GP|Solo Law Trends & News
Practice Area Newsletter

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

September 2005 **Volume 2, Number 1**

In this issue...

Dear Division Member:

Last fall, we launched GP|Solo Law Trends & News, a new member service. It was extremely successful and we had many members tell us how much they enjoyed it. We now begin the second year of our electronic newsletter. As with last year, this e-newsletter will be published quarterly and will include articles, checklists, and other valuable practice information and practical tips, all from each of our substantive practice areas in the Division. This edition of the e-newsletter includes articles on the new bankruptcy law revisions, methods to effect service of process on persons serving in the military, a checklist to be used in real estate closings, what is meant by an "ethical will" and much more. Thus, I am delighted to attach your Fall Edition of Law Trends .

We hope this publication continues to be helpful to you in your daily practice. I encourage you to take just a few moments to read this publication. 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 located below .

There are many Division members integrally involved in putting this e-newsletter together. Without their hard work and dedication, the quality and timeliness of this publication would have easily faltered. I thank them for producing this edition of the publication for the Division. Special thanks to Jim Schwartz for heading up the effort and to Doug Knapp and the other staff members for their work in getting this edition to you.

I hope each of you enjoy this edition's Law Trends articles. The publication will continue quarterly this year and will continue to not only be informative to our members but a source of valuable information for you . If you are interested in either writing an article for the fall issue or participating in the production of the newsletter or are interested in getting involved in any way, please contact Jim Schwartz, Law Trend's editor, at attyjls@aol.com. Jim can direct you to the proper editor if you would like to submit an article to be considered for publication in one of these newsletters or help you get involved in publishing it. I know that Jim is always seeking new writers and is willing to work with volunteers in submitting articles and working on the newsletter. Also, if you have any questions, comments or suggestions about this issue or other things you would like to see in the future, please contact Jim or me.

I hope to see you at at the Divison's Fall meeting in Boston later this week. Otherwise, I'll look forward to seeing you somewhere soon.

Best regards,

Dwight L. Smith , Chair

Estate Planning

Profile: Karla Y. Vogel, Estate & Financial Planning Group Newsletter Editor

Karla Y. Vogel, Esq., CLU, ChFC is the founder of the Vogel Law Office and is licensed to practice law in the state of Georgia. Ms. Vogel has over seventeen years experience in the financial services industry, which serves to enhance her law practice in the areas of estate planning and administration, resolution of probate disputes, real estate litigation, and tax controversies. In addition to the practice of law, she arbitrates securities matters as a Panel Arbitrator for the National Association of Securities Dealers – Dispute Resolution. Using her training as a Reconciler from Peacemaker Ministries, Ms. Vogel helps families and businesses resolve interrelational conflicts.

Business Law

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Profile: O. Max Gardener, III, Business Law Author
Mr. Gardner received his undergraduate degree from the University of North Carolina at Chapel Hill in 1969 and graduated with high honors from the UNC School of Law in 1974. Among others, he was a member of the Law Review, President of the Student Bar Foundation and elected to the Order of the Coif. Following graduation, he served as law clerk to the Hon. William H. Bobbitt, the late Chief Justice of the North Carolina Supreme Court, and to the Hon. William Copeland, an Associate Justice.

He opened a law practice in Shelby, NC in 1977 and currently limits his practice to consumer bankruptcy issues and related law.

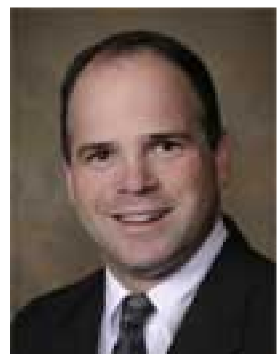
Gardner was named the Outstanding Consumer Lawyer of 2004 by the National Association of Consumer Bankruptcy Lawyers and was elected a Member of the North Carolina Legal Elite by Business North Carolina in December of 2004. He is a long-time member of NACBA and NACA and a frequent national speaker on bankruptcy law and consumer representation.

Litigation

Defending a Criminal Case

Effective Voir Dire

Subpoenas -- How To Make Them Stick



Profile: Henry M. DeWoskin, Litigation Group Coordinator
Henry M. DeWoskin is a partner at the law firm of Alan E. DeWoskin, P.C. in St. Louis, Missouri. His practice consists of wills, estate planning, military law, probate, domestic relations, social security and general civil litigation. Henry holds multiple positions in the GP Solo & Small Firm Division and the YLD of the American Bar Association and the Bar Association of Metropolitan St. Louis. In addition, he is a Major in the Judge Advocate General's Corps in the United States Army Reserves. Henry received his B.A. from Bucknell University in 1992 and his J. D. from Temple University in 1996.

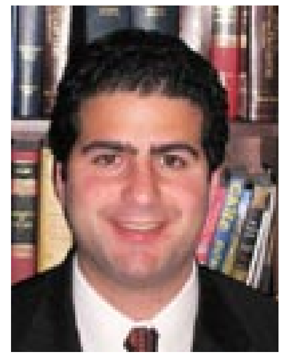
Family Law

Dying to Get a Divorce?

Life Insurance and Divorce

No Service, No Divorce Case

Profile: David Wolfe, Family Law Group Newsletter Editor



Mr. Wolfe is an associate in the litigation department of Skoloff & Wolfe, P.C. in Livingston, New Jersey, where he practices in the real property valuation group, the family law group and in the general litigation group. Mr. Wolfe was formerly an associate in the litigation department at the law firm of Davis Polk and Wardwell in New York.

Mr. Wolfe holds multiple positions in the American Bar Association and the New Jersey State Bar Association. He currently serves as the Editor of the ABA GP Solo Online Newsletter for Family Law, Juvenile Law and Elder law and is a member of the ABA YLD's National Conference Team. He is also the Chair of the New Jersey State Bar Association's Committee on Real Property Tax and Procedure.

Mr. Wolfe received his J.D. from New York University School of Law in 2002 and graduated with honors from Cornell University in 1998.

Real Estate

10 Things Landlords Should Know About Fair Housing

20 Important Steps for a Real Estate Closing

The New Bankruptcy Reform Act And Some Changes To The Automatic Stay Of Interest To Real Estate Practitioners

Profile: Kristi Bunge, Real Estate Author

Kristi Bunge is a partner with the law firm of Springman, Braden, Wilson & Pontius, PC in Denver, Colorado, a firm that handles more than 500 evictions each month. Ms Bunge focuses on representing landlords in eviction and collection matters. Ms Bunge also represents property managers and Associations, advising them on Community Association issues.

Law Student Corner

Book Review: *The First Trial in a Nutshell: Where Do I Sit? What Do I Say?*

Announcing the GPSolo Law Student Mentoring Certificate Program

Student Writers

Announcing a publication opportunity for students! Share your summer clerkship experience. Convert that legal memo into scholarly essay. Explore an undeveloped area of law. The sky's the limit, so long as the article pertains to the legal profession. Articles should range from 500 to 2,000 words in length. Preference will be given to pieces that are particularly germane to law students. Want to write but unsure about a topic, contact Alan Fowler, one of our co-editors, to get assistance in brainstorming ideas. Don't wait, take advantage of this opportunity today!

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How To Market An Alternative Dispute Resolution Practice

By Andrea Goldman

When I attended my first mediation training, in 1996, the session began with an ominous message, "Don't quit your day job!" Although in many ways, the message presented was accurate, it is possible for a small firm or solo practitioner to make a foray into the world of ADR and develop an additional practice area, or even switch over entirely.

The first thing to contemplate when thinking about ADR is which type of practice interests you. There are many titles out there these days, including arbitrator, mediator, facilitator, conciliator, and even collaborative lawyer. Each of these positions has its own "spin," and not all are suited to every practitioner.

A little soul-searching is in order when considering about an alternative dispute resolution practice. Law school trains us to work as advocates for our clients. Some of us are more confrontational than others, but the ethical rules demand that we zealously represent our clients. Making the transition to ADR requires a transition in mindset. Some attorneys find it easier to look at both sides of an issue and maintain a neutral stance. Others form opinions and prefer sitting in the decision-making position. Neither personality is better than the other. It is important, however, to recognize one's strengths and choose an area of dispute resolution that is suitable.

After choosing an area of alternative dispute resolution to pursue, it is necessary to seek out the appropriate training. In Massachusetts, there is still no certification required for mediators or arbitrators unless they participate in court-connected dispute resolution. Any practitioner worth his salt however, is going to seek out the best training possible. In most states, for mediation, community mediation programs offer the best training. State mediation associations or the Association for Conflict Resolution (http://www.acrnet.org) frequently have lists of available programs.

The most important feature of any training is the opportunity to acquire mediation experience once the training is completed. The reason for this is that the best mediation training comes from court-connected programs (usually small claims court), and most programs will not place you on their panels if you have not trained with them. To avoid this “Catch 22,” it is therefore imperative to find out if one is guaranteed an internship of some sort in the courts. In addition, it is important to ask if there is a formalized program involved in the internship, and if it costs extra. One should also make sure that the training offers the requisite number of hours as required by your state statute

Once the training is completed, the next step is to attempt to join mediation panels. Your training program will hopefully offer you a place on their roster, and that is a great place to start. The federal district court in your state may also have a mediation program. Other entities that have mediation panels include state government, the United States Post Office, and the National Association of Securities Dealers. Mediation panels are generally quite restrictive and are frequently closed for long periods of time. It requires persistence and patience to be listed on panels.

Arbitration trainings are given by agencies that offer arbitration services. Probably the best-known arbitration organization is the American Arbitration Association. If one is lucky enough to have the kind of background and experience that AAA finds attractive, they provide excellent training in the arbitration process. The National Association of Securities Dealers also has an arbitration program and requires participation in their training. It takes a long time to develop either a mediation or arbitration practice and one should expect that it might be quite some time before receiving that first case.

Once the credentials are acquired, it is time to think about how to market your ADR practice. As with marketing any business, it is best to start with what you know. Although there are people who study ADR and go directly into the business, they are few and far between. Most solo or small firm practitioners already have some areas of expertise and an established clientele. The ADR practice should be a natural outgrowth of these areas. Employment lawyers should consider employment mediation and look into agencies that deal with employment issues. Labor mediators or arbitrators can affiliate with government agencies that handle labor disputes. Construction lawyers are frequently used as arbitrators and mediators. Personal injury attorneys engage in mediation as well. The rule is, start with what you know, and let everyone you know become aware of that fact that you are now an arbitrator and/or mediator.

Another way to attract clients is to join private mediation/arbitration panels. The biggest alternative dispute resolution companies are the American Arbitration Association (www.adr.org) and JAMS (www.jamsadr.com), but there are also a number of smaller panels out there. Being placed on a panel is just the beginning of the process, however. One still has to market oneself in order to receive cases. The best marketing is usually networking with other attorneys. They understand ADR and its role in and outside the litigation process. Writing an article for a legal journal or newspaper, giving a CLE, or speaking at a bar association meeting are all excellent ways to gain recognition as a mediator and/or arbitrator.

What about the lay public? In my experience, a talk or article about “mediation,” or “alternative forms of dispute resolution,” does not attract a large audience. It is far better to speak about a substantive subject, such as “how to resolve a neighbor dispute,” “dealing with home contractors,” “what to do when the dry cleaner ruins your favorite outfit,” and include information about ADR as part of your talk. For most people, their introduction to ADR occurs as a result of making contact with an attorney about a problem, and consequently, they become involved in mediation or arbitration.

Hopefully, with the training period completed, all that hard work at marketing will start to pay off, and those mediation and/or arbitration cases will start coming in. It is an excellent idea to observe as many other mediators and arbitrators as one can. It will help you develop your “style” and determine what makes for a skilled mediator. Getting involved in ADR organizations and reading journals also helps to improve skills and keeps one in touch with the profession. Expecting referrals through these ADR networks is generally not very successful, however. Most programs are working quite hard just to sustain themselves.

Marketing an alternative dispute resolution practice can work if one maintains realistic expectations and goes about it the right way. The process can take quite a long time unless one has a pre-established client base, so it is necessary to start the journey with one’s eyes open. Get proper training, seize every available opportunity to practice your newfound skills, and try to be placed on panels. Once you “know the ropes,” try to market in your area of expertise and experience. Network with other lawyers, and make sure you tell everyone you know about your new practice. Do not try to market to other ADR professionals; it is usually just a frustrating exercise. Observe other mediators and arbitrators so you can develop your style and keep improving your skills.

Finally, determine how your practice will be divided between alternative dispute resolution and legal advocacy and use the new skills that you have attained in both areas of your practice.

Andrea Goldman is a partner in the law firm of Gately & Goldman, LLP, in Newton, Massachusetts. She focuses on construction/contractor, business, and consumer disputes as well as mediation and arbitration. Ms. Goldman is also fluent in Spanish and French. She can be reached at (617) 969-8555 x201 or agoldman@gately-goldman.com.

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Breaking News: Report on the Scope of Reasonable Inquiry in the New Bankruptcy Law

The Executive Boards of GP|Solo Division and the Business Law Section recently approved for distribution the Report on Attorney Liability under § 707(b)(4) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) prepared by the Task Force on Attorney Discipline of the Ad Hoc Committee on Bankruptcy Court Structure and Insolvency Process.

The report is designed to give some guidance and lend some certainty to the Scope of Reasonable Inquiry required by §707(b) as revised by the BAPCPA. The report explains the factors that go into a reasonable inquiry and contains case annotations that support the Task Force's conclusions.

The Ad Hoc Committee on Bankruptcy Court Structure and the Insolvency Processes is a Committee housed in the Business Law Section of the ABA consisting of members representing a number of ABA entities concerned with bankruptcy and its implications, including the Business Law Section, the GP|Solo Division and the Judicial Division.

Download the report in PDF

Keep up to date on changes to the bankruptcy laws by joining our Bankruptcy Committee.

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Attorney Liability and § 521: Dismissal for Failure to File Required Documents

Catherine E. Vance

*[This is an excerpt from the forthcoming book, Cooper and Vance, **Attorney Liability in Bankruptcy** (ABA forthcoming 2006.) In the interim, to find out more about attorney liability under BAPCPA*[1] *, you can purchase our latest article on attorney liability, Vance and Cooper, "Nine Traps and One Slap: Attorney Liability under BAPCPA," 79 Am. Bankr. L.J. 283 (2005) from the ABA at* http://www.abanet.org/abapubs/books/5150411PDF*]*

Among the many new Bankruptcy Code provisions regulating attorneys as "debt relief agencies"[2] is § 526(c)(2)(B), under which a debt relief agency *shall* be liable to an assisted person if the agency is found to have:

> provided bankruptcy assistance to an assisted person in a case or proceeding under this title that is dismissed or converted to a case under another chapter of this title because of such agency's intentional or negligent failure to file any required document including those specified in section 521.

The biggest (but by no means the only) threat is that § 521 provides for *automatic* dismissal of a bankruptcy case where certain documents are not timely filed. Even where dismissal is not automatic, the risk of liability in this regard is high.

What does § 521 require?

Three general categories of documents are addressed by the relevant provisions of § 521:

- General documents relating to the commencement of the case
- Pre-petition tax documents
- Post-petition tax documents

A. The first category, general documents relating to the commencement of the case, is governed by §§ 521(a) and 521(i). Section 521(i) provides at paragraph (1):

> Subject to paragraphs (2) and (4) and notwithstanding section 707 (a),[3] if an individual debtor in a voluntary case under chapter 7 or 13 fails to file all the information required under subsection (a)(1) within 45 days after the date of the filing of the petition, the case shall be automatically dismissed effective on the 46 th day after the date of the filing of the petition.

The documents that are subject to § 521(i)(1)'s automatic dismissal are governed by § 521(a)(1) and include:

- A list of creditors
- A schedule of assets and liabilities
- A statement of financial affairs
- If § 342(b) applies, the certificate of the attorney whose name is on the petition as the attorney for the debtor indicating that the attorney delivered to the debtor the notice required by § 342(b)[4]
- Copies of all payment advices or other evidence of payment received within 60 days pre-petition by the debtor from any employer of the debtor
- A statement of the amount of monthly net income, itemized to show how the amount is calculated
- A statement disclosing any reasonably anticipated increase in income or expenditures over the 12-month period following the date of the filing of the petition

If *any* of these documents is not filed by the end of the 45 th day after the date the petition is filed, then the case is *automatically dismissed* on the 46 th day. Section 521 offers two express exceptions and two others that are suggested, but not clearly permitted.

Express Exceptions to Automatic Dismissal

First, on motion of the *debtor* the court can *extend the time* within which the debtor must comply by up to 45 days. The debtor's motion for the extension must be filed before the 45-day period expires and the court must find "justification" for the extension. The statute is silent about whether the case is automatically dismissed if the debtor fails to file the various documents by the end of the extended period, but that is the presumed result.

Under the second exception, the *trustee* can ask the court to *decline to dismiss* the debtor's case . The trustee's motion must be filed before the end of the initial 45-day period or, if granted, the extension of that period. The section also says that the trustee can make the motion before the expiration of the five-day period after dismissal during which "any party in interest may request the court to enter an order dismissing the case." Because this five-day period is confusing, it's discussed in greater detail below.

The court can grant the trustee's motion and decline to dismiss the debtor's case if it finds that –

- The best interests of the creditors would be served by administration of the case; and
- The debtor attempted in good faith to file copies of all payment advices or other evidence of payment received within 60 days before the date of the filing of the petition, by the debtor from any employer of the debtor.

The second finding seems odd at first glance, but makes some sense in the context of all the documents required under § 521(a)(1). Evidence of payment from employers is the one filing requirement that is most out of the debtor's control. For any number of reasons, the debtor may simply be unable to comply. But no good faith exception is provided for unless the trustee opposes dismissal of the case. Without a motion by the trustee, the debtor faces dismissal of his bankruptcy case despite even extraordinary efforts to acquire and file the required information. As a "debt relief agency" the attorney likely faces no liability for a dismissal under these circumstances because the failure to file must be intentional or negligent. The attorney's ethical duty to the client, on the other hand, might require more, such as a challenge to the statute itself.

Implied Exceptions

Two additional exceptions are implied under § 521. The first is the "unless the court orders otherwise" of § 521(a)(1)(B), which qualifies the debtor's duty to file all the § 521(a) documents listed above except the list of creditors. This language pre-dates BAPCPA and could be interpreted as retaining with the court the discretion to order that a particular document need not be provided at all, such as where it is impossible for the debtor to comply. Another interpretation is that the "unless the court orders otherwise" language is now limited to orders granting the debtor's request for additional time, or the trustee's motion to not dismiss the case – the express exceptions found in amended § 521.

The second implied exception to automatic dismissal on day 46 comes from § 521(i)(2), which provides:

> Subject to paragraph (4) [the exception to dismissal on motion of the trustee] and with respect to a case described in paragraph (1), any party in interest may request the court to enter an order dismissing the case. If requested, the court shall enter an order of dismissal not later than 5 days after such request.

By itself, this language creates no exception, but provisions within § 521(i) treat paragraph (2) as if there were:

- Paragraph (1), which mandates automatic dismissal on the 46 th day, is made expressly "subject to" paragraph (2)
- The trustee's motion requesting that the case not be dismissed may be made before the end of paragraph (2)'s five-day period even though the case is, technically speaking, already dismissed

In other words, the plain language of paragraph (1) regarding automatic dismissal ("the case shall be automatically dismissed") is in direct conflict with the "subject to" language of paragraph (1) and with paragraph (4)'s allowance for a motion by the trustee after day 46 but before the end of the five-day period after which a party requests that the court enter an order of dismissal. This could be interpreted to mean that the dismissal is not effective *until and unless* a party makes such a request and the order of dismissal is entered.

No attorney should rely upon the implication created by the poorly constructed language of paragraph (2), or the general "unless the court orders otherwise" language. However, either could prove useful for an attorney facing liability or, as mentioned above, any ethical obligation the attorney has to her client to challenge a statute that puts a debtor into a situation where compliance is impossible.

B. The second category is pre-petition tax documents. These are governed by § 521(e)(2), which requires the debtor to provide a copy of the most recent federal income tax return (or, at the election of the debtor, a transcript of that return) to the trustee and any creditor that requests a copy of the return or transcript.[5] The time for compliance is at least seven days prior to the first date *set* for the § 341 meeting of creditors.

If the debtor fails to provide the return as required, then "the court shall dismiss the case unless the debtor demonstrates that the failure to so comply is due to circumstances beyond the control of the debtor."

Dismissal in this regard does not appear to be automatic. Section 521(e)(2) makes no explicit reference to an automatic dismissal, as § 521(i) does (which itself is somewhat ambiguous) and, because of the "unless" clause – under which the debtor may seek to be excused for the compliance failure – the statute seems to contemplate some form of notice and hearing.

C. The third category pertains to post-petition tax documents. The debtor's duty is outlined in new § 521(j):

> (1) Notwithstanding any other provision of this title, if the debtor fails to file a tax return that becomes due after the commencement of the case or to properly obtain an extension of the due date for filing such return, the taxing authority may request that the court enter an order converting or dismissing the case.
>
> (2) If the debtor does not file the required return or obtain the extension referred to in paragraph (1) within 90 days after a request is filed by the taxing authority under that paragraph, the court shall convert or dismiss the case whichever is in the best interests of creditors and the estate.

Of the various dismissals triggered by a failure to file documents under § 521, the duty with respect to post-petition tax returns is the most straightforward. Section 521(j) creates no new obligations; rather, it imposes an additional penalty for the failure to file tax returns.

Notice also that § 521(j) does not require the filing of any particular document *with the court*. Although some may argue ambiguity, it appears clear that "file" in paragraph (1) refers to the annual ritual of filing with the IRS. In addition, § 521 (j) is not automatic and the attorney will have 90 from the date the IRS requests that the debtor's case be dismissed or converted to insist on her client's compliance with his duties under the tax code.

Attorney Liability for Dismissal or Conversion

How does this affect the attorney who fits the definition of a "debt relief agency" (as opposed to the hapless client whose case is dismissed or converted)?

Because of new § 526(c)(2)(B), liability to the client is *mandatory* so long as it is shown that:

- the dismissal or conversion resulted from the *attorney's* failure to file the required document, and
- that failure was intentional or negligent.

Because § 526(c)(2)(B) requires that the attorney act intentionally or negligently in order to be liable, diligent attention to the § 521 filing requirements is in the best interest of not only the debtor, but the attorney as well. The best way to avoid liability is to implement strict procedures for internal processing and filing of the required documents and an effective calendar system to ensure timely compliance.[6]

Our book, *Attorney Liability in Bankruptcy* (Cooper and Vance, ABA forthcoming 2006) will provide checklists and other helpful information to assist attorneys not just with respect to § 521 compliance, but with liability that could arise under BAPCPA generally.

[1] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23.

[2] "Debt relief agency" is defined at 11 U.S.C. § 101(12A) and incorporates the terms "assisted person," defined at § 101(3) and "bankruptcy assistance," defined at § 101(4A).

[3] Section 707(a): The court may dismiss a case under this chapter only after notice and a hearing and only for cause, including –

> (1) unreasonable delay by the debtor that is prejudicial to creditors;
> (2) nonpayment of any fees or charges required under chapter 123 of title 28; and
> (3) failure of the debtor in a voluntary case to file, within fifteen

> days or such additional time as the court may allow after the filing of the petition commencing such case, the information required of paragraph (1) of section 521, but only on a motion by the United States trustee.

[4] The § 342(b) notice requirement is broader than set forth here, addressing petition preparers and pro se filers.

[5] The duty to creditors is stated twice in new § 521(e)(2): once in § 521(e)(2)(A)(ii) and again in § 521(e)(2)(C). The first qualifies the creditor's request with "timely," but the second does not.

[6] Attorneys must also keep in mind that if the debtor refiles within a year, the automatic stay is restricted because the debtor is treated as a serial filer. Blaming the attorney for the prior case's dismissal is one of the few ways the debtor can convince the court to lift the restrictions and give the automatic stay full effect. *See* Vance and Cooper, *Nine Traps and One Slap: Attorney Liability under the New Bankruptcy Law*, 79 Am. Bankr. L.J. 283, 323-25 (2005). This article is available from the ABA at http://www.abanet.org/abapubs/books/5150411PDF.

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Palm Integration with Tabs3 and PracticeMaster

By Dan Berlin

"If it takes less than 2 minutes, do it."

That refinement of Ben Franklin's "Never leave that till tomorrow which you can do today"

comes from David Allen's "Rosetta Stone" for Mastering Workflow. Mr. Allen, a time management guru and the author of the book Getting Things Done, helps people keep their inboxes empty and their lives organized. Part of his process involves doing small, simple tasks right away. As an example, one simple task you should always do right away is track your billable time and your expenses.

It is easy to see the benefits of tracking your time as you spend it. Record your time right after a meeting or phone call and you will know exactly how much time you spent with the client and what you discussed. Wait until the end of the week and you might forget whether your appointment ran longer than the 90 minutes you had scheduled in your calendar. If you wait, you also start to dread that inevitable meeting with your timesheet at the end of the week, or the end of the month. Why waste time on tediously retracing your steps to remember how you spent last Tuesday morning or how late you were at the office revising a contract the Monday before last?

One tool that can make it easier to keep current on your billable time is a Palm handheld device integrated with Tabs3 Billing Software. Tabs3's Palm integration adds your client and billing code information to your Palm. So when you finish a task while you are out of the office, you can easily record the time you spent on it. Whenever you incur an expense for a client you can track that too, immediately, no matter where you are. Simply select the client and expense code, enter in the amount and you're done. Then, the next time you sync your Palm with your computer at the office, the information instantly flows into your

Tabs3 Billing Software. For your time entries, the billing rate that you have set up for the client in Tabs3 will automatically be applied to the time you tracked in your Palm. The fee and expense entries you synced from your Palm will immediately be available on your clients' pre-billing reports and ready to appear on your client's next statement.

Tabs3 also includes a free copy of PracticeMaster Practice Management Software that can also integrate with your Palm. PracticeMaster is an easy way to track contacts, your calendar, tasks and search for conflicts of interest. When you integrate it with your Palm, you can conveniently take all of that information from your computer with you. It is easy to see how this is helpful too. Let's say you are walking though an airport when a client calls you. She wants to reschedule a meeting for later in the week. You can immediately update the appointment on your Palm and, the next time you sync your Palm, the updated time will automatically show up on your calendar on the office computer. Or, you are at a client's office and she gives you her cell number so that you can be sure to get in touch with her after your meeting with opposing counsel later in the week. You add to your Palm her new number and a reminder to follow up with her. After your next sync, the information is in PracticeMaster where you are sure to notice the reminder and have her number at your fingertips.

Staying up to date with your billable time, expenses, calendar and client information will help you bill more time and look more professional, not to mention lower your stress level. If you are interested, you can order a demo of Tabs3 and PracticeMaster at www.Tabs3.com. It takes less than two minutes.

Dan Berlin is President of Software Technology, Inc.

Neither the ABA nor ABA entities endorse non-ABA products or services, and the product reviews in the Technology eReport *should not be so construed.*

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A Brief Primer on Fighting Predatory Lending Practices

By Melissa A. Huelsman

There has been a great deal of coverage in the mainstream media in the past year regarding the increase in non-traditional lending practices, including the making of interest-only and negative amortization loans. The media often concludes its coverage with the optimistic observation that these creative lending practices have contributed to a greater percentage of homeowners in the United States.

Upon closer inspection, however, "nontraditional lending practices" in many instances becomes a euphemism for a disturbing rise in predatory lending practices to hopeful homebuyers. The rosy optimism and the image of proud homeownership cultivated by the media obscures a darker reality: growing in tandem with the rise in the number of home owning Americans are a range of practices collectively known as predatory lending practices, and a consequent rise in foreclosures throughout the nation.

Briefly, predatory lending is a term used to describe a variety of practices that mislead consumers, gouging them with exorbitant fees and usurious interest rates on their loans. In the context of home mortgage loans, predatory lending practices strip the equity from a home. In essence, practices which at first blush appear to enable home buying ultimately destroy the possibility of authentic ownership. Historically, more than 50% of the victims of predatory lending practices have been the elderly of all ethnic backgrounds, followed by African-Americans and Hispanics. The victim profile is changing, however; as predatory lending practices become more vicious, sophisticated, and prevalent, young, white prospective homeowners are as at risk as populations that historically may have been more vulnerable to them.

Predatory lending in the context of home buying is comprised of a plethora of lending practicing and arrangements, including:

- Kickbacks to mortgage brokers (Yield Spread Premiums, where a broker can get a loan at a lower interest rate, but tells the borrowers only about the higher rate loan so that the broker will receive a kickback from the lender);
- A lender's arrangements for payments that are higher than the borrower can afford;
- Falsifying loan applications (i.e., a lender may state on a loan application that a prospective borrower's income is greater than it really is in order to facilitate approval of the loan);
- Adding insincere co-signers (lender adds a fake cosigner for loan approval);
- Making loans to mentally incapacitated homeowners;
- Forging signatures (lender forges a borrower's signature on an early disclosure);
- Paying off lower income or interest mortgages;
- Loans in excess of 100% loan to value (LTV);
- Bait and switch tactics, such as substantially changing loan terms at closing;
- High annual interest rates;
- High points or padded closing costs;
- High loan origination fees;
- Balloon payments;
- Negative amortization (where principal balance increases rather than decreases);
- Padded appraisal costs (inflated home values in appraisal);
- Padded recording fees;
- Bogus fees (e.g., HUD will state that the broker has a fee for underwriting fee, when in fact brokers have no underwriting fee);
- Itemizing duplicate services and charging separately for them;
- Misinforming the prospective homebuyer that credit insurance is required and/or failing to disclose to the buyer that they are earning a commission on the insurance;
- Mandatory arbitration clauses;
- Falsely identifying loans as lines of credit or open ended mortgages;
- Forced placed homeowners insurance (lender falsely claims that homeowner does not have insurance and then gets an undisclosed commission for selling it to them);
- Repeated refinancing (flipping);
- Daily interest when payments are late;
- Excessive prepayment penalties;

- Foreclosure abuses; and
- Home improvement scams.

A range of state and federal law of laws are available to help attorneys address dismantle the harm wrought by predatory lending practices. Federal legislation that can protect homeowners includes the Truth in Lending Act (TILA), 15 U.S.C. § 1601 and the Real Estate Settlement Practices Act (RESPA), 12 U.S.C. § 1201. Regulations Z and X, derived from the federal statutes, and the Commentary to the Regulations also benefit consumers in suits against predatory lenders. State consumer protection act statutes and traditional common law causes of action, including fraud, negligence, unjust enrichment, intentional infliction of emotional distress, and unconscionability, also may enable consumers to prevail in claims against predatory lenders.

Not coincidentally, the prevalence of predatory lending practices and the subsequent increase in foreclosure rates has contributed to an increase in foreclosure rescue scams. Foreclosure rescue scams describe an ever-evolving range of scams whereby a third party approaches a homeowner who has fallen behind on his mortgage payments, offering to help the homeowner forestall an impending foreclosure. In the simplest version, a fly-by-night company offers to negotiate with the borrower's lender to arrive at some sort of workout, thereby stopping the foreclosure. More often than not, the company has no physical presence and operates from a mailbox rental address and/or a website. The company generally charges a homeowner between $1,500 and $2,500 for its services and demands payment up front. After receiving its fee, the company vanishes, its promises to negotiate a workout unfulfilled. The funds the desperate homeowner paid the company are now unavailable to either help reinstate the homeowner's loan, or to help him relocate should a workout with the lender not be possible.

In a more pernicious foreclosure rescue scam, the savior company approaches the homeowner and offers to help save his home by temporarily "buying" it from the homeowner. In this version of the scam, the company persuades the homeowner to sell the home to either the company or to an "investor" (a third party involved in the scam). The company or investor then permits the homeowner to continue living in the home, renting it from them with an agreement that the homeowner can earn back title to the home. More often than not, the repurchase price is substantially higher than the price the homeowner originally paid for the home. Even in cases where the repurchase price is not higher than the original purchase price of the home, the rent is equal to or greater than the amount of the homeowner's prior mortgage payments. Barring a highly improbable, fortuitous change in circumstances for the homeowner (how many of us win the lottery?), the transaction is destined to fail: a homeowner who is unable to meet mortgage payments will not be able to meet rent payments that are equal to or higher than those mortgage payments. Typically, the company evicts the homeowner within six months of the rescue sale, and the homeowner loses any equity he may have had in his home prior to the scam.

In addition to fraud, negligence, consumer protection act claims, unconscionability, unjust enrichment, slander of title, and intentional infliction of emotional distress, foreclosure scam artists may be liable under state statutes addressing the licensing of mortgage brokers and real estate sales and under federal lending statutes.

There are several resources available to attorneys who wish to pursue predatory lending and foreclosure rescue scam cases Many states have active consumer law bars that may also offer assistance and advice. The most thorough print resources are a series of volumes on consumer law published by the National Consumer Law Center (NCLC) (www.consumerlaw.org). One volume is dedicated to a detailed analysis of TILA, while other volumes address foreclosure law and consumer banking law. All of NCLC's volumes include sample pleadings, interrogatories, and other useful documents in appendices. The National Association of Consumer Advocates (NACA) (www.naca.net) also is an invaluable resource for attorneys contemplating developing a practice assisting homeowners with predatory lending and its attendant issues.

Melissa A. Huelsman is an attorney practicing in Seattle. Her practice is focused on predatory lending, consumer and fraud litigation, and bankruptcy. Ms. Huelsman received her J.D. from Southwestern University School of Law, Los Angeles, California. She is admitted to practice before the State Bars of California and Washington, the Ninth Circuit Court of Appeals, the United States District Court for the Central District of California and the United States District Court for the Western District of Washington and for the Eastern District of Washington. In addition to pro bono work, Ms. Huelsman is a member of the Board of the King County Bar Bulletin, and former Chairperson of the P.L.A.C.E. Subcommittee of the Seattle-King County Coalition for Responsible Lending. Ms. Huelsman is also an associate member of the Association of Certified Fraud Examiners and a member of the National Association of Consumer Advocates.

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Mortgage Securitization, Servicing, and Consumer Bankruptcy

By O. Max Gardner III

Wayne Gretzky once said that his success was due to the fact that he focused on where the puck was going to be, not where it was. For most consumer debtors who have home mortgage loans and are involved in Chapter 13 bankruptcy cases, this Gretzkyism is somewhat of a double entendre. The fact of the matter is that most of these debtors have no idea who really owns their home mortgage loan and they most assuredly do not know why the balance owed keeps going up. Or, as Yogi Berra might say, these "guys have been double-pucked!"

And, the so-called "double-pucking" all starts with mortgage securitization. Securitization is a complex series of financial transactions designed to maximize the cash flow and cash out options for loan originators. The securitization and sale of assets is what gets the "off the balance sheet" boost in reported income for the originator. The originators secure immediate liquidity from assets that, in some circumstances, could not be readily traded in the capital markets. On paper, it sounds simple, in the real world it involves the creation of numerous Special Purpose Vehicle Corporations (SPV) designed to create the legal impression of an actual BPF sales transaction. However, the residuals, credit enhancements, and other derivative rights retained by the originators in the transferred assets create a Pandora's Box of problems. A good example is Enron. Enron had enhanced the credit worthiness of thousands of asset-backed securitizations with Enron stock. When the Enron stock tanked so did the securitizations and Enron had to "recognize" all of these "off the books" transactions as liabilities. We know the rest of the story.

To securitize an asset, the loan originator creates a pool of financial assets such as mortgage loans. It then uses one or more SPV corporations to convert the large pools of these mortgages into complex investment certificates, backed or securitized by valid liens on the transferred collateral. These certificates are then rated and offered for sale to asset capital investors, foreign investors and life insurance companies to name a few. The certificates are normally split into various types or tranches, each of which has pre-determined cash flow or equity positions in the underlying collateral.

Unlike conventional bonds, payments of principal and interest from these mortgage backed securities (MBS) are based on the cash generated by the pooled assets. Cash can be generated by monthly mortgage payments and the pre-payment of the mortgage instruments by refinancing or early payment. The collateral for all of these bonds is always a pooled trust of the underlying assets, administered by a designated Trustee. The Trustee then enters into an agreement with a third-party to actually service the collection of the income from the pooled assets. These servicing agreements are normally consummated prior to the initial funding or transfer of the assets to the trust and are normally referred to as a Pooling and Servicing Agreement (PSA).

In many cases, the entity that originates or aggregates the assets for securitization will retain the rights to service the pool of mortgage loans for the trustee. These rights are referred to in the mortgage context as retained mortgage servicing rights (MSR). The entity holding the MSR rights is normally referred to as the Master Mortgage Servicer. The PSA may give the Master Mortgage Servicer the right to “farm-out” the actual servicing and collection of the mortgage loans to a primary servicer, a secondary or subservicer, or a default servicer. In the vast majority of cases, the consumer-mortgagor is making his or her monthly payments to one of these servicers, whom they erroneously believe is the entity that actually “owns their mortgage.”

The rights to service a mortgage loan are considered to be assets with recognized value. In fact, Mortgage Servicing Assets (MSA) are sold, assigned, and securitized just like the mortgage loans they service. Suffice it to say, the buying and selling of servicing rights accounts for much of the consumer confusion that leads to the common misstatement that “my mortgage has been sold 4 times in the past five years.” The mortgage has not been sold, just the rights to service the mortgage, the mortgage is still swimming in a pool with other similar debt instruments. And, since a Master Mortgage Servicer receives a service release premium (SRP) when it sells the servicing rights, the market is certainly active.

The final element in understanding this financial model is that you have public and private label placements of mortgage securitizations. All of the public placements are originated by the Government Sponsored Entities (FannieMae, FreddieMac, and GinnieMae commonly referred to as the GSE's) and normally involve a single form of an investment bond or certificate called Pass-Through Certificates. All of these placements are the subject of detailed SEC filings and other public reports. The private-label placements, on the other hand, represent mortgages that have been aggregated on the secondary market by private investors and the pooled trusts of these assets are normally not subject to any SEC reporting or filing requirements. The private placement MBS's also normally offer multiple forms of investments and create these instruments by splitting the income and principal aspects of the MBS trust into many different segments or tranches. The GSE's have historically purchased for securitization only traditional mortgage products but in recent years have expanded into a variety of areas such as loan size, higher loan-to-value loans, alternative mortgages (ARMS, Hybrid ARMS, Interest Only ARMS, etc.). The private label aggregators, on the other hand, have purchased all of the others including Alt-A, sub-prime, etc.

At his point, you might ask what does any of this have to do with consumer mortgages and Chapter 13 bankruptcy cases. Well, in short, in the words of the Rapper Puff Daddy[1], "It's all about the benjamins, Baby." The problem arises out of the fact that in most cases the "income" for servicing a mortgage is "fixed" at the time of securitization. The "fixing" of this compensation is based on historical financial models of the pooled mortgages that make certain assumptions on default rates, foreclosure rates, the ability to market REO (real estate owned) properties, and the like. If these projections are not accurate, then the costs of servicing an above average pool of defaulted mortgage loans may be a money losing proposition for the servicers. And there is a fine margin in the mortgage servicing business between operating in the black or in the red.

One of the most startling statements about these revenue reduction problems that this writer has seen was one reported in the August 2005 edition of *Mortgage Banking*. *Mortgage Banking* is published monthly by the Mortgage Bankers Association of America and touts itself as "the magazine of real estate finance." In an Article by Thomas J. Healy, a Certified Mortgage Banker employed by HanoverTrade Inc., the following statement is made:

"Because servicers average approximately $60 per loan per year in net profit, it does not take much in the way of additional non reimbursable inspections/collections/foreclosure costs to wipe out the profits on a lot of loans."

This statement is supported by a "cost of servicing" survey that is being conducted by the Research Department of the Mortgage Bankers Association of

America. Marina Walsh, the Director of this Department, was recently quoted as saying that “in general, servicing costs [for subprime mortgages] were about three times that of the prime side.” Ms. Walsh went on to state that when subprime loans go into default, the servicing costs are 4.5 times higher than for defaulted prime loans.

These quotes and these statistics remind me of some advice I received about 30 years ago from a veteran personal injury attorney. We were about to settle a very large medical malpractice case and our fee was based on a percentage of the total recovery. I remember asking the veteran, “How much is 33% of that settlement?” He responded as follows: “I don’t know for sure but 33% of a lot is a lot!" Well, in order to enhance their default servicing revenues, mortgage servicers “involved in” consumer bankruptcy cases have created all sorts of new fees and charges that are not assessed against the investors (the holders of the certificates in the pooled trusts, who will not pay these fees) but against the poor Chapter 13 debtors.

What type of fees are we talking about? Well in Mr. Healy’s article, he writes about inspections. What type of inspections is he referring to? I guess the best place to start would be with Gerald Stark, a civil engineer for whom I filed a Chapter 13 case about 10 years ago. Gerald had a mortgage loan that had been securitized by FannieMae and was being serviced by Crestar Mortgage Corporation. The mortgage was current on the petition date and remained current during the course of the plan. Notwithstanding the Chapter 13 filing, Crestar continued to send monthly billing statements to the debtor. It was not the billing statements that concerned Gerald but the $9.00 additional fee added to his statement each month designated as “other charges.” Mr. Stark called Crestar numerous times about these charges and was told everything from “we have no idea” to they are just “bankruptcy fees.” Mr. Stark took the matter up with me when the total amount of the monthly property inspection charges reached $135.00.

Mr. Stark subsequently filed a motion for sanctions against Crestar for violations of the automatic stay. Crestar admitted that it had caused the home to be inspected once per month so as to make sure it had not been vacated, which was curious in itself since the debtor at all times remained current on his mortgage payments. If Gerald had abandoned his home, you would assume he would have stopped making the mortgage payments.

The property inspection fees in Stark’s case were allegedly paid to third parties who would simply ride by the house and file a written report indicating such things as the grass was mowed. Crestar’s defense to Gerald’s motion was that, as servicer, it was only acting in compliance with the Mortgage Servicing

Guidelines issued by FannieMae. In rejecting this defense, and holding in favor of the debtor, the Bankruptcy Court stated: "The $9.00 monthly inspection fee that Crestar imposed on the debtors in this case was in effect a monthly bankruptcy 'monitoring fee'*". Stark v. Crestar Mortgage Corp*., 242 B.R. 866, 871 (Bankr. W.D.N.C. 199). The Court went on to hold that "since Crestar attempted to collect these 'inspection or bankruptcy monitoring fees' from the debtors while the stay was in effect, by adding fees to the debtor's monthly statements, Crestar violated Section 362(a)(3)." *Id*. at 873.

Gerald Stark's case turned out to be the tip of a very large ice-berg of unlawful and illegal mortgage servicer fees in consumer bankruptcy cases. The next case that came to light involved the practice of advancing various sums of money against the mortgage for the costs of alleged legal fees related to the filing of a proof of claim in a Chapter 13 case. Samuel and Melinda Smith filed a Chapter 13 case in 2000 (W.D.N.C., 00-31220) and scheduled a secured debt to TMS Mortgage, Inc (now HomEq). TMS filed a proof of claim that included the sum of $125.00 for "legal fees related to the preparation and filing of the claim." TMS admitted that it had never filed a motion under Code Section 506(b) or Bankruptcy Rule 2016 for approval of this fee. About the same time, Jason and Sherri Tate, who had filed a Chapter 13 case in 1997 (W.D.N.C. 97-32126), noticed that the proof of claim on their home mortgage filed by Nationsbanc Mortgage Corporation (now Bank of America) included the sum of $125.00 for "bankruptcy fees". *Tate v. Nationsbanc Mortgage*, 253 B.R. 653,660 (Bankr. W. D.N.C 2000). Nationsbanc's defense was that it had outsourced the proof of claim process to a law firm in Texas and the $125.00 was a reasonable fee for their services. The charge was a flat fee that the lawyers charged per case, per claim.

In rejecting these arguments, the Court in *Smith* and *Tate* found these attorney fees to be procedurally "per se unreasonable." *Id*. at 665. Specifically, the Court noted that Rule 2016 sets forth "a straight forward methodology for requesting payment of attorney fees. The rule applies to any person or entity seeking compensation for services or reimbursements of expenses from estate assets." *Id*. To the Court, it seemed pretty simple: 11 U.S.C. Section 506(b) authorizes the payment of legal fees to secured creditors who seek such fees upon the filing of a proper application with adequate notice; and, the Court has authority under 11 U.S.C. 105 to enforce a failure or refusal of a creditor to so comply. *Id.* at 668. In concluding the decision in *Tate*, the Court stated: "In summary, Section 105 authorizes this Court to take whatever action is necessary to enforce the Code's provisions. The bankruptcy court is entitled to exercise its powers under the Code to restrain a creditor from overreaching. To do otherwise would allow Nationsbanc to perpetuate a fraud on the Court and other parties in interest." *Id*. at 669.

Unfortunately, the only thing the Mortgage Servicers appear to have learned from any of their cases is that the vast majority of Chapter 13 debtors and their attorneys do little or nothing about these illegal fees and charges. As a result, it is actually profitable to “perpetrate a fraud” on the Bankruptcy Courts, the Bankruptcy Trustees, the attorney for the debtors, and of course the debtors. A good example of these practices can be found in a trilogy of cases presented to the Bankruptcy Court in New York in November of 2002. *In Re Gorshtein*, 285 B. R. 118, 120 (Bankr. S.D.N.Y. 2002).

One of the *Gorshtein* cases was a Chapter 13 case, which had been filed by Mandy Abrue in July of 2000. On February 7. 2001, Fairbanks Capital Corp. (now Select Portfolio Servicing) filed a motion for relief from stay in which it alleged that “no post-petition payments have been received from the Debtors.” *Id*. The debtor objected and provided proof that all these payments had been made. The motion was thereafter withdrawn. Exactly one year later Fairbanks filed a second motion for relief from stay in which it made the same allegations as the first motion (no payments had been made on the mortgage since filing). This second motion was filed by the same attorney who filed the first motion. Once again the debtors objected and provided proof of all post-petition payments. Fairbanks explained that due to some type of internal accounting function the motions had been filed because the payments had been placed “into a debtor’s suspense account” and therefore they had never been applied to the mortgage loan. *Id*. at 123. (FN2). The use of various forms of “suspense accounts” by the mortgage servicers deserves a separate Chapter. The accounts, in short, allow the servicers to “hide payments” and then raid the accounts to pay themselves bogus fees and charges.

The *Gorshtein* court imposed sanctions on its own motion pursuant to Bankruptcy Rule 9011 in all three of the consolidated cases including the one involving Fairbanks. The Court noted that whether “the cause of the false certification [of a serious payment default in each case] should be labeled intent to deceive, gross negligence, incompetence or mere inadvertence is indeterminable and, in any event, it really does not matter. It does not matter because the result is the same for the debtor and the judicial process, which will be victimized by the misstatement if for any reason the debtor fails to respond timely to a baseless motion.” *Id*. at 126.

Fairbanks learned little if nothing from the Court in *Gorshtein*. On July 16, 2002 the Bankruptcy Court for the District of Massachusetts entered a judgment for sanctions against Fairbanks (including rescinding the mortgage) in the case of Pearl Maxwell, an 83 year old woman with minimal schooling and limited financial recourses. This case provides a textbook illustration of the extent to which the mortgage servicing industry is out of control.

During the *Maxwell* case, Vince Brando, who identified himself as a Special Default Technician, testified that " Fairbanks buys loans in bulk without checking to ascertain whether each loan is accompanied by proper documentation." *Maxwell v. Fairbanks*, 2002 W.L. 1586325 (Bankr. D. Mass. 2002). Mr. Brando testified at one time Fairbanks paid $129,344.00 for the Maxwell loan but admitted that Fairbanks at another point claimed to have paid $175,955.00. In trying to explain this and other inconsistencies in the amount of the default, the principal balance owed, the corporate advances and the use of suspense accounts, Mr. Brando indicated that "Fairbanks has no documents in its possession to substantiate payments of that amount, and Fairbanks cannot identify any account, fund or other source of monies from which that amount was paid."

Brando later testified that rather than purchase the mortgage Fairbanks actually only acquired the servicing rights. When questioned about the payment history, he said that Fairbanks, "never had the prior payment history from the prior servicer." He added that "he could not say what happened when the prior lender owned the loan." And, when pressed how Fairbanks could determine the amount owed, the amount of arrears, or the current payment status without a payment history, he said: "I go off of whatever the computer has for me and what it offers me, because that's all the information we would have. No one would have any more than that." *Id*. Fairbanks, of course, was later involved in a consumer class action and was named in a Fair Debt Collection Act enforcement proceeding filed by the FTC. In addition to agreeing to pay more than $56,000,000.00 in the class action, Fairbanks also agreed to terminate the CEO and president, and to terminate many officers, attorneys, agents, and employees.

The abuses of the mortgage servicers have been described by many knowledgeable commentators as "predatory mortgage servicing." This term does not do justice to the current practices of these parties. These practices are beyond predatory in that they constitute more of a premeditated plan to ignore the entire bankruptcy process. The actions of these mortgage servicers in consumer bankruptcy cases are nothing more or less than an intentional abuse of the judicial process and the rule of law. It is also part of a pervasive pattern of chicanery, fraud, trickery, deceit, double-dealing and just plain old-fashioned illegal conduct.

During the past 7 years I have compiled a list of my own **Top 10 Mortgage Servicer Abuses**. The list is reprinted below along with representative cases if applicable:

1. The systematic and universal creation of junk fees such as monthly property inspections, monthly property preservation fees, broker price opinion fees, proof of claim preparation fees, review of Chapter 13 plan fees, and other similar and related charges. Case Examples: *In Re Coates*, 292 B.R. 894 (Bankr. D. Ill 2003) and *Dawkins v. Chase Manhattan*, unpublished Slip Opinion, Case No. 99-40552. (Chase was actually seeking over $11,000 in attorney fees for simply a motion for relief from stay that Chase lost).

2. The systematic failure to disclose any of the junk fees during the pendency of the Chapter 13 case by way of the filing of a proper Rule 2016 Fee Application with adequate due process notice and the right to object. Case Example: *Tate v. NationsBanc Mortg. Corp. (In Re Tate)*, 253 B.R. 653 (Bankr. W.D.N.C. 2000); *Harris v. First Union Mortg. Corp. (In re Harris)*, 2002 Bankr. LEXIS 771 (Bankr. D. Ala. 2002) (awarding $2,000,000 in damages).

3. The sinister collection of these fees post-discharge in Chapter 13 cases when the debtor no longer has the benefit of a bankruptcy attorney or any other party who can review a payoff statement for accuracy. Since many Chapter 13 debtors are eligible to refinance their mortgage loans after a Chapter 13 discharge, many of these charges are secretly collected at closing. And, most of the software systems used by the servicers are programmed to automatically download all of the fees and charges held in “suspense” into a payoff quote.

4. The use of these fees to create negative payment histories that result in motions for relief from stay. The system developed by the servicers is both complex and simple. The servicer establishes a software program that automatically adds a late charge to any post-petition payment based solely on the pre-petition default. The system is also designed to transfer any post-petition payment that does not include the “secret late fee” into a suspense or forbearance account. The funds in these accounts are obviously not applied to the post-petition mortgage payments. The debtor receives no interest on these funds and the suspense account is not a trust account. In many instances, the servicers will raid the suspense accounts to pay the unlawful corporate advances and other undisclosed fees and charges.

5. As the court noted in *Gorshtein*, the attorneys for the mortgage servicers are guilty of the repeated and systemic filing of false representations of defaults in motions for relief from stay. The attorneys know or should know that the data they are receiving from the servicers is not accurate or otherwise reliable; yet, in order to keep a “good client” they continue to accept the cases and file the motions.

6. The attorneys for the servicers who do ask for court approval of their legal fees in connection with a motion for relief from stay are also guilty of making false representations to the Court, the Trustee, the debtor, and the attorney for the debtor. These false representations relate to the nature and extent of their attorney fee agreements with the servicers. For example, many courts have a presumed no-look fee of $450.00 for a motion for relief from stay plus the filing fee of $150.00. Many attorneys for the servicers agree to these fees with full knowledge that their firm has been paid $850.00 plus the $150.00 filing fee by the servicer and that these “actual” fees and not the court approved fees will be charged back to the debtor’s account.

7. The creation of bogus “escrow” accounts to fund unlawful corporate advances. The obvious intent is to use these “escrow accounts” to hide the improper application and disbursement of funds from the debtor’s contractual payments and from the Trustee arrearage payments.

8. The practice of including undisclosed legal fees in attachments to proofs of claim and then inserting language in a hidden addendum that the failure of the debtor to object to these fees constitutes a waiver, estoppel, or res judicatta defense. See *Slick v. Norwest Mortg. Inc.* (In re Slick), 2002 Bankr. LEXIS 772 (Bankr. D. Ala. 2002).

9. The placement of forced-place insurance with a captive company (i.e., a wholly owned or related subsidiary) when debtors have such insurance. This triggers an escrow review, an enhanced payment, and more money for the suspense accounts.

10. The advancement of funds against the debtor’s mortgage loan for monetary damages actually paid to the same debtor for violations of the bankruptcy law. The servicer will also charge the debtor for the attorney fees incurred in defending such action. Case Example: *In Re Riser*, 289 B.R. 201 (Bankr. D. Fla. 2003).

[1] The writer is fully aware that Puff Daddy is currently known as “Diddy” per his request, but thought Puff Daddy to be the more accurate name for such an old school song reference.

Mr. Gardner received his undergraduate degree from the University of North Carolina at Chapel Hill in 1969 and graduated with high honors from the UNC School of Law in 1974. Among others, he was a member of the Law Review, President of the Student Bar Foundation and elected to the Order of the Coif. Following graduation, he served as law clerk to the Hon. William H. Bobbitt, the late

Chief Justice of the North Carolina Supreme Court, and to the Hon. William Copeland, an Associate Justice.

He opened a law practice in Shelby, NC in 1977 and currently limits his practice to consumer bankruptcy issues and related law.

Gardner was named the Outstanding Consumer Lawyer of 2004 by the National Association of Consumer Bankruptcy Lawyers and was elected a Member of the North Carolina Legal Elite by Business North Carolina in December of 2004. He is a long-time member of NACBA and NACA and a frequent national speaker on bankruptcy law and consumer representation.

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Save Tax Dollars With A Section 1031 Exchange

By Max Hansen

Introduction: The use of tax-deferred exchanges of taxpayers' property continues to increase as realtors, attorneys and accountants become more aware of the benefits of Internal Revenue Code (I.R.C.) Section 1031 Exchanges.

Even those people regularly involved in 1031 exchanges are confused regarding the proper methodology for structuring exchanges. It is also important to remain informed on some of the new developments in the exchange business. The purpose of this article is to outline some of the basic exchange concepts and update you on some new ideas in the exchange industry.

The Ground Rules

To qualify for tax deferment under I.R.C. Section 1031, the taxpayer must exchange property held for productive use in a business or trade, or held for investment for a "like kind" property also to be held for productive use in business or trade or held for investment purposes. An exchange can be a simple swap of property, a simultaneous exchange or a delayed exchange. With court cases and the IRS regulations now in place, it really does not make much sense to structure an exchange using multiple parties as was done before the changes in the law.

The Starker decision in 1979 was the landmark case which established the basis for delayed exchanges (T.J. Starker vs. U.S., 432 F. Supp. 864 (D. OR. 1977) aff'd, rev'd & rem'd 602 F. 2d 1341 (9 thCir.,1979).) The taxpayer, Starker, exchanged title to his property for a contractual promise by the buyer, Crown-Zellerbach, to acquire like-kind property to be selected and designated by Starker at a later date. No cash was paid at the time of Starker's conveyance to Crown-Zellerbach. Starker's net sale proceeds were held by the buyer as a "net exchange value" credit on its books. Starker later selected properties using his credit toward the acquisition price. Crown-Zellerbach acquired the properties and immediately transferred the title to Starker. This delayed exchange transaction set the precedent for completing 1031 exchanges on a delayed basis.

The IRS amended the regulations for exchanges generally in 1991. The regulators clarified the case law for exchanges including the issues of identification and receipt of replacement property and "safe Harbors" for avoiding actual and constructive receipt of cash or other non-qualifying property. Under the most recent regulations, it is easier to structure an exchange acceptable to the IRS while providing the taxpayer some security for the exchange funds held during the course of the transaction. The regulations also helped resolve some taxpayer uncertainty about exchanges in general.

To qualify for tax deferral, the taxpayer must trade or exchange his or her Section 1031 property for like-kind Section 1031 property following the terms of an integrated plan (exchange agreement) structured to effect the exchange of like-kind properties. An agreement to sell and a subsequent purchase do not qualify as an exchange. The taxpayer may enter into an agreement to exchange with either (a) the Seller of the replacement property, (b) the Buyer of the replacement property, or (c) a qualified exchange intermediary. Since individuals are subject to liens, judgments, incapacity or vacations, the taxpayer is well advised to seek the assistance of a professional exchange intermediary to facilitate the exchange. Most professional intermediary companies will provide the exchange agreement and documentation, and will oversee the closing, reviewing closing instructions and settlement statements.

The Exchange Agreement

The exchange agreement should set forth clearly and concisely the intentions of the parties. The agreement should clearly provide for retention of exchange funds by the qualified intermediary.

It should also describe the limited circumstances under which the taxpayer may terminate the exchange and receive the exchange proceeds. If the taxpayer has the right to demand cash in lieu of property during the exchange period, after the closing on the relinquished property, the agreement appears more like a taxable sale transaction than an exchange of property, and may create problems for the taxpayer. A well-drafted exchange agreement can eliminate or at least reduce potential problems with an exchange.

Replacement Property

The taxpayer must identify the replacement property within 45 days of the date of closing on the relinquished property. The taxpayer may identify up to three replacement properties without limitations on value. The taxpayer may also identify any number of replacement properties if their aggregate value does not exceed 200% of the aggregate value of all relinquished property. A party to the exchange (i.e., the intermediary or the qualified escrow holder) must receive the written identification form, or "designation form," not later than the 45 th day of the exchange. There is absolutely no grace period.

In addition to properly identifying the replacement property, and staying within the limited number of properties, the taxpayer must acquire the title to the replacement property the sooner of (1) his or her tax filing date, or (2) 180 calendar days from the date in which the relinquished property was transferred (tax filing extensions not with-standing).

Danger Zones

Problem areas in exchanges have always been "constructive receipt" or "actual receipt" of cash or other non-qualifying property, and the "agency" or "related party" issues.

Simply put, the taxpayer cannot receive cash form the exchange, have the right to receive cash (including the interest or "growth factor"), or have control over the exchange funds, directly or indirectly, during the course of the exchange without creating a tax liability or disqualifying the exchange. The actions taken during the course of the exchange must coincide with the taxpayer's intent. The taxpayer is in constructive receipt of the exchange funds if they even indirectly "enjoy the benefit of" the funds. These issues are more specifically addressed in the "safe harbors" discussion contained in the current regulations.

"Safe harbors" include a "qualified intermediary," "qualified escrow accounts or trusts," or "qualified security or guarantee arrangements." The taxpayer will not be considered to be in constructive receipt of cash or replacement property if the transaction utilizes these safe harbors. You should refer to the regulations or an expert for further clarification.

The qualified intermediary must acquire both the relinquished property and the replacement property. This requirement can be satisfied by the intermediary acquiring title to the property or accepting an assignment of contractual rights, notifying all of the parties prior to the transfer date, and causing the direct delivery of the property.

Final regulations also address who can act as the exchange intermediary. A “disqualified person” or “related party” is anyone who acted as the taxpayer’s attorney, employee, accountant, investment banker or broker, or real estate agent or broker within two years of the disposition of the relinquished property. Persons with a relationship to the taxpayer within the definitions of I.R.C. Ô Ô267(b) and 707(b) are also disqualified. If a disqualified person acts as the intermediary, the entire exchange may be jeopardized.

Getting the Boot

Another important issue covered in the regulations is the taxpayer’s receipt of cash or other non-qualifying property, or “boot.” “Boot” is cash or other property the taxpayer receives which does not qualify for non-recognition of gain. Mortgages or other liabilities attached to property transferred in an exchange can also be “boot.” The taxpayer can receive cash boot ¾ although caution should be exercised when making it available ¾ and the regulations provide examples of how to treat a boot.

Recent Developments

There have been a number of recent developments, which are of some interest to taxpayers. Those involve exchanges of conservation easements, water rights, timber rights and wetland mitigation credits.

With regard to conservation easements, some conservation groups and state agencies are now offering to purchase conservation easements on ranch, farm and other land. These offerings are especially attractive to landowners who can grant the easement on unproductive land, generating cash to acquire more productive property to enhance their ranching or farming operations. The Internal Revenue Service (IRS) issued Private Letter Ruling (PLR) No. 9621012 on February 16, 1996. In the ruling the IRS determined that a perpetual scenic conservation easement on ranch land was “like kind” with timberland, farmland and ranch land. In that instance, the state in which the property was located recognized the scenic conservation easement as a real property right and, therefore it was “like kind” with other real property interest.

Keep in mind that PLR’s are specific to the situation addressed in the request for letter ruling and are not binding in other situations. Even though the letter ruling is not controlling with regard to other transactions, but may be a good indication of how the IRS may look at a similar situation involving the exchange of a conservation easement for other land held for investment purposes or productive use in the trade or business.

In PLR No. 9612009, which was issued December 18, 1995, the IRS determined that mitigation credits for restoring wetland property could be exchanged utilizing Section 1031 for other mitigation credits.

Water rights are another potential basis for exchange. In many states, water rights are treated as real property interests. Increasingly, ranchers and farmers have conveyed or leased water rights and that trend will probably increase. In those states where water rights are classified as real property interests, the conveyance or long term leasing of water rights could be utilized for the purposes of effecting a 1031 exchange into other “like kind” investment or income producing property.

With regard to timber rights, there have been an increasing number of farmers and ranchers who own timber property and entered into timber sale contracts with various logging companies. They have attempted to use those sale proceeds to acquire properties in a Section 1031 exchange. Unfortunately, the Internal Revenue Service has relied upon a 1953 tax court case, known as the Oregon Lumber Company Case, in disallowing those transactions as exchanges. In TAM No. 9525002, the IRS disallowed the sale of timber as part of a Section 1031 exchange.

However, timber rights, much like water rights or mineral rights, are classified as real property interests in many states.Properly structured, the conveyance of timber rights should be the basis for an exchange into other “like kind” property. Use of real estate professionals who know how to structure these exchanges can result in an exchange acceptable to the IRS or at least the Tax Court.

Gray Areas

“Parking arrangements” and “construction to suit exchanges” have increased in the past few years as more and more real estate professionals become acquainted with the benefits of utilizing those transactions to effect exchanges for their clients. Pure “reverse exchanges” have never been approved by the Internal Revenue Service and are not included in Section 1031.

A pure “reverse exchange” is simply a situation when the taxpayer acquires the replacement property before they divest themselves of the relinquished property. However, taxpayers have been successful in entering into an a qualified exchange accommodation agreement with an exchange accommodation titleholder who acquires a replacement property and holds that replacement property for a period of time until the taxpayer is successful in entering into an agreement to exchange out of the relinquished property. Once the relinquished property transaction is closed, the taxpayer can then proceed to close the transaction for the acquisition of the replacement property using a qualified intermediary.

The structure for what is commonly referred to as a “safe harbor reverse exchange” is set forth in Revenue Procedure 2000-37 which was issued September 15, 2000. (the “Rev. Proc.”)

These “parking arrangements” especially those outside the 180 day “safe harbor” of the Rev. Proc. can be tricky, but as long as the real estate professionals involved know some of the pitfalls, those pitfalls can hopefully be avoided, and the transaction successfully concluded.

“Construction to suit exchanges” are increasingly utilized where the taxpayer has been able to exchange out of the relinquished property but is unable to find a replacement property which is suitable for their purposes. The taxpayer can find the raw land, but requires certain improvements to be constructed on the replacement property as part of the exchange. In those situations, it is possible to enter into an agreement with the seller of the replacement property, a developer or the exchange accommodator to construct the improvements on the property prior to the closing on the replacement property. When the improvements are complete, the taxpayer then closes on the replacement property to complete the exchange. Great care must be taken in structuring these construction to suit exchanges to avoid the agency or related party issues discussed above. Special care must also be taken to insure that the construction process can be completed within the 180-day exchange period. That can be tricky, especially in the Rocky Mountain region and other areas where the building season is shortened by adverse weather conditions and problems in obtaining materials. Some taxpayers elect to utilize parking arrangements, which are structured out of the “safe harbor” of the Rev. Proc. These “non-safe harbor” parking arrangements can be successfully completed provided they are done properly. Again, the help of qualified real estate professionals, including professional exchange accommodators, can be very helpful in making sure that a construction to suit exchange or non-safe harbor parking arrangement is successfully completed.

Summary

Tax deferred exchanges under Section 1031 continue to be a sensible and cost effective way of deferring tax on capital gains. Because the tax code is amended form time to time and new regulations adopted, taxpayers should discuss their impending exchanges with a professional, qualified exchange intermediary and accountant and attorney. Intermediary's fees vary, but the taxpayer should not be afraid to ask about them up front. If the taxpayer desires to continue reinvesting in property without paying taxes, he or she will certainly value suggestions from a knowledgeable exchange intermediary about how exchange transactions are structured.

To find a good qualified intermediary, check with real estate professionals for someone they have used and recommend. A taxpayer can also check the Yellow Pages in larger cities or contact the Federation of Exchange Accomadators at 215-320-3881.

Max A. Hansen, a Montana native, has been practicing law since 1976. His law practice is limited primarily to transactional real estate and water rights matters. Max is President and CEO of American Equity Exchange, Inc., one of the first qualified Section 1031 exchange intermediaries in the Rocky Mountain Region. He is also Executive Vice President and a founding Director of Reverse Exchange Services Inc. For over fourteen years, Max has helped taxpayers and real estate professionals throughout the United States successfully complete property exchanges. Max can be contacted at 1-800-237-1031 or max@irc1031x.com

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Curing Execution Errors And Mistaken Terms In Wills

The Restatement of Wills Delivers New Tools (and New Duties) to Probate Lawyers

John H. Langbein

In recent years a remarkable change has been emerging in the way American courts treat cases involving errors in the execution or mistakes in the content of wills. When some innocuous blunder occurred in complying with the Wills Act formalities, such as when one attesting witness went to the washroom before the other had finished signing, the courts used to apply a rule of strict compliance and hold the will invalid. Likewise, in cases of mistaken terms, for example, when the typist dropped a paragraph from the will or the drafter misrendered names or other attributes of a devise, the courts applied a no reformation rule; the will could not be corrected no matter how conclusively the mistake was shown.

Ironically, these intent-defeating results were reached in the name of legal requirements that were meant to be intent-serving. The various state Wills Acts require three main formalities for attested wills--written terms, the testator's signature, and attestation by two witnesses. Wills have to be given effect when the testator has died and is unable to testify about what was intended. The formalities are designed to generate and preserve highly reliable evidence of intention. The requirement of written terms obliges the testator to articulate his or her intention. Compliance with the signature and attestation requirements provides evidence of genuineness and finality, while cautioning the testator about the seriousness of the document. In extreme cases the requirement that the will be attested by disinterested witnesses may also serve a protective function, to spare the testator from imposition.

The formalities are not difficult to comply with, and cases of breach mostly arise when the testator does not use counsel. What should be the consequence in a case in which the testator does not fully comply with the Wills Act formalities, but the evidence is very strong that the document was genuine and was intended to be the will? Under the strict compliance rule any formal breach, no matter how innocuous, results in invalidity, hence in a conclusive presumption that the will lacked testamentary intent. The alternative that has grown in favor in recent years is to treat the presumption of invalidity as rebuttable, and to allow the proponent of the defectively executed instrument to prove by an exceptionally high standard of proof (clear and convincing evidence) that the testator intended the instrument to be the will.

Cases involving omitted or mistaken terms raise a similar issue--whether to restore to a will language that was intended to have been included within the will but was accidentally omitted or misrendered before the will was signed and attested.

The Trend Away from Formalism

Leading modern authority in a number of American states has now reversed the strict compliance and no reformation rules. Both by judicial decision and by legislation, the courts have been empowered to excuse harmless execution errors and to reform mistaken terms. Section 2-503 of the revised Uniform Probate Code, promulgated in 1990 and now adopted in several states, treats a noncomplying will "as if it had been executed in compliance with [Wills Act formalities] if the proponent ... establishes by clear and convincing evidence that the decedent intended the document" as his or her will. (This provision also applies to cases of defective compliance with the formalities for revocation, in which a similar strict compliance rule was applied.)

In some states in which such curative legislation is not in force, courts have developed a judicial substantial compliance doctrine. In In re Will of Ranne, 589 A.2d 1339 (N.J. 1991), the New Jersey Supreme Court validated a will in which the attesting witnesses had failed to sign the will, because the lawyer who supervised the execution ceremony mistook the self-proving affidavit for the attestation clause and had the witnesses sign only the affidavit. Emphasizing that the purpose of the Wills Act formalities is to implement the testator's intent, the court said that insisting on strict compliance in that case "would frustrate rather than further the purpose of the formalities." The court reasoned that "when formal defects occur, proponents [of the defectively executed will should be allowed to] prove by clear and convincing evidence that the will substantially complies with the statutory requirements."

A few years earlier, in In re Snide, 418 N.E.2d 656 (N.Y. 1981), the New York Court of Appeal excused defective compliance with the requirement that the testator sign the will. Snide was one of the recurrent "switched wills" cases, in which two testators, usually husband and wife, execute their wills simultaneously, but an inattentive lawyer supervising the execution ceremony allows each testator mistakenly to sign the will prepared for the other. Each testator thus leaves unsigned the will that he or she intended to sign. The decisions before Snide treated such wills as void. In Snide the court excused the error. The court rejected the contention that strict compliance with the signature requirement of the Wills Act prevented remedy for "a mistake so obvious." The court did not order the unsigned will to be probated under a substantial compliance doctrine such as that in Ranney. Rather, the court reformed the mistaken terms of the will that the decedent actually did sign. The husband was the decedent, and the court ordered the names in his will corrected as he intended so that he left his property to his wife and not to himself.

The Restatement

This movement to excuse harmless execution errors and to reform mistaken terms in wills has now received powerful reinforcement in the American Law Institute's Restatement (Third) of Property: Wills and Other Donative Transfers. This Restatement is appearing in installments as it wends its way through the Institute's deliberative process. The first two volumes, published in final form in 1999 and 2003, cover the law of wills, will substitutes, and construction. Further volumes covering class gifts and powers of appointment are still in preparation. The reporter and principal drafter is Professor Lawrence W. Waggoner of the University of Michigan Law School, a leading academic authority on probate law, who also served as the principal drafter of the 1990 revision of the Uniform Probate Code. The two volumes of the Restatement now published contain curative doctrines empowering courts to excuse harmless execution errors and to reform mistaken terms in wills.

Section 3.3 of the Restatement deals with execution errors, providing that "[a] harmless error in executing a will may be excused if the proponent establishes by clear and convincing evidence that the decedent adopted the document as his or her will." As does the Uniform Probate Code's harmless error rule, the Restatement rule also applies to defects in compliance with the revocation formalities.

A similar intent-serving provision disapproves the older rule that forbids a testator to alter by will the beneficiary designation in a will substitute such as a life insurance policy. Competent counsel will of course see to it that the transferor complies with the change-of-beneficiary requirements in insurance policies and other nonprobate accounts, but laypersons acting without counsel often think that a will can trump a prior beneficiary designation. The Restatement rule (§ 7.2, comment e) implements the testator's intent in such cases but also protects the financial intermediary from double payment.

Mistaken Terms

Section 12.1 of the Restatement authorizes courts to reform mistaken terms in a will. The measure is based upon an extensive body of supporting case law, which the Restatement canvasses in its Reporter's Notes. Section 12.1 provides that a court may reform any donative document, including a will, to "conform the text to the donor's intention if it is established by clear and convincing evidence (1) that a mistake of fact or law, whether in expression or inducement, affected specific terms of the document; and (2) what the donor's intention was."

The Restatement also endorses the movement to allow courts to reform wills, trusts, and other donative documents quite apart from instances of mistake, in situations in which reformation would achieve a tax objective that the donor would have wished. RESTATEMENT § 12.2 (extensive case law is reviewed in the Reporter's Notes).

Why the Change?

The reorientation toward a more intent-serving approach to the Wills Act formalities is the product of many influences. The scholarly literature that has accompanied the change has drawn attention to four main factors:

(1) the rise of the nonprobate system;

(2) experience in other jurisdictions;

(3) growing embarrassment that failure to cure well-proved mistakes inflicts unjust enrichment; and (4) concern to spare lawyers from needless malpractice liability.

Unifying the Law of Probate and Nonprobate Transfers

Since World War II the use of nonprobate modes of transfer on death has burgeoned. Far more wealth now flows through the main will substitutes (inter vivos trusts, beneficiary designations in pension accounts, life insurance policies, and POD/TOD accounts with banks, mutual funds, and brokerage houses) than passes through probate. A dominant theme of law revision activity during this period has been to unify the constructional principles across the field of probate and nonprobate transfers. Accordingly, on topics ranging from the slayer statutes (such as UPC § 2-803), to the Uniform Simultaneous Death Act, to the statutes dealing with the effect of divorce on prior wills and beneficiary designations (such as UPC § 2-804), the law has been changed to treat probate and nonprobate transfers alike. The harmless error and reformation rules now being applied to mistakes in wills are part of this process of unification, because they are the rules that have long applied in the nonprobate system. Courts of equity have for centuries exercised the power to reform (to "rectify" in English law) mistakes in trusts, deeds of gift, and beneficiary designations. Likewise, there is a well-developed doctrine of excusing defective compliance with the contractually required formalities for change-of-beneficiary designations in the nonprobate system for life insurance policies and joint-and-survivor accounts. (The life insurance substantial compliance cases are conveniently collected in Annot., 19 A.L.R.2d 5 (1951 & later supps.).)

The ostensibly new rules being recognized by the courts and endorsed in the Restatement turn out, therefore, to be quite old; what is new is applying them to wills as well as to will substitutes. The principle being recognized in the Restatement is that wills and will substitutes entail a common issue, ascertaining the intention of a deceased transferor. The lesson of the nonprobate system, now being absorbed as the probate rule, is that in cases of mistake in execution or mistaken terms, the purposes of the formal requirements can be served by allowing the proponent of the instrument to prove by clear-and-convincing evidence that the testator intended the transfer.

Experience Abroad

Versions of the harmless error rule for execution errors have been in effect for decades in various Australian and Canadian jurisdictions and in Israel. The Uniform Law Commission emphasized the successful experience in these countries when promulgating the harmless error provision of the Uniform Probate Code (§ 2-503), as did the American Law Institute in explaining the thinking behind Restatement § 3.3. Both groups pointed out that a main lesson of the experience abroad was that the harmless error rule did not breed litigation. Each pointed to the report of an Israeli judge, prepared for the British Columbia Law Reform Commission, which explained that the Israeli version of the harmless error rule "actually prevents a great deal of unnecessary litigation," because it "eliminates disputes about technical lapses and limits the zone of dispute to the functional question of whether the instrument correctly expresses the testator's intent." UPC § 2-503, extracts in comment; RESTATEMENT § 3.3, Reporter's Notes. Persons who under the strict compliance rule would benefit from proving an intent-defeating technical defect lose the incentive to do so, because under the harmless error rule the court will validate the will anyhow.

Experience with the harmless error rule in Australia and elsewhere has shown in what kinds of cases the rule is invoked. The Restatement explains that "a hierarchy of sorts has been found to emerge among the formalities. The requirement of a writing is so fundamental to the purpose of the execution formalities that it cannot be excused as harmless ...." Similarly, the reformation rule of Restatement § 12.1 would never validate an oral will. Reformation is a rule of documentary practice, which conforms the language of the document to what it was meant to be.

Not only is the harmless error rule never applied to excuse compliance with the writing requirement, it is also virtually never applied to excuse compliance with the signature requirement. One of the things that you are free to do with a will that has been drafted for you is to decide not to execute it. Failure to sign the will is seldom harmless, because it raises a grave doubt about whether the testator intended the instrument to be his or her will. Nevertheless, as we have seen in Snide, the switched wills case, rare circumstances can arise in which the testator's failure to sign his or her will ("a mistake so obvious") should be excused.

Consequently, almost all cases in which the harmless error rule has been applied have involved mistakes in complying with the attestation requirements. The Restatement observes: "Because attestation makes a more modest contribution to the purpose of the formalities, defects in compliance with attestation procedures are more easily excused."

Preventing Unjust Enrichment

When an innocuous execution error defeats a will, or when a scrivener's mistake defeats a devise, the failure to implement the testator's intent not only frustrates the testator's wishes, but it also works unjust enrichment. The devisee or distributee who takes is unjustly enriched at the expense of the intended beneficiary. Preventing unjust enrichment is the central policy value of the law of restitution. The field of restitution emerged only in the twentieth century as a result of the fusion of law and equity, which allowed the common principle of preventing unjust enrichment to be generalized from the older law of quasi-contract and constructive trust. The modern understanding of the importance of avoiding unjust enrichment has been an important stimulus to the development of the rules curing harmless execution errors and reforming mistaken terms.

Malpractice Liability

Although most execution blunders occur when laypersons attempt testation without the help of counsel, cases (such as Snide) do occur in which counsel's negligence causes or contributes to the error. By contrast, cases of mistaken terms more often involve a lawyer-drafter, who has misrendered instructions or omitted intended terms. In these cases in which the lawyer might be liable to the intended beneficiaries for malpractice, it can be argued that making available a remedy to correct the mistake is unnecessary, because the curative doctrines benefit the lawyer, who would otherwise bear the malpractice liability. There are, however, many objections to this line of reasoning. Malpractice liability does nothing about the cases in which lawyers are not involved or not culpable. When there is a lawyer to sue, he or she may be wholly or partially judgment-proof--for example, when the lawyer is uninsured or underinsured. For devises of unique property, such as the family home or the family Bible, relief in damages cannot be adequate. Most importantly, what is wrong with the malpractice solution is that, by transforming the mistake claim into tort, it neglects the unjust enrichment intrinsic to mistake cases. Whereas most forms of malpractice cause deadweight loss that can only be remedied by compensation, in the testamentary mistake cases a benefit is transferred from the intended devisee to the mistaken devisee (or intestate taker). Because the mistaken devisee has no claim of entitlement, he or she is unjustly enriched. The malpractice solution leaves the unjust enrichment unremedied and instead creates a needless loss to be charged against the drafter. The mistake remedies (harmless error, reformation) respond to the simple truth that preventing loss is better than compensating loss.

New Vistas for the Probate Lawyer

The Restatement provisions endorsing the harmless error and reformation rules for American law bring new opportunities and responsibilities for probate lawyers. The older conventions of the strict compliance rule and the no reformation rule are now open to challenge everywhere. Lawyers processing probate matters need to be alert to the opportunity they now have to raise issues that used to be foreclosed. Sad cases of defeated intent that used to be beyond hope are now remediable, an innocuous formal defect can be excused, mistaken terms can be reformed, but only if counsel sees the issue and brings it forward.

When confronting such cases, lawyers will find the Restatement (Third) of Property: Wills and Other Donative Transfers to be a deep resource. The Restatement is a work of reference as well as authority, which will guide the user to the case law, legislative developments, and scholarly literature. The Restatement covers the entire law of wills, and it points to a battery of constructional techniques that can be used to resolve cases of ambiguity (RESTATEMENT § § 10-11) without having to invoke the curative doctrines of harmless error and reformation that have been emphasized in this article.

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Reintroducing The Ethical Will: Expanding the Lawyer's Toolbox

By Scott E. Friedman and Dr. Alan G. Weinstein

Perhaps the best-known of all legal documents is the will -- the instrument by which individuals direct how and to whom their assets are to be transferred upon their death. Often in consultation with other professionals such as accountants and financial planners, both general practitioners and estate planning specialists devote much or all of their professional time and resources to assisting their clients prepare their will and ancillary documents in contemplation of wisely and efficiently transferring their wealth.

Notwithstanding the often considerable time spent in the estate planning process, too many people fail to even consider, much less plan for, the transfer of wisdom, insight, experience and similarly related intangibles. This failure results in an unnecessary loss of real value to families, friends, and communities. Parents, particularly as they age, find themselves wondering who will offer advice and guidance to their children after their demise. Children who have lost their parents are often left wondering what advice "mom or dad would have given." The transfer of these intangibles may provide families and friends with a continuity and sense of purpose that traditional wills do not.

Historically, professional advisors have too often neglected the opportunity to counsel their clients with respect to the transfer of wealth which takes the form of "wisdom" and "insight." The time is now for that omission to be rectified. Lawyers can offer at least a partial solution to the foregoing problem by introducing their clients to an ancient, but little-publicized, tool known as an "ethical will."

What is an Ethical Will?

Since it is a uniquely personal document, it is difficult to precisely define what is meant by the term “ethical will.” As a general proposition, it is a letter that is intended to share important values, lessons, and blessings to loved ones. Ethical wills are sometimes used to ask for forgiveness or to forgive someone else. An ethical will might even contain burial instructions or, as one of the authors recently experienced, instructions to forego a traditional burial service in lieu of a party. It can be written to family members, friends, and even organizations.

While some ethical wills continue to be transmitted orally, the modern ethical will is most typically prepared as a written letter. With the wide access to new forms of technology, ethical wills are now being prepared on CDs and DVDs, with all the accompanying bells and whistles (video clips, photographs, sound bites, music, etc.) It is even possible to engage production companies for those interested in a preparing a professional quality video. Whether simply written on the back of a napkin, or recorded with the most advanced technology, an ethical will represents one of the surest tools available to transfer wisdom, values and expressions of feelings.

Contents of An Ethical Will.

Mostly conceived of as a vehicle for expressing deeply held personal or family values, visions and beliefs gleaned from a lifetime of learning and experiences, there is almost no limit to the amount or type of information that can be included in an ethical will. Contents might include insights into happiness, business success, dealing with difficult times and difficult people. Historical information that might otherwise be forever lost can be transmitted. For example, the circumstance surrounding meeting a spouse, delivery of a child, overcoming adversity, or the memories from a particular trip or moment of time. Recounting major lifetime decisions, and the purposes underlying those decisions, might also be included. Recommendations about favorite books, songs or movies might be important for some to share for posterity.

In helping our clients prepare their ethical wills, we ask them consider a wide variety of subjects for possible inclusion. For example, in addition to the subjects referred to in the preceding paragraph, we ask our clients to consider including thoughts on the following:

1. A statement of values and examples of how they were used to help make difficult decisions;
2. Lessons from loved ones, including parents, spouse, children and friends;
3. Hopes for the future;

4. Advice;
5. Important events in life;
6. Expressions of love, gratitude, appreciation, and forgiveness;
7. Favorite books, movies, songs, quotations, and places to visit.

We have found that those who take the time to prepare an ethical will not only discover a unique way to share important gifts with their loved ones but, along the way, they also learn something very important about themselves in the process. The experience of working on the ethical will has, in our experience, been a universally positive emotional experience for our clients, providing an often unexpected sense of clarity (as to what is most important to a person) as well as a sense of “completion,” particularly as a parent.

Adjunct to a succession plan

The pressing need for a more holistic approach to estate planning finds particular relevance with respect to family owned businesses. The unique challenges facing family businesses are as well known as their high statistical failure rate. Many attorneys have watched helplessly as their family business clients unravel and implode following the demise of their founder. In the storm of controversy and resulting despair, the refrain among survivors is as predictable as the sun rising in the east: “What would Dad [Mom] have wanted?” Without the benefit of clear guidance, each child freely interprets the wishes of the deceased parent. As a result, offspring often bicker and seek to promote their own self-interest, to the detriment of the family business and family relationships.

In contemplating the scale and variety of intra-family conflict, we have come to the conclusion that many such conflicts are, in part, attributable to the death of a leader who had not thought to clearly transfer his or her intentions, wishes and wisdom to the surviving family members. Lacking direction and the benefits gleaned from a legacy of insight and wishes passed on by the patriarch or matriarch, surviving children often become absorbed in the negative emotions of selfishness, resentment and jealousy, which all inevitably leads to trouble for the business.

While practitioners have become increasingly aware of a number of strategies to assist families in business together (e.g. family council, code of conduct, family constitution, etc.), an ethical will is a complimentary tool that, in conjunction with other strategies, can play a role in intentionally seeking to create and reinforce a higher level of cooperation and trust among family or group members who often struggle in the vacuum created by a leader’s passing.

While traditional estate or succession plans might detail the mechanics pursuant to which ownership interests in a business are transferred, an ethical will can explain why the interests are being transferred in a particular way. The ethical will could also outline how its author hopes future decisions regarding the company's operations might be made in order to build collaboration and family unity. In short, an ethical will can be used by a senior member of the family business who seeks to (1) share his or her intentions with regard to leadership, succession, ownership and governance of the family business; and (2) provide a moral compass that permits the leader to transmit his or her insights and wisdom to the next generation.

Preparation tips

While there is no right or wrong way to prepare an ethical will, we offer a few recommendations based on our experiences. Traditionally, an ethical will is provided to its intended recipients upon the author's death. We believe a better approach is to review the document as a family while the author is still alive. This creates a better learning opportunity for the beneficiaries, who can ask questions and gain a sense of clarity and understanding.

As is done with traditional wills, it can be useful to update and edit the ethical will and perhaps add to it over the years as you continue to clarify your thoughts, knowledge and insight. Ethical wills can be used throughout life to help clarify values and guiding principles: in a sense, something akin to an "ethical statement" (or statement of core values and principles). Such statements might be helpful to couples as they enter into marriage, to children upon the divorce of their parents, or at any other point where one feels inspired to share insight, experience and wisdom.

Consider using communication options such as videotape, CD or DVD. A statement that captures not just your words, but also your tone, emotions and other intangibles, can be extremely helpful to your beneficiaries. If your client likes to write poetry or songs, encourage him or her to include a poem, or lyrics of a song, in their ethical will. If an ethical will is written, consider using archival paper to ensure long term survival.

Finally, we note that an ethical will, although potentially more valuable in many respects than a traditional will, should not be considered a legally enforceable instrument. If there are particular points that an author would like to make enforceable, such as a succession plan in a family business, include those points in other documents such as a legal will or shareholders agreement.

Sharing your wisdom

A parent's insight, knowledge and wisdom are the most important assets they can transfer to a child. Yet in the traditional will, lawyers and their clients traditionally limit their focus to how money and tangible assets can be given away. The ethical will is a wonderful tool that all lawyers should become aware of and use in their professional practice to help their clients share insight and wisdom with children, friends and favorite organizations.

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Flexible Fiduciary Accounting From The Outset Of Administration

By Robert Whitman

At the first meeting of the National Fiduciary Accounting Project in 1970, a decision was reached that the project would work toward unifying fiduciary accounting practice nationally by creating a set of Uniform Principles and Model Account Formats that would serve as one way to properly account by a so-called Charge and Discharge Statement.

Most state statutory provisions in the United States calling for fiduciary accountings are based on Charge and Discharge Fiduciary Accounting. This type of accounting starts with opening inventory values, adds gains during administration, and deducts expenditures for taxes, expenses, and distributions, leaving a balance on hand at the time of the accounting.

Charge and Discharge Fiduciary Accounting was the most popular form of fiduciary accounting in the 19th century, before the computer made it possible to more easily create fiduciary accountings that provide more information to beneficiaries by periodically providing computer generated statements. Today, periodic statements can clearly present information to beneficiaries in an understandable way. The statements can also provide performance data, allowing beneficiaries to gain a more in-depth understanding of the details of administration on a regular and ongoing basis.

The decision made by the National Fiduciary Accounting Project to focus exclusively on Charge and Discharge Fiduciary Accounting was based on project members' familiarity with that type of fiduciary accounting. There was no intention on the part of the project to decree that Charge and Discharge Fiduciary Accounting was the "best" type of fiduciary accounting or the type of fiduciary accounting that necessarily should be mandated by state statutes.

In 1984, the project issued its final report, and, subsequently, its Uniform Principles and Model Account Formats won widespread acceptance as "one form" (not the only form) of fiduciary accounting that would be found to be acceptable in courts in the United States.

On the 20th anniversary of the issuance of the project's report, it seems appropriate to revisit the important question that was originally sidestepped.

What is the "best" type of fiduciary accounting? I would suggest that Flexible Fiduciary Accounting from the Outset of Administration is a reasonable candidate. Flexible Fiduciary Accounting would be most likely to accomplish the major goals for fiduciary accounting: (1) to answer beneficiary questions as quickly as possible, (2) to allow beneficiaries early input into the form and scope of accounting best suited to their needs, and (3) to allow the fiduciary, depending on the size and complexity of the assets being accounted for and the resources and expertise of the fiduciary, to offer a variety of accounting choices to the beneficiaries.

In considering standards for flexible fiduciary accounting, the following might be kept in mind:

> • Taking a trust administration as an illustrative example, the fiduciary must willingly serve both the settlor and the beneficiary group. To the settlor, the fiduciary owes an obligation to carry out the trust terms in accordance with the settlor's wishes. To the beneficiary group, the fiduciary owes, among other things, the duty of effectively conveying full information regarding the stewardship of the fiduciary.
>
> • In the event of a conflict between the duties owed to the settlor and the beneficiary group, the guiding principle for the fiduciary is that the purpose for creating the fiduciary's obligation is to properly serve the beneficiary group.
>
> • To maximize the information conveyed to the beneficiary group in the most effective and economical way, the fiduciary should, from the outset of administration, offer the beneficiary group a reasonable plan for accounting. In creating such a plan, the fiduciary will need to take into account costs and the resources available to the fiduciary. The fiduciary will also need to balance the interests of the settlor and the various beneficiaries constituting the beneficiary group. When doubt about what a reasonable plan

for accounting should be, the guiding principle should be that except when conflicts and/or special circumstances may exist, without creating an unreasonable expense, full disclosure and complete transparency regarding fiduciary conduct are expected and information is to be disclosed promptly after a request is made.

• In the event that a reasonable plan for accounting cannot be agreed to between the fiduciary and the beneficiary group, the fiduciary shall offer a proper resolution plan to decide the matter. Depending on the circumstances, such a plan may involve an independent resolution officer, mediation, arbitration, or a court decision.

When all of the parties focus from the outset of administration on the need for reasonable, effective accounting at a reasonable cost, and when the fiduciary demonstrates a willing and helpful attitude toward answering beneficiary requests for information, the chances of the administration proceeding smoothly are greatly enhanced.

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Dying to Get a Divorce?

Why Interim Wills Are Essential for Divorcing Clients

By Naim D. Bulbulia and Jonathan W. Wolfe

The Uniform Probate Code's intestacy statute (U.P.C. 2-102) provides that in the case of a decedent who dies with a surviving spouse and children, the surviving spouse receives the entire decedent's estate. This provision (the "Intestacy Statute") can cause particularly unjust and unintended results for married persons with children who die without Wills who are getting (or merely contemplating) a divorce. To be clear, if an individual dies without a Will during a pending divorce, his or her spouse may nevertheless be entitled to receive ***all*** of his or her assets -- marital and non-marital alike.

Numerous states, including New Jersey (as of February 27, 2005), have adopted all or substantially all of this provision of the Uniform Probate Code. Under New Jersey's prior intestacy law, if an individual died without a Will while married with children, $50,000 plus one-half of the decedent spouse's estate passed to the surviving spouse and the remaining share was divided among their children. However, under the new law (N.J.S.A. 3B:5-3), in the case of a married individual with children who dies without a Will, ***all assets*** pass to the surviving spouse and nothing passes to children.

This should be extremely troubling news for a spouse who is either contemplating or in the process of obtaining a divorce. Under a literal construction of the Intestacy Statute, the last person that such spouse may want to inherit any of his or her property (including what would otherwise be his or her separate, non-marital property), could now be in a position to inherit it all! Of course, an individual who has an existing Will that leaves assets to a spouse (as most married people do) is potentially in a similar position of inadvertently leaving a soon to be ex-spouse assets that he or she might not otherwise intend and to which his or her spouse might not otherwise be entitled in the event of divorce.

In order to avoid this potentially perverse result, it is crucial for all matrimonial attorneys to immediately ascertain (i) whether or not a new client has a Will and (ii) if a Will is in existence, whether the existing Will leaves assets to the client's spouse. New clients must be alerted to the potential dangers they face at the outset of the representation, and in virtually all cases (other than when the client has a Will that excludes their spouse) an Interim Will should immediately be drafted. Even in the case where a client has no children, it is important that he or she execute an Interim Will in order to ensure that his or her property passes other than to the surviving spouse.

It should be noted that in nearly all states, upon the actual divorce of the parties, all intestacy rights of the spouse are automatically extinguished, and all rights of said former spouse to take under an existing Will are also extinguished (see, *e. g.* N.J.S.A 3B:5-3 and N.J.S.A. 3B:3-14, respectively).

Can the Interim Will completely extinguish a soon to be ex-spouse's rights to receive any property, effectively disinheriting said spouse? Generally, most states' laws bar an individual from completely excluding a spouse from sharing in his or her estate. Most states have elective share statutes that permit a spouse that receives less than a certain percentage of a decedent spouse's augmented estate to bring an action to obtain his or her rightful one-third share (an "Elective Share Statute").

Although the Uniform Probate Code's Elective Share Statute does not, many state's Elective Share Statutes bar recovery in certain circumstances. Consider New Jersey's Elective Share Statute (N.J.S.A. 2B:8-1) that explicitly bars spouses from recovering an elective share in cases in which the spouses are living apart in separate habitations or when spouses have ceased to cohabit as man and wife either because of a judgment of divorce from bed and board, or due to circumstances that would give rise to a cause of action for a divorce or nullity of the marriage.

When the above inability to exercise the right of election is coupled with the fact that death typically severs all rights to equitable distribution, a surviving spouse whose divorce is pending often has no statutory right to share in the assets of the deceased. *See e.g. Carr v. Carr*, 120 N.J. 336 (N.J. 1990) (surviving spouse during pending divorce has no rights to equitable distribution or elective share). In *Carr*, the New Jersey Supreme Court recognized that a spouse left in such a "black hole" is nevertheless entitled to an equitable share of the marital assets under the equitable remedy of a constructive trust.

Unlike most states' Elective Share Statutes, most states' Intestacy Statutes do not explicitly exclude spouses who have separated or are in the process of divorcing, and there is little precedent elucidating how such a situation would be resolved. *See e.g., Matter of the Estate of K.J.R.(2002)*, 348 N.J. Super. 618 (App. Div. 2002) (finding termination of spouse's right to take under intestacy during pending divorce based only upon an explicit waiver in a signed property settlement agreement); *Di Bella v. Di Bella*, 372 N.J. Super. 350, 354 (Ch. Div. 2004) (appointing son – rather than the surviving spouse – as executor of estate of spouse who died intestate during divorce, but expressing no view on whether surviving spouse is entitled to participate in the estate).

In *Fulton v. Fulton*, 204 N.J. Super 544,550 (Ch. Div. 1985), the Court avoided the issue all together by awarding a divorce posthumously in order to prevent a spouse from receiving her intestate share of her deceased husband's estate. In that case, however, the divorce was virtually over and the only asset of value was a personal injury award recovered during the parties' separation. As the Supreme Court recognized in *Carr*, absent such "unusual or exceptional circumstances," the "general rule" remains that "statutory equitable distribution is conditioned on the termination of marriage by divorce" – not death. 120 N.J. at 875-76. Accordingly, posthumous entries of divorce will rarely be available to avoid the unintended passing of assets to a surviving spouse during a pending divorce.

Therefore, in many jurisdictions, if no Interim Will is drafted and an individual dies prior to the divorce becoming final, a surviving spouse (with children) is presumptively entitled to the entire estate -- including the decedent's separate, non-marital property. As detailed above, there is little precedent concerning how a court would resolve this conundrum. A court could choose to disregard the literal application of the statute, *see e.g. Di Bella,* 372 N.J. at 584 ("If a literal construction of the statute be absurd, the act must be so construed as to avoid the absurding"), or could award a portion of the intestate share to the parties' children under a theory of quasi contract or constructive trust. However, an argument certainly could be made that a state Legislature's choice to include an explicit exception for separation in the Elective Share Statute on the one hand, and omit a similar provision in the Intestacy Statute on the other hand, demonstrates a Legislature's intent to create no such exclusion for the Intestacy Statute. In any event, in order to eliminate uncertainty and to avoid placing the burden on the children (or other intended heirs) to pursue their share of the estate through a lawsuit, it is essential that an Interim Will be drafted.

Under most states' laws, drafting an Interim Will that removes the soon to be ex-spouse (or drastically reduces his or her share of the estate), creates a valid

Last Will and Testament and confines the surviving spouse's rights to his or her equitable share of the parties' ***marital*** assets. This is of particular significance to clients with substantial non-marital assets, because the execution of an Interim Will will allow them to ensure that their separate assets pass to their children (or the party of their choosing) rather than to their soon to be ex-spouse.

The Uniform Probate Code's solution of entitling a separated spouse to his or her elective share (a provision that has been adopted in a few states), also fails to achieve a just result. In the case where a separated spouse passes away with a Will that leaves the surviving spouse less than one-third of the adjusted estate, the separated spouse is entitled to one-third of all assets (including non-marital assets)!

Given the uncertainty and potential inequity under many states' existing statutory schemes, the state legislatures throughout the country should consider enacting legislation to explicitly define the rights of separated spouses in the event of death before divorce. Such a statute could mandate that only marital assets would be subject to division between the surviving spouse and the decedent's estate. Thus, the decedent's share of the marital property and the decedent's separate property would remain in the decedent's estate, to pass either (i) to the beneficiaries designated in the decedent's Will, or (ii) by intestacy. In either case, the surviving separated spouse (having received his or her equitable share of the parties' marital assets) would be excluded entirely from further participating in the estate.

Be that as it may, unless and until states' laws change, Interim Wills should be drafted for anyone that is even considering getting a divorce.

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Life Insurance and Divorce

Who Gets What?

By Martin M. Shenkman and Richard M. Weber

Life Insurance is an important matter in most divorces. There are a host of issues that are not addressed in the typical negotiation. Consider the following sample insurance clause from a Property Settlement Agreement [PSA]: "The husband shall maintain life insurance for the wife having an aggregate death benefit of $250,000. Said obligation shall be terminated if the husband's obligation to pay alimony is modified/terminated. The husband shall maintain life insurance having an aggregate death benefit of $250,000 for the benefit of the unemancipated children. Said benefit shall be reduced by $75,000 upon the emancipation of the first child and again upon the emancipation of the second child. The obligation to maintain any life insurance for the children shall terminate upon the emancipation of all Three [3] children."

There are many important decisions and considerations not addressed in a simplistic -- and typical -- clause like this, and practitioners need practical recommendations and advice on how better to address life insurance issues.

For the discussion below, we assume that the insured/payor client is a reasonably healthy (but not a marathon-running) 47-year-old, non-smoking male, needing $250,000 life insurance coverage. The prices are based on information obtained from various insurance companies.

Administrative Issues Time Frame and Insurance Selection

The issue of what type of insurance product to be used is most objectively dictated by the duration of the coverage. The shorter the obligation, the more likely "term insurance" will be used; conversely, the longer the time frame, the more likely some form of "permanent" insurance will be used. Insurance obligations for children are typically maintained until the children are emancipated. While this may not be a fixed date, there is almost always a cut-off date based on age. This is addressed in greater detail below. Of course, time is usually not an issue if lifetime alimony is involved, making it a lifetime obligation and "permanent" insurance coverage.

Does the Client Have Beneficiaries Other Than Those in the PSA?

The type of coverage and structure of the insurance will depend on two key factors. If the insured ex-spouse has other beneficiaries that he/she wishes to benefit after the lapse of insurance obligations under the PSA, "permanent" (typically policies with cash values) life insurance coverage and/or the use of an irrevocable life insurance trust (ILIT) might be preferable to term insurance coverage owned outright.

For example, if the insured ex-spouse has a new spouse he or she wants to benefit for life, then "permanent" insurance coverage (see discussion below) owned by an ILIT can provide protection and flexibility. The ILIT would direct insurance proceeds from policies it owns to pay PSA obligations and when those obligations end, the ILIT would direct the benefits to the insured's other beneficiaries, such as a new spouse.

Payment Structure

There are two options to consider. Annual premium payments are best, unless the budget and cash flow situation is very difficult. This simplifies the administrative burdens, especially on the beneficiary spouse who wants to monitor the policy to assure it remains in force. Theoretically, the ideal policy would be one that is fully paid so no issue of lapse can arise, but it is unlikely that this would be financially viable or agreed to. For our hypothetical ex-husband, the single-premium cost range for a $250,000 paid-up policy is between $35,000-$50,000. If the ex-spouse is concerned about malpractice risks or other major problems, perhaps this could be considered. Another payment frequency option is to have the premium deducted automatically against the insured ex-spouse's checking account.

Notice

The beneficiary spouse should endeavor to monitor the policy to assure that it remains in force. A duplicate invoice could be requested for the beneficiary ex-spouse. Some carriers may offer an automatic notification when the premium is paid. If not, the beneficiary ex-spouse may simply be able to call a toll-free number some time after the premium notice has been received to verify actual payment. This is important because if the policy lapses and the insured ex-spouse is no longer insurable, there may be a substantial problem.

Comparing Different Prices

A client reviewing premium ranges, especially post-divorce, may choose the cheapest policy. This may be problematic for the beneficiary spouse. While life insurance seems like a "commodity," lower term insurance premiums may reflect differences in the financial strength ratings of the companies. A poorly rated company may sell a cheaper policy, but your client will be dependent on that coverage for many years; when the payor ex-spouse dies, you want to know the carrier will still be in business! Consequently, setting some minimum standards for the quality of insurance company in the PSA may be advisable.

Another difference in pricing can be due to differences in underwriting standards. The price your client sees quoted on a Web site does not reflect the standards assumed in that price. When the client applies, the policy may actually cost more than the same policy sold by a company that uses different underwriting standards and initially quoted a higher price. This has proved a costly trap for some insureds if a deadline is fast approaching: They may have sacrificed the time necessary to evaluate alternative policies.

Perhaps the best approach to resolving many of these uncertainties is to designate a neutral insurance consultant in the PSA to make the policy recommendations in a manner that is best for all concerned, and meets the criteria in the PSA. Such a consultant can also review the proposed provisions in the PSA and offer comment and analysis.

Funding Temporary Insurance Obligations

If the coverage period is 10 years or less, term life insurance is typically the preferable alternative. Term policies being sold today are sold for a fixed period of time, and the premium is guaranteed for the specified period. This type of term insurance is sold in 5-year increments. Thus, for an 8-year obligation, the insured spouse should be required to purchase a 10-year minimum term. After the 8 years have passed, the insured spouse could simply choose not to pay subsequent premiums. If the premium is significant enough, consideration could be given to paying quarterly, or changing to quarterly in the last year to end more closely to the date the obligation ends. For example, for our hypothetical ex-husband purchasing a 10-year level term, quoted premiums range from

$305-$445 per year. A client might simply choose the cheapest without understanding the differences. These could have to do with ratings and other factors. This example illustrates how using consumer Web sites can be problematic: You generally do not get a better price on the Internet than you would through an agent, and you lose the ability to get advice.

How do you deal with the reductions in the above sample clause? With some companies, you can purchase a $350,000 policy and then reduce the coverage at certain points, subsequently paying a proportionately lower premium. This is not a contractual right and the insurance company can refuse to reduce the policy. This might leave the insured spouse facing the dilemma of continuing to pay for more insurance than necessary, or lose coverage and jeopardize the financial security of the beneficiary spouse.

There are several options to addressing this problem. One is to have an ILIT own the coverage, and allocate the death benefit as required under the PSA. As the PSA obligations wane, the ILIT could allocate the death benefits to other designated beneficiaries. Another option is to ascertain through the agent in advance those insurance carriers willing to allow reductions in coverage under the terms of the PSA. A third approach is to layer the policies by staggering terms of smaller policies that meet the requirements of the PSA.

Here are some of the terms and factors to consider:

• Level Term: Neither the price nor the death benefit will change during the policy period. (Renewal premiums beyond the guarantee period, however, can jump ten-fold, making the selection of the guaranteed period rather important.);

• Annual Renewable Term: There will generally be a guaranteed premium structure, but the premium will be scheduled to increase each year. This will be less expensive than a level term policy in the initial years when most divorced clients are hard pressed financially, so this may be an option to encourage greater coverage. However, in later years the increased cost may encourage default. These options should be part of the strategies reviewed in structuring the PSA; and

• Group Term Insurance: The client may be able to get group insurance through a professional organization, eg, bar association. If an employment group is used, the coverage will be lost if the insured loses employment. If the client is then uninsurable what happens? Could the client be required to convert the group term insurance to a permanent policy? If not, there may be no coverage. However, if it is converted, the cost is usually extremely high because generally only those with poor health exercise such conversion features. Few PSAs address this. Perhaps they should in the notice provision mentioned above.

Funding Permanent Insurance Obligations

Obligation periods exceeding 15 years should probably be insured with a "permanent" policy. Between 10 and 15 years is a bit of a gray area and more analysis has to be performed. There are many different types of policies to consider:

Guaranteed Premium Universal Life

This is a policy guaranteed to pay a death benefit even if the underlying cash value falls to zero. Conceptually, this is analogous to guaranteed level premium lifetime term. If the specified guaranteed premium is paid, the policy benefits are guaranteed by the insurer regardless of policy performance. For counsel representing the beneficiary spouse with a permanent insurance obligation, such as that in the illustrated clause above, this type of coverage should be required in the PSA. A 47-year-old male client required to provide $250,000 of coverage would expect to pay about $2500 per year for as long as he lives. Note, however, that there may be little cash surrender value if the insurance obligation lapses; for example, if the ex-spouse remarries or dies.

Conventional Universal Life

This is a policy that does not have a specific premium guarantee, but allows the insured to have more flexibility with respect to premium amount and timing of payments. Thus, the insured ex-spouse could skip a premium in a tough financial year. A typical premium for our hypothetical ex-husband client is approximately $3000 per year. This policy has an investment component and accessible cash values that the Guaranteed Premium Universal Life policy may not have. If the ex-spouse dies or remarries, there is likely to be some residual value to the policy.

Variable Universal Life

In this type of policy the insurance company is not responsible for investing the premium, but rather gives the insured/owner the opportunity and risk associated with this arrangement. A flexible premium, investment-oriented policy for our hypothetical ex-husband could be obtained for as little as $2200 per year, and we might expect the insured spouse to prefer this "least expensive" approach. However, applying sophisticated investment modeling tools suggests a rather low probability that $2200 per year will sustain the policy to the likely life expectancy of the insured. This is not the type of policy the beneficiary spouse will generally want!

If the client has the additional desire to continue the policy for his children, even if his obligation to his ex-wife ends, he might consider funding the policy at a modestly increased level of $2800 per year. Analysis suggests that 90% of the time (based on 1000 randomized policy returns), $2800 per year successfully sustains the policy to age 100. This greatly enhances the likelihood that the coverage will be in force when it is needed. Even more significantly, the average death benefit at age 100 in these illustrations is $4.6 million, not the base value of $250,000. For this reason, many insured spouses may prefer this type of approach. If permitted, it can benefit everyone, especially the children, but the assumptions must be reasonable and should be specified in the agreement.

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No Service, No Divorce Case

Establishing jurisdiction and effecting service of process

By Marion J. Browning-Baker

Any divorce attorney who represents an active duty servicemember, a military retiree, or nonmilitary spouse will face pitfalls regarding service of process and jurisdiction not present in a civilian divorce case. The basic concept is, as my law school civil procedure professor used to say, “ If you don’t have proper service, you don’t have a case.”

Service of process can be particularly vexing when dealing with the military case. Having a final judgment set aside due to lack of proper service will not do you or your client much good. Starting the case again will be time-consuming and expensive.

Defendant in the United States

If your client’s spouse is an active-duty servicemember, military retiree, or nonmilitary spouse living in the United States, service is made under the applicable state statute. To serve the active-duty military member, you often must try to catch him or her between deployments.

If the servicemember lives on a military installation, have the sheriff or process server coordinate service efforts with the installation provost marshal’s office (military for “police station”); don’t bother contacting the servicemember’s commander. Military officials may not serve legal process.

You can breathe a sigh of relief if your defendant lives off post (military for "having a house or apartment off-base"). If that is the case, effect service as you would with anyone else. Don't make this harder than it is.

Formal service overseas

If your defendant is overseas, service may be governed by a treaty, such as the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. Do not attempt to cut corners by using a state statute that allows for service by publication. You will not have made proper service. The only time an overseas defendant may be served by publication is when his or her address is unknown. Don't make the mistake of thinking that, just because a defendant has a military postal address, he or she may be served via certified or registered post. That is not proper service unless the country in which the servicemember is located allows service in that manner.

The particularities of treaties and the signatories change on a fairly frequent basis. Therefore, your best resource for overseas service is the U. S. Department of State Web site at www.state.gov/s/l/c8455.htm, which lists all service treaties and country requirements. For a legal memorandum on how to serve process under the Hague Service Convention, go to www.ncbar.com/home/lamp.htm, click on "Other Publications/Resources," and then go to "Administration of Justice–International Service of Process under the Hague Convention. Currently, one may serve anyone in Iraq or Afghanistan via the U. S. postal service; the Hague Service Convention does not apply.

Think twice about serving a servicemember in a war zone, however. I won't do it unless the servicemember also wants the divorce because I know of at least one case in which the member's death was directly related to service of a divorce petition.

If the defendant wants the divorce as much as the plaintiff, he or she may be willing to accept service voluntarily. When drafting the acceptance of service, it is good practice to mention statute or rule governing service, as well as any applicable treaty.

Jurisdiction

In divorce cases involving military personnel, jurisdiction generally has four aspects: jurisdiction over the military pension, over personal and real property, over child custody, and over support. Jurisdiction over personal and real property is governed by specific state jurisdictional cases and statutes. The pitfalls for the practitioner lie in jurisdiction over the other three issues.

Jurisdiction over military retired pay is controlled by federal statute; 10, U.S.C. § 1408(c)(4), states the requirements for jurisdiction over the military pension. This can be compared to subject matter jurisdiction, except that the active-duty or retired servicemember may waive the statutory requirements. Only a court of the United States and its territories may divide the military pension; no foreign court may do so.

To have jurisdiction over the military pension, the following requirements must be met:

> (1) The court must be in the member's domicile state; or
>
> (2) The military member must reside in the territorial jurisdiction of the court (but not *due* to military assignment, or
>
> (3) The military member must consent to the jurisdiction of the court.

To understand the first requirement, one must be aware of a peculiar aspect of military life. Normally we are residents of the state in which we live. If we are born and raised in State A and think of State A as "home" but live in State B, we are legal residents of State B. For an active duty military member, however, this does not hold true. A military member is allowed to keep State A as "residence" even when stationed (living) in State B. Numerous state statutes and cases specify that a servicemember who has left the state due to military orders is still considered the legal resident of in the state, unless he or she acts affirmatively to change domicile. The Servicemembers Civil Relief Act, 50 U.S.C. App. § 501 *et seq.*, specifically provides that a servicemember may keep his or her original legal residence for tax and voting purposes.

A member's residence may or may not be the same as his or her "home of record," which generally is where the servicemember entered service or the state to which he or she has changed residence. The home of record is a military administrative entry that is not intended to denote domicile. Servicemembers are seldom consistent as to indicia of domicile. It's not uncommon for a servicemember to have a driver's license in State A, bank accounts in State B, and real property in State C, but to be a resident of State D.

So how does one determine a servicemember's state of residence? Although all states make domicile determination dependent on all the member's facts and circumstances, the best clue is on the servicemember's Leave and Earnings Statement (LES) or pay statement. The state listed there is the servicemember's home for income tax withholding purposes.

Consent or waiver to the court's jurisdiction is fairly obvious. If the member is the petitioner in a property division lawsuit, he or she has consented to the court's jurisdiction. The danger lies with the attorney who represents a servicemember-defendant. To avoid consenting to the court's jurisdiction over the pension, the servicemember must affirmatively object; otherwise this defense will have been waived. Therefore, when representing a defendant-servicemember, make sure you know his or her state of legal residence and you object to the court's jurisdiction over military pension division if your strategy is to avoid it in that state.

The retiree's military pension

Obtaining jurisdiction over a retired servicemember's pension is as problematic as dealing with the active-duty servicemember's pension. If the retiree resides in the United States, the state of residence is determined by physical location. However, many military retirees work for the U.S. government overseas or live abroad on their retirement checks. If the retired servicemember is working for the U.S. government overseas, his or her residency is either the last state lived in prior to going overseas or else his or her state of residence during active duty.

But how does one know? If the retiree lived in a state for at least six months after retirement, that state is the likely state of residence. If the member retired overseas or took an overseas position shortly after retirement, look to the state of residence during the last tour of active duty. The following examples may be instructive.

(A) While Mary was on active duty, her state of legal residence was Kentucky. Her last duty station was in Georgia. Upon retirement, rather than moving back to Kentucky while looking for a job, she decided to remain in Georgia. However, she did not register to vote or apply for a driver's license in Georgia and accepted a U.S. government position overseas shortly afterwards. In this case, one would look to Kentucky, her state of residence while on active duty, as her domicile while she is working post-retirement overseas.

(B) While John was on active duty, his state of legal residence was New York.

His last duty station was in Virginia. Upon retirement, he applied for a driver's license and registered to vote in Virginia. However, about six months after he retired, he accepted a position with the U.S. government overseas. His state of legal residency under this set of facts would be Virginia.

Child custody

Jurisdiction over a child for the purposes of custody in the United States is determined under state law, which generally is based on the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). Problems may arise when the child is overseas. However, the basic concept is the same as under the UCCJEA. The state or foreign country in which the child is *habitually resident* has jurisdiction over the child. This "habitual resident" is usually the physical location of the child for six months prior to the filing. Child custody jurisdiction is subject matter jurisdiction, and this cannot be waived.

Although a comprehensive look at child custody jurisdiction is beyond the scope of this article, the following are some common pitfalls to avoid.

1. One may not bootstrap onto the parent's state of legal residency. A military parent's domicile in Ohio does not give Ohio jurisdiction over child custody.

2. Citizenship has nothing to do with child custody jurisdiction. If the child habitually resides in Italy, that country's courts have jurisdiction over child custody. The child's U.S. citizenship is not a factor.

3. This bears repeating: One may not waive or submit to the

jurisdiction of a court for the purpose of child custody . Jurisdiction

over one party has nothing to do with jurisdiction over the child. It may be unfortunate for your state court case that the child has been in Japan for six months prior to the filing or that the child was born in Germany and remains there. Your state does not have custody jurisdiction.

What can you do? Your client can apply to the foreign court for a custody order; some foreign courts are more "user-friendly" than others. Or, if the parties are amicable, they can enter into a parenting agreement. I tend to prefer the parenting agreement for two reasons: (1) although it is not an order, it is enforceable under contract law, and (2) sometimes foreign courts are not as creative as U.S. courts allow parents to be, and that can frustrate the plans of the parties for flexible custody arrangements.

Child support

Jurisdiction over child support is based on personal jurisdiction over the parent paying the support not over the child. It is easy enough if everyone is in the same place or can use a state long-arm statute or if the noncustodial parent (NCP) relocates to State B. But what happens when you represent the custodial parent (CP) in a state to which the noncustodial parent (NCP) has no connection and he or she is assigned overseas? This is where the military member's state of legal residence can work to your benefit. The servicemember's state of domicile always has personal jurisdiction over the member. Therefore, even though the NCP is overseas, the CP can still file for child support in the NCP's state of residence.

Miscellaneous pitfalls

1. Don't use the SGLI (Servicemembers Group Life Insurance) to insure child support. Federal law effectively bars state court enforcement of life insurance provisions if the servicemember later changes the intended beneficiary.

2. Do become familiar with the new Servicemembers Civil Relief Act (SCRA) found at 50 U.S.C. App. § 501 *et seq*. See *A Judge's Guide to the Servicemembers Civil Relief Act* on the ABA Section of Family Law Web site at www.abanet.org/family/military/home.html.

3. Because the SCRA is new, use cases decided under the old Soldiers' and Sailors' Civil Relief Act when no precedent is otherwise available.

4. Remember that the military pension is divided under state law. No federal statute mandates how the pension is to be divided.

5. The '10-Year Rule" applies only to the issue of whether the nonmilitary spouse is eligible to receive a share of the pension from DFAS (Defense Finance & Accounting Service) as a garnishment. It is not a threshold for pension division eligibility.

6. When drafting a visitation schedule, take into consideration overseas and out-of-state visitation and draft appropriately.

7. If the servicemember is near retirement and your state allows, draft a recalculation of child support to be accomplished at the time of retirement.

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Subpoenas -- How To Make Them Stick

By Rayna J. Conetta

As many employers already know, it's essential in employment litigation to obtain information and documents from third parties, such as prior employers and health care providers, to successfully defend against often groundless claims. Actually receiving that critical information, however, can be very difficult. One litigation tool that can be invaluable in that effort is a subpoena.

During the discovery phase of the litigation (the pretrial exchange of facts and documents) and then finally at trial, the subpoena can get you the valuable information needed to win your case and can open doors of information about your adversary. It's a simple yet effective tool if used properly.

The following are five simple rules to follow to make this tool work and make the subpoena "stick" -- once a subpoena is "attached" to a person, organization, or medical provider, you have the court's jurisdiction over them to ensure full compliance.

Get jurisdiction

The first rule is proper jurisdiction. Jurisdiction will most likely be the U.S. district court since most employment issues deal with federal questions. The subpoena form is obtained from the court, and you may request as many as you need for your purposes.

Now that you have the form, be mindful to fill it out entirely. Most information you seek will be in the state of Maryland, but if it isn't, use the Internet to see if the distance from the court to the recipient's address exceeds 100 miles. If it's more than 100 miles and the case is in the U.S. district court, you must use a U. S. district court subpoena that's within a 100-mile radius of the recipient. You can note the original jurisdiction of the case above the case number on the subpoena form. For all other subpoenas besides federal, the original jurisdiction is valid even if the recipient is outside a 100-mile radius of the court.

Now that you have ensured the court's hold over the recipient, you can have that witness you need for trial or records from your adversary's previous employers.

Get medical records

Subpoenas are also useful in obtaining medical records. Here are some tips for obtaining them.

You must first figure out what sort of medical records you want to obtain -- physiological or psychological. Most adversaries won't give you a signed authorization that complies with the Health Insurance Portability and Accountability Act. If they do, the authorization must follow the new federal guidelines or it will be denied. Therefore, if you want to obtain medical records and you have only a doctor's name, the Internet can be very helpful. In all states, the medical provider must be licensed and using an Internet site called "AIM" (Administrators in Medicine). You can look up any physician, physician's assistant, or psychiatrist.

The site allows you to look up a name by last name and first name. If you don't have a correctly spelled last name, you can do a "wildcard" search using the first two letters of the last name and an asterisk. From there, you will find the doctor you need records from and all his current licensing information. The AIM site will also tell you if the physician's license is nonrenewed, thus saving you the time of drafting the subpoena in the first place.

Most of your adversary's physicians will currently be in practice, however. Some doctors will have more than one office, but since the fields on the AIM website are limited to one address, you can use www.yellowpages.com to find all the doctor's listings. Be sure to obtain the telephone number of the doctor since that will be vital for the last tip of this article.

For psychological records, a subpoena simply isn't enough. Who the provider is and where she's located is very important. You need to check the rules of discovery for each state to see if psychological records are obtainable. Generally, Maryland doesn't hold psychological records as privileged if the person filing the suit claims psychological damage. That includes social workers and nurses in the field. Some psychiatric inpatient hospitals, however, defer to their private-sector rules and will ignore a subpoena if the patient didn't authorize the release of the records.

In many cases, using a certification of subpoena of mental health care records in accordance with Md. Code Ann., Health Gen'l § 4-307, with a copy of Maryland rules and/or the federal rule attached will help you obtain your adversary's mental health records. The certification is basically a brief memo using the heading of a pleading, citing the rules of Maryland that state the documents aren't privileged.

Serve the subpoena properly

This brings us to the third tip -- proper service. All requests for psychiatric records must be served by private process. Subpoenas for trial must also be served by private process. For physiological records and other organizations' records, you may serve the subpoena by certified mail, return receipt requested. Be sure to hold on to the return receipt so that if you need the court to obtain the documents, you have proof of service. Private-process servers will automatically create an affidavit of service and file it with the court once service is complete.

Give adequate time to respond

The time allotted for subpoenas is also important in ensuring that your subpoena "sticks." Subpoenas basically give a deadline to the recipient for when (and where) the records should be produced. According to Maryland rules, the minimum is 30 days. But since a copy is given to your adversary's counsel, they only need five days to object or quash the subpoena. Common courtesy will allow for 30 days, but if you're stuck in a pinch and you need a person for trial, five days is the minimum. In the U.S. district court's jurisdiction, the minimum is 15 days.

If you want records, time is important because most medical providers and large corporations need at least 15 days to produce them. Usually, they will send the subpoena through their own legal department to see if it's "good." If you want your subpoena response fast, call ahead and ask how the recipient would process a subpoena, therefore clearing through a lot of red tape.

Follow up, follow up, follow up!

Even by strictly adhering to the above tips, the fifth is most important: Follow up. To get records before the court steps in, you must make good-faith efforts to contact the recipient. By making phone calls and sending letters, you can remind the recipient that he's bound by the court to produce the records -- remember, a subpoena is only as strong as the person who sends it is diligent.

In the instance of a subpoena for trial, if the recipient doesn't show up for trial, he may be arrested by the sheriff's office. A simple reminder of that fact to the recipient usually is sufficient to ensure compliance with your subpoena.

By using the above tips for your subpoena, you can make your subpoena stick.

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Defending a Criminal Case

By Allen B. Bickart

You have taken the quantum leap and decided to represent an individual charged with a felony offense. All efforts at plea negotiations have failed, either because the prosecutor is unwilling to dispose of the case with a favorable outcome for your client, or because your client is adamant that he or she is not guilty of the offenses charges.

It is at this point that you should reach for the Supreme Court Reporter that contains the case of *Strickland v. Washington* (466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed 2nd 674 (1984)). Read it and ask yourself honestly whether you possess the necessary trial skills to be able to defend this person. You don't need the experience of many jury trials to feel a degree of confidence. What you do need, however, is a great familiarity with your local rules, knowledge of the law as it applies to the charges involved, an honest relationship with your client, an evaluation of your judge, and an understanding of the dynamics of the jury process. Armed with the foregoing, you are hopefully prepared to go into battle in the criminal arena.

Examine the Paperwork

At the start of a criminal case, the defense lawyer is provided with the charging document - reports prepared by the police agency (the city police department, county police, highway patrol, or federal agencies). These reports should be scrutinized with great care, for often they contain assumptions that an experienced trial lawyer can exploit for the defense.

The maxim in criminal law is never assume. Start at the beginning of the documentation, be it the grand jury trial transcript (if you are fortunate to practice in a jurisdiction that entitles you to obtain the transcript) or any other information, and determine by independent investigation whether the state's case is predicated upon an assumption that may be false. If this is the case, then that erroneous assumption may be the fatal flaw that becomes the Achilles' heel of the prosecution.

Wherever you practice, the mission of the defense lawyer is to obtain all of the facts from either the client or the witnesses. Like a good physician, a good trial lawyer takes a very complete history from his or her client.

Diagnostic History

This history should contain all of the material about your client, such as his or her education, ability to understand, mental capacity, state of mind at the time of the event charged, and recollections of events. Obtain from the client a chronological overview of all the events leading up to the incident that has brought the client into your office or into jail. The accuracy of this chronology is dependent upon your ability to have a heart-to-heart talk with your client about the necessity of being truthful and forthright with you in the facts.

It is often suggested that you tell the client that it is unwise to mislead the defense lawyer just the same as it is unwise to mislead a physician in the treatment of a medical condition or an accountant in the handling of your financial affairs. If you detect reticence on the part of your client in being forthright with respect to the events charged, examine the source behind the reticence to determine whether your client is being intimidated by co-defendants, is afraid of repercussions from other individuals not charged, or is unwilling to "rat" on somebody else. An interesting development in the criminal defense practice these days is the frequency with which "rats" often turn on your clients. Thus, you must explain to your client his or her vulnerability from others charged with offenses. This may convince your client to tell you the complete truth about the events that occurred.

If the event is not in an isolated incident of aberrant behavior or an accidental arrest by virtue of a traffic stop and subsequent search, it may be necessary for you to create a timeline. As evident by the recent Simpson trial, timelines often vary based upon interpretation. The prosecution may have its own timeline, the defense another version. The full and complete history provided by your client is the essential beginning to a criminal defense.

It may appear that your client is suffering from some type of mental disorder such as bipolar disorder, manic depression, schizophrenia, or other mental disabilities. You can discover this in the history stage by asking about medications taken by your client, hospitalizations, or any other treatment given by a physician or psychiatrist. A mentally deficient defendant is generally rather obvious to the trial lawyer. If you discover in your history-taking stage that your client is unable to provide you with any coherent history of events, then your first task is to undertake a proceeding in court to test his or her mental capacity to stand trial. Every jurisdiction has such a mechanism, and most jurisdictions still determine competency based upon the McNaughton Rule. The more enlightened jurisdictions have diminished capacity, which is a lesser standard of competency, but nevertheless it is your obligation to pursue this possibility before anything else is done in the case. You also need to consider the possibility that your client will not be able to assist you at all stages of the proceedings.

Once you have your basic and complete history, then use the timeline to examine the events and determine if some law has been violated. Look for illegal search and seizure, improper entry into residences without knock and announce, inappropriate procedures utilized in the identification of your client, or an effort on the part of the officers to stretch the facts to justify their actions.

If there is a question of the validity of the search or seizure of anything belonging to your client, whether it is a slim issue, file a motion to suppress in every case. Whether or not you believe you will win is immaterial. Do it for the purpose of preserving the record. Request an evidentiary hearing and probe the circumstances under which the officers obtained the necessary information in their affidavit to obtain the search warrant. All too often, in their efforts to ferret out crime, police officers will bootstrap information in a manner to justify the issuance of a warrant. The execution of the warrant is likewise important. The facts surrounding that issue should be examined carefully.

A warrantless search presents a whole new area of law. Was the search incident to a lawful arrest? Remember the recent cases of the Supreme Court, such as *Whren* (116 S.Ct. 1769, 135 L.Ed. 2d 89 (1996)) and *Bostick v. Florida* (501 U.S. 429, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991)). Traffic stops can be made based upon sham traffic violations. Luggage can be searched based upon general policy. Underlying it all are the principals of *Terry v. Alabama* (392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)) and the factual circumstances surrounding any warrantless search - whether the circumstances were exigent or the dynamics of the facts were such that time did not permit the obtaining of a written warrant. Many jurisdictions have telephonic warrants. In motions to suppress, use the timeline to question why they did not get at least a telephonic warrant. But in each case involving a search question, file the motion to suppress merely to preserve the record.

The Charging Document

The charging document should be carefully examined to determine whether the offenses charged are correctly set forth in the indictment and/or information. In the case of a unique statute, the constitutionality of which has never been tested, it is always wise to make a determination of whether a motion directed to the constitutionality of the statute would be appropriate. If there is a question of whether the statute has ever been tested based upon your research, by all means bring the motion. Remember, a record is being made. It is often said that winning at trial by preparing to lose is a trial technique. A recent article by Natman Schaye in The Champion (National Association of Criminal Defense Lawyers, March 1997) discusses the successful defense of a criminal case and creates themes upon which cases are tried, keeping certain issues for appellate postures.

Developing a Theory of Defense

In order to sufficiently develop a theory of defense, a good trial lawyer must anticipate what the prosecution will present - both witnesses and evidence. As you read the reports that have been provided, you will see that investigating officers are often the only witnesses the state plan to call. On occasion, however, there are material witnesses whose interviews are required. Keep in mind such issues as identification; ability to see the events occurring; and any bias, motive, or prejudice that a witness may have.

You have to be prepared to be at war with the prosecutor once you set foot in the courtroom. There is no "nice guy" approach to the trial of a criminal case. That does not mean you have to abandon your civility and your professional attitude toward the trial of a case, and in particular, to the court. All too often, however, we find ourselves before judges who are either pro-prosecution or enamored with their own sense of their legal skills. To be deferential to such a judge is often a very good tactic in front of a jury. You can respond to a judge who has made a comment either by making an objection or by asking the court's indulgence in permitting you to go forward in an effort to obtain a fair and complete picture on behalf of your client.

Once you have evaluated the prosecution's case, you can begin the theory of defense. The theory of defense is essentially filling the gaps in the prosecution's case to enable a jury to hear the entire version of what occurred.

The next question is to assess the state's evidence that may be irrelevant and/or prejudicial under Rule 403 of the Rules of Evidence. If you make such a determination, be prepared to utilize a motion in limine in advance of the commencement of the trial. A good reference is Uncharged Misconduct Evidence by Professor Imwinkelried (Clark Boardman, updated annually), which deals with Rule 404(b).

Trial Notebook

Prepare a trial notebook before the trial, starting with an index of the charging document, a preliminary hearing or grand jury transcript, police reports, witness interviews that have been transcribed and reported, and your proposed jury instructions. If you have exhausted all of your motions - motions to dismiss, motions to determine the mental capacity of your client, motions to suppress, motions to sever, motions for additional production of Brady material (*Brady v. Maryland*, 373, U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)) - then you are prepared for the commencement of the trial.

Sit back and think about your case. Try and envision the type of juror you wish to have on the case you are about to try. Is your appeal to the jury emotional? If it is, then do not consider accountants, engineers, computer analysts, or statisticians for the jury. These people tend to be "data in, data out" in their deliberations. But these people can be a great asset on a jury if your case is dependent upon a finely tuned timeline or scientific evidence that needs some analysis on the part of the jury. Generally, retired individuals are more firmly fixed in their views toward the criminal justice system.

Shoot for the middle range - people of a certain age, who belong to a two-income family, are trying to raise or educate their children, and are gravely concerned about the crime problem in America today. Do not overlook your visceral impression of a particular juror. But do not deceive yourself into believing that a juror who is friendly and smiles at you is necessarily going to be on your side of the case. That juror may very well just like the suit or dress that you're wearing that day, or identify with you in some other fashion.

Be mindful of your *Batson* objections (*Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L.Ed.2d 69 (1986)), and make sure that if you have a genuine Batson motion, have a hearing where you require the prosecution to articulate the particular reasons for striking a given juror. Whether your objection is sustained and the juror is permitted to sit will be based upon your ability to finesse the prosecution into articulating these reasons in an improper fashion.

Trial Conduct

Once the jury is sworn in and seated for the trial, and in most jurisdictions when the first witness is sworn in, your client is now in jeopardy. If at this juncture there are any double jeopardy issues, this is the appropriate time to raise them.

Depending upon the length and complexity of your trial, generally an opening statement should be given to the jury at the beginning of the case following the state's opening statement. If the case is complex and is likely to be lengthy, and it will be a long time before the jury can focus in on your theory of the case, it might be wise to defer the opening statement to the commencement of the defense case. However, statistical surveys have revealed that jurors do retain and are influenced by what lawyers say in opening statements. In cases that are likely to last two weeks or less, it is a good practice to make a dynamic, theatrical (or low-key, as the case may dictate) opening statement to the jury, leaving them with something to consider during the testimony that is being presented to them.

Do not promise anything in opening statement that you know you cannot provide. Do not tell the jury that your client will tell them about what happened that night if you and your client have not made the decision of whether the client will testify. If there are alternative ways to get the material in front of the jury, be sure to allude to the topic rather than stating that the proof will come from the mouth of your client.

If you find major inconsistencies in the statements of the prosecution's witnesses during pretrial discovery, the opening statement is an appropriate forum to comment on this. This places prosecutors in a very untenable position. They must live with the inconsistencies or face the possibility of the jury concluding that the prosecution has prepared its witnesses so well that they will gloss over the inconsistencies. On cross-examination of a material and major witness, always inquire about the amount of time spent by the prosecutor in preparing the witness to testify at trial. In the case of an informant or a "rat," in opening statement allude to the witness who has acted for payment or has agreed to testify for the magnificent and wonderful walk out of the back door of the courtroom.

It is often wise to prepare an outline of your closing statement before the trial starts. This gives you an overview of your theory of defense and the prosecution's theory of prosecution. During the course of the trial, you can embellish on your outline, adapting it to the evidence. Whether you practice in a large or a small city, never engage in conversation relating to objections or discussions about the case with the court without the presence of the court reporter.

All too often, judges will try to expedite matters by having you reserve the reasons for certain objections until the end of the trial day. Strenuously object to this procedure. For every sidebar conference, have the court reporter present. Make your record carefully, clearly, and understandably, so that if your client is convicted, a reviewing court can see that you did your job within the meaning of Strickland.

When the prosecution's case has rested, make your motion for directed verdict as complete as you possibly can, articulating all of the legal and factual reasons for the record. Remember, the court is acting either as the ninth or thirteenth juror and can test matters of law on a motion for directed verdict. The court can also test the sufficiency of the evidence. At the conclusion of the case, remember to renew the motion for directed verdict of acquittal; if you do not, you will have committed a plain error.

Be sure at the conclusion of the case that all of your exhibits are marked and entered into evidence, keeping track of them at all times. If you have casually drawn a diagram of a scene on the easel, have it marked and move for its admission as evidence. Jurors often make judgments based upon these casual drawings, so you want them in the jury room with the jury.

Above all, be professional. Try to express yourself in a fashion and manner that the jury can identify with. Before the trial, whatever your degree of trial experience, ask the opinion of fellow lawyers either to test a theory you may have or to seek the advice of the best way to present your client's defense.

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Effective Voir Dire

By Jeffrey T. Frederick

During the questioning of potential jurors in the voir dire process, lawyers strive to achieve four major goals: eliciting information from jurors, developing rapport with jurors, educating jurors on key concepts, and persuading jurors to view the case from their perspective.

Information Gathering

The most important goal is to understand each juror's mindset. Based on the juror's background, experiences, and opinions, how does he or she view the world, and how will he or she view the evidence, arguments, and issues in your case? Certain skills and approaches can help lawyers elicit information from jurors.

Get jurors talking. The key to successful voir dire is to have jurors tell you about themselves. Ask jurors questions that give them an opportunity to talk. What do they do at work? What are their interests or spare-time activities? Such questions not only provide important information but also help jurors open up to the voir dire process.

Ask open-ended questions. Give jurors the opportunity to put their answers into their own words. Questions that are open-ended and do not restrict the jurors' answers to a "yes or no" format provide more information about the thought processes and opinions of the jurors. "Tell me about your views on punitive damages," will produce a much fuller understanding of the jurors' true beliefs than "Do you disagree with the law that provides for punitive damages?"

Avoid questions that encourage jurors to "look good." Like everyone, jurors want others to think the best of them. Some questions, simply by the way they are phrased, lead jurors to answer in ways that make them "look good." Asking jurors, "Based on what you have heard about the case, do you believe that you could be a fair and impartial juror?" will lead them to answer in a predictably socially acceptable manner, i.e., "yes." Jurors are very reluctant to admit that they could not be fair. Changing the phrasing to "Based on what you have heard about the case, would you tend to feel that the defendant would need to provide you with evidence that he is innocent?" will lead to more candid and truthful answers.

Capitalize on the environment. Make the most of what your jurisdiction allows. When the jurisdiction allows individual questioning of jurors, take advantage of this fact and ask critical, open-ended questions. Also, develop your voir dire from the perspective of having a conversation with jurors - not conducting a job interview or an interrogation. Jurors are more likely to tell you more about themselves in a supportive conversation than when they feel they are being interrogated.

When the jurisdiction restricts questioning to a group format, use approaches that maximize the participation by jurors in the process. First, ask questions where a majority of jurors will raise their hands. Doing so helps jurors become more comfortable with raising their hands in open court. Second, where appropriate, call upon jurors who do not raise their hands. This strategy quickly lets jurors know that they cannot avoid participation by failing to raise their hands. Finally, use jurors' answers for a second bite at the apple. When a juror raises a hand and gives an important answer, particularly a negative one, follow up this answer with the remainder of the jurors. The following is an example of this approach:

Lawyer: "How many of you would have any reservations in returning a verdict of no money damages?"

[One juror raises his hand.]

Mr. Smith: "Well, I've had to take care of my sick mother for a number of years now. I know how much her medical bills are, and it would be really difficult for me not to provide the plaintiff with something."

Lawyer: "Mr. Smith, thank you for your candor. How many of you [referring to the panel] feel like Mr. Smith does and would have reservations in returning a verdict of no money damages?"

[Another juror raises her hand.]

In this manner, jurors who were initially reluctant to raise their hands are given a second opportunity to participate. Failure to take advantage of the jurors' answers can lead to some unacceptable jurors passing below the lawyer's radar screen and becoming members of the trial jury.

Don't settle for demographics. Demographics or background information (e.g., occupation, marital status, and educational background) can be useful. However, it is only the first step in understanding the jurors' mindsets. Research shows that demographic information is less predictive of jurors' decisions than information concerning the jurors' experiences and opinions. Determine the impact of experiences. Information on the relevant experiences that jurors may have had is important also. Again, you must go beyond the mere experience and uncover the impact that this experience has had on the juror's views and beliefs. If victimization is important, ask jurors not only whether they have been a victim of a crime but also: (1) what type of crime it was; (2) what the circumstances of the crime were; (3) whether their behavior changed in any way as a result of this experience (e.g., adding security devices to their home); and (4) as a result of this experience, what their views are concerning their personal safety and regarding the criminal justice system.

Ask about the jurors' opinions. Delve into the jurors' views on relevant issues. Do they distrust police? Do they have reservations concerning lawsuits against doctors? Do they think that a woman assumes the risk of sexual assault when she accompanies her date to his bedroom? The closer you can get to how the jurors view critical issues in your case, the closer you will be to understanding the jurors' mindsets.

Listen to jurors. Jurors' answers can reflect subtle differences in opinions. As such, careful attention to the jurors' answers is imperative. Jurors know when lawyers are not paying attention to them. When the jurors feel that the lawyer is not paying attention to what they are saying, they often clam up and reciprocate by not making the effort to respond with thoughtful answers.

Pay attention to body language. What jurors say is important, but so is how they say it. Movements of the juror's body, the orientation of the juror's body, gestures, facial expressions, and eye contact are all potentially important clues to the juror's thoughts and feelings. In addition, speech disturbances, the timing of pauses during the juror's answers, pitch, tone of voice, and the willingness of the juror to reveal information to you as compared to opposing counsel help complete the picture of what jurors are thinking and feeling.

There is no single cue that reliably indicates deception on the part of jurors.

Gestures and movements can be made for a number of reasons, and need to be placed in the context of the jurors' overall pattern of behavior. A key to understanding the body language of jurors lies in evaluating the changes in behavior in light of what questions are being asked and who is asking the questions.

Use juror questionnaires. Some jurisdictions ask jurors to complete supplemental juror questionnaires that provide additional information on the jurors' backgrounds, experiences, and opinions. Such questionnaires can provide valuable information concerning the jurors, particularly in jurisdictions where voir dire questioning is conducted by the judge and/or in a group questioning format. Under these latter circumstances, jurors are more reluctant to candidly discuss their experiences and opinions and are less likely to fully participate in the questioning process. A juror questionnaire may be your only route to greater disclosure in these situations.

Developing a Positive Relationship with Jurors

Establishing rapport with jurors provides two major benefits. First, jurors are more willing to be open and candid in their answers. Second, the positive impression of the lawyer fostered by rapport increases the lawyer's persuasiveness at trial.

To develop rapport with jurors:

1. Show an interest in each juror.
2. Treat jurors with respect.
3. Make jurors feel comfortable during the questioning process.
4. Adopt a nonjudgmental attitude.

Rapport results from positive interaction with jurors. Thus, there is a need to develop questions that give jurors an opportunity to talk about themselves and their views. As with information gathering, open-ended questions are helpful in developing rapport.

Educating Jurors

Lawyers need to take the opportunity to educate jurors on important issues and decision-making criteria. In essence, we want jurors to understand the issues and decision-making criteria that are important to our case. Jurors often come into court with misconceptions as to what their task as jurors will be and what the law is.

Essential to this goal of education is recognizing how jurors process information. If jurors have misconceptions concerning important issues, they will filter information during the trial through these misconceptions. If these misconceptions are not corrected early, jurors can come to erroneous conclusions or disregard important evidence.

The education process begins by uncovering the jurors' beliefs concerning key issues through information-gathering techniques. When misconceptions are uncovered, lawyers can use open-ended questions to determine whether the jurors' views reflect a true misconception or a firm bias. If the view is a misconception, the jurors are led through a series of questions that discuss the relevant legal issue and address the jurors' willingness to comply with the appropriate judicial standard. The following exchange illustrates this approach:

Defense: "Would you expect the defendant to testify?"

Juror: "Yes. I guess, I kinda thought that the defendant was supposed to testify. I mean, it always seemed that way on Matlock."

Defense: "How would you feel if the defendant didn't testify?"

Juror: "I guess something would be missing for me."

(Additional questioning would further explore this area.)

Defense: "Now, we mentioned earlier that the prosecution has the burden of proof in this case. What does that mean to you?"

Juror: "Well, it means that it's up to the prosecution to prove its case - that they have to convince us that the defendant is guilty."

Defense: "What does that mean for the defense?"

Juror: "It means that the prosecution has to prove everything and the defense doesn't."

Defense: "That's exactly it. A criminal case is serious. If the government is trying to convict someone and send him to jail, they are the ones who must come forward and prove it. Now, how does this fit in with the defendant testifying in this case?"

Juror: "Well, he doesn't have to and he shouldn't have to. It's the government's job."

Defense: "Would you tend to hold anything against the defendant if he didn't take the stand?"

Juror: "No."

Defense: "Is this a position you take lightly?"

Juror: "No. I really hadn't thought about it too much before. As a juror, it's my duty to uphold the law, and that's the law."

Defense: "Would you have any reservations in doing this?"

Juror: "No."

Where possible, avoid using phrases like "According to the law..." or "Do you understand that..." in the early stages of the education process. While some jurisdictions may require the use of such phrases, these phrases elicit the "looking good" or socially acceptable answers from jurors. Proper education requires that jurors discard prior misconceptions and adopt the legally appropriate position.

Persuasion

The final goal is persuasion. Because voir dire involves an interaction between the lawyer and the jurors, a potential for persuasion exists. Persuasion differs from education in that an attempt, often subtle, is being made to influence how the jurors view the case. Several aspects of persuasion are potentially available.

Set the tone for the case. Through the questions asked, lawyers can set the tone for the case; that is, jurors can be led to view the case from a certain perspective. For example, a plaintiff's lawyer may set the tone for higher compensation for a severely injured plaintiff by asking: "Would you have any reservations in returning a money award sufficient to allow Mrs. Smith to live at home rather then being placed in an institution?"

The above question sets the tone for the case by contrasting an unpopular outcome (i.e., placing someone in an institution) with a more positive outcome (i.e., allowing an injured person to stay in her own home). This contrast also paints the defense in a negative light by implying that it is seeking to place the plaintiff in an institution.

Win the language war. The words used to describe events affect how jurors view these events. Lawyers can capitalize on this through the consistent use of desirable words and phrases throughout the questioning process (and the trial itself). For example, consider the difference in impressions formed by the plaintiff's lawyer asking the same question with a simple change in wording:

> "This case involves the injury of Mrs. Smith by the defendant, who crashed into her vehicle while she sat at a stoplight. Have any of you heard about this?" or:
>
> "This case involves the injury of Mrs. Smith by the defendant, who struck her vehicle while she sat at a stoplight. Have any of you heard about this?"

Note that the use of the phrase crashed into versus struck produces a more violent impression of the impact of the vehicle.

Win the war of concepts and definitions. The choice of words not only affects the jurors' general view of the case but also can influence the standards the jurors apply in a given case. Defining a legal standard in terms that make it appear more or less stringent influences how jurors will use this standard. Prosecutors and plaintiffs' lawyers attempt to lower the relevant standard of proof, while defense lawyers seek to raise this standard. The following example highlights this approach concerning the standard of proof in civil trials:

> Plaintiff: "The plaintiff need only show by a preponderance of the evidence that the defendant, Dr. Thomas, was negligent in his treatment of Mrs. Jones. "Preponderance of the evidence' is a legal term that simply means more likely than not, a simple tipping of balancing scales. [Gesturing with hand movements.] That is, we need only show that it is more likely than not that the defendant doctor was negligent in his treatment of Mrs. Jones." [Again, illustrating the tipping of the scales.]
>
> Defendant: "The plaintiff in this case has the burden of proving by the preponderance of the evidence that Dr. Thomas was negligent. That is, the plaintiff must prove by the greater weight or clear preponderance of the evidence that what Dr. Thomas did when he was caring for the plaintiff constituted negligence."

Conclusion

Pay attention to the four major goals of voir dire - information gathering, rapport, education, and persuasion - and take advantage of techniques and strategies for achieving these goals. Lawyers who do so will make the most of the voir dire process and seat the best jury.

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10 Things Landlords Should Know About Fair Housing

By Kristi Bunge

Sounds pretty simple if there are just 10 things to advise Landlords about with regard to fair housing law. Unfortunately there are more than just the 10 items listed in this article. However, these 10 are an excellent start, and knowing about fair housing will help lead to understanding what should and should not be done when renting property. Understanding fair housing is the best protection against a claim that a fair housing law has been violated. If you are an attorney advising a landlord on what to watch out for, the following items are a good start.

1. ADVERTISING. Advertising is one of the most common ways landlords find people to place in rental properties. When advertising, landlord clients should describe property attributes and/or amenities, not what they are or are not looking for in a resident. Landlords should not say “great for a young couple” as it may be considered discriminatory to families with children. Nor should landlords say “safe” or “exclusive” as this may imply they only rent to certain groups. At the end of the advertisement, landlords should use either the fair housing logo or a disclaimer such as “This community does not discriminate on the basis of race, color, religion, national origin, sex, disability or familial status.” Photographs need to be carefully considered before use in advertising and only after speaking with an attorney.

2. STEERING. “Steering” occurs when a landlord attempts to direct a resident, for whatever reason, to a specific area of the property. To help avoid claims of “steering” by a prospective resident, landlords should show all available properties to prospects, let the prospect decide what to see and what to skip, and finally present only facts about the property and the community, not about other residents or neighbors. Landlords should never say “you would really like

this particular apartment because it is nice and quiet with few children around", or "there are lots of other children in the same age group as your own" as both statements may be considered a violation of fair housing law. Failing to show a handicapped person the recreational areas (on the assumption the prospect would not use those facilities) may create potential liability. However, if a prospective resident expressly states they are not interested in seeing a specific area it is okay to skip that area. Even if asked, landlords should never comment on the "types" of persons who live in the community.

3. SCREENING/APPLICATIONS. Fair housing claims arise frequently as a result of the application and screening process. Landlords should have a written rental policy detailing the criteria necessary for approval to live in their property. The rental policy should include occupancy guidelines, availability policy, rental criteria (i.e. employment history/income, credit standards, etc.) with an explanation of what the criteria are, an outline of the application process and that your client adheres to all applicable fair housing laws. Questions included on the application should not ask about physical or mental disabilities, and landlords should limit questions about drug/alcohol use and lawsuits. Asking questions regarding prior evictions, prior money judgments, bankruptcy and why prospective residents are leaving their current landlord are acceptable and may provide important information. Once a written policy is created, the landlord should expect strict adherence and compliance with the written policy. Additionally, landlords need to keep good records of each applicant or inquiry. However, if an applicant requests a deviation from the written policy based on a disability, the landlord should consult you immediately before making a decision.

4. OCCUPANCY STANDARDS. In 1996 Congress enacted a law based upon a 1991 HUD memo stating that a 2-person-per-bedroom occupancy standard was acceptable in most situations. This is by no means a hard and fast rule with regard to the number of occupants for a particular residence. This figure can change depending on how the property is laid out. More occupants may be allowed if there are unusually large living spaces or bedrooms, and fewer occupants if the opposite holds true. Many fair housing experts believe that infants do not count when calculating occupancy standards.

5. APARTMENT RULES. It is absolutely acceptable for a landlord to have a set of "house rules" for all residents to live by. The house rules should be basic and non-discriminatory. Rules should be written so they are applicable to all residents and not just specific groups of residents. Rules stating "Children shall not roughhouse in the hallway" may be discriminatory. Using general terms such as "Residents or guests" should keep the rule unbiased, fair and applicable to all residents. Rules must be enforced uniformly against all residents and records regarding rule violations need to be kept. The records

should include the time/date and manner of the violation, how the landlord became aware of the violation and what actions were taken to enforce the rule. As a special note, pool rules should be carefully scrutinized to insure they do not discriminate against children. A rule saying "no children under 4 in the pool area" is discriminatory, while a rule saying "children under 12 must be supervised by an adult over 18" is likely not discriminatory. As always, landlords should consult you for specific state or local laws on these issues as well.

6. REASONABLE ACCOMODATION. A reasonable accommodation is at the resident's request and when a client voluntarily makes exceptions to their standard rules/policies to accommodate the resident's disability. The requested accommodation must be reasonable and should not present an undue burden on the landlord. If the accommodation is not reasonable or if it would impose an undue hardship on the landlord, the request may be denied. If the request is denied a letter should be sent to the resident explaining the denial, the facts behind the denial, how those facts were discovered and offering to meet with the resident. Landlords should not offer to make an accommodation to a resident but should wait for a resident to request the accommodation. Offering an accommodation before it is requested may subject your client to a claim of discrimination.

7. REASONABLE MODIFICATION. This should not be confused with a reasonable accommodation. Landlords may require a resident to pay for modifications to the property and require that those modifications be removed when the resident vacates the property. If the modification were for something that federal law already requires a landlord to have in place then the landlord would be responsible for the cost of the modifications. Landlords should check with you to determine where financial responsibility for common-area modifications lay, and whether the resident would be responsible for both the installation and removal of the modifications. As with accommodations, the modifications must be reasonable.

8. RECORD KEEPING. Landlords need to keep records on all prospective residents, in addition to current/past residents. Landlords can create a system of guest cards or logs with relevant information (i.e. date/time of visit, properties shown, prospective move-in date, etc.) as well as a log of all calls made by prospective residents, even if the resident never comes to see the property. Records regarding available properties also need to be kept and updated every time there is a change in availability. Additionally, all applications should be retained, even if the applications were rejected or withdrawn. Landlords should contact you regarding how long the records should be saved in order to comply with changing requirements in federal and state law, as well as what types of records to maintain. Being able to produce consistent records showing

nondiscriminatory application of written screening criteria in every case can usually successfully defend a Fair Housing claim.

9. EMPLOYEE TRAINING. Landlords need to ensure that there is a written policy to avoid claims for harassment, particularly sexual harassment. Every time a new employee joins the staff there should be a training meeting about fair housing laws and how to comply with them. The meeting should include copies of all memos regarding policies about how to comply with fair housing, what can happen to the landlord for a violation and what will happen to the employee who violates fair housing.

10. EVICTION. Landlords should not be afraid to evict a resident for legitimate reasons because of a fear of a fair housing violation claim. The rules set by the landlord apply to all residents equally. When contemplating an eviction for other than non-payment of rent advise your client to ask themselves the following two questions: (1) Has there been a serious violation of the lease agreement? (2) Do you and have you evicted other residents for the same type of problems or behavior? If the answer to these questions is yes, then an eviction would be warranted under the circumstances. Resident files should contain records of all complaints against the resident and what has been done in response to each of the complaints. HUD has historically looked for five types of documentation when dealing with fair housing claims. Landlords should document and include in resident files the following information: (1) warning letters/eviction notices, (2) written complaints by third parties, (3) written logs kept by management, (4) police records and (5) photographs. Resident file documentation needs to be consistent for all residents. This documentation may prove there was a legitimate reason, unrelated to any fair housing claims, for evicting the resident.

All information contained in this article is consistent with the Fair Housing Act (42 U.S.C.A. 3601 *et seq*.) Information was also obtained from the Federal Housing and Urban Development website (http://www.hud.gov).

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20 Important Steps for a Real Estate Closing

An Initial Real Estate Closing Checklist for the Closing Agent

By K.F. Boackle

After you have opened a file and started a closing information sheet and action log, you should being the process of preparing for closing. The following initial checklist can be used as a guide.

1. Verify employment of the lawyer. Does the person calling have the authority to choose the closing lawyer?

2. Get as much information as possible as quickly as possible.

3. Obtain the latest sales contract. Understand the terms and clarify uncertain terms. Ask the lender to include a copy of the contract with its package so you can verify that you have the latest contract. Determine who is paying closing costs and which agent is holding the earnest money.

4. When closing involves the sale of property by:

    a. A corporation: Verify corporate status with the state office that regulates corporations and get a copy of the charter if necessary. Get a corporate resolution to sell the property if you believe the sale is outside the general business purpose of the corporation.

    b. Power of attorney: Get the original. Is it durable? If not, can it be replaced?

c. A ward, a person in bankruptcy, or an estate: you will need a court order.

5. If the contract provides for a loan assumption, satisfy yourself about the following:

a. Does the contract state that either the cash down payment or the sale price is firm? Is the other allowed to fluctuate with the loan balance? If not, an addendum to the contract will be necessary.

b. Check with the mortgage company to find out if the loan is assumable; if so, request a loan assumption package.

c. What is the transfer fee?

d. Will this transaction require a modification and assumption agreement?

e. Will the lender need a supplemental certificate of title after closing?

6. Obtain the following information from the seller's agent:

a. The legal description. The best source of the correct legal description is the title search. The correct street name is on the subdivision plat.

b. Complete names, marital status, work and home telephone numbers, and social security numbers of sellers. The property sources of the sellers' names is the instrument by which they took title.

c. Those who will obtain the wood infestation report, and whether it will need to be paid at closing.

d. The name of the mortgage company, loan number, phone number, address, and other pertinent information for the entity receiving the payoff.

e. Whether the seller filed for a homestead exemption for the current year.

f. If the seller is divorced, a copy of the decree if the subject property was owned at the time of the divorce.

g. If the seller's spouse is deceased, a copy of the death certificate, and a copy of the title deed by which the seller took title. If the seller took title under a tenancy with survivorship, you will have no problem. You should secure a certified copy of the death certificate and attach it to the deed.

h. Verification of the commission split.

7. Tell the seller's agent the requirements of the lender that involve the seller, and that you require photo identification of the parties at all closings.

8. Obtain the following information from the buyer's agent:

a. Which insurance company will be providing the new insurance for the purchaser, and the agent's name and phone number.

b. The name of the new mortgage company, and the processor's name and telephone number.

c. Whether a survey is required, and, if so, whether it has been ordered.

d. Complete names, marital status, social security numbers, and day and night phone numbers of the purchasers. Use the names as the lender provides them.

9. Remind the purchasers and their agent that a certified check and photo identification will be required at closing.

10. Call the new lender about the following:

a. The status of the new loan application.

b. The preliminaries required before the loan package can be released.

c. Inclusion of a copy of the contract and the appraisal in the preliminary package (check appraisal for house size and sewer type).

d. Verification of the proposed closing date. Generally, all else equal, the best day for a buyer to close is the first day of the month, as this enables the buyer to have a full month before the first payment is due, and yet not pay any prepaid interest at the closing. Generally, all else equal, the best day for a seller to close is any day that will allow the payoff to reach the former lender on or before the due date of the next monthly payment.

11. Write or call the former mortgage company to obtain the payoff information (some companies will not give this information over the telephone, but will honor a faxed request). When you request the information, give the loan number, name of borrower, property address, and date through which you would like the payoff to run. This amount should include the prepayment penalty, if any. Also get a per diem amount (daily rate) in case the closing is postponed. If the mortgage is held by an individual, arrange for the original note and deed of trust or mortgage to be tendered upon receipt of the payoff. Have a release signed at that time. Always get a written payoff.

12. Determine whether the contract calls for a zoning certification.

13. Determine whether the contract includes personal property, whether a Uniform Commercial Code search is necessary and whether the lender will approve.

14. Determine whether oil, gas, or minerals are involved. If the contract does not exclude minerals, determine whether then can be excluded in the deed.

15. If leases are involved, address the following matters:

a. Notice of sale to tenants.

b. Estoppel certificates from tenants.

c. Security deposits-transfer.

d. Personal property-bills of sale.

e. Prorate rents.

16. As agents to handle utility switch-over.

17. If the house has a septic tank, obtain a county health department certificate.

18. Determine whether possession will be delivered at closing. If not, is there a lease agreement?

19. Determine whether an escrow will be required for uncompleted or unrepaired items.

20. Arrange the time and date of closing, and verify that all parties to the transaction will be present at the closing. If not, the procedure and steps to be taken must be determined at an early date.

Did you find this checklist helpful? Do you think more information like this would help you? More information is available - This checklist is republished with permission from the GP/Solo Publication: Real Estate Closing Deskbook, 2 nd Edition – A Lawyer's Reference Guide & State by State Summary; pp28-30, by K.F. Boackle. GP/Solo members can purchase this book, which includes electronic forms, at a discount through the GP/Solo bookstore website: http://www.abanet.org/genpractice/books/index.html .

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The New Bankruptcy Reform Act And Some Changes To The Automatic Stay Of Interest To Real Estate Practitioners

By Thomas S. Linde

Real estate practitioners should be aware of the enactment of a number of changes to the automatic stay provisions in The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the "Act") which will become effective October 17, 2005. Most attorneys are somewhat familiar with the automatic stay provisions set forth in 11 U.S.C. § 362(a). But what § 362(a) giveth to debtors, § 362(b), § 362(c) and § 362(d) can taketh away. Section 362(b) is the section of the Bankruptcy Code that defines which types of actions are *not* subject to the automatic stay. Section 362(c) is the section of the Code that defines the duration of the automatic stay. Finally, Section 362(d) is the section which governs the conditions for lifting or conditioning the stay by the court. All three of these sections are substantially changed under the Act. This article will discuss some of the changes to the automatic stay which may be of interest to real estate practitioners.

(1) Additional matters now outside the scope of the automatic stay under 11 U.S.C. § 362(b).

(a) Residential Evictions and Unlawful Detainer Actions.

In cases involving residential property where the debtor resides as a tenant under a lease or rental agreement and where the lessor has obtained a judgment for possession *before* the date of the bankruptcy filing, the automatic stay in most instances is ineffective immediately. 11 U.S.C. § 362(b)(22).

Section 362(b)(22) must be read in conjunction with Section 362(l), however. Under § 362(l), if the debtor complies with a series of requirements, the stay may remain in place for thirty days.

First, the debtor must list the name and address of the lessor of the residential property where he resides and the judgment on his bankruptcy petition. 11 U.S.C. § 362(l)(5). The debtor must also file and serve upon the lessor a sworn certification which provides (1) that applicable nonbankruptcy law provides for a cure of the default after judgment for possession has been entered; and (2) that the debtor has deposited with the clerk of the court the rent which will fall due during the thirty-day period.

The lessor may object to the debtor's certification. If the lessor does object, the court is required to hold a hearing within ten days of the service and filing of the objection to determine if the debtor's certification is true. 11 U.S.C. § 362(1)(3)(A). If the court sustains the lessor's objection, then the stay is immediately not effective.

Within thirty days of filing his bankruptcy petition, the debtor must also file a second certification that he has cured the entire monetary default that gave rise to the judgment for possession. 11 U.S.C. § 362(b)(22) and (l). If the debtor files this second certification, the stay remains in effect. 11 U.S.C. § 362(l)(2). If the debtor has filed the first certification but not the second, the stay is not effective thirty days after he has filed his bankruptcy petition.

In addition, the automatic stay has limited application in residential evictions where a debtor tenant resides in the property under a lease or rental agreement and the lessor seeks possession of the property on the basis of endangerment of the property or the illegal use of controlled substances on the property. To limit the application of the stay in such circumstances, the lessor must file with the bankruptcy court and serve on the debtor a certification stating that an eviction was started pre-petition or that the debtor within the thirty days preceding the petition endangered the property and/or illegally used or allowed to be used a controlled substance on the property. 11 U.S.C. § 362(b)(23).

The automatic stay will terminate fifteen days following the lessor's filing and service of the certification unless the debtor files an objection to the truth of the lessor's certification. 11 U.S.C. § 362 (m)(1) and (m)(2)(A). If this occurs, the court must hold a hearing within ten days to determine if the situation giving rise to the lessor's certification existed or has been remedied. 11 U.S.C. § 362 (m)(2)(B). If the debtor prevails, the automatic stay remains in place. If the lessor prevails, the court need not grant an order lifting the stay; rather, it shall serve upon the debtor and lessor the court's order upholding the lessor's certification. 11 U.S.C. § 362 (m)(2)(D).

(b) Foreclosure of Security Interests in Real Property.

> The automatic stay will not apply to an action to enforce a lien against real property in circumstances where the debtor is ineligible to be a debtor under
>
> § 109(g) or if the current case was filed in violation of a bankruptcy court order entered in a prior case. 11 U.S.C. § 362(b)(21). Given the necessary factual determinations regarding whether a debtor is actually "ineligible" for bankruptcy relief under §109(g) or whether a new filing actually violates a prior court order, in most cases creditors are likely to continue to opt for the safe harbor of a court order granting relief from stay or declaring there is no stay (particularly if required by title companies).
>
> Also, the automatic stay will not apply to an action to enforce a lien against real property for which an "in rem" order was entered within two years in a previous case, although a debtor in a subsequent case may file a motion for relief from the "in rem" order based upon changed circumstances or for other good cause shown. 11 U.S.C. § 362(b)(20). "In rem" orders are discussed further below.

(2) The Act includes new circumstances under which the automatic stay will expire under 11 U.S.C. § 362(c).

The new Act includes extensive amendments to 11 U.S.C. § 362 (c), the section which governs the duration of the automatic stay. Under the new Act, unless a party in interest (usually the debtor or the trustee) timely requests an extension of the stay, it will automatically expire under several circumstances, including:

(a) The Stay Simply Terminates Within Thirty Days Where Individual Debtor Files A Case Within One Year of An Earlier Dismissed Case

If an individual files a case within one year of an earlier dismissed case (other than one dismissed under §707(b)), the automatic stay will simply terminate thirty days after the new case is filed unless during the initial thirty day period, a party in interest (usually the debtor or the bankruptcy trustee) files a motion with the court to extend the stay on the basis that the second filing was in good faith. 11 U.S.C. § 362(c)(3)(A)(B).

A new case is presumed to be “filed not in good faith” as to all creditors if (1) the debtor has been a debtor in more than one prior proceeding pending within one year of filing; (2) the debtor has had a prior case dismissed because of the debtor’s failure to file required pleadings without substantial excuse, or has failed to provide adequate protection as ordered by the court, or to perform the terms of a confirmed plan; or (3) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous bankruptcy petition or any other reason to conclude that the most recent case will be concluded with a discharge or confirmed plan. 11 U.S.C. § 362(c)(3)(C)(i). A debtor may rebut the presumption that a subsequent case has not been filed in good faith only by presenting clear and convincing evidence of good faith. For example, if a previous case was dismissed due to the creation of a debt repayment plan, for purposes of subsection (c)(3), any subsequent case commenced by a debtor shall not be presumed to be “filed not in good faith”. 11 U.S.C. § 362(i).

(b) There is No Automatic Stay Where Individual Debtor has had Two or More Prior Bankruptcy Filings Dismissed Within the Preceding Year.

In cases where an individual debtor files a bankruptcy petition within one year of two earlier dismissed cases, the automatic stay provisions do not go into effect at all. If a party in interest so requests, the court shall enter an order confirming that no stay is in effect in the latest case. 11 U.S.C. Section 362(c)(4). If, within thirty days of filing of the petition, a party in interest so requests, the court may order that the stay be effective as to any one or all creditors, but only if the party in interest demonstrates that the third filing is in good faith.

As under (a) above, the third filing is presumed not to be in good faith as to all the creditors if (1) the debtor has been a debtor in at least two prior proceedings within one year of filing; (2) the debtor has had a prior case dismissed because of his failure to file required pleadings without substantial excuse, or to provide adequate protection as ordered by the court, or to perform the terms of a confirmed plan; or (3) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous bankruptcy petition or any other reason to conclude that the most recent case will be concluded with a discharge or a confirmed plan. 11 U.S.C. § 362(c)(3)(D)(i).

Additionally, a new filing is presumed to be not in good faith as to any creditor who had filed a motion to life the automatic stay in a previous case, if that motion was pending at the time of dismissal or had been resolved by terminating, conditioning or limiting the stay . 11 U.S.C. § 362 (c)(3) (C) (ii); 11 U.S.C. § 362(c)(3)(D)(ii). A debtor may rebut the presumption that the new filing is not in good faith only by presenting clear and convincing evidence that the filing is in good faith.

(3) The Act allows a court to enter an "in rem" order regarding the automatic stay as to a particular parcel of property under 11 U.S.C. § 362(d) .

Under revised § 362(d), bankruptcy courts will be able to enter "in rem" orders terminating, annulling, modifying or conditioning the automatic stay with respect to actions by secured creditors against particular parcels of real property if the court finds a bankruptcy petition to be part of a scheme to delay, hinder, and defraud creditors involving either 1) the transfer of full or partial ownership interests in the subject real property without the consent of the secured creditor or court approval; or 2) multiple bankruptcy filings affecting the subject real property. 11 U.S.C. § 362(d)(4)(a)(A) and (B). If entered and recorded in accordance with applicable state law, an "in rem" order is binding in any bankruptcy case that would affect the subject real property filed within two years after the "in rem" order is entered. A debtor may seek relief from an "in rem" order in a subsequent bankruptcy case based upon changed circumstances or for good cause shown.

The above is a brief description of certain changes under the Act regarding the automatic stay which may be of interest to real estate practitioners. There are numerous additional changes concerning the automatic stay which affect, for example, domestic support obligations and personal property in individual cases. Overall, the Act constitutes probably the most extensive revisions to the Bankruptcy Code since its original enactment in 1978. Anyone whose practice is remotely affected by bankruptcy will need to familiarize oneself with the Act as bankruptcy practice is going to change profoundly, effective October 17, 2005.

Thomas S. Linde is an attorney with the Law Offices of Karen L. Gibbon, P.S. He concentrates his practice in the areas of real estate law and creditors' rights and remedies, including real estate transactions and financing, judicial and non-judicial real property foreclosures, real estate contract forfeitures, evictions, and the representation of creditors in bankruptcy proceedings. Mr. Linde received his B.A. degree, magna cum laude, from the University of Washington and his J.D. degree, with honors, from the University of Washington School of Law. He is a frequent speaker at continuing legal education seminars relating to real estate and creditors' rights and remedies. Mr. Linde is a member of the King County, Washington State and American Bar Associations and the American Bankruptcy Institute.

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Book Review: *The First Trial in a Nutshell: Where Do I Sit? What Do I Say?*

By Steven H. Goldberg

Reviewed by Alan A. Fowler

"May it please the court. . . ." Well, may it? One of the most common and well-known criticisms of legal education is its failure to teach students what they really need to know. Fortunately, Steven H. Goldberg fills in some of law school's blanks in *The First Trial in a Nutshell: Where Do I Sit? What Do I Say?* published by Thomson West. Goldberg provides the new litigator with the perspective and resources to present a case with confidence and skill, rather than insecurity over formal courtroom protocol.

In *The First Trial,* Goldberg, a former litigator turned law professor, likens the trial to theater and the attorney to the stage director. Such an approach can be eye opening for the law-trained reader. Once adopted, this perspective calms the nerves and helps the new litigator see the trial from the jury's viewpoint. Goldberg reiterates this helpful perspective, analogizing each trial component to an aspect of a play.

Accordingly, *The First Trial* offers more than mere tips to keep the neophyte litigator from embarrassing himself. Goldberg outlines the importance and the procedures in properly preparing and organizing a case for trial. From constructing a trial notebook to formulating jury instructions to evaluating a jury pool, Goldberg trains the new litigator in developing his legal theory into a case-in-chief, much like developing "an idea into a play." Further, Goldberg offers the neophyte guidance for familiarizing herself with stylistic and procedural nuances that vary among jurisdictions and courthouses, such as the use of and resources for demonstrative evidence.

Hearing the bailiff call, “All rise,” for the first time can result in anxiety and awkwardness for new litigators. After profiling the necessary preparation for trial success, Goldberg then offers guidance to alleviate the apprehension common to new trial lawyers. In addition to suggestions of appropriate places to stand and sit, Goldberg presents a variety of trial-tested techniques, including conducting voir dire, examining witnesses, and presenting a closing argument. Although the book is a limited primer on trial advocacy skills, the new litigator would nonetheless find Goldberg’s trial techniques a good complement to his briefing on courtroom formalities.

The First Trial arms new litigators with the resources and frame of mind to conduct their first journeys into trial with poise and proficiency—so that they may please the court and the jury, too.

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Announcing the GPSolo Law Student Mentoring Certificate Program

The GP|Solo Division is now offering a mentoring certificate program, open to all law student members. While most mentoring programs are based on occasional meetings between seasoned practitioners and young lawyers, GP|Solo's Law Student Mentoring Certificate Program does more. The program, aimed to fill some of the gaps of traditional law school education, focuses on introducing law students to the practical aspects law practice through real world activities and the insight and guidance of attorneys. Further, the program is flexible, enabling the law student to pick his or her own mentor and tailor the program's criteria to his or her own interests.

Certificate requirements include:

- Attending state or national bar association events;
- Receiving insight to rainmaking, networking, and client development; and,
- Attending several court activities, alternative dispute resolution meetings, or other legal proceedings.

The program seeks to help students supplement their legal education by guiding them through a program featuring practical skill introduction, employment search assistance, and much more with the assistance of experienced practitioners. Be one of the first students to complete the GPSolo Law Student Mentoring Certificate Program, the only one of its kind in the ABA!

Find out more about and register for the program