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Summer 2007

~REAL ESTATE  
Alexander J. Clark  
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## Up, Up, and Away!

*The creative use of air rights can aid urban development, historic preservation, and land conservation*



**T**hink air space is reserved for flight routes? Think again. Developers are looking skyward as they search for resourceful ways to build up or add on. It all centers on the concept of air rights.

**A**ir rights represent ownership of the space above a structure. And landowners can sell or transfer that space, allowing developers to build over an existing structure, or construct neighboring buildings higher than would normally be allowed. State and federal tax authorities may also sweeten the deal by providing incentives and deductions to those who donate air rights over and around historic properties as a conservation easement.

**T**he creative use of air rights can be good for urban areas, beautification efforts, historic preservation, land conservation, property owners, and developers alike.

**F**or example: Chicago's beautiful new Millennium Park is built over rail yards. The city now plans to use air rights over a truck staging area near McCormick Place to construct a \$1 billion lakefront community. In Boston, developers are proposing a mixed-use residential and retail center over part of the Massachusetts Turnpike near Fenway Park.

**O**ther inventive applications involve the transfer of air rights to a neighboring landowner in order to allow construction of a taller structure. In New York, churches and smaller buildings commonly sell their air rights so developers can put up high-rise condos and office centers. In some cases, landowners can merge adjacent space to create a larger building lot.

**A**cross the country, conservation easements—donated by landowners—help protect acres of wildlife habitat, scenic views, and rural vistas. But landowners may use conservation easements to protect certified historic properties, too. By donating the air rights above and around their historic building or site to a qualified conservation organization, landowners may receive a charitable tax deduction. In such cases, the IRS strictly defines all elements of the process—from the types of properties that qualify, to valuing the land for tax-deduction purposes.

# What's lurking on your hard drive?

**Better be careful.  
It might come back  
to bite you!**

**A recent federal court ruling in the Western District of Michigan makes it clear: When it comes to gathering evidence, your computer hard drive is fair game. Applying the new federal electronic discovery rules that took effect last December, the judge said it was all right to inspect a computer's relevant contents in the quest for justice. What does this mean for your company?**



Simply put, if you or your organization are involved in a lawsuit, the contents of your computer hard drive can be targeted by the opposing party as a source of evidence. Taking proactive steps now to establish policies and protocols can save you significant time and expense down the road—not to mention the risk of an unfavorable judgment.

Here are some best-practice tips:

1. Establish a records retention policy specific to electronic documents. Your policy should categorize documents and establish an appropriate time period for the destruction of material in each category.
2. Include guidelines to clarify the categorization of records. Always select the category with the longest retention period if you are unsure of how to classify material.
3. Take measures to ensure your policies are followed throughout the organization.
4. Include a mechanism for immediately halting the destruction of records if you receive notice of a lawsuit or subpoena.
5. Make sure to protect the privacy of confidential records—even during the disposal process.

Need some help? Contact us for assistance with your electronic record retention policy.

## Some limits may apply

In the Michigan case, the Magistrate Judge did impose these limits on the inspection of the computer documents.

- Confine the examination's focus to relevant electronic information
- Mandate the inspection be performed by a qualified and experienced forensic examiner
- Conduct the inspection in private, outside the presence of parties to the case and their attorneys
- Release the examination's findings to the computer user's legal counsel before turning them over

## Looking for a smart estate-planning tool?



# Why a **GRAT** could be a **GREAT** idea

What's so great about GRAT? The Grantor Retained Annuity Trust (GRAT) is an irrevocable trust agreement used by individuals as a vehicle for transferring assets to family or friends—without paying a large gift tax.

ESTATE PLANNING  
Dawn M. Schluter  
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GRANTOR RETAINED ANNUITY TRUST

In recent years, GRATs have been growing in popularity as an estate planning strategy—and for some very good reasons. For starters, interest rates have been low. Then, there's the uncertainty surrounding the future of estate taxes. What's more, a GRAT allows its owner to discount the taxable value of a gift.

Sound good? A GRAT works like this: An individual transfers assets to a GRAT in return for payment of a fixed annual annuity—usually an amount chosen by the grantor.

The GRAT is structured to pay a gift tax up front on an amount determined to be the present value of the annuity trust's remainder at the time it terminates. That taxable amount is calculated by the grantor's attorney or accountant, using a formula based on several factors. The assumed rate of return is established by the IRS under Section 7520 of the Internal Revenue Code—sometimes known as the "hurdle rate."

But here's where the benefits really come into play. Most individuals set up what is known as a "zeroed-out GRAT," selecting an annuity rate that will result in the present value of the remainder being zero (or close to it) in order to avoid paying a larger gift tax at the front end.

If the GRAT's assets earn a rate of return that's greater than the Section 7520 rate, the earnings accumulate in the trust. And, when the trust terminates, the remaining portion (including, it's hoped, those earnings) is distributed to beneficiaries free of any gift or estate tax.

The only drawback? If the grantor should die before the term of the GRAT ends, the entire value of the GRAT reverts to the grantor's estate, where it's subject to estate tax. Still, even given that worst case, the grantor is no worse off for having established a GRAT.

*If you'd like to know more about how a GRAT could work for you, contact our office. We'd be happy to help.*

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# How Miller Canfield helped save the **Mighty Mac**

Today, it's almost impossible to imagine Michigan without Mighty Mac spanning the Straits, linking our state's two peninsulas, and connecting tourists, travelers, manufacturers, and merchants to the world beyond.

Beginning as a farfetched scheme for floating tunnels in the late 1800s, bridge ideas brewed until, in the 1920s, the state highway department established ferry service across the five-mile stretch. Still, bridge-backers continued to champion their cause through the Great Depression and two World Wars.

Finally, in 1952—after favorable feasibility studies, geologic borings, traffic analyses, and consultations with the world's premier engineers—the bridge was given a green light. Michigan's Public Act 214 created a Mackinac Bridge Authority, chaired by former U.S. Senator Prentiss Brown, and empowered it to issue \$99,800,000 in bonds (about \$800 million in today's dollars).

If it seemed bridge supporters had overcome adversity, prior challenges would pale against a roadblock waiting ahead: financing the project. Prospective lenders spoke bluntly: The Mackinac Bridge was too big. Too costly. Too risky to build. It couldn't be done.

Nonetheless, the Authority moved ahead, engaging world-renowned bridge engineer David B. Steinman to design what would be the longest suspension bridge yet constructed anywhere in the world. Less well known was the Authority's selection as legal counsel: John H. Nunneley, head of Miller Canfield's thriving bond practice.

Nunneley had successfully handled several large issues—interstate highway systems and big drainage and sewer projects among them. He possessed a keen intellect, and would prove to be a tireless ally and tenacious lawyer when things got tough. And get tough they did.

Everything about the proposed bridge seemed to fall outside the usual parameters.

Aside from the perilous nature of the structure, Act 214 stipulated that the bridge would have to be built and paid for without *any* financial backing from the State. Absent a good-faith pledge of taxes to back the bonds, or a solid revenue stream to offset the cost of construction and operation, interest rates would be prohibitive and financing costly.

In the summer of 1953, with Steinman's innovative bridge design completed and construction bids secured, the Authority approached New York investment banks looking for financing. At that very time, the market turned soft and no takers came forward.

Next, they pled their case before the State Legislature, asking for a token demonstration of confidence to make the bonds more attractive to investors. After a good bit of haggling, the Authority received an annual appropriation of just \$417,000.

But there was a catch, put in by bridge opponents: bonds had to be sold by December 31 of that year, or the appropriation would lapse.

That autumn, the market remained tight. Interest rates were trending upward, and financial institutions and insurance companies remained skeptical. The clock was ticking. If financing could not be found soon, the Mackinac Bridge was doomed.

With year's end approaching, and at the advice of investment bankers, Nunneley undertook a creative restructuring of the bond issue, dividing it into two types of bonds to make the deal more attractive.



**This summer, we celebrate the 50th anniversary of our magnificent Mackinac Bridge. (Miller Canfield is assisting with the celebration.) There'll be fireworks and fanfare, parties and parades, historic exhibits, and feature articles recounting the great engineering feat. But few people today remember a key part of the story: the bridge came close—within just a few hours, in fact—to never having been built.**

On December 9, 1953—just *one day* prior to publication of the required bond sale notice—Nunneley and Bridge Authority secretary Lawrence Rubin flew to

**Nunneley considered the challenging Mackinac Bridge bond work his finest legal accomplishment and joked that he really earned his fee.**

New York to conference with investors. The issue on the table was simple and decisive: Would the underwriters buy the bonds? Would the bridge be built?

After hours of tense negotiations, agreement was reached. The syndicate would submit its bid for

first-lien Class A bonds at 4%; and second-lien Class B bonds at 5.25%. The State Administrative Board, chaired by Michigan Governor G. Mennen Williams, was scheduled to open the bids on December 17.

Just when it appeared the deal was done, it hit another speed bump.

State Senator Haskell Nichols—a naysayer from the start—filed a petition with the Michigan Supreme Court on December 16 asking the Court to forbid approval of the bond sale until a hearing on Act 214’s legality could be held. In bypassing the lower courts, Nichols had raised the ante. If the State’s highest Court issued even a temporary restraining order, the appropriation would expire and everything that had been accomplished over the prior months and years would be lost. At risk were engineering and construction contracts and finance agreements. If the bridge ever got back on track, costs might be prohibitive.

Nichols’ request sounded reasonable. But it was perfectly timed to thwart the bond sale—and scuttle the bridge.

By chance, Nunneley was in Lansing when Nichols filed his petition. Nunneley, accompanied by Prentiss Brown, sprung into action, requesting an immediate meeting with members of the Court, many of whom were preparing to head home for the holidays.

In a shrewd move, Nunneley *agreed* to Nichols’ request for a Court hearing—but insisted that a fair contest, with arguments from both sides of the issue, be held *after* December 17 (the bid opening date) and *before* February 17, 1954, when the bridge bonds were scheduled for delivery. That way, the bond sale process could continue on schedule. If the Court then ruled against Nichols’ petition, nothing would be lost. If Nichols’ petition were upheld, the Bridge Authority would be prevented from delivering the bonds.

Nunneley’s request was granted. In the afternoon of December 16—*less than 24 hours before the scheduled bond sale*—the Court refused to grant a restraining order. (In fact, a month later, it would unanimously uphold the Bridge Authority’s position.)

The next morning, the syndicate’s bid was opened and accepted. The sale of bonds was approved. A long and arduous struggle ended. No doubt, members of the Bridge Authority, along with John Nunneley, celebrated.

Just short of four years later, on November 1, 1957, the beautiful Mackinac Bridge officially opened to traffic. The last of the bonds were retired in 1986. John Nunneley, the masterful bond attorney who helped steer the project through a legal maze, remained at Miller Canfield and continued making his mark on other high-profile, publicly financed projects until retiring in 1971.

And what of Haskell Nichols, whose eleventh-hour maneuvering almost put the brakes on the bridge? He’s remembered too. A portion of US-127 near Jackson, Michigan, is known as the Haskell L. Nichols Memorial Highway. No doubt some of the traffic it carries is headed north—to the Mackinac Bridge.

*For more than 50 years, Michigan governments have turned to Miller Canfield for creativity and persistence in getting tough projects done. Call on us if you need some help.*

~PUBLIC LAW  
Michael P. McGee  
313/496-7599

**Our construction practice reaches new heights**

Big projects like the Mighty Mac have established Miller Canfield’s national bond law reputation. But our expertise doesn’t stop once the financing is done. Our construction lawyers have advised many high-profile construction projects over the years. Now, one of our current projects will rank among the world’s tallest buildings. The Freedom Tower, located at One World Trade Center in New York, is designed to reach 1,776 feet, including its spire and antenna.

Ron Hodess, leader of our Real Estate and Construction Practice Group, reports the 87-story, 2.6 million-square-foot building will take three years to complete at a cost of \$2.8 billion.

“Representing contractors on these types of developments involves challenging elements of legal structuring and risk management,” says Hodess, “and we’re proud to be part of this significant project.”

*“Actual construction of the Mackinac Bridge was by far the most spectacular part of the entire work, but it failed to surpass in sheer drama, disillusioning developments, and heartbreaking setbacks the long, active struggle for the authorization and financing of the bridge.”*

David B. Steinman  
World-renowned bridge engineer & chief designer of the Mackinac Bridge,  
from his book, *Miracle Bridge at Mackinac*



# Angel Investors & Devilish Details

*Their name says it all... Angel investors answer the prayers of start-up companies in need of capital. But entrepreneurs should be careful when supplicating these seraphs. The devil is often in the details.*



**The angle on angels.** They could be retired executives, wealthy individuals, suppliers, customers, or owners of other companies. Whatever their motivation, “angel investors” see potential in a new business idea and want to help it grow. Often the non-monetary assets they bring are as valuable as the cash they contribute. Their business contacts can open doors and attract other seed money. Their business expertise can be tapped to shape a new company’s strategic plan. Their name can lend needed credibility to the venture.

In short, when you’re trying to get a business off the ground, these angels help you take flight.

**Calling angels.** Like any investor, angels like to see business founders bootstrap some of their start-up. In fact, nothing is a bigger red flag than an entrepreneur who’s not willing to bet on the business. So, make sure you’ve put some of your own money—or friends-and-family finances—into the project.

It also helps if you’ve built some momentum and can show tangible evidence that you’re on your way. Depending on the nature of your venture, substantiation may be in the form of filing a patent application, obtaining FDA approval, producing a prototype, or getting advance purchase orders. Proof of

customer interest and commitment to buy greatly increases the value of your business in the eye of a prospective investor.

Finally, don’t let investors think you’re desperate for cash or have no other options. Talk to several potential backers and compare their investment offers. Competition among potential investors will give you a bit of leverage and they won’t be offended. They’ll actually feel more secure knowing they’re not the only ones who find your idea worth pursuing.

**Landing an angel.** How do you find investors? Two choices: do it yourself, or outsource the search to investment bankers or finders—for a fee, of course. Investment bankers who believe in your idea will gladly share their network in exchange for compensation usually in the range of two-to-six percent of the capital they help raise, plus an option to purchase a small percentage of your company down the line. If their assistance extends to negotiating investment terms or advocating on your behalf, they should be registered as a broker/dealer with the Securities Exchange Commission.

Identifying and attracting investors on your own doesn't mean working alone. Cultivate your networks and ask for introductions. Remember: "It's not about the people you know. It's about the people who the people you know know."

In all cases, be sure to carefully document all your investments. The detail of documentation required will depend on whether investors are accredited or not—a designation determined by

**Institutional venture capitalists mostly invest OPM--other people's money. Angel investors put their own dollars in deals. Some have described them as the three Fs (friends, family, and fools), but most angel investors are sophisticated business backers who bring cash and a wealth of business experience to the table.**

their income and net worth. Selling to non-accredited investors requires substantially more disclosure including an audited balance sheet, appropriate details about risk factors, and the kind of information contained in a prospectus for an IPO. All of this documentation—for friends-and-family seed money and angel money alike—must be properly prepared in order to protect yourself from lawsuits from disgruntled backers, and not spook subsequent investors such as venture funds.

**Saving grace.** If all this sounds challenging, it is. That's why you'll want to work with an attorney who specializes in private offerings. Our firm represents investors and venture capital funds, as well as many start-ups during their capital financings. In fact, several of our attorneys have themselves

been officers and directors of start-up companies that have gone on to successfully commercialize their products.

We can advise you on funding sources and valuation issues, ensure your offering documents are accurate and comply with securities laws, and handle all the legal requirements involved—from structuring your company and establishing stock option plans to obtaining patents, and implementing intellectual property safeguards.

But, beyond that lawyerly know-how, our insight and experience can make all the difference, and get you where you want to go. Call our Venture & Technology Practice Group if you'd like some help.

## Meet the authors and our new colleagues

John M. Sommerdyke and Jeffrey G. York recently joined our firm as members of the



**John M. Sommerdyke**  
616/776-6312

Corporate & Securities Group in the Grand Rapids office, bringing 35 years of valuable experience between them.

John—who has represented many start-up venture and technology companies—focuses on mergers and acquisitions, as well as a

range of financial transactions involving traditional bank debt, angel and private equity funding, and venture capital financings.

A practitioner of corporate law for nearly 20 years, Jeffrey specializes in mergers and



**Jeffrey G. York**  
616/776-6314

acquisitions, manufacturing, construction, and real estate. He has also represented many entrepreneurs and helped clients launch successful companies.

With Grand Rapids' growing role in helping to diversify Michigan's economy, the

two able attorneys will expand our corporate and securities practices, and enhance Miller Canfield's ability to assist and mentor start-ups.

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# Our Biotech & Life Sciences Practice Expands

*Two prominent industry attorneys lead new Cambridge office*

We've added a new address to our roster of offices: One Broadway in Kendall Square, Cambridge, Massachusetts.

Long recognized as the gateway to biotech research and home to numerous biomedical, biopharmaceutical, and other high-tech companies, as well as renowned institutions of higher learning and fine research hospitals, Kendall Square puts us—well, *squarely*—where the action is.

The new office, staffed by Raymond G. Arner and Anne Marie Cook—two well-known life sciences attorneys, will expand our expertise and geographic reach and position us to serve some of the world's most promising industries—from life sciences and alternative energy, to cutting-edge venture technology.

Both Arner and Cook have extensive industry experience in handling the multidisciplinary legal matters confronting life sciences companies ranging from legal, regulatory and intellectual property issues, to technology acquisitions and strategic alliances, licenses, and FDA compliance.

Our new office, which opened mid-April, is located at One Broadway, 14th Floor, Cambridge MA 02142. The phone number is 617/ 679-5200.

*Watch for more information on the practice in our next Hot Points.*



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[silkworth@millercanfield.com](mailto:silkworth@millercanfield.com)

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The transfer of air rights—whether through conservation easements, lot mergers, or outright sales—is a wonderful tool that offers benefits for everyone involved. In fact, it may be unique in that it brings together the disparate interests of urban renovation, historic preservation, environmentalists, and developers. But it's also a tool that requires careful planning and consideration of all the tax and legal consequences. Call us if you'd like to know more.

**Learn more with a click**



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