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

SUMMER 2014 | BWM&S BULLETIN | VOLUME 12 • ISSUE 3

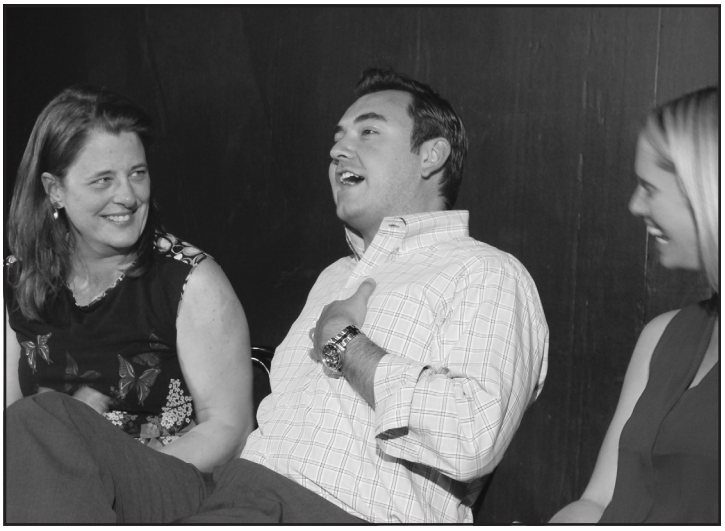
LITIGATION

CHICAGO TRIBUNE FEATURES BWM&S ON STAGE AT iO CHICAGO

Featured for groundbreaking legal training through comedy, the firm made the front page of the *Tribune's* Business Section!

iO Chicago (formerly ImprovOlympic) is a theatre improv institution that has trained some of America's top comics, including Tina Fey, Amy Poehler, Mike Meyers and now, the Firm's litigators — no kidding.

BWM&S's training workshop at iO was recently featured on the front page of the *Chicago Tribune* Business section. (http://articles.chicagotribune.com/2014-06-19/business/ct-improv-training-0619-biz--20140619_1_training-program-comedy-club-improv) Fifteen attorneys worked through classic improv training exercises designed to improve communication, advocacy, and negotiation skills through iO's fundamental "yes, and" approach to comedy.



(From left) The Firm's Victoria Collado, Eric Vanderploeg, and Elizabeth Pall perfect communication skills through improv comedy by iO Chicago.

Continued on page 5

CONSTITUTIONAL LAW

SUPREME COURT EXTENDS RELIGIOUS EXEMPTION FROM H.H.S. CONTRACEPTION MANDATE TO CLOSELY HELD FOR-PROFIT CORPORATIONS

The Affordable Care Act ("ACA") requires employers above a certain size to provide health insurance coverage to employees, and requires all such plans to include "preventative care." The U.S. Department of Health and Human Services ("HHS") has defined "preventative care" to include all forms of FDA approved female contraception, as well as sterilization ("the Mandate"). Most of the FDA approved medications prevent fertilization, but some act on already fertilized eggs.

Jim Geoly

Continued on page 10

INSIDE THIS ISSUE:

NEXT ISSUE: Next Issue: Crowdfunding, client successes, the Firm grows again and more.

U.S. Supreme Court Ruling Finds Inherited IRAs Not Protected In Heir's Bankruptcy

Jonathan W. Michael

Recently, the U.S. Supreme Court unanimously ruled that the U.S. Bankruptcy Code does not protect funds in an inherited individual retirement account ("inherited IRA") from a creditor's claims in the heir's bankruptcy. The case, *Clark v. Rameker*, involved petitioners Brandon Clark and Heidi Heffron-Clark who declared bankruptcy in 2010 after their pizza restaurant closed in their hometown of Soughton, Wisconsin.

In 2000 Ruth Heffron established an IRA naming her daughter, Heidi Heffron-Clark, as the designated beneficiary of her IRA. At Mrs. Heffron's death in 2001, the IRA had a value of $450,000.

When daughter Heidi filed a Chapter 7 bankruptcy petition in October 2010, the IRA had a value of $300,000. She asserted in her petition that the money in the inherited IRA represented "retirement funds" that were protected from creditor claims. The U.S. Supreme Court rejected her argument and held that assets retained in inherited IRAs are not "retirement funds" within the meaning of the federal bankruptcy laws and therefore are subject to the claims of bankruptcy creditors.

In reaching its conclusion, the Court noted that inherited IRAs are different from traditional IRAs and Roth IRAs because (i) the beneficiary-owner may not contribute additional funds to an inherited IRA, (ii) the assets of the inherited IRA must be withdrawn immediately or over a period years and cannot be retained pending the beneficiary-owner's future retirement and (iii) unlike a traditional IRA, which imposes a penalty if the owner begins to take withdrawals prior to attaining age 59½, the beneficiary-owner of an inherited IRA may withdraw all or any portion of the assets immediately without penalty.

A Court distinguished a traditional IRA inherited by a spouse from an "inherited IRA." A surviving spouse can roll the traditional IRA over into a separate IRA in his or her own name. It is not clear how the Court would rule in the event a surviving spouse fails to make such a rollover.

Ruth Heffron probably never gave a second thought to how she should structure her IRA account to protect Heidi in the event of financial problems down the road. Had Ruth designated an irrevocable trust established for Heidi's benefit as the primary beneficiary of her traditional IRA (instead of designating her daughter individually), Heidi may have been able to protect the inherited IRA funds from her bankruptcy creditors, saving her a lot of dough!

At BWM&S we encourage our friends and clients to review their primary estate planning documents, including the beneficiaries of their retirement plan accounts and insurance policies, at least every two years. If you have not had a chance to speak with your attorney about how the *Clark v. Rameker* case impacts your estate plan, we recommend that you do so.

Please contact Jonathan Michael at jmichael@burkelaw.com or 312/840-7049 with any questions regarding estate and business succession planning, including the implications of *Clark v. Rameker.*

MacKay Quoted in Kiplinger's Retirement Report

Karen K. MacKay was quoted in the May 2014 issue of Kiplinger's Retirement Report, one of the nation's leading estate planning publications. In the article *Planning to Pass on Your Family Business,* Karen discusses techniques to equalize bequests among all children when transferring a business to one child. She also discusses the use of nonvoting shares or similar interests as a means of providing those children not involved in running the business with some equity and a potential cash flow.

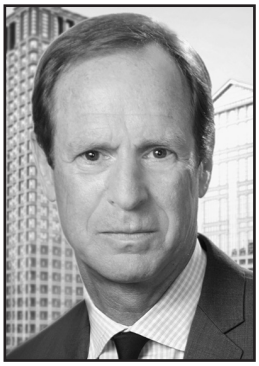
She explains that because the business is often the largest asset of the estate, the voting shares remain with the children actively involved in the business. She says if you are giving a business to one child, you might give his or her siblings a larger share of other assets, such as real estate, investment accounts, or life insurance proceeds.

Karen K. MacKay

If you would like more information on strategies for business succession planning or your own estate planning needs, please contact Karen at 312/840-7009 or kmackay@burkelaw.com.

ML Realty Partners Builds Two New Facilities at Heritage Crossing Corporate Center

Firm client ML Realty Partners is launching the construction of two speculative buildings, 121,800 SF, and 512,265 SF respectively, at Heritage Crossing Corporate Center, a new business park located in Lockport, Illinois.



John Stephens

With its initial 121,800 SF building almost fully leased, Heritage Crossing Corporate Center offers more than 2.6 million square feet of state-of-the-art development space with exceptional design flexibility. The 228-acre site is located in Will County at the I-355 & 143rd Street interchange, along the southern extension of I-355.

Heritage Crossing will consist of 12 buildings, ranging in size from 60,000 SF to 512,265 SF, well suited for light industrial and distribution centers, and logistically designed to allow businesses to move goods, services, and employees quickly throughout the city and neighboring suburbs. With shortened travel times throughout the region, Heritage Crossing tenants will reap the benefits of reduced delays, lower fuel costs and increased productivity, as they move their goods from distributor to customer with maximum efficiency.

The Firm's John Stephens, together with John Kobus and Steve Schuster, have provided real estate counsel through all phases of the project. For more information on Heritage Crossing Corporate Center visit www.heritagecrossingcc.com, contact Patrick Shannon of ML Realty Partners at 630/250-2915, or contact John Stephens at 312/840-7017 or jstephens@burkelaw.com.

REAL ESTATE LAW

Chicago Landlord 101: an Introduction to the Residential Landlord Tenant Ordinance

The **Chicago Residential Landlord Tenant Ordinance** (CRLTO) may be the most tenant friendly legislation of its kind in the United States. CRLTO imposes an absolute duty to comply with the law — it is the landlord's responsibility to know the rules — even unintentional violations are severely punished. If the tenant can prove that the landlord violated a CRLTO provision, the tenant may be entitled to terminate the lease and/or file a lawsuit for compensation and attorneys' fees.

Does CRLTO apply to you? CRLTO applies to every rental agreement for a "dwelling unit" located within the City of Chicago, specifically excluding dwelling units in *owner-occupied buildings containing six units or less*. This exception does not always apply in situations involving townhouses, but can apply to coach house rentals, when certain requirements are met.

Brad Ader

Is your lease form CRLTO-compliant? Most generic lease forms contain provisions that CRLTO identifies as unenforceable. If the landlord attempts to enforce a prohibited provision, the tenant may recover two months' rent, plus attorneys' fees.

Have you delivered all required disclosures and attachments? The lease must disclose specifics concerning the security deposit, as well as

Continued on page 9

LABOR & EMPLOYMENT LAW

New Law Curbs Criminal Background Inquiries By Employers

Employers commonly inquire regarding a criminal background history on prospective job applicants, a practice that will see increased restrictions in Illinois when the Job Opportunities for Qualified Applicants Act (the "Act") takes effect on January 1, 2015. The Act prohibits employment agencies or private employers with 15 or more employees from asking a job applicant about, or requiring a job applicant to disclose, his or her criminal record or history on an initial job application. Instead, under the Act any criminal history inquiry cannot occur until after "the applicant has been determined qualified for the position and notified that the applicant has been selected for an interview … or, if there is not an interview, until after a conditional offer of employment is made to the applicant… ."

Alex Marks

The goal of the Act is to ensure that qualified applicants with criminal histories are "properly considered" for employment opportunities. By signing the law, Illinois became the fifth state to "ban the box" on initial applications. These state laws conform to the EEOC's previously issued guidance for employers that warns against using criminal records to make employment decisions in a manner that disparately treats or disparately impacts applicants. Instead, the EEOC recommends employers make individualized assessments of candidates, and ensure any exclusion due to prior criminal conduct is consistent with the employer's business necessities.

The Act does provide three limited exceptions: (1) for employers who are required to exclude applicants with certain convictions due to federal or state law; (2) where the applicant's criminal conviction would disqualify the applicant from obtaining a required standard fidelity (or equivalent) bond; and (3) where the employer employs individuals licensed under the Emergency Medical Services Systems Act. The Illinois Department of Labor is tasked with investigating alleged violations of the Act, and employers may be liable for civil penalties ranging from written warnings to monetary fines for violations.

The Act's practical application is that non-exempt employers should wait to inquire regarding criminal background history and/or run a criminal background check on job applicants until the above-described conditions are met. Employers should also regularly review their hiring guidelines and processes to make sure they comply with all applicable state and federal laws.

Alex Marks is a partner in the firm's litigation practice group, and is the chair of the firm's employment law practice. Alex can be reached at 312/840-7022 or amarks@burkelaw.com.

NOT-FOR-PROFIT LAW

Political Campaign Activity and Tax-Exempt Organizations

Churches and other tax-exempt organizations (TEOs) described in Section 501(c)(3) of the Internal Revenue Code ("Code") may not understand that the Code absolutely prohibits them from participating in or intervening in political campaigns for or against any candidate for public office. Indeed, it seems that the IRS has not been actively pursuing enforcement of this prohibition, perhaps in light of its own recent political troubles. But TEOs should take note: recent developments have brought renewed IRS scrutiny, and violating this prohibition may lead to severe sanctions, including the loss of tax-exempt status.

Past misunderstandings are not surprising, given that TEOs *are* allowed to "educate the public" with regard to "important policy issues" and to engage in an "insubstantial" amount of lobbying. The limits of such activities are often confusing to even the most experienced tax professionals. More importantly, many TEOs simply ignore the political campaign prohibition, contending that they have a First Amendment right to intervene in a political campaign on behalf of a candidate, and believing that the IRS would be hesitant to put its prohibition to a constitutional test.

Until recently, aggressive enforcement of the Code's prohibition may have been the one thing rarer than a Cubs World Series appearance. But, heads up: while it remains unknown whether we'll live to see the Cubs in a World Series, the IRS' reluctance to challenge TEO political campaign activity appears to have come to an end.

In December 2012, the Freedom From Religion Foundation ("FFRF")

Continued on page 7

iO CHICAGO

Continued from page 1

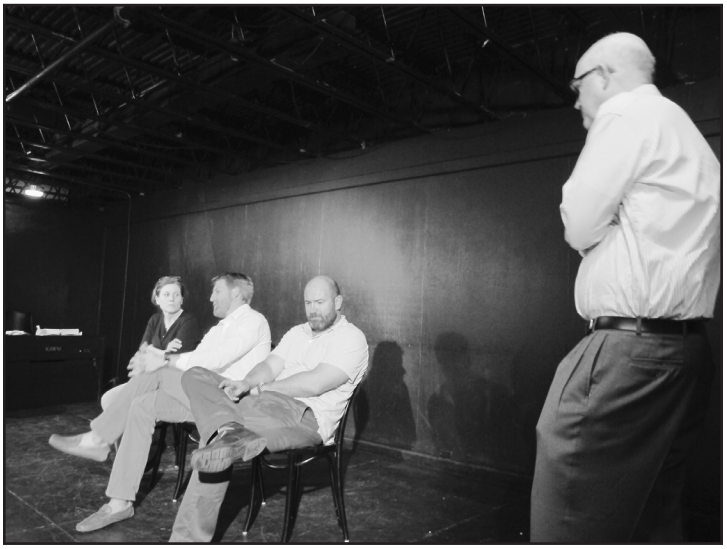
Tina Fey describes the "yes, and" approach this way:

The first rule of improvisation is AGREE. Always agree and SAY YES. When you're improvising, this means you are required to agree with whatever your partner has created. So if we're improvising and I say, "Freeze, I have a gun," and you say, "That's not a gun. It's your finger. You're pointing your finger at me," our improvised scene has ground to a halt. But if I say, "Freeze, I have a gun!" and you say, "The gun I gave you for Christmas! You bastard!" then we have started a scene because we have AGREED that my finger is in fact a Christmas gun.

For attorneys, the "yes, and" approach means learning to "respond" with a consensus-building tone in court and in negotiations, rather than simply reacting — or worse, reciting talking points like a politician on a Sunday morning news program. In court, as in comedy, the "yes, and" approach can establish a collaborative mood, even in an otherwise contentious atmosphere, which can often impute more authority to the attorney who employs the technique.

The workshop plan was hatched by the Firm's Litigation Group chair, Gerry Ring, who worked with Charna Halpren and Joe Bill of iO to develop a program to meet the Firm's needs. Once the goals and exercises were selected, the Firm drafted and submitted a proposal to the Illinois Mandatory Continuing Legal Education Board, who deemed it "creditworthy," approving 2.75 hours of CLE credit toward each participating BWM&S attorney's 15 hour requirement.

Attorneys Dan Klapman (left) and Gerry Ring (right) compete for Shana Shifrin's (center) attention as Shana engages in simultaneous conversation.



iO Chicago's creative director and senior corporate trainer Joe Bill (pictured right) provides instruction to attorneys (from left) Madeleine Milan, Ben Wieck, and Steven Meinertzhagen.

Attorneys (from left) Blake Roter, Andrew LeMar, Victoria Collado, and Danielle Gould discuss the practice benefits of improv comedy training.

Lighten Your Tax Burdens on an Angel's Wings

If you are considering either starting a new business or investing in a business, you should know about Illinois' Angel Investment Credit Program ("Angel Program"). The Angel Program, which started in 2011 and ends in 2016, is a great way to both start and invest in early-stage, innovative companies based in Illinois.

The Angel Program begins with an application by a "Qualified Business" meeting the following requirements:

The business must be headquartered in Illinois and at least 51% of its employees must work in Illinois;

The business must have the potential for increasing jobs in Illinois, increasing capital investment in Illinois, or both, and either of the following must apply:

(A) it is principally engaged in innovation in any of the following: manufacturing; biotechnology; nanotechnology; communications; agricultural sciences; clean energy creation or storage technology; processing or assembling products, including medical devices, pharmaceuticals, computer software, computer hardware, semiconductors, other innovative technology products, or other products that are produced using manufacturing methods that are enabled by applying proprietary technology; or providing services that are enabled by applying proprietary technology; or

(B) it is undertaking pre-commercialization activity related to proprietary technology that includes conducting research, developing a new product or business process, or developing a service that is principally reliant on applying proprietary technology;

The business must not be principally engaged in real estate development, insurance, banking, lending, lobbying, political consulting, professional services provided by attorneys, accountants, business consultants, physicians, or health care consultants, wholesale or retail trade, leisure, hospitality, transportation, or construction, except construction of power production plants that derive energy from a renewable energy resource; and

At the time it is first certified the business must have fewer than 100 employees, must not have been operating for more than 10 consecutive years and must not have received more than $10,000,000 in aggregate private equity investment in cash or more than $4,000,000 in investments qualifying for the Angel Program.

The Angel Program, which started in 2011 and ends in 2016, is a great way to both start and invest in early-stage, innovative companies based in Illinois.

A corporation, partnership, limited liability company or a natural person (a "Claimant") is eligible to invest in a Qualified Business. The benefit of investing in a Qualified Business is an Illinois income tax credit in an amount equal to 25% of the Claimant's investment. For example, if an individual invests $100,000 in a Qualified Business, the individual is eligible for a $25,000 Illinois income tax credit. Although the credit cannot exceed a Claimant's Illinois income tax for the taxable year, the nontransferable credit can be carried forward and applied against the Claimant's Illinois income tax for up to 5 years.

Not surprisingly, there is a limit: The Angel Program is allocated only $10,000,000 in tax credits each year, which are awarded on a first-come, first-served basis. As of June 17, $5,500,000 in credits remain in the 2014 Angel Program allocation.

If you are starting a Qualified Business, or operating an existing Qualified Business and are seeking a capital raise, you should consider registering with the Department of Commerce and Economic Opportunity ("DCEO") and alerting your potential investors about the possibility of their receiving an Illinois income tax credit in an amount equal to 25% of their eligible investment.

Likewise, if you are looking to make an investment in an Illinois business, you should either determine whether the target is registered with DCEO as a Qualified Business or coordinate with the target to have it register with DCEO before making your investment.

In short, the Angel Program provides investors with an immediate return on investment that is relatively simple to obtain. But remember, timing is still critical in that Angel Program funds must still be available when a Claimant applies for participation with DCEO.

The Angel Program is a great way to invest in innovative Illinois businesses. The key of course is to comply with the program's many requirements before making an investment or pursuing a capital raise, not all of which have been addressed above. To learn more about the Angel Program, please contact either Craig McCrohon (cmccrohon@burkelaw.com, 312/840-7006) or Rich Lieberman (rlieberman@burkelaw.com, 312/840-7011).

POLITICAL CAMPAIGN ACTIVITY

Continued from page 4

filed suit in the U.S. District Court for the Western District of Wisconsin seeking a declaration that the IRS violated the First Amendment establishment clause "by failing to enforce the electioneering restrictions of §501(c)(3) of the Tax Code against churches and religious organizations," and asking the court to order the IRS "to authorize a high ranking official within the IRS to approve and initiate enforcement of the restrictions of §501(c)(3) against churches and religious organizations, including the electioneering restrictions, as required by law."

On July 17, 2014, FFRF issued a press release announcing a settlement with the IRS:

"[t]he IRS has now resolved the … issue necessary to initiate church examinations. The IRS also has adopted procedures for reviewing, evaluating and determining whether to initiate church investigations. While the IRS retains 'prosecutorial' discretion with regard to any individual case, the IRS no longer has a blanket policy or practice of non-enforcement of political activity restrictions as to churches."

The press release further states that FFRF withdrew its lawsuit because

Pat Carlson

Richard Lieberman

"[u]ntil the IRS has satisfied congressional overseers that objective procedures are firmly in place with regard to political activities by all tax-exempt organizations, the judge in FFRF's pending suit would not currently be able to order any immediate or effective relief."

With FFRF's announcement in mind as we approach another highly fractious campaign season, churches and other TEOs would be wise to carefully scrutinize how the Code prohibition on "political campaign intervention" might apply to their own political involvement.

A December 9, 2013, memorandum from the IRS' Exempt Organizations Determinations Unit, listed the following types of activities as potentially qualifying as "political campaign intervention":

- Voter registration
- Inaugural and convention host committees
- Post-election transition teams
- Voter guides
- Voter polling
- Voter education
- GOTV drives
- Events at which candidates speak
- Communications expressing approval or disapproval of candidates' positions or actions
- Other activities that appear to support or oppose candidates for public office

With the IRS' blanket non-enforcement policy/practice at an apparent end, now may be an opportune time for churches and other TEOs to proactively review what qualifies as impermissible political campaign intervention.

If you have any questions on what constitutes impermissible political campaign intervention, please contact either Pat Carlson (pcarlson@burkelaw.com, 312/840-7076) or Rich Lieberman (rlieberman@burkelaw.com, 312/840-7011). BWM&S

BWM&S

Firm Welcomes New Associate Josh Abern

Josh Abern is a senior associate and the newest member of the firm's Wealth & Succession Planning practice. Josh brings significant experience in estate planning and administration for high net worth clients — corporate and individual fiduciaries, beneficiaries and heirs — as well as extensive probate experience, both administering and litigating, including will and trust contests,

Josh Abern

fiduciary claims, creditor claims, and contested guardianship matters. He also represents clients in IRS audits, administrative appeals and other judicial proceedings.

In light of his particular emphasis on flow-through entity taxation in income tax planning, Josh became the designated associate assisting in researching issues and questions raised at Flow-Through Taxation Seminars conducted annually across the US by his prior firm. In cooperation with the publisher CCH, Josh contributed to updating the seminars in view of changes in the law.

Continued on page 12

Ten Low-Tech Ideas to Protect High-Tech Secrets

Even though certain firms — especially those in technology or other innovation industries — live or die on the protection of their business secrets, many fail to undertake some basic steps to protect their proprietary information from competitors or disgruntled former employees.

The following short list of practical low-tech steps can significantly improve the chances of these companies protecting their valuable confidential information. Once taken, it can be almost impossible to recover, and can require years of litigation and oppressive legal costs to reclaim it.

Craig McCrohon

What to Protect

Business secrets might include customer lists, formulas, software, businesas processes, or market information. Theft of these intellectual property items can damage a company just as much, if not more than, the loss of a valuable piece of equipment or expensive raw materials.

Value of Low-Tech Precautions

Sadly, companies too often "skip the small stuff" when protecting confidential information. They enact expensive labor-intensive techniques like complex confidentiality agreements and patents, when a few low-tech procedures are capable of providing as much protection as the pinnacle of innovation.

Under the law, the mere presence of corporate "policies and practices" protecting sensitive information helps retrieve stolen secrets. Courts follow doctrines that provide that if a firm demonstrates "habitual protection" of its confidential information, it will more likely prove that the information is valuable and merits protection under the Uniform Trade Secrets Act. The opposite also holds true: a company that ignores strict protection of confidential information and ideas triggers a presumption of low value and little confidentiality.

Weave a tangled web

Like unraveling a political cover-up, the best way to catch an information thief is to follow the trail of lies, copied emails, records of downloads, and rogue hard copies. The more impediments you put in place to copying and removing information, the more likely that the perpetrator will leave a trail of theft.

Ten Practical Tips to Save Confidential Information

1. *Lock Doors*. Keep the documents, disks or other media in a locked room. It's that simple.

2. *Use Document Passwords*. Amazingly, emails fly around offices and through cyberspace without password protection. Companies that habitually lock secret, or even semi-secret, documents with passwords avoid years of litigation. If a computer forensics expert can show that the culprit broke the password, or sent separate emails sharing the passwords with others, a judge is far more likely to acknowledge the confidential status of the information.

3. *Create Virtual Compartments*. Documents should be available only to persons with a need to know. Rather than simply dumping items into communal drives, companies should create levels of security to limit access. Some firms will even prevent their programmers from seeing an entire code, granting access to only that portion of the software code being developed by that programmer.

4. *Use Snail Mail*. Documents can be delivered in hard copy, marked with confidential stamps. Does the other party need to make copies? Do it for them. Mark all copies with a notation such as "Do Not Copy. This Stamp In Red." If a black and white copy lands in the thief's hands, it would be easy to prove that he or she should have known better.

5. *Organize Confidentiality Agreements*. Companies get lazy about this. Don't. Routinely execute and file these agreements - whether from new employees or other business partners. Such habits, while not foolproof, demonstrate serious commitment to confidentiality and will often sway judges to rule against the information thief.

6. *Leave Your Mark*. Companies should aggressively apply copyright symbols, confidentiality stamps, or trademark notices. When in doubt, mark the document. As with other practices, this puts the thief on notice, demonstrates commitment to secrecy by the company, and validates court claims of value and confidentiality.

7. *Use Employee Manuals*. These books outline the general rules of the workplace for all employees. They provide the perfect means for clarifying and emphasizing strict processes and obligations of employees for maintaining the security of company information. These rules evidence corporate commitment to confidentiality.

8. *Reject Stolen Property*. Often

Continued on page 9

Just as someone would reject a gift of clearly stolen merchandise, so should companies reject improperly obtained software, customer lists or manuals from a new employee. A firm with "unclean hands" should hardly expect judicial sympathy.

new employees will bring pilfered intellectual property from their last job. Just as someone would reject a gift of clearly stolen merchandise, so should companies reject improperly obtained software, customer lists or manuals from a new employee. A firm with "unclean hands" should hardly expect judicial sympathy.

9. *Monitor Guests; Limit Access*. Companies should keep a strict log of any guests. This could be as simple as a sign-in sheet, or the provision of temporary electronic badges that guests can use to check in or out. Such procedures are compelling evidence of a firm's sincerity in protecting its corporate secrets, while also demonstrating the value of its confidential information.

10. *Embrace shredding*. Rather than toss confidential information in the garbage, use shredders liberally. It will prevent others from rifling through your garbage to steal valuable information, and again, it reinforces your claim before a court that certain information is both valuable and proprietary.

The Bottom Line

Following these tips, not only will a firm more likely prevail in court, but unscrupulous individuals will be less inclined — and less able — to untangle the protections to steal your confidential information. Like car alarms, these protections cannot prevent every theft, but they might make it difficult enough for a trade secrets thief to target the next guy.

Craig McCrohon is a partner in the corporate group. You may reach him at cmccrohon@burkelaw.com or 312/840-7006.

CHICAGO LANDLORD 101

Continued from page 3

The landlord can avoid onerous security deposit requirements by using a non-refundable "move-in fee" rather than a deposit. Move-in fees are not regulated by CRLTO and are therefore the landlord's property, which can be used for any expense at any time, with no interest requirements.

contact information for the owner and any property managers — without which the property manager or agent is liable for all obligations of the landlord, and the tenant may be entitled to terminate the lease. The lease and all renewals must also include certain attachments providing information on CRLTO, security deposit rules and interest rates, as well as various disclosure forms regarding lead paint, radon, bed bugs, building code violations, utility shutoff notices, foreclosure information, and additional requirements for condo leases.

Have you complied with Security Deposit rules? While the security deposit fundamentally exists for the tenant's failure to pay rent and repairs to damage caused by the tenant, the security deposit is at all times the tenant's property and it must be held in a segregated, interest bearing FDIC insured account. Both the city and the state have requirements concerning security deposit collection / return and interest rates due to tenant. Failure to comply with the rules may result in the tenant being awarded a sum of two times the deposit amount plus attorneys' fees.

Have you considered a move-in fee? The landlord can avoid onerous security deposit requirements by charging a non-refundable "move-in fee" rather than a deposit. Move-in fees are not regulated by CRLTO and are therefore the landlord's property, which can be used for any expense at any time, with no interest requirements. The lease should clearly state that the move-in fee is *not* a security deposit and that it is non-refundable.

Must your tenant vacate when the lease expires? Another twist — a tenancy in Chicago does not automatically terminate at the expiration of the lease term, despite what the lease may say. A landlord's written notice of intent not to renew must be served on tenant a minimum of 30 days prior to the expiration of the lease. A variety of strategies are available when the landlord is uncertain whether a tenant will renew.

While Chicago landlords may not be conversant with all aspects of CRLTO, their attorneys at Burke, Warren, MacKay & Serritella are, and we would be pleased to provide guidance and draft a CRLTO-compliant lease form.

Brad Ader can be reached at 312/840-7137 or bader@burkelaw.com.

Continued from page 1

Hobby Lobby is a closely held, family owned *for-profit* corporation that runs a chain of hobby stores. It is large enough to be subject to the ACA and the Mandate. Hobby Lobby maintains a health plan for its employees that includes most of the contraceptives covered by the Mandate, but the owners objected to providing four forms of contraception that acted *after* fertilization on the ground that such medications extinguish an existing human life, in violation of the owners' sincerely held religious beliefs. Hobby Lobby claimed that requiring it to be the provider of such medications would force it to violate its conscience, i.e., the consciences of its individual owners. When HHS refused to accept Hobby Lobby's objection, Hobby Lobby sued and ultimately prevailed in the Supreme Court on a 5-4 opinion written by Justice Alito and joined by Justices Scalia, Thomas, Roberts and Kennedy. Justice Ginsburg dissented, joined by Justice Sotomayor and (in most parts) Justices Breyer and Kagan.

Before reaching the merits of the religious liberty argument, the Supreme Court first had to address the interesting question of whether a for-profit corporation was a "person" protected by RFRA; that is, could a for-profit corporation "exercise religion" in the first place?

The **Religious Freedom Restoration Act of 1993** (RFRA) is a federal statute requiring exemptions from neutral, generally applicable federal laws that substantially burden a person's free exercise of religion, unless the government can show a compelling interest and that it has employed the least restrictive means in furthering the compelling interest. RFRA was enacted by a unanimous House of Representatives and a virtually unanimous Senate, and signed into law by President Bill Clinton, in response to a Supreme Court decision limiting claims for free exercise exemptions from neutral, generally applicable laws to a far less exacting "rational basis" test. Thus, the free exercise right protected by RFRA is statutory and, in that sense, distinct from the free exercise clause of the First Amendment.

Under RFRA, Hobby Lobby argued that the Mandate substantially burdened its exercise of religion by forcing it to choose between staying in business or violating its conscience. Hobby Lobby further argued that the government had no compelling interest in requiring it to be the provider of abortifacient drugs and, in any event, the government had many less restrictive alternatives for ensuring access to such drugs.

Before reaching the merits of the religious liberty argument, the Supreme Court first had to address the interesting question of whether a for-profit corporation was a "person" protected by RFRA; that is, could a for-profit corporation "exercise religion" in the first place?

Holding in a new context that corporations were legal "persons," the court held that a for-profit, *closely held* corporation could bring a claim under RFRA because (i) RFRA's statutory definition of "persons" expressly includes corporations, without distinguishing between for-profit and not-for-profit; and (ii) a closely held corporation is really just the group of human beings who seek to do business in a manner that is consistent with their religious beliefs. The Supreme Court also held that whether or not an organization is a "charity" is irrelevant to the application of RFRA because the statute itself contains no such requirement. In essence, the right to freely exercise religion includes the right to function in society — including conducting a business — in accord with the owner's religious beliefs.

Next, the Court found that Hobby Lobby's RFRA claim had merit. First, a law that compels a person to violate his or her conscience is a *per se* substantial burden on the person's exercise of religion. Thus, compelling Hobby Lobby to provide coverage for medications that, in Hobby Lobby's view, make it complicit in the taking of human life (in violation of its sincerely held religious beliefs) DOES substantially burden its exercise of religion.

Second, the Court "assumed" for the sake of argument that the government had a compelling interest in requiring employers to provide all of the mandated contraceptives. The question of whether the government really has such a compelling interest remains open.

Instead (and third), the Court held that, even if the government did have a compelling interest, it did not employ the least restrictive means to further that interest. Specifically, even assuming that it was of paramount public importance to ensure that employees of closely held for-profit corporations could receive ALL of the mandated contraceptives at no cost (irrespective of the employer's religious objection), the government still had many alternative ways to provide for this without forcing the employer to violate its conscience. Obviously, the government could simply provide the contraceptives itself. Alternatively, it could enlist a different organization to do so. Requiring a less restrictive alternative would not defeat the purpose of the Mandate or the regulatory scheme in which it was promulgated.

As the Court makes clear, the Hobby Lobby decision is

Continued on page 11

The battle over the HHS Mandate now shifts back to the not-for-profit world. The Mandate itself contains an exemption for what might be described as "core religious organizations," such as religious denominations and places of worship. The exemption does not appear to extend to religiously affiliated charities, hospitals, educational institutions and other bodies that profess religious missions and are not-for-profits.

narrow. It applies only to *closely held* for-profit corporations with religious objections to *the contraception Mandate*. Nonetheless, the decision is important in a number of respects, regardless of the identity of the objector. First, it removes any doubt about whether RFRA applies to separate statutes enacted after RFRA, including the ACA. Second, it makes clear that laws forcing a person to comply with the contraceptive Mandate in violation of his or her sincerely held religious beliefs do constitute a substantial burden on the exercise of religion under RFRA and such laws cannot be enforced because there are less restrictive ways to accomplish the goal of providing the mandated contraceptives to employees.

Justice Ginsburg's vigorous dissent argues that the majority's approach would allow businesses to claim exemption from a wide variety of important regulations and anti-discrimination laws solely on the basis of a purported religious belief.

The battle over the HHS Mandate now shifts back to the not-for-profit world. The Mandate itself contains an exemption for what might be described as "core religious organizations," such as religious denominations and places of worship. The exemption does not appear to extend to religiously affiliated charities, hospitals, educational institutions and other bodies that profess religious missions and are not-for-profits. In order to address this, HHS has promulgated an "accommodation" for such groups, under which they can avoid directly providing coverage for the mandated contraceptives if they certify that they are religious organizations and have sincere religious objections to the Mandate. Unfortunately, HHS has designed the accommodation such that the objecting organization is required to tender a form not only to the government (stating the objection), but also *to the objector's insurance provider*, based on which the insurer will then provide the mandated contraceptives and collect reimbursement from the government.

The problem with this approach is that, in the eyes of some groups, the act of tendering the form to the insurer constitutes a *de facto* instruction to the insurer to provide the mandated contraceptives, thereby implicating the objecting organization in the very act to which it is objecting. Objectors have called this a "trigger," and have argued in various courts that they should be exempt under RFRA from the Mandate itself, and from the particular requirement that they be the "trigger" of the accommodation for the same reasons Hobby Lobby was exempt: the government can easily accommodate them without requiring them to be the trigger of the coverage. As simple a change as allowing the groups to tender their objections only to the government might accomplish this.

The Supreme Court majority in *Hobby Lobby* does not indicate how it will rule on the religious objections to the accommodation for non-exempt, religiously affiliated entities. In one place, the Court majority expressly states that it is not offering any opinion on how such accommodation cases will or should come out. In another place, however, the Court points to the accommodation as an example of how Hobby Lobby might have been accommodated. As noted above, Hobby Lobby was decided on a 5-4 split, with Justice Kennedy in his usual role as the swing vote. Justice Kennedy joined the majority, but also wrote a separate concurring opinion emphasizing the availability of less restrictive alternatives and specifically endorsing the very accommodation that religious not-for-profits continue to challenge:

> [T]he means to reconcile those two priorities [of religious liberty and the government's compelling interest] are at hand in the existing accommodation the Government has designed, identified and used for circumstances closely parallel to those presented here.

Justice Kennedy's comments are *dicta*, of course, but they certainly provide a clue to how he might approach the issue when the not-for-profit cases reach the Supreme Court. A number of lower courts have reached different conclusions about this, and the matter is likely to be decided by the Supreme Court next term. In the meantime, the Supreme Court has entered a temporary injunction pending appeal, prohibiting the government from enforcing the Mandate against certain religious affiliates objecting to the accommodation.

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Continued from page 9

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