Lum, Drasco & Positan, LLC
ATTORNEYS AT LAW SINCE 1870

Lum Law Notes
Spring 2018

Lum, Drasco & Positan LLC
Attorneys At Law Since 1870

FEATURED ARTICLES

FIRM NEWS

The Firm is pleased to announce the following attorneys have been selected for inclusion in the 2018 listing of New Jersey *Super Lawyers* by Thomson Reuters which is published in *New Jersey Monthly Magazine*:

Dennis J. Drasco for Business Litigation (Top 100 Lawyers)

Wayne J. Positan for Employment and Labor (Top 100 Lawyers)

Paul A. Sandars, III for Construction Litigation

Kevin F. Murphy for Estate Planning and Probate

Steven J. Eisenstein for Business and Corporate Law

Kevin J. O'Connor for Business Litigation

Christina Silva for Employment and Labor

Gina M. Sorge for Family Law

Dennis J. Smith for Business and Corporate Law

Edward M. Callahan, Jr. for Construction Litigation

Additionally, we are pleased to announce that the following attorneys from the Firm have been selected for inclusion in Thomson Reuters listing of New Jersey *Rising Stars* for 2018:

Elaine R. Cedrone for Employment and Labor

Elizabeth Moon for Employment and Labor

Arthur M. Owens for Civil Litigation Defense

These selections were based on a statewide survey, an evaluation process and a peer review by a blue ribbon panel of attorneys. The methodology for selection can be found at **http://www.superlawyers.com/.**

Scott E. Reiser is the organizer and moderator of a CLE program entitled "The Lawyer, the Addict: Facing a Silent but Prevalent Issue in the Profession", which is being offered as part of the ABA Section of Litigation's Annual Conference in San Diego on May 3, 2018.

Dennis J. Drasco is participating in an ABA CLE Webinar on May 21, 2018 from 1:00 to 2:35 p.m. EDT entitled "Principles for Juries and Jury Trials from the Bench and Bar: How to Facilitate Good Decision Making in Jury Trials." Also on the program are Hon. Barbara M.G. Lynn (Chief District Judge, United States District Court, Northern District of Texas), Hon. Charles N. Clevert, Jr. (Retired United States District Court Judge for the District of Wisconsin and Mediator and Arbitrator, JAMS), and Moderator, Stephanie McCoy Loquvam (Chair, Commission on the American Jury). Mr. Drasco is a former Chair of the Commission on the American Jury.

Wayne J. Positan was the organizer and moderator of the N.J. Institute for Continuing Legal Education "Annual Labor and Employment Law Forum" in Woodbridge, NJ on February 28, 2018. Positan led the panel discussions on "Ethical Obligations of Local Counsel", "The Road To Hell Is Paved With Good Intentions", a program dealing with the changes to federal tax law and pending legislation in New Jersey that would impact on settlement negotiations in matters involving harassment claims under federal and state law; and "Workplace Harassment Litigation." Positan also spoke on the status of the law nationally on multijurisdictional practice, motion by admission and *pro hac vice* admission.

Kevin F. Murphy served as a speaker during the National Business Institute's "Trusts--Made Simple" program held on December 15, 2017 in Saddle Brook. Kevin presented on the topics "Where To Begin?--An Overview Of Trusts" and "Ethical Considerations".

NEUTRAL THOUGHTS

By Donald J. Volkert, Jr., A.J.S.C. (Ret.)

There is an expression "There is nothing new under the sun." Alternative Dispute Resolution falls into that category. Although it's all the rage now, Mediations, Arbitrations --- Alternative Dispute Resolution has been around for a long time. In fact, long before there were five pages of advertisements for Mediators, Arbitrators and people assisting with complex litigation management in the weekly New Jersey Law Journal. There are a lot of reasons supporting its increase in popularity and use as an alternative to litigation, which every study conducted concluded takes too long, costs too much and is unpredictable.

In the 1970's (wonder why I picked that to start) everyone did almost everything. It was truly a general practice. As a young associate, every day was an adventure.

The growing complexity of life, proliferation of regulations and changes in the organizational structure and procedures for processing cases has imposed a significant burden on the legal system. In the early 1970's there was the burgeoning environmental law practice. As time progressed there were people who micro-specialized in clean water, clean air and a host of sub-categories within those contexts such as Energy Law, Natural Resources, Land Use and Climate Change to name a few.

While there is nothing new about ADR, it has been growing steadily in popularity given its ability to enhance both the speed and quality of outcomes. By way of contrast, it has been reported that at its present pace India will not clear its backlog of cases until the year 2330.

In 1926, the American Arbitration Association was formed. Today, law firms regularly employ retired judges or AAA certified attorneys to offer mediation, arbitration, or complex case management services. The Judiciary has mandatory mediation and arbitration programs in a variety of case types. As one of my former colleagues was fond of saying, "Litigation is a lot like going to Atlantic City and placing everything on Red."

Mediation, the most popular form of ADR, is also the least adversarial. It's a participatory process where the ultimate decision belongs to the parties. The mediator facilitates the discussion, asks questions and discusses the pros and cons of the case. In the typical mediation, the goal is to come to a resolution which represents a fair outcome in light of the facts. Mediation can also be utilized at every stage of a dispute before or after the filing of a complaint, before or after discovery is undertaken, before or during trial and throughout the appellate process. In both State and Federal Courts mediation is the primary process for Alternative Dispute Resolution. As a practical matter, there has been a huge increase and interest in pre-litigation mediation.

The Lum Firm's Alternative Dispute Resolution services include arbitration, mediation and discovery master appointments of New Jersey Superior Court cases, cases pending in the United States District Court for the District of New Jersey and other jurisdictions.

PARTNERSHIP AUDIT RULES

By Steven J. Eisenstein, Esq.

As part of the Bipartisan Budget Act of 2015, the IRS established new rules for conducting partnership audits and assessments of taxes in partnerships. These new rules did not take effect until 2018 so it is now time to assess and determine whether your existing organizational documents adequately address the new requirements of this law.

Beginning with the Tax Equity and Fiscal Responsibility Act of 1982, partnerships and entities taxed as partnerships (including most limited liability companies) were subject to audit rules and procedures which were considered by the IRS to be inefficient. Tax treatment of partnership items of income, deduction and credit, were determined on the partnership level, but tax changes resulting from audits were assessed on an individual level for each partner. (Partner also means member of an LLC when used in this article).

Under the new rules, the IRS will continue to examine partnership returns and make adjustments at the partnership level. However, assessment and collection efforts will be done on the partnership level and not the individual partners. This change is important because as pass through entities partnerships and LLC's were never required to pay federal tax at the partnership level before.

Ownership interests in a partnership or LLC are fluid. To illustrate, let us assume that a partnership or limited liability company is formed with ten partners or members in Year 1. That ownership remains constant during Year 1, but in Year 2, one partner passes away and his interest is transferred to his children who were not previously partners. Then in Year 3, a partnership interest is sold to an outsider and another partner declares bankruptcy. Now what happens in the event of an audit of Year 1, conducted in Year 3, resulting in an assessment of taxes paid by the partnership in Year 3? The important fact is that the IRS collects from the partnership in the year the audit is completed (Year 3), not the year for which the taxes are adjusted (Year 1). Obviously, this is now a different set of partners, some of whom had nothing to do with the taxes paid in that previous year.

As if that is not bad enough, assume that several of the partners pay their obligation to the IRS but some do not. The IRS then imposes penalties and commences collection efforts, again, from the partnership itself. This means that the people who have already paid their share of the liability are again subject to their percentage of this obligation, leaving them to sue their recalcitrant partners.

It is very important to consult with an experienced tax practitioner when navigating these tricky waters. Planning opportunities exist. For some partnerships and limited liability companies, the entity can annually elect to opt out of the new rules entirely. These entities must have 100 or fewer partners and those partners

must be composed entirely of individuals, corporations or estates of deceased partners. If one of the partners is another partnership or LLC, this opt out election is not permitted.

If the partnership has not opted out prior to the tax year, then the partnership may "push out" during the review year. This involves furnishing a statement to both the IRS and each of the partners during the reviewed year that reflects that partner's distributive share of any resulting adjustment from the audit. It is vital to get proper advice in order to correctly make these elections.

While there are many other changes, one other deserves mentions in this short article. Under the law in effect prior to the new rules, a partnership appoints a partner to serve as the tax matters partner ("TMP") who has limited authority to act on the partnership's behalf to address tax issues. Under the new rules, the TMP is replaced by a Partnership Representative who must be named in the tax return. That Partnership Representative has full authority to act on behalf of the partnership before the IRS. The Partnership Representative can bind the partnership and the individual partners but has no legal obligation to even notify the other partners that there is an audit or keep them updated on the status. As you can see the need to place restraints on the Partnership Representative is important.

Given the significant changes to the tax law, it is important to carefully examine your partnership agreements and operating agreements for any entities in which you have an interest. Many of these matters can be dealt with through the organizational documents but professional advice is highly recommended. In consultation with your tax professional, these documents should be amended to include a limitation on the Partnership Representative's powers; delineate and quantify the obligations of the individual partners in the event of an audit, with appropriate indemnifications; and provide advance directives and actions for the Partnership Representative to take certain actions which may be in the best interests of the partnership. The partnership agreement or operating agreement can also provide for the eventuality of changes in the partnership or limited liability company over time and what will happen to new and departing partners and members.

Here at Lum, Drasco & Positan LLC, our Business Department has substantial experience in helping our clients through the many difficult issues associated with business entities. Advice like this from a competent professional is ever more important in an increasingly complex business, tax and legal environment.

AN EMPLOYER'S GUIDE TO AVOIDING INAPPROPRIATE INTERVIEW QUESTIONS

By Christina Silva

A job applicant sits across from the interviewing manager, and the manager wants to find common ground. The manager asks a seemingly innocent question about the applicant's background in an attempt to make conversation. Despite this intention, the question asked of the applicant has created a potentially illegal interviewing scenario. Managers should be aware at all times during the job interview process that any questions asked of a potential job applicant must remain focused on the functions of the job, and not the subjective characteristics of the individual job applicant.

Employers seeking to fill a job position should start with having a job description which details the essential functions of the job. The job description provides a guideline for inquiries of a job applicant which relate specifically to occupational requirements. Such an approach creates an objective overview of the job applicant's suitability for the job position.

During the job interview, employers should avoid asking the job applicant any personal questions that are not directly related to the job. For example, unless the employer is asking a teenager if he or she is over the age of 16 for purposes of child labor laws, the job applicant should not be asked about their age or date of birth. Also, the job applicant cannot be asked any questions about any disabilities of any kind. The employer's job description may detail that being able to lift a certain amount of weight is a requirement of the job. The interviewer should thoroughly describe the job, and its physical or lifting requirements, and ask the job applicant if they are able to perform the necessary lifting or other physical job function. Similarly, the job applicant should not be asked whether they have a particular religious affiliation or are able to work any

religious holidays. Instead, the interviewer should inform the job applicant of the required work schedule and generally inquire whether the work schedule poses any issue for the applicant.

In all circumstances, the employer should avoid asking the following interview questions:

- What is the job applicant's marital status (married, single, divorced, engaged);
- Whether the job applicant has children; age and number of children; who provides child care; and if the applicant has plans to have more children;
- Whether the applicant has taken or would take maternity leave and return to work afterwards;
- Whom the job applicant lives with;
- What the job applicant's country of origin is; or family's country of origin;
- Ethnic background based on last name;
- Identification of religious denomination;
- The applicant's height, weight, gender identity, or sexual preference;
- Any health issues, illness or operations;
- Any inquiry relating to an arrest if not substantially related to job functions;
- Inquiry about the type of discharge from military service;
- Whether the applicant has ever been treated by a psychologist or psychiatrist;
- Whether the applicant has ever been treated for drug addiction or alcoholism;
- Whether the applicant has ever been injured on the job or filed for workers compensation;
- Whether the applicant has any plans to retire in the near future.

Information regarding an applicant's employment background, including offices held, nature of job responsibilities, past military service, educational background, vocational and professional training, and inquiry into language skills if job related, are generally appropriate areas of interview questioning. Additionally, an employer is permitted to obtain proof of legal right to work in the United States through appropriate identifying documentation.

If overtime may be required for the job position, it is acceptable to ask whether the job applicant is available to work overtime on occasion. If travel is associated with the job position, the employer may inquire whether the applicant is available to travel as the job may require. It is also permissible to inquire of a job applicant what he or she will bring to the role and its requirements, but it is not acceptable to ask the applicant how he or she feels about working with a group or management of one gender or another. While an employer can inquire about an applicant's long term career goals, no inquiry should imply any limitation on the applicant's ability to work long term for any reason.

Employers in New York City are now subject to an additional job interview restriction which is that they cannot inquire as to an applicant's current or prior salary history or benefits or other compensation. Employers in New York City also cannot ask individuals from the applicant's current or former place of employment for information about the applicant's salary history. These restrictions apply not only to the job interview but also to written job applications. Similarly, recent legislation in New Jersey prohibits state government entities from inquiring into job applicants' salary histories. Specifically, state employers will not be permitted to ask prospective employees about their prior compensation and benefits, until a job offer has been made.

Legislation introduced in New Jersey regarding these same restrictions with regard to all New Jersey employers, including private employers, was not passed. New Jersey employers, however, do remain subject to appropriate parameters of job interview questioning, and should take caution that all interview questions asked of a job applicant relate exclusively to objective job requirements.

FINANCIAL ACCOUNT DIVORCE EQUITY DISTRIBUTION EXEMPTION AND COMINGLING CLAIMS: DISCOVERY AND EVIDENCE

By Gina M. Sorge, Esq.

Pursuant to N.J.S.A. 2A:34-23, "All property, regardless of its source, in which a spouse acquires an interest during the marriage shall be eligible for distribution in the event of divorce." However, the Statute also provides that the property acquired by inheritance during the course of the marriage is *not* subject to equitable distribution upon divorce, nor are sums received by a spouse during the marriage as derived from personal injury claims representing payment for pain and suffering or disability. Landwehr v. Landwehr, 111 N.J. 491 (1988). However, "*comingling of marital assets with exempt assets"* may render an otherwise exempt asset as "marital" and subject to distribution to the spouses upon divorce. Pascarella v. Pascarella, 165 N.J. Super. 558 (App. Div. 1979), Ryan v. Ryan, 283, N.J. Super. 21 (Ch. Div. 1993).

The burden of "exemption immunity" is upon a party asserting it.

New Jersey case law is sparse in dealing with financial account comingling of marital and exempt funds. Discovery and evidence related to such claims are subject to the standard articulated in the Ryan case. Specifically, "If the comingling effectuates an intent to treat all the assets as marital so that the otherwise exempt assets are gifted, the entire account held by one spouse becomes subject to equitable distribution. Similarly, if the spouse holding title to the account cannot trace the account to immune assets, there would be a failure of proof respective immune nature of the account, which would then be distributable."[1] Ryan v. Ryan, 283 N.J. Super. 21 (Ch. Div. 1993).

Financial account comingling of an inherited and marital funds issues warrant several discovery and evidential considerations. Proofs demonstrating a direct "tracing" of inherited funds to a separate financial account including an investment account during the course of the marriage, evidence of non-contribution of funds by the other spouse, and non-withdrawals or use of inherited funds to pay marital expenses or benefit to the "marital enterprise" are demonstrative of financial account "immunity" and non-distribution upon divorce.

Discovery and evidence demonstrating "comingling" and rendering a financial account as subject to equitable distribution may include tracing the inheritance funds to marital accounts, using inherited funds to pay marital expenses and/or to acquire marital assets.

Investment accounts inheritance funding exemption claims may require expert assistance to prove "immunity and/or "comingling" challenges.

Proofs supporting "comingling" include the establishment and marital funding of the investment account prior to the receipt of inheritance funds. Discovery, including wills or other testamentary documents, revealing the designation of the other spouse as a beneficiary of the asserted "immune" investment account, are also proofs supporting a "comingling" claim.

Finally, immunity claims may warrant consideration of *indirect proofs* to demonstrate the intentions of the parties with regard to the financial account. Such proofs may include that the asserted exempt account is the only investment account created during the marriage and/or the use of all marital income to pay marital expenses in lieu of depleting the investment account and facilitating its enhanced value.

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[1] **See** Hyduk v. Hyduk, Docket No. A-5578-04 (August 1, 2007) [unpublished opinion]

WILL YOUR BUSINESS BE READY TO SELL WHEN YOU ARE READY?

By Philip L. Chapman, Esq.

Do the right things now to put your business in a more saleable state when you will want to sell it. If you don't, a sale may be for less money or less advantageous terms, may involve a great deal of delay and extra expense or may not even be doable.

Here are some planning issues you should address, if you have not done so already.

Form of Financial Statement

So many business clients use Quick Books, and the form of their financial statement is a "compilation". If they show the compilation to an accountant, the accountant does not investigate as to the accuracy or completeness. Very often neither prospective buyers, investors nor lenders are willing to on compilation statements.

The Company should upgrade at least to "review" statements. However, if you believe that it is likely that the business will attractive for purchase by public company, keep in mind that public companies much prefer to acquire businesses which have audited financial statements. Therefore, you should have a cost/benefit discussion with your accountant as to upgrading to audited statements.

The Company's Accountant

Make sure that your accountant is both business and tax-savvy and is really interested in the account. If the accountant's services are just to keep score and neither business planning nor tax planning is provided, you may be making important mistakes of omission or co-mission. A seasoned business accountant can share important insights and procedures that he or she has learned alongside other clients.

Confer with your accountant at least twice a year about the Company's activities and results of operations and to seek suggestions and comments. For example, make sure your receive informed advice as to whether the Company has to collect sales or excise taxes. Don't be a seller who, having "played games" or was oblivious to this issue, suddenly finds out that a proposed a proposed sale will trigger a very large and unanticipated liability.

Upgrade the Company's financials from compilation at least to review statements. Also, keep in mind that public companies much prefer to acquire businesses which have audited financial statements; and, therefore, you should have a cost/benefit discussion with your accountant as to upgrading to audited statements.

Having a Lawyer in the Role of General Counsel

No matter what the size of your business, the Company should have a lawyer who fits the description of general counsel, with whom you confer during the year, not just on a crisis basis.

Such a lawyer should be is pro-active, not merely reactive; and should with other professionals who serve your business and who can assist you in engaging the services of other lawyers in specialty fields.

Protection of Intellectual Property

If a patent, tradename, trademark or copyright is important to the business, make sure you confer, at least annually, with a qualified intellectual property lawyer to see that you are doing all that is necessary to protect the Company's investment and rights.

For example, some patent owners, having fallen out of contact with their intellectual property lawyer, have lost their patents for failure to pay a required annual maintenance fee.

The Company's Insurance and Insurance Agent

Review, annually, with a qualified insurance professional (a) the Company's operations; (b) amount and scope of coverages for public liability, casualty, product liability, workers' compensation, employee theft, employment practices liability insurance; cyber security insurance (c) the financial condition of the insurers; and (d) whether the premiums are competitive.

Do this review face-to- face, at your place of business--too many insurance agents just "mail it in" and lose touch with what their client is actually doing.

Human Resources and Employment Practices

Lawsuits and administrative complaints as to sexual harassment, discrimination in hiring or terminating, wrongful termination of at-will employees without following the procedures in the company's employment manual, elimination of job positions previously occupied by a mother wishing to return from maternity leave, failure to provide a "reasonable accommodation" to an employee who has a special problem interfering with or preventing normal performance of these occur more and more every day.

Failure to handle the above and other human resources problems with maximum touch can turn a small fire into a major conflagration, with very high legal costs, even if the Company settles for little money of consequence or wins; and can expose the business to huge compensatory and punitive damage awards.

If, in a proposed sale of the ownership of your Company as opposed to a sale of its assets, there is too much uncertainty about contingent liabilities in the employment practices area, this can queer the deal. And, even in an asset sale, where the buyer is acquiring a work force to continue to operate in place, too many poor past employment practices which will require the immediate attention of the buyer can get impede the transaction or effect the purchase price.

If you don't have a well-qualified in-house human resources professional or a relationship with a lawyer who concentrates in employment law, you should engage one to review your employment manual or to prepare one, to review your employment practices, to train management and other employees with respect to compliance with New Jersey's Law Against Discrimination and to be on the other end of a "hot line" when problems arise.

Confidentiality and Non-Compete Agreements, etc.

Long before a potential purchaser comes on the scene, a salesperson who controls a very significant amount of the Company's business might just pick up and leave to go to a competitor or to establish his or her own competing business. And, even if the salesperson is still there at the time of negotiations for the sale of the business, the absence of a non-compete agreement can result in the killing of the deal or the transfer of some of the monies that would have been paid to you to the salesperson.

For your key sale employees, obtain reasonable agreements covering confidential information, and where applicable, reasonable non-competition after termination of employment.

For key technical employees it may be advisable to obtain agreements which provide that inventions and improvements by them are Company property.

Provisions in the Company's Lease Relating to transfer of the Leases to a Buyer

The obtaining of third party consents in order to close a sale of a business can cost time and money and sometimes kill a deal. This is especially true in case of an asset sale which involves transfer of the seller's lease or leases.

If the Company leases property from a non-related third party, make sure the lease contains provisions permitting, in case of a sale of the business, the free right of assignment--or at least some reasonable conditions concerning the financial strength of a proposed assignee, which would restrict the right of the landlord to refuse to consent to the assignment.

Environmental Investigation of the Company's Facility

When the facility used by the company is an environmental unknown by the time of the Asset Purchase or Stock Sale Agreement, the negotiations regarding environmental contingencies and responsibility for clean-up costs, indemnifications and escrows are sometimes so complex and arduous that deals die because of them; and quite often the buyer does not have time to delay the closing until all the environmental questions are answered and problems are remediated.

Accordingly, whether the Company owns or leases its facility, and whether or not New Jersey's Industrial Site Recovery Act would apply, investigate the property now, long before a sale is on the horizon, for the presence of hazardous materials, including asbestos and PCBs, and for the presence of underground fuel storage tanks and possible leakage.

Important Agreements with Third Parties

If the business depends on any key agreements with third parties (e.g. distributorship, license, franchise, sales representation, furnishing of a third party's requirements), make sure that these agreements are in writing and protect against unreasonable termination.

If you follow the above suggestions, not only will your business be in better position for sale, but you will be enhancing its opportunities and protecting its interest along the way.

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