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Law Trends & News

Practice Area Newsletter

Summer 2008
Vol. 4, No. 4

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Chair's Note

Dear Division Member:

Below is the fourth issue of *Law Trends* for the 2007–08 bar year. As always, this is a very exciting issue, and I am very happy to present it to you. As with prior issues, this e-newsletter will help you simplify your practice beacuse it includes articles, checklists, and other valuable practice information and practical tips, all from each of our substantive practice areas in the General Practice, Solo & Small Firm Division. This issue also highlights some emerging areas, some interesting checklists, and much more.

In this issue, there are portions of two newly published books, one about giving representation and counseling to small corporations and the other about representing the elderly. These books not only cover most issues attorneys will face while representing small companies and the elderly but also have many forms an attorney will need in that representation. Please take a look at those topics; if you like what you see, you can immediately click through to purchase the books.

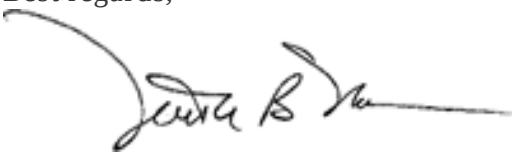
With this issue, *Law Trends* is now completing its fourth year and is certainly a member benefit. We hope you agree that with each edition, *Law Trends* continues to provide meaningful articles for you, and that this edition, like the others, helps you in your daily practice. I encourage you to take just a few moments to read the list of articles included below. Of course, it is yours to download and keep as a reference for the future. And, as in the past, you can either download specific articles, or you may download the entire newsletter by clicking the PDF link.

There are many Division members integrally involved in putting this e-newsletter together. Their hard work and dedication are certainly present. I thank them for producing this issue for the Division. Specifically, I want to thank each of the assistant editors and group coordinators. Each of their names are listed in the body below next to the substantive group. Without their superb efforts, none of this would be possible.

I hope each of you enjoys this issue of *Law Trends*. Next bar year, the publication will continue quarterly, and we hope you continue to find it a source of valuable information. If you are interested in either writing an article or participating in the production of the newsletter, please contact Jim Schwartz at attyjls@aol.com. Jim has been the editor since its launch four years ago and will continue as editor next year.

I hope to see you at the ABA Annual Meeting in New York!

Best regards,



Keith B. McLennan
Chair, General Practice, Solo & Small Firm Division

Letter from the Editor

Dear Division Member:

I have been editor of *LawTrends* since its founding. We are now completing our fourth year as a publication. In that time, we have strived to bring you timely and helpful articles and checklists—all to help you in your daily practice.

For a publication like *LawTrends* to excel, the people working on its behalf must be a dedicated group of volunteers. To be sure, I have had the extreme pleasure of benefitting from the efforts of such a group this year. And so, with this being our final edition of *Law Trends* for this bar year, I want to take this opportunity to thank the men and women from the Division who have volunteered their time and worked on *LawTrends* throughout the year. They are as follows:

Assistant Editors

Kathleen Hopkins, Jane Kow, Scott Laufenberg, William Schwab

Practice Area Group Coordinators

Lloyd Cohen, Richard DeMichele, Henry DeWoskin, Kenneth Vercammen, Randi Whitehead

Practice Area Group Newsletter Editors

James Menton, Joan Swartz, Kenneth Vercammen, Randi Whitehead, David Wolfe

Lastly, I also want to recognize Tom Campbell and Susan Wilson of the ABA staff. Without both of them, none of this would be possible. Their dedication and zeal can be

seen in the product delivered to you, and I sincerely want to say thank you to both of them for a job very well done.

Without everyone's incredible help and assistance, none of this would have been possible. I again congratulate each and every one of them and look forward to their continued help next year.

Very truly yours,

Jim Schwartz
Editor

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Business Law

The Tentative Man

By Chris Bradley

My first job after law school was in sales. Perhaps I earned some credibility with colleagues as a sales representative and a lawyer, and this, I surmise, is why one of my first clients came to me with a problem regarding unpaid sales commissions. At the time I took the case, I was building our website (still a work in progress), and my law partner Jeremiah Neville was filing papers with the secretary of state for Bradley|Neville Law Firm, LLC. I had always wanted to start a business and practice law with my name on the letterhead, and now it began: my first employment and contract law case.

It started with a soft knock on the door (figuratively speaking). The man who would later be my client approached me with a problem I'd never encountered before. I was tentative at first. I did not want to take on this man's problem. I was not sure I could do it. So I turned him down. When he asked me again, a pending birth and a wife's bed rest forced my hand: I needed to practice law. When we sat down to sign the contingent fee agreement, I was mute on the fact that as a new lawyer I hadn't encountered most problems. As it goes, competence follows experience.

I went home that night with an honest-to-God case and a flesh-and-blood client. I had a stack of manila folders in my desk drawer for the occasion. I went downstairs to my makeshift basement office, pulled one out, and scrawled my client's last name in felt-tip black on the cover. I did a quick conflicts check just to be sure: yes, the other folder had a different last name.

I opened the new file, put the executed agreement inside, closed the cover, and closed my eyes. What next? My client had already sent numerous emails. I opened my Google account and began running through them. Much of it was the extraneous gristle that sharp legal minds cut away, leaving enough for fact patterns and precedent. I cut off what I could and discovered that my client had been shorted thousands of dollars in commissions.

My client told a passionate story of grievance, unfair treatment, and Lady Justice. At the outset, the deal appeared quite large and outside his assigned business segment. Management encouraged him to pursue the deal anyway. He spent an extraordinary amount of time and energy on his work and closed the deal. It was worth thousands of dollars to the company (and thousands of dollars in earned commissions). Suddenly, the payout set in the compensation agreement looked too high, and the company decided to pay my client much less than his due. The company cited a provision in the agreement stating that its internal review board had final say as to how much he would ultimately be paid, on the basis that the deal was over a certain dollar-value threshold.

Sales representatives have a job that often requires as much "right place, right time" circumstances as preparation and hard work. Employers reward sales representatives handsomely for exceeding quota and driving growth for the company. But "right place, right time" circumstances are not contemplated under many agreements when signed—and thus not worthy of full commissions

payment.

I asked experienced sales representative and friend Chad McDonald for insight, and he explained that sales is the lifeblood of any organization, but it's very easy to decrease earned commission payments by one percent and add more to the bottom line. A company must attract high-caliber sales representatives with lucrative pay, but not so much that the company can't turn a profit. My client closed the deal and expected his due, but the company disagreed, and a dispute was born.

Brozo v. Oracle Corp.[1] represents the issue well. On appeal, the majority stated that employers can determine (to a point) how much employees are paid, even if the amount of commissions paid differs from the agreement.[2] In his dissent, Judge Lay writes that any contract granting an employer sole discretion to determine how much to pay employees—after the deal has closed and the work is finished—is an illusory contract.[3] The tension lies between allowing companies discretion in awarding compensation and granting to sales representatives the benefit of the bargain originally struck in the agreement.

A company that wants more control over commission payments should include a provision in the agreement allowing for sole discretion to retroactively change commissions in prescribed circumstances. Make sure the provision contains express language to this effect. When Joe Closer really "kills it" (greatly exceeds quota in sales parlance), the company can prevent paying sales representatives too much money and minimize disputes.

Joe Closer should keep an open line of communication with management. Great deals are usually closed through plain hard work. Occasionally, companies will attempt to characterize the deal as windfall, or some other untoward business event, thereby warranting retroactive discretion to alter commissions. Joe Closer should confirm with the boss that he will be paid properly under the agreement as he works to close the deal.

This I learned after thorough legal research, demand letters, and negotiation. Fast-forward to several months later. I drove to the bank in Uptown and let my thoughts wander. I recalled scrawling my client's last name on the manila folder in felt-tip black, drinking coffee at 11 in the evening, scratching the tension off my head, and thanking my wife for her sympathy. I reached the bank and parked the car. No longer the tentative man, I strolled inside, retrieved my law firm's tax identification number, and sent it to opposing counsel so he could cut the settlement check.

I suppose I did just fine.

[1]324 F.3d 661 (8th Cir. 2003).

[2]*Id.* at 667.

[3]*Id.* at 672.

Chris Bradley is an editor at FindLaw, building websites for lawyers, and is the author of BradleyScribe, a blog of words. Chris can be reached at 651-808-0791 or cbradleylaw@gmail.com.

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Business Law

Say "Yes" to Notaries

By Tami Kamin-Meyer

Your client just signed a lucrative contract to build a million widgets that you spent hours negotiating. Your client is thrilled with your work, and you're about to enjoy a well-deserved vacation. You are just about to stroll out of your office wearing a wide smile when your newly elated client calls with a question that stops you dead in your tracks: "Does it matter the signatures to the contract were not notarized?"

What? You didn't have the signatures to the contract notarized?

Big mistake, says Tim Reiniger, executive director of the National Notary Association in Pasadena, California. According to Reiniger, having a notary public witness a signature is a "powerful risk management tool to prevent fraud and identity theft."

A notary public is a person with a special commission from a state or county government that allows him or her to acknowledge the official witnessing of another person's signature on a document. According to Reiniger, there are 4.5 million notaries in the United States. That figure does not include the millions of lawyers nationwide who by virtue of being an attorney are also vested with that authority. Each state maintains its own rules about whether attorneys are automatically notaries.

He says having a contract signature notarized is important for a few reasons. Chief among them is that under the Federal Rules of Evidence, a notarized document is considered "self-authenticating." The same is true under the rules of evidence in effect in each state, although there are a few states that don't follow this norm. When a document is self-authenticating, the signers of the contract do not need to testify in court to verify the authenticity of their signatures. That saves a lot of time and money. Having a document notarized is, says Reiniger, "a huge strategic advantage" in litigation.

Although the duties of a notary public might seem simple to execute, they are extremely important. First, notaries cannot attest to witnessing a signature unless the signer signs the document in their presence. To ensure the parties signing the document are the real people who are supposed to do so, some states require signers to present identification to the notary. The notary must also ascertain whether people are signing the document voluntarily or under duress. This is especially crucial when a senior citizen or someone with limited English skills is signing a document, says Reiniger. In some states, notaries are required to maintain a journal of the documents they notarize. The journal details the type of identification presented to the notary and a basic description of the document they notarized.

While in the distinct minority, a handful of states require notaries to attend educational courses prior to becoming commissioned. States imposing these restrictions are North Carolina, Pennsylvania, Florida, Missouri, Oregon, and California. Reiniger says he sees this educational requirement a trend in the

industry, one he wholeheartedly supports. “Notaries should receive basic training about their duties,” he says.

He also notes that simply by virtue of being lawyers, attorneys in 11 states are granted notarial authority, although with a few caveats. For example, in Missouri, a state that requires its notaries to undergo educational training prior to becoming commissioned, lawyers wishing to also become notaries are not exempt from that educational requirement. However, in North Carolina, another state that requires precommission education for notaries, attorneys are exempt from participating in those same courses. In New Hampshire, state laws grant broad yet not total notarial authority. However, in Ohio, New York, New Jersey, Connecticut, Louisiana, Maine, North Dakota, and Wisconsin, lawyers are granted full notarial authority.

In one state, California, notaries are also required to obtain the thumbprint of signers in a notary journal, but only in three specific situations. They are when a deed is signed, when a quitclaim deed is signed, or when deeds of trust affecting real property are notarized.

“Prosecutors love it because it leaves an evidence trail,” says Reiniger. Having the thumbprint of a person who fraudulently signed a contract gives “absolute proof of the frauder’s identity,” should that become an issue, he says. Journal entries require a detailed description of the notarial act and are even considered public records.

The determination of venue is another important reason behind getting contractual signatures notarized, says Aronson. Venue identifies the “proper or possible place for a lawsuit to proceed, usually because the place has some connection either with the events that gave rise to the lawsuit or with the plaintiff or defendant,” Aronson says.

However, venue is not the deciding factor for where a case is tried. A court decides the jurisdiction of a case, which determines who has the legal authority to preside over a legal matter. Therefore, jurisdiction may be different from the venue, says Aronson.

Therefore, for many reasons, it’s important to say yes to having signatures to a contract notarized. That simple act could go a long way in saving your client money and aggravation and you a huge malpractice payout.

Tami Kamin-Meyer is an Ohio attorney and writer.

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Business Law

Myers-Briggs Type Indicator (MBTI) Applications in a Law Practice

By Gini Nelson

I've been a practicing attorney for 25 years, but I was a sociologist before I was a lawyer—I have a BA and an MA in sociology and taught undergraduate social problems courses in graduate school before going to law school. I continue to love what a character on *Law and Order: Criminal Intent* (one of my favorite television shows) called Detective Bobby Goren's "predilection for detecting obscure patterns."

Patterns are tools. Tools are great when they are used well and effectively—think "coffee," which I embraced as my vice of choice when I started law school, or what you really *like* about the Internet. They are not so great when they are used badly and ineffectively, if not destructively—think "illegal and offensive profiling," or what you really *dislike* about the Internet.

I like and use Carl Jung's principles of psychological type as measured by the Myers-Briggs Type Indicator®. The MBTI® is probably the most widely used assessment instrument of its kind (millions are administered annually in the United States, and more in other countries). It's also the only general psychological test of personality that has ever been administered to a large number of practicing attorneys. I'm a qualified administrator of it and use Jung's type principles in my own practice, business, and personal life almost daily. With familiarity with its principles, attorneys can help clients get through misunderstandings based on type differences; identify blind spots in the problem solving process based on type; and use type *similarities* to bridge cultural and gender differences in negotiation and advocacy. Indeed, with knowledge of her own type, an attorney can better identify the kind of law practice she wants, and better pinpoint her own weaknesses and strengths in running a law office.

Scientists say that about 50 percent of our temperament is inherited, and that the rest of it is shaped by our upbringing and environment (including gender, ethnicity, socioeconomic factors, and birth orders). Carl Jung's psychological type theory posits inherited preferences that can affect how we negotiate, mediate, or engage in any other form of conflict engagement. Type is like individual style—the various ways we choose to learn, lead, carry on friendships, manage work, and experience conflict—and it is also our deep and enduring "mental habits." Type gives clues about your own and others' general strengths, productive places, and pursuits, clues that you and they are being overwhelmed, common sources of stress, and suggestions for dealing with stress and conflict. Knowledge of type can help us learn to control impulses, show empathy, and persist in the face of obstacles with resilience and flexibility. This enhances leadership ability, enriches relationships, and extends influence.

Use of this psychological type analysis has been studied in the law practice field. The most notable law-related works are University of Florida Law Professor Don Peters's article, *Forever Jung: Psychological Type Theory, the Myers-Briggs Type Indicator, and Learning Negotiation*, 42 Drake Law Review 1 (1993); and Florida Coastal School of Law Professor Susan Swaim Daicoff's book, *Lawyer,*

Know Thyself: A Psychological Analysis of Personality Strengths and Weaknesses, American Psychological Association (2004).

Don Peters's study documented differences in law students' choices in negotiation strategic orientations (between adversarial and problem solving) and styles (between competitive and cooperative) based on their MBTI® psychological type. He concluded that type theory can substantially help negotiators better understand their behavioral inclinations, and further, that these understandings facilitate learning negotiation theory and skill by helping students see when their behavioral tendencies are effective and ineffective within the strategy-style matrix. Finally, he concluded that type theory insights can also help negotiators understand other's actions and appreciate different behaviors by enhancing their abilities to identify, value, and communicate about them more effectively.

Susan Daicoff, after examining 40 years worth of empirical data on the personality of the typical lawyer and law student, concluded that there is indeed a typical lawyer personality and that this personality explains in part both the success of lawyers within the profession and the complaints and jokes about lawyers. She *doesn't* mean MBTI® type (her conclusions are beyond the scope of this article—among other things, she concludes that fully 20 percent of attorneys are "walking wounded," meaning working, functioning, and representing clients while being psychologically impaired enough that intervention is indicated), but she also looks closely at attorneys and MBTI® type characteristics.

Statistically, lawyers' type is significantly different from most other adults in the United States. Lawyers are slightly more likely to be introverts than extroverts. Attorneys tend to be intuitives (57%), while seventy-five percent (75%) of the U.S. population is born with a sensing preference.

Lawyers overwhelmingly prefer thinking to feeling (again, as the terms are used in type theory). Here it's critical to note the difference between "feeling" and "emotions" (ala neuroscience definitions and finding—every person has "emotions," and type "feeling" refers to preferences in dealing with impacts of actions on individuals), and to look at the male/female statistical variations.

Fifty-six percent (56%) of U.S. males have a thinking preference, compared to eighty-one percent (81%) of U.S. male attorneys. The difference is even more striking for females: twenty-five percent (25%) of U.S. females have a thinking preference, compared to sixty-six percent (66%) of U.S. female attorneys.

Finally, lawyers are more likely to prefer judging to perceiving, again as those terms are used in psychological type theory.

These differences from the general population may well help the lawyer do the daily work of law, but the differences may create a gap in understanding between lawyers and nonlawyers, be they clients, staff, or spouses. These differences in

part explain why people perceive lawyers as *different* and why they are critical of attorneys. (Note: corporate clients may be an exception. Top corporate executives are surprisingly similar to lawyers in type.)

It is important to note that people are very complex and varied. People do not fit neatly in one category or another; they range in their responses; and type characteristics can overlap. Superficial understandings and inept uses of any type theory are forms of stereotyping.

And I'm not saying the MBTI is the right tool for everyone, or that everyone who uses it uses it well or correctly. Remember, I was a sociologist before I was a lawyer. My working assumptions in looking for patterns and explanations for human behavior include:

1. No one field can explain human behavior to the exclusion of other considerations. I started out focused on sociological explanations (my BA and MA studies). Later, I became interested in psychology. Later, I became interested in the neuroscience. It's no one of them. It's all of them (and more, most likely).
2. For each field that has a role, its explanations are also affected by the other fields: It's not additive, it's complex, and synergistic.
3. Most individuals don't want to deal with complexity, or don't have the education or time to deal with complexity, and end up (over)simplifying, especially for explanations of how and why humans act as they do.
4. Every tool (whether sociological, psychological, or a theory about neuroscience) can be used by people who are not the most skilled or wise about its use, and can be misused.
5. Any explanation, or explainer, who doesn't recognize the above is suspect.

Gini Nelson is a sole practitioner in Santa Fe, New Mexico. Her practice emphasizes private dispute resolution, including distance dispute resolution, and domestic, bankruptcy, and bankruptcy avoidance law. She is a member of the State Bar of New Mexico's Law Office Management Committee; publishes EngagingConflicts, a Mediate.com Featured Blog, and can be reached at 505-629-0768 or GiniNelsonLaw@gmail.com.

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Business Law

Finding Your Better Half: Paralegals in the Small Law Office

By Todd C. Scott

More often than ever before, lawyers are choosing to practice law in small law firms or as solo practitioners. At some point, many of these small firm lawyers will also conclude that hiring a paralegal makes sense for the success of their law practices.

Identifying the right candidate to work as a paralegal in your law practice is not always easy. For some attorneys, after looking at the process of finding a paralegal and negotiating a wage and benefits package while training them to work alongside you, they may conclude it is not worth the trouble. But many small firm lawyers who have decided to take on the additional help have been pleased with their decisions and have found that adding a paralegal may have been the necessary step to operating a thriving practice for the long run.

"Having a good paralegal frees me up to be a better lawyer," says Ann Barker, a solo practitioner who operates a family law practice in Owatonna, Minnesota. "I want to be a lawyer, not a bookkeeper. Doing it all is not very attractive to me."

Barker also points out that for the attorney's overall health and wellness, "Having a paralegal means you don't have to be tied down to the law practice 24/7. You need to have a life, and taking it all on yourself will burn you out and shorten your career as a lawyer."

If you have decided to hire a paralegal, where to find a good one can become a difficult first step. Minnesota, like every other state, does not require certification status for an individual to operate as a paralegal, so finding an individual who's well trained may require contacting the postsecondary institutions around the state that offer educational programs and training for paralegals.

For years, programs like the ones at the Minnesota School of Business, Inver Hills Community College, Winona State University, and Hamline University have trained students in paralegal studies so they will be able to hit the ground running when they reach their new law firms.

Jeanne Kosieradzki is an attorney who serves as chair of the legal studies department at Hamline University in St. Paul, Minnesota, points out that not all paralegal studies programs are alike.

"Employers want paralegal graduates from an ABA-certified program," says Kosieradzki. Hamline University's paralegal studies program is ABA certified, which requires Kosieradzki to apply for certification every seven years. The certification process also requires Kosieradzki to show the ABA Hamline's class syllabi, extensive background information about their educators, student feedback, and that they are staying current with ABA standards—especially in areas that may be hard to meet, like legal technology training.

Some lawyers, like Barker, would rather identify potential candidates for

paralegal positions from an office temp agency that may already be familiar with their law practice, as well as the personality type of the attorney.

"They do the screening," says Barker. "I pay a premium to the temp service, but then the employee is on their payroll for the first 90 days, and I don't have to worry about the having the payroll structure set up."

After the first 90 days are over, lawyers usually has the option of offering a position to the candidates, or letting them go—another task that the agency will take care of.

Kosieradzki also points out that lawyers in small firms may have an advantage when attempting to hire a well-qualified paralegal.

"Small law firms tend to offer more flexibility to paralegal candidates, making them attractive workplaces to the most qualified candidates," says Kosieradzki. Owners of small law firms may get the benefit of hiring well-qualified paralegals for less pay, and in return, the employee may expect to receive more flexible work hours, or work from an office that is closer to their home.

In 2006, Minnesota CLE, Minnesota Lawyers Mutual, and the Practice Management and Marketing Section of the MSBA jointly conducted a survey of small firm lawyers, in which they were asked to report what they were currently paying their nonlawyer assistants in annual salary. The most frequent response from small firm lawyers who had hired new nonlawyer assistants was $20,000–$24,999. Nonlawyer assistants with 5 to 10 years experience were most frequently earning $25,000–$29,000, and those with 10 or more years in the industry typically earned $40,000 to $45,000 annually.

Of course, what you pay your paralegal can depend upon many variables, including the practice area you specialize in, what types of tasks and duties they take on as your assistant, or even how good they are on the phone with your clients.

The attorney's foremost responsibility when hiring nonlawyer staff is to supervise their performance to make sure they understand the ethics associated with a law practice, and that they will always maintain the ongoing duty of client confidentiality—even well after they have left your office to work elsewhere.

Paralegals are often thought of as being the first line of defense when dealing with client matters, and their demeanor with clients will often reflect the treatment they receive from the attorneys they work for. Take time to talk to your paralegal about the frustrations they encounter and the problems they see. You'll find that heir instincts are good ones: to look out for what's best for your law firm, to make sure the clients are being treated fairly, and to see that the boss is happy.

Todd Scott is the Vice President of Member Services for Minnesota Lawyers Mutual Insurance Company. He is a member of the Minnesota State Bar Association, where he serves as Co-Chair of the Practice Management & Marketing Section, and the Nebraska State Bar Association.

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Business Law

Being Prepared With Law Office Emergency Planning

By Lloyd D. Cohen

From a hospital bed a lawyer scheduled for emergency surgery begins a stream of consciousness recitation about the law office. The anxious spouse jots onto "sticky notes" everything that can be remembered about files, deadlines, and money. The surgery is a success, but the ethical and malpractice exposure is a near miss. Another lawyer is not so lucky. By the time that the family recovers from the shock of the lawyer's untimely demise, the staff has fled, the clients have panicked, and the value of the practice has disappeared. Still another lawyer temporarily separated from the practice by a freak occurrence wonders how to get word to any of a number of friends who would volunteer to help if only someone had a clue! What the above examples have in common is an emergency situation exacerbated due to a lawyer's loss of ability to supervise a law practice. Regardless of the type of emergency at hand, the professional aggravation compounding it can be minimized if some forethought is given to the development of a law practice emergency plan.

A new ABA book titled *Being Prepared* explains how lawyers can insulate their law practice from life's unexpected events and at the same time fortify themselves against the ethical and malpractice demons that may haunt these contingencies. Regardless of whether the emergencies at hand spring from a personal disability or a larger unexpected event, these contingencies emphasize the importance of developing an emergency casualty manual. The manual does not necessarily need to be a notebook or even be on paper, but somehow enough information must be preserved to provide a game plan for your helpers. Events that can diminish your ability to supervise your practice can be as widespread and devastating as a Gulf hurricane or a Mississippi flood, but they can also be as personal and intimate as sickness or as serendipitous and capricious as an isolated a civil disturbance occurring while you are at your favorite vacation spot. If the inevitable occurs, becoming prepared now can protect your life's work and reputation. Although a flood or hurricane may provide a good excuse for losing files or missing deadlines, the tasks needed to prepare a law office for headline disasters are much the same as the steps needed to make sure your professional practice is protected in the event of personal disability or other temporary absence.

No one wants to plan on having a disaster, but lawyers know the value of being prepared. Even when faced with a case that has a bad set of facts, being prepared allows a lawyer to take advantage of opportunities that can sometimes turn a poor start into a winning finish. In somewhat analogous fashion, being prepared for life's unexpected events can allow a lawyer to save a practice. The plan needs to organize a human support network available to help if you are sidelined. Then, the plan should create the legal relationships needed to empower your helpers. Then some kind of emergency manual should be readied to preserve the essential parts of your firm's institutional memory in order to provide continuity for clients and support for office functions. Finally, appropriate controls for access to this information must be set in place. Within this context, the following factors should be considered:

1. The Unexpected Can Happen

1. Compromise of your office or physical plant
2. Interference with your ability to get to your office
3. Sudden diminishment of your physical or cognitive ability to supervise your office or cases

2. Identify and Nominate People Who May Be Available to Help
    1. Secondary helpers who may to available to give support and who are aware of your preparation and the identity of your primary helpers
    2. Primary Helpers
        1. Lawyer or lawyers who, if necessary, can review cases and contact clients, and if needed, take immediate protective action to preserve client rights
        2. Lawyer or nonlawyer friends who might be available to help preserve your physical plant, if needed
        3. Helpers who can assist in maintaining your firm's financial integrity
3. Enable Your Helpers
    1. Consider a financial power of attorney
    2. Consider backup bank account signing authority
    3. Consider other formal or informal agreements
4. Facilitate Your Helpers
    1. Back up: (1) passwords, (2) bank names and account numbers, (3) alarm codes or office keys, and (4) any other essential information
    2. Describe where and how to access your primary and other calendars and dockets together with contact names and phone numbers of courts or persons with whom you normally have contact
    3. Describe where and how to review active files to determine if any immediate action is needed to maintain a case, insure compliance with deadlines, or other action needed to protect client rights
5. Guild Your Helpers
    1. Provide instructions for when and how information about your clients and your practice should be accessed and when and how it should be used
    2. Provide for both multiple safeguards and multiple helpers so that no one person can act unilaterally and at the same time no one person becomes indispensable; thereby the "team" will be able to adapt to changing circumstances, as needed
6. Be Prepared by Preserving Your Emergency Casualty Plan
    1. Store a copy or copies of the above information in alternate safe place(s)
        1. One of the places can be in an electronic format
        2. One of the places should be a different physical location from your office
    2. Give effect to your plan and preparations by making sure that one or more of your primary helpers know about your emergency casualty plan and one or more of your primary helpers know how to retrieve it

The ABA book *Being Prepared* guides lawyers though these factors and explains

how to record your firm's intuitional memory, gather your human support network, and form the legal relationships that will create your emergency plan. Because the last thing that small firm lawyers need is another management project, the great thing about this book is that it shows the reader how to avoid having to assemble everything alone. It actually guides whatever helpers you nominate, delegate, or otherwise enlist. It makes preparation into a process that does not require doing everything at once. The book is divided into portions and steps that permit progress in stages, and it is organized for delegation. Chapters 1 and 2 of the guide immediately bring a beginning level of preparedness. Chapter 1 introduces the concepts and provides the first questionnaire, while chapter 2 is a guide for helpers during the first 72 hours following an emergency. These two chapters can be completed immediately, and together they give you the beginnings of a recovery plan. Chapters 3, 4, 5, and 6 fortify the ability to respond to crises by providing more details, additional questionnaires, and refined plans. Their completion creates a framework that would help your law office adapt in the event of an unforeseen extended period of absence or unavailability.

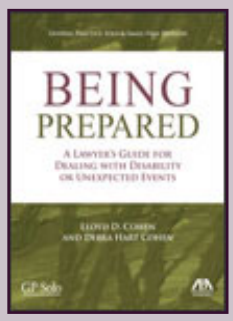
To complete an emergency plan, you do not need to dwell on every detail or fill out every questionnaire. They are provided as a compendium of items that you can consider, delegate, discard, or use. Their function is to permit you to dispense with the need to consider everything the entire project might entail before getting started. This book is a working manual that simply allows you to get started. Chapter 7 adds resources that include a number of Internet links for free downloadable legal forms. Instead of merely reprinting what's already available on websites, the authors instead describe both the sources and contents of existing available free sites so that you can efficiently obtain appropriate planning documents without having to read though entire scholarly works. Together with a completed emergency manual, the planning documents would help your family or estate preserve the value of your law practice should something happen to you. The completed plan would provide continuity for a deceased lawyer's active cases. The plan would also establish a structure in which a caretaker lawyer could provide immediate action to protect client interests. However, because death is only one of many casualties that can befall any of us at any time, this guide does not dwell on that possibility. Instead, it focuses on the self-reliant, independent, essential practitioner for whom temporary casualties should stay temporary and not escalate into professional or economic catastrophes.

The picture of the past was a solo lawyer surrounded by a team of loyal support people. The picture of the future is a small firm lawyer surrounded by computers, electronic aids, and outsourced services. As inefficient as the past was, that bloated staff collectively maintained an institutional memory that could be tapped when their boss was absent. Today's efficiency is achieved through the sacrifice of a staff that knows everything about the office. Furthermore, this evolution to electronic practice styles now comes at a time when the "graying" of our profession raises the absent lawyer scenario to a matter of heightened concern. These modern problems can be alleviated though the development of an emergency manual and plan. For more information about these issues and their solutions, look for *Being Prepared: A Lawyer's Guide for Dealing with Disability and Unexpected Events* by Lloyd D. Cohen and Debra Hart Cohen,

which should be on the ABA Solo|GP Bookstore website in August.

Lloyd D. Cohen is a solo of more than 28 years, has practiced a lot of bankruptcy and a little estate planning in Columbus, Ohio, and can be found at www.lloydcohen.com or blog to http://planandprepare.blogspot.com.

Being Prepared: A Lawyer's Guide for Dealing With Disability and Unexpected Events



Did you find this article helpful? Do you think more information like this would help you? More information is available.
If you haven't started thinking about, or formulating an action plan to properly protect your law firm, your clients and your family in the event of a temporary disability, incapacity or death, this book will help you to jump start that process. The book is a "how to" workbook to assist you in taking active and immediate steps to develop a plan so that your designees can carry out your wishes and protect the financial and professional integrity of your firm if you are unable to do so. BONUS: The book is accompanied by a CD-ROM with various forms and worksheets that can be mixed and matched to meet your needs.
$104.95; $89.95 for General Practice, Solo & Small Firm Division Members Product Code: 5150423 GP/Solo members can purchase this book, which includes electronic forms, at a discount through the GP/Solo bookstore website: http://www.abanet.org/abastore/index.cfm?section=main.

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Business Law

Raising Money for the Small Business

By Jean L. Batman

Which Laws Should a Small Business Be Aware of When Raising Money?

Editor's Note: Presently being marketed by the Division is an outstanding book on advising small businesses. The book contains not only suggestions and issues to consider in representing a small business but also contains many of the forms that will assist you in your daily representation of a company. Please read the portion that follows. If you like it, click the link below and purchase the book. Best wishes, Jim

Even when clients already have groups of friends and family lined up for a seed round of financing, they need to be aware of their securities law obligations because there are a number of legal issues and requirements to be concerned about. The applicable requirements will be determined in part by the number of investors, which state (or states) they are in, and whether they are all "accredited investors."

Whenever a company raises funds by selling common stock, membership interests, limited partnerships, convertible debentures, or some other form of equity, it is selling securities and must comply with applicable securities laws. This basic rule applies regardless of the consideration received—services, cash, notes, or other property such as stock in another company. Generally, whenever an "issuer" (i.e., the company selling its equity) wishes to sell any securities, it must register those securities with the Securities and Exchange Commission (SEC) and appropriate state regulators, unless one of the many exemptions from registration applies to the proposed sale. For offerings that qualify for an exemption from registration, rules must be observed governing the way in which the offering is conducted, the filing of notices, payment of fees, consents to service, and in some cases submission of offering documents.

Companies often rely on the so-called private placement exemptions from the securities registration requirements. Typically, an issuer can sell stock to any number of accredited investors and to a limited number of investors who don't meet the accredited investor standard in a private (i.e., nonpublic) offering. Reasonable disclosure about the business must always be made to prospective investors; and if the company is selling stock to investors who are not accredited, specific written information about the business must be provided. When a company relies on these exemptions, it will be required to make certain notice filings with the SEC and with state securities regulators in states in which offers or sales are made. Failure to comply with the securities laws can subject a company or its principals to investors' claims for their money back ("rescission" claims) and other penalties.

Whenever a company is dealing with securities law issues, a lawyer should be consulted. Problems with early stage fund-raising may subject the company to rescission claims and could dissuade venture capitalists, institutional investors, and fund-raisers from working with the company later.

Rule 506 of Regulation D is a "safe harbor" for the private offering exemption, assuring issuers that they are within the section 4(2) exemption if they satisfy the standards within the rule. The criteria for reliance upon the Rule 506 exemption from registration are that the offering be made without any means of "general solicitation"; that the offering be made to no more than thirty-five persons who are not "accredited investors"; that each nonaccredited investor be financially sophisticated (that is, has such knowledge and experience in financial and business matters that he or she is capable of evaluating the merits and risks of the investment); and that if the offering is made to any nonaccredited investors, the same detailed disclosures required in comparable public offerings be made to them. Blue-sky compliance (meaning the securities law compliance in each state where the securities are offered or sold) for Rule 506 offerings was simplified by the National Securities Markets Improvement Act of 1996 (NSMIA), section 18(b)(4)(D) of the Securities Act of 1933, which preempts a state's registration requirements with respect to securities being offered and sold under Rule 506 of Regulation D. States are permitted only to (i) require a notice filing from the issuer, (ii) impose a filing fee, and (iii) require the issuer to consent to service of process in the state. In accordance with NSMIA, each state generally requires an issuer that offers and sells securities in its state pursuant to Rule 506 to submit the following materials within fifteen days after the first sale of securities in that state in order to qualify for an exemption from registration: (a) an executed copy of Form D Notice of Sale of Securities, (b) an executed copy of Form U-2 Uniform Consent to Service of Process, and (c) a filing fee. A Form D must also be filed with the SEC.

The *Securities Lawyer's Deskbook*, a website maintained by University of Cincinnati College of Law, is a great resource for accessing the federal securities laws (at http://www.law.uc.edu/CCL/index.html). The Securities and Exchange Commission website is also a great resource at http://www.sec.gov.

Is It Okay to Put Fund-Raising Information on a Website?

No general solicitation is permitted in connection with a private offering of securities, thus the designation of the offering as "private." Don't let your client put fund-raising information on its website, or it will likely be deemed to have made a general solicitation in connection with its sale of securities.

A problem that often arises in meeting the criteria of the Rule 506 safe harbor is that either the company's officers and directors or the selling agent inadvertently engages in an act that is deemed to constitute a general solicitation, or at least cannot be affirmatively shown not to involve a general solicitation (the burden of proof being upon the person seeking to rely upon the exemption). Often the problem arises indirectly, and the company's management or the soliciting agent are not aware of the issue until it is too late.

A typical action that raises a general solicitation issue is a mass mailing to potential investors, even if the mailing is confined to accredited investors. To preclude these issues from arising, the company's management and the selling

agent should review carefully in advance the strategies for solicitation of investors in the offering. Form letters, particularly to strangers, should be avoided, as should mailings with similar contents to a large number of persons. An appropriate procedure is to forward the offering materials or an executive summary to persons with whom management or the selling agent has an existing, established relationship (such as, for example, an existing securities customer of the selling agent) to determine if the recipient has any interest in the offering. The contact should be direct and personal, not general and to a number of persons, and particularly not to a number of strangers. A mass mailing by a selling agent in an attempt to solicit for itself, through advertising, newsletter, or otherwise, new accredited customers (especially strangers) can be deemed a general solicitation if the company's offering is then in progress—unless steps are taken to preclude any person so solicited from becoming an investor in that pending offering.

One common occurrence that creates general solicitation issues is the appearance of a company's management before a meeting of an investment forum consisting of potential investors, even if confined to accredited investors. The nature of these gatherings and how they are assembled will determine whether they are deemed to involve a general solicitation. Some of these groups have sought and obtained no-action letters from the SEC assuring that the Commission will not take any administrative action if their methods of operation are confined to certain stated circumstances. Companies that desire to appear before such groups should inquire before appearing as to whether the group has obtained such a no-action or interpretive letter and whether the circumstances recited in these letters are being observed. Otherwise, the ability to proceed with funding may be impaired or precluded.

Another common occurrence that creates general solicitation issues is media coverage at or near the time of the offering. If the company becomes the object of media reporting, even if not sought out by the company, a general solicitation may be deemed to be involved. Particularly problematic are news reports or articles that mention the company's possible financial success or the fact that it is or may be seeking financing. Unless the company is then actually engaged in product or service marketing efforts, reports by the media should generally be avoided. If product or service marketing efforts are then actually in progress, media coverage should be confined to information concerning the company's products or services, and then only to the extent that it might be of interest to potential customers.

It goes without saying that no solicitation of investors should be entered into directly or indirectly by any form of paid advertising, whether in newspapers or on radio or television. Such activity is usually inconsistent with the concept of a "private" offering and in any event is expressly prohibited by Regulation D.

The foregoing are examples of typical ways in which a "general solicitation" issue can arise. There are many other possibilities, of course. It is thus important for those persons involved in a private offering to be alert to the general solicitation

prohibition and the ways that it may be violated, and to ask securities counsel for guidance when doubts arise before irreversible action has been taken.

Jean L. Batman founded Legal Venture Counsel, Inc., in 2004 to provide outside general counsel services to investors, entrepreneurs, and small businesses. As outside general counsel to a variety of companies and individuals, Ms. Batman provides business and financial legal services to privately held entities operating in a broad range of industries. Ms. Batman chaired the ABA Business Law Section's Small Business Committee from 2001 to 2005.

Advising the Small Business: Forms and Advice for the Legal Practitioner

Did you find this article helpful? Do you think more information like this would help you? More information is available. *Excerpted from Advising the Small Business: Forms and Advice for the Legal Practitioner, 2007, by Jean L. Batman, published by the American Bar Association General Practice, Solo and Small Firm Division. Copyright © 2008 by the American Bar Association. Reprinted with permission.* ***GP/Solo members can purchase this book, which includes electronic forms, at a discount through the GP/Solo bookstore website:*** *http://www.abanet.org/abastore/index.cfm?section=main.*

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Estate Planning

Ten Things to Do to Prepare a Will for Probate

By Angela Barker

If you are the executor of a will there are many things you must do to get that will ready for probate. Probate means the process by which the deceased's assets are gathered; outstanding debts, taxes, and expenses of the funeral and the probate process are paid; and the assets are distributed to the beneficiaries in the will. Following here are the top ten things needed to prepare for probate.

1. Get names and addresses of all person named in the will;
2. Determine if the deceased has any pending financial or legal matters requiring immediate attention;
3. Arrange for a meeting with everyone named in the will;
4. Gather, do not destroy, any of the deceased's records, tax returns, checks, or other documents;
5. Get death certificates (from funeral home);

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6. Keep careful records of all funeral-related expenses;
7. Don't pay debts unless truly necessary;
8. Change locks on the door if deceased lived alone;
9. Secure valuable items;
10. Notify insurance carriers of the recent death.

Angela Barker is a graduate of Columbia Law School and is an attorney in private practice. Her firm, The Law Office of Angela Barker & Associates, LLC, handles a full range of family law matters, including, prenup agreements, divorce, legal separation, establishment and modification of child support, establishment and modification of child custody and visitation, and cohabitation and domestic partnership documents. The law office also handles a full range of real estate transactions and trust and estate matters. She is admitted to practice in the State and Federal Courts of New York and New Jersey. Visit her at www.angelabarkerlaw.com.

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Family Law

- The Write Stuff

  By Brian Hermanson

The Write Stuff

By Brian T. Hermanson

The trial of a family law case has always been an example of “he said, she said.” It is amazing how different people see the same facts in different ways. I have been involved in cases in which both parties have testified to the court that the child lives with them almost every day. Obviously, both parties cannot be telling the truth. I have seen one party say that they have great contact with the child when the other party says that the opposite is true. What a dilemma for the trial judge and a problem for the lawyer wanting to prove his client’s case.

To help resolve this problem, I have told my clients at the first interview that they need to immediately write down everything that happens regarding the other party and the child. I suggest that they get one of those free calendars given out by insurance companies and write down when the other parent calls, when child support is paid, when visitation is held, and everything else that occurs (or

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doesn't occur). (Marketing tip: Think about giving your clients calendars with your name on it so they will think of you when future changes happen.) I tell my clients to do this not only while this case is pending, but until the child is no longer receiving benefit from the orders of the court.

Does having this record prove that the written notations are true? No. But I would suggest the court is going to be more likely to believe those notations than someone trying to remember something that may have happened weeks or months before trial. It just adds a bit of credibility to the claims of your client. That increased credibility might be all you need to prevail.

I have been recommending this to my clients for years. I am beginning to see cases now where clients come back to my office on motions to modify, and the first thing they show me are their calendars. All of a sudden I have all the history that I will need to prove our case. I then use those dates so that I can prepare graphs and other demonstrative exhibits showing all the facts that will support my client's position.

Now when the other side tries to put on evidence that his client has exercised every visitation, I can come back with evidence that those visitations either did not occur or that the other party would always bring the child back early and unfed. Now we have a leg up on the other side that may be enough to convince the judge that the other side is not telling it like it is.

This same type of thinking should be used whenever your client has to deal with the other parent. When your client is paying child support, get a receipt. Do it whether the client is paying cash or by check. It will show the day you put the check in the hands of the other party. If you are dealing in cash, it will prove to the court that you are complying with the orders of the court. There have been some real problems when a person has paid in cash and no receipts were obtained. What happens if the other party denies that the payments were made? What if the other party, through death or illness, is not available to acknowledge what payments were made?

Bottom line: none of our clients should be paying in cash. Have the client use money orders so that a money trail is there. And as I said above, get a receipt to show when the money order was delivered to the other parent. If they live out of town, do a certified letter or deposit it to their account yourself and keep the receipts.

And please, make sure your client preserves all of this proof. To get a receipt and then lose it does no one any good, except maybe the other side.

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Litigation

Immigration Security Checks: How the Process Works

By Neil S. Dornbaum and Kathleen M. Peregoy

Many have asked for an explanation of the USCIS security check program, as it has been blamed for delaying the finalization of many immigration filings. Below is an overview of the requirements.

Background

All applicants filing for a U.S. immigration benefit are subject to criminal and national security background checks to ensure they are eligible for that benefit. U. S. Citizenship and Immigration Services (USCIS), the federal agency that oversees immigration benefits, performs checks on every applicant, regardless of ethnicity, national origin, or religion. Since 2002, USCIS has increased the number and scope of relevant background checks, processing millions of security checks without incident. However, in some cases, USCIS customers and immigrant advocates have expressed frustration over delays in processing applications, noting that in some cases individual customers have waited a year or longer for the completion of their adjudication pending the outcome of security checks. Although the percentage of applicants who find their cases delayed by pending background checks is relatively small, USCIS recognizes that for those affected individuals, the additional delay and uncertainty can cause great anxiety. Although USCIS cannot guarantee the prompt resolution of every case in its communications with the public, USCIS assures the public that applicants are not singled out based on race, ethnicity, religion, or national origin. Currently, USCIS reports more than 300,000 applications are on hold nationwide, with more than 100,000 pending more than one (1) year due to security checks.

USCIS strives to balance the need for timely, fair, and accurate service with the need to ensure a high level of integrity in the decision-making process. The information appearing below is taken from an informational that bulletin outlines the framework of the immigration security check process, explaining its necessity, as well as factors contributing to delays in resolving pending cases.

Why USCIS Conducts Security Checks

USCIS conducts security checks for all cases involving a petition or application for an immigration service or benefit. This is done both to enhance national security and ensure the integrity of the immigration process. USCIS is responsible for ensuring that our immigration system is not used as a vehicle to harm our nation or its citizens by screening out people who seek immigration benefits improperly or fraudulently. These security checks have yielded information about applicants involved in violent crimes, sex crimes, crimes against children, drug trafficking, and individuals with known links to terrorism. Completing these investigations require time, resources, and patience, and USCIS recognizes that the process is slower for some customers than it would like. Because of that, USCIS is working closely with the FBI and other agencies to speed the background check process.

Immigration Security Checks-How and Why the Process Works

How Immigration Security Checks Work

To ensure that immigration benefits are given only to eligible applicants, USCIS adopted background security check procedures that address a wide range of possible risk factors. Different kinds of applications receive different levels of scrutiny. USCIS normally uses the following three background check mechanisms but maintains the authority to conduct other background investigations as necessary:

- **The Interagency Border Inspection System (IBIS) Name Check**—IBIS is a multiagency effort with a central system that combines information from multiple agencies, databases, and system interfaces to compile data relating to national security risks, public safety issues, and other law enforcement concerns. USCIS can quickly check information from these multiple government agencies to determine if the information in the system affects the adjudication of the case. Results of an IBIS check are usually available immediately. In some cases, information found during an IBIS check will require further investigation. The IBIS check is not deemed completed until all eligibility issues arising from the initial system response are resolved.
- **FBI Fingerprint Check**—FBI fingerprint checks are conducted for many applications. The FBI fingerprint check provides information relating to criminal background within the United States. Generally, the FBI forwards responses to USCIS within 24–48 hours. If there is a record match, the FBI forwards an electronic copy of the criminal history (RAP sheet) to USCIS. At that point, a USCIS adjudicator reviews the information to determine what effect it may have on eligibility for the benefit. Although the vast majority of inquiries yield no record or match, about 10 percent do uncover criminal history (including immigration violations). In cases involving arrests or charges without disposition, USCIS requires the applicant to provide court certified evidence of the disposition. Customers with prior arrests must provide complete information and certified disposition records at the time of filing to avoid adjudication delays or denial resulting from misrepresentation about criminal history. Even expunged or vacated convictions must be reported for immigration purposes.
- **FBI Name Checks**—FBI name checks are also required for many applications. The FBI name check is totally different from the FBI fingerprint check. The records maintained in the FBI name check process consist of administrative, applicant, criminal, personnel, and other files compiled by law enforcement. Initial responses to this check generally take about two weeks. In about 80 percent of the cases, no match is found. Of the remaining 20 percent, most are resolved within six months. Fewer than one percent of cases subject to an FBI name check remain pending longer than six months. Some of these cases involve complex, highly sensitive information and cannot be resolved quickly. Even after FBI has provided an initial response to USCIS concerning a match, the name check is not complete until full information is obtained and eligibility issues arising from it are resolved.

For most applicants, the process outlined above allows USCIS to quickly determine if there are criminal or security-related issues in the applicant's background that affect eligibility for immigration benefits. Most cases proceed without incident. However, due to both the sheer volume of security checks USCIS conducts, and the need to ensure that each applicant is thoroughly screened, some delays on individual applications are inevitable. Background checks may still be considered pending when either the FBI or relevant agency has not provided the final response to the background check or when the FBI or agency has provided a response, but the response requires further investigation or review by the agency or USCIS. Resolving pending cases is time consuming and labor intensive; some cases legitimately take months or even several years to resolve. Every USCIS District Office performs regular reviews of the pending caseload to determine when cases have cleared and are ready to be decided.

Note: USCIS does not share information about the records match or the nature or status of *any* investigation with applicants or their representatives.

In some cases you may want to consider using various procedures available to expedite a pending security check. To discuss eligibility and options, you should contact your legal representative.

Neil S. Dornbaum and Kathleen Peregoy are members of Dornbaum & Peregoy LLC Newark, New Jersey. Their practice is limited to immigration and naturalization with special emphasis on employment-based immigration. The firm is listed in Martindale-Hubbell's "Preeminent Lawyers," and both members are listed in "Best Lawyers in America." They also appear in *New Jersey Magazine*'s listing of "Top Lawyers" for their work in immigration law, and the "Super Lawyers" publications.

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No Need for Concern If You Have I-140 Receipt Notices

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on Which the EB Category Is Listed As "Unknown"

By Neil S. Dornbaum and Kathleen M. Peregoy

In the wake of 300,000 filings made between July 2007 and August 17, 2007, there have been many inquiries made about the issuance of I-140 receipt notices that indicate the employment-based (EB) category as "unknown." This has caused concern among individuals uncertain as to which category their case has been assigned. The USCIS has stated that this is a result of its exercising its discretion to eliminate the designation (that would require a clerk to first review the file to determine the category). In order to expedite the processing, given the heavy volume of filings received, USCIS determined to dispense with including the designation, but has also indicated this will not have any effect on the validity of any petition.

In most cases, the notation of "unknown" on the I-140 petitions is not a result of any error by the applicant or USCIS's processing department. Due to the increase of I-140/I-485 filings during the summer of 2007, USCIS was forced to streamline its processing procedure in order to ensure that receipt notices were processed and delivered to the applicants in a timely manner. Even with USCIS's recognition of the need for speed, it took 10–12 weeks after August 17, 2007, to confirm the issuance of any appreciable number of receipts. This delay occurred even though the USCIS directed the receipting contractors to enter only the data fields that are required to process filings in order to expedite processing. USCIS has been indicating the correct EB category on the I-140 approval notices and add any additional information not initially indicated during the first screening process when the USCIS examiner reviews the petition.

You should still check all receipts carefully, however. There are many errors, including first and last name reverses, spelling errors, Country of Birth, and Date of Birth errors. If you see these types of errors, you should contact USCIS or your legal counsel to seek a correction.

Neil S. Dornbaum and Kathleen Peregoy are members of Dornbaum & Peregoy LLC Newark, New Jersey. Their practice is limited to immigration and naturalization with special emphasis on employment-based immigration. The firm is listed in Martindale-Hubbell's "Preeminent Lawyers," and both members are listed in "Best Lawyers in America." They also appear in *New Jersey Magazine*'s listing of "Top Lawyers" for their work in immigration law, and the "Super Lawyers" publications.

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Litigation

DHS Final Rule Effective November 1, 2007: I-485 Receipt Notices No Longer Required When Traveling

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Under the H and L Visas After Filing for Permanent Residence

By Neil S. Dornbaum and Kathleen M. Peregoy

Now that the holiday travel season is almost upon us, it is worthwhile to remind you that last year the Department of Homeland Security (DHS) issued a Final Rule, effective November 1, 2007, that eliminates the previous requirement that all foreign nationals who travel abroad under their current H or L status must possess an original receipt notice for a filed I-485, Application for Adjustment of Status. Before this Final Rule was published, a pending I-485 application was voided if the applicant traveled abroad without either an approved advance parole (AP) or a valid H (H-1B/H-4) or L (L-1/L-2) visa together with the original receipt notice pertaining to the filing of an application for adjustment of status, upon reentry into the United States.

The Final Rule repeals the I-485 receipt notice requirement and allows applicants in H-1B/H-4 or L-1/L-2 to travel without it, without risking the validity of their pending I-485 applications. The rule was issued in the wake of the mass of I-485 filings in June, July, and August 2007 because many immigrant classes were deemed current, and there was a wave of filed I-485s for which receipts could not be issued timely due to volume. An effort to increase convenience and eliminate unnecessary burdens on foreign nationals traveling, the requirement was lifted because DHS could not guarantee immediate issuance and mailing of receipt notices due to the influx of applications. To avoid problems for applicants in H1B/H-4 or L-1/L-2 status who want or need to travel abroad, this Final Rule was issued to accommodate any immediate and necessary travel by I-485 applicants currently in H or L status.

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Litigation

Trends in Construction Dispute Resolution: An Opportunity for Small Firm and Solo Practitioners

By David D. Hammargren

The evolution of dispute resolution processes in the construction industry has created a number of opportunities for attorneys in small law firms or solo

practices. Not that many years ago the industry began to rise from the primordial ooze of litigation and regularly breathe the fresh air of arbitration as a means for resolving its claims and disputes. Slightly more than ten years ago, the industry ceased walking on all fours, stood erect, and began introducing in its contract documents the concepts of (a) early initial claim consideration by the project architect, and (b) mandatory mediation before arbitration. This evolutionary process has continued, and in late 2007 the industry took a number of important strides forward to make its dispute resolution processes more meaningful and effective.

Two Significant Trends Emerge

The construction industry (and its lawyers) have historically relied upon and utilized standard form construction contracts and related documents. Although these form documents are typically modified or customized by the parties on a project-by-project basis, one may study the development of these documents over the years to identify industry issues and trends. Two things happened in late 2007 that are of great interest to construction industry participants and observers: the American Institute of Architects (AIA) completed its ten-year review and modification of its family of contract documents, and a number of industry organizations banded together to create an entirely new set of construction contract form documents under the name ConsensusDOCS.

The revised AIA documents and the ConsensusDOCS documents hint at the further evolution of construction industry dispute resolution processes by illustrating two trends: first, a trend to emphasize earlier and less formal resolution of disputes; and second, a trend to utilize independent third parties as the initial arbiter in the early dispute resolution process.

The AIA Process

The AIA contract documents, drafted by architects, have historically required that the contracting parties submit claims and certain disputes to the architect for consideration and decision before the binding arbitration process could begin. Only after the architect rendered its decision or failed to render a decision could a party demand arbitration. See paragraph 4.5.4, AIA A-201 (1987). In addition, the AIA documents specified the American Arbitration Association (AAA) as the arbitration administrator and required compliance with the AAA Construction Industry Arbitration Rules. *Id.*, paragraph 4.5.1.

1997 Revisions

The dispute resolution provisions of the AIA documents were substantially revised in 1997. The standard General Conditions, AIA A-201 (1997), still required that claims be submitted to the architect for an initial decision, but an intermediate requirement of mandatory mediation was inserted before binding arbitration could be pursued. See paragraph 4.5, AIA A-201 (1997). Unless the

parties agreed otherwise, they were required to mediate according to the Construction Industry Mediation Rules of the AAA. *Id.*, paragraph 4.5.2.

The arbitration provisions in AIA A-201 were modified and streamlined in 1997. *Id.*, paragraph 4.6. Procedures for demanding arbitration were simplified, and the time for demanding arbitration was shortened from 45 to 30 days after the claim was submitted to the architect. Although the AAA was still the designated arbitration administrator, the door was left open for the parties to select a different provider.

2007 Revisions

The new 2007 versions of the AIA documents illustrate the further development of meaningful dispute resolution procedures in the construction industry. Key provisions include the following:

1. ***Initial Decision Maker***. This requirement in the AIA documents that the architect consider claims and render decisions before the parties could proceed to mediation and arbitration was a concern for many in the industry. First, contractors believed architects to be biased, favoring owners (who happened to be paying the architect), or protecting themselves where the architects' conduct was an issue. Second, some owners did not want the architect deciding claims because the owners wanted the architects to be advocating openly in favor of the owners and against the contractors in the dispute resolution process. Finally, many architects had no desire to act as an arbiter of project claims due to the added administrative challenges and a perceived conflict of interest.
   In the 2007 A-201, the AIA permits the parties to designate by agreement a third party that will act as the Initial Decision Maker (IDM) on claims. If no designation is made, the architect becomes the IDM by default. See article 15, AIA A-201 (2007). The parties cannot proceed with mediation, arbitration or litigation until they have sought an initial determination by the IDM.
2. ***Mandatory Mediation***. The 2007 A-201 retained the requirement that the parties mediate before proceeding to formal dispute resolution. Unless the parties agree otherwise, the AAA shall administer the mediation according to its Construction Industry Mediation Rules. Id., paragraph 15.3.2.
3. ***"Check Box" Selection for Dispute Resolution***. For the first time in over a century, the AIA documents do not mandate arbitration as the sole binding dispute resolution process. Instead, the AIA has implemented a system that requires the parties to check the desired box and specify a binding dispute resolution process-arbitration, litigation, or "other." If no selection is made, the agreement defaults to litigation. If arbitration is checked, the parties are free to specify an administrator of choice. If no administrator is specified, it defaults to the AAA.

With these revisions, the AIA has not only provided the parties with a greater

variety of options with respect to their preferred methods if dispute resolution, it has also created an opportunity for interested attorneys to become more involved in the process.

The ConsensusDOCS Process

The ConsensusDOCS general conditions contain article 12, which is aptly named "Dispute Mitigation and Resolution." The architect has little, if any, direct involvement in the mitigation or resolution of disputes. The ConsensusDOCS place an even greater emphasis than the AIA documents on the efforts of the parties to resolve their disputes before entering into an extended and expensive binding claim resolution process. The approach of the ConsensusDOCS is divided into the following stages:

1. ***Direct Discussions***. The first logical step in this process is to conduct "good faith direct discussions" between the parties' representatives. If these representatives cannot resolve the dispute, then "senior executives" of the parties must get involved. In the event the senior executives cannot resolve the dispute, and the parties have so agreed, the dispute goes to the next level—the dispute mitigation procedure.
2. ***Dispute Mitigation Procedures***. At the time of contracting, the parties may elect one of two possible nonbinding dispute mitigation procedures—a project neutral, or a project dispute review board. If the parties select one of these options, they enter into a "retainer agreement" with the project neutral/dispute review board. The project neutral/dispute review board is then required to make regular visits to the project site, be familiar with the project and its progress, and be available promptly at any party's request to address a dispute between the parties. Nonbinding findings must be issued by the project neutral/dispute review board within five (5) days of referral. If this mitigation procedure does not resolve the dispute, the parties proceed to the binding dispute resolution procedure specified in the contract. Interestingly, the nonbinding findings of the project neutral/dispute review board are admissible and may be introduced at any subsequent binding dispute resolution proceeding.
3. ***Mediation***. The ConsensusDOCS documents also provide for mediation, but it is not mandatory and is presented more as an alternative to the direct discussions mentioned above. The parties are free to select their own mediation procedure and rules, but if they do not, the default is mediation through the AAA according to its Construction Industry Mediation Rules.
4. ***Binding Dispute Resolution***. In the event the direct discussions or mediation are unsuccessful, the ConsensusDOCS documents provide for binding dispute resolution using the procedure selected by the parties. At the time of contracting, the parties may choose either binding arbitration or litigation. If arbitration is selected, the parties may designate a mutually agreeable provider and rules. If nothing is designated, the default is the AAA and its Construction Industry Arbitration Rules.

The new ConsensusDOCS approach to dispute resolution illustrates the construction industry's desire to resolve disputes early and informally, without the use of the architect as decision maker but with assistance from outside neutral third parties.

Opportunities for Practitioners

The emphasis of the 2007 AIA documents and the 2007 ConsensusDOCS documents illustrate trends toward earlier and less formal dispute resolution on construction projects. Small firms and sole practitioners can take advantage of these trends to simultaneously enhance their practices and further the goals of the project participants.

Assuming that the contracting parties will wish to designate someone other than the architect as the IDM or project neutral, there will be a real need for qualified individuals to serve in these roles. Factors that will likely be considered by owners, contractors, architects, and construction managers in selecting these individuals include:

- **Expertise**. The individual should have sufficient experience to understand the construction process and the dynamics of project relationships, have some familiarity with construction contracts and documents, and know construction law.
- **Availability**. The individual must be available to the parties on short notice to address claim situations when they first arise and before they grow into more serious problems with more serious consequences for the project.
- **Impartiality**. This individual's lack of bias is what distinguishes him from the architect in the role of IDM or project neutral.
- **Convenience**. The easier it is for the parties to deal with you, the more likely it is they will use you as an IDM or project neutral. You can make it easy for them by having the IDM/project neutral retainer agreement prepared and ready for use. The agreement should set forth at a minimum the scope of services, cost and payment provisions, the procedure for presenting claims, and the timing and format for any decision to be issued.
- **Cost**. The parties are looking for prompt, economical assistance in resolving disputes. Assuming the other factors are relatively equal, and given the nonbinding nature of these services, the parties will likely select the individual available at the most reasonable rate.

Early Resolution

Embrace the trend already evident in the newly published construction industry standard form documents. Fill the void, enhance your practice, and encourage and facilitate the early, cost-effective resolution of construction disputes.

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Transfer Fees: How to Make Money in Real Estate (and Render Your Purchaser's Title Unmarketable) Without Really Trying

By Janice E. Carpi

The Basics of the Program[1]

Several companies, particularly in Texas and Florida, have recently developed

and copyrighted innovative new programs whereby developers, individual homeowners, and realtors can derive future income from residential properties that they sell today. These programs provide the seller with proprietary documentation that enables the seller to impose a covenant on the title at the time of conveyance to a third-party purchaser. The covenant requires the payment of a "transfer fee" to the seller each time the property is thereafter sold, and imposes a lien in favor of the seller to secure the obligation to pay that fee. The covenant is then recorded in the land records, where it will be picked up in later title searches. By purporting to impose a lien on the property, the covenant forces the title company to either take exception to the lien, or require payment of the fee at closing. The program companies selling these programs then collect the fees and forward the payments, less a commission, to the seller.

A "No-Lose" Situation for the Seller (?)

The program appears very attractive to sellers. When a property owned by a seller participating in the program is sold, the seller does not collect any transfer fee at the time the covenant is created/imposed. The seller has no upfront costs, and no costs of administration, but does have the promise of a potentially huge profit in the future. Because of the promise of future profit, the seller can reduce its sales price, making the sale more attractive to purchasers, and yet still have the prospect to make more money from (an indeterminate) future transfer fee income stream. All of this adds up to provide the seller with a sales advantage.

The program company also markets the product to realtors, who are allowed to share in the payment of the future transfer fees, as both an incentive to sell the product, and, as stated in the marketing materials, a way to derive larger commissions.

According to marketing information of the first known company to market this scheme, the program company gets 30 percent, the seller gets 60 percent, and the realtor gets 10 percent of each future transfer fee payment.

At least one of the program companies has sought to patent its "unique business method" to protect its program from being copied and its prices undercut by competitors.

Effect of the Covenant on the Title

Most of the transfer fee programs have a 99-year term, with a suggested transfer fee of 1 percent to 3 percent per transfer. Because statistically the typical residential property is resold every seven years, the transfer fee collection opportunity is quite attractive. If a seller (not a future owner of the encumbered real estate) is pressured to release the covenant because of a potential lost sale, it is free to do so. However, according to the marketing materials, a 1 percent additional fee on the purchase price generally is not enough to cause a purchaser to "back down" or, on the other side of the deal, to cause a future title-holder to

sue to release the covenant.

In some cases, the covenant provides for a one-time "buy out" of the transfer fee, for a payment of 5 percent of the current sales price. Because for this seller and buyer it is cheaper to pay the one-time fee of 1 percent, there is little incentive to pay 5 percent to buy out the covenant, and it remains in place to generate future income.

One of the first of these programs was created by Freehold Licensing. Their program is based on a type of "note" given by Freehold to the seller, whereby Freehold agrees to pay to the seller a sum certain, but with no payment schedule. Instead, payments are made as future transfer fees are collected. The only party coming away from the original closing table with extra money is the realtor, who generally receives an immediate payment of approximately $1,000, supposedly for getting the seller to participate in the program.

What Is the Potential Income to the Seller?

For a residential developer, theoretically, the potential income is significant. Quoting from the Freehold Licensing marketing materials:

- Developer buys 250 acres, plats it into 1,000 lots, and files the Covenant with a 2% Transfer Fee. Homebuilder buys the lots and builds $200,000.00 homes on each lot. Sales through 2010 are exempt.
- After 2010, when the subdivision turns over once (meaning each home sells just one time), **Developer earns an estimated $3.5 million dollars (avg. $500,000/year). The next time the homes turn over they have presumably increased in value again, earning Developer an estimated $4.5 million dollars (avg. $650,000/ year).** This trend continues for 99 years.[2]

The Title Industry's Response

When title companies first encountered these covenants, they were unsure how to handle them. For example, several years ago title companies encountered another type of scheme where homeowners were filing "common law" liens against their own properties. Title companies felt it was safe to ignore these liens, on the basis that they were based on faulty law, and lacked consideration. However, on their face, these new "future transfer" liens appear to be supported by some sort of consideration (reduced purchase price), and could be valid under state law. They also are not so large as to be voided as an unreasonable restraint on alienation. In fact, informal industry assessment suggests that several large developers report no resistance to the imposition of the fee on their properties. Therefore, title companies are unable to simply ignore them.

In Texas, where it appears that these schemes started, the title companies are prohibited from insuring over recorded liens against the property without some

kind of surety bond or funded escrow. Because it appears that the program company occasionally tracks the records of properties subject to their covenants, the risk of having an action filed to foreclose the lien arising from the nonpayment of the transfer fee is real. Therefore, for the time being, title companies cannot ignore these liens, and must require that these transfer fees be paid, or an exception will be taken in the title policy.

Be Aware

It's hard to know what challenges, legislative or otherwise, might be mounted against the program, but practitioners should be aware of the subject. And it is probably a good idea to ask yourself if you'd be willing to help a client who wanted to implement one.

[1] This article is based on a paper that was presented at the American College of Real Estate Lawyers 2007 Fall Meeting and is now available as part of the ACREL Papers produced by ALI-ABA.

[2] Freehold Licensing marketing brochure, www.FreeholdLicensing.com.

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Real Estate

Due Diligence Checklist

By Sidney G. Saltz

1. **Physical**
   1. Property description including detailed description of mechanical systems.
   2. Plans and specifications, if available.
   3. Roof report.
   4. Engineering reports to cover the following items:

1. structure, including the condition of the slab, columns, bumpers, structural walls, exterior doors, and dock doors;
2. masonry;
3. exterior caulking;
4. exterior painting;
5. washrooms and locker rooms;
6. interior ventilation;
7. unit heaters;
8. mechanical systems including sprinkler systems, electrical, plumbing, and HVAC;
9. lighting, ceiling tiles and light lenses, dry wall, and entrance steps;
10. compliance with laws and ordinances, including ADA;
11. building size;
12. parking lot; and
13. landscaping.

5. Phase I Environmental Assessment (including asbestos).
6. Phase II Environmental Assessment, if recommended by engineer.
7. Floor and service plans.
8. Meters in multitenant spaces.
9. Permits.
10. Soil analysis for load-bearing capacity, if required.
11. Access and other appurtenant rights, such as easements, that benefit the property.
12. Availability and adequacy of utilities.
13. Code violation search from the local municipality, if required.
14. ADA compliance.

2. **Tenant Analysis (If There Are Tenants)**
    1. Financial statements and credit reports.
    2. Tenant interviews covering the tenant's plans regarding the building, comments regarding the building and its management, and a discussion of the business outlook of the tenant.
3. **Economics of Property**
    1. Analysis of historical income and expense statements.
    2. Comparison of historical income and expense statements to purchaser's pro form/budgets.
    3. Cash flow analysis.
    4. Review of tenant files including billing statements, tenant collections, and comparison to lease.
    5. Review and analysis of reimbursable and nonreimbursable expenses.
4. **Lease Analysis (If There Are Tenants)**
    1. Review all leases and abstract the same.
    2. Analyze lease problems, if any.
    3. Analyze expansion rights and option space in multiple-tenant buildings for conflicts.
    4. Analyze potential conflicts between use clauses and restrictions on retail multitenant properties.
    5. Review for options to purchase, options to terminate, and rights of

extension or renewal.
6. Review "Go Dark" clauses and assignability clauses on multitenant retail properties.

5. **Market Analysis**
    1. Rent comparable and sale comparable.
    2. Market description/supply and demand.
6. **Legal**
    1. Review title commitment and exception documents.
    2. Review survey.
    3. Review zoning.
7. **Ancillary Contracts**.
    1. Insurance.
    2. Certificates of occupancy or equivalent.
    3. Warranties (including roof) and assignability thereof.
    4. Management company in place to manage the property.
    5. Service contracts-cancellation clauses.
    6. Any common area management agreements.
    7. Other agreements.

Note

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Real Estate

States Move to Limit Enforceability of Transfer Fees

By Lavinia James Vaughn and Kathleen E. Kraft

Florida and Missouri recently took steps to prohibit the enforceability of transfer fees against subsequent grantees of realty. Counsel, particularly those representing buyers of residential property, should be aware that these types of restrictions may be present in grant deeds, covenants, or other documents and verify whether there is law in their jurisdictions addressing their enforceability.

Florida

The Florida legislature recently moved to prevent a transfer scheme originating in Texas from taking root in Florida. The scheme causing Florida consternation provided for a property owner to reserve in a recorded instrument the right to receipt of a percentage of the purchase price or value of real property on transfer of that property in all future transfers and sales of the property. The percentage is generally a small one, one to two percent (1–2 percent) of the transfer price or value, but buyers are generally unaware of the fee until they have entered into a contract for the property and review title documents or prepare for closing on the purchase. The scheme unjustly enriches the former owner, adversely impacts the marketability of the real property, impedes the purchase and sale process, and places an unreasonable restraint on the transfer of real property subject to these reservations. It further erodes property values in the existing difficult real estate market.

The prohibition against transfer fee covenants enacted by the Florida legislature is set out in newly created section 689.28, Florida Statutes. The statute is the result of work on Senate Bill 464 by Senator Dave Aronberg (D-Greenacres) and on House Bill 391 by Representative Charles McBurney (R-Jacksonville). The bill was signed by Governor Crist on May 28, 2008, as Laws of Florida 2008-35 and is effective on July 1, 2008. The text of the Florida bill may be accessed at www.flsenate.gov/.

Missouri

In Senate Bill No. 907, the Missouri Legislature added section 442.558 to Missouri's statutory provisions on Titles and Conveyances of Real Estate. The new section 442.558 creates a prohibition on transfer fees by declaring that transfer fees, declarations, and covenants requiring the payment of a fee to a specified person upon a transfer of an interest in real property are not enforceable against subsequent owners, purchasers, or mortgagees of the real property, and that liens purporting to secure the payment of a transfer fee under a transfer fee covenant are void and unenforceable.

Section 442.558.2 provides that a "transfer fee covenant" recorded in Missouri on or after September 1, 2008, "shall not run with the title to real property and is not binding on or enforceable at law or in equity against any subsequent owner, purchaser, or mortgagee of any interest in real property as an equitable servitude or otherwise." S.B. 907, 94th Gen. Assem., 2d Reg. Sess. (Mo. 2008). Further, it states that "[a]ny lien purporting to secure the payment of a transfer fee under a transfer fee covenant recorded in [Missouri] on or after September 1, 2008, is void and unenforceable." Id. The new section defines "transfer fee covenants" as declarations or covenants that require or purport to require the "payment of a transfer fee to the declarant or other person specified in the declaration or covenant or to their successors or assigns upon a subsequent transfer of an interest in the real property." Id. It defines "transfer fees" as fees or charges

"payable upon the transfer of an interest in real property, or payable for the right to make or accept such transfer, regardless of whether the fee or charge is a fixed amount or is determined as a percentage of the value of the property, the purchase price, or other consideration given for the transfer." Id.

Transfer fees do not include (a) a grantee's consideration payable to the grantor for the transfer, (b) a commission payable to a licensed real estate broker pursuant to an agreement between the broker and the grantor or grantee, (c) any amounts payable to a lender by a borrower under a loan secured by a mortgage against real property, (d) rent or other amounts payable by a lessee to a lessor under a lease, (e) "any consideration payable to the holder of an option to purchase an interest in real property or the holder of a right of first refusal or first offer to purchase an interest in real property for waiving, releasing, or not exercising the option or right upon the transfer of the property to another person," and (f) taxes, fees, charges, assessment, fines or other amounts payable or imposed by a governmental authority. Id.

Senate Bill No. 907 was delivered to the Missouri Governor on May 29, 2008. The statutory changes and additions in the bill will take effect on August 28, 2008.

Note

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Real Estate

Borrowers Still Slow to Get Help

By Angela Barker

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A recent article in *The New York Times* states that despite the vast publicity about ways to avoid foreclosure, most borrowers remain unaware that their lenders are willing to help them.

Indeed, the article cites a recent report released by Freddie Mac, one of the two government-sponsored businesses that acquired mortgages from lenders and sell them to investors, which states that 57 percent of delinquent borrowers did not know about the various options lenders offer to delinquent borrowers.

In this slow real estate market it is to no one's advantage to foreclose on a home. Moreover, many lawyers' associations have formed task forces to assist buyers in saving their homes. If you are falling behind on your mortgage payments, contact your lender. In addition, contact your local lawyers' bar association and ask them for a referral to a foreclosure prevention task force in your area.

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