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Law Trends & News

PRACTICE AREA NEWSLETTER

SPRING 2011
VOL. 7, NO. 3

CHAIR'S NOTE

Dear Division Member:

Below is the third issue of *Law Trends* for the 2010–11 bar year. As always, the editors believe this is a very exciting and informative issue, and I am very happy to present it to you. This enewsletter includes articles, checklists, and other valuable information and practical tips, from our substantive law committees and other areas in the General Practice, Solo & Small Firm Division.

In this issue, the editors continue to present articles that are of interest to lawyers with solo and small-firm lifestyles. As the editor-in-chief writes in his note below, this issue contains an excerpt from a book that was published by the TIPS Section involving general liability insurance coverage as well as excerpts from books published by the Division: one on estate planning forms, and another on securities law. Other articles include practical tips in the closing of a business transaction as well as an article concerning whether a short sale is really a good tool to be used in a real estate sale. We are very pleased to present this issue to you—to help you get "Back to Basics."

We hope you agree that with each issue, *Law Trends* continues to provide meaningful articles for each of you. We trust that this issue, like the others, will be helpful to you in your daily practice. I encourage you to take just a few moments to read the list of articles below. Of course, the issue is yours to download and keep as a reference for the future. And, as in the past, you can either download specific articles, or you may download the entire newsletter by clicking the the PDF link.

There are many Division members integrally involved in putting this enewsletter together. Their hard work and dedication are certainly present in this publication. I express my gratitude and thank them for producing this issue for the Division. The list of editors is at the bottom of this email, and I hope you take a look at each of their names to thank them for a job very well done.

I hope each of you enjoys this issue of *Law Trends*. We hope you continue to find *Law Trends* a source of valuable information. If you are interested in either writing an article or participating in the production of the newsletter, please contact Jim Schwartz, our editor-in-chief at attyjls@aol.com. As with the other editors, I thank him for his work and dedication.

Best regards,
Joseph DeWoskin
Chair, General Practice, Solo & Small Firm Division

LETTER FROM THE EDITOR

Dear Division Member:

When the Division was formed several years ago, it dedicated itself to bringing to the Solo and Small Firm Practitioner members the very best that many of our substantive Sections had to offer. Over the years, *Law Trends* has provided you with articles from other Sections that the editors felt would be helpful to each of you. In this issue we have included a portion of a book from the Tort Trial and Insurance Section of the ABA/a>

/>, a/k/a TIPS. This book, entitled *The Reference Handbook on the Comprehensive General Liability Policy*, is a wonderful reference handbook on comprehensive general liability insurance policies. I found this book to be an excellent resource for any attorneys involved in business insurance issues regarding either transactional and/or litigation matters involving general liability insurance policies.

We have also included here excerpts from two Division publications. The first is from a book entitled *Estate Planning Forms*. This book comes with a disc for your use in downloading various forms to use in estate planning. The other is from a book called *Corporate Counsel Guides: Securities Regulation*. This book will be extremely helpful to any of you who practice securities law, either transactional or litigation. In this issue, we have included a glossary of terms often used in the securities industry. As always, there is a "click through" for you to purchase any of these books if you like what you see. More excerpts from these and other books will be printed in subsequent editions of *Law Trends*.

Other articles in this issue include 13 practical tips for closing a business transaction; whether a short sale is truly an alternative to foreclosure; and many more. I truly enjoyed putting this issue together with the other editors and hope you enjoy it as much as we did in planning it.

Very truly yours,
Jim Schwartz
Editor

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Defending Liberty Pursuing Justice

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BUSINESS LAW

Corporate Counsel Guides: Securities Regulation (Glossary of Terms)

By Thomas Lee Hazen

Blue sky law. Blue sky law is a term used to refer to state securities laws.

Boiler room. Boiler room refers to a brokerage firm that focuses on high-pressure sales practices and various fraudulent activities.

Bucket shop. A variety of boiler room where the customer orders are not actually placed. The orders are bucketed rather than entered in the markets.

Call option. A call option is a contract between a seller (the option writer) and a buyer under which the option buyer has the right to exercise the option and thereby purchase the underlying security at an agreed-on price (the "strike" or "exercise" price). The option will expire unexercised (and hence valueless) unless it is exercised within a specified time period, the last day of which is the expiration date. *See also* "put option."

Churning. Churning is an illegal practice when brokers with discretionary authority or control over an account enter into trades to generate commissions.

Cross trade. *See* "matched order."

Flipping. Flipping occurs when someone purchases securities as part of a public offering with an intent to sell immediately into a rising aftermarket.

Free writing. Free writing refers to information not contained in a prospectus relating to a company that may be disseminated by a company engaged in a public offering.

Gun jumping. Gun jumping results from premature publicity about an upcoming public offering. Gun jumping is prohibited by 1933 Act § 5(c).

Haircut. Haircut is a discount deducted from the value of securities when computing value for purposes of the net capital requirements for securities broker-dealers (SEC Rule 15c3-1).

Margin. A margin transaction involves buying securities with funds borrowed from the broker. The Federal Reserve Board and the exchanges set the minimum margin requirements.

Market maker. A market maker is a securities dealer that provides firm bid and asked prices for securities. Market makers are regulated by FINRA and originally functioned primarily in the over-the-counter markets but now also make a market for exchange traded securities.

Marking the close. Marking the close is a manipulative practice whereby a portfolio manager artificially inflates the price of stocks held in the portfolio just before the close of trading for the purpose of increasing the portfolio's value.

Mark-up (and mark-down). A mark-up or mark-down refers to the commission received by a broker-dealer for a retail transaction in the NASDAQ market. A mark-up represents the amount that the customer is charged above the actual purchase price. A mark-down is the amount deducted from the proceeds of the sales price.

Matched order. A "matched" order occurs when orders are entered simultaneously to buy and sell the same security. The mere fact that a broker crosses trades or enters into matched orders does not violate the 1934 Act. In fact, cross-trades can actually benefit the firm's customers if the savings on commissions are passed on to the customers. However, the cross-trades become problematic when the cost savings are not passed on to the customer.

Over-the-counter. An over-the-counter transaction is one that takes place other than through the facilities of an organized securities exchange.

Painting the tape. Painting the tape is a manipulative practice of reporting fictitious orders to make it appear that real transactions are taking place.

Parking. Parking is a fraudulent practice of parking shares in someone else's name in order to hide the identity of the true owner.

Post-effective period. The post-effective period is the time after a 1933 Act registration has become effective. Sales of the securities covered by the registration statement are not permitted until the beginning of the post-effective period. During the post-effective period, the prospectus delivery requirements of 1933 Act §§ 5(b), 10 continue to apply.

Prefiling period. The prefiling period is that time shortly before the filing of a registration when all offers to buy and all offers to sell are prohibited by the terms of 1933 Act § 5(a).

Proxy. A power of attorney from a shareholder authorizing the proxy holder to vote the shares owned by a shareholder. *Proxy* is defined in SEC Rule 14a-1(f) to include any shareholder's consent or authorization regarding the casting of that shareholder's vote. Requirements for the appropriate form of the proxy itself can be found in Rule 14a-4.

Prospectus. As defined in 1933 Act § 2(a)(10) is a written offer to sell or one made through other permanent means such as online. During a public offering, a prospectus is subject to the disclosure requirements spelled out in § 10. Also § 5(b) sets forth the circumstances under which a prospectus must be provided to

investors.

Proxy solicitation. Solicitation, as defined in SEC Rule 14a-1(*l*), includes the following: any request for a proxy; any request to execute or not to execute, or to revoke, a proxy; or any communication to shareholders reasonably calculated to result in the procurement, withholding, or revocation of a proxy. Rule 14a-1(l). Rule 14a-2 lists the types of solicitations exempt from the proxy rules. Rule 14a-2. Rule 14a-3 sets forth the types of information that must be included in proxy solicitations. Rule 14a-3.

Pump and dump. A pump and dump scheme is the fraudulent and manipulative practice of hyping particular stocks to bring them to artificially high levels and then dumping the stock into the market.

Put option. A put option gives the option's buyer the right to exercise the option by selling the underlying security. The put-option seller must purchase the underlying security at the agreed-on price if the option is exercised on or before the expiration date. If the strike price is "out of the money" in comparison with the price of the underlying security, so that it would not make economic sense to exercise the option, the option will simply expire unexercised. *See also* "call option."

Odd-lot. An odd-lot refers to a block of shares under 100. Traditionally shares in publicly held companies have been traded in 100 share lots. Transactions in hundred share lots are referred to as round lots.

Quiet period. The quiet period is the time shortly before a 1933 Act registration statement is filed in connection with a public offering (also known as the prefiling period). During the quiet period participants in the offering must be careful not to disseminate information that could be construed as an illegal offer to sell the securities to be covered by the registration statement.

Red herring prospectus. A red herring prospectus is a preliminary prospectus that may be used after the filing of a 1933 Act registration during the waiting period. *See* SEC Rule 430.

Restricted securities. A restricted security is one that is subject to transfer restrictions. Restricted securities often result from securities that are sold in a private placement as opposed to a public offering.

Safe harbor rule. A safe harbor rule is a rule under which the SEC provides guidance as to how to comply with specific provisions of the securities laws. It is a safe harbor but is not the exclusive way of complying with the applicable law.

Sale against the box. A "sale against the box" takes place when the seller, anticipating a decline in the price of stock she owns, sells it to a buyer at the present market price, but delivers it later, when (she hopes) the market price will have fallen below the sales price, thus creating a paper profit for the seller.

Scalping. Scalping is the illegal practice that occurs when someone touts securities that he owns with the goal of raising the price to increase the value of his holdings.

Secondary offering. A secondary offering occurs when securities are offered as part of a distribution by existing securities holders. In a secondary offering the proceeds of the sale go to the selling shareholders. In contrast, with a primary offering the shares are sold by the issuer and the proceeds go to the company.

Shelf registration. A shelf registration is a 1933 Act registration statement for securities that are going to be offered on a delayed or continuous basis. *See* SEC Rule 415.

Short sale. A "short sale" takes place when a seller, believing the price of a stock will fall, borrows stock from a lender and sells it to a buyer. Later, the seller buys similar stock to pay back the lender, ideally at a lower price than he received on the sale to the buyer.

Solicitation. *See Proxy* solicitation.

Specialist. For most of its existence, New York Stock Exchange trading took place through specialist firms who had no retail securities business. Over time the specialist system is giving way to a system based on designated market makers who function much like market makers in the over-the-counter markets.

Spread. The spread is the difference between the bid and the asked price of a security. A market maker makes its commission through the spread by buying at the bid price and then selling the securities at the asked price. *See also* mark-up and mark-down.

Street name. Securities are held in street name when the brokerage firm holds the securities in their own name for the benefit of the customer as beneficial owner.

Tombstone advertisement. A tombstone ad is the industry term for an identifying statement that simply announces the offering and lists the underwriter.

Underwriter. An underwriter is a broker-dealer or investment banking firm that acts as a wholesaler for a securities distribution. Underwriter status can also result from substantial participation in a securities distribution. *See* 1933 Act § 2(a)(11).

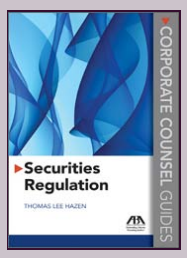
Waiting period. The waiting period is the time between the filing a 1933 Act registration statement is filed and the time that it becomes effective. Sales of the securities covered by the registration statement are no permitted during the waiting period (1933 Act § 5(a)). Also, during the waiting period, written, online, radio, and television communications must satisfy or be exempt from the prospectus requirements of 1933 Act §§ 5(b), 10.

Warrant. A warrant is a stock option issued by the company itself often as compensation to promoters or as a separate security to be publicly traded. Stock options may also be issued by the company to employees or consultants; these are generally simply referred to as stock options and not as warrants.

Wash sale. A "wash" sale is a fictitious sale where there is no change in beneficial ownership: It is a transaction without the usual profit motive and is designed to give the false impression of market activity when in fact there is none.

Thomas Lee Hazen is the Cary C. Boshamer Distinguished Professor of Law at the University of North Carolina School of Law at Chapel Hill. Professor Hazen joined the Carolina Law faculty in 1980. After graduating from Columbia Law School, he practiced law in New York City until 1974. He then served on the faculty at the University of Nebraska College of Law until 1980, when he moved from Nebraska to Chapel Hill. Prof. Hazen's writings have been concentrated in the areas of corporate, securities, and commodities law. He has authored leading treatises in those areas and numerous law review articles focusing on securities regulation, corporate law, and corporate governance. He has also written about the use of computers in legal education and contract issues relating to protecting intellectual property rights in computer software. He can be reached at tomhazen@email.unc.edu.

Corporate Counsel Guides: Securities Regulation



Did you find this article helpful? Do you think more information like this would help you? More information is available. *This glossary is excerpted from Corporate Counsel Guides: Securities Regulation, 2011, by Thomas Lee Hazen, published by the American Bar Association General Practice, Solo and Small Firm Division.* ***GP/Solo members can purchase this book at a discount.***

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BUSINESS LAW

Thirteen Practical Tips for "Closing" the Deal

By Cara Bradley

"Closing" a transaction is one of the most important duties performed by a junior business attorney. A transaction is considered closed when all requisite documents have been negotiated, signed and delivered, any instruments or certificates have been exchanged, authorizations and consents are final and effective, and any funds have exchanged hands. The following checklist contains practical tips to help ensure your next closing will proceed in a smooth and orderly fashion.

1. Understand the Substance of the Transaction

Before you can prepare for a closing, learn about the operative documents involved in the transaction. You must understand the intent of the parties entering into the transaction and the relationships between the parties prior to and after the closing. Is ownership of an entity changing? Are securities being issued? Will new entities be created or any existing entities dissolved?

2. Understand the Mechanics of the Transaction

Decide what steps are necessary for the closing. Do one or more of the operative documents include schedules and exhibits that need to be prepared, and if so, who is the party responsible for their preparation? Do stock certificates need to be printed? Are there any certificates or UCC forms that need to be filed with federal, state or local authorities, and if so, where must those filings be made? Are Board of Directors votes, shareholder votes or other authorizations or consents required? Does either party need to provide audited financial statements or comfort letters, and if so, who is the person responsible for

coordinating with the auditors? Which legal opinions need to be provided? Where and when should money be wired?

3. Determine If Any Regulatory Filings or Clearances Are Needed

Regulatory filings, including any Hart-Scott-Rodino clearance for merger and acquisition deals, often involve a substantial amount of lead time to prepare the filing and to wait for governmental approval. Identify any regulatory filings or clearances that will be required early in the negotiations so that your closing is not held up.

4. Prepare a Detailed Closing List and Agenda

Your closing list should lay out the timing and responsibility of each party to close the transaction. Carefully review each of the operative documents to create a list of closing items. Keep in mind that closing deliverables may appear throughout the document, not just in the closing conditions section. Confer with the attorneys on the other side and the client to determine if any special closing items need to be built into the list and to confirm that parties tasked with specific items are aware of their responsibilities. Modify and update your list as the negotiations continue. Build in lead time to get your documents signed in advance of the closing.

5. Lay Out Any Items Required for Closing that Require Lead Time

Stay aware of any required notice periods to hold a Board of Directors or a stockholder meeting. Figure out whether your entities are currently in good standing, and if not, determine what needs to be done to bring them into good standing. Estimate how much time is needed to order and receive certificates from the Secretary of State. Coordinate with your client and their auditors if an audit opinion or a comfort letter needs to be delivered at closing.

6. Establish the Basic Logistics for the Closing

Determine a projected date and time for the closing. Decide whether the closing will be “live” or
completed by telephone or fax. Establish if there are deadlines for fund transfers. Establish if a “preclosing” is needed to prepare for the closing and if so, ensure that you have enough time to have all documents signed in advance.

7. Keep in Mind Which Parties Need to Be Involved in the Closing

Know which parties need to approve any last-minute changes to documents. Confirm that everyone can be reached by telephone, fax or courier on the date of the closing or make alternative arrangements. Be aware of travel schedules. Keep in mind that a signatory’s assistant or secretary can be your best source for accurately and timely signed documents. Make sure to accommodate any difference in time zones.

8. Collect Signature Pages from Your Client

Talk to the other parties about the number of original signatures that will be required from each
signatory. Collect your signature pages early. Do not date the signature pages until you have confirmed when the closing will occur. If you send signature pages to another party prior to the closing, make sure you stipulate that the pages are held in escrow pending your release at closing.

9. Prepare the Items That Your Law Firm Must Present at the Closing

Draft and review any legal opinions that your law firm will present at the closing. Make sure that the appropriate partners at your law firm have reviewed the opinion before it is signed. If your client or any other parties will pay legal fees in connection with the closing, make sure the legal bill is prepared and includes accurate time entries up to the date of the closing.

10. Stay Organized

As closing items are completed, keep careful track of them. Establish a system for collecting and
organizing final documents as completed, especially signature pages. Follow up with your team to assess progress on closing items and identify any potential problems early in the process. Update closing checklists regularly to reflect the status of the deal. Keep your team and the attorneys on the other side apprised of the status of items and who is responsible for which tasks.

11. Solve Problems As They Arise

If a problem arises, you must first identify it and understand how it affects the overall transaction. There are no strict rules about what will hold up a closing and what will not. Some items can be delivered "postclosing" so long as the parties agree and there is little or no risk to enforceability of the transaction. If you are faced with a problem, consult with other attorneys on your team and if appropriate, your client. Problems at closing can generally be divided into three categories:

- Administrative Problems require some nonsubstantive changes to the closing items or timing of delivery. Examples include accepting a faxed copy of a signature instead of an original copy, fixing numbering or a spelling errors postclosing, or holding onto signed and delivered documents until money is wired. These types of matters can generally be worked out between the parties and do not typically need to hold up a closing.

- Substantive Problems affect the validity or enforceability of the transaction. Examples include incomplete disclosure schedules, improper or incomplete corporate authorization, or the rejection of a certificate by the Secretary of State because of drafting errors. These items will usually delay a closing until the problem can be resolved. To avoid certain substantive problems, consider preclearing important and time sensitive documents with applicable state authorities.

- "Show Stoppers" will prevent the transaction from going forward as intended, even with modifications, concessions or waivers. Examples include the discovery of encumbered title to assets, improperly issued securities or the refusal of one or more parties to move forward. In this case, the closing cannot happen until the parties resolve the remaining open issues.

12. After the Closing Date, Prepare Closing Files as Soon as Possible

After the closing has occurred, collect any remaining postclosing items while the transaction is still fresh in your mind. Promptly prepare any blue sky filings or shareholder notices. Prepare and distribute closing binders to the appropriate parties and prepare your closing files with final copies of documents and all important correspondence.

13. When in Doubt, Always Ask for Help

Other attorneys on your team or more senior lawyers at your law firm are more than willing to help you understand how a closing should proceed and are available to answer your questions. In addition, often paralegals at your firm will have been through literally hundreds of closings and will be able to answer many questions about the more administrative aspects of a closing.

Ms. Bradley is a business lawyer in Boston. She is a member of the American Bar Association Young Lawyers Division and Business Law Section. She can be reached at cara_bradley@verizon.net.

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By Amy Rigdon

The Reference Handbook on the Comprehensive General Liability Policy

From the Insurance Coverage Litigation Committee of the Tort Trial and Insurance Practice Section

Chapter 1: Introduction and Overview

By Rabeh M.A. Soofi

This book is a product of the Insurance Coverage Litigation Committee of the ABA's Tort Trial & Insurance Practice Section, also known as TIPS. Members of our committee take pride in being "real insurance coverage lawyers." We handle insurance law every day.

In the spirit of embracing our status as dedicated insurance practitioners, we put this book together as a survey of the many issues that arise from a liability policy. It's an overview of the whole area. We genuinely hope that our fellow lawyers will find it useful.

* * *

In the commercial insurance industry, there is perhaps no product more prevalent than the commercial general liability (CGL) policy. CGL policies are the most common form of liability insurance purchased by numerous public and private businesses throughout the United States[1] and, as a result, are arguably the most litigated insurance product in the marketplace. CGL policies are purchased in order to provide the insured with the broadest possible spectrum of protection and to transfer to the insurer the risk of all liabilities for unintentional and unexpected personal injury or property damage arising out of

the conduct of the insured's business.[2]

1. Brief History of the CGL Policy

The rise of the CGL policy in the landscape of the American insurance industry is rather remarkable given its relatively short lifespan, which began in the 1940s. Generally, contractual liability insurance began early in the 1800s, taking root in the risk-transfer practices of the maritime industry.[3] The early ancestors to general liability policies—public liability policies—were first written in the United States in the late 1800s and until the first quarter after the turn of the century, and provided coverage to a wide range of commercial insureds, including manufacturers, contractors, landlords, and other businesses.[4]

Until 1940, liability policies were written for a specific hazard. The first CGL policy was created in 1940 jointly by the National Bureau of Casualty and Surety Underwriters and the Mutual Casualty Insurance Rating Bureau,[5] mainly to address the inconsistency of coverages provided by manuscript forms. It was replaced by a second version in 1943, which in turn was replaced in 1955.[6] With additional revisions made in 1966, 1973, 1986, 1988, 1993, 1996, 1997, 1999, and 2001, the CGL policy (known as a comprehensive general liability policy before 1986) slowly took shape into the standard CGL policy that is known and recognizable today.[7]

2. Overview of CGL Policies

Although CGL policy forms can be custom-written manuscript forms or standardized forms, the most widely used forms are the ones created and maintained by the Insurance Services Office (ISO).[8] The typical ISO CGL policy comprises four components, including a declarations page, insuring agreements, the policy's terms and conditions, and, finally, endorsements.

The declarations page is usually the first page of the policy, and provides a summary of the policy. Generally, the declarations page will state the policy number, the name of the insurance company writing the policy, and contact information for the insurer, including a phone number and address. It also will be countersigned by and include the name and address of the agent, broker, or other authorized representative through whom the policy was purchased. The declarations page also will state the name and address of the insured, the effective dates of the policy, a summary of the risks insured, and the limits of liability. There may be additional information and schedules accompanying the declarations, such as the policy rate and basis for rating, and perhaps any risks or property specially covered.

The declarations page also will specify whether the CGL policy is an "occurrence-based" policy or "claims-made" policy. CGL policies can be written on an "occurrence" or "claims-made" basis, as a monocline policy, or combined with one or more other lines of insurance (such as an auto or workers compensation policy) to form a commercial package policy. A claims-made liability policy covers losses for which claims are made during the policy period. An occurrence-based liability policy covers losses that occurred during the policy period, no matter when the claim is made. If the policy is on a claims-made liability form, it also will be identified as such on the declarations page.

From there, the insuring agreement of the CGL policy lists the coverages afforded by the policy. Distinct coverages are provided, and each coverage contains its own insuring agreement and exclusions.

Endnotes

1. 1 Rowland H. Long, The Law of Liability Insurance § 3.06(1) (1992).

2. *See, e.g.*, London Mkt. Insurers v. Superior Court, 53 Cal. Rptr. 3d 154, 166 (Cal. Ct. App. 2007).
3. Timothy Stanton, *Now You See It, Now You Don't: Defective Products, the Question of Incorporation and Liability Insurance*, 25 Loy. U. Chi. L.J. 109, 136 n.17 (1993). Early in the 1800s, insurers indemnified vessel owners against losses from damages resulting from the collisions of two or more ships. 1 Donald S. Malecki Et Al., Commercial Liability Risk Management and Insurance 57 (1978).
4. 7A John A. Appleman, Insurance Law and Practice § 4491 (1979); Eugene R. Anderson, Joseph D. Tydings & Joan L. Lewis, *Liability Insurance: A Primer for Corporate Counsel*, 49 Bus. Lawyer 259, 262 (Nov. 1993).
5. George B. Flanigan, *Evolution of CGL Coverage: A Four-Decade Perspective*, CPCU Journal, Spring 1999.
6. Jordan S. Stanzler & Charles A. Yuen, *Coverage for Environmental Cleanup Costs: History of the Word "Damages" in the Standard Form Comprehensive General Liability Policy*, 1990 Colum. Bus. L. Rev. 449, 457.
7. *Id.* at 450 n. 3.
8. ISO was founded in 1971 in a merger of smaller underwriting service organizations. News release, ISO, Insurance Services Office Proposed Change to For Profit, http://www.iso.com/Press-Releases/1996/insurance-services-office-proposes-change-to-for-profit-part-of-managed-evolution-to-better-meet-cu.html. ISO replaced a number of state property-insurance bureaus and regional and national bureaus for various lines of property/casualty insurance. *Id.*

Rabeh M. A. Soofi is an attorney with the firm of Ice Miller LLP in Indianapolis, Indiana. Ms. Soofi's experience with insurance law and regulation includes working with policyholders, carriers, and regulatory agencies on litigating or otherwise resolving numerous types of disputes spanning the spectrum of policies and lines of coverage for first and third-party claims. She also practices in emerging practice areas of the insurance industry such as cyberlaw/technology coverage and Islamic insurance systems.

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Custody Rules for Investment Advisors

By Amy Rigdon

On December 30, 2009, the Securities and Exchange Commission (the SEC) published its final rule amending the Custody Rule and related forms and rules. These amendments became effective March 12, 2010, and affect four main areas: (1) account statements; (2) additional surprise examinations; (3) physical custody of client assets; and (4) enhanced compliance and reporting obligations.

Who is affected? The Custody Rule applies to registered investment advisers (RIAs). In the amended Custody Rule, the definition of "custody" has been expanded to specifically include RIAs that have related persons who hold or are authorized to possess client funds or securities in connection with the advisory services provided by the RIA to its clients. This expansion is a significant departure from the SEC's practice of not attributing custody of client assets held by a related person of an RIA if the related person was operationally separate. The term "related" means a person directly or indirectly controlling, controlled by, or under common control with the RIA. Thus, RIAs who are a part of multiservice financial organizations may have "related person" custodians that are banks and broker dealers. While the amended Custody Rule still applies to only RIAs, unregistered investment advisers should be aware of the rule given that they may have to register depending upon the outcome of the proposed financial reform legislation (e.g., Dodd Bill).

Changes to Custody Rule (New Requirements)

Account Statements

Under the amended Custody Rule, the qualified custodian must send account

statements on a quarterly basis directly to an RIA's clients. The RIA may send an additional account statement to its client, but the statement must include a legend asking the client to compare this statement to the one from the qualified custodian. Additionally, the RIA must form a reasonable belief that the qualified custodian is sending the account statements directly to clients. The reasonable belief must be formed after "due inquiry." Notably, even if a client receives its quarterly accountant statements electronically from the custodian, the RIA must still form a reasonable belief after due inquiry that the clients are receiving those statements.

Neither the Custody Rule nor its adopting release prescribes a particular method to satisfy "due inquiry." The adopting release specifically states that an RIA cannot satisfy its "due inquiry" obligation if the custodian merely makes the clients' account statements available on its website for the clients to access.

Practice Tip: An RIA will probably satisfy its "due inquiry" if the custodian emails a link to electronically access the statement to the clients and includes the RIA as a "CC:" recipient on each email.

Annual Surprise Examination

RIAs with custody of client assets generally are subject to annual surprise examinations by independent public accountants. The amended Custody Rule includes three exceptions from this requirement. First, the requirement does not apply to RIAs that (1) maintain client funds and securities at a qualified custodian and (2) have custody solely because of the RIA's authority to deduct advisory fees from client accounts. Be aware that this exemption does not apply if the RIA has custody for any additional reason.

Second, the surprise examination requirement is deemed fulfilled for an RIA of a private pooled investment vehicle if (1) such vehicle undergoes an annual financial statement audit by an independent public accountant who is registered with and subject to inspection by PCAOB; (2) such audited financial statements are prepared in accordance with GAAP; and (3) the audited financial statements are distributed to the fund's investors within 120 days after the end of the fiscal year (or 180 days for fund-of funds). This second exemption is significant for RIAs of hedge fund and other private funds because it allows those RIAs to not only be exempt from the surprise examination but to also be exempt from the requirement to have a custodian send quarterly annual account statements to investors. Accordingly, if an RIA of a private pooled investment vehicle complies with this annual audit exemption, the requirements to deliver quarterly account statements and undergo surprise examinations do not apply to the RIA. Please note that this exemption is available only to RIAs' advisory services provided to clients that are pooled investment vehicles and not any advisory services provided to another type of client.

Practice Tip: Not all PCAOB registered accounting firms are regularly inspected by the PCAOB. You should inform your RIA clients to ensure that the engagement letter with their accountant includes a representation that the accountant is both registered and inspected by the PCAOB. Additionally, this requirement applies to audits for fiscal years beginning on or after January 1, 2010.

Third, the surprise examination requirement is waived if the RIA is deemed to have custody of client assets solely because a related person is holding the assets and the related person is "operationally independent" of the RIA. The SEC presumes that related persons are not operationally independent, which makes it difficult for RIAs to use this exemption. Nevertheless, an RIA may rebut this presumption by demonstrating that certain conditions apply to the related person. Note that the presumption cannot be rebutted if the RIA has custody for additional reasons, and in such case, the RIA would be subject to the surprise

examination requirement.

Internal Control Report

If client assets are held by an RIA or a related person, the RIA must obtain, or receive from the related person, a report of the internal controls relating to the custody of those assets from an independent public accountant. This requirement exists whether or not the related person is operationally independent; however, an RIA who maintains custody of privately offered securities is not required to obtain an internal control report unless the RIA also acts as qualified custodian with respect to other client funds or securities.

The RIA must receive the first internal control report within six months of becoming subject to this requirement. For RIAs subject to the requirement as of the Custody Rule's effective date, the deadline to obtain an internal control report was September 12, 2010. RIAs must maintain copies of these internal control reports for five years.

In the case of a private pooled investment vehicle, if the pooled vehicle's assets are maintained with a qualified custodian that is either the adviser to the pool or a related person of the adviser, then the RIA must obtain an internal control report from the related person. This requirement applies whether or not the RIA has fulfilled the surprise examination requirement by distributing audited annual financial statements.

Recommended Compliance Policies

The adopting release recommends certain policies and practices for RIAs to comply with the new Custody Rule. In addition to those recommendations, the subcommittee discussed additional best practices. Some of those best practices for RIAs include:

- Conduct background and credit checks on the RIA's employees who will have access to client assets;
- Require the authorization of two or more employees to transfer assets in and out of a client's account;
- Limit the number of employees who are permitted to interact with custodians regarding client assets and rotate such employees on a periodic basis;
- If the RIA also serves as a qualified custodian for client assets, segregate the duties of its advisory personnel from those of custodian personnel to impede any one person from misusing client assets;
- Track the status of the auditor;
- Establish policies to track the due inquiry supporting the RIA's belief that custodians have sent quarterly account statements to client;
- Establish policies to document the reasons the RIA believes its related person is operationally independent;
- Prohibit employees from becoming trustees for client assets or obtaining powers of attorney for clients to prevent the RIA from inadvertently being deemed to have custody of client assets; and
- **Most importantly**, ensure that the RIA's chief compliance officer has access to information on relevant matters so that he or she may enforce these policies and practices.

Lawyers with clients affected by the new Custody Rule should tell their clients to anticipate more detailed reporting and recordkeeping obligations in these areas. The SEC has announced that in light of these amendments Form ADV Part 1 will be amended to require RIAs to report more detailed information about their custody practices, to identify the accountants that perform audits or surprise examinations and that prepare internal reports, and to identify related persons that serve as qualified custodians. For RIAs that use a related person as its

custodian, the RIA must also report whether it has determined that its related person is operationally independent and thus is not subject to the surprise examination requirement. RIAs can expect to provide these responses to the revised Form ADV in their annual amendments as of January 1, 2011.

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PRACTICE AREA NEWSLETTER

Defending Liberty Pursuing Justice

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REAL ESTATE

Is a Short Sale Really an Alternative to Foreclosure?

By Lynn Arends

I am both an attorney and managing broker. Most of my law practice involves negotiating debt and advising borrowers on foreclosure, deed-in-lieu, bankruptcy, short sales, and loan modifications. As a Managing Broker, I am predominantly a listing agent and most of my listings are short sales. I start with a thorough, two-hour consultation. No one gets to see me as a real estate agent until they first see me as a lawyer. This is very important because more often than not, a short sale is not the answer.

Short Sale Basics

A short sale occurs when a bank agrees to accept less than what is owed on a mortgage or deed of trust to release its lien. Negotiated correctly, a short sale can be an excellent alternative to foreclosure to both sellers and buyers. And banks will consider a short sale because it allows them to recoup some of their investment without the work and expense of selling the home themselves.

New Obama administration initiatives, such as the Home Affordable Foreclosure Alternatives Program (HAFA) and recent changes to HUD's Pre-Foreclosure Sales Program (PFS) for FHA loans, have made short sales an ever more viable option in today's current economic state. But before signing up for a short sale, here are some issues to consider:

Who Qualifies?

Assuming the property is underwater (more is owed than what it's worth), here are the necessary criteria to be considered for a short sale.

• **The mortgage is in default or default is foreseeable.**
Yes, borrowers can be current on their payments and still be considered for a short sale.

• **The seller has experienced a true hardship**.
Basically, this is the "what has changed since you took out the loan that you could afford it then but can't now" test. Examples of a hardship are

unemployment, job relocation, divorce, bankruptcy, illness, or disability.

• The seller has no assets.
Before accepting a short sale, a lender will require the seller to submit a short sale package. This includes the seller's tax returns, financial statements, bank and credit card statements, hardship letter, and schedule of assets. If there are assets, the lender may not approve the short sale because the seller has the ability to bring cash to the closing or the seller may still be granted a short sale but be expected to pay back the deficiency.

Deficiency Judgments

A deficiency is the difference between the amount received and the amount owed. Although a promissory note makes the seller personally liable for the debt, whether the bank can pursue a deficiency judgment after a foreclosure or short sale depends in part on the security instrument used and that state's deficiency statute.

Most lenders foreclose through a trustee's sale. In some states, that extinguishes the debt and usually does not give the lender the right to pursue a deficiency judgment. However, when a senior lienholder nonjudicially forecloses and the second lienholder is wiped out during a foreclosure under a trustee's sale, the junior security interest is extinguished but the obligation on the note is not—possibly giving the junior lienholder the right to pursue a judgment on the debt.

And yes, a lender can issue a 1099 to a borrower and still attempt to collect the remaining debt. The mere issuance of the Form 1099 does not alter the creditor's legal right to attempt to collect the debt and it does not act as an admission that the debt is no longer due (although the creditor will need to amend the 1099 issued to the borrower upon collection).

Junior Lienholders

The property may be encumbered by more than one lien. If so, all junior lienholders (and any mortgage insurer) must agree to accept a short sale. This is where good negotiation skills and playing well with others kicks in. In today's typical short sale, it is often the only the first lienholder who is receiving any money. Generally, it is up to that first lender to give some of its proceeds to the junior lienholders. This encourages the junior lienholder to agree to the short sale and release its lien. That amount, whether it is $3,000 or $5,000, is negotiated between the senior and junior lienholders.

But lately some junior lienholders have been demanding outrageous sums of money to approve the short sale and requiring contributions from the buyer, seller, and/or real estate agents. Often, all of this occurs without any disclosure to the first lender. Monies not disclosed or paid outside of closing? That's called mortgage fraud.

To me this is a case of the junior lender cutting off its nose to spite its face. In the event that the short sale fails, the first lender will most likely get the property back in the foreclosure, thus eliminating the second lien entirely.

It's All About the Debt!

Even if a client is a perfect short sale candidate, I spend a lot of time walking people through what nonjudicial foreclosure looks like. To me, this is the "what if I wake up tomorrow and do nothing" option. That's the baseline. Everything else—short sale, deed-in-lieu, loan modification, or bankruptcy—requires some action and needs to yield a better result. What that means is that I need to negotiate a better settlement in a short sale than any of the other options, especially with respect to the remaining debt.

For example, when my office receives the standard short sale letter of consent from a certain lender on a first mortgage, it always says that the lender is not waiving its right to a deficiency. I practice in Washington, where we have non-judicial foreclosures. If the client is delinquent in its payments, and facing a nonjudicial foreclosure on the first, given that the Washington Non-Judicial Foreclosure Statute prohibits the lender from obtaining a deficiency (except against a guarantor in certain settings, which does not apply in virtually all residential sales), the client is better off simply allowing the property to go to foreclosure rather than allowing it to go to short sale. So the question is: Why does the lender not recognize this reality and waive its deficiency in transactions involving a pending nonjudicial foreclosure? Or if the mortgage insurer is calling the shots, why is it not able to convince the mortgage insurer to pay the claim without proceeding to foreclosure? Of course, foreclosure procedures and deficiency treatment varies from state to state and the prudent practitioner will consult the most current version of its state's foreclosure statutes before advising the client.

So who is the perfect short sale candidate? Three scenarios immediately come to mind.

- There is only one loan and there is a program for dealing with the deficiency. HAFA, HUD's PFS, and the VA's Compromise Sale Program are all attempts to waive deficiencies in short sales and deeds-in-lieu.

  • Two loans and the first is being fully paid off in the short sale. Foreclosure does not benefit the borrower in any way. It's all about the second lien and I can negotiate that debt as part of the short sale.

  • Borrowers who are able and desire to remain current on their payments. Obviously, being current never triggers the foreclosure. And if credit is important, clearly the biggest hit to credit is every month a borrower doesn't make a payment. Again, this is debt I can negotiate.

In the end, it's all about the debt.

Beware of Condominiums and Any Super-Priority Liens

Unless the former owner of the unit files bankruptcy, he or she remains liable for the preforeclosure assessments on the foreclosed unit. States have differing HOA acts, but most afford the association some preference for association dues owed prior to a foreclosure sale (in Washington it is 6 months). What that means is that HOAs are a force to be reckoned with in any short sale transaction because if an HOA can collect the "preferential" (i.e. in Washington the six months) dues from the lender or new buyer in a foreclosure, they will need to be offered more than that amount to accept a short sale and release its lien. So it's important to do the math when dealing with an HOA. But the good news is that when an HOA approves a short sale, it is usually for satisfaction of debt and the seller is not liable for any additional preforeclosure or short sale assessments.

Buying Again After a Foreclosure or a Short Sale

At the time of this writing, the dust has not yet settled on the requisite waiting period after a short sale or foreclosure. Not long ago, Fannie Mae came out with new guidelines. Unless the foreclosure was the result of documented extenuating circumstances, which only requires a three-year waiting period (with additional requirements), all borrowers will now be required to meet a seven-year waiting period after a prior foreclosure to be eligible for a new mortgage loan eligible for sale to Fannie Mae. Contrast that to the waiting period after a short sale which can be as little as two years depending on the loan-to-value ratio and other factors.

Final Short Sale Thoughts: Seller Beware!

A short sale is nothing more than a voluntary agreement on the part of a lender to release its security interest. Unless an express written term of the short sale approval is the waiver of any right to a deficiency, that lender, or the lender's assignee, will have the right to seek recovery of the deficiency, and may pursue an action up to the expiration of the statute of limitations for collection of a note. In my opinion, any attorney advising a borrower otherwise is committing malpractice. Finally, always seek legal counsel before attempting to pursue a short sale. A real estate agent cannot give legal advice.

Lynn Arends, concentrates her Seattle practice at Lynn Arends Law Group PLLC and Lynn Arends Realty Group, on short sale and foreclosure issues. She is a frequent speaker for the Washington State Bar and the King County Bar and an instructor for Washington Association of Realtors. Contact her at lynn@lynnarends.com or visit her blog and website at www.lynnarends.com.

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REAL ESTATE

Homeowner Association Management Contracts

By James C. Middlebrooks

A large percentage of all housing in the United States is located within a *common interest community*—a development in which a "[homeowner], by virtue of the [homeowner's] ownership of a [home], is obligated to pay for a share of real estate taxes, insurance premiums, maintenance, or improvement of, or services or other other expenses related to, common elements, other [homes] or other real estate" (Uniform Common Ownership Act §1-103(9).). These common interest communities will generally have a homeowners association (HOA), of which all homeowners (Owners) are members, and the responsibilities of which are generally handled by a board of directors (Board) elected by the Owners. The Board will often hire a professional association manager (Manager) to perform various manangement functions. The following material relates to the management contract between the HOA and Manager.

The Key Questions

- **What Does the HOA Want?** "5-Star Full-Service" to "Limited Bookkeeping and Accounting.

- **What Can the HOA Afford?**
- Almost all HOA Boards and owners would like to offload all management responsibilities to someone else, but at what per unit per month cost?
- Managing a 10- to 20-unit project may require almost as much time as a 100- to 200-unit project. So, most professional managers have a minimum base monthly charge for full service management.
- In Washington, typical of many states, approximately 70 percent of all condominiums have fewer than 30 units, and 70 percent of subdivisions have fewer than 50 homes. Thus, most HOAs do not have the benefit of "economy of scale" to spread the cost of professional management.
- Finally, these high-density projects are the prime source of affordable housing, which means the owners may be in the bottom one-third of income and are unable to afford a $30+/month/unit management fee.

- **What Are the Priority Management Functions?**
- Financial and property condition is most important—annual budget and

reserve analysis; quarterly income/expense statement and balance sheet; monthly bank account reconciliation; monthly assessment deposits and assessment ledgers; annual common area condition inspections. These are the management functions for which owner self-management often does not work well.

- But the less the manager does, the more the HOA Board and owners have to do themselves—from enforcing the dog-leash rules to supervising the HOA vendors and service providers. So as you fine-tune the management contract to provide for what the manager will do, you have to make clear in writing to the HOA Board what the Board will have to do.

- **Who Is a Good Manager**?
- In most states, there is no licensing, testing, bonding, or governmental supervision of "professional managers"—anyone that can print a business card can be a manager. With an incompetent or dishonest manager, the contract is almost irrelevant.
- Is the manager a member of Community Association Institute (CAI)? [Note: Encourage the HOA Board to join CAI and gain access to seminars, publications, and similar resources.]
- Does the manager have the various professional designations that first require education and testing?
- Are the manager's existing HOA Boards happy with the service?
- Does the manager have multiyear relationships with HOAs (rather than a series of one- to two-year relationships)

- **How to Terminate?**
- The most important management contract provisions is the "30 or 60 day, no fee, no penalty, no cause termination"—both by the manager and the HOA.
- Residential HOA management is a highly subjective and intensely personal relationship—if it is not working, you do not want to spend time with legalistic contract analysis—by all means have a frank discussion of concerns, but if mutual trust and satisfaction is lacking, then just end the relationship.

The Key Provisions

There is no one standard HOA management contract template, nor is a one-size-fits-all approach possible. Each management contract may have to be modified to work with a particular project, the provisions of the project governing documents, and the desires of the HOA Board and Owners. However, the following are some of the more key provisions:

- **Governing Documents.** The management contract and the performance of the Manager's duties must comply with the project governing documents, including the Declaration of Covenants, Conditions and Restrictions (Declaration), and HOA bylaws.
- **Law.** The management contract and the performance of the Manager's duties must comply with federal, state and local law (including, for example, a state condominium statute).
- **HOA Board Policies.** The management contract and the performance of the Manager's duties must comply with the HOA Board policies and resolutions.
- **Common Elements (Not Units).**
- The Manager's duties will primarily be confined to the common elements (that is, the portions of the project other than what each Owner owns exclusively).
- The Manager's authority and duties will generally not include the supervision, management, or interior maintenance of individual homes except as may be required by the governing documents.
- **Independent Contractor Status.** The Manager will generally be an

independent contractor—not an employee of the HOA.

- **Manager's Employees.** The Manager must comply with all local, state, and federal laws in employing employees and subcontractors and agree to hold harmless and defend the HOA from any and all claims arising by reason of employment of any of Manager's employees or subcontractors.
- **Limitation on Manager's Obligations**. The Manager should not be obligated to implement any decision which:
- Is contrary to applicable law or the governing documents of the HOA,
- Would involve transactions or services about which the Manager has no expertise, knowledge, or requisite license, or
- Would involve transactions or services which are not expressed in the contract.
- **Notice of Violations of Law.** The Manager should notify HOA if the Manager knows of a violation of law.
- **Compliance with Law.** Subject to the contract, the Manager should assist the HOA in complying with law.
- **Hiring HOA Employees.** The Board should have the sole authority to hire and fire HOA employees.
- **HOA Books and Records.**
- HOA books and records should be maintained by the Manager in accordance with generally accepted standards, including applicable state law.
- All HOA books and records belong to the HOA and must be turned over to the HOA Board upon request.
- **HOA Professional Contracts.** Except as may be otherwise provided in a written resolution of the Board, all contracts on the behalf of the HOA (including without limitation contracts for professional services such as attorneys, accountants, inspectors, reserve specialists, architects, engineers and other professional or personal service providers) should be in writing, be approved in advance by the Board and be executed by the Board.
- **HOA Insurance**.
- HOA insurance should require Board approval.
- All HOA insurance should be reviewed annually by a qualified insurance professional.
- **HOA Insurance Claims**. Settlement of insurance claims should require Board approval.
- **Enforcement.**
- HOA is responsible for enforcement of HOA governing documents.
- The Manager only assists HOA.
- **Term and Termination of Management Contract**. A one-year term is customary, but the contract should subject to a 30-day no penalty/no fee/no cause termination by either Manager or HOA.
- **Manager Liability.**
- Managers will generally limit their liability to the HOA to intentional misconduct and gross negligence.
- The important thing for the HOA is the insurance coverage provided by insurance maintained by the Manager and by the HOA.

Subject Matter for HOA Management Contract

The following is the table of contents of a well-drafted and comprehensive HOA management contract. It illustrates the appropriate subject matter:

1. Appointment and Function of Manager

1.1. Appointment
1.2. Duties and Services
1.3. Independent Contractor Status

2. Employees of Manager

3. Duties of Manager

3.1. **General Management**
3.1.1. Counseling
3.1.2. Development of Policy
3.1.3. Implementation of Policy
3.1.4. Compliance with Government Order
3.1.5. Administration of Personnel
3.1.6. Enforcement
3.1.7. Administrative Records
3.1.8. Solicitation of Proposal for Service
3.1.9. Contracting
3.1.10. Insurance Placement and Claims
3.1.11 Attendance at Meetings
3.1.12. Meeting Administration
3.1.13. Financial Records
3.1.14. Bank Accounts
3.1.15. Investments
3.1.16. Collections
3.1.17. Delinquency Enforcement
3.1.18. Disbursements
3.1.19. Financial Statements
3.1.20. Management Report
3.1.21. Budget Preparation
3.1.22. Independent Audit
3.1.23. Tax Filing
3.1.24. Record Maintenance and Storage
3.1.25. Inspection
3.2**. Property Management**
3.2.1. Supervision
3.2.2. Preventive Maintenance
3.2.3. Inspection
3.2.4. Work Request Administration

4. Duties of Association

4.1. Provision and Accuracy of Records
4.2. Provision of Funds
4.3. Provision of Plans
4.4. Designation of Association Principal Place of Business
4.5. Designation of Corporate Contact
4.6. Enforcement

5. Compensation

5.1. Base Management Service
5.2. Additional Management Service
5.3. Resale Certificates, Broker and Lender Requests, Transfer Fees
5.4. Administrative Expenses
5.5. Management Services
5.6. Maintenance Services
5.7. Professional Services

6. T**erm of Agreement and Termination**

6.1. Term
6.2. Termination
6.3. Notice
6.4. Termination Procedure
6.4.1. Turn-over of Records
6.4.2. Termination Accounting

6.5. Expenses Incurred After Termination

7. Liability and Indemnification

7.1. Manager's Liability
7.2. Manager's Insurance
7.3. Association's Insurance
7.4. Placement of Association's Insurance
7.5. Indemnification

8. General Provisions
8.1. Conflict of Interest
8.2. Affiliated Interest
8.3. Modification of Agreement
8.4. Use of Counterparts
8.5. Arbitration
8.6. Jurisdiction
8.7. Void or Unenforceable Terms
8.8. Precedence and Scope of Agreement
8.9. Assignment

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FAMILY LAW

Five Myths About Premarital Agreements

By Diana Mercer

Between news coverage, soap operas, and family drama, we all have some preconceived notions about premarital agreements (also know as prenuptial agreements). Here are a few of the most common myths, debunked:

Myth 1: Prenuptial agreements are only for wealthy people. My fiancée and I are not rich, and so we don't need an agreement.

You may not be rich, but you definitely want to have a successful marriage. Having those honest discussions regarding how the two of you will approach finances will ensure that there won't be any surprises once you are married. You never want to actually need to enforce the premarital agreement, right? Talking about financial issues in advance will help ensure that you handle your finances with minimal conflict during your marriage as well as in case of divorce.

Example: You may become rich in the future. Your education or ideas and talents may one day become more valuable than they are today. You need to think about how you'd want to handle the sale of a book, screenplay, or song; you may also need to think about how you'd handle the division of a business in the event of a divorce.

Example: Second and third marriages can often bring conflict between children from prior relationships and new spouses. Clear discussions about finances in a divorce or premature death situation help everyone avoid conflict later.

Myth 2: Prenuptial agreements are designed to simply protect the wealthier spouse and strip the other spouse of all of his or her rights.

Fact: Prenuptial and premarital agreements should be designed to protect both spouses. Premarital agreements that are unfair and completely one-sided are probably not enforceable in court. By definition, the agreement must be fair. The basic requirements for premarital agreements to be enforceable are: signing the

agreement must be voluntary; it can't be unfair when it's signed; each party needs to make a full disclosure of your assets and debts.[1]

Premarital agreements can be designed so that everyone's needs are met.

Example: With a premarital agreement, you will know in advance how your assets and debts would be handled in the event you do not stay married. You're negotiating the property settlement while you're both in love with each other. You would not be at the mercy of your spouse's generosity or lack of generosity at the time of a divorce.

Example: If you end up needing your agreement to be enforced by the court, you'll be glad that you made it reasonable from the beginning (and therefore enforceable). For example, by providing a reasonable support structure for your spouse in the premarital agreement, in the event of a divorce, this agreement defines the support's limits, terms, amount, and duration. If you left it up to a court, you would have no control over any of the terms.

Myth 3: Premarital agreements aren't romantic.

Fact: Jessica Simpson didn't think they were romantic, either. And there's nothing romantic about fighting about money once you're married because you never discussed how you'd handle your finances, either. Clearly, premarital agreements are touchy subjects, but consider this quote from the Nolo Press book *Prenuptial Agreements: How to Write a Fair and Lasting Contract* (Nolo Press 2004):

While a prenuptial agreement may not seem like a very romantic project, working together to consider and choose the terms of a prenup can actually strengthen your relationship. After all, marriage is a partnership in every sense of the word. Learning how to deal respectfully and constructively with each other about finances is a benefit in itself. So even if you conclude that you don't need a prenup, using this book can help you converse with each other about the important—and sometimes challenging—financial matters that are sure to arise in the course of your marriage.

When you marry, you make what you expect and hope will be a lifetime commitment to be there for each other in every way. Your prenup should support and reflect the spirit of partnership with which you approach your wedding vows.

Myth 4: Premarital agreements must deal with every issue that might come up in a divorce.

Fact: You can include as many issues or as few issues as you wish. Because premarital agreements are private contracts, you can make them as detailed as you want.

Example: If the only thing you want for your premarital agreement to accomplish is to protect your premarital property, you can limit your premarital agreement to that issue alone.

If the only thing you want for your premarital agreement to accomplish is to outline what would happen in the event of your death, in addition to a will or a trust, you can limit your premarital agreement to that issue alone.

If you want your premarital agreement to cover almost every issue that might come up in a divorce except one or two issues (like spousal support, or contributions to a pension during the marriage, for example), then you can have the agreement cover everything except the issues you want to exclude.

If you want your premarital agreement to cover every issue, you can do that, too.

Myth 5: If we don't get married, my live-in mate won't have any claims to my income or property.

Fact: You could risk your income or assets by living together without marrying.

Palimony is a spousal support substitute for alimony or spousal support for people who are not married. Palimony claims are difficult to prove, but that doesn't stop some people from trying.

Also, if you have an oral or written discussion about how you will own property, share income, assets, debts, and so forth, it's sometimes possible to make a claim that contract law applies (as opposed to family law), and that property should be divided even if it's only in one person's name, or only one person paid the bills. There are also real estate partition laws that can dictate how property is divided, and in some cases you can even force an involuntary sale at auction.

If you are going to live together without getting married, you'll want a cohabitation agreement. It's better to decide who contributes to and owns property before you buy things rather than afterwards.

Example: Remember actor Lee Marvin (*The Dirty Dozen* and more than 60 other movies)? In the 1970s, his live-in girlfriend of six years, Michelle Triola, brought an action against him alleging that she and Lee Marvin entered into an oral agreement that during the time they lived together they would combine their efforts and earnings and share equally the property accumulated through their individual or combined efforts, and that Michelle would be his companion, housemaker, housekeeper, and cook, give up her career as an entertainer and singer, and that Lee Marvin agreed he would provide for all her financial support for the rest of her life.[2]

After a couple of appeals, the court agreed with Michelle Triola. Lee Marvin had to pay her $104,000, which was quite a bit of money back in the 1970s. Worse still, you can imagine what he probably paid in attorneys' fees to defend these claims. But that's only half the story: Michelle Triola Marvin also had an attorney who needed to be paid, too. Taken in this perspective, a premarital agreement or cohabitation agreement is a cost-effective way to handle this type of situation.

Conclusion: The truth is that a carefully crafted premarital or prenuptial agreement can cement your relationship, prompt you to have the hard discussions that engaged couples need to have, and ensure that your finances are handled the way you each intend in the event you were to divorce or pass away prematurely.

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Endnotes

1. Cal. Fam. Code § 1615. Most states have similar laws dictating what must be done in order to make a prenuptial agreement valid.
2. Marvin v. Marvin, 18 Cal. 3d 660 and 122 Cal. App. 3d 871; 176 Cal. Rptr. 555; 1981 Cal. App. LEXIS 2132.

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Will Divorce Jeopardize the Green Card?

By David J. Hart and Jordana A. Hart

Immigration status-related issues may further complicate a case.

As a family law practitioner, you see firsthand the anguish of divorce in battles over money, children, and property, tinged by feelings of bitterness and failure. For a foreign national married to a United States citizen, the effects of divorce may grow exponentially from there.

The effects of divorce or domestic violence on the immigration status of a spouse who is not yet a U.S. Lawful Permanent Resident (LPR) or "green card" holder are difficult to fathom for attorneys not familiar with family-based immigration law. That some foreign nationals (FNs) may need an interpreter and have a culturally ingrained suspicion of authority figures—including lawyers — could heighten barriers to effective advocacy.

The Basics

Under the U.S. Immigration and Nationality Act (INA), a U.S. citizen (USC) who marries an FN can sponsor for permanent residence that foreign national and his or her children under age 21 (if the couple married before the children turned 18) by filing an alien relative petition (Form I-130), with the spouse and each child concurrently filing permanent residence applications (Form I-485) with the U.S. Citizenship and Immigration Services (USCIS), the former INS. The I-485 applicants also can get permission to work (Form I-765) and, in certain cases, permission to travel abroad (Form I-131) while their residence applications are pending.

In the case of a spousal petition, spouses must prove that they entered the marriage in good faith, and not solely for immigration benefits, by offering evidence of the bona fides of the marriage, including but not limited to children's birth certificates, joint property holdings, joint lease, health and car insurance and bank accounts, and joint tax returns, etc. The couple is subject to an in-person interview by a USCIS officer to determine the bona fides of the marriage. The officer can approve the petition that very day or send a letter of concern based on the results of the interview. An interview that raises

suspicions of a sham marriage will lead to a notice of intent to deny—or the couple may be called for a second or even third interview, during which they can be questioned separately, sometimes for several hours. This is also known as a "Stokes" interview. *Stokes v. INS*, 393 F. Supp. 24 (S.D.N.Y 1975).

The USCIS penalties for a fraudulent marriage are up to $250,000 in fines and/or up to five years in prison for the USC and deportation of the FN with a bar of 10 years to seeking re-entry into the United States. INA § 205 and § 237(a)(1)(G).

Public Charge Provisions

Under INA §§ 212 and 213A, the U.S. petitioner must file a binding Affidavit of Support (Form I- 864) that guarantees support of the FN spouse and children, if any, at no less than 125 percent of the federal poverty income level in force at the time of filing. (The 2009 minimum income level for a family of three is $22,887.) A joint sponsor (who must be a USC or LPR, age 18 or older, and domiciled in the United States) who is willing to accept liability for the FN can file a joint affidavit with the petitioner if the latter fails to show sufficient income. Even if a petitioning spouse has insufficient income, he or she *must* file an affidavit. Both the petitioner and sponsor, if any, must file a letter from their employer, pay stubs, a federal tax return for the most recent year, and other evidence of cash and assets to support the affidavits.

Liability ends when the FN becomes a USC or has worked 40 qualifying quarters. If the spouse has already worked, or can be credited with at least 40 qualifying quarters, an affidavit is not required. Note that the contract can be enforced even if the relationship ends in divorce or legal separation. Exceptions are allowed for widows and widowers of USC spouses, as well as battered spouses of USC and LPR spouses.

Conditional Lawful Permanent Residence

If at the time of the marriage interview the couple has been married for less than two years, the USCIS will approve the immigrant status for two years only, known as "conditional permanent residence." Specifically, the FN will receive a "green card" (Form I-551) that expires on the second anniversary of the granting of permanent residence (not on the second anniversary of marriage). To convert to a permanent status, the petitioner and beneficiary spouse must file a Joint Petition to Remove Conditional Residency (Form I-751) up to 90 days prior to the second anniversary of the granting of residence status. The petition must be accompanied by evidence that shows that the legal relationship of marriage continues (since the initial approval of conditional status), such as tax returns, home lease or deed, children's birth certificates, joint insurance, etc. Increasingly, an interview with the USCIS is required to remove conditional status.

Failed Marriages

Given the often-harsh consequences of immigration law on families generally, it is surprising that the INA provides relief for a FN spouse who entered a marriage in good faith with a USC only to see it end in divorce. For example, if a marriage was entered into with a genuine desire and intent for a marital relationship, the Board of Immigration Appeals (BIA) has held that subsequent failure is not necessarily a reason for USCIS to deny the I-130 petition or I-485 adjustment-of-status application. *Matter of Adalatkhah*, 17 I&N Dec. 404 (BIA 1980). Even if the parties are separated at the time of the initial I-485 marriage interview, the USCIS should not deny the application as long as the separation is informal, the marriage has not been legally terminated, and the marriage was entered in good faith.

However, the INA establishes a legal presumption that a marriage is fraudulent, i.e., it was entered into solely for immigration benefits, if USCIS approves permanent residence before the second anniversary of the marriage and the marriage ends within two years of the FN obtaining conditional LPR status through the union.

At the stage of removing conditional residence, if the marriage is legally terminated or the petitioning spouse refuses to sign the joint I-751 petition, the conditional resident may file the form on his or her own, based on any of following grounds that, if proved, serve to waive the joint filing requirement: (1) The petitioning spouse is dead; (2) the marriage was contracted in good faith, but terminated through divorce or annulment; (3) the conditional resident was subject to extreme cruelty or battery; or (4) the termination of conditional status and deportation would cause extreme hardship. INA § 216 (c)(4).

In a recent clear-cut example of the second ground for a waiver, the USCIS approved the permanent LPR status of a conditional resident who, before the second anniversary, divorced her USC husband after he fathered a child with another woman. The conditional resident submitted an affidavit and one from her ex-husband, as well as the baby's ultrasound picture she discovered in her husband's car with the other woman's name on it, and the child's birth certificate. She submitted evidence that she and her husband had entered the marriage in earnest. At the time of her application, she had already remarried, but the experience that led to her divorce was so compelling that USCIS waived the joint filing requirement and approved her permanent residence without even an interview.

Domestic Violence

Under provisions of the Battered Immigrant Women Protection Act of 2000, the INA provides relief for the abused FN spouse (and children) of a USC or LPR, allowing petition for immediate relative classification without a spouse's knowledge or consent. There is no INA definition of "battered" or "abused" spouse; it is proved on a case-by-case basis with documentary evidence. A spouse–parent also can petition on behalf of his or her children who have been abused by the USC or LPR spouse, regardless of whether he or she is the biological parent.

The battered FN spouse files Form I-360 with the USCIS to show:

- The marriage was entered in good faith; and
- During the marriage, the FN spouse or children were battered or subject to extreme cruelty by the USC or LPR spouse; and
- The FN had resided in the past or present with the USC or LPR spouse; and
- The FN's current residence is in the United States or, if living abroad, the abusive spouse is a U.S. government employee or military servicemember, or subjected the FN to battery or extreme cruelty in the United States; and
- FN is a person of good moral character; and
- Abusive spouse was a USC or LPR at the time battered spouse filed the petition and at the time of its approval, or was a USC or LPR who lost status as a result of domestic violence.

The "U" Visa

Prior to 2000, a battered spouse had relief under the INA only if he or she was married to a USC. Today, a battered spouse whose lawful presence in the United States derives from the FN spouse who is, for example, on a student or work visa, can escape the abuser without having to leave the United States by seeking protection under the U "victim of crime" nonimmigrant visa provisions of the

Violence Against Women Act (VAWA). The victim must document that the crime took place in the United States and caused substantial physical or emotional harm. A law enforcement officer involved in the case must complete and sign a form that confirms to USCIS that the crime occurred, as well as the fact that the FN "has been helpful, is being helpful, or is likely to be helpful" to a federal, state, or local law enforcement officer, prosecutor, judge, or other investigator. INA § 101 (U)(i)(III). Domestic violence is just one of several crimes for which the U visa is available to FN victims.

In the absence of domestic violence, divorce automatically terminates the FN derivative spouse's (i.e., the spouse whose status derives solely from marriage to the foreign student or worker who is considered the principal visa holder) lawful presence in the United States. However, the derivative spouse is free to change a nonimmigrant visa classification while in the United States, but must file the application *prior* to losing spouse-derived status. For example, if the divorcing FN holds F-2 visa status as the spouse of an F-1 foreign medical student and wants to remain in the United States after the divorce is final, she would need to determine whether an employment-based visa or other type of visa classification is available to her. If so, she can change her status by filing an application (Form I-539) with USCIS. As long as she does so before the divorce is final (on which date she automatically loses her status), she remains in legal status in the U.S. pending a USCIS decision. Depending on the status to which she changes, she may be able to pursue permanent residence on her own.

Immigration law is a complicated puzzle of federal rules, statutes, and procedures that are subject to change at any time by Congress, USCIS, and various other federal agencies. If immigration issues surface in a divorce case, consulting with or partnering with family-based immigration cocounsel is a very good idea.

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Sidebar: Family Matters

- A child born in the United States to FN parents cannot petition for permanent residence for his parents until reaching age 21.
- An LPR can file for U.S. citizenship five years after being granted permanent resident status, but waits only three years if status was acquired through marriage to a USC. The two-year period of conditional resident status counts toward the three-year wait to naturalize. To apply in three years, LPR must still be married to and residing with the USC spouse. If divorced, LPR must wait the full five years to apply.
- Proxy marriages for immigration purposes are not recognized unless

consummated; common law and incestuous marriages are recognized if they are legal in the country or U.S. state in which they occurred.
- Same-sex and polygamous marriages are not recognized, even if valid in the foreign country or U.S. state in which they were celebrated.

Sidebar: Cohabiting Couples

To find out how immigration issues affect cohabitation and same-sex marriages, see "Why Can't My Wife Get a Green Card?" by Virginia E. Carstens, *Family Advocate*, Winter 2010 (Vol. 32, No. 3) at 38.

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Essentials of a Forensic Child Custody Evaluation

By Alan M. Jaffe and Diana Mandeleew

Before an expert can begin to conduct a good custody evaluation, he or she must have a full understanding of the various types of divorce, including the effects of divorce on children of different ages, both in the short- and long-term. The expert must also demonstrate a good legal knowledge of the types of custody and visitation arrangements that can be recommended. Although the evaluator should definitely have some experience in the treatment of children and adolescents, it is most important that the evaluator have advanced skills in the assessment of child and adolescent personality, mental illness, family dynamics, and parenting skills required to provide a healthy environment for growth and development of children. A competent evaluator also will be familiar with the legal aspects of custody procedure and understand the various legal definitions of custody as reflected in state law.

When conducting a custody evaluation, the procedure should be equitable and offer fair treatment to all parties by administering the same procedures with each party. Specifically, it is important to use interviewing, psychological testing, home visits, the utilization of collateral informants, observation of parents with children, and the amount of time children spend in a consistent way with all parties.

Who Should Be Included?

A thorough custody evaluation should include not only parents but also any other adults directly responsible for the daily care of children, such as stepparents, grandparents, and either parent's significant other. Any other party living in the custodial or visiting home also should be seen, such as step- or half-siblings. It is generally a good practice for daycare providers as well as medical professionals, psychotherapists, and school personnel to be included. However, it is not always in the best interests of the children to include these collaterals for various reasons.

A good evaluation and a seasoned evaluator may elect not to include specific

collaterals at certain times. If consulting with any of these individuals is not ultimately in the best interests of the children and/or would cause a negative result in the day-to-day life of the children, then a competent evaluation need not include them.

For example, (1) the daycare provider who is concerned that what is said may interfere with his or her ability to continue working with the children due to the inadvertent alienation of a parent or an inability to communicate with either parent going forward; (2) the psychotherapist who risks upsetting the course of treatment by taking a position that would either risk confidentiality with his patient or risk the unfavored parent's discontinuing therapy; or (3) school personnel who are concerned that close scrutiny will result in a modification of the curriculum or approach to the student, resulting from the fear of repercussions from either parent. Assuming the use of collateral informants will not interfere with the best interests of the children, a good evaluation will include them.

Life History

A thorough evaluation should include a good life history. Although there has been a good deal of discussion among judges about the relevance of early historical information, it is important to include as much early history as possible. A good evaluation should demonstrate the expert's deep understanding and working knowledge of each parent's individual psychology and philosophy of child rearing. To truly understand who a parent is and how he/she "arrived" at where the parent is today, a competent evaluator should demonstrate that he or she understands the events that led up to the current crisis. (Those who were political science majors instead of psychology majors would agree. Understanding national and world politics today is impossible without the context of history.) Evaluations differ in the amount of history provided, but a good evaluation should provide a significant amount of relevant history.

The evaluation should include evidence of document review. It is not necessary for the evaluation to summarize all pleadings and the court-related matter, but it should include reference to relevant medical records, school records, encounters with the police, and other issues that affect the well-being and placement of children.

There is some debate about the pros and cons of psychological testing. But a good evaluation includes at least some psychological testing. Experience has shown that testing is not only appropriate and relevant when used correctly, but also essential to a comprehensive evaluation. The tests permit a comparison of each party's performance with the performance of the general population.

Psychological Testing

Some psychological tests and scales specifically measure the test-taker's approach to the test, that is, whether the tests or scales exaggerate or minimize the test-taker's problems or symptoms. This is especially valuable in a custody situation where there is much at stake and the parties have an interest in appearing problem-free. The fact is that some people do better in interview situations than others. Even though the evaluator makes use of trained clinical interview skills, without the testing, the evaluator is relying entirely on what he or she is being told.

Evaluators are not mind readers. Even with the limitations inherent in psychological testing, it is more information for the courts, and it is based on scientific research. A good evaluation includes psychological testing widely used in custody situations and can demonstrate for the courts, if necessary, how the tests are relevant.

There is a multitude of psychometric measures from which a psychologist can choose. Typically, widely used tests with established validity and reliability measures, as well as those supported by a substantial research body, are better choices. When examining psychometric measures, it is important to look at the content as well as statistical parameters, including validity and reliability. Validity is the degree to which a test measures what it was designed to measure, and reliability is the degree to which the results of a test remain consistent over repeated administrations under identical conditions.

In child custody evaluations, most psychometric measures tend to fall within the following categories: cognitive functioning tests, objective personality tests, projective personality tests, and parenting assessment tests. A comprehensive evaluation will contain a battery of tests from numerous categories. Some of the more common tests used in child custody evaluations follow.

In child custody evaluations, the purpose of cognitive functioning tests given to parents is to determine whether their intellectual skills are adequate to meet parenting demands. Since these tests often are time consuming and not high predictors of custody placement, they are often omitted in evaluations of high-functioning parents. When cognitive tests are administered, it is important to keep in mind that they measure only aptitude or achievement of an individual and might not fully correspond to the multifaceted intelligence of an individual.

The Wechsler Adult Intelligence Scale—Third Edition (WAIS-III) is a comprehensive measure of intelligence composed of verbal and nonverbal tasks (Wechsler, 1997). Examinee's scores are compared with norms of his or her peer group and are calculated into a standard score with a mean of 100 and a standard deviation of 15. In addition to the Full Scale Intelligence Quotient (FSIQ) score, Verbal and Performance IQ scores are generated. Scores are further broken down into the Verbal Comprehension Index (VCI), the Working Memory Index (WMI), the Perceptual Organization Index (POI), and the Processing Speed Index (PSI). The WAIS-III can be administered to examinees over 16 years of age.

To assess a child's cognitive abilities, the Wechsler Intelligence Scale for Children-IV (WISC-IV) can be administered (Wechsler, 2003a; Wechsler, 2003b). Similar to the WAIS-III, this test is composed of a number of verbal and nonverbal tasks. The Full Scale IQ score (FSIQ) can be broken down into four indices: Verbal Comprehension (VCI), Working Memory (WMI), Perceptual Reasoning (PRI), and Processing Speed (PSI). A child might be administered an intelligence measure when it is suspected that he or she has a much lower intelligence than average and, as such, requires additional parental support.

Assessing Academic Achievement

The Wide Range Achievement Test (WRAT-IV) is a measure of academic achievement and includes Reading, Comprehension, Spelling, and Mathematics subtests (Wilkinson & Robertson, 2006). This test can be administered to children, adolescents, and adults and has strong validity and reliability coefficients. The resulting scores compare the examinee with a normative sample of peers, and the results can be expressed either in grade level or age level.

For individuals who have a limited English-speaking ability or whose verbal or fine-motor skills might undermine their true cognitive functioning, a nonverbal measure of cognitive ability can be administered. An example of such a test is General Ability Measure for Adults (GAMA), which yields an IQ score (Naglieri & Bardos, 1997). It consists of 66 pictorial puzzles that require the examinee to indicate which of the six possible answers is correct. GAMA takes only 25 minutes to administer, compared with the much lengthier Wechsler Scales, which can take hours to complete. An obvious drawback of a nonverbal test is

that it does not assess verbal expressive abilities.

Objective Personality Tests

Objective measures assess personality and socio-emotional functioning, including broadband comprehensive measures (such as MMPI-II, MCMI-III, and PAI) and narrowband measures (such as the Beck Depression Inventory-II). Typically these tests are designed to screen for clinical symptoms and personality disorders, consistent with the criteria in the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR).

The Minnesota Multiphasic Personality Inventory (MMPI-II) is an objective inventory of adult personality designed to provide information on critical clinical variables (i.e., depression, social introversion, hypochondriasis, schizophrenia, etc.) (Hathaway & McKinley, 1989). It contains nine Validity Scales, five Superlative Self-Presentation Subscales, 10 Clinical Scales, 31 Clinical Subscales (Harris-Lingoes and Social Introversion Subscales), nine Restructured Clinical (RC) Scales, 15 Content Scales, 27 Content Component Scales, and 20 Supplementary Scales.

The MMPI-II is based on a large normative sample of thousands of individuals from various communities in the United States. This test incorporates recent trends in mental health diagnosis and includes many common mental health disorders. It is one of the most widely used psychometric measures and, although there are some concerns regarding its validity in testing nonpsychiatric individuals, it has well-established validity and reliability (Friedman, Lewak, Nichols, & Webb, 2001). The drawback to administering the MMPI-II is that it contains 567 true or false items, which can be lengthy to administer.

The Millon Clinical Multiaxial Inventory-III (MCMI-III) is a personality measure for adults, which is composed of 175 true or false questions (Millon, Davis, & Millon, 1997). This instrument can be completed in approximately 30 minutes and can provide numerous subscales for interpretation. It is more sensitive to Axis 2 psychopathology.

The Personality Assessment Inventory (PAI) is an objective inventory of adult personality, which contains 344 items (Morey, 1991). It was designed to provide information on critical clinical variables (i.e., depression, anxiety, schizophrenia, antisocial tendencies, alcohol and drug problems). It contains four validity scales, 11 clinical scales, five treatment scales (including possible areas of interventions, such as suicide or anger), and two interpersonal scales (whether the examinee tends to be domineering or supportive in his or her interactions). It is based on a large database and includes many common mental-health disorders.

The Beck Depression Inventory–Second Edition (BDI-II) is a 21-item self-report instrument that assesses the existence and severity of depressive symptoms, including cognitive, affective, and physiological factors over the past two weeks (Beck, Steer, & Brown, 1996). The time period and the areas of functioning reflect the DSM-IV-TR criteria for depression. The measure's construct validity has been established, and research indicates that this measure can be used to differentiate between depressed and nondepressed patients. However, this test has a high face validity, which means that its purpose easily can be determined from reading the items. As such, the examinee can respond so as to appear to be either more or less pathological than he or she truly is.

Projective Personality Tests

The Rorschach Inkblot Test is a projective measure of emotional functioning and personality characteristics (Rorschach, 1942). The test contains ten inkblots: some are achromatic, and some are multicolored. The individual is first asked

what he or she sees in each of the cards, what makes it look like that, and where the image is located. Some evaluators look at the content and common themes of the Rorschach responses. Alternatively, the Exner Scoring System can be used for scoring and interpretation (Exner, 2002). Although some clinicians still incorporate this test, it generally has been abandoned because the concepts employed in the interpretation are too abstract for the courtroom.

The Thematic Apperception Test (TAT) is a projective measure that requires the examinee to tell stories about a series of pictures (Murray, 1971). For each picture, the individual is asked to tell a story with a beginning (what led to the event), a middle (what is happening now), and an end (what will be the outcome). The examinee is asked what the character(s) might be thinking or feeling. It generally is believed that characters in the stories represent projected aspects of the self. The evaluator looks for common themes among the stories.

The Sentence Completion Series–Adult Form (Brown & Unger, 1998) consists of sentence stems on a variety of topics, which the individual is asked to complete. It is designed to gauge areas of concern and distress. The responses can be analyzed based on themes; conflicts; conflict resolution styles, wishes, and fears; and the presented world view.

Projective drawings also are part of the projective personality tests. For example, in the House–Tree–Person Technique, the examinee is asked to draw a house, a tree, and a person on paper (Buck, 1970). In the Kinetic Family Drawing Technique, the examinee is asked to draw his or her family performing some activity (Burns & Kaufman, 1972). There are different ways to interpret projective drawings (i.e., Ogdon, 1998). For example, some evaluators view the drawing of a person (part of the House–Tree–Person Technique) to be indicative of how the individual views him- or herself, including ideas about gender roles. The evaluator looks at the details of the drawings, the placement of the drawing on the page, as well as the verbal description provided by the examinee.

Parenting Assessment Tests

The Bricklin Perceptual Scales (BPS) is a measure that was designed for child custody evaluations (Bricklin, 1984). A child over the age of six is asked 32 questions about both parents (64 questions in total). The four parenting areas gauged by this measure include Supportiveness, Competence, Follow-up Consistency, and Possession of Admirable Personality Traits. A limitation of this test is that it uses a child's report, which can change over time and might be a function of the child's current mood or parental influence. Limited research has made this an instrument beneficial for information gathering, rather than relying on the classifications.

The Ackerman–Schoendorf Scales for Parent Evaluation of Custody (ASPECT) also was designed specifically for child custody evaluations (Ackerman & Schoendorf, 1992). This measure includes a parental questionnaire and incorporates the results of a variety of other tests (i.e., MMPI-II, parents' and child's IQ scores, TAT, projective drawings, etc.). In addition to the global Parental Custody Index, Observational, Social, and Cognitive–Emotional Scales can be used to compare the parenting effectiveness of both parents.

Psychologists choose from a variety of psychometric tests for a child custody evaluation. General trends change over time. For example, in 1986, the three most common psychometric measures administered to adults in custody evaluations were MMPI-II, Rorschach, and TAT (Keilin & Bloom, 1986). A similar study in 2001, found 92 percent of evaluators had reported administering MMPI-II, and relied much less on objective personality and cognitive tests than did evaluators 15 years previously (Quinnell & Bow, 2001). Today, children are being tested less frequently than before, and when they are,

evaluators tend to administer projective rather than objective measures (Quinnell & Bow, 2001).

Since both parents in a child custody evaluation often are motivated to present themselves in the best possible light, the results of the psychometric measures must be considered carefully and compared with other information obtained during the evaluation. Similarly, psychometric measures that contain validity scales, such as the MMPI-II, can be useful in determining the degree of consistency between the examinee's report and their true functioning.

Language Preferences

When assessing a bilingual client, it is important to ask which is his or her preferred language. The client may feel more comfortable conversing in a native tongue. When an examiner fluent in the examinee's native tongue is unavailable, the services of a translator may be sought. Family members, and especially minors, should not be used for translations of "sensitive and confidential conversations" between the assessor and the examinee (Raso, 2006, p. 56).

Keep in mind that cultural factors may influence the examinee's performance on psychometric measures, particularly those that assess verbal expression and culture-bound knowledge. In such circumstances, the psychological report must contain a disclaimer to explain this limitation.

When making recommendations about custody matters, each parent, guardian, stepparent or any adult who physically lives or could potentially live with the children should be clinically evaluated. These are the people who will have the most influence on the children. A report should show that clinical interviews have been given to anyone in a position of parental responsibility and that they have been carefully examined. Although there is no magic number of clinical interviews each parental figure should have, a good report demonstrates that an adequate number has been given.

A good evaluation should include observations of the children with their parents and other live-in significant others. Some evaluators conduct these observations at the parent's home, while most are conducted in the evaluator's office. The observation sessions allow the evaluator to see children relating to and interacting with their parents at a moment in time. It is at the discretion of the evaluator as to whether these observation sessions are open-ended, task structured, or a combination of both. These observation sessions are important, will bolster the credibility of the final report, and will demonstrate to the court that the evaluator has spent time in the same room with the parents and children who are the subject of recommendations for the future.

Interviewing Children

The custody evaluation should include individual clinical interviews with the children as long as such interviews do not create undue stress for a given child. The evaluation should include how the child spends time in general with each parent, what he or she likes and dislikes about each parent, the kinds of activities parent and child engage in together, and how discipline is administered. The evaluator should demonstrate competence at eliciting information from children without having to be too direct about controversial issues. It is not the responsibility of the evaluator to extract a statement of preference from a child unless it is clear that the child is old enough and free from all of the other psychological and emotional consequences that could occur.

Psychological testing of children is not necessary unless there are questions raised that require deeper exploration of the child's mental health. By the time the custody evaluation is underway, this generally has been accomplished by a

school or outside agency. However, a good evaluation provides enough information about the children's behavior through clinical interviews with parents or by having parents fill out checklists or inventories regarding their children.

A home visit usually is at the discretion of the evaluator. Because the home visit is an additional expense to one or both parties, it should not be conducted if both parties stipulate that the other's living situation is adequate. But where allegations have been made that a home environment is substandard or undesirable for any reason, a home visit should be included.

Sidebar: Summary and Recommendations

Ultimately a good report should provide a summary section and a list of conclusions and recommendations. The report should emphasize to the judge how conclusions and recommendations were reached, based on the facts gathered throughout the evaluation. The evaluator should be free to express his or her opinion as an expert, but also should expect to demonstrate the foundation for the opinions. In the best reports, little or no additional explanation is required, because the conclusions follow naturally from the foregoing information. However, the evaluator should explain how he or she processed and interpreted the information to reach the final recommendations. Every expert has a particular style of writing a report, and there is room for differences in style and written expression. A good evaluation should be written so that a layperson can readily understand information in it. When it is necessary for a report to contain theoretical information, it is important to explain in layman's terms what the expert is attempting to communicate.

All things considered, a good report walks the fine line of taking into account that the court requires a demonstration that all relevant information has been obtained and a showing that appropriate and logical conclusions have been reached.

This should be accomplished without burdening the court with every word said during each clinical interview and every other encounter. The court appreciates thorough work, but expects the expert to distill the information into a manageable form.

In the end, after the hard work of testing, interviewing, and evaluating has been completed and objectives reached, the best experts keep in mind as they draft the final report that someone else will be reading it.

Alan M. Jaffe, Psy.D., is on the faculty of Northwestern University Feinberg School of Medicine in Chicago. He has authored book chapters and articles and has published internationally in the area of psychological testing, substance abuse, and compulsive disorders. He is a Fellow of the American College of Forensic Examiners. Diana Mandeleew, M.A., has extensive experience conducting psychological assessments, including forensic, personal injury, and custody evaluations. She is completing her doctorate at the Adler School of Professional Psychology.

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ESTATE PLANNING

Estate Planning Forms: Engagement Letters »
By L. Rush Hunt

Estate Planning Forms: Engagement Letters

By L. Rush Hunt

This book is intended to be a user friendly will and trust manual. I have sought to make the book user friendly by having numerous comments throughout the various provisions of each of the documents. Just consider these comments my conversation with you as you use the forms. Also, I have made references to a number of excellent ABA publications that can assist the reader with some of the more intricate substantive issues of the law concerning wills and trusts. These are excellent publications and will make an important addition to your library.

The book is divided into five basic parts. Part one provides samples of various documents that can be used in client interviews and samples of engagement letters. The assumption is that the reader already uses forms for these purposes, but it is my hope that by providing you with these documents, you will be able to modify your existing forms. While many lawyers do not use engagement letters for will and trust work, it is suggested that you consider an engagement letter for this area of practice. As litigation in the estate and trust area is increasing, it is a wise practice for the lawyer to use an engagement letter to better define the limits of representation and as an aid to your liability protection. The forms provided are based upon an hourly rate being charged. Simple modifications can be made if the fee agreement is a flat fee.

Part two provides a number of basic documents that the lawyer can use for most estate plans. These forms include a master will, a pour over will, a master inter vivos trust for a single grantor and a master inter vivos trust for multiple grantors. These forms have more options than will be needed in most estate plans. You must review these documents in detail in order to be familiar with the various provisions. Then you can delete those provisions not needed when drafting for a given client's estate plan. Also, you will find basic forms for a power of attorney, an advanced health care directive and several marital agreements.

While part two provides general forms for estate planning, the other three sections deal with specific drafting situations. For example, part three provides multiple options that the lawyer may wish to use for clients who have young children. These include forms specifically designed for families with young children, including both a testamentary and an inter vivos trust. The other two options are ones that are sometimes used by clients when establishing a trust fund for a child's education. While these forms are not inclusive of all options, they do provide two options that are frequently used.

Part four provides several different options when drafting for a client who has a child with special needs. Both a testamentary trust and an inter vivos trust are provided as sample documents. Both documents include supplemental care trust provisions that will keep the trust beneficiary from losing SSI or Medicaid benefits. The qualifying income trust, or Miller trust, is of limited applicability, but is used in those situations in which the client could qualify for Medicaid to pay nursing home expenses but has income in excess of the state's income cap, thus prohibiting the person from receiving Medicaid benefits. The sample trust will allow the person to qualify for Medicaid benefits. The final form in this section is a spendthrift trust. The form is the basic type of trust used for trust beneficiaries who should not receive an inheritance outright due to any number of reasons such as, health, marital, financial, or addiction problems.

Part five provides an irrevocable life insurance trust and a marital-credit shelter trust. These trusts are used when there are federal estate tax considerations that require special drafting. These are basic forms to get the lawyer started. There are a number of variations of each of these trusts. The ones provided are intended to provide one set of options. If the lawyer is going to become deeply involved in estate tax planning, then these forms are a good starting point. But the lawyer is cautioned that there is much more to learn when tax planning is involved. The reader will find the cited ABA resources to be most helpful.

As with all form books, the reader is cautioned to not use them blindly. They are intended to be an aid to you as you customize an estate plan to meet your client's own particular needs. These forms should be a helpful supplement to those forms you currently use, or for the less experienced lawyer these forms should be a springboard to establishing your own forms.

* * *

Engagement Letter for Individual

Dear_____:

I am pleased that you have asked me and [name of firm] to assist you in developing your estate plan. This letter confirms my discussion with you regarding your employment of our firm and describes the basis upon which we will provide legal services to you. Accordingly, I submit for your approval the following provisions governing our employment. If you are in agreement, please sign a copy of this letter in the space provided below.

Scope of Representation. You have asked me to represent you with regard to the planning, preparation, and implementation of appropriate estate planning documents (such as wills, health care power of attorney, durable power of attorney and revocable trust agreements). You may limit or expand the scope of my representation from time to time, provided that any substantial expansion must be agreed to by me. While our firm would be interested in assisting you in other matters, unless our firm is specifically engaged for some other future matter this letter shall confirm that our representation of you is limited to the foregoing matters and shall end when they are concluded.

Fees. Our fees are based primarily upon the time expended by our attorneys and paralegals on the engagement. Attorneys and paralegals have been assigned hourly rates based upon their experience and level of expertise. The present rates of those attorneys and paralegals likely to work on these matters range from $_____in the case of the paralegal who will work on this matter, $_____in the case of the associate who will work on this matter, and $_____ in my case. Our hourly rates are reviewed periodically and may be increased from time to time, but will remain at these rates during this representation. We do not consider any billing for our services final until you are satisfied as to both the quality of our services and the amount charged. If you have any questions

about a billing, please contact me directly.

Potential Conflicts. Our firm represents other businesses and individuals. This can create situations where work for one client on a matter may preclude us from assisting other clients on unrelated matters. It is at least possible that during the time that we are representing you some of our present or future clients may have disputes or transactions with you. In order to avoid the potential problems that this kind of restriction could have for our practice, we ask you to agree that we may continue to represent (or may undertake in the future to represent) existing or new clients in any matter that is not substantially related to matters in which we have represented you, even if the interests of such clients in those other matters might be adverse to yours. We do not intend, however, for you to waive your right to have our firm maintain confidences or secrets that you transmit to our firm, and we agree not to disclose them to any third party without your consent. We will, of course, take appropriate steps to insure that such information is kept confidential.

Additional Standard Terms. Our engagement is subject to the policies included in the enclosed memorandum.

Privacy Policy. Enclosed is a copy of the Firm's privacy policy. Please let us know if you have any questions about it.

If these terms of our engagement are acceptable to you, please sign a copy of this letter for my records. You may keep the original letter for your records.

Sincerely,

[name of firm]

_____

[name of attorney]

The foregoing is understood and accepted:

_____

Date: _____

* * *

Engagement Letter for Couple

Dear_____,

I am pleased that you have asked me and [name of firm], to assist you in developing your estate plan. This letter confirms my discussion with you regarding your employment of our firm and describes the basis upon which we will provide legal services to you. Accordingly, I submit for your approval the following provisions governing our employment. If you are in agreement, please sign a copy of this letter in the space provided below.

Scope of Representation. You have asked me to represent you with regard to the planning, preparation, execution and implementation of appropriate estate planning documents (such as wills, health care power of attorney, power of attorney and revocable trust agreements) for each of you concerning the management of your assets during your joint lives and the life of the survivor and the disposition of those assets to beneficiaries in connection with various contractual rights, such as life insurance policies and retirement plan accounts. You may limit or expand the scope of my representation from time to time, provided that any substantial expansion must be agreed to by me. While our firm would be interested in assisting you in other matters, unless we are specifically engaged for some other future matter this letter will confirm that our

representation of you is limited to the foregoing matters and will end when they are concluded.

Joint Representation. Under the ethical rules that govern attorneys, I may represent both of you jointly so long as you are in agreement about your estate plan. It is normally quite beneficial for one attorney to represent both a husband and wife in the estate planning process, and my goal in doing so will be to help you implement a mutually agreeable plan for both the present and future. However, in the course of the estate planning process a husband and wife sometimes develop differences in their choices of beneficiaries, appointments of trustees, executors and representatives and in their overall interests and desires. Occasionally, couples initially agree on a plan and then later change their minds and go in different directions. Consequently, please understand that if I undertake to represent both of you jointly, I cannot take sides or favor one of you over the other, either now or in the future.

During the planning process, I will obtain confidential information from each of you, whether in conference with both of you together or with one of you alone. If I undertake to represent you jointly, please understand that I cannot withhold any such information from either of you even if one of you asks me to do so. The alternative is for me to represent only one of you separately without open sharing of information. The other one of you would then have to either engage separate counsel or choose not to be represented at all. Such separate representation is usually not practical and having one party unrepresented is usually not desirable. If during the course of my joint representation of you a conflict should develop that in my opinion would keep me from adequately representing both of you or if either of you asks me to take sides against the other, I will have no choice but to withdraw from further joint representation of the two of you and advise each of you to obtain separate counsel. By your signing this letter you are assuring me that you are comfortable with my representing both of you jointly.

Fees. Our fees are based primarily upon the time expended by our attorneys and paralegals on the engagement. Attorneys and paralegals have been assigned hourly rates based upon their experience and level of expertise. The present rates of those attorneys and paralegals likely to work on these matters range from $_____ in the case of the paralegal who will work on this matter, $_____ in the case of the associate who will work on this matter, and $_____ in my case. Our hourly rates are reviewed periodically and may be increased from time to time, but will remain at these rates during this representation. We do not consider any billing for our services final until you are satisfied as to both the quality of our services and the amount charged. If you have any questions about a billing, please contact me directly.

Potential Conflicts. Our firm represents other businesses and individuals. This can create situations where work for one client on a matter may preclude us from assisting other clients on unrelated matters. It is at least possible that during the time that we are representing you some of our present or future clients may have disputes or transactions with you. In order to avoid the potential problems that this kind of restriction could have for our practice, we ask you to agree that we may continue to represent (or may undertake in the future to represent) existing or new clients in any matter that is not substantially related to matters in which we have represented you, even if the interests of such clients in those other matters might be adverse to yours. We do not intend, however, for you to waive your right to have our firm maintain confidences or secrets that you transmit to our firm, and we agree not to disclose them to any third party without your consent. We will, of course, take appropriate steps to insure that such information is kept confidential.

Additional Standard Terms. Our engagement is also subject to the policies included in the enclosed memorandum.

Privacy Policy. Enclosed is a copy of the Firm's privacy policy. Please let us know if you have any questions about it.

If these terms of our engagement are acceptable to you, please sign a copy of this letter for my records. You may keep the original letter for your records.

If you have any questions regarding any of the matters discussed in this letter, please feel free to give me a call.

Sincerely,

[name of firm]

_____

[name of attorney]

The foregoing is understood and accepted:

_____

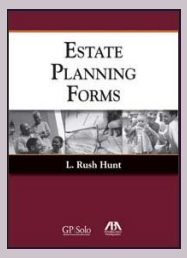
Date:_____

_____

Date:_____

Estate Planning Forms

Did you find this article helpful? Do you think more information like this would help you? More information is available. *This material is excerpted from Estate Planning Forms, 2009, by L. Rush Hunt, published by the American Bar Association General Practice, Solo and Small Firm Division. Copyright © 2009 by the American Bar Association. Reprinted with permission. All rights reserved. This information or any or portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.* ***GP/Solo members can purchase this book at a discount***.



L. Rush Hunt is currently engaged in the private practice of law in Madisonville, Kentucky, where he devotes much of his time to areas of estate and trust law. Mr. Hunt brings more than thirty years of experience in estate planning and related areas of the law to the writing of this text, including not only his legal experience but also his experience as a certified financial planner and his previous employment as a vice-president of trust services for Citizens Bank of Kentucky, where he supervised trust administration and investments. Mr. Hunt earned his B.S. in accounting from Murray State University, his J.D. from the University of Louisville School of Law, and his Ph.D. in public law at Southern Illinois University. A frequent lecturer at continuing legal education seminars for both lawyers and accountants, Mr. Hunt is a member of the General Practice, Solo and Small Firm Section of the American Bar Association; the Kentucky Bar Association; and the Christian Legal Society.

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LITIGATION

How to Hire a Business Litigation Attorney »
By David Z. Kaufman

How to Hire a Business Litigation Attorney

By David Z. Kaufman

The world of business and commercial litigation is much too specialized for someone who does not regularly handle these cases. You should be aware that the law firms who represent many of the larger businesses know who the attorneys are in your area who actually go into court to try cases and who does not. They will use that information to evaluate their client's risk. One of the first questions any good business litigation attorney will ask when a serious claim comes in is, "Who is representing the other side?"

So how do you find out who is good in your area? Here are factors and good points to look for and question your attorney about. Note that not every attorney will meet all of these criteria, but the significant absence of the following should be a big question mark.

- Experience—obviously, the longer you have been practicing a particular area of the law, the more you will know.
- Experience actually trying cases—ask the attorney how many cases he has actually tried. Has he or she achieved any significant verdicts or settlements for his/her clients? The greater your number of cases actually tried and substantial verdicts and settlements achieved, the more the other side will respect you.
- Respect in the legal community—has your lawyer lectured or taught other lawyers?
- Membership in trial lawyer associations, not just bar associations.
- Publications—has your attorney written anything that has been accepted for publication in legal journals?
- Is your attorney licensed in the state where your case will be filed?
- Once you have decided on an attorney, make sure that you both understand your goals and that you understand how the relationship between you and your attorney will work.
- How will your attorney keep you informed about the progress of the case?

Make sure that you and your attorney have a firm understanding as to who will

be handling your case. There are a lot of things that go on with a case that do not require the senior attorney's attention. On the other hand, if you are hiring an attorney because of his or her trial skills, make sure that that person is going to be trying your case for you.

David Z. Kaufman's practice concentrates on business and commercial litigation. He has personally tried more than 30 jury trials and more than 80 bench trials to verdict. For more information about his practice, visit http://www.BusinessBrawls.com.

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PRACTICE MANAGEMENT

Cloud Security and Encryption 101

By Jack Newton

What Is Cloud Computing?

Cloud computing is one of the hottest technology trends to emerge in the last decade. The concept of cloud computing is that software, rather than being installed and hosted on your own computer, will be hosted online and delivered to your via your web browser. While cloud computing is a relatively new term, it's a concept that's been around for a long time, and you're likely already using cloud computing in some fashion, whether it's via web-based email like Gmail or Hotmail, or through your online banking provider.

Benefits of Cloud Computing

The benefits of moving traditional desktop- and server-based applications to the cloud are numerous for firms of all sizes. Cloud-based services typically eliminate large up-front licensing and server costs, offer drastically reduced consulting and installation fees, and do away with the "upgrade treadmill" typically associated with traditional desktop- and server-based software. Cloud-based services also typically are accessible anywhere, easy to use, and compatibile with both Windows and Mac OS X.

Aside from IT-related benefits, cloud computing offers the freedom to get your work done anywhere. You'll be able to provide responsive, professional service to your clients on a schedule that works for you, regardless of your location. Cloud computing services can typically be accessed from any computer with an Internet connection, and often provide mobile versions that can be used on

devices such as the iPhone, iPad, and BlackBerry.

The Cloud Computing Security Chain

While the benefits of cloud computing are numerous, important security- and ethics-related issues need to be considered, especially in a law-firm setting. Because a third party will be entrusted with potentially confidential client data, proper security and encryption measures should be implemented.

There are links in the cloud computing security chain: *server security*, *connection security*, and *client security*. As is always the case, cloud computing security is only as strong as the weakest link, and ensuring both you and your cloud computing provider are adhering to the following guidelines will help ensure confidential data stays that way.

Server Security

The server security implemented by your cloud computing provider protects your data against hackers and other threats. Although it is hard for the average web user to assess a cloud-based provider's server security, there are services from companies such as McAfee that perform regular security audits on software as a service (SaaS) providers to ensure server security. Ask for evidence of regular third-party security audits, be it from McAfee or another provider, before entrusting your data to a cloud-based provider.

Connection Security

One important component of the security equation is encryption. Secure sockets layer (SSL) is an industry-standard encryption technology that enables secure online banking and e-commerce. SSL ensures all communications between your computer (the client) and the cloud-based server are encrypted and protected from interception. SSL is an extremely powerful technology, as it allows for completely secure communications even over public, untrusted networks, such as a public Wi-Fi connection.

Each web browser uses a variant of a "lock" icon to indicate a website it using an SSL connection—look for it prior to inputting any confidential data into a website.

Client Security

In networking terminology the "client" refers to the actual computer—whether it is a desktop, laptop, or handheld device—that a cloud application is being accessed from. This is the final—and often overlooked—piece of the cloud computing security puzzle.

Cloud computing doesn't obviate the need to ensure your desktop or laptop is properly secured with a firewall, antivirus protection, and the latest security updates for your operating system and web browser. For Windows users, Google Pack offers free antivirus, antispyware, and Google's own web browser, Chrome.

To ensure data stored on your desktop or laptop remains private even if it's stolen, you may want to look at installing TrueCrypt, a free tool that will encrypt the entire contents of your hard drive.

Finally, client security also encompasses password security. The best SSL encryption and server security can all be undone by the choice of a weak password. Be sure to choose a secure password for any website you're using, and try to avoid using a given password for more than one website. A free password generator and manager is PasswordSafe.

Putting Your Practice on Cloud Nine

The best practices for cloud computing security outlined above, when properly implemented, represent one of the most secure ways to store a law practices' confidential client data. "The cloud" presents firms of all sizes with a compelling method of reducing IT costs and overhead while increasing efficiency, security, easy-of-access, mobility, and convenience.

Jack Newton is co-founder and President of Clio, a leading provider of cloud-based practice management software. Jack holds an M.Sc. in Computer and holds three software-related patents in the United States and EU. He has also spoken at CLE seminars across the US about how cloud computing can help law practices run more effectively and efficiently. Jack can be reached at jack@goclio.com. Clio is a sponsor of the GPSSF Division of the American Bar Association.

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Attracting Window Shoppers to Your Virtual Law Firm

By Kevin Chern

When you open a traditional brick and mortar law firm, one obvious benefit is the fact that your front door and signage serve as a type of advertisement for your firm. Assuming you list your name and phone number on the front door, anyone who walks by your office knows that they can get in touch with you in at least two ways: by picking up the phone or walking through the door. With a virtual law office, however, it might be a bit trickier to catch people just browsing by your window.

While marketing a virtual law office isn't entirely different from marketing a traditional brick and mortar practice, it does take a bit of creative thinking to attract "window shoppers." Just like when you have a physical office, you need to make sure that your web-based practice is (a) positioned so that it will get a lot of traffic and (b) designed in a way that makes your front door look attractive to passers-by. The goals are the same, but the execution is a bit different. Here are a few tips on how to create a website that will help you attract regular visitors and convert these visitors into clients:

Create a Website That Looks Good

For a virtual law firm, your homepage is a lot like your front door. You wouldn't maintain an office in a rundown neighborhood with your shingle hanging by a broken chain, so why would you host your virtual office on a cheap site with a lengthy web address? If you want to website visitors to choose your firm over

thousands of others, make sure you give them a great first impression by investing a little bit of time and money on a unique website address. While you are at it, drop the free email address, and opt for something more personal. Not only will it make your website look more inviting, but it also will let potential clients know you care about quality and professionalism.

Build a Consistent Online Presence

If you want to position your law firm to get more traffic, it is important that you build an online presence that directs traffic to your website and boosts your reputation. Use social media to connect with other attorneys, business professionals, and potential clients. By creating profiles on multiple sites, you are essentially creating more than one "front door" for your firm. In addition to engaging in social media, create a blog or post regular updates to your website. Not only will this showcase your expertise and give consumers a reason to regularly visit your website, but it also will help boost SEO (search engine optimization) so your website can appear higher in search engine results.

Spend Less Time on Traditional Methods of Advertising

If you want to run a fully virtual practice, you want to attract clients who are comfortable working with attorneys online. If you advertise a lot in phonebooks, on billboards, or in print ads, you may discover you are spending a lot of money on the types of clients you do not want to attract. Instead, focus your advertising dollars where your best clients will be: online.

Make It Easy for People to Communicate With You

Make sure potential clients know exactly how to get in touch with you on the first page of your website. One virtual attorney website that I really like has three visible links on her homepage: one for consumers who are ready to become new clients, a registration link for free consultations, and another button that will set up a phone call for the consumer and attorney at the click of a button. Another website includes a live chat box that welcomes visitors to the screen, helps them navigate the website, and encourages visitors to set an appointment to speak with an attorney.

Stand Out

With hundreds of thousands of attorneys competing for business both online and off, it is important for you to create a presence that is both unique and memorable. Avoid using cliché images in the design of your website, and build your practice and marketing plan around the types of law you want to practice and the types of clients you want to attract.

Kevin Chern is president of Total Attorneys, a leading provider of marketing and practice management services to small law firms, serving solo attorneys and small law firms nationwide. Previously he was managing partner of the country's largest consumer bankruptcy law firm. His articles have appeared in numerous publications, websites, and blogs, and he frequently speaks about legal technology and marketing across the country. For more tips on how you can market your law firm, check out his blog. Total Attorneys is a sponsor of the GPSSF Division of the American Bar Association.

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PRACTICE MANAGEMENT

The Human Element: Developing Your "Deskside Manner"

By Michael J. Maslanka, Former Member Standing Committee on Group & Prepaid Legal Services and Immediate Past President, American Prepaid Legal Services Institute

As an attorney for more than 26 years, I have experienced innumerable occasions with clients when I have had to act almost as a social worker or grief counselor. Perhaps that is because I do a lot of family law, but that area of practice certainly has no monopoly on emotionally needy clients. With helping any client having legal problems, there should arise the attorney's need to acknowledge the client's "human element," which becomes the "human element" of the relationship. Exactly *how* to do that is not taught in law school. We have to learn as we go. Clients come to us with questions, concerns, issues, and anxieties. During the representation, clients need to be told the good news and the bad news. How that news is conveyed to them is important for obvious reasons, not the least of which should be the attorney's own professional, and hopefully personal, need to communicate clearly, timely, and perhaps compassionately with the client. Some news needs to be conveyed in warm, empathetic terms. Meaningful communication with a client that tells him or her that you care is satisfying, and it can lead that client to want to come back to you in the future for other services. It's a no-brainer, in a way, but certainly worth talking about. A doctor's bedside manner is often discussed, usually in the negative. As attorneys, we need to develop and polish our deskside manners.

Many clients come to attorneys after waiting too long to seek legal advice, and then want their problems solved immediately, if not sooner. So, why don't you

do that? Why can't you? Shouldn't this be the age of drive-through legal services? Immediate legal service satisfaction and gratification? But what can we do to ease the client's disappointment upon hearing bad news? One tool I use when trying to explain to a client how long a case may take is to point to the law books on my library shelves. We keep a few decision reporters around for historical purposes and legal atmosphere, and maybe for some good karma. While pointing to them, I explain that they are all appeals. Someone lost a case and tried a second or third time to win. Some win and some lose, but they each took years. I go on to tell them that the wheels of justice can move slowly (I heard that one somewhere) but that I will do all I can as their "personal" legal representative to make sure that their case is not unduly delayed. I also explain that I can only control so much in litigation, and much of their case's development will depend on what the other party and the judge do. From time to time I will even print a case opinion for them to take home and read, to highlight for them why some cases take so long.

I recently read an Illinois appellate court decision that I will add to my collection of cases to give to clients that demonstrates the potential of cases to take longer than one party might want: *People of Illinois vs. Al Burei,* decided on September 30, 2010. A defendant was indicted for transporting cigarettes for sale that were never stamped for tax purposes. The defendant was stopped by the police in July 2003. The case proceeded through the Illinois Supreme Court two times and the Illinois Appellate Court three times. The case raised the constitutional issues of unreasonable search and seizure, which, as of today, seven years later, was last decided in the defendant's favor. Many personal injury and products liability cases have long shelf lives, too. Finding specific case examples to share with clients may help them understand that you help drive the course with them, but that you do not dictate how long it is.

Knowing when a client does not understand something may be obvious to some, but professional instinct may need to be involved, because some clients might never tell you that they do not really understand what you just said about comparative negligence or absolute liability. If you suspect a lost connection, restate your advice and recommendations. The client may be more appreciative than you will ever know.

Lawyering for some is just an occupation (something to do and earn income), but for most, lawyering is a profession (an occupation with aspirations and goals beyond monetary remuneration). The words *occupation* and *profession* are often used interchangeably, but the intent in using one word or the other makes a real difference. A profession is likely to have altruistic goals and a code of ethics. A meaning beyond the money. Most general practitioners around the country are true professionals. Their stories of *pro bono* work and donations to funds are endless. They realize that there is something else to the lawyering work besides the "paid in full" receipt the client eventually receives. It deserves mentioning that there is nothing wrong with earning a living and getting paid for hard work. Clients need to understand that, and lawyers need to understand that some clients need *pro bono* work, or reduced fee work, or perhaps just an ear to listen for awhile. The human element of the client can be addressed in many ways, such as declining possible interruptions while conferencing, offering a firm handshake, exhibiting a strong nod of the head, serving a hot cup of coffee, or asking sincerely, "How is your family doing?" Once the relationship has begun, the client and attorney need to help each other understand needs and goals. It is a two-way street, but the lawyer should take the lead to make sure all questions are answered and obligations are explained.

For those doing group and prepaid legal service plan work, the challenge to address the human element of the attorney-client relationship may be greater. Some plans direct call after call to a lawyer or firm. For economical purposes, that may be beneficial, but it does take a lot of time. Provider attorneys may struggle with giving each call or client a caring ear because there are so many. In

that situation, the attorney should take a step back and decide if the volume of calls and cases is causing him or her to dilute the meaningful attention the attorney should give to each, as though it were his or her only call or case. Clients want that. They want you to be their attorney, and maybe your only case. We all know that is not possible, but we can act and talk and listen as though it were true. Some providers use paralegals and support staff to handle some calls and some parts of cases, which is fine. In the end, the client just needs to know that you truly have his or her case under control. Some clients will need more hand holding than others: that is just a part of the diversity of the collective human element of our clients. The profession dictates that we not work our practice as a factory, i.e. roll 'em in, and roll 'em out. We went to law school and took oaths to do more than that. Recognizing that we always need to do more will help us stay on the professional road.

For attorneys to meaningfully address their clients' human element, I suggest the use, during conferences, of materials and visuals, like photos, books, case decisions, and charts of statistics, but, perhaps, most importantly, a caring ear to listen to every word the client says. Take a lot of notes. Listening may be the best tool. The attorney-client relationship can suffer irreparable harm if you ignore the human element, or if your client ever believes that you did not really listen to his or her story. Take that earful! It can do wonders!

Michael J. Maslanka is an attorney in the downtown Chicago, Illinois, law firm of Sacks, Goreczny, Maslanka & Costello, P.C. He has been involved in group and prepaid legal services for most of his legal career. He has been actively involved in the work of the Illinois State Bar Association for many years, and is currently a member of the Human Rights Section Council, and the Standing Committee on Bar Services and Activities. He is also Immediate Past-President of the American Prepaid Legal Services Institute, and a former member of the American Bar Association's Standing Committee on Group and Prepaid Legal Services.

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Law Trends & News

PRACTICE AREA NEWSLETTER

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PRACTICE MANAGEMENT

Lawyer Seeks Treatment, Boss Seeks Assurance

By Todd C. Scott

Is your recovered employee ready to start seeing legal clients again?

For one recovering professional, the time to get help and get sober became apparent to his employer when he came to work drunk. Thinking he had enough time between lunch and an evening working late with colleagues, he lost track of his alcohol consumption, and to everyone there, he was in no condition to work. His employer already had a plan for chemically dependent employees that involved treatment, aftercare, and ongoing support programs. If he successfully completes his employer's mandated program, his chances of recovery and remaining sober for at least two years are very high, about 92 to 95 percent—because he is an airline pilot.

For chemically addicted or mentally impaired lawyers, the story is often much different. The problem is frequently ignored. And, whereas in the airline industry, the employer and the Federal Aviation Administration (FAA) have created a mandated recovery process (after recognizing the chances of a pilot slipping into chemical addiction as a statistically probably event for eight percent of their workforce), no such industrywide standard exists for getting lawyers fully recovered and back with their clients.

It's not as though help for recovering lawyers is not available. In fact, a lawyer assistance program or committee exists in every state, whereas 25 years ago only 15 states had programs for lawyers who abuse drugs and alcohol. Lawyer Assistance Programs (LAPs) have an impressive array of resources to provide

services and support to lawyers and law students in need, backed by an army of recovering lawyers and counselors sympathetic to the stresses and difficulties of trying to make it in the legal profession.

But as the employer of an addicted or chemically dependent lawyer, what are you to do? Is it your job to help the employee recognize that he or she has an alcohol abuse problem? How long will it take for the lawyer to successfully recognize and deal with their difficult problem, and ultimately graduate through treatment? And most importantly, how do you know when your recovering lawyer is ready to start seeing clients again? The questions are abundant, but in the legal profession, the answers can be murky.

A Uniquely Troubled Group?

Since drug and alcohol counseling centers and the legal profession began recording statistics on chemically addicted and impaired professionals, the data involving lawyers has been off the charts. The American Bar Association's Commission on Impaired Attorneys shocked the profession in 1991 when it estimated that 18 to 20 percent of the nation's lawyers abuse alcohol or drugs. By comparison, among the general population, including persons in other highly stressful professions such as physicians and pilots, the estimated rate of chemical abuse is at a much lower eight to ten percent.

Illicit drug use is prominent in the legal profession. In 1990, the international *Journal of Law and Psychiatry* published a study on the prevalence of drug abuse in the legal profession and found that 26 percent of lawyers had used cocaine at least once, a rate more than twice the general population.

Depression among lawyers dwarfs all other professions. Research shows 33 percent of lawyers suffer from mental health issues, and that 19 percent of the lawyers studied suffered from significant elevated levels of depression—more than twice the national average. In all, lawyers are 3.6 more times likely to suffer from depression than all other professions, according to a 1990 Johns Hopkins Medical School study.

Saddest of all, the legal profession claims the highest rate of suicide among all other occupations. A study conducted by the National Institute for Safety and Health found that male lawyers between the ages of 20 and 64 are more than twice as likely to die from suicide than men of the same age in other occupations. A Canadian bar study found that suicide was the third leading cause of death among lawyers studied—behind cancer and heart failure—leading to about 69 deaths per 100,000 population, nearly six times the suicide rate in the general population. Those most at risk were lawyers and judges aged 48 to 65.

Added to the likelihood that someone you work with in the legal profession is suffering from some sort of debilitating chemical or mental impairment are barriers that uniquely hinder success rates for lawyers in counseling and treatment programs. It may be no surprise that recovery professionals view a lawyer's tendency toward debate and verbal challenges as a significant obstacle for overcoming addiction.

"Lawyers are treatment resistant," says William Messinger, a lawyer and president of Aureus, Inc. a St. Paul, Minnesota, company that assists legal professionals and their employers with recovery and relapse preventions strategies. "Lawyers ask a lot of questions and are not self-revealing," says Messinger. Such attributes are generally seen by treatment counselors as uncooperative behavior and can delay effective recovery for the lawyer.

Messinger's views are backed up by a study commissioned by Cottonwood de Tucson, a behavioral health treatment center in Tucson, Arizona, where 460 LAP professionals and recovering lawyers from around the nation were

interviewed. The 2004 study identified several obstacles for lawyers accessing treatment. Among the findings was:

- The primary obstacle that prevented legal professionals from accessing care was the belief that they could handle their problem on their own, due to their strong sense of self-reliance.
- A significant obstacle to making the decision to seek treatment was a concern regarding a potentially negative impact the decision might have on their professional reputation among peers, judges, and potential clients.
- Treatment professionals find that once in a treatment program, lawyers rely upon intellectualization as an ego defense and are shut off from emotional life.
- Although those offering services to lawyers for behavioral health problems have some understanding of lawyers' problems, there can still be some misunderstanding about lawyers among clinic professionals including underestimating or misunderstanding the lawyer's sophisticated level of denial and highly developed sense of being right.

"The lawyer will absolutely swear they are not drinking," says Messinger. "Meanwhile, their friend in the firm will report back that the lawyer is abusing. The friend knows about it because they are usually right there abusing with them."

Messinger also points out that that firm culture often serves as a barrier for the chemically dependent lawyer to get effective treatment.

"The whole [recovery] process is counterintuitive to the legal profession," says Messinger. "In a law firm, showing support often means covering up for the lawyer instead of letting him or her fail so the problem can be identified."

Law firms may hesitate to approach the troubled lawyer about an addiction problem out of a deep understanding of the stresses and anxiety that the practice of law brings, as well as the shame and stigma that their colleagues face when seeking help. Worse yet, some firms with knowledge of a lawyer's past addictive behavior and sudden relapse may avoid intervening on behalf of the lawyer if they feel the timing of the event would pose economic concerns for the firm, such as the delay of a matter set for trial.

"Law firms are not good at dealing with disruptions," says Messinger. "That would never happen in the medical profession. It astounds me that a firm would tolerate that behavior."

For firms that do intervene, the path to healing is often unclear. Even if they succeed in getting the impaired lawyer the professional guidance needed for recovery, law firms struggle with their own questions about doing the right thing for both their colleague and their clients. The duties and ethical obligations a firm owes to its clients are paramount and must be kept in mind when seeking help for the impaired lawyer who is doing everything they can to back to working again.

Successful Recovery and Back to Work Models: Physicians and Pilots

Highly trained professionals are not immune from the perils of addiction. Although the prevalence of substance and use disorders for physicians is similar to that of the general population, they have their own special risk factors that would ordinarily hinder successful treatment. Easy access to controlled substances, along with spending long hours in a highly stressful working environment, create difficult conditions for addicted medical professionals and can be significant obstacles to recovery. Also, physicians entering addiction treatment report high rates of problem complexity such as family histories of

addiction, multiple drug choices, and co-occurring medical/psychiatric conditions.

Despite the risk factors, the documented long-term recovery rates for physicians are very high—between 70 and 96 percent according to three studies between 1987 and 2005. Airline pilots who go through an extensive rehabilitation process have even higher recovery rates of 92 to 95 percent, according to a 1998 published report in the *Hazeldon Voice*. Returning to work can happen for an airline pilot relatively fast—often within four to six months of finishing primary treatment.

Such high recovery rates for airline pilots weren't always the case. Before 1975, evidence of alcohol of drug dependence automatically ended a flying career. FAA rules mandated that a diagnosis of alcohol dependence meant a permanent loss of the pilot's airman certificate. Pilots had an even greater incentive than most to deny they suffered from an addiction, and their peers were equally reluctant to express concerns about coworkers alcohol consumption due to the dire consequences.

Recovery experts attribute the success of pilots and physicians returning back to work, free of addiction and depression, to similar factors. After identifying the chemically addicted employee and evaluating them for chemical dependency, the employee undergoes primary treatment for the chemical addiction and participates in long-term aftercare programming that includes continuing support and monitoring.

For pilots, the process can be rigorous. From the start, the pilot is assigned to an independent medical sponsor who oversees every step of the recovery process, including communicating with the FAA, which has the ultimate responsibility to determine if the pilot can return to flying. By all accounts, intensive aftercare is the key. Aftercare can take several different forms and is ongoing for at least two years. It can include staying at a halfway house, participating in aftercare groups, intensive involvement in Alcoholics Anonymous, and reporting to a peer monitor and a company monitor. Relapse prevention education and personal growth counseling further strengthen the likelihood of successful recovery from chemical dependency beyond the normal six-month continuing care program that most professionals in other fields go through.

Even after a returning pilot is certified to fly, they must participate in drug and alcohol screening for a minimum of two years. Ongoing drug and alcohol screening is a condition of their return to work. Pilots who relapse can be certified again upon successful completion of additional treatment, and after demonstrating the factors that led to the relapse were dealt with adequately.

For both physicians and pilots, post-treatment continuing care is a key factor in developing highly successful recovery rates in their professions. But another very important element that leads to their successful treatment and recovery is that physicians and pilots are highly motivated to seek help in order to keep their jobs. For individuals in these careers, loss of license, whether it be by the FAA or a local medical licensing board, means loss of the status related to their profession, as well as the loss of their identity, income, and social standing. Even to the most hardened alcoholic and drug abuser, loss of income means they simply won't be able to afford their abusive habit any longer, and it's time to get some help.

Help for Lawyers (and Their Employers)

One of the most grueling tasks a managing law partner may undergo in their career is to identify an alcoholic or chemically dependent lawyer in their firm and to confront them with their addictive behavior. It is likely that the troubled attorney will deny they have a problem, further compounding the difficulty of the situation and eroding the trust and goodwill of the employer. What's worse

is that, especially in the smaller firm, there is almost always no precedent in the matter, and without guidelines or resources, the employer is usually left wondering, "What's the right thing to do?"

The three components to a successful strategy of getting a healthy lawyer back to work and free of addiction are: 1) dealing with the issue head-on with the purpose of helping the troubled lawyer to accept that they have a problem they cannot deal with on their own; 2) primary treatment for ridding the lawyer of the alcohol and drugs that are in the body's system and are the paramount cause of the lawyer's life-disrupting behaviorisms; 3) intense aftercare programming that is designed to identify the underlying issues in the lawyer's life that led to the addiction and the troubling behavior. There is a direct correlation between the length of time in aftercare programming—with ongoing monitoring and support to help the lawyer stay in touch with the systems and tools that got them on the right path—and the lawyer's chances of a full recovery with no relapses.

Additionally, there are some practical matters that behavioral health professionals point out are necessary to initiate the recovery effort and to keep the healthy lawyer from abusing again. As with physicians and pilots, addicted lawyers are highly motivated to participate in a treatment program if their refusal might mean losing their job. In fact, the majority of successful interventions involving legal professionals occur with participation of legal colleagues and coworkers of the alcoholic or addicted lawyer. Such participation is necessary because, at the point where the legal professional is being asked to acknowledge their problem and get help through treatment, they need to know their job is at stake.

Last chance agreements between the employer and the addicted employee can be a constructive part of recovery by outlining the employee's recovery responsibilities and providing the return-to-work motivation the lawyer often needs. The treatment and return to work agreements typically require the lawyer to formally acknowledge their work performance and/or behavior have provided a basis for termination of employment, and in order to avoid termination, the lawyer voluntarily agrees to seek an immediate evaluation and follow all recommendations of a health care professional. By authorizing within the agreement regular progress reports to be made to the firm during the course of treatment, the employer can talk to treatment counselors to obtain information about treatment compliance and get advice for the lawyer's return to work.

The agreement also acknowledges that the employer will return the lawyer to work upon completion of the recommended treatment program, with an understanding that the return to work is conditioned on the lawyer's strict compliance with other follow-up aftercare recommendations. Such aftercare recommendations include complete abstention from all alcohol and mood-altering substances, frequent attendance at recommended 12-step programs, and regular testing for the presence or use of drugs or alcohol.

Seeking help for a troubled lawyer on staff may not always be a quiet, easy thing, but it is usually necessary to avoid a looming disaster for both the lawyer and the firm.

Theodore J. (Ted) Collins, of St. Paul, Minnesota, serves as of counsel to the firm of Collins, Buckley, Sauntry & Haugh, P.L.L.P, a firm he managed for more than 30 years. As a past supervising attorney, and in his role as board member for the nation's longest continuously operated lawyers assistance program, Minnesota Lawyers Concerned for Lawyers, Collins has seen a lot of employers making decisions about what to do with their alcoholic employees.

"Taking the person out for coffee and telling them that you're worried about them is certainly okay," says Collins. "There are things short of interventions."

Collins worries about employers who find it hard to take that first step and talk to the lawyer suffering from the problem.

"If you aren't going to do the right thing," Collins cautions employers, "you should start thinking about the reasons why you didn't because you are going to need them."

Doing the right thing and getting help for the troubled lawyer is one big step toward avoiding malpractice. A 2002 study by the Oregon Attorney Assistance Program, a provider of malpractice insurance for lawyers in the state of Oregon, revealed that the claim frequency rate for lawyers dropped from 30 percent to 8 percent annually after they received treatment for chemical dependency. Getting help for treatment also means that underwriters who set professional liability policy premium rates will not penalize the lawyer for seeking treatment because, statistically, the recovered lawyer is seen as an average insurance risk compared to the general lawyer population.

For the employer that is willing to take the steps necessary to get help for the addicted attorney but would like some assistance, addiction recovery professionals like Messinger are available to usher the firm through the process. Everything from advising firm managers and organizing the intervention to drafting and implementing the treatment and return to work agreement can be accomplished with the assistance of addiction recovery specialists.

"A big firm would typically have employee assistance programs in place," says Collins. "Small firms have a duty to try and encourage healthy behavior and to act on it when they notice the changes." And as Collins points out, noticing the addictive behavior and acting upon it may come a lot sooner in a small firm environment where it is tougher for lawyers to successfully hide their problems.

The old theory of waiting until the lawyer with the problem hits bottom is not often mentioned anymore as a strategic option.

"It takes tremendous courage," says Collins. But by forcing the choice to get help, and having some expectations for the lawyer in recovery, the employer can save a life as well as a firm.

Todd C. Scott is VP of Member Services and Risk Management at Minnesota Lawyers Mutual Insurance Company. He blogs at www.attorneysatrisk.com and can be reached at tscott@mlmins.com or on Twitter at RUatRISK.

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PRACTICE MANAGEMENT

Lessons From National Disability Insurance Awareness Month Apply Year-Round

Special to Sections of the ABA from the American Bar Endowment (www.abendowment.org)

Each year in March Lifehappens.org sponsors Disability Insurance Awareness Month (DIAM), but the lessons from DIAM apply year-round, and may be important for ABA members to learn more about.

Just ask any financial advisor what risk could be called "the forgotten risk," and, chances are, the answer will be disability. Their clients often ask whether they have too little, too much, or the right kind of life insurance, but rarely have they thought about how they could survive financially if their income stopped due to a disability. In reality, disability insurance is as important as (and in some cases, even more important than) life insurance.

Want to know how much disability insurance you could need? Check out this online disability insurance calculator.

Facing the Numbers

At any given age, the odds of becoming disabled are much higher than the odds of dying. Every year, 12 percent of the adult US population suffers a long-term disability. One out of every seven workers will suffer a five-year or longer period of disability before age 65. If you're 35 now, your chances of experiencing a three-month or longer disability before you reach age 65 are 50 percent, according to the National Association of Insurance Commissioners (NAIC). If you're 45, the figure is 44 percent.

These odds would not be a problem if people had substantial savings that could be drawn on in the event of a disability. But that's rarely the case, and any money that has been set aside has likely been earmarked for goals such as college or retirement. In a 2007 NAIC survey, 56 percent of adults said they would be unable to meet their expenses if they couldn't work for a year due to a disability.

Disability Is Called "A Living Death" for Good Reason

First, suffering a disability would be a catastrophic event for you, your family, your friends, and your coworkers. It could create enormous emotional pressures for the family because your role would change, and you would have physical needs to be met. There could be enormous financial pressures that would exacerbate those emotional pressures. You could witness firsthand the impact that your disability planning—good or bad—would have on you and your family.

Harder to Get

To complicate matters, fewer employers offer disability insurance than life insurance, and it may be harder to qualify for individual disability coverage than for individual life insurance. If you are a solo or small law firm practitioner, there may be even fewer options. The bottom line is that if you're working you should protect your income, and one way to do that is with disability insurance.

When you apply for disability insurance, usually you can get a maximum of 60 percent of your monthly earned income before taxes. (Unearned or investment income does not qualify, because it presumably continues even if you are disabled.

Social Security Disability Coverage

If you have been working for at least 40 quarters, you may be able to obtain a small disability benefit from Social Security. However, there is a lengthy waiting period, you have to be so disabled that you cannot do *any* job (not just those for which your education and training suits you), and it's very difficult to obtain benefits. More than 80 percent of the applicants fail the first time around. Some hire lawyers to help in the appeals process, which can take more than a year.

You can get an estimate of your Social Security disability benefits online. Just as with retirement benefits, your disability income is dependent upon your "covered earnings," or the amount on which you are taxed for Social Security. Because they're so hard to come by, don't count on Social Security disability benefits when you evaluate your disability income needs.

Features and Benefits of Coverage

Insurance can becomplicated because of the variety of policies available, and disability is no exception. There are all kinds of disability policy features and benefits. However, the basics are simple. The first feature to consider is the amount of monthly benefit. Many disability policies have a fixed monthly benefit that does not increase with time. If you remain healthy, you may be able to apply for additional coverage if your income goes up in the future, or some policies offer an automatic benefit increase rider that you can purchase with your policy for an extra premium.

The second, and perhaps the most important, feature of your plan is the definition of disability— whether it is "own occupation" (the inability to perform the duties of your specific occupation) or "any occupation" (the inability to perform the duties of any job for which your education and training make you qualified). One reason ABA members turn to American Bar Endowment (ABE) sponsored insurance is that ABE has negotiated an "own occupation" definition

of disability that includes your specialty of law. With this feature, you can receive benefits for up to five years when you are totally disabled and unable to perform your regular job including specialty of law—not just "any job." It's an important feature if you become disabled. You can find more information on ABE-sponsored Disability Insurance plans. The third important feature of your plan is the waiting period, or the amount of time you must be disabled before benefits begin. These waiting periods can range from one week to two years. Waiting period length does affect the cost of coverage. The longer the waiting period, the lower the cost of the coverage.

Another feature to consider when choosing a disability plan is the benefit period, or how long you will receive monthly benefits once your disability plan begins to pay. The benefit period can range from six months for a short-term disability plan to age 65 for a longer term disability plan. Of course, the longer the benefit period, the more the disability plan will cost.

Other Options

In addition to these features, there may be other coverage options, as well as a variety of riders. An important rider can be one that pays a partial benefit if you can return to work only part time. As noted above, another rider may offer you automatic benefit increases once you become disabled so that your benefits keep up with inflation.

In addition, there may be a rider for an additional-purchase option, which guarantees you the right to buy additional disability insurance in the future if your income increases, regardless of your health at that time.

Start With Your Employer

If you are evaluating your disability insurance needs, the first place to check is with your employer. Group insurance coverage offered by the law firm may be less expensive than an individual policy and may not require health underwriting. Your firm may also pay part or all of your disability premium. Ironically, it is not necessarily beneficial for your employer to pay for your coverage. Normally benefits are taxable if paid by an employer and nontaxable if you pay the premium personally. (Talk with your tax advisor about your particular situation.) Since you cannot insure 100 percent of your income, whether you pay income taxes on your disability benefits can make a huge difference in your family's standard of living.

When you review your law firm's coverage, keep these points in mind: if it doesn't cover at least 60 percent of your income, doesn't pay benefits to age 65, and has a waiting period longer than your savings can last, you may need to look into individual insurance as well.

Turn to Your Professional Association

Professional associations are a resource for insurance, including disability insurance. All American Bar Association members are eligible to apply for ABE-sponsored group insurance, which provides quality, affordable insurance tailored to meet the needs of attorneys. ABE-sponsored plans are from trusted insurers and provide portable, flexible coverage options for members and their families. In addition, ABE-sponsored plans have a unique charitable feature ABA members are asked to donate their share of any dividends on the group policies to the ABE. The ABE awards substantial grants from these donated dividends each year to the ABA Fund for Justice and Education and the American Bar Foundation for their work in advancing research, education, and public service in the field of law. Last year's grants totaled more than $7 million! You can find out more information about ABE-sponsored insurance programs.

Buying on Your Own

Individual policies can vary enormously. The monthly benefit amount for which you can qualify, the price, and the benefit period depend upon your occupation, income, health, and other factors, because most individual disability insurance policies have a health underwriting requirement.

Here are some rules of thumb to consider as you look to buy disability insurance:

- Buy the highest monthly benefit for which you can qualify and you can afford.
- Consider an “own occupation” feature. Many insurers now only offer the “any occupation” coverage, which could force you to work at any job, even if it isn’t in the legal field.
- Choose the longest waiting period that your savings will allow. A policy with a six-month waiting period is much less expensive than one with a 30-day waiting period.
- Buy coverage for the longest benefit period possible. A plan that pays to age 65 may be a good option if your plan is to work until then.

The not-for-profit American Bar Endowment provides unique opportunities for all ABA members to get quality, affordable insurance for attorneys, through trusted insurers, while giving back to the good works of the legal profession. Through the ABE, ABA members can donate dividends to help fund the hundreds of legal public service and educational activities of ABA's Fund for Justice and Education (FJE) and the legal research and activities of the American Bar Foundation (ABF).