A service of the ABA General Practice, Solo & Small Firm Division

Law Trends & News

PRACTICE AREA NEWSLETTER

WINTER 2011
VOL. 7, NO. 2

CHAIR'S NOTE

Dear Division Member:

Below is the second issue of *GPSolo Law Trends & News* for bar year 2010–2011. 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 are articles about what a 3L and a dean from a law school expect of each other as the student plans for graduation and seeks a job, an article about the evolution of same-sex marriage, and another about trust fiduciary obligations. Many of the articles in this issue cover situations faced by solo and small attorneys. Also included are checklists an attorney will need in their representation of clients.

With this issue, *GPSolo Law Trends & News* is now into 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. Each of the assistant editors did a fine job. Without their superb efforts, none of this would be possible.

If you are interested in either writing an article or participating in the production of the newsletter, please contact Jim Schwartz at attyjls@aol.com. Jim has been the editor since its launch six years ago. I thank him for his work as well.

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

LETTER FROM THE EDITOR

Dear Division Member:

Below are two articles: the first written by a 3L at Villanova University School of Law and the second by the former Assistant Dean of Career Strategy at the same school. I asked that they be written because several

law students seem to be having a tough time finding full-time employment. Given that, I asked the student to describe the types of assistance he is expecting from his law school, and I asked the Assistant Dean of Career Strategy to describe the types of services the school is providing to its students and what the school expects from its students. I intend to have other schools do the same. I hope you find them interesting.

Very truly yours,
Jim Schwartz
Editor

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YOUNG LAWYERS

One 3L Perspective on Life After Law School Circa 2011

By John C. Stellakis

"*The only place where success comes before work is in the dictionary.*"—Vince Lombardi

The most-asked question to third-year law students from friends, family, and mentors is something like the following: "Are you excited to graduate from law school? You're almost done!" The most received response to this question is something like, "Sure . . . if I can find a job." Of course we're excited to graduate from law school. Scare you, work you, bore you—right? We've been scared. We've been worked. Now, we're bored and anxious to launch our professional careers as successful, earnest, and trustworthy attorneys. Launching our careers, however, may be more difficult than our three years of law school.

I believe I am doing all that I can, but there's just not much out there.

Have I done enough in law school? I survived the first two years. I found my way onto a journal, clerked for two judges, studied abroad, completed a healthy chunk of pro bono hours, and passed the MPRE. I sent out dozens of applications—some to very good contacts—to land a second summer job at a firm. Not many firms hired, so I spent my second summer working as a research assistant for a professor and a law clerk for two solo practitioners. During my last year I am serving the journal and the clinic. I believe I am doing all that I can, but there's just not much out there.

I've attended our school's interview and resume workshops. I've met with our career strategy office to brainstorm a plan to obtain employment. The plan

seems to be something along the lines of searching wider and digging deeper. Join bar associations where you'd like to hook into the legal community. Pillage the alumni directory for contacts. Consider working in legal fields you've never thought you'd like. It's not bad advice. And, it's not their fault that firms are not hiring. With or without the help and advice, our job forecast remains bleak and stormy.

From what I can gather, it seems the legal profession is saturated with new graduates, and many firms cannot afford to hire. Supply is very high and demand is nonexistent. If my sophomore economics course serves me well, I believe this makes new graduates a dime a dozen—a quarter-million dollar dispensable commodity. Harsh math. I have received many letters from firms congratulating me on my accolades and telling me how employable I am, but they are not interviewing or hosting a first-year associate program. Even the firms hiring are not taking many people.

I always thought there was more to the legal profession than how many personal injury law suits a student can find in a time-pressured torts exam during the first year or who is able to get the best outlines from upper classmen to snag the better grade. I'm a hyper-type-A personality. I'm welcoming and outgoing, patient, willing, empathetic, ambitious, and genuine. I'm a trusting person who could sell ketchup popsicles to a lady in white gloves. This description probably fits many third-year law students. Don't firms want lawyers who will build a rapport with the public, comfort and reassure clients, bring in business, and work hard day-in and day-out? In other words, do firms actually seek an intellectual and social asset? In fairness, legal employers must watch their bottom lines and they go through hundreds of resumes a season. To expedite this process, they seemingly choose a few schools to hire from or only take the best GPAs from midranked schools. (Rankings are a whole other issue.) A logical deduction leads me to believe all of my hard work will yield nothing.

Luck is when opportunity meets preparation.

What to do from here? Well, law students are not known for giving up. Achieving admission to law school in itself is a lifetime achievement. The battle is uphill from there: deal with the stress and mental rigors of school; slave away during summers; graduate and study the whole summer to pass the bar. Doesn't "success come to those who work hard?"

Despite losing comfort in that adage, I maintain that work does breed success. Another maxim keeps my fire alive: "Luck is when opportunity meets preparation." We just need the chance to seize an opportunity where everything we've done shines through. Opportunities are few and far between, but some have to be out there.

My faith and calmness in this difficult climate comes from my atypical law student perspective. I went to law school *to learn*. I did not work hard through high school and undergrad to go to law school to get a high paying job. Don't get me wrong, I have loans to repay, and hard work should be its own reward, so I hope to do well for myself. My ambition to attend law school, however, is not motivated by money. My aspirations are motivated by learning for learning's sake and the privilege to help those in need of legal advice and support—to be someone's confidant, source of reassurance, and, at times, savior.

I hope that I will find my luck—that my preparation will meet an opportunity. Although times are tight and things are difficult, there must be something out there for me. My persona and etiquette have provided me with many contacts and some good networking, and I will most likely find my match via these avenues.

Third-year law students approach the bleak and stormy horizon hoping for two results. On the one hand, perhaps things will clear up, and we will find a way to

secure the spark for our career. On the other hand, we battle the darkness and survive long enough to find our respective paths. We don't think about the third possibility.

John C. Stellakis is a juris doctor candidate of the 2011 class at Villanova University School of Law. He is an active member of the Villanova Environmental Law Journal*, an officer of the Villanova Law School Student Bar Association, and served as chairman of his law school's Constitution Committee for 2010. John graduated with a B.A.H. from Villanova University in 2008.*

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YOUNG LAWYERS

The New Normal for New Law Graduates: A Career Professional's Perspective

By Elaine Petrossian

What a Difference a Recession Makes

Just a few years ago, legal employers declared entry-level lawyers as the "lifeblood" of their organizations, bemoaned the "talent wars," and applauded law schools for practical training that did not exist for their more seasoned attorneys. When times were flush, law students were essential for future law firm survival and succession.

Blaming the Victim

After the Great Recession, the tune changed and a torrent of "bad news" flooded the legal community. Corporate clients lashed out at firms that raised rates to finance escalating salaries and partner payouts. Large law firms laid associates off, rescinded or deferred offers, and suspended student recruiting. Suddenly, law schools were accused of producing "an irrelevant product." The value of a JD is now debated strictly like any other financial asset in the portfolio, to be priced, purchased, and flipped for the highest (short-term) gain possible.

The "bad news" is bad. Since 2008, the US legal sector has shed jobs at an unprecedented rate, in virtually every segment and region of the legal market. At a time when the cost of a legal education shows no sign of shrinking, legal media and Internet sites bombard us with news, rumors, and rants that question the sanity of anyone who desires a legal career in this climate—or who hires an entry-level graduate for their office.

However, the new normal is not as bleak as the blogosphere may portray it.

Entry-level attorneys are finding work. Law students are finding summer internships, especially with smaller firms, solo practitioners, and public service agencies and nonprofits.

Navigating New Terrain

From my vantage point, I see several trends that graduating law students should prepare to navigate as they enter the profession in the new normal.

First, new law graduates should anticipate more legal opportunities in freelance or nontraditional work arrangements (e.g., independent, temporary, time-limited, or part-time positions). Due to their flexibility, solo practitioners and smaller firms have proven to be a major source of new graduate opportunities in this way. For these reasons, we have been reaching out to smaller firms and solos specifically to encourage them to take new graduates on as law clerks or freelance associates. Employers who may be reluctant to commit to permanent or full-time employment arrangements frequently find it helpful to bring a new graduate on for part-time or temporary positions.

Second, new law graduates should plan for the possibility of managing their own practice earlier in their careers. Rather than waiting for others to give them a job, a growing number of graduates are channeling their entrepreneurial spirit into developing their own slate of work. Whether through freelance arrangements, attorney referrals, court appointments, or direct client engagements, the number of junior attorneys running an independent or sole proprietorship is growing significantly. At Villanova, we have offered programs to alumni and students who need to be their own boss and run their own practice. The ABA and other bar associations offer valuable workshops, resources, and support systems for lawyers running an independent practice. With fellowship and mentoring from more experienced lawyers, this can be a viable option for junior lawyers.

Third, mentors and other professional support systems will be more important than ever before. New graduates must dedicate disciplined, enthusiastic effort toward nurturing professional relationships with lawyers and nonlawyers. Professional contacts should be treated as valued colleagues, not merely as solicitation targets. We reinforce this constantly with our students and alumni, and we support their efforts with programs, events, directories, and social networking media site tools. New graduates need to actively seek out mentoring by being “mentor-ready.” Would-be mentors feel more compelled to assist those who show active engagement and eagerness to learn and develop.

Taking the Long View

Finally, unwavering commitment to the long-term goal of building a satisfying legal career will create the conditions that lead to success, despite this (or any) economic downturn. It is absolutely true that “luck is when opportunity meets preparation.” Opportunity comes in many forms and often when we look for ways to help others. Some of the most successful job seekers I have seen during this downturn found excellent opportunities because they rarely missed a chance to help others. Whether through pro bono, professional association service, community service, or offering to help a lawyer or nonlawyer with a project, these individuals kept their skills sharp, their relationships fresh, and their optimism high. Their preparation eventually met with opportunity.

Elaine Petrossian served as Assistant Dean for Career Strategy at Villanova Law from August 2000 through February 2011. She graduated from the University of Virginia School of Law and practiced law in Philadelphia at two major law firms.

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YOUNG LAWYERS

Forging Ahead: A Young Lawyer's Continuing Experiences in Developing a Solo Law Practice

(Part Three of a Series)

By Brian Annino

"The best thing about the future is that it comes only one day at a time."

—Abraham Lincoln

This is the third installment in my series of articles based on my experiences in starting and building my law practice. In this series, I outline lessons I have learned and provide opinions and ideas to help you in starting your own law practice or analyzing your current practice.

My first article, "Hanging the Shingle," discusses selecting the right time to open your own law practice, the central role of budgeting, and the importance of networking in the real and virtual worlds. My second article, "Extending the Reach," continues the discussion on networking and provides strategies and tips that I have utilized in growing my law practice.

In this article, I write about the important considerations involved in selecting your law office. Future articles will continue to discuss additional ideas, opinions, and lessons learned from my own practice. As always, please feel free to reach out to me and let me know your comments, ideas, and experiences. I greatly enjoy receiving your comments generated from my previous articles and welcome the opportunity to speak with other attorneys about the joys and challenges of solo and small firm practice.

My grandfather was a big believer in having the "right tools for the job." Building on this belief, I am a strong proponent of having the "right office for the job." This does not mean that you should devote your cash resources into a lavish office space at the expense of other firm needs. However, you should select and utilize an office space within your budget that best fits your needs.

The Home Office

I recognize that many of us (particularly in this extended down economy) are forced to practice law out of our homes and apartments out of pure necessity. I was in the same boat and started my law practice in January 2009, working out of a home office. However, I still applied the mantra of "having the right office for the job" in creating this space. With the significant help of my wife, we converted our (generally unused) dining room into a fully functional law office.

To accomplish this, we first moved out every piece of furniture in the room to get a fresh perspective on the room. Our second step was to select a new paint color and choose wall hangings that we wanted in our office space. Never underestimate the use of good paint to change the character of any room.

As I have discussed at length in my first article, we were on a very strict budget. Within this budget, we purchased a nice office desk and other office furniture. It was nothing fancy, but frankly as nice as any furniture provided to me as a junior law firm associate. Upon determining that our existing DSL internet connection was sufficient for our needs, we moved in our computer and printer/fax machine.

Before long, we had a fully functioning law office through which I was able to produce the same amount of work (if not more) than any typical law office I had worked in. However, the major drawback that I could never fully overcome involved client meetings. I never felt comfortable enough to invite clients to my home office for meetings. This was largely driven by the fact that our home is tucked away in a residential subdivision that lacks any other businesses. I wanted to project an image as a trustworthy and experienced attorney, but I felt that it would be difficult for clients to overcome the fact of driving up our driveway and parking next to the basketball hoop and garden hose. Much of this concern may have been magnified in my own mind because I just recently went into solo practice, but I continue to believe that it is important to have an office that projects the image you want clients to perceive. Therefore, after a couple months of working out of my home and meeting clients at their offices or other attorney's conference rooms, I decided that it was time to select a more traditional office space. That being the case, I kept my home office fully functional and enjoy working there on nights, weekends, and those days when you would rather just work from home.

Locating a Law Office

The first and most important step in the process is choosing a location for the office. Your options for office space will be provided by your choice of location. I purposely chose my location so I would be situated in a major metropolitan area that provides a large number of potential clients and great options for office space.

In my decision-making process, I paid close attention to the reasons for opening my own practice. As I desired a better work-life balance, I wanted my office to be closer to home. In my previous law firm position, I commuted nearly 90 minutes a day roundtrip. When adding this to a typical associate's work-schedule, it left little time for family and personal time. Therefore, I wanted an office close to home but also conveniently located for clients to meet me with me.

Another important consideration is proximity to the local courts in which you primarily practice. Because my practice is fairly equally divided between litigation and transactions, proximity was important, but not an absolute necessity. However, if my practice was solely devoted to litigation in the local courthouse, I imagine that proximity to the local courthouse would have been much more of a factor in my decision.

How Much Space Will I Need?

After selecting my location, I carefully considered the amount of space that I really needed. Obviously, I needed an office big enough for me to meet with my clients and perform my work. However, I knew that my wife was going to join me in my practice as a paralegal as soon as we could afford it. As such, I needed sufficient office space for her as well. Also, I thought it would be nice to have a conference room for client meetings, depositions, and document signings, but I needed to consider whether this was absolutely essential or a budget buster. After all, I could accomplish all necessary tasks within my office if necessary.

What Type of Building Should I Select?

After determining the amount of space I absolutely needed, I then considered the type of office building in which I wanted my office to be situated. The options varied between skyscrapers to restored Victorian homes. I understand the type of structure where an office is situated is important to some, but it was not crucial to my decision-making process. So long as it met my criteria of being close to home, provided a professional atmosphere for my clients and I to meet, and provided sufficient space for me and a potentially growing firm, I was open to different types of structures. I can assure you, however, that in this economy, you will be able to find a particular type of structure that you have your heart set on if it is important to you.

Pounding the Pavement

I was now ready to visit potential office spaces. After an analysis of the market, I set a ceiling to my office budget. I thoroughly reviewed all available information on each property prior to the visit. While I could not afford to take too much time away from my growing practice, I narrowed down my list of potential office spaces by conducting “drive-by” investigations. I ultimately narrowed my list of potential candidates to five locations.

Important Factors to Consider

In visiting my short list of candidates, I made note of the following:

- Is rent negotiable? (It generally is, particularly if you like to negotiate.)
- Is a personal guaranty required for rent? This is very important, because you will be personally liable for the lease even if you close your law practice's business entity.
- Is the landlord willing to work with me on the rent? Will he be understanding if we need an additional couple of days to make a rent payment?
- Are there telephone lines, fax lines, internet connections already set up? If so, are these included in rent, or do I have to pay these additional costs?
- Are utilities included with rent? If so, will I have control over the thermostat if I am working late at night or on weekends?
- Are there other attorneys within the office complex or unit? As I discussed earlier, it is always helpful to have mentors and networking connections.
- Is the landlord located on the property? If so, is it a corporate entity or a real person that I will have contact with?

- Will my clients feel safe here and view this as a professional office?
- Is housekeeping included with the office?
- Can I bring my Labrador retriever with me to work? Ok, maybe this was not at the top of the list, but my dog Jordy loves coming to work with me. Plus, he is a pretty good paper shredder.
- Is this a location that I feel comfortable committing to for at least one year in which I can produce good work and continue to grow my practice? I recommend committing to a new office for at least one year to establish some degree of stability for your brand and because you will incur expenses in changing letterhead, business cards, etc.

Of course, this list does not discuss in detail the ins and outs of commercial leases, a topic that requires a much more extensive discussion. However, I always recommend having independent counsel review a commercial lease, even if you are a real estate attorney. Because we can get clouded by our excitement and fear, having a neutral set of eyes review such a lease is very important.

Finally, I found it important to view my favorite candidates at least twice at different times of day. I also brought my wife with me, since our hope was that she would be joining the firm in the near future.

The Selection

In the end, I chose to rent an office from a local attorney that owned an office condominium roughly half-way between my home and the local courthouse. There were three offices located in the office condominium (each occupied by attorneys, one of which was the landlord) and a conference room. We shared resources in a manner that complied with local bar rules (make sure you review these carefully) and held ourselves out as independent attorneys. Nearly two years later, we couldn't have been happier with the arrangements. The other attorneys became friends and mentors to me.

My wife ultimately joined my firm over a year ago as a paralegal. We both occupied the same office together and despite the close quarters, we were able to survive and ultimately thrive. It can be a rewarding and special experience to practice with your spouse.

As discussed, it is of essential importance to have "the right office for the job." Choosing the right office for you will involve a careful consideration of your needs and resources. In conducting this analysis, I recommend paying close attention to the reasons you chose to open your practice, such as my desire for better work-life balance. I also recommend making a decision in light of recommendations and strategies I discussed in previous articles, including the importance of networking and adhering to a budget. In the end, I hope you locate an office that best works for you in building your law practice.

This concludes my third article in this series. I look forward to continuing discussing my experiences in starting and building my solo law practice. In the meantime, I welcome ideas from your own practice and perspective. Please feel free to contact me at brian@anninolawfirm.com or connect with me via LinkedIn, Twitter, and Facebook.

Brian Annino is the owner of Annino Law Firm, LLC, where his practice focuses on estate planning and business formation, management, and transactions. Mr. Annino is admitted to practice law in South Carolina, Georgia, and Massachusetts. He received his B.A. and J.D. from the University of Connecticut and has been published in the ABA Journal.

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If You're Not First, You're Last: Honestly Assessing Workplace Priorities

By Jennifer Hilsabeck

When they see that I am a full-time working mother of three, people often ask me how I manage to successfully balance the various demands of my busy life. It is probably true for most of us that finding the time to fit everything into a hectic work day or week is usually remedied by sacrificing the nonessentials, such as quality time with family and friends, or perhaps even sleep. But are there other victims to an overly fast-paced lifestyle whose demise might not be felt until months or even years after they were first neglected in the pursuit of that elusive reward known as success? Perhaps our physical or mental health or relationships with friends, family, or other loved ones are suffering silently on a daily basis due to neglect in the face of the unrelenting pressures of work. The more troubling question for me has become not whether I am actually able to get everything done in a timely manner, but rather whether this demanding balance is being executed successfully. To use what is certainly a tired cliché at this point, am I truly managing to “have it all?”

Regardless of whether or not we have children, each of us as working professionals must balance different aspects of our lives on a regular basis. The demands of a career in the law are great, and many times other elements of who we are must suffer in order to meet those demands. After all, who hasn’t blown off a medical checkup or social engagement because of a heavy workload or impending deadline? Each time we do this, we tell ourselves that this is the last time and that from now on we will be better about prioritizing, but the truth is that sacrifices such as these are inevitable in the ongoing quest for professional success.

Nevertheless, I continue to be cautiously optimistic that my decision to pursue a

career in the law full time will not result in a complete imbalance in the work-life arena. My personal recommendation, for what it is worth, on successfully managing this stressful balancing act is to:
(i) honestly assess what your personal priorities are, (ii) create solid boundaries to protect those sacred priorities, and then (iii) hold the line when being challenged to subjugate your stated priorities to the demands of another.

Because this is the real world in which we are living, unfortunately there will be times when you will have to back down in order to preserve your reputation as a professional, your marriage/romantic relationship, or perhaps even your sanity. But if this retreat from what you have thoughtfully declared to be most sacred begins to occur on a regular basis, perhaps it may be time to reconsider whether being perceived as "having it all" is really something worth attaining. Although I understand that while my method for coping may not be a universal prescription for happiness and success, perhaps this article has given you something to ponder the next time you have a few moments to yourself in between deadlines.

Jennifer Hilsabeck has practiced law in Las Vegas, Nevada, since 1999. Since January 2010, Jennifer has been practicing as Of Counsel with the Law Vegas office of the regional law firm Lewis and Roca, LLP in the firm's Environmental and Natural Resources and Energy, Alternative Energy, Telecommunications and Utilities practice groups. Her practice emphasizes renewable energy development, legislative affairs and general corporate transactions, as well as county and municipal relations. Prior to joining Lewis and Roca, she served for five years as Associate General Counsel for American Nevada Company, a Greenspun family company that was founded in 1974 and is a major developer of commercial office centers, retail centers, and master planned communities in Southern Nevada. Prior to joining American Nevada Company, she practiced as an Associate with the Nevada firm of Jones Vargas. In addition, she has been an active member of various Sections and Divisions within the American Bar Association since becoming an attorney, including serving as a Young Lawyers Division Liaison to both the Business Law Section and the General Practice Solo Small Firm Division. Jennifer is currently serving as a Council Member for the General Practice Solo Small Firm Division and as an active Member of the Diversity Committee of the ABA Section of International Law.

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Should a Corporation Pay Dividends in 2010 to Take Advantage of Low Dividend Tax Rates? »

By Stephen B. Gorin and Hugh Drake

Should a Corporation Pay Dividends in 2010 to Take Advantage of Low Dividend Tax Rates?

By Steven B. Gorin and Hugh Drake

Qualified capital gains and dividends are currently taxed at a maximum federal rate of 15 percent. The current rates are schedule to expire at the end of this year. The plan recently proposed by the president would extend the current rates through December 31, 2012. It is anyone's guess whether the president's proposals will be accomplished in Congress this year. If there is no action on Capitol Hill, the maximum federal rate on net capital gains will go up to 20 percent in 2011. Additionally, the rate on all dividends will shoot up from 15 percent to the regular income tax bracket rates, potentially reaching 39.6 percent. Even if Congress approves the president's proposals, tax rates would be scheduled to increase January 1, 2013, so the analysis below would still be a worthwhile exercise.

When the tax cuts expire, many investors will be taking action on sales and dividends before the end of this year before the rate increases. Whether a corporation should pay dividends in 2010 (or by the end of 2012, if applicable) to take advantage of low rates depends on whether paying dividends will ever be beneficial.

For a C corporation, the answer depends on whether the corporation needs to pay the dividend to save accumulated earnings or personal holding company tax and, ultimately, whether the shareholders need the cash.

For an S corporation that had been a C corporation and retained earnings and profits (E&P), the answer depends on whether the shareholders need a distribution in excess of AAA (Accumulated Adjustments Account—similar concept to E&P applicable to net earnings since becoming an S Corp—IRC Section 1368(e)) or have excess passive income issues.

C Corporation

If a corporation appears headed for an accumulated earnings tax problem, then one should consider accelerating dividends to take advantage of current low rates. Additionally one should consider an S election as a better solution, because S corporations are not subject to that tax. But, of course, corporate structure or exposure to built-in gain tax often precludes the S election strategy.

Personal holding tax is a year-by-year calculation, so only short-term planning would be available to address it. Details about accumulated earnings and personal holding company taxes are beyond the scope of these materials.

Whether the shareholder needs the cash is more of a matter of when. If the shareholder plans to hold the stock for a long time, then the shareholder can get capital gains rates on the sale of stock or liquidation of the corporation, although remember that the latter risks double taxation on any growth in reinvestments of accumulated dividends.

S Corporation With E&P

If you have an S corporation with E&P that earns excess passive income, you are at risk for imposition of a tax. If the situation lasts too long, then you are at risk of the S election being terminated.

One solution is to distribute E&P. An election can be made to have all distributions come first from E&P and then, when E&P are exhausted, from AAA. The corporation can even declare a deemed dividend of E&P to practically guarantee that no E&P remain. If such a strategy is pursued, 2010 might be the last chance to get rates this low (or by the end of 2012, if the President's proposal is enacted).

Another solution is to generate sufficient non-passive gross receipts. Nonpassive gross receipts would include an active business or active rental real estate (*passive* has a different definition here than it does for the Code § 469 passive loss rules). Some people stop here, because clients say that they have sold their business and do not want to run another one. However, gross receipts attributable to an active business run by someone else would also work. The most common example is oil and gas partnerships. When an S corporation just has marketable securities, experience suggests that investing only 2–3 percent of the portfolio in oil and gas partnerships will do the trick.

Therefore, although distributing the corporation's E&P is technically sound, as a practical matter investing in oil and gas partnerships often is much less expensive than paying tax—even at current low rates—on a dividend that cleanses a corporation with substantial E&P.

Conclusion

Paying dividends now to take advantage of low dividend tax rates has its merits, but consider alternatives to see whether that strategy truly measures up. The clock is ticking!

To contact the authors, email Steve at sgorin@thompsoncoburn.com (who also will provide a 300+ page set of materials on business succession planning upon request) or Hugh at hdrake@bhslaw.com.

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FAMILY LAW

The Write Way: How to Make Your Byline a Beeline to New Clients

By H. Joseph Gitlin

Getting published is the best and easiest way to develop a successful family law practice. Once published, getting articles printed becomes progressively easier as you build your reputation as a legal author.

By about my tenth year out of law school, I was practicing largely family and criminal law. I wanted a mastery of the law in the area in which I practiced. I found that the body of criminal statutory and case law was overwhelming, so I decided to practice only family law, where the body of law was more manageable.

My practice is in Woodstock, Illinois, a small town about 65 miles northwest of Chicago. My best referral sources are from Chicago area lawyers. I have been writing monthly law columns for the *Chicago Daily Law Bulletin* for more than 30 years. My goal has been to put my name on lawyers' mental screens so that they would think of me whenever they seek to refer a case in my part of the state.

Whether you should write for a national or local publication or both depends on your goals. Most of us practice in one state and usually only in our own county and neighboring counties. Thus, your best bang for the buck is local publications. But once you are known through publication, referrals will come from all over the state and sometimes from all over the nation.

What to Write About

Generally, stay away from articles that attempt to be a primer on any subject, e.g., contempt. Instead, be topical. For example, if the supreme court of your state accepts the review of a family law case, study the intermediate appellate court opinion and become knowledgeable about the area of law. When the

supreme court opinion comes down, you can immediately write an authoritative article.

Target your writing to a particular publication. Become knowledgeable about its subject areas, writing style, and submission requirements. Query the editor about a topic or submit an article for publication.

Start with the rule that local publications are the most practical. If your county bar association has a newsletter, begin there. Next, look to the family law section of your state bar association. Such sections publish newsletters. Next turn to your state bar journal. These publications tend to be more learned and follow the scholarly style of law school journals. For building your practice, law school journals are a waste of time.

Is Publishing Nationally Worthwhile?

It depends. If among your goals is to be on some national "best lists," e.g., being listed in *The Best Lawyers in America*, national writing and lecturing is the route. The main national family law groups are the ABA Section of Family Law and American Academy of Matrimonial Lawyers. As you know, *Family Advocate* is the quarterly membership magazine of the ABA Section of Family Law. Each issue addresses a different theme, such as trial of a custody case or what is electronic evidence. Practicing family law attorneys serve as editor in chief and as issue editors. If you are going to submit an article, contact *Family Advocate* to determine subjects to be addressed in the next year or so and focus your articles to the targeted topics. (See Instructions to Authors on the *Family Advocate* website (in the How to Contribute Articles section).)

Family Law Quarterly is the section's "learned" publication. Each issue addresses a particular subject area from a scholarly perspective. (See submission requirements on page ii of each quarterly issue, or visit the FLQ website for more information.)

The American Academy of Matrimonial Lawyers publishes the *Journal of the American Academy of Matrimonial Lawyers*, which also is more scholarly and is limited to one subject per issue.

Among the best places to publish an article that receives national attention is the *American Journal of Family Law*, published by Aspen Publishers, Inc. It also is a quarterly publication, but issues are not subject limited.

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FAMILY LAW

The Emergence of Same-Sex Marriage

By Charles P. Kindregan, Jr.

Throughout the late twentieth century, a number of lawsuits attempting to secure the right of same-gendered persons to marry were met with quick rejection by courts in the United States. However, the change in rejectionist attitudes toward same-sex marriage is (and continues to be) remarkable as we near the end of the first decade of the twenty-first century. While there were intimations of this late in the last century, through court decisions in Hawaii and Vermont, it is only more recently that the idea of a full right of same-gendered persons to marry has found acceptance in a number of American courts and legislatures. In the sense that Americans have been increasingly accepting of principles of true equality in our civil life, this development should not be too surprising. But for many, this is a revolutionary development that has created great debate.

A basic premise of the historical development underlying the same-gender marriage movement is that for many, marriage is a religious institution, but from a legal viewpoint, marriage is a state-created civil institution subject to changing social needs. I have noted in previous writings that marriage evolved in part from religious concepts, but over centuries, the law defined so many benefits attributed to married persons that it took on a civil cast. In response to this new view of marriage came demands for equal access by those who were for centuries excluded from the right to marry. See Bonauto, “Ending Marriage Discrimination,” 40 *Suff. U. L. Rev*. (2007).

Federal law and the laws of every state confer hundreds of specific benefits that flow from marriage; examples include the economic protections of domestic relations law, tax benefits, land titles, descent and distribution of property, family leave benefits, protection of marital communications, homestead rights, workers' compensation and personal injury claims, and numerous other benefits. Clearly, modern marriage is a civil institution (notwithstanding that for many it continues to have private religious meaning), for which principles of equality require that its civil benefits be nondiscriminatory.

In 2003, Massachusetts became the first state by judicial decision to recognize a state constitutional right of same-gendered persons to marry. *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941 (Mass. 2003). The governor of the state responded by complaining that the court had overturned "3000 years of recorded history." This statement was premised on the proposition that heterosexual marriage is forever fixed in history and time. In reality, my research and that of others has demonstrated that marriage has assumed various forms throughout history; see Kindregan, "Same-Sex Marriage: The Cultural Wars and the Lessons of Legal History," 38 *Fam. L. Q.* 427 (2004).

Family law practitioners are familiar with various changes that have affected our understanding of family life in the not very distant past, including recognition of nonmarital cohabitation contracts, equitable property division, assisted reproduction, abortion, no-fault divorce, covenant marriage, civil unions, domestic partnerships, etc. These significant developments show that historically family law is in a state of constant flux to meet the demands of modern life.

The argument that the law of marriage and the family is immutable has played a significant role in the debate over same-sex marriage. However, the history of modern family law suggests that the argument is not justified by experience. I suspect that efforts to legislate absolute prohibitions on same-gender marriage will fail in the long run. That, I predict, will ultimately be the fate of the federal attempt to restrict marriage by laws, such as the Defense of Marriage Act (DOMA). In Massachusetts v. U.S., 698 F. Supp. 2d 234 (D. Mass.), a federal court ruled that DOMA interfered with a state's 10th Amendment right to regulate marriage and family; in Perry v. Schwarzengger, 704 F. Supp. 2d 921 (N.D. Cal.), a federal court ruled that a state's bar on same-sex marriage created by a referendum had no rational basis. In 2011 the U.S. Department of Justice announced that while it would enforce DOMA, it would not defend the statute in court cases.

An example is found in our neighbor Canada. In 1999, the Canadian House of Commons defined marriage as "the union of one man and one woman," but less than a decade later, Canada recognized the right of two persons to marry, regardless of gender. Canadian Civil Marriage Act, 2005 S.C. ch. 33.

The Procreation Argument

The first courts to consider marriage license applications for same-gender couples focused considerable attention on the proposition that the purpose of marriage is procreation and that same-sex couples are not capable of producing children. The legislative history of the Defense of Marriage Act suggested that the procreation argument had considerable influence in the enactment of that Act. (H.R. Rep. No. 104-664, pt. V. at 12–14). Although it is true that infertility or postreproduction age has never been a bar to legal marriage, the prevailing argument in this analysis was that by restricting marriage to different-gender couples, the law reaffirmed the potential for procreation as a purpose of marriage.

By the start of the twenty-first century, the procreation argument was annulled by advances in reproductive medicine, which made it possible for same-sex couples to produce children through assisted reproductive technologies. Both all-female and all-male unions have used this technology to have children, and though the law is not uniform everywhere, courts have increasingly recognized the parental legal status of children conceived by its use.

The American Bar Association Section of Family Law has taken the lead in developing law affecting this medical science by drafting and approving the Model Act Governing Assisted Reproductive Technology (2008). Although some states have insurance or other regulations that restrict recognition of assisted

reproduction, its use by same-gender couples is nowhere different legally than is its use by heterosexual couples.

The Changing Legal Landscape

After Massachusetts became the first to rule that its state constitution protected the right of same-gender couples to obtain a marriage license, other states followed the lead of Vermont and enacted statutes creating civil unions or domestic partnerships. However, until recently, efforts to legalize same-sex marriage did not meet with success, other than in Massachusetts. In 2008, Connecticut recognized the right of same-gender couples to marry in *Kerrigan v. Comm'r of Public Health*, 957 A.2d 407 (Conn. 2008). In 2009, Iowa, by court decision, did the same in *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

Then three more states enacted legislation allowing same-sex marriage—Vermont, Maine, and New Hampshire—although the Maine law was overturned by voter referendum. A referendum in California (Prop. 8) amended the state constitution and effectively annulled a California decision authorizing same-sex marriage. The court later ruled that the referendum only applied prospectively and that same-gender marriages that took place before its enactment were valid. *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009).

It is impossible to predict with certainty where recent acceptance of same-sex marriage will lead in the future. However, it is clear that American society's increasing acceptance of principles of equality for previously excluded groups has found greater acceptance in the law governing marriage, at least in some states. It is likely that over the next decade, efforts in still more states will build on recent developments that have marked some legal acceptance of same-sex marriage.

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FAMILY LAW

The Ten Commandments of Military Divorce: Representing the Nonmilitary Spouse

By Peter C. Cushing

Representation of the nonmilitary spouse in a dissolution action requires specialized knowledge. Federal law and regulations frequently govern or limit the relief available in state court. Jurisdiction, pension splits, insurance, and health benefits involve the application of complicated rules. The following suggestions seek to advance the interests of the nonmilitary spouse.

1. Thou Shalt Obtain Personal Jurisdiction

Assuming that dissolution subject-matter jurisdiction exists, it still is necessary to personally serve the active-duty member with a summons and petition for dissolution of marriage to obtain jurisdiction. If the respondent is overseas or deployed, service can be extraordinarily difficult. It is not possible to compel military authority to serve the summons and petition on an active-duty member. It is possible to request that military authority serve the active-duty member, but service is allowed only with that consent. If the member will not consent, one solution is to have the court appoint a process server as an officer of the court to serve the papers. However, service aboard any ship or shore installation must be done in accord with military regulations. In addition, service in the territorial jurisdiction of many foreign nations may be regulated by the Hague Convention. With some Hague Convention signatory countries, it is possible and preferable to serve the summons and petition abroad by mailing the documents to the "Central Authority," who will then accomplish service in accordance with the law of that jurisdiction.

When the case also involves child support, service of process on members with children who are stationed overseas may be easier. Federal agencies and the uniformed services have designated officials who are responsible for facilitating service of legal process involving child support, regardless of the location of the members' duty station.

2. Thou Shalt Proceed Without Personal Jurisdiction to Obtain Child and Spousal Support

In Rem Orders: Uniform Code of Military Justice

Despite diligent efforts, in some cases one may not be able to accomplish service by foreign authority, military authority, or court-appointed process server. In that event, provided subject-matter jurisdiction and long-arm jurisdiction exist, one may proceed after publication and issuance of notice of the action to obtain the appropriate in rem orders, subject to personal enforcement when the active-duty member may be personally served, or against the respondent's real property or other assets within the state, specifically described in the notice.

One also may serve the in rem order by certified mail on the active-duty member's commanding officer, pointing out that in the U.S. military, failure to support dependents constitutes "service-discrediting" misconduct. Under military regulations, the servicemember must be counseled regarding his or her obligations and informed that administrative or disciplinary actions under the Uniform Code of Military Justice (UCMJ) may be initiated if such service-discrediting conduct continues.

In Rem Support Orders: Involuntary Allotments

Although letters to the active-duty member's commanding officer are ordinarily effective, there is good reason to exercise restraint in taking action that could jeopardize family income and assets. In many cases, obtaining an *involuntary allotment* may be a better solution. The basic requirement for such an allotment is a state court support order and an arrearage equal to or exceeding support required for a two-month period. If your client is seeking *only* alimony, involuntary allotment is not available. If the client needs alimony and child support, involuntary allotment is available and preferable to garnishment because the definition of "disposable earnings" includes basic pay, basic allowance for quarters, basic allowance for subsistence, sea pay, special pay, and other allowances. These allowances are not included within the definition of "remuneration for employment" utilized by the federal garnishment statute.

The order is sent to the military finance center with a statement from a court or support agency official stating that the requisite arrearage exists and requesting a mandatory allotment. The finance center notifies the member's commander and the member concerning the request. Absent presentation of an adequate defense by the member, an involuntary allotment is started. Arrearages may be collected in a similar fashion. The maximum amount of the allotment is generally 60 percent of disposable earnings, or 50 percent if the member is supporting other family members, including allowances. Utilizing involuntary allotments thus increases the net monthly support amounts received by your client, in many cases avoiding the need for the extraordinary remedy of contempt.

3. Thou Shalt Penetrate the Civil Relief Act

The mere mention of the Servicemembers Civil Relief Act (SCRA) is enough to make most attorneys cringe. Under the Act, an initial stay of proceedings for at least 90 days is available to the servicemember who meets certain conditions in his or her petition to the court. After that, further stays depend on whether the member's military duties materially prejudice his or her ability to appear and participate in court proceedings. One can argue that a "temporary hearing" will not prejudice the rights of the servicemember since an interim order is always subject to a full hearing when the member returns and is available. When only income is involved, such as a hearing on "guidelines child support," one can argue that the presence of the servicemember is unnecessary since his LES (leave-and-earnings statement) can be faxed to the court for full consideration

at the support hearing. If the member is in knowing and willful violation of an order, one can argue that good faith and "clean hands" are required for a successful motion to stay the proceedings, and noncompliance with agreements or orders related to family responsibilities is presumptive evidence of bad faith.

Successful implementation of the Act often requires volunteers to make themselves available to act as attorney *ad litem* for the absent servicemember who has not filed a written response to the action or who has demanded appointment of counsel. There is no basis in the SCRA for the attorney *ad litem* to demand fees directly from the member, from the moving party, or from the court.

4. Thou Shalt Split the Military Pension

In a long-term marriage involving years of active-duty service, the pension often is the major asset of the marriage. Senior enlisted personnel frequently retire in their forties after 20 years' active service and receive a lifetime pension of one-half of their basic pay. Not including general officers, payments range from about $1,200 to several thousand dollars per month. Assuming a 40-year life expectancy after retirement, a military pension can be worth from $500,000 to more than $2 million, not reduced to present value and not including cost-of-living or inflation increases. The client usually is entitled to equitable distribution of this asset under state property division laws and the Former Spouse Protection Act, 10 U.S.C. § 1408.

However, special federal jurisdictional rules apply to splitting a military pension. Personal jurisdiction of the servicemember based on residence other than by military assignment, based on domicile, or based on consent is essential. Under no circumstances should a default be taken against an out-of-state active-duty military member followed by entry of final judgment. Omitting the pension as an asset or erroneously distributing it could have equally disastrous results. Both open the practitioner to grievance and malpractice claims, and both can be avoided by associating competent co-counsel.

A final judgment distributing a military pension in the case of an active-duty member must certify that the Civil Relief Act was complied with. Also, to divide a military retirement pension at the source, the parties must have been married for 10 years, during which time the servicemember was on active duty or earning retirement point credits, and this fact must be certified in the judgment or by separate documentation.

The mechanics of the pension split involve preparing the final judgment in proper form and completing DD Form 2293, "Application for Former Spouse Payments From Retired Pay," and forwarding the documents to the Defense Finance and Accounting Service (DFAS). In the event one cannot meet the 10-year rule, it is possible to split the pension as marital property. However, enforcement may be a problem because payments cannot be obtained directly from DFAS under federal law and regulations.

5. Thou Shalt Insure the Military Pension

As the population ages, many military pensioners will die and, unless insured, valuable pension benefits for both spouses will lapse. The pension stops when the retiree dies. Failing to advise the client to obtain appropriate insurance is likely legal malpractice in a case involving a long-term military marriage.

Oddly, there is general reluctance on the part of the judiciary to order appropriate insurance benefits to secure pension interests even when life insurance has been canceled shortly before the initiation of divorce proceedings. Unlike life insurance to secure child support or health insurance benefits for children, ordering life insurance to secure alimony or pension benefits in many

states is discretionary, subject to review for abuse of discretion. Therefore, the burden is on the practitioner to explain to the court the insurance benefits available, the costs, who should pay, and why insurance is considered essential in a particular case.

Private Life Policies

Insuring the military pension may involve private life insurance. On the plus side, this insurance may have been maintained for many years and may have a cash surrender value. If it insures the life of the member, with the former spouse as beneficiary, then counsel should determine whether the premium is affordable, whether the former-spouse beneficiary is willing and able to pay it (if the insured cannot be counted on to make the premium payments), and how to change ownership of the policy to the beneficiary (to prevent the insured from changing the beneficiary or attempting to cancel the policy). On the negative side, many former spouses feel that the cost or the inconvenience make this course undesirable.

Servicemembers' Group Life Insurance (SGLI)

Sanctioned by federal law and regulations, SGLI typically provides $400,000 of life insurance benefits for the member's designated beneficiary. The military member may name his or her parents, children, spouse or former spouse, or others as beneficiaries. The cost is quite reasonable. Because nearly all active-duty service persons carry SGLI, on the surface SGLI appears to be an ideal method of providing insurance benefits to secure at least part of the military pension or to provide for the former spouse or children of the servicemember. The difficulties of enforcement are found below at "7. Thou Shalt Be Aware of the Doctrine of Federal Preemption."

The Survivor Benefit Plan (SBP), 10 U.S.C. § 1447 et seq.

The Survivor Benefit Plan is available to active-duty members. Also, every few years "open enrollment" for retired members has become available. Divorcing parties may enter into marital settlement agreements to provide for an annuity to the surviving spouse in the event of the servicemember's death. Such agreements, by federal statute, may be approved by state courts, and orders may be entered sufficient to bind the servicemember and DFAS to provide the annuity. Benefits may be paid to the surviving widow or widower, surviving dependent children, former spouses, or other natural persons. Significantly, a court may order a person to elect SBP to provide an annuity to a former spouse or a former spouse and a child.

The downside to SBP is that premiums are somewhat expensive. The SBP premium is 6.5 percent of the selected base amount (from $300 up to full retired pay), to provide a benefit of 55 percent of the base amount. Payments are made out of retired pay, and both parties share in the cost in the same ratio as they do in the military pension. Various manipulations of the parties' percentages of the pension are possible to make one side pay all or none of the premium, but in most cases the parties simply let the statute make the allocation.

6. Thou Shalt Enforce the SBP Award

The most likely area of legal malpractice is in the enforcement of the Survivor Benefit Plan award. Given the complexity of the SBP statute and regulations, many SBP awards lapse and cannot be reinstated. Typically, counsel serves on DFAS the final judgment of dissolution of marriage, which equitably distributes the military pension and orders SBP coverage. The safest method is by certified mail, return receipt requested. Occasionally DFAS loses documents. The servicemember may have already named the spouse as SBP beneficiary at the

time of retirement before the divorce. However, sometimes the nonmilitary spouse is not designated as "former spouse beneficiary" in the divorce decree, thus disqualifying her. Often the attorney misses the deadline. The decree must be sent to DFAS by the member within one year of the divorce. If the former spouse sends it, DFAS must receive it within one year of the order providing SBP coverage. If the problem is discovered years later, the ex-spouse's only hope may be that Congress creates an open enrollment period for SBP, during which time the servicemember can be compelled to sign the necessary forms or petition the Board for the Correction of Military Records.

The Deemed Election Provisions

One of the SBP nightmares described above can be eliminated by utilizing the "deemed election" provisions of Title 10 U.S.C. § 1448. The statute provides that if the court has ordered SBP coverage and the servicemember fails to elect this, then the member shall be deemed to have made such an election if DFAS receives a written request from the former spouse, asking that such an election be deemed to have been made, along with a copy of the court order requiring same. Merely serving a certified copy of the final dissolution judgment and marital settlement agreement on DFAS is not sufficient. The order should be served with a letter specifically requesting that the servicemember be deemed to have made the election. It is preferable to serve it by certified mail, along with the SBP order or incorporated agreement, the divorce or dissolution decree, and DD Form 2293, available at the DFAS website, www.dod.mil/dfas, at "Money Matters." This important procedure secures payments for the former spouse upon the member's death.

Advantages of Survivor Benefit Plan

(1) Income for life—When the retiree dies, the former spouse receives benefits for life unless he or she remarries before age 55, which terminates benefits. (2) Available without qualifying—The SBP is available even if the military member could not qualify for commercial insurance due to health reasons. (3) Tax-free—Deductions from retired pay to fund the SBP are from gross retirement pay. Thus, they are tax-free, and the premiums are paid by the retiree and former spouse who receives a share of the pension. (4) Guaranteed—SBP cannot be terminated by the retiree and does not lapse as commercial policies do. (5) Cost-of-Living Adjustments—SBP benefits increase with the cost of living.

Disadvantages of Survivor Benefit Plan

(1) Inflexibility—The SBP, once chosen, cannot be canceled except by death of the eligible spouse and a few other exceptions. (2) Premiums are expensive and may increase—Although both spouses usually pay and premiums are tax exempt, premiums are expensive and do go up. (3) No cash value—The SBP does not have a cash-value buildup. If there is no payout of benefits because the former spouse dies first, premiums cannot be returned. (4) Dependency and Indemnity Compensation (DIC) or Social Security reduction—A complex set of rules may reduce SBP plan benefits by up to 40 percent when the beneficiary reaches age 62 or if the beneficiary receives DIC payments from the Department of Veterans Affairs related to the retiree's death. The former reduction, known as the "Social Security offset," is being phased out over a four-year period.

7. Thou Shalt Be Aware of the Doctrine of Federal Preemption

Although many servicemembers have signed marital settlement agreements to maintain their former spouses as the irrevocable beneficiaries of Servicemembers' Group Life Insurance (SGLI) and such agreements have routinely been approved by the courts in final judgments, this purported protection is illusory and unenforceable. The U.S. Supreme Court in *Ridgway v.*

Ridgway, 454 U.S. 46 (1981), held that this area was preempted by federal law, and a military member is free to name his new spouse or anyone with an insurable interest as the beneficiary of SGLI proceeds, despite a valid contract approved by the court, designating a former spouse and/or children.

Later lawsuits predicated on fraud, breach of trust, or contract violation have met with little success in both state and federal courts. After the death of the servicemember in such a situation, suit against the estate is possible, but the estate may be insolvent. The remedy of contempt during the servicemember's life is not available, since the member has a statutory right to designate whomever he or she wishes and such right cannot be infringed upon by a state family court judge.

Attempting to obtain private insurance involves the problems discussed above. All too frequently, the practitioner obtains military pension benefits for the spouse and then obtains court-ordered SGLI benefits, but the insurance beneficiary designation is secretly changed or the policy lapses before the death of the servicemember.

The client's next remedy may be suit against the attorney, perhaps many years later.

8. Thou Shalt Plan for Early Retirement, Defense Draw Down, Medical Retirement, or Merger With Other Benefits

When representing the nonmilitary spouse, an attorney must be aware that military personnel cutbacks in all branches of the U.S. military have resulted in "early outs." Often, the servicemember receives a separation benefit, referred to as Voluntary Separation Incentive (VSI) or Special Separation Benefit (SSB). Most state courts have found that this benefit is subject to equitable distribution, because it is similar to the pension benefit it replaces. In the event that the servicemember comes into possession of such funds, the judgment should require that the appropriate portion of the proceeds be held in trust for the nonmilitary spouse.

Another common scenario involves the medical disability retirement of the active-duty member. Medical disability payments are, in general, not subject to equitable distribution under federal law. If there is even a remote possibility that the servicemember may medically retire, jurisdiction should be reserved in the final judgment to award permanent alimony as medical disability benefits may be considered a stream of income from which alimony may be paid to a needy former spouse. Without such a reservation of jurisdiction, a military retirement split may be defeated by conversion of the property asset to a disability benefit. Recent legislation providing for "concurrent receipt" of both disability benefits and regular retirement pay for retirees with more than 50 percent service-connected disability has partially solved the problem of conversion of the regular military pension into a disability pension.

Finally, be aware that the retiring military member may, under a complex set of federal regulations, merge his or her military retirement benefits with another federal retirement plan. Careful drafting of the marital settlement agreement and final judgment is essential to preserve the nonmilitary spouse's interest in the transmuted asset.

Failure to include the "magic words" will result in DFAS returning the order with a polite letter declining to honor the attorney's fees garnishment writ.

9. Thou Shalt Obtain and Collect Your Attorney's Fees

In representing the nonmilitary spouse, it often is necessary to look to the active-duty member to pay at least some of the attorney's fees incurred. Also, given the substantial responsibility taken on by the attorney seeking to obtain

insurance and pension benefits for the client, it is important that the attorney understand how and if he or she will be paid.

Obtaining a fee award is a matter of state law, requiring a significant disparity in income or assets between husband and wife. Without such a disparity, look to your client for payment. Assuming sufficient financial disparity does exist, the issue is one of enforcement. To garnish an attorney's fee award, the order must meet the requirements of 42 U.S.C. § 659 and be legal process brought for the enforcement of a legal obligation to provide child support or make alimony payments. Further, the legal process must expressly provide for inclusion of attorney's fees and/or court costs as (rather than in addition to) child support and/or alimony payments.

Lastly, the order must be within the authority of the court. It will be deemed to be within the court's authority if the order is not in violation of or inconsistent with state or local law, even if state or local law does not expressly provide for such an award. Failure to include the "magic words" will result in DFAS returning the order with a polite letter declining to honor the attorney's fees garnishment writ. Correct drafting results in enforceability of the award, regardless of the geographic location of the obligor.

10. Thou Shalt Be Aware of Federal Health Benefits

It frequently is in the best interest of the nonmilitary spouse to delay entry of the final judgment of dissolution of marriage until either the requirements of the 20/20/20 or the 20/20/15 rules can be met. (For an explanation of these rules, see Grandjean, page 38.) Vesting of health benefits or health benefits and commissary, theater, and exchange benefits are important.

In both 20/20/20 and 20/20/15 situations, substantiating documents and information to support an application for a military ID card (DD1773) must be submitted.

Military COBRA Plan

Effective October 1, 1994, divorced spouses of servicemembers will be eligible for three years of TRICARE-type coverage if they have not remarried and do not fall within either the 20/20/20 or 20/20/15 rule. The statute requires that the services provide appropriate notification and a 60-day election period to former spouses. A person receiving continued health care coverage is required to pay into a military health care account the necessary premiums for the 36 months of available coverage. Responsibility for premium payments should be negotiated or ordered in cases that fall within the rule.

Conclusion

These suggestions were written with the interests of the nonmilitary spouse in mind. Compelling arguments can be made for a different approach in the pension division area and for different tactical considerations when representing the active-duty or retired servicemember. Controversy surrounding the interests of the nonmilitary spouse and the active-duty or retired member continues in Congress.

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Don’t Let Children Take the Fall When Parents Split

By Joan Middleton

We can all easily agree that every child deserves a safe home and a roof over his or her head, good nutrition, access to education, protection by nurturing, loving and healthy parents, access to extended family on both sides, health care, dental care, and vision care. Those are the basics in simple terms.

But life does not always go smoothly for kids, and they don’t always get all of the above. This is very often because of the problems among the adults in their lives.

When things don’t work out between parents and they go their separate ways, kids still deserve all of the essentials listed above. But kids also have the right to child support and to be the subject of a parenting plan that clearly defines their residential placement and the roles of their parents. Unfortunately for kids, these usually are negotiated by their parents and/or lawyers without the child’s participation, unless a child advocate is involved.

As an aside, in Washington state, the residential placement schedule for a child is established by a parenting plan that is approved by the court and entered with the order for child support. The parenting plan establishes where the child lives, the schedule for how much time the child spends with each parent and when, how the handoffs are managed by the parents, and how parenting decisions are made. In the event of disagreement between the parents, the parenting plan determines how child-rearing conflicts are resolved. A parent who fails to follow a parenting plan can be held in contempt of court. Since I practice law in Washington state, in this article I refer generically to the parenting plan, although the reader’s state may use another, similar vehicle.

As a child advocate who has read countless parenting plans over the years, I want to share some child-approved ideas with family law attorneys and others who draft parenting plans.

A parenting plan is not a one-size-fits-all commodity. I've learned over the years that parents often are unable to put the best interests of their children ahead of their petty squabbles. Children at different developmental stages require different considerations in their residential placement. Just as important, the children who are the subject of that parenting plan need to have a voice in its creation.

As an example, recently working with 11- and 12-year-old girls, I know at that age girls are more interested in spending time with their peer groups on weekends. Tweens and teens are learning how to establish friendships and develop their own interests. And some may be starting to notice boys. Most of all, they are learning to become independent. This is healthy behavior. A female tween or teen is probably more interested in going to the Saturday night sleepover with her friends than she is in spending the weekend with her "alternate weekend residential placement."

Perhaps when you negotiate your next parenting plan, you can include language to the effect that the plan should be revisited every two years so that appropriate developmental milestones are recognized as the children age. Most kids I work with love this idea. They don't want to be locked into alternate weekends and holiday splits forever. They may not even want to spend Mother's Day with mom and she needs to be okay with this if there is a year when a child has a scheduling conflict.

If your clients have resources, consider having them retain a child advocate or lawyer to represent the children. If your clients don't have resources, review the feasibility of having a CASA (Court Appointed Special Advocate) or a GAL (Guardian ad Litem) appointed to work for the best interests of the child.

Here's an interesting idea. If your client's children are young, ask them to come to your office with their parent. Keep the parent occupied elsewhere (reviewing documents?), but have the kids in your conference room. Give them some crayons and paper on which large circles are already drawn. Ask them to color in pie sections for how much time they want to spend with each parent, their friends, their video games, their pets, their favorite grandmother, their neighborhood, their basketball coach, or school friends. Tell them that the bigger the pie slices, the more important that piece of pie is to them.

I guarantee that the circles will not be filled in with equal-sized pie slices for each parent and each activity. I once worked with a little boy who could not play on the junior softball team every Saturday morning because his dad had alternate weekends. This child was heartbroken, too. His parents didn't get it.

After you review the drawings, give that feedback to your client and ask him/her how they want to handle that with the other parent. Maybe suggest a mediator or a collaborative approach at this point, if you haven't already.

Also consider the logistics of weekend handoffs. Do you want to sit in Friday rush-hour traffic taking your children to your ex's house? I've had cases where the child was strapped into a car seat for two hours while riding home with his weekend parent. To make matters worse, he had to be driven back at 7 a.m. on Monday to be back in school on time. Don't do that to your clients' kids or your own kids if you're working out your own parenting plan.

One more observation: It really sounds great to have a 50/50 residential placement compromise, doesn't it? Except that means neither parent may have to pay child support. Little Biff's allowance and discretionary funds for social stuff will be impacted. Every kid deserves the maximum monetary award from each parent and a bedroom with most of his stuff in it, not an awkward split between two homes. Maybe your clients could trade years of residential placement instead of weekends or weeknights?

Little boys may want to go to live with dad when they are 12 or 13. Young girls may want to go live with mom to get more of "the girl thing" as one of my 12-year-old clients once told me. She didn't like hearing her dad talk to her about menstruation and feminine hygiene products, even though he was an excellent father and willing to have those conversations with her and present the information in an appropriate way. She wanted her mom to do that. She wanted to go bra shopping with her mom, too.

Last but not least, while you are negotiating, make sure there is a court order to establish a 529 account into which each parent must make regular deposits for future tuition costs, even if each parent has to take an evening job flipping burgers to do so. Every child deserves a college education or vocational training to acquire a job skill valued in the marketplace. Translate: kid gets a good job someday because the parents could work cooperatively and collaboratively to plan for their child's future employment.

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Trusts, Fiduciary Obligations, and the Family Jet

By Michelle M. Wade and Dillon L. Strohm

In the United States, aircraft may be registered in the name of the trustee of a trust, provided they both satisfy the FAA requirements. With the July 20, 2010, publication of new regulations, trustees became subject to new obligations to re-register aircraft every three years. Risks of failing to properly re-register an aircraft could include cancellation of the aircraft's registration, temporary grounding of the aircraft, loss of insurance coverage, breach of loan covenants, and cancellation of a coveted N-number.

Effective October 1, 2010, the FAA began to limit the duration of an aircraft's Certificate of Registration (Certificate) to three years, at which time the Certificate may be renewed for a successive three-year term upon completion and submission of a renewal request form and payment of the applicable fee. Previously, a Certificate did not expire. The stated goal of this massive undertaking by the FAA is to improve the accuracy of the Civil Aviation Registry database.

When required, a trustee should promptly file re-registration and renewal applications. Owners must renew the registration and receive the renewed Certificate before expiration. If an owner renews after the registration expires, the aircraft will no longer be properly registered with the FAA and will not be operable. If the aircraft is on a Part 135 certificate, loss of charter revenue may also occur.

Approximately six months before an aircraft's Certificate expires, the FAA Registry is to mail a notice with instructions to the registered owner using the mailing address of record. The notice will identify the expiration date, and the three month window during which application must be made to ensure receipt of the new Certificate before the old Certificate expires.

The three-month filing window occurs in the fifth, fourth, and third months before expiration of the Certificate. A code is to be provided in the notice from the FAA Registry to allow online re-registration and payment of the fee when there are no changes in ownership, address, or citizenship. If there are any changes, the form must be printed, signed, and mailed with the fee.

At the end of the three-month filing window, the opportunity for online re-registration closes. Remaining applications and fees must be mailed to the FAA Registry.

Two months before expiration, a second notice is to be sent to registered owners for which the registry has not yet received an application for re-registration. Applications for registration may be submitted, but due to processing and mailing times, the aircraft may be grounded until re-registration is completed. Upon expiration of registration, the owner is to be sent notice of the scheduled cancellation of the N-number and their option to reserve the N-number. Once cancelled, the N-number will not be available for assignment or reservation for five years.
Steps that a trustee should take now include:

1. Contact your flight department to make sure they are aware of the new requirements and to ask them to look at the current Certificate to determine the month in which it was issued. This will allow both the trustee and the flight department to calendar the anticipated re-registration filing window.
2. Either the trustee or the flight department should look up each aircraft on the FAA's website and verify that the mailing address and the names of owner(s) shown are correct.
3. If any information is incorrect, the trustee should consult with the user of the aircraft and work together to update the information.

Aircraft with certificates issued in March of any year were the first to face the re-registration process. Based on the above schedule, these owners should have received the first notice in October 2010, with the following three months constituting the filing window. If no application was received, the registration expired on March 31, 2011. Aircraft with certificates issued in April of any year should have receive their first notice in January 2011 and will have a filing window from February 1 to April 30, 2011.

Addressing aviation issues can quickly become complex. Deciding how to best handle each issue varies from person to person. An attorney experienced in corporate jet registration and operations can assist by providing guidance on how to ensure FAA compliance while satisfying other goals.

Michelle M. Wade and Dillon L. Strohm are attorneys with the law firm of Jackson & Wade, L.L.C. and counsel clients on the acquisition, financing, and operation of corporate jets operated under Part 91 and Part 135 of the Federal Aviation Regulations. Jackson & Wade, L.L.C. can be found at www.jetlaw.com.

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ESTATE PLANNING

Essential Predeath Planning for Postdeath

By Lynne R. Ostfeld

Much of the discussion about estate planning now centers on tax reduction, as it generally does. This article addresses the problems that are too seldom discussed but that are of equal importance: things to do to ensure that your heirs, or your client's, are not left in the lurch.

I have recently had the sad experience of dealing with two deaths close in time and in relationship to me: that of my mother, in 2009; and that of my older brother, two days after Christmas in 2010. The purpose of this article is not to evoke your sympathy and condolences but to point out things that must be done to ensure that the people taking care of things are aided, not impeded, by your own situation. Of course, substitute "your client" for "your"; these recommendations are not sophisticated but practical.

To start, understand the context in that both my mother and brother had wills executed many years before their deaths, and both looked at sophisticated estate planning for tax reduction and other purposes, but this after the loss of someone close to them. My mother did hers two years after my father's death. My brother was in the process of doing his after our mother's death, but never completed it. My brother started his estate planning much later in life than my mother, and both had children in their 30s at the time. One lived in Illinois, one in New Jersey. My mother had gone to an expensive attorney in a large firm who gave her very good advice that met her goals. My brother was in the process of talking with me and meeting with someone to do something similar.

Funeral Arrangements

Plan your own funeral. You get what you want and avoid stressing everyone, particularly children without any experience in doing this. My mother was in hospice for a week before her death. I knew that her death was imminent. I called the funeral home where we waked my father and told them to pull out his file because we would be doing the same thing for my mother. For my brother, I followed the ambulance to the hospital in his car and arrived after he had passed away: it was that quick. My brother was divorced. I was there with my niece, neither one of us lived in the area, and we had no knowledge of funeral homes in the area. By looking through his cell phone call records, we narrowed down a small list of local people he was in frequent communication with, and they gave

us advice about not only a funeral home but one that would be near the school where he taught, which would help all the teachers, students, and their parents wanting to attend.

Burial

Plan your burial. My mother had a double headstone made when we buried my father's ashes in a family cemetery. All we had to do was have the date of her death carved underneath the date of her birth. My brother let everyone know that he wanted to be cremated but never said anything further about what should be done with the ashes. I directed that they be sent to me to be buried in that same family cemetery. I once worked in a law firm that had as a client a man who buried his first wife and then, years later, decided to dig up the corpse to have it cremated, much to the unhappiness of his second wife and the children from his first marriage, who fought him in court. Avoid this.

Funeral Expenses

Either prepay a funeral or open an account for that purpose, with a trusted friend or relative(s) as joint tenant. Make it clear to everyone what the purpose of the money is for. I had access to my mother's "operating account" to pay her funeral expenses. My brother had no one else on any of his accounts. I was fortunate to be able to put the expenses on a credit card. I had a client who told me that the hearse stopped in front of the bank on the way to the burial so that she could beg the bank officer to release sufficient funds to pay the funeral expenses. The decedent had money in various accounts, but his children had none of their own and no access to his. The hearse was not going to the cemetery without the payment. Poor families often will assign small life insurance policies to a funeral home to pay the expenses. Years ago, a probate judge in Cook County fought using the policies for this on the basis that the children were the intended beneficiaries of the policies and that they had no obligation to pay this expense or their parent's debts.

Will

Whatever the estate planning, you should at least have a will that designates the executor and waives bond. I am the executor of both estates. The designation of an executor helps to avoid family problems, if one of the children thinks that they should handle the estate and cannot, and it also speeds up getting letters of office in certain states.

Waiving bond not only saves the estate the cost of the bond, assuming that the designated executor is trustworthy and will not bring into effect the reason for the bond, but it also saves time because no credit check has to be made of a proposed administrator.

Tell someone where the will is. I knew where my mother's will was. It took us five days to find a copy of my brother's will and an additional two days to find the original. He was in such apparent good health that it never occurred to us to discuss this, and we knew that he would have a new one within a few weeks because he had already made the appointment with an estate planning attorney. Had I been able to give the original of the will to that attorney before I flew back home after the funeral, I might have been able to sign the New Jersey court forms while there, rather than having to have them sent by FedEx to the presiding judge of the Circuit Court of Cook County so that I could sign everything under oath. The delay in getting letters of office delayed my being able to talk with the bank to learn why it blocked my brother's bank accounts, particularly the one with the automatic bill pay procedure.

Safe Deposit Box

It is easier to find important documents, and they are less likely to be damaged or destroyed, if they are in a safe deposit box. But put someone onto the account so that they can get into the box. Give them the second key. Do not put your burial instructions in that box. My mother had one, I had access to it, and I easily retrieved her will after her passing. My brother had given up his safe deposit box when he moved into his current home. We found his will buried in a box in one of his daughter's closets, which is why it took so long to find. Probate case books are replete with stories of people finding wills under floorboards. Not only does this method risk the heirs never finding the will, but it also risks a disadvantaged heir finding the will and destroying it.

PINS, Passwords, and User IDs

This will be the new Waterloo of probate lawyers, or maybe their assurance of a comfortable retirement. Make these available to someone you trust. I have a hard enough time with my own PINs, passwords, and user IDs, and it is worse trying to figure out someone else's. I knew what my mother's numbers were because we set them up together, and they were on a slip of paper underneath her computer screen. That system failed when one of my siblings set up an account for online transfers, which she never did, and did not adequately record everything. Fortunately, I could walk over to the bank with my letters of office and obtain access. My brother had a perfect system to remember these things. Everything was coded, and he wrote the code down, but you had to know how to apply it. I knew that one series revolved around telephone numbers from when he was growing up, but I did not know how he applied it, whether certain things were capitalized, whether there was a hyphen, and whether he had a revolving end number to distinguish one password from another. He fortunately had some very smart children, with a son particularly gifted in this area.

With the number of people who keep everything in their computers and do not keep paper copies, it is vital to know how to get access to their information, whether it be the value of an account or the simple existence of an account. With paperless statements, the risk of not knowing of the existence of estate assets increases daily. For my own part, I have let my sister know how to get into things, but I am slowly writing up the list of PINs, passwords, and user IDs that I will keep in my safe deposit box. I will then issue a durable power of attorney to both my sister and nephew authorizing them access to this box after my death for a set amount of time.

Accounts to Pay Bills

Put some money into an account, and a trusted person in joint tenancy on that account, to pay postdeath bills. There are many stories about friends and family having access to all of the funds and stealing them. But they do not need access to all of the funds, just enough to pay bills for a few months, until an estate is open. Otherwise, you risk the mortgage not being paid, the utilities being shut off, and any number of other disasters taking time to straighten out. I had signatory authority on my mother's operating account for a number of years. She would transfer just enough money from her trust account to have her bills paid. I did not gain access to the trust account until I became the successor trustee and assumed fiduciary responsibilities. My brother had no one on any account. He had direct debit of certain bills. The bank blocked access to that account a few days after his death, which resulted in bills being unpaid and potential insufficient fund charges. I could not do anything about this until I got those letters of office. I am still blocked from collecting his assets and monitoring his stock because he died in New Jersey, which requires a tax waiver for the executor to have full access. Put someone in title on a joint tenancy account with enough money to pay your bills for a month or so, and make it clear to everyone that this is a convenience account, and not a gift to the joint tenant. That should cut down those fights over whether grandma put grandson onto her account because she wanted him to have the money or because she just

wanted him to help her pay bills.

Whatever you do, do something, and do not get superstitious that doing estate planning speeds up death. My mother had her headstone 26 years and her estate planning documents executed 24 years before she passed away. My brother had seriously discussed options with me but not done more than make the appointment when he died unexpectedly. I myself have not yet done half of these things because I am spending my free time trying to track down my brother's assets and liabilities and set things up to pay them. His system worked quite efficiently and well for him, but I have not yet figured everything out.

Lynne R. Ostfeld is a solo practitioner in Chicago with a general practice divided among probate and estate planning, civil litigation, business law, and international agribusiness. She has an associated office in France and has often helped clients retrieve funds left there or get inherited land sold and the money distributed. She is adjunct professor of international agribusiness law at the John Marshall Law School.

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PRACTICE MANAGEMENT

Remedies for Resolving Your Retirement: Developing Retirement Strategies You Can Live By

By Thomas A. Haunty

It is time to treat “yourself” like your most important client and begin to construct a framework for turning your retirement dreams into a realistic retirement lifestyle. As a lawyer, you spend your days advocating for your clients’ needs, yet may lack the tools or knowledge to begin addressing your own retirement planning goals. In particular, solo or small practice lawyers enjoy many benefits and freedoms, yet when thoughts of retiring from that practice arise, planning can seem burdensome. You have not represented yourself very well financially, whether this is a result of a lack of time or knowledge, so for too long you have put off addressing your inevitable need for retirement income planning. This article will give you a general blueprint to get your financial house in order and help you focus on the most important remedies to maximize your retirement wealth.

Measuring Your Net Worth

Building retirement financial security starts with making an honest assessment of where you are today. You have to collect and assess the materials you have to work with before building your retirement plan. The first tool to help build your retirement financial security is a net worth statement, which is just a snapshot of what assets you have accumulated to date. Just list your assets less liabilities to show what you would be worth if you sold everything you owned today and turned it into cash after paying off all your debts. The goal of your planning is to grow your net worth—your financial house—so that your assets are far greater than your debts. Your net worth is an important way to keep score, and it is a key measurement of your financial progress. Your net worth represents your financial security and, ultimately, your financial independence because it has to

be enough to cover the 100 percent drop in income you will face when you fully retire. So, of course, the closer you are to retirement, the higher your net worth should be. You should measure your progress by annually recalculating your net worth to see if it has grown or not. That way you can make adjustments to make sure you stay on track toward growing your assets.

One question I often get is "Do I include my personal residence as a retirement asset?" Unless it is going to be used to provide retirement income, I suggest not counting your home as a retirement asset. I do not see very many lawyers selling the home they love when they retire, buying a much cheaper double-wide trailer to live in, and investing the difference for retirement income. Even if they do sell their homes, they end up spending more than what they sold it for to purchase their new retirement condo! Renting out your home to make it produce income, reverse mortgages, or tearing off a wall and selling it to pay bills are also not preferred options. Yes, you can borrow against your home to access the equity, but that produces debt at a cost that erodes rather than builds retirement wealth. Take the same approach with your practice value. It is prudent to be conservative here and not delude yourself into thinking that you will be able to sell your practice for a large sum at retirement. The types of assets you need to accumulate are those that can be easily converted to a retirement income stream.

Maximizing What You Can Save

The second financial tool you must develop is your monthly budget (income less expenses) to help you avoid spending more than you earn. Whatever system you use, its main purpose is to produce a monthly surplus for you to add to your assets. This is a critical strategy, since the vast majority of lawyers develop retirement assets by earning an income from their practice, spending a portion of that income to live on today, and saving and investing the rest each month toward their future goals. Generally, from running numerous retirement projections over the years, I have found that you need to be saving between 15 to 20 percent of your gross (before tax) income to potentially avoid running out of money during retirement. The more serious you are about being able to retire, the more focused you will be on saving the most you can from your income.

If you find that you cannot save very much at the moment, start somewhere, at any amount, and set it aside each month. A critical strategy is to then find ways to *gradually increase* the amount you save and invest over time. A major goal for you should be to increase what you save every year. You have the potential to accumulate substantial retirement assets as long as you stay committed to increasing your investment contributions each and every year.

Here are some key budgeting habits to implement that can help you save more each month:

- Escrow in a separate "savings-to-spend" bank account to pay larger irregular bills that occur during the year, like vacations and Christmas expenses.
- Reset your income tax withholding or estimated tax payments to avoid receiving large tax refunds—you need to have those dollars invested sooner, not loaned to the government at 0 percent interest.
- Develop an emergency/opportunity cash fund to help you avoid having to sell retirement assets.
- Automate your monthly savings with automatic withdrawals from your checkbook so saving becomes a habit.
- Be careful not to adjust your lifestyle spending to your higher income when you get raises, bonuses, or large case payouts—try to save the excess income.
- Work on trying to earn more money so you can increase the amount you save.

- Reduce debts and invest at the same time to give retirement assets the longest time to grow.

Accumulating Retirement Assets

The most common vehicle in which to accumulate retirement assets are tax qualified retirement type accounts. One main advantage they offer is an income tax deduction now on annual contributions so it will cost you less to contribute to them. Another advantage they provide is tax deferral of earnings so you do not have to pay income taxes on the money in these accounts until the funds are withdrawn. The most popular plans include traditional individual retirement accounts (IRAs), SIMPLE IRAs, simplified employee pension IRAs (SEPs), pension and profit-sharing plans, and 401(k) plans.

Traditional or deductible IRAs allow you to invest up to $5,000 (2011) as long as you do not have another qualified plan or make a Roth IRA contribution. If you are over age 50, you can add an additional $1,000 “catch-up” amount (2010), and you may be able to make a contribution for your spouse as well. Be aware: there are income limits and other caveats that may limit or prevent you from making deductible IRA contributions, so it is best to check with your tax advisor as to your eligibility.

If you can afford to save more than the traditional IRA limits, you may want to consider setting up a SIMPLE IRA plan for yourself or your firm. A SIMPLE IRA allows for any owner or employee to contribute up to $11,500 (2011). If you are over age 50, you can add an additional $2,500 “catch-up” amount (2011) as well. The employer must also choose a matching contribution of 1 to 3 percent per year or a flat 2 percent contribution for any eligible employees. The match is immediately vested.

If you can save still more and want to control contributions somewhat, you may want to set up a profit-sharing plan. These are qualified plans where employers can make discretionary contributions that may vary from year to year. Each employee usually receives the same contribution percentage, unless the plan is designed to take advantage of permitted disparity rules. These permitted disparity rules allow you to allocate a higher percentage of the dollars to the older or more highly compensated people (partners and associates) in a firm. The maximum deductible employer contribution that can be made to a profit-sharing plan is 25 percent of “eligible” compensation, up to a maximum of $49,000 (2011).

You can also add a 401(k) component to your profit-sharing plan, which allows employees and owners to make tax deductible contributions from their own paychecks. The maximum annual deferral is $16,500 (2011). If you are over age 50, you can add an additional $5,500 “catch-up” amount (2011) as well. Employers then often add matching contributions to encourage employees to help fund their own retirement and may impose a vesting schedule with respect to the employers' matching funds. Still, the limit together of employer and employee contributions each year is $49,000 (2011).

For smaller practices, many choose to do a SEP IRA instead. SEPs are very similar to a basic profit-sharing plan and the employer-only contribution limits are essentially the same. However, you are not allowed to put a vesting schedule on a SEP IRA. You must also contribute for all employees that have worked for you during three of the last five years.

You may also consider investing in a Roth IRA if your income is below $122,000 (single tax filer) or $179,000 (married). You do not get a current tax deduction today, but under current law, all the growth is tax-deferred. The big advantage to Roth IRAs is that you receive all withdrawals tax-free when you take the money out at retirement. Their contribution limits are the same as deductible IRAs. Be aware: 401(k) plans now allow the addition of “Roth 401(k)” (after-tax)

deposits, which may make Roth IRAs accessible for more lawyers.

Just because you have made the maximum contribution to the above plans in some fashion does not mean you are necessarily saving enough for retirement. You may also have to make additional contributions to other investment areas, such as nonqualified annuities; life insurance cash value; real estate; and individually owned stocks, bonds, and mutual funds.

Protecting What You Saved

With all the focus on building up assets, you still need to protect those assets from some other common risks that could significantly deplete them.

Losing Your Income Due to Disability

The greatest asset you have for most of your law career is your ability to earn an income. You cannot build retirement wealth without it. You should maintain sufficient personal disability income insurance to mitigate this potential loss throughout your career.

Losing Your Investment Growth Due to Large Losses

Since the assets in which you invest force you to take various risks, you must have an overall investment plan to earn sufficient returns for the risk taken. Investments will fluctuate, and when redeemed may be worth more or less than when originally invested. The first step then is to set an investment objective or model allocation that fits your risk profile and timeframe. Then mix your assets across the asset classes of stocks, fixed income, and cash, including the sub-styles within them. For example, if you invest $1,000/month, and you invest $600 in stock mutual funds and $400 in fixed income funds, you create an asset allocation strategy of 60 percent stocks and 40 percent fixed income. By properly diversifying, some assets will go up to offset others that might go down, smoothing out the volatility. Then at least annually, you should rebalance your mix back to your model to make sure that it stays on track with your risk profile. Keep in mind, diversification does not guarantee against loss, but is a method used to manage risk.

Losing Your Investment Principal Due to Taxes and Penalties

Keep in mind that contributions and earnings to traditional IRAs will be taxed at ordinary income rates when withdrawn. Distributions must begin after age 70½ or a penalty (50% of the amount that should have been distributed) will be assessed. There also is a 10 percent penalty for early withdrawals before age 59½. Roth accounts do not have required minimum taxable distributions; however, Roths must be held for at least five years or until age 59½ to avoid a 10 percent early withdrawal penalty. Roth IRA withdrawals prior to age 59½ are income taxed as well (on earnings only). Allow these accounts to grow untouched for the longest period of time you can. Always roll over these accounts and prior pension plan balances to avoid paying these taxes and penalties.

Depleting Your Assets Due to Long-Term Care Expenses

The most incalculable concern today is how to pay for the cost of potential medical and long-term care expenses in retirement. These costs can force very large withdrawals that can significantly deplete retirement capital very quickly. Besides having proper powers of attorney for medical and financial needs and establishing a revocable living trust, you should consider securing long-term care insurance to protect your assets. If designed right, these policies can cover almost any type of care you need at home or in a facility. One affordable policy

design used today is to secure a larger monthly benefit for a shorter period of years on you and your spouse. That benefit can be inflated at compound interest each year (while the premium stays the same), and each spouse can access the other's policy benefits if left unused. For example, a $5,000 per month, five-year duration plan is about $300,000 of coverage, $600,000 accessible to both spouses. The amount of coverage will also grow over time with the inflated benefits feature to protect even more of your assets over time.

Drawing Out Too Much Retirement Income

As a general rule, try not to withdraw more than what your investments earn each year. If you do, you will deplete the principal. Too many years of withdrawing more than you earn just hastens the time when you will run out of money.

A Summation

Rather than focus only on "the number" you need to have at retirement, I have outlined some key remedies (habits and strategies) you need to be implementing to make your money last as long as you do. An easy way to remember them is to look at the four overall choices you have:

Save and invest enough money from your current income as soon as possible.

Increase the potential rates of return by reallocating investment assets.

Delay retirement: work longer.

Live on less during retirement.

You need to focus more on the first two options above so that you can avoid being forced to implement the less desirable third and fourth choices. If you have not been able to implement these strategies effectively, maybe it is time to hire a trusted financial advisor who understands the challenges you face as a lawyer to help you plan and implement successful retirement savings strategies. After all, I have found, you will get what you plan for.

This information is a general discussion of the relevant federal tax laws. It is not intended for, nor can it be used by any taxpayer for the purpose of avoiding federal tax penalties. This information is provided to support the promotion or marketing of ideas that may benefit a taxpayer. Taxpayers should seek the advice of their own tax and legal advisors regarding any tax and legal issues applicable to their specific circumstances.

The American Bar Endowment (ABE) provides insurance plans to ABA members. Each plan contains a unique charitable giving component. The ABE sponsors Tom Haunty for participation at various ABA Section meetings and to write articles for ABA Section publications.

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PRACTICE MANAGEMENT

Your Business: What You Don't Know Could Hurt You

By Ann Guinn

Growing up, I bet your Mother told you more than once "What you don't know can hurt you." She must have had a premonition that one day you would have your own law firm, because truer words were never spoken about the business side of a law practice. What you don't know can hurt you.

If you are a brand-new attorney, you don't yet know what you don't know. Don't be embarrassed about this—there are plenty of attorneys with many years of practice under their respective belts who are only just figuring out what they need to know about business—but, don't. I can relate to this. I have a side-line business in antiques, and I have heard many an antiques dealer say, "The longer I'm in this business, the more I realize all that I don't know." The same is true for many small firm attorneys.

So, what must a small firm practitioner know about running a successful law practice? Arguably, the most important point is that a law practice is a business. Your legal services? That's your product—what your business sells. Macy's is a business that sells clothing—that's their product. You own a business that sells legal services—that's your product.

The more you understand about your business, the more successful it can become—so, it stands to reason that the less you know about your business, the less successful it will be.

Your business provides the framework and support that allows you to provide your legal services. Law school taught you how to be an attorney (although some might disagree with that statement), but nothing about running a business. It's not until they get out in the real world and open up their small practices that many attorneys begin to learn the business skills necessary to be successful.

Learn all you can about business in general, and about your business in particular. Develop a plan, carefully select your business strategies, get on intimate terms with your firm's financial statements. Understand your position in the marketplace, hone your marketing skills, become a proactive manager. Never stop learning about business—or about your business.

"All right, already. I know my business backwards and forwards. So, why isn't it working so well for me now?"

You think you know everything there is to know about your business? Take a minute to answer the following questions, and then let's talk. [NOTE: This is not an open-book quiz!]

- What were your firm's revenues last week? Expenses?
- What percentage of your revenues goes to expenses annually?
- How many days does it take you to get paid?
- How many months' worth of revenues do you have tied up in accounts receivable?
- How much money is currently tied up in your WIP (work in process)?
- What is your realization rate and that of each of the firm's other timekeepers?
- Does your firm have a written budget, business plan and marketing plan? When is the last time you reviewed each? Updated each?
- How many hours must you bill in a day to break even?
- How many hours did you bill last year? The other timekeepers?
- What do you expect to bill this year? The other timekeepers?
- Which of your practice areas is most profitable? Least? Are you guessing or do you have actual cost/revenues proof?
- What is the true cost of each of your employees?
- What share of the firm's overhead should be allocated to each timekeeper?
- How often do you review your profit and loss statement? Your balance sheet? Your aged receivables report? What do you do with the information you glean from reviewing financial statements?
- Have you formulated a strategic plan to help you increase revenues over the next five years?
- What trends have you noticed in your overhead expenses over the last five years?
- How do you set your fees? Was your first consideration what your competition is charging?
- How old is the oldest file you have in storage?
- What is your associate attorney and/or legal assistant's long-term career plan and how does your firm fit in?
- What is your best source of new clients? What data have you collected to substantiate this belief? How do you incorporate this valuable information into your marketing strategies?
- Which is your most cost-effective marketing strategy?
- How much does it cost to generate a new client from each of your marketing strategies?
- What do your clients really think of you? Have you asked them? When did you last ask?
- Before you renew your office lease, what are the building owner's long-term plans for the building/your space?

This list could go on and on, but you get the picture. There is so much more to knowing your business than simply looking at the bottom line. You still may not know what all you don't know, but you now have a starting point. Ask your mentors, take classes, attend CLEs on law practice management issues, read—you need to know these things. Study other service industries. Read business-related books. Learn, learn, and learn some more. The more you know about the "business" of the practice of law, the more efficient, productive, profitable and

satisfying your practice will become. Fill in the gaps in your business knowledge and you'll have a good shot at growing the practice of your dreams.

Make minding your own business your top priority!

What's Working—What's Not

To find out how your firm is doing and where you might need to do some work, please take a moment to answer the following questions:

- Do your expenses consume more than 45% of your revenues?
- Do you sometimes have trouble meeting monthly expenses?
- Have you had to borrow to meet basic operating expenses within the last year?
- Do you have less than six months' worth of operating expenses (including your compensation) set aside for emergencies?
- Does it take longer than 60 days for you to be paid by your clients?
- Do your accounts receivable equal more than two months' worth of revenues?
- Is your realization rate lower than 90%?
- Are you operating without a written business plan, budget, or marketing plan?
- Do you write off direct client expenses incurred in-house (e.g., postage, fax, photocopies, phones)?
- Are you without a plan to increase profitability over the next five years?
- When you set your fees, was your first consideration what your competition charges?
- Do you want to add staff or another attorney, upgrade your technology, or buy a building, but can't afford to?
- Does it seem that you are working harder now than you were five years ago, but with less to show for it?
- Do you want to make more money?

Every "yes" is a red flag indicating that you've got some work to do. Put in the effort and your practice will reward you nicely.

Make minding your own business your top priority!

Did you find this information helpful? Would you like to learn more about profitably and efficiently managing your firm (including forms to help guide the process)? If so, click here to purchase the author's book Minding Your Own Business. *GP/Solo Division members automatically receive a discounted price.*

Ann Guinn is a former law firm manager turned consultant who provides practical business advice to lawyers on the business side of running their practice. She can be reached at Anngp15@aol.com.

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PRACTICE MANAGEMENT

New ABA Ethics Opinion Helps Lawyers Understand Pitfalls of Attorney Websites

By Todd C. Scott

A recently published ABA ethics opinion provides attorneys with a much-needed guide on the best ways to avoid accidentally establishing an attorney-client relationship with readers of a law firm's website. ABA Formal Opinion 10-457, a first-of-its kind ethics opinion on attorney internet websites, identifies the different types of web users that visit an attorney website, and provides lawyers with an understanding of the various professional duties owed to each type of web visitor.

Attorneys that actively promote their legal services through the use of websites have been wary of the potential for inadvertently establishing an attorney-client relationship with visitors to the site. The issue is sometimes put to the test when website visitors send legal questions to lawyers at the firm—often lawyers whom they have never met—through the website's Contact Us page. One question that has always been troubling is, "If a lawyer invites the general public to tell them about their legal concerns, does that attorney have any professional obligations to that web visitor once they take them up on that offer?"

ABA Formal Opinion 10-457 is more instructional than ground breaking, since it follows the tenets of ABA Model Rule 7.1 Attorney Advertising closely. That is, it is a reminder that detailed information about lawyers and their legal services is acceptable for publication so long as the information is not false and misleading. However, the bulk of the Opinion serves as a much-needed guide for lawyers with websites by labeling the types of visitors who use the site and addressing the potential for a lawyer to owe certain professional duties to the visitors, depending on their status.

Know Your Web Visitors: Readers, Prospective Clients, and Clients

Lawyers have long offered legal information to the public in a variety of ways and, according to ABA Formal Opinion 10-457, offering the information on the firm's website does not automatically convert a web reader into a client of the firm. General information about the law in a narrative or FAQs (frequently asked questions) format is permissible, but the information must meet the requirements of ABA Rules 7.1, 8.4(c), and 4.1(a), by being accurate and current, and that it does not materially mislead a reasonable reader. To avoid any misunderstandings, the website should include disclaimers that remind the reader that you are publishing general information about the law, and reading the information included on the website does not constitute the formation of a client-lawyer relationship.

A lawyer does not owe any specific professional or ethical duty to a reader of the firm's website, other than to get it right when offering general legal information. However, the ethical responsibilities owed by a lawyer to an individual can change very quickly if a reader of the firm's website becomes a prospective client.

The concern about website visitors becoming prospective clients comes from an understanding of ABA Model Rule 1.18 Duties to Prospective Clients. Rule 1.18 protects the confidentiality of communications an attorney may have had with those who never hired the firm, but may have discussed the possibility of forming a client-lawyer relationship. Rule 1.18 was created with an understanding that certain information that is passed from a prospective client to a lawyer during the process can be damaging in the hands of the wrong party. Therefore, Rule 1.18(b) prohibits use or disclosure of information learned during such a discussion absent the prospective client's informed consent. Rule 1.18(c) disqualifies lawyers and their law firms who have received information that "could be significantly harmful" to the prospective client from representing others with adverse interests in the same or substantially related matters.

According to ABA Formal Opinion 10-457, here is one way to convert a reader of your website into a prospective client, thus invoking the duties and responsibilities owed under Rule 1.18—you invite them. The opinion notes that lawyers have the ability on their websites to control features and content so as to invite, encourage, limit, or discourage the flow of information to and from website visitors. ABA Formal Opinion 10-457 states that, "By specifically inviting submissions of information concerning the possibility of forming a client-lawyer relationship with respect to a legal matter, a discussion, as that term is used in 1.18, will result when a website visitor submits the requested information."

Inviting readers to submit information about their legal matter likely will invoke the Rule 1.18 duties owed to prospective clients, but even if you don't invite readers to do so, what you do after unsolicited information from a web reader is received may still unintentionally give the reader the status of a prospective client. ABA Formal Opinion 10-457 goes on to say, "If a website visitor submits information to a site that does not specifically request or invite this, the lawyer's response to that submission will determine whether a discussion under Rule 1.18 has occurred." After receiving unsolicited information from a web reader, a simple reply to the sender indicating you have received their information and you plan to review it for the purposes of determining whether a client-lawyer relationship can be formed would likely convert the inquiry into a "discussion" under Rule 1.18.

Attorney websites come in all forms. It is a combination of the tools available within the website and the content surrounding them that plays a large role in converting a web reader into a prospective client. A particular website might facilitate a very direct and almost immediate bilateral communication in response to marketing information about a specific lawyer. It might, for example, specifically encourage a website visitor to submit a personal inquiry

about a proposed representation on a conveniently-provided website electronic form. The availability of those tools and the invitation that comes with it is the basis of a discussion between a prospective client and a lawyer as soon as the prospective client uses it. However, a website that describes the work of a law firm, lists only contact information, or provides an email link to a lawyer does not create a reasonable expectation that the lawyer is willing to discuss a client-lawyer relationship.

The Accidental Client

Providing legal advice to anyone, whether or not they have agreed to pay you for your legal opinion will automatically form a lawyer-client relationship between you and the person on the receiving end of the advice. Thus, you are responsible for the accuracy of the advice, and you must be mindful of the other aspects of their legal matter that could bring harm to your unintended client. Most lawyers learn this soon after becoming a licensed practitioner and are given the example of a friend who asks you for legal advice in a grocery store.

In the context of legal websites, lawyers who publish fact-specific questions from readers, along with the lawyer's answers, may be characterized as providing personal legal advice. The person submitting the question could reasonably believe that the lawyer was responding to their personal legal matter and rely on what they believe to be the lawyer's sound legal advice. Lawyers who conduct radio shows on legal topics, or who take questions during speeches to the general public, are usually mindful of the dangers in addressing fact-specific questions in order to avoid creating an unintended client-lawyer relationship.

Website Q&As should be avoided at all costs. Answers to questions about general legal principles or hypothetical situations can be addressed in a way where it is apparent that the lawyer is not offering legal advice, but it should be accompanied with a statement that the information is general in nature and should not be understood as a substitute for personal legal advice. It is important that lawyers take reasonable steps to avoid any misunderstandings with the readers of their website. Disclaimers or warnings are especially useful for website visitors who may be inexperienced in using legal services and who may believe that they can rely on general legal information to solve their specific problem. An individual who is inexperienced with legal matters may not understand that legal advice cannot be given without full consideration of all relevant information relating to the visitor's individual situation.

Advice for Your Internet Website

The key to avoiding unintended client or prospective client relationships with the visitors to your legal website is to limit the avenues for direct communication with web readers. Web tools that invite the reader to submit their personal information open the door for a web reader to become a prospective client. That may be exactly what the firm intended by creating the Contact Us submission form, but keep in mind the duties the firm owes to prospective clients when you choose to do so. Also, by publishing statements that inform the reader that the information on the website is general in nature and that no personal legal advice has been provided to the reader, you can avoid a troubling misunderstanding. The disclaimer statements should be placed in key spots on the attorney website where they can be seen by all who choose to request further information from the firm—such as a Contact Us page with form fields.

When creating disclaimer statements for your legal website, keep in mind some of the issues you may want to consider including to avoid any misunderstandings by the web reader:

- A statement that legal advice has not been offered.

A statement that a client-lawyer relationship has not been formed.
- A statement that the visitor's information may not be kept confidential.
- A statement that the visitor's information may not prevent the lawyer from representing an adverse party.

Remember, a disclaimer may be undercut if you act contrary to the warnings contained within it. If you've taken the time to formulate a disclaimer statement for your website, all communication with readers who contact you through your website should be consistent with the disclaimer. This is especially true if the firm's website automatically generates an email response to anyone submitting a web inquiry to the firm. The email response should contain the same website disclaimer and only confirm that the information was received.

For a copy of ABA Formal Opinion 10-457 by the American Bar Association's Standing Committee on Ethics and Professional Responsibility, click here.

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Redefining Work/Life Balance

By Kevin Chern

The legal profession is often cited as one of the most stressful career paths in the world, and some studies even suggest that attorneys show higher than average rates of depression, substance abuse, and suicides. On top of that, many attorneys are natural workaholics. Add those factors to the competitive work market, and it is no wonder that many attorneys have begun to explore the idea of "work/life balance."

When people talk about work/life balance, however, they tend to focus on things like flex time, dress-down Fridays, and maternity leave. In a recent TED Talk, Nigel Marsh observed, "People spend long hours to buy things they don't need to impress people they don't like. It's my contention that going to work in jeans on a Friday isn't really getting to the nub of the issue."

So, what is "the nub of the issue"? If we want to avoid high stress in a highly stressful industry, we have to change the way we view work/life balance. Although things like technology and outsourced services can help us get our work done more efficiently, work/life balance is not about just taking time off from work or learning how to do our work on the go. According to Marsh, we should change the way we view work/life balance in four ways:

1. We have to acknowledge the fact that certain career choices are fundamentally incompatible with being fully engaged in family life if we want to have an honest discussion. That means you may have to make choices between work and family and decide for yourself which parts of your life should be high priority.

2. We cannot put quality of life in the hands of others. Governments, corporations, and our clients will take whatever they can get out of their citizens, employees, and attorneys, so it is up to us to set and enforce the boundaries we want in our lives.

3. Next, we have to reset the timeframe on which we judge balance in our lives. Although we shouldn't wait until retirement to be happy and relaxed, we cannot make every day perfect. You may need to put in extra hours on a Monday so that you can take a vacation on Friday.

4. Finally, it is important to approach balance in a balanced way. Many attorneys define success by income or billable hours, but if we want to define success as it applies to achieving a balanced life, we have to include factors that have nothing to do with job success. Though you may be able to take on a heavy caseload or bring in high volumes of new clients, are you also putting in the same efforts to create success in the intellectual, emotional, spiritual, and physical parts of your life?

Marsh concluded his speech with an excellent point: by investing more energy in the success of all aspects of our life, we can transform society's definition of success from the "moronically simplistic notion that the person with the most money when he dies wins to a more thoughtful and balanced definition of what a life well-lived looks like." Are you striving for success in just your law firm, or are you striving for success in all areas of your life?

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. Under his direction, a staff of 180 employees in 19 states served approximately 450 new clients each week. He is also an author and a contributing writer to several legal blogs. For more info, visit Kevin on the web at www.totalattorneys.com.

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The Continuous Evolution of Military Sexual Assault Law

Patrick D. Pflaum

According to a report submitted to Congress, the Department of Defense (DoD) received 3,230 reports of sexual assault involving members of the Armed Forces during Fiscal Year 2009.[1] According to the same report, the number of reported sexual assaults has continued to trend upward over the past several years.[2] While the report clarifies that this increase is likely due to "a greater proportion of victims coming forward, not an increase in crime," the issue of sexual assault in the military ranks has had the attention of Congress for a number of years.[3] In 2005, Congress completely revised the sexual assault provisions in the Uniform Code of Military Justice (UCMJ), those provisions in Title 10 of the United States Code that establish a system of criminal justice for the military. Based on recent congressional activity and case law, it appears that more change is on the horizon.

Beginning in the 1990s, some military justice practitioners began to suggest that the UCMJ provisions governing sexual assault were antiquated and ripe for revision. At the time, the language in Article 120 (the UCMJ article covering rape) remained largely unchanged from the original version that was passed in 1950. Military courts, however, had generally kept pace with developments in the law and interpreted the language of the statute in a manner that accommodated modern understandings of constructive force, parental compulsion, and incapacitation due to drugs or alcohol. In addition, using his power under Articles 36 and 56, the president has provided for the punishment of several other sexual offenses under Article 134, a "general article" proscribing any conduct that is prejudicial to good order and discipline or discrediting to the armed services.[4] Since 1951, the Manual for Courts-Martial (MCM) has identified several sexual offenses as potentially punishable under Article 134, including indecent assault, indecent acts with another, indecent acts or liberties with a child, indecent exposure, and indecent language.

At the turn of the century, though, the movement for significant change to the military sexual assault provisions gained momentum. In 2001, on the 50th anniversary of the UCMJ, a panel of military justice experts released the results of a study of several military justice issues. The Cox Commission (named for The Honorable Walter T. Cox, III, the chair of the committee and a senior judge on the Court of Appeals for the Armed Forces) recommended the revision of the UCMJ in order to create a comprehensive sexual assault article in the UCMJ.[5] This recommendation prompted little action until allegations of mishandling of sexual assault complaints surfaced at the United States Air Force Academy in 2003.[6] With this incident, sexual assault in the military became an issue with definitive Congressional interest. In the Ronald W. Reagan National Defense Authorization Act of 2005,[7] Congress directed the DoD to take two important actions. First, the statute directed the DoD to "develop a comprehensive policy for the prevention of and response to sexual assaults involving members of the Armed Forces."[8] Congress mandated that the policy address several specific issues, including medical treatment of victims, confidential reporting, uniform data collection procedures, and victim advocacy and intervention.[9] The statute also directed the DoD to:

> review the Uniform Code of Military Justice and the Manual for Courts-Martial with the objective of determining what changes are required to improve the ability of the military justice system to address issues relating to sexual assault and to conform the Uniform Code of Military Justice and the Manual for Courts-Martial more closely to other Federal laws and regulations that address such issues.[10]

Based on this second directive, the Joint Service Committee on Military Justice, a DoD focus group tasked to recommend changes to the military justice system, formed a special subcommittee to study the punitive provisions addressing sexual misconduct in the military. The committee published a lengthy report that proposed six options. The subcommittee recommended "no change," concluding, "The subcommittee members were unable to identify any sexual conduct (that the military has an interest in prosecuting) that cannot be prosecuted under the current UCMJ and MCM."[11] Despite this recommendation, the larger Joint Service Committee suggested several changes.[12] In 2006, about 15 months after directing the study, Congress completely overhauled the statutory provisions addressing sexual assault in the military, with one of the subcommittee's proposals forming the basis for the revision. These changes became effective on October 1, 2007, and the current version of Article 120 became the largest punitive article in the UCMJ—by a significant margin.[13]

The "new Article 120" consolidated all of the sexual assault provisions into one article of the UCMJ, with one notable exception. The drafters of the legislation chose to leave Article 125, prohibiting sodomy, as a separate provision. This is notable for two reasons. First, in the federal scheme, conduct that would constitute "forcible sodomy" is included in either aggravated sexual abuse or sexual abuse, depending on the circumstances.[14] Second, despite the Supreme Court's holding in *Lawrence v. Texas*,[15] Congress did not amend or repeal Article 125, leaving intact the military caselaw interpreting both Article 125 and *Lawrence*.

As a general concept, the current Article 120 is a reasonable amalgam of the federal sexual assault scheme and some traditional principles that have been a part of the military system for decades, if not longer. The article borrows the concepts of "sexual act" and "sexual contact" from the federal provisions that address sexual assault,[16] and borrows concepts like "indecent act" and "indecent

liberty with a child," from the military tradition.[17] The statute also addresses certain misconduct that was not expressly included in the MCM before, like the sexual exploitation of subordinates by persons with superior military status.[18] Under the old provisions, military courts sometimes struggled to identify which types of type of senior-subordinate sexual conduct could be considered a sexual assault, as opposed to some other military offense like sexual harassment or maltreatment of subordinates.

One notable aspect of the new Article 120 is the role of consent. The issue is common in sexual assault cases, and jurisdictions vary in how consent is treated in their sexual assault provisions. Under the old Article 120, "rape" was "an act of sexual intercourse by force and without consent."[19] As a general principle, the prosecution had to prove that the victim did not consent or was unable consent to the alleged sexual conduct. Under the new statute, "consent" is defined as "words or overt acts indicating freely given agreement to the sexual conduct at issue by a competent person."[20] It is omitted from the language of all but one of the sexual offenses.[21] Instead, the current Article 120 makes consent an affirmative defense to only the four most serious offenses: rape, aggravated sexual assault, aggravated sexual contact, and abusive sexual contact.[22] The statute also assigns the accused the burden to prove an affirmative defense by a preponderance of the evidence.[23] If so proved, the statute then appears to offer the government an opportunity to disprove the existence of the affirmative defense beyond a reasonable doubt.[24] Unfortunately, neither the statute nor the MCM lay out a workable formula for the application of this construct at trial. As such, the defense bar has raised constitutional challenges to this statutory scheme, arguing, in general, that the statute violates due process by shifting the burden to an accused to disprove an element of the offense. This argument is rooted in the precedent established in a series of cases that includes *In re Winship*,[25] *Mullaney v. Wilbur*,[26] *Patterson v. New York*,[27] and *Martin v. Ohio*.[28] In 2010, the Court of Appeals for the Armed Forces (CAAF) rejected a facial challenge to the statute,[29] but in early 2011, the CAAF found certain provisions unconstitutional as applied. In *United States v. Prather*, the court concluded that "the second burden shift . . . which purports to shift the burden to the government once an accused proves an affirmative defense by a preponderance of the evidence, constitutes a legal impossibility."[30] The court then held that the statutory framework unconstitutionally shifted the burden to the accused to disprove an element of the offense when asserting an affirmative defense of consent—a due process problem not cured by the military judge's instructions in the case.[31] *Prather* and its progeny will almost certainly provide a powerful catalyst for revision.

The due process issue has not been the only criticism of the statute. Some general criticism is to be expected as long-time military justice practitioners adjust to a wholly new statutory scheme. Some is based on the complicated nature of the statute. According to the *2009 Report of the Defense Task Force on Sexual Assault in the Military Services*, "Practitioners consistently advised Task Force members that the new Article 120 is . . . cumbersome and confusing."[32] In addition, "[p]rosecutors expressed concern that it may be causing unwarranted acquittals."[33] This is not surprising considering the statute establishes fourteen different sexual offenses and contains a significant amount of overlapping language. The statute and the accompanying MCM provisions also lack some procedural clarity, particularly related to affirmative defenses and lesser included offenses. Based on these concerns, as well as those regarding its constitutionality, the Defense Task Force on Sexual Assault in the Military Services advised the Secretary of Defense to conduct "a follow-up review of the effectiveness of Article 120, UCMJ."[34]

It appears that some members of Congress also believe some revision is

warranted. During the legislative cycle for the National Defense Authorization Act (NDAA) for Fiscal Year 2011,[35] both houses passed versions of the bill that would have affected Article 120. Neither made it into the final version of the NDAA, but they are instructive nonetheless. The House version, H.R. 5136, directed the Secretary of Defense to conduct "a review of the effectiveness" of Article 120, and specifically directed him to "use a panel of military justice experts to conduct the review."[36] The bill also mandated a number of changes to the Armed Forces sexual assault prevention and response program, including a requirement that all of the service secretaries "issue guidance to all military unit commanders that implementation of the Department of Defense sexual assault prevention and response program requires their leadership and is their responsibility."[37] The Senate version took a more aggressive approach and would have completely overhauled Article 120 once again. It revised the basic organization, reworded some offenses, and eliminated the provisions that triggered the due process challenges.[38] The NDAA that ultimately passed did not include any language affecting Article 120, even that directing a study of its effectiveness. This is likely due to the passage of the bill repealing the "Don't Ask, Don't Tell" policy,[39] which may result in other changes to the UCMJ.[40] Nevertheless, practitioners can be assured that Article 120 is destined for more change.

For those practicing military justice, the body of law addressing sexual assault under the UCMJ is vast, complicated, and continually evolving. Constant vigilance is required to maintain the competence required to litigate these cases. For those without any involvement or experience with the military justice system, these sexual assault provisions provide a snapshot of a system that is modern, nuanced, and subject to the continued supervision of Congress and the president. While there can be no doubt that the military remains vigilant in its effort to lower the incidence of sexual assault in this era of persistent conflict, it appears that Congress remains poised to ensure that the UCMJ continues "to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States."[41]

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Endnotes

1. Office of the Secretary of Defense, Sexual Assault Prevention and Response Office, *Department of Defense Fiscal Year 2009 Annual Report on Sexual Assault in the Military* (Mar. 2010), at 58, *available at* http://www.sapr.mil/media/pdf/reports/fy09_annual_report.pdf.

2. *Id.* at 59.

3. *Id.* at 3.

4. UCMJ art. 134 (2008).

5. Nat'l Inst. of Mil. J., Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice, 11–12, (May 2001), http://www.wcl.american.edu/nimj/cox_commission.cfm.

6. US Air Force Inspector General, Summary Report Concerning the Handling of Sexual Assault Cases at the United States Air Force Academy 1 (Sept. 14, 2004),

http://www.379aew.afcent.af.mil/shared/media/document/AFD-060726-031.pdf.

7. Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (NDAA), Pub. L. No. 108-375, § 576, 118 Stat. 1811, 1924–26.

8. *Id.*, § 577, 118 Stat. 1926–28.

9. *Id.*, § 577(b), 118 Stat. 1926.

10. *Id.*, § 571, 118 Stat. 1920–21.

11. Letter, Subcommittee Chair of the Joint Service Committee, to the Chair of the Joint Service Committee (Jan. 13, 2005), http://www.dod.gov/dodgc/php/docs/transmittal_letters2005.pdf.

12. Memorandum, Executive Chair, Joint Service Committee on Military Justice, to Department of Defense, Office of the General Counsel, subject: Review of Sexual Assault Offenses (18 Feb. 2005), http://www.dod.gov/dodgc/php/docs/transmittal_letters2005.pdf.

13. National Defense Authorization Act for Fiscal Year 2006 (NDAA), Pub. L. No. 109-163, § 552, 119 Stat. 3136, 3256–63 [hereinafter 2006 NDAA] (codified at 10 U.S.C. § 920 (2006)).

14. *See, e.g.*, 18 U.S.C. §§ 2241, 2242, & 2246 (Westlaw 2010).

15. 539 U.S. 558 (2003).

16. *See, e.g.*, 18 U.S.C. § 2246 (Westlaw 2010).

17. Manual for Courts-Martial, United States, pt. IV, ¶ 87 (indecent acts or liberties with a Child), ¶ 90 (indecent acts with another), & ¶ 88 (indecent exposure) (2005).

18. UCMJ art. 120(t)(7) (2008).

19. Manual for Courts-Martial, United States, app. 27 (2008), at A27-1 [hereinafter 2008 MCM].

20. UCMJ art. 120(t)(7).

21. *Id.* art. 120(m) (lack of permission is an element of wrongful sexual contact).

22. *Id.* art. 120(r).

23. *Id.* art. 120(t)(16).

24. *Id.*

25. 397 U.S. 358, 364 (1970).

26. 421 U.S. 684 (1975).

27. 432 U.S. 197 (1977).

28. 480 U.S. 228 (1987).

29. United States v. Neal, 68 M.J. 289, 304 (C.A.A.F. 2010).

30. 69 M.J. 338, 340 (C.A.A.F. 2011)

31. *Id.* at 344.

32. Defense Task Force on Sexual Assault in the Military Services, Report of the

Defense Task Force on Sexual Assault in the Military Services ES-5 (Dec. 2009), http://www.sapr.mil/media/pdf/research/DTFSAMS-Rept_Dec09.pdf.

33. *Id.*

34. *Id.*

35. The National Defense Authorization Act (NDAA) is the annual bill where Congress authorizes the appropriation of funds for the armed forces. It is also the normal vehicle for amending the UCMJ. The 2011 version that ultimately passed is the "Ike Skelton National Defense Authorization Act for Fiscal Year 2011." *See* Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, 124 Stat. 4137 (2011).

36. H.R. 5136, 111th Cong. § 1618 (2010).

37. *Id.*

38. S. 3454, 111th Cong. § 561 (2010).

39. *See generally* The Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010).

40. Major Sherilyn A. Bunn, *Straight Talk: The Implications of Repealing "Don't Ask, Don't Tell" and the Rationale for Preserving Aspects of the Current Policy*, 203 Mil. L. Rev. 207, 254 (Spring 2010); Major Laura R. Kessler, *Serving With Integrity: The Rationale for the Repeal of "Don't Ask, Don't Tell" and its Ban on Acknowledged Homosexuals in the Armed Forces*, 203 Mil. L. Rev. 284, 326 (Spring 2010).

41. 2008 MCM, *supra* note 19, at I-1 (Preamble).

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Before You File the Patent Lawsuit: A Checklist for Your Prefiling Investigation

By Jennifer L. Dzwonczyk

A client is considering filing a complaint for patent infringement. The client (or perhaps a partner) comes to you and asks you to file a lawsuit. But there's much more behind the scenes than just filing a complaint. Here are some important issues to consider before launching (or even preparing) that complaint:

- purposes of enforcing the patent(s):
  - to obtain an injunction;
  - to obtain a settlement, license, and/or money;
  - to preserve the client's market position;
  - to preserve the client's patent rights;
  - to enforce obligations under an existing agreement;
- who can bring the suit (standing);
- anticipated costs and likely timeline;
- location of suit (forum);
- identification of potential defendant(s);
- possible counterclaims;
- past communications between your client and potential defendant(s) (including previous litigation or licenses);
- mediation or other alternative dispute resolution;
- substantive assessment of patent strength and infringement issues; and
- potential reexamination.

Clients often have widely varying reasons for filing a complaint; be sure to understand them before preparing a complaint.

Before filing, you should:

- carefully check the patent's status (maintenance fees, ownership, chain of title, assignments, proper claim to priority, terminal and/or statutory

disclaimers);
- check the diligence file history;
- check for foreign patents/litigation;
- consider compliance with 35 U.S.C. § 287, if applicable;
- consider the validity of:
    - any new prior art,
    - reexamination risk,
    - inventorship issues;
- consider prior art searching;
- consider potential unenforceability counterclaims, including inequitable conduct, misuse, and other equitable defenses such as laches;
- consider potential antitrust counterclaims;
- consider filing a preliminary injunction motion if the client is severely harmed;
- consider infringement issues, including claim construction;
- consider whether more information is needed;
- obtain defendant's product(s) if possible;
- consider electronic discovery issues; and
- if manufacturing is offshore, consider an ITC § 337 action.

Another consideration is whether to send a cease-and-desist letter to the potential defendant before (or in lieu of) filing a lawsuit. Such letters may have a significant impact, as they may give rise to an actual controversy and potentially trigger the filing of a declaratory judgment action; on the other hand, the letters may bring a company to the settlement table.

Jennifer L. Dzwonczyk is a partner in the Intellectual Property Group at Howrey LLP in Washington, DC. Her practice focuses primarily on patent litigation before federal district courts. She is also experienced in patent counseling and prosecution, as well as appellate matters. She can be reached at DZJen@howrey.com.

Did you find this checklist helpful? Do you need more information on patent litigation? This checklist is excerpted from The Patent Litigator's Job: A Survival Guide, *which is available at a discount to ABA GP Solo Division members.*

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So Your Client Has Been Sued: A Checklist for Dealing With a Patent Complaint Filed Against Your Client

By Jennifer L. Dzwonczyk

A complaint has been filed against your client—now what? Assuming you have the green light from the client or partner from whom you received the assignment, you should immediately consider the following first steps:

- Assess if the complaint has been served on the client; if so, calculate the due date of the answer or other response.
- Check that the patent-in-suit is currently in force, verifying the term, maintenance fees, and that there are no effective disclaimers on the patent-in-suit.
- Ascertain information on the plaintiff, whether a nonpracticing entity (NPE) or competitor.
- Check if the plaintiff or patent-in-suit have been involved in prior patent litigation or reexamination and, if so, obtain the relevant case dockets.
- Obtain the file history for the patent-in-suit.
- If possible, ascertain whether other companies have previously taken a license to the patent-in-suit.
- Obtain the local court rules for the district court, including patent rules if applicable.
- Gather intelligence on the assigned judge, including reviewing the judge's webpage on the court's website.
- Prepare a document preservation memo for the client to distribute to its employees.
- Send the complaint, likely a PDF document, to an assistant or word processing department to convert to Word format so that preparing an answer will be easier.
- Review recent Rule 16 orders from the judge to determine a likely schedule.

- Review the judge's recent opinions in patent infringement cases.
- Reach out to colleagues experienced in this particular court or before the assigned judge.
- Retain local counsel, if needed.
- If it's a multipatent suit (especially three or more related patents), prepare a chart or other visual aid to present critical information concerning the patents-in-suit.
- Determine if a Rule 12 motion may be appropriate, such as for lack of personal jurisdiction, improper venue, failure to state a claim, or failure to join an indispensable party.
- Determine if a transfer motion may be appropriate.

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