any type of medical treatment, even though death may result. The statute provides that you can direct your agent on such decisions as the continuation or refusal of life support systems, the continuation or refusal of food or water, placement into a nursing or assisted living institution, blood transfusions, autopsy and donation of body parts, and any other health care related issues. Unlike the Living Will, which requires you to be in a "terminal condition" before your instructions are operative, the Power of Attorney for Health Care can apply to any issue concerning your health, regardless of whether or not a terminal condition exists.

The Illinois statute sets out a "Statutory Short Form Power of Attorney for Health Care" which, if used, permits health care providers who rely on the acts of the agent to do so without fear of liability.

While only one agent can act at a time under the Illinois Short Form Power, you are free to name an unlimited number of successor agents, who would act one at a time. Clients often name their spouse, followed by adult children, parents, friends, or others as agents. You would name persons whom you trust to carry out your directions.

The Statutory Short Form Power of Attorney for Health Care provides three choices regarding withholding or removal of

life-sustaining treatments, but specifies that you are free to provide your own definition of when life-sustaining treatments should be withheld, or any other instructions to refuse treatments that are unacceptable to you or inconsistent with your religious beliefs. Because the Power of Attorney for Health Care is broader in scope than the Living Will, the Power of Attorney for Health Care should be your primary document to address health care matters.

What happens if you do not have either a Power of Attorney for Health Care or a Living Will?

If you do not have either the Power of Attorney for Health Care or the Living Will and are unable to make decisions regarding medical treatment, then surrogate decision makers may make decisions on your behalf under the Illinois Health Care Surrogate Act. Most states have a comparable statute. This statute sets out a priority of persons who may make health care decisions without court order, starting with the patient's guardian (if any), followed by the patient's spouse, the patient's adult son or daughter, and so on. Multiple surrogate decision makers may be involved.

A surrogate decision maker could have extensive power over health care matters, and may not be the person you would have selected to make the decision. Obviously, it is preferable for you to have designated someone as your agent to act on your behalf, and to specify in detail the types of treatments which are to be used, or are not to be used.

For more information, please contact your BWM&S attorney or a member of our estate planning group which includes Karen MacKay, Stephanie Denby, Martin Ryan, Jonathan Michael and Melanie Witt. **B**

REEMPLOYMENT RULES

U.S. Department of Labor requires posting of Reemployment Rules in support of employees serving in the Armed Forces

The U.S. Department of Labor recently issued a notice in poster format explaining the rights of employees under the Uniformed Services Employment and Reemployment Rights Act (USERRA). This is a part of the Veterans Benefits Improvement Act, enacted by Congress in December 2004, which mandates that employers provide the notice to "all persons entitled to rights and benefits under USERRA." Employers can meet this obligation by posting the notice in a prominent place where employees customarily check for such information.

This effort ensures that all people serving in the military, particularly National Guard and Reserve, have the opportunity to return to civilian life. USERRA protects the job rights of individuals who voluntarily or involuntarily leave employment positions to undertake military service. The law also prohibits employers from discriminating against past and present members of the uniformed services and applicants to the uniformed services.

To obtain a copy of the poster, please contact your BWM&S attorney or visit the Department of Labor (DOL) Web site at www.dol.gov. **B**