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SECURITIES LAW

TWO'S COMPANY

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crept upward, rules were triggered forcing firms to file private financial information that became publicly available.

The Way It Was: If the number of shareholders of a company exceeded 500, the firm would be required to file annual and quarterly reports with the SEC. If the number of equity securities held by a public company dipped below 300, then the company was required to de-register securities and return to its status as a privately-held company.

The Way It Will Be: Companies may have up to 2,000 shareholders before triggering periodic filing requirement. In addition, up to (but not including) 500 of the shareholders may be non-accredited investors. Persons who acquired securities under the crowd-funding exemptions are also excluded from this 2,000 holder limit. Note, however, that as firms approach the shareholder limit, many of the same practical difficulties of being public will arise. These include making a market for stock, providing information to the shareholders, and adhering to corporate governance practices to shield officers and directors from shareholder claims of self-dealing and incompetence. For banks and bank holding companies

that are also public firms, if the number of holders of securities declines to 1,200 or less, then the firm must de-register as a public company. The 300 threshold of the prior law still applies to non-bank firms.

Impact rating: ⭐⭐⭐

Somewhere in the middle. Many public companies intentionally reduce the number of shareholders to trigger de-registration.

IPO-Lite

Companies have complained for years about the excessive burdens of Sarbanes-Oxley, especially on smaller firms. The Jobs Act is one of the most significant reductions of the regulatory burden of the Sarbanes-Oxley Act on smaller public companies.

The Way It Was: Companies with less than \$1 billion in revenue (small by the standards of public markets) endured the expense of rules applicable to Fortune 500 firms.

The Way It Will Be: Firms with less than \$1 billion in sales will need only provide two years of audited financial statements. Upon the adoption of regulations, executives and their investment bankers may discuss the state of their company more freely, even before the effective date of a registration

statement. The new law also exempts smaller companies from detailed executive compensation disclosures, the Dodd Frank rules regarding “say-on-pay” voting, and Sarbanes-Oxley Section 404 rules regarding verification of the company’s internal financial procedures.

Impact rating: ⭐⭐

Hard to tell, but this will likely relieve smaller public companies materially from the burdens of SEC requirements.

The Beginning of a Trend?

Ironically, during this time of enhanced government regulation of many financial firms, these new rules demonstrate that the new climate in Washington is more accommodating of business capital raising efforts. With tight money, tight times, and tight elections, government officials are revising rules to encourage more investment and growth in entrepreneurial firms.

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WEALTH & SUCCESSION PLANNING

COUNTDOWN TO 2013

If you are considering significant gift-giving, you may want to make those gifts before year-end. In less than six months, the chance to make large gifts, free of gift tax, will end unless Congress acts. On January 1, 2013, the current transfer tax rules will revert to the pre-2001 rules, with a gift tax exemption of only \$1 million and a GST exemption of only \$1 million (adjusted for inflation).

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BWM&S

CHICAGO FAMILY BUSINESS COUNCIL PARTNERS WITH DEPAUL UNIVERSITY

For more than 20 years, the Family Business Council has taken the lead in offering a support network to owners and heads of family businesses in the Chicago area. Leaders from nearly 100 member companies have come to rely on the Council to create opportunities for business growth and leadership mentoring. Member companies operate in industries including construction, printing, accounting, retail, metal fabrication, floor coverings, and chemicals manufacturing. Together, members address common

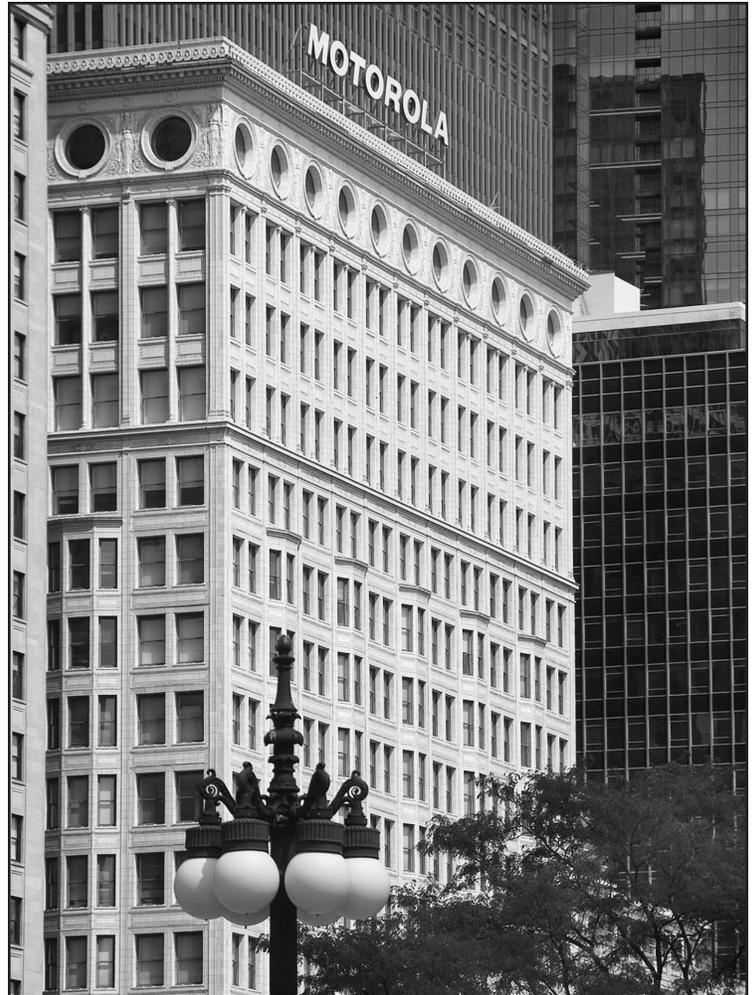
challenges faced by every family-owned and closely-held business, regardless of the products or services they offer.

Family Business Council roots date back to 1993, when local businessman James P. Liataud approached the University of Illinois at Chicago about underwriting an organization dedicated to encouraging family



Judy Hogel

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CHANGING LANDMARK

For more than a century, the landmark Railway Exchange Building, located at 224 South Michigan Avenue in Chicago, featured the permanent Santa Fe sign on its roof. The sign was recently changed to read MOTOROLA to identify the building's newest tenant. The firm's John Stephens represented the landlord in this transaction, working with Hamilton Partners on behalf of an institutional investor.

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NEXT ISSUE: Firm grows again and more.

TWO'S COMPANY, TWO THOUSAND IS A CROWD: New Law Relaxes Restrictions on "Crowd Funding"

Bowing to the backlash against government regulation in the financial markets, Congress and the President have approved changes to securities laws that loosen rules on selling stock and other securities. The American Jobs Act, enacted this spring, permits companies to raise private capital from thousands of buyers regardless of their wealth, instead of only a few dozen non-accredited purchasers. In addition, the law includes a smorgasbord of reforms relaxing prior restrictions on private capital raising.

Crowd Funding

The highest profile provision legalizes "crowd funding," a recent internet-inspired trend in fundraising based on "crowds" that gave money in small amounts to non-profits and start-ups. The trend had become sufficiently popular that businesses lobbied Congress to bless this novel fundraising technique.

The Way It Was: Before the Act, regulations permitted sales of securities to a virtually unlimited number of purchasers, up to \$1 million per offering. However, if a company raised more than \$1 million, the law restricted the number of buyers to 35 non-wealthy non-accredited investors.

The Way It Will Be: After the Jobs Act, and the adoption by the Securities and Exchange Commission of rules implementing the law, companies will be permitted to issue an unlimited amount of money to an unlimited number of investors — regardless of the wealth of the investor. As usual, the rules will include much fine print. First, the aggregate offering amount for securities sales may not exceed \$1 million in any year. Second, purchasers of securities are limited in any year to the greater of \$2,000 or five percent of the purchaser's annual income or net worth (for those with

annual income or net worth of less than \$100,000). Persons with annual income or net worth greater than \$100,000 may invest up to ten percent of their annual income or net worth.

To qualify for crowd funding, companies must use a broker registered as a funding portal with the SEC, or registered under the rules of the financial authority that regulates all other brokers. Issuers must file short-form disclosures with the SEC, which include financial statements and a description of the risks associated with the offering. Any broker assisting with a crowd-funded investment must confirm that purchasers do not invest more than the rules permit and that the company honor a promise not to take any money unless a specified minimum is raised. The broker must also obtain a background check on the principals of the issuer.

The company itself must provide the SEC with financial statements, audited in the cases of capital raises exceeding \$500,000. The issuer must also provide descriptions of the use of the funds, methods for determining the price of the securities, and the capital structure of the firm.

Importance rating (five being the highest): 6*

The red tape involved in using the crowd-funding renders this option inefficient for most offerings.

Regulation A and the Mini-IPO

For years, Regulation A has enabled issuers to sell shares to a few hundred purchasers without fear of a full-blown IPO registration process. One big problem, however: the \$5 million limit made this option attractive to only selected businesses that appealed to retail investors. Issuers rarely used this exemption given the complex rules combined with the low limit on the offering.

The Way It Was: Prior rules limited companies using this rule to a \$5 million offering.

Companies provided a detailed prospectus and followed the small public company disclosure guidelines. They avoided the agony and the ecstasy of selling shares on a public stock exchange to thousands of purchasers, which would have cost hundreds of thousands of dollars for the privilege of listing shares on a public exchange.

The Way It Will Be: Companies may issue up to \$50 million as part of this "mini-IPO." Firms must comply with state securities laws, file audited financial statements and other regulatory disclosure statements similar to those required of public companies. The SEC may require some periodic filings in the future, as are now required of public companies.

Impact rating: 6* 6* 6* 6*

This could be big. Real big. At \$50 million, many companies may forego initial public offerings and accept the limits of this new Regulation A. Firms raising tens of millions of dollars may happily accept the inconvenience of the detailed rules that would otherwise suffocate an offering of only \$5 million.

Exemptions for Periodic Filings with the SEC

The new law allows companies to accommodate many more shareholders, while avoiding periodic reporting requirements with the SEC. Smaller firms sometimes had hundreds of shareholders, such as 100-year-old banks or issuers whose shares are held by several generations of owners. As the numbers of owners quietly



Craig McCrohon

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POPE BESTOWS ORDER OF ST. GREGORY THE GREAT KNIGHTHOOD ON THREE DISTINGUISHED CHICAGO CATHOLICS

On June 23, Francis Cardinal George presented a Papal Decree from Pope Benedict XVI appointing three distinguished members of the Chicago Catholic community to knighthood in the Pontifical Equestrian Order of St. Gregory the Great. The newly appointed Knights of St. Gregory are the firm's Jim Serritella; Jimmy Lago, Chancellor for the Archdiocese of Chicago; and James Denney, business leader and special advisor to the Archdiocese of Chicago. The ceremony at St. James Chapel in Chicago included a prayer service by Cardinal George and a formal induction to the Order. The recipients' families, friends and colleagues were present to share the occasion.

The Knights of the Pontifical Equestrian Order of St. Gregory the Great was established in 1831 by Pope Gregory XVI and is the highest honor to a lay person awarded by the Pope. It is one of the five orders of knighthood of the Holy See. This Order is bestowed on Catholic men and women in recognition of their personal service to the Holy See and the Church, unusual labors, and the good example they set in their communities and country. Past recipients include G. K. Chesterton, British essayist, poet, novelist, and historian; Bob and Dolores Hope, American philanthropists and entertainers;



From left: James Denney, Jim Serritella, Jimmy Lago, and Francis Cardinal George.

Eunice Kennedy Shriver, founder of the Special Olympics; Roy E. Disney, longtime senior executive for The Walt Disney Company; and Riccardo Muti, conductor and music director of the Chicago Symphony Orchestra 

CORPORATE LAW

FIRM WELCOMES NEW CORPORATE ASSOCIATE

Burke, Warren, MacKay and Serritella welcomes associate Erica “Ricki” Alva to its Corporate group. Ms. Alva focuses her practice on complex business transactions, including



Ricki Alva

mergers and acquisitions, venture capital, and private equity transactions. She also advises clients on general corporate matters, internal restructurings

and business contracts. Ms. Alva has experience assisting clients in varying industries including manufacturing, energy, information technology, and health care. She joins the firm after practicing at the Chicago-based firm Neal, Gerber & Eisenberg, LLP, where she worked on corporate and transactional matters.

“I chose Burke, Warren because I was looking for an environment where I would be encouraged to grow and develop my practice,” said Alva. “I have enjoyed getting to know many of the firm’s clients and I appreciate the sophisticated and challenging work they bring to the firm.”

Ms. Alva received her J.D. in 2009, *cum laude*, from Northwestern University School of Law. During her time in law school, Ms. Alva was a member of the Northwestern Journal of International Law and Business. She received her undergraduate degree in 2005, *cum laude*, from Northwestern University. Ms. Alva spent a year as a Dunn Fellow in the Office of the Governor of Illinois before entering law school. She has also worked as a volunteer at Talcott Elementary School through the Power Lunch Program.

Ms. Alva may be contacted by phone at 312/840-7112 or by email at ealva@burkelaw.com 

FAMILY BUSINESS COUNCIL

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businesses. The Family Business Council welcomed its first members in 1994 and operated under UIC's College of Business Administration for nearly two decades.

"We had a meaningful and productive partnership with UIC for many years," says Judy Hogel, Family Business Council executive director. "Over time, the University's plans and needs changed and so did ours. It became clear to all involved that serving our active and growing membership would require a new University partner."

The Council's desire was to become more independent, yet remain affiliated with a major university program. Negotiations between DePaul University's Driehaus College of Business and the Family Business Council took place in mid-2011 and culminated with an agreement later that year.

"CFBC membership puts me in regular conversation with successful CEOs with decades of business experience."

— **Burt Klein**

Under its affiliation agreement with DePaul, the council now operates as a separate entity with its own board. Now known as the Chicago Family Business Council (CFBC), it coordinates efforts with DePaul's Driehaus College

of Business and with the Coleman Entrepreneurship Center in particular, to provide educational programs for students and local businesses. The firm's Jeff Warren represented the CFBC in



Burt Klein

its negotiations with DePaul, and the firm remains a strategic partner with the CFBC. "Our new DePaul partnership is delivering many new opportunities for both CFBC members and for DePaul," says Hogel. "We are now able to deliver important new benefits to CFBC members with a combination of professor know-how and student ambition."

Via DePaul, CFBC members now have access to many high-value services ranging from executing research projects to designing and implementing training programs. There are also opportunities for CFBC members to teach courses as adjunct professors.

"If a member requests help with a strategic plan or a new product launch, Driehaus College of Business can very likely address that need with a for-credit student project," says Hogel. The work would be performed under professorial direction at no or vastly reduced cost to the CFBC member. DePaul students also benefit from the partnership as they receive authentic business experience that they are not likely to find elsewhere.

"Better than a Board"

As of July 1, the CFBC welcomed new member president Burt Klein, CEO of Chicago-based PortionPac Chemical Corp., a business with 100 employees providing sustainable cleaning products

to janitorial, sanitation and food service industries. PortionPac was recently featured in *Inc. Magazine*. (See www.inc.com/top-workplaces/2010/a-look-inside-the-un-factory.html)

Klein first came to the CFBC when he felt a need for insight into some of the challenges of running his business; he was hoping for enlightened support from accomplished CEOs.

"I have a lot of smart friends in different fields to talk to, but very few have a full understanding of what it takes to run a business" says Klein. "CFBC membership puts me in regular conversation with successful CEOs with decades of business experience. There aren't many places where you can be surrounded by that level of talent that is open to sharing what they have learned. In my view, CFBC is better than a board."

CFBC members get together eight to ten times a year for "all-in" meetings. They also take turns hosting various monthly CFBC forums. To find out more about the CFBC, please contact Judy Hogel at 312/362-7518 or Judy@chicagofbc.com. Burt Klein can be reached at 312/226-0400 or bklein@portionpaccorp.com. Firm sponsorships for the CFBC are Jeff Warren, who can be reached at 312/840-7020 or jwarren@burkelaw.com, and Jonathan Michael, who can be reached at 312/840-7049 or jmichael@burkelaw.com. 

FIRM EXPANDS, RECEPTION TO RELOCATE TO 21ST FLOOR

Burke, Warren, MacKay & Serritella is delighted to announce that, to accommodate our own continuing growth and increasing client needs, we are expanding and refining our facilities here at 330 North Wabash in Chicago. In a few short months we will be established on the 21st and 22nd floors — renovations are already underway on 21, and our reception area will move from 22 to 21.

“When so many other firms are downsizing, our expansion is testimony to the steady growth of both our client base and our clients’ operations,” says Doug Wambach, chair of the firm’s real estate practice and member of its management committee. “We were bursting at the seams when 21 became available. Beyond meeting our own increasing space requirements, adding convenience and comfort for visiting clients became a priority in our expansion.”

Of course, like anyone keenly anticipating soon-to-be-completed home renovations, we are eager to host! We can’t wait to extend our enhanced capabilities to offer richer services and amenities to our clients.

Our new and larger Reception Area on 21 will function as our hub — providing efficient access to a new set of meeting rooms, which will be fully outfitted to accommodate client



New firm conference rooms will be clustered just steps from the reception area.

meeting needs, including an adjacent food service facility.

Firm expansion is occurring just ahead of the building’s new identity as “AMA Plaza,” as the American Medical Association will soon take up residence in the Chicago landmark tower (formerly known as “IBM Plaza” after its original owner).

We are also looking forward to the AMA Plaza’s installation of a conference center which we can use for larger meetings or presentations of up to 100 people, as well as a food service facility on the 16th floor of the building, serving breakfast and lunch. 

WEALTH & SUCCESSION PLANNING

FIRM’S MICHAEL FEATURED IN *CRAIN’S CHICAGO BUSINESS*

The firm’s Jonathan Michael was recently featured in a *Crain’s Chicago Business* article titled “Succession Planning Do’s and Don’ts.” In the article, Mr. Michael discusses best practices when making a succession plan. Key advice includes the need for business owners to put everything in writing to avoid confusion down the road. In a follow-up to the article, Michael said, “While business succession specifics may seem like they are cast in stone during a meeting, details and recollections fade as time passes. Put it in writing!” The *Crain’s* two-part article series also featured



Jonathan Michael

specializes in estate and gift tax issues, as well as wealth and business succession planning for closely held business owners and entrepreneurs.

members and strategic partners of the Chicago Family Business Council.

Mr. Michael, a partner in the firm’s Wealth and Succession Planning practice,

Together with Jeff Warren, Mr. Michael is the firm’s sponsor-liaison to the Chicago Family Business Council at DePaul University, where he advises owners of family owned and closely-held businesses on a wide variety of business and succession issues.

Mr. Michael can be reached at 312/840-7049 or jmichael@burkelaw.com. 

WEALTH & SUCCESSION PLANNING

COUNTDOWN TO 2013

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	Current Law	2013 Law
Gift Tax Exemption (the amount that may be transferred during life free of Federal gift tax)	\$5,120,000	\$1,000,000
Top Gift Tax Rate	35%	55%
Generation-Skipping Transfer (GST) Tax Exemption	\$5,120,000	\$1,000,000*
Top GST Tax Rate	35%	55%

*adjusted for inflation

Taxes will significantly increase for gifts made in 2013.

Gift Tax Due

Gift of \$5,120,000 in 2012	- 0 -
Gift of \$5,120,000 in 2013	\$2,111,000

GST Tax Due

Gift of \$5,120,000 in 2012	- 0 -
Gift of \$5,120,000 in 2013	\$2,068,000

Taxes on a gift of \$5,120,000 in 2013 to a GST exempt trust will total \$4,179,000 (i.e., gift tax of \$2,111,000 plus GST tax of \$2,068,000), versus no taxes in 2012.

What Might Congress Do This Election Year?

1. **Congress does nothing.** With a gridlock in Washington, the return of the pre-2001 rules of only a \$1 million gift and estate tax exemption, a \$1 million GST tax exemption (adjusted for inflation), and a 55% rate seems quite possible.
2. **The Democrats Retain the White House and Control the House and Senate.** The Obama 2013 Budget Proposals include only a \$1 million gift tax exemption, a \$3.5 million estate and GST tax exemption, and a 45% top rate.
3. **The Republicans Control the White House and the House and Senate.** The current gift tax, GST tax, and estate tax exemption of \$5,120,000 might be made permanent with the current top 35% rate.

Likely Scenario: Neither party controls the White House and both the House and Senate. Stalemate continues, and the pre-2001 rules return.

What to Consider

Following are steps to take advantage of the \$5,120,000 gift and GST tax exemption amounts during the remaining months of 2012:

Outright Gifts. Make outright gifts to children and more remote descendants.

Gifts in Trust. Make gifts to GST tax exempt trusts for the benefit of children and more remote descendants. Use assets you expect to appreciate to increase the tax savings of such a gift. Your spouse can also be a beneficiary of such trusts entitled to discretionary distributions, with no adverse tax consequences.

Forgive Loans. If you have made loans to children or others, consider forgiving such loans thereby using a portion of the increased gift tax exemption.

GRATs. Use a grantor retained annuity trust (GRAT) when making a gift. A GRAT is a trust to which you gift assets, retaining the right to receive an annuity from the trust for a certain period of time. Upon the termination of such period, the GRAT assets pass in trust for children free of estate and gift tax. GRATs are an excellent wealth transfer tool, particularly in light of continuing historically low interest rates.

Intentionally "Defective" Irrevocable Grantor Trusts. Use an irrevocable "grantor" trust to make a large gift to a trust for the benefit of descendants. Under this type of grantor trust, the assets of the trust are not subject to estate, gift, or GST taxes, but you pay the income tax on trust income, thus maximizing the amount being transferred from your taxable estate to the beneficiaries. You can sell assets to the trust, without triggering capital gains tax on the sale. Your spouse can also be a beneficiary of the trust entitled to discretionary distributions, with no adverse tax consequences.

Both Spouses Create Trusts for One Another. Both spouses can use their exemptions to create an irrevocable trust for the



Karen MacKay

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COUNTDOWN TO 2013

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benefit of the other spouse and descendants. Spouses thereby keep benefits from the trusts, if they are carefully crafted. Such trusts must be designed to avoid the “reciprocal trust” rule, whereby the courts “uncross” the trusts, a result that defeats the trusts’ tax advantages.

Take Action Before Year-End

Until January 1, 2013, or until the date on which Congress might take action, you can take advantage of the current law, including the ability for a married couple to transfer up to \$10,240,000 in assets, gift tax free. If you would like to discuss the opportunities still available this year, please contact Karen MacKay at 312/840-7009 or at kmackay@burkelaw.com. 

LITIGATION

COMPUTER FORENSICS AT BURKE, WARREN

Spoliation (spō-lē-ā-shen) is the destruction, alteration, or failure to preserve evidence. If a court determines that a party in litigation has failed to produce evidence due to spoliation, juries are instructed that they may infer that the evidence would be adverse so long as the evidence was: (a) under the control of the party that destroyed or altered it; (b) not equally available to the other party with the evidence; and (c) would have been produced by the party who destroyed the evidence if it was favorable. *Illinois Pattern Jury Instructions, Civil, No. 5.01.*

“A spoliation instruction is a powerful litigation tool that can be as damaging

to your opponent as the evidence that was destroyed,” said Gerry Ring, chair of the firm’s Litigation group. Proving spoliation before computer forensics was difficult, and often required whistleblower testimony. Today, with the help of experts like Protek International, Inc.’s Keith Chval, spoliation can be easier to detect and prove at trial.

Chval is an attorney and former prosecutor who attended the July 2012 BWM&S Litigation group meeting to present: “Deleted” Doesn’t Mean “Gone.” Chval explained the benefits, and limits, of digital investigation, including computer forensics. “Television shows like *CSI* create many myths about the ability to recover information that someone has intentionally tried to delete,” said Chval, adding, “each investigation is unique and depends on the methods used to attempt to purge damaging evidence.”

Protek’s investigations can lead to conduct other than evidence destruction, including evidence manipulation. Protek conducted a digital investigation for BWM&S that disclosed the production of a “bogus” laptop computer in discovery. Upon its review of the computer that was produced, Protek learned that the emails it contained were created with Word 7 software. The problem for the party producing the computer, however, was that Word 7 software was never

installed on it, so it could not have been the computer used to create the emails. Further investigation disclosed that the Word

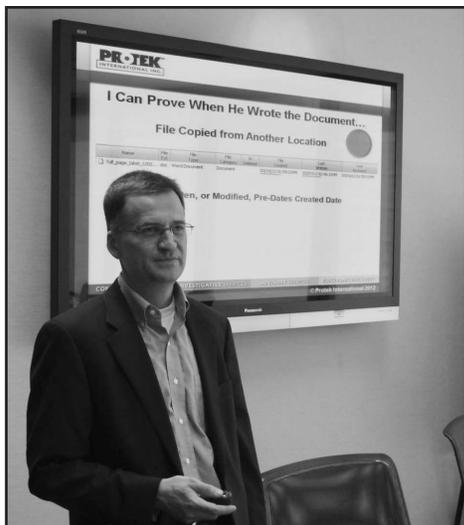
7 emails on the bogus laptop had been transferred onto it from another computer via a USB port *after* the inspection was made — meaning the emails contained on the bogus laptop were cherry-picked for the inspection, leaving the balance of the emails on the original computer that created them.

Unfortunately, software designed to destroy computer evidence continues to improve, making the destruction more common, and more challenging to detect. Chval advised BWM&S that the best way to recover valuable evidence, or detect its destruction, is to act fast to preserve the evidence, and to protect the chain of custody to avoid inadvertent contamination so that it can be used at trial.

For more information regarding digital investigations, including computer forensics, contact Keith Chval at 630/986-8206, kchval@protekintl.com or Gerry Ring at 312/840-7014, gring@burkelaw.com. 



Gerry Ring



Computer forensics expert Keith Chval from Protek International Inc.