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Law Trends & News

Practice Area Newsletter

fall 2008
Vol. 5, No. 1

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Chair's Note

Dear Division Member:

Below is the first issue of *Law Trends* for the 2008–09 bar year. As always, the editors believe this is a very exciting issue, and I am very happy to present it to you. As with prior issues, this e-newsletter 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, we are continuing to present a portion of a book recently published by the Division about giving representation and counsel to small corporations. This book not only covers most issues attorneys will face while representing a small company but also has a CD containing most forms attorneys will need in that representation. Please take a look at the article; if you like what you see, you can then click through to purchase the book. Also in this issue is a new area containing articles that are of interest to Young Lawyers concerning the Solo/Small Firm Practice Setting. We are very pleased to add this new area to *Law Trends*, and we will be publishing articles quarterly in this area.

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

I hope each of you enjoys this issue of *Law Trends*. 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 is now in his fifth year as editor-in-chief, and I thank him for his work and dedication.

Best regards,

Robert A. Zupkus
Chair, General Practice, Solo & Small Firm Division

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Featured Editor

Kathleen Hopkins is a founding member of the Seattle, Washington, law firm Real Property Law Group, PLLC. Kathleen limits her practice to commercial real property transactions, finance, commercial leasing and related issues. She is a frequent speaker and writer on real property, leasing, and creditors' rights issues. Kathleen is very active in leadership positions for the American Bar Association. Presently she is on the ABA Board of Governors and chairs its Investments subcommittee. She recently completed a term as the editor-in-chief of the ABA magazine *Business Law Today*. She is an ex-officio member of the ABA General Practice Solo & Small Firm Division's Executive Council, a member of the Division's Publications Board, an assistant editor of the Division's e-newsletter *Law Trends*, and the vice-chair of the Division's Real Estate Law Committee. Kathleen is also a member of the ABA Business Law Section Executive Council and its Finance Committee, and chairs the ABA Business Law Section's Real Estate Financing Subcommittee. In addition, she is a fellow and Washington co-chair of the American Bar Foundation Fellows. Kathleen has a wonderful spouse and the world's greatest law partners, who support her doing bar service. She can be contacted at 1326 Fifth Avenue, Suite 654, Seattle, WA 98101, 206-625-0404, email: khopkins@rp-lawgroup.

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Business Law

Digitizing the Paper File

By Todd C. Scott

A frequently asked practice management question of the risk management advisors at MLM has been, "How can lawyers begin scanning and digitizing client files?"

Many of the lawyers who are considering saving a digital copy of the file did not turn to the digital option out of a desire to make their law office paperless. Instead, they found the digital option after realizing they have assigned many more files to permanent storage than they ever anticipated, and they've come to realize that saving key portions of the file digitally might be a cost-effective way of eliminating the paper file before it reaches the end of its retention schedule.

Another reason lawyers are considering digital means for saving client files is that, increasingly, documents arrive in the firm in digital formats such as email, or are produced within the firm in a word processor. These documents are readily available to be stored electronically in the firm's network directory or in a case management software system.

Lawyers who are considering scanning client files are also finding that many firms already possess several of the key components a firm must have to scan and save client information. As lawyers look around their firms and see their networked computer can hold several gigabytes worth of data, they have come to realize that they may be one good scanner away from becoming a digital law firm.

There are four key components that a firm needs to have to consider scanning and saving matters digitally. They are:

- **Networked computers**—Many law firms have only begun recently to network their computers so workstation users can share client data.
- **Data storage**—With the price of data storage coming down in recent years, consumers can now own many gigabytes worth of storage space necessary for scanning and saving document images.
- **Scanning software**—Image-making software like Adobe Acrobat Professional Edition is necessary to save the scanned images in a format that is both searchable and retrievable.
- **Scanner—**The primary tool for converting paper to digital images. Many copier machines now double as a scanner and can scan digital images in the same time it takes to copy a document.

For lawyers who are considering digitizing client files, some initial considerations are necessary to determine how the program will become part of the firm's filing process. For example, the firm needs to consider which group of files will be part of the scanning program—open files, closed files, both open and closed files, or perhaps just files in long-term storage.

Firms that opt to begin scanning newly opened files take the approach that the system for scanning client documents will be administered on the front end—that is, scanning the documents for the open client files as the documents arrive, one by one, in the mail. Building scanned files from the front end is a decision that

allows the firm to ease into the scanning process and build up the digital files over time.

By incorporating a small, high-speed scanner that can capture digital images at 30 pages per minute in the firm's mail sorting area, letters, reports, court orders, pleadings, discovery documents, and anything else that arrives in the mail that would ordinarily be delivered to the attorney can be scanned and saved immediately to the digital file.

It is important that a firm organize its scanned documents in an electronic filing system that is understandable by everyone in the firm. Lawyers receiving paper copies of the documents should know where in the firm's computer system they can find the digital equivalent.

In a digital office environment, backing up the scanned data with a tape backup system or some other form of digital media is more important than ever to preserve the scanned images for all time. If the firm is going to make a conscious effort to save matters electronically, it needs to know that the current backup system is working and consider adding another layer of protective backup.

Although some attorneys choose to take a big leap and begin scanning client documents on the front end, most practitioners who are choosing scanning for preserving client information seem to be opting for scanning the old files in storage. Scanning older, closed files does not usually require that the firm initiate new systems that everyone must learn. After all, the files in question are the files that, in theory, the firm may never have to use again.

For firms choosing to scan older or closed files, the key decisions that need to be made are which files should be designated for scanning (recently closed, or those in long-term storage) and what, if any, documents from the closed files do not necessarily need to be included in the scanning effort.

The most common question for lawyers who are actively scanning any file is, "When is it okay to destroy the paper file?" The answer to that question is, of course, "It depends."

Knowing when it is okay to destroy the paper file can change depending on the goals the firm pursued when they initiated the scanning program in the first place. For example, firms who initiate the scanning program for files in long-term storage, where the likelihood of needing the file ever again is remote, find that destroying the paper file immediately after scanning the image is an acceptable step to add to the file retention schedule.

Firms that initiate scanning on the front end, while the matter is active and the file is building, are finding more often that properly destroying the paper copy of the document soon after it is scanned is an acceptable part of the procedure. Courts tend to accept digital reproductions of common documents especially in

cases where the original documents can be produced if necessary (e.g., client medical records).

Of course, any scanning procedure that involves destroying paper documents related to active or recently closed files must involve thorough training for the individuals assigned with the task. Staff personnel must be able to recognize the difference between an ordinary letter of correspondence and a letter that bears more evidentiary weight such as an opinion letter.

Coming Up With a Plan

Recently, an Iowa lawyer approaching his 60th year in practice represented a fifth-generation farmer involved in a land dispute with a distant relative. The lawyer expressed how he sometimes wished he had the file with his original notes from the 1940s outlining the wishes of the great grandfather of the disputing parties.

A firm can now save all the items from any client file forever—in a digital format. Whether the firm chooses to maintain a paper file system, or to incorporate some or all of the file in a digital system, it is important that the firm have in place a well-documented file retention policy. Everyone involved in the process should have a clear understanding of his or her role in maintaining a plan for the file, or bringing about its final destruction.

Remember that for any retention schedule, the plan must be created and supervised by the attorneys. The staff will not know of changes in law that could affect the length of time a file should be stored.

By carefully considering the retention schedule, and supervising the plan activities, your firm can be well served for generations to come.

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

Discussion Points for a Joint Venture or Strategic Partnership

By Jean L. Batman

• Past Issues

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.

Note: In any new relationship, it is important to explore and define the relative benefits and obligations of the parties at the outset and put them in writing. It is much easier to get this done at the outset, while energy and attention are on the nature of the new relationship and before there is an opportunity for misunderstandings to arise.

1. Identification of parties to the agreement, including names, addresses, and other information as appropriate, such as state of incorporation and authorization to conduct business in California;
2. Designation of relationship being created, e.g. partnership, or other relationship or form of organization;
3. Nature of the enterprise to be undertaken, its scope, extent, and duration;
4. Name under which venture is to be carried out;
5. Contributions of each party, whether in money, property, time and skill, or other;
6. Time at which each contribution must be made and effect of failure of any party to make its contribution at the required time and in the required amount;
7. Requirements if any for additional or ongoing contributions and the effect of the failure of a party to make such contributions;
8. Right of each party to manage and control the enterprise;
9. Duties of each party other than the obligation to make contributions;
10. Designation of one party as manager, including specific duties, or the designation of a management committee;
11. Division of profits, including definition of profits, and obligations that must be satisfied before division and distribution of profits;
12. Apportionment of losses, liability, indemnification;
13. Designation of who shall hold legal title to the joint venture property;
14. Surety bonds for party in control of the assets;
15. Percentage interest or claim of each party in property purchased or created with joint venture funds, profits, or operations;
16. Rights of or restrictions on parties to assign or transfer interest in the joint venture including, where appropriate, rights of first refusal;
17. Insurance required to protect the parties and the joint venture property (public liability, Internet, personal injury, property damage, fire, theft, workers' compensation for any employees, etc.);
18. Effect of death, insolvency or bankruptcy of a party;
19. Records and accounting;
20. Arbitration or other dispute resolution provisions for matters not specifically fixed by the contract terms or for disputes arising under or relating to the contract;
21. Termination of or withdrawal of a party from the joint venture;

22. Rights and duties of parties on termination and winding up, including any compensation to be paid to the party charged with the duty to wind up and distribute assets;
23. Any representations and warranties to be given by each party to the other; and
24. Effective date of agreement
25. And anything else that comes to mind in the process.

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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Business Law

Overview of SEC Amendments to Rules 144 and 145: Limits on Sales of Securities

By David H. Pankey, LaTisha O. Chatman, and Meredith Sanderlin Thrower

The Securities and Exchange Commission has amended Rules 144 and 145 of the Securities Act of 1933, effective February 15, 2008. Rules 144 and 145 limit a person's ability to sell securities acquired (1) from a company with which the person is affiliated and (2) in a private offering or other exempt transaction. By easing the restrictions found in Rules 144 and 145, including the holding period and the amount of securities that may be sold, the SEC has made it easier for affiliates and others to sell securities governed by the rules. It should be noted that the amendments apply to securities acquired before or after the effective date.

Background

As background, the Securities Act requires registration of all offers and sales of securities in interstate commerce or by use of the U.S. mails, unless an exemption from registration is available. The importance of Rule 144 is that it provides a safe harbor from the Securities Act's registration requirement for sales of restricted securities and control securities held by affiliates, if the rule's requirements are met. Rule 144 requires that

- adequate current public information about the issuer be available;
- the seller of the restricted securities hold the securities for a minimum period of time (the "minimum holding period");
- the number of shares sold not exceed certain thresholds ("volume limitations");
- the securities be sold in a certain manner, for example, in a transaction using a broker ("manner of sale conditions"); and
- the seller file a Form 144 when required.

In order to understand the safe harbor, it is important to know the meaning of restricted securities, control securities, and affiliates. First, restricted securities are securities acquired from the issuer or an affiliate in a private offering or another exempt offering described in the rule. Second, control securities generally are securities held by an affiliate of the issuer without regard to how the affiliate acquired the securities. Finally, an affiliate is a person who directly or indirectly controls, or is controlled by, or is under common control with, an issuer and includes persons such as members of a company's board of directors and senior-level management.

Rule 144 Amendments

With this background in mind, it is easier to understand the impact of the amendments. For affiliates, the Rule 144 changes have the following effects:

- **Shortened Minimum Holding Period**. Currently, affiliates must hold restricted securities for one year before selling them in order to satisfy the requirements of Rule 144. However, the amendments permit the sale of

securities of reporting companies after six months. Reporting companies are those that file periodic reports under the Securities Exchange Act of 1934, including annual reports on Form 10-K and quarterly reports on Form 10-Q. In contrast, affiliates must still hold restricted securities of nonreporting companies for one year before selling them. Moreover, sales by affiliates remain subject to the manner of sale conditions and volume limitations, as well as the current public information requirements.

- **Expansion of Manner of Sale Conditions**. The amendments broaden the manner in which securities may be sold by affiliates by expanding the definition of a broker transaction and adding an additional category of sales called "riskless principal transactions" that the SEC believes are equivalent to agency trades.
- **Increased Threshold for Volume Limitations**. The volume limitations, which provide for the sale of up to 1 percent of any outstanding class of securities in any three-month period, have been expanded to allow sales of debt securities as follows. In addition, the amendments add an alternative volume limitation for debt securities that permits up to 10 percent of a tranche of debt or of a class of nonconvertible preferred stock to be sold during a three-month period.
- **Elimination of Manner of Sale Limitations for Certain Securities**. The manner of sale limitations have been deleted for debt securities, nonparticipating preferred stock, and asset-backed securities.
- **Revised Trigger for Form 144**. Affiliates still must file a Form 144 where the intended sale exceeds 5,000 shares or $50,000 in any three-month period.
- **Elimination of Holding Period for Control Securities**. Control securities remain subject to all requirements of Rule 144, other than the holding period requirement.

The amendments benefit both affiliates as described above and nonaffiliates. First, nonaffiliates can sell restricted securities of reporting companies after six months if the current public information requirement is met. Second, nonaffiliates can sell restricted securities of nonreporting companies after one year without satisfying any other requirements of Rule 144. In other words, the manner of sale, volume, and notice of sale provisions no longer apply to nonaffiliates, and the current public information provisions cease to apply after one year.

Although not as significant as the previously described revisions to Rule 144, it is also important to highlight that the SEC wrote amended Rule 144 in plain English and codified several of its interpretations. The codified interpretations include those regarding tacking, or combining, holding periods to meet the minimum holding period requirement; aggregation of securities held by pledges; and the applicability of Rule 144 to shell companies.

Rule 145 Amendments

Rule 144 was not the only rule to receive an overhaul. The SEC also revised Rule

145, which requires the registration of certain securities issued in various types of business transactions. In effect, the revised rule no longer restricts resales of securities received in business combinations by persons who are affiliated with one of the parties to the transaction if they are not affiliates of the surviving company. However, the amendments to Rule 145 will not apply to transactions involving shell companies.

Conclusion

The SEC believes that the amendments will increase the liquidity of securities acquired in private offerings and decrease the cost of capital for all issuers, while continuing to protect investors. The SEC is likely to achieve its stated purposes because affiliates and nonaffiliates can sell securities more quickly and are subject to fewer restrictions on their ability to sell securities.

David Pankey is a partner at the Washington, D.C., office of McGuireWoods LLP. LaTisha Chatman is a partner in the firm at Norfolk, Virginia, and Meredith Sanderlin Thrower is an associate at the firm's Richmond, Virginia, location. Their respective e-mails are dpankey@mcguirewoods.com, lchatman@mcguirewoods.com, and mthrower@mcguirewoods.com.

Note

"Keeping Current: Securities: SEC Amends Rules 144 and 145" by David H. Pankey, LaTisha O. Chatman, and Meridith Sanderlin Thrower, published in *Business Law Today*, Volume 17, No. 5, May/June 2008.

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Business Law

Non-Delaware Lawyers Can Be Sued for Giving Advice on Delaware Law

By Francis G.X. Pileggi and Danielle S. Blout

In *Sample v. Morgan*, 2007 WL 4207790 (Del. Ch. Nov. 27, 2007), the Delaware Chancery Court provides a scholarly and practical analysis of Delaware's long-arm statute. The court determined that a non-Delaware lawyer and a non-Delaware law firm who provided advice on Delaware law to a Delaware corporation, and who caused a charter amendment to be filed with the Delaware Secretary of State, are both subject to personal jurisdiction in Delaware courts. This decision should be of great interest to the many lawyers all over the country who give advice on a daily basis about Delaware corporate law. (Some wags suggest that there are more lawyers in New York City who give advice on Delaware corporate law than all the lawyers in the state of Delaware who do so.)

This opinion also addresses the issue about when a corporate officer can conspire with the corporation he or she serves, and under what circumstances a corporate act can also create liability for those who caused the corporation to act. Corporate lawyers risk liability by entangling themselves in schemes that may be viewed as having entrenchment of incumbent management as their goal as opposed to actions taken in the best interests of the corporation.

The court itemized the factual foundation on which the issue presented was based. The non-Delaware lawyer and his non-Delaware firm:

1. prepared and caused corporate documents to be filed in Delaware;
2. advertised themselves as nationwide experts in matters of corporate governance;
3. provided extended legal advice regarding Delaware law to a Delaware company;
4. undertook to direct the defense of the Delaware lawsuit related to the advice on Delaware law; and
5. faced allegations of aiding and abetting top managers in breaching fiduciary duties based on Delaware law.

In connection with finding that a non-Delaware lawyer may be sued on claims arising out of providing advice and services to a Delaware corporation, the court reasoned that Delaware has an interest in ensuring that Delaware corporations and their stockholders have access to its judicial system. Extensive factual details about this case are provided in an earlier opinion in the case that outlines a scheme in which the court described some of the directors as "unwitting and uninformed accomplices." *See Sample v. Morgan*, 914 A.2d 647 (Del. Ch. Jan. 23, 2007).

The court described as a "graceless position" the non-Delaware lawyer's argument that it would be "constitutionally aggrieved" if the suit proceeded in Delaware. The position was belied by his overt actions in providing a Delaware corporation advice relating to Delaware law. Delaware's long-arm statute applied in this case because the non-Delaware lawyer transacted business in the state by causing the filing of the certificate with the Delaware Secretary of State and by providing a broad range of services to the board and officers of a Delaware

corporation. Additionally, a due process argument was not viable because when a Delaware corporation is financially injured by the faithless conduct of its agents, the corporation is injured in its legal home for purposes of the long-arm statute.

The court acknowledged that the facts of the case were unusual, but warned that "lawyers and law firms, like other defendants, can be sued in [Delaware] if there is a statutory and constitutional foundation for doing so." The court also noted that the non-Delaware lawyer's assertion that he had "no cause to enter Delaware nor did he file any documents with any court or agency in Delaware in connection with this representation" was implausible because of his direct facilitation of filing the certificate amendment.

Moreover, the jurisdictional issue was impacted by the non-Delaware firm's active role in drafting the briefs in the summary judgment motion in defense of the claims against it. Even its Delaware local counsel had to concede that at least one of the arguments in the non-Delaware firm's brief lacked any "plausible basis in law or logic."

The court found it unnecessary to rely on the conspiracy theory of personal jurisdiction in light of the actions being committed by the non-Delaware lawyer himself. The court rejected the argument that it was really the corporation that committed the alleged actions in Delaware, because the lawyer allegedly was acting only as the corporation's agent. The court analyzed the situation as follows:

> When well-pled facts support the inference that a person caused a corporation to take jurisdictionally-significant conduct in Delaware and that conduct is an element in a scheme by corporate fiduciaries to unfairly advantage themselves at the expense of a Delaware corporation and its stockholders, our case law has consistently held that the long-arm statute may be used to serve that person.

In essence, if a lawyer or law firm facilitates or arranges, directly or indirectly, through its use of Delaware situated agents the filing of corporate documents with the Delaware Secretary of State and those facilitated transactions are ultimately challenged, Delaware courts have repeatedly recognized that these acts alone are sufficient to constitute the transaction of business under the Delaware long-arm statue. The Delaware Supreme Court has opined that trial courts must provide a broad reading to the terms of the long-arm statute in order to effectuate the statute's intent.

In addition, the non-Delaware lawyer attempted to assert the "intra-corporate conspiracy doctrine"and/or the "agent's immunity rule"where corporate officials are deemed incapable of conspiring with the corporation they serve and/or that they should not be held personally liable when acting in their official capacity. However, the court observed that the alleged conspiracy did not include the corporation. Rather, the corporation was a victim of the scheme between the lawyer and the directors whose plan was to "enrich"and "entrench"themselves at the expense of the corporation. Further, the court explained:

> The doctrine on which the moving defendants rely does not even apply on its own terms. Well-pled facts support the inference that the moving defendants were not acting within the appropriate scope of their agency. The moving defendants were in fact acting to unfairly advantage the Top Managers at the expense of their real client, the company.

The court also included a brief analysis of decisions discussing the viability of an intra-corporate conspiracy argument involving a corporation and its agents. "It is well-settled that 'a conspiracy between a corporation and its agents, acting within the scope of their employment, is a legal impossibility.' . . . The policy behind the intra-corporate conspiracy doctrine "is to preserve independent decision-making by business entities and their agents free of the pressure that can be generated by allegations of conspiracy." *See Chain Store Maint., Inc. v. Nat'l Glass & Gate Serv. Inc.*, 2004 WL 877599 at *11 (R.I. Super. 2004). "Because an attorney is an alter ego of his or her client, a conspiracy between the attorney and the client is not possible." *See Roth v. La Societe Anonyme Turbomeca France*, 120 S.W.3d 764, 778 (Mo. App. 2003).

In sum, the court reasoned that Delaware's public interest would not be served by adopting a rule that insulates advisors of managers of a Delaware corporation from accountability if the advice assisted managers of the corporation in breaching their fiduciary duties.

Francis Pileggi is the founding partner of the Wilmington, Delaware, office of Fox Rothschild LLP. His e-mail is fpileggi@foxrothschild.com. Francis G.X. Pileggi's blog at www.delawarelitigation.com summarizes all the key decisions on corporate and commercial law from the Delaware Court of Chancery and Delaware Supreme Court. Danielle Blount is an associate in the firm's Wilmington office. Her e-mail is dblount@foxrothschild.com.

Note

"Keeping Current: Jurisdiction: Non-Delaware Lawyers Can Be Sued for Giving on Delaware Law" by Francis G.X. Pileggi and Danielle S. Blout, published in *Business Law Today*, Volume 17, No. 4, March/April 2008.

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Business Law

The Robots Are Coming: Protecting Website Owners From Copyright Infringement Claims

By John Grant

From the earliest days of the Internet, online technology has allowed users to access and distribute copyrighted content with seemingly reckless abandon. In recent years, however, high-profile copyright holders like major record labels and media companies have harnessed technology to detect—and demand payment for—online infringements of their works. Now, as wider adoption of online detection tools drives down the costs of discovering infringement, many more companies and individuals are turning to such tools to protect their copyrights.

Image recognition is one such tool that is proving extremely useful for owners of visual works to police use of their works online. Companies like Digimarc, PicScout, and Idée are exploiting the emerging market for copyright infringement detection by using sophisticated robots (also known as spiders) that troll through web sites image by image to find uses of their customers' creative works. The robots then report those uses back to the copyright holder and, if no license is found, the copyright holder will typically seek damages for the unauthorized use. While the expense of these services had previously limited their use primarily to large media companies, new developments like the TinEye service from Idée promise to bring online detection of unlicensed images to a wider base of copyright holders. Similar services like copyscape.com are available for detecting infringements of written text.

What will these developments mean for website owners who are using these images? As copyright holders discover more unauthorized uses online, unsuspecting website owners will see an increase in cease and desist letters, Digital Millennium Copyright Act (DMCA) takedown notices, and, of course, demands for payment. The strict-liability nature of copyright law is often poorly understood by typical website owners, and anyone without scrupulous practices for licensing digital media risks liability for copyright infringement.

Attorneys whose clients include website owners—a group that encompasses practically every business and countless individuals—can advise those clients to take several specific steps to protect themselves from copyright infringement claims:

1. **License all content**. While this may seem elementary, there still exists a common attitude that if something is available on the Internet, it must be in the public domain. This is not the case. And just because a work doesn't have a copyright notice doesn't mean it is available for free; Congress abolished the notice requirement for all works published after March 1, 1989, to comply with an international treaty. As noted above, copyright infringement is essentially a strict liability offense—where infringement in fact occurs, intent to infringe is not required to establish liability (although "innocent infringement," as defined by statute, can reduce damages). This means that the burden is on a user of content to ensure that he has obtained proper permissions, not on the copyright holder to police her work.

2. **Supervise your web designer**. Relatively few businesses create and maintain their own websites; most outsource this work to a web designer of some sort. But the owner of a website is ultimately responsible for the content it contains, so it is important to ensure that any web designer obtains all necessary permissions to use creative content. A savvy website owner will demand copies of all licenses for content of any kind. On top of that, your client may seek a warranty from the web designer that he has obtained all necessary licenses as well as indemnification should any infringement claims arise. But the licenses themselves are of paramount importance; contractual claims have little value against a cash-poor or defunct web designer, but a valid license will often defeat—and will at least mitigate potential damages resulting from—an infringement claim.

3. **License from the proper party.** This step can be easier said than done. Where an author has registered her work with the U.S. Copyright Office, a potential licensee can demand to see a copy of the registration certificate or search the copyright records online to verify ownership. But registration is not required for copyright protection to vest in a work, and anyone can fraudulently claim authorship of an unregistered work. Even with registered works, an author may have already transferred her licensing rights to a third party. The best solution is often to seek warranties and/or indemnification from the licensor that she has all necessary rights to issue the license.
4. **Keep records of your licenses.** Again this seems elementary, but most people don't realize that content is often licensed for specific uses and durations. Any use that exceeds the license is technically infringement and is actionable as such. In practice, however, a typical copyright holder will likely seek license-extension fees from someone who can show that he holds a valid-but-incomplete license rather than sue for full-blown infringement. Extension fees are usually much less costly than defending against an infringement claim.
5. **Comply with the DMCA.** This suggestion applies primarily to owners of websites that allow users to post and edit their own content online. Such websites include content-sharing sites, social networking sites, and even blog sites that allow users to post comments to blog entries. Without DMCA protections, website owners risk being held primarily liable for copyright damages whenever an outside user posts infringing content on the site. And while the DMCA shield is powerful, it is not automatic; website owners must comply with the specific requirements of the statute including registering with the Copyright Office as an Online Service Provider, publishing the contact information of a Designated Agent for handling DMCA takedown requests, and complying with such requests within the statutory time periods.

While this list isn't exhaustive, these basic steps will go a long way towards insulating website owners from copyright infringement claims and defending any claims that do arise. For more information, the Copyright Office maintains several publications on its website, www.copyright.gov, to help content users navigate copyright law.

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Note

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Business Law

Franchising in the Real World
Part One: In the Beginning

By Kat Tidd

Everyone wants a franchise, or they have an idea or a business they think should be franchised. If the business is or could be a franchise, what does it matter? From the business side, franchises are perceived as having less risk than starting up a new business from scratch. There appears to be an inherent assumption that if the business offered for sale is a franchise, it must necessarily be a more proven concept, tested and with certain assurances of startup and ongoing assistance. However, *virtually anybody can franchise virtually anything*, whether it makes sense or not.

All that is really required to franchise is to *disclose* certain things required by law. There are no requirements of minimum testing or operation of the business model to be franchised, no requirements for a minimum capitalization or financial condition of the franchise, no requirements as to what the franchisor must provide to do for its franchisees, and no restrictions on the franchisor other than what is committed in its contract with the franchisee. Most franchisors, however, will promise only the minimum necessary to get the franchised business started, and what is promised on an ongoing basis for continuing assistance are often illusory, catch-all phrases like “as deemed advisable” or “from time to time in its sole discretion.”

Franchises are defined at both the federal and the state level and are affected not only by franchise specific

legislation, but also by a variety of state business opportunity and deceptive trade practices statutes and regulations. So long as a franchisor (or, more neutrally, "opportunity seller") takes the proper steps in complying with the franchise laws, and any business concept can be offered up as a franchise and sold to others.

Any licensing or distribution arrangement can be a franchise with these three elements:

1. Granting the right to use a trademark, trade name or other commercial symbol in the sale of goods or services;
2. Providing continuing control or assistance, or prescribing the marketing plan or system to operate the business; and
3. Requiring payment of a fee, direct or indirect, [typically includes any purchase from franchisor or an affiliate greater that $500].

The Laws

The sale of franchises is regulated federally by what is known as the FTC Franchise Rule (16 CFR section 346.1 et seq.) Franchising is also affected and regulated by different state laws, such as franchise registration laws, deceptive trade practices laws, business opportunity laws, and some have special franchise relationship laws.

The Way It Has Been

The FTC has regulated franchising since it first promulgated what is now known as the FTC Franchise Rule in 1979. The Franchise Rule imposed a series of restrictions and requirements primarily on the offer and sale of franchises, perhaps most significantly requiring the use of the prospectus to be given to all prospective franchisees. A number of states had already enacted similar laws that mandated the use—and in most cases the registration—of a Uniform Franchise Offering Circular (or UFOC) that was developed by state regulators through NASAA (North American Securities Administrators Association). Long story short, the UFOC format became the dominant form of disclosure and was the preferred alternative to the FTC's original prospectus format, allowing franchisors to sell their franchises by using a form of prospectus that was more or less accepted in all states.

The Way It Is Going to Be Now

After efforts by state and federal regulators for a number of years, a single reconciled disclosure format has recently been adopted for use both in the registration states and in compliance with the Amended FTC Franchise Rule, 16 CFR section 346.1 et seq. The new, universal format is called the Franchise Disclosure Document (FDD). Its use was optional beginning July 1, 2007, and became mandatory July 1, 2008. Although substantially the same as the previous UFOC in the look and feel of the FDD, there have been some significant changes.

For those who do not deal regularly in this area but have some acquaintance with the UFOC, probably the most notable change is in item 19, formerly known as Earnings Claims, which have been renamed Financial Performance Representations. Anything constituting an earnings claims requires inclusion in the body of the UFOC or it could not be given. Now, the definition of a "financial performance representation" excludes providing estimated and actual costs in operating the business and so can be freely given without inclusion in the FDD. There has been much litigation over what information needs to be provided to prospective franchisees in violation of the item 19 requirements, which is discussed below. To a great extent, that it is unlikely to change under the new FDD format.

The FDD (in theory) can be provided in a single standardized version to prospects throughout the United States. However, if the prospects are located in certain states that are generally referred to as "registration states," the franchisor must first register *with a current version of the FDD*, modified to meet state requirements.:

California	Maine*	Rhode Island
Connecticut*	Michigan	South Dakota
Florida*	Minnesota	Utah*
Hawaii	Nebraska*	Texas*
Illinois	New York	Virginia
Indiana	North Carolina*	Washington
Maryland	North Dakota	Wisconsin

*These are business opportunity states in which franchisors must register at least file a notice of exemption for compliance with the FTC. Some do not require the notice if a federally registered trademark is a part of the franchise.

Franchising Is a Partnership Between Opposites

With respect to the most significant interests and concerns of franchise clients, there is a great divergence of priorities between the franchisor and the franchisee.

As a franchisor, the primary concerns are compliance with applicable laws, ensuring control over its franchise system, and retaining the flexibility to change its business model. There is considerable tension between disclosing the minimum necessary in the FDD to comply with the FTC Franchise Rule and offering a franchise agreement that allows the franchisor control over the elements of the franchise business by making only minimal commitments to perform or to refrain from acting over the life of the relationship

As a franchisee, the concerns are twofold: is the franchise a good investment, and will the franchisee get what they think they are buying?

Disclosure Basics

The FDD is a critical source of information, and counsel on both sides of the franchising fence should be aware of the information with which their clients will deal. Not only does the FDD contain copies of all contracts to be signed or that might be signed, but it is also a wealth of other information about the franchisor, highlighting critical obligations—or the lack thereof—on both sides.

Practice Tip

Franchisee clients often try to minimize legal fees by asking that only the franchise agreement be reviewed, but counsel should always require a copy of the FDD to review. Here are the items of information provided in an FDD.

1. History of Franchisor and Franchise
2. Officers, Directors and other Executives
3. Litigation
4. Bankruptcy
5. Initial Fees
6. Other Fees
7. Initial Investment
8. Restrictions on Sources of Products and Services
9. Franchisee's Obligations
10. Financing
11. Franchisor's Obligations
12. Territory
13. Trademarks
14. Patents, Copyrights, and Proprietary Information

15. Obligation to Participate in Actual Operation
16. Restrictions on What Franchisee May Sell
17. Renewal, Termination, Transfer and Dispute Resolution
18. Public Figures
19. Financial Performance Representations
20. List of Outlets
21. Financial Statements
22. Contracts
23. Receipt

How the FDD Is Used

As a practical matter, this is how disclosure works in selling franchises:

1. Every prospective franchisee must receive a FDD no later than 14 calendar days before signing any documents or paying any consideration, *whichever occurs first*. (No postdated checks!) An FDD can be provided electronically.
2. Every franchisee must have the franchise agreement and any ancillary contracts in the form in which they are to be signed for seven calendar days, *before* they sign.
3. Discussions with prospective franchisees and information provided must be consistent with the FDD. Information provided to a prospect inconsistent with or contradictory to any statement or other content of the FDD is a violation of the Franchise Rule.
4. No "earnings claims or "financial performance representation" may be given to a prospective franchisee unless it is described in item 19 of the FDD.
    - A "financial performance representations" is any information given to a prospect by, on behalf, or at the direction of the Franchisor/Company or its representatives, from which a specific or range of actual or potential sales, income, or profit from franchised or Company owned units can be ascertained. This includes charts, tables, or mathematical calculations presented to demonstrate possible results based upon a combination of variables (such as multiples of price and quantity to reflect gross sales).

    - *In other words, a franchisor cannot use numbers or financial data relating to the actual or projected performance of a franchise or similar operating units, unless prepared as required by Item 19* and included in the FDD.

    - These rules even apply to preliminary franchise information packets sent in response to inquiries *and* to information give to prospective lenders when franchisees seek financing after signing the Franchise Agreement.

5. The franchisor must take special steps to conform to state law to legally exchange communications *of any kind* with anyone in the "registration" states.
6. Terms of the franchise agreement may not be changed without affecting disclosure requirements and necessitating revision of the FDD regarding negotiability of those terms.

Laying Out the Rules

The FDD is a powerful tool for the franchisor in selling and for the franchisee in evaluating whether or not to purchase the opportunity. Basically it lays out the rules of the franchise game to be played by the parties. Part two of this article will highlight issues and pitfalls in the ongoing franchise relationship.

Useful Links

www.ftc.gov/bcp/menus/consumer/invest/business.shtm

Extensive information on franchising for consumers as well as FTC Franchise Rule text and recently issued compliance guidelines.

www.ftc.gov/bcp/franchise/netbusop.shtm

Listing of state business opportunity laws and agencies.

www.franchise.org

Site of the International Franchise Association, the first trade association for franchisors, now truly international and accepting franchisees.

www.aafd.org/

Site of franchisee association, which includes franchise-system-specific franchisee chapters.

www.nasaa.org/Issues___Answers/Legislative_Activity/Testimony/594.cfm

State regulators policy statements.

www.nasaa.org/Industry___Regulatory_Resources/Franchise/

Text of compliance guidelines for preparation and use of FDD in registration states available here.

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Estate Planning

Till Death Do Us Part (Again): Estate Planning for Second Marriages

By Richard E. Barnes

If you were to go back and review your most challenging estate planning files over the past few years—the ones in which emotions ran high throughout or the clients left with some bad feelings, either at you or at one another—the odds are that at least one of the clients was in a second marriage.

Counseling blended families is hard. With death and divorce creating ever-larger numbers of individuals available to remarry, these families quite possibly constitute a significant portion, if not a majority, of an estate planner's practice. Unfortunately, these families and their particular issues receive relatively little attention in the estate planning press.

This article seeks to answer two questions:

1. Why is it so hard to counsel blended families?
2. What can be done about it?

Why Is It So Hard to Counsel Blended Families?

Blended families present seven principal challenges. Of these, the presence of unresolved emotional issues and the existence of multiple sets of children create the most likely barriers to a successful outcome—a finalized plan that reaches the parties' desired dispositive goals without unnecessary tears. Any of the seven issues listed in what follows, however, can enflame emotions and threaten to disrupt the process.

Estate taxes present a special concern. To avoid unintended and inequitable results, for taxable estates, an estate planner must attend to how the estate will pay any taxes and the manner in which several sets of beneficiaries and different types of assets will share the tax burden. If the documents do not adequately address this issue, one set of beneficiaries may enjoy an inheritance undiminished by estate taxes,while another set of beneficiaries may see its inheritance reduced or eliminated. The second set of beneficiaries may, in essence, pay the estate tax on the first set's inheritance. This inequity may not be discovered until after the second spouse's death when planning options are much more limited.

What Can Be Done About It?

When dealing with blended clients, two steps are critical. First, the estate planner needs to use a carefully considered engagement letter that spells out whom the planner represents and addresses what will happen in the event of conflict. The planner should disclaim any representation of or responsibility for the children of the spouses. ACTEC has model engagement letter forms available on its website at www.actec.org. A planner should always remember that the more children with competing goals there are, the more disappointed beneficiaries there may be, which equates to more potential plaintiffs!

Second, the planner can deal with the issues discussed in this article most appropriately if he or she has knowledge of them early in the estate planning process. Using a comprehensive checklist, supplemented by in-depth client interviews, can ensure that the planner obtains the necessary information and can respond to it at the outset.

Dealing With Unresolved Emotional Issues

Left unresolved, emotional issues from a client's previous relationship can negatively affect decisions made in the estate planning process. For many of these clients, the last contact with an attorney may have been in the context of a difficult divorce. The process of meeting in a lawyer's office, discussing the

division of assets, and struggling over the treatment of children may recall similar agonizing issues raised in the divorce. The estate planning client may begin to view the process as adversarial, which can rekindle frustration and animosity experienced in the earlier divorce and spark conflict between spouses or with the attorney planner.

The substantial emotional effects caused by the dissolution of a marriage can linger for many years. Healing takes time, and it is not uncommon for individuals to enter into new relationships before fully recovering from the previous one. Planners need to understand these issues.

Anticipating the likely tension and being sensitive to signs of conflict as they arise are huge steps toward minimizing the severity of the problem. In addition, alerting clients in advance to the potential for some turbulence along the way may weaken the potential for quarrels. The sample letter shown at the end of this article is an example of one way an attorney can alert clients to the fact that the estate planning process can be difficult and emotional at times. The important thing is to keep clients in the here and now, reassure them that conflicts are not unusual, and try to exude empathy and sensitivity while pressing on toward the goal.

Dealing With Multiple Sets of Children

Frequently, remarried individuals have children from a previous relationship, as well as one or more children from the current relationship. Discussions over how to plan for the children can easily become combative.

Clients may need to be reminded that the desire to provide for biological children is strong and does not indicate any current emotional attachment with the previous partner. Complicating this may be a somewhat strained bond with the child from the previous relationship—whether that bond is between the new spouse and the child or the biological parent and the child, or both.

A planner may wish to use a trust, direct provider payment (such as tuition or medical expenses), or other technique that provides for the child without placing the inheritance under the control of the "other" biological parent. Using separate assets or life insurance to fund the inheritance also may avoid having to dip into the expected pool of assets available for the other spouse's children or the children from the current relationship.

Dealing with Support Obligations to a Previous Spouse or Children and Antenuptial Agreements

Whether it is a support obligation or an antenuptial agreement, obtaining the relevant documents detailing the client's continuing responsibilities and conducting a thorough review are essential. Frequently, the estate planner will need to press the client to obtain copies of the settlement agreement or final

divorce decree. The estate planner must confirm that the terms of the agreement are being met, such as establishing and funding any required trusts, purchasing any necessary insurance, appropriately designating beneficiaries, and making any contractual provisions for the previous spouse and/or children.

Antenuptial agreements also need to be reviewed to confirm that they are currently effective, as many contain "sunset" provisions. In addition, the estate plan must reflect the dispositive provision agreed on by the clients as reflected in the antenuptial agreement. If the clients wish to vary their current estate plan from the provisions in the antenuptial agreement (because, for example, some years have passed and the wealthier spouse wishes to make greater provision for the other spouse than is required), the planner should carefully document the variance and insert language in the estate plan to avoid a potential conflict. If the variance requires amending the antenuptial agreement, the spouses may need to obtain separate counsel.

An antenuptial agreement may include a waiver of each party's rights to the other's retirement plans. A potential trap lurks in such provisions, however. A premarital waiver of spousal benefits for certain retirement plans may not be effective because applicable Treasury Regulations require the parties to be married at the time of signing the waiver. If the antenuptial agreement purports to waive spousal rights to retirement plan assets, the estate planner may need to obtain waivers that have been signed after the clients were married.

Dealing with Substantial Age Differences in Spouses (The May/ December Romance)

Substantial age differences between spouses are not confined to the movie-star set. These age differences can present a problem, and not just because of the special rules for computing minimum required retirement plan distributions when the participant is more than 10 years older than the participant's spouse.

The children of the elder spouse may resent or distrust the younger spouse. General Chuck Yeager's 2003 marriage to a much younger spouse triggered a dispute that continues to estrange the retired general and test pilot from his children. Before his remarriage, General Yeager's adult daughter lived next door to him and managed his money following his first wife's death. His attempts to resume management of his finances following his remarriage have been resisted by his adult children.

In 2006, a Nevada County Superior Court judge ordered Yeager's adult daughter to repay almost $1 million in funds received through the sale of family assets. Later that year, General Yeager sued each of his children, accusing them of diverting money from his pension fund. To date, the family has spent years in litigation, all initially arising out of a remarriage to a younger spouse.

If the younger spouse is close in age to the elder spouse's children, the children

will not want to wait for the younger spouse to die before receiving the bulk of their inheritance. A standard QTIP trust can place the children in the unenviable position of having to wait, creating likely conflict between the children and the younger spouse and producing resentment toward the trustee administering the trust. When appropriate, a large outright distribution, an irrevocable life insurance trust naming the children as beneficiaries, or a QTIP trust capped at a fraction of the estate may provide funds for the children immediately while still providing for the surviving spouse and lessening the animosity between the children and the younger spouse.

Dealing With Wealth Disparities in Spouses

Wealth disparities in spouses (so-called fiscal unequals) can create a host of difficult issues. One spouse may not have enough assets to fund fully that person's applicable exclusion amount. The wealthier spouse may reject the idea of transferring outright sufficient assets to fund that amount. Without equalization, the clients will lose valuable tax savings if the less-wealthy spouse passes first.

When both spouses have children, resentment is likely to surface if the wealthier spouse supports his or her children in a more lavish manner than the less-wealthy spouse. The fiscal unequals also may have some unspoken tensions regarding their wealth disparities that surface in the estate planning process. Because of societal and gender issues, the tension and potential for conflict may increase when the man is the less-wealthy spouse.

To address these issues, knowledge of the likely tension can be helpful, as is discovering the disparity as soon as possible in the process. If it is a potentially taxable estate and the wealthier spouse is unwilling to make an outright disposition to fund the less-wealthy spouse's applicable exclusion amount, a joint revocable trust may be a helpful vehicle. (See Beth A. Turner, *Joint Revocable Trusts: New Flexibility in an Old Form*, Prob. & Prop., July/August 2005, at 48.)

In the current presidential campaign, both Senator Obama and Senator McCain have supported the "portability" of the unified credit, which would allow the second-to-die spouse to utilize any unused portion of the first-to-die spouse's unified credit. If portability becomes law, and the second-to-die spouse is able to combine his or her credit with the first-to-die spouse's remaining credit, estate equalization will become less critical.

Dealing With Who Pays the Estate Taxes (Apportionment)

Estate tax apportionment is beyond the scope of this article, perhaps beyond the scope of the number of pages of this newsletter put together. With that caveat, this discussion should at least consider the basics of apportionment.

In most wills and in most states, the burden of paying the estate taxes falls on the

"rest, residue and remainder" of the estate. If the plan calls for deferring estate taxes until the second spouse's death, the inheritance of the beneficiaries of the residue of the second-to-die spouse will be diminished by the estate taxes—essentially, those beneficiaries "pay" the taxes because they end up with less. In a first-marriage situation, this may not matter because all of the beneficiaries of the first spouse to die are probably the same individuals as those who would be the beneficiaries of the surviving spouse. In one form or another, then, these individuals would shoulder the tax burden at some point in time.

In a second-marriage situation, this may not be the case. Assume Husband has two children and Wife has two children, each from a prior marriage. Husband's will may well provide for a generous bequest to his children, and Wife's will may intend to do the same for her children with the expected residue of her estate. If Husband passes first and estate tax is payable at Wife's death, then Husband's children may have received their full inheritance, while Wife's children may receive little or nothing after all the taxes are paid. Wife's children are likely to be very unhappy with this and may want to marshal whatever assets they do have to pursue a claim against the attorney who engineered the estate plan.

The issue also can arise when inheritances pass outside the will, either through a nonprobate asset (life insurance proceeds, transfer on death accounts, right of survivorship property) or through a trust or other document. Despite the fact that these assets may pass outside the will, they may still be includable within the decedent's gross estate for tax purposes. The lucky beneficiary of the life insurance policy gets the proceeds tax-free; the unlucky beneficiaries of the residue pay the tax. If a portion of the estate passes in a trust outside the will, that trust will likely have its own tax payment provisions, which may conflict with those in the will.

To determine whether an estate plan may give rise to special apportionment issues, a planner should look for the following warning signs:

- beneficiaries of large nonprobate assets or large specific bequests are not the same as the beneficiaries of the residue,
- beneficiaries of each spouse's will are not the same, and
- beneficiaries of nontestamentary trust assets and beneficiaries of the residue are not the same.

If any of these warning signs appear, a planner should take these steps. First, he or she should consult a more comprehensive source on tax apportionment such as the BNA Tax Management Portfolio on Estate Tax Apportionment authored by Prof. Jeffrey Pennell, or Daniel B. Evans, *Tax Clauses to Die For*, Prob. & Prop., July/August 2006, at 38. Second, the attorney should discuss the issue with the clients and document how they wish to treat this issue. In certain situations, the clients may elect to pay a portion of the estate taxes at the first spouse's death to ensure that the residuary beneficiaries of the second-to-die spouse are not forced to foot the bill for everyone. In other cases, the client may wish to apportion estate taxes among the various assets, both probate and nonprobate. Finally, the

provisions of the wills and any planning documents should reflect the clients' wishes and should be revised if they conflict with one another.

Conclusion

Blended families present special challenges for estate planners and frequently require heightened counseling, increased sensitivity, and vast stores of patience while testing the depth and variety of the estate planner's bag of tricks. The estate planner needs to be familiar with the issues and concerns common to blended families to address adequately the needs of such families in the estate plan.

Seven Challenges Presented by Blended Families

1. Unresolved emotional issues negatively impacting current decision making.
2. One or more sets of children from current and previous relationships (blended families).
3. Support obligations to a previous spouse or children.
4. Increased likelihood of an antenuptial agreement.
5. Substantial age differences in spouses (the May/December romance).
6. Wealth disparities in spouses (fiscal unequals).
7. Who pays the estate taxes (apportionment)?

Sample Letter

Dear Client,

Thank you for setting up an appointment to discuss your estate planning. For our meeting, I will need for you to bring in the financial information we discussed on the telephone. I have attached to this letter a detailed list of the information I will need. I assure you that the information you provide will be held in the strictest confidence.

I wanted to speak for a moment about what your expectations should be in this process. Planning your estate can be one of the most important and exciting things you can do, as it allows you to make decisions today about how best to care for your family once you are gone. We will discuss a number of options for your consideration.

The estate planning process can also be somewhat stressful. You have mentioned that you both have children from prior marriages/relationships, as well as children together. In our meetings we will be discussing how to provide for these children in accordance with your wishes, as well as providing for the disposition of your individual and joint assets. However, it would be most helpful if the two of you could discuss these issues in advance of our meeting so that you might familiarize yourself with each other's expectations.

I salute the two of you for initiating this process and I look forward to working with you.

Very truly yours,

Friendly, Friendly, Kinder & Gentler, LLP

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Estate Planning

How to Effectively and Efficiently Interact with Grieving Clients

By Gary Glober, M.D.

All interactions are combinations of *facts* and *feelings*. Because of client needs and economic realities, trust and estate lawyers often focus rapidly on the *facts*. But *feelings*, especially during grieving, can inhibit the client's ability to hear and understand the lawyer's recommendations.

Thus, trust and estate lawyers must attend to clients' feelings before moving to the facts.

Although counterintuitive, this approach actually saves time in the long run. Hood, in the 2004 *ACTEC Journal*, warns that prematurely directing the interaction to legal and tax issues could result in "bottom-line" ill effects such as client procrastination or litigation. At the very least, the lawyer risks the client

choosing another advisor.

Lawyers are not trained nor do they wish to be therapists. Nevertheless, using rapport-building skills and armed with insights into the signs and symptoms of grief, the lawyer can create a "therapeutic" interaction. To do otherwise might be perceived as being insensitive and reduce the efficacy of the interaction.

Fortunately, rapport-building skills are few in number, conceptually simple, and it is never too late in one's career to learn to employ them. This article begins with practical approaches to addressing both facts and feelings in the context of grief and concludes with a scenario illustrating appropriate rapport-building skills.

Background

Grief is the psychological, social, and physical reaction to a loss closely tied to a person's identity. Clients may begin grieving in anticipation of a loss as exemplified by a terminal illness in the family or the expectation of a divorce. Even without death, the people we care about may not be physically or psychologically available, resulting in what Boss terms "ambiguous loss." (P. Boss, *Loss, Trauma, and Resilience: Therapeutic Work with Ambiguous Loss* (2006)). Examples of ambiguous loss include a loved one physically missing after a natural disaster or mentally absent because of Alzheimer's Disease.

Manifestations of grief can differ from individual to individual and from time to time. (H.J. Lunche, *Understanding Grief: A Guide for the Bereaved* (1997), and *The Dougy Center Training Manual: Grief Indicators*, as abstracted in the *Bo's Place Training Manual* (Spring 2003)). Examples include, but are not limited to, the following:

- *physical*—fatigue, low energy, appetite changes, and tightness in chest and/or throat;
- *emotional*—numbness, emptiness, anger, resentment, guilt, regret, and a desire to join the lost one;
- *social*—hiding feelings to "take care of others" and friction with others over advice;
- *behaviors*—profound dependence, "staying busy," and avoiding situations and locations that arouse grief; and
- *spiritual*—questions to and about God.

These reactions can come and go without warning—like "being on an emotional roller coaster." Not always knowing what "triggers" these symptoms can be very frustrating. Common "triggers" include anniversaries such as the day of the loss, birth, or wedding; family celebrations; and questions or statements from others about the loved one.

The Kübler-Ross "Five Stages of Grief"—denial, anger, bargaining, depression,

and acceptance—come to mind when thinking about the natural progression of bereavement. Not every grieving individual exhibits each stage or in an orderly progression, however. (P.K. Maciejewski et al., *An Empirical Examination of the Stage Theory of Grief*, 297 JAMA 716–23 (2007); Robert A. Neimeyer, *Lessons of Loss: A Guide to Coping* (1998)).

A constant refrain of the bereaved is that friends, family, and coworkers either treat them as "lepers" or "fragile glassware" or pressure them for "closure." Fortunately, most people suffering a loss are resilient. (George A. Bonanno, *Loss, Trauma, and Human Resilience: Have We Underestimated the Human Capacity to Thrive After Extremely Aversive Events?*, 59 Am. Psychol. 20–28 (2004)). Although resilient individuals may experience transient perturbations in normal functioning such as several weeks of sporadic preoccupations or restless sleep, they generally exhibit appropriate functioning across time. Indeed, some reports indicate that grief interventions may impede the natural resilience processes and inhibit adaptation by increasing rumination about the loss. (Robert A. Neimeyer, *Searching for the Meaning of Meaning: Grief Therapy and the Process of Reconstruction*, 24 Death Stud. 541–58 (2000); Margaret Stroebe et al., *Who Benefits from Disclosure? Exploration of Attachment Style Differences in the Effects of Expressing Emotions*, 26 Clinical Psychol. Rev. 66–85 (2000)).

Rapport-Building Communication Skills Open-Ended Questions

During the early weeks and months, grieving individuals might find it difficult to respond to routine questions like: *How are you?* Instead, after shaking hands and sitting, make an empathic statement such as: *I appreciate your coming. I imagine that these days have been difficult for you.*

When the client enters the office, your staff should simply greet him or her with a gentle smile: *Good morning/afternoon, Mr., Mrs., Ms _____. Please make yourself comfortable and I will let _____ know that you are here.*

Attention to nonverbal details throughout the interview is important. For example, keep your eyes at the same level or just below those of the client and use more eye contact with the client than with files and notes. Avoid imposing mechanical barriers such as a large desk. Instead, consider interacting around a small round table or place yourself somewhat at a right angle to the client. Have a box of tissues nearby. After a pause, continue with an open-ended question: *How do you hope that I might be of assistance today?* Or: *What would you like to talk about today?*

Then, because clients want their lawyers to *really* listen, avoid interrupting too quickly to focus, for example, on "fact-finders" and educational aids such as graphic projections. Hood cautions us to avoid thinking, while listening to the client, about the details involved in issues such as transfer of wealth, avoidance of taxes, and the establishment of property management mechanisms. If abruptly interrupted on a regular basis, the client rapidly assumes that the lawyer prefers

fact-oriented questions and wants to avoid his or her feelings.

Listening Skills

- *Silence*—Being quiet can be difficult given the lawyer's predisposition to move quickly to facts. Because nature abhors a vacuum, however, silence is a very powerful communication-stimulating skill.
- *Minimal Verbal Encouragers*—Examples include: *I see. Go on. What else*? *Please tell me more.*
- *Follow-up Questions—What did that mean to you? What concerned you the most about that?*
- *Reflect/Clarify—Please tell me what you meant by feeling in a fog. I would like to hear a little more about the experience you mentioned of not being understood by your family.*
- *Explore Feelings—Tell me what went through your mind when I emphasized the need for a timely decision.*

If you sense inconsistencies between verbal and nonverbal behaviors, make an "educated guess" such as: *You say that you are coping well, but I get the impression that you are struggling.* Even if the guess is incorrect, the attempt shows clients that you are trying to further your understanding of their emotions. Often, clients will tell you what they are really feeling.

Barriers to Effective Listening

- *"Yes/No" Questions*—For example, if you ask, *Do you have anything else that I should know today,* it would be easy for a grieving client to distractedly answer, *No.* Instead, you will obtain more useful information by asking, *What else do you want me to know today?*
- *Why Questions*—Asking "why" seems to question a client's motivation. Thus, instead of *Why did you hesitate when I suggested that you incorporate this new approach into the planning?* Say *What reasons did you have in hesitating to incorporate this new approach?*
- *Trite or Canned Expressions*—For example: *I understand how you must feel.* Such statements increase the risk of the client saying or thinking: *How can you understand? Have you ever had a husband killed by a drunk driver?*
- *Professional Jargon or Legalese.*
- *Premature Advice—How about seeing a grief counselor?*
- *False Reassurance—Don't worry. I will take care of everything.*

Handling the Feelings

While listening, stay alert for the client's verbal and nonverbal expressions of emotions. If feelings are not acknowledged empathically, the lawyer runs the risk that the client will keep repeating ("re-cue") the emotions and be unable to interact effectively. The use of empathy demonstrates to the client that the lawyer

does understand and, thus, helps to get the interactions back on track by stopping the "re-cue."

Empathy is a brief phrase that attempts to identify verbally the speaker's emotions. One does not have to experience personally the patient's feelings to be empathic.

Lawyers are often concerned that being empathic will "open Pandora's box." Actually, empathy does the opposite by greatly increasing the likelihood that the client will feel heard and understood.

Empathic examples: Sadness—*I can sense that this experience has been very troubling.* Anger—*You appear irritated about my urgency for you to complete these forms.* Apprehensive—*The forgetfulness that you report must be scary.* Dispirited—*Hiding your grief to protect your children must be a drain on your energy.*

In addition, the life of the grieving client is full of potentially guilt-inducing *shoulds* and *what ifs*. For example: (1) *I should* be strong for my loved ones. (2) *It should* have been me instead. (3) *I should* have told my father that I loved him. Now, he doesn't even recognize me. (4) *What if* I had insisted earlier that she go to the doctor? (5) *What if* I forget what my wife looked like?

If the bereaved expresses a *should* or a *what if*, employ an empathic "educated guess" such as: (1) *That must be very draining, always having to be strong.* (2) *The idea of forgetting your wife must be depressing.*

Chunking and Checking

When interacting with clients, lawyers tend to talk and talk and talk and talk, especially when a lot of feelings are in the room. Unfortunately, the client usually is still thinking about the first few sentences and does not hear the rest. To be efficient, give information in small "chunks" with pauses to "check" for the client's emotions and his or her understanding of the facts.

Personal Awareness

The grieving client challenges the lawyer to stay focused. Although most of his or her communications are appropriate, occasionally the lawyer might experience (1) anger toward the client as expressed in thoughts such as *why doesn't he just follow my advice?*, (2) being bored, (3) excessive bluntness, or (4) being overly pleasant.

These feelings may be secondary to (1) identification with a client's appearance, age, personality, or ethnicity; (2) having a seriously ill family member or a history of loss; (3) malpractice concerns; or (4) counter-transference. Sometimes, the

lawyer experiences sensations of anger, hopelessness, and sadness when talking with the client. What may be happening is that he or she is unconsciously mirroring ("counter-transferring") the client's feelings.

Equally important are the lawyer's *shoulds*: (1) *I should* always remain professional ("Even though Jim is agonizing about the murder of his brother, I must control my emotions"); (2) *Mary should* be grieving more about her husband.

Closing the Interview

Summarize what you and the client said: *Let's go over the main points to be sure that we are both on the same page.* Then, screen to find out if any major points or concerns were missed: *What did I not address that you hoped we would cover today?* Or: *I hope that I have not left something out that is important to you.*

Illustrative Scenarios

The following scenarios demonstrate two approaches to a challenging interaction.

Estate planner (EP) has been trying for several months to have Bob, whose wife recently died of cancer, complete necessary papers, but to no avail. During each office visit, Bob looks morose, moves slowly, and has difficulty concentrating. EP, aware of rapidly approaching deadlines, becomes increasingly frustrated.

Scenario 1

EP: *Bob, please come in. How are you?* [EP looks up briefly and then returns to shuffling documents on a large desk that is between him and the client.]

Bob: *Wish I were better . . . .* [Voice trails off a little.]

EP: *Bob, I hate to keep harping on the need for you to complete the papers I gave you two months ago.* [Ignores the feelings and moves to facts.]

Bob: *I know I have to do it, but . . . .* [Looks sadly down at the floor, which represents a nonverbal "re-cue"]

EP: *I realize that you lost Betty not very long ago, but, as your lawyer, I feel obligated to point out that the legal clock is ticking. I would hate for you to have financial complications. You would feel much worse if that happened.* [Factual statements, but EP said too much at one time—did not chunk and check. Also, did not acknowledge the "re-cue."]

Bob: [Sadly] *I can't feel any worse than I do now.* [Second "re-cue" as the EP is

still avoiding his feelings.]

EP: *The sooner you sign the documents, the quicker you can get on with your life.* [False reassurance.]

Bob: *I know, but it's damn difficult even to get up in the morning.* [Third "re-cue" plus a hint of irritation.]

EP: *I understand how you feel, but here are copies of the same forms that I sent you last week. I need to have them back by Friday.*

Bob: *Okay.* [Brusquely takes the packet, extends a limp handshake, and leaves while thinking, *How in the hell can he understand?* Hence, the chances that Bob will quickly return the signed forms are slim.]

Scenario 1 illustrates how rushing to facts, avoiding the client's "re-cues," and not chunking and checking led to frustration and further delays.

Scenario 2

Please note in this revised scenario how the use of silence, specific clarification of Bob's emotional statements, chunking and checking, and empathy move the process forward more efficiently and compassionately:

EP: *Bob, please come in. How are you?* [EP stands up, shakes Bob's hand and then sits at right angles to him.]

Bob: *Wish I were better . . . .* [Voice trails off a little and looks down at the floor.]

EP: [Instead of speaking, the EP leans forward a little but remains silent.]

Bob: [Sighs. First "re-cue."]

EP: *Bob. These past two months have been very challenging for you.* [Acknowledges the "re-cue" by using empathy.]

Bob*: I'm either crying my eyes out or walking around in a fog.*

EP*:* [As the client still is "re-cueing," the EP remains silent.]

Bob*:* [Brightening a little, now makes eye contact with the EP.] *Thank you for being so patient with me. I know that I've been procrastinating.*

EP*: In my experience, most clients in your situation have difficulty focusing even when having to meet important deadlines.* [EP validates/legitimizes Bob's

emotions.]

Bob: *I feel torn . . . .*

EP: *Torn.* [Reflection as Bob is still not emotionally ready to sign.]

Bob: *I can't help feeling that when I sign the papers, she's really gone.*

EP: [Silent. The EP avoids false reassurance that might inhibit Bob's reflection about why signing the papers was difficult.]

Bob: [Sighs deeply and straightens up in the chair.] *Thank you for hearing me out. I don't want to, but I have to take the bull by the horns. Please give me a pen and the forms.* [Signs the documents.]

EP: *Bob, thank you. It's been difficult because of what you just said about the signing and Betty*. [Pauses, and then, observing that Bob still appears positive, shakes his hand warmly and escorts him out.]

Additional Considerations

As you gain trust with the client, ask if he or she is presently under the care of a medical physician and is engaging in potentially rejuvenating activities such as regular exercise, meditation, yoga, and community activities.

Given the physical and emotional drain of interacting with grieving clients, please consider (1) sharing, from time to time, the challenges of professional life with trusted and insightful friends, family, and colleagues; (2) one-on-one coaching to continue learning and practicing, with feedback, communication skills tailored to your needs; and (3) regularly scheduled quiet time and exercise.

Also, encourage your staff to express to you in private their feelings about the grieving clients with whom they interact. Use the same rapport-building skills with them as with your clients.

Final Thoughts

Estate planning and administration is one of only a few professions that must continually address both facts and feelings to be effective and efficient. This obligation is made more difficult during interactions with a grieving client. The author hopes that the practical rapport-building skills—open-ended questions, reflective listening, empathy, and chunk and check—will assist the lawyer to efficiently provide accurate and compassionate expertise.

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Note

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Estate Planning

A Message to Clients: Avoiding Probate Court Litigation

By Karen S. Gerstner

When I was a young lawyer, I attended a meeting with several attorneys to discuss certain “contested matters” that had arisen after the death of a widower who died survived by four children. I was shocked to hear one of the seasoned attorneys say, “If all decedents had only one child, my workload would decrease to nothing.” Whether you go back to Cain and Abel, or only as far back as the Smothers Brothers (“Mom always liked you best”), sibling rivalry is the chief factor in many disputes arising after a parent dies. Many laypeople attribute all litigation to greed, but in the case of family situations, often much more is involved than simply greed. Sometimes children hold deep-seated resentments, which may be based on perceived unfair treatment by a parent or sibling, often going back many years. Sometimes the last living parent is the only “glue” holding the children in the family “together” (if they ever truly were, in fact,

"together"). Sometimes parents have unrealistic expectations about family.

What Is Probate Court Litigation?

The terms "contested matters" and "litigation" are often used interchangeably. Both refer to situations that may require court action to resolve a dispute or fix a problem. Some contested matters do not involve animosity between the parties, while others definitely do. If the matter surfaces because of a person's death or mental incapacity, then any necessary court proceeding will usually be filed in a court that has "probate jurisdiction." Many urban counties have specialized courts to handle decedents' estates and mentally incapacitated persons. In other communities, these matters may be heard in a court that handles a number of different matters, including probate matters. Most of the matters handled by probate courts, such as admitting wills to probate and appointing executors, are routine and not contested. Routine probate matters can be handled very efficiently.

"Contested matters" handled by probate courts (aka "probate court litigation") is a broad term that includes a variety of situations, including, but not limited to:

- will contests (a challenge to the validity of a will);
- will and trust construction suits (a request that the court make a determination regarding the legal meaning or effect of particular wording used in a will or trust);
- guardianship contests (a fight over (1) whether a guardian should be appointed for a particular individual who allegedly has lost his mental capacity (and did not do any advance planning, such as executing powers of attorney), and (2) if so, who should be appointed as the guardian to make medical decisions and handle financial matters for that mentally incapacitated person);
- trust modification and trust reformation suits (a proceeding that requests the court to change (or "fix") the terms of a trust because something is wrong with the way the trust is worded);
- trust termination suits (a legal action brought to terminate a trust because the purpose of the trust has been fulfilled or can no longer be fulfilled); and
- breach of fiduciary duty actions (suits by beneficiaries against an executor, trustee, guardian, or agent alleging that the fiduciary failed to act in accordance with the law and/or the instrument appointing her and thereby caused damage to the beneficiaries).

Multiple Marriages

Besides sibling rivalry, another high-risk factor for probate litigation is the so-called "second marriage" situation. Many people marry for a second (or even third or fourth) time without signing a premarital agreement (**pre-nup**) before the wedding. Many people, including the media, still mistakenly believe that the

sole purpose of a pre-nup is to specify how their assets will be divided *on divorce*. Although such matters *can* be addressed in a pre-nup, estate planning lawyers are more concerned with the "messy issues" that develop *on death* (they have an optimistic attitude that their clients' marriages will work out; they have a pessimistic attitude when it comes to death, however—all of their clients will die someday). The pre-nup is one of the best ways to avoid probate litigation on death. It can also avoid a very expensive "forensic accounting" on the death of the first spouse. Many people mistakenly believe they own certain assets as their separate property (perhaps simply because the asset was in existence before the marriage and/or is titled solely in their name) when, in fact, their property may have become community or marital property, in whole or in part, during the marriage. It is better for living persons to create the necessary documentation regarding the ownership of their assets, even if it involves a pre- or postmarital agreement, than to have family members fight over these matters on the death of their spouse or parent. Not to be too harsh, but it appears irresponsible (and, perhaps, also "penny wise and dollar foolish") for persons who own any significant assets to enter into a second marriage without a pre-nup. Even if the spouses in a second marriage are themselves happy to treat all assets on hand on the death of the first spouse as joint or community property, unless the proper legal documentation is in place, there is nothing to prevent one or more children of the deceased spouse from claiming otherwise after the death of their parent. This is the classic probate court litigation case: children of the first marriage versus the spouse of the second marriage.

Dysfunctional Families

The term *dysfunctional family* is often used by lawyers who handle probate litigation (one of my former law partners liked to explain his practice by saying he represents "dysfunctional families with wealth"). By definition, a family involves multiple people who have wants and needs and must interact with each other. It is easy for dysfunction to arise in families, especially if resources must be shared. Family relationships can be very rewarding, but they also can be very hard. It appears that many misunderstandings arise because of the fact that people do not always communicate clearly with each other, leading to unresolved issues. Sometimes it is just too painful for people to address issues that really should be addressed. Estate planning lawyers are not psychologists, but they understand the difficult situations some people are in. They are able to help clients deal with difficult issues in a proactive way: "An ounce of prevention is worth a pound of cure." This is particularly true when it comes to avoiding probate litigation. Some people say they do not care what happens after they are dead. But, if there is probate litigation after death, even the decedent's favored beneficiaries suffer. Good planning is the answer.

Factors That Could Lead to Probate Litigation

Here is a list of *some* of the factors (in no particular order) involved in probate litigation, grouped by categories.

Creating a "Nonstandard" Estate Plan

Some examples included estate plans that (1) "cut out" a child, (2) treat children differently, (3) create overly detailed trusts attempting to "control from the grave," and (4) make gifts to mistresses. It does not matter if the person creating the plan has "good reasons" for doing what he is doing. A nonstandard estate plan increases the odds for probate litigation after death. It's just a fact.

The Second Marriage Situation

As already noted, if the pre-nup or post-nup does not clearly define the ownership of assets by couples who were married previously, the potential for litigation on the death of a spouse is much greater (especially if there are children from the prior marriage). If assets are not cleanly divided between the surviving spouse and the children from the prior marriage, problems can arise. Life insurance can sometimes be the best way to separate the interests of the deceased spouse's children from the surviving spouse and provide for both of them. The use of trusts can help, but the trust must be carefully structured. Probate litigation is more likely with plans that create a trust for the surviving second spouse (1) with the children of the first marriage as *permissible current beneficiaries* of the trust along with that spouse; (2) that gives the surviving spouse a power of appointment over the trust, especially if the trust assets can be given to beneficiaries other than the decedent's children; and (3) in which either the surviving spouse or a child of the deceased spouse (or both together) is the trustee(s)—this type of trust is usually best handled by an independent trustee such as a bank or trust company.

Not Appointing the Right Fiduciary

Serving as the executor of an estate, the trustee of a trust, or an agent under a financial power of attorney requires a huge commitment of time and effort and absolute honesty. When determining who should be named in these important fiduciary positions, the personality traits and skills of the appointee should be carefully considered. It would be a big mistake to name someone in one of these fiduciary positions who

- does not communicate well with the beneficiaries,
- does not read (or listen to) *and follow* the instructions of the attorney advising him,
- procrastinates in getting things done,
- is not 100 percent trustworthy,
- may be susceptible to the (bad) influence of his or her spouse or someone else,
- is arrogant, conceited, or a "know it all,"
- is disorganized and/or loses things, and
- is lacking in common sense.

Further, it is often a mistake to name two people to act together as co-fiduciaries (unless both individuals are extremely mature, sensible and well-adjusted, good communicators, and good at coordinating their efforts).

Ill-Conceived or "Faulty" Planning

There are so many examples of "bad estate planning" that it is impossible to list all of them here. Some are the result of incompetence and/or lack of experience on the part of the attorney who prepared the plan. Others are the result of individuals trying to do things themselves that are not well thought-out. Some examples include (1) a person writing his or her own will or codicil (unless the instrument is a handwritten codicil that disposes *only of* personal effects); (2) having a customized estate plan prepared by an attorney who lacks the necessary expertise to draft nonstandard provisions; (3) creating a group trust for adult beneficiaries (that is, one trust out of which the trustee can make distributions currently to any of several persons); (4) appointing one child as the trustee over another child's trust; (5) buying too many annuities (these assets are almost impossible to deal with effectively in an estate plan); (6) an executor, trustee, or agent ("fiduciary") not hiring an attorney to represent and advise him, at least initially; (7) an executor hiring a lawyer who lacks the necessary expertise to help with the postdeath matters when the will contains tax and other "sophisticated" estate planning; (8) a fiduciary not hiring an accountant to prepare all required income tax returns and provide relevant tax advice affecting the estate, trust, and/or the beneficiaries; (9) a trustee not hiring an investment advisor or agent to assist her with managing the investments of the trust; (10) a parent not explaining or discussing his estate plan (at least in general terms) with his children; (11) a person signing a will or codicil on her "death bed" or while suffering from a serious illness; (12) a person naming a minor (a person under age 18) as the direct beneficiary in a will or living trust or as the beneficiary of life insurance, IRAs, retirement plans, and so on; (13) attempting to dispose of nonprobate assets (such as assets that pass by beneficiary designation) in the will; (14) arranging for the complete disposition of assets in a nonprobate manner by using "multiparty accounts" (such as JTWROS and POD/TOD), leaving the executor with no funds to pay debts, taxes, and expenses after death; (15) attempting to dispose of all assets individually, rather than using percentages (at least for the bulk of the estate); and (16) in a taxable estate situation, having a plan that disposes of assets passing outside the will differently from assets passing under the will and not properly coordinating the tax consequences of the dispositions.

Other Difficult Situations

Other situations that are always more difficult to plan for and that increase the need for solid planning to avoid probate litigation (and other problems) include (1) heterosexuals living together who have not executed a "nonmarital cohabitation agreement" to avoid a "common law spouse" lawsuit on death; (2) gay and lesbian couples who do not do "special additional planning" to place their partners in a secure position of control (to override state law priority statutes)

and to arrange for the unassailable transfer of assets to their partners on death (tax planning also can be harder because the estate tax marital deduction is not available to gay and lesbian couples); (3) making unreported "taxable gifts" during life (a taxable gift is a gift that is more than $12,000 per person per year (the current annual exclusion amount)); (4) making gifts during life to just one child and not to all children in equal amounts; (5) failing to tell the estate planning attorney about an illegitimate child or child from a prior marriage; and (6) failing to organize the client's financial and other important information to enable the executor of the estate to do a good job.

Failure to Follow Up

This category includes the client (1) failing to review the estate plan on a periodic basis (estate plans become outdated very quickly now); (2) failing to do the necessary "homework" incident to the estate plan (such as retitling accounts and completing beneficiary designation forms as instructed so that nonprobate assets are coordinated with the client's estate plan in his will or trust); (3) failing to change the will, account titles, and beneficiary designations after marriage or divorce; and (4) failing to retitle all the assets in the name of the living trust before death if the intention is to avoid probate completely.

How to Avoid Probate Litigation

Don't do things that could cause serious legal consequences without first discussing them with legal or other advisors. Come in for a "check up" on a regular basis and be prepared to discuss every issue and concern. Follow through on necessary "homework" such as account titling and beneficiary designation matters (see above). Plan ahead for possible mental incapacity by having the appropriate documents in place. Make sure the persons appointed to fiduciary positions are completely trustworthy and responsible.

If a nonstandard estate plan is being implemented, use stronger techniques (such as a funded living trust) and additional provisions (such as a "no contest" clause). Consider creating a "will wall": a series of wills executed over a lengthy period of time, designed to make it undesirable for a relative who the client wishes to "cut out" (or treat less favorably) to contest the will, so that if the last will is successfully contested, the contestant will still have to contest the prior will, which, through advance planning, would have been prepared to provide even less generous gifts to the contestant than the last will (and so on).

In discussions with family members, the client should explain the reasons for the plan being implemented, although the client will need to be careful to state the reasons in a way that is calm and rational ("incendiary" statements will only add fuel to the fire and could be detrimental in a will contest).

Not all probate litigation can be prevented, of course, but a large portion of probate litigation can be prevented by good planning. Good planning is what

estate planning is all about.

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Family Law

- Grandparents' Rights to Visitation

By Aaron Larson

Grandparents' Rights to Visitation

By Aaron Larson

Background

Historically, following the death of a child, an acrimonious divorce leaving custody with a child's former spouse, or the breakdown of their relationship with a child, grandparents have been without any legal right to secure granparenting time visitation with their grandchildren. With the aging of the population, and with increased divorce rates, state legislatures started to enact statutes which granted grandparents some rights to seek court-enforced time with their grandchildren, even against the wishes of the grandchild's parents. The circumstances under which grandparents could seek grandparenting time, and the nature and amount of grandparenting time which could be made available, varied from state to state.

Arguments for Grandparents' Rights

In 2000, in the case of *Troxel* v *Granville*, the United States Supreme Court addressed the issue of third-party rights to seek court-enforced time with children. Within this context, a "third party" is somebody other than the child's parents. The Washington State statute examined in *Troxel* was not technically a "grandparenting time" statute, as it allowed "[a]ny person" to petition for visitation rights "at any time." The Supreme Court had little difficulty in determining that the Washington statute was overbroad. While the *Troxel* opinion is a "plurality" decision, meaning that there is no single opinion of the

court which was signed by a majority of the Justices, the decision made clear that there were certain prerequisites that grandparenting time statutes must meet in order to be constitutional. Six justices joined opinions holding the Washington statute to be unconstitutional. While there can be significant divergence of opinion with regard to what *Troxel* means, many practitioners believe that it requires advocates of grandparents' rights to take positions including the following:

- Grandparents may provide a stabilizing role in their grandchildren's lives, particularly after a divorce or crisis (such as the death of a parent).
- Where grandparents have been involved in a child's life, it can be traumatic to the child to suddenly be denied access.
- The mere fact that parents are divorced, or the grandparents's child dies or is incarcerated, should not automatically serve to grant the custodial parent the right to sever a positive relationship between the grandparents and their grandchildren.

Arguments Against Grandparents' Rights

Opponents of grandparents' rights take positions including the following:

- The the state has no business interfering with the child-rearing decisions of competent parents, even if the parent determines that grandparent visitation will not be permitted.
- Some grandparents are excluded from their grandchildren's lives for good cause-for example, because they were abusive to their own children and cannot be trusted with the grandchildren. Some grandparents interfere with ordinary parental decision making, or badmouth one or both parents to the grandchildren, creating unnecessary conflict.
- Where conflict exists between parents and grandparents, even if the parents are being unreasonable, court interference can destabilize the home environment of the grandchildren.

The State of the Law

Following *Troxel*, many state courts have addressed the constitutionality of their grandparenting time statutes, and many state legislatures have revisited (or are in the process of revisiting) their statutes, either following or in anticipation of court decisions finding them to be wholly or partially unconstitutional. It remains possible that the Supreme Court will revisit this issue in the future, as this new generation of grandparenting time statutes faces constitutional challenge. Until that time, the circumstances under which court enforced grandparenting time can be obtained will continue to vary from state to state, depending upon each state's interpretation of *Troxel*, although perhaps to a lesser degree than prior to the *Troxel* decision.

It is likely that most statutes created or amended after *Troxel* will require first

that there be some form of break in the parent-child relationship—perhaps a divorce, perhaps the placement of the grandchild in the custody of the grandparents, or perhaps the **death**—and that the grandparents provide "clear and convincing evidence" that grandparent visitation is in the best interests of the grandchild. Some argue that *Troxel* demands that the grandparents demonstrate that the child will suffer harm in the absence of grandparental visitation, although it does not appear that a majority of states will require a showing of harm.1

Considerations for Grandparents

Grandparents who are actually caring for their grandchildren should take affirmative steps to protect their rights. This can often be done by obtaining legal guardianship over the grandchildren, or by actually obtaining an order of custody. Absent a formal legal grant of rights, grandparents may find it much more difficult to preserve their relationship with their grandchildren, or to protect their grandchildren from being restored to the custody of a parent who is not ready to assume responsibility for them. (For example, grandparents may care for grandchildren while a parent goes through rehabilitation for a drug addiction, and have legitimate concern that the parent has relapsed, but without a legal grant of custody or guardianship be without any power to prevent the parent from taking the grandchildren out of their care.)

It is usually best to try to resolve grandparenting time problems amicably, as opposed to through the courts. It may be that the parent who is refusing access will be amenable to having the dispute mediated by a qualified professional. It is usually best not to make threats, and to make litigation a last resort— to be used only when all else has failed.

Don't make negative comments to your grandchildren about their parents, or make them part of an emotional conflict between you and their parents. The children don't need the stress, and that is perhaps the fastest way to get their parents to decide that your grandchildren don't need you in their lives.

Don't use access to your grandchildren as an opportunity to interfere with the way in which your grandchildren are raised by their parents. The parents have the right to make ordinary parenting decisions, and are likely to resent your attempts to interfere with their parental authority. Please note that this does not mean that you should not intervene or seek the involvement of a child protective agency in the event of abuse or potential harm to a grandchild.

Your grandparenting time will ordinarily be governed by the laws of the state where your grandchildren reside.

Endnote

[1]When the ACLU submitted a brief to the Supreme Court in Troxel, it argued that

the grandparents should be required to show that a denial of grandparental visitation would substantially harm a grandchild before grandparenting time should be allowed.

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Note

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Litigation

Voir Dire: To Google or Not to Google

By Jamila A. Johnson

A seasoned attorney packs his bags and shuffles out of the courtroom. He knows that the jury selection will continue the next morning. In his hands rest a stack of juror questionnaires. The million dollar question: Does he search Google or a similar Internet search engine for more information about the strangers who could decide his client's fate?

The initial act of researching the lives of potential jurors is painless. It is quick and inexpensive. With a click of a mouse, an attorney can have a heap of information regarding potential jurors: socioeconomic information, religious affiliation, education, and political campaign donations. With two more clicks onto a blog or a social networking site, the attorney can know details about the people in the juror's life. "Eureka!" The attorney's mind jumps to how this insight

should alter his opening statement. Throw in a few dollars and the juror's criminal background is available.

The Hesitation

With all these benefits, it seems peculiar that attorneys would think twice before "Googling" members of the potential jury pool. Are there risks to performing Internet investigations into the lives of potential jurors? U.S. District Judge David Coar thought so in 2006 when he banned search engine inquiries into the prospective jurors in the corruption trial of former Chicago mayoral aide Robert Sorich and codefendant Tim McCarthy.

"I am not in favor of Googling jurors unless there is some incredible need to do that," said Pat Deady, attorney for Tim McCarthy. He agreed with the court's pre-voir dire decision to prohibit him and his colleagues from investigating the background of potential jurors. "No good can happen," he said.

Deady falls into one camp on the debate into juror research—the camp that sees peril for the sanctity of the jury, in the abstract, and the potential for a circus in the courtroom. But how can more information be bad? To best understand Deady's position, picture yourself as an attorney in Chicago.

The "Tainted" Jury

Illinois has had more than its fair share of concerns over the practice of investigating the lives of jurors in the technology age. The most infamous involves the former Illinois Governor George Ryan, who underwent a five-and-a-half-month trial for corruption. After eight days of jury deliberation, reporters from the *Chicago Tribune* uncovered public records suggesting that two of the jurors had provided false answers on the jury questionnaires. Convicted felons are barred from serving on federal juries. Both jurors had records. The Court substituted alternate jurors during deliberations, and Ryan was sentenced to six and a half years in prison.

Earlier this year the Supreme Court refused, without comment, to hear Ryan's appeal that his jury was tainted. Not all judges responded to *Ryan* the same way. Judge Reggie Walton ruled in January 2007 that all potential jurors would undergo criminal background checks in her courtroom during the Lewis "Scooter" Libby Jr. trial.

It is possible that the more information the system has on a potential juror, the better chance at a trial free from prejudice. Then why are even those who favor investigation hesitant? There is not enough precedent to define attorney conduct in this arena. There is an unknown risk of jury tampering, professional responsibility concerns, trial disruption, and respecting privacy. Without clear decisions, this is a challenging landscape.

Jury Tampering

Jury tampering is a gross misdemeanor under the laws of each state. Jury tampering in most states hinges on communication with jurors. A person is guilty of jury tampering if, with intent to influence a juror's decision, he attempts to communicate directly or indirectly with a juror other than as part of the proceedings. An Internet search is unlikely to be considered an attempt to communicate with a juror. That does not mean that an attorney is completely free from caution online. Neither attorneys, nor their agents, should e-mail or post comments on websites that their jurors are known to frequent.

Improper Influence over Jurors

A request for access to juror's private sites may lead to influence under RPC 3.5. If a juror has a private Myspace or Facebook account, any attempt to view the private page would require an electronic message requesting access. This is likely an improper communication and influence. Attorneys should be careful that investigation does not actively interact with a juror's web presence in a way that could lead to favor or disfavor.

Discovering Bias

Parties have a right to the free judgment of a jury, unclouded by bias, prejudice, or fixed or preconceived opinion. An investigation into a juror may unearth grounds for excluding a juror for these reasons. Prospective jurors can be removed for cause if they possess a state of mind that satisfies the court that the challenged person cannot try the issue impartially and without prejudice.

Attorneys have a duty of candor to the court. The duty of candor to the tribunal under the Model Rules of Professional Conduct suggests that the attorney's role is to present evidence and argument so that the case will be decided according to the law. When information is known, be it from any source, that may prevent the case from being decided by law it is ethical to inform a tribunal as soon as possible.

Benefits to the Profession

Respect for the privacy of the jurors is undoubtedly a concern. No one wants his or her privacy invaded, and almost everyone sneers at decreasing privacy in the information age.

Yet in some ways increased juror investigation may show more respect for the individuality of jurors. For years the practice of law has relied heavily on stereotypes during jury selection. Data is published left and right discussing whether married mothers are better jurors than single women for cases against corporations, or whether men over 50 are good picks for a jury trial about Social

Security fraud. There is tremendous potential with juror research to step away from classifying individuals by these subcategories. Instead, an attorney can look at a blog and say, juror 12 seems compassionate or juror 15 seems financially savvy. The characteristics of the jurors are determined by their actions online, and not by their membership in a certain classification.

As that seasoned attorney unpacks his bags at his office and looks at the questionnaires, it is apparent that the decision to Google or not to Google is not **clear-cut**. But inside the stack of juror questionnaires are individuals and not categories like city dweller or grandmother. The million-dollar question may not be whether to investigate or not, but rather how to find moderation to increase, not hinder, the chances of a fair trial.

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Litigation

Handling the Criminal Case

By Kenneth A. Vercammen

The Telephone Call and Scheduling the Interview

Criminal courts are a great place where practitioners can get some trial experience and meet more experienced attorneys. By commitment and preparation, you can obtain excellent results and satisfy clients. Too often lawyers throw up their hands when a client presents a ticket involving drug possssion, driving while suspended, DWI, or assault. While defense of criminal court charges involving serious motor vehicle charges may become an involved process requiring commitment and persistence, there are a number of viable defenses and arguments that can achieve a successful result. Rather than simply suggest that a client plead guilty and avoid trial, an attorney should accept the challenge and apply his best legal talents to protect the client's rights.

You should never provide legal advice over the telephone. We do, however, often advise potential clients of some of the mandatory penalties and jail terms that the court could impose. This makes people realize the seriousness of the charge. We direct them to bring in a copy of the complaint, all their papers in connection with their case, accident report, and any documents they received from the Motor Vehicle Commissions. Oftentimes I will instruct them to write a confidential narrative if it is a case that is fact-specific or involves a great deal of detail, such as an assault case.

The In-Office Interview

When the client is first in the office, we have them fill out the Confidential New Criminal Case Interview Sheet. We obtain background information such as their name, address, the offenses charged, date of the person's arrest, other witnesses, statements given to them by the police, their occupation, and information regarding prior criminal convictions and prior motor vehicle convictions. Our interview sheet also asks if there is anything else important, such as a medical condition that affects their case. This form will also let us know whether or not the client will follow instructions and cooperate with us. If they refuse to provide information, you may have a problem client.

After reviewing the summons and the interview sheet, I ask a series of questions of the client. We request the client wait until the end of the interview before explaining their side of the story. We also ask them if there is anything else of importance in connection with the case that we should know. The client may have pending serious criminal charges in another state or country. I usually open up our statute book and show the clients the specific language of the offense they are charged with and explain to them the maximum penalties that could be imposed. By understanding the charges they are facing, my clients are more likely to realize the seriousness of the offense and pay our retainer.

Being Retained (Paid)

Rule 1:11-2 of the Rules of Professional Conduct indicate a retainer letter or written statement of fees is required for new clients. I also provide all my clients with written information explaining how to appear in court, information on surcharges, information on points, and information regarding substance abuse treatment, if applicable.

Famous Beverly Hills attorney Jay Foonberg writes: The fee: "Get it up front." This is the best time to obtain your fee while your client is in fear and is in jeopardy. If you are owed money after the case is over, you will never get it. The written fee agreement also protects you from clients that demand that you appeal or provide work other than what is set forth in the retainer agreement.

Once we receive our retainer, we begin work right away. Usually while the client

is still in the office, we prepare a discovery letter on the computer to the prosecutor/ district attorney and court and hand a copy to the client. We occasionally call the court to advise them that we will be handling the case and to inquire who handles discovery. We check the Lawyers Diary to determine who are the judges and prosecutor/ district attorneys for the county or town. It is important to learn about the judge and the prosecutor.

We require a great deal of cooperation from our clients in an effort to help keep their costs reasonable. We require our clients to take photographs of accident sites and prepare diagrams and provide us with the names, addresses, and telephone numbers of witnesses.

I recommend that my clients provide me with a list of between 10 to 15 reasons why they should not go to jail and why court should impose the minimum license suspension. We recommend they obtain a Motor Vehicle Abstract. This provides us with information for mitigation and penalties and also provides information to be considered by the judge in sentencing

Law is a business. Criminal court could be very lucrative if you provide competent representation and satisfy your client. I try to impress my clients and hope they will send additional clients.

Post-Interview Work

Many states have programs for first time offenders who have never previously been arrested or previously convicted of a criminal offense. Again, to avoid embarrassment, it is a good idea to speak with the prosecutor/district attorney and the police officer because they may have a criminal abstract to indicate that the client is not eligible for a diversions type program. We also make a motion to suppress where there is a question regarding the validity of a stop or search. Any other motions to dismiss should be made in writing such as statue of limitations or lack of jurisdiction.

Oftentimes in cases that deal with just one triable issue, such as the admissibility of a blood test result in alcohol or drugs, you can make a motion in limine or suggest a pretrial conference. It is often a good idea to try to know how the judge will decide in order to save you a three-hour trial on a complicated case. If the court rules against you in the motion in limine, you can enter a guilty plea contingent upon reserving your right to appeal on that one issue.

Discovery Phase

Oftentimes we do not receive all of the discovery that we request. We send a letter to the prosecutor requesting additional discovery and request that the discovery be provided within 10 days. If we do not receive the discovery within 10 days, then we may make a motion to compel discovery. We thus make a motion to compel discovery.

In the case involving essential witnesses, we occasionally write to the witnesses and ask them to call us so that we can find out what really happened. If possible I have a law clerk call up after we send the initial letter. The attorney could not testify if the witness provides an inconsistent statement, but our law clerks could testify. I sometimes speak to friendly witnesses myself later to make a decision to determine whether or not the witnesses are credible. You must protect yourself from looking like a fool. Oftentimes the clients are not telling the truth, and the witnesses are not telling the truth.

Upon receiving discovery, you should forward a photocopy of all discovery to our client. You should then discuss with the client whether or not you have a reasonable prospect of winning.

In drunk-driving cases, you should review the videotape with the client prior to the trial date and make arrangements to retain an expert. Prior to trial you should determine who the trial judge and prosecutor will be. It is very important to know your judge and to discuss with other attorneys familiar with the judge how your trial judge handles cases and sentencing. It is also a good idea to know the prosecutor's position on your case, such as the merger of a CDS in motor vehicle charge.

Preparing for Court

If it is a drug case, you should make an objection to the entry of the lab certificate as evidence at trial. You are also under a responsibility to provide any reciprocal discovery to the prosecutor. Occasionally, in a court where there is only one prosecutor you should call the criminal court prosecutor ahead of time to see if a matter can be worked out or plea bargained. Some criminal prosecutors in lower courts work part time and are not compensated for the many telephone calls they get in their offices. If you do call criminal prosecutors, remember they do not have any of the files in their offices and are too busy to discuss a detailed case.

If you discover a favorable case, make a copy for the judge, prosecutor, and client. Never assume the part-time prosecutor or judge is familiar with all the laws.

You should prepare a subpoena ad testificandum for witnesses to testify and subpoena duces tecum for witnesses to bring documents. You should have our clients hand deliver the subpoenas and write out their own check for the subpoena fees. It is better to be overprepared than underprepared.

Over the years I have made it a practice to build up files on particular legal subjects with complete case law. I now have files for drunk driving, driving while suspended, drug possession, assault, and careless driving.

When you receive the hearing notice, send a follow-up reminder to the client to be on time, bring all papers, and call 24 hours ahead to confirm the case is still on

the calendar. You also must make sure that your client is prepared and looks neat. The Grateful Dead and Budweiser T-Shirts should be replaced with something that looks presentable. They should have their pregnant wives sitting next to them. If you know you are going to have a trial or will be late, attempt to have the case marked ready hold for an hour late, otherwise you will be sitting around for a long period of time.

Preparation is the key to winning cases or convincing the prosecutor of exceptional defenses. Upon arrival at court, we will attempt to ascertain if the police officer is available. Often the police officer is on vacation, retired, or suspended, and this may assist your ability to work out a satisfactory arrangement for your clients.

There is no prohibition against speaking with State's witnesses. Outside of the courtroom, I usually call out the name of the non-law-enforcement State's witnesses to determine what their version of the facts are. If you have an excellent trial issue but believe the judge is going to rule against you, bring an appeal notice with you and file it with the court on the record. I keep in my car blank forms for order to compel discovery, order mark try or dismiss, order to be relieved, and an appeal notice.

Plea to a Lesser Defense

If your client is going to enter a guilty plea to an offense, it is important they understand what the offense is and put a factual basis on the record. You will be embarrassed if your client is pleading guilty to a drunk driving case and the judge asked your client what he had to drink, the client insists he only had one beer. The judge will send you back to your seat and must refuse to take the guilty plea unless an adequate factual basis is put on the record.

When your case is called, speak clearly before the court, providing your name and spelling out your name and where you are located. The judges like to know the names of new or unfamiliar attorneys. Your name is your future, and announcing it also provides free publicity for yourself. The judges and prosecutors want to move the calendar. However, your obligation is always to your client. Sometimes you have nothing to lose by trying a case. Courts are forbidden from increasing penalties merely because someone excused their constitutional right to a trail.

Having previously obtained for my clients their favorable background, I usually put on the record reasons why the judge should give them the minimum penalties.

Letters of reference and character reference letters are helpful in cases where the judge has wide discretion in his sentencing. After the client pleads guilty, it is a good idea to also ask the client on the record if he has any questions of you or of the court.

Conclusion

Whether or not you have a trial or there is a plea to reduce the charge, you wish to walk out knowing you did the best you could for your client. Even if you lose, you want to have been such an articulate advocate that your client walks out saying my attorney is great, but the judge is wrong. Always be innovative and prepare new arguments. We handle a substantial amount of criminal court and personal injury cases and have put case law and certain legal defenses on our website: www.NJLaws.com. If you have an overly difficult case and have problems handling it, do thorough research or refer the case out.

Kenneth A. Vercammen is an Edison, Middlesex County, trial attorney who has published 125 articles in national and New Jersey publications on criminal court and litigation topics.

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Litigation

Effective Mediation of High-Value Cases

By Joe Epstein

Parties who participate in complex, high-value, and/or multiparty mediation invest an enormous amount of time, money, and emotion. Most parties are looking for closure at such mediations. The key ingredient to more effective and productive mediations is premediation design and preparation. The parties should make sure that each side has the data necessary for a comprehensive evaluation and that the necessary decision makers participate in the case evaluation. Likewise, these decision makers should be at the mediation. Parties should prepare for mediation, employing the same forethought and planning as in preparing for trial. Since most cases settle, it behooves all parties to schedule the mediation date after they have gathered sufficient data for a comprehensive case evaluation but while there is still an opportunity for transactional cost savings. In multiparty cases, parties may consider a premediation caucus with the

mediator well in advance of the mediation. Parties might also discuss with the mediator whether they want a general session at the beginning of the mediation and, if so, how it would be conducted. Opening statements, which should focus on the case's key issues, can serve an important, positive purpose, but they can also be polarizing. On occasion, I have asked a party to argue his or her opponent's case. Similar to trial preparation, checklists are important for mediation preparation. The following checklists provide guidance on the issues parties must consider before the mediation commences.

Premediation Checklists

A Checklist for All Parties

1. Counsel should consider the usefulness of meeting with the mediator to specifically design the mediation process to fit the case.

2. Counsel should consider the usefulness of a premediation caucus or a premediation site visit with the mediator.

3. All parties should timely provide opposing parties and the mediator with all the information necessary to educate and to persuade them.

4. Counsel and the mediator should determine who needs to be present at the mediation to educate, to persuade, and to close the case.

5. All parties may consider creating a premediation settlement bracket.

6. Counsel should provide the mediator with significant motions, briefs, orders, photographic charts, graphs, etc.

7. Counsel should review with their clients before the mediation their best and worst case and the likely outcome range.

8. In commercial cases, all parties should assess the financial status of their opponents.

Plaintiffs Counsel's Checklist

1. Prepare clients for mediation in the same manner as in preparing clients for trial.

2. Provide the defendants and the mediator with any economic loss projections and life care plans well in advance.

3. Have complete and accurate subrogation and lien information and have subrogation and lien claimants at the mediation or available by telephone.

4. Consider making a demand before the mediation. As a general rule, the greater the demand, the earlier it should be made.

5. Depending on the value of the case, consider providing the defense team with a demand letter, a settlement brochure, a settlement DVD, or a PowerPoint settlement brochure.

6. Obtain insurance coverage information before the mediation and determine how it affects your negotiations strategy.

7. In multiparty cases, plaintiffs counsel may have to negotiate as a unit and devise a mechanism in advance of the mediation for dividing any settlement.

Defense Counsel's Checklist

1. Consider how acknowledgement and apology will be handled.

2. Give independent medical evaluations to the plaintiff and the mediator.

3. Put excess insurance carriers on notice before the mediation to allow for their meaningful participation in the process.

4. In multiparty cases, defense counsel and their clients may need to have a premediation caucus with the mediator to discuss the defense settlement strategy.

The Mediation

Parties to a mediation should keep in mind that, first and foremost, they must treat each other with dignity and respect. Parties should control anger and frustrations, and be gracious with one another. A fair mediation "process" is important for a positive outcome. Parties should be prepared to address underlying interests, needs, motivations, and emotions. Although sometimes difficult to accomplish, a mediation process built on trust and respect is geared to achieve one ultimate goal—to reach closure—and the process must be respected even if it differs from the usual adversarial approach. Opening presentations must focus on the key issues in the dispute and should be as objective and candid as possible. The opposing party (or parties) must be prepared to listen and shed its partisan perspectives during such presentations, just as it should throughout the entire process. Parties need to remain reasonably flexible, reconsider their positions, and reflect on new information and different perspectives as they wend their way through the mediation. Only if they show such traits and abilities will they be able to be creative and to connect with the opposing decision maker in order to break impasses. A few tactical and practical considerations: All parties should consider how they can create credible fear in their opponent(s). They should measure their own and their opponent's risk tolerance and consider how they can create trust with the other party and with the mediator. Parties must

find a way to understand and appreciate the emotions in play on both sides of the mediation table. Finally, all participants to a mediation should be prepared to build a golden bridge over which their opponent(s) can retreat, allowing them to save face. Remember that the goal is closure, not vanquishing the enemy.

Mediation Checklists

Plaintiffs Counsel's Checklist

1. If possible, let the client "sell" the case.

2. Present oneself as prepared for trial and confident of the ability to produce at trial.

3. Focus on the opposing decision maker(s), but don't lose sight of the opposing gate keeper.

4. Determine what aspects of the client's case are best "sold."

5. Have a strategy for utilizing a punitive damage claim, if any, at mediation.

Defense Counsel's Checklist

1. Acknowledge the severity of the plaintiff's injury and, where appropriate, sincerely apologize.

2. In multiparty cases, be more concerned with each defendant's own risk assessment and the overall case evaluation than the percentage split among codefendants.

3. Consider the plaintiff's need to have a day in court, to be heard, and to have a sense that justice has been served via mediation.

4. Measure the plaintiff's desire for closure and finality and appeal to those feelings.

Mediation of high-value cases requires thoughtful preparation, exquisite patience, creativity, legal and emotional insight, energy, and even courage. Parties need to understand both interpersonal and intrapersonal issues that arise in mediation: Don't shy away from using both intuition and imagination. Flexibility and awareness of partisan perception, when combined with effective persuasive techniques, are tools necessary for advocates to employ to be effective in high-value mediation.

Joe Epstein is a principal with Conflict Resolution Services in Greenwood Village, Colorado. He has mediated more than 3,000 cases in a nationwide practice and is

secretary-treasurer of the International Academy of Mediators. This article was adopted from one first appearing in Trial Talk, August-September 2004, at 33. He can be reached at crs@crs-adr.com.

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Litigation

Experts and Notice: The When, The What, and The Why

By Jon May

If you intend to present an expert witness in a federal criminal case, you may be required to disclose the identity of the expert, his or her qualifications, and a summary of the expert's anticipated testimony in advance of trial. In some cases such disclosure may be so detrimental to the defense that it may be better not to offer the expert's testimony at all. In other instances, the expert's testimony may be so important to the defense, that the possibility of exclusion of this evidence requires the strictest adherence to the rules mandating disclosure. This article is intended to help educate counsel on the requirements of the various rules and suggest those considerations that should affect how counsel can best respond.

In contrast to what is required by the federal rules of civil procedure (see Fed. R.

Civ. P. 26(a)(2)), neither the government nor the defense in a criminal case is required to disclose the identity of an expert witness or the substance of the witness's testimony prior to trial. Such disclosures arise if, pursuant to Fed. R. Crim. P. 16(a)(1)(G), the defense requests that the government disclose a written summary of the testimony the government intends to introduce pursuant to Fed. R. Evid. 702, 703, or 705. If such a request is made, the reciprocal discovery provision of Fed. R. Crim. P. 16(b)(1)(C) requires that the defense provide the same information in response.

Failure to provide reciprocal discovery can result in the exclusion of the expert. (*See United States v. Nichols*, 169 F.3d 1255, 1267-70 (10th Cir. 1999); *United States v. Dorsey*, 45 F.3d 809, 816 (4th Cir. 1995) cited in Nancy Hollander and Barbara E. Bergman, Everytrial Criminal Defense Resource Book, §60:2.) While appellate courts pay lip service to the "least severe sanction necessary" doctrine, courts invariably uphold exclusion of a defense expert as within the discretion of the court and find any error in failing to exclude a government expert to be harmless error. (*United States v. Batts*, 171 Fed.Appx. 977, 982 (4th Cir. 2006).) Not surprisingly, the sanction of exclusion is far more likely to be directed at a defense expert than a government expert. (*See, e.g., United States v. Suthar*, ___F.3d___, 2007 WL 731401 (4th Cir. 007)(upholding trial court's decision not to exclude government expert, claiming that exclusion of testimony is almost never imposed).)

In addition, there is one situation where the government can force the defendant to disclose the identity and substance of an expert witness's testimony: a defendant who intends to offer a defense of insanity is required to give notice of that defense pursuant to Fed. R. Crim. P. 12.2(b). In the event such notice is given, the defense must, upon request of the government, provide the government a written summary of the testimony that the defendant intends to offer under Rules 702, 703, and 705. If such a request is made by the government and the defense complies, the defense can also seek to have the government disclose what evidence it intends to offer in rebuttal. (Fed. R. Crim. P. (a)(1)(G).)

Putting aside for a moment the timing of disclosure, the first question counsel should consider is whether to request disclosure at all. What if your expert has identified some significant flaw in the government's theory of liability? If you feel comfortable that you know what the government's expert is going to say anyway, why telegraph what would otherwise be surprise testimony? Unfortunately, you may only have one or two cases in your entire career where you will have such explosive testimony. In the vast majority of cases you will be far more concerned with finding a way to neutralize the government's expert. The best way of identifying those flaws is by invoking Rule 16 and demanding that the government identify its witness and the substance of the witness's testimony.

Does this mean that you may have to forgo putting on your own witness? Possibly, but that is not necessarily a bad thing. The most persuasive testimony that can be presented on the defendant's behalf comes not from a defense witness (whose credibility and motives are always in doubt) but from a government

witness who has been turned. If in fact there is a flaw in the expert's testimony, you should be able to elicit that flaw on cross. Your ability to trap the witness is a function of careful preparation and assistance from your own expert.

Practice Tips

While the purpose of Rule 16(a)(1)(G) is "to minimize surprise that often results from unexpected expert testimony, reduce the need for continuances, and to provide the opponent with a fair opportunity to test the merit of the expert's testimony through focused cross-examination, " Fed. R. Crim. P. 16 Advisory Committee Notes to 1993 amendment, the rule does not apply to rebuttal testimony. Thus the government can present an expert on rebuttal without providing any notice to the defense even if this prejudices the defendant's ability to effectively examine the witness. (*United States v. Frazier*, 387 F.3d 1244, 1269 (11th Cir. 2004); *United States v. Silva*, 141 Fed.Appx. 521, 523 (9th Cir.2005) but see *U.S. v. Tin Yat Chin*, 476 F.3d 144, 146 (2d Cir. 2007)(calling failure to provide notice sharp practice but finding no due process violation in facts of the case).)

How detailed must the notice be? That is unclear. One court has held that at a minimum, the disclosure should include:

(1) Any reports and analyses that the expert has prepared, concerning the facts of the case;

(2) Copies or a specification of all documents, writings and other information reviewed by the expert or on which the expert's opinions are based, in sufficient detail so that the opinion rendered can be tested against that upon which it is based;

(3) The expert's work papers; and

(4) The expert's curriculum vitae or professional resume. (*United States v. Reliant Energy Services, Inc.* ___F.Supp. 2d._____ , 2007 WL 640839 (N.D.Cal. 2007).)

The bottom line is that defense counsel is faced with a major strategic decision. Is it more important to destroy the government's expert, or is it more important to prevent the government from learning the substance of your expert's testimony? In making that determination, you will need to consider some of the following factors:

(1) the likelihood that the government will offer expert testimony;

(2) the likelihood that you will learn something you don't know about the government's case through any disclosures the government will have to make if you invoke Rule 16;

(3) how important is the expert to the government's case;

(4) the likelihood that disclosure of the government's expert and the substance of his testimony will help you to neutralize the expert's testimony.

(5) how likely is it that you will put on your expert;

(6) how significant is the expert's testimony to your case; and

(7) will disclosure of a summary of the expert's opinion and reasoning

(a) make the exclusion of the expert more likely under a Daubert challenge?

(b) reveal a critical aspect of the defense that you wish to keep concealed?

There is no deadline in the rules for the defense to request disclosure from the government; however, courts usually set a set a date for a response after a request is made. As discussed above, the failure of a party to comply with the court's scheduling order may or may not lead to exclusion of expert testimony, depending upon whether the expert is offered by the defense or the government.

If you decide not to request disclosure of the government's expert in advance of trial, have a *Daubert* motion ready to file when the government calls its witness. Because Fed.R.Evid. 702 independently requires the court to determine the relevance and reliability of all expert testimony, you may get much of the discovery you need, and—if you're lucky— the court grants an evidentiary hearing, a crack at examining the witness before the witness testifies before the jury. But be prepared to go through the same process when you call your expert in the defense case.

Finally, don't hesitate to educate your client on these issues. Some clients believe that, in order to win at trial, the defense must affirmatively present testimony to counter the government's proof. Such clients will try to pressure counsel to offer expert testimony when the safer and more effective means of demonstrating the client's innocence is through effective crossexamination. Some times you have to take risks.

Sometimes it's better not to. Having to make those judgments is why you get the big bucks.

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Note

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Real Estate

Using Real Estate Financing Commitment Letters to the Borrower's Advantage

By Maria Milano

A real estate financing loan commitment letter is an important document in the loan negotiation process because it is a *binding contractual commitment* by the lender to lend money on the terms stated. In the commitment letter the lender will outline the terms upon which it is willing to make the loan and upon signing the commitment letter, the borrower is agreeing to borrow the funds subject to the stated terms.

The commitment letter should contain *all* of the business terms and some of legal the terms for the loan.

Use the Commitment Letter Process to the Borrower's Advantage

1. Before the commitment letter is finalized is the borrower's best time to negotiate.
    - Unfortunately, borrowers often do not involve attorneys until after the commitment letter is executed, which can be too late because many of the loan terms are already locked in by the commitment letter.
    - Lenders are also less willing to negotiate terms of loan documents that were not included in a commitment letter.

2. Examples of items to negotiate at the commitment letter phase:
    - In a multifamily apartment loan agreement, there is often a requirement that all leases be at least 6 months—no month-to-month leases are allowed. However, the borrower can negotiate a deviation from this standard language by asking for it in the commitment letter. This type of deviation would be much harder to get later.
    - Many loan documents preclude transfers of ownership interest in the borrower; but a borrower may want to have the right to transfer ownership for estate planning purposes in the future—most lenders have language that can be inserted into their forms, permitting such transfers without the application of transfer/assumption fees or prepayment "premiums"—but this alternative language needs to be negotiated for up front when the borrower has leverage.
    - The commitment letter negotiation phase is also a good time to try to get a reasonable cap on lender's legal fees, other post-closing charges (such as escrow account fees) that are charged to the borrower.
3. The following standard terms appear in most commitment letters:
    - loan term;
    - interest rate (and if not locked, how and when to lock it);
    - amortization of payments;
    - whether a guaranty will be required;
    - prepayment premiums (if any);
    - commitment and loan fees; and
    - payment of lender's expenses.
4. The borrower should consider negotiating to have the following added to the terms outlined in the commitment letter:
    - *Interest:*
        - How will it be calculated (actual days elapsed or 30-day months)?
        - What is the mechanism to lock in an interest rate, if it is not already locked?
    - *Secondary Financing*:
        - Does the borrower need or envision a second position deed of trust or mezzanine financing? If so, get it addressed in the commitment letter so it is excepted from the "due on sale" clause in the note or deed of trust (also make sure the financing will be attractive—will the second position lender have the ability to realize on its collateral?).
    - *Tax And Insurance Escrows*: ask if they can be abated until there is an uncured monetary default.
    - *Insurance Requirements:*
        - The borrower may want to get insurance requirements established and be able to satisfy them before executing the commitment and before paying the commitment fee
        - Is there is a form lease in place (or is it a single tenant property), and if so, can the lender agree that the lease's insurance section's description of coverage is sufficient?

        - How much and what types of insurance are required?
        - Can the lender change and increase the insurance requirements later?
        - Can the borrower self insure, or include the property as part of larger (blanket) policy?
    - *Recourse vs. Non-Recourse Liability*: spell out carve outs in detail, rather than just state "standard carve outs"—watch for carve outs which create "full recourse" rather than just paying the lender for its damages caused by a particular breach.
    - *Guarantor:*
        - Is the death of a guarantor is an event of default?
        - Is there a restriction on transfer of guarantor's assets?
        - Is there a limit on the guarantor's liability?
    - *Extension:* Is there a provision to extend commitment date if needed?
    - *Expenses*:
        - Can you cap lender's legal fees?
        - Can you cap charges for post closing escrow accounts?
        - Can you use existing surveys?
    - *Assignment/Assumption:*
        - Can there be at least one assumption by an acceptable borrower for a one-percent fee?
        - Will the assuming borrower assume based on the same interest rate?
        - Will the original borrower and/or lender be released upon assignment?
    - *Partial Releases and Partial Prepayments:*
        - Are there multiple parcels of collateral being pledged? Does the borrower want some of them released as the loan balance gets paid down? If so, this should be spelled out in the commitment letter.
        - Will the loan payment be reamortized upon partial pre-payments (including application of insurance or condemnation proceeds)?
    - *Late Charges, Default Interest, Cure Period*:
        - Consider asking for small late charges (flat dollar amount) and specific predetermined default interest rates; ask for 5–10 days to cure (after notice if possible) for monetary defaults and 30 days for nonmonetary (but with extended time if the default cannot be cured within 30 days).
    - *Title Insurance:*
        - Are their oddities regarding title you need waived or endorsed around now? If so, the borrower should bring these up before paying nonrefundable commitment fees.
        - Ask for surveyor's certification early on as it is another long lead time item and the process should be started before the commitment letter is signed.
    - *Opinion Letter:*
        - Can you get the lender to agree that any opinion letter

required will be limited to borrower's authority and due organization?
        - If a Delaware borrower entity, are you required to employ Delaware-licensed counsel, or will the lender let the attorney assume the laws of the jurisdiction where the property is located are the same as Delaware for opinion purposes (some lawyers may be willing to give Delaware authority opinions without being licensed in Delaware; this is risky, and lenders may not be willing to accept it regardless).
        - For large loans ($20 million or more) the borrower may be required to obtain a bankruptcy remote opinion.
    - *Confidentiality:*
        - Request confidentiality of financial information for *both* the borrower and guarantors.
        - Try to have most confidential information contained in the loan documents and other unrecorded documents instead of in the deed of trust (e.g., release prices for parcels).
    - *Other Lender Due Diligence:* Be sure the commitment letter spells out what the lender will be looking at and spending borrower's money to get, including:
        - surveys;
        - appraisals;
        - environmental assessments;
        - review of entity documents, consents;
        - financial statements of borrower and guarantor; and
        - UCC searches.
5. Timing: The limited time between finalizing the commitment letter and closing of the loan makes negotiating before the commitment letter is signed important. For instance, with a Fannie Mae loan the time between execution of the commitment letter and actual closing on the loan is very short.

Note

This outline is excerpted from the General Practice Solo and Small Firm Division's Real Estate Committee's CLE conducted on August 9, 2008 in New York entitled "Advising the Small Business in the Big Real Estate Deal." Ms. Milano's program was entitled: "Commercial Real Estate Financing: The Borrower's Perspective."

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Law Students

Finding the Perfect Fit: Determining Which Practice Setting Suits You Best

By Jennifer Sloan Hilsabeck

Most attorneys practicing for any length of time have switched settings once or twice before finding the one that best suits them. In my case, I started with a relatively large firm by Nevada standards, worked briefly in a very small firm, and then made the move to my current position as an in-house counsel with a private company. Most of my friends have embarked upon similar employment journeys, with many taking on roles as government attorneys along the way. As attorneys, we all share a common career rooted in the practice of law, although how and where we provide our services can differ greatly.

As an attorney in the early stages of your legal career, you may be wondering which path to pursue and may likewise be looking for guidance on how best to navigate that course. Although I certainly do not purport to have the best answers to questions such as these, I can share some thoughts on what has worked for me thus far in my career:

1. **Honestly, and continually, assess your career goals**. Although this may sound like a no–brainer exercise, it can be a starting–off point for some deeper soul searching. For example, many readers who are currently working as associates in law firms may think that the logical end goal for their career is to achieve partnership status within that firm, end of story. Before ruling out any other potential opportunities, take an honest evaluation of this proposed career path. Are the partners at your current firm not only financially successful but also happy in other areas of their lives? Do you feel that you are being given adequate guidance at this early stage in your career in order to be able to achieve the goal of partnership within a reasonable time frame? Can you see yourself being accepted by the partners at your firm as an equal player whose opinions and contributions will be valued and acknowledged?

   If you can answer "yes" to these questions, congratulations! It sounds like you have found a firm that fits you perfectly! If not, don't panic. Perhaps you should take a moment to reach out to a senior associate for a frank discussion of your concerns. If you don't already have a partner mentor within the firm, it's probably time that you sought one out. Or perhaps it's time to dust off your resume and test the waters. The bottom line is that you owe it to yourself to make sure that you are working in the best possible environment for your continual development as an attorney. You've worked very hard in the competitive educational environment of law school to make it this far and you owe it to yourself to ensure that this hard work pays off by best positioning yourself for a successful career. That career may be with law firm or it may not—either way, it should be somewhere you feel appropriately challenged by the work that you are given, valued for your unique contributions and, above all, happy with the overall working environment. After all, as you undoubtedly know by now, you will be spending much more time at work than anywhere else for many years to come!

2. **Find a good mentor . . . or two!** Once again, this may sound like something that goes without saying, but it's important enough to emphasize again. Having a mentor to bounce career concerns and aspirations off will give you invaluable insight. Experience really is the best teacher, and talking to someone who has already been down a career path similar to yours can result in learning about pitfalls while you still have time to avoid them. An effective mentor can be someone with whom you work, someone from your law school, or a trusted family member. The key to finding a good mentor is finding someone that you trust and with whom you can speak frankly. If you can find more than one person who fits this description, even better! Just like the old saying, two heads are definitely better than one. Soliciting advice from more than one source, especially about something as important as your future career, makes practical sense.

3. **Don't be afraid of change simply because it is different.** This really is easier said than done. Change is scary, especially if you have been

doing things a certain way for a period of time. But that shouldn't stop you from making a change necessary to achieve your professional (and therefore personal) happiness. Although this phrase has become cliché, it really is never too late to change. For example, I know of an attorney who had commenced his career as a litigator and, after practicing as such for several years, decided that he would rather work as a corporate attorney. Rather than thinking this avenue was forever unavailable to him because he began his career in litigation, he took the time necessary to develop his legal skills in the corporate law arena and became arguably one of the best and widely respected corporate law attorneys in my home state. Life is full of change—it's what keeps things interesting! You are probably not the same person that you were back in law school, and odds are you won't be the same person years from today. If you find yourself yearning to focus on a different practice area or move to a different practice setting, take the time to research the steps required to make that transition. If after your investigation you find that you are still interested—go for it!

4. **Always remember where you started.** Every experience in life helps to shape and define who we are today. Likewise, each experience in your legal career will determine who you eventually are as an attorney. Regardless of where you end up, always remember the first law firm/ government entity /corporation to hire you. It was that organization that recognized your potential as a new attorney and was willing to take a chance on you, usually without much prior law-related work history on which to base its decision. The first employer you have is most likely the one that will show you the ropes and give you the basic set of skills that you will continue to develop throughout your practice of law. It never hurts to acknowledge this employer's contributions when you receive compliments on your skills later in your career. Also, maintaining contacts with the people who gave you your first break can help you throughout your career in many ways: these people can act as a referral source and can provide invaluable guidance as needed. If you are lucky, as I have fortunately been, you may even develop genuine friendships with these fellow attorneys that will continue to blossom, regardless of where you work.

Overall, it's important to remember that the practice of law is more than just a job: it's a true profession, which means that your colleagues are most likely individuals who care just as much about your development as a professional as you do. As a young attorney, don't be afraid to reach out to these people for advice—you'll most likely be pleased with the response!

Jennifer Sloan Hilsabeck is associate general counsel for American Nevada Company, a Greenspun family company that was founded in 1974. ANC is a major developer of commercial office centers, retail centers, master planned communities, and mixed-use projects in Nevada, and is currently developing new planned communities in Arizona and Texas aggregating approximately 7,000 acres. In addition, she is currently a member of the Leadership Advisory Board of the American Bar Association's Young Lawyers Division and has been appointed

to serve as a Young Lawyers Division Liaison to the General Practice, Solo and Small Firm Division as well as the Business Law Section of the ABA. Within the GP|Solo Division, Jennifer also currently serves as Chair of both the Young Lawyer and the Corporate Counsel Committees.

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Law Students

Starting a Law Firm: A Woman's Perspective

By Youshea A. Berry

Solo practice is not for the faint at heart. Any solo will tell you that a successful practice takes one-third legal expertise, one-third good business sense, and one-third unremitting gumption. A healthy dose of lunacy always helps.

I have learned more in my solo practice than I learned in three *very* expensive years of law school. Here are some tips and advice that will (hopefully) be helpful to those of you who want to blaze a trail:

Lesson #1: Get Great Mentors. And Share Your Wit and Wisdom With Others.

Before I started my law practice, I sought the counsel of women in Maryland that I know to be Super Women in legal practice. They met with me over lunch, shared encouraging words, taught me the secrets of solo practice in the wee hours of the summer solstice, and probably even prayed for me—more than once. These

are genuinely good women who freely and candidly talk about their experience in solo practice and the challenges of the family-work-life balance. These attorneys showed me that solo practice is a feasible career goal, that you can be a good person, yet fierce in the courtroom, and have a profitable law practice. They taught me to enjoy the benefits of working for myself. They taught me to develop and maintain a strong network and support system that would bolster me during the tough days of solo practice. They are mentors and friends to whom I owe a significant debt; without them, the formative weeks and months of my practice would have been significantly more difficult.

Your mentors have traveled this road before. That computer/scanner/fax issue that seems brand new to you is old hat to them. The office space debacle that you face is an issue on which they can calmly advise you. During those days when you have few clients, they will offer encouragement and try their best to send work your way. They will never judge you or harangue you about your decision, because they are business owners themselves. They understand the entrepreneurial ambition that drives you, and they want to help you succeed. Understand that you need them, and you will be well on your way to success.

A great place to find mentors (and get possible experience in the fields where you want to practice) is in national, state, and local and specialty bar associations. Getting involved with bar organizations gives you a chance to meet some dynamic movers and shakers.

Become a mentor to those who need mentoring. Each of us has something to share with the world. Give time to a local organization to mentor a high school student or get involved with your law school alma mater. Third-year law students are happy to get advice from practicing attorneys; there is a bit of hero worship for those of us who have passed a bar exam.

Lesson #2: Don't Reinvent the Wheel. It's Already Perfectly Round and Works Just Fine.

Solos have more than their fair share of work to do. Time spent reinventing the wheel is valuable time that is totally wasted. Solo practice is more of an art than a science. The same people who shared their "master" torts outline with you in law school are still willing to share with you post-JD. I've learned that being a solo is a misnomer—we feel a deep sense of camaraderie, and good karma returns twice as quickly among solos. There are attorneys who have a generous spirit who won't think twice about sharing form contracts, pleading forms, and advice with other solos. I find these people populate the solo and small list serve with a helping hand and a listening ear.

Lesson #3: Partner With People Who Rock. There Is Strength in Numbers.

I partner with large law firms on cases. I refer a significant number of cases to

other attorneys and get referrals back from them. I have developed *of counsel* relationships with attorneys who have experience in other legal areas that I am still learning. I continuously try to find ways to be a better staff manager, colleague, attorney, and team player. I have law clerks, legal interns, and a wonderful spouse—all of whom "rock" in my opinion.

Partner with your family too! Take inventory of their talents and use those talents to the good of the firm. For instance, my husband has created a database for my clients and a software program for billing and time management. He set up my server and DSL hub. He's also done a whole slew of high tech things for my office that keeps the spam filters working, the website running, and the viruses at bay. My husband is my software engineer, IT manager, U-Haul office mover, and at times my career counselor. He has been there to lend a helping hand and is the most integral part of my support system. My grandmother is religious. She knows every prayer and clergyman this side of Lourdes. She has prayed to the patron saints of lost cases, lost briefs, and lost souls. I witnessed more than one miracle in my legal career. My mother is a budding interior decorator who has organized and decorated and office on a shoestring budget.

Solo does not mean alone. Indeed, those who find themselves alone might find themselves completely isolated from colleagues, friends, spouses, and even clients during the formative months and years of their practice. This is not a road to happiness or success; you *can* blaze a trail for your practice while maintaining positive and healthy relationships with those around you. It is those relationships that will sustain you on the days that you question your sanity for having started a practice in the first place.

Lesson #4: Don't Be Afraid to Step Out of Your Comfort Zone.

I didn't know exactly what I was getting into when I got appointed to serve as the Deputy Chair of the Real Estate Committee of the American Bar Association's General Practice and Solo Small Firm Division. There are 183 members of the Committee—attorneys who practice throughout the United States, many of them who started practicing long before I was born. At one ABA Midyear Meeting, I found myself on a panel of commercial real estate attorneys who have probably closed higher dollar deals than I could ever imagine. I was sitting in front of an audience of solo practitioners who could have eaten me alive. I was the only young lawyer and was quite nervous. Needless to say, I made it through. Whether I was memorable or witty, I'll never know. I could not tell whether they were laughing with me or at me, but I was satisfied to know that not a single person threw a tomato from the audience. That experience allowed me to develop the courage to perhaps do it again.

Lesson #5: Work Hard, Play Hard, and Make No Excuses for Either.

I work long hours and often think about my work when I am not actually at work.

Admittedly, I am still working on the "play hard" part of that phrase. When I do have time to play, I indulge myself with facials, manicures, pedicures, massages, and yoga. I also travel (though, admittedly, most of my travel has centered around bar association events). I have even been known to take up a foreign language here and there. These activities not only rejuvenate my awesomely tired mind, but they also give me the incentive to do the administrative and financial management tasks at my office when I'd much rather be writing a 600-page treatise on the Rule of Perpetuities.

Tidbit: You *will* work hard when you work for yourself. Expect it, but know that that is the trade-off for having *your own business*. When you work for yourself, you work for a tyrant, which is evident in the fact that it's two a.m. and I'm writing this article.

Rule #6: Generate Good Karma.

Karma is like a boomerang. Either it will come back to you and land safely in your hand, or it will come back and smack you in the forehead when you least expect it. One thing holds true: it always comes back to you. Extend professional courtesies when you don't have to, and realize that good deeds generate good karma. After all, you never know when you will need that extension or when you might need to cut in front of someone to make a postmark deadline.

Good deeds also build relationships. And in the legal business, relationships go a long way. That lawyer who seems like such an adversarial nut could be the one who sends along a much-needed client at a much-needed time because that lawyer remembered your tact in dealing with a difficult situation. That mother at the grocery store with the twins who have thrown themselves on the floor in a screaming fit at 6:30 in the evening over some Twizzlers could be the CEO of a company who needs your services. Let her cut in front of you. The service clerk at the post office that postmarks my clients' letters, the dentist who appeared at career day, my husband's coworkers, the mobile notary I used for a closing, the motivational speaker at our a nonprofit Board of Directors' retreat, and on and on . . .

The golden rule cannot be more important than in the legal field.

Rule #7: Keep Yourself Going. Laugh Out Loud and Have Theme Music.

When I need to get focused, centered, or motivated, I have what I call theme music. It's the music I play when a pleading needs to get completed, my nerves are shot, and the phone is ringing off the hook. It puts me in the zone. Besides, all good guys have theme music in the movies.

Laughing is key. I still make prank phone calls—on my friends and staff. My

nephew and I invent our own knock-knock jokes. I make fun of myself; unfortunately, other people don't hesitate to make fun of me as well. When something funny happens, I laugh hard and loud. It really is a sin to take yourself too seriously.

Rule #8: Learn to Roll With the Punches and Have a Plan B.

I had a huge setback at the beginning of the year when a merger my business partner and I had been planning for a year and a half did not happen. When I was nine, I wanted to be a lady of G.L.O.W. (the female version of the WWF). After law school, I tried out for a women's professional football team.

Well, the G.L.O.W. career never took off, and the football team disbanded before the season started. None of those ventures worked out for me. My mom always says have a Plan B. Thomas Edison said that he would rather fail at something he loved, than succeed at something that he hated. While I don't anticipate failure as a solo, I do have a Plan B—early retirement.

Lesson 9: Say Thanks.

Be generous with praise and gratitude. Although I grew up in California, I went to school in the South. I found that people were liberal with greetings and kind words and unexpected good deeds. I believe I practice in one of the most challenging cities in the country. Not because D.C. has the highest number of lawyers per capita but because people are overcommitted and barely have time for themselves. Anytime someone takes a second to help me or encourage or motivate me, I try my best to let them know that it's appreciated.

Lesson 10: Dream Bigger.

Even a small star shines in the darkness (Danish proverb).

Youshea Berry is the principal of the Law Office of Youshea A. Berry in Washington, D.C. She has been an American Bar Association Diversity Fellow, assistant editor of the Young Lawyer newsletter of the ABA GPSolo Division, and vice chair of the ABA Young Lawyers Division's Law Practice Management Section.

Note

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Law Students

Opening Your Own Shop: Ten Things You Should Know

By Matthew B. Butler

Opening your own shop is an exciting but risky adventure. Craig Nicholas and I opened Nicholas & Butler, LLP, in March 2005 in San Diego, California. In the course of starting and building a civil litigation firm, we have learned a lot about what works and what does not in running a small firm. This list is a compilation of the top ten things we learned, and you should know about, when opening your own shop. It is by no means an exhaustive list. Your situation may involve different areas of practice or particular circumstances that require unique action. However, this should be a good starting point to plan your success.

If you would like more information about one of the following topics, many of them are covered in more detail with 101 Checklists on the ABA-YLD GP/Solo Committee website. There are also several full-length books written on the topic, including *How to Start and Build a Law Practice* by Jay Foonberg, which is an ABA Law Practice Management and Law Student Division sponsored publication.

These types of books can be tremendous resources for opening your own firm. But the best resource is fellow lawyers who succeeded in opening their own firm.

Build Your Network

The practice of law is a service-based industry. National, state, and local bars heavily regulate lawyer advertising for good reason. In light of restrictions on advertising, you will need to build a network of happy former clients, colleagues, professionals in other industries, and friends who can refer you business. Networking will also help you when challenges arise in the practice of law, or in the running of a business. Networking can be done in many different ways, but should involve activities in three main areas. First, you need a plan for casting your net. Activities focused on meeting new people will likely result in a larger network. Second, you need a plan for keeping current clients and contacts happy. Obviously, maximizing the quality of your service increases the likelihood that your clients will refer people to you from their network of contacts. Third, you need a plan for follow up. That plan should include ways to effectively conclude cases, encourage referrals, and build new contacts.

Share or Sublease Office Space

Our firm subleases office space from a medium-size firm. With one payment, we receive access to a full law library with practice guides, copy machines (at a price per copy), furniture, a phone system, access to conference rooms, a full kitchen, and the option to use receptionist services as well. We also have the advantage of a month-to-month lease. So, if we grow out of the space, we can move easily. This type of arrangement is a tremendous advantage to a small firm. It saves money and maximizes resources. If there are no firms in your area looking to sublease, then investigate the option of sharing office space with another lawyer or two.

Maximize Technology.

Modern technology makes it possible for your firm to compete with the largest firms in the country. You can instantly communicate with your clients or your office. You can work on a brief on your laptop in Miami and save it to your server in San Diego. You can email your client in New York from an airport in Portland. You can delegate tasks to your legal assistant while you are on a site inspection. All you need is a computer system that allows you remote access, a laptop, a phone with email and internet capability, and the necessary software to run particular programs. Most of all, you need a reliable computer consultant. These resources require an investment of time and money, but they are well worth it. In the long run, the technology will make money for you by drastically increasing your productivity and efficiency.

Practice Good Hiring Habits

You may not need staff at first. Even so, you will likely need staff at some point. Resist the urge to be cheap when hiring staff. There are a few steps you can take in the hiring process to ensure productivity from your staff. First, increase your chance of hiring good people by creatively advertising for the position. Use internet sites like Craigslist.com, Monster.com, and others. Second, interview more people rather than less. ***Do not hire the first person who shows interest***. Again, the interviews will take your time, but if you get good employee (s) it will save you time and money in the long run. Third, hire on an hourly basis instead of salary. If an employee consistently proves themselves, you can move them to salary. Hourly pay increases the employee's desire to be at work, decreases tardiness, and decreases days taken off of work. It also can provide you flexibility if you want to hire someone for 30–40 hours a week, so you can save some money when business is slow.

Spend Time Managing

No doubt billable hours are important to bring in money. Keep in mind, however, that a law firm is a business. If you do not manage your business, it will fail. No business can succeed without adequate management of finances, marketing, and staff. Do not let your desire to maximize billable hours prevent you from doing what is necessary to manage the business.

Choose Areas of Practice Wisely

Sony chooses its products carefully. They don't try to sell cars. They sell electronics. They spend the time and money to research and develop new products in that industry while continuing to successfully sell established products. Your firm should be the same, only with services. If you do corporate formation work well, continue to offer that in your new practice. To expand, you could research the possibility of expanding into tax law. If your experience is in the defense of civil litigation matters, continue those services in your new firm. But don't be afraid to investigate a case that you could represent a plaintiff. Be sure to expand your practice in small, gradual steps. Don't try to be a litigator if your experience is in corporate work, and vice versa.

As a corollary, always be ready to explain the work you do to colleagues, professionals, friends, or even a new person you meet in the real world. Short examples of your work are effective marketing tools. A lay person may not know what "employment litigation" is, but will know what you mean when you say "I handle lawsuits between employees and employers related to overtime pay."

Choose Cases Wisely

When you take a risk, do it with your eyes open. If a potential client contacts you about a contingency case, consider the case as though you were launching a new product line. Ask questions of yourself like "How much of my money will have to go into this case?"; "How many hours will this likely take?"; "What do I think are

the chances of success?"; "What are the chances that I can end the case with a happy client?"; "Is the potential gain enough to justify the risk?" A good business person asks these questions. So should a good lawyer.

On an hourly case or matter, investigate your own client. Be sure that you are confident that your client can afford the costs of litigation, and the attorneys' fees that are necessary. If it is a transactional matter, be sure that your client can afford any fees associated with the transaction, and the attorneys' fees. Remember, Sony doesn't give plasma televisions away for free. And you don't give your services away for free.

Use the Joint Venture

One way to minimize risk is to joint venture with other attorneys. The joint venture is best used in larger cases or matters. It is also helpful if you are expanding your practice into an area that you do not normally practice. If you have a potential securities litigation case, and you have never handled one before, then a securities litigator could be your cocounsel. This is particularly helpful to litigators on plaintiff's cases. Your small firm might not have the resources to litigate a large securities case, but the case would be manageable with another, larger firm involved. Be creative with this idea. See if there is a way to do it in your practice area.

Require a Retainer

Collection is the biggest risk for a small firm. You cannot afford to work for a year on a case, and end up getting stiffed on your fee. Your challenge is to find ways to avoid such a circumstance. The first line of defense is to require a certain amount to be paid up front. If the client is unwilling to pay a retainer, then you are probably going to have collection problems.

Most lawyers are good at requiring the retainer up front, but will not continue to collect the retainer. Your second line of defense is continuous replenishment of the retainer. That way, you shift the timing of any collection problem forward. If a client will not replenish the retainer, then you know you need to be on alert in the following months. If the client falls behind, it is time to start talking about withdrawing from representation.

Maintain Files Well

Organization is key to successfully running your firm. Choose a filing system and structure that you enjoy using, and make sure that every piece of paper gets into your filing system. If you have staff to maintain the filing, be sure that the protocol for filing is well established. Have the protocol in writing so that it is easily passed on to the next file clerk.

Matthew B. Butler is a founding partner in the law firm of Nicholas & Butler LLP in San Diego, California. Mr. Butler has practiced civil litigation for the past eight years. He has significant experience in complex litigation including business litigation and construction law.

Note

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