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SECTION NEWS

Winter 2015 Real Property, Trust & Estate Law Journal
The Winter edition of our member-only journal will be mailed soon — be sure to check your mailbox! In the meantime, get a preview of the featured articles by checking out the synopses.

Registration for the Skills Training for Estate Planners Program Closes June 26
Whether you're a new or experienced estate planning lawyer, this CLE program in New York is the ideal educational opportunity for expanding your practice. This popular annual program presents a wide range of essential topics in an intensive classroom environment and includes detailed course materials. Be sure to register before June 26! Visit the website for more information.

New Resources for RPTE Members
RPTE is introducing a new membership benefit called the Lawyer's Tool Box. It will consist of various resources that introduce lawyers to legal skills that they can use to expand their practices. The first available tool is a series of Estate Planning Basics videos and their corresponding course materials. RPTE members have FREE access to this "how-to" program that provides an overview of drafting, executing, and implementing a basic estate plan. More resources, including a series of Real Property Basics videos, will be added soon.

Leadership Directory Sponsorship Opportunity
Is your company interested in advertising in the RPTE Leadership Directory, which 375+ leadership members receive and use throughout the entire year? Download the directory buy document, and email staff member Bunny Lee with any questions.

Successful 27th Annual Spring Symposia in Washington, D.C.
More than 480 registrants took advantage of various continuing legal education programs, networked with colleagues, and enjoyed social events not only with members in the RPTE field but also members of the Section of International Law. Save the date for next year's Symposia! Join us May 12–13 in Boston.

Young Lawyers - Apply for an RPTE Fellowship
The June 26 application deadline for this highly regarded two year Fellowship is quickly approaching. Click here to read more about this program and how to apply.

Now Accepting Entries for the RPTE Law Student Writing Contest
Did you write a paper for a law school class and want to submit it for the chance to win $2,500 and a trip to the RPTE Fall Leadership Conference in Naples, Florida this November? See the official contest rules and entry form for details.
REAL PROPERTY

Keeping Clear of ADA Accessible Route Claims—the Ninth Circuit Discusses What Constitutes Temporary Obstructions
Joshua A. Stein
This article discusses a recent 9th Circuit opinion providing helpful guidance on "temporary obstructions" to accessible routes under Title III of the ADA.

It's Up In the Air: Air Rights in Modern Development
Martin A. Schwartz
This article discusses the issue of air rights from the Romans through WWII to 21st Century development.

Purchasing a Partnership/LLC Interest: Tax Tip #1—Requiring Tax Distributions
Philip Hirschfeld
There are a handful of basic tax points the real estate lawyer should keep in mind that can help the client's tax situation without bringing in the need for extensive tax analysis. This article will be the first installment of a series of articles on tax tips for the real estate lawyer.

TRUST & ESTATE

Reversal of Fortune—the Elkins Appellate Decision
Garry L. Marshall
While the Elkins case was a clear victory for the taxpayer one must take caution in relying too much on the results of this case.

Fiduciary Best Practices for an Individual Trustee—Reducing Liability and Improving Client Relationships
Richard B. Freeman and Ruth Flynn Raftery
Whether advising a client who is named as trustee or serving as the trustee yourself, the following "best practices" will mitigate the risk of breaching your fiduciary duties as they relate to the investment of trust assets.

PRACTICE ALERT

Status of the Uniform Fiduciary Access to Digital Assets Act.
Not enacted anywhere...yet.
Anne W. Coventry and Karin Prangley
Although there is usually some opposition to every uniform act, UFADAA has been subject to far more opposition than is typical.

ELDER LAW TIP

The Achieving Better Life Experience Act
Bernard A. Krooks
ABLE accounts provide a mechanism to fund an account in the name of an individual with disabilities, and allow the funds in that account to accumulate income tax-free.

TECHNOLOGY & LAW PRACTICE MANAGEMENT

Legal Technology Coming to Your RPTE Practice?
Keith Mullen
Recent conferences showcase new uses of technology focused on legal topics and content. These tools point to similar tools for use by RPTE lawyers—all possible if you have a thoughtful plan.

UPCOMING PROGRAMS

eCLE PROGRAMS
The IRS T&E Attack List and How to Defend Against It
June 2

Real Estate Purchase and Sale Agreements—Don’t Forget to Cover These Points!
June 3

Hawaii, Kentucky, South Dakota, Utah
Domestic Asset Protection Trusts Planning: Jurisdiction Selection Series
June 9

Sustainability and Real Estate—What is it and why should I care?
June 10

Managing Business Owner Equity Valuation Audit Risk: Optics Matter!
June 16

News From the Hill: Supreme Court’s decision on Same Sex Marriage
July 7

WEBINARS
Introduction to Estate Tax Returns, Estate Expenses and Deductions
Paralegal eLearning Program: Session 7
June 4

Recent Real Estate Case Developments
Professors’ Corner
June 10

LIVE IN PERSON
Skills Training for Estate Planners
July 13 – 17
New York, NY

Joint Fall CLE Meeting with ABA Section of Taxation
September 17 – 19
Chicago, IL

To view a complete list of upcoming programs, visit www.ambar.org/rpteCLE

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YOUNG LAWYERS NETWORK

RPTE Fellows Program - Applications Due June 26
The ABA Section of Real Property, Trust and Estate Law Fellows Program encourages the active involvement and participation of young lawyers in Section activities. The goal of the program is to give young lawyers an opportunity to become involved in the substantive work of the RPTE Section, while developing into future leaders. The application deadline for the 2015–2017 program is Friday, June 26, 2015.

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LAW STUDENTS

RPTE Writing Competition
The goal of the RPTE student writing contest is to encourage and reward law student writing on the subjects of real property or trust and estate law. It is designed to attract students to these law specialties, and to encourage scholarship and interest in these areas. Articles submitted for judging are encouraged to be of timely topics and have not been previously published. This contest is open to all J.D. and LL.M students currently attending an ABA-accredited law school. Entries must be received by the Section no later than June 30, 2015.

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GROUP AND COMMITTEE NEWS
REAL PROPERTY
Practice Management Group
The Real Property Practice Management Group consists of three committees of relevance to real estate practitioners: Economics, Technology and Practice Methods; Ethics and Professionalism; and Real Estate Litigation/Alternative Dispute Resolution. Read more.

Residential, Multifamily and Special Use Group
Members of these committees handle all aspects of shelter law, working closely with investors, developers, governmental regulators and owners. Read more.

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JOIN A GROUP OR COMMITTEE TODAY!
Group and Committee membership is free to all RPTE members! Learn more about our nine Real Property Groups and seven Trust and Estate Groups. For questions regarding membership, contact Bunny Lee at (312) 988-5651 or bunny.lee@americanbar.org.

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TRUST & ESTATE
Charitable Planning and Organizations Group
The Charitable Planning and Organizations Group and its three committees, Charitable Planning, Charitable Organizations, and Legislative and Regulatory Issues, have remained very productive. Read more.

Elder Law, Disability Planning and Bioethics Group
This Group is focused on a diverse set of issues of particular concern to older adults, persons with disabilities, and vulnerable patients. Read more.

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FEATURED RPTE BOOK OF THE MONTH
Mark E Dall and Noble Carter Hatfield

A commercial lease is the law. Unlike certain other areas of real estate that are subject to major governmental regulation, most states have enacted only limited statutory authority on commercial leases. Therefore, to negotiate the best lease possible for your client, it is essential to anticipate and address during the lease negotiations potential areas of conflict or concern that may arise during the life of the lease since the lease document itself will largely determine the rights and obligations of the parties.

Written by attorneys who each negotiate over 200 leases a year, Commercial Retail Lease and Outlot Purchases: A Practitioner’s Guide to Forms and Provisions is an educational manual that provides a practice-focused examination of commercial lease negotiations and language. It contains sections on critical negotiating topics, followed by sample clauses that address the issue. The scope of the book will be valuable to both those attorneys with limited exposure to commercial leases and seasoned attorneys who want a desk reference on these important topics.

Purchase this book today!
Regular price: $129.95
RPTE member price: $99.95

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Keeping Clear of ADA Accessible Route Claims – the Ninth Circuit Discusses What Constitutes Temporary Obstructions

By Joshua A. Stein

On March 5, 2015, the United States Court of Appeals for the Ninth Circuit issued an opinion in Chapman v. Pier 1 Imports (U.S.) Inc., 2015 WL 925586 (9th Cir. Mar. 5, 2015) that provides retailers with useful insight into how to manage the issue of “temporary obstructions” to accessible routes under Title III of the Americans with Disabilities Act (“Title III”).

Title III’s overarching obligations that retailers provide individuals with disabilities with full and equal enjoyment of their goods and services and engage in ongoing barrier removal include the requirement to provide and maintain accessible routes (generally, a minimum of 36 inches in width) into the store, to merchandise, and to locations such as check-out and service counters, restrooms, fitting rooms, and other amenities. Title III’s implementing regulations and related Technical Assistance Manuals clarify that isolated and temporary obstructions to the accessible route do not violate the ADA, if infrequent and promptly removed.

Here, Chapman alleged that Pier 1 violated Title III and related state accessibility laws, by, among other things, repeatedly obstructing its aisles with merchandise, furniture, display racks, and ladders. Chapman encountered such obstructions on eleven separate visits to a Pier 1 store. In upholding the district court’s finding of summary judgment for Chapman on the obstructed aisle issue, the Ninth Circuit rejected Pier 1’s argument that these allegations should be excused as mere temporary obstructions and thus, did not violate the law.

The Ninth Circuit’s reasoning suggests helpful guidance for retailers looking to avoid similar lawsuits:

- Adopting policies governing the placement of merchandise to maintain accessible routes, and practices and procedures to help implement those policies (e.g., regular walks of the store with a tape measure) do not insulate a retailer from liability if, the policies, practices, and procedures are – as in Chapman – ineffective;

- An obstruction is unlikely to be deemed temporary, if retailers place the onus upon the customer to request its removal;

- An obstruction will not necessarily be deemed temporary just because it was created by another patron and not the retailer itself – the retailer has an obligation to maintain its accessible routes;
• Even if individual instances of obstruction when viewed separately might be temporary, a volume of “temporary obstructions” can become sufficiently prevalent to constitute repeated and persistent failures that were not promptly remedied and, thus constitute a violation of Title III; and

• True temporary obstructions – those that are isolated and transitory in nature – e.g., maintenance equipment being actively used to make repairs or items currently involved in re-stocking merchandise – remain subject to Title III’s exemption to the accessible route requirements.

For additional information please contact Joshua A. Stein.
It's Up In the Air: Air Rights in Modern Development

By: Martin A. Schwartz

**Brief History of Air Rights**

Romans gave us architectural marvels, funny looking numbers and the concept of property rights in airspace under the doctrine "*culus est solum, cius est usque ad coelum*" translated as "[to] whomsoever the soil belongs, he owns also to the sky."\(^1\) This doctrine endows a landowner with a private property right in the airspace, upwards to an indefinite extent, above the land. It was incorporated into both English and American common law appearing in Edward Coke's commentaries in the seventeenth century and William Blackstone's commentaries in the eighteenth century.\(^2\)

Although this doctrine may have worked well in the age of Robin Hood, the unlimited right of ownership of airspace above private property created a problem with the advent of commercial aviation in the early twentieth century. In response, Congress limited the scope of landowners' airspace rights to an upper limit of private ownership in order to allow for air travel. The enactment of the Air Commerce Act of 1926 created a "public right of freedom of transit in air commerce" through the navigable airspace of the United States. "Navigable airspace" is defined as airspace above the minimum altitudes of flight and is designated a nationally-shared common area for modern flight. Generally speaking, the "Navigable airspace" consists of airspace above an elevation of 500 feet from ground level.

Currently, although 49 U.S.C. § 40103(1) states that "The United States Government has exclusive sovereignty of air space of the United States," subsection 2 recognizes public use of airspace only above "Navigable airspace," thereby retaining private ownership below "Navigable airspace."

Because the statutory limitation on ownership of airspace conflicted with the common law rights in unlimited ownership of airspace, a potential taking issue arose as a result of this early federal legislation. This issue came before the Supreme Court in 1946 in *United States v. Causby.*\(^3\) The main issue in this case involved a low flight path of U.S. bombers and other aircraft over plaintiff's property. The flight path and size of the aircraft caused intense noise and vibrations resulting in death to plaintiff's chickens and mental distress to plaintiff. Justice Douglas, however, writing for the Court, stated that the so called "ad coelum" doctrine "has no place in the modern world. The air is a public highway, as Congress have declared."\(^4\) The Court noted, however, that landowners still maintain a property interest in the non-navigable airspace above their land.
The common law doctrine of ownership of airspace has been limited to allow for air travel, but the concept of a landowner's ownership of airspace above the surface of owned land below "navigable airspace" remains well established. The ownership and use of air rights is significant in today's society in the context of view easements, solar access easements, flight path easements and development rights in the non-navigable airspace above an owner's land. It is important to note, however, that while one may own the non-navigable airspace above one's property, local zoning and land use regulations may make it impossible or expensive to utilize such airspace in development.

**Horizontal Subdivision of Airspace**

Most development situations involve an integrated ownership of fee interest in the underlying land, the building and the airspace occupied by the building. However, is it possible to transfer airspace and own airspace separately and apart from the ownership of the surface of the land? Some courts held that one must own underlying surface land in order to own the overlying airspace.5

Today, the law is less clear but separation of ownership appears to rely on statutory authority. Tiffany's textbook on real estate notes:

> Whether the owner of the land, in the ordinary case, actually owns the air space above the land, and whether such air space is susceptible of division into strata for the purpose of separate ownership, is a question of difficulty. . . . [A]s a practical matter, leases or sales of air space for the erection of buildings, signs, etc., are by no means uncommon, especially in the larger cities of this country. However, it has been held that airspace is an integral part of the land below and is not separate property that may be conveyed completely detached from the land.6

One of the ways the Legislature has permitted separation of ownership in air rights is by the creation of condominiums. Condominium unit ownership illustrates that a single condominium unit owner can hold title to the envelope of airspace occupied by the condominium unit. Condominiums allow the subdivision and transfer of exclusive rights in airspace - rights that are separate from ownership of the surface land below. In fact, under the Florida Condominiums Act, the definition of "land" may include "all or any portion of the airspace . . . between two legally identifiable elevations" and may exclude the surface of a parcel of real property.7

Air rights may be divided into separate units of real property created by the horizontal subdivision of real estate. Accordingly, two or more parties may possess separate ownership interests or rights of control over real property located in different tracts of horizontal airspace over the subjacent land. By dividing the airspace above a parcel of land, it is often possible to "stack" uses in a mixed use development owned by more
than one owner, in the same way it is possible to subdivide and develop side-by-side a horizontal surface subdivision.

**Subdivision Laws**

Although the concept that a landowner may horizontally divide and convey his or her property interest in the airspace above the land has been accepted, such conveyances always involve retention of a footprint on the surface of the land. It is unclear whether a conveyance of airspace can be totally divorced from surface ownership without legislative enabling.

Is the vertical subdivision of airspace a "subdivision" for purposes of platting? Some counties appear to treat it as a subdivision and others do not. Developers try to avoid platting wherever possible in order to avoid delays and reduce costs it may entail but platting may solve other issues relating to the viability of the divided airspace.

**Real Estate Tax Issues in Utilizing Air Rights**

With the advent of mixed use projects, developers sought to carve up airspace among various uses and separate ownership. One of the earliest examples in South Florida was the Four Seasons building on Brickell Avenue in Miami. The building contains a hotel, an office component, a spa component, a parking component, all separately owned, and a residential condominium and a hotel condominium with hotel units. The building looks like a single integrated structure when viewed from the outside but when its legal descriptions are analyzed, it looks more like a jigsaw puzzle with various interlocking pieces. Given the vertical separation in ownership, the individually owned components should each receive a separate tax folio number. However, while the Miami-Dade Tax Assessor has issued separate tax folio numbers for the units in the two separate condominiums, the residential and hotel condominiums, he has refused to issue separate tax folio numbers for the remainder of the building, all of which components receive only a single tax folio even though each has a separate owner. The Tax Appraiser has taken the position that existing legislation requires a separate tax allocation between land and building in a tax parcel. Airspace, without a footprint on the ground, cannot be separately assessed except in the case of condominiums for which statutory authority currently exists.

The separation of tax folios in a mixed use project can be avoided if only one element in the project is not a condominium unit. Thus, if a project contains a commercial condominium, a residential condominium and non-condominium retail space, the retail space would receive a separate folio by default. But if the non-condominium portion of the building consists of more than one separate element, like in the Four Seasons' building, there is a serious problem.

The absence of separate folios for individual building components makes it difficult, if not impossible, to separately finance the individual components. A legislative "fix" for projects which subdivide airspace has been proposed and will hopefully be enacted in
the 2015 session. It is not clear whether other counties in Florida share the same problem.

**Transferring Air Rights for Development**

Air rights are sometimes critical for proposed development of a parcel because they allow more dense development. In the early 1900s, property owners in New York and Chicago began trading air rights, separating the ownership of defined parcels of airspace from ownership of the surface of the earth. Airspace has become an increasingly valuable resource, especially in urban areas. According to Robert Von Ancken, an air rights expert and appraiser, "[t]he trading of air rights is more prevalent than it's ever been before." Von Ancken estimates that air rights trade for 50 to 60 percent of what the earth beneath them would sell for. In New York, the price of air rights has dramatically increased: 20 years ago, $45 a square foot was considered a reasonable fee, but in recent years the norm in prime neighborhoods has crept toward $450 a square foot. A recent article indicated that some professionals believe that air rights may be worth more than the underlying land. While this may sound ridiculous, it is attributable to the premium a developer may obtain for penthouse units in a taller structure affording more dramatic city views.

The determination of what air interests can be transferred can be a critical issue. Development rights in airspace may be sold or transferred to other parcels of land in two main ways. A zoning lot merger joins two or more adjacent zoning lots into one new zoning lot so that the unused development rights in one lot may be shifted to the other. This may be true even though the individual parcels are separately owned. For example, two adjacent lots may each permit an 8-story structure. But if the improved lot consists of only 2 stories, the adjacent developable lot may then support a 14-story building.

Alternatively, a transfer of development rights ("TDR") allows for the transfer of unused development rights from one zoning lot to another lot which may not be located adjacent to the property. A TDR severs the unused development value from a property known as a "contributing site" and allows the landowner of the contributing site to transfer or sell the development rights to another property known as the "receiving site" to increase the density of development potential on the receiving site.

Creation of TDRs is often used by governments to restrict development on certain properties while mitigating a regulatory taking claim. In essence, TDRs transform potential development rights into currency for the property owner of the restricted property.

Although the Miami 21 Zoning Code imposes height limits for buildings in the Miami Modern Biscayne Boulevard historic district, the Code allows for TDRs. The TDRs enable owners of historic property to sell to developers whose projects are located in specially designated, high-density zoning areas of Miami the development rights that they are unable to utilize because of historic designation. In such transactions, the property in the high-density zone obtains a “development bonus” in the form of greater
height or density rights. The revenue from such transfers for the contributing site, which can amount to millions of dollars, can then be used for renovations of the historic property.

As an example, developer Avra Jain sold 440,000 square feet of Vagabond motel's development rights for $3 million to developers who were able to enlarge the size of their condominium projects in Coconut Grove, Edgewater and Brickell. She also sold the Royal Motel's 142,868 square feet of air rights to a developer for a 57-story Brickell project. Jain commented that the ability to raise money through a TDR sale "is key to the restoration of the deteriorated boulevard motels, whose small size and big renovation needs would otherwise make the job financially unfeasible." TDRs also appeal to condominium developers because they have been able to purchase them for $7-9 per square foot, considerably cheaper than the cost of buying additional development capacity through the city's Miami 21 “bonus” program, which also permits builders to purchase the right to add volume to their projects at about $17 per square foot.

Municipalities can also create additional sources of income by the sale of air rights over public rights of ways and public land. Swire Properties, in developing Brickell City Center in downtown Miami, paid millions of dollars to build over streets to connect properties on both sides of the street. The failure to collect payments on another massive project in Miami has generated controversy.

Sunny Isles Beach allows the purchase of TDRs from a municipal site or a private site. It also allows "banking" TDRs following purchase so there may be no connection to the contributing site. TDRs can then be traded as currency or sold to a development site.

Each municipality has their own rules regarding TDRs and transferring air rights so that each municipality's code needs to be examined to the extent air rights are sought for development.

**Conclusion**

Air rights are significant in 21st Century development but we are still somewhat tethered to the ancient Roman construct tying air rights to ownership of the surface of property. Permitting transfers of air space without a surface component might promote more ingenious developmental structures. It appears, however, that further development in this area will be reliant on a legislative developed framework since most courts have been reluctant to sever ownership of air space from the underlying property.

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Property, Probate and Trust Law Section of The Florida Bar.

The author recognizes Desiree Fernandez, George Washington University Law School, J.D., 2015, for her assistance in the preparation of this article.

4 Id. At 261.
6 *Tiffany Real Property* §583 (2011).
7 See Florida Statutes 718.103(18): "Land" means the surface of a legally described parcel of real property and includes, unless otherwise specified in the declaration and whether separate from or including such surface, airspace lying above and subterranean space lying below such surface. However, if so defined in the declaration, the term “land” may mean all or any portion of the airspace or subterranean space between two legally identifiable elevations and may exclude the surface of a parcel of real property and may mean any combination of the foregoing, whether or not contiguous, or may mean a condominium unit."
9 Id.
Purchasing a Partnership/LLC Interest: Tax Tip #1–Requiring Tax Distributions

By Philip Hirschfeld

Tax Tip #1--Need for Mandatory Tax Distributions:

As background, most corporations pay tax on their income and then shareholders pay tax on dividends the corporation pays them, which is commonly referred to as subjecting the underlying income to a double tax. There are some exceptions to this rule such as for real estate investment trusts or S corporations, but it is generally the prevailing view. By contrast, partnerships or LLCs are a flow through entity for tax purposes. Income is not subject to tax at the partnership or LLC level, but rather the income passes through to the partners or members who then must pay the tax on their allocable share of such income.

Partnership tax status, thus, eliminates double taxation of the underlying income that is economically very helpful. However, each partner needs to have the cash to pay the tax due on that partner's allocable share of the income. Also, estimated taxes are required to be paid during the year on this income, so the partner cannot wait until year end to address this issue.

The determination of whether a partnership or LLC distributes cash to its partners or members is left to the managing general partner or member. The manager may want to not make any distributions to the partners and retain all cash in the partnership for capital improvements, repairs, creation of reserves or other valid business reasons. However, retaining all cash in the partnership leaves the partner with an economic problem in trying to find the cash to pay the tax on this income.

This financial dilemma can be addressed in the partnership or operating agreement or in a side letter that can mandate distributions to the partners, so that the partners can have the cash needed to pay their taxes -- a tax distribution requirement.

A review of the partnership or LLC operating agreement distribution provisions should first be made to see if they contain a tax distribution provision. Such provision will require a distribution of available cash to the partners or members so they can meet both their regular tax and estimated tax payment obligations. Such provision is very reasonable since a corporation would have to pay such taxes regardless of its business needs and the partners now have that legal obligation. If no tax distribution provision exists then inclusion of such provision by amendment of the partnership or operating agreement should be requested or if that may not be possible to obtain, a side letter committing to make such tax distributions would be recommended.
An effective tax distribution provision should take into account that the determination of how much cash is needed depends upon each partner's own federal, state and local tax situation. If the provision is written to address the specific needs of each partner's tax situation then that may lead to an administrative burden in determining each partner's effective tax rate. If there are differing tax rates among the partners then tailoring distributions to the differing rates will lead to continuing administrative complications in keeping track of the amounts each partner gets, which also needs to be credited against future distributions to those partners.

A simpler approach is to negotiate up front a specific effective tax rate to use for all tax distributions based on the highest effective tax rate of any partner. For example, if one partner is an individual residing in high taxed New York City, an effective tax rate would be 50% based upon federal, state and local taxes. Therefore, 50% of their allocable share of the partnership's taxable income should be distributed. This approach may reward some partners from lower tax jurisdictions, but this approach is much simpler to apply.

Apart from determining what tax rates to apply, another issue is how to deal with the situation when the partnership generates a tax loss in year one (for example, an $80 ordinary loss) and then taxable income in year two (for example, $100 ordinary taxable income). The tax distribution provision can be applied on a yearly basis with no regard to prior year losses and thus, mandate a distribution in year two to cover all the taxes on year two's $100 taxable income. In that case, the formula for this tax distribution would equal the Effective Tax Rate multiplied by the partner's share of current Taxable Income. Alternatively, the tax distribution provision can be applied on a "cumulative" basis that combines all years together and then only provide for tax distributions once "aggregate" taxable income is generated. In that case, the formula for this tax distribution would equal the Effective Tax Rate multiplied by the partner's cumulative share of all Taxable Income and Loss allocated to them since they first became a partner. By applying this alternate formula, a tax distribution would only be allowed in year two to cover taxes on $20 of taxable income (namely, $100 taxable income from year two minus $80 loss from year one). The partner may prefer applying this rule by using current taxable income, but the manager may insist that a cumulative approach be applied to allow more cash to remain at the partnership.

These points can be used to draft an effective tax distribution provision so clients are not left with finding cash to pay taxes arising from their new partnership investment.
Philip R. Hirschfeld, J.D., LL.M., is an associate with Ruchelman P.L.L.C., New York, NY. He is a tax attorney specializing in international tax matters and is the co-chair of the FATCA Subcommittee of the Committee on U.S. Activities of Foreign Taxpayers and Treaties of the ABA Section of Taxation.
Elder Law Tip

By Bernard A. Krooks, Esq.

On December 19, 2014, the Achieving Better Life Experience Act, commonly known as the ABLE Act was signed into law. ABLE accounts are modeled after Internal Revenue Code Section 529 Plans and provide a mechanism to fund an account in the name of an individual with disabilities, and allow the funds in that account to accumulate income tax-free. Moreover, under certain circumstances, the accounts will not disqualify an individual for means-tested government benefit programs such as Medicaid and Supplemental Security Income (SSI).

In order to be eligible for an ABLE account, the onset of the individual’s disability must have occurred prior to age 26. Each calendar year, the individual with disabilities, or another person for their benefit, can deposit cash up to the federal annual gift tax exclusion amount, presently $14,000, into an account in the name of the individual with disabilities. Aggregate annual contributions from all sources cannot exceed $14,000. These contributions are not tax-deductible for federal income tax purposes (at this point, it is not clear what the individual states will do for state income tax purposes). Total contributions into the ABLE account are capped at each state’s limitations for 529 accounts and the first $100,000 in an ABLE account will not adversely affect the individual’s eligibility for SSI. So long as the funds in that account are used for permitted government-approved disability-related expenditures, the account will be permitted to accrue value income tax-free.

Upon the beneficiary’s death, any money remaining in the ABLE account must be used to reimburse Medicaid for any cost of care provided. This is similar to a first party Special Needs Trust created pursuant to 42 USC Section 1396p(d)(4)(a). It is expected that ABLE accounts will be available soon as various state legislatures are in the process of passing enabling legislation. The IRS has issued Notice 2015-18 proclaiming that they are in the process of issuing regulations. Any individuals who set up ABLE accounts prior to the issuance of IRS regulations will not fail to receive the benefits of ABLE accounts simply because the accounts do not fully comport with the subsequent regulations to be issued.

It is too early to tell how useful ABLE accounts will be in an elder law/special needs planning practice. Since they do not require court approval to set up, it is anticipated that the disability community will be attracted to these accounts. For amounts under $14,000 a year they can be quite useful for certain beneficiaries and provide them with a sense of independence.

Reversal of Fortune – the Elkins Appellate Decision

By Garry L. Marshall

The recent decision from the United States Court of Appeals for the Fifth Circuit, Estate of Elkins v. Commissioner, resulted in the reversal of the prior Tax Court opinion (140 T.C. No. 5; March 11, 2013) and a repudiation of the IRS position of not allowing discounts for fractional interests in art. The Fifth Circuit opinion reinstated the very large discounts taken by the taxpayer’s expert. However, the decision in Elkins was not necessarily a vindication of the taxpayer’s position on valuation discounts. Rather, it was more about the IRS’ perfunctory no-discount position and the Tax Court’s attempt to come to its own novel conclusion on the appropriate discounts.

The decedent, James A. Elkins, Jr., held undivided interests in 64 works of contemporary art. Mr. Elkins acquired the works of art between 1970 and 1999. Both before and since the decedent’s death in 2006, the art had been displayed primarily in Mr. and Mrs. Elkins family home and at the family office, both in Houston, Texas. For three works of art, the decedent held a 50% undivided interest and each of his three children held a 16.7% undivided interest. For 61 works of art, the decedent retained a 73% undivided interest and each of his three children held a 9% undivided interest. A lease in effect at Mr. Elkins’ death required that no co-owner could dispose of his interest in the leased artworks unless joined by all of the co-owners. A co-tenancy agreement stipulated how the artworks would be shared among the co-owners, including how many days of possession each owner was entitled to each year. Plus, the co-tenancy agreement apparently prohibited the sale of an interest in any artwork by any co-owner without the prior consent of the other co-owners and provided that the co-owners could not transfer or assign their “rights, duties and obligations” under the lease without the consent of the other co-owners.

The value of the decedent’s undivided interests was initially reported on Form 706 at $12.1 million. At trial, the taxpayer presented two expert reports indicating values of $7.7 million and $5.5 million. The undiscounted pro-rata value of the art was stipulated to be $23.3 million. At both the Tax Court trial and on appeal the IRS argued that no discount from the pro-rata value of the decedent’s interest in each of the 64 works of art was warranted because, among other reasons, the proper market in which to determine the fair market value of fractional interests in artwork is the retail market in which the entire work is commonly sold at full fair market value, and that the fractional interest holder is entitled to a pro-rata share of the proceeds (in reality there is no recognized market for undivided interest in art, which is a fact that makes valuing such interests difficult). In addition, the IRS cited the fact that, since discounts are not to be applied
with respect to the valuation of charitable contributions of undivided interests in art (Rev Rul 58-455 and 57-293), they should not be applied in an estate or gift tax context.

One of the estate’s valuation experts used a cost-of-partition analysis. Based on one scenario the resulting discounts were between 50 and 80%. In another scenario the discounts were higher (and even 100% for certain interests!!). In our opinion, the cost-of-partition approach is the best way to look at this due to the absence of transaction data. Essentially this is an income approach in which you consider any income (say from a lease to another party) and expenses related to the art (insurance, maintenance, etc.), estimate an appreciation rate in the value of the art (over the time period of the partition process), and determine a rate of return to apply to the future proceeds resulting from the sale in a partition action. It is imperative for the valuation expert to talk to an attorney experienced in personal property law in the subject state in order to make the appropriate assumptions as to duration and cost of the partition process. Ultimately, the valuation will be driven in large part by these assumptions.

The Tax Court did not buy into the IRS’ arguments. It also did not agree with the taxpayer’s much higher discounts on the grounds that a buyer “would be in an excellent position to persuade [the other owners] to buy [the interest]” and that knowing this, a buyer and seller would agree upon a price that was close to pro-rata (undiscounted) value. Ultimately, the Tax Court applied a 10% discount to account for the fact that a hypothetical buyer could not be certain that the other undivided interest owners would agree to pay pro-rata value for the interest.

Similar to the discounting rationale found in Holman v. Commissioner, 130 T.C. 170, aff’d, 601 F.3d 763 (8th Cir. 2010), the Tax Court assumed a specific “strategic” buyer (the other undivided interest owners in this case). The Court also noted the strong sentimental and emotional ties to the artwork. The Fifth Circuit opinion clearly states that the Tax Court’s construct violates the hypothetical buyer/seller fair market value standard.

The Appeals Court ruled that the IRS did not meet its burden of proof since it did not produce any valuation evidence. It also noted that the Tax Court had no basis for its 10% discount. Therefore, the only valuation opinion left to be considered was that of the taxpayer (the Appeals Court noted that the taxpayer’s valuation evidence “is not just the preponderance of the evidence, it is the only such evidence”). Thus, the taxpayer’s valuation won by default.

While the Elkins case was a clear victory for the taxpayer one must take caution in relying too much on the results of this case since the IRS did not put any credible valuation support and since the Tax Court did not substantiate its discount
position. While the 5% discount allowed in cases like Scull (T.C. Memo. 1994-211), and Robert Grove Stone et al. v. United States; No. 3:06-cv-00259, does not make any sense (given the unattractiveness of undivided interests), the discounts allowed in the Elkins case (70-80% at the appellate level) may not necessarily be sustainable. That leaves a lot of room in between to fight over the valuation of undivided interests in art.

Garry L. Marshall is a Managing Director in the Valuation & Financial Opinions Group and is the head of the Houston office of Stout Risius Ross, Inc. He has extensive experience valuing corporate securities and partnership interests of private and closely held entities. Typical engagements include valuations for estate, gift and income tax purposes, transactions including those required by buy/sell agreements, and employee stock ownership plans. He also advises companies on structuring buy/sell and other shareholder agreements. Mr. Marshall serves a broad range of industries including manufacturing, media, plastics, wholesaling, engineering and construction, oil and gas drilling and servicing, distribution, and telecommunications.

Prior to joining SRR, Mr. Marshall was a Senior Managing Director at HFBE for 18 years where he actively managed valuation engagements with a focus on estate, gift, and income tax matters involving companies in various industries. Mr. Marshall is a Chartered Financial Analyst and a member of the Houston Society of Financial Analysts. He has an MBA from the University of Houston and a BBA from the University of Texas.
Agreeing to act as trustee is a major responsibility. Attorneys, accountants, and other trusted advisors, are being asked with increasing frequency to serve as trustees for their clients’ trusts. Changes in technology, trust laws and client preferences are driving this trend. It is easier than ever before to access information, many states have enacted favorable trust laws, and people are becoming more comfortable appointing individuals as trustees.

Individual trustees – whether professionals or family members – need tools and techniques to fulfill their fiduciary duties and may not be familiar with the investment responsibilities that they now hold. While individual trustees lack the staff of a corporate trust department, these individuals have similar responsibilities and will be held personally liable if they are found to have breached their fiduciary duty. Whether advising a client who is named as trustee or serving as the trustee yourself, the following “best practices” will mitigate the risk of breaching your fiduciary duties as they relate to the investment of trust assets.

**The Uniform Prudent Investor Act**

The Uniform Prudent Investor Act (UPIA), enacted in 1994, has been adopted – with minor modifications - by most states. The act requires trustees to follow the Modern Portfolio Theory (MPT) of investing. The MPT theory assists in creating a framework for a diversified investment strategy that includes different asset class combinations and identifies the optimal risk/return solution for each of these combinations. Prior to the enactment of the UPIA, trustees were subject to the “Prudent Man Rule” which limited the investment choices of a trustee to only safe or conservative investments and did not allow trustees to delegate investment decisions.

The chart below provides an introduction to the major provisions of the UPIA. As of this writing, most states have adopted the UPIA with only minor modifications; however, the requirements of state law in the state in which the trust is located should always be consulted.
<table>
<thead>
<tr>
<th>Section Name</th>
<th>Provisions and Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prudent Investor Rule</td>
<td>The trustee owes a duty to all beneficiaries – current and future - to act prudently. The trustee may reasonably rely on provisions of a trust that expand, restrict, eliminate, or otherwise alter the prudent investor rule.</td>
</tr>
<tr>
<td>Standard of Care; Portfolio Strategy; Risk and Return Objectives</td>
<td>The trustee must consider various circumstances in investing and managing trusts. Decisions should be evaluated in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.</td>
</tr>
<tr>
<td>Diversification</td>
<td>The trustee must diversify the investments of the trust unless they reasonably determine that the purpose of the trust is better served by not diversifying. <strong>Comment:</strong> Where the trust document directs the trust to hold a non-diversified asset (e.g. single stock or family business), the trustee would be wise to obtain consent from the beneficiaries as decisions are made.</td>
</tr>
<tr>
<td>Duties at Inception of Trusteeship</td>
<td>A new trustee must review trust holdings and bring the trust portfolio into compliance with this act as well as the purposes, terms, distribution requirements, and other circumstances of the trust. <strong>Comment:</strong> retaining assets in the trust may be appropriate and should be documented accordingly.</td>
</tr>
<tr>
<td>Loyalty</td>
<td>The trustee must act solely in the interests of the beneficiaries as opposed to the interests of himself or other 3rd parties.</td>
</tr>
<tr>
<td>Impartiality</td>
<td>The trustee must take into account the different interests of the trust beneficiaries. <strong>Comment:</strong> this includes both current and future beneficiaries.</td>
</tr>
<tr>
<td>Investment Costs</td>
<td>The trustee has a duty to incur costs that are appropriate and reasonable in relation to the assets and purpose of the trust.</td>
</tr>
<tr>
<td>Reviewing Compliance</td>
<td>Compliance with UPIA is based upon facts and circumstances at time of decision. <strong>Comment:</strong> the test of prudence is based on facts and circumstances and not on hindsight; trustee is not a guarantor of investment performance.</td>
</tr>
<tr>
<td>Delegation of Investment and Management Functions</td>
<td>Delegation of investment and management functions is authorized. <strong>Comment:</strong> This delegation was not permitted under prior law.</td>
</tr>
</tbody>
</table>

**Gather Information**

Thorough documentation is an important part of being an effective trustee and of mitigating the risk of being sued for breach of fiduciary duty. A trustee should gather all relevant documents including the trust document, income, gift and/or estate tax returns,
custodial statements, current investment management agreements, etc. “Know the Client” standards imposed on trustees include knowing the beneficiaries and awareness of the trust provisions. For beneficiaries, the trustee should generally be aware of the ages, time horizons, financial situations (including earned income, outside assets and potential inheritances and resources), level of financial sophistication, maturity, etc. With regard to the trust document, the trustee should know the settlor’s intent, time horizon and ages of the various beneficiaries of the trust (including future beneficiaries), and distribution of income and principal requirements of the trust.

Establish Roles and Responsibilities

The individual trustee should define, document, and acknowledge the roles and responsibilities for all parties involved in administering the trust. This should include custodians, investment professionals, trust administrators, tax preparers, valuation consultants, attorneys, and other professionals. When new relationships are introduced, a due diligence process should be followed and documented. For example, when delegating investment decisions to an investment advisor, the individual trustee should understand the standard of care that the advisor must follow. The trustee must know the difference between a broker who need only follow a “suitability” standard for investments and a Registered Investment Advisor who is required to follow a Fiduciary Standard. The roles and responsibilities of all professionals advising the trustee should be outlined in writing.

Establish a Plan: The Investment Policy Statement

A written Investment Policy Statement (IPS) is an essential document to help mitigate the risk that a trustee will be challenged for breaching his or her fiduciary duties with regard to investment decisions. The parameters of an investment plan that should be described in an IPS include the time horizon, risk level, targeted return, appropriate asset classes, and any implementation requirements. A balance must be struck between the needs of the current and remainder beneficiaries. These inputs are used to create a diversified investment portfolio based upon the MPT, discussed above. Merely holding a number of different securities is not enough for a portfolio to be considered “diversified.” There must be a plan and that plan must be documented. The most appropriate portfolio solution for a given trust situation should be the guide for developing an IPS and implementing the investment plan that the trustee will follow. The typical IPS covers basic information about the beneficiaries, the main components of the investment strategy, and implementation and monitoring requirements. An even better IPS would also include elements of the trust’s provisions as they relate to investment considerations.
Implement the Plan

The trustee - or the delegated investment advisor - should choose investment vehicles that are appropriate for the portfolio size, the needs of the trust beneficiaries and the purpose of the trust. Due diligence should be performed and documented as part of the selection process for both investment strategies and custodians. Strategies could include both passive and actively managed vehicles. For actively managed accounts, track records, manager style and longevity, firm size, and history are among the important factors to consider. For custodians, breadth of investment offerings, costs, conflicts, and service capabilities will be important factors.

Monitor the Plan

Investment returns, as well as the IPS, should be monitored and, where appropriate, updated on an on-going basis. Periodic reports should be prepared to compare trust investment performance versus benchmarks and IPS objectives. Evaluations should be made of investment managers and any other decision makers to ensure that they are meeting the objectives as laid out in the IPS. Fees for investment advice, including commissions and hidden fees should be transparent and understood and documented, by the trustee.

Manage Expectations

In addition to documentation and following the requirements of the UPIA and state law, a trustee would be wise to cultivate good relationships with the beneficiaries. Managing client relationships as a trustee is best accomplished through both formal communications and making an effort to understand the family dynamics that play a significant role in many trusts. As a formal matter, it is a sound practice to send all beneficiaries a trust summary letter detailing each beneficiary’s rights and how the trust will be administered. It is also prudent to send each beneficiary a copy of the IPS, as well as annual update to summarize trust activity during the course of the year.

“Knowing the Client” is often a key variable in managing a trust—especially where discretionary distributions are involved.

Conclusion

Becoming a trustee gives rise to fiduciary responsibilities regarding the investment of trust assets. Individuals who serve as trustee do not have the processes and procedures in place that a corporate trustee would have, and without such processes and procedures, could be subject to the risk of a lawsuit by one or more beneficiaries of the trust. Since an individual trustee is personally liable for breach of fiduciary duty, fulfilling these responsibilities in an organized and disciplined manner will help insure a satisfactory experience for both trustees and beneficiaries. Whether advising a client
who is named as trustee or serving as the trustee yourself, the above “best practices”
will mitigate the risk of breaching your fiduciary duty as it relates to the investment of
trust assets.

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Round Table Wealth Management (www.roundtablewealth.com) is a leading
independent, fee-only Registered Investment Advisor (RIA) with offices in New York,
New Jersey, and Connecticut. Round Table operates as a Multi-Family Office with
approximately $1 billion in assets under management (as of December 2014) and
serves clients throughout the US as well as internationally. Founded in 1999 Round
Table offers a wide range of advisory services and investing solutions that are tailored
to the specific needs and requests of each client.
Status of the Uniform Fiduciary Access to Digital Assets Act. Not enacted anywhere... yet.

By: Anne W. Coventry and Karin Prangley

The Uniform Fiduciary Access to Digital Assets Act (“UFADAA”) addresses an increasingly pressing problem fiduciaries face in fulfilling their duties to administer decedents’ estates, trusts, and guardianship estates: a growing reliance on electronic storage of information that is essential to the proper and timely administration of an estate, trust, or guardianship.

A few examples illustrate the problem:

- A decedent received his bills, bank statements, and 1099s only by email rather than by U.S. mail. The only way for his personal representative to ascertain the estate’s assets, liabilities, and critical tax information is to gain access to the decedent’s online data.
- A decedent set up automatic, recurring payments from a bank account during his life. His personal representative needs online access in order to shut those automatic payments off promptly after death, to avoid overdrawning the account or risking liability for paying creditors out of order.
- An incapacitated individual is unable to change passwords when her accounts get hacked. Her court-appointed guardian needs online access in order to take remedial action to secure and monitor accounts to protect against identity theft or damage to the individual’s reputation.
- An incapacitated individual is unable to conduct her personal ecommerce business and fill purchase orders. An agent acting under her power of attorney needs online access to ensure that customers’ orders are filled on time, to preserve the value of the business.
- A decedent owned domain names, a valuable blog, and Bitcoins. These assets have monetary value and should be reported as part of the taxable estate. The personal representative needs access to ensure that valuable assets of the estate are not lost to the decedent’s heirs, and in order to pay appropriate estate taxes.

UFADAA seeks to address these problems by providing that executors, administrators, trustees, conservators/guardians and agents acting under a power of attorney have the legal authority to access the digital assets (such as domain names, webpages, online purchasing/sales accounts and electronic communications such as email and social media messages) of a deceased or disabled person. Some have been surprised that UFADAA was even necessary. After all, legally authorized fiduciaries have been accessing and managing assets and information for centuries. Isn’t a fiduciary able, within the bounds of his rightful fiduciary powers, to manage the full estate, including the digital estate, of the decedent/ward/trust? Not necessarily. In many instances, restrictive terms-of-service agreements to which a user agrees when he signs up for an online account prohibit a legally authorized fiduciary from accessing...
the digital assets of the deceased or disabled person.

UFADAA was finalized and approved at the Uniform Law Commission’s annual meeting during the summer of 2014. UFADAA was endorsed by the RPTE Council last November (during its Fall Leadership Meeting in Dana Point) and was approved by the ABA House of Delegates at its mid-year meeting. It has also been endorsed by the National Association of Elder Law Attorneys and as of May 7, 2015, the AARP.

A modified version of UFADAA was enacted in Delaware in 2014 and it has been introduced in 27 states thus far in 2015. Although there is usually some opposition to every uniform act, UFADAA has been subject to far more opposition than is typical and it has been alarmingly difficult to get UFADAA enacted anywhere in 2015 thus far. Representatives from several large tech companies (e.g., Yahoo, Facebook and the tech trade association NetChoice) were heavily involved in the UFADAA drafting process, where it appeared that there was at least a consensus that UFADAA was a workable solution to providing fiduciaries with legal access to digital assets. But these same representatives have now mobilized to fight hard against UFADAA in each state where it has been introduced, and have argued that granting broad fiduciary access to certain digital assets such as email messages violates the user’s federally protected privacy rights. In some states, the American Civil Liberties Union has also entered formal opposition to UFADAA, although usually when the ACLU learns that UFADAA does provide mechanisms to honor a person’s wish that his/her electronic communications will not be disclosed following death or disability, the ACLU withdraws its opposition. The opposition is well-funded and is backed by paid lobbyists. It is speculated that the opposition has been using campaign contributions as a carrot and a stick to gander support against UFADAA.

The opposition has also drafted its own Act, the PEAC Act (available at http://netchoice.org/library/privacy-expectation-afterlife-choices-act-peac/) which provides that an executor/personal representative or administrator may only gain access to the electronic communications of the decedent, or a log of such communications, with a court order.

Proponents and opponents of UFADAA now seem to find themselves at a impasse. A modified version of UFADAA has been enacted in 1 state (Delaware), and a modified version of the PEAC Act has been enacted in 1 state (Virginia). But in many other states, a fiduciary’s access to the digital assets of a deceased or disabled person has not been formally addressed and proposals to adopt UFADAA or the PEAC Act are being tabled in state legislatures across the country.

What is being done to break the stalemate? First the RPTE Section has proposed the adoption of a new substantive Committee, the Digital Property Committee, within the
Non-Tax Estate Planning Considerations Group. This committee will embrace RPTE and the ABA Board of Governor’s endorsements of UFADAA and will support the enactment of UFADAA in the states. For one, the new Committee will develop a public outreach and education campaign to make more estate planning attorneys and the general public aware of the need for UFADAA. This committee will also take measures to encourage Congress to amend relevant data privacy laws so that there is a specific fiduciary exception built into the electronic communications privacy laws. To become involved in the new Digital Property committee, please contact karin.prangley@bbh.com or acoventry@pasternakfidis.com.

Leadership at the Uniform Law Commission (“ULC”) and within the UFADAA drafting committee have also sought to re-engage the opposition and to come to a workable compromise. During the week of May 11, 2015, ULC and UFADAA representatives and several large electronic communications service providers met in Washington DC to negotiate a compromise to potentially “meet half-way” between UFADAA and the PEAC Act. Negotiations are ongoing, but the negotiating points will clearly center around what type of access fiduciaries will have to the deceased or disabled user’s 1) digital assets other than the actual content of electronic communications (such as, for example, email messages), and 2) the actual content of electronic communications that may be subject to federal data privacy laws. UFADAA proponents believe that fiduciaries should have access to both 1&2 as a default, and PEAC Act proponents believe that neither 1 nor 2 should be released to a fiduciary without a court order.

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Co-Chair of the Newly Formed Digital Property Committee

Karin Prangley, Regional Trust Head, Brown Brothers Harriman Co., Chicago, Illinois
Co-Chair of the Newly Formed Digital Property Committee

† The views expressed are as of May 2015 and are a general guide to the views of Brown Brothers Harriman (“BBH”). The opinions expressed are a reflection of BBH’s best judgment at the time. This material should not be construed as legal advice. Please consult with attorney concerning your particular circumstances.
Practice Management Group

The Real Property Practice Management Group consists of three committees of relevance to real estate practitioners: Economics, Technology and Practice Methods; Ethics and Professionalism; and Real Estate Litigation/Alternative Dispute Resolution. We regularly produce standalone CLE including, for example, a group program on the Americans with Disabilities Act litigation issues at this year's Spring Symposia and Mike Rubin's many entertaining and musical ethics programs. We also seek to collaborate with other groups and committees within the Section when a program presents ethics, litigation or practice methods issues. We have also provided resources and programming for other issues of interest within the section, including the home mortgage foreclosure crisis and consumer credit regulatory changes that affect real estate practice. Please consider joining one of our committees or if you are already active and another committee please feel free to reach out to us if we can assist with any of your committee's projects.

Residential, Multifamily and Special Use Group

The Residential, Multifamily and Special Use Group consists of 4 committees – Single Family Residential, Multifamily, Senior Housing and Affordable Housing. Members of these committees handle all aspects of shelter law, working closely with investors, developers, governmental regulators and owners.

The group presented a program at the Spring Symposium on the TILA/RESPA Integrated Mortgage Disclosures, the next round of changes in home mortgage brought about by the Dodd-Frank Act. The Single Family Committee is closing following the regulation and enforcement of Dodd-Frank by the Consumer Financial Protection Bureau, to keep attorneys who advise lenders and consumers of home mortgages of the large scale and rapid changes resulting from these reforms. The Single Family Committee is reaching out to the solo and small practice attorneys who handle the majority of transactions in residential housing to help them prepare for the changes in the closing process required by the new regulations.

The Senior Housing and Affordable Housing committees are working together on a long term project looking at the special nuances of redevelopment in areas hit hard by foreclosure and civil unrest. They will be presenting a series of substantive calls focusing on innovation by local government in Detroit in dealing with large scale property abandonment, and a case study from Baltimore on what counsel can do to help rebuild both a structure and a community damaged when a senior housing project under construction is destroyed by riot.
Charitable Planning and Organizations Group

The Charitable Planning and Organizations Group and its three committees, Charitable Planning, Charitable Organizations, and Legislative and Regulatory Issues, have remained very productive. For the remainder of this bar year, the Group Chair is Elaine Waterhouse Wilson, of West Virginia; the Group Vice-Chair is Grace Allison, of New Mexico; and the Group Supervisory Council Member is Carol Kroch, of Delaware.

In addition to its monthly leadership calls, the Group hosts quarterly membership calls with discussions of charitable planning topics, each following a brief presentation by an expert in the field. For example, on April 1, 2015, Lawrence G. McMichael, Chair of the Dilworth Paxson law firm in Philadelphia, fielded questions about the special issues facing donors—and nonprofit organizations—in bankruptcy. The Group’s next quarterly membership call is scheduled for July 29, 2015, and will feature Una Usili, Director of Research for the Indiana University Lilly Family School of Philanthropy, leading a discussion of U.S. charitable giving trends.

The Group has completed—or has in process—a number of submissions to the U.S. Treasury:

- Last year, members of the Group submitted a set of comments on the Final and Temporary Regulations governing Supporting Organizations issued in December, 2012; the comments are available on the Committee’s website. Earlier this year, the Group provided further information supporting its position that the distribution rules for Type III Non-functionally Integrated supporting organizations should not include an alternate 5% of asset value requirement.

- A working group headed by Grace Allison and Chris Hoyt prepared comments to Treasury on potential issues relating to forthcoming regulations under Sections 4966 and 4947, which impose penalty excise taxes in certain circumstances on donor advised funds, donors and related persons, and/or fund managers.

- Another committee is considering suggestions regarding regulatory changes and administrative guidance in the conservation easement area. Individuals interested in this project should contact David Dietrich or Nancy McLaughlin.

- The Group also intends to submit comments on IRS Notice 2015-27, which invites recommendations for Treasury’s 2015-2016 Priority Guidance Plan. Anyone with thoughts regarding the Priority Guidance Plan comments should contact Elaine Waterhouse Wilson. Last year’s comments can be found on the Group’s website.

On April 29, 2015, Group leadership held its annual meeting in Washington, D.C. with representatives from the Department of Treasury. The discussion centered on various regulatory issues in the charitable arena, ranging from pending guidance on appraisals of non-cash contributions to future guidance on qualified conservation easements. Later that week, the Group presented a well-received panel on “International Philanthropy
and Your Clients: Rules to Give By” at the Section’s Annual Spring Symposia, also in Washington, D.C.

Finally, this spring the ABA published *Handbook of Practical Planning for Art Collectors and Their Advisors*, by former Group Chair Ramsay H. Slugg.

**Elder Law, Disability Planning and Bioethics Group**

The Elder Law, Disability Planning and Bioethics Group is focused on a diverse set of issues of particular concern to older adults, persons with disabilities, and vulnerable patients. The Group has three Committees. The Surrogate Decision-Making Committee, led by Catherine Anne Seal, focuses on the legal and ethical challenges decision-making for persons with diminished cognitive capacity. The Long-Term Care, Medicaid, and Special Needs Trusts Committee, led by M. John Way, focuses on the challenges of meeting the health care and basic human needs of persons with disabilities and those anticipating the possibility of future disability. Finally, the Bioethics Committee, led by Judith Daar and Cara Koss, focuses on ethical challenges in the health care arena. The Group is looking to expand participation in its Committees, and encourages those interested in engaging in these vital issues to contact the Committee Chairs.
Legal Technology Coming to Your RPTE Practice?
Tools Pointing to Change
Tips to Help You Change

By Keith Mullen

The number of publications and conferences focusing on legal technology grows every year. These articles and conferences proclaim technology as a driver of change in the work product and services offered by lawyers. At conferences, presentations often include comments on both the impact of these changes upon the legal profession, and the challenges preventing or impeding these change.

Unfortunately, none (zero) of the conferences offered tools designed for use in our favorite corner of the legal world: RPTE.

Perhaps this omission is explainable simply because –

- the concepts and tools discussed at these conferences do not involve RPTE speakers
- RPTE lawyers are so busy bringing in the wheat - we simply don’t have the time to put down the sickle, to take a look at the neighbor’s field and to build our own combine

Let’s lay the sickle down for a moment, and examine some of these concepts and tools. We’ll discover some of them might be adaptable to our work as PRTE lawyers – which I mark with this notation “RPTE.”

Law School & Law Firm Innovation

Numerous law schools are addressing uses of technology in the practice of law. Several innovative approaches and events are particularly interesting for RPTE.

Suffolk Law School’s Institute on Law Practice & Innovation has teamed with Casey Flaherty, an in-house lawyer with KIA Motors America, to enhance and automate an audit created by Flaherty. The audit tested associates in the law firms engaged by KIA on basic desktop tools. (Yes, the associates flunked his test.) This is an outstanding example of legal tech “innovation” – are you good at the tools on your computer? This is innovation is the more basic sense.

RPTE: we simply need to be better at using the tools currently on our desktop. The ABA Law Technology Resource Center is a great resource for improving your use of stuff on your desktop.

At the recent New York Legal Tech Show, ALM and Stanford Law School Code X collaborated in a very noteworthy manner. They identified ten legal tech startups and
then placed them on a single aisle at the show, where you could meet the innovators and learn about their visions. This thoughtful summary was written by Tim Baran:¹²

Docket Alarm, Inc.¹³ Legal research tool that runs full-text searches across millions of law-suits providing analytics and predictions, and delivers real-time alerts to your inbox or mobile device.

RPTE: conceptually this approach could be used in reviewing real estate portfolios, or trust documents. However, I’ve been told by lenders (who have tried it), the results are not consistently accurate

IP Nexus¹⁴ A global, online services marketplace for intellectual property that matches inventors, entrepreneurs, startups, universities and companies with lawyers, patent attorneys, patent agents and other professionals who can help them protect their inventions and build successful businesses

RPTE: so, is this an approach that a group of lawyers, who focus on a discrete legal topic or task, might band together and create an app (with a check list and/or doc prep tools)?

Lawdingo¹⁵ Handles the marketing, screening, intake, routing, connection, payment process and follow up in the attorney-client engagement process.

MeWe Inc.¹⁶ Mobile software that simplifies compliance and make the law more accessible for businesses and consumers

RPTE: this is interesting – is it a replacement for small companies and individuals contacting a lawyer; or not? Or, is this an approach that a group of lawyers, who focus on a discrete legal topic or task, might band together and create an app (with a check list and/or doc prep tools)?

One400¹⁷ A digital marketing agency devoted to the legal industry

PatentVector LLC¹⁸ A company which has scraped the entire global patent registry and built a set of tools for discovering important patents

Plainlegal¹⁹ Intake software that collects the information lawyers need, including client intake, document assembly, filing, and docketing, to prepare IP filings

RPTE: is this an approach that a group of lawyers, who focus on a discrete legal topic or task, might band together and create an “intake” app (with a check list and/or doc prep tools)?
Priori Legal

An online platform for businesses to find, hire and pay for legal services. It connects businesses with a network of trusted attorneys at discounted and transparent rates.

Shake

A platform making the law accessible, understandable and affordable for consumers and small businesses. Create, sign and send legally binding agreements in seconds.

RPTE: this is interesting – as a replacement for small companies and individuals contacting a lawyer; or not? Or, is this an approach that a group of lawyers, who focus on a discrete legal topic or task, might band together and create an app (with a check list and/or doc prep tools)?

WizDocs, Inc.

Provides attorneys with a software solution to manage their legal processes and makes corporate transactions and company legal document management more efficient and cost effective.

RPTE: this might be a tool for RPTE lawyers to use – or would such a tool just be another doc prep tool that lawyers resist to use?

Last month, my focus on RTPE tech concepts and tools took me to the “Digital Tools in Law Practice” program sponsored by the Georgetown Law Center and the ABA Journal. Speakers at the program included lawyers from several large law firms, who have developed various technology tools focused on discrete industries or tasks.

Listening to these practical and thoughtful products inspired me to create a list of legal tech innovations focused on the transactional practice of law – such as RPTE. Here is my list of those law firms, with links to their websites and a brief description of their legal tech products or services:

<table>
<thead>
<tr>
<th>Target Customer(s)</th>
<th>Product(s) or Service(s)</th>
<th>Law Firm (&amp; Affiliate)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Compliance and training covering a limited number of topics</td>
<td>Training courses, information &amp; documents for:  - Export compliance tools  - Franchisor Toolkit</td>
<td>Baker Donelson and its wholly-owned subsidiary, Mitigated Risks, LLC</td>
</tr>
</tbody>
</table>

RPTE: if you regularly give presentations, why not take the next step and create a training ap? Then, take the next step and integrate checklists, followed by
| Technology startups: documents & information on basic entity formation, convertible note term sheets, IP rights, venture capital funding, & related information | Forms & information for:
- Forming a DE corp
- Running the company (advisor agreement; consulting agreement; NDA; etc.)
- Protecting your website
- Raising money |
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<tbody>
<tr>
<td>The Cooley law firm &amp; its CooleyGo website</td>
<td>RPTE: if you regularly represent small CRE development companies, or have a sector of your TE practice that is repetitive or the first-step in more lucrative work, why not create an ap? Then, take the next step and integrate checklists, followed by simple documentation</td>
</tr>
</tbody>
</table>

| Technology startups: documents & information on forming a corporation and raising money | Forms & information for:
- Incorporation questionnaire
- Terms sheet (convertible note)
- Financing (private equity) market information |
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</thead>
<tbody>
<tr>
<td>The Wilson Sonsini Goodrich &amp; Rosati law firm, &amp; its WSGR Term Sheet Generator</td>
<td>RPTE: if you regularly represent small CRE development companies, or have a sector of your TE practice . . . . (see above)</td>
</tr>
</tbody>
</table>

| Technology startups: Documents & information on formation, financing, operations, hiring, growing & IP protection | Forms & information for:
- Forming a DE corp & LLC formation (including subscription letters, confi agreements, contribution agreements, etc.) |
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</thead>
<tbody>
<tr>
<td>The Goodwin Proctor law firm &amp; its FoundersWorkBench</td>
<td>RPTE: if you regularly represent small CRE development companies, or have a sector of your TE practice . . . . (see above)</td>
</tr>
</tbody>
</table>
### Virtual Currencies (Cryptocurrencies):
- Info on the latest international regulations and legal developments

<table>
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<tr>
<th>Information on bitcoin and other cryptocurrencies:</th>
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<tbody>
<tr>
<td>- As an app on your mobile device</td>
</tr>
<tr>
<td>- Virtual currency tracker</td>
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<tr>
<td>- Resource library</td>
</tr>
</tbody>
</table>

**RPTE:** If you practice is tied to a public venue or a market that reports on outcomes, then create an app that correlates your work product to the reported variables.

<table>
<thead>
<tr>
<th>Perkins Coie law firm and its CoinLaw app (with other online information)</th>
</tr>
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</table>

### Creating Tailored Solutions Using For Specific Client Needs

<table>
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<th>Tools include:</th>
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<tbody>
<tr>
<td>- Hiring compliance[^39]</td>
</tr>
<tr>
<td>- Practice specific solutions (RE leases, patent database, litigation case database, employment tracker &amp; database)[^40]</td>
</tr>
<tr>
<td>- Data mining and predictive analytics[^41]</td>
</tr>
</tbody>
</table>

**RPTE:** Again, if you have an intake process that collects information, and you track results, then tie or correlate your information to information available in a public venue or market.

<table>
<thead>
<tr>
<th>The Seyfarth Shaw law firm and its SeyfarthLean Consulting (with SeyfarthLink, an online matter management and collaboration tool)</th>
</tr>
</thead>
</table>

### Hints and Hurdles

Of course, none of this will be easy. But if you are intent on growing a practice, or defending a practice in an era of uncertainty and change, then identifying some of the challenges are crucial first steps in acting upon your innovative idea.

- Start small; stay discrete: pick a granular task or area
- Listen to and involve “friendly” prospects or clients in -
  - Identifying the problem to be solved
  - Designing the solution
  - Paying for the development (in exchange for use of the tool)
  - Being the “beta” user
- Find a mentor to guide you, to give you advice and to introduce you to others
• If you city has office sharing locations used by “techies” to collaborate, spend some time there; get to know them. As lawyers, we closely guard our “trade” secrets. In contrast, developers will openly share code and help each other solve problems. Venture into one of those locations, and explore if there is an interest on the part of a developer to “spec out” some work on your vision and tool

• Identify a product that is -
  o Scalable
  o Symbiotic to your legal practice
  o In demand; and solidly focused on legal content

• Develop mobile first – doing so will make the desktop version very easy to use

Intuitively, we know that technology someday will impact our beloved RPTE. We can wait for that day, and simply experience “how” it impacts our RPTE practice; or we can be a “first mover” and a survivor. I favor the surviving approach.

1 Keith Mullen is a shareholder at the Higier Allen & Lautin law firm, and founder of CounselData, LLC. Keith comments on legal technology and commercial real estate finance at Lenders360blog. He can be reached at kmullen@higierallen.com and at kmullen@counseldata.com.
2 Look at the “campaign trail” listing on the right side of the home webpage of the computationallegalstudies website (http://computationallegalstudies.com/). Kudos to Daniel Katz (http://www.danielmartinkatz.com/) and Michael Bommarito (http://bommaritollc.com/resume-michael-j-bommarito-ii/) for an outstanding list.
3 Of course, there is another perspective, articulated by a former partner of mine: “Keith, this will kill the Golden Goose.”
4 In 2013, Richard Granat listed 13 other law schools then teaching law practice technology. In 2014 Granat and Marc Lauristen identified their top 10 law schools that teach the technology of practice. And, of course, look at the “campaign trail” listing on the right side of the home webpage of the computationallegalstudies website (http://computationallegalstudies.com/).
5 Link: http://lawpracticetechnology.blogs.law.suffolk.edu/
6 Linkedin profile: www.linkedin.com/in/dcseyleflaherty
7 Link to Suffolk’s announcement: http://www.suffolk.edu/news/19391.php#.VVXWaflVhBc
8 Link: http://www.abajournal.com/legalrebels/article/could_you_pass_this_in-house_counsels_tech_test
9 Link to a podcast (yes, listen to this in the car or as you work out): http://legaltalknetwork.com/podcasts/digital-edge/2013/10/technology-audits-for-your-firm-by-your-clients/
10 Link: http://www.americanbar.org/groups/departments_offices/legal_technology_resources.html
12 Link: www.legalproductivity.com/technology/legaltech-stanford-codex-legal-startups/
13 Link: www.docketalarm.com
14 Link: www.ipnexus.com
15 Link: www.lawdingo.com
16 Link: https://twitter.com/meweorg
17 Link: http://www.one-400.com/
18 Link: http://www.patentvector.com/
19 Link: www.plainlegal.com
20 Link: www.priorilegal.com
21 Link: http://www.shakelaw.com/
22 Link: http://www.wizdocs.net/2012/
This was in conjunction with the “Iron Tech Lawyer” competition at Georgetown Law, where students build apps and compete as part of the center’s Technical Innovation and Law Practice courses (www.law.georgetown.edu/academics/centers-institutes/legal-profession/legal-technologies/iron-tech/index.cfm).

If you know of a law firm missing in this list, please email me a link to the firm’s web description of the product or service.

Link: www.exportcomplianceTools.com
Link: www.mitigatedrisks.com/franchisor-toolkit/
Link: www.bakerdonelson.com/
Link: www.mitigatedrisks.com
Link: www.cooley.com
Link: www.cooleygo.com
Link: www.wsgr.com
Link: www.foundersworkbench.com/document-driver/
Link: www.goodwinprocter.com/
Link: www.foundersworkbench.com
Link: www.seyfarth.com/hirecompliance
Link: www.seyfarth.com/technologysolutions
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