



BWM&S

McCROHON CHAIRS ILLINOIS SURS INVESTMENT COMMITTEE

The firm's Craig McCrohon was recently appointed to serve as Chairman of the Investment Committee of the Illinois SURS, the retirement fund responsible for all Illinois institutions of higher education and state hospitals. The position requires oversight of about \$16 billion on behalf of more than 200,000 members of this Illinois retirement system.



Craig McCrohon

McCrohon was appointed to SURS by Illinois Governor Pat Quinn, and confirmed by the Illinois Senate earlier in 2013.

SURS, the State Universities Retirement System, is one of the 100 largest retirement funds in the United States and covers employees at all 65 state universities, community

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Guiding Institutions in the Age of Crisis

Harlan Loeb presented at the Guiding Institutions in the Age of Crisis event sponsored by the firm's Religious and Not-for-Profit practice. Loeb, head of Edelman's Global Crisis & Risk Practice, shared insights from more than 25 years of representing institutions in crisis. The firm's Jim Serritella provided welcoming remarks. Edelman, the world's largest public relations firm, with 67 offices and more than 4800 employees worldwide, is based in Chicago.

ESTATE PLANNING & TAX LAW

TAX AND ESTATE PLANNING

When my 2012 year-end article went to press last year, a great deal of uncertainty remained as to what tax changes would be rung in (or wrung out!) as the Bush-era tax cuts were set to expire on



Greg Winters

January 1, 2013, and it appeared that all taxpayers would see increased rates. Ultimately, Congress and the President did act (albeit not until January 2, 2013) — the American Taxpayer Relief Act ("ATRA") essentially extended the Bush-era tax rates for most Americans, but reinstated a top rate of 39.6% for higher income earners.

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NEXT ISSUE: New Partners, Partnership Disputes Practice and more.

## WAMBACH RECEIVES MAKING A DIFFERENCE AWARD

**D**oug Wambach recently received the Making a Difference Award for 2013. This award honors the contributions of an individual in the legal profession or corporate world for making a difference through his/her contributions to a mentoring/tutoring program. Doug was recognized for this work as a mentor of the firm's recent summer intern Jaquan Grier and also for his accomplishments serving as board chair of Boys Hope Girls Hope in Evanston. Boys Hope Girls Hope provides academically capable, at-risk young men and women with residential living in Evanston, and scholarships to Loyola Academy and Regina Dominican High School in Wilmette. Mr. Wambach can be reached at 312/840-7019 or [dwambach@burkelaw.com](mailto:dwambach@burkelaw.com). 



*Doug Wambach*

## STEPHENS NAMED MAN OF THE YEAR AT 2013 CHICAGO BUONICONTI FUND

**T**he firm's John Stephens was named Man of the Year by the Chicago Chapter of the Buoniconti Fund at their 2013 dinner, held at Hugo's Frog Bar in Chicago on December 5. Established in 1992, the Fund has raised over \$350 million for the Miami Project to Cure Paralysis, which was co-founded by NFL Hall of Fame linebacker Nick Buoniconti, his son Marc (paralyzed by a college football injury in 1985), and neurosurgeon Barth Green. The Project has made significant breakthroughs in addressing the multifaceted problems of spinal cord injury, improving care and developing treatments for people with SCI.

The Fund's Chicago Chapter was established in 1998, and is currently led by the firm's client, Volunteer Regional Director John Bucheleres.

Stephens says, "I'm honored to be able to support the important work of the Buoniconti Fund and the remarkable developments taking place in the fight to cure paralysis." Mr. Stephens can be reached at 312/840-7017 or [jstephens@burkelaw.com](mailto:jstephens@burkelaw.com). 



*John Stephens*

## NEW MEDICAL OFFICE DEVELOPMENT IN MENOMONEE FALLS, WI

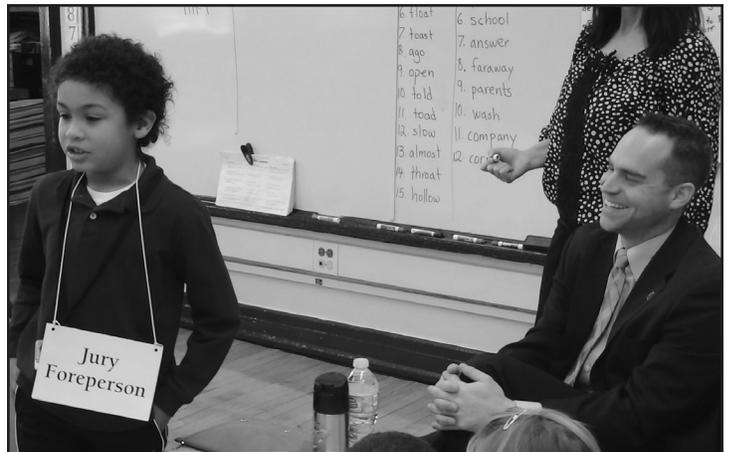


*The firm assisted Ryan Companies US in a mixed use development in Menomonee Falls, Wisconsin. Anchor tenants of this sports medicine and fitness facility are Froedtert Health and the Wisconsin Athletic Club. Ryan's Jim McDonald "quarterbacked" this conversion of the former brownfield site into a \$14 million state-of-the-art facility. The Burke Warren team, headed by John Stephens, handled all legal matters including a tax increment redevelopment agreement, acquisition, leasing, and ultimately the sale of the facility to an investor group.*

## PRO BONO SUCCESS

Associates (from top left) Adam Rick, Krista Smith, Ricki Alva, Blake Roter, and Joan Ahn recently volunteered in a 2nd Grade Classroom at Budlong Elementary School (2701 W. Foster, Chicago) as part of the Constitutional Rights Foundation of Chicago's Lawyer in the Classroom Program. The attorneys led student discussions in conjunction with the mock trial presentation of State v. Wolf, wherein B.B. Wolf was charged with destruction of property

for blowing down the homes of Stan and Fran Pig. Mr. Wolf asserted in defense that he had a cold and accidentally sneezed and did not intend the result. At the conclusion of the trial, the students acted as jurors and found Mr. Wolf guilty as charged. The students were thrilled to have our attorneys present, as captured in the photos below. Partner Alex Marks (bottom right) chairs the firm's Pro Bono committee and also participated in the program. 



## THE DANGERS OF FIFTY-FIFTY AND HOW TO AVOID THEM

**M**any businesses are owned “50-50,” for a multitude of reasons — perhaps the entity was initially formed or inherited by two parties, or perhaps the entity was initially formed or inherited by two parties, or perhaps the entity’s ownership



*Fred Mendelsohn*

structure changed during the life of the business leaving two partners. While “partners” can mean the owners of a traditional partnership, the entrepreneurs in a joint venture,

or owners in a legally recognized entity, like a corporation or a limited liability company, the problems of equal ownership don’t really change. Equal partners often fail to maintain the formalities of a governance procedure for resolving disputes — such as establishing a buyout mechanism — as would owners who were not founders but rather found themselves joined together by circumstance, without emotional ties to keep their business venture afloat.

One obvious problem in a business equally owned by two parties is deadlock or stalemate. Deadlock can be deadly; it can grind a business to a halt, create (often extreme) dissension between partners and/or lead to litigation — including “business divorce.” Business divorce litigation can run the gamut of court actions: removal and/or disassociation of partners; a compelled buy-out of a complaining partner; dissolution or sale of the underlying business; appointment of a “third-party tie breaker” (whether a third director in a corporation or an interim

*Partners without a plan for navigating an impasse before they begin working together run the risk of destroying not only their partnership, but also the value of the business.*

receiver or manager in a corporation or LLC); and/or claims of one partner for money damages for the alleged bad acts by the other. A business divorce can become the ultimate business problem, when partners can’t reconcile their differences.

Partners without a plan for navigating an impasse before they begin working together run the risk of destroying not only their partnership, but also the value of the business. Either way, without some mechanism for reconciling disputes, the risks of doing business increase dramatically, along with the risk of business divorce litigation — which too often takes on a life of its own, irreparably destroying relationships of formerly content partners.

The absence of a controlling interest by one partner vis-à-vis another partner is amply demonstrated by immeasurable deadlock cases — all of which have one common denominator: governance documents and structure which lack resolution mechanisms. Without such mechanisms, depending on the degree of disagreement and/or dissension, partners can be left to their own devices to seek satisfaction. In some cases, partners resort to “self-help,” — looting the business — sometimes directly and at other times by starting a competing business. In other situations, partners end up in heated litigation. This can often become the case in family disputes, which can grow even more complicated if trusts for passing wealth through generations are involved, as

the interests of subsequent generations become relevant. Sometimes later generations have minor interests in the business at hand, leaving intact the fundamental equal ownership dispute, but requiring complete participation of the business’s other minority interests in business divorce litigation.

If your business is 50-50, if you intend to enter into such an arrangement, or if you anticipate that such could occur (due to the imminent or eventual retirement of a third partner, perhaps) you should consult knowledgeable counsel to negotiate and design a governance structure that allows for the resolution of deadlock. One approach is to enter into a “business prenuptial agreement” detailing how the partnership will be unwound, under what circumstances, and by whom if the partners cannot agree on important issues. For example, corporate partners might agree that any deadlock dispute be submitted to mandatory mediation and/or arbitration, before invoking a “buy-out remedy,” which would allow a complaining partner to exit the business, on certain terms, for fair value. In an LLC, the entity’s Operating Agreement should provide a similar resolution mechanism, while also outlining an agreed-upon process for the appointment of a third-party manager to resolve fundamental disagreements.

Alternatively, whether the business is operated as a joint venture, partnership,

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## THE FIRM WELCOMES NEW ASSOCIATES

### Blake Roter

Blake Roter is an associate in the firm's Litigation group. Prior to joining the firm, Mr. Roter served as the law clerk for Chief Justice Shirley S. Abrahamson of the Wisconsin Supreme Court.



*Blake Roter*

Mr. Roter earned his B.A. in History and Political Science, *cum laude*, from Tulane University in 2006, and his J.D., *cum laude*, from the University of Wisconsin Law School in 2012, where he was elected to the Order of the Coif. While in law school, he served as a Managing Editor of the Wisconsin Law Review, and as both a member and coach of the

Moot Court Board. Mr. Roter also worked in the Law School's Consumer Law Clinic and as a Law Student Ambassador. Prior to attending law school, he worked on a variety of political campaigns at the local, state, and national level.

Mr. Roter was a Summer Associate with the firm in 2011. He is admitted to practice in Illinois and Wisconsin. Mr. Roter can be reached at 312/840-7116 or broter@burkelaw.com

### Bradley Ader

Bradley Ader is an associate in the firm's Real Estate group. Mr. Ader earned his B.S. in Business Process Management and Operations Management from Indiana University's Kelley School of Business in 2002, and his J.D., *cum laude*, from Loyola University Chicago School of Law in 2013. Mr. Ader worked as a Summer Associate with the firm in 2012.

Prior to law school, Mr. Ader worked as a licensed real estate salesperson in the Chicago office of a national commercial real estate brokerage firm that specialized in investment sales of office, industrial, and retail properties.



*Bradley Ader*

While in law school, Mr. Ader volunteered as a tax preparer for low income Chicago families through the LadderUp organization and reviewed residential foreclosure files in an investigation for the Office of the Sheriff of Cook County. He received CALI Awards in Administrative Law, Corporate Governance and the Law, Mergers & Acquisitions, and

Professional Responsibility.

During law school, Mr. Ader clerked for a highly regarded firm where he specialized in preparing and filing property tax appeals. He also updated and revised the Illinois chapter of the American Bar Association Property Tax Deskbook and a chapter entitled "Assessment of Taxable Property" in the IICLE Attorney's Guide to Real Estate Taxation. Mr. Ader can be reached at 312/840-7137 or bader@burkelaw.com.

### Krista Smith

Krista Smith joined the firm as a Summer Associate in 2012 and is a member of the Corporate practice group. Ms. Smith earned her B.A., *magna cum laude*, from New York University in 2008, where she majored in Anthropology



*Krista Smith*

(Honors). Ms. Smith was awarded her J.D., *summa cum laude*, from The John Marshall Law School in 2013, where she was a three-year recipient of the John Marshall Distinguished Scholar Award. During law school, Ms. Smith received CALI awards for Constitutional Law I, Civil Procedure I & II, Criminal Procedure: Police Investigation, and Bankruptcy Law. While attending law school, she served as a Staff Editor for The John

Marshall Law Review and was on the Executive Board for the Corporate Law Association.

During law school, Ms. Smith also served as a law clerk for a small Chicago law firm where she worked on various corporate, real estate, and litigation matters. She further served as both a Research Assistant and a Teaching Assistant at The John Marshall Law School for a professor who taught Legal Writing and Property Law. Ms. Smith can be reached at 312/840-7134 or ksmith@burkelaw.com. 

## TAX LAW

### TAX AND ESTATE PLANNING

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For 2013, the tax table is as follows:

Taxable Income Joint (Single)	Tax Rate	Long-Term Capital Gains Rate	Qualified Dividend Rate
\$0 - \$17,850 (\$0 - \$8,925)	10%	0%	0%
\$17,851 - \$72,500 (\$8,926 - \$36,250)	15%	0%	0%
\$72,501 - \$146,400 (\$36,251 - \$87,850)	25%	15%	15%
\$146,401 - \$223,050 (\$87,851 - \$183,250)	28%	15%	15%
\$223,051 - \$398,350 (\$183,251 - \$398,350)	33%	15%	15%
\$398,051 - \$450,000 (\$398,051 - \$400,000)	35%	15%	15%
\$450,001 & above (\$400,001 & above)	39.6%	20%	20%

While ATRA brought some relief, many of the tax provisions in the Affordable Care Act (referred to as “Obamacare” on both sides of the aisle) also took effect in 2013, creating several new or increased taxes. The most prominent of the new taxes are:

- **Increased Medicare Tax** – An individual is liable for Additional Medicare Tax equal to 0.9% if the individual’s wages, other compensation, or self-employment income (together with that of his or her spouse if filing a joint return) exceed the threshold amount for the individual’s filing status. Thus, the wage withholding rate for Medicare taxes will be 1.45% up to the income threshold and 2.35% (1.45% + 0.9%) on amounts in excess of the threshold amounts.

Filing Status	Threshold Amount
Married filing jointly	\$250,000
Married filing separately	\$125,000

Filing Status	Threshold Amount
Single	\$200,000
Head of household (with qualifying person)	\$200,000
Qualifying widow(er) with dependent child	\$200,000

- **Surtax on Unearned Income** – A new surtax will also be imposed on the unearned income of individuals, estates, and trusts. For individuals, the surtax is 3.8% of the lesser of:

1. The taxpayer’s **net** investment income; or
2. The excess of modified adjusted gross income over the threshold amount.

Investment income includes income from interest, dividends, annuities, royalties, rents (not derived from a trade or business), capital gains (not derived from a trade or

*Continued on page 7*

business), trade or business income that is a passive activity with respect to the taxpayer, and trade or business income with respect to the trading of financial instruments or commodities. The surtax on unearned income would result in long-term capital gains and dividends being taxed at rates as high as 23.8% (20% + 3.8% surtax).

### Consider New Tax Rates when Calculating Estimated Tax Liabilities

Make sure that you have paid enough in federal and state withholding taxes to avoid penalties. For 2013, you will avoid a federal penalty for the underpayment of estimated tax if your tax payments (including withholdings) have been timely made and are at least equal to the lesser of:

- (i) 100% of the tax shown on your 2012 federal income tax return (110% for individuals with adjusted gross income in excess of \$150,000 or \$75,000 for married individuals filing separately); or
- (ii) 90% of the tax shown on your 2013 federal income tax return.

Illinois requires that you pay in the lesser of (i) 100% of the tax shown on your 2012 return; or (ii) 90% of your 2013 liability.

When calculating your federal estimated payments, be sure to take into consideration the increased tax rates for high income taxpayers and the additional taxes related to the Affordable Care Act.

### Tax-Free Distributions from IRAs for Charitable Purposes

Individuals age 70½ or older are permitted to make direct transfers of up to \$100,000 annually from an Individual Retirement Account (IRA)

to a charitable organization. Funds distributed directly from your IRA to charity are not included in your taxable income. Consequently, you are not allowed to claim a tax deduction for the charitable contribution.

This provision is advantageous in that without it, the individual must take a distribution from his IRA and

*When calculating your federal estimated payments, be sure to take into consideration the increased tax rates for high income taxpayers and the additional taxes related to the Affordable Care Act.*

then contribute the funds to charity — requiring the individual to include the distribution in his/her income, before taking the permitted deduction for his charitable contribution. In many cases that deduction would not fully offset the additional income because of (among other things) the phase-out of itemized deductions for high-income taxpayers.

The provision permitting the direct transfer of funds from an IRA to a charity was scheduled to expire as of December 31, 2013. However, Congress may act to extend this provision into 2014.

### Estate & Gift Taxes

ATRA also brought much needed clarity to the estate and gift tax regime. Without ATRA, the tax-free exemption amount would have decreased from

\$5.12 million in 2012 to \$1 million in 2013. ATRA essentially made permanent the Bush-era tax-free exemption amount. For 2013, the exemption amount is \$5.25 million (\$10.5 million for married couples). The exemption amount is indexed for inflation and will increase to \$5.34 million (\$10.68 million for married couples). The top tax rate for estate and gift tax purposes has also been set at 40%.

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. For 2013, the rate is a flat 40%. The tax is in addition to any gift or estate tax otherwise payable. As with the gift and estate tax, each taxpayer is allowed a \$5.25 million GST tax exemption for 2013.

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

Many clients utilize a portion or all of their \$5.25 million gift tax exemption (\$10.5 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.

If you already have taken advantage of the current \$5.25 million exemption amount or you are not in a position where it makes sense to gift a large amount, you should still continue to plan a gifting strategy going forward.

## THE FIRM'S INTERNAL INVESTIGATIONS PRACTICE

Companies of all sizes in all industries often find themselves confronted with burdensome allegations of corporate fraud,



Joe Roddy

inquiries from government and regulatory entities, allegations of whistleblowers, and incidences of employee misconduct. With the widespread use of technology

across all business sectors, cyber crime is also a growing concern.

In any such situation, an internal investigation becomes a key part of a company's proactive strategy to minimize its risk of employee misconduct, protect its reputation and brand, and, once allegations are formalized, to ensure that essential facts are gathered and presented, so that any ensuing damages are minimized. These investigations allow a client to get out in front of issues and respond in a reasoned and well thought out approach.

Burke, Warren, MacKay & Serritella's Internal Investigations practice

provides critical expert assistance to companies navigating the complex and evolving landscape of laws surrounding implementation of such investigations. Attorneys in the firm's Internal Investigations practice have

*Internal investigations allow a client to get out in front of issues and respond in a reasoned and well thought out approach. They become a key part of a company's proactive strategy to minimize its risk.*

conducted various investigations and have successfully assisted clients in enacting protective measures such as establishing policies to prevent employee misconduct, designing and implementing corporate compliance procedures and providing employee training and audit programs. These measures serve to mitigate reputational,

brand, and litigation exposure.

Our Internal Investigations attorneys represent and assist clients faced with criminal or civil proceedings, in their dealings with government agencies, state and local regulatory bodies, and grand juries, and can advise on best practices for responding to a subpoena or a request for a face-to-face interview. Former prosecutors and government attorneys assist in advising clients, so that the best possible outcome is reached.

The Internal Investigations practice is chaired by partner Joe Roddy, who previously served in the Cook County State's Attorney's office, where he prosecuted numerous jury trials and oversaw a multitude of different types of criminal investigations. In private practice, Joe has coordinated and conducted internal investigations for Fortune 500 companies, closely-held companies and local municipalities.

For more information about internal investigations, contact Joe Roddy at 312/840-7033 or jroddy@burkelaw.com. 

### McCROHON

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colleges and hospitals in Illinois. The fund is larger than the endowments of the University of Chicago and Northwestern University combined. Of the private foundations in the United States, only the Gates Foundation has more assets.

The position carries significant

responsibility in addition to oversight of the multi-billion portfolio. The Committee oversees the spending of about \$50 million in professional fees each year to attorneys, fund managers, brokers and other professionals.

McCrohon has significant experience in the financial sector, having worked with the staff of the United States Senate Committee on Banking and advising financial institutions and their

boards of directors throughout his career. In addition to his legal education, McCrohon studied financial regulation at the London School of Economics and he holds an M.B.A. in finance from the Wharton School of Business.

McCrohon can be reached at 312/840-7006 or cmccrohon@burkelaw.com. 

## JONATHAN MICHAEL DEVELOPS NEW COURSE AT JOHN MARSHALL LAW SCHOOL

Jonathan Michael has been asked to prepare and teach an LLM level course at John Marshall Law School on Business Succession Planning. For the past 13 years, Jonathan has been developing and teaching master level courses at the law school including Basic Estate Planning and Advanced Estate Planning. He is currently developing this new course which he will teach in the fall of 2014. Jonathan can be reached at 312/840-7049 or [jmichael@burkelaw.com](mailto:jmichael@burkelaw.com). 



*Jonathan Michael*

### YEAR-END TAX

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#### Annual Exclusion Gifts

In 2013, you may make a gift of \$14,000 to any individual and certain trusts without any gift tax consequences. Married individuals may make gifts of up to \$28,000. 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 2013, gifts must be made by December 31. Gifts over \$14,000 or gifts that will be “split” between spouses must be reported on a gift tax return, which must be filed in April 2014. The annual exclusion amount is scheduled to remain \$14,000 in 2014 (\$28,000 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 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.

#### Take Advantage of Today’s Low Interest Rates

Interest rates remain at historically low levels. Low interest rates enhance the benefits of several gift and estate planning strategies. One such strategy is the “grantor retained annuity trust” or GRAT. A GRAT is an irrevocable trust to which a donor transfers property, while retaining the right to receive a fixed annuity for a specified term. At the expiration of the term, the property usually passes outright or in trust for the

benefit of descendants or other named beneficiaries. The amount of the gift resulting from the transfer of the property to the GRAT is the present value of the remainder interest that passes to the beneficiaries at the end of the term. Under the valuation methods adopted by the IRS, the lower the interest rate at the time of the gift, the lower the present value of the remainder interest — and the smaller the amount of the gift that must be reported to the IRS. Interests in closely-held family businesses or marketable securities with high growth prospects are often ideal properties to transfer to a GRAT. While there has been considerable discussion about disallowing “zeroed-out” GRATs and requiring a minimum GRAT term of 10 years, Congress has not taken any action in this respect. As a result, GRATs remain a very attractive planning opportunity.

Low interest rates also make sales to “defective” grantor trusts more attractive. Under this strategy, a taxpayer creates a trust, typically for his or her spouse and descendants. The taxpayer then sells assets to the trust, while holding a Note requiring the trust to repay the taxpayer in installments. The trust is structured so that it is ignored for income tax purposes, resulting in no income tax consequences upon the sale. The interest paid on the Note is typically at the applicable federal rate, which changes month to month based on current market rates. The lower the interest rate on the Note, the greater the amount of assets that will accumulate in the trust, free of estate, gift and GST taxes.

This article was prepared by Greg Winters. He can be reached at 312/840-7059 or [gwinters@burkelaw.com](mailto:gwinters@burkelaw.com). 



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## DANGERS OF FIFTY-FIFTY

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corporation or LLC, the partners might structure a mechanism to dissolve and split equally the value of the business, subject to offsetting claims to be resolved by mediation and/or arbitration.

If partners are unwilling to commit to such alternative dispute resolution procedures, they may be instead willing to agree to limit the scope of dispute resolution, such as waiving any right to a jury trial and/or limiting the types of disputes that can be brought to court.

Imagination and creativity are required in structuring a business relationship (whether existing or contemplated), so that partners feel each will receive a “fair shake,” should disputes arise. Further options can include a dissatisfied partner disassociating from the business after receiving fair value for his/her investment (in a global sense); mandatory

business counseling (a service offered through most major business and/or law schools for distressed business ventures); or an agreement effecting an orderly liquidation and wind-up of the business, so that each partner can feel that he or she exited the business “whole.”

The moral of our story: provide concrete pathways early on for addressing and resolving deadlock situations, before business relationships become complicated, and you can avoid messy business divorce litigation.

For those interested in further discussing this article, feel free to contact Fred Mendelsohn at [fmendelsohn@burkelaw.com](mailto:fmendelsohn@burkelaw.com) or at 312/840-7004. 