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*Employment Law*

**To HR or Not to HR . . .  
That is the Question**

Article originally appeared in February 2006 issue of Washington SmartCEO  
(<http://washington.smatceo.com>)

By Richard G. Vernon and Mark Palermo

The value to a business of a Human Resources capability is complex in its analysis. On the one hand, HR can almost never be a profit center for a business, as it has no basis for generating income. Instead, it serves only as a cost center. HR may, however, be extremely valuable to any organization by focusing on organizational development and business goals, as well as focusing on basic legal compliance and essential processing for benefits programs, recruiting activities, and similar bureaucratic functions. Done well, both the strategic and administrative aspects of HR can help foster a productive culture that enhances company profits and can guard the company against discrimination and other employment claims. The issue for many smaller employers, however, is whether the cost of an HR capability is worth the reward.

All employers must pay attention to such HR functions as recruitment of the best available employees, achieving compliance with I-9 (immigration) obligations, orientation of new employees to their new employment, negotiating benefits premiums and resolving benefits questions, imposition and documentation

of discipline, and handling discharge in accordance with legal standards, all of which require the attention of someone who understands the purposes and goals of human resources. At the same time, a strong argument can be made that small-to medium-sized companies do not necessarily need to spend money on a dedicated strategic HR person.

As suggested above, HR encompasses many possible activities, and these can be broadly divided into the administrative and the strategic. The administrative functions include anything from benefits administration to legal compliance activities. These are extremely important to do well, both as a matter of creating a strong professional organization and as a matter of compliance with the law. It may be efficient, and even acceptable, to have an office manager or a similar person responsible for this and is, in fact, one of the strongest arguments for hiring a versatile and intelligent office manager. If an employer has such a part-time benefits manager or HR administrator, it is also important to invest in teaching that multi-tasking individual about the context in which he or she will execute the administrative HR functions.

Strategic HR is about organizational development – finding the right people, keeping them, managing risk, and supporting the business goals of the company. The strategic part of HR involves such activities as knowing what kind of skills an employer needs to add to its staff, and designing a benefits package that is attractive and affordable within an employer's industry. An administrative HR person is almost certainly not the right person to make those decisions. The most important strategic HR decisions are about selecting who the brokers, service providers, and attorneys will be that an employer will rely upon to help with complex issues.

In a small- to medium-sized company, these strategic HR issues are essential to a healthy organization, but execution of them need not be a full-time job in and of itself. Somebody in senior management who has a broad overview of the firm and its industry can own strategic HR as part of his or her portfolio.

Some strategic HR matters should be handled directly by this designated HR leader, such as an overall compensation strategy, a staffing plan tied to a business plan, and the tone and modes of communication with staff. To be effective, some strategic HR matters can and should be invested in other parts of the organization, such as getting mid-level staff involved in defining and maintaining the desired culture. The role of the strategic HR leader in such activities is to be a champion or advocate, but not to administer them directly. Some strategic HR matters may, alternatively, be outsourced, and deciding what HR functions can be handled this way is a critical area of strategic thinking.

HR is a broad topic, and the biggest and most-evolved organizations have complex teams of HR professionals, including strategists, business planners, attorneys, compensation and benefits experts, and administrative staff to run things. It is not possible for a small- to medium-sized company to have this range of talent and skills on

staff, or to imagine that they can find it all in one or two people. Small- to medium-sized businesses would do better to find the kind of leader who can be a part-time champion of HR issues and HR decisions, somebody who can assemble a team of consultants to work on HR on an as-needed basis, and who can help develop a company culture that achieves strategic HR and business objectives. If your company is successful and grows, when the time comes “to HR” with a dedicated strategic HR leader, you then should also have a wealth of knowledge and contacts to help find the right person for the role.

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*Commercial Lending*

## **Keys To Successful Construction Lending**

By Arnold D. Spevack

With construction booming throughout the Metropolitan Washington, DC region, it is important that both borrowers and lenders pay attention to

details in the construction loan processes. A successful construction loan – where the project is completed in a timely fashion and the loan is repaid as agreed

– is achieved by careful coordination between the borrower and the lender. The costs associated with a construction loan will almost certainly reflect the

attention to the process by borrower and lender – the less the attention to the detail by the parties, the greater the cost to both.

The process is much like any other real estate loan transaction, with the added requirements that the borrower and lender ensure that the building is properly designed and constructed, and all parties involved in the construction are paid. Fundamental to the success of the project is a borrower who is familiar with the construction process and who assumes responsibility for its oversight.

Beginning with the first meeting between borrower and lender, the borrower should deliver all available documentation to the lender (see below.) Throughout the process, the borrower and lender must communicate frequently in order to ensure that the lender has the most up-to-date versions of all documents. A successful construction loan typically proceeds as follows:

- The borrower submits a formal loan application together with copies of all available underwriting documents including the purchase contract, organizational documents, construction contract, preliminary plans and specifications and back title information. The borrower should coordinate the delivery of these documents, as the lender who becomes overly involved in supervising

the parties risks lender liability exposure if problems develop later or the project is ultimately unsuccessful.

- The lender evaluates the project and issues a “term sheet” outlining the circumstances under which the lender would commit to making a loan for the project, with the borrower advancing the lender’s anticipated costs associated with the appraisal and environmental review and legal costs. Not all lenders utilize a term sheet; however, those that do are less likely to chase the deal that never closes.
- The borrower elects to proceed by the terms outlined in the term sheet, and the lender receives and reviews the appraisal and environmental reports for the project. The lender will likely engage a technical consultant to evaluate whether the building is properly designed and can be constructed within the borrower’s construction budget. This person must be working with the same construction documents that the borrower’s representatives are working with.
- The lender issues a formal commitment letter which can be either very specific, or can contain only fundamental deal terms while leaving negotiation of specific points for later. Whatever the form of the document, the borrower and lender should have reached an agreement as to what will be required to collateralize the loan and what information the borrower will be required to provide during the construction process, such as an ALTA survey, contracts with the general contractor and key subcontractors, additional surveys, builder’s risk insurance coverage, etc.
- The borrower provides additional underwriting materials, including complete copies of the real estate purchase contract, all organizational documents, final drafts of the construction contract and the contract with the architect, up-to-date copies of the final plans and specifications, a preliminary construction budget, insurance policies, a proper survey of the property, evidence that the property is properly zoned and all real estate title documentation. The contract with the general contractor should never be finalized until after it has been reviewed and approved by the lender.
- No construction should proceed until after (i) all required permits have been issued; (ii) the loan closes; and (iii) the deed of trust or the mortgage is recorded in the land records. Contractors and material suppliers have lien rights in construction projects – and these rights may be superior to a lender’s rights as mortgagee if the proper procedures are adhered to.

- The lender should work closely with counsel to ensure that the construction loan agreement is tailored to the transaction, removing requirements that the lender has no intention of enforcing. At this stage, the parties should reach agreement as to how the loan proceeds will be advanced and how the loan will be repaid. Do the parties contemplate that there will be partial releases of the project as it is completed – as in the instance of a condominium or housing project? Will a permanent lender provide funds to repay the construction loan – and, if so, what underwriting requirements must be satisfied before that can take place?
  - Closing takes place. The lender partially funds the loan to provide acquisition funds. Almost without exception, the borrower should expect that the borrower's equity will be injected into the project before the lender makes an initial loan advance.
  - Construction proceeds. Loan advances are made periodically as the borrower provides evidence of compliance with the lender's construction loan requirements, and both borrower and lender should make provision to have the construction inspected as it proceeds. Remember, the lender's inspector does not work for the borrower; a lender who allows a borrower to rely upon the lender's inspector is potentially exposed to lender liability claims for any construction defects. To the extent required, disbursements are made through a title company and "pending disbursement" endorsements are provided.
  - The building is completed. At the time of completion, the borrower should expect to provide documentation showing that the project is complete and compliant with all regulatory requirements such that a certificate of occupancy has been issued, all contractors and suppliers working on the project have been paid and lien rights extinguished and that all other conditions of the construction loan agreement have been satisfied.
- If all proceeds as planned, the project will be completed at or close to budget. The wise lender and the wiser borrower will proceed with the construction process assuming that they will encounter problems. If borrower and lender work together, the result will be a soundly constructed building and the loan will be repaid.

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*Health Care*

## **Maryland Health Care Advance Directives: The Law May Be Changing**

By: Sigrid C. Haines

As we mark the one-year anniversary of Terri Schiavo's death, most Maryland residents still have not completed any form of health care advance directive. This is a missed opportunity, since such forms provide patients with the ability to state their wishes about their

health care in the event they are unable to make their own decisions.

Since the Maryland Health Care Decisions Act became law in 1993, Maryland has allowed for family members and friends to make decisions on behalf of

incapacitated patients. A hierarchy of surrogate decision-makers is established under the law. In addition to immediate family members, surrogates can include those friends and less immediate family who certify that they know the patient's wishes. To control or change

that hierarchy and to express their wishes, Maryland residents can create two types of documents: 1) an advance directive appointing an agent; and/or 2) a living will. These forms are often combined. Maryland law now contains one such model form, although many experts believe that the current Maryland model form is quite confusing. Also, as often happens over time, a few defects in the technical drafting of the Act have been identified.

As this newsletter goes to press, it appears to be highly likely that the Maryland legislature will approve revisions to the Act. Responding to certain issues raised by the Act, the Office of the Maryland Attorney General had proposed some revisions to the Act, particularly to the model advance directives, as well as to the types of practitioners who could determine the patient's mental incapacity. The new model advance directive would be far clearer than the current model. It is designed to be completed in two parts: one part is an advance directive appointing an agent, and the second part allows patients to state preferences about specific treatments (i.e., a living will). Patients can complete either or both parts. The new form would also allow for choices to be made about organ donation and disposition of the body upon death. A technical correction is also proposed that would assume that other decision-makers may act only if the health care agent is unavailable (as had long been

assumed but not actually stated in the law).

At this time, however, there are differences in the versions of the law passed by the Maryland Senate (SB 369) and House (HB 592). SB 369 allows physicians and nurse practitioners to make certain certifications, while HB 592 would maintain the existing law that only physicians can make

## **If you currently do not have a signed advance directive, there is no reason not to make one now.**

the necessary certifications. (Since physicians and psychologists can currently make similar certifications for purposes of obtaining a guardianship, this inconsistency has proven confusing.) Both versions would take effect on October 1, 2006. Of course, to become law, both the House and Senate must pass identical versions of the bill and that passed bill must be signed by the Governor. While it seems very likely that the differences will be reconciled and signed by the Governor, it is not a certainty.

Another bill, HB 23, would have required the State to

establish a central registry for advance health care directives. While this idea sounded appealing at first blush, a host of technical problems were quickly identified with this bill, such as how the State would receive notice of termination of the documents and how the necessary "secure electronic database" could be maintained and yet be sufficiently accessible to be useful. Accordingly, HB 23 received an unfavorable report from the applicable House reviewing committee. A similar bill, SB 236, has passed the Senate and, at press time, was awaiting a hearing in the House. This bill, if it passes and is signed by the Governor, would establish a voluntary registry for advance directives and allow annotations on drivers' licenses that such documents exist. However, it presents some of the same technical issues as HB 23.

If you currently do not have a signed advance directive, there is no reason not to make one now. Our office will be glad to supply free model forms, or they can be obtained in English or in Spanish from the Office of the Maryland Attorney General at <http://www.oag.state.md.us/Healthpol/AdvanceDirectives.htm> or by calling that Office at 410-576-7000.

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*Real Estate*

## Will Indemnity Deeds Of Trust Soon Be Subject To Recordation Tax?

By Cindi E. Cohen

A bill has been introduced in the Maryland General Assembly that would require the payment of recordation tax in connection with the recordation of an indemnity deed of trust which secures a guaranty of repayment of a loan, where the owner of the property encumbered by the deed of trust is not primarily liable for repayment of the loan.

Currently, indemnity deeds of trust, where the grantor under the deed of trust is the guarantor of a loan, have not been subject to Maryland State recordation tax based on a 1973 Opinion of the Attorney General. That opinion stated that a guarantor's liability is a contingent liability, and therefore a guarantor under an indemnity mortgage will not have incurred a secured debt at the time of recordation. Section 12-105 of the Tax-Property

Article of the Maryland Code provides that if the total amount of secured debt has not been incurred at the time of recording of a deed of trust, the recordation tax applies only to the principal amount of the debt actually incurred at that time. Technically, recordation taxes must be paid if and when the guarantor incurs the debt, i. e., after a default when the lender is pursuing its remedies under the guaranty, including foreclosure of the indemnity deed of trust. However, as a practical matter, at that stage there are often no funds available to pay the recordation tax, and the Attorney General has also held that the failure to pay the tax does not negate the lien of the deed of trust.

House Bill 454 has been introduced to amend Section 12-105 of the Tax-Property Article. The amendment would

add a section which provides that for purposes of the recordation tax, with respect to an indemnity mortgage or deed of trust securing a guarantee of repayment of a loan for which the guarantor is not primarily liable, the secured debt will be deemed to be incurred as debt is incurred on the guaranteed loan, and therefore the recordation tax applies as if the guarantor were primarily liable for the guaranteed loan.

House Bill 454 has only been introduced and not been enacted. An update on the status of this bill will be provided in a future issue of this newsletter.

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## Lerch, Early & Brewer News and Notes

Lerch, Early & Brewer wishes to extend a warm welcome to two employees: **Genevieve Quarfoot** recently joined the firm as a law clerk, and **Mireya Fiallos** has joined as a legal assistant in our litigation and business and taxation groups.

The firm regretfully announces the departure of **Jennifer Shellhammer**, who worked in the firm as a legal assistant for nearly two years. The firm wishes her the best in her future endeavors.

The firm announces the election of two attorneys to the firm's management committee, **Harry Storm** and **Paul DiPiazza** (Board Chair). They join **Cindi Cohen**, **Larry Lerman** and **Art Lafionatis** on the committee. Mr. Storm

replaces **Stan Reed**, and Mr. DiPiazza replaces **Robby Brewer**, who served as Board Chair for the past three years.



On Thursday, March 23, **Steve Robins** served as Chair of the 32nd annual Montgomery County Public Safety Awards Luncheon. The Public Safety Awards honor members of Montgomery County's Police, Sheriff's Office, Park Police, Fire & Rescue, and Correction & Rehabilitation departments for acts of bravery, courage and distinction during the past year. The event, which Mr. Robins chaired for the fifth consecutive year, drew more than 1,000 business and community leaders from throughout the County, and was held at the North Bethesda Marriott Hotel and Conference Center.



**Harry Storm**, a principal in our firm's Business and Taxation and Litigation groups, was recently elected to a two-year term to the Maryland State Bar Association's Board of Governors.

**Jeff Van Grack**, co-chair of our firm's Community Associations Group, has been appointed as Chair of the Planning Committee for the 2007

Law Seminar for the College of Community Association Lawyers (CCAL) through the Community Associations Institute. The Law Seminar is an annual educational event conducted by the Community Associations Institute that provides training and knowledge for over 400 attorneys in the community associations field.

Mr. Van Grack also recently spoke at the 2006 Washington Metropolitan Community Association Institute Conference and Expo, held on Saturday, February 18 at the Washington Convention Center. He co-presented a topic entitled "How to Avoid Burnout: Stress and Time Management Techniques."

On Tuesday, March 21, **Larry Lerman** and **Alison Rind**, both principals in our Commercial Lending Group, presented a seminar for real estate lending professionals entitled "Anatomy of a Real Estate Loan." The seminar addressed all aspects related to real estate lending, including loan documents, the commitment letter, title insurance, land use and zoning concerns, and more. The seminar was presented in Bowie, MD in conjunction with the Center for Financial Training, Atlantic States.

**Arnie Spevack** and **Natasha Luddington** of our Commercial Lending Group presented a number of seminars throughout January and February on the topic of "Successful Construction

Lending." The seminars, which were held multiple times in our Bethesda office as well as in our Virginia office, attracted lending and real estate professionals from across the region who came to learn about the intricacies of construction lending and strategies for documenting and closing construction loans.

On Tuesday, March 21, **Marc Engel**, a principal in our Employment and Labor Group, made a presentation to the National Capitol Club Managers Association of America on the topic of workplace harassment training. Marc's speech, made before nearly 50 country club managers from across the Washington, D.C. region, discussed ways that employers can identify and prevent harassing behavior in the office.

On March 10 and 11, Lerch, Early & Brewer's attorneys gathered at the Harbourtowne Resort in St. Michael's, Maryland for their annual firm retreat. The retreat featured a discussion led by consultant **Alan Gregerman** on strategic planning and vision, as well as firm-led discussions on topics related to the practice of law.

*The information in this Newsletter is not intended to render legal, accounting or other professional advice and should not be acted upon without first consulting an attorney or other professional.*



*A portrait of our firm (except those on vacation!) taken at the firm's annual New Year's Luncheon, held at the Columbia Country Club.*

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