Heckerling Institute 2007 Reports from the event, as posted to the ABA-PTL List Serve

Report #3

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As we have done in January for the last ten years, and again with the permission of the University of Miami School of Law Center for Continuing Legal Education, we will be posting daily Reports to this list containing highlights of the proceedings of the 41th Annual Philip E. Heckerling Institute on Estate Planning that is being held January 8-12, 2007 at the Orlando World Center Marriott Resort and Convention Center in Orlando, Florida, a new venue for the Institute this year. A complete listing of the proceedings and speakers will be published here later and is also available on the Institute's Web site at http://www.law.miami.edu/heckerling.

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This Report contains coverage of the Wednesday sessions on Charitable Gift Planning, Estate Planning and Compliance after the Final GSTT Qualified Severance Regs, Current Issues Involving FLPs, Power of Attorney Forms and Private Trust Companies.

In addition, since this Report includes a report on the Kathryn Miree charitable law session, we are sending copies of this Report to the GIFT-PL and PG lists.

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Navigating the Landmines in Charitable Gift Planning: Legislation, Lawsuits and Personal Liability Wednesday morning, January 10, 2007 Presenter: Kathryn Miree

Reporter: Alan Rothschild Esq. of Hatcher, Stubbs, Land, Hollis and Rothschild, LLP in Columbus, Georgia

Kathryn Miree, a planned giving consultant based in Birmingham, AL, presented this Wednesday morning program on a variety of charitable gift planning issues. Kathryn opened by noting that the publicity of donor and exempt organization malfeasance and the related press, governmental and public reaction had greatly alternated the planning giving landscape over the last decade.

She reviewed the United Way/Aramony scandal in 1992 and its lingering impact; Hawaii's Bishop Estate; and New Era Philanthropy's pyramid scheme. Kathryn then summarized the series of Congressional hearings since June, 2004. She particularly noted the Senate Finance Committee's Staff Discussion Report issued just before the June, 2004 SFC hearings – the legislative agenda it contained and how many of its proposals that had already been adopted. These include the American Jobs Creation Act of 2004, which contained new rules on vehicle and intellectual property donations; the Katrina Emergency Relief Act that temporarily allowed cash donations up to 100% of AGI to public charities (but not, as a precursor to future legislation, donor-advised funds, supporting organizations or private foundations); and the Pension Protection Act of 2006 (discussed below).

The speaker then reviewed a number of charitable giving statistics, including Bank of America's 2006 Study of High Net Worth Individuals which found 98% of high net worth individuals give to charity, 16% had donor-advised funds and 20% have private foundations. Kathryn emphasized the size and amount of charitable giving, particularly by high net worth individuals, create a significant potential client base.

Miree then turned to a broad overview of the few benefits to charitable giving and a number of major reforms/restrictions on charitable giving and exempt organizations contained in the Pension Protection Act of 2006: · Most dramatic revision to charitable provisions of IRC since 1969 · Good news – three tax incentives (all of which expire 12/31/07) § Tax-free transfer of IRA to charity – only age 70 ½ and older eligible, capped at $100,000 year, only to public charities, not donor-advised funds, support orgs or private foundations § More favorable basis rules of gifts made by S corporations § Expansion of deduction limitations for conservation easements

Much greater bad news in the new law:

● Increase and extension of excise taxes – most private foundation penalties doubled; private foundation taxes on excess business holdings extended to donor-advised funds and many supporting organizations § Rules for easements in Historic Districts tightened § Limits placed on deductions for gifts of distressed clothes and property § New substantiation rules for gifts of $250 or more § New rules for gifts of fractional interests in tangible personal property – particularly damaging to museums

● Charities must report life insurance holdings

Other changes under PPA of 2006, including those impacting donor-advised funds and supporting orgs are to be covered in afternoon break out session.

The Treasury is also studying insurance ownership by charities; abuse and minimum distribution issues related to donor-advised funds and supporting organizations. Miree predicted that we have only seen the first wave of charitable legislation, more is to come. But at this point, somewhat surprisingly, private foundations look like a more preferred form of grant-making entity than donor-advised funds or supporting organizations – for example, they can make grants to individuals and pay reasonable compensation to family members.

Miree next turned her discussion to endowment gifts. As the numbers of large, permanent gifts have increased, so have the problems. Miree briefly discussed the Barnes Foundation gift and the Robertson – Princeton dispute, which to date has cost many millions in attorneys fees.

Although it won't avoid all disputes, Miree suggested a written gift agreement would avoid many legal problems and strained donor relationships. In her experience, only about 10% of endowment gifts are documented by a gift agreement. A well drafted agreement will address such issues as the donor's goals, a "Plan B" if the original purpose cannot be carried out, and standing to sue. On the standing issue, states are divide on the issue – some allow donor to file sue to enforce gift, others, consistent with common law, say the power is vested only in the attorney general. The present version of UMIFA (1972) does not really address. The recently adopted successor law, UPMIFA, contains greater flexibility in the release or modification of endowment funds, it is still no substitute for a gift agreement.

Finally, Miree shared her views on post-gift liability for the management of charitable gifts. She noted that 38% of charitable remainder trusts name individual unrelated trustees and 18% name family members. In her experience, CRT's are rarely administered properly by individuals, just as private foundations often operate incorrectly, such as paying for charitable dinners. She suggested planners consider naming corporate trustees more frequently for charitable trusts to ensure the complex rules are followed.

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Estate Planning and Compliance after the Final GSTT Qualified Severance Regs Wednesday morning, January 10, 2007 Presenter Pam Schneider

Reporter: Kimon Karas Esq. of McCarthy, Lebit, Crystal and Liffman Co., LPA in Cleveland, Ohio.

The topic was to address the final or reproposed regulations regarding qualified severance. Since no regulations had yet been issued Ms. Schneider discussed the interplay between GST planning and charitable planning.

Ms. Schneider started her presentation with an overview of the GST definitions which are important in understanding and planning with the GST provisions.

Interest in a trust. A charity has an interest in a trust if it has a present right to receive income or corpus from the trust or if it is the remainder beneficiary of a qualified charitable remainder trust or a pooled income fund.

Skip persons. A trust is a skip person only if persons with interests in the trust are skip persons (individual assigned to a generation that is two or more generations below that of transferor) or if no persons have interests in the trust and no distributions can be made from the trust to non-skip persons. A charity is a non-skip person.

When dealing with trusts, the skip person rules relating to trusts, rather than that of individuals applies, even if the individual has the absolute right to withdraw trust property. Trust is not definitively defined for GST purposes and can include any arrangements (except estates) that have the same effect as a trust, such as life estate, remainders, estate for years, insurance and annuity contracts. Ms. Schneider identified certain split interest arrangements that are not trusts which could create traps where there are transfers to skip persons such as charitable gift annuities or gifts of remainder interests in personal residences. What is not answered is where the tax is paid from in those cases.

Ms. Schneider next reviewed the inclusion ratio requirements. The inclusion ratio is 1 minus the applicable fraction. The numerator being the GST exemption allocated the transfer and the denominator being the value of the property transferred. Ms. Schneider cautioned that with charitable transfers the denominator is reduced by estate or gift tax charitable deductions chargeable to the property.

Ms. Schneider posited whether a late allocation can be made. She suggested that it may be a possible planning opportunity with a high unitrust or annuity trust payment where the value of the trust is expected to decline prior to the GST event occurring.

Ms. Schneider discussed charitable lead trusts. A charitable lead trust will never be a skip person and hence no direct skip can be made to it. On the termination of the lead interest a taxable termination or distribution will probably occur. If no particular charity is entitled to the lead interest, arguably no one had an interest during the lead period and thus there was no interest to terminate and thus a taxable distribution occurs on the distribution to the skip person. This was the result in the Robertson v. U.S. case. The significance of the Robertson case is that the trust terminated in 2001 but the distribution was not made until 2002. Because GST rates fell between the years in question (55% v. 50%) there was considerable GST savings if the result were that the termination was treated as a taxable distribution in the year of the distribution

The issue centers around when the distribution is deemed to have occurred, when the beneficiary becomes entitled to the property or when actual distribution is made? Ms. Schneider citing Reg. Section 26.2612-1(f), Ex 13, states the time of the distribution controls.

Ms. Schneider suggests as a planning alternative in designing non-GST exempt charitable lead trusts terminating in favor of a skip person it is advisable not to designate a particular charitable beneficiary and to continue the trust property in trust with discretionary distributions to skip persons (and authority to make direct payments of medical and tuition expenses).

GST allocations are made to charitable lead unitrusts at the time of the initial transfer whereas with lead annuity trusts one cannot determine the GST amount cannot be determined until the end of the lead period. The denominator is the value of the property at the end of the lead period and there is no credit for the charitable deduction.

Can there be a negative rate? No, if the fraction results in a negative the result is a zero inclusion ratio. Can the negative rate be purged by adding property or combining trusts? Ms. Schneider believes that is possible to add property to the trust to get to a zero value.

Ms. Schneider compared GRATS with CLAT. A CLAT is not subject to ETIP so she suggests a client charitably inclined client should consider a CLAT to replace charitable gifts the client might otherwise make.

Choice between CLAT or CLUT. No easy answer. CLUT advantages are inclusion ratio can be determined and the charity shares in appreciation and depreciation in the assets. The advantage to the CLUT is the family benefits from growth (detriment of depreciation).

Ms. Schneider concluded with a discussion of combining charitable planning with ensuring funds for the education and health of descendants. She discussed Section 2611(b) the exclusion for transfers that if made by an individual during life would not be treated as gifts under Section 2503(e) relating to transfers for tuition or medical expenses.

Suggestions were

1) giving an interest in a trust to a charity or

2) making sure that no one has an interest in the trust initially and that the only distributions from the trust that can be made are to skip persons in the same generation and to charities.

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Current Issues Involving FLPs and LLCs Wednesday afternoon, Special Session 1-A, January 10, 2007 Presenter: John Porter

Reporter: L. Paul Hood Jr. (APLC) in Mandeville, Louisiana

Porter began by emphasizing that preparation for the transfer tax dispute begins in the estate planning phase. He reviewed the various arguments that the IRS has used or is using to battle FLP's.

The first argument was lack of economic substance. Porter noted that the IRS really doesn't make this argument much anymore, especially where the FLP is validly created and validly existing under state law after the Tax Court's decision in Strangi II.

The second argument was IRC Sec. 2703. Porter pointed out that the IRS was using this argument now, especially where the FLP agreement contains a buy-sell or right of first refusal provision. Porter informed all that he tried a case last spring that is awaiting decision, Holman v. Commissioner, Docket No. 007581-04, that involved a right of first refusal. The facts involved a Minnesota entity. Porter used a Minnesota lawyer as an expert to testify that the terms of the right of first refusal are commercially comparable. The IRS countered with a Minnesota law professor as its expert witness.

The third IRS argument was gift on formation of the FLP. Porter noted that this argument went back to the 1997 TAMs, and he further noted that the IRS made this argument (in the form of the integrated transaction argument) in both Shepard and Senda (where there was eight days between formation of the FLP and the gift). He advised that good formation facts (partners take back proportionate interests, capital accounts are maintained and liquidation was to be made in accordance with capital account balances) pretty well defeat the gift on formation argument. Porter stated that the IRS really is not using this argument much anymore, except in egregious situations. He offered a number of suggestions to avoid this argument. First, he suggested maintenance of contemporaneously prepared financial records to reflect the initial capital accounts and to not wait for the initial FLP income tax returns. Second, he suggested waiting six months to one year between formation of the FLP and gifting of FLP interests, although he agrees with Lou Mezzullo that waiting one day between formation/funding and gifting should be sufficient.

The fourth IRS argument was IRC Sec. 2036(a)(1), which Porter observed almost always involve bad operational facts and some bad formation facts. He reviewed the "badges of IRC Sec. 2036(a)(1)," all of which deal with whether the parties respected the separate existence of the FLP during the decedent's lifetime, namely (1) commingling of FLP assets with personal assets, (2) non pro rata distributions, (3) delay in funding the FLP, (4) the inclusion of personal use assets in the FLP, (5) the percentage of the decedent's assets that went into the FLP, (6) the discretion of the GP in making distributions from the FLP and (7) post-death operation of the FLP relative to the payment of administrative expenses and death taxes out of the FLP property. Porter stated that he doesn't like distributions from the FLP to pay taxes or administrative expenses, and he also doesn't recommend redemptions of FLP interests to pay those items or collateralizing FLP assets to pay those items. He said that borrowing on commercially reasonable terms is fine.

Porter then discussed the bona fide sale for full and adequate consideration in money or money's worth exception. He noted that satisfaction of the full and adequate consideration prong can be met by meeting the three gift on formation steps discussed above. The "fight" is in the bona fide sale prong. He discussed the Bongard decision, which he tried. Porter suggested having the junior generation be the GP or at least have an interest in the GP. He also suggested "peppering" the file with non-tax reasons for creating the FLP. He observed that since the estate planning attorney likely will be a witness, the client will have to waive the attorney-client privilege.

The final IRS argument that Porter discussed was IRC Sec. 2036(a)(2), which the IRS asserts where the senior generation retains control over distributions. He offered the following tips to assist in avoiding IRC Sec. 2036(a)(2): have the FLP agreement contain affirmative fiduciary duties, prohibit unilateral decisions being made by the senior generation and have the FLP agreement contain ascertainable standards relative to distributions.

He noted that there is no substitute for quality appraisals and that all FLP/IRC Sec. 2036 cases are Appeals coordinated cases, which has had the effect of some cases settling more favorably at the audit level than at Appeals (when it usually is the other way around).

Porter concluded with a discussion of the McCord decision out of the Fifth Circuit. He believes that, contrary to the opinion of many commentators, the Fifth Circuit inferentially took on Procter and Ward in its opinion. Porter also believes that the IRS will continue to push its Procter/Ward argument in circuits other than the Fifth Circuit. He stated that he has a defined value disclaimer case pending in the Tax Court.

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One Size fits all - Tailoring a Form Power of Attorney to Meet Individual Needs Wednesday afternoon, Special Session 1-D, January 10, 2007 Presenters: Prof. Linda Whitton and Prof. William LaPiana

Reporter: Gene Zuspann Esq. of Zuspann & Zuspann in Denver, Colorado

This report summarizes the breakout session. Alan Rothschild reported on the initial session that occurred on Tuesday.

The breakout session included a discussion of the statutory form, followed by numerous questions and comments by the audience and a short discussion of the hypotheticals set out in the materials.

Both Linda Whitton and Bill LaPiana were on the drafting committee for the Act.

The first issue discussed was the inclusion of a proposed form in the Act. The drafters feel that the option is necessary but worry that the lay person will execute a form power of attorney without advice or counsel and include something that may not be appropriate in the circumstances. Linda said “This is a very lay person area.”

The drafters did not want to encourage co-agents. Feedback from a number of attorneys and others was that there are many problems in using co-agents. Linda said that the form omitted this option but that it would be simple for an attorney to add language to authorize co-agents. The important information section at the start of the form indicates that co-agents are possible and the special instructions section should contain these provisions.

Linda reiterated that, by using the statutory form, that the Act is incorporated. If an attorney prepares a custom form, the form must also either incorporate the provisions in the Act or set the desired powers out in the form.

The statutory form and the Act make the POA effective immediately. If the principal wants a springing power, language will have to be added. Linda indicated that she used to prefer springing powers but over the years, has changed her mind.

Some other provisions discussed:

1. If the agent is not an ancestor, spouse or descendant of the principal, then the agent may not benefit other than through compensation.

2. The agent must accept the appointment. This may be done in writing, or by acting under the power of attorney. The principal can execute the power of attorney and hold it for delivery later. In this case, the acceptance of the agent is not necessary until such future time that the appointment is accepted.

Linda reviewed the default provisions in the Act in detail. These are:

1. The POA is durable.

2. It is effective when executed.

3. A spouse-agent’s authority terminates upon filing for divorce, annulment or separation. She said that this is a default rather than a mandatory provision because elder lawyers advised that sometimes divorce is used for purposes other than

the separation of the spouses.

4. Lapse of time does not affect validity.

5. Successor agents have the same authority as the original agent.

6. Successor agent may not act until all predecessors are no longer acting.

7. An agent is not liable for the actions of another agent.
8. An agent is entitled to reimbursement of expenses and reasonable compensation.

9. An agent must accept the appointment in some manner.

10. An agent has default duties - loyalty; not to create a conflict of interest that impairs the ability to act, act with care; competence and diligence and others.

11. Duty to account if a court order or request by the principal.

12. The method of resignation.

She also reviewed some options

1. Acknowledgment of the principal's signature

2. Nomination of conservator or guardian

3. Springing power and authorization of person who will determine that triggering event

4. Appointment of co-agents

5. Exonerations provisions

6. Grants of general authorities

7. Grants of authority for extraordinary acts

8. Special instructions Some of these are recommended, some are not, and some are neutral.

Much of the rest of the presentation involved questions or issues raised by the audience.

There were questions about using springing powers and triggers. Linda pointed out the comments to section 109 and she and Bill discussed the information in the comments. One person suggested the use of an escrow letter.

Linda made it clear that she expects this form to be expanded or modified as necessary.

Several people asked questions about having the attorney serve as the agent. Bill felt that this creates a significant conflict of interest. Linda suggested that the attorney should either act as the attorney or as the agent, but never as both.

One person pointed out that there is no place for a signature for the agent. This was intentional because the principal may not want to deliver the form to the agent at the time of execution.

Bill indicated that NY is working on a form. He indicated that the agent may sign at any time. He also said that the NY form would include a specific lecture to the agent.

Any person may act as the agent, i.e. a corporate fiduciary.

A short discussion of some hypotheticals followed. One duty of the agent is to attempt to preserve the estate plan of the principal. The drafter of the form needs to be careful in allowing gifts by the agent and powers to change or create the estate plan.

Another issue, involved in a domestic partnership, is when does a DP end? In a marriage, it is easy to determine when the marriage ends and when an action is filed to terminate the marriage. This may not be so clear in a domestic partnership and depends on the law of the state.

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When Trusts are Not Enough - Strategic Family Plans Also Require a Strategic Structure: The Private Trust Company
Wednesday afternoon, Special Session 1-E Presenters: John Duncan, Michael Conway, Bryan Dunn and Sarah Hamilton

Reporter: Joanne Hindel Esq. of Fifth Third Bank in Cleveland, Ohio

John Duncan started the presentation by describing the fact that ultra-wealthy families, those with hundreds of millions or billions of dollars of wealth, are setting multi-generational goals and creating strategic plans for achieving them over 50, 100 or more years. The goals include preserving and maximizing not only a family's financial capital but also its "human", "intellectual" and "social" capital down through the generations.

John described "human capital" as the well-being (health, happiness, comfort etc.) of family members together with the human potential each person presents. Intellectual capital is the knowledge necessary or useful to help the family, other people and society as a whole.

Sara Hamilton then discussed the challenges facing multi-generational families and said that when significant family wealth last beyond the founder's life-time, generational planning often spans more than 100-year time periods and requires sophisticated operating and governance structures to implement strategic family goals.

Holding a family enterprise together means addressing the family's unique business heritage; preserving the family's financial success; investing in the development of future generations; working together in a meaningful way and giving back philanthropically.

She reviewed how financial families typically work together to accomplish 5 goals:

* Business Ownership and Control: A continuation of family business leadership and control

* Wealth preservation and enhancement: Growing the purchasing power of wealth as fast as the family grows

* Financial security: Supporting the lifestyle of current owners and ensuring the financial security for future generations

* Family Continuity: Preserving the family history/reputation and building strong personal relationships

* Family Philanthropic Legacy: Reinforcing family values and giving back in meaningful ways. She described the profile of a typical financial family as one with more than $500 million in assets, 2nd to 4th generations in existence; 22 adult households, 46 family members and 101 legal entities, primarily trusts. She also stated that this typical family has 53 family advisors consisting of 12 members of a family office staff, 14 family member trustees, one corporate trustee and 26 other external advisors.

She then described the shared risks that threaten the longevity of the family enterprise and discussed strategies to mitigate the risks as reviewing how the family: * structures the ownership of assets

* manage shared ownership

* organize group decision-making

* engage future owners in the process

* manage family transitions

* invest family capital

She finally discussed the most important financial family goals regarding trusts:

* Institutionalize the beneficiary's voice at the planning table

* Ensure alignment of interests in support of long-term family goals

* Invest in educating younger generations to be responsible owners

* Establish an effective governance/decision –making process

* Bring professionalism to the trustee process

* Eliminate personal trustee liability

* Restructure trust instruments as needed to accommodate branch differences

Byran Dunn then posed a case study for the audience by describing the family situation of the Grimm Brothers and their business Grimm Brothers Fantasies, Inc.

Bryan and John applied some of the principles and issues outlined above to the Grimm Brothers situation.

After describing how many families' strategic structures consist of either a patriarch/matriarch and/or informal family collaboration or a sophisticated family office, John then discussed the advantages of using a Private Trust Company. He described how a PTC is a perpetual entity that is legally qualified to act as trustee of family trusts and is owned, controlled and serves a single family and its trusts, affiliated companies and charitable organizations.

As a regulated trust company, the PTC may act as trustee with full control over family fiduciary assets and exercise comprehensive financial services powers to provide a full range of family investment and other financial services.

He also pointed out that the PTC's powers, family control and inherent risk management assure effective implementation of governance decisions and perform its tasks without exposing the family or assets to undue risk.

John also described how a family charters a PTC with the primary goal of providing a qualified permanent successor to the current trustee of the family trusts. In addition, a PTC may enable a family to a) promote and encourage participation by family members in the family businesses; b) aggregate the management of family wealth in order to find high quality, responsive and flexible financial services at a competitive cost; c) improve fiduciary risk management by using a corporate hierarchical structure with appropriate committees, professional executives and other employees; d) obtain the benefits of regulatory supervision of trustees by a state banking department; e) hire and retain executives and directors without asking them to assume an unreasonable level of personal risk.

The final presentation was made by Michael Conway who discussed the tax challenges and opportunities of PTCs:

Most family-owned PTCs permit and encourage the involvement of family members on their board of directors and committees. In order to avoid adverse tax consequences, firewall procedures should be established so that no grantor or beneficiary should be in a position to control, directly or indirectly, discretionary distribution decisions or the beneficial enjoyment of a related trust while allowing family members to participate as fully as possible in the management of the PTC.

The appointment of a properly structure PTC should not result in the grantor trust treatment of any Family Trust for income tax purposes if the Family Trust was not already taxed as a grantor trust.

The appointment of a properly structured PTC, in and of itself, should not result in the inclusion of the value of any Family Trust in the estate of a grantor for estate tax purposes.

Also, the appointment of a PTC as trustee of a Family Trust is an administrative change and should not be considered a shift of beneficial interest, a modification or a constructive addition under the GST Tax Regulations and should not adversely affect a trust's status as exempt from the GST tax.

All the presenters did an excellent job of laying out the uses and benefits of Private Trust Companies and included very valuable written materials for the audience to use as well.

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Our on-site local reporters who are present in Orlando this year are Gene Zuspann Esq. of Zuspann & Zuspann in Denver, Colorado, Herb Braverman Esq. of Walter & Haverfield, LLP in Cleveland, Ohio, Merry Balson Esq.of Wade, Ash, Woods, Hill & Farley in Denver, Colorado, Paul Hood Esq. of L. Paul Hood Jr. (APLC) in Mandeville, Louisiana, Joanne Hindel Esq. of Fifth Third Bank in Cleveland, Ohio. Jason Havens Esq. of Havens & Miller PLLC in Destin, Florida, Alan Rothschild Esq. of Hatcher, Stubbs, Land, Hollis and Rothschild, LLP in Columbus, Georgia, and Kimon Karas Esq. of McCarthy, Lebit, Crystal and Liffman Co., LPA in Cleveland, Ohio. The editor again this year will be Joseph G. Hodges Jr. Esq, a solo practitioner in Denver, Colorado, who also is the Chief Moderator of the ABA-PTL List.

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NOTICE: Although audio tapes of all of the substantive session at the Miami Institute currently are only made available to Institute registrants for purchase, the entire proceeding of the Institute are published annually by Lexis/Nexis. For further information, go to their Web site at http://www.lexisnexis.com/productsandservices. The text of these proceedings is also available on CD ROM from Authority On-Demand by LexisNexis Matthew Bender. For further information, contact your sales representative, or call (800) 833-9844, or fax (518) 487-3584, or go to http://www.bender.com, or write to Matthew Bender & Co., Inc., Attn: Order Fulfillment Dept.,1275 Broadway, Albany, NY 12204.
