WOODS OVIATT GILMAN LLP

The art of representing people®

Spring 2015

Practices

- Business & Finance
- Employment & Labor
- Family Wealth & Estate Planning
- Intellectual Property
- Litigation
- Real Estate Development & Finance
- Secured Lending & Financial Recovery

Offices

Rochester, New York
700 Crossroads Building
2 State Street
Rochester, New York 14614
p 585.987.2800 | **f** 585.454.3968

Buffalo, New York
1900 Main Place Tower
350 Main Street
Buffalo, New York 14202
p 716-248-3200 | **f** 716-854-5100

Phoenix, Arizona
275 N. GateWay Drive
Suite 118
Phoenix, Arizona 85034
p 602.633.1793 | **f** 585.362.4614

WoodsOviatt.com

Feature Article

Woods Oviatt Gilman LLP Opens New Office in Buffalo

We are pleased to announce the opening of our office in Buffalo, New York effective October 1, 2014. Joining us in the Buffalo office as Partners in the firm are Anthony L. Eugeni, Esq., Brian D. Gwitt, Esq., Christian J. Henrich, Esq. and William F. Savino, Esq. Bernard Schenkler, Esq. has joined the firm as Of Counsel and Jeffrey P. Gleason, Esq. has joined as an Associate of the firm.

The addition of a Buffalo office will allow us to serve more effectively our Buffalo-based clients and other clients who have Buffalo operations. We also look forward to forging new client relationships in the Buffalo market.

Anthony L. Eugeni, Esq. is a Partner in the firm's Business and Finance Department. He represents both privately held companies and smaller public companies. His practice primarily includes matters involving mergers and acquisitions, commercial transactions, business formations, and representing borrowers in debt-based finance transactions. Mr. Eugeni also provides general advice and consultation to business entities on contract matters, governance issues, and day-to-day operations.

Mr. Eugeni received his B.A., *cum laude*, from the University of Notre Dame and his J.D. from the State University of New York at Buffalo Law School. Mr. Eugeni has passed the Uniform Certified Public Accountants Exam.

Brian D. Gwitt, Esq. is a Partner in the firm's Litigation Department. His practice involves business and commercial litigation, including contract disputes, Uniform Commercial Code, corporate governance, intellectual property/trade secret litigation, bankruptcy litigation, real estate litigation, and debtor/creditor matters. A large part of Mr. Gwitt's practice involves handling critical matters for businesses, including seeking/defending against temporary restraining orders and preliminary injunctions, and handling other forms of emergency relief. Mr. Gwitt has successfully handled multiple lawsuits and arbitrations through verdict. He has

The office is located at 1900 Main Place Tower, Buffalo, New York 14202. Telephone: (716) 248-3200.

Continued on page 2

New Buffalo Office *From page 1*

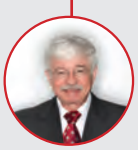
Anthony L. Eugeni, Esq.

Brian D. Gwitt, Esq.

Christian J. Henrich, Esq.

William F. Savino, Esq.

Jeffrey P. Gleason, Esq.



Bernard Schenkler, Esq.

a multi-jurisdictional practice, handling cases in federal and state courts in New York, Illinois, Massachusetts, Indiana, Ohio, Pennsylvania, California, Texas, Utah, and other states.

Mr. Gwitt received his B.A. from the State University of New York at Fredonia and his J.D. from the State University of New York at Buffalo Law School.

Christian J. Henrich, Esq. is a Partner in the Business and Finance Department. He advises clients, ranging from start-ups to Fortune 100 companies, in connection with mergers, acquisitions, and divestitures; private equity and debt financings; and Delaware corporate law. During the last year, Mr. Henrich has represented investors and institutional funds as lead counsel on over 15 private equity transactions nationwide with total capital invested exceeding $250 million. In addition to his representation of institutional venture capital funds, he is one of a handful of attorneys in the country that represents search funds.

Mr. Henrich obtained his B.A. from Dartmouth College, *magna cum laude*, Phi Beta Kappa, a J.D. from the University of Pennsylvania, *cum laude*, and an MBA from the University of Pennsylvania's Wharton School where he was honored as a Palmer Scholar. Mr. Henrich is also a retired Infantry Captain having served on active duty for five years, two of which were in the Army's elite 75th Ranger Regiment.

William F. Savino, Esq. is a Partner in the Litigation Department. His practice focuses on matters involving business litigation (including construction, corporate and partnership dissolution, and Uniform Commercial Code matters) and insolvency (both debtor and creditor) with an emphasis on reorganizations. During the last year, he litigated in Manhattan against competing ownership to clear title to a $30 million building acquired in a "loan to own."

Mr. Savino received his B.A. from the University of Rochester, High Honors, and his J.D. from the State University of New York at Buffalo Law School, *cum laude*. In May 2014, he was honored as a Distinguished Alumni for Business at the 52nd annual University at Buffalo Law School alumni dinner. For many years, Mr. Savino has been an instructor at the SUNY Buffalo Law School and a lecturer III in Management. Mr. Savino has repeatedly earned the designation as a Top 10 Upstate New York Attorney and was ranked third in 2013 by Super Lawyers magazine.

Jeffrey P. Gleason, Esq. is an Associate in the Business and Finance Department. His practice involves representing business clients ranging from start-ups to publicly traded companies across a variety of industries as well as individual clients in their business-related matters. Mr. Gleason routinely advises his clients in connection with mergers, acquisitions, divestitures, private equity and debt financings, corporate governance, and employment related matters.

Mr. Gleason received his B.A. in Political Science from the University of South Carolina and his J.D. from the State University of New York at Buffalo Law School.

Bernard Schenkler, Esq. is Of Counsel to the firm's Litigation Department. He has a background in business and commercial litigation and business torts and has represented creditors, debtors, and trustees in bankruptcy matters including Chapter 11 and objections to discharge. He filed one of the few Chapter 15 international bankruptcy proceedings in the Western District of New York. He has also defended accountant malpractice actions. His publications include "Probate and Bankruptcy" in the Journal of Bankruptcy Law and Practice, and he is a contributor of seminar materials for the annual Western New York Bankruptcy Conference.

Mr. Schenkler received his B.A. from the University of Pennsylvania and his J.D. from Columbia University School of Law.

Estate Planning Update

Nicholas S. Proukou, Esq.
Associate

There were significant developments for estate planning last year. Most significantly, the New York estate exemption now increases incrementally as shown on the following chart:

New York Estate Exemptions

April 1, 2014	$2,062,500
April 1, 2015	$3,125,000
April 1, 2016	$4,187,500
April 1, 2017	$5,250,000
January 1, 2019	$6,000,000 (estimated)

The increases will benefit many New Yorkers. Those with estates within these exemption limits will not need to file estate tax returns or pay New York estate tax. For estates in excess of these exemptions, however, the New York estate tax is the same or less than the tax imposed before the 2014 law changes (no rate reduction).

However, those taxpayers whose estates exceed the new exemption by five percent or less are subject to an estate tax that rapidly increases. This creates a so-called estate tax "cliff," as it has been dubbed by some commentators. For example, an estate of $3.1 million after April 1, 2015 will owe no estate tax, but an estate of $3.2 million will owe an estate tax of $124,475. Estates subject to the cliff should be carefully administered to ensure proper use of asset valuations and deductible expenses to minimize or eliminate the potential estate tax.

Perhaps not surprising was the decision by the New York legislature not to adopt the concept of "spousal portability" now provided under the Federal system. For Federal estate taxes, spouses can combine their exemptions regardless of which spouse dies first and regardless of who has the larger estate, but a surviving spouse in New York remains unable to inherit his or her decedent spouse's unused New York exemption. This idiosyncrasy in the law often mandates trust planning in order to properly take advantage of both spouses' New York exemptions.

The 2014 New York law has also changed the treatment of taxable gifts made within three years of death. These gifts will be added back into the New York taxable estate, but only for gifts made from April 1, 2014 to December 31, 2018. This does not mean lifetime gifts should not be considered as there are other benefits of gifts, but the tax law change needs to be taken into account in the gift planning.

While there is no New York gift tax, there is a Federal gift tax, which requires the filing of gift tax returns for "taxable gifts" (the amount of a gift made in excess of the annual gift tax exclusion, $14,000 per person per year). There is no gift tax liability until the total lifetime taxable gifts exceed the exemption amount ($5,430,000 in 2015).

As before, the capital gains tax basis of gifted assets should be considered. Assets that are gifted during one's lifetime keep their original tax cost basis, while assets bequeathed at death receive a step-up in basis to the date-of-death value, essentially avoiding capital gains accrued during one's lifetime. This is the "trust loophole" President Obama seeks to change. It is not, however, a "loophole" at all but a time-honored aspect of tax law and is unlikely to be changed. Therefore, the tax basis of gifted assets should be carefully planned.

In all, the recent developments for estate planning have reduced the number of estates subject to estate tax liabilities. These benefits, however, will not be felt by every New Yorker and do not solve every problem with respect to estate planning. Consequently, a periodic review of existing estate plans, for tax and non-tax reasons, is recommended.

If you have questions about any aspect of your estate plan, please contact your Woods Oviatt Gilman LLP attorney. •

Nicholas Proukou is an Associate in the firm's Family Wealth and Estate Planning Department. He can be reached at (585) 987-2866 or Nproukou@woodsoviatt.com.

New Faces at the Firm

Daniel F. Brennan is an Associate in the firm's Real Estate Development & Finance Department. He concentrates his practice in the areas of land use and zoning, as well as residential real estate. Mr. Brennan received his B.A. degree from the University of Rochester. He received his J.D. degree, *magna cum laude*, from the SUNY Buffalo Law School.

Stephen P. Burke is an Associate in the firm and a member of the Litigation Department. He concentrates his practice in the areas of commercial litigation, intellectual property litigation, and personal injury litigation. Mr. Burke received his J.D. degree from Syracuse University College of Law, *cum laude*. He also holds an M.S. in Bioengineering from Syracuse University and a B.S. in Biomedical Engineering from Marquette University.

Brian J. Capitummino is an Associate in the Litigation Department. He concentrates his practice on the representation of companies, financial institutions, and individuals involved in complex commercial litigation. Mr. Capitummino received his B.A. degree from the State University of New York at Geneseo and his J.D. degree from Syracuse University College of Law.

Thomas J. D'Antonio is an Associate in the firm and a member of the Family Wealth and Estate Planning Department. He concentrates his practice in the areas of estate planning, estate and trust administration, long-term care planning, and Medicaid planning. Mr. D'Antonio received his J.D. degree from the College of William and Mary School of Law. He also holds a B.A. in both Political Science and Writing from Loyola University Maryland.

Larry A. Kallaur is an Associate in the firm's Business & Finance Department. His practice is concentrated on corporate finance, securities law, and mergers and acquisitions. Mr. Kallaur is a graduate of the University of Rochester and received his J.D., *cum laude*, from Fordham University School of Law.

Timothy P. Lyster is an Associate in the firm's Secured Lending and Financial Recovery Department. He concentrates his practice in bankruptcy, workouts, commercial litigation, and foreclosures. Mr. Lyster received his J. D. from St. John's University School of Law and a Bachelor of Science degree in Business and Economics from Lehigh University.

Brendan P. Smith is an Associate in the Secured Lending and Financial Recovery Department. He concentrates his practice in real estate litigation. Mr. Smith received his B.S. degree from Providence College and his J.D. degree from Suffolk University School of Law.

Stefanie C. Tedesco is an Associate in the firm's Real Estate Development & Finance Department. She concentrates her practice in the areas of commercial and residential real estate, and real estate financing. Ms. Tedesco received her B.A. degree, *magna cum laude*, from the College of the Holy Cross and her J.D. degree, *cum laude*, from Boston College Law School.

Jamie K. Winnick is an Associate in the firm's Business & Finance Department. She concentrates her practice in the areas of mergers and acquisitions, corporate law and governance, corporate finance, securities law, and other business-related legal matters. Ms. Winnick received her J.D., *cum laude*, from Syracuse University College of Law. She received B.A. degrees in both Psychology and Criminal Justice from the University of Delaware.

David Willoughby is registered Patent Attorney and an Associate in the firm's Intellectual Property Practice Group. His practice involves the preparation and prosecution of patent and trademark applications, patentability searches and opinions, patent infringement and validity analyses, and trademark searches and opinions. He received his bachelor degree from Gannon University. After graduating, Mr. Willoughby became a Commissioned Officer in the United States Air Force. Mr. Willoughby received his J.D. and Certificate of Intellectual Property from the Franklin Pierce Law Center at the University of New Hampshire.

Sarah J. Kwiatkowski and David P. Shaffer become Partners of the firm

Woods Oviatt Gilman LLP is pleased to announce that Sarah J. Kwiatkowski, Esq. and David P. Shaffer, Esq. have been named Partners in the firm effective January 1, 2015.

Sarah J. Kwiatkowski is a Partner in the firm's Real Estate Development & Finance Department. She concentrates her practice in the areas of residential and commercial real estate, commercial leasing, real estate financing and business banking.

Ms. Kwiatkowski received her B.A. degree, *magna cum laude*, Phi Beta Kappa from the University of Rochester. She received her J.D. degree, *cum laude*, from the University of Pittsburgh School of Law, where she was a Research Editor of the *University of Pittsburgh Law Review*.

David Shaffer is a Partner in the Family Wealth and Estate Planning Department. He concentrates his practice in the areas of estate planning, estate and trust administration, long-term care planning and Medicaid planning.

Mr. Shaffer received his J.D. degree from the State University of New York at Buffalo Law School, *summa cum laude*, where he was named the recipient of the Max Koren Award for Outstanding Academic Achievement by the law school faculty and also served as Note & Comment Editor for the *Buffalo Law Review*. Mr. Shaffer received his A.B. degree, *cum laude*, from Dartmouth College.

Charitable IRA Rollover for 2015

A tax benefit for people 70½ and over.

Robert W. Kessler, Esq.
Partner

In 2006, a temporary law was passed that permitted an individual over 70· to make up to $100,000 of charitable gifts directly from his or her IRA. This law was extended through 2014, and there are bills currently pending in Congress to extend the charitable rollover for 2015 and beyond. Many retirees have been particularly motivated to apply their charitable IRA gifts to satisfy their required minimum distribution (RMD).

In order to take advantage of the tax-free distribution of up to $100,000 from your IRA, you must be 70· or older, and the distribution can only go to public charities. By making such a gift, you would not have to pay the extra 3.8% surtax on investment income that you would pay from your RMD.

At the end of last year, we waited eagerly for the bill to be passed to provide the charitable rollover for 2014. The extender bill was finally signed in the middle of December. Many clients struggled to get their rollovers completed before December 31st.

If and when the 2015 bill is passed, you will need time to have the checks paid from your IRA directly to your charities. Last year, many custodians of IRAs said that they needed two to three weeks to make the qualified distribution.

If a client makes a distribution of his or her RMD amount now to the charity, and the 2015 bill is never passed, then the individual would include the RMD in his or her income and would receive a corresponding charitable deduction for the contribution made. With the income tax surcharge of 3.8% and a reduction in the itemized charitable deductions, this is not as beneficial as the direct rollover which would avoid any income taxation on the RMD. Nevertheless, it would be better to have received a charitable deduction for the RMD after being forced to pay the income tax and 3.8% surtax on distribution received. It is for this reason that we are again advising our clients who want to take advantage of the rollover in 2015 to go ahead and notify their custodian and direct them to send the forms for the rollover so that the distribution can be made well before the end of the year. Most commentators believe the charitable rollover law will be extended by the end of the year and acting sooner will avoid any last-minute rush.

Therefore, we are recommending that interested individuals consult with their tax advisors and consider rolling over all, or some portion of, their RMD to charity as soon as possible and await the proposed passage of the bill to approve the qualified charitable distribution for 2015. With a Republican-controlled Congress and considering the past history, we expect the bill to pass well before Christmas.

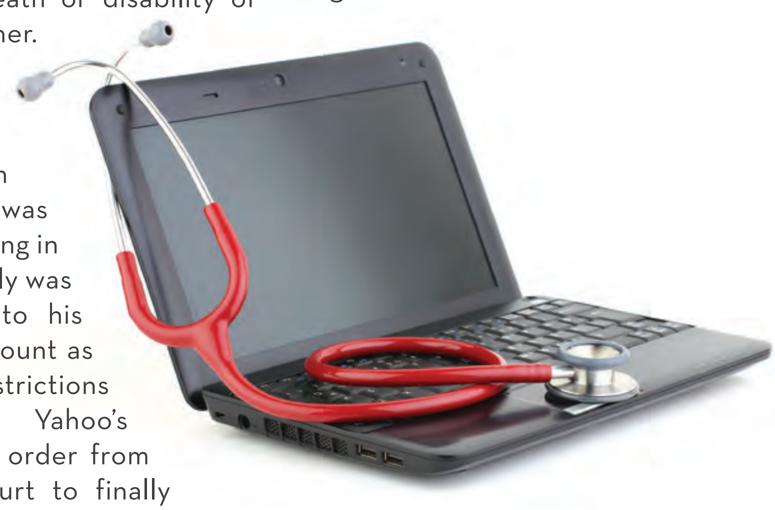
Robert W. Kessler is a Partner in the Family Wealth and Estate Planning Department. He can be reached at Rkessler@woodsoviatt.com or (585) 987-2849.

Helping Your Family Survive Your Digital Death

Philip L. Burke, Esq.
Partner

Back in the "good old days," before computers ran our lives, we kept our memorabilia in a couple of shoeboxes at the bottom of the closet, our photos in a photo album and personal notes and thoughts in a diary. Nowadays, with the digital age upon us, these items are likely to be stored in online email accounts, on Instagram or Facebook, etc. Of course, your access to these accounts is protected by a password that only you (or anyone who knows your mother's maiden name, your dog's name, your birthdate, etc.) have access to. However, access to these accounts on the death or disability of the account holder can become quite problematic. This so-called "digital death" requires some additional planning, record keeping, and, hopefully, changes in federal and state law.

We are all aware of the "terms of service" (TOS) agreements that pop-up on the screen every time we open a digital account, which practically no one ever reads and which we accept (click "I agree") without giving this a second thought. However, many TOS's severely limit or restrict access to a third party especially in the event of death or disability of the account owner. This problem was illustrated in the not too distant past when a U.S. Marine was killed while serving in Iraq and his family was denied access to his Yahoo email account as a result of the restrictions contained in Yahoo's TOS. It took an order from the probate court to finally resolve this dispute and allow access to the family.



Of course, the practical issue that needs to be addressed before someone becomes incapacitated or dies is access to the online relationships. Providing passwords and log in information to trusted family members and/or advisors is one way to assure that someone can check your online stock account, your automatic bill payments from your online bank account, and monitor other online relationships. However, even if this information is provided and authorization for access is given to the family member or trusted advisor, the technical provisions of the TOS agreement may still prohibit access and, in addition, there may be roadblocks erected by state and federal law.

Only a handful of states have enacted legislation attempting to address these issues and these range from laws only allowing access to email accounts to more updated legislation recognizing a broader range of "digital assets." From the federal perspective, there are existing laws attempting to regulate the conflict between access

Continued on page 9

Achieving a Better Life Experience Act (ABLE) of 2014

Richard A. Marchese, Esq.
Partner

On December 19, 2014, President Obama signed into law the Achieving Better Life Experience (ABLE) Act. The ABLE Act allows people with certified disabilities, as well as families/friends of people with disabilities, to have an opportunity to create tax-exempt savings accounts that can be used as funds to maintain and improve the well-being and quality of life of the disabled.

The stated purpose of the ABLE Act is as follows: "To encourage and assist individuals and families in saving private funds for the purpose of supporting individuals with disabilities to maintain health, independence, and quality of life."

Advocates for the disabled had lobbied Congress for years to find an alternative funding option other than the creation of a special needs trust for a disabled individual. ABLE Act accounts will be similar to the current IRS Section 529 program that allows families to save for the college education of their children or grandchildren. A new section, 529A, will govern ABLE Act accounts. The law allows each state to establish and operate an ABLE Act Program. Therefore, each state will have to pass legislation and appropriate regulations to implement the ABLE Act. There is now proposed legislation in New York to enact the ABLE Act. As of the writing of this article, the bill was still in committee in the State Senate. We are hopeful of its passage by sometime early this summer.

Who is eligible?
For those under age 19, it must be established that the individual is either blind or disabled as defined by the Social Security Administration (SSA), or under new disability certification criteria set forth in Section 529A.

For those over age 19, it must be established that the individual is either blind or disabled under SSA definitions, and it must be established that such blindness or disability occurred before age 26.

Each eligible individual may only have one ABLE account. ABLE Act accounts must be opened in the state that the beneficiary resides.

Contributions to ABLE Act accounts may be made by anybody. Please note, however, that contributions are NOT tax deductible. Total annual contributions by all sources to any one account may not exceed the annual gift tax exclusion for any one year ($14,000 for the year 2015), and will be adjusted annually for inflation. Contributions must be in cash unless rolled over from a prior 529 account. Any growth in the account accrues tax free. Aggregate contributions are subject to the New York State limit for education related 529 accounts (currently, $375,000), but, if contributions exceed $100,000, an individual on Supplemental Security Income (SSI) may lose their eligibility. Contributions up to $100,000 will be deemed exempt for those disabled on SSI. Medicaid eligibility, however, will not be impacted by ABLE Act accounts, even if the aggregate balance exceeds $100,000. The IRS has issued preliminary guidance that, for income tax purposes, the owner of an ABLE Act 529A account is the designated beneficiary.

What may ABLE Act funds be used for?
ABLE Act accounts may be utilized for "qualified expenses," which are expenses related to an individual's disability, such as health, education, housing, transportation, assistive technology, employment training and support, personal support, financial management and administrative services, legal fees, funeral and burial expenses, and related services and expenses. Distributions are not taxed as long as the money is used for such qualified expenses. Unpermitted distributions will cause the account to lose its exempt status for Medicaid purposes, and will also be subject to a 10% penalty for income tax purposes.

Drawbacks of ABLE Act accounts
For those disabled who are in receipt of Medicaid, any monies remaining in an

ABLE Act account, upon the death of the beneficiary, must first be utilized to pay back the Medicaid program for expenditures made during the lifetime of the disabled individual. This is potentially a big issue, especially for relatives or friends of a disabled individual who would like to contribute to an ABLE Act account. The limitation of $14,000 per year is also an issue, particularly for relatives or friends who want to, and have the means, to contribute more funds. Finally, ABLE Act accounts will not work for those individuals whose disability onset date is after age 26.

An alternative to an ABLE Act account

An alternative to an ABLE Act account that bypasses all of these issues is a THIRD-PARTY SPECIAL NEEDS TRUST, also known as a SUPPLEMENTAL NEEDS TRUST. Unlike an ABLE Act account, there is no limit on annual contributions to a third-party special needs trust, and, most importantly, no payback to Medicaid is required upon the passing of the beneficiary. Also, there is no age requirement with respect to the establishment of a certified disability. Distributions are generally managed by a family member of the beneficiary who acts as a trustee, and, if properly drafted by an experienced attorney, neither SSI nor the Medicaid program will be impacted by the funding of a third-party trust.

ABLE Act account or third-party special needs trust? Consult your Woods Oviatt Gilman attorney.

The ABLE Act has opened up a new vehicle to help those in our community with disabilities. Attorneys at WOG have counseled and assisted many families over the years that have children or relatives with special needs. Every client is unique. We can help guide families through the intricacies of government programs and regulations, and work to come up with a plan that is best suited to help achieve the goals of their loved ones: health, independence, and quality of life. •

Richard Marchese is a Partner in the firm's Family Wealth and Estate Planning Department. He can be reached at Rmarchese@woodsoviatt.com or (585) 987-2859.

Digital Death *From page 7*

and privacy concerns. For example, Congress and each state have enacted something akin to the Computer Fraud and Abuse Act that makes unauthorized access of hardware or stored data a crime. Even with the account holder's express authority allowing access to an account, the individual gaining access to the account is still technically in violation of this law if the service provider has not also given consent—because in order to access the account you have to access the service provider's computers, which, again, requires their consent.

However, access to these accounts on the death or disability of the account holder can become quite problematic. This so-called "digital death" requires some additional planning, record keeping, and, hopefully, changes in federal and state law.

There are legislative proposals pending in many states and in Congress attempting to bring some clarification to these issues, but what can you do in the meantime? There are a few options to consider:

- Check with your service provider on how access by a third party (such as an agent under a durable power of attorney, executor of an estate, a court-appointed guardian or other fiduciary) could be authorized. More and more providers are dealing with this issue.
- Three little words: back-up, back-up, back-up. Items stored on external media devices (CD, DVD, flash drives, etc.) can be accessed by a fiduciary on their own computer and would not involve potential violations of any state or federal laws.
- Prepare an inventory of your accounts, log in parameters, passwords, etc. for a fiduciary to access if and when needed. Obviously, this needs to be kept in a safe place (possibly with your attorney or accountant) to avoid someone misusing them, and would also need to be updated for new accounts, changed passwords, etc. from time to time.
- Update planning documents (wills, trusts, and powers of attorney, for example) to address access to and use of digital assets. This is something we are addressing here at the firm with our estate planning clients going forward.

This is an area that is in constant flux and updates to controlling federal and state law, if past history is any indication, will likely lag behind developments in technology. Let's hope not. It should be noted, on the other hand, that many service providers are updating their sites to provide alternatives to deal with the death or disability of the account holder. It may well be worth your while to check with your provider to see what is available. Also, if you would like to have these issues reviewed with your Woods Oviatt Gilman attorney, please do not hesitate to contact us. •

Phil Burke is a Partner in the Family Wealth and Estate Planning Department. You can contact him at (585) 987-2850 or Pburke@woodsoviatt.com.

Foreign Bank Accounts

Jack M. Battaglia, Esq.
Partner

Over the last few years there has been a big push by the Internal Revenue Service and the U.S. Department of Justice to have United States taxpayers with foreign bank accounts disclose those accounts through their Offshore Voluntary Disclosure Program.

In addition, the U.S. Department of Justice and the Swiss Government entered into an agreement that would allow Swiss banks to potentially mitigate U.S. criminal charges for helping U.S. taxpayers avoid tax through secret Swiss bank accounts.

As a result, many Swiss banks have been notifying United States customers that they are about to disclose their names to the U.S. Treasury Department if they do not come in compliance with the U.S. law requiring the disclosure of foreign bank accounts.

On top of this, FATCA (Foreign Account Tax Compliance Act) was enacted in 2010 imposing reporting obligations on foreign financial institutions relating to U.S. account holders. The U.S. Treasury Department has also entered into agreements with France, Germany, Italy, Spain, the United Kingdom, and approximately 50 companies to adopt programs exchanging information on U.S. taxpayers with foreign bank accounts.

Disclosure Requirements

FBARs

Any U.S. taxpayer who owns a foreign account or has signature authority over that account must disclose that account to U.S. authorities on an FBAR (Report of Foreign Bank and Financial Accounts) if the account or total of all accounts exceed $10,000 at any time during the year. The form must be filed no later than June 30th of the subsequent year.

For example, if the taxpayer had a foreign bank account in excess of $10,000 at any time during 2013, it must be reported by June 30, 2014 to the Treasury Department on the FBAR.

Taxpayers are also required to "check the box" on Schedule B of their tax return indicating whether or not they have a foreign bank account.

Form 8938

In addition, since 2011 taxpayers are also required to file Form 8938 with their income tax return disclosing any foreign financial assets which total more than $50,000 on the last day of the year or $75,000 during the year for single individuals. For married individuals, the threshold amounts are $100,000 and $150,000 respectively.

Penalties

Those taxpayers who have not complied with the above requirements are subject to substantial civil and criminal penalties.

For FBARs, the criminal penalty for a willful failure to file the FBAR is a prison term of up to 10 years and penalties of up to $500,000 per violation.

In order to prosecute successfully, the Department of Justice must show that there was an intentional failure to file with knowledge of the obligation to file the FBAR. This can be a very difficult threshold for the Department of Justice in most cases. Therefore, they tend to rely primarily on the civil penalties.

There are two civil penalties for failure to file the FBAR:

- A non-intentional failure to file: up to $10,000 a year for the last six years.
- A willful failure to file: up to the greater of $100,000 or 50% of the total balance of the foreign bank account per violation.

In addition to the FBAR penalties, there is a penalty for failure to file the Form 8938; it is a $10,000 per year penalty for each year the form is not filed. Since From 8938 did not come into effect until 2011, the penalties would be $10,000 for failure to file for 2011, 2012, and 2013. The penalty is not "up to" $10,000 but is a flat $10,000 penalty for each year the form is not filed. In order to eliminate the penalty, the taxpayer must show that there is "reasonable cause" for not filing the return.

Reasonable cause may consist of a good tax compliant history, the promptness in filing the delinquent Forms 8938, lack of knowledge of the requirement, and reliance upon your accountant to inform you of this requirement.

OVDP

The Internal Revenue Service has initiated an Offshore Voluntary Disclosure Program (OVDP) to mitigate these penalties. In this program, the taxpayer must disclose all of his foreign bank accounts and relevant information relating to that bank account. In exchange for this, civil penalties are limited and criminal penalties may be avoided.

In order to participate in the program a taxpayer must:

- Not be under any civil or criminal investigation by the Internal Revenue Service.
- Pay a penalty of 27.5% of the highest value of the offshore account during the last eight years.
- File amended tax returns for the last eight years reporting any unreported income during those years from the foreign account and pay the taxes, interest, and a penalty equal to 20% of the additional taxes.

As you can see, these penalties are very severe and can amount to substantially more than the current value of the bank account.

For example, assuming that in the last eight years the highest value of the foreign bank account was $500,000 but with withdrawals from the account the value is now $100,000. Under the OVDP the penalty would be $137,500 plus the taxes, penalties, and interest on the unreported income. In this case, it would amount to more than the current value of the account.

Assuming the taxpayer did not know of his or her obligation to file the FBAR, the taxpayer may be better off not participating in the program and doing a "quiet disclosure" as opposed to entering the program. An example of "not knowing" would be that the taxpayer's accountant never asked the taxpayer about a foreign bank account or the answer to the "check the box" question on the tax return.

Quiet Disclosure

A quiet disclosure is merely filing the delinquent returns and hoping for a better result than you would obtain under the OVDP if you were audited by the Internal Revenue Service.

This would include filing the delinquent FBARs for the past six years, amended tax returns for either three years or six years depending upon the statute of limitations, and the Form 8938 for 2011, 2012, and 2013 which is attached to the amended income tax return.

The IRS may not audit the taxpayer and accept the amended returns and the FBARs as filed. However, as a result of a recent Government Accountability Office finding, it is expected that the IRS will pursue "quiet disclosures" with more vigor.

Therefore, one can expect that the filing of the FBARs and the amended tax returns will more likely than not will trigger an audit and the taxpayer will then have to show that the failure to file the FBAR was not willful or intentional. In addition, the taxpayer will have to show that there was "reasonable cause" for failure to file the Form 8938.

Unless there is evidence of the taxpayer's "willfulness" in failing to file the FBAR, the maximum penalties would be $10,000 a year for six years or $60,000, plus the penalties of $10,000 a year or $30,000, for failure to file the Form 8938. Absent willfulness, these are the maximum penalties that could be imposed but it is possible that they might not be imposed to their maximum extent. In any event, they could be much less than the amount of the penalties under the OVDP. See the above example.

"Opt Out"

The third alternative is to enter the OVDP and then opt out at the last moment. This is a procedure recognized by the Internal Revenue Service which gives you the opportunity to opt out after you have been informed of the penalties.

If the taxpayer feels that the penalties are too stringent and the taxpayer gets an indication from the revenue agent working on his disclosure that the penalties may be lesser if he or she was not in the program, then the taxpayer may opt out.

This is a common procedure recommended by many tax professionals.

Streamline Filing Compliance Procedures

In 2014, the Internal Revenue Service came out with a new program offering a smaller penalty to taxpayers who failed to file FBARs and can certify that their failure to file was "non-willful."

The penalty under this program is 5% of the highest balance of the taxpayer's foreign financial assets for the 6 years for which FBARs have not been filed.

The concern of most taxpayers considering this streamline procedure is certifying that their failure to file the FBARs was "non-willful". Unless the taxpayer was totally unaware of his or her obligation to file the FBAR, it will be very difficult to certify that the failure was non-willful.

Conclusion

Now is the time for taxpayers with undisclosed foreign international accounts to come forward and take advantage of one of the three alternatives described above. In doing so, the taxpayer should rely upon experienced counsel in this area to weigh and discuss the pro and cons of each alternative. •

Jack Battaglia is a Partner in the Tax Department. You can reach him at (585) 987-2860 or Jbattaglia@woodsoviatt.com.

In The Community

Christen C. Bruu, Esq. has joined the planned giving committee at The School of the Holy Childhood.

Philip L. Burke, Esq. has been named Chair of the Advancement Committee of the Rochester Area Community Foundation.

Thomas M. DiPiazza, Jr., Esq. has joined the committee for the Boy Scouts of America Seneca Waterways Council "2015 Sporting Clays Classic."

Natalie A. Grigg has been named Co-Chair, Default Services Practice Group Committee for the American Legal Financial Network (ALFN). She is also a member of the Marketing & Business Development Group, and the Junior Professionals & Executives Group for the ALFN.

Frances M. Kabat, Esq. has joined the Board of Directors for the Genesee Center for the Arts and is also a member of their Development Committee.

Robert W. Kessler, Esq. has been named President of the Board of Directors for the Seneca Waterways Council for the Boy Scouts of America effective May 1, 2015.

Greta K. Kolcon, Esq. will be named a Vice President for the Women's Bar Association of New York, effective May 14, 2015.

Richard A. Marchese, Jr. Esq. has become a member of the Planned Giving Advisory Council for the University of Rochester.

Honors and Awards

René H. Reixach, Esq. receives the Catholic Charities Community Services Inaugural "Community Champion" Award.

René Reixach, Partner and Chair of the firm's Elder Law Practice Group, received the Catholic Charities Community Services Inaugural Community Champion Award. This award is given to an individual who has significantly advocated, supported, encouraged and promoted a just and compassionate society for the individuals served by Catholic Charities Community Services. René was honored at a breakfast on March 6, 2015 at Irondequoit Country Club.

Lorisa LaRocca, Esq. and Timothy Lyster, Esq. named recipients of the "Forty Under 40 Award."

Lorisa LaRocca, a Partner in the firm's Litigation Department, and Timothy Lyster, an Associate in the firm's Secured Lending and Financial Recovery Department, have both been named recipients of the "Forty Under 40 Award" by the *Rochester Business Journal*. The "Forty Under 40" awards recognize 40 men and women under the age of 40 who have achieved professional success and made significant civic contributions to our community.

They were both honored at a luncheon on Thursday, November 20, 2014 at the Rochester Riverside Convention Center.

Robert W. Kessler, Esq. Named as a "Leader in Law" by *The Daily Record*.

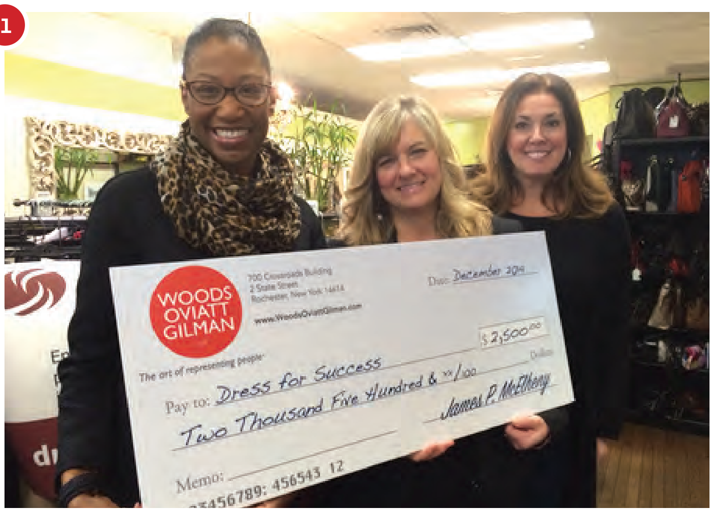
Robert W. Kessler, Esq., a Partner in the firm's Family Wealth and Estate Planning Department, was selected as a "Leader in Law" by *The Daily Record*. This award is given to attorneys in the Rochester area who have shown tremendous dedication to the legal profession and selfless, tireless commitment to the community. Bob and the other honorees were honored at a dinner on Thursday November 6, 2014 at the Hyatt Regency Hotel.

2014 Holiday Donations

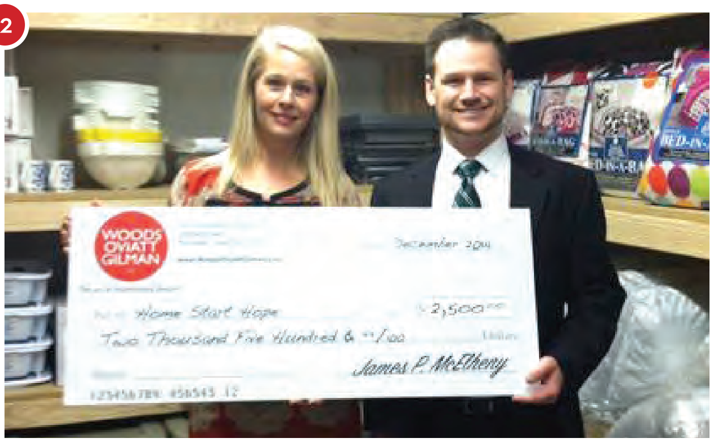
In December of 2014, Woods Oviatt Gilman LLP once again made contributions to five local not-for-profit organizations as part of its annual holiday donation program. This holiday tradition began in 1999 and the donations are made in lieu of the firm buying gifts for its clients. The following organizations were recipients of the donations for the 2014 holiday season:

1. Kelly Beauchamp presents the check to Alyssa S. Whitfield of **Dress For Success** and Joan Lincoln of Panache. For more information go to: **www.rochester.dressforsuccess.org**
2. Nate Bank presents the check to Kristin Mathis of **Home Start Hope**. For more information go to: **www.homestarthope.org**
3. Jim McElheny, Sam Merlo and Bob Attardo present the check to Peter Sarratori, Brandi Koch, Tracy Armstrong & Tracey Dreisbach of The **Rotary Sunshine Camp for the Treehouse Project**. For more information go to: **www.sunshinecampus.org**
4. Dick Brovitz and Jim McElheny present the check to Gary Mervis of **Camp Good Days and Special Times**. For more information go to: **www.campgooddays.org**
5. Anthony Eugeni presents the check to Rebecca Vincheski of the **Niagara Falls Boys and Girls Club**. For more information go to: **www.nfbgc.org**

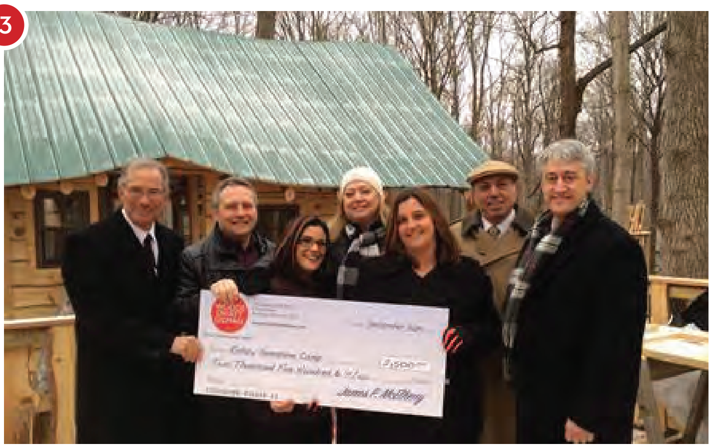
1



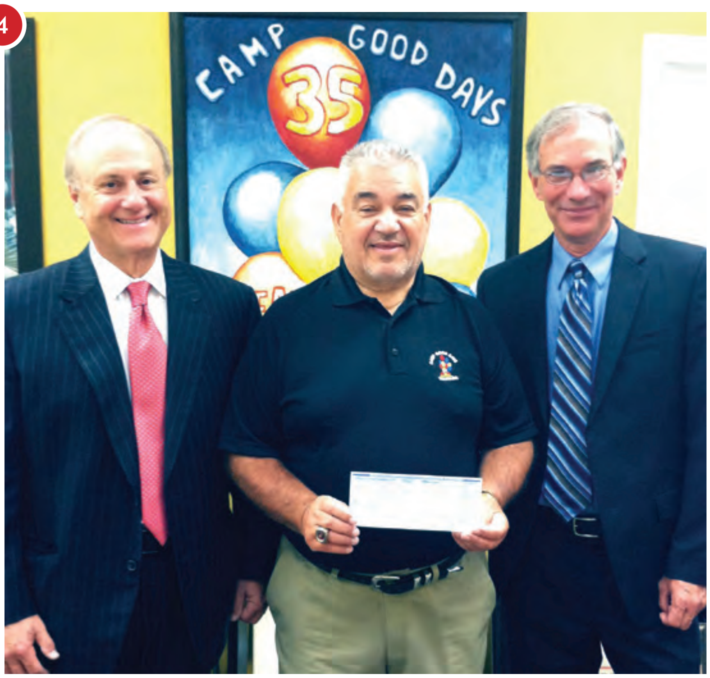
2



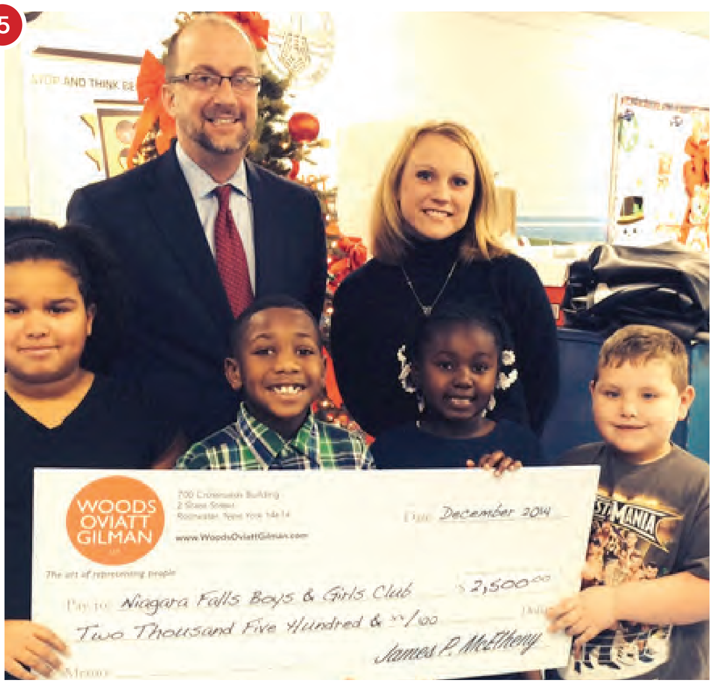
3



4



5



Expanding Your Business Internationally?

Christopher Rodi, Esq.
Partner

International business transactions are no longer limited to large, multi-national corporations. Small and mid-sized Rochester area businesses are increasingly looking to international markets both to extend the marketplace for their products and services and to expand their supply chain. Although technology has allowed for nearly any business to have a global reach, there are a number of issues you should consider as you contemplate the expansion of your business internationally.

Cross-border transactions must generally comply with two sets of rules: those of the United States and those in the country where you are seeking to do business. It is important not only to know how each set of rules work, but also how they interact and work together. This article points out a few of the key issues to consider, although many others exist and could be of greater importance for businesses operating in certain industries.

One area to consider is how to structure your international business dealings, and how this structure affects liability and taxes for your existing U.S. operations. Businesses often start by transacting with international partners through their existing company. As international transactions grow, they may consider opening a new, separate legal entity to oversee their international operations. Eventually, they may even consider opening a local branch office in a foreign country or a foreign subsidiary through which to operate. Some transactions may call for a joint venture between the U.S. and foreign partners. Each of these choices carries different U.S. and local country tax and liability benefits and burdens that need to be carefully thought out.

Another issue to take into account is intellectual property protection. Patents and trademarks granted by the U.S. government only protect within the U.S. Each other country has its own set of rules for registering and protecting intellectual property there. However, there are several international efforts to help streamline this process. For example, the Patent Cooperation Treaty and the Hague Agreement Concerning the International Registration of Industrial Designs, which provide unified procedures for applying for certain patents in a number of participating countries at once. Beyond having legal protection, a company must also consider the practical and financial reality of trying to enforce their intellectual property rights in another country.

If you plan to have people working for you in another country, you also need to comply with the labor, employment, and immigration laws of that country. Many countries have vastly different labor, employment, and immigration regulations than our own. If you are sending U.S. individuals abroad, the appropriate local visa or work permits must be obtained. Furthermore, you should make sure your U.S. employees understand the local laws that may apply to them. For example, local anti-corruption laws can turn what your employee may consider to be a normal transaction into a criminal bribery offense.

If you are retaining local people abroad, you must decide whether you are hiring these foreign individuals as employees or retaining them as independent contractors under U.S. and local laws. This distinction can affect issues such as your liability for their actions or whether or not you become subject to tax in the foreign country. Foreign countries can also have significant statutory severance and vacation requirements. Cross-border transactions can also involve foreign individuals traveling and working in the U.S., in which case the proper visas and work permits must be obtained.

The items above are just a few of the considerations to keep in mind when preparing to expand your business internationally. There are many other issues that may apply in particular situations. For example, U.S. attorney-client privilege may not apply in certain circumstances, particularly if you become involved in litigation in another country.

The benefits to your business in expanding internationally, however, can easily outweigh what may at first seem to be an overwhelming number of possible pitfalls. Understanding your legal obligations and liabilities and performing your due diligence before you enter into a cross-border transaction are essential to ensuring that you avoid these difficulties.

Your U.S.-based legal counsel can help you navigate the U.S. laws that may apply to your cross-border transaction. It is often necessary for them to reach out to their foreign counterparts to help you understand and comply with the local laws in the country where you are seeking to do business. Woods Oviatt Gilman LLP, for example, is a member of Meritas Law Firms Worldwide, an international network of law firms, which it regularly accesses to help its local clients doing business around the world. •

Christopher Rodi is a partner at Woods Oviatt Gilman LLP, practicing in its business and finance department. Chris is also chair of the firm's cross-border transactions practice group. He can be reached at Crodi@woodsoviatt.com or (585) 987-2820.

Lorisa D. LaRocca, Esq.
Partner

Labor & Employment Alert

NLRB Decision Requires Review of Handbook Policies Regarding Email Use

In its recent decision, *Purple Communications*, the National Labor Relations Board overruled its own 2007 decision, holding that "employee use of email for statutorily protected communications on non-working time must presumptively be permitted by employers who have chosen to give employees access to their email systems."

What does this mean for employers? A policy restricting email use by employees to "business purposes" can no longer prohibit such communications from being used to engage in union activities nor can employers rely on general prohibitions against "engaging in activities on behalf of organizations or persons with no professional or business affiliation" with the employer to avoid general employee use of company email for concerted activity.

Partial Repeal of Wage Theft Prevention Act Requirements

On December 29, 2014, New York Governor Andrew Cuomo signed a bill eliminating the requirement that before February 1 of each year employers must notify and receive written acknowledgment from every worker about their rate of pay, allowances, pay day and employment classifications. However, the bill also increases penalties for non-compliance with the Act, closes a longstanding loophole in the law by providing that the 10 members with the largest percentage ownership in a limited liability company are now jointly and severally liable for unpaid wages and salaries, imposes successor liability for violations of the Act, and requires that any investigation of alleged wage payment violations conducted by the Department of Labor cover the entire six-year statute of limitations period absent notice from the Commissioner of Labor.

Please contact us if you would like to discuss how these updates may affect your business. •

Lorisa LaRocca is a partner in the Labor and Employment Department. She can be reached at (585) 987-2834 or by email at Llarocca@woodsoviat.com

WOODS OVIATT GILMAN LLP

700 Crossroads Building | 2 State Street | Rochester, New York 14614

The art of representing people®

WoodsOviatt.com

"Make it a Day On, Not a Day Off."

That was theme on Monday, January 19, 2015 at Woods Oviatt Gilman LLP as a group of attorneys and staff celebrated Martin Luther King Day and volunteered at two not-for-profit organizations in Rochester. One group spent the day at the Volunteers of America's store and another group spent the day painting at one of CDS Unistel's residential homes.