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Back in the Saddle Again

By Tiffany N. Provence

Whether it's a vacation, maternity leave, or an unexpected absence, getting back in the solo saddle can be difficult for anyone without additional staff to cover the workload. To further complicate matters, many of us can barely spare the time to take a few days off, let alone the cost of lost time and low productivity when we return. And yet it never seems to fail that even a short vacation from the office will lead to weeks of being ridden by your clients. Below are a few basic practice management steps that can be implemented before,

during, and after your absence to keep you trotting forward.

Before Your Vacation:

1. **Find a riding partner.** Locate another solo or a member of your small firm team who will agree to cover any true emergencies while you are away in exchange for you doing the same when he or she needs backup. Knowing someone is available to take the reins while you're away will reduce your anxiety and help your clients feel more secure.
2. **Use out-of-office features.** One week before you depart set the out of office reply and voice mail to begin warning people when you will be out. Update them again when you leave to indicate you are no longer in the office. Be clear on when you will return, but always pad your return date by at least one day so that everyone isn't attempting to reach you on your first day back. If possible, offer the contact information for the person who has volunteered to cover you.
3. **Plan your first day back.** In addition to finishing projects before you leave, make a schedule for the date you return. Plan to meet with any staff and get an update on any issues that arose in your absence. Plan some time for a lunch out of the office or another enjoyable activity that will help you ease the stress of your return. Lastly, make sure to schedule plenty of time in those first days back to catch up, and don't overload your calendar with new appointments.
4. **Prioritize.** Organize your workspace so you don't return to a mess. Leave behind a checklist of the deadlines and "to do" items that must be addressed when you return.

During Your Absence:

1. **Work a little during your downtime.** If logging on to your e-mail or checking in with the office is going to destroy your time away, don't do it. If, however, you can use airline delays, rainy afternoons, or holiday downtime to your advantage, you might find they provide a great opportunity for uninterrupted work time. If you feel that's being too much of a killjoy, use the time away to read that stack of legal magazines you've been meaning to get to, or brainstorm on ways to improve your practice.
2. **Watch your routine.** It's easier said than done, but one of the reasons that many people feel sluggish after an absence is that their body clocks have adjusted to a later waking time. As much as possible, try to sleep and wake at your normal time. If that's just too hard to do, try your best to get your body back on schedule the two days prior to your return.
3. **Take an extra day.** If your vacation includes out-of-town travel, resist the urge to fly home late Sunday night and return to work immediately Monday morning. This is especially true if you are changing time zones. Blocking off one extra day or even a few extra hours will allow you to unpack, unwind, and recharge before heading into the office.

On Your Return:

1. **Arrive early.** Arrive at the office 30 minutes before opening to avoid the flurry of questions when you walk in the door.
2. **Decorate.** Bring some vacation or holiday memorabilia for your workspace. A digital picture frame or well placed

memento can brighten your mood and provide a conversation piece as you meet with clients who have waited for your return.

3. **Sort your inbox.** Most of us immediately start with the oldest messages; however, emergencies and inquiries in the legal world often have a way of resolving themselves. If you sort your e-mail starting by the newest, you are less likely to waste time responding to outdated request and will prevent yourself from addressing items that may have already been handled by an employee.
4. **Respect others right to time away.** When we are back at work, we expect others to be doing the same. Do your best to respect the vacation or leave of fellow attorneys. Mark your calendars or files with dates opposing counsel will be away, and do your best not to leave voice mails or e-mails during that time. The attorney will appreciate the courtesy and will hopefully do the same for you the next time you break free.
5. **Plan your next trip.** Although it may be months away, the best way to overcome the depression of returning to work is to spend a few minutes planning your next escape. Flip through a travel magazine, consider a weekend getaway, or simply focus on the next opportunity to spend time with your family.

Each of us deserves and needs time away from the practice of law. Unfortunately, the law is very much like a horse as summed up by the Yiddish proverb that states, "The wagon rest in winter, the sleigh in summer, the horse never." Following these few simple steps will allow you time away, but put you back in the saddle to a successful practice.

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The Lie Behind Foreclosure Rescue

By Amy Clark Kleinpeter

Stop Foreclosure Now!
Special relationships with investors!
Stay in your home!
Guaranteed!!

What do these four phrases have in common? A four-letter word—quite a few, actually—but one we can print is "SCAM."

Foreclosure scams can be simple: A homeowner pays someone who guarantees positive results, but the scammer does no work and the homeowner has no money left to pursue other options. If a potential client wants to pursue a case against this type of scammer, be sure to gather your evidence before filing any cases. Major bank servicers almost always claim that they never received the paperwork. Get the file from the potential scammer and see for yourself what work was done.

Start with a letter to the business requesting a return of the client's

payments. The damages beyond the homeowner's payments are tough to prove. You must show that the homeowner would have gotten the modification and saved the home if it were not for the unhelpful foreclosure rescue operation.

Scams can also be much more complex, with a common scheme that goes like this:

A "rescuer" persuades the homeowner to transfer title to a straw buyer, usually another consumer who has been told he or she is acting as an "investor" to help people save their homes. The homeowner is told to make payments for a year, after which the home's title will "revert back" to the original holder.

The straw buyer has good credit and after the property is transferred, the rescuer gets a loan in the straw buyer's name. Money from this new loan pays off the original mortgage. The straw buyer is paid a small stipend—\$5,000 is common. The new mortgage is usually significantly larger than the original, and after the straw buyer is paid, the remainder of the money goes to the "rescue" operation.

The homeowner may pay the new mortgage directly but more likely will end up paying the rescuer. At some point, payments to the new mortgage cease and the lender forecloses. The original homeowner is now a mere renter in the property and may not even get notice!

And, the straw buyer now has a foreclosure on his or her credit report. Although some straw buyers may be a part of the con, usually these are decent folks whose excitement at easy money—wrapped in the guise of "helping" people—got the better of their common sense.

I've had a case where a homeowner saw a news special about foreclosure rescue scams, realized she was in one, quit making the payments and (no surprise) was foreclosed upon and evicted. By the time she came to my office, the house had been sold to a bona fide purchaser who razed it. Although we sought payment from the scammers, they are con artists. My client lost more than \$100,000 in equity; she'll be lucky to get a small percentage back.

This leads to the obvious question: What *can* you do to help such victims?

If clients approach you for advice about a housing opportunity, look for signs that they are being used as straw buyers. If you recognize an individual as a straw buyer, be careful; this person may not have fully understood the implications of the deal when it was first proposed, but this individual is now a part of the con and could potentially be held criminally liable.

Victims of foreclosure rescue scams have common-law fraud claims against the scammers—all elements are present: false promises, the scammer knew they were false, and the homeowner relied on these claims to his or her own detriment. However your state defines it, this is a fraud. The problem is twofold: proving the damages and collecting.

The easiest way to calculate damage is the sum of the money paid out to the rescuer plus the homeowner's equity at the time of the transfer. If the homeowner had done a simple sale prior to foreclosure instead of being "rescued," what would be the gain? Those are the damages.

Depending on your state law, actual damages can include emotional

distress. Do not be misled by defense counsel arguing that a homeowner was already distressed. "Kicking 'em when they're down" is not a defense and jurors know the difference between feeling horrible because you are likely losing a home versus feeling horrible about it being stolen from you.

Collection is the major issue. Many of these rescuers are more skilled in conning than finance. They invested their own money in the real estate market and are as broke as your clients.

Client selection is also important if you are going to take on a big fight. Borrowers who have no ability to make a mortgage payment of any amount do not seem to play well to judges who often find a way to bounce these cases or minimize the claims. If you go to court for clients who have not paid their mortgage for a few months, make sure they have at least some of that money saved—because if you do save someone's house from a scam, it would be rewarding to save it from the bank as well.

In the end, going after the con artists who prey on homeowners in their hour of desperation is both noble and righteous, but take on a foreclosure-rescue-scam case with an expectation that it will be pro (or low) bono. Nevertheless, if the world can be made a better place by each person righting the wrongs immediately before him or her (and I believe it can!) then representing a victim of a foreclosure rescue scam is a worthwhile battle and one that may provide benefit to both client and counsel.

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Negative Equity: A Tale of Death, Taxes, and Moving On

By William H. Glasson

Diane, your new estate planning client, recently inherited a condominium from her mother. She wants to occupy the condominium, but it's underwater and she's asked for your counsel, particularly on tax issues created by the gift. To complicate matters, the mother's estate lacks the resources to pay off the mortgage. With more than a quarter of the nation's homeowners buried in consumer debt and in negative equity positions on their residential properties, this scenario is not uncommon.

From the planning side, Diane's mother could have tried to provide Diane with sufficient cash, or "liquidity," to pay off the mortgage. One common way to create liquidity in an estate is to purchase life insurance on the testator's life. Many estate planners also advise their clients to allow significantly encumbered real property to pass into their residual estate and to give away percentages of the residue. This can be preferential to a specific bequest because it provides greater assurance to the testator that the beneficiaries will receive something of value (as opposed to a condominium worth less than the principal balance of its mortgage).

Addressing Diane's predicament, she should be aware that her options are few and potentially expensive. Notwithstanding the Garn-

St. Germain Act, Diane likely cannot assume her mother's mortgage; even discussing the loan with the bank may be impossible due to privacy concerns. But one way or another—either on her own or through her mother's estate—she must deal with the lender. As her counsel, you need to help her negotiate from the strongest position possible.

Diane could pay off the mortgage, but this option doesn't make much economic sense because the assessed value of the condominium is less than the principal balance of the loan. Another option is to contact the lender (likely through the personal representative of her mother's estate) and essentially negotiate a mortgage reduction. Diane's chances for success with such a negotiation may increase if she threatens to disclaim the condominium, leaving it in an estate lacking the resources to pay off the mortgage and leaving the lender with a non-performing loan.

Few tax issues arise from Diane's receipt of the condominium. Assuming Diane is unwilling to pay off the loan, any mortgage debt cancellation should flow to the estate and potentially could be excluded as income from discharge of indebtedness under the Mortgage Forgiveness Debt Relief Act of 2007.

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By John D. Kitch

Red Flags: Avoiding the Bad Client

At one time or another each one of us has taken on clients who became disasters. It may have been because our rent was due and the clients had enough up-front money to cover it. It may have been because we felt sorry for them. It may have been because our phone wasn't ringing and we needed to do something, anything, to feel like a lawyer. Regardless, in each case we wound up wishing we had never signed on.

How could we have steered clear? Easy—we could have declined representation if we only had observed the warning signs. In no particular order here are 20 clients to duck, or to dump, if you get sucked in:

- 1. Wimpy.** If you remember Popeye you'll remember Wimpy, who was fond of saying "I'll gladly pay you Tuesday for a hamburger today." This person has no money but he or she "is good for it." Unless you need the pro bono hours or can afford to work for free, run! No retainer, no representation.
- 2. The Serial Client.** You're the third or fourth lawyer in the case. Either the client won't ever be happy with the chosen lawyer, or the client didn't pay the other lawyers, or something else is rotten in Denmark.
- 3. Last-Minute Charlie.** This guy has piddled until he has one day left to beat the statute of limitations. Will he ever do anything on time? Will he even show up for trial?
- 4. The Irresponsible and Noncompliant Client.** This one constantly misses or breaks appointments, and acts as though court

orders are mere suggestions.

5. Blanche DuBois. She is always dependent on the kindness of strangers. She's helpless and clueless and wants you to make all the decisions. And guess who she'll blame if things go south?

6. The Professional Victim. Nothing is ever this client's fault; the world conspires against him/her. If you agree to be this client's representative, and anything at all goes wrong, you will only be the latest in a long line of betrayers.

7. The Greedy Client. If you get anything less than everything imaginable and then some, you're a hack. Even if you get the perfect result you're a hack—because you didn't get a pound of flesh, too.

8. The Unbeliever. This person refuses to face the facts, such as "You likely will go to jail if convicted because you've been found guilty of DUI seven times before."

9. The Crusader. Whenever you hear "It's not the amount of money, it's the principle of the thing," go to your "clientspeak" translator. This really means "I'm lying, it's the money." Again, get paid up front. Principles disappear when you start talking cash.

10. The Revenge Seeker. This client will want you to do things that don't advance the case and may even hurt it, just to cause the other side pain. And you can bet this person will seek revenge against you later.

11. The Expert. You will be second-guessed at every turn because the client "knows the law" based on what the uncle's step-daughter's brother said, "who had a case just like mine, or, better yet, based on information found surfing the Internet.

12. The Withholder. You'll be told only the "good" facts for fear that you'll not take the case if you know the "bad" facts. No case has only good facts, and if the case looks too good to be true . . . well, you know the rest.

13. The Blue Light Special Shopper. This client will promise to "do a lot of the work" to keep costs down. Of course, the "work" will be unacceptable or it won't be done, and you can count on the client questioning every fee you charge.

14. The Independent Contractor. This one wants you to take the case but then calls the opposing party to work things out; your only involvement is "to get their attention" and let them know the client is "serious." The client will then give away information that hurts the case and probably settle on the side, cutting you out.

15. The Cash Cow Client. A client who promises a long and lucrative relationship with lots of fees to come if you'll cut a cheaper deal now on this matter. Guess what? It won't happen.

16. The Micro-Manager. This person already knows exactly how the case should be handled and tells you so in no uncertain terms. Just before you decline representation you might ask—for your own amusement—where the Micro-Manager went to law school.

17. Mr. Panic. Everything is a crisis. He's the type who will send you an e-mail and then call in 30 minutes to ask why you haven't responded yet. If you sign him on you'll constantly fight, being sucked into his emergencies—and there will be many.

18. The Marionette. For those of you as old as I am, think of

Howdy Doody. If you sense that someone else is pulling the PC's strings, you had better find out who it is, and don't take the case if you can't first meet the puppeteer and lay down the ground rules.

19 The Moving Target. How can you possibly represent someone who doesn't know what he/she wants on any given day? If you can't pin the client down to a goal you will never be able to build a strategy to achieve it, and no result will be satisfactory.

20. The "Don Rickles." Everyone knows him—he's an equal opportunity nasty person. If the PC is rude to you or your staff, put him out the door. Life's too short.

While everyone may be entitled to have a lawyer no one is entitled to have *you* as his or her lawyer. But if you're ever tempted to take a case your instincts tell you to avoid, remember Mark Twain's caution: "It is easier to stay out than to get out." You'll thank yourself later.

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The Problems with HAMP

By Drew Winghart

The U.S. Treasury reported in February 2010 that almost one million homeowners have obtained modifications under the Home Affordable Modification Program (HAMP). Critics, and tepid supporters, questioned the metrics the Treasury used, and how effective the program has been. Part of the 2009 Economic Stabilization Act included the Making Home Affordable plan—"a plan to stabilize the housing market and help struggling homeowners get relief and avoid foreclosure."

It has been more than a year since the plan began and the results, overall, are not good. The problems with the current loan modification process are significant and not likely to be resolved before the program ends. From a simple numbers perspective, anyone dealing with the problem—attorney, debt relief counselor, or mortgage modification company—will state that helping one million is slight compared to the number of individuals who need help. But the problems are not only with the small number of individuals obtaining a permanent modification of their existing mortgage; they are systemic problems when the program was launched.

It appears that lenders are generally ill-equipped to help homeowners and homeowners are generally limited in the recourse they have to protect their homes once they are unable to meet the original obligations to their lenders.

The dilemma facing homeowners is the lack of alternatives. Basic guidelines for HAMP eligibility are simple: a one- to four-unit dwelling with the borrower residing at the property; a mortgage obtained before January 1, 2009; and a total loan unpaid balance of under \$729,750 (for a one-unit property). After meeting the lender or investor requirements for a modification, the borrowers are placed into a temporary modification that sets payment terms and other conditions. Typically there are three trial payments, but that does not mean it take only three months to convert a temporary into a permanent modification. During the modification application process,

the homeowner is under a threat of foreclosure that doesn't end until a permanent modification is in place.

Under the current scheme, however, homeowners are behind from the start—beginning with eligibility. Borrowers are often told they need to be at least 60 days late with payments before a lender will help. Now delinquent, homeowners encounter a bureaucratic nightmare: re-sending documents over and over; demands for documents that don't exist (such as next month's utilities to establish residency); lost documents; conflicting responses; no responses; or, worst of all, a conversation with the lender to learn how the home was sold at foreclosure while a modification was pending.

Additionally, there is also a lack of incentives for lenders, who, in order to comply with the process, must create departments to handle the incoming flood of applications and information. The delay from the time a submission reaches the lender's loan "advisor" can take weeks. This is problematic for a borrower facing a trustee sale of the property; documentation that might persuade the lender to stop the sale and modify the mortgage is now "in process." Further, as many loans were securitized and sold, the current investors for the loans must be located (they are not always readily known) in order to approve new terms.

Many borrowers also lack strong advocates. The company servicing the loan has limited incentives to assist homeowners. Penalties for noncompliance are ineffective, the staff is overwhelmed, and it tends to be a money-losing process for the bank. Some borrowers find legal representation to fight the banks, but these attorneys find themselves in complex new areas of law and banks are aggressively litigating on all points.

Finally, lenders, especially large banks, suffer from an image problem and are responding to investors who have seen their investment plummet. Eager to get questionable mortgages off the books, the banks have no incentive to modify a loan. If the property is foreclosed and a loss is realized by the sale of the "toxic" mortgage, the bank can go to investors seeking new capital explaining they have "cleaned-up" the outstanding liabilities, signaling an end to losses.

Lacking real incentives for lenders, this past year has shown that the current scheme will only impel banks to do enough to avoid the worst of penalties and fines from the federal government. The modification of the first mortgage does not resolve a number of other problems that borrowers face. There are issues of bankruptcy, second liens on the home, financial (and at times emotional) counseling, and a working process that protects homeowners that need to be addressed. While Treasury's oversight of HAMP indicates the program is a work-in-progress, that progress will be far too late for most homeowners.

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