

Law Trends & News

PRACTICE AREA NEWSLETTER



SUMMER 2011
VOL. 7, NO. 4

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TO WIN."**

SUSAN CLARY, PARTNER, HENNELLY & GROSSFELD, LOS ANGELES



CHAIR'S NOTE

Dear Division Member:

Below is the final issue of *Law Trends* for the 2010–11 bar year. As always, this is a very exciting issue, and I am very happy to present it to you. As with prior issues, this publication is designed to help simplify your practice by including articles, checklists, and other valuable practice information and practical tips.

In this issue, there is an article about very recent changes to the Delaware Corporation Act, portions of some books recently published by the Division, including one about sample letters to use to corporate clients, another about handling a commercial real estate transaction, and yet a third about selected forms to use in estate planning. These books cover many issues solo and small firm attorneys encounter on a daily basis, and many also have sample forms to use in the representation of a client. Each book has a link that lets you look at the topics in these books. If you like what you see, you can immediately purchase any of them.

With this issue, *GPSolo Law Trends & News* is now completing its seventh year and is certainly a member benefit. We hope you agree that with each edition, *Law Trends* continues to provide meaningful articles for you, and that this edition, like the others, helps you in your daily practice. I encourage you to take just a few moments to read the list of articles included below. Of course, it 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  PDF link.

There are many Division members integrally involved in putting this publication together. Their hard work and dedication are certainly present. I thank them for producing another fine year of *Law Trends* for the Division. Without their superb efforts, none of this would be possible.

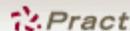
I hope each of you enjoys this issue of *Law Trends*. If you are interested in either writing an article or participating in the production of the newsletter, please contact Jim Schwartz, our editor-in-chief, at attyjls@aol.com. Jim has been the editor since *Law Trends* was launched seven years ago and will continue next year. I thank him for his work as well

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

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LETTER FROM THE EDITOR

Dear Division Member:

I have been editor of *GPSolo Law Trends & News* since its founding. We are now completing our seventh year as a publication. In that time, we have strived to bring you timely and helpful articles and checklists—all to help you in your daily practice. I am proud of the quality of articles and tips given this year, and I hope you enjoyed them as well.

Beginning with the next bar year, there will be some exciting changes to *Law Trends* and the other electronic newsletters each of you receives from the Division. *Law Trends*, the *Technology eReport*, *Solo*, and *The Buzz* are being combined into one publication entitled *GPSolo eReport*, which will be sent to you monthly. By combining them and sending them to you monthly, you will receive the very finest materials from the Division on a monthly basis in one email and still have the luxury of either downloading only those portions you want to keep or downloading the entire *eReport* to read at your leisure.

For a publication like *Law Trends*, or any of the Division's other publications, to excel, the people working on them must be a dedicated group of volunteers. To be sure, *Law Trends* has had the very best volunteers, not only this year, but also for all of the years it has been a standalone publication. I have had the extreme pleasure of benefiting from the efforts of such a group. And so, with this being our final standalone issue of *Law Trends*, I want to take this opportunity to thank the men and women from the Division who have volunteered their time and worked on *Law Trends* this past year. They are as follows:

Assistant Editor-in-Chief

Kathleen Hopkins

Assistant Editors

Brian Annino, Ken Ashman, John Carr, Henry DeWoskin, Todd Frommeyer, Jennifer Hilsabeck, David Kaufman, Evan Loeffler, Lynne Ostfeld, and Ignacio Pinto.

Lastly, I also want to give an extraordinary *special thanks* to Tom Campbell from ABA Publishing. Without his incredible assistance and guidance, none of this would have ever been possible or have happened. His dedication and zeal can be seen in the product delivered to you, and I sincerely thank him for a job very well done.

I again congratulate each and every person involved with *Law Trends* this year as a stand alone and look forward to working with everyone next year as *Law Trends* evolves into *GPSolo eReport*.

Respectfully yours,
Jim Schwartz
Editor

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By Jean L. Batman

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Practice Area Division Director Henry DeWoskin
Law Trends & News Editor James Schwartz
Law Trends & News Associate Editor Kathleen Hopkins
Assistant Editors Brian Annino, Ken Ashman, John Carr, Travis Cushman, Henry DeWoskin, Todd Frommeyer, Jennifer Hilsabeck, Chantis Jenkins, David Kaufman, Travis Life, Evan Loeffler, Lynne Ostfeld, Ignacio Pinto

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Rethinking the Tire Without Reinventing the Wheel: Delaware Clarifies and Improves Business and Corporate Statutes for 2011

By Scott L. Matthews

Delaware long has sought to cement its role as the pre-eminent jurisdiction for the formation of business entities and as a leading commercial law jurisdiction. In 2011, the Delaware General Assembly amended the General Corporation Law of the State of Delaware (the DGCL), the Delaware Limited Liability Company Act (the LLC Act), the Delaware Revised Uniform Limited Partnership Act (DRULPA), the Delaware Revised Uniform Partnership Act (DRUPA), and the Delaware Statutory Trust Act (the DSTA), and adopted the Uniform Foreign-Country Money Judgments Recognition Act (UFCMJRA) to replace the Uniform Foreign Money Judgments Recognition Act (UFMJRA), in an effort that may best be analogized to improving tire technology without changing the fundamental shape or nature of the wheel. Unless otherwise stated, amendments are effective August 1, 2011.

In one of the more substantive amendments to the various entity statutes, DRULPA, DRUPA, and the LLC Act were amended to provide for a result different from that articulated by the Delaware Chancery Court in *In re LJM2 Co-Investment, L.P. Limited Partners Litigation*, 866 A.2d 762 (Del. Ch. 2004), in which the court held that if a partnership or LLC agreement contained a clause requiring a supermajority vote to amend any provision itself requiring a supermajority vote for action to be taken, then the supermajority amendment provision also applied to default provisions of the applicable entity statute not included in the text of the agreement. The amendments make clear that such a supermajority amendment provision does not apply to default provisions of the applicable entity statute, absent express contractual incorporation by reference.

DRULPA, DRUPA, and the LLC Act were also amended to allow for the filing of a certificate of correction to effectively “correct” the filing of a certificate of cancellation of a partnership or LLC that was filed prior to the completion of the winding-up process of the entity. The main problem these amendments were designed to eliminate is the situation where stakeholders in a Delaware LLC or partnership discover an asset or liability after termination of the legal existence of the entity, despite their best efforts to identify all actual or contingent assets and liabilities of the entity in the dissolution and winding-up process.

Written consents are another area of controversy in LLC and partnership law. The LLC Act, DRULPA, and DRUPA were amended to provide that when providing electronic evidence of written consent to actions to be taken by the entity, the members, managers, or partners, as the case may be, need not restate subject matter of the resolutions being adopted, as is required by the stockholders of a Delaware corporation.

DRUPA was amended to provide that a partner is not personally responsible for liabilities arising out of circumstances or events occurring during the period in which a general partnership has limited liability partnership status. Previously, the statute provided protection for partners only with respect to liabilities *incurred* during the period in which a partnership is a limited liability partnership—not for liabilities which materialize later but are the result of circumstances or events during the period of the partnership’s LLP status. DRUPA was also amended to clarify that the cancellation of a statement of partnership existence does not act to cancel a statement of qualification as an LLP, or vice versa.

The LLC Act was amended to establish a default rule for amendment of an LLC agreement. Previously, the statute did not address whose consent was required for amendment of an LLC agreement, in the absence of an express amendment provision. Now, if the LLC agreement does not provide for the manner in which it is to be amended, the unanimous consent of the members is required under the new default rule. Unlike the majority of the other amendments, this one takes effect January 1, 2012.

In addition to the more substantive amendments, there were several amendments designed to make the practical administration of Delaware business entities easier, and several amendments to the DGCL that clarify certain matters.

The alternative entity statutes were all amended to provide that, effective January 1, 2012, if a certificate establishes a future effective date, such date may not be more than 180 days from the date of filing. The alternative entity statutes were also all amended to provide that parties may no longer form an entity with the same name as another domestic entity of the same type (prior to August 1, 2011, this was permitted but required the consent of the existing domestic entity). All of the entity statutes were revised to clarify that when converting or domesticating, a certificate of domestication or certificate of conversion, as well as the applicable entity certificate, must be filed simultaneously, and that if a future effective date is used, it must be identical in both filings. Finally, for all Delaware business entities, parties must provide the postal code of the registered agent, registered office and trustee, as applicable, when making any new filing that includes the address of such party.

The DGCL was amended to confirm that a provision of a corporate charter or bylaws that provides for a right to indemnification or advancement of expenses may not be eliminated or impaired by a change to the certificate of incorporation or bylaws after the occurrence of the act or omission that is the subject of such provision, unless the provision in effect at the time of the act or omission expressly authorizes such elimination or impairment. The provision had been added in 2009 to supersede a contrary judicial decision, but it was

unclear whether the provision was limited to restricting the effect of the amendment solely of the original provision giving rise to the right to indemnification or advancement, and not other provisions of the charter or bylaws. The DGCL was also amended to confirm that the filing of a certificate of dissolution, merger, transfer, or conversion requires the payment of franchise taxes due through the month of effectiveness of the filing, and the filing of an annual report for the year in which the filing is to become effective, on the part of the corporation that is to be dissolved, merged, transferred or converted by the filing.

The DSTA was amended to provide that an agreement of merger adopted in accordance with the DSTA may amend the governing instrument, or may provide for the adoption of a new governing instrument, of the surviving or resulting statutory trust. The DSTA was also amended to provide that a registered agent of a statutory trust may resign as registered agent, either with or without appointing a successor (though if resigning without appointing a successor, the resigning agent must notify the trust at least 30 days prior to such resignation, and the resignation is not effective until 30 days after the filing of the certificate of resignation).

In addition to the important amendments made to the various business entity statutes, Delaware also adopted the UFCMJRA, promulgated by NCCUSL and recommended by the ABA. The UFCMJRA replaces the UFMJRA of 1965. Although it is similar to its predecessor statute, the UFCMJRA makes key procedural distinctions and clarifications. Among them, the statute now expressly provides that judgments entitled to full faith and credit under the US Constitution are not subject to the statute. Although the statute now expressly requires the party seeking recognition of a judgment to bear the burden of proof that the judgment is subject to UFCMJRA, it also expressly requires that a party bears the burden of proof when seeking to establish that a specific element of the statute requires that a judgment not be recognized. The UFCMJRA further provides guidance as to the process for seeking recognition of a foreign judgment. Finally, the UFCMJRA provides that a judgment must still be enforceable in its country of origin, or, if the country of origin does not have a relevant statute of limitations, it provides a 15-year statute of limitations on enforcement in the enacting jurisdiction. The enactment of the UFCMJRA was effective immediately upon signing of the bill into law by Governor Jack Markell on June 28, 2011.

With these amendments, Delaware has ensured that the coherent, practical body of law that has been developed in the state over the course of the past century has been enhanced yet again. Without reinventing the wheel, the general assembly, with the assistance of the state bar, has improved upon its tires, and the next step will be for the various constituencies to give them a kick.

Scott L. Matthews is Counsel at The Delaware Counsel Group LLP in Wilmington, Delaware, where he focuses on Delaware corporate and alternative entity advice and commercial transactions. He can be reached at smatthews@delawarecounselgroup.com.

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New INCOTERMS 2010

By Lynne R. Ostfeld

An important part of a contract for the sale of goods, particularly but not only when the sale is between nationals of two or more countries, is who pays for the transport and where transfer of title takes place. INCOTERMS were designed to help resolve these issues. However, they do not deal with the formation of the contract, liability, jurisdiction, breach, etc.

INCOTERMS stand for International Commercial Terms and are commercial terms drafted and published by the International Chamber of Commerce (ICC) in Paris. First published in 1936, the terms were just updated in 2010 and are often referred to as INCOTERMS 2010. These became effective January 1, 2011, and are recommended for use for contracts executed subsequent to that date. The new INCOTERMS will not invalidate contracts using the prior version. Drafters should specify which version is being used.

These terms are intended to define the tasks, costs, and risks associated with the transportation and delivery of goods. They are intended to clarify who takes responsibility for which aspect of the transport of goods and to avoid confusion and misinterpretation. There is no INCOTERM obligating the seller to hand the goods over to the buyer. It does not exist under the UN Convention on the International Sale of Goods (CISG). It is considered impractical with international sales.

Domestic transactions are now included. The UCC now refers to INCOTERMS, because they make more sense.

Some abbreviations have been accepted as INCOTERMS, some have not. COD and FOB are not INCOTERMS.

Also, the transactions can now be done electronically. String sales are also addressed in the INCOTERMS 2010.

The parties to a contract can modify the terms but do so at their own risk.

The obligations of the buyer and seller which are regulated by the INCOTERMS rules address:

- responsibility for export, import, and transit clearance including security clearance
- contracts of carriage and insurance
- place/point of delivery and of taking delivery
- act of delivery, loading, and unloading
- transfer of risks
- allocation of costs
- notices and assistance with information
- packaging and marking

The application of a clause of the INCOTERMS results in the appliance of the ICC rules for the use of domestic and international trade terms. INCOTERMS are not law, except for being a part of the contract. Different jurisdictions rule differently about whether the site of delivery is also the site of legal jurisdiction.

There are now 10 identical headings and 11 terms. They were reduced from the previous 13, which were used in INCOTERMS 2000.

Two new rules have been introduced:

DAT—Delivered at Terminal
DAP—Delivered at Place

These replace four rules of the prior version:

DAF—Delivered at Frontier. This was used only with truck and train transport because the goods were delivered at the border. It was hard to handle with air transport of goods.
DES—delivered ex ship
DEQ—delivered ex quay
DDU—delivered duty unpaid

The eleven clauses are arranged in different groupings. There is a group of seven rules which applies regardless of the method of transport: EXW—Ex Works (named place); FCA—Free Carrier (named place); CPT—Carriage Paid To (named place of destination); CIP—Carriage and Insurance Paid to (named place of destination); DAT—Delivered at Terminal; DAP—Delivered at Place (named place of destination); DDP—Delivered Duty Paid (destination place).

A smaller group of four rules is applicable only to sales that solely involve transportation over water, whether ocean and inland water transport: FAS—free alongside ship (named loading port); FOB—Free on board (named loading port); CFR—cost and freight (named destination port); CIF—cost, insurance, and freight (named destination port).

Four groups cover systematic characteristics:

C Group

CFR—cost and freight

This is only for sea or inland waterway transport. It involves placing the goods on board the vessel or procuring goods already so delivered.

CIF—cost insurance and freight

This is only for sea or inland waterway transport. It involves placing the goods on board the vessel or procuring goods already so delivered. The seller provides insurance cover during transport of the goods.

CPT—carriage paid to

This involves any mode of transport, and the handing of the goods over to the carrier.

CIP—carriage and insurance paid to

Any mode of transport is covered. The seller hands the goods over to the carrier. Insurance cover is paid by the seller during the transport of the goods.

With CPT and CIP, the place of delivery may be designated as being at the seller's place of business or at any place between the seller's place of business and the site of transport.

Export clearance is up to the seller to obtain. The import and transit clearance are up to the buyer to obtain.

D Group

DAP, DAT, DDP—all three deal with any mode of transport.

DAP—delivered at place (new)

This term involves any mode of transport, and the placing of the goods at the buyer's disposal, ready for unloading.

DAT—delivered at terminal (new)

This term involves any mode of transport, with the goods unloaded and placed at the buyer's disposal.

Between DAP and DAT, the only difference is the loading.

DDP—delivered duty paid

This allows for any mode of transport, and placing the goods at the buyer's disposal ready for unloading. The clearance for export, transit and import are up to the seller.

In the D Group, the place of delivery may be at the buyer's place of business or any place between the buyer's port of entry and his place of business. Import clearance is up to the buyer to obtain, except for DDP, where the seller must obtain it. Export and transit clearance are up to the seller to obtain.

E Group

EXW—ex works

This covers any mode of transport. The seller places the goods at the disposal of the buyer, without loading the goods onto the carrier. The export and import clearance is up to the buyer to obtain.

F Group

FCA—free to the carrier at a named place

Any mode of transport is covered. This is especially designed for transport in containers, as well as the handing over of the goods or placing them at the buyer's disposal.

The place of delivery may be fixed at the place of business of the seller or at any place between the seller and the port.

Import and transit clearance are up to the buyer to obtain while export clearance is up to the seller to obtain.

This is designed for the seller to place the goods on board or procuring their placement on board the carrier. It allows the seller of a commodity to resell it to someone while the good is in transit. It is already on board and the impossibility of putting it on board as part of the sale is eliminated.

FAS—free alongside ship

This is only for sea or inland waterway transport, and placing the goods at the buyer's disposal.

FOB—free on board

This is also only for sea or inland waterway transport. This involves the seller placing the goods on board the vessel or the buyer procuring goods already so delivered. It is not designed for goods in containers.

Further information, as well as the purchase of the ICC's publications, can be obtained at <http://www.iccwbo.org/incoterms>.

Lynne R. Ostfeld, Lynne R. Ostfeld, P.C., is a solo practitioner with an associated office in Paris and Vincennes, France. She concentrates in business law, civil litigation, estate planning and probate, and agribusiness. She is adjunct professor at The John Marshall Law School where she teaches an international agribusiness law class.

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[EDITOR'S NOTE: Below are a sampling of some selected letters from a book written by Jean L. Batman. This book contains many valuable letters that can be used when writing to a business client. I find this book quite helpful in giving guidance to the attorney in everyday practice when communicating. It also has sample letters terminating contracts, sample letters of intent, and many more. In future issues, other sample letters will be published. JLS.]

Marketing Letter Featuring an Attorney and Reception

{Date}
{Name}
{Company Name}
{Address}
{City, State, Zip Code}

RE: FIRM Welcomes ATTORNEY

Dear {Salutation}:

Please join us in welcoming ATTORNEY to the FIRM as a Partner in the CITY office, where she will continue to focus her practice on general corporate, securities, and commercial transactions.

ATTORNEY serves as outside General Counsel to a variety of companies and individuals engaged in a broad range of industries, including Real Estate Development, Financial and Professional Services, Manufacturing, Software, Retail, Biotechnology, and High Technology. She has lectured and written on a number of topics of interest to the business community, such as Venture

Financing and Finding Practical Solutions to Common Business Problems.

[ATTORNEY leadership positions, memberships, and awards.]

ATTORNEY is a graduate of the LAW SCHOOL (J.D.) and UNDERGRADUATE UNIVERSITY (B.A. in Political Science).

We invite you to meet ATTORNEY at the following informal reception welcoming her to FIRM:

DATE:

TIME:

LOCATION:

RSVP:

Thank you.

Very truly,

FIRM NAME

Lawyer Name

Seasonal Greetings

{Date}

{Name}

{Company Name}

{Address}

{City, State, Zip Code}

RE: Happy Holidays!

Dear {Salutation}:

This is the time of year we reach out to friends, family, and colleagues to let them know how much we appreciate them and to give our warmest wishes for the holidays and the New Year. We don't say it often enough—thank you!

It has been a busy year for many of you forming new entities, learning to grow, forging strategic partnerships, and closing financing transactions, both at home and at the office. We're proud to have been at your side each step of the way.

Best wishes for an enjoyable holiday season and a very happy New Year!

Warmly,

FIRM NAME

Lawyer Name

Estimating Legal Expenses for a Start-up

{Date}

{Name}

{Company Name}

{Address}

{City, State, Zip Code}

RE: Estimating Legal Expenses for Your New Venture

Dear {Salutation}:

I enjoyed reading your Executive Summary. I see a lot of potential for your business concept. For what it's worth, I have attached a copy of the template I give to my clients for their Executive Summaries.

Below is a discussion of the some of the types of legal expenses you may

encounter in your new venture. But first, I have to give you my disclaimer about estimates (which you'll see again in our engagement letter, if we get to that stage):

Any estimate of fees and costs associated with our engagement is only an estimate, not a fixed fee or an agreed limit. The actual fees and costs incurred will depend on a variety of factors, some of which are beyond our control. At the same time, we understand that you may wish to establish a budget for your legal expenses and will work with you to establish such budgets on request. We will also work with you to help make the most efficient use of our time as practicable. Although we will perform our professional services to the best of our ability, we trust you understand that we cannot guarantee, and we have not guaranteed, any outcome.

We should probably talk further about what type of entity makes the most sense for this business. However, based on your stated goal of taking the company public, and the likelihood of having to raise venture capital on the way to an IPO, it probably would be best to form a corporation, and it may be beneficial to form it in Delaware rather than California. Legal fees, filing fees, filing service, and agent for service of process costs will vary depending on where the company is formed and the number of states in which you must qualify to do business, among others elements.

A Shareholder Agreement among founders is highly recommended. Budget some cost for a basic agreement to document rights of first refusal, buy/sell provisions, etc. This can take a lot of time and cost a lot more if the founders don't readily agree on a valuation method, vesting requirements, or transfer restrictions in general—or don't really know what they want to cover. However, I think it is worthwhile doing, even if it becomes pricey, because I have seen companies fail over disputes among founders in the absence of an agreement (not that an agreement is any guarantee, but it can be a big help).

Investor documentation and securities law compliance in connection with early-stage fund-raising can be done relatively inexpensively if you limit yourself to "Accredited Investors" as defined in Rule 501 of Regulation D under the Securities Act, a small number of investors, and raise money in California only. An Accredited Investor has individual income (exclusive of the income of his spouse) in excess of \$200,000 for each of the two most recent years, or joint income with his spouse in excess of \$300,000 in each of those years, and reasonably expects the same income level for the current year; or has (either individually or with his spouse) a net worth in excess of \$1 million. Some entities also qualify as Accredited Investors. Accredited Investors are generally deemed to be capable of protecting their own interests in making an investment decision and should be given full access to company information and management in the conduct of their due diligence, subject to an appropriate confidentiality agreement.

Your costs will also be lower if all of your investors are in California, as you will avoid having to file multiple securities law notices and pay multiple filing fees. However, having investors in a number of states is not a real problem (as compared to accepting non-Accredited Investors); it will just mean we'll have to file notices with the SEC and each state in which you sell shares, and pay the applicable state filing fees, as opposed to a single notice and a single fee if everyone is in California. Therefore, your legal costs in connection with early-stage fundraising can vary dramatically. Based on our telephone conversation the other day, if you're only raising funds from one or two Accredited Investors in California, investing in Common Stock (as opposed to Preferred), your legal budget for the offering can definitely be on the lower end of the spectrum. However, if it turns out your investors want venture capital-style documentation (e.g., preferred stock, shareholder agreement, voting agreement, legal opinion, etc), which more and more high-net-worth investors (or "Angels")

require, your legal costs will be much higher.

Trademark registrations are recommended, and the cost varies depending on the number of marks and the number of classes of goods in which each mark is to be registered. The USPTO filing fees for applications completed online are currently \$275 for each class of goods or services for each mark being registered. Our fees will depend on the amount of time spent. Professional search costs (to determine availability) can be expensive, but a lot of my clients do their own searches using online resources and skip right to the application itself if the mark appears to be available. Of course, relying on your own research could result in an investment in a mark that you are ultimately not able to register.

There will, no doubt, also be other contractual arrangements to document along the way, such as for production, manufacture, distribution, etc. Also, if you don't already have one, you should be using a Nondisclosure Agreement (NDA) before you reveal any details of the proposed product/business to third parties. I can prepare a form NDA for you if you need one. Also, I have sample agreements for a wide variety of circumstances that I can use to prepare whatever types of agreements you may need along the way. However, it should be noted that third parties often insist on using their own forms, in which case you'll want me to review and/or revise them before you sign. I'd suggest including room in your budget for these sorts of ongoing legal drafting and review projects that inevitably arise along the way. Some months may go by without using the budget, and some months may burn up several months' worth of the budget. Simple form contract preparation or review can take as little as one-half hour, while complex contractual arrangements can cost a fortune to complete. I don't imagine you'll encounter anything too complex in the beginning, but since you don't know exactly what you will encounter, you would be wise to have something in your budget on an ongoing basis.

Rather than going on and on, let me just say that I am very efficient with my time, having practiced in this area of law for many years, and will work with you to attempt to keep your legal costs well within your budget.

Please do not hesitate to call me with any questions with regard to the above. I hope to have the opportunity to work with you on this exciting new venture.

Very truly,
FIRM NAME
Lawyer Name
Enclosure

Forwarding a Template for an Executive Summary

{Date}
{Name}
{Company Name}
{Address}
{City, State, Zip Code}

RE: Drafting an Executive Summary

Dear {Salutation}:

Attached please find an Executive Summary template you can use to approach prospective investors. You may want to require a nondisclosure agreement before you share a detailed business plan with anyone.

I would be happy to review your draft Executive Summary for suggested changes from a legal perspective. At the very least, please retain the restrictive language on the front of the template and the safe harbor language at the end.

Your Executive Summary should be revised each time there is a material change to any of the information contained in the summary. Be sure to review your summary periodically with an eye toward necessary changes.

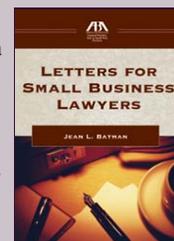
Finally, please remain mindful of the type of prospective investor you approach, as we discussed in connection with the securities law requirements for your proposed stock sale.

Please do not hesitate to call me with any questions in regard to the above.

Very truly,
FIRM NAME
Lawyer Name
Enclosure

[Letters for Small Business Lawyers](#)

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Jean L. Batman founded Legal Venture Counsel, Inc. in 2004 to provide outside general counsel services to investors, entrepreneurs, and small businesses. Prior to forming Legal Venture Counsel, Ms. Batman was a Partner in the San Francisco offices of Duane Morris LLP, one of the country's 100 largest law firms. As outside general counsel to a variety of companies and individuals, Ms. Batman provides business and financial legal services to privately-held entities operating in a broad range of industries including real estate development, financial and professional services, manufacturing, software, retail, biotechnology/specialty pharmaceutical, and high technology.

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Duty to Defend

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The Insurer's Obligation to Defend Its Insured

The Policy Language

Insurers have two significant obligations to their insureds under a commercial general liability (CGL) policy: a duty to defend, and a duty to indemnify. The duty to defend is a contractual obligation almost always found in CGL policies and, as the costs of litigation continue to rise, is often considered to be more valuable to an insured than the duty to indemnify.

The origin of the duty to defend is purely contractual.¹ Most CGL policies contain a standard clause setting forth the obligation and the right to defend.² The contractual duty to defend comes directly from the insuring agreement set forth in the coverage form and typically provides as follows:

We will pay those sums that the insured becomes legally obligated to pay as damages to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any occurrence and settle any claim or "suit" that may result: But:

- (1) The amount we will pay for damages is limited as described in Section III—Limits Of Insurance; and
- (2) Our right and duty to defend ends when we have

used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.³

Contrast this language with an example of language concerning defense obligations under a professional malpractice policy:

Subject to this Subsection V.C., it shall be the duty of the Insureds and not the duty of the Underwriter to defend Claims against the Insureds.

The Company and the Insured Persons agree not to settle any Claim, incur any Defense Cost or otherwise assume any contractual obligation or admit any liability with respect to any Claim without the Underwriter's written consent. The Underwriter shall not be liable for any settlement, Defense Cost, assumed obligation or admission to which it has not consented.

The Underwriter shall have the right and shall be given the opportunity to effectively associate with the Company and the Insured Person in the investigation, defense and settlement, including but not limited to the negotiation of a settlement, of any Claim that appears reasonably likely to be covered in whole or in part by this policy.

Defense Costs are part of and not in addition to the Limits of Liability set forth in Item 2 of the Declarations, and the payment by the Underwriter of Defense Costs reduces such Limits of Liability.⁴

Moreover, compare this provision to language found in this marina operator's liability policy:

We agree to indemnify to the extent of this coverage's proportion of legal costs or fees, or expenses of counsel, occasioned by the defense of any claim against you for any liability, or your alleged liability covered by this form, provided that such costs, fees or expenses are incurred with our prior written consent. We shall have the option of naming attorneys to represent you in the defense of any claim insured hereunder made against you and we may exercise exclusive direction and control of said defense. You shall cooperate with us and shall not assume any obligations, admit any liability, or incur any expense for which we may be liable without prior written approval.⁵

In most jurisdictions, if an insurer fails to provide a defense, it is found to have breached its contractual obligation to the insured and it may be held liable for all damages that normally would be expected to flow from that breach.⁶

While the insurance carrier's contractual obligation and right⁷ to defend the insured usually arises out of this policy language, there is growing support for the proposition that even if the policy does not contain such specific language, the court will require the insurer to defend if the insured has a reasonable expectation of a defense.⁸ For example, the U.S. Court of Appeals for the 10th Circuit, in deciding whether, under Oklahoma law, a carrier had a duty to defend an alleged advertising injury claim, stated that "the defense duty is measured by the nature and kinds of risks covered by the policy as well as by the reasonable expectations of the insured."⁹ It is important to note that if an insured accepts a defense from its insurer, it has an affirmative obligation to cooperate with the insurer in carrying out that defense.¹⁰

A “Claim” Versus a “Suit”

Generally speaking, CGL insurance policies distinguish between an occurrence that gives rise to a claim under a policy and a lawsuit being filed against an insured. In fact, the policy language typically requires notice of both. An occurrence generally is defined as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.”¹¹ The duty to defend generally is triggered when a “suit” asserting liability covered by the policy is filed, but “suit” is generally not a defined term in the policy. While the majority of decisions across the country have held “suit” to mean a complaint or legal action,¹² a “suit” for the purposes of triggering the insurer’s obligation does not always mean a complaint filed in a court of law.¹³ For example, various courts have held that an insured has a right to be reimbursed for its expenses incurred in defending itself in administrative proceedings.¹⁴

Tendering the Defense

In order to trigger the insurer’s contractual obligation under the duty to defend, the insured must tender its defense in accordance with the policy’s conditions. The tendering of a defense is considered a precondition to coverage.¹⁵ The standard “Commercial General Liability Conditions” provide that the insured is required to give notice of any suit filed against it “as soon as practicable,” furnish the insurer with the specifics concerning when it was served, and forward to the insurer all legal papers it receives on a timely basis.

To ensure that the duty to defend is triggered, an insured is best off tendering its notice of suit to the carrier with an affirmative request for a defense under the policy. However, some courts have held that it is implicit in the notice of suit that the insured is demanding a defense.¹⁶ Other courts, though, have held that the obligation was not triggered where the insured did not make a specific request.¹⁷ Several other factors, including compliance with the notice requirements specified in the particular policy, also must be weighed in determining whether the carrier’s obligation to defend has been triggered.¹⁸ Generally, the insurer has no obligation to reimburse or assume defense costs prior to the time it receives notice of the claim.¹⁹

The Duty to Defend in the Presence of a Reservation of Rights

The Insurer’s Reservation of Rights

The tension between an insurer’s right to disclaim coverage where there is none and its obligation to defend the insured from claims that potentially may trigger coverage has led to the concept of “defense under reservation of rights.” A reservation of rights is a statement by the insurer to the insured explaining what the insurer considers to be its rights and obligations under the policy. This statement typically comes in the form of either a reservation of rights letter or a nonwaiver agreement. A reservation of right notice is a unilateral statement by an insurer in writing notifying the insured of its intention to continue with the defense while retaining the right to press all issues that could lead to a finding of noncoverage.¹⁰⁶ A proper reservation of rights letter is one that allows the insured to choose intelligently between accepting the insurer’s defense counsel and retaining his own counsel.¹⁰⁷ Under either a nonwaiver agreement or a reservation of rights letter, the insurance company can preserve its option to later disclaim coverage during or after defense of the matter.¹⁰⁸

A nonwaiver agreement generally serves the same purpose, with the exception that it is a written agreement, signed by the insured and acknowledging that the insurer's defense of the insured will not be construed as an admission of liability under the policy.¹⁰⁹

An insurer does not breach its duty to defend by defending under a reservation of rights or nonwaiver agreement.¹¹⁰ To the contrary, "a reservation of rights allows the insurer to fulfill the broad duty to defend while at the same time investigating and pursuing the narrower issue of whether indemnification will result."¹¹¹ "Such an announcement by the insurer permits the insured to decide whether to accept the insurer's terms for providing a defense, or instead to assume and control its own defense."¹¹² A prompt reservation of rights protects the insured and negates the inference of a "voluntary relinquishment of a known right to contest coverage."¹¹³ However, the converse is also true: Where an insurer continues to defend with knowledge of facts suggesting it has no coverage, that is generally taken as an acknowledgment of coverage.¹¹⁴ When an insurer, with knowledge of facts indicating noncoverage under the insurance policy, assumes¹¹⁵ or continues the insured's defense without obtaining a nonwaiver agreement to reserve its coverage defense, the insurer can be held to have waived its policy defense.¹¹⁶

Many jurisdictions require the insurer to obtain the insured's consent to a reservation of rights before proceeding with a defense.¹¹⁷ In the absence of consent, the insurer is faced with having to file a declaratory judgment action.¹¹⁸ Georgia has a specific procedure to be employed by an insurer when an insured will not consent to its reservation of rights:

Upon learning of facts reasonably putting it on notice that there may be grounds for non-coverage and where the insured refuses to consent to a defense under a reservation of rights, the insurer must thereupon (a) give the insured proper unilateral notice of its reservation of rights, (b) take necessary steps to prevent the main case from going into default or to prevent the insured from being otherwise prejudiced, and (c) seek immediate declaratory relief including a stay of the main case pending final resolution of the declaratory judgment action.¹¹⁹

In Georgia, if the insurer does not follow this procedure its coverage defenses are considered waived.¹²⁰

The Impact of Waiver and Estoppel

As referenced above, the majority of jurisdictions hold that when an insurer assumes the defense of its insured without first reserving its rights to assert coverage defenses, those defenses may be waived or the insurer may be estopped from raising them in toto.¹²¹

Waiver is generally defined as "the intentional relinquishment of a known right, either in terms or by such conduct as clearly indicates an intention to renounce a known privilege or power."¹²² "Estoppel is an equitable doctrine intended to prevent a party from taking unconscionable advantage of his own wrong by asserting his strict legal rights."¹²³

Waiver and estoppel principles are generally stringently applied in this context but "waiver is not available to bring within insurance coverage risks expressly excluded by the terms of the policy."¹²⁴ Only a few jurisdictions will apply waiver to rewrite the terms of the policy to include coverage where it was otherwise excluded.¹²⁵ Generally, waiver or estoppel only will act as a forfeiture

of a condition of coverage such as notice or the duty to cooperate.

Louisiana is one of the few jurisdictions in which courts have held that coverage defenses, including policy exclusions or warranties, can be waived if they are not reserved.¹²⁷ In *Steptore v. Masco Construction Co.*, the Louisiana Supreme Court refused to permit the insurer to maintain a coverage defense based on the navigational warranty in an ocean marine policy, when the insurer assumed and continued the defense of the insured with knowledge of “unequivocal indications” that the warranty had been breached and did not preserve its right via a reservation of rights.¹²⁸ The Louisiana Supreme Court stated that

A waiver may apply to any provision of an insurance contract, even though this may have the effect of bringing within coverage risks originally excluded or not covered.¹²⁹

Another example of waiver operating to expand coverage arises out of the Wilkinson Rule established by the Texas Court of Appeals in 1980.¹³⁰ In *Farmers Texas County Mutual Insurance Co. v. Wilkinson*, the insurer defended and tried to settle a personal injury action (arising out of a car accident involving the insured) for more than four years without reserving its coverage position.¹³¹ After four years, the insurer filed a declaratory judgment action.¹³² The insurer then sent the insured two letters, one unconditionally assuming the defense of the insured and another that reserved the company’s right to withdraw its defense subject to the declaratory judgment action.¹³³ The court considered the two letters together and decided that the insurer at best had issued an ambiguous reservation, which it construed as a waiver of the company’s defense of noncoverage.¹³⁴ Under the Wilkinson Rule, a Texas court will allow the insured to trump the general no-expanded coverage rule only when it can show

(1) that the insurer had sufficient knowledge of the facts or circumstances indicating non-coverage but (2) assumed or continued to defend its insured without obtaining an effective reservation of rights or non-waiver agreement and, as a result, (3) the insured suffered some type of harm.¹³⁵

To prove harm, the insured must show that it relied to its detriment on the representations of its insurer.¹³⁶ The Texas Court of Appeals ultimately affirmed the lower court’s finding that the insurer had waived its defenses to noncoverage by its actions.

Though the Wilkinson Rule has been applied as recently as 2007,¹³⁷ the Texas Supreme Court recently issued an opinion that appears to overrule the lower court’s decision in *Wilkinson*.¹³⁸ In *Ulico Casualty Co. v. Allied Pilots Ass’n*, the Texas Supreme Court stated that it did not agree that an insurer essentially could create a new insurance contract through waiver, which would require the insurer to cover a risk it never intended to cover.¹³⁹ The court held that

If an insurer defends its insured when no coverage for the risk exists, the insurer’s policy is not expanded to cover the risk simply because the insurer assumes control of the lawsuit defense. But, if the insurer’s actions prejudice the insured, the lack of coverage does not preclude the insured from asserting an estoppel theory to recover for any damages it sustains because of the insurer’s actions.¹⁴⁰

Jurisdictions are mixed as to whether an insured must prove prejudice as a result of the insurer’s failure to reserve a particular coverage defense.¹⁴¹ Some jurisdictions conclusively presume prejudice by virtue of the insurer’s defense of

the insured; others have taken the position that there is no prejudice requirement because the insurer has taken away the insured's right to control its own defense, which in itself is prejudice without further proof; the third view is that the insured must prove prejudice.¹⁴²

The Right to Control the Defense and the Fiduciary Obligations to the Insured

Commensurate with the insurer's duty to defend is the insurer's right to control the defense.¹⁴³ However, the insurer can lose that right when it wrongfully refuses to defend the insured or if the insurer does not accept the insured's reservation of rights.¹⁴⁴ The right to control the defense generally entitles selecting and directing defense counsel, determining defense strategy, and, in many instances, deciding when and whether to compromise a claim through settlement.¹⁴⁵

In some jurisdictions, the insured's duty to defend is held to create a type of fiduciary relationship with the insured.¹⁴⁶ The fiduciary relationship discussion often arises in the context of disagreements over the production of claim file materials.¹⁴⁷ For example, the Florida Court of Appeals in *Liberty Mutual Fire Insurance Co. v. Kaufman* considered whether certain claim file materials belonging to the insurer had to be produced to the insured, Kaufman, who was being defended by his insurer, Liberty Mutual.¹⁴⁸ Kaufman had initiated eviction proceedings against two of his tenants, and those tenants had filed a counterclaim against him for which Liberty Mutual was providing a defense. After a judgment was entered against Kaufman that included a punitive damages award, Liberty Mutual denied coverage.¹⁴⁹ Kaufman thereafter sued Liberty Mutual seeking a declaration of coverage under his policy. Kaufman sought access to Liberty Mutual's claim file in discovery and Liberty refused to produce it, asserting attorney-client privilege. The court stated that

[a] liability insurer's relationship with its insured is fiduciary in nature. Thus, a liability insurer has a continuing duty to use the degree of care and diligence a person would exercise in the management of his or her own business when it undertakes to defend its insured. To this end, when an insurer accepts the defense obligations of its insured, certain interests of the insured and the insurer essentially merge. Such common interests bar, among other things, the attorney-client privilege from attaching to communications among the attorney, the insurer, and the insured.¹⁵⁰

Based on the above, the court determined that a fiduciary relationship existed between the insured and the insurer because they shared common interests throughout the trial.¹⁵¹ As a result the court ordered the production of certain portions of the claims file.¹⁵² The court permitted Liberty Mutual to withhold its internal employee communications as well as the communications with its in-house counsel on a finding that those documents were subject to attorney-client and work-product protections as the relationship between the insured and the insurer had turned adversarial when the insured filed its declaratory judgment action.¹⁵³

Other courts have held expressly that no such fiduciary relationship exists between the insured and insurer.¹⁵⁴ Texas specifically holds that there is no general fiduciary relationship between an insured and insurer such that an insured cannot maintain a breach of fiduciary action against its insurer.¹⁵⁵

Conflicts Arising Out of Reservations of Rights and the

Right to Independent Counsel

Various jurisdictions have considered whether an insurer's issuance of a reservation of rights creates a conflict that would require the insurer to relinquish control of the defense to independent counsel.¹⁵⁶ The conflict issue arises when an insurer issues a reservation of rights letter asserting there is no coverage as to all or part of a claim.¹⁵⁷ A majority of the jurisdictions considering this issue have held that just because the insurer has issued a reservation of rights, the insurer is not necessarily in conflict with its insured such that it has to provide the insured with independent counsel.¹⁵⁸

Independent counsel has been defined as counsel that is (1) operating independent of the insurer, (2) not involved in the coverage dispute, and (3) not a part of a captive law firm or in-house for the insurer, such that it relies on the insurer for its primary source of income.¹⁵⁹ A conflict of interest should not be presumed just because the insurer selected the defense counsel.¹⁶⁰

Endnotes

1. Nat'l Union Fire Ins. Co. v. Guam Hous. & Urban Renewal Auth., 2003 Guam 19 ¶ 16 (Guam 2003) (citing Allstate Ins. Co. v. RJT Enters., 692 So. 2d 142, 144 (Fla. 1997)); Stamford Wallpaper Co. v. TIG Ins., 138 F.3d 75, 79 (2d Cir. 1998).
2. See *Nat'l Union*, 2003 Guam at ¶ 17; FMC Corp. v. Plaisted & Cos., 72 Cal. Rptr. 2d 467, 508 (Cal. Ct. App. 1998).
3. ISO Form CG 00 01 12 04 (2003).
4. Zurich Non-Profit Directors, Officers and Employees Liability and Reimbursement Policy, Form U-DO-101-B CW (July 1994), at 6–7.
5. N.H. Ins. Co., Yacht Dealers/Marina Operators Coverage Form, JDL 2901 (formerly IMD 510) (4CO) (rev. Mar. 1991, July 1993).
6. See, e.g., Am. Cas. Co. of Reading PA v. Health Care Indem., Inc., 613 F. Supp. 2d 1310, 1323 (M.D. Fla. 2009); Aladdin's Carpet Cleaning, Inc. v. Farm Bureau Gen. Ins. Co., 2009 Mich. App. LEXIS 423, at *23–24 (Mich. App. Feb. 26, 2009); United Fire & Cas. Co. v. Boulder Plaza Residential, LLC, 2008 U.S. Dist. LEXIS 39537, at *27 (D.C. Col. May 13, 2008); Roger Kennedy Constr., Inc. v. Amerisure Ins. Co., 506 F. Supp. 2d 1185, 1195 (M.D. Fla. 2007) (citing Carrousel Concessions, Inc. v. Fla. Ins. Guar. Ass'n, 483 So. 2d 513, 516 (Fla. Dist. Ct. App. 1986)).
7. Cont'l Cas. Co. v. City of Jacksonville, 550 F. Supp. 2d 1312, 1342 (M.D. Fla. 2007) (citing Travelers Indem. Co. of Ill. v. Royal Oak Enter., Inc., 344 F. Supp. 2d 1358, 1370 (M.D. Fla. 2004)).
8. See, e.g., Homedics, Inc. v. Valley Forge Ins. Co., 315 F.3d 1135, 1140 (9th Cir. 2003); IDG, Inc. v. Cont'l Cas. Co., 275 F.3d 916, 920 (10th Cir. 2001); Atwater Creamery Co. v. W. Nat'l Mut. Ins. Co., 366 N.W.2d 271, 277–78 (Minn. 1985); Gray v. Zurich Ins. Co., 419 P.2d 168, 171–72 (Cal. 1966).
9. *IDG, Inc.*, 275 F.3d at 920 (quoting First Bank of Turley v. Fid. & Deposit Ins. Co of Md., 928 P.2d 298, 303 (Okla. 1996)).
10. See, e.g., *Cont'l Cas. Co.*, 550 F. Supp. 2d at 1338–42.
11. ISO Form CG 00 01 12 04 (2003).
12. See, e.g., Travelers Prop. Cas. Co. of Am. v. Hillerich & Bradsby Co., Inc., Civ. A. No. 3:05CV-533-H, 2007 U.S. Dist. LEXIS 48785, at *5 (W.D. Ky. Jul. 3, 2007) (“[s]uit” always referred to an action brought in court); Keystone Consol. Indus., Inc. v. Employers Ins. Co. of Wausau, 456 F.3d 758, 763 (7th Cir. 2006); Foster-Gardner, Inc. v. Nat'l Union Fire Ins. Co., 959 P.2d 265, 274 (Cal. 1998); Lapham-Hickey Steel v. Protection Mut. Ins. 655 N.E.2d 842, 843, 846–48 (Ill. 1995) (“suit” in an all-risks policy clearly and unambiguously refers to a proceeding in a court of law; hence there is no duty to defend environmental agency letters and proposed consent decree); Anderson Dev. Co. v. Travelers Indem. Co. 49 F.3d 1128, 1131 (6th Cir. 1995) (Michigan has ruled that a “potentially responsible party” letter is the functional equivalent of a “suit”).
13. See, e.g., Aetna Cas. & Sur. Co. v. Ky. Nat. Res. & Env'tl Protection Cabinet,

179 S.W.3d 830, 837 (Ky. 2005).

14. *See id.* (U.S. Environmental Protection Agency); *see also* Md. Cas. Co. v. W.R. Grace & Co., 88 Civ. 4337 (JSM), 1994 U.S. Dist. LEXIS 5505, at *3–4 (S.D.N.Y. Apr. 29, 1994) (U.S. Environmental Protection Agency).

15. *See* Towne Realty, Inc. v. Zurich Ins. Co., 548 N.W.2d 64, 66–68 (Wis. 1996) (citations omitted); *Cincinnati Cos. v. W. Am. Ins. Co.*, 701 N.E.2d 499, 502 (Ill. 1998).

16. *See, e.g.*, *Brown v. Church Ins. Co.*, 2005 Del. Super. LEXIS 400, at *27 (Del. Super. Ct. Mar. 24, 2005) (adopting New Hampshire rule that notice is the trigger of duty to defend); *Cincinnati Cos.*, 701 N.E.2d at 503.

17. *See, e.g.*, *Unigard Ins. Co. v. Leven*, 983 P.2d 1155, 1160 (Wash. Ct. App. 1999); *First Bank of Turley v. Fid. & Deposit Ins. Co of Md.*, 928 P.2d 298, 304 (Okla. 1996); *Am. Gen. Fire & Cas. Co. v. Progressive Cas. Co.*, 799 P.2d 1113, 1119 (N.M. 1990).

18. *See, e.g.*, *Blaske v. Provident Life & Acc. Ins. Co.*, 162 Fed. Appx. 943, 946 (11th Cir. 2006) (unpublished) (applying Georgia law) (timely notice is condition precedent to duty to defend); *Prof'l Prod. Research, Inc. v. Gen. Star Indem. Co.*, 06 Civ. 5685 (CM) (GWG), 2008 U.S. Dist. LEXIS 50904, at *14 (S.D.N.Y. June 30, 2008) (notice of loss is condition precedent to coverage).

19. *See, e.g.*, *Ingalls Shipbuilding v. Fed. Ins. Co.*, 410 F.3d 214, 227 (5th Cir. 2005); *Elan Pharm. Research Corp. v. Employers Ins. of Wausau*, 144 F.3d 1372, 1381–82 (11th Cir. 1998); *Hoppy's Oil Serv., Inc. v. Ins. Co. of N. Am.*, 783 F. Supp. 1505, 1509 (D. Mass. 1992); *but see* *Liberty Mut. Ins. Co. v. Black & Decker Corp.*, 383 F. Supp. 2d 200, 207 n.5 (D. Mass. 2004).

106. *Twin City Fire Ins. Co. v. Ben Arnold-Sunbelt Beverage Co. of S.C., LP*, 336 F. Supp. 2d 610, 613 (D.S.C. 2004) (citing *Black's Law Dictionary* 1082 (7th ed. 1999)).

107. *Safeco Ins. Co. of Am. v. Liss*, 2005 Mont. Dist. LEXIS 1073, at *25 (Mont. Dist. Ct. 2005) (citing *Royal Ins. Co. v. Process Design Assoc., Inc.*, 582 N.E.2d 1234, 1239 (Ill. App. Ct. 1991)).

108. *Sauer v. Home Indem. Co.*, 841 P.2d 176, 183 (Alaska 1992).

109. *Draft Systems, Inc. v. Alspach*, 756 F.2d 293, 296 (3d Cir. 1985).

110. *Roger Kennedy Constr., Inc. v. Amerisure Ins. Co.*, 506 F. Supp. 2d 1185, 1193–94 (M.D. Fla. 2007) (M.D. Fla. 2007); *RLI Ins. Co. v. Grand Pointe, LLC*, No. 1:05-CV-157, 2007 U.S. Dist. LEXIS 53058, at *37 (E.D. Tenn. Jun. 12, 2007); *Scottsdale Ins. Co. v. Sullivan Props., Inc.*, 2007 U.S. Dist. LEXIS 57021, at *10–11 (D. Haw. Aug 2, 2007); *Davis v. State Farm Fire & Cas. Co.*, NO. 1:03-cv-01208-SEB-VSS, 2005 U.S. Dist. LEXIS 4281, at *12–13 (S.D. Ind. 2005).

111. *Davis*, 2005 U.S. Dist. LEXIS 4281, at *18.

112. *Scottsdale Ins. Co.*, 2007 U.S. Dist. LEXIS 57021, at *10.

113. *Arceneaux v. Amstar Corp.*, 969 So. 2d 755, 768 (La. Ct. App. 2007) (citing *ROBERT KEETON, INSURANCE LAW* § 6.6 (1971)).

114. *Id.*

115. *Vara v. Essex Ins. Co.*, 604 S.E.2d 260, 262 (Ga. Ct. App. 2004) (“[A]n insurer who assumes and conducts an initial defense without written notification to the insured that such defense is tendered under a reservation of rights by the insurer, is deemed estopped to assert the defense of noncoverage and is deemed to have waived its right to deny liability under the policy.”); *Joslyn Mfg. Co. v. Liberty Mut. Ins. Co.*, 939 F. Supp. 603, 610 (N.D. Ill. 1996) (“Under Louisiana law, the duty of an insurer to reserve its rights can arise once the insurer is notified of an occurrence even if the insurer does not yet know of a suit.”)

116. *Arceneaux*, 969 So. 2d at 765 (citing *Steptore v. Masco Constr. Co.*, 643 So. 2d 1213, 1216 (La. 1994)).

117. *Citi Apartments, Inc. v. Markel Ins. Co.*, No. C 06-5752 CW, 2007 U.S. Dist. LEXIS 44469, at *11 (N.D. Cal. June 11, 2007) (finding that insured must expressly waive conflict created by reservation of rights); *Twin City Fire Ins. Co. v. City of Madison*, 309 F.3d 901, 905 (5th Cir. 2002) (applying Mississippi law);

- Richmond v. Ga. Farm Bureau Mut. Ins. Co., 231 S.E.2d 245, 248 (Ga. Ct. App. 1976); CHI of Alaska, Inc. v. Employers Reinsurance Corp., 844 P.2d 1113, 1118 (Alaska 1993) (stating insured must surrender its right to control the defense if the insured does not accept the reservation of rights).
118. *Richmond*, 231 S.E.2d at 248; *see also* Servants of the Paraclete, Inc. v. Great Am. Ins. Co., 857 F. Supp. 822, 831 (D.N.M. 1994) (stating that where the coverage is in doubt, the proper remedy is for the insurer to seek a court ruling as to noncoverage).
119. *Briggs & Stratton Corp. v. Concrete Sales & Ser., Inc.*, 166 F.R.D. 43, 46 (M.D. Ga. 1996) (citing *Richmond*, 231 S.E.2d 245).
120. *Richmond*, 231 S.E.2d at 248.
121. *See, e.g.*, Canal Ins. Co. v. Flores, 524 F. Supp. 2d 828, 834 (W.D. Tex. 2007); Devcon Int'l Corp. v. Reliance Ins. Co., Civil No. 2001-201, 2007 U.S. Dist. LEXIS 78672, at *14–15 (D.V.I. Oct. 23, 2007).
122. *Day-Towne v. Progressive Halcyon Ins. Co.*, 164 P.3d 1205, 1211 (Or. Ct. App. 2007); *see also* Tate v. Charles Aguiard Ins. & Real Estate, Inc., 508 So. 2d 1371, 1373 (La. 1987).
123. *Minn. Commercial Ry. Co. v. Gen. Star Indem. Co.*, 408 F.3d 1061, 1063 (8th Cir. 2005).
124. *Emerson v. Med. Mut. of Ohio*, No. C-030074, 2004 Ohio App. LEXIS 3512, at *15 (Ohio Ct. App. July 23, 2004); *see also* Milwaukee Metro. Sewage Dist. v. Sedgwick of Ill., Inc., No. 05-C-1352, 2008 U.S. Dist. LEXIS 27667, at *38 (E.D. Wis. Apr. 4, 2008) (insured sought to use estoppel to compel insurer to apply coverage to property not listed on policy); *Sayah v. Metro. Prop. & Cas. Ins. Co.*, 733 N.W.2d 192, 197 (Neb. 2007) (holding waiver could not be used to expand liability cover in to property damage cover); *Day-Towne*, 164 P.3d at 1211; *Minn. Commercial Ry.*, 408 F.3d at 1063 (applying Minnesota law); *Pekin Ins. Co. v. Tysa, Inc.*, CA No. 7:05-3233-HMH, 2006 U.S. Dist. LEXIS 93525, at *32 (S.D. Iowa Dec. 27, 2006).
125. *Steptore v. Masco Constr. Co.*, 643 So. 2d 1213 (La. 1994); *see also* *Minn. Commercial Ry.*, 408 F.3d at 1063 (citing *Tozer v. Ocean Acc. & Guar. Corp.*, 103 N.W. 509, 511 (Minn. 1905) (concerning application of the “assumption-of-defense” estoppel)); *Tate*, 508 So. 2d at 1374; *Ivey v. United Nat. Indem. Co.*, 259 F.2d 205, 207 (9th Cir. 1958); *McGee v. Guardian Life Ins. Co.*, 472 So. 2d 993, 995 (Ala. 1985); *but see* *Tate* at 1374 (citing Comment, *Waiver and Estoppel in Louisiana Insurance Law*, 22 La. L. Rev. 202, 202–03 (1961) (“Only powers or privileges relating to conditions of a contract can be waived; thus waiver cannot be used to extend insurance coverage to a risk not properly within the limits of a policy as written.”)).
126. *Day-Towne*, 164 P.3d at 1210–11.
127. *Steptore*, 643 So. 2d 1213.
128. *Id.* at 1217.
129. *Id.* at 1216; *see also* *Arceneaux v. Amstar Corp.*, 969 So. 2d 755, 765 (La. Ct. App. 2007); *T.H.E. Ins. Co. v. Larsen Intermodal Servs., Inc.*, 242 F.3d 667, 675 (5th Cir. 2001).
130. *Farmers Tex. County Mut. Ins. Co. v. Wilkinson*, 601 S.W.2d 520, 521 (Tex. App. 1980).
131. *Id.* at 521.
132. *Id.*
133. *Id.*; *see also* Canal Ins. Co. v. Flores, 524 F. Supp. 2d 828, 835 (W.D. Tex. 2007).
134. *Wilkinson*, 601 S.W.2d at 523.
135. *Canal Ins. Co.*, 524 F. Supp. 2d at 834.
136. *Id.* at 836.
137. *Id.* at 834.
138. *Ulico Cas. Co. v. Allied Pilots Ass'n.*, 262 S.W.3d 773, 782–83 (Tex. 2008).
139. *Id.* at 775.
140. *Id.* at 787.
141. Couch on Insurance, *supra* note 21, §§ 202:67–69.
142. *Id.*; *see also* *Arceneaux v. Amstar Corp.*, 969 So. 2d 755, 767 (La. Ct. App.

2007).

143. Assurance Co. of Am. v. Lucas Waterproofing Co., Inc., 581 F. Supp. 2d 1201, 1213 (S.D. Fla. 2008); Monarch Plumbing Co., Inc. v. Ranger Ins. Co., No. S-06-1357 WBS KJM, 2006 U.S. Dist. LEXIS 68850, at *11 (E.D. Cal. Sept. 23, 2006); see also Cont'l Cas. Co. v. Jacksonville, 283 Fed. Appx. 686, 689–90 (11th Cir. 2008) (applying Florida law); Nutmeg Ins. Co. v. Employers Ins. Co. of Wausau, No. 3:04-cv-1762-BF (R), 2006 U.S. Dist. LEXIS 7246, at *47 (N.D. Tex. Feb. 24, 2006); HK Sys., Inc. v. Admiral Ins. Co., No. 03-C-0795, 2005 U.S. Dist. LEXIS 39939, at *12 (E.D. Wis. June 24, 2005); Hartford Cas. Ins. Co. v. A&M Assocs., Ltd., 200 F. Supp. 2d 84, 89 (D.R.I. 2002) (applying Massachusetts law).

144. See, e.g., *Int'l Cas. Co.*, 283 Fed. Appx. at 689 (applying Florida law); *Nutmeg Ins. Co.*, 2006 U.S. Dist. LEXIS 7246, at *47; *HK Sys., Inc.*, 2005 U.S. Dist. LEXIS 39939, at *12; *CHI of Alaska, Inc. v. Employers Reinsurance Corp.*, 844 P.2d 1113, 1118 (Alaska 1993); *A&M Assocs.*, 200 F. Supp. 2d at 89.

145. James A. Fischer, *Insurer or Policyholder Control of the Defense and the Duty to Fund Settlements*, 2 Nev. L.J. 1 (2002).

146. *Id.* (citing *Birth Ctr. v. St. Paul Cos., Inc.*, 727 A.2d 1144, 1157–58 (Pa. Super. Ct. 1999) (fiduciary relationship arising out of the insurance contract is based upon the trust and reliance that the insured is required to place in the insurer as a result of the unequal bargain and the insurer's retention of discretionary control over the decision to settle or litigate the claim)); *Brodeur v. Am. Home Assurance Co.*, 169 P.3d 139, 154 n.15 (Colo. 2007); *Hutchinson v. Farm Family Cas. Ins. Co.*, 867 A.2d 1, 22 (Conn. 2005); *Liberty Mut. Fire Ins. Co. v. Kaufman*, 885 So. 2d 905, 908 (Fla. Dist. Ct. App. 2004).

147. *Kaufman*, 885 So. 2d at 908.

148. *Id.*

149. *Id.* at 907.

150. *Id.* at 908 (internal citations omitted).

151. *Id.* at 909.

152. *Id.*

153. *Id.* at 909–10.

154. See, e.g., *Employers Reinsurance Corp. v. Mass. Mut. Life Ins. Co.*, No. 06-0188-CV-W-FJG, 2007 U.S. Dist. LEXIS 24161, at *11 (W.D. Mo. Apr. 2, 2007) (applying Connecticut law and finding that Connecticut courts have held that unless a third party is involved, the insurer/insured relationship is one of contract and is not a fiduciary one); *Evanston Ins. Co. v. Robb Techs, LLC*, No. 2:05-cv-1138-KJD-RJJ, 2006 U.S. Dist. LEXIS 46698, at *8 (D. Nev. July 10, 2006) (finding that while contract is fiduciary in nature, no fiduciary relationship is created); *Meritage Corp. v. Clarendon Nat'l Ins Co.*, No. 3:03-cv-1439-G, 2004 U.S. Dist. LEXIS 29723, at *27 (N.D. Tex. Oct. 6, 2004) (stating that Texas law is “clear that there is no general fiduciary duty between an insurer and its insured”); *Vu v. Prudential Prop. & Cas. Ins. Co.*, 33 P.3d 487, 492 (Cal. 2001) (“The insurer-insured relationship, however, is not a true ‘fiduciary relationship’ in the same sense as the relationship between trustee and beneficiary. . .”).

155. *Meritage Corp.*, 2004 U.S. Dist. LEXIS 29723, at *27.

156. See, e.g., *Long v. Century Indem. Co.*, 163 Cal App. 4th 1460, 1470 (2d Dist. 2008); *N. County Mut. Ins. Co. v. Davalos*, 140 S.W. 3d 685 (Tex. Sup. Ct. 2004); *San Diego Navy Fed. Credit Union v. Cumis Ins. Society*, 162 Cal. App. 3d 358 (4th Dist. 1984).

157. *Twin City Fire Ins. Co. v. City of Madison*, 309 F.3d 901, 904 (5th Cir. 2002) (applying Mississippi law).

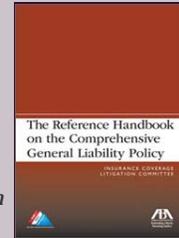
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159. Hartford Cas. Ins. Co. v. A&M Assocs., Ltd., 200 F. Supp. 2d 84, 89–90 (D.R.I. 2002).

160. Cent. Mich. Bd. of Trs. v. Employers Reinsurance Corp., 117 F. Supp. 2d 627, 635 (E.D. Mich. 2000).

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FAMILY LAW

Client Preparation for Custody Evaluations and Court-Ordered Mediation »

By Tara Fass and Diana Mercer

The Appraisal: What's It Worth? Is It Credible? Is It Accurate? »

By Roger F. Tibble

Client Preparation for Custody Evaluations and Court-Ordered Mediation

By Tara Fass and Diana Mercer (Edited by Peg Healy)

Custody mediations and evaluations are critical in contested custody cases, yet clients routinely go into sessions without a basic knowledge about the process and what is expected of them, and often with inflexible positions on custody arrangements. Family lawyers, as advocates and educators, can help clients dig themselves out of entrenched positions, evaluate their goals, and develop a child-centered parenting plan that will get them through the mediation and evaluation process and promote the best interests of their children.

Dress Rehearsal

Most custody disputes are resolved in mediation. But custody mediation can also be the dress rehearsal for the child-custody evaluation, because if the case is not settled in mediation, the evaluation process (see Fam C §§3110 et seq.) could be next.

The mediator's job is to reduce acrimony and get the parties to agree to a custody and visitation arrangement that is in the best interest of the children. Fam C §3161; Cal Rules of Court 1257.1. In mediation the current circumstances of the parties is paramount, although parenting history is also material. Although some counties have a written policy permitting "extended" mediation, often the mediation meeting is a one-time appointment that lasts 90 minutes at most, so there's no time to go into the client's past in depth.

However, big-picture information is always used in evaluation. You can help your clients organize their background information and, more important, develop a more objective perspective about their case by creating an overview of the relationship and putting the important events in the parties' and children's lives on several thematic time lines.

In the relationship time line, include when the parents met, when the parents' relationship became serious, when the parents began living together, when the parents got married, when the parents first separated, the total number of

separations, the date of the last separation, and whether and when couples or family counseling was ever done. In the parenting time line ask: What was each parent's share of custody during the first six months after separation? From the six-month mark to the end of the first year after separation? When were the significant changes in the amount of time each parent had custody over the next two years? What is the current parenting plan the parents are using?

In the personal time line, ask: Are the children's grandparents living or dead, married or not? If living, where do the grandparents live, and are they a part of the children's lives? How many siblings does the client have, and what is his or her relationship historically and presently with the siblings? What contact does the client have with extended family, and how often? Briefly, what was the client's life like from birth to age 12? From 12 to 18? From 18 to 30? What is the client's educational history? What is the client's work history? What is the client's current living situation, including all the household members? If there are minor children other than those in question, what are the custody arrangements concerning those children? What is the client's drug and alcohol history, including DUIs and hospitalizations, if any? What is the client's domestic violence history? Who was the client's family at these times?

There are certain red flags that mediators and evaluators look for; discuss these with your client in advance. Challenge his or her version of the time line and ask whether the other parent might see the time line and relationship in a different way. Your client's ability to see the situation from the other parent's perspective is an important part of starting to test his or her grip on the reality of the situation and learning to live constructively with it.

Red flags that often appear in the parents' time lines include: different representations about the existing parenting plans; different dates, particularly the date when the relationship became serious; inability to identify troubling aspects of the relationship even in retrospect, particularly if a similar dynamic is present today; glossing over or dismissal of traumatizing history; and inability to put the situation in perspective by recognizing unresolved issues from childhood or family of origin.

Never forget, and never let your clients forget, that presenting themselves as reasonable, articulate, and flexible parents is essential to success in mediation and evaluation, as well as in implementing the actual parenting plan. So remind clients to cooperate with the mediator, tell the truth, and focus on the children's best interests at the mediation. Remind them that they will get their point across better if they don't interrupt, shout, or cry. Tell them to expect that strong feelings may come up: anger, despair, or fear. And remind them that they must speak for themselves, even though counsel is routinely present at the mediation in some counties, under local rule and practice.

Framing the custody conflict in terms of angel versus devil is unproductive, unrealistic, and divisive. If your clients are stuck in that attitude, remind them that unless such a dynamic can be documented, asserting it will likely work against them in the long run and give the impression that they are emotionally out of control. Worse, your clients run the risk of being viewed as abusing a tax-supported service. A client who consistently fails to grasp that concept, or who stays mired in the past, should be referred to a mental health professional.

A Parenting Plan

Obviously, the actual parenting plan proposal is very important. Though the client should request as much parenting time as is realistic, you should help the client generate three or four possible plans, ranging from the best-case scenario to a backup plan that is "the nightmare the client can live with." Think in terms of a step-up plan, perhaps starting with less than your client might have hoped for but working into a more desirable plan over time. Take into account each

child's general developmental stage and consider having your client consult with a child psychologist to discuss what might be appropriate. Provide names of providers for parent-training courses or other resources to improve parenting skills.

Red flags in the area of parenting proposals include: plans that are not well thought-out or fail to recognize the realities of their lifestyles; plans that don't take into perspective the child's point of view and developmental needs; or plans that aren't based in reality, such as starting parenting duties at 3:00 p.m. when the parent typically works until 6:00 p.m., without providing for childcare.

Ultimately, your client will be asked about his or her concerns regarding the other parent or the proposed parenting plan. Find out these concerns in advance and help your client make a list. Make sure that the client keeps to the present and only includes the past as a prelude to the present. (Dwelling on the past is a definite warning sign, especially if the other spouse has stopped drinking or otherwise worked to improve problems.) List or explain how the other parent might reduce your client's concerns. Then explore what the other parent might raise as a concern with your client's parenting or parenting plan, and how your client might address those concerns. List relevant skill building your client has done or is willing to do, such as attending parenting classes or anger-management therapy.

Red-flag issues that come up during the formulation of a parenting plan include: negative attitudes, especially failing to recognize any positive qualities in the other parent; claiming that the other parent can do little or nothing to repair the damage; lack of perspective on the client's own role in the conflict; and perceiving no room for improvement by either parent.

Evaluation

You'll need to prepare your client for the evaluator's home visit. Before the visit, do a safety check and make necessary adjustments. The home does not have to be spotless, but sheets should be on the beds. Odors from cigarettes, trash, pets, and diapers should be minimized. A wide variety of fresh and healthy food should be in the refrigerator and cupboards. Everyone who lives in the home should be present for the interview. Anyone who is a frequent visitor to the home may be there at the beginning but should also be prepared to leave approximately ten minutes after the evaluator's arrival.

The television should be turned off as soon as the evaluator arrives. The evaluator should not be offered anything but a glass of water. Let the evaluator choose where to sit and where to talk to household members individually and as a group. Inform the evaluator in advance if a household member needs to be seen first because of a work or school commitment.

References

When the evaluator asks for collateral references (sometimes called a custody evaluation witness list), have your client be prepared with names, addresses, telephone and fax numbers, as well as the best time and way to reach them. You may want to speak with the references in advance to make sure they can, in good conscience, say positive things about your client's parenting and that they have had enough contact with your client to comment intelligently. Put the reference into the time line to give the evaluator some perspective on when and how long the reference has known the family. Choose references, including family members, whose observations can corroborate the parenting-plan history as well as a parent's good character. Finally, minimize problems with collateral references, including: dates on documents that come from the parents differing from dates on the same document that comes from a reference; and references who fail to back up the referring parent's claims, who barely know the parent, or

who haven't observed him or her being a parent.

After the Evaluation

The evaluator's confidential report must be filed with the court and served on the parties (if appearing in pro per) or their attorneys at least ten days before the custody hearing. It is not otherwise distributed. It will be used as evidence at the hearing and is technically not binding on the court. Fam C §3111. The parties may object to the contents of the evaluator's report when it is presented to the court (Cal Rules of Court 1257(c)) and even present other evidence or cross-examine the evaluator if permitted under local rules.

Many counties provide for a postevaluation meeting or settlement conference among the parties, their attorneys, and the evaluator. See Alameda County Local Rule 11.4(9); Contra Costa County Local Rule 13.2(I); Orange County Local Rule 703(E)(5); San Francisco County Local Rule 11.30(D). This postevaluation conference gives your client a quick opportunity to hear the results of the evaluation before it's actually put on paper and gives both parents an opportunity and an incentive to return to negotiations or mediation, and settle. It can save the client money, as it is not necessary to pay for the writing of the evaluation if the matter settles quickly, before the written report is required. Have your client make sure the evaluator knows that he or she is interested in using this service as soon as the evaluator has done the last visit or research on the case, because the custody hearing will come up relatively quickly.

Special Considerations

In custody matters, Family Code section 3011 requires the court to consider the health, safety, and welfare of the child; the nature and amount of contact with both parents; any history of child abuse by relatives or any caretaker; and any allegations of either parent's substance or alcohol abuse. Typically it is considered to be in the child's best interests to preserve close contact with both parents (Fam C §3020(b)) as well as siblings and other close relationships (see Fam C §3040; *Marriage of Williams* (2001) 88 CA 4th 808). The court will consider the child's wishes if the child is "of sufficient age and capacity to reason so as to form an intelligent preference as to custody." Fam C §3042.

Normally the courts encourage settlement, in which the parents stipulate to a custodial arrangement without court investigation or intervention. (There is a presumption in favor of joint custody if the parents stipulate to it. Fam C §3080.) But the court will review a situation even when there is a settlement if the court becomes aware of substantiated domestic violence or substance-abuse allegations. Fam C §3011(e). A court finding of domestic violence within the past five years also creates a presumption against joint or sole custody by the perpetrator that can only be rebutted by a preponderance of the evidence. Fam C §3044.

Therefore, if your client's background includes unflattering elements, it may become important to know whether the case is in a county where the mediator will make a custody recommendation to the court if the parties do not agree. Fam C §3183. That is known as nonconfidential mediation. In contrast, with a private mediator, or in a "confidential" county such as Los Angeles or San Francisco, the mediator does not report back to the court except to report nonagreement. Although the case may proceed to evaluation anyway, confidential mediation gives a client an opportunity to rethink or address the other parent's concerns.

There are some important exceptions to confidentiality even in confidential counties. Therapists, mediators, and other officials may be required to report child abuse or child endangerment to child protective services. See Pen C §11166. Therapists and mediators may have a duty to disclose the existence of threats of

death or bodily harm in accord with *Tarasoff v Regents of Univ. of Cal.* (1976) 17 C3d 425. Allegations of sexual abuse or neglect, if made during a child-custody proceeding, are treated very seriously, and subject the accuser to sanctions if the allegations are found to be false. See Fam C §§3027, 3027.1, 3118. And the mediator may recommend appointment of counsel for the minors or appropriate restraining orders. Fam C §§3183, 3184. Note: Recent legislation (SB 174, signed September 30, 2002) may modify the mediator's duty to tell the court why he or she makes such a recommendation and may make more counties' mediation confidential.

In cases of domestic violence, the victim-client is free to decline mediation. However, mediation and evaluation is available that can be tailored to the parties' needs; for instance, through separate sessions and other safety precautions. See Fam C §§3113, 3181 (separate meetings), 3170 (protocols), 6218 (protective order); Cal Rules of Court 1257.2 (protocols). If the client chooses to participate in a joint session, which can be very helpful strategically in revealing the truth about the relationship, he or she may also request the presence of a nondisruptive advocate or support person. Fam C §3182; Cal Rules of Court 1257.2(h).

When a party's mental health is placed at issue, the party may be examined by a qualified expert for discovery purposes. CCP §2032. Though participation in therapy need not be revealed in mediation, it is typically interpreted as a positive fact about a client. Your client's adherence to a therapist's treatment plan and medication instructions can work in his or her favor. The court may also order the parents and the children to participate in outpatient counseling for up to one year (Fam C §3190).

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The Appraisal: What's It Worth? Is It Credible? Is It Accurate? »

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Your client, Mrs. Smith, has presented appraisals of marital property for your consideration. Mr. Smith presents appraisals of the same property at considerably lower market values. What steps can you take in analyzing each appraisal to determine an equitable settlement for the marital real estate?

The above scenario raises the following questions:

- What constitutes a "credible" appraisal/valuation?
- What is "highest and best use" and why is it important?
- How are income producing/rental properties appraised?

What Constitutes a "Credible" Appraisal?

In many cases, a family's greatest asset is real estate. When it comes to a divorce settlement, it is important that all parties have confidence in the valuation of that real estate. The first step in building confidence is evaluating the quality of the appraiser. At minimum, the appraiser should possess a state license or certification in the state in which the property is located. However, for properties located in a state different than the state in which the appraiser is licensed, it is possible to obtain a temporary appraisal license from the state in which the property is located. If this situation occurs, two additional criteria should be met in order to assure a credible appraisal. (1) Does the appraiser have experience appraising properties in that state? (2) Does the appraiser have experience in appraising the type of property that is the subject of the appraisal?

A licensed or certified residential appraiser is qualified to appraise single-family residences and residential properties of up to four units. A licensed or certified general appraiser, who is licensed as such, is qualified to appraise any property by reason of additional hours of education and work experience.

Although an appraiser's certification or license may be appropriate for the property being appraised, the most important confidence-building quality is depth of experience in appraising similar properties in locations similar to your

client's property. An additional factor is whether an appraisal association, such as the Appraisal Institute (AI), has designated the appraiser as meeting more than the minimum state requirements for certification or licensure by completing additional hours of education, work experience, and peer review.

Appraisal Institute appraiser designations include:

- **MAI:** Appraisers experienced in the valuation and evaluation of commercial, industrial, residential, and other types of properties, and who advise clients on real estate investment decisions.
- **SRPA:** Appraisers experienced in the valuation of commercial, industrial, residential, and other types of property.
- **SRA:** Appraisers experienced in the analysis and valuation of residential real property.

Questions to Ask

The second component of a credible appraisal/property valuation is the quality of the appraisal and the report. In reviewing an appraisal and report, consider the following questions.

1. Has the appraiser appropriately analyzed the property's general and immediate market by identifying and analyzing those market factors and trends that impact market demand for the property and its market?
2. Has the appraiser correctly quantified the subject property, both its land parcel and improvements?
3. Has the appraiser properly analyzed the property's highest and best use, as vacant and as improved?
4. Has the appraiser selected the appropriate approaches to a value indication, cost approach, sales comparison approach, and income approach; and correctly used them?
5. Are the appraiser's comparables cited in the sales comparison approach truly comparable and were they properly analyzed and adjusted for differences when compared to the appraised property?
6. In reconciling the value indications from the approaches to value that were used, did the appraiser communicate why one approach was relied on more than another or why one comparable was a better indication of value for the appraised property than another?
7. Does the appraisal and appraisal report meet the *Uniform Standards of Professional Appraisal Practice* as published by the Appraisal Standards Board of The Appraisal Foundation (USPAP) and thus include a separate, signed certification to that effect?

Because an attorney may not be familiar with USPAP or with the nuances of reviewing an appraisal and an appraisal report, retaining an experienced and qualified appraiser to review the opposing party's appraisals and reports may be important. The appraisal review process provides not only an opinion as to whether the appraisal and its value estimate are credible, but also forms the basis for issues or challenges to the opposing expert at deposition and trial.

What Is Highest and Best Use?

The principle of highest and best use and the appraiser's analysis of a property's highest and best use is the first of many important steps in the analysis of the market and the appraised property. The *Appraisal Institute's Appraisal of Real Estate, Thirteenth Edition*, defines highest and best use as "the reasonably probable and legal use of vacant land or an improved property that is legally permissible, physically possible, appropriately supported, financially feasible, and that results in the highest value."

A market or marketability analysis of the property needs to be performed to

narrow the appraiser's focus from a broad view of the market to data that is most pertinent to the subject property. Then, four steps or tests are completed to determine a property's highest and best use, both as vacant and as improved. Is the property (1) legally permissible, (2) physically possible, (3) financially feasible, and (4) maximally productive? This assessment needs to occur prior to applying the applicable approaches to value.

In many instances, the highest and best use of a property, both as vacant and as improved, is rather straightforward. For example, a single-family residence located in an established single-family area in which there is an active market with buyers acquiring houses for their continued use and occupancy; and, a relatively new and modern office or industrial property located in an established industrial or business park with an active buyers' market (both owner/users and investors).

Difficulties arise in arriving at a property's highest and best use when either the appraised property is vacant land and there are no clear market patterns or trends to indicate its highest and best use, or if an improved property is located in a market that is in transition. This latter example is seen in areas where single-family residences are located on busy streets and houses are being converted from residences to office or other commercial uses.

The appraiser's opinion of the appraised property's highest and best use provides the foundation for its valuation. Therefore, since sections of an appraisal report are intertwined and dependent upon one another, the appraiser's market analysis and other areas of the appraisal report must support the appraiser's opinion of highest and best use. This is particularly critical in the valuation section. The cited market data must be of properties that have the same highest and best use as the subject property.

For example, when appraising a one-story, single-family, ranch-style residence (which is the property's highest and best use), it would not be proper to select sales transactions of two-story, colonial-style houses as comparable sales. For a one-story, single-occupant, 10,000-square-foot office or industrial property (which is the highest and best use of the property), the selection of multi-tenant, office or industrial properties or significantly smaller and/or larger industrial properties would not be appropriate.

Points to Probe

Finally, in reviewing an appraiser's opinion of highest and best use, *The Appraisal of Real Estate* suggests the following analysis:

- If the land is already improved to the property's highest and best use, a discussion of this analysis and conclusion should be found in the report.
- If the highest and best use of an improved property is different from its existing use, the report should include justification for this conclusion.
- If the property is improved, but a separate land value estimate is presented, the report should include a separate discussion of the highest-and-best-use of the land as vacant and of the property as improved.
- If the highest and best use of the property—as vacant land or improved property—vary greatly, the report needs to include a separate discussion and analysis of each highest and best use.

In summary, highest and best use of a property, both as vacant and as improved, can be rather straightforward. However, such an analysis still requires the appraiser to be consistent and supportive of the highest-and-best-use opinion throughout all sections of the report, particularly in the valuation section. For properties located in transitioning areas or vacant land parcels where market trends or factors are not clear as to highest and best use, the analysis becomes more complex. Although in each instance, particularly if legal counsel is not familiar with real estate appraisals and reports, retaining an experienced

appraiser to complete the appraisal review is recommended; it is especially recommended when highest and best use involves complex issues.

Income-Producing Or Rental Properties

There are several ways to appraise income-producing properties, depending on the type of property and the amount of income being produced.

1. In arriving at a market value opinion for a small residential property, single-family or multi-family from one to four units, the **sales comparison approach** is used primarily with a simplistic income approach (a gross income multiplier or an effective gross income multiplier).
2. For an income-producing property that appeals to an owner or investor purchaser and is acquired based on its existing or leased income or anticipated income, the **income approach** would be the primary method in determining value and would be more complex.

In using the income approach, the starting point is the property's potential gross income, and the end goal is its net operating income. It is the property's net income that is capitalized or discounted to arrive at a value indication. The application of the direct capitalization method is to divide the property's net income by an overall capitalization rate to arrive at a value indication.

The discounted cash-flow analysis is typically used in appraising complex income properties that have a number of tenants and leases, such as a larger, multi-tenant office building, a shopping center, a hotel, etc. This method discounts the appraised property's anticipated or forecasted annual net cash-flow over an estimated investment-holding period. The sum of the discounted cash-flow results in an indicated value.

The appraisal of income-producing or rental properties can be a rather complex assignment. The complexities result from not only the application of the income approach, in which a number of factors and variables need to be estimated, but because also cost and sales comparison approaches need to be considered. Therefore, a residential-certified or licensed appraiser generally can review small residential (one-to-four unit) income-producing properties, and general certified or licensed appraisers can review the appraisals of small commercial income-producing properties. However, a designated appraiser (MAI) should review the appraisals of larger and more sophisticated income-producing properties.

By using the guidelines outlined above, you will have the tools needed to determine if a credible appraisal is being used in dividing marital property in the divorce case of your client, Mrs. Smith. A methodical valuation, undertaken by a qualified and experienced appraisal expert who bases the final opinion of value on sound principles and well-researched comparables, will be an invaluable tool in establishing a credible property value, defending your expert's report, and in rebutting an ill-conceived or poorly rendered opposing report.

Roger F. Tibble, MAI, SRA, president of Gadd, Tibble, & Associates, Inc., functions as a real estate appraiser, counselor, and analyst.

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Understanding Real Property Interests and Deeds »

By Brad Dashoff and John Antonacci

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Understanding Real Property Interests

As you might remember from your property class in law school, real property interests can be acquired and held in several different ways, including as an owner, a possessor, or a party entitled to some future or contingent interest. This article briefly touches on the most common real property interests, and how such interests might be typically applied in “real-world” transactions.

Ownership Interests

Fee Simple Interest. The most common estate for owning a real property interest is the “fee simple absolute,” often shortened to “fee simple.” A fee simple property interest is the broadest estate described under law, and has the following distinguishing features: (i) the owner of a fee simple property interest has the sole power to dispose of such property interest; (ii) upon the current owner’s death, and in the absence of instruction (i.e., a will), the property interest automatically transfers to an owner’s heirs; and (iii) the property interest continues until the current holder dies without heirs. In most situations when a single buyer wishes to acquire real property, typically such buyer will want to acquire a fee simple interest (with no others having joint interests, future interests, or possessory interests that could supplant the buyer’s interest in the real property).

Joint Estates. Joint estates allow two (or more) parties to own title to real property at the same time. However, there are different types of joint estates, each with distinguishing characteristics:

Joint Tenancy. In order to have a joint tenancy, four different “unities of ownership” are required:

1. **Time.** Each owner must receive title at the same time.
2. **Title.** Each owner must receive title via the same deed or instrument.
3. **Interest.** Each owner must receive the same proportionate and equal share of ownership.
4. **Possession.** Each owner must have the identical right of possession. Unlike a tenancy in common (discussed later), a joint tenancy includes the right of survivorship (i.e., the interest held by each joint tenant, upon

the death of such joint tenant, will pass to the other joint tenants). If a joint tenant sells or conveys its interest in the real property to a third party, then the joint tenancy is broken, and a tenancy in common is deemed to have been created.

Tenancy by the Entirety. This is a specific type of joint tenancy that arises between a husband and wife when a single instrument conveys real property, but nothing is stated in the conveying instrument about the nature of such couple's ownership. A tenancy by the entirety entitles a surviving spouse to take title to all of the real property upon the death of the other spouse.

Tenancy in Common. With a tenancy in common, there is no limit as to the number of individuals who can share ownership of a particular parcel of real property. Tenants in common hold one unity or requirement that is similar to a joint tenancy: the right of possession. However, unlike joint tenancies, upon the death of a co-tenant, the interest of the deceased will pass to such co-tenant's heirs (not to the other co-tenants). This type of co-ownership allows each co-owner to choose who will inherit the tenant in common interest upon such co-owner's death. Tenancies in common have often been used among co-owners of multi-unit properties, who each wish to have exclusive usage rights to a particular area of the property, without the formalities associated with establishing condominium regimes, or when ownership needs to be separately held for other reasons (e.g., in connection with a property exchange pursuant to Section 1031 of the Internal Revenue Code [IRC] of the United States). Although each tenant in common owns an undivided property interest (i.e., none of the tenants can exclude the others from any portion of the property), the rights of particular tenants in common can be limited and modified by contract, using what is commonly called a "Tenants In Common" or "TIC" Agreement. Under a TIC Agreement, and unlike joint tenancies, the tenants in common can agree to have unequal shares in the underlying real property. One key feature that may be included in a TIC Agreement is an option that allows some owners to buy out the interests of the other tenants in common. If considering such a mechanism, then the parties must negotiate to establish when the buy-out may be exercised, when or if an exercised buy-out can be refused, and what are the agreed upon buy-out prices. Since the laws governing joint estates and tenancies in common can vary from jurisdiction to jurisdiction, the drafter of such contracts must be aware of the pertinent local laws, which could potentially supersede any written TIC Agreements.

Future Interests and Possessory Interests

Future Interests. When your client is deciding whether or not to acquire a particular property interest, it is important to determine whether any future or contingent interests in such property exist. A future interest may exist with a prior owner of such property (as with a right of reversion), or a contingent interest may exist with third parties (as with options to purchase, or rights of first offer).

It is more common to encounter rights of reversion when a prior owner of a particular parcel of property was a governmental or municipal entity, and in such cases, typically the reversionary right is triggered when the current property owner fails to comply with certain covenants, conditions, or restrictions placed upon the property. For example, when the government conveys property to a developer to build and lease affordable housing for the citizenry, the government places covenants, conditions, and restrictions on the property, which run with the land (i.e., cannot be changed), and which limit the use of the property for that particular purpose. If the developer fails to comply with those covenants, conditions, and restrictions, then the government retains the right to recapture the property from the developer. Note that some states limit the ability to create reversionary interests, and others may not enforce them if the restriction on use violates public policy.

A real-world example of a future interest can typically be found when a large landowner (such as a farm) sells its property in phases. In these cases, the buyer may want the right to buy more of the seller's property, once the seller decides to sell more. As a result, the buyer often negotiates for a purchase option and right of first refusal, to be recorded in the land records, which specifies that before the remainder of the seller's property can be sold, it must first be offered to the buyer (often at a stated price, or some discount of market), and the buyer then has the option to purchase that property.

Possessory Interests. The most common form of possessory interest is the leasehold estate, which you may recall includes the following varieties:

- the tenancy for years (i.e., a tenancy whose duration is known from the moment of its creation);
- the periodic tenancy (e.g., a month-to-month lease);
- the tenancy at will (i.e., a tenancy that may be terminated by either the landlord or the tenant upon notice); and
- the tenancy at sufferance (i.e., a tenancy arising when a party wrongfully remains in possession after a prior, lawful possession expired).

In today's world of commercial real estate transactions, the most common form of leasehold interest is the tenancy for years.

Understanding Deeds

Deeds are the legal documents that transfer ownership of real property interests from one party to another. Although deeds tend to be fairly short documents, they embody the whole purpose behind the underlying transaction (the transfer of real property), and therefore the deed is an essential component of every real estate purchase and sale transaction. Upon consummation of the real property transaction, the deed is recorded at the local county courthouse or recorder's office where the property is physically located. In a deed, generally the party conveying the property is called the "grantor," while the party receiving the property is called the "grantee." Often, the grantee will want to require that the deed contain certain covenants of title, or assurances that the grantor possesses good and marketable title, with the right to convey the property free and clear from undisclosed encumbrances. Different types of deeds offer varying levels of a grantor's covenants of title, and following is a general description of each type of deed. However, it is important to note that:

- Although different states may use the same term for a particular type of deed (e.g., a "general warranty deed"), the covenants of title actually required for that deed could vary by jurisdiction.
- Different states and local jurisdictions have differing requirements for the types of deeds that may be used when conveying real property interests, including differing requirements for the form and presentation of the deed.
- Therefore, a lawyer must be familiar with the laws of the jurisdiction where the property is physically located prior to preparing and submitting a deed for recordation.

Deeds are fairly short documents that tend not to be technically complex. The following paragraphs will provide an overview of the typical qualities and characteristics for the following most common types of deeds, which will help determine the type of deed that may be appropriate for your client's needs. Keep in mind that state laws vary and the prudent practitioner needs to check local statutes to ensure they use the proper form of deed. The most common types of deeds include:

- General warranty deeds

- Special warranty deeds
- Grant deeds
- Quitclaim deeds

General Warranty Deed

A buyer of real property is best protected by having the property conveyed via a general warranty deed. A general warranty deed expressly guarantees the grantor's good and marketable title to the property and the grantor's unfettered right to sell the property to the grantee. The guarantee is not limited to only the time the grantor owned the property, but instead extends to the entire chain of the property's ownership (as may be limited in time by certain state or local statutes). In other words, the grantor not only guarantees that clear title was received from the previous owner of the property, but also guarantees that no other parties, past or present, retain an interest in the property. In addition, a general warranty deed also typically includes the following covenants of title:

Covenant of Seisin: A covenant that the grantor has an estate (or the right to convey an estate) of the quality and size that the grantor purports to convey (i.e., the grantor has both title to and possession of the property at the time of conveyance to the grantee).

Covenant to Convey Free from Encumbrances: A covenant that the property is being conveyed to the grantee without any liens or encumbrances (except for those specifically disclosed in the deed).

Covenant of Quiet Enjoyment: A covenant ensuring that the grantee will not be disturbed, or dispossessed of the property, by grantor or a party having a lien or superior title (claimed by or through grantor or any of grantor's predecessors in title).

Covenant to Defend Title: Most importantly, a covenant ensuring the defense of title against claims of all third parties (even if the claim related to a prior period when the property was owned by a party other than the grantor and grantee), and if title is discovered to not be clear (also known as "defective" title), then grantor will compensate the grantee for any resulting damages. Some examples of defects in title include claims of previously unknown heirs, claims of lenders/mortgagees, outstanding tax liens, judgment liens, or materialmen's liens.

Special Warranty Deed

With a special warranty deed, the grantor limits the title warranty given to the grantee to anyone claiming by, from, through, or under the grantor (but not any predecessors in title). By using a special warranty deed, the grantor is only warranting to defend title against grantor's own actions or omissions, and the grantor does not warrant to defend against title defects that existed before the grantor's ownership of the property. The special warranty deed is not nearly as protective of the buyer as is the general warranty deed, and therefore, sellers prefer special warranty deeds over general warranty deeds for conveying real property interests.

The argument of whether to use a special warranty deed over a general warranty deed revolves around the question as to which party is in the best position to know about title defects, and how the risk of title defects should be allocated. Although sellers are arguably better positioned than buyers to discover (or have knowledge of) title defects, realistically, sellers cannot be expected to research the entire historical chain of title for a given property. As a result, most sophisticated parties rely on title insurance, which covers many types of losses that may occur if title defects are discovered. Before issuing title insurance policies, most title companies will perform a thorough search of the applicable

title records to determine whether any title defects are present. If a buyer of real property is able to obtain title insurance, then that buyer need not be as concerned with accepting a special warranty deed in lieu of a general warranty deed.

Grant Deed

Grant deeds are distinguished from warranty deeds (whether general or special) in that grant deeds do not require the grantor to defend title claims (whether for all time as with a general warranty deed, or only during grantor's ownership of the property as with a special warranty deed). Note that grant deeds are not universally available in all states, so be sure to check local statutes to determine whether use of this deed type is permitted. Typically, a grant deed only contains the following covenants of title:

- A covenant that the grantor has not previously sold the real property interest now being conveyed to the grantee.
- A covenant that the property is being conveyed to the grantee without any liens or encumbrances (except for those specifically disclosed in the deed).

In review, a grant deed transfers a grantor's ownership interest in real property, and covenants that title has not already been transferred to another party or been encumbered (except as explicitly set forth in the deed). By contrast, a warranty deed also transfers a grantor's ownership interest in real property, and explicitly warrants to the grantee that: (i) the grantor has good and marketable title to the property, and (ii) the grantor agrees to defend the grantee against third-party claims to title of the property.

Quitclaim Deed

A quitclaim deed conveys a grantor's complete interest in real property, but does not warrant or profess that the grantor's claim of title is actually valid. In other words, a quitclaim deed only transfers whatever ownership interest a grantor has in a particular property, but makes no guarantees about the extent of the grantor's interest in such property, if any. Essentially, a quitclaim deed only conveys to a grantee whatever rights the grantor has in the subject property, and makes no assurances or warranties that the grantor actually has a valid ownership interest in the subject property, but if the grantor does possess a valid ownership interest, then grantor conveys such ownership rights to the grantee. When a buyer accepts a quitclaim deed, then that buyer also accepts the risk that the grantor may not have a valid ownership interest in the property being conveyed, and there may be additional ownership interests or claims to title. Title insurance companies may be reluctant to issue title insurance policies if the subject property was conveyed to the proposed insured (i.e., the buyer) using a quitclaim deed.

Quitclaim deeds are most frequently used when there is a potential for a title defect (sometimes referred to as a "cloud" on the chain of title). Common instances where quitclaim deeds may be appropriate include:

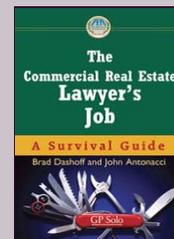
- when there is uncertainty about whether a particular heir of a prior property owner may have a claim to the property;
- when a party may have acquired title to the property by adverse possession;
- when the division of property is necessary for divorcing couples, with one spouse signing all of his or her rights in a particular piece of real property over to the other spouse; or
- when there is a possibility that another party may have some other type of remaining interest in the property (e.g., a leasehold interest of a

former tenant, or an outstanding option to purchase the property), and the current owner or prospective buyer of such property wants such other party to disclaim any such interest.

Be careful when considering a quitclaim deed, since it cuts off claims against prior owners. If the use of a quitclaim deed is part of a related party or internal transfer (e.g., as part of an estate plan), then it is important to consider purchasing an endorsement to the title policy (if available and cost effective) to ensure the grantee can claim against and through the grantor's title insurance policy.

[The Commercial Real Estate Lawyer's Job](#)

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 [The Commercial Real Estate Lawyer's Job](#), 2009, by Brad Dashoff and John Antonacci, 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.***



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John Antonacci is vice president and deputy general counsel of Atlantic Realty Companies, Inc., which is a full-service commercial real estate company that owns and manages a portfolio of approximately five million square feet of office and retail space throughout Virginia and Maryland. He is involved in a wide variety of real estate and corporate matters, including the following primary areas: purchase and sale transactions, commercial leasing (with a specialty in retail leasing), and commercial lending. Before joining Atlantic Realty Companies, Inc., he was a senior associate in the real estate group of Pillsbury Winthrop Shaw Pittman, LLP (McLean, Virginia office).

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By L. Rush Hunt

Master Will Worksheet

By L. Rush Hunt

1. Testator's and Family Information

1.1 Testator's Name _____

1.2 Testator's City and State _____

1.3 Name of Spouse _____

1.4 Names of Children _____

1.5 Are any of the above-named children step-children? Yes / No
(See Paragraph 1, Option 2)

1.6 Are provisions needed for after-born children? Yes / No
(See Paragraph 1, Option 3)

1.7 Are provisions needed for adopted and/or illegitimately born children? Yes / No
(See Paragraph 1, Option 4)

1.8 Are any children to be disinherited? Yes / No
(See Paragraph 1, Option 5)

Name of disinherited child: _____

1.9 Are any loans or gifts/advancements to be considered for any child? Yes / No
Name of Child: _____

Is loan or gift/advancement to be considered in making distribution? Yes / No

(See Paragraphs 4 and 5, Options 1 and 2)

2. Payment of Death Taxes

2.1 Are taxes on probate and nonprobate assets, including apportionment property, to be paid from the residue? (Option 1) Yes / No

2.2 Are death taxes to be paid by beneficiary and taxes collected on apportionment property? (Option 2) Yes / No

2.3 Are death taxes to be paid from the residue, but taxes on apportionment property to be collected?
(Option 3) Yes / No

2.4 Other tax provisions _____

3. Specific Bequests and Legacies

3.1 Specific Gifts (See Paragraph 3)

- a. Description _____
- b. Primary Beneficiary _____
- c. Contingent Beneficiary _____
- d. Survivorship Period _____

3.2 Tangible Personal Property (spouse, and if not surviving, to children)

- a. Description _____
- b. Primary Beneficiary _____
- c. Contingent Beneficiary _____
- d. Survivorship Period _____

3.3 Gift of land provision needed? Yes / No

3.4 Gift of residence provision needed? Yes / No

3.5 Gift of life estate in residence provision needed? Yes / No

3.6 If no agreement among children as to division of personal property:
(See Paragraph 6)

Personal Representative Decides? (Option 1) Yes / No

or Sell and Distribute Proceeds to Residue? (Option 2) Yes / No

3.7 Residuary estate:

Outright to spouse if surviving, then outright to children? (Option 1) Yes / No

To spouse if surviving, if not then to inter vivos trust? (Option 2) Yes / No

To inter vivos trust directly? (Option 3) Yes / No

To spouse if surviving, if not then to separate testamentary trusts? (Option 4) Yes / No

Ages of child for mandatory distributions: _____

Deceased child's share distributed to such child's estate? Yes / No

or Deceased child's share per stirpes to lineal descendants? Yes / No

To spouse if surviving, if not then to single testamentary trust? (Option 5) Yes / No

Age of youngest child for termination of trust: _____

Additional comments: _____

3.8 Contingent trust if child deceased? Yes / No

Age for termination _____ years

If remote descendants are deceased:

Distributed to person's estate? (Option 1) Yes / No

Allocated per stirpes to lineal descendants? (Option 2) Yes / No

4. Default Provisions, if all named beneficiaries are deceased:

5. Special Provisions

Residential Real Estate? Yes / No

Rule against Perpetuities? Yes / No

Subchapter S Stock? Yes / No

Reliance on Will? Yes / No

Method of Payment? Yes / No

Accrued Income and Termination:

Distributed to such interested person's estate? (Option 1) Yes / No

Remain an asset of the trust (not distributed)? (Option 2) Yes / No

Life Insurance Policies? Yes / No

6. Powers

Environmental Powers? Yes / No (See Paragraph 15)

Farm Powers? Yes / No (See Paragraph 16)

Limitation on Trustee Powers? Yes / No

7. Trustees

Name of initial trustee: _____

Name of successor trustee: _____

Corporate trustee compensation? Yes / No

Individual reimbursed for expenses but no compensation? Yes / No

Individual receives compensation? Yes / No

Amount of compensation: \$_____

8. Personal Representative

8.1 Spouse named initial personal representative? Yes / No

8.2 If spouse not initial personal representative:

Name _____ Address _____

8.3 Successor Personal Representative:

Name _____

Relationship _____

Address _____

8.4 Surety Bond Waived? Yes / No

8.5 Special Provisions needed to operate business? Yes / No

9. Incompetency

One physician decides? (Option 1) Yes / No

Two physicians decide and one board certified? (Option 2) Yes / No

10. Miscellaneous

Is no contest provision needed? Yes / No (See Paragraph 26)

Is employment of law firm needed? Yes / No (See Paragraph 27)

11. Guardian, if spouse not surviving:

Name _____

Relationship _____

Address _____

Successor _____

Relationship _____

Address _____

Surety Bond Waived? Yes / No

Special provisions or bequests for guardian? _____

12. Survivorship (See Paragraph 29)

1. Simultaneous Death Yes / No

If yes, which spouse is presumed to die first? _____

2. General Survivorship _____ days

Does this apply to spouse? Yes / No

Joint Trust Worksheet

1. Grantor and Trustee Information

Grantor 1 Name _____

Grantor 2 Name _____

Grantors' City and State _____

2. Name of Trust

“ _____ Trust”

3. Children

3.1 Names of Children _____

3.2 Are any of the above-named children step-children? Yes / No

3.3 Are provisions needed for after-born children? Yes / No

4. Payment of Death Taxes (if provision needed)

4.1 Are taxes on probate and nonprobate assets, including apportionment property, to be paid from the trust principal? (Option 1) Yes / No

4.2 Are taxes to be paid by beneficiary and taxes collected on apportionment property? (Option 2) Yes / No

4.3 Are taxes on probate and nonprobate assets to be paid from trust principal, but taxes on apportionment property to be collected? (Option 3) Yes / No

4.4 Other tax provisions _____

5. Allocations at Death

5.1 Separate trust for lifetime of beneficiaries? (Option 1) Yes / No

A. Provision for educational incentive? Yes / No
(See 5.c)

B. Provision for distribution to descendants? Yes / No
(See 5.d)

C. Provision for trustee authority to withhold? Yes / No
(See 5.e)

D. Power of appointment:

Limited to descendants/charities? (Option 1) Yes / No

Broad? (Option 2) Yes / No

Limited and age restricted? (Option 3) Yes / No

Broad and age restricted? (Option 4) Yes / No
(See 5.f)

If no power of appointment or not exercised and a child is deceased:

Deceased child's share distributed to such child's estate? (Option 1) Yes / No

or Deceased child's share per stirpes to lineal descendants? (Option 2) Yes / No
(See 5.g)

5.2 Separate trusts until minimum age of beneficiaries? (Option 2) Yes / No

A. Provision for educational incentive? Yes / No
(See 5.c)

B. Provide for distribution one-half at each of two ages? Yes / No

If yes: Initial age to inherit: _____

Final age to inherit: _____
(See 5.d)

C. Provision for trustee authority to withhold? Yes / No
(See 5.e)

D. If a child is deceased:

Deceased child's share distributed to such child's estate? (Option 1) Yes / No

or Deceased child's share per stirpes to lineal descendants? (Option 2) Yes / No
(See 5.f)

5.3 Single testamentary trust for children? (Option 3) Yes / No

A. Final age to inherit: _____
(See 5.c)

B. If a child is deceased:

Deceased child's share distributed to such child's estate? (Option 1) Yes / No

or Deceased child's share per stirpes to lineal descendants? (Option 2) Yes / No
(See 5.c)

C. Provision for trustee authority to withhold? Yes / No
(See 5.b)

6. Special Provisions:

Residential Real Estate? Yes / No

Rule against Perpetuities? Yes / No

Subchapter S Stock? Yes / No

Reliance on Will? Yes / No

Method of Payment? Yes / No

Accrued Income and Termination:

Distributed to such interested person's estate? (Option 1) Yes / No

Remain an asset of the trust (not distributed)? (Option 2) Yes / No

Life Insurance Policies? Yes / No

7. Default Provisions (if needed), if All Named Beneficiaries are Deceased:

8. Definition of "Child" and "Descendant"

Include children adopted prior to age _____ (18, 21, etc.).

Include provision for illegitimate children (treated same, etc.)? Yes / No

9. Powers

Environmental Powers? Yes / No (See Paragraph 11)

Farm Powers? Yes / No (See Paragraph 12)

Limitation on Trustee Powers? Yes / No

10. Trustees

Name of first successor trustee: _____

Name of second successor trustee: _____

Corporate trustee compensation? (Option 1) Yes / No

Individual reimbursed for expenses but no compensation? (Option 2) Yes / No

Individual receives compensation? (Option 3) Yes / No

Amount of compensation: \$ _____

Provision needed for children to act as trustee of own trust? Yes / No

11. Incompetency

One physician decides? (Option 1) Yes / No

Two physicians decide and one board certified? (Option 2) Yes / No

12. No-Contest

Is No-Contest provision needed? Yes / No

13. Revocation

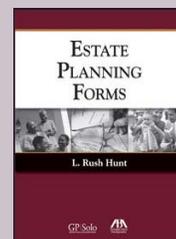
Both spouses? (Option 1) Yes / No

Survivor with limits (Option 2) Yes / No

Survivor without limits (Option 3) Yes / No

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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As law firms are some of the slowest to adopt new technologies, the average attorney can be left feeling a little like Fred Flintstone waiting on some prehistoric bird to deliver him a stone tablet. In the ever-changing paperless office landscape we find our relationship with tangible work materials and the archaic means in which we manage them coming to an end. As all manner of information is transferred through a variety of networks invisible to the eye, it has become paramount for attorneys to be able to identify which technology will help, which technology will not, and how to align with IT specialists who know both so that their firms may evolve and grow. My time as a technologist in a small law firm showed me that the dynamic that exists between attorneys and burgeoning technologies is best described as strenuous (as growing pains often are), yet their demand for technology built around their needs has given life to a number of options for managing various facets of their firms. All they need is someone to help realize the potential of these new technologies.

To understand how technology can improve your business by improving efficiency and in turn increasing profits, one must analyze the flow of information through the various strata of your firm. There's a reason why IT or information technology is one of the most commonly used acronyms in the twenty-first century and that is because every aspect of your business will be driven by the efficient exchange of information. Traditionally, attorneys have been slow to warm up to new technologies, but we have entered a new era where cell phones, computers, PDAs, and the networks they interact with are now necessary items within a lawyer's toolbox. Each year new and affordable technology solutions empower solo and small law offices with big-firm efficiencies. As the "Boomers" move closer to retirement, young tech-dependent graduates are replacing them, changing the way in which attorneys interact with

each other, members of their office, and work materials. These changing dynamics are the reason it is time to begin thinking about the inclusion of an IT consultant as part of your team (not as an employee) to help navigate and integrate these new technologies that have, and will continue, to become available.

A primary function of any firm, legal or otherwise, is marketing. The rapid adoption of Internet-based marketing services has excited many about using their computers to attract new business. The problem with everyone simultaneously adopting these methods is that your specific message will be lost among your competition and everyone else who thought they have found a unique vehicle for their marketing voice. Although common in today's professional ecosystem, the creative management of your social networking portals will help you define yourself from your competition. Take time to cultivate your presence on LinkedIn, as your customer feedback ratings are crucial to defining your worth to potential new clients. An online rapport with both existing and new customers is important because it allows you to control the perception of your firm. Do not underestimate the power of a blog or any digital medium that allows you to inundate your audience with expert information. The regular addition of this information to your online presence will position you to be perceived within your community and by potential clients as an industry leader. As an aside, all of this information assumes you have already spent time generating a website which, in today's world, is something that you need to have.

Business continuity solutions are a prime example of how law firms can increase the efficiency of daily office operations. There are free services that allow you to sync files between multiple PCs without having to carry a thumb drive or log in remotely, simplifying the way you interact with your pertinent work documents from any location. Secure remote backup services also allow you to back up your work, ensuring your files will always be available for restorations after the most unexpected problems, which is fundamental in recovering from unforeseen technology hurdles and allowing daily operations to continue.

Client management is the most complex function of any law practice. It is critical to understand the logic of the in(puts) and out(puts); specifically, the information they produce and which manual processes can be automated. Most of the software developed over the years has been focused on the automation of common tasks that clerks, paralegals, and lawyers perform; time and billing being the most popular followed by practice management suites, document generation, and document management systems. It is important to fully understand the features, advantages, and benefits of each, as some are more effective in certain practice areas than others. Something as simple as standardizing a client intake sheet can lend to less chaos overall.

As a general rule, lawyers tend to not be the most organized bunch. Efficiency-enhancing document management software unifies scanned documents, file folders, and email into one simple search. This solution saves hours and hours of lost productivity by eliminating the need to click through subfolder after subfolder both within emails and client file folders to uniquely identify and organize each document by client, case, or some other system.

Some of the most creative lawyers log calls directly to their computer with the click of a mouse. Data storage is very inexpensive, which is why companies can offer service that will not only email voicemails received but also transcribe them in a preview before you listen. Your voicemails are stored indefinitely, similar to the way an e-mailbox works, allowing you easy access to documented phone exchanges.

At the end of the day all businesses grow with the acquisition of new clients and customers. The means in which you engage new clients is an art that is not easy

to master as it is constantly evolving, much like the people with whom you are speaking. Quick refreshers for a manner of sales and service-related issues are available in a variety of online resources from webinars to video chats providing a plethora of readily available information to help you sharpen your sales skills.

Most of these services are free or very cheap, but understanding the evolving nature of them is what involves time and attention, which are the two things an attorney has the least of. Hiring an IT consultant with experience working with law firms and the specific personalities and protocols that exist within them is a cost effective way for your firm to navigate, implement, and utilize these various services, thus keeping your firm at the cutting edge of IT developments at a reasonable cost.

Jason Volmut is a consulting technologist with more than 10 years' experience helping small and midsize businesses optimize their IT operations with process-driven solutions tailored to their specific needs and budgets.

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When former Chicago Bulls basketball great and NBA Hall-of-Famer Scottie Pippen participated in a transaction with a business partner and their joint purchase of a Gulfstream jet, Pippen thought he was involved in a deal where his contribution toward the purchase would total \$1 million. What Pippen didn't know about was another \$5 million in loans arranged by his attorneys, the Chicago firm of Pedersen & Houpt, and included in the transactional documents Pippen had signed as part of the deal. Eventually, when the jet was grounded for nearly two years due to maintenance and repair issues, the subsequent loss of lease revenue caused the loans to go into default, and Pippen was stuck paying loans he says his lawyers never told him about.

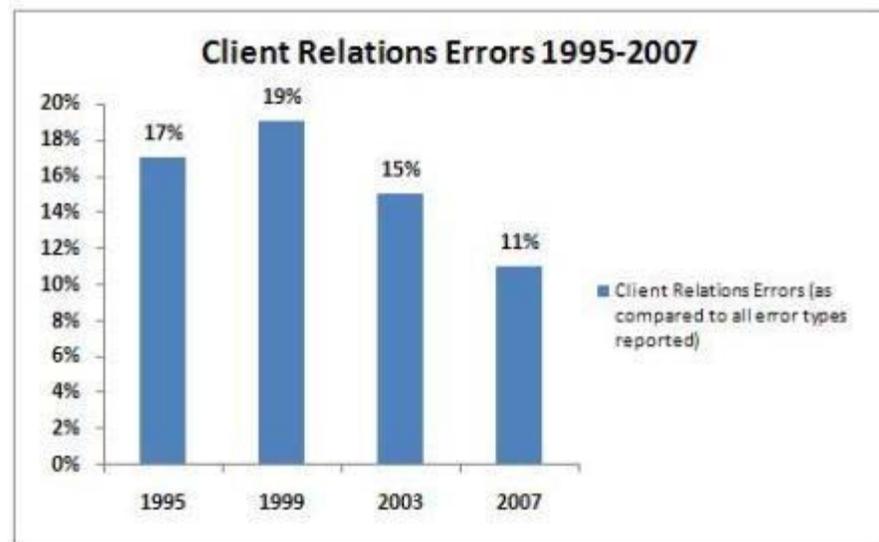
After paying nearly \$7 million in principal, interest, and legal fees on the unpaid loans, Pippen brought a suit against his attorneys alleging they did not properly explain the terms of the 2002 deal to him. Pippen testified that he didn't know he had gotten himself into a \$7 million deal, and his attorneys should have informed him of the changing terms of the transaction. A Cook County, Illinois, jury somewhat agreed with Pippen and awarded him \$2 million.

"They had an obligation to explain and supervise the documents," Pippen's attorney who handled the malpractice action, George Spellmire Jr., was quoted as saying after the verdict became public. "What he thought he was getting into was not what was actually happening."

Pippen's malpractice claim for failing to get his consent on a matter is not very different than the hundreds of claims that are brought against attorneys every year involving an attorney-client communication breakdown. The ABA Standing

Committee on Lawyers' Professional Liability tracks errors alleged against attorneys in legal malpractice actions, including those involving a communication breakdown between lawyers and clients. In their most recent study, professional liability insurers reported that 11.2 percent of all claims alleged against attorneys in the period from 2004–2007 involved a breakdown in client communications. Specifically, five percent of the claims involved a lawyer's failure to obtain the client's consent.

On the whole, the number of malpractice claims involving a breakdown in client relations is getting better. The ABA Standing Committee's study has been conducted every four years, and it shows a significant decline from the 1999 high, when 19 percent of all claims reported against attorneys involved an allegation that the lawyer failed to obtain the client's consent, properly provide informed consent, or follow the client's instructions. (See graph in figure 1.) The decline in claim activity involving attorney-client communications is one of the few hopeful trends that came out of the most recent ABA Standing Committee study on professional liability.



But for lawyers involved in transactional matters that sometimes became very complicated, the outcome of the Pippen case leaves them wondering: are lawyers doing all they can to ensure that the client has been fully informed about the risks of the transaction?

"Transactions such as Pippen's jet deal are often very speculative investments," says attorney Howard S. Golden of the Chicago firm Robbins, Salomon, Patt Ltd. "If the client gets mailed lengthy documents that are single-spaced, small print, with lots of clauses and a note that says, 'sign here,' the lawyer is not really doing their job of explaining what the client is getting into," says Golden. "Half of lawyers not involved in this kind of work wouldn't fully understand what a document like that says."

Golden, whose practice involves a broad variety of transactional work including the purchase and sale of businesses, advises that even in an investment where there is much less at stake, he believes it is important to educate the clients fully about the risks, and to break them down in simple terms.

"You have to make sure the client is fully informed of the risks involved in the investment," says Golden. "You start by sending them a letter saying, 'Are you aware . . . ' and then you list your concerns about your client's potential exposure."

Bryon G. Ascheman, of the St. Paul, Minnesota, firm of Burke & Thomas PLLP that defends lawyers in legal malpractice actions, agrees with that advice.

"Typically, the law says that an individual should have knowledge of what he is signing," says Ascheman. "But a lawyer has to remember that a client goes to them for an explanation of what is in the document."

Ascheman recommends that attorneys sit down with their clients and fully identify the terms of the transaction and the potential hazards associated with it.

"Not enough lawyers actually sit down with their clients, go through the transaction, and fully document for their file that the discussion took place," says Ascheman. Such documentation is necessary to successfully defend a malpractice action if there is a subsequent dispute as to whether the lawyer fully informed the client regarding the risks of the transaction.

Another concern is whether the lawyers fully understood what Pippen was hiring them to do. Pippen testified that he expected his attorneys to "monitor" the transaction, saying that as a professional basketball player he was busy playing his sport and that his lawyers should have "policed the deal better." If Pippen was looking for something more than someone who would simply handle the paperwork, did his lawyers have that same understanding?

"A firm should always send out a letter spelling out exactly what their obligation is," says Golden. He recommends a letter to the client specifically identifying the scope of the attorney's engagement in the matter.

Also, an attorney who has not been hired to provide an opinion on the merits of a transaction should state in the letter, "You are *not* expecting me to opine on whether this is a good deal." Stating those facts in simple terms is necessary to make it perfectly clear to the client that the lawyer is not giving business advice.

For Ascheman, laying out the attorney's scope of engagement in the matter is something that every attorney should do in every matter in order to prevent misunderstandings between the lawyer and the client.

"Sometimes the scope of the matter changes," says Ascheman, "And that's okay. You just want to be continually monitoring the agreed-upon relationship between the lawyer and the client and document any changes to avoid misunderstanding."

Malpractice claims involving client relations are among the most preventable of all legal malpractice actions. For nontransactional matters, the claims usually involve a misunderstanding in the expected outcome of a matter, or the client's lack of understanding regarding the legal process they are involved in.

The key to preventing most such claims is to continually communicate with the client regarding the status of a matter—even if there are no file activities going on. Nothing frustrates a client more than not hearing from their attorney for some time regarding the status of their file. Clients often need to be made aware that the lawyer is still working on their matter, and although there may be a break in activities, a communication to the client that the break is an expected step in the legal process reassures the client that the lawyer has not neglected their matter.

Essential steps for ensuring that a client is completely aware of the important elements of a transaction include:

- Fully document the key terms of the transaction or agreement that the client is entering into, explaining the risks in simple terms that the client can understand;
- If possible, sit down with the client and review the writing that identifies the terms of the agreement and the risks associated with the matter;
- Ask the client what is his or her understanding of the agreement. They

may tell you something that is contrary to what is your understanding of the deal, giving you an opportunity to head off any misunderstandings after the transaction is complete;

- Memorialize for your legal file any discussions you have had with the client about the key provisions of the transaction and the risks associated with entering into the agreement. Such a memo to the file can be crucial if there is ever a dispute between the attorney and the client about the advice that was given;
- Identify in writing the scope of the lawyer's involvement in the legal matter to avoid any confusion as to what the lawyer was hired to do. If the lawyer has *not* been hired to provide an assessment of the merits of a transaction, such a statement should be included in the engagement agreement in clearly identifiable terms;
- Always stay in communication with a client regarding the status of their matter. Every means for communicating, whether it is a phone call, an email, or a description on an invoice is essential for the client to understand the ongoing status for their matter.

Todd C. Scott is VP of 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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The legal profession is changing. You've probably heard that phrase, or some version of it, a thousand times over the past couple of years. It's true, and so is the equally common assertion that those attorneys who understand and embrace the change will have a significant competitive edge in the near future. Too often, though, these exhortations come in the context of a sales pitch and gloss over the "understanding" step. Change is inevitable. New technologies, changing mindsets, and evolving consumer demands are creating new imperatives and new opportunities. But that doesn't mean that every change is a good one, nor that the wave of the future that attorneys can't afford to miss includes every new strategy and technology available.

What you really need isn't just to be aware that changes are coming or to be open to change, but to assess the new opportunities that are available to you now and make realistic decisions about which will save you time, save you money, help you reach a broader client base, allow you to provide better client service, or help you meet other concrete goals for your law practice.

Direct Benefits to Your Law Firm and Your Staff

The most obvious and easily measurable benefits to look for are the direct benefits to your firm: the changes that cut your overhead or reduce the staff time involved in day-to-day operations while maintaining or increasing productivity.

Efficiency

New technology can often increase the efficiency of your practice, freeing up your time and staff time for direct client service, increased marketing activities or just to get you home in time to have dinner with the family. But that's only

true if the technology makes it faster and easier for you and your staff to get the job done. When evaluating new technology, ask questions like:

- Will this allow us to cut back on the number of different processes and programs we're using and so decrease time required to change gears, transfer information, and otherwise duplicate efforts?
- Is it easy and intuitive for me and my staff, or will we have to invest a significant amount of time in learning and getting used to the system?
- Will it automate or partially automate processes that are currently labor-intensive, like preparing invoices?

Don't make a decision based on a vague impression that a product could save you time and effort: look at how much time you're currently investing in those tasks and assess exactly what you can expect to gain.

Cost-Effectiveness

Making cost comparisons among law practice management products and services can be difficult and confusing, because the variety of offerings available and their rapid evolution means that there are few apples-to-apples situations in your pricing process. With monthly subscriptions, annual updates, add-on charges for tech support, answering services measuring volume differently, and a host of other considerations, you may have to grab a pencil or pop up the calculator on your desktop to figure out what's truly most cost-effective for your firm. Some things to consider beyond the advertised price include:

- Is the cost one-time or recurring?
- When you make a one-time purchase, is it complete and long-lasting, or will you have to pay for upgrades and tech support to keep the software working smoothly?
- What existing expenses, including labor costs, would the new technology or service allow you to eliminate?

Even after you've crunched those numbers, remember to consider the longevity and adaptability of the product and whether or not you're going to be locked in to a long-term contract or required to make a significant investment up front. One thing that's certain about the evolution of legal technology and law practice management support is that it's not complete: make sure you're investing in solutions that can grow with you or allow you the flexibility to move on as your options expand and your needs change.

Solving an Existing Problem

New technology, services, or processes should solve existing problems for your law firm, whether those problems come in the form of time wasted in day-to-day operations or missed opportunities. Although some of those problems are near-universal, others will be specific to your practice. For example, in some law areas, accessibility can make or break your business. If you're a criminal defense attorney, many of your callers will have a sense of urgency, and will keep moving down the list making other phone calls if someone doesn't pick up your telephone immediately. And many of those calls may come after hours. In that circumstance, having a remote receptionist answering your telephone 24/7 and interacting with the prospective client in a way that makes him feel like he's taken a productive step can be critical to keeping new business coming through the door. If you represent primarily financial institutions that keep regular business hours and tend to research and interview attorneys in some depth before making a selection, that instant accessibility may be less important to cultivating new business.

- Do we have a problem this technology or service can solve?
- Could this technology or service solve a problem we haven't been aware

of, but that is slowing us down or hindering our growth?

- Is this product or service the best and most cost-effective way to solve that problem?

Benefits to Your Firm Through Benefits to Your Clients

Technology can help expand your client base in many ways: it offers new options for marketing your practice, allows you to provide certain types of services across a larger geographical area, and provides opportunities for improved client service that will set your law firm apart and encourage repeat business/referrals and more. Again, it's important to assess your options in terms of what will benefit *your* practice and *your* client base, not just what generally sounds like a good development. Taking advantage of new opportunities to expand your client base and stay ahead of the competition means understanding the needs of your client base, both stated and unstated.

Building Your Client Base

Evolving legal practice management can help you grow your client base in three key ways: reach more prospective clients, increase the range of clients you're able to serve, and provide something extra that draws repeat business and referrals.

New methods of reaching potential clients might include Internet marketing options, using social media, offering webinars and ebooks, or any of many other emerging marketing strategies. Expanding your prospective client base might involve creating flexible options that are workable for a wider range of consumers; for example, if you frequently get calls from prospective clients who are willing to pay for your services but can't afford full representation, you might increase revenues by offering unbundled services to expand your client base into that sector. Ask questions like:

- Will this help me reach an untapped sector of my existing market, and do so cost-effectively?
- Will this help me serve clients who aren't currently part of my market in a way that's profitable for my firm?
- What kind of return on investment can I expect and how will I measure it?

Improving Client Service

Improving client service is good for your clients and probably makes your day-to-day interactions more pleasant and your work day less stressful, but it's also a means of increasing repeat and word of mouth business. For example, if your clients often complain that they don't know what's going on with their cases, a web-based portal that allows you to share case documents and updates with clients as they're entered might help you solve that problem without investing additional staff time in helping clients feel better attended to. Ask yourself:

- Will this change address a concern clients have voiced?
- Will this solution make the client's experience smoother and more pleasant, make him feel more in the loop, or otherwise improve his overall interactions with our law firm?
- Will it make those improvements in a way that's time-efficient for me and my staff?

Be sure you don't limit your analysis to those issues your clients have raised in the past; there are many ways in which you can improve client service and the overall client experience that may not even be on their radar—and if you can solve the problem before they ever perceive it, all the better!

Technology, changing consumer demands, economic realities, and other factors are changing the legal profession, and those who warn that attorneys who don't get ahead of the curve will find themselves left in the dust are correct. Just remember that getting ahead of the curve means plotting out your direction and making educated decisions, not simply embracing every new possibility that arises.

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](#).

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Consumers use the Web to find lawyers and to decide on one among lawyers. If you do not have a website, they will not find you. If you do not have an effective website, they will choose someone else.

We live in a time when “Google” has become a verb. Searching the Web is as much a part of the daily fabric of people’s lives as searching the telephone book. For any lawyer seeking to build a practice, that means a website is as essential as having a telephone number.

So what makes a law firm website effective? It all boils down to four characteristics:

Informative. Distinctive. Simple. Innovative.

Easy to say, but not always as easy to do. Let us walk through each of these characteristics.

Be Informative

At its most basic, a website is an advertisement for your law practice. It should tell the reader who you are, what you do, and where to find you. The vast majority of law firm websites follow virtually the same structural template. Yours should be no different. Whether you are a solo or a megafirm, your site should include:

- **A home page** that provides an overview of your firm. This should be quick to read and easy to understand.
- **Practice pages** that describe what you do. If your practice is diverse, have separate pages for each area of practice. If you focus on a single

area, one page should do. Write these pages in language that relates your skills to consumers' needs.

- A biography for each professional in the firm. Note that I said, "for each professional." Many firms list only the lawyers. Include all key business and professional staff, including administrators, marketing directors, financial officers, and the like. Give each biography a separate page, but index them all from a central page. Small firms should index names alphabetically; larger firms should make them searchable. If your firm is quite large, include searching by office and practice area.
- Contact and address information. At a minimum, provide your main office address, telephone, and email. Much better is to provide this for every professional and every office, with direct dial telephone numbers and individual email addresses. Contact information should be prominent, not hidden.

Those are the basic elements: who you are, what you do, and where to find you. Beyond those basics, law firms have any number of options for providing greater depths of information about their lawyers and their practices. The more information you provide, the better a potential client can evaluate your capabilities.

This is why it is common for law firm websites to include libraries of articles written by or about their lawyers, histories showing their heritage and community ties, descriptions of noteworthy cases or deals, and listings of representative clients. More cutting-edge variations on these themes include blogs, podcasts, and Web videos.

Emphasize Distinctive

There was a time in the not-so-distant past when simply having a website distinguished a law firm from its competitors. It was a time when a consumer who searched for a lawyer via the Web would find a handful of results and be impressed even at that.

Today, that same consumer is drowning in results and often is uncertain about choosing from among them. For this reason, a key requirement of an effective website is that it distinguishes you from your competition. In these days of information overload, it is not enough for a website to show what you do. It must also show how you stand out from all the other lawyers who do what you do. In other words, why hire you?

This starts with the writing of your site. In journalism, editors sometimes critique a story for "burying the lead." This aptly describes the problem with far too many law firm websites and with almost every page of those sites.

How many lawyers' biographies have we all read that start with the most boring of details: "Mary Smith graduated from Anytown School of Law in 1987, where she was notes editor for the *Toxic Sludge Law Review*. Upon graduation, she clerked for two years for the Hon. Baerley Awake."

Now compare that with: "Mary Smith is a family lawyer whose tireless advocacy led the state supreme court to change its approach to alimony awards."

A website must show how you stand out from all the other lawyers who do what you do

For the reader surfing lawyer bios on the Web, which is she more likely to read? Which is more likely to make the lawyer stand out?

This applies to every page of a website. The content of a page should pointedly deliver its message, and that message should be: "Here is why you want our firm over others."

Keep It Simple

Why, why, why? Why do so many law firms persist in using animation for the opening page of their sites? My time is valuable. I do not want to type in a firm's URL only to be told, "Please wait while this page loads." Thank you for asking, but I think I'll decline.

A website is about providing information, not about showing off your Web designer's technical and graphical prowess. Leave that to the designer's own site. Your site should be simple in design, simple in structure, and simple in content. To borrow another concept from publishing: do the work for the reader, do not make the reader work to understand you.

Simplicity is achieved in three ways:

Design. Avoid gaudiness and technical tricks. Lean and clean should be your mantra. The design should convey professionalism and a degree of elegance, but always with the understanding that less is more.

Structure. The site's architecture and navigation should be clear and easy to follow. If a reader wants to know how to contact you or to read about a particular attorney, she should be able to find that information easily. Every page should include links to the site's main sections. Keep in mind that readers rarely enter a site through its main page. If they come to you through a search engine or external link, they should be able to find their way easily to other key pages.

Content. Keep the text on a page as concise and direct as possible. Use graphical elements such as bullet points, boxes, and callouts to enhance readability. For more complex sections, such as practice descriptions, break text over multiple pages. Design each page so that it fits on the screen without scrolling.

Showcase Innovation

Innovation in a website serves every characteristic discussed so far. It can make your site more informative, make it more distinctive and enhance its usability. More importantly, innovation in your website suggests innovation in your law practice. It tells readers that you are a lawyer on the leading edge, not just in your use of technology, but also in your knowledge of the latest developments in law and practice.

Innovation is the introduction of something new. It can be subtle or dramatic and its range is limited only by your creativity.

One example of innovation is the minisite of the Washington, D.C., law firm of Keller & Heckman. Wanting to highlight a key practice area, the firm launched PackagingLaw.com, a site separate and apart from its primary Web presence. The site serves as a reference source for news and analysis in the field of packaging law, while also showing off the firm's expertise in the field.

An increasingly common example, but one that continues to be perceived as innovative, is a blog. A blog has multiple benefits:

- It positions you as a knowledge leader in your field of law.
- It shows you to be savvy about technology.
- It dramatically enhances your search-engine rankings.

A step beyond a blog is a podcast, an audio recording that visitors to your site can listen to online or download to a CD-ROM or MP3 player. A step beyond a podcast is a video recording. These audio and video podcasts add a personal element to your website, allowing visitors to hear and even see you.

But innovation need not be high-tech. Simply presenting information in a different way can be innovative. Consider the mid-sized firm seeking to recruit first-year associates. It swapped its stuffy recruiting page for real stories from real associates, letting potential recruits see the firm through the eyes of actual recruits.

At its most basic, the purpose of your website should be to inform visitors about who you are, what you do, and how you outshine your competitors. The site should provide this information in language that is clear and in a format that is simple to follow. You can build from there, but never stray far from these basic elements.

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