

**LAPP, LIBRA,
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Dear Friends:

This Newsletter will update you about our Firm, the legal services we provide, our attorneys, and certain developments in the law that you may find interesting.

Our Firm: Lapp, Libra, Thomson, Stoebner & Pusch, Chartered provides thoughtful and careful solutions for our clients' diverse legal needs. We are grateful for the opportunity to serve our clients, and we work hard to use our legal experience and knowledge on their behalf. Please call us if we can help with any of your legal issues.

Estate Planning and Administration Group: Bill Lapp, Dave Libra, and Robert Richert offer thoughtful, sophisticated estate planning counsel to our clients. These attorneys draw on many years of experience with effective estate planning strategies to help clients identify and accomplish their important long-range objectives. We do not believe that "one size fits all." Our attorneys take time to learn about our clients, their financial affairs and their objectives before designing customized wills, trust documents, and living wills (medical directives). Our aim is to develop an estate plan with which our clients are comfortable and to create opportunities for saving taxes and expenses.

Business owners and executives learn that our attorneys understand their goals, their businesses and assets, and their business succession plans. Because of our business expertise, we are able to develop estate plans that meet their goals and expectations. Careful planning for long-term management of financial resources can provide security and peace of mind for all family members. Otherwise, large sums of money may go to pay avoidable estate taxes and expenses of administration.

Estate administration involves important tasks relating to both probate and non-probate assets and proceedings. Decisions often have important but unintended consequences that may be overlooked by persons not experienced in this area of the law. We share our clients' goals of protecting assets and minimizing administration expenses and taxes. We strive to communicate with family and business partners during the administration of an estate and at its completion. We will assist in the successful and smooth transition of businesses and assets from one generation to the next.

When controversies cannot be avoided, we are able to draw upon our experience in litigation to effectively represent the interests of our clients in any will contest or claims dispute.

If you would like to discuss any estate planning and/or administration issues, please call us. Our attorneys are committed to offering prompt, effective and economical legal services. We continuously seek to find new and creative ways to meet the goals of our clients, to maintain their trust, and to deliver results-oriented and cost-effective legal services.

Tips to Avoid Business Losses and Personal Liability:

By Ralph V. Mitchell

Tip 1: Avoid Deposits Going Awry

Think about this. If someone embezzles from your business, will it be your most trusted employee or the least trusted? It will likely be the person you trusted enough to permit him or her to handle bank deposits from your customers, the life blood of your business.

Consider this true story which describes a common form of embezzlement. Brenda owned a profitable lumber business. Diane was a close personal friend and was hired as secretary treasurer of the company. Diane was authorized by a corporate resolution, signed by Brenda and Diane and provided to the company's bank, to both sign the company's checks and to endorse checks payable to the company from others.

Diane then began embezzling money from the company, ultimately stealing about \$500,000 before she was caught and fired. Diane would open the mail, pull out checks payable to the company, endorse them in the name of the company by signing her name as secretary treasurer, and deposit some of the checks into her personal account or the accounts of her children at the company's bank.

The company sued to recover the \$500,000 from the company's bank asserting that the bank should have detected (and prevented) the thefts or at least made further inquiry because Diane was a corporate officer and fiduciary of the company and was depositing checks payable to the company into accounts other than the company's accounts. In January 2007, a Tennessee court held that under the statutes applicable to checks, the bank had notice of Diane's breach of fiduciary duty because Diane had deposited checks payable to the company into accounts other than company accounts. *C-Wood Lumber Co., Inc. v. Wayne County Bank*, (Tenn. Ct. App. 2007). The bank therefore was not a holder in due course of the checks which would have protected the bank from liability in accepting the deposits. Stripped of its holder in due course status, the bank was liable to the company for conversion.

But, the court held, notwithstanding this ruling, the company could not recover from the bank for the money deposited into Diane's account because the bank's corporate resolution form Diane and Brenda signed contained the following language:

The bank is hereby authorized to honor, receive, certify or pay all instruments signed in accordance with the foregoing resolution even though drawn or endorsed to the order of any

officer signing the same, payable to cash or bearer or in payment of the individual obligation of such officer, or for deposit to his personal account and said bank shall not be required or be under any obligation to inquire as to the circumstances of the issuance or use of any instrument signed in accordance with the foregoing resolution or the application or disposition of such instrument or the proceeds thereof.

Because Diane was expressly authorized by this resolution to deposit checks into her personal account, the bank was not liable for those stolen deposits. But the court held that the bank was liable for the deposits into her children's accounts because the corporate resolution did not authorize deposits into her children's accounts. Minnesota has the same law that triggered the bank's liability in this Tennessee case.

There are lessons here for both company and bank. For the company, read carefully the standard corporate resolution form. If you do not want your employee to have the authority to deposit funds into her personal bank account, put the bank on written notice of that wish and take that authority out of the resolution. For banks, watch out for Minn. Stat. § 336.3-307 which imputes knowledge of a breach of fiduciary duty by a corporate officer to the bank if the bank accepts a check payable to the company and deposited by a corporate officer into an account other than the company's account. Minnesota has the same statute that C-Wood Lumber Co. used to nail Wayne County Bank.

Tip 2: Careless Signing Creates Personal Liability

Every business person knows that one of the primary reasons for doing business as a corporation, limited liability company or some other such entity is to minimize personal liability by the owner for debts of the entity. Every business person also knows that it is necessary to sign a variety of agreements for the company in order to operate. But few business people know that signing such documents can subject the person signing to personal liability for the entity's debts if the signor is not scrupulously careful. (Because this is so important, this Tip really contains several parts).

First, read the document you are being asked to sign. Vendors often use preprinted credit application forms which may contain standard boilerplate provisions or provisions on the reverse side of a triplicate form. These forms sometimes contain language such as this, "The undersigned hereby agrees, both on behalf of applicant and personally, to be liable for all amounts due to [vendor]." This innocuous sounding language can lead at least to an assertion that the signor is personally liable. Credit card companies will issue corporate credit cards in the name of your business but the fine print may contain language that the user of the card is personally liable for charges made by such person if the company fails to pay. These documents are often poorly (or cleverly) drafted, so read carefully.

Second, sign correctly. Pre-printed forms may contain only one signature line at the bottom. The applicant for credit may be correctly named as the limited liability entity, i.e. ABC, Inc., but there is no place for including ABC, Inc. in the signature line at the bottom. So you simply sign your name. In so signing you are exposing yourself to personal liability. The correct legal way to sign an agreement for the business is this:

ABC, INC.

By: John Doe
Its: President

ABC, LLC

By: John Doe
Its: Chief Manager

Or, you could sign like this:

ABC, INC., by *John Doe*, President

ABC, LLC, by *John Doe*, Chief Manager

Third, don't use assumed names in legal documents. Use the proper legal corporate name on all agreements. Let's say ABC, Inc. does business as Alphabetical Systems, an assumed name. The vendor provides you a contract in the name of Alphabetical Systems and you sign John Doe, President. An ambiguity is created and an opportunity for the vendor to claim that you are personally liable. Or worse, let's say that the agreement is in the name of Alphabetical Systems and you just sign John Doe. That form of signature may also create personal liability. Whether or not you are personally liable depends on how you signed the document and where there is an ambiguity as to your intent. If you are signing for a corporation or LLC, the document must show unambiguously the name of the entity and that you are signing as its representative. If it does not, you are headed for trouble and potential personal liability. Where a legal issue involves an "ambiguity" or "intent" you can safely assume that you are headed for legal fees. Avoid these potential costs by using the correct form of signature for your business. Problems of inadvertent personal liability arising from defective signatures are almost 100% preventable.

If you have questions regarding business or banking procedures and issues, call Ralph at 612.338.5815. Ralph focuses his practice on commercial and bankruptcy litigation and appeals, creditors' and landlords' remedies in bankruptcy cases and problem loan workouts for secured creditors.

Carbon Monoxide Detectors Required: A new law requires carbon monoxide detectors in all Minnesota dwelling units by August 1, 2009. Detectors are required in new single-family and multi-family residential construction on or after January 1, 2007. Existing single-family dwellings must install detectors by August 1, 2008, while existing multi-family dwelling units have until August 1, 2009, to comply with the new law. Property owners are required to install detectors within 10 feet of each room lawfully used for sleeping purposes. Owners of multi-family dwelling units have some flexibility to comply with the new requirements by installing a detector 15-25 feet from all carbon monoxide-producing equipment if there is a centralized alarm system for the entire building.

Statutory Residential Construction Warranties: The Minnesota statutory residential construction warranties have generated many issues. Minnesota law requires residential builders to warrant that "during the ten-year period from and after the warranty date, the dwelling shall be free from major construction defects due to noncompliance with building standards." A recent Minnesota Supreme Court case held that a homeowner could not recover on faulty construction

claims against a dissolved business that were brought more than two years after the dissolution. *Camacho v. Todd and Leiser Homes*, 706 N.W.2d 49 (Minn. 2005). In effect, new amendments to the statute attempt to reverse the *Camacho* decision. The new law is intended to preserve a homeowner's claims against the residential builder until the end of the statutory warranty period despite the dissolution of the corporate entity. Additional changes add "notice and opportunity to repair" provisions to the statutory warranties. After discovering a construction defect, the homeowner must provide notice to the builder within six months of discovery and allow the builder 30 days in which to inspect the alleged defect and make a written offer to repair. The builder must provide the homeowner with a written list of completed repairs and notification that the homeowner may have a statutory warranty claim.

Amy Schwartz Named Rising Star: Amy was recently named as a "Rising Star" by *Minnesota Law & Politics*, *Twin City Business* and *Mpls/St. Paul Magazine*. Rising Stars are top lawyers in Minnesota who are 40 or younger or have been in practice for 10 years or less. Only 2.5 percent of Minnesota attorneys are identified as Rising Stars.



A 2004 graduate with high distinction from the University of Iowa College of Law, Amy served as a Note and Comment Editor for the *Journal of Gender, Race and Justice*. In law school, Amy was a member of Phi Delta Phi legal fraternity, the Organization of Women Law Students and Staff, and the American Constitutional Society. During the summer of 2003, she interned at the United States Attorney's Office in Minneapolis. Amy earned a Bachelor of Arts, with distinction and honors, in Political Science from the University of Iowa in 1999.

Amy joined the Firm in 2004. Her practice focuses on litigation and real estate. Amy is admitted to practice in the Minnesota state and federal courts, as well as the United States Court of Appeals for the Eighth Circuit.

Worry-Free Commercial Leases: Dave Libra recently participated in the seminar "How to Structure Worry-Free Commercial Leases" sponsored by the National Business Institute. Dave's presentations included:

Dealing with Tenant Defaults covering the rights, obligations, and remedies of the parties when a tenant breaches the lease, including events of default, notice and cure periods, eviction and rent collection remedies, and rights in bankruptcy.

Navigating the Insurance Coverage Minefield covering liability and property insurance coverages and lease provisions concerning insurance, indemnity, waiver of claims and subrogation, and casualty loss.

In a litigious society, it is essential for a commercial lease to carefully prescribe the rights and obligations of the parties relating to defaults and the risks of liability and damage to the real and personal property of the landlord and tenant.

Dave is a Minnesota State Bar Association Board Certified Real Property Law Specialist and has been named a "Super Lawyer" in real estate law by Minnesota Law & Politics magazine. He regularly represents both landlords and tenants in negotiating, drafting and reviewing commercial leases, work letters, subleases, and related documents.

Membership - Independent Community Bankers of Minnesota: We are pleased to announce that our Firm has become an associate member of the **Independent Community Bankers of Minnesota**, an association dedicated to keeping community banks competitive for the benefit of their customers and the communities they serve through education, networking and information regarding essential banking services, products, and technology. Our Firm represents a number of community banks in Minnesota. Our bank and non-bank clients turn to us when they face matters involving, among others: check fraud, letters of credit, Fair Credit Reporting Act, and Uniform Commercial Code issues regarding checks, commercial paper, and security interests.

Update: Employers Must Review Vacation Policies: The Minnesota Supreme Court heard oral arguments in the case of *Lee v. Fresenius Medical Care, Inc.*, on March 12, 2007. The issue before the Court is whether a provision in an employer's handbook, providing that an employee terminated for misconduct is not eligible for payment of earned but unused vacation, is permitted under Minnesota law. The Minnesota Court of Appeals previously determined that such a provision is contrary to Minnesota law. The Minnesota Supreme Court's decision will change the landscape of vacation pay, and employers should be prepared to review their vacation pay policies to determine whether those policies are still effective in light of the Minnesota Supreme Court's forthcoming decision in *Lee*.

Investment-Related Arbitration: Did you know that, if you have a dispute with your investment broker or brokerage firm, you will most likely be required to arbitrate the matter? Twenty years after the United States Supreme Court made it legal for brokerage firms to compel arbitration of customer disputes, investment-related arbitration has changed from a quick and easy process to a complex system often involving expert witnesses, discovery disputes, and motion practice. Our firm's attorneys have experience representing both customers and brokers/brokerage firms in investment-related arbitrations. If you need help concerning an investment-related matter, please call us.

Community Involvement: **Jeff Timmerman** currently serves as Co-Director of Continuing Legal Education for the **New Lawyers Section** of the **Hennepin County Bar Association**. Jeff recently sat on a panel at Southwest High School in Minneapolis, encouraging high school students to seek further education and consider a career in law. Prior to moving to Minnesota, Jeff practiced in Florida, where he founded and chaired the Tallahassee Restoration of Rights Coalition, a group dedicated to assisting rehabilitated felons regain their civil liberties, including the right to vote in state and federal elections.

Our Practice Areas: We look forward to meeting the needs of our clients in the following areas: Commercial Litigation; Business and Corporate Law; Creditors' Remedies and Bankruptcy; Employment Law; Estate Planning and Administration; Real Estate Law; Securities; and Taxation.

Our Attorneys:

William S. Lapp
David A. Libra *
Richard T. Thomson
John R. Stoebner *
Gregory D. Pusch
Julia A. Christians

Ralph V. Mitchell
Robert L. Richert +
Amy L. Schwartz
Jeffrey A. Timmerman #

* Minnesota State Bar Association Board Certified Real Property Specialist

+ Also licensed in Wisconsin

Also licensed in Florida

Our Location: We are conveniently located in Downtown Minneapolis on the 25th floor of One Financial Plaza, 120 South Sixth Street. There are many parking ramps in the immediate area, and the light rail line and many bus lines run next to One Financial Plaza. For specific directions, please check our Website at www.lapplibra.com.

We strive to provide you with "Excellent, Efficient and Economical" legal services. Thank you for your confidence in trusting us with your important legal matters in the past. We also appreciate your referrals of friends and relatives to our Firm. If we can be of assistance on any legal matter, please contact us.

If you have any comments on our Newsletter or want to change your address, to receive our Newsletter by e-mail, to add anyone to our Newsletter list, or to be deleted from our Newsletter list, please e-mail us at: receptionist@lapplibra.com.

Best Wishes,

Dave Libra

This Newsletter is published to inform our clients and other readers about our law firm and legal developments. The information in this Newsletter is only a general summary and is not intended, and should not be relied upon, as legal advice. If you have any questions, please contact one of our attorneys at 612-338-5815.

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ENGAGED IN THE GENERAL PRACTICE
OF LAW, INCLUDING:

BANKRUPTCY
BUSINESS & CORPORATE
COMMERCIAL LITIGATION
EMPLOYMENT

REAL ESTATE
SECURITIES
TAX LAW
WILLS, TRUSTS & PROBATE