



# POINT OF LAW

## Clarkston Joins Firm as Shareholder

Kenneth J. Clarkson has joined Sullivan Ward as a shareholder to continue his concentration on counseling real estate and other businesses in organization, finance and operation.

Mr. Clarkson's extensive experience in real estate financing includes negotiating institutional and non-institutional joint ventures, mezzanine financing and traditional construction and permanent financing. He represents both sellers and purchasers on developed and raw land projects, negotiates purchase agreements for properties to be held for development and syndication, and works with developers in establishing condominium and co-operative associations.

Mr. Clarkson assists clients in the leasing of commercial shopping centers and office developments, negotiating leases for office buildings larger than 250,000 square feet, as well as strip and regional malls. He lectures regularly at seminars involving real estate matters.

Mr. Clarkson is authorized to practice in Michigan and Florida and is a member of the American, Florida, Oakland County and Livingston County Bar Associations.

## Attorneys Reap Professional Rewards

Several Sullivan Ward attorneys have been honored by their peers for their ethical and professional acumen by the following organizations:

### *Litigation Counsel of America*

Sheri B. Cataldo, Ronald S. Lederman and Lee C. Patton have been named to the Litigation Counsel of America, an invitation-only trial lawyer honorary society. Membership is limited to 3,500 Fellows, representing less than one-half of one percent of American lawyers. Fellows are selected and invited into the Fellowship after being evaluated on effectiveness and accomplishments in litigation and trial work, along with ethical reputation. Established as a trial and appellate lawyer honorary society reflecting the American bar in the twenty-first century, the LCA represents the best in law among its members.

### *Best Lawyers in America*® 2008

Brian S. Ahearn, Kevin J. Gleeson and Wallace M. Handler have been named *Best Lawyers* in America honorees. *Best Lawyers* is a peer-review publication in the legal profession and assists lawyers and clients in finding legal counsel in unfamiliar jurisdictions or unfamiliar specialties.

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## BEING EMAIL SAVVY Could Save Your Business

by Sheri B. Cataldo & Kevin S. Toll

Email has become a convenient staple in today's business culture, perhaps even a risky one for some employers. With the press of a button, companies could be vulnerable to substantial corporate losses.

While many business emails contain disclaimers for their content, legal concerns still exist. Email is subject to discovery in lawsuits just like other employer records. That's significant because emails can be retrieved long after an employee believes they've been erased.

Employers are concerned, too, about liability for inadvertent or unintentional disclosure of confidential information, whether it's in an email's text or its attached documents. The sheer volume of communication email generates also could expose businesses to liability. The more email sent, the greater the possibility for exposure.

Companies must consider electronic harassment and discrimination issues. Offensive material circulating on a company network can be evidence that a "climate conducive to a hostile environment" is tolerated there. Even so, employers should be careful not to overreact to the mere presence of suggestive email, but respond to it in a measured and appropriate manner.

The difficulty is striking a balance between company business needs and employee privacy. Fortunately, federal statutes like the Electronic Communications Privacy Act serve as a guideline. Employers are taking heed by cautioning workers to choose their words and messages more carefully. They're stressing email may not be used to defame individuals or convey messages or images that violate company discrimination and harassment policies. They're also advising employees that company email may only be used for business. Finally, employers are reminding workers that all email is company property and may be monitored. Any misuse could result in disciplinary action, including termination.

Though the technology is relatively new, employers are tailoring company email policies to reduce their risks to liability – a smart move in becoming email savvy.

**Sheri B. Cataldo** is a partner with Sullivan Ward and has a successful commercial litigation and transactional practice with an emphasis in contract and business litigation, employment litigation, and professional and special risk liability. She also has several years of experience in civil appellate practice and procedure. She can be contacted at [scataldo@swappc.com](mailto:scataldo@swappc.com).

**Kevin S. Toll** is an attorney with Sullivan Ward and represents business and individual clients in commercial litigation, including contract disputes and insurance matters. He also represents clients in insolvency and bankruptcy proceedings. He can be contact at [ktoll@swappc.com](mailto:ktoll@swappc.com).



## Professional Rewards continued from cover

Because *Best Lawyers* is based on an exhaustive peer-review survey in which 16,000 leading attorneys cast more than a half-million votes on the legal abilities of other lawyers in their specialties, and because lawyers are not required or allowed to pay a fee to be listed, inclusion in *Best Lawyers* is considered a singular honor. Mr. Handler has been named to this prestigious list for 25 years and Mr. Ahearn for 20.

Since its inception in 1983, *Best Lawyers* has become universally regarded as the definitive guide to legal excellence in the United States. Corporate Counsel Magazine has called *Best Lawyers* "the most respected referral list of attorneys in practice."

### Super Lawyers

Sullivan Ward attorneys Sheri B. Cataldo, Scott D. Feringa, Thomas J. Giachino, Kevin J. Gleeson, Wallace M. Handler, Matthew I. Henzi, Adam P. Lumberg, Christopher B. McMahon, Lee C. Patton, and Charles E. Randau have been named as 2008 "Super Lawyers," a consumer guide to outstanding attorneys from more than 70 practice areas. Selection is based on a rigorous multi-step process including peer nominations, a blue ribbon panel review and the independent research of Law & Politics. Only the top 5% of the attorneys in Michigan are eligible for consideration.

Mr. Patton and Ms. Cataldo were also singled out for the "Super Lawyers" Counsel Edition of the publication. Super Lawyers, published as a special supplement in leading newspapers and magazines throughout the country, features articles about the attorneys named to the Super Lawyers List. Distribution includes lead corporate counsel of Russell 3000 companies, the ABA-approved law school libraries and all attorneys in the state or region.

### Res Loquitor Corporation's Select List of Law Firms

Sullivan Ward and Sheri B. Cataldo has been named as the only firm in Michigan presently recommended, evaluated and approved to be listed on the national Select List of Law Firms for the Defense of Life, Health and Disability Insurance.

Res Loquitor Corporation was founded to develop video directories of recommended and evaluated attorneys in various industries. The directories enable in-house counsel to quickly identify and confidently select highly qualified law firms in any area of the country.

To qualify for the Select List, a firm is evaluated by at least five life and health insurance company clients in 16 separate areas related to insurance defense work.

# Preparation is Key to Successful Municipal Site Plan Reviews

by Matthew I. Henzi

Developers, retailers or business owners who want to develop property sites constantly deal with challenges. Urban sprawl, aging suburbs and adapting to things like increased competition in the marketplace are just a few. Still, after finding the perfect property, perhaps the most difficult hurdle is trying to convince government planners and elected and appointed officials to approve their projects. Most property developers will agree: The first step in successfully navigating through a site plan review process is preparation.

### Know Your Venue

When choosing a location for development and construction, be sure to consider the municipality's zoning ordinances. Understanding the master plan and the community's development history helps in crafting a strategy to obtain site plan approvals.

### How Does Your Project Compare?

Decision-makers want to know about similar projects constructed in other communities, locally or nationally. Comparing the properties allows them to reference lessons learned. This background helps officials analyze potential benefits and concerns involved with the project and how these issues may affect their community.

### Make the Vision Visible

Simple blueprints are not enough any more to bring a project to life, especially for officials who have little or no experience in construction. Brightly colored photographs, diagrams and models do more to help answer the ultimate question: Will this project improve my community? Remember also to tailor your presentations to the level of knowledge and diverse backgrounds of those who will hear and see them.

That's exactly what the president of an auto dealership recently did. He was requesting permission from the Zoning Board of Appeals to renovate an aging facility and replace its signage. During the first public hearing, a representative provided the board members with color drawings of what each sign would look like. The board had an incredibly difficult time imagining what the finished product would look like.

The president of the dealership and the sign company representative listened to the board members' comments and, at the second hearing, presented photographs of the existing dealership with images of the proposed signs superimposed. It gave board members a bird's eye view of what the proposal would look like if approved. This creativity, along with a sincere desire to work with municipal officials, convinced the board to grant the variance.

### Reach Out to Neighbors

Getting community buy-in is also important to any development project. The most successful developers seek input from neighboring property owners and community groups long before the first public hearing on their proposed project. These advanced discussions provide invaluable information, which may lead to modifications in the site plan that could save much time, money and effort in the long-run.

There is no one method to seeking site plan approval or a zoning variance that will guarantee your success. But proper planning will help you make the best possible case for your development.

**Matthew I. Henzi** is a partner with Sullivan Ward and represents businesses, insurers and individuals in litigation arising out of personal injury and business disputes, including premises liability, product liability, automobile negligence and general negligence claims. Mr. Henzi also represents individuals in probate matters. He can be reached at [mhenzi@swappc.com](mailto:mhenzi@swappc.com).



## Now is the Time to Transfer Your Estate Plan

by Adam P. Lumberg

With the recent collapse of the stock market and the country's current recession, many clients are not in a position to modify their estate plans. If your estate is exposed to taxation, and you can afford to transfer your asset appreciation to heirs, consider doing it now.

One option is to sell assets to an intentionally "defective" grantor trust. You can lower the price of your assets and the trust issues a promissory note for the purchase price. The note carries interest at the applicable federal rate, which is the lowest the IRS permits. You determine the trust beneficiaries, and the trust distributes assets to them.

The goal is to freeze the value of the assets, allowing it to appreciate outside of your gross estate. Since you would be paying tax liabilities on any income generated in the trust, your entire estate is reduced.

Additionally, the assets held in the trust aren't included in your gross estate. To include them, you must have an interest in the property at the time of your death. The trust ensures you don't retain interest in the property. Upon your death, only unpaid promissory notes or cash received from those notes will be included in your estate if received before your death.

As owner of the trust, you're liable for all its taxable income, which is a benefit because the tax paid on the income reduces your taxable estate – an additional tax free gift.

No gains or losses should occur when selling assets to the trust because it qualifies as a "grantor trust." Several cases and IRS rulings provide that transactions between a "grantor trust" and the grantor are disregarded for tax purposes. According to the IRS, even though the sale of the assets should be for an amount more than your tax basis, no gain will be generated since you and the trust are treated as the same person. The same logic applies to interest payments the trust pays you as seller of the property. The transaction generates neither interest income nor an interest deduction. When your assets are managed by the trust's beneficiaries, the beneficiaries take a carry-over basis in the assets. The trust then steps in on your behalf. Otherwise, upon your death, there would be a step-up in the basis of the assets).

**Adam P. Lumberg** is a partner with Sullivan Ward and concentrates his practice in the areas of corporate transactions, business planning, estate planning, taxation, and real estate law. He can be contacted at [alumberg@swappc.com](mailto:alumberg@swappc.com).

## Persistence and Documentation Help You Collect Debt

by Debra B. Pevos

When collecting debt, it's standard practice to properly document agreements, update customer financial information and keep copies of customer checks in credit files. When customers begin paying outside their established patterns, intervention is required.

Different rules apply depending on the type of debt being collected. For instance, when dealing with security interests, remember to retain an interest in all sold goods. Customers must agree in writing to grant a security interest and file a UCC-1 financing statement in a timely manner. The secured status of a customer's non payment or bankruptcy could determine whether or not a debt gets paid.

Obtaining complete information is essential when filing for construction liens. Subcontractors and suppliers routinely secure Notices of Commencement and Notices of Furnishing for construction projects, which should be provided to the owner in a timely manner. If the subcontractor or supplier is not paid, a construction lien must be recorded within 90 days of the debtor last furnishing services or materials. Failure to record a lien within 90 days is fatal. A lawsuit to foreclose a construction lien must be filed within one year of recording it or the lien ceases to exist. Getting a lien could prompt delinquent payment.

Unfortunately, bankruptcy filings are inevitable in a poor economy. Simply reviewing a bankruptcy file may indicate whether payment can be recovered. If a debtor recently bought goods, you could recover those goods or payment. If you have a security interest in the debtor's property, you should file a motion for relief from stay to recover your collateral. You may also be entitled to "adequate protection" payments.

If credit records show a debtor provided false written financial information, you could have your claim excepted from the debtor's discharge. Proofs of Claim should properly document, otherwise, a collector may not receive a dividend from the estate.

In short, being proactive and keeping good records is essential to collecting debt in these rough economic times.

**Debra B. Pevos** represents business and individual clients in commercial litigation, including contract disputes and construction litigation. She also represents clients in insolvency and bankruptcy proceedings. She can be contacted at [dpevos@swappc.com](mailto:dpevos@swappc.com).



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