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

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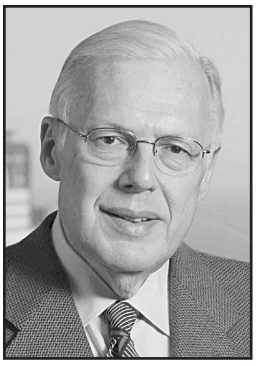
BWM&S

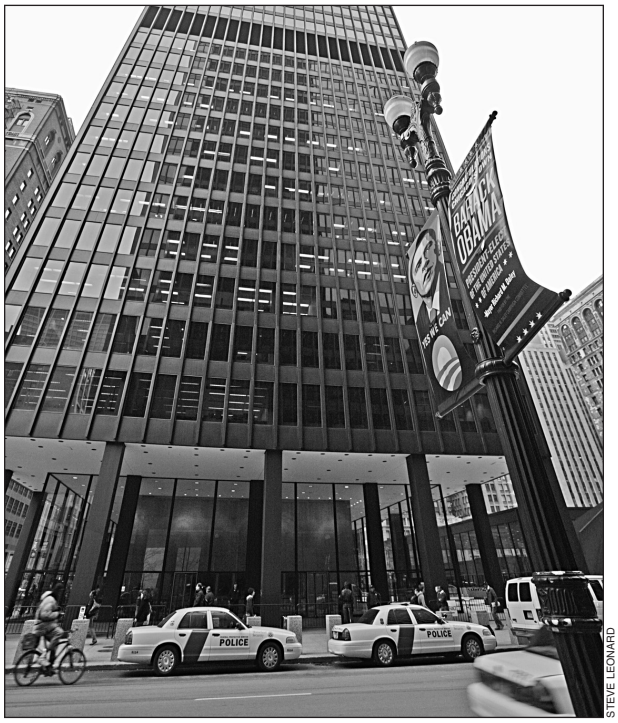
MEDIATION: AN ALTERNATIVE APPROACH TO THE RESOLUTION OF LITIGATION AND OTHER DISPUTES



Jim Serritella

Litigation is time-consuming, aggravating and expensive. And that's if you win. If you lose, it is also a business or personal setback. Nonetheless, people being people, there are and will be disagreements and disputes. Some disagreements are resolved quickly and amicably, others just go away, but there are always some that develop into claims and litigation. Because of the time and expense of litigation, business and professional people increasingly are seeking alternative ways to resolve their disputes. For example, many matters are presented to arbitrators who hear the evidence and render decisions. Arbitration is generally viewed as less time-consuming and expensive than litigation, yet it is often just as contentious and it puts the outcome in the hands of an arbitrator, without some of the protections (such as

Continued on page 4



STEVE LEONARD

A Chicago-style White House: Since his election on November 4, 2008, President-elect Barack Obama has set up transitional offices in the Kluczynski Federal Building in downtown Chicago. The 45-story structure is home to the government in waiting until January 20, 2009, when Barack Obama is inaugurated as the nation's 44th president.

REAL ESTATE LITIGATION

FIRM PROVIDES STRATEGIES FOR LANDLORDS COPING WITH THE CURRENT ECONOMIC SLUMP

Gerry Ring

As the economy continues to soften, retail, office, and industrial tenant defaults have started to rise, some leading to bankruptcy. While no one knows how long or severe the current downturn will be, commercial property owners are dealing with the fallout.

In preparation for what is becoming a significant need for firm clients, Gerry Ring recently shared his 20-plus years of experience in landlord-tenant and bankruptcy law with a group of attorneys at the firm. Gerry supervises the firm's forcible detainer practice and has also been involved in numerous

Continued on page 8

INSIDE THIS ISSUE:

NEXT ISSUE: Shareholder Wars And More...

Planning a Reduction in Force?

Reduce your liability by taking the following steps:

The slowing economy is one of many factors that can lead company directors to initiate a reduction in force (RIF). While the need to reduce a work force is common, RIFs can be laden with legal pitfalls. The following should be considered by any company considering an RIF.

Any layoff decisions should be underscored by legitimate, non-discriminatory business reasons guided by job functions and operational necessities. Making decisions based on objective criteria to assess which positions to eliminate is less likely to result in claims of discrimination than decisions involving subjective criteria. Production statistics, seniority, or a failure to meet specific performance criteria are always preferable to more subjective factors, such as performance evaluations or an employee's "attitude" or "contribution."

Fred Mendelsohn

Take into account the Age Discrimination in Employment Act (ADEA) that protects employees over 40. Employment costs are a big part of any RIF analysis and often lead to selection of a group of highly paid (and often older) employees for termination. While decisions based strictly on cost are not *per se* illegal, salary and benefit costs are often considered a proxy for age, and hence age discrimination claims. Moreover, severance or early retirement packages commonly offered to RIF employees involve legal complexities like releases of employment discrimination claims. Ensuring the legality of these packages is complex, so it is imperative to ensure compliance with ADEA requirements and other applicable laws.

Companies should consider establishing an RIF committee. If comprised of various members of legally protected employee classes (e.g., age, sex or race), an RIF committee can significantly minimize claim exposure. Committee decisions can often refute any claim that an illegal factor had any bearing on RIF determinations. A statistical analysis can be used to ensure that a particular protected class of the selected group is not disproportionately affected. If the statistics uncover a "disparate impact," the RIF can be reconfigured to avoid unnecessary exposure.

Companies should document the reasons underlying the RIF decision and individual discharge selections. It is also a good idea to conduct exit interviews and issue post-termination letters setting out other legal obligations. Good documentation can go a long way in proving that decision making was non-discriminatory and based upon good business judgment. Employers conducting an RIF should "script" all termination meetings and document any follow up exit interviews so that no ambiguity exists as to what was said, or by whom, as to the reasons for discharge.

Avoid filling the job functions of a laid off employee shortly after an RIF, particularly if only a few positions are affected and the replacement is the antithesis of the discharged employee (e.g., a younger employee replacing an age protected employee). Also consider instituting a hiring freeze for a period after an RIF. Decisions to replace jobs or job functions should be sufficiently separated in time to break allegedly discriminatory connections.

Companies conducting an RIF should consider all other potentially applicable laws, contracts and policies, and should consult with their labor counsel. For those interested in this or related topics, please contact Fred Mendelsohn at fmendelsohn@burkelaw.com or 312/840-7004.

MacKay Presents at Women in Business Event

Karen MacKay

On November 13, Karen MacKay was a participant in Harris Bank's Business Succession Planning event entitled: "Here, Take the Wheel: Succession Stories and Insights From Business Owners." The event was attended by women business owners, and focused on transferring ownership of businesses to family, co-owners or third parties. Succession planning for closely-held business owners is a significant part of Karen's estate planning practice. Karen can be reached at 312/840-7009 or kmackay@burkelaw.com.

Attorneys Join Burke, Warren, MacKay & Serritella, P.C.

Over the last few months, Burke, Warren, MacKay & Serritella, P.C. has welcomed several new attorneys to the firm. A brief introduction to each follows.

Katie E. M. Bunch, one of the firm's 2007 summer associates, is now a member of the firm's litigation group. She earned her B.A. in Journalism and Political Science from the University of North Carolina-Chapel Hill in 2005. Katie was awarded her J.D. from Loyola University Chicago School of Law in 2008. While in law school, she was both a member and coach of the Frederick Douglass Moot Court Team. She also served as Managing Editor of Loyola's Children's Legal Rights Journal.

Katie E. M. Bunch

Laura R. Edwards left the private equity and venture capital group of Ice Miller in Indianapolis to join the firm, where she is now an associate in our corporate group. She has represented businesses in corporate transactional matters, including acquisition and sale transactions, mergers, debt and equity offerings, and private equity fund formation.

Laura R. Edwards

Laura received her B.S. in Business with a concentration in Finance from Indiana University in 2003, and was awarded her J.D. from Washington University School of Law in 2006. While in law school, she served as the Executive Development Editor of the school's law review, in which her article, "Looking Through the Hedges: How the SEC Justified Its Decision to Require Registration of Hedge Fund Advisers," was published in 2005.

June Y. Kim is a new associate in the firm's litigation group who previously practiced at the Chicago offices of Dewey & LeBoeuf, LLP. She represents businesses in commercial disputes, including bankruptcy, securities, and energy matters. June has also represented secured and unsecured creditors, insurers, and debtors in Chapters 7, 11, and 13 proceedings. June received her B.A. in Economics, *cum laude*, from Carleton College in 2000, and was awarded her J.D. from Northwestern University School of Law in May 2003.

June Y. Kim

Sonal Shah practiced at Locke Lord Bissell & Liddell in Chicago before joining the firm.

She is an associate in the firm's labor and employment and litigation groups. Sonal advises employers on a broad range of labor and employment law matters arising under federal and state law. She has represented employers in federal and state court, as well as in front of the Illinois Human Rights Commission.

Sonal Shah

Sonal received her B.A. *summa cum laude* from Ohio State University in 2002 and her J.D. from Washington University School of Law in 2006.

Al-Lynn Symmons, another 2007 firm summer associate, is now practicing in the firm's corporate and real estate groups. She received her B.B.A., *magna cum laude*, in Legal Studies and Risk Management and Insurance from Temple University in 2005. Al-Lynn was awarded her J.D. from Loyola University Chicago School of Law in 2008.

While at Loyola, Al-Lynn worked as a judicial extern for the Honorable Jack Schmetterer, U.S. Bankruptcy Court for the Northern District of Illinois. She also served as a member of Annals of Health Law, worked in the Business Law Clinic at Loyola, and served on both the local and regional boards of the Black Law Students Association.

Al-Lynn Symmons

MEDITATION *Continued from page 1*

appeals) that are a part of courtroom litigation.

Mediation has existed in one form or another for as long as there have been people and disputes. For ages, if a Jim and a Jack had a dispute, they may well have gone to an Uncle Joe and asked him to help them work it out. More recently, mediation is also being used to help parties to legal, commercial and other disputes resolve their differences. With mediation, there is no decision maker, such as a judge or arbitrator who decides for one party or the other. The parties themselves remain in control of the outcome. The mediator helps them through their negotiations but it is they who agree to a resolution.

The essential components of a mediation are at least two parties and a mediator. The parties, of course, must have a disagreement and a desire to try resolving it through negotiation. There can be more than two parties. The mediator is usually (but not always) trained as a lawyer. Importantly, the parties remain the decision makers.

The classic example of a successful mediation is two sisters who each want an orange, when there is only one orange available. A trained mediator meets with them and helps them identify their individual interests and negotiate about who gets the one available orange. As it turns out, the first sister really wanted just the zest of the orange to bake a cake and the other sister only wanted to eat the pulp. Thus, their interests were not mutually exclusive and the one orange could satisfy both of them. There is no need for a loser and both parties win.

Of course, most disagreements are not quite so simple or as easily resolved, but the essence of the process remains the same. At the beginning of most disputes, each party usually stakes out a position. "I want that orange." As the mediation progresses, the mediator helps them focus on their interests (to bake a cake or to eat the pulp), and their interests become the basis for a negotiated resolution. A key part of the mediator's assistance is helping the parties identify the best and worst alternatives to a negotiated solution. These alternatives are part of the context for mediation and shed an important light on its utility.

There are those who say that by agreeing to mediation, one has already given up something. In fact, there is no court or third party who requires you to give up anything in mediation. The parties remain in control, evaluate their interests and alternatives, and then decide what, if anything, they may want to compromise. All that is required is a good faith effort to seek a negotiated solution.

Litigation and arbitration usually result in a winner and a loser. The price of winning (or losing) cannot be measured in dollars and cents alone. Company staff must divert their efforts from company business to the litigation. Staff members sometimes polarize and take sides, especially as the discovery requests, court calls and monthly bills keep on coming. The company also becomes increasingly estranged from its opponent in the litigation. In contrast, mediation can be useful for a wide range of disagreements such as differences between companies that want to continue working with each other, as long as they can get by a particular dispute. Litigation in such a situation could so alienate the parties that neither of them will ever want to work with the other again. Mediation, on the other hand, could help them resolve their dispute without the rancor that could impede their working together in the future. It could do so without the time commitment required by litigation and at a small fraction of the cost. The same would be true of a dispute between a company and its customer, between an employer and an employee, and in many other situations.

Litigation and arbitration usually result in a winner and a loser. The price of winning (or losing) cannot be measured in dollars and cents alone.

Nonetheless, sometimes litigation is really the only effective solution. There may be a strong clash of interests that cannot be compromised, so a third party must decide. In this kind of situation, the parties accept the risk of losing and the fact that victory, if it comes at all, will come at a price. More often, an alternative to litigation, such as mediation, can help the parties achieve an acceptable outcome. Importantly, with mediation there doesn't have to be a winner and a loser. Both parties have the opportunity to define and achieve their interests in a realistic context. Mediation warrants serious consideration as an alternative to litigation, especially during an economic downturn when money, time and positive relationships are in short supply.

Jim Serritella is a 1971 graduate of the University of Chicago Law School. He has received mediation training from the National Health Lawyers Association and has had advanced mediation training from the CPR Institute for Conflict Prevention and Resolution and the Program on Negotiation at Harvard University. Jim has worked as a consultant on alternative dispute resolution, a party representative in mediations and a mediator for most of his legal career. Jim can be reached at 312/840-7040 or jserritella@burkelaw.com.

Year-End Tax Planning and Estate & Gift Tax Considerations

After a long presidential campaign, 2008 is drawing to a close. Although tax planning should be an ongoing process, the end of the year offers an opportunity to review your current position and take steps to minimize your tax liability.

INCOME TAX CONSIDERATIONS

Assess Your Tax Situation First

Prior to implementing any tax plan, the most important step you or your business can take is to conduct a full assessment of your current tax situation. Such an assessment should include a review of current year income and deductions (including capital gains and losses); an estimate of income and deductions for future years; a review of any carryover items (e.g., net operating loss or charitable contribution carryover); and identification of taxable items for which you can control the timing.

Once you have a full understanding of your current tax position, you will be able to make more informed decisions about what steps should be taken to minimize your tax exposure going forward. Below is a brief summary of some planning opportunities you may consider prior to year-end.

Accelerate Deductions and Defer Taxable Income

By deferring taxable income into a future year or accelerating deductions, you can reduce your current tax liability. Taxes can be paid in a later year allowing you to invest the savings in the interim. One common method for accelerating deductions is for taxpayers to make estimated tax payments for their fourth quarter state tax liability prior to year-end (ahead of the January 15 due date). You can claim a deduction for state taxes paid on your 2008 federal return.

Review Capital Gains and Losses

2008 has been a difficult year for the stock market. Like most investors, you may have realized losses in your portfolio. Consider selling some of your securities with losses to offset capital gains. Even if you did not sell securities at a gain during the year, you may have had capital gain income allocated to you from your mutual fund investments. Likewise, most dividends you receive are taxed at long-term capital gain rates. By selling securities with losses, you will be able to offset some or all of your capital gain income and reduce your overall tax obligation.

0% Long-Term Capital Gain Rate in 2008 for Low-Income Taxpayers

For 2008, the long-term capital gain rate for lower-income taxpayers (those in the 10% or 15% ordinary income tax brackets) has been reduced to 0%. While not applicable to many taxpayers, the 0% capital gain rate represents a planning opportunity for many, including retirees, prospective retirees, and parents and children. If you or a family member is in a lower-income tax bracket, you may consider selling securities in 2008 to take advantage of the 0% tax rate.

Gifts to Charity

A charitable contribution made before year-end can be claimed as a deduction on your 2008 income tax return. Also, by contributing publicly traded stock to a charity, you will avoid tax on the stock's appreciation and be able to deduct the full value of the stock. Regardless of the type of contribution, you must maintain a proper record of your gifts. For gifts made in 2008, a donor contributing money to a charitable organization (regardless of the amount) must maintain a cancelled check, bank record or receipt from the donee organization showing the name of the donee organization, the date of the contribution and the amount of the contribution. If you give a non-cash gift, ask for a letter estimating the value of the gift. Gifts over $5,000 that are not cash or publicly traded stock require an appraisal.

Max Out Your 401(k)

Consider contributing the maximum amount to your 401(k) plan. The contribution limit for 2008 is $15,500. In addition, individuals who will be at least 50 years of age by the end of 2008 may make an additional "catch-up" contribution of $5,000 in 2008. The contribution limit for 2009 will be $16,500 and the catch-up contribution limit for 2009 will be $5,500.

Tax-Free Distributions From IRAs for Charitable Purposes

As part of the Emergency Economic Stabilization Act of 2008 (the financial bailout package), the provision allowing the direct rollover of funds from an IRA to charity was extended to include calendar years 2008 and 2009.

As a result of the legislation, individuals age 70½ or older are permitted to make direct transfers of up to $100,000 annually from their individual retirement account to a charitable organization. By distributing funds directly from your IRA to charity, the distribution is not included in your taxable income. Conversely, you are not

Continued on page 6

YEAR END *Continued from page 5*

allowed to claim a tax deduction for the charitable contribution. Without this provision, if an individual wished to contribute IRA assets to charity, the individual would be required to take a distribution from his IRA and then contribute the proceeds of that distribution to charity. The individual would be required to include the distribution in income, but would be allowed a deduction for his contribution. Unfortunately, the deduction in many cases would not fully offset the additional income because of (among other things) the phase-out of itemized deductions for high-income taxpayers.

"Kiddie Tax" Extends its Reach

Originally enacted to prevent the transfer of unearned income from parents to their children in lower tax brackets, the so-called kiddie tax targets children with investment income in excess of $1,800, taxing such income at the same rates as their parents. Prior to 2007, the kiddie tax applied only to children age 14 and under. In 2007, the kiddie tax was expanded to apply to children under age 18. For 2008, the kiddie tax was expanded again to apply to any dependent child under age 19 and full-time students under age 24.

Avoid Underpayment Penalties

Make sure that you have paid enough in federal and state withholding taxes to avoid penalties. For 2008, you will avoid a penalty for the underpayment of estimated tax if your tax payments (including withholdings) have been timely made and are at least equal to 100 percent of the tax shown on your 2007 federal income tax return (110 percent, if your adjusted gross income for 2007 exceeded $75,000 if you were married, but filed separately, or $150,000 for other taxpayers) or 90 percent of the tax shown on your 2008 federal income tax return, whichever is less.

When reviewing your 2008 tax payments, keep in mind that income tax withholdings are considered paid equally throughout the year, even if withholdings are made near the end of the year. If you anticipate that you have underpaid your estimated taxes for 2008, consider adjusting withholdings for the remainder of the year to avoid penalties for underpayment of estimated taxes.

What Lies Ahead?

No one knows what the future holds. However, with a new administration taking office, there will likely be substantial changes to the tax code over the next several years. The timing of any changes will undoubtedly be affected by the current economic situation. Some of the proposals offered by President-elect Obama include:

- Reinstate pre-2001 top individual tax rates of 39.6 and 36 percent for families making over $250,000 ($200,000 for singles).
- Elimination of all income taxes for seniors (age 65 and over) earning under $50,000.
- Raise capital gains and qualified dividend rates to 20 percent for families earning more than $250,000 ($200,000 for singles).
- Eliminate all capital gains taxes on start-ups and small businesses to encourage innovation.
- Provide a refundable tax credit to small businesses that provide health insurance to employees to claim up to 50 percent on premiums.
- Retain existing payroll tax on first $102,000 of income (indexed for inflation). Exempt income from $102,000 to $250,000, then reinstate a 2-4 percent payroll tax (combined employee and employer) on income above $250,000. According to the President-elect, this proposal would not take effect for at least 10 years.
- Increase the estate tax exemption level to $3.5 million per person ($7 million per couple) and increase top estate tax rate to 45%.

ESTATE & GIFT TAX CONSIDERATIONS

No Change to Federal Estate Tax

We still have a Federal estate tax. The death tax-free exemption amount is $2 million for 2008 and is scheduled to increase to $3.5 million in 2009. The top estate tax rate is 45% for 2008. Under current law, the estate tax is scheduled to be repealed for one year in 2010, but reverting to its pre-2001 Tax Act level of only $1 million per taxpayer for persons dying in 2011 or thereafter, with a top rate of 50%.

Annual Exclusion Gifts

In 2008, you may make a gift of $12,000 to any individual and certain trusts without any gift tax consequences. Married individuals may make gifts of up to $24,000. Gifts may be made outright or in trust and may be in the form of cash, securities, real estate, artwork, jewelry or other property. Giving property that you expect to appreciate in the future is an excellent way of utilizing your annual exclusion gifts because any post-gift appreciation is no longer subject to gift or estate tax. To take advantage of your annual exclusions for 2008, gifts must be made by December 31. Gifts over $12,000 or gifts that will be "split" between spouses must be reported on a gift tax return, which must be filed in April 2009. The annual exclusion amount increases to $13,000 in 2009 ($26,000 for married couples).

Payment of Tuition and Medical Expenses

In addition to annual exclusion gifts, you may pay tuition and medical expenses for the benefit of another person without incurring any gift or generation-skipping transfer ("GST") tax or using any of your estate or GST

tax exemption. These payments must be made directly to the educational institution or medical facility. There is no dollar limit for these types of payments and you are not required to file a gift tax return to report the payments.

Lifetime Gifts Using Gift Tax Exemption

In addition to annual exclusion gifts and the payment of tuition and medical expenses, individuals are also allowed a lifetime gift tax exemption. The gift tax exemption amount is currently a flat $1 million and is scheduled to remain at that level through 2010. Many clients make use of their $1 million lifetime exemptions by gift strategies such as Grantor Retained Annuity Trusts and other techniques that leverage the use of the exemption. A gift of appreciating property during your lifetime removes all future appreciation from your taxable estate at your death.

Generation Skipping Tax

The generation-skipping transfer ("GST") tax is still in place. Generally, the tax applies to lifetime and death-time transfers to or for the benefit of grandchildren or more remote descendants, at a 45% flat rate for 2008. The tax is in addition to any gift or estate tax otherwise payable. However, each taxpayer is allowed a $2 million GST tax exemption for 2008, which is scheduled to increase to $3.5 million in 2009.

Consider Lifetime Gifts that take Advantage of both the Gift Tax Exemption and GST Exemption

Many clients utilize their $1 million gift tax exemption ($2 million for a married couple) by structuring long-term GST exempt trusts benefiting multiple generations. Such trusts will remain exempt from all gift and estate tax as long as the trust remains in existence. Under Illinois law, such trusts can last in perpetuity, thereby allowing you to create a family endowment fund for your children, grandchildren and future descendants.

For more information, please contact your attorney or a member of the firm's Wealth & Succession Planning practice group which includes Karen K. MacKay, Stephanie H. Denby, Jonathan W. Michael, Martin P. Ryan, Melissa C. Selinger, Julia A. Turk, Gregory M. Winters and Melanie L. Witt at 312/840-7000 or burkelaw.com.

Tax Law

Nonqualified Deferred Compensation Plans

Section 409A of the Internal Revenue Code of 1986, as amended (the "Code") provides rules governing the taxation of non-qualified deferred compensation plans. Final Treasury Regulations for Code Section 409A were issued on April 17, 2007. The transition period for compliance with these Treasury Regulations is set to expire on December 31, 2008. Plan documents must be reviewed and amended to be written in accordance with the Final Treasury Regulations by such date.

Section 409A of the Code provides that amounts deferred by an employee or other service provider under a "non-qualified deferred compensation plan" are included in income when deferred, or, if later, when they are no longer subject to a substantial risk of forfeiture, unless the plan complies with requirements under Code Section 409A. These requirements relate to the timing of elections, the events upon which distributions can be made, and the funding of benefits.

Julia Turk

A non-qualified deferred compensation plan is generally defined as any plan that provides for the deferral of compensation. A deferral of compensation occurs when a service provider receives a "legally binding right" to compensation in one year but does not actually receive (and is not deemed under "constructive receipt" principles to have received) that compensation until a later year. Contracts that may be included within the scope of Code Section 409A include executive employment (or compensation) agreements, change of control agreements (and change of control provisions in employment contracts), and director compensation agreements. However, the term does not include qualified employer plans (such as Section 401(k) plans and other plans qualified under Section 401(a) of the Code, Section 403(a) or (b) annuity plans or contracts, governmental plans, SEPs, simple retirement accounts, and Section 457(b) plans), or any bona fide vacation leave, sick leave, compensatory time, disability pay, or death benefit plans.

If a plan fails to comply with Code Section 409A, the employee or service provider loses the benefit of the deferral of compensation and must include the income currently. The employee or service provider must also pay interest and a 20 percent additional penalty on such compensation.

If you have not yet reviewed and/or amended in writing your deferred compensation plans, please consult your attorney as soon as possible. Julia Turk can be reached at 312/840-7033 or jturk@burkelaw.com.

Circular 230 Disclosure: Any tax advice contained in this newsletter was not intended or written to be used, and cannot be used (i) by any taxpayer for the purpose of avoiding any penalties that may be imposed on the taxpayer, or (ii) to promote, market or recommend to another party any transaction or matter addressed herein.

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WEALTH & SUCCESSION PLANNING

DEPAUL'S "FINANCIAL SERVICES FOR THE COMING RETIREMENT BOOM" CONFERENCE

The firm's Jonathan W. Michael was a panelist and featured speaker at the "Financial Services for the Coming Retirement Boom" conference sponsored by DePaul University's Center for Financial Services on October 24.

Jonathan W. Michael

The conference, featured in the Chicago Tribune, included trust executives, accountants and investment advisors. Rick Waddell, CEO of The Northern Trust, was the keynote speaker.

Jonathan focused his presentation on the unique business succession planning and estate planning needs of the "baby boomer" generation.

For more information about business succession planning, please contact Jonathan W. Michael at 312/840-7049 or jmichael@burkelaw.com.

LANDLORD *Continued from page 1*

bankruptcy proceedings over the years including: AboveNet, Bonwit Teller, Caldor, Enron, Kmart, McCrory's, Montgomery Ward and Revco.

According to Gerry, landlords need to be diligent to protect their rights when a tenant defaults, and they need to make sure that their default notice is flawless to avoid complications, delay, and even dismissal in forcible court. To that end, Gerry prepared a forcible checklist for landlords to make certain that the default notice is correct, and service proper. A small amount of precautionary efforts by the landlord at the beginning will save time and expense in the end.

For those tenants who file for bankruptcy protection, Gerry explained how landlords can obtain rent during bankruptcy, determine whether an objection to the assignment of a shopping center lease is appropriate, and under what circumstances a landlord can shorten the time a debtor has to assume or reject a lease. Gerry also explained the limitation on damages in bankruptcy proceedings.

If you would like further information regarding Gerry's in-house seminar, or would like to receive his landlord forcible checklist, please contact him at 312/840-7014 or gring@burkelaw.com.