General Practice, Solo & Small Firm Division

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Law Trends & News

PRACTICE AREA NEWSLETTER

FALL 2010
VOL. 7, NO. 1

CHAIR'S NOTE

Dear Division Member:

Following is the first issue of *GPSolo Law Trends & News* for the 2010–2011 bar year. Following the past trend this is another exciting issue and, as Chair of the GPSolo Division, I am honored to be able to present it to you. Going along with the theme for this year, "Back to Basics," this publication is designed to help simplify your practice. It includes article, checklists, and other valuable practice information and practical tips.

With this issue, *GPSolo Law Trends & News* enters its seventh year of publication and being a member benefit. I hope you agree that with each edition, this publication provides meaningful articles for your practice and you. I encourage you to take just a few minutes to read the list of articles included below. As in the past you can either download specific articles relevant to your practice or you may download the entire newsletter by clicking the PDF link.

Included in this issue are portions of books which have recently been published by the Division—one about providing representation and counseling to small corporations, another about corporate real estate transactions, and another about the running of a profitable solo practice. These books not only address issues faced by solo and small firm attorneys, but also provide forms for the attorney to use. Click through the link and take a look at the topics addressed in these books. If you like what you see, you can immediately purchase the book(s).

Many Division members are integrally involved in putting this publication together. To them, I thank them for their hard work they do for the Division and for you, our members. Without the assistant editors' hard work and dedication, this publication would not be possible. If you are interested in writing an article or participating in the production of the newsletter, please contact the editor of *GPSolo Law Trends & News*, Jim Schwartz at attyjls@aol.com.

As has occurred in the past, during this bar year, *GPSolo Law Trends & News* will continue as a quarterly publication. I hope you continue to find it as valuable a source of information as I do. As your Chair, of the GPSolo Division, I also welcome your thoughts about this publication or anything else regarding our Division. Please feel free to share them with me. I can be reached at j.dewoskin@wbbdlaw.com.

Best regards,

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

LETTER FROM THE EDITOR

Dear Division Member:

I have been editor of *GPSolo Law Trends & News* since its founding. I normally do not send a message with the newsletter but I am doing it because of all of the books we have included in this issue and is the highlight of this issue. Our Publication Board finds excellent authors to write timely materials for you to sue in your practice. I have chosen some portions for you to look at and determine if the book, itself, would be beneficial for your practice. If you do, please click through to the book itself and if you like what you see, purchase it. In the years that Law Trends has been in existence, we have strived to bring you timely and helpful articles and checklists—all to help you in your daily practice. I am proud of the quality of articles and tips given this year, and I hope you enjoyed them as well.

Very truly yours,

Jim Schwartz

Editor

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Jacqueline M. Lage is a senior associate with the law firm of Gonzalez and Wermuth, PL. Ms. Lage focuses her practice on complex commercial real estate transactions, commercial lending, as well as estate planning transactions, intellectual property matters, corporate transactions, and public finance matters. She can be reached at 305-591-8844 or Jacqueline@rgmwlaw.com.

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PAST ISSUES

REAL ESTATE

Negotiating the Best Deal: Commercial Leases 101

By Jacqueline M. Lage

Can you review this lease for me? Even though you may not be a transactional attorney working in the areas of real property or corporate matters, you may find yourself in a situation where someone will ask you this question or maybe you will need to negotiate a lease for yourself someday. This article sets out a checklist that should be considered when negotiating a commercial lease.

Client Goals

Before negotiating a commercial lease, you should first determine what your client's ultimate goals are for the lease. A few important variables to consider are:

- The size of the space in relation to the client's business needs, e.g., availability of additional storage or a common-area space;
- The term of the lease and any renewal rights;
- The current leasing market;
- The importance of a specific space or location to the business;
- The amount the client is able to pay per month, including taxes, insurance, and operating expenses; and
- Restrictions on use, signage, assignment, and subleasing.

In a tenant-favorable market, like the one that we have currently in the United States, you generally can motivate a landlord to grant certain concessions, such as rental concessions (free rent periods or reduced rent periods),

improvements (the landlord picks up the tab for any renovations or repairs), renewal rights (the client being able to add additional lease years to the overall lease term), expansion rights (the client being able to grow into adjoining spaces), and fewer tenant obligations.

Types of Leases

An understanding of basic types of leases is fundamental to effectively negotiating a commercial lease. Some of those leases include:

- **Gross lease**. The tenant pays a set amount of rent. The landlord is responsible for paying taxes, insurance, and operating expenses.
- **Industrial modified gross lease**. The landlord generally pays for property taxes and insurance for a certain year, which is called a base year. The tenant pays its proportionate share of common-area maintenance expenses, utilities, and any taxes and insurance over the base year amount.
- **Triple net lease**. The tenant pays rent plus its proportionate share of operating expenses (sometimes referred to as "CAM" or common-area maintenance), insurance, and taxes.
- **Retail leases**. The tenant pays a set rental rate and a proportionate share of common-area expenses. The tenant may also be required to pay a percentage of its gross sales as additional rent and a percentage of property taxes.

Key Components of Leases

It is important to keep in mind that leases come in all shapes and sizes and may be negotiated in many ways to achieve a client's goals. Some of the major areas of concern when negotiating a lease are:

- **Rent.** You should ensure that a tenant can afford the lease payments, especially rent escalations during the term of the lease; confirm that your client understands the total monthly obligation and what is included in that amount. You also should examine triple net leases for operating costs that are necessary to maintain your client's space and the larger premises. In negotiating leases with a landlord, sometimes a landlord may be amenable to putting a cap on the "controllable" operating expenses. Other times, a landlord may agree to set the base year as the year in which the lease commences, and the tenant may pay any escalations over that first year.
- **Terms.** You should always be cognizant of what a client's goals are in terms of lease duration. For example, with a startup business, you may want a shorter lease with renewal options if the location does not remain ideal for the tenant, the business does not run as planned, or the rent becomes unaffordable.
- **Use and exclusivity.** You may want to explore an exclusivity option in a lease to prevent your client from experiencing direct competition in the building or complex. Also, you should ensure that the client's intended use and any operational aspects of the client's business are permitted.
- **Assignment.** You should determine whether your client plans to assign or transfer the lease to another entity, related or otherwise, during the term of the lease; whether such assignments are allowed; what expenses are associated with any assignment; and whether your client is released from liability under the lease if the client assigns.

- **Repairs.** You should clarify which party will be responsible for what repairs and try to shift the burden of structural or large mechanical repairs to the landlord.

There may be many more items that should be negotiated or considered when reviewing a specific commercial lease that are not included here. However, when you tackle any lease review, the most important considerations to keep in mind are: (1) the client's needs; (2) any negative provisions in the lease that cannot be negotiated away; (3) which factors in the lease, if any, may inhibit the growth of your client's business; and (4) which points constitute deal breakers and which points will not impact the tenant enough to kill the deal.

Finally, know your style of negotiating, and use your unique qualities to your advantage. After all, you will not receive what you want unless you ask for it.

This article is an excerpted reprint of "*Negotiating the Best Deal: Commercial Leases 101*" by Jacqueline M. Lage, ABA Young Lawyers Division, *The Young Lawyer*, June 2010. Copyright 2010 © by the American Bar Association. Reprinted with permission.

Jacqueline Lage is a senior associate with the law firm of Gonzalez and Wermuth, PL. Ms. Lage focuses her practice on complex commercial real estate transactions, commercial lending, as well as estate planning transactions, intellectual property matters, corporate transactions, and public finance matters. She can be contacted at Jacqueline@rgmwlaw.com.

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REAL ESTATE

Found Money or Lost Opportunity? Still Too Few Take Advantage of the Federal Historic Tax Credits Program

By Stephen J. Day, AIA

Part 2: Project Requirements

This is the second of a two-part series on the Federal Rehabilitation Tax Credit Program. Part I explained the basic parameters of this program that allows developers and owners to attract cash investments for their historic properties redevelopment projects. Part 2 describes more detailed aspects of the RTC program and application to typical development projects.

Introduction

Since the 1970s, the federal Rehabilitation Tax Credits (RTC) program has spurred the redevelopment of more than 35,000 historic buildings in the United States, providing substantial support to projects through tax credit investors' cash infusions. The program has made projects economically viable that otherwise would not have been realized. This installment gives an overview of which redevelopment projects are eligible and outlines some of the recurring challenges in using the credits.

Key Requirements Under the RTC Program

"Substantial Rehabilitation"

In order for a project to qualify for the RTC program, the project must be "substantial." "Substantial rehabilitation" is defined in Treas. Reg. section 1.48-12(b)(2)(i) and includes projects that involve qualified costs in excess of the larger of: (a) the adjusted basis of all owners of the building; or (b) $5,000. The adjusted basis can generally be described as the un-rehabilitated

property purchase price, less the costs of the land, less any depreciation taken to date, plus the cost of any improvements made since the latest purchase. These costs must be expended within any 24-month period ending with or within the tax year that the tax credits are claimed.

"Qualified Expenditures"

These are defined in Treas. Reg. § 1.48-12 (c) and IRC § 47 (c) (2) (B) and can include a wide range of hard and soft costs associated with the building work. The total dollar value of the qualified expenditures is critical, because the total amount of tax credits is calculated as 20% of this value for historic structures (or 10% for non-historic structures). Qualified expenditures can include costs of construction, along with certain developer fees, consultant fees (including legal, architectural and engineering fees), if added to the basis of the property. Costs that are not included in the qualified expenditures include property acquisition costs, new additions to the historic structure or other new buildings, parking and landscaping costs.

Building Uses

To qualify for the RTCs, the building must be depreciable, so it must be income producing or used in a business. Rental housing, commercial and industrial uses all qualify. Owners of condominium housing units can utilize the tax credits provided that the unit is held for income or is used in a business or trade. An owner's personal residence will not generate RTC. See IRC § 47 (c) (2) (A).

Building Users

There are also limitations on the types of users for the restored historic property. For example, tax exempt entities cannot lease more than 50% of the rentable area in a rehabilitated building unless the lease terms are limited in length and there are no purchase options at the end of the term. There are also restrictions on sale and leaseback arrangements with tax exempt entities. The tax exempt user rules are complex and must be analyzed carefully on a project by project basis. IRC § 47 (c) (2) (B) (v); Treas. Reg. § 1.48-12(c) (7); IRC § 168 (h).

Claiming the Credit

The RTCs are generally claimed in the taxable year that the rehabilitated building is "placed in service," which essentially means the date that the rehabilitation work has been completed such that, for example, a certificate of occupancy has been issued. For projects that have never been removed from service, this would be the date that the project work is completed. Any excess credit not claimed in the initial tax credit claim can be carried forward for up to 20 years and carried back 1 year. IRC § 47 (b); Treas. Reg. § 1.48-12(f)(2); Treas. Reg. § 1.48-12(c) (3) and (6).

Transferring or Allocating the Credits

RTCs cannot be "sold" without selling the corresponding interest in the real estate. Only owners of the real property (or long term lessees; see below) can be allocated tax credits. But in practice RTCs are often allocated differently to one or more members of the ownership entity (such as an LLC), so long as the percentage allocation of the tax credits matches the members' interests in profits and losses for tax purposes.

How Long Must the Tax Credit User Own the Property?

An owner that claims the RTCs must retain ownership of the property for at least five years after the date the project was placed in service, or the tax credits will be subject to recapture.

Recapture of the Credits

RTCs can be recaptured if the owner claiming the credit (or passing the credit through to a long term lessee) sells the building before the end of the minimum five year holding period, or if the property ceases to be income-producing. Recapture can also occur if the project ceases to comply with other transfer or leasing restrictions imposed under the program or if the project is physically altered such that it no longer complies with the approved rehabilitation improvements. These recapture rules are laid out in IRC section 50(a). *See also* Treas. Reg. § 1.48-12(f)(3). The amount of the credit recapture is based on how much of the minimum five year holding period has elapsed at the time of noncompliance.

Challenges/Opportunities in Using the Credits

The Tax Credit Investor

A recurring challenge in using the tax credits is in identifying the partner entity that can utilize the credits and joining that entity with the developer in a partnership arrangement (usually an LLC). But this can also present opportunities. For example, lenders have substantial tax liabilities that can be reduced by using the tax credits. An affiliated entity of a lender can act as a member in a development LLC and can be allocated the tax credits. An affiliate of that same lender can provide loans for the development project, perhaps on more favorable terms than another lender that does not have the tax credit incentive to lend on the project. This investor is typically primarily interested in taking advantage of the tax credits and in getting out of the project as soon as possible, with as little risk as possible.

Choice of Development Entity Type

The pass-through tax capability of limited liability companies make the LLC the typical entity of choice for RTC developers, allowing the tax credit advantages to flow to members. The single entity structure is more commonly used for smaller projects, where the “developer” entity and the tax credit investor entity are members of a single LLC. In larger, more complex projects, a master tenant lease structure is commonly used, where the owner/developer will pass through the tax benefits to a master tenant entity that leases the entire building from the owner/developer through a qualifying long term lease.

Put/Call Provisions

As mentioned above, an owner that is allocated the tax credits must remain in title for at least five years after the project is placed in service. To accommodate this five year window, the development agreement will typically include put/call (buy/sell) provisions that set out a mechanism for the developer to buy out the tax credit investor. Caution is required in drafting these agreements to avoid an IRS characterization of these arrangements as a disguised sale, thus potentially invalidating the tax credit allocation.

Allocation of the Tax Credits

There are also potential pitfalls involving the allocation of the tax credits by the investor party. In general, the percentage allocation of the tax credits should match the profits interests of the parties. If one party is allocated all of the tax credits over the five year period that the tax credit investor remains an owner in the project, then that investor will be allocated all or nearly all of the profits interests. To accommodate this, and to compensate the developer partner for its participation and origination of the project, the company will typically pay development or management fees or other distributions to the developer entity. Payments to members do not necessarily match the profit/loss allocation percentages. At the end of the five-year tax credit recapture period, profit/loss ratios are typically revised to allocate greater profits to the developer.

Leasing to Tax Exempt Entities

As mentioned above, leasing space in a certified historic structure to tax exempt entities is possible so long as the lease does not fall into the category of "disqualified leases" as defined in the IRC § 168(h)(1). There are several factors in that code section that must be analyzed for each individual situation, including requirements that the lease term be less than 20 years, the lease cannot occur after a sale of the property from the lessee to lessor, the lease cannot include an option to purchase or a fixed or determinable purchase price for the property, along with limits on financing involving tax exempt financing. These limits are generally not applicable if in the aggregate less than 50% of the rentable floor area in the historic building is leased to tax exempt entities.

Leasing to Taxable Entities

Taxable lessees may be eligible to claim RTCs provided that the lease term is at least as long as the recovery period under IRC § 168(c), currently 39 years for non-residential property and 27.5 years for rental residential real property. See also IRC § 47 (c)(2)(B). If the lease term is less than this minimum recovery period, the full tax credit is not available but is instead reduced prorata based on a formula tied to the length of the lease as compared with the recovery period and based on the fair market value of the rehabilitated lease property. See Treas. Reg. § 1,48-4(c)(3).

Are the Historic Tax Credits Worth the Effort?

Not all historic property redevelopment projects are natural candidates for tax credit utilization. If for whatever reason the developer cannot or will not endure the designation and certification process, or the project does not fit the tax credit criteria, or if the developer cannot structure the deal to bring in the tax credits investor, then the project will not work as a tax credit venture. Also, if the project does not involve at least $1 million in qualified rehabilitation expenditures, the transactions costs involved can make a tax credit project very challenging. But for those projects that involve qualifying structures (and this category is broader than one might think, and getting broader every year), where the development strategy can be flexible, where the rehabilitation is substantial and where the tax credits investor can be identified that fits with the specific development strategy for the project, the rehabilitation tax credits can produce significant cash investments to developers and can make the difference between a project that will pencil and one that won't.

A Note of Caution

The RTC rules are complicated and involve many interrelated parts. This brief summary is intended only as a very general introduction to the subject and should not be taken as tax advice. Project developers and investors must seek ongoing advice and counsel from experienced legal and tax advisors for any specific project.

Resources

The National Park Service web site at www.nps.gov includes numerous links to sites that include information on the various stages of the National Register process and the RTC program. The IRS web site at www.irs.gov also has links to sites that focus specifically on tax aspects of the RTC program.

Stephen J. Day is both an architect and attorney. He has collaborated with a variety of clients and colleagues in real estate development projects over the past twenty years, focusing on the redevelopment of landmark historic properties. For more information on the tax credit projects he has been associated with, go to www.StephenDayArchitecture.com and www.rp-lawgroup.com. Stephen can be reached at (206) 625-1511.

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REAL ESTATE

Closing Checklists: Important Survival Tools in Real Estate Deals

By Brad Dashoff and John Antonacci

When you are asked to work on a purchase and sale or financing transaction, one of the first steps you should take is to create a closing checking. The closing checklist will serve as your roadmap through the transaction and is a very useful tool for staying on top of all of the various components in a transaction.

- The elements of a closing checklist will vary depending on the type and terms of the transaction and which party to the transaction is creating the checklist. The closing checking for a loan will include different documents than the closing checklist for a purchase and sale. If you are representing the buyer in a purchase and sale transaction and the buyer is also taking out a loan to finance the purchase, your checklist will include all of the documents and information needed for both the purchase and the loan, whereas if lender's counsel prepared the checklist, it will most likely only include the information and documents necessary for the loan. Quite often, the lender will prepare a checklist for the loan transaction so that the borrower will know exactly what the lender is requiring. The borrower can then incorporate those items into the purchase and sale checklist to create one master checklist.

- Each side may use its own checklist tailored to what it needs for the transaction, however, in large multi-party transactions, you might have one central checklist for the transaction and each party might then create its own checklist for the items it cares about.

- For certain transactions, such as a retail or office lease, where the

lease may be the only document, a formal checklist may not be needed.

- In preparing your closing checklist, you should leave space next to each item to provide additional information about the item. If a document has been agreed upon or signed, it is helpful to indicate because it shows the parties that progress is being made and everyone can refocus on the documents and issues not yet agreed upon. If due diligence information has been requested but not provided, you should indicate so and list who is responsible for providing the information. If there are open questions or issues between the parties, these can also be included next to the relevant document or due diligence item.

- The closing checklist should be updated from time to time over the course of the transaction. On larger transactions, the client may want to see weekly or daily updates but most often, updating the closing checklist concurrent with revised drafts of the transaction documents being distributed will suffice. Updating the closing checklist too frequently is not recommended because things might not have changed enough to warrant an updated draft and you may convey to your client the impression that you are generating unnecessary work for yourself (at their expense). When you are revising and updating your closing checklist, consider whether you should show your revisions in tracking (if your word-processing program has such a feature). This is a very easy way for everyone to see the progress made, or the issues that have arisen since the last draft.

- There is no magic formula to creating a closing checklist and they come in many different forms. The trick is to come up with a form that works for you and your clients and that is easily manageable. The more complicated a closing checklist becomes, the less likely it is that it will be useful.

Do you want to learn more on this? Do you need sample real estate forms and/or a sample closing checklist? If so, click here to purchase the author's book. GP/Solo Division members automatically receive a discounted price.

Brad Dashoff is a senior associate in the real estate group of Pillsbury Winthrop Shaw Pittman, LLP (McLean, Virginia office). His practice includes a variety of real estate matters, such as acquisitions and dispositions of commercial properties, commercial lending, mixed use development, and the creation of private equity funds to invest in real estate. John Antonacci is also a senior associate in the real estate group of Pillsbury Winthrop Shaw Pittman, LLP (McLean, Virginia office). He advises clients on a wide variety of real estate matters, including the following primary areas: purchase and sale transactions, commercial leasing (with a specialty in retail leasing matters), investments in real estate private equity funds, and investments in affordable housing.

This article is an excerpt from the book *The Commercial Real Estate Lawyer's Job, A Survival Guide*, by Brad Dashoff and John Antonacci, pp. 145–146, published by the ABA GP/Solo Division and available to members of the

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LITIGATION

Dealing With *Pro Se* Litigants

By Evan L. Loeffler

> *I was reminded the other night ... of Clarence Darrow when he was prosecuted for trying to fix a jury. The first thing he realized was that he needed a lawyer—he, one of the country's great criminal lawyers.*
> Abe Fortas, quoted from *Gideon's Trumpet*, Lewis, A., p. 171 (1964).

The goal of litigation is supposed to be to resolve the problem. Sometimes that goal is obscured by the desire to grind the opposition into the dirt, to heap ashes on the dirt, to spit upon those ashes, and finally to build a monument upon the resting place of the opposition as a testament to the virility of the prevailing party and dangers of opposing him. The job description of a lawyer involved in litigation is not only to assist one's client in achieving the goal of the litigation, but to keep the litigant's attention focused on the goal. As a trained professional, the lawyer is supposed to know better than to sling insults at the other side, to waste time in producing discovery, and to take the proceedings personally. This is why we have lawyers.

Unfortunately, not everyone can afford a lawyer. Some people who are able to do so choose not to employ one. The increasingly prevalent specter of the *pro se* litigant requires litigators to re-think trial strategies and methods of communication. Those who believe they may simply run over a helpless *pro se* litigant will be unpleasantly surprised by the results of this strategy.

As anyone with litigation experience can attest: litigation sucks. An inordinate amount of time and effort goes into drafting pleadings, discovery, research and preparation, seemingly for the purpose of documenting why an underpaid and overworked judge's decision is wrong. Litigation is not perfect, but it is still considered far better than other less-civilized methods of dispute resolution

including dueling and the time-honored tradition of open warfare. In an effort to make litigation less expensive and streamlined, bar associations the world over have implemented rules of procedure. For the most part, professional litigators embrace these rules. The rules assume, however, that the adverse parties are acting as mature adults. Unfortunately, this is not always the case (even among professionals). The *pro se* litigant is generally not as noble-minded as an attorney. By definition the *pro se* is in it for himself and the outcome will affect him in a very real manner in the immediate future. This is not an intellectual exercise; the *pro se* is playing for keeps.

The basic axiom in dealing with *pro se* parties is contained in the Rules of Professional Conduct:

Rule 4.3 of the Model Rules of Professional Conduct: Dealing With Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Put simply, Rule 4.3 states that a lawyer should not give advice to the *pro se* other than to get a lawyer. State rules and local rules put additional burdens on the attorney, such as identifying the parties and the issues in dispute.

In practice, this is not as easy as it sounds. Frequently, a *pro se* party who has been served with legal documents will call the lawyer who signed them and demand an explanation. The answer, "get a lawyer" is unlikely to resolve the problem or result in anything other than ill will.

In my practice, I deal with *pro* se parties on a regular basis. I have developed some guidelines:

Always Be Polite and Respectful

Don't be rude or nasty to a *pro se.* This should really go without saying. The rules of professional conduct and basic rules of civility apply to all communications (something some lawyers would do well to remember), but this can be difficult when a *pro se* is screaming obscenities at you or questioning your place on the food chain. While it's no excuse, the fact is the *pro se* does not understand the adversary nature of the system and takes everything personally. The fact that you do not agree with her position, mean, in her opinion, you are (a) stupid, (b) evil, (c) unethical, and (d) all of the above, again.

Responding rudely to a *pro se* may occasionally be satisfying, but it does not help your case. The enraged *pro se* will be incented to file motions for sanctions, bar grievances and appeals. Responding to these motions take up

valuable time and resources. Whether a lawyer can charge his time to his client for responding to a motion for sanctions is a question for one's conscience and possibly one's malpractice carrier. It is far better to keep it civil pretend not to hear the insults.

Make Your Role Clear

In settlement communications and any other discussion, the *pro se* may ask questions that cross the line into asking for help. Some examples:

- How do I respond to the summons and complaint?
- What should I say if I want to fight this?
- How do I issue a subpoena?
- What happens at a show cause hearing?
- What happens if I file for bankruptcy?

Be firm that you will not give help. The answer to these questions, in summary, as follows:

"My ethical duty as a lawyer requires that I make very clear my role in this matter. I represent the other side, not you. I cannot and will not give you legal advice. You should get a lawyer. I will not refer a lawyer to you." Polite but firm adherence to these rules during communications usually gets the point across.

This does not mean you cannot discuss the merits of the case with a *pro se* litigant. I will explain what relief I am seeking on behalf of my client, and why I believe my client is entitled to that relief. I am careful, however, to keep the discussion away from discussions of civil procedure. I will mention the possibility of settlement and attempt to determine if this is a possibility.

Don't Rely on Using Courtroom Procedure to Win the Case

The lawyer is ill-advised to rely on the court to limit the *pro se* litigant from putting on her case due to the failure to fully comply with pre-trial procedures. It may be a surprise to some attorneys, but judges really are aware of the rule that *pro se* litigants are supposed to be held to the same standards as lawyers.

The fact is many judges will not rigorously enforce this rule. Judges are aware of the high likelihood of *pro se* litigants appealing. They want the record to show that the case was resolved on the merits despite procedural irregularities caused by the *pro se* party's acts and omissions. In Washington State, for example, tenants are required to pay disputed rent into the court registry or to file a sworn statement there is no rent due including the reason why. Even though the rule specifically requires it, a judge will rarely keep the tenant from presenting a defense if the statement fails to meet all the requirements of a sworn statement.

Get Everything in Writing

Of course, this rule applies to all communications relating to litigation, but it is

more important when dealing with a *pro se* party. The lack of trust between the parties, coupled with the fact the *pro se* usually does not understand all the legal concepts behind waiver, makes it difficult enough to settle. Proving there was, in fact, a meeting of the minds by following up with a letter or a signed settlement agreement makes a record the lawyer was not "playing lawyer tricks" with the *pro se* litigant and solves a lot of problems.

Don't Take the *Pro Se* Lightly

Prepare for the case as you would against a seasoned litigator. As with attorneys, *pro se* litigants can be of varying degrees of competency. Generally an incompetent attorney is not difficult to spot. On the other hand, in many cases the presumption is that a *pro se* litigant is incompetent. This is a dangerous and frequently incorrect assumption. Many *pro se* litigants are a hell of lot smarter and more experienced than you think. I have seen several attorneys swagger into court assuming they would run roughshod over the hapless *pro se* only to be caught unawares by a well-prepared opposition. Also, it is always possible an attorney may appear at the last minute. It is never too late to hire a lawyer, even on the day of trial in order to secure another delay in the proceedings.

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Common Contract Errors and Omissions Checklist

By David Z. Kaufman

When Signing the Contract

√ Be sure everyone signs & dates the final page
√ Be sure everyone initials & dates each page of contract
√ Contract should have numbering “1 of xx pages”
√ Be sure all warranties etc. that are incorporated by reference are attached to basic contract.
√ If the contract is a form contract, *all* entries must be filled out (If the space does not apply use “NA” etc.)

Be Sure to Include:

√ Reasonable attorney’s fees & costs in collection
√ A provision for interest finance charge
√ A statement of which state law controls
√ A statement of where disputes must be resolved
√ The consequences of not paying, e.g., contract and warranty are void
√ Carefully Defined terms
√ A statement that only the written contract controls and that verbal statements do not make part of contract
√ A statement that the contract is the written contract plus its additions etc. so that warranties, exceptions, etc are incorporated by reference.
√ A requirement that all changes must be in writing
√ Beware of fixed dates for completion, is time really of the essence?
√ A clear statement that the Contractor cannot be liable for things that are out

of their control (terror, weather problems, etc.)

Finally:

√ Are appropriate consumer protection laws are complied with (if applicable).

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Lawyer and Witness: A Special Relationship

By Daniel I. Small

In any area of the law, the relationship between lawyer and client is an important and unusual one. First, it is confi dential. The attorney-client privilege creates a wall of confi dentiality that is unmatched in any other profession. Second, lawyers have knowledge and experience that are vital to people going through a wide range of important events. Third, lawyers can "do" things for people in the legal arena that others cannot: represent them, speak for them, and sometimes act for them. In few places in the legal world is that relationship as close and complex as that between a lawyer and a client who is going to be a witness in a legal proceeding or an investigation. That special relationship puts unusual responsibilities and burdens on both lawyer and client. A lawyer in this type of situation must act with feeling and wisdom. That may include the following:

Learn about the client's business, or other matters relating to the inquiry. Part of the challenge of any litigation is learning about a new world—a new product, profession, technology, or whatever. To prepare a witness, you not only have to learn the new world, you have to *understand* it. You have to go beyond just learning the jargon to understanding the way business is done: how things really work, what the real issues and procedures are, what roles different people play. For example, a client's position on an organizational chart may not accurately refl ect her real authority or responsibilities. You need to ask questions of your client and do your own research to truly understand this new world.

Understand the client's personality, background, and needs. Clients facing the prospect of being a witness may come to you displaying a full range of

emotions and attitudes, from overwrought to overconfi dent. The irony is that once you get to know him better, you may fi nd that the initially overwrought client may make a good witness, while the overconfi dent client may make a lousy witness. Clients bring with them an enormous range of insecurities and fears about being questioned, knowledge of and familiarity with legal proceedings, and willingness and ability to learn.

Teach the client the unnatural and bizarre language of "question and answer." Few clients realize how diffi cult *and* different this process is. It is necessary to fi nd creative ways to help them understand both points. One way is to minimize their defensiveness or embarrassment. I sometimes tell witnesses that I feel like their high school French (or Latin, or German) teacher who has to condense the whole school year into just a few hours. To teach how different this process is, I may talk about the difference between a lump of clay and a rock, explaining that most witnesses treat questions like clay: they work them, worry them, play with them, and often mold them into something else. I remind them that questions should be thought of like rocks—hard and fast words that should either be answered precisely as asked, or challenged.

Encourage the client to talk about sometimes diffi cult matters. Questioning in different types of legal proceedings can often reach into areas that the witness views as private, sensitive, embarrassing, or even incriminating. As a lawyer, you cannot effectively represent your client as a witness if she is not fully candid and forthcoming. As a person, you must understand that you are asking someone to say things and admit things that she may not have admitted before, sometimes even to herself. This can be a long, hard process that must be handled with patience and feeling.

Shield the client from unnecessary intrusions or harm. Few clients *want* to be witnesses in legal proceedings, and a surprising number think their lawyer can wave a legal magic wand and make it go away. Occasionally, there are ways to avoid questioning. But if not, there is much you can do to act as a buffer for your client before, during, and after questioning. Consider ways to control the timing, location, subject matter, or other elements, in addition to acting as the funnel or a shield from aggressive opposing counsel, investigators, or parties. This process is stressful enough for clients without allowing unnecessary intrusions.

Advise the client every step of the way based on a full understanding and careful analysis of the law and the facts. The process of being a witness and the questions a client may be asked as a witness may expose him to a wide variety of risks: criminal, civil, financial, employment- or family-related, and more. As counsel, you need to be constantly on guard against these risks and ready to discuss them openly with your client when they arise. Being called as a witness can often lead to a diffi cult balancing of risks and opportunities, which requires your client's best wisdom and judgment—at a moment's notice. It's up to you to prepare your client to be able to avoid those risks and to take advantage of the opportunities.

Guide the client through a sometimes strange and terrifying legal maze. From childhood, we are scared of the dark because we do not know what's out there. For most people, being a witness is like being in darkness: they don't know how to get through it, but they do know that there are monsters and other

dangers lurking out there. You have to be aware of this, and take care to explain and guide them through each step, knowing that what may seem to you the smallest, most routine step may look like an unfathomable leap to your client.

Earn the trust and faith of the client. This is a circular process: the more confi dence your client has in you, the more he will listen to you and the more help you can be when the client is on the witness stand. However, that trust and faith does not automatically come from the fact that you are a lawyer or that you have a nice offi ce with diplomas on the wall. You have to earn that kind of relationship, just as you would have to earn it in the outside world—except that with your client, you have far less time to develop that relationship. Foremost throughout this process is the need to communicate clearly and effectively. There is so much that needs to be communicated about both the substance and the process that good communication becomes not just a means to an end, but an end in itself.

Additionally, it is important to understand the perspective of the people who walk into our offi ces. Much of a potential client's perspective is shaped by what he reads in the papers and what he sees on television. We all know that on television, cases begin, reach their climax, and end all within the hour, with plenty of time for commercials. This gives people a grossly distorted view of litigation generally, and of being a witness specifi cally. Television and other media portray litigation as a game of miracles. In reality, litigation is not a game of miracles, but a game of inches. It is much more diffi cult and complex than the simplistic portrayal we experience on television. The media also create a common notion that there are only two types of witnesses: good guys (who don't need lawyers and preparation) and bad guys (either who don't deserve lawyers and preparation, or who don't require lawyers or preparation because they will eventually get caught and confess). The best example of this phenomenon can be seen in the old Perry Mason series, which for years created the vision that our clients have of what being a witness is like. On that show, no witness ever seems to have a lawyer, and sooner or later, one of them confesses. Because of these notions and the effects they may have on testimony, it is important for us to understand clients' expectations and their thinking coming into this process. Our responsibility is to understand and address the myths.

Agreeing to prepare a client to be a witness is a major undertaking: fi rst, there is a great deal that has to be done to teach a layperson this strange new language; second, what must be taught is so foreign to most people that communicating it in a way that will really help them is an enormous challenge. Much of this book is written *as if* speaking directly to the client in the hope that lawyers will see not just what needs to be taught, but how it might best be communicated. The fi rst step is for both lawyer and client to understand fully the importance and diffi culty of meeting that challenge.

Did you find this article helpful but need more information on this topic? If so, click here to purchase the author's book. GP/Solo Division members automatically receive a discounted price.

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This article is an excerpt from the book *Preparing Witnesses: A Practical Guide for Lawyers and Their Clients*, 3d ed., by Daniel I. Small, pp. 5–9, published by the ABA GP/Solo Division and available to members of the GP/Solo Division for a discounted price through the link provided at the end of this article.

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LITIGATION

The Battle of Persuasion: Harder Than It Looks

By Cecil C. Kuhne III

The primary tools of the litigator's trade are words, and the lawyer who uses them adroitly in his arguments maintains a distinct advantage over his adversary—whether in the courtroom, in negotiations, or in writing an appellate brief.

A litigator starts with the words of others—statutes, judicial opinions, contracts, and the myriad other sources of language that eventually lead to litigation. An effective advocate then strives to legitimately parse and interpret those words to the advantage of the client, and he does this by using his own words to craft a solid argument that will prove persuasive in communications with the court.

Lawyers typically work with challenging legal and factual situations that must be explained to a judge who has limited time to devote to the resolution of issues before him, no matter how interesting or important. This makes it even more imperative that the ligitgator present the best argument in the most efficient way possible.

If the judge's attention is drawn to faults of logic or expression, the client will ultimately suffer as a result. The risk is too great that if the argument is not made effectively, the busy judge may misinterpret what you are trying to say. A judge simply doesn't have time to decipher a poorly prepared argument, and the lawyer's credibility with the court will be damaged in the process.

Your analysis must provide the court with a quick and clear view of the legal landscape, without unnecessary distractions. The final product will be evaluated by how well it educates and convinces the judge that the reasoning

and authorities contained within are correct. The key to building a great argument is to design a logically reasonable theory, and then reinforce it with compelling propositions and authority. The most persuasive arguments are not necessarily the most emotionally or morally moving. They are simply the ones with which the court is most likely to agree.

An argument, after all, is much more than a random collection of vague assertions that are abstractly positive for the advocate's client and abstractly negative for the opposing party. A collection of assertions becomes an argument only when they coalesce into a coherent presentation that firmly convinces the judge of their truth and fairness.

It is impossible, of course, to write more clearly than you think. Thought and expression are inseparably linked. Painstaking care in expressing what you want to say will help you avoid the hazy writing that a less careful approach produces. The goal in all of these efforts is clarity, conciseness, and forcefulness.

To write clearly, you must not only gather your material and carefully organize it, but you must think deeply about it. You must ponder the relationship of facts and law to one another, evaluate the importance of one point over another, and then construct a logical plan of presentation.

Considerable time must be spent digesting, organizing, and thinking through the implications of the material before you even begin to write. Only when you see clearly what is central to the argument can you persuade the court to focus on those points, instead of dispersing attention over a morass of details where nothing significant stands out.

From the pages of the arguments composed by the experts whose work is featured in this book, several principles clearly emerge:

Tailor Your Argument. In your attempts to persuade the judge, logic certainly has its place, but it isn't everything. First of all, you must tailor your argument to the specific audience you seek to persuade. To determine what will appeal to the court, you need to know not only what the court has held, but something about the viewpoints of its members. By reading previous opinions of the judge, you can gain an appreciation of his or her legal mindset. If those views differ from your position in the litigation, this knowledge will give you the opportunity to make distinctions that might change the judge's mind.

You must also delve deeper into the judge's values and personality. For this reason, it's imperative that you contact those who have personally dealt with the judge to learn more about his or her particular mannerisms, style, and idiosyncrasies. This information will then allow you to fashion an argument that the judge will find most appealing.

Establish Your Trustworthiness. There is really only one way to establish your trustworthiness: you must be scrupulously honest in how you present the facts and the applicable law to the court. Opposing counsel will be quick to point out any misstatements, distortions, or omissions you make, and as a result, the court will quickly lose confidence in your reliability.

Admit Unfavorable Facts. When you are forthcoming about problems or weaknesses in your case, you enhance your credibility. If you initially disclose bad facts, you significantly minimize their impact.

Avoid Extreme Posturing. It is tempting to simply argue your client's position in the strongest possible terms while belittling the opposing argument. If, instead, you give your adversary his due while arguing your own case in a moderate and reasonable light, you rise admirably above the fray.

Demonstrate Your Knowledge of the Facts. A lawyer who is perceived as intimately familiar with the facts of the case will in the end prove far more persuasive. You can best do this by organizing your argument logically, explaining the source of your facts, and corroborating all of your assertions.

Thoroughly Research the Issues. Before presenting a legal analysis on any matter, it's essential that you conduct a thorough search of potentially relevant material, so that all of the appropriate cases, statutes, and regulations are considered.

Develop a Theory of the Case. After gathering all of the relevant information about the case, you must carefully analyze it. During this process, you must identify the fundamental reason why your client should win in the end.

Select Persuasive Points as Themes. As you scour the material you have gathered, you should develop short, fact-based statements of why equitably—rather than just legally —your client should prevail. The best themes are grounded in common sense and shared human experiences like fairness and honor, and therefore are those that will resonate emotionally with the judge.

A few other suggestions about themes: They should be brief, pithy, and partisan, but they must *not* appear contrived and manipulative. They should be consistent. And they should be repeated often, but not so much as to be annoying.

Emphasize Visual Aids. Studies show that people are strongly persuaded by what they see. You should, as appropriate, use charts, graphs, and other helpful visual aids to enhance comprehension and to render your points of argument more memorable.

The examples of legal argument set forth in this book demonstrate the truth of these axioms. They also reveal that a well-constructed argument invariably contains the following components:

- forceful clarity;
- strong introduction;
- helpful overview;
- well-stated factual background;
- short paragraphing;
- thorough case history;
- reliable statutory construction;

appropriate legislative history;

- stellar discussion of case law;
- effective challenges to opposing arguments;
- necessary policy considerations; and
- obsessive-compulsive organization.

Legal writing is a highly structured form of expression that requires an effective application of the facts at hand to the controlling rules of law. A legal writer cannot adequately approach this task without a great deal of planning, a process that is much like that of constructing a building. The architectural plans must be thoroughly conceived, or the resulting structure will not function well.

When you have managed to integrate the facts of your case into a seamless argument like those featured in the following pages, you will have successfully built an argument that you can be proud of. You will also have constructed an argument that can withstand the brutal onslaught of even the most skilled adversary. And that after all is said and done, is not a terribly bad way to spend the day.

Do you want to learn more on this subject? If so, click here to purchase the author's book. GP/Solo Division members automatically receive a discounted price.

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A Simple Roadmap for a Complicated Transaction

A Simple Roadmap for a Complicated Transaction

Negotiating Complex Transactions Involving Multiple Parties and Multiple Jurisdictions

By Jason M. Hoberman

This article presents a practical method by which transactional lawyers can analyze, document, and negotiate complex deals such as securities offerings, financings, mergers, acquisitions, derivative transactions, and real estate deals.

A complex transaction is a lot like a road trip. You need to have the right vehicle. You need to know where you're going, how to get there, and the rules of the road. Very often, parties to a complex transaction look to their lawyer as the driver on these road trips. This can be a rather daunting task, especially for beginning lawyers. It is impossible for counsel to give accurate and pragmatic legal advice without having a complete and thorough understanding of the transaction at hand. With that in mind, I offer below a process by which lawyers can navigate through a complex transaction structure: a "Transaction GPS." The GPS contains 10 points of interest designed to help counsel understand, analyze, and document such a deal. Within the GPS are a number of red flags that may signify legal, regulatory, or structural issues. The process I describe can be used for a variety of deals such as securities offerings, financings, mergers, acquisitions, derivative transactions, and real estate deals. While written with newer lawyers in mind, this method also may be helpful to seasoned professionals. Given that the process is general, and designed for a wide array of situations, it does not address specific substantive legal issues, and you should always be on the lookout for these issues as they arise.

So, let's pull the Family Truckster onto the highway.

Understanding the Transaction

Stop 1: Know Your Client

The very first thing any lawyer should do before dispensing legal advice is know the client. Before even looking at a transaction structure, you should have a thorough understanding of who your client is and what that client hopes to achieve from the deal. Who is your client? What business is the client in? How does the business typically make money? What is the current economic position of the business: is it doing well, is it facing a liquidity crunch, is it anticipating a difficult upcoming economic climate? What are the client's appetite and tolerance for risk? If possible, review your client's most recent financial statement to get a sense of the key business and financial issues with which they are dealing. Finally, it is important to understand the goal of the transaction for your client. Is it making a profit, raising capital, financing a specific venture, entering into a risk mitigation transaction (such as a derivative), or something else?

The goal of this step is twofold: it not only gives you a better understanding of the transaction, it also provides you with the effective negotiation position of the client. This will be important as you negotiate the transaction documents later.

Stop 2: Know the Other Parties

Almost as important as knowing your own client is knowing each of the parties with whom you are negotiating. Try to ascertain the same information as you did for your own client. Obtaining this may be somewhat more difficult, but you still may have access to public filings, news clippings, and information that your own client may have. It is key to understand why each party is entering into the transaction and what they hope to achieve.

Make sure you understand the specific entities being used by each party. Is it a parent company or a subsidiary? Is it an entity subject to a specific regulatory regime such as a broker/dealer, a bank, an insurance company, or an investment fund?

At this point, be on the lookout for the first red flag: the inappropriate use of a special purpose vehicle. A "special purpose vehicle" (SPV) is an entity that is created for the specific purpose of the transaction at hand and has no other bona fide business purpose. Of course, an SPV can be used legitimately for a variety of transactions such as certain mergers and structured finance deals. However, it also can be used for more nefarious purposes, for example, evasion of tax or securities regulation. Therefore, if the transaction involves the use of an SPV, understand the purpose for which it is being used and make sure that you are comfortable as to its legality.

Draw a Map

Stop 3: Follow the Cash

No road trip would be complete without a map. It's nearly impossible to analyze a complex transaction without a structure chart. So draw one. Draw boxes representing each entity in the transaction, with connecting lines representing the transfer of assets and liabilities. For the more involved transactions, this can be a bit of a challenge, so I find that the easiest first step

is to "follow the cash." A cash transfer is the most basic of financial transactions, and filling out the cash transfers first is like starting a puzzle with the corners. Note where the cash starts (often with investors in the case of securities transactions or a bank in the case of financing transactions (or both)) and where it goes, through to where the cash is no longer transferred to other transaction parties. Note where an entity receives cash and passes the entire amount to another party, where an entity passes cash along but retains a profit, and where the cash stops. These facts will begin to paint the whole transaction picture for you.

Stop 4: Complete the Map

Now, fill in the rest of the puzzle. Draw arrows representing the transfer of all noncash assets such as securities, promissory notes, and physical assets. Note where the assets are transferred on the closing date and where future receivables are being exchanged. Also note where a transfer is contingent on the occurrence of another event (for example, a derivative with a "knock-in" or "knockout" component that gets triggered upon a stock price reaching a certain level). Fill in other liabilities to be assumed by the parties to the extent not already noted.

Don't forget to include the transfer of collateral (noting where it is held and by whom). I often designate collateral with a special symbol (indicating that it is not a clean asset transfer), noting also the nature of the collateral "transfer" as this will vary by jurisdiction. For example, in some jurisdictions such as New York, collateral is often pledged to a secured party, whereby the collateral is controlled by the secured party but still technically owned by the transferor. In other jurisdictions, such as England, the transfer of collateral is often consummated by an outright transfer of ownership; the secured party owns the collateral. Still in other jurisdictions, Japan for instance, collateral is often loaned to a secured party (under what is known as a "loan for consumption"), to be repaid by the secured party upon the satisfaction of the original obligation.

Your transaction may have some additional transfers that I haven't discussed here. Include them in the map; the idea is to have as complete a visual representation of the transaction as possible.

Analysis

Upon completion of the map, it is time to analyze the transaction to determine the presence of legal issues. I take this phase in two steps. First, I search the transaction for red flags. Then, I look at each party and transaction and assess their legality in the context of the entire deal.

Stop 5: Is Every Party's Role Clear?

One of the quickest signs that a transaction may have a legal issue or that the transaction is not properly structured is the presence of an entity whose role is not quite clear. At this point, look at each of the parties and make sure they have a necessary purpose within the deal. There are three red flags for which to look within this step. First is a party with no arrows pointing to or away from it on your map. If a party is not giving or receiving assets, counsel should question the role this party plays in the transaction, whether such a role is legal (and structurally sound), and, ultimately, how that party's role will be documented. Second is a party with only one connecting arrow. This means

the party is only receiving or paying assets, and not the other way around. This may suggest that there is a problem of consideration, or that a party is potentially misusing a special purpose vehicle. It also may suggest that there is a trade being conducted that is not at arm's length. It is also worthwhile to look for parties with an odd number of connecting arrows. That may suggest it is in receipt of an asset without a corresponding obligation, or vice versa; however, it also may suggest that the party is undertaking two obligations in consideration for one receivable (or vice versa), which is not necessarily problematic. Third is a party that is passing through one or several assets it receives to another party (without keeping a profit or commission). This also may suggest the misuse of a special purpose vehicle or some other attempt to evade law or regulation.

If you spot any of these red flags, you should not assume that there is a legal or structural issue. Valid transactions can be structured as I describe above. Rather, when you uncover a red flag, you should give that portion of the transaction extra scrutiny, considering any relevant legal issues and being sure to understand why the deal is structured in this manner.

Stop 6: Is the Structure

Unnecessarily Complex?

A big red flag for which to be on the lookout is unnecessary complexity. There is nothing per se wrong with complex transactions; however, where the deal can be structured more simply to achieve the same result, there may be a hidden legal or regulatory issue. To determine if this is the case, first ask yourself what the deal is designed to achieve. Then, consider if the structure can be simplified to produce the same end. If it can, the added complexities––be they additional transaction parties or special purpose vehicles, asset transfers that pass through parties unnecessarily, etc.––should be scrutinized.

Stop 7: Consider Each Transaction Party

After searching the transaction structure for red flags, it is time to analyze each party. The degree to which you can gain comfort on entity-related legal issues will vary depending on the party: your client and its affiliates will likely be able to provide you with corporate minutes, regulatory authorizations, etc. Counterparties may be required to provide this type of information in the due diligence process; however, in some cases, your client may need to rely only on representations, conditions, and/or covenants in the transaction documents and information gleaned from publicly available sources.

Looking at each party should be an exercise in basic corporate law. Start by ensuring that each entity is duly formed, validly exists, and is in good standing under its jurisdiction of organization. If the entity is subject to a specific regulatory regime, also be certain that such entity is in good standing with respect to any relevant authorities (such as the state insurance regulator or the Securities and Exchange Commission). Then, consider whether the entity has the power under its own corporate documents and governmental/regulatory authorizations to enter into the transaction under consideration. Finally, consider whether corporate approval (shareholder, board of directors, officers) and/or governmental or regulatory approval are required. If so, ensure that such approval has been granted, or is contemplated by the transaction documents (typically, as acondition precedent to consummating the

transaction).

In some transactions, most notably securities offerings, a party may simply be "Investors" or "The Capital Markets." In this case, it is still necessary to analyze the nature of this group. In the United States, if "Investors" include the public, the offering may need to be registered under the Securities Act of 1933. Registration would trigger ongoing reporting obligations under the Securities Exchange Act of 1934, and counsel should consider the impact of registration and reporting on the issuer. If the offering is not public (or in the case of certain types of public offerings), exemptions may be available. If the securities being offered are shares of an investment fund, counsel should consider registration obligations under the Investment Company Act of 1940 and the related exemptions. In the context of such a fund deal, the fund's adviser also must consider its own registration and reporting obligations under the Investment Advisers Act of 1940. Finally, parties to securities offerings also must consider their obligations vis-à-vis investors. U.S. broker/dealers, for example, have the duty to determine whether or not the securities they sell to clients are suitable for such clients.

Stop 8: Consider Each Exchange

Once you've looked at each party, shift your attention to each exchange drawn on your map. During this step, you should determine whether or not the exchange is *legal*, and, if it is, whether despite such legality the transaction raises legal issues that should be addressed.

With respect to legality of an exchange, first determine the governing law of each entity involved, as well as that of the exchange itself. Then, conduct the review necessary to ensure the legality of the trade under these laws. At this phase, it may be necessary to employ local counsel. Note that entities may be subject to more than one governing law; for example, a Delaware corporation issuing stock will involve both the corporate law of Delaware as well as the U.S. federal securities law. There may be other jurisdictions involved, as well. For example, if the transaction involves a custodial arrangement or the holding of collateral, it may be necessary to consider the law of the jurisdiction in which the assets or collateral are located.

It is also necessary to consider legal issues, even if you have comfort on the fact that the trade is legal. This analysis will vary from transaction to transaction, but some items I usually consider include tax issues, pension plans law, the potential adverse recharacterization of the exchange by regulators (for example, a purchase and sale being recharacterized as a loan), and validity/perfection of security interests. As you work your way through these issues, note where you may need added protections from your counterparty(ies). These may include, for example, a condition precedent that certain filings will be made to ensure perfection of a security interest, indemnities if a transaction is adversely recharacterized, covenants that a transaction will not involve a pension plan, or the like.

Documentation

Stop 9: Determine the Required Documents

Now that you know the parties, understand the transaction, and have unearthed the legal issues, it is time to determine the required deal

documents. The most logical place to begin is by listing required contracts. The task here is simple; look at each exchange on your map and determine how it is to be documented. Most exchanges (purchase and sales, loans, posting of collateral) will be consummated via contract. In some cases, one contract may encompass more than two parties; in others, multiple exchanges will be conducted via a single contract. In any event, each line on your map connecting two parties should have some document evidencing it.

Of course, contracts will not be the only documents involved in a complex transaction. The precise documents involved will vary for each transaction, but some of the most common other documents include securities prospectuses, collateral financing statements (and other documents used to establish and perfect a security interest), officer's and other certificates, regulatory filings, and proxy statements. The analyses you conducted during stops seven and eight will be particularly helpful in determining the documentary requirements.

Stop 10: Term Sheet andTransaction Checklist

As for any road trip, you need to be organized. Jumping into documentation drafting before the parties have agreed on the basic terms of the transaction and the responsibilities of each party could result in wasted time.

First, start with a term sheet. Hopefully, your client had prepared something in writing that summarized the transaction before you even began your analysis. Use that as a basis for a more formal term sheet. Include the basic terms of the transaction: each entity involved, each exchange being conducted, and each document that will be required. The parties should agree on the substance of the term sheet before proceeding with the time and costs of the more formal agreements.

Then, prepare a transaction checklist. The checklist is a list of each task required, the responsible party or parties, and the target deadline. While it is typically the lawyer's role to list the relevant documents, the businesspeople on all sides of the transaction also should include other closing tasks required. Again, the parties should agree on who is responsible for what and the deadlines for each task before the substantive work begins.

Negotiation and Documentation

By now, you should have a comprehensive understanding of the transaction. With your map, term sheet, and transaction checklist in hand, you can begin negotiating and drafting your deal documents. Remember to refer to your map and your transaction analysis frequently as these tools will greatly assist you in these tasks. For example, during stops one and two, you gained critical knowledge about the parties involved in the deal; this information will be valuable to assessing your client and your counterparty's positions as you negotiate. During stops seven and eight, you may have uncovered representations or conditions that should be included in the deal documents. Be sure to consider these provisions as you negotiate the transaction. Bon voyage!

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BUSINESS LAW

Beware and Aware of Those International Treaties!

By Lynne R. Ostfeld

Practitioners thinking to do any international work need to understand that more is involved than speaking another language in order to deal with the other party, the other attorney, and the other court system.

A starting point is to know whether the "other" is in a common or civil law system, or whether they are subject to sharia. Or, is it a system that takes something from all of these? Civil law systems do not use case law precedence so that decisions of other courts have little predictive value for the court in which your case is being, or might be, heard. How much does culture and custom play a part? In at least Japan, Norway and Germany the parties are expected to resolve differences out of court as often as not, and good faith negotiating before a contract is executed is required in Germany.

What about international agreements that supersede national laws, or which cover points not otherwise addressed?

Two treaties of importance are the United Nations Convention on Contracts for the International Sale of Goods ("CISG")[1] and the United Nations Convention on the Use of Electronic Communications in International Contracts.[2] The former is in force and the latter is pending.

The CISG was finalized in 1980 and came into force in 1988. It applies to contracts for the sale of goods between parties whose places of business are in different States when the States are Contracting States. It does not apply to consumers. It governs the formation of the contract and does not generally get into the validity of the contract or liability for harm caused by the products. Parties to an international contract can exclude application of the CISG or any of its provisions. A sales contract under the CISG need not be in writing.

Although sophisticated and experienced attorneys can be ignorant of the existence of the

CISG, they best not plead that ignorance, or the inapplicability of the CISG to a disputed contract, because U. S. courts have dealt with a variety of issues brought under it.

Courts have looked at whether certain States were signatories or not and, therefore, whether parties doing business in those States were covered by the CISG.[3] They have looked at whether strict liability and negligence claims were preempted by the CISG.[4]

Because the CISG can apply to a contract, unless excluded, it is important to look at contract formation from both the point of view of the CISG as well as the U.C.C. and even local law. The CISG applies the mirror-image rule to terms which materially alter the terms of the offer while the U.C.C. does not.[5] The CISG does not have a statute of frauds.[6] Also, the CISG does not have a parol evidence rule but allows contract formation to be governed by statements showing what a party's known or expected intent was, what a reasonable person would have understood, and the practices between the parties.[7]

The United Nations Convention on the Use of Electronic Communications in International Contracts ("E-Contract")[8] was adopted by the U.N. General Assembly on November 23, 2005. It has been ratified by two nations, Honduras and Singapore, and will go into force when a third nation ratifies it. It applies to the use of electronic communications in connection with the "formation or performance of a contract between parties whose places of business are in different States."[9] It does not apply to most personal matters, financial transactions, or documents related to the transfer and delivery of goods.[10]

As with the CISG, parties may exclude this treaty from applying to a contract and may change any of its provisions. Singapore included a declaration that basically excludes its application to real estate transactions and estate planning documents.

Parties do not need to use or accept electronic communications but their agreement to do so may be inferred from their conduct.[11] Several provisions that may seem a bit unusual and worth paying attention to concern the transfer and receipt of the communications. In Article 10, the time of dispatch is when the communication leaves an information system and the time of receipt is when it becomes "capable" of being retrieved. Without more, there does not seem to be a requirement that a person has actually seen the communication for it to be effective and binding. In Article 12, there are provisions that provide for enforceability of a contract even if no natural person reviewed or intervened in the action carried out, but that it was done only by automated message systems.

In anticipation of errors and the difficulty of correcting them when communication is with an automated message system, Article 14 provides that a natural person may withdraw an electronic communication in which an input error was made under certain circumstances. The first is that the initiator notifies the other party of the error as soon as possible after having learned of it, and the second is that this initiator has not benefited from the goods and services received from the other party.

To conclude, any attorney involved with an international transaction needs to be aware of treaties such as these and make a determination if he or she will accept or exclude their provisions. Failure to do so in advance could result in their applicability to the contract, possibly to the client's detriment.

Endnotes

1. www.cisg.law.pace.edu/cisg/text/treaty.html. Further resources on this treaty can be

obtained at www.cisg.law.pace.edu/. The ABA Section of International Law and Practice published in 1990 *The Convention for the International Sale of Goods: A Handbook of Basic Materials*, edited by Daniel Barstow Magraw and Reed R. Kathrein, but this may now be out of print.

2. www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention.html

3. Gregory M. Duhl, *International Sale of Goods*, 65 Bus. Law. 1313, 1313–1314 (2010) (discussing cases treating the issue of whether Hong Kong was a signatory after China advised the U.N. that it would not extend the CISG to Hong Kong).

4. *Id.*, at 1315–1316.

5. *Id*. at 1317.

6. *Id*.

7. Art. 8, CISG

8. www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention.html

9. Art. 1.

10. Art. 2.

11. Art. 8.

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A Template for an Executive Summary

By Jean L. Batman

Please click here to reach the Template for an Executive Summary, in a PDF version.

Did you find this article helpful but need more information on this topic? If so, click here to purchase the author's book. GP/Solo Division members automatically receive a discounted price.

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

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Mexico's Supreme Court Orders States to Recognize Same-Sex Marriages and Adoptions of Minors by Such Couples

By Ignacio Pinto-Leon

Earlier in August of this year, Mexico's highest court, the *Suprema Corte de Justicia de la Nación* (Supreme Court of Justice of the Nation), paved the road to all–states recognition of same–sex marriages and adoptions of minors made by such married couples. From now on, validly executed marriages and adoptions in Mexico City—either by same or different sex couples—shall be recognized as *valid* in all states of the country.

Currently, only the Federal District (Mexico City) performs same–sex marriages—and only one state (Coahuila) and the Federal District provides for same–sex civil unions. But thanks to a 9–2 decision by the Supreme Court, all 31 states of Mexico have to give full effects to such marriages and adoptions, due in part to Mexico's Full Faith & Credit Clause of article 121.IV of the *Constitución Política de los Estados Unidos Mexicanos* (Political Constitution of the Mexican United States); the Court also based its decision on the equal rights clause of Mexico's Constitution.

The Supreme Court's opinion is still to be published—but the text is now available on its webpage; the debates were transmitted live via web and cable TV and closely followed by the public and press, and the transcripts of the debates are available at the Mexico's Supreme Court's website.

The case came to the Supreme Court of Mexico via constitutional challenge made by the *Procuraduría General de la República* (Mexico's Attorney General Office) to amendments to the local Civil Code and other laws of Mexico City enacted by the Assembly of Representatives of the Federal District

—the local legislative body for Mexico City. The Attorney General alleged that the new law violated the legislature's duty to protect families, failed to protect the children's best interest and attacked federalism. All arguments were found invalid in due course by the Supreme Court.

Mexico's *Suprema Corte* made a direct interpretation of article 121.IV – Full Faith & Credit Clause – of Mexico's Constitution. The Mexican version of the Full Faith & Credit Clause is more detailed and extended than the one in article IV.1 of the U.S. Constitution as interpreted by U.S. courts to date.

Article 121.IV of the Mexican Constitution establishes that "[all] acts related to the civil status [of individuals] executed in accordance to the laws of one state shall be valid in the others." Marriage and adoptions are clearly acts of such nature.

[*On a note irrelevant to this article but crucial to attorneys licensed to practice in Mexico (as myself), article 121 also command states to recognize professional titles and licenses issued validly in any state or Mexico City: this nicety of the Mexican constitution means once a lawyer – and other professionals – are admitted to one jurisdiction, we're admitted to all!*]

The Supreme Court held—in a legally–impeccable argument—that this constitutional mandate extends to and includes same–sex marriages and adoption of minors by same–sex married couples, therefore ordering states to recognize such acts if validly executed in Mexico City, just as if celebrated within their territory. The lack of similar marriages or adoptions in a particular state was not to be an obstacle to their recognition.

The argument used by the Supreme Court in Mexico is similar to those advanced by many in the United States, such as Harvard Professor Joseph Singer and others in the context of the Full Faith & Credit clause of article IV.1 of the U.S. Constitution. It will ultimately be up to the American Supreme Court to define whether the Full Faith & Credit compels all states within the U.S. to give legal effects to same-sex marriages executed in one of the states that allow it. If they do so, it may probably happen in similar terms to those set up by their Mexican counterpart in the instant case.

The Supreme Court of Mexico got it right on its interpretation of the Mexican Full Faith & Credit clause of its Constitution. The amended Civil Code of the Federal District provides for same–sex marriages and allows same–sex married couples to adopt minors. States consequently have an obligation to recognize and give full effects to such marriages and adoptions within their territory – regardless of their particular position on the issue. And Mexico City's legislature got it right too by granting equal rights to same–sex couples in marriage and adoption matters.

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FAMILY LAW

Tools of the Trade: Get the Cash in Hand

By Lee S. Rosen

She is standing at the reception desk with wallet in hand. She wants to pay your fee. It is imperative for the success of your practice that her fee makes its way into your bank account. Unfortunately, sometimes the “simple” act of a client paying her lawyer is more complicated than it needs to be.

Three general principles are most important when it comes to accepting payments:

1. Not only must you follow the ethics rules of your state, but you must stay informed about the changes to those rules. Nearly every year, a new ethics opinion relates to fees. For example, credit card payments have received considerable attention from regulatory authorities in the past year. With the rapid changes in technology, you simply must stay on top of ethics rules revisions.

2. Create a detailed manual for your staff, outlining your firm’s procedures for accepting payments. The last thing you want is for a client to be ready to pay with no one available to handle it. Set forth your payment rules in writing so that everyone on your staff understands the procedures. Then keep the manual easy to grab so that your staff can quickly follow your step-by-step instructions. In our office, we keep the manual next to the credit-card swiping machine.

3. Update your manual regularly. Technology and machinery will evolve, the bank may change its phone number, or a new ethics rule may emerge. This information is central to everything you do, so keep your manual current. Without the means to get paid, you have no practice.

Even beyond these safeguards, however, accepting payments can be surprisingly complex. Let's look at the problems that can arise with different forms of payment.

Cash

We all love cash. In family law, we often receive initial funds from people who want to make sure a spouse doesn't find out they're hiring an attorney. We must be especially careful about ethics rules and banking regulations in such a case. Make sure you know exactly how much cash you can receive without filing a report. Otherwise, you might be accused of money laundering.

Another problem is what to do with cash when you cannot get it to the bank right away. You might receive the funds after 5:00 p.m. on a Friday, you might occasionally meet with a client on the weekend, or you may simply be short-staffed on a particular day with no one available to go to the bank. You must have a secure place in which to keep cash in the meantime. At our firm, we have a small safe for this purpose.

Next, determine which account is appropriate for the deposit. Does the money belong in your operating account or your trust account? Review the rules of your state. Always present your client with a receipt for the cash and have the client sign it. Then keep it on file to record the transaction.

Checks

Surprisingly, checks are still the number one way lawyers get paid. In my firm, we have a machine that allows us to swipe the check and have the money immediately credited from the client's account into our account. As a result, we do not have to take the check to the bank; we simply put it in the client's file. (The exception is a certified check, which may need to be physically deposited at the bank.) Our bank charges about 25 cents per check for this scanning service, which is certainly worth it because funds are immediately available with no need for a staff member to leave the office.

Another service that may be helpful is a check guarantee service. These companies promise that every check is good, even if a stop payment is issued. Of course, you must pay for this service, but it can be helpful if you fear check scams. In Canada, attorneys have been targeted with bad settlement checks. If they cut checks to their clients before the settlement checks clear, they are out of luck. In North Carolina, we are prohibited from issuing funds to clients until we have a guarantee that the check has cleared our trust account.

These days someone can fax you a check, and with very simple software, such as Checks by Fax Software or Chax, you can recreate that check and deposit it via an electronic scanner. This is just one more way to accept a check from your clients. Of course, a wire transfer is yet another way. All you have to do is provide your account and routing numbers. As technology continues to advance, there will undoubtedly be more convenient ways to process checks and new ways for thieves to scam the banks. So, again, keep track of the news, and change your procedures accordingly.

Credit Cards

Our firm takes MasterCard, Visa, Discover, and American Express. We want to make it as easy as possible for our clients to pay us. Credit cards are, by far,

the trickiest method of payment, however. Credit card companies charge for each transaction, and these fees can be complex. For example, American Express charges more than most, but others charge a fixed fee and/or a per-transaction fee. Generally there are two layers of fees, even though they're charged as one—one fee from the actual credit card company and another fee from the company that processes the transaction. One thing many businesses fail to realize is that these fees are negotiable. We renegotiate every year with our credit card companies to get a better deal. Don't miss out on these savings.

When you take a credit card payment in person, print out a receipt, and have the client sign it. Do not send these receipts to the credit card company, but keep them in the client's file as a record of the transaction. Some consultations are conducted on the telephone, but bear in mind that you pay a higher fee to the credit card company if you do not swipe the card. The companies compensate themselves for the added fraud potential, so it's very important that your staff know to get all of the necessary information from your clients when taking credit card payments by phone. These include the credit card number, the three-digit security code, the expiration date, and also the billing address. Without any one of these pieces of information, you will probably end up paying a higher fee.

Finally, be aware that clients can seek a refund from the credit card company if they are not satisfied with your services. You will receive a notice of a "charge back," and the funds may be debited immediately from your account. It is important to be familiar with the agreement between you, the credit card processors, and the banks.

Online Payments

PayPal is an online service that is used by people all over the world for bank transfers and credit card payments. PayPal takes a percentage of each payment you receive. Our firm has negotiated a better rate by working directly with the credit card companies. Again, check your state's ethics rules before using PayPal or any such service.

On our firm website, we include a page that allows a client to make a secure payment. It automatically transmits credit card information to us without any of the normal e-mail security issues. With this method, we can send the client a bill via e-mail, instructing them to pay online or come into the office with payment or call with credit card information. The e-mailed bill includes a link to our website where the client can make the payment online. Since few of our clients use this method as yet, we don't have a way for the charge to go through automatically on the computer. Instead, we enter the credit card information manually. Eventually, this will change.

If you decide to accept online payments, remember to send the client an e-mail confirmation. Otherwise, your client may worry that the payment has not gone through. It also goes without saying that you must keep impeccable records of your clients' payments. You may find yourself answering inquiries years after the transactions have taken place. We use QuickBooks for tracking all financial transactions, but numerous other options also are available.

One Last Thing

Many attorneys are uncomfortable asking to be paid. Remember that you offer

a valuable service to your clients and you are absolutely entitled to payment. In most instances, you and your client already will have discussed the fee, so your client will expect to pay you. We have found that most of our clients automatically pull out their checkbooks or credit cards at the end of the consultation. If a client does not, however, you must raise the subject. This is especially true if you see clients after hours or before your staff arrive in the morning. If you are hopelessly uncomfortable discussing money, make sure that someone else is around to handle it for you.

Whatever methods you employ, the bottom line is that you need to make it easy for your clients to pay you and foolproof for your staff to take those payments.

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The Law and Living Together

By Jeanne M. Hannah

A cohabitation agreement is essential protection for unmarried couples

Many couples in the United States cohabit without the benefit of marriage. As a direct result, in the event of illness, death, or dissolution of the relationship, cohabitants are deprived of many of the rights and financial safeguards accorded to legally wed spouses.

Consequently, unmarried partners who have not been protected by a written agreement that specifically spells out property and support rights upon death or separation from a partner face grave risk of financial harm.

Since the early 1970s, some states have protected rights arising from the relationships of cohabitating adults through various legal theories, such as implied contract, express contract, unjust enrichment, equitable estoppel, joint venture, constructive trust, and/or equitable partnership. The few states that have legalized same-sex marriage or civil unions also provide some protection to couples. However, many states have refused to grant such relief to people living in what, in some jurisdictions, is called a “meretricious relationship.”

Statistics from the U.S. Department of Census make clear that cohabitation is definitely on the uptick. Between 1960 and 2000, U.S. Census data confirms that cohabitation by unmarried couples has increased 1,247%. Tavia Simmons and Martin O’Connell, Married-Couple and Unmarried-Partner Households: 2000, Census 2000 Special Reports, CENSR-5 U.S. Census Bureau, Washington, D.C. (Feb. 2003), p. 1. Archived at: http://www.census.gov/prod/2003pubs/censr-5.pdf (last accessed Oct 4, 2009).

Approximately 5.5 million U.S. couples (both heterosexual and same sex) were living together as unmarried partners in 2000. That's up from 3.2 million in 1990. The number is believed to be underreported. *Id*. See also Martin O'Connell and Gretchen Gooding, Editing Unmarried Couples in Census Bureau Data: 2007, Census 2000 Housing and Household Economic Statistics Division Working Paper, Washington, D.C. (July 2007) (last accessed Sept. 16, 2009).

Approximately 9.2 million U.S. men and women live in 4.6 million unmarried-partner households. Jason Fields, America's Families and Living Arrangements: 2003, Current Population Reports, P20-553. U.S. Census Bureau, Washington, D.C. (2004), p. 17. Archived at http://www.census.gov/prod/2004pubs/p20-553.pdf (last accessed Sept. 16, 2009).

While same-sex couples have the right to marry in some jurisdictions, that does not mean they always will. Individuals may not always be able to protect themselves by a written contract if their prospective partner refuses to enter into a contract. Such individuals will need to reflect upon whether entering into a partnership is a good idea.

Cohabiting adults should operate under a written contract that states with specificity each party's rights and responsibilities upon death or separation and at breakup of the relationship. A relationship may well be made more stable and secure when a contract triggers a frank discussion of unmarried partners' commitment and if incentives are incorporated into the agreement acknowledging each partner's rights and responsibilities. This is particularly true where one party has more education or greater earning capacity, owns property at the inception of the relationship, or is responsible for improvement or appreciation of property acquired prior to or during the relationship. This also is true where partners do not share equally in all duties and expenses.

Statutes also govern the distribution of property of adults who die intestate. Especially in same-sex relationships, many partners wish to ensure that their life partner will be taken care of if one partner dies without a will or if family members challenge the conveyance of assets to a partner through a will or trust.

What issues should be included?

1. Purpose. A cohabitation agreement should state (a) the purpose of the agreement, (b) that it is intended to be legally binding on each partner and his or her heirs and assigns. A choice-of-law provision will ensure that the contract remains binding in the event of relocation and, if the partners should move to another state, that the laws of the state in which their contract was formed will govern.

2. Identity of parties. State each party's full name, address, age, financial position, and current health.

3. Disclosure of assets and liabilities. Attach separate schedules showing each partner's full disclosure of assets and liabilities.

4. Duration. State how long the parties intend the agreement to last. Many people build incentives into such agreements to increase the commitment to the partnership. For example, consider a "sunset clause" that provides for a partner to be treated like a surviving spouse after 15 to 20 years. Other agreements provide for a "liquidated damages" clause that discourages switching to "a newer model" by imposing substantial support obligations upon the breaching or terminating party. Other agreements may tie financial incentives to major life events, such as the birth of a child.

5. Property rights. State whether the partners waive property rights in favor of natural heirs. If not, state exactly how such interests will be handled. (See Inheritance and wills below).

- **Real estate.** State how the parties will deal with any property owned before the relationship or acquired during it. State how title will be held during cohabitation and after a death or dissolution of the relationship. If the parties' intent is to protect both partners' interests upon death (a frequent goal of same-sex couples), the easiest way to defeat claims of potential "natural heirs" is to create the title as "joint tenants." A joint tenancy will automatically become vested in the surviving tenant upon death of a co-tenant. Note that a joint tenancy is sufficient. In Michigan and some other states, if a deed provides that title is held as "joint tenants with full rights of survivorship" this will open a can of worms preventing partition to divide the property upon separation. (For more information on this, contact the author.)
- **Restitution for contribution to the estate of the other.** (See also income/expenses/debts) If one partner owns the house, state how financial restitution will be made to the other partner for monies expended if the partnership is later terminated and the title-holder has accrued equity and enjoyed tax benefits to the detriment of the other partner.
- **Buy-outs of property interests.** If the partners acquire real estate jointly, state how the equity will be liquidated and/or divided upon breakup of the relationship.
- **Termination of the partnership and moving out.** State how the parties will deal with removal from the home, including the specific period for notice prior to an obligation to leave when the ousting party owns the house.
- **Accrual of savings, pensions, annuities, and other retirement interests.** State who will be named as beneficiary or co-owners of such interests, including retirement interests, savings, pensions, and annuity policies. Provide for division of such interests in the event of separation or restitution to achieve an equitable division. Some couples may elect to hold these assets separately. If a beneficial interest is created for the partner, state a time limit within which, at separation, a waiver of such interest must be executed and delivered.
- **Income/expenses/debts.** State how each party's income is to be managed, such as pooling each partner's income into a joint account or keeping such accounts separate. State how the partners' regular monthly expenses will be allocated, i.e., equally or as a pro rata share, based on income. State how each partner will help pay for such things as vacations and home furnishings. State when a partner who gave up career advancement to be a homemaker is

entitled to rehabilitative support upon separation. State whether one party has an obligation to support a party who sacrifices career opportunities to remain at home as caregiver for children. State how debts will be allocated upon dissolution.

- **Personal property.** Vehicles—In states such as Michigan, owner liability statutes make it imperative that cars be titled in the name of the principal driver to avoid imposing liability on joint assets in the event that a driver is underinsured and incurs liability arising out of an accident. Household goods—State how personal property acquired during the partnership will be divided upon separation or death. It is preferable that a party who holds credit card debt takes the personal property for which that debt was created.

6. Children. Note that United States courts generally have been unreceptive to parental claims to custody or parenting time by a partner who is not a birth parent after a relationship breaks up. This is particularly troublesome in states where two-parent adoptions are not legal. Courts retain the statutory obligation to adjudicate each case based on the children's best interests. Courts have generally rejected the concept of contract applied to decisions about the future best interest of children, thus an agreement that incorporates intentions about custody or parenting time after a breakup will generally not be enforceable, and the genetic or biological parent will prevail in such disputes. A few progressive courts have, however, allowed coparents to form contracts about future coparenting upon dissolution of the relationship. See, *e.g., Elisa B. v. Superior Court*, 117 P.3d 673 (Cal. 2005); *Kristine H. v. Lisa B.*, 133 P.3d 690 (Cal. 2005); *In re Parentage of L.B.*, 122 P.3d 161 (Wash. 2005).

State any commitments to have children and planning details, such as who will be the birth mother and how such children will be educated. One creative way to deal with this problem is to make sure that the child has genetic material from each parent or that the genetic material is from one parent with the other partner being "the host." Today, it is entirely possible to create a child or children through in vitro fertilization (IVF), and for partners to share children who are genetically related to both partners.

7. Inheritance and wills. State what each partner plans to leave to the other. Great care should be taken to avoid a will contest where a party is disinheriting natural heirs in favor of a partner. If the partners are subsequently able to marry, a new will is required.

8. Modifications. State the method by which changes can be made to the contract. To avoid unintended results if partners reside in a state where property rights may arise by implication or other equitable remedies, make sure that changes are in writing, signed by both parties, and that a choice of law provision is included. This will ensure portability, i.e., that an agreement that is enforceable where entered is not later invalidated because cohabitants have moved to a state in which the law would invalidate such an agreement.

9. Acknowledgments. At the end of the agreement, together with the usual boilerplate, provide for acknowledgment by each partner that this agreement has been entered into willingly and without coercion or duress. A videotaped execution is a good way to document lack of coercion or duress.

Are all cohabitation agreements enforceable?

Since the early 1970s, courts have increasingly been willing to recognize and enforce contracts made by spouses—either antenuptial (prenuptial) agreements or postnuptial agreements. Cohabitation agreements will generally be enforced in the same manner as a prenup or postnup is enforced in the state where the agreement is executed. However, note that in some states, prenuptial agreements are treated differently than postnupial agreements.

To ensure enforceability

What is the best way to ensure enforceability of a cohabitation agreement? Enforceability and validity vary from state to state. Observe the following formalities to increase the likelihood of enforceability of an agreement.

- **Consideration.** A cohabitation agreement that has, as its primary purpose, the intent to engage in a sexual (meretricious) relationship will be held as void against public policy in many states. It clearly is important to state that each partner promises the other something of value in exchange for promises made in the agreement.
- **Construction.** Write the agreement in clear, unambiguous language.
- **Property and debts.** Describe specifically the rights and obligations each party has in any property and debts acquired during the relationship by one or both parties.
- **Time for reflection.** The agreement should be in writing and signed by both parties, at least one month prior to the cohabitation. Avoid hurried execution that could render the agreement unenforceable.
- **Legal counsel.** Both parties should have separate legal counsel of his or her choosing.
- **Fairness.** The agreement should be entered into voluntarily and should not be so one-sided and oppressive that no person of sound mind would sign it without duress, coercion, or fraud. Consider videotaping the execution of the document to demonstrate that the parties were under no duress or coercion at the time of execution.
- **Disclosures.** Each party should provide specific disclosure of his or her financial information. Disclosure should be in writing, attached to the agreement, and incorporated by reference within the agreement. Some courts will enforce a prenuptial agreement if the parties have expressly waived that disclosure.

Conclusion

Couples that continue to cohabit without the benefit of marriage should do so only with a cohabitation agreement. Practitioners must consider each client's special circumstances, needs, and expectations. Drafting must specifically address the division of assets and liabilities, taxation, and specific issues pertaining to the parties, while taking into consideration the law of the particular jurisdiction. Remember, too, to counsel the client on pitfalls that may be faced if the couple relocates or laws change.

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Defending Liberty Pursuing Justice

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YOUNG LAWYERS

Extending the Reach: A Young Lawyer's Continuing Experiences in Developing a Solo Law Practice (Part Two of a Series) »
By Brian Annino

Extending the Reach: A Young Lawyer's Continuing Experiences in Developing a Solo Law Practice (Part Two of a Series)

By Brian Annino

"Ah, but a man's reach should exceed his grasp,
Or what's a heaven for?"

- *Robert Browning*

Since launching my practice in January 2009, I have learned many important lessons along the way. I chronicled some of my initial experiences in the first article of this series, "Hanging the Shingle," published in the Spring 2009 issue of *GPSolo Law Trends & News*.

This article is the second of this series through which I discuss my experiences in developing and building my practice and offer ideas and opinions for you to consider in starting a new solo practice or analyzing your current practice. Future articles will continue to discuss additional ideas, opinions, and lessons learned from my own practice. Please feel free to reach out to me and let me know of your comments, ideas, and experiences. I enjoyed the comments you provided resulting from my first article and appreciate the opportunity to speak with other attorneys about the joys and challenges of solo and small firm practice.

In this article, I discuss the importance of networking within local business organizations and participating in bar associations and lawyer organizations. For the reasons set forth herein, I believe that my participation in each of these types of groups has extended my reach for clients, in terms of gaining additional education and experience in addition to my making strategic contacts for them.

Networking Within Local Business Organizations

I assert that networking is fundamental to success as a solo and small firm attorney. In order to build trust amongst clients and potential clients, we need

to earn that trust through in-person discussions and exchanges.

I am a big believer in utilizing social networking through the World Wide Web, particularly through LinkedIn, Twitter, and Facebook. As more fully discussed in my last article, I see these as tools to supplement, but not replace face-to-face meetings and networking. Therefore, in order to thrive, we must be successful in our in-person networking encounters.

I am currently a member of a county Chamber of Commerce and various business organizations. Some of these organizations are structured to serve all types of business within a locality and others are designed to serve particular types of businesses (such as an association of real estate agents).

These business organizations offer a great amount of networking opportunities. In fact, my county Chamber of Commerce may offer enough events to provide most of my breakfasts and lunches each week. Therefore, the key is selecting the appropriate audience.

I find that “leads” or “connection” events that feature 50–200 people offer an ideal opportunity to grow one’s practice. Typically, these events begin by each person introducing themselves and conducting a brief (30 second-1 minute) description of their business. I carefully make note of each presentation and decide which persons and business to connect. For example, financial advisors, accountants, and real estate agents are natural allies to me in my estate planning, business, and real estate practice. Therefore, I seek them out after completion of the presentations and have private discussions. Also, I have a number of persons approach me directly for discussions. These discussions lead to future discussions, and in many cases, ongoing business relationships and clients.

As we would not imagine entering a courtroom without proper planning, you should not plan on entering a networking event without having a game plan. Most importantly, you want to ensure that your short presentation (think of it as your “elevator speech”) is a clear and concise description of your practice and how you can help the businesses that are in the room. This may require more preparation than you think. If you are not sure, take some time tonight and practice a speech before a loved one (or someone else that will provide you an honest assessment).
Another great preparation tool is to review the membership list of an organization prior to an event. You can pinpoint particular connections you wish to make at the event.

I generally refrain from utilizing large events (featuring 500 attendees) in furtherance of networking. I think that these events are too impersonal and do not allow for sufficient time to connect with businesses and persons. These events frequently provide excellent educational and civic functions, however.

Such educational and civic functions should not be underestimated. I find it extremely helpful to learn about local businesses in the area and seek out civic volunteer opportunities that are typically broadcast through the organizations of which I am a member.

Business organizations provide ample opportunities for the solo and small firm attorney to network and participate. With proper selection of the organization

and networking event coupled with proper presentation, the attorney has a very useful marketing tool at hand. In addition, such groups provide a great resource for the attorney to better learn about businesses and civic affairs in his or her community.

The Importance of Bar Associations and Lawyer Organizations

As discussed in my previous article, budgeting is of the utmost importance. In furtherance of strict budgeting, it may appear tempting to forgo paying the membership dues for voluntary bar associations or lawyer organizations, particularly when we have to pay yearly mandatory state bar association fees.

However, I assert that participation in voluntary bar associations is essential towards building your law practice. Voluntary bar associations for purposes of this artcile include all bar associations for which membership is not required to practice law in a particular jurisdiction. Important voluntary bar associations include national and local bar associations, such as the American Bar Association and the Atlanta Bar Association.

Lawyer organizations are varied and include the American Association for Justice and the Defense Research Institute, amongst a multitude of others. There are lawyer organizations geared towards numerous practice areas, philosophies, religions, and ethnic groups.

Bar Associations and lawyer organizations are important to solo practitioners because they allow for efficient and extensive networking opportunities, continuing education offerings, and learning opportunities. For these reasons, I assert that the solo and small firm attorney greatly benefits from membership in such bars and organizations.

As discussed, networking with business professionals and potential clients is very important towards the goal of developing a solid client base. However, I assert that networking with fellow attorneys is also important. Its importance lies in our duties towards our clients. Because we are charged with looking out for the best interests of our clients, this will often lead us to legal issues beyond the scope of our practice areas. Therefore, I believe that we must have resources to attorneys in other practice areas related to our own. For example, I have a strong real estate and business law practice, but I do not practice bankruptcy law. Therefore, I stay connected to what I deem to be the top bankruptcy attorneys so I can refer my clients to these attorneys as may be necessary.

In my experience, I have built trust with my clients by referring them to other attorneys and business professionals that practice in areas that I do not. They appreciate my good resources and endorsement of attorneys outside my practice area. In short, this extends my reach for my clients and I find that they really appreciate this.

Also, I believe you will be quite pleased to hear that solo and small firm attorneys genuinely enjoy referring clients to each other. In referring clients to other such attorneys, I have enjoyed receiving referrals three-fold in return.

I find the best way to stay connected with other attorneys is through the various networking events of the bar associations and lawyer organizations of which I am a member. These groups offer networking events geared to a wide

variety of practice areas and include breakfasts, lunches, and evening events. If I wanted to, I could probably attend networking events through these groups nearly every day of the week.

The bar meetings I most frequently attend are "meet and greet" type events, roundtable discussions, and seminars. In the course of these meetings, I make note to get there early, stay late (or both) and introduce myself to as many attorneys as possible. I very much enjoy the conversations I have with attorneys regarding legal trends, news, and discussing our recent experiences in the transactional and litigation worlds.

These groups are also important because of the continuing legal education (CLE) credits offered at affordable rates. If you are in a mandatory-CLE state such as me, you are conscious of fulfilling CLE requirements without breaking the bank.

I receive an estimated 15 flyers per week about CLE courses offered by various private education companies. Prior to becoming a solo practitioner, I never paid too much attention to the price of the CLE courses. Of course, now that business expenses are drawn out of my own operating account, I pay particular attention to such costs. The flyers and brochures I receive advertise hundreds (even thousands) of dollars for half or full day courses.

Bar associations and lawyer organizations offer CLE courses at much lower rates than private education companies. For example, my local bar associations routinely offer a half and full-day course for $200.00 and less. In addition to such rates being a relative bargain compared to private education companies, I find that the courses offered by the local bar associations often feature local judges and experts. Therefore, I can stay sharp on local law and trends at a reasonable rate.

Voluntary bar associations and lawyer organizations also present additional learning opportunities for attorneys. These opportunities include pro bono opportunities, lending libraries, mentor/mentee relationships, and exposure to other practice areas. All of these opportunities are invaluable for developing a practice. I find that these learning opportunities also extend my reach for my clients.

It is also important to note that bar associations and lawyer organizations have generally frozen dues increases due to the economic climate. Some have actually reduced their dues or made special arrangements for solo and small firm attorneys. Most notable is the American Bar Association's action to reduce dues for solo attorneys, effective for the 2010–2011 membership year. See http://www.abanet.org/members/solo/.

I assert that to be successful, the solo and small firm attorney must make good use of local business organizations, voluntary bar associations, and lawyer organizations. This leads to new clients and connections, increased experience and learning opportunities, and the personal enrichment that comes from human interaction. It also helps us extend our reach for our clients.

This concludes my second article in this series. I look forward to drafting future articles that discuss my experiences in starting and building my solo law practice. In the meantime, I welcome ideas from your own practice and

perspective. Please feel free to contact me at brian@anninolawfirm.com or connect with me via LinkedIn, Twitter and Facebook.

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Scammed! Sophisticated Check Fraud Schemes Target Lawyers

By Todd C. Scott

A surge in sophisticated email scams directed at attorneys at large and small firms is being reported by lawyers from around the US. Minnesota Lawyers Mutual Insurance Company has also seen an increase in check fraud activity aimed at lawyers and law firms.

The scams typically involve a foreign corporation contacting an attorney by way of email for the purposes of collecting a debt owed by an American corporation. Before the attorney has a chance to contemplate the collection offer, a cashier's check arrives by mail at the attorney's office from the American corporation representing repayment for the debt. The attorney is asked by the client to keep an amount for legal fees, but to repay the difference with a wire transfer to a foreign bank. Although the correspondence and the cashier's check look authentic, the check is a counterfeit and the attorney can usually never recover the transferred funds.

The scam has a few variations—including a request to seek collection on an unpaid property settlement from and ex-spouse pursuant to a divorce decree—but in all cases, the attorney is being used to run funds through their client escrow account. For the scheme to be successful, the scammer is relying on the attorney to transfer the funds owed to the foreign client before verifying that the deposited funds have been collected by the bank and have become available to cover the transferred amount.

Although the scam seems relatively simple, the damage caused to attorneys falling prey to the scheme from all over North America has been staggering:

Honolulu, Hawaii—Two law firms lost more than $500,000 to an email scheme where the firms were sent counterfeit cashier checks as payment for a

retainer agreement. When the unsuspecting firms notified the client that they have overpaid the retainer amount, the client requested the firm send a cash wire transfer refund, to which the firm obliged.

Nashville, TN—A targeted firm lost more than $400,000 after it received a referral from someone posing as an out-of-state attorney to collect a debt from a local corporation owed to a foreign company. Soon after the firm accepted the work, a demand letter was sent and the firm received a cashier's check from the client representing payment received for the debt. After depositing the money into its client trust account and waiting for the check to clear, the firm wired the collected funds to the client less its fees and costs. It was only after the funds were transferred that the firm was notified that the cashier's check was a forgery.

Atlanta, GA—Attorney Gregory Bartko is a defendant in a federal suit by Wachovia Bank, which is seeking nearly $200,000 in reimbursement of funds wired on Bartko's instructions to a Korean Bank on behalf of a company that hired Bartko via the Internet. Attorney Bartko states he is the victim of an Internet fraud scam and that his firm escrow account was overdrawn by $190,000 because the check the firm received from the foreign client was counterfeit.

Houston, TX—Attorney Richard Howell, Jr., recently has taken out a home equity loan in the amount of $182,500 to repay his firm for money lost in an email scam involving what Howell thought would be a potentially lucrative matter from a Japanese client. After agreeing to collect a foreign debt from a US company, and receiving a counterfeit check in the amount of $367,000, Howell transferred $182,500 to the foreign client. Howell is now pursuing legal action against Citibank for incorrectly stating that the counterfeit check was legitimate and money from the check was paid to Howell's escrow account.

Long Beach, CA—Workers at City National Bank in Los Angeles stayed up late to help an attorney who had wired $193,000 from his trust account to a bank in Hong Kong after receiving a counterfeit cashier's check the attorney thought was good. The California bank employees were able to notify the Hong Kong bank soon after the foreign bank opened the next day to prevent the funds from being deposited in the scammer's bank account.

FBI Warning and the Telling Signs

For every attorney falling victim to counterfeit check fraud, there are many more that encounter the solicitations and have declined collection offers, or have determined the true nature of the activity after receiving notice from the bank holding their escrow account that the deposited check is a forgery.

In March, the Omaha field Office of the Federal Bureau of Investigation (FBI) warned 10,000 Nebraska and Iowa lawyers of a scam targeting attorneys, according to Robert Georgi, a supervisory special agent in the FBI's Omaha office. Soon after the alert was issued, Georgi reports his office was getting 10 calls an hour about the scam, including one call from a Nebraska attorney who was waiting for the cashier's check to clear before he sent his client the "overpayment."

Of the lawyers encountering the fraudulent activity, many report that the solicitations are not of the variety that are often easily spotted such as the "Nigerian Advance Fee Scheme" where the request to participate in a money-making venture is usually never personally addressed to the recipient, and uses the same confidence-building language, which is often riddled with misspellings.

Instead, the solicitations are personally addressed to the lawyer, and the initial email usually includes detailed information about the foreign corporation requesting legal services, the American corporation owing the debt, details about the nature of the debt including the debt amount and past attempt to collect on the debt, as well as web links and telephone numbers to persons that can verify the debt. Attorneys attempting to verify the debt have had mixed results, reporting in some cases that an email or call to the "representative" of the debtor corporation has produced a quick verification response—also part of the scam.

The scheme aimed at attorneys also relies on the attorney's sense of urgency by requesting the quick processing of the funds and addressing the large-scale collection matter as if it were a routine transaction for the target of the scam. The fact that the debt repayment comes in the form of a cashier's check gives the attorney a false sense of security that the funds are legitimate since they are not written on an account from the debtor corporation that is presumed to be struggling financially. However, it is the opportunity to earn a large fee with relatively little effort that ultimately causes the victim of the scam to let their guard down and process the wire transfer once they believe the debt funds have been properly deposited.

As a reminder, counterfeit checks are not often recognized at the point where they are accepted for deposit into the depositor's bank account. Additionally, confirming with the bank that the funds are "available" is not necessarily confirmation that the check has cleared and the funds have been collected from the check writer's account.

One final twist to the scheme is that the request by the foreign client for quick processing more often occurs around bank holidays—taking advantage of the fact that bank processing time is greatly postponed over a lengthy three-day weekend. Extending the time for processing a bank transaction adds to the amount of time the bank needs to identify the counterfeit check, and ultimately works to the scammer's advantage when collecting the firm's funds.

Don't Get Burned: Tips for Avoiding Scams

The most important advice involving the transfer of escrowed funds is to always wait for bank verification that the deposited funds have been collected from the check issuer's account. A bank representative accepting the funds for deposit or indicating orally that the funds are available is not assurance that the funds have cleared. The lawyers who waited for verification that the funds have been collected from the issuer's account—despite the client's fervent requests for quick escrow processing—saved themselves from becoming the victims of large-scale fraud.

Here are a few other tips for avoiding fraud:

- If the request for assistance is outside your area of expertise, do not

take on the work. Debt collection is fraught with malpractice hazards that can tie up any attorney that is not familiar with the Fair Debt Collections Practices Act 15 U.S.C. § 1692. Such a request may be tempting especially if it involves relatively little work, but it may be aimed at you for that very reason.

- Verify the client is a legitimate organization seeking legal services. If you cannot meet personally with a representative of the client corporation, consider asking the client for references including names of other attorneys doing work for the foreign corporation.

- Verify the debtor is a legitimate organization. A call to the comptroller of the debtor company can verify whether the debt was owed and that the cashier's check was legitimately issued as repayment. Do not rely on contact information provided to you from the foreign client for contacting key employees that can verify the debt.

- Obtain a retainer payment for your anticipated legal services. A check to your firm from the foreign client is not necessarily proof that their activity is not fraudulent, but most scammers won't bother responding to your request.

- Trust your gut instincts. If the proposal sounds too good to be true, it probably is. Some scammers have visited the lawyer personally, presenting to the attorney false identification documents in order to gain the lawyer's confidence that the legal services being requested are for a legitimate purpose. Your gut instincts are often the best test for determining whether your attorney client relationship will eventually have a successful outcome.

Todd C. Scott is VP of Member Services of Minnesota Lawyers Mutual Insurance Company. For nearly three decades MLM has been providing risk management advice for lawyers seeking information on preventing legal malpractice. RU@RISK? To learn more about lawyer scams and other trends in legal malpractice check out our blawg: www.attorneysatrisk.com.

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PRACTICE MANAGEMENT

Are You the Architect of Your Firm's Culture?

By Kevin Chern

Hiring the right people can determine the success or failure of your law firm. It's not just you that makes an impression on prospective clients and determines whether or not they hire you; it's not just you that builds the relationship that will determine whether or not your past clients refer you to their friends and colleagues. Good hiring means not just finding talented people, but choosing staff who fit your law firm's culture.

"Talent" is largely self-explanatory, but many attorneys and law firm administrators aren't quite so clear when it comes to "culture". In screening for talent, you're looking directly at the applicant, but in determining whether or not a prospective employee fits your firm culture, you must first look at yourselves. Every law firm has a culture that defines it, but few take an active, conscious role in defining that culture and ensuring that it is compatible with the firm goals, desired clientele, and employee satisfaction.

The solo practitioner or law firm partner who doesn't think about culture is missing an important opportunity, almost certainly to the detriment of the firm. Culture will develop, with or without conscious guidance, and the culture that grows up accidentally may not be the one you'd like to foster, nor the one that helps your firm achieve its goals.

In part, that's because the skills and mindset that make an effective lawyer are not the same skills and mindset that help build relationships, create a friendly environment, engender loyalty, or even grow a business. Gerry Riskin talked about this disconnect at Get a Life 2009, and the laughter in the room full of attorneys indicated that nearly all of us recognized the truth of his words. But even armed with that knowledge, many attorneys simply aren't aware of the way that their own personalities and methods of interacting steer the culture

of the firm as a whole.

Building a firm culture that furthers your aims means understanding the relationship between culture and success, and then taking steps to create and maintain a culture that supports those goals. The process of assessing and evolving your firm's culture may take time, but the first step is asking critical questions:

Does the Current Culture of Your Firm Accurately Reflect Your Goals and Priorities?

The first step is an honest look at your current firm culture in light of your goals and priorities. Are you currently acting like the firm you want to be? Assess the relationship, and the disconnect, between your vision for your firm and the culture that has organically grown up around you. Understanding the ways in which your current actions and environment don't reflect your values and vision is the first step toward redefining your firm culture.

Is Your Culture Built From the Top Down Or From the Bottom Up?

Now that you're consciously thinking about developing a positive culture that's in line with your firm goals, consider the source of that culture. Shared values and shared goals keep your organization working more efficiently because everyone is working to accomplish the same result; there are no hidden agendas and warring priorities. The mission extends beyond revenue goals to a vision for the firm environment, type of clients you want to serve, relationship with the community and more. That vision may be communicated to the whole firm by a strong leader whose priorities are clear, or may flow from the team as a whole. Law firms are traditionally top-down organizations and in many firms that structure will have become part of the culture by default. If you're open to letting your team help define who you are as a company, be sure to communicate that openness and create an environment that encourages two-way communication.

Do Your Actions Agree With Your Words?

Many firms pay lip service to things like work-life balance and an openness to input from the trenches, but don't operate in a way that supports those stated priorities. Telling your employees that you want to hear from them isn't enough; actively encourage the interaction and make sure those who do step forward feel that their input is appreciated and seriously considered. Likewise, make sure that your allocation of resources matches your stated priorities. While there may be fluctuations and the occasional need to shift resources in the short-term, the work you assign and the money you spend says more about your goals and priorities than your pep talk at the weekly firm meeting or a mission statement on the wall. If you claim to value one thing but pour your energy and financial investment into another, the mixed message is confusing and interferes with the ability to create that all-important sense of common purpose.

Culture consciously crafted can be a powerful tool for your firm, helping to define your image to the community and your prospective clientele and increasing employee investment. The right culture draws the right people to you, whether those people are clients, employees, or others in your field. But culture ignored has just as significant an impact on your day-to-day operations, even if that impact isn't consciously recognized. Make the choice to

create and nurture a positive culture that reflects the goals and values of your firm.

Kevin Chern is the president of Total Attorneys, a technology-enabled services firm that provides legal marketing and practice management consulting services to more than 1400 solo practitioners and small firm attorneys. Under his leadership, Total Attorneys has become one of the country's leading managed services firms in the legal industry, more than doubling revenues annually and joining the ranks of the Inc. 500 elite. For more information on Kevin Chern and Total Attorneys, visit www.totalattorneys.com.

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Self-Limiting Behaviors: How Attorneys Underearn

By Ann Guinn

As a consultant to small law firms, I have discovered an unsettling phenomenon amongst the attorneys I meet. So many of these practitioners are struggling with chronic underearning – and I am at a complete loss to explain why. Simply put, *underearning is earning below your potential*. Some of the symptoms of underearning include:

- Not living the life you want
- Not being able to provide the lifestyle you would like for your family
- Not making enough money to cover your basic needs
- Not having enough money each month to be able to save for emergencies or retirement
- Not being able to give your staff the raises or bonuses they deserve
- Living in deprivation
- Not being able to do the things with the business that you would like
- Constant stress about money.

Underearning is about making the choices that keep you earning below your potential. In his book, *Earn What You Deserve* (Bantam 1996), Jerrold Mundis tells us that underearning may take an “active” form or a “passive” form. Passive underearning is about choosing not to do something, or failing to do something that would have resulted in you making more money. Failing to raise your fees, refusing to spend money on software or equipment that would make you more efficient and productive, or not tending to your marketing are examples of passive underearning. Active underearning involves knowingly doing something that will cause you to underearn. Examples

include: accepting a client whom you believe will not be able to pay your bills, providing excessive pro bono services, discounting your fees, writing off time, or handling certain administrative (nonbillable) tasks yourself that could be outsourced (e.g., payroll and bookkeeping responsibilities, etc.). Either consciously or unconsciously, too many attorneys are making the choices that cause them to underearn.

Over the years, I have encountered a variety of behaviors that lead to underearning. Some are personal issues, while others are poor management strategies. Do any ring a bell with you?

- Giving away time
- Discounting fees
- Irregular billing
- Failure to market
- Accepting bad clients/cases
- Accepting clients who can't pay
- Lack of self-motivation
- Undervaluing your work
- Underbilling for work performed
- Write-offs
- Self-limiting beliefs
- A continuing expectation that someone or something will save you
- Rationalizing low income
- Reverse snobbery ("People with money aren't nice")
- Subtle self-sabotage
- Co-dependency (putting other people's needs ahead of your own)
- Living in financial chaos
- Lack of self-discipline
- Not working enough hours
- Filling free time with nonrevenue-producing activities and tasks (internet surfing, computer games, endless chores, personal e-mails, shopping, and staring out the window).

If you are an underearner, unless you understand how your behavior is taking money out of your pocket and those of your partners, you're going to have a hard time changing your behavior. Unless you see underearning as depriving your family of a better lifestyle, you aren't going to change. Unless you see underearning as earning below your potential—and recognize that you could be earning more—you will never believe that it doesn't have to be this way. Unless you get angry about it, you are not going to stop underearning.

Okay, so do you think you might be an underearner? Take a moment to answer the following questions and decide for yourself. Circle the statements

that apply to you, as well as those that might apply, but you just aren't sure if they accurately describe you or not.

- I often give away my services (pro bono work, not billing for all of the time worked, volunteering, answering questions for free on the telephone, free initial consultations, etc.)
- My initial consultations almost always run over the time allotted, but I don't charge more for the extra time.
- Raising my fees causes me such stress and fear that I only do it every few years.
- I regularly discount my fees to encourage prompt payment.
- Sometimes I feel that I'm not worth what I charge, so I write off part of my time.
- I don't record my time contemporaneously for either hourly or flat fee work.
- I let my accounts receivable become 90 days or more past due before I take action.
- I continue working for clients who aren't paying me.
- Talking with clients about money is uncomfortable for me.
- I waive my advance fee deposit if a potential client can't afford it.
- I have time management issues.
- I am good at self-sabotage (accepting clients who are unable or unlikely to pay my fees, not setting goals and developing action plans to reach them, taking cases I'm not qualified to handle, billing irregularly, not doing focused marketing to attract my ideal client, etc.)
- My debt level is high, I have very little in savings, my retirement account is underfunded, and I'm not clear on where my money goes.
- I don't really know how much I actually earn until I see it on my tax return.
- I continually put others' needs before my own.
- I am often worried about money.
- I frequently feel guilt about not earning as much money as I could.
- I fear for my financial future.
- I believe that I can make money.
- I am confident in the value of my services to my clients.
- My expenses are always below my income.
- Money is my friend and I appreciate what it does for me.
- I believe I have a rosy financial future.
- I experience very little fear or insecurity around money.
- I am committed to getting paid what I am worth.
- I love my work.

I am blessed with a supportive fan base (including spouse/partner, other family members, close friends, etc.)

- I admire wealthy people.
- I have little or no credit card debt.
- I get myself in situations beyond my ability and then rise to them.
- I am resilient and able to bounce back when I fail.
- I am filled with gratitude for the success I've achieved.
- I work very hard, but I know I don't have to do everything myself. I know how to delegate and set limits.
- I am tenacious in achieving my goals.
- I take action on past-due accounts as soon as they become delinquent.
- I fire clients who don't pay me.

The dividing point in these questions is pretty obvious. If you answered "yes" to any of the first 18 questions, you probably are an underearner. A "yes" to questions 19–36 demonstrates that, even if you are underearning, you have a healthy relationship with money and a great chance of breaking that self-defeating pattern.

So, are you an underearner? Do you see that your underearning is a result of choices you make—actions you take or don't take?

Why do you set yourself up to underearn? What's in it for you? (Any psychologist will tell you that we get something out of negative behavior, as well as positive.) Underearning issues are frequently rooted in a lack of self-worth or a feeling of helplessness or hopelessness. What's behind your underearning?

When considering this issue, it's important to *remember the insidious damage caused by a long-term pattern of underearning*. It robs you of the peace that comes from knowing you are financially secure. Underearning seldom impacts only the underearner. Your pattern of underearning can:

- Keep your practice partners and employees from earning more
- Deprive you and your family of a lifestyle that you would all like to enjoy
- Put the lion's share of the burden of keeping your home/family afloat on your spouse/partner
- Restrict the growth of your practice
- Affect your ability to provide clients with first-class legal services because you don't have the money to invest in the resources that would aid in representation
- Undermine your self-esteem and may even make you question your career choice
- Saddle you with constant money worries that can distract you from your work

- Create stress which can endanger your health by causing depression, anxiety, stress, sleeplessness, and over- or undereating.

Recently, I met an attorney who is an extreme underearner. He prides himself on the fact that he drives a 40-year-old car. His home has no electricity. He bills only 1-2 hours a day and gives the rest of his time over to pro bono work. He has a wonderfully kind and caring heart – and pro bono work is his passion and his motivator. What he has come to realize, though, is that this lifestyle is his choice – not the choice of his eight-year-old daughter. She wants the things her peers have, and she wants to participate in the activities enjoyed by her friends. His underearning no longer affects only he and his wife; now, they are raising a child in deprivation. The problem is that his lifestyle is so ingrained in his psyche that he is terrified at the thought of giving it up and putting more emphasis on earning money. He has eschewed what he calls the "superficial trappings" of mainstream America in favor of "just getting by." It remains to be seen if he can make the change from chronic underearning to earning a sufficient amount to provide his family with some of the niceties of life – like an electric lamp.

How do you want to live out the rest of your career? What are you willing to do to achieve that? If you suspect your pattern of underearning is rooted somewhere deep inside, search out a therapist who deals specifically with money and/or esteem issues, or a certified financial recovery coach to help you break out of your self-limiting practices. It may not be easy to change the behaviors that are keeping you from earning at your potential, but the end result will be well worth the effort. You've worked hard to get where you are – and being able to make enough money to take care of yourself and your family is one of your rewards. You deserve it!

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

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